

1948

Ralph Reid and Milt Stamoulis v. Oluf H.
Andersen, Ellen M. Andersen; and S. M. Kalm dba
Kalm & Son Real Estate Company, and Sterling G.
Webber : Brief of Respondents Andersen

Utah Supreme Court

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Recommended Citation

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**IN THE SUPREME COURT
of the State of Utah**

RALPH REID and MILT STAMOULIS,

Appellants,

VS.

OLUF H. ANDERSEN, ELLEN M. ANDERSEN, his wife; and S. M. KALM, d.b.a. KALM & SON REAL ESTATE COMPANY and STERLING G. WEBBER,

Respondents.

BRIEF OF RESPONDENTS ANDERSEN

Appeal from Third District Court

Salt Lake County, Utah

Hon. A. H. Ellett, Judge

FILED **THOMAS & ARMSTRONG,**
Attorneys for Respondents
Andersen,
JUL 12 1948 **Salt Lake City, Utah**

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OLUF H. ANDERSEN, ELLEN M. ANDERSEN, his wife; and S. M. KALM, d.b.a. KALM & SON REAL ESTATE COMPANY and STERLING G. WEBBER,

Respondents.

Case No.
7183

BRIEF OF RESPONDENTS ANDERSEN

I.

STATEMENT OF THE CASE.

Appeal by plaintiffs from dismissal on demurrer of their amended complaint which prayed a declaration of rights as to specific performance (or damages) against defendants Andersen upon an alleged \$10,000 sales agreement of Salt Lake City land signed by only one plaintiff,

Reid, as buyer and by Andersen alone, as seller, and not by his wife.

Plaintiffs joined Kalm and Son, a real estate broker and Webber, a salesman, as defendants notwithstanding they manifestly had no concern in the controversy between the buyer and seller strictly over specific performance or damages. The broker and salesman only received and held a \$500 down payment which Reid left with them in attempting to make the purchase.

The broker and salesman did not defend. Defendants Andersen filed separate demurrers for uncertainty, misjoinder and non-separation of causes of action, misjoinder of parties, and insufficiency of the complaint. The demurrers were sustained with leave to amend against Andersen but without leave as against his wife who had not signed the agreement.

Dismissal on the merits was entered in the wife's favor March 2, 1948. (Tr. 56).

Plaintiffs refused to amend and proceed against Andersen. The allowed time passed and the action was dismissed as to him also. (Tr. 64).

Later, although they did not defend and were in default, judgment of dismissal was entered in favor of Kalm and Webber (Tr. 66). They were not represented. Defendants Andersen did not procure in any manner their dismissal. It must have been entered at plaintiffs instance.

Plaintiffs appeal from the three dismissal judgments: (1) the dismissal in favor of the wife who did not sign the contract, (2) the dismissal afterward in favor of Andersen as against whom plaintiffs deliberately refused to plead over and to correct by amendment the misjoinder of causes of action and parties etc., pointed out, and which might readily have been done, the court having extended them the opportunity, and, (3) the dismissal as against Kalm and Webber which plaintiffs procured apparently themselves.

But this is the brief of defendants Andersen. As to the dismissal of Kalm and Webber they are not concerned. Their only concern is the dismissal in favor of themselves. These were proper as will be shown. They must be affirmed.

II

STATEMENT OF FACTS ALLEGED

The amended complaint (petition) must be analyzed.
It states:

1. The residence of defendants. (Tr. 33).
2. That Kalm and Son and Webber were, on information and belief, agents for defendants Andersen under a listing contract, the contents of which are unknown.
3. The description of the land.
4. That Andersen acquired the land from a named grantor and on information and belief that his wife's only interest is statutory and inchoate. (Tr. 34).
5. On information and belief, Andersens authorized the broker to secure a purchaser for \$10,000 and to accept \$500 down.
6. That on or about May 31, 1947 the Plaintiffs agreed to pay \$10,000 cash for said property. That said terms were agreeable to the Defendants Oluf H. Andersen and Ellen M. Andersen, and that said acceptance thereof is evidenced by a certain Earnest Money Receipt and Agreement, bearing date of May 31, 1947, a copy of which is attached hereto marked Exhibit "A" and by reference made a part hereof. That Plaintiffs made a part payment, and there was part performance of said agreement by Plaintiffs paying \$500, to the aforesaid agent, which was duly accepted and received, for and on behalf of the Defendants Andersen and Andersen. Upon acceptance of the \$500 down payment, Plaintiff allege upon information and belief, that they received

constructive, if not actual, possession of the property which was merely an unenclosed vacant lot. Pursuant to said possession Plaintiffs went on to the land and formulated plans and specifications for construction of a building thereon. That the only thing remaining to be done by Defendants Andersen and Andersen was the execution of final transfer papers, there being no further negotiations contemplated and the deal was closed. That "possession" was expressly "given immediately on closing," as shown by Plaintiff's Exhibit "A". (Tr. 34).

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7. Upon information and belief Plaintiffs allege that Defendant Ellen M. Andersen agreed to all of the terms and conditions of the sale and told Defendant Oluf H. Andersen, her husband, in the presence of Defendants S. M. Kalm and Sterling G. Webber that she approved of the terms and that the entire transaction was agreeable to her. Pursuant thereto the Defendant Oluf H. Andersen signed the Earnest Money Receipt and Agreement at his home and in the presence of his wife, but the Defendant Ellen M. Andersen did not personally sign said Earnest Money Receipt and Agreement for the reason that she was not requested to sign, but upon information and belief Plaintiffs allege that Defendants Kalm and Webber signed for and on behalf of Defendant Ellen M. Andersen as "agents". That although said purchase price is a fair and reasonable figure for said property, Plaintiffs believe, and therefor allege upon information and belief that said refusal to convey is based upon the fraudulent intent of the Defendant Oluf H. Andersen to avoid conveyance to the Plaintiffs and accept a higher offer which he may have received since entering into the agreement herein alleged.

8. That plaintiffs tendered and hereby tender the \$9500 balance but Andersens refuse to accept and convey.

9. That plaintiffs are partners and Reid acted for the partnership in signing the Earnest Money Receipt.

10. That Defendants brought the abstract of title up to date and delivered it to Plaintiffs for examination. That suggested additional entries were made by Defendants and the title approved by the Plaintiffs. That Plaintiffs acted in good faith in entering into this agreement, and relied upon the representation that a good marketable title would be conveyed evidencing the sale. After making the part payment aforesaid, and taking possession, Plaintiffs went to a great expense preparing to build on said property and have incurred great expense in the purchase of materials and incurred obligations for the construction of a building on said property. That Plaintiffs have been or will be damaged irreparably and in excess of the purchase price of said land, unless specific performance is ordered by the court. That the market value of said property is subject to broad fluctuation and therefore time is the essence of this action.

10. (*sic*) That \$750 is a reasonable attorney's fee to be awarded Plaintiff's attorney for services in this action if no appeal is taken.

11. Plaintiffs are uncertain about their rights and therefore petition for a declaratory judgment against the defendants.

WHEREFORE: Plaintiffs pray for a declaratory judgment:

1. Whether plaintiffs are entitled to specific performance and a conveyance. (Tr. 36).

2. If not entitled to specific performance from both defendants Andersen, whether plaintiffs are so entitled from Andersen alone, subject to the wife's statutory dower with abatement of the purchase price to cover her subsequent assertion thereof or indemnity against the same.

3. If not entitled to specific performance whether plaintiffs may have damages.

4. And if so, what items and amounts are payable by which defendants.

5. For such further declaratory statements of rights as may be proper, and further relief, and for costs and attorney's fees. (Tr. 37).

Attached to the amended petition was a printed copy of the alleged sales agreement denominated "Earnest Money Receipt and Agreement." (Tr. 38). This contains two separate independent parts or agreements: (1) first a separate receipt signed by Kalm and Company, only, to Reid (not Andersens) in which Kalm acknowledges he has received \$500 from Reid, (Andersens are nowhere mentioned), and, (2) a separate agreement at the foot of the page following the receipt and signature of Kalm and wholly apart therefrom signed by Reid and Andersen only, (not by his wife). The receipt and agreement provide:

THE RECEIPT. Kalm acknowledges he has received from Reid \$500 to secure and apply on the purchase price of vacant property at Southeast corner Main and Hollywood Avenue, 99 x 111½' for \$9,000, the balance \$8,500 to be

paid on acceptance and delivery of deed, possession to be given immediately on closing etc., etc. If seller does not approve in five days return of the \$500 by the broker cancels the sale. Seller agrees to pay Kalm his commission. (Tr. 38).

(Signed) *Kalm & Son Real Estate Agent*
by (Signed) *Sterling G. Webber*

THE AGREEMENT. We do hereby agree to carry out and fulfill the terms and conditions on the above receipt specified, the seller agreeing to furnish a good marketable title with abstract to date, or policy of title insurance at the option of the seller and to make final conveyance by sufficient deed. If either party fails so to do, he agrees to pay the expenses of enforcing this agreement, including a reasonable attorney's fee.

I will accept \$10,000

Cash
/s/ O. H. Andersen
Seller

x/s/ Ralph Reid
OK /s/ Ralph Reid
Purchaser

Approved Salt Lake Real Estate Board

(Tr. 38)

The trial court sustained the separate demurrers of defendants Andersen. This as we will see was proper.

III ARGUMENT

1. **The Amended Petition Was Uncertain As To Whether Plaintiffs Relied Upon A Cause Of Action Upon A Written Contract Affecting Only Andersen Or Upon A Cause Of Action . On An Oral Contract Affecting Only His Wife.**

The code provides that defendants may demur to a complaint "when one or more of the following objections thereto appears upon the face thereof":

"That the complaint is ambiguous, unintelligible or uncertain." §104-8-1 (7).

Defendants Andersen filed separate identical demurrers. Each alleged:

3. That said amended petition is uncertain in that it cannot be ascertained therefrom whether there is attempted to be pleaded therein (1) a cause of action upon a written agreement for the sale of real property, or, (2) a cause of action upon an oral agreement for sale of real property and part performance thereunder by the vendees, —the one cause of action affecting only defendant Oluf H. Andersen and the other affecting only defendant Ellen M. Andersen. (Tr. 44, 50).

The ground selected was plain. Taking the whole complaint it showed (1) that Andersen signed up with Reid, but, (2) that his wife did not sign. The copy attached shows this plainly. (Tr. 38). The complaint confesses it by the odd allegation that:

"Ellen M. Andersen did not personally sign said Earnest Money Receipt and Agreement for

the reason that she was not requested to sign.”
(Tr. 35).

So we have a complaint for specific performance (or damages) charging in a single statement that (1) one defendant, Andersen, signed a contract to sell, but, (2) that his wife did not sign,—and seeking relief as against both.

If the complaint contained a cause of action against Andersen it could only be upon the writing that he signed. But if it contained one against Mrs. Andersen, his wife, it was upon her oral agreement as charged in the complaint by the statement “that defendant Ellen M. Andersen agreed to all of the terms and conditions of the sale and told defendant Oluf H. Andersen, her husband, in the presence of defendants S. M. Kalm and Sterling G. Webber that she approved of the terms and that the entire transaction was agreeable to her,” coupled with an attempted charge of part performance “that plaintiffs made a part payment and there was part performance” etc. (Tr. 35, 34).

The two alleged obligations arise upon distinct agreements. His upon a writing. Hers upon an oral undertaking. They are even controlled by different statutes of limitation. His six years. Hers four years. §104-2-22, §104-2-23.

The code declares that uncertainty is a ground of demurrer, and this court has held it is.

“Ordinarily the remedy for uncertainty or unintelligibility in a pleading lies in a special de-

murrer which is equivalent to a motion to make more certain, and not in a motion to strike.”
Bamberger Co. vs. Certified Productions Inc.,
88 U. 213, 53 P. 2nd 1153.

The complaint was wholly uncertain as to whether the cause of action claimed was upon a written or an oral contract. The demurrer upon that ground was properly sustained.

2. There Was A Misjoinder Of Causes Of Action. They were Not Separately Stated. They Did Not Affect All The Parties To The Action.

The code provides that several causes of action may be joined (united) in the same complaint, specifying them, but concludes as follows:

“But the causes of action so united must all belong to one of these classes and except in actions for the foreclosure of mortgages and of other liens *must affect all the parties to the action*, must not require different places of trial, and *they must be separately stated.* §104-7-3.

The code also provides as ground of demurrer:

“That several causes of action are improperly united; or, are not separately stated.” §104-8-1 (5).

We have seen that plaintiffs attempted to plead two distinct causes of action (1) one against Andersen on the written agreement, and, (2) another against his wife on an oral agreement and part performance. The plaintiffs claimed oddly enough throughout the pleading that the writing affected both Andersen and his wife. Plaintiffs were not particular on which claim they might succeed if only the court would hold Andersen and his wife, both, in some way.

Kalm and his salesman were joined too. And thus plaintiffs pleaded different claims, (1) against one or another or some of the defendants, but not all, and, (2) claims which were not separately stated.

But the code says that if different claims are joined (united) they must affect *all* the parties and they must be *separately stated*. And so defendants Andersen each demurred:

“4. That several causes of action are improperly united and are not separately stated in said petition, to wit:

(a) One cause of action for specific performance of the alleged written agreement, earnest money receipt aforesaid, and claimed by plaintiffs to affect both of the defendants Andersen, and

(b) Another and different cause of action for damages for breach of said written agreement and affecting defendant Oluf H. Andersen only and not affecting defendant Ellen M. Andersen and all other defendants to the action, and

(c) Another and different cause of action for specific performance of an alleged oral agreement to sell real property and part performance thereof affecting defendant Ellen M. Andersen only, and not affecting defendant Oluf H. Andersen and all other defendants to the action.

(d) The three several causes of action aforesaid each affecting only Plaintiffs and defendants Oluf H. Andersen or defendant Ellen M. Andersen, as the case may be, and not affecting all other parties to the action. (Tr. 45, 51).

Ground (a) pointed out that plaintiffs claimed the amended petition charged an obligation by both Andersen and wife upon the writing and that this claim af-

fects said defendants only (not Kalm, and not Webber, too).

Ground (b) demonstrated that plaintiffs (at least alternatively) claimed a distinct cause of action for damages against Andersen upon the writing signed by him (not his wife) and this distinct claim, the demurrer showed, did not affect Andersen's wife; also, that it did not affect Kalm and Webber. In short, that it did not affect *all* the parties to the action.

Ground (c) showed the complaint charged an oral agreement and part performance by and against the wife and this claim affected her only, not also her husband; and not Kalm and Webber, too.

Ground (d) finally illustrated that the three claims above affected Andersen and his wife, or Andersen or his wife, as the case might be, but did not affect all other parties to the action also. (Kalm and Webber).

And so the grounds noted were all within the provisions of the code upon demurrer. The several claims were upon distinct obligations. One written. One oral. The claims were as against one or another or some only, but not all, of the defendants. They were packaged together in one plea; not separately stated. And each claim did not affect all the parties to the action.

Since they were not separately stated the demurrer was good. And since they did not affect all the parties to the action the claims were not properly united. For these improprieties the demurrers were properly sustained.

3. There Was A Misjoinder Of Parties Defendant.

We have seen the code provides that all claims united in a complaint must affect all the parties to the action. §104-7-3. And that the several claims did not affect all parties, but only affected one or another or some of them; not all.

The code also provides as a ground of demurrer:

“That there is a defect or misjoinder of parties, plaintiff or defendant.” §104-8-1 (4).

And so defendants Andersen each separately demurred:

“5. That there is a misjoinder of parties defendant, to wit, misjoinder (a) of defendant Oluf H. Andersen who is alleged to have signed and become a party to said alleged earnest money receipt, and (b) of defendant Ellen M. Andersen who is affirmatively alleged and shown not to have signed said agreement, and (c) defendants Kalm and Webber who are not alleged or shown to have any interest in the subject matter of the action.” (Tr. 45, 51).

The demurrer in the particulars stated is self-proving. Andersen is charged upon his written obligation—the sales agreement which he signed. His wife did not sign. Her obligation, if any, can rest only upon the alleged oral promise by her and part performance by the plaintiffs. And Kalm and Webber were not parties to either of those alleged claims written or oral. They neither signed nor were parties to either. They were parties to a different and distinct writing: the *receipt*

which they gave Reid for the \$500 down payment. The controversy over specific performance (or damages) can be waged only between the plaintiffs and defendants Andersen; not Kalm and Webber.

Thus misjoinder of defendants resulted by the complaint. The wife cannot be joined upon the claim against her husband on the writing which it is said he signed; nor he upon her alleged oral promise. The two are distinct claims. They require distinct and separate suits against distinct and separate obligors. Kalm and Webber could not be joined with Andersen or wife upon the claim for specific performance (or damages). They could have nothing whatever to do with a conveyance which a court might order Andersen and wife, or either of them, to make to plaintiffs. Kalm and Webber would not be parties to any such conveyance. And for obvious reasons they would have no part in a judgment against Andersen for damages for failure to convey. That judgment could run only in favor of plaintiffs and only against Andersens, or one of them.

And so the demurrer for misjoinder of parties defendant was properly sustained.

4. Ellen M. Anderson Did Not Sign The Agreement. She Was Not A Party To It.

Before discussing the next ground of demurrer (uncertainty of the alleged agency which it is claimed Andersen had previously given the broker) we will discuss the wife's not having signed the written agreement.

Her signature is not on the instrument. (Tr. 38).

But plaintiffs are zealous in attempting to draw her into the writing (to avoid the bar of the statute of frauds) and, since she did not sign, they continually cast about for some means of putting a signature on the writing for her. And so, ingeniously, they suggest that perchance Kalm's signature followed by the printed word "agent" might be implied as hers where Kalm signed on the line marked agent. Remember, they allege that she did not personally sign "for the reason she was not requested to sign." (Tr. 35).

But to try and get her on the writing in some way at least they go on to say, not positively—for that would commit them—but only evasively, that "on information and belief plaintiffs allege that Kalm and Webber signed for and on behalf of defendant, Ellen M. Andersen." (Tr. 35).

But assume for argument the wife had actually authorized Kalm to sign for her. He did not so sign. He signed only the receipt. And he did not sign her name at all. The usual agency signature would have been "Ellen M. Andersen by Kalm & Sons, agent." Nor does her

name appear in the body of the receipt or the body of the contract below.

The rule is:

“If the agent merely adds the word ‘agent’ to his signature in a document, not otherwise manifesting that he is not a party, it is inferred that he alone is a party to the transaction.”

Restatement, Agency §156.

“Ordinarily the mere fact that a person adds to his signature a word such as ‘agent,’ ‘manager,’ ‘treasurer,’ or the like, without stating that he is contracting in behalf of another, are not regarded as preventing a personal obligation from attaching to the signer; such words are deemed not to change the character or capacity of the person signing, but to be merely descriptive of him, or, to use the legal term, *descriptio personae*.” 2 *Am. Jur., Agency*, §244.

Furthermore, the receipt says it must be approved by the seller within 5 days:

“This payment is made subject to the approval of the seller and unless so approved within 5 days from date hereof the return of the money herein receipted shall cancel this sale,” etc. (Tr. 38).

Now Andersen subsequently signed his approval in the contract below the receipt. (For \$10,000.00, not \$9,000.00, as the buyers had offered). But Andersen’s wife did not. She did not sign her approval either personally or by agent. Yet if Kalm had been her agent to sell and sign why, if he signed for her in the receipt, did he not

also sign her required approval? He had Andersen sign. His approval was necessary. But her approval was not signed in person or by agent. She simply was never party to the writing.

All that can be deduced is that Kalm was a real estate agent as the descriptive term is generally understood. He signed a receipt to Reid for the \$500.00 down payment. And as all real estate agents do on the printed form "approved Salt Lake Real Estate Board" (Tr. 38) this real estate agent signed and added the "descriptive" word "agent." Of course, in law, Kalm became an agent. Agent for Reid when Reid deposited the money with him. He was Reid's agent to hold the money to abide the sale or to return it if Andersen did not "approve" within 5 days; or even to return it if Reid withdrew his offer before Andersen accepted and approved.

Mrs. Andersen did not sign personally. Kalm did not sign for her. She was not a party to the sales agreement.

**5. If Kalm Actually Was Agent For The Wife
The Alleged "Listing" Contract Was Not
Pleaded With Proper Certainty.**

We have seen that Andersen's wife did not sign and that Kalm did not sign for her.

But assume for argument that in signing his own name Kalm attempted to sign for her as the plaintiffs would imply. The demurrer as to those circumstances was well grounded, notwithstanding.

Upon information and belief only, plaintiffs allege that before the sales contract was made Kalm & Webber were agents of defendants Andersen,—

“for the purpose of selling or obtaining a purchaser.” (Tr. 33).

Furthermore, and only on information and belief, they stated that the alleged agency was in writing (as it must be under the statute of frauds §33-5-3 and §33-5-4 (5)), and that the agency was:

“Evidenced by a ‘real estate listing’ contract.” (Tr. 33).

Then it is asserted that Kalm & Webber signed for Mrs. Andersen, presumably by authority of their prior agency to “sell” or “obtain a purchaser” as “evidenced by the real estate listing contract.”

Defendants Andersen demurred. The particular ground at this juncture was for uncertainty as to the alleged agency-listing agreement:

"1. That said amended petition is uncertain in that the terms, provisions and conditions, if any, of the alleged agency agreement referred to on information and belief in paragraph 2 and denominated 'real estate listing contract' are not alleged or set forth either positively or on information or belief or at all." (Tr. 44, 50).

The ground of objection was well founded.

As to the wife plaintiffs sought to apply her signature to the agreement through that of Kalm, the broker, by authority of the alleged "listing contract" to "sell or obtain a purchaser." But like those of other special agents the powers of real estate brokers are limited and to be strictly construed:

"An agent authorized to *sell* real estate is generally deemed to be a special agent acting under a limited power rather than a general agent. He can have only the power to do those acts specifically named in his contract of agency. Moreover, his authority to sell is to be *strictly* construed." 2 *Am. Jur., Agency*, §142.

And courts construe agency contracts for the "sale" of land as:

"Merely authorizing the agent to find a purchaser and submit his offer to the principal for acceptance, and consequently as not empowering the agent to execute a contract of sale in behalf of this principal. This is, as a general rule, the construction put on the employment of professional brokers or real estate agents." 2 *Am. Jur., Agency*, § 137.

Consequently, an ordinary contract for the employment of a real estate broker does not authorize him to sign a contract of sale for his principal.

“A real-estate broker, under the ordinary contract of employment, has no implied authority to execute a contract of sale in behalf of his principal. Such authority must be *expressly* conferred upon him or necessarily implied from the terms of the particular contract. . . . Ordinarily, there is no implied authority to execute a contract of sale from a mere *listing* of the property with a broker, even though the owner specifies the terms of sale, from a mere employment to *find a purchaser* or to *sell* real estate.” 8 *Am. Jur., Brokers*, §61. (*italics added*).

In *Payne vs. Jennings* (Va.), 48 A.L.R. 628, an owner “listed” his property with a real estate broker to “sell” at \$12,000.00, payable \$3000.00 cash and the balance on specified terms, and agreed to pay a commission. The broker found a buyer and signed a contract of sale for his principal upon the terms required. But the owner renounced and refused to be bound. The court of appeals upheld him ruling that the real estate agent had no power to sign a sales contract.

“A real estate agent is generally a special agent of limited powers, and those dealing with him deal at their peril. Usually his only authority is to secure a purchaser who will take the property at a price fixed by the owner. He cannot, unless expressly or impliedly authorized, execute a contract of sale on behalf of his principal.” 48 A.L.R. page 631, *Payne vs. Jennings, supra*.

The extensive annotation following the decision shows that the courts uphold the rule of the *Payne* case. It explains that ordinarily a real estate broker has no power to sign a contract of sale. 48 *A.L.R.* 635; and that employment to "find a purchaser" of land will not authorize the broker to sign a sales contract. *id.* 637; that the broker must have special authority. *id.* 637; that mere authority to "sell" does not carry with it the right to make a contract, *id.* 638; nor does authority to accept and receipt for a deposit, *id.* 644; and the mere "listing" of the property with a broker will not authorize him to sign a contract of sale. *id.* 641.

Plaintiffs alleged, but only on information and belief, that Andersen and wife engaged Kalm & Webber as their agents to "sell" or to "obtain a purchaser" and that they did so in the alleged "listing" contract. Then they assert Kalm & Webber signed for the wife as her agents. But it is not alleged that the agency-listing agreement contained authority for the broker to sign a contract of sale for Mrs. Andersen. Lacking that indispensable allegation the statement that Kalm did sign in her behalf was futile as the authorities show an agency merely to "sell" or to "obtain a purchaser" does not authorize a broker to sign a sales contract; nor does a mere "listing" agreement give that authority.

That is all that was alleged. And this the plaintiffs stated by indirection and not positively — only upon information and belief. True, they claimed the excuse that they could not "specifically set forth the contents

thereof" because, so they alleged, the same was "within the knowledge and possession of the defendants". But they did *not* state that they themselves did not know those contents. They might have known them well, even though the listing agreement was in the possession of the defendants.

And while free and ready to make charges throughout the complaint only on information and belief, why did plaintiffs stop here? Why didn't they go on and allege that this phantom listing-agency contained "on information and belief" a provision *authorizing* Kalm to enter into a contract of sale for Mrs. Andersen and to sign her name thereto. But they did not. We wonder why.

So the special demurrer challenged for uncertainty the allegations about the purported written agency in not setting forth its terms. It was well taken as we have seen. And as will next be shown, this deficiency was a mortal one and the attempt to charge the wife upon the written sales contract thereby failed to state a cause of action as against her.

6. The Complaint Did Not State A Cause Of Action As To The Wife Upon The Written Agreement Which She Did Not Sign.

We have just seen that the demurrers for uncertainty were good as against the allegation that Kalm signed for Mrs. Andersen under the claimed authority of an alleged prior agency-listing agreement because it could not be detected whether Kalm was authorized therein to sign a contract of sale for Mrs. Andersen. And since plaintiffs did not allege any of those terms it was not asserted—not even on information and belief—that any term or provision of the alleged agency authorized Kalm to sign for her.

True, they claimed (on information and belief) that she “listed” the property for “sale” with Kalm to “obtain a buyer”. This is all they charged. But as we have already seen, “listing” property with an agent to “sell” or to “obtain a purchaser” does not authorize him to sign a contract of sale for his principal.

Thus, the result of the charge was that Mrs. Andersen authorized and listed the property with Kalm to find a purchaser or to sell, but that she did *not* empower him to sign any contract of sale; but that he signed one *anyway*. This ingenious charge defeats itself and the complaint thus failed to state a cause of action upon the written contract as against Mrs. Andersen. Her general demurrer thereto was properly sustained.

7. Mrs. Andersen's Alleged Oral Agreement Was Barred By The Statute Of Frauds.

Seeking to hold Mrs. Andersen also by way of alleged oral agreement, plaintiff asserted that she orally consented to the alleged sale:

“7. Upon information and belief plaintiffs allege that defendant Ellen M. Andersen agreed to all of the terms and conditions of the sale and told defendant Oluf H. Andersen, her husband, in the presence of defendants S. M. Kalm and Sterling G. Webber that she approved the terms and that the entire transaction was agreeable to her.” (Tr. 35).

Now the statute of frauds provides:

“Every contract . . . for the sale of any lands or any interest in lands shall be void unless the contract or some note or memorandum thereof is in writing subscribed by the party by whom the . . . sale is to be made, or by his lawful agent thereunto authorized in writing.”
§33-5-3.

Attempting to avoid the statute of frauds as to Mrs. Andersen and her alleged oral consent, plaintiffs also averred:

“That plaintiffs made a part payment, and there was part performance of said agreement” etc. (Tr. 34).

Also,

“That defendants brought the abstract of title up to date and delivered it to plaintiffs for examination. That suggested additional entries

were made by defendants and the title approved by the plaintiffs. . . . Plaintiffs went to great expense preparing to build on said property and have incurred great expense in the purchase of materials and incurred obligations for the construction of a building on said property." (Tr. 35).

These allegations, plaintiffs hoped, might take them around the statute of frauds under the part performance section which reads:

"Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof." §33-5-8.

Here, let us point out that part performance applies only in suits for specific performance. The statute expressly says so. It is not available in actions for damages. This court has held so:

"Since the second count of the complaint is based on a breach of the oral agreement to sell the land, and is an action at law for money damages, the doctrine of part performance is not available to plaintiff." *Baugh vs. Darley*, (Utah) 184 Pac. 2nd 335.

So the charge of the wife's oral consent was insufficient as a claim for damages against her and her general demurrer was good in that regard.

And as a claim for specific performance against her it fares no better. The part performance claimed was: (1) part payment of \$500.00 to Kalm (Tr. 34;); (2) that

plaintiffs actually went on the land and formulated plans to build; (3) that defendants, not plaintiffs, brought the abstract of title up to date and delivered it to plaintiffs for examination, and defendants made additional entries therein and plaintiffs approved the title, (Tr. 35); and (4) that plaintiffs went to expense preparing to build and incurred expense for materials and construction.

These alleged acts are insufficient. If proved they would not support specific performance of an oral agreement. Part payment will not suffice.

“A person acquires no equity in law that can be enforced in a court of equity by a parol purchase, with a *part payment of the purchase money.*” *Maxfield vs. West*, 6 U. 327, 23 Pac. 754.

Williston affirms the rule:

“It is true that payment of a pecuniary consideration by the buyer is not generally held sufficient justification for enforcing specifically an oral contract to convey land, the purchaser being left to his quasi contractual remedy of recovering back what he has paid.” *Williston on Contracts*, Rev. Ed. §494.

Formulating plans is not part performance. These are merely preliminary or preparatory acts. Preliminary or preparatory acts are insufficient. 49 *Am. Jur.*, *Statute of Frauds*, §431. Formulating plans is not unlike the preliminary act of making and securing estimates of cost of an improvement. This is not enough. 101 *A.L.R.* 967. The note there says:

“Making estimates of the cost of an improvement is not a part performance.” 101 *A.L.R.* 967.

And the charge that the abstract was brought up and delivered to plaintiffs is no better.

“Nor does the preparation or delivery of abstracts of title constitute a part performance of such a contract.” 101 *A.L.R.* 966.

It is asserted that defendants, not plaintiffs, procured the abstracts to date. But acts of a defendant cannot constitute part performance. They must be performed by the plaintiff. 101 *A.L.R.* 971.

Simply preparing to build, being preparatory and preliminary, is also insufficient. 49 *Am. Jur., Statute of Frauds*, §431. And incurring expense for materials and construction is only preparatory also and is insufficient.

Moreover, the allegations of part performance are fatally deficient.

“It is well settled that the acts of part performance by the plaintiff, in order to entitle him to the specific performance of an oral contract for the purchase of real estate, must have been performed with the *knowledge* and *consent* or acquiescence of the defendant.” 101 *A.L.R.* 971.

This is because the basis of the doctrine of part performance is fraud or inequitable conduct of a defendant.

“Since the basis of the doctrine of part performance is fraud or inequitable conduct on the part of the person sought to be charged on the

oral contract; it is well settled that the acts of part performance by the plaintiff, in order to entitle him to the enforcement of an oral contract, must have been performed with the *knowledge and consent or acquiescence* of the defendant." 49 *Am. Jur., Statute of Frauds*, §432.

Plaintiffs do not allege that the wife knew they were "formulating plans to build" or that she knew they had gone to expense "preparing to build" or had "incurred expense for materials and construction." There is no charge that she knew anything about these alleged acts of part performance—insufficient as they were. But had they been sufficient the alleged acts by plaintiffs do not save the charge from the statute of frauds for it is not alleged that they were done with her knowledge or consent.

Furthermore, it is held that possession is necessary to sustain part performance. 49 *Am. Jur., Statute of Frauds*, §433. Plaintiffs' allegations here are contradictory and must be resolved against them for the burden is on them to allege a sufficient case of part performance. *Hargreaves vs. Burton*, 59 U. 575, 206 Pac. 262. Plaintiffs say (again on information and belief) "that they received *constructive*, if not actual possession, of the property." (Tr. 34). Also, that after making the part payment "and taking possession" they did the acts of part performance. (Tr. 35).

In one place they allege they had possession; in another that they had only *constructive* possession. The latter belies the former. Actual possession is necessary

and they have not charged it. The burden was on them to allege sufficient part performance. *Hargreaves vs. Burton, supra*. They have failed to do so.

The alleged oral agreement was barred by the statute of frauds. The acts of part performance claimed were insufficient to save it from the statute. The general demurrer of Mrs. Andersen was, therefore, properly sustained.

8. The Allegations Charging Oral Consent Were Stricken By The Trial Court.

We have seen that Mrs. Andersen's demurrer to the charge that she orally consented to the sale was well taken for insufficient supporting allegations of part performance.

So far we have considered the charge of oral consent as if it were actually part of the complaint. But actually it is not; and it was stricken by the court on motion of Mrs. Andersen. She moved to strike,—

“3. The following in paragraph 7:

“Upon information and belief plaintiffs allege that defendant Ellen M. Andersen agreed to all of the terms and conditions of the sale and told defendant Oluf H. Andersen, her husband, in the presence of defendants S. M. Kalm and Sterling G. Webber that she approved of the terms and that the entire transaction was agreeable to her. Pursuant thereto the defendant Oluf H. Andersen signed the Earnest Money Receipt and Agreement at his home and in the presence of his wife, but the defendant Ellen M. Andersen did not personally sign said Earnest Money Receipt and Agreement, for the reason that she was not requested to sign.” (Tr. 42). See also P. 5 herein).

The motion was granted and the allegations were stricken. (Tr. 55). Appellants assign error in the court's striking this out. But they do not argue the assignment. The error, if any, is therefore waived under the long established rule.

Hence, while we have earlier treated the complaint as if the stricken allegations remained, actually they are gone and the entire charge of oral consent has wholly failed.

9. Demurrer Is A Proper Pleading In Declaratory Actions.

“Where the declaration, complaint, or petition shows on its face that the contract is not in writing as required by the statute, a demurrer is a proper method of raising the defense of the statute of frauds.” 49 *Am. Jur., Statute of Frauds*, §603.

But plaintiffs imply that demurrer has no office in declaratory suits. This is remarkable. The chapter governing Declaratory Actions is part of the Code of Civil Procedure. It is contained therein. §104-64-1. It is the uniform Declaratory Judgment Act. Martindale-Hubbell, Utah Law Digest, Judgments. See *id.*, Part VI, Appendix, Uniform Acts, for text of Uniform Act.

The Uniform Act has no specific provision as to pleadings. 16 *Am. Jur., Declaratory Judgments*, §63.

“It follows that proceedings under these declaratory acts are governed by the applicable established rules of pleading.” 16 *Am. Jur., Declaratory Judgments*, §63.

This court has recognized the propriety of demurrer in declaratory suits. *Millard County vs. Millard County Drainage District*, 86 U. 475, 46 Pac. 2nd 423. The opinion shows the case was considered on demurrer:

“The appealing defendants demurred to the complaint on the ground that there was a misjoinder of both parties plaintiff and parties defendant. Such demurrers on the part of the realty corporations were overruled, and such rulings are assigned as error.”

10. Other Considerations.

Respondents demurred for uncertainty alleging that a copy of the Earnest Money Receipt was not attached to the amended petition as alleged. (Tr. 44, 50). None was attached to the copy served. We demurred to insure completion of the record. But the record now shows a copy was actually attached to the original. (Tr. 38). We confess this ground (2) of demurrer was not well taken.

Plaintiffs imply, as we read their brief, that they were entitled to some "declaration if not relief." Of course they received a declaration as to Mrs. Andersen. It came in the form of a dismissal for want of any cause of action against her. But it was a declaration no less. Her dismissal declared they had no case against her.

As to Andersen, they must not complain. They were given leave to plead over when his demurrer was sustained. They refused. Dismissal followed. For failure to amend when invited by the court they cannot complain. The sustaining of Andersen's demurrer on the special grounds required plaintiffs to correct the misjoinder and other defects by amendment. They refused. Andersen's dismissal "declared" that their pleading was not in proper form as prescribed by the Code and that until plaintiffs conformed they had no right to "declaration or relief."

Plaintiffs also make much of a plain typographical error in Andersen's demurrer. The last ground thereof alleged failure to state a cause of action. But through

inadvertence it was stated that no cause of action was stated against defendant Ellen M. Andersen. This should have been Oluf H. Andersen. Plaintiffs urge that one party may not defend on the ground that no action lies against a co-party. This ordinarily is the rule. We confess it. But the other grounds of demurrer stated by Andersen were well taken and the demurrer was sustained as it should have been. Furthermore any party may raise the question of insufficiency of a complaint to state a cause of action, with or without a demurrer. Failure to state a cause of action may always be raised at any time.

III

CONCLUSION

This is a simple case of two plaintiffs claiming that a man signed a contract to sell lands, but admitting also that his wife did not join in signing. The case alleged is just that simple. Candor would command a recognition of the absolute barrier those circumstances impose. The wife cannot be held. And the true facts cannot be dimmed. They blaze with brilliancy. Even through the maze cast off by easy charges only on information and belief the facts shine out. Plaintiffs have no case against Mrs. Andersen and the trial court was forthright in dismissing her upon demurrer.

As to Andersen, upon the allegations charged, plaintiffs have themselves to blame for their travail. They did not amend when Andersen's demurrer struck them down for the uncertainty, the misjoinder and improper union, the non-separation of causes of action and the other defects which abounded in their pleading. The court invited them to amend, but they refused. Their reason is apparent. They were determined not to proceed against Andersen without his wife, for the quality of interest in Utah land acquired without the joinder of a wife is dubious. Its only certainty is that it is most uncertain.

Plaintiffs should have amended and proceeded against Andersen alone. Since they did not they are bound to abide the consequence and the trial court's dismissal as to him upon their defective pleading must

stand. If plaintiffs actually thought they could hold Andersen (and we hold that in the circumstances damages would have provided the limit of their rights) then they should have amended and sued him alone upon a charge affecting him only. Or they should have dismissed and sued him over again alone. But they did neither. Theirs was the choice. A choice uninfluenced by what Andersen might hope or wish. And now upon deliberate choosing they find themselves before this bar with no justification for appeal. Both respondents are dismissed. But Andersen, because plaintiffs deliberately refused to properly plead (which is not to say, however, they would have been able to prove their charges). But the fact remains they are out of court as to him by reason of deliberate choosing.

Respondents submit:

(1) The amended petition was uncertain as to whether plaintiffs relied upon a cause of action on a writing affecting only Andersen, or upon an oral promise affecting only his wife; or upon the alleged writing on the claim that it affected both of them.

(2) There was a misjoinder of causes of action. They were not separately stated and did not affect all the parties. The demurrers pointed out that the plaintiffs claimed the pleading charged both Andersen and wife upon the writing; charged only Andersen thereon (not his wife), and that the alleged causes of action each would not thus affect all the parties to the action, but

only one or more or some but less than all, including Kalm and Webber, too.

(3) There was a misjoinder of defendants. Andersen was sued upon an alleged writing; his wife upon an alleged oral consent. This misjoinder of defendants is clear. Kalm & Webber, too, were joined. They had no place in the controversy over specific performance or damages being waged between plaintiffs and Andersen; certainly none in the controversy over the alleged oral promise of Mrs. Andersen.

(4) Mrs. Andersen did not sign and was not a party to the alleged contract of sale. She did not sign it personally. Her name does not appear therein. The copy attached shows Kalm signed his own name and that he signed only the receipt to Reid acknowledging the \$500.00 down payment. He did not sign the contract of sale or approval. He only signed the receipt. His signature was on a printed line preceding the printed word agent. Adding agent did not alter his individual capacity. It was only "descriptive". The real contract had to be "approved" within 5 days by the seller. Andersen is alleged to have signed his approval. But Mrs. Andersen never did.

(5) But even if Kalm was agent for Mrs. Andersen and had signed for her he was not authorized. The extent of his alleged agency was a "listing" to "sell or obtain a purchaser." Without more he had no power to sign a contract of sale for Mrs. Andersen. The complaint was uncertain for not alleging the terms of the

alleged agency for it could not be detected whether it contained authority for him to sign. Hence, the demurrers were properly sustained for uncertainty.

(6) The complaint did not state a cause of action against Mrs. Andersen upon the writing which she did not sign because it did not charge—not even on information and belief—that Kalm was authorized to sign for her.

(7) Mrs. Andersen's alleged oral consent was barred by the statute of frauds. The part performance charged is insufficient. Bringing up abstracts, preparing to build, purchasing materials, etc., in contemplation of building are only preliminary and preparatory acts. They are insufficient as part performance. And what is most important, it is not charged that Mrs. Andersen *knew* of those alleged acts. Possession, too, is necessary in part performance cases. Plaintiffs contradict themselves. They say once they had possession, but again that it was only constructive. Actual possession is necessary. And the burden to allege and prove sufficient part performance rests on plaintiffs. *Hargreaves vs. Burton, supra*. The acts charged are insufficient and the possession alleged was only constructive. The allegations are entirely confusing and contradictory. Plaintiffs have not sustained the burden of pleading a clear case of part performance.

(8) The allegations charging oral consent by Mrs. Andersen were stricken by the trial court. This stripped the pleading of any charge of oral consent by her. Ap-

pellants do not argue the alleged error assigned. The striking was proper, but if wrongful the order stands for appellants' failure to argue their assignment, and the stricken matter is not a part of the complaint.

(9) Demurrer is a proper plea in declaratory actions.

(10) Plaintiffs claim that they were entitled to some "declaration". They have received it. The dismissal of Mrs. Andersen for want of any case against her was a declaration as to that. And if they were stopped short of a plenary declaration as to Andersen it was for their own folly in deliberately refusing to amend and proceed according to the rules of pleading to the point where a plenary declaration could result.

(11) The case is simple. Two plaintiffs charge that a husband signed a sales contract. They admit his wife did not. Ensnarled in the legal uncertainty of the value of a judgment for specific performance (if recoverable) against the husband without the wife, they endeavored to put her signature on that agreement which she did not sign or to hold her to an alleged oral consent by allegations incapable of overcoming the statute of frauds. Both attempts have failed.

(12) Andersen and wife could never have been sued in the same action. A single cause of action against both on the writing would always fail against her because she did not sign and she would be dismissed. A suit with one cause of action against Andersen on the writ-

ing and another against her on the oral consent would likewise fail for neither cause would affect the defendant not charged thereon. Neither cause of action would affect *all* the parties to the action. The only possible way in which both could be sued was by separate actions; one against Andersen on the alleged writing and the other against his wife upon her alleged oral consent. But Kalm and Webber could not be party to either suit for then it would not affect all the parties to the action since Kalm and Webber could not be involved in a controversy over specific performance or damages sought in favor of the plaintiffs and against defendants Andersen.

The demurrers were properly sustained. The judgments of dismissal for no cause of action as against Mrs. Andersen and for refusal to amend as against Andersen when the right was granted were correct. They must be affirmed with costs to respondents.

Respectfully submitted,

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July, 1948.