

1986

Vaughn Rasmussen v. Deseret Federal Savings Association : Brief of Respondent

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT
OF THE STATE OF UTAH

CKET NO. 860105, 860106-CA

VAUGHN RASMUSSEN,

Plaintiff/Appellant,

vs.

DESERET FEDERAL SAVINGS AND LOAN
ASSOCIATION, a Utah corporation,
THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES, a
New York corporation, and
OKLAND-FOULGER COMPANY, a
Maryland joint venture, dba
Crossroads Plaza Associates,

Defendants/Respondents.

860105 + 860106 CA

No. 20512

and

No. 20755

BRIEF OF RESPONDENT

CROSSROADS PLAZA ASSOCIATES

Consolidated Appeals From Summary Judgments of the
Third Judicial District Court for Salt Lake County, Utah
Honorable James S. Sawaya, Judge

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FILED

NOV 26 1985

Clerk, Supreme Court, Utah

IN THE SUPREME COURT
OF THE STATE OF UTAH

VAUGHN RASMUSSEN,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	No. 20512
)	
DESERET FEDERAL SAVINGS AND LOAN)	and
ASSOCIATION, a Utah corporation,)	
THE EQUITABLE LIFE ASSURANCE)	No. 20755
SOCIETY OF THE UNITED STATES, a)	
New York corporation, and)	
OKLAND-FOULGER COMPANY, a)	
Maryland joint venture, dba)	
Crossroads Plaza Associates,)	
)	
Defendants/Respondents.)	

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LIST OF ALL PARTIES TO PROCEEDINGS

Appellant

Vaughn Rasmussen ("Rasmussen") (plaintiff below).

Respondents

Deseret Federal Savings & Loan Association ("Deseret Federal") (defendant below).

The Equitable Life Assurance Society of the United States and Okland-Foulger Company, dba Crossroads Plaza Associates (hereinafter collectively referred to as "Crossroads") (defendants below).

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VAUGHN RASMUSSEN,
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DESERET FEDERAL SAVINGS AND LOAN
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Crossroads Plaza Associates,
Defendants/Respondents.

The two appeals involving Crossroads present two basic issues. The first issue is whether the district court properly granted summary judgment on Rasmussen's claim for breach of an alleged oral lease agreement. That issue involves consideration of the following:

1. Whether the plaintiff Rasmussen alleged facts sufficient to invoke the doctrine of promissory estoppel as a bar to application of the statute of frauds?
2. Whether there are sufficient memoranda of the alleged oral agreement, subscribed by Crossroads, to satisfy the statute of frauds?

3. Whether any of the acts alleged by plaintiff Rasmussen constituted part performance of the alleged oral lease agreement?

The issue presented by the second appeal is whether the district court erred in rejecting plaintiff's attempt to raise fraud as an affirmative defense to Crossroad's counterclaim for unpaid rent under a written lease. That issue involves consideration of the following:

1. Whether the duty to plead an affirmative defense is satisfied by an answer filed nearly one year after it became due?

2. Whether Rasmussen waived his claim of fraud by occupying the leased space and accepting the benefits of the lease for nearly five years before asserting his claim?

3. Whether the statute of limitations applies when fraud is asserted as a defense?

DETERMINATIVE AUTHORITIES

The Utah statute of frauds is dispositive of Rasmussen's claims for breach of an alleged oral lease agreement. The applicable provisions state:

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting,

assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

Utah Code Ann. § 25-5-1 (1984).

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

Id. § 25-5-3.

The rules of civil procedure requiring that affirmative defenses be set forth in a timely responsive pleading are dispositive of the appeal from summary judgment on Crossroads' counterclaim. The applicable provisions state:

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

Rule 8(c), Utah Rules of Civil Procedure.

A defendant shall serve his answer within 20 days after the service of the summons is complete (unless the court directs otherwise, as provided by Rule 65B), unless otherwise expressly provided by statute or order of the court. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall

serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days the service of the more definite statement.

Rule 12(a), Utah Rules of Civil Procedure.

A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject-matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

Rule 12(h), Utah Rules of Civil Procedure.

The statute of limitations applicable to claims based on fraud is also dispositive of the appeal from summary judgment on the counterclaim.

Within three years.--

. . .

(3) 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.

Utah Code Ann. § 78-12-26(3) (1977).

STATEMENT OF THE CASE

Plaintiff Rasmussen has appealed from three separate judgments on two unrelated claims. The first appeal concerns Rasmussen's claim that both Deseret Federal and Crossroads breached an alleged oral agreement requiring Deseret Federal to release certain space on Level One of the Crossroads Mall to Crossroads in order for Crossroads to lease the same space to Rasmussen. On December 10, 1984, District Judge Sawaya entered summary judgment in favor of Deseret Federal on the grounds that enforcement of the alleged oral agreement was barred by the statute of frauds. Crossroads thereafter moved for summary judgment on the grounds that Crossroads could not possibly be required to lease space to Rasmussen that Deseret Federal would not relinquish. Crossroads' motion was granted on January 7, 1985.

The second appeal relates to Crossroads' counterclaim for rents due from Rasmussen pursuant to a separate lease of separate space on Level Two of the Crossroads Mall which Rasmussen occupied from November, 1980, until the day he abandoned the premises immediately after the entry of summary judgment in favor of Crossroads on May 20, 1985.

STATEMENT OF FACTS

I. Alleged Agreement For Lease of Deseret Federal's Level One Space.

In July of 1982, Rasmussen contacted Bruce Barcal regarding the possibility of taking over certain space on Level One of the Crossroads Mall then occupied by Deseret Federal. R. 175 (Rasmussen Depo. 19). Barcal was a leasing agent employed by Kravco, Inc. which manages the Crossroads Mall for the owner, Crossroads. R. 175 (Rasmussen Depo. Ex. 12, p. 2). Rasmussen informed Barcal that Deseret Federal had "tentatively agreed" to release the space in question, subject to Crossroads' permission, in order for Crossroads to lease the space to Rasmussen. R. 175 (Rasmussen Depo. 19). Barcal indicated that he needed permission from Crossroads before negotiations could proceed. R. 175 (Rasmussen Depo. 20-21).

At a second meeting in July, Barcal indicated that Crossroads had given permission for Rasmussen to proceed with his negotiations with Deseret Federal. R. 175 (Rasmussen Depo. 25). At that time Rasmussen understood that Barcal was simply a "negotiating lease agent" and that "whatever documents were generated would have to be approved by the owner." R. 175 (Rasmussen Depo. 26).

Subsequent to the July, 1982 meetings, Barcal informed Rasmussen that the negotiations for space on Level One would not proceed unless Rasmussen paid certain construction costs (approximately \$2,400) relating to Rasmussen's space on Level

Two of the Crossroads Mall. R. 175 (Rasmussen Depo. 26-27). Rasmussen testified by way of sworn affidavit that he was told "that Crossroads would negotiate for a lease of new space (then occupied by Deseret Federal) only if affiant paid the disputed construction charges." R. 239, ¶ 3. Rasmussen paid the disputed construction costs over a six-month period between August of 1982 and January of 1983. R. 157.

By letter dated December 30, 1982, Barcal informed Deseret Federal that he was "very close to putting together a transaction" and requested Deseret Federal's "corporate approval to proceed with the lease negotiation." R. 175 (Rasmussen Depo. Ex. 11). Deseret Federal supplied a copy of the letter to Rasmussen R. 175 (Rasmussen Depo. 29-30). Rasmussen understood the letter to refer to a prospective tenant other than Rasmussen and he expressed to Barcal his displeasure with Barcal "circumventing" their "negotiation". R. 175 (Rasmussen Depo. 30). Rasmussen also told Barcal "that he should contact Deseret Federal because that is the nature of the negotiation, that they had intended to lease to none other but Vaughn Rasmussen's, Inc." Id.

In a subsequent meeting in January, 1983, Rasmussen reiterated his and Deseret Federal's position that "we had been negotiating all these many months and unless there was an agreement with Deseret Federal and Vaughn Rasmussen's to take

over that space that there was no agreement." R. 175
(Rasmussen Depo. 32).

Deseret Federal's position and conditions for an agreement were set forth in a letter, dated January 13, 1983, that Rasmussen brought to the January meeting. R. 175 (Rasmussen Depo. 35, Depo. Ex. 2). The letter recited that Deseret Federal and Vaughn Rasmussen "had been negotiating a proposal" and purported to give Barcal "the authority necessary to manage the proposal" upon certain conditions, including the execution of additional agreements between Deseret Federal and Rasmussen. R. 175 (Rasmussen Depo. Ex. 2). The conditional authority would expire on March 15, 1983. Id. The tentative, nonbinding nature of the proposal was reiterated by Deseret Federal's statement that "If for any reason Vaughn Rasmussen should choose to discontinue his plans to occupy the subject space, Deseret Federal is not interested in any further proposals." Id. Rasmussen later testified that the letter was consistent with the negotiations that had taken place up to that time. R. 175 (Rasmussen Depo. 75-76).

Rasmussen claims that Barcal promised on numerous occasions that the necessary lease documents would be sent by Kravco, Inc., and that on two separate occasions in February, 1983, Barcal promised that the documents would be delivered to Rasmussen by a certain date. R. 175 (Rasmussen Depo. 45-46). On March 9, 1983, Rasmussen addressed a letter to Barcal

stating that he had to have the leases by March 11, 1982 in order to meet the deadline imposed by Deseret Federal. R. 175 (Rasmussen Depo. Ex. 3). Rasmussen threatened legal action against Barcal and Kravco, Inc. (but not Crossroads) if the "deal fails due to lack of follow-through either by you or Kravco." Id. Rasmussen testified that he felt Barcal had been negligent. R. 175 (Rasmussen Depo. 46).

On the same date, March 9, 1983, Barcal addressed a letter to Deseret Federal which stated that Crossroads intended to release Deseret Federal from the space in question and lease it to Rasmussen. R. 175 (Rasmussen Depo. Ex. 4). The letter advised that Kravco, Inc. was providing lease forms which "you should be receiving. . . in approximately five (5) business days." Id.

Prior to Deseret Federal's unilaterally imposed deadline of March 15, 1983, Deseret Federal informed Rasmussen that it did not want to release the space and began negotiating a sublease with Rasmussen. R. 175 (Rasmussen Depo. 48, 63). Deseret Federal requested Crossroads' consent to the sublease on March 23, 1983. R. 175 (Rasmussen Depo. Ex. 5). Crossroads was opposed to the sublease proposal but was still willing to pursue the original proposal. Thus, despite Deseret Federal's and Rasmussen's change of plans, Kravco, Inc. proceeded to prepare the promised lease and lease surrender forms and delivered those to Rasmussen on April 13, 1983. R. 175

(Rasmussen Depo. Ex. 8). The documents provided by Kravco, Inc. were never executed by either Deseret Federal or Rasmussen. R. 129, ¶ 4. Similarly, the "additional agreements" between Rasmussen and Deseret Federal which Deseret Federal required to be executed by March 15, 1983, were never executed. Id.

Rasmussen contends that he incurred several expenses in reliance on the alleged promises of Deseret Federal and Crossroads.

II. Crossroads' Counterclaim For Rents Due On Rasmussen's Space On Mall Level Two.

In May of 1980, Vaughn Rasmussen entered into a lease for space on Level Two of the Crossroads Mall which was then under construction. R. 239, ¶ 3. The Crossroads Mall was completed and opened in August of 1980. R. 175 (Rasmussen Depo. 19). Prior to the opening of the Mall, Rasmussen determined that he would not be prepared to open his shoe store when the Mall opened and requested that the rent be abated until the shoe store opened for business. R. 175 (Rasmussen Depo. 17). Crossroads agreed to the abatement of rent and Rasmussen opened for business in late October or early November of 1980. R. 175 (Rasmussen Depo. 18). Rasmussen continued to occupy the Level II space at least until the time of Crossroads' motion for summary judgment on its counterclaim. R. 226.

On May 25, 1984, Crossroads filed its counterclaim

against Rasmussen, alleging that Rasmussen had failed to make his monthly rental payments for November, 1983 and all subsequent months. R. 74.

At his deposition on July 5, 1984, Rasmussen admitted that he was behind in his rent payments and that the rent was owed to Crossroads. R. 175 (Rasmussen Depo. 73-74). At no time during the deposition did Rasmussen suggest that the lease for the Level Two space was unenforceable or affected by fraud in any way.

On March 28, 1985, Crossroads moved for summary judgment on its counterclaim. R. 176-78. The hearing on the motion was set for April 15, 1985. R. 227-229. The hearing was later re-set for May 6, 1985. R. 230-232. On May 1, 1985, just two business days before the hearing and more than 11 months after Rasmussen's answer to the counterclaim was due, Rasmussen's counsel mailed an answer to the counterclaim, together with an affidavit, asserting that Rasmussen was not obligated to pay rent because of an alleged misrepresentation made prior to May of 1980. R. 234-242. The alleged misrepresentation was that Crossroads' leasing agent indicated an intent to construct a walkway across Main Street between the second levels of the Crossroads Mall and the ZCMI Mall. R. 239-240. No such walkway was ever built on any level of the Crossroads Mall.

District Judge Sawaya granted summary judgment on the

counterclaim ruling that Crossroads' affidavit stating the amounts owing was uncontroverted and that Rasmussen's "claimed defenses will not lie." R. 244.

SUMMARY OF ARGUMENTS

The district court properly granted summary judgment on Rasmussen's claim against Crossroads for breach of an alleged oral lease agreement. The correspondence between the parties and the testimony of Vaughn Rasmussen show that no lease agreement was ever entered into. The lengthy negotiations involving three principals and one agent required a coordination of acts which never occurred and, as a result, the proposed deal fell through.

Even if the Court accepts all of Rasmussen's contentions (that Crossroads promised to execute a written lease agreement and that Rasmussen acted to his detriment in reliance on Crossroads' promise), those alleged facts are not sufficient to prevent the application of the statute of frauds. Nor are the facts alleged by Rasmussen sufficient to satisfy the statute of frauds either by sufficient memoranda or part performance.

Summary judgment on Crossroads' counterclaim was also proper. Rasmussen's failure to allege fraud as a defense until nearly a year had passed since the filing of Crossroads' counterclaim constituted a waiver of the defense. That Rasmussen had proceeded to occupy his leased space and

continued to occupy the space for more than four and one-half years after the alleged fraud occurred and that he occupied the space for more than 18 months without paying any rent before he ever suggested that he would claim fraud as a defense also constituted a waiver of the fraud claim. Because the statute of limitations had run on Rasmussen's fraud claim before Crossroad's claim for rent had accrued, the assertion of fraud as a defense was also time-barred.

ARGUMENT

I. The District Court Properly Granted Summary Judgment On Rasmussen's Claims Against Crossroads For Breach Of The Alleged Oral Lease Agreement.

Appellant Rasmussen concedes that the alleged oral lease agreement between Deseret Federal, Rasmussen and Crossroads comes within the Utah statute of frauds which requires that leases for a term exceeding one year must be in writing and must be subscribed by the party assigning or surrendering the leasehold interest. Utah Code Annotated, §25-5-1 (1984). Rasmussen asserts however that both Crossroads and Deseret Federal are barred from asserting the statute of frauds as a defense by the doctrine of promissory estoppel. Rasmussen further asserts that there are sufficient written memoranda and sufficient acts of part performance to satisfy the requirements of the statute of frauds. The facts of record in this case, however, interpreted in the light most favorable to Rasmussen, create no genuine issue of material fact

sufficient to support any of Rasmussen's theories.

The brief of Deseret Federal correctly sets forth the applicable law regarding each of Rasmussen's theories and Crossroads adopts by reference the arguments of Deseret Federal. The application of law to the particular facts involving Crossroads is set forth below.

A. There Is No Basis For Rasmussen's Claim of Promissory Estoppel.

Rasmussen contends that Crossroads should be estopped from asserting the statute of frauds as a defense because its leasing agent, Kravco, Inc., allegedly promised to provide lease and lease release forms to Rasmussen on various occasions. Rasmussen contends that he relied on the promises of Kravco, Inc., when he obtained an SBA loan, incurred various expenses relating to the improvements of the space to be leased, and paid disputed construction costs relating to space that he already occupied on the Level Two of the Crossroads Mall. The record in this case controverts the assertions of Rasmussen on appeal. But even if accepted as true, those allegations do not meet the threshold requirements established by this Court for the application of the doctrine of promissory estoppel.

The controlling authority in Utah makes it absolutely clear that:

A mere promise to execute a written contract and a subsequent refusal to do so is insufficient to create an estoppel, although reliance is placed

on such a promise and damage is sustained as a consequence of the refusal. The acts and conduct of the promissor must so clearly manifest an intention that he will not assert the statute that to permit him to do so would be to work a fraud upon the other party.

McKinnon v. Corporation of the President of the Church of Jesus Christ of Latter Day Saints, 529 P.2d 434, 436-37 (Utah 1974).

In this case there is no allegation, nor any fact of record to support an allegation that Crossroads ever manifested an intention that it would abandon an existing right or that it intended to waive the statute of frauds. To the contrary, the facts alleged by Rasmussen establish that if there was any point on which all of the parties agreed, it was that unless and until various written agreements were executed (some of which did not even involve Crossroads), there was no agreement at all.

Furthermore, the facts alleged by Rasmussen don't even amount to a refusal to execute a written contract. The most that can be said is that Kravco, Inc. failed to deliver the written lease forms as quickly as it had promised. The only parties that refused to execute the forms were Deseret Federal and Rasmussen himself. In Ravarino v. Price, 123 Utah 559, 260 P.2d 570 (1953), the defendant promised to execute a written conveyance of property and when informed that the plaintiff intended to purchase adjacent property in reliance on the defendant's promise, assured the plaintiff that he would sign the conveyance. The defendant later refused to sign the

conveyance after learning that the property he had promised to convey was a "hot" property. Id. at 260 P.2d 574. The Court found that this conduct was not sufficient to give rise to promissory estoppel. If the defendant in Ravarino was not estopped from backing out of a promise to execute a written conveyance, which was relied upon by the plaintiff, simply because he believed he could get a better deal elsewhere, clearly Crossroads cannot be estopped from asserting the statute of frauds simply because its agent Kravco, Inc. failed to deliver the lease agreement before the other parties, Deseret Federal and Rasmussen, decided to change the deal. Crossroads never refused and remained willing to execute the documents implementing the original lease proposal. If the facts of this case do give rise to promissory estoppel, then the statute of frauds is without meaning.

B. There Are No Written Memoranda Subscribed By Crossroads Which Satisfy The Statute Of Frauds.

Rasmussen contends that a letter from Bruce Barcal (presumably the letter expressing Crossroads' intent to release Deseret Federal from its space) combined with the unsigned lease form provided by Kravco, Inc., constitute sufficient written memoranda of the alleged oral lease to satisfy the statute of frauds. In order to satisfy the statute of frauds the signed writings must acknowledge that a contact has been

entered into. Birdzell v. Utah Oil Refining Co., 121 Utah 412, 242 P.2d 578, 580 (1952). The documents relied upon by Rasmussen were neither signed by Crossroads, nor did they indicate that a contract had been entered into.

Rasmussen knew and so testified that the lease documents to be produced by Barcal remained subject to approval by Crossroads:

Q. You understood that Mr. Barcal was the negotiating lease agent and whatever documents were generated would have to be approved by the owner?

A.. That's correct.

R. 175 (Rasmussen Depo. 26). The letter accompanying the lease form confirmed Rasmussen's understanding, stating that the submission of the lease form did not "impose any obligation upon either party until the execution of such document by the Landlord. . . ." R. 175 (Rasmussen Depo. Ex. 8). Rasmussen had already entered into one lease with Crossroads and knew the procedures to be followed. Under such circumstances there is no question but that Crossroads never executed any written memoranda acknowledging that a contract had been entered into. The documents relied upon by Rasmussen therefore fail, as a matter of law, to satisfy the statute of frauds.

C. None Of The Facts Alleged By Rasmussen
Constitute Part Performance Of The
Alleged Oral Lease Agreement.

Rasmussen contends that the statute of frauds is satisfied by certain acts performed in reliance on the alleged

oral lease agreement. As Deseret Federal points out, none of the alleged acts of performance are exclusively referable to the actual performance of the alleged oral lease agreement and therefore do not constitute part performance. See, Martin v. Scholl, 678 P.2d 274 (Utah 1983). The plans made, the bids taken, and the expenses incurred in anticipation of remodeling the Level One space were merely preparatory acts and were equally consistent with Rasmussen's proposal to sublease from Deseret Federal as with his proposal to lease the space from Crossroads. The SBA loan and the purchase of inventory were also equally consistent with the continued operation of Rasmussen's shoe store on Level Two or, for that matter, a shoe store anywhere in the city.

The payment of construction costs on the Level Two lease is so directly related to that lease that under no circumstances could it be said to be unequivocally related to performance of the alleged Level One lease. Furthermore, Rasmussen's own testimony and pleadings refute his present contention that the payment constituted performance of the Level One oral lease. On appeal, Rasmussen contends that Crossroads entered into the oral lease agreement in August of 1982 and that the agreement required the payment of construction costs relating to the Level Two space. Rasmussen Brief at 5. He claims that he paid those costs (amounting to \$2,400.00) between August of 1982 and January of 1983. Id. In

his Amended Complaint, however, Rasmussen asserts that Crossroads agreed to the Level One lease after Deseret Federal authorized Crossroads to conclude the transaction by its letter of January 13, 1983. R. 3. By that date most if not all of the construction costs had been paid.

Rasmussen's sworn testimony further confirms that the payment of the Level Two construction costs did not constitute performance of the alleged Level One lease. Rasmussen's affidavit of May 1, 1985 unequivocally states that Crossroads required payment of construction costs on Level Two before it would even negotiate a lease for additional space on Level One. R. 239. Rasmussen cannot create a genuine issue of material fact by merely contradicting his own testimony. Radobenko v. Automated Equipment Corporation, 520 F.2d 540, 544 (9th Cir. 1975). Moreover, even if Rasmussen's contradictory positions could create a genuine question as to his reason for paying the construction costs, the fact that such a question even exists further establishes that the payments were not exclusively referable to performance of the alleged oral lease.

There is, therefore, no genuine issue of material fact concerning the question of part performance. Assuming that Rasmussen did perform all of the acts that he relies on, none of those acts meet the requirements of the doctrine of part performance.

II. The District Court Properly Granted Summary Judgment On Crossroads' Counterclaim For Rents Due.

Five years after executing the lease; four and one-half years after opening for business; 18 months after he stopped paying rent; 12 months after being sued for breach of his covenant to pay rent; and just two business days prior to the hearing on Crossroad's motion for summary judgment, Rasmussen asserted fraud as an affirmative defense to enforcement of the lease agreement. Although Rasmussen had been previously deposed regarding the Level Two lease and had acknowledged that he owed rent to Crossroads R. 175 (Rasmussen Depo. 73-74), his last minute affidavit and answer to the counterclaim asserted that he was not obligated to pay rent.

The district court properly refused to permit Rasmussen to extend his 18 month rent-free operation of his Level Two shoe store by raising a surprise claim of fraud for the purpose of preventing summary judgment. There were at least three separate grounds, each of which was sufficient by itself, to support District Judge Sawaya's determination that "plaintiff's claimed defenses will not lie." R. 244. Those grounds are: (1) Rasmussen's failure to plead the affirmative defense of fraud on a timely basis constituted a waiver of the defense; (2) Rasmussen's actions after learning of the fraud also constituted a waiver; and (3) Rasmussen's claim of fraud was barred by the applicable statute of limitations.

A. Rasmussen Failed To Plead And
Therefore Waived The Affirmative
Defense Of Fraud.

Fraud is an affirmative defense that is waived unless set forth in a required responsive pleading. Utah Rules of Civil Procedure, Rules 8(c), 12(h). An affirmative defense to a counterclaim must be served within 20 days after service of the counterclaim. Utah Rules of Civil Procedure, Rule 12(a). Rasmussen did not answer Crossroads' counterclaim until more than 11 months had expired since the filing of the counterclaim and more than one month had expired since the filing of the motion for summary judgment.

In the absence of any reason or excuse (such as an agreement with opposing counsel) such a complete disregard of the pleading requirements of the Rules of Civil Procedure must be considered a failure to answer. One who keeps his affirmative defense secret for a year after becoming obligated to assert it, and who conceals the defense even when questioned whether he owed the rent required by the lease, must be deemed to have waived the defense. The district court's refusal to permit the affirmative defense was the only fair and proper decision and was clearly within the district court's discretion.

B. Rasmussen Waived His Claim Of
Fraud By His Actions Subsequent To
Discovery Of The Alleged Fraud.

Rasmussen's affidavit states that prior to execution of the lease in May of 1980, he was told that Crossroads

planned to construct a walkway between the second levels of the Crossroads and ZCMI malls. R. 239-240, ¶ 5. He claims that "following execution of the subject lease agreement" he learned that the alleged representations were false. R. 240, ¶ 8. The affidavit conspicuously and conveniently fails to specify exactly when Rasmussen learned of the alleged fraud.

In the absence of any facts or allegations to the contrary, it must be assumed that Rasmussen realized there would be no walkway by the time the Crossroads Mall was completed and held its grand opening in August, 1980. Knowing that the Crossroads Mall had been completed without the walkway, Rasmussen proceeded to occupy his Level Two space and began paying rent in November of 1980. Rasmussen continued to occupy the space until Crossroads' motion for summary judgment was granted in May of 1985.

Rasmussen's acceptance of the leased space and continued occupancy for nearly four and one-half years prevents Rasmussen from asserting a fraud alleged to have occurred several months before performance of the lease began. This Court has observed that such actions constitute a waiver of the fraud claim:

We do not question the correctness of the defendant's averments that where one has entered into a contract where fraud may be involved, and after having knowledge of those facts, continues to perform or otherwise ratify the contract, he is deemed to waive the claim of fraud. Nor that one who claims to be defrauded must exercise reasonable prudence and diligence in discovering

it and seeking a remedy therefore, or be precluded from doing so.

Bezner v. Continental Dry Cleaners, Inc., 548 P.2d 898, 901 (Utah 1976). The record in this case creates no genuine issue as to the fact that Rasmussen ratified the lease and failed to exercise any prudence or diligence in seeking a remedy for the alleged fraud.

This Court's decision in Dugan v. Jones, 615 P.2d 1239 (Utah 1980) indicates a distinction between waiver of the right to rescind a contract for fraud and waiver of the right to recover damages. The Court stated that:

[T]he defrauded party, who does not discover the fraud until he has partly performed, may go forward with the contract, keep what he has received, and still maintain his action for damages.

Id. at 1247 (emphasis added). Although Rasmussen asserted both the right to rescind and the right to affirm the lease, his right to affirm and recover damages is not preserved by the distinction recognized in Dugan v. Jones, supra. That distinction requires that the defrauded party begin to perform before discovering the fraud. Rasmussen has not even alleged that the fraud was not discovered before he began to perform the lease, and the facts of record indicate otherwise. Having failed to plead facts sufficient to support his affirmative defense of fraud, the summary judgment on that claim was proper.

C. Rasmussen's Affirmative Defense Of
Fraud Was Barred By The Statute Of
Limitations.

Utah Code Annotated, Section 78-12-26(3) (1977), provides that an action for relief on the ground of fraud must be brought within three years of the accrual of the cause of action. Rasmussen does not deny that his claims for fraud accrued more than three years prior to the date on which he asserted fraud as a defense. He only contends that the statute of limitations cannot operate to bar an affirmative defense. The law in Utah does not support Rasmussen's claim.

Rasmussen cites Jacobsen v. Bunker, 699 P.2d 1208 (Utah 1985), for the proposition that fraud, as a defense or counterclaim, is never barred by the statute of limitations. Jacobsen, however, held only that where cross-demands co-existed at some point in time, such cross-demands may be asserted as set-offs against each other notwithstanding the statute of limitations. The case relied upon in Jacobsen makes it clear that there must have been some point in time when both cross-demands would have been timely in order to permit an otherwise barred claim to be asserted as a set-off. In Salt Lake City v. Telluride Power Co., 82 Utah 607, 17 P.2d 281 (1932), the Court clearly held that claims which became barred by the statute of limitations prior to the accrual of the opposing party's claim could not be asserted as defenses or set-offs. Id. at 285.

The obvious rationale for the limited "set-offs" exception to the statute of limitations is that it would be unfair to permit one party to benefit by waiting to assert his claim until the opponent's claim becomes time-barred. But where, as in the Telluride Power case and in the present action, the timely action did not accrue before the opposing claim had ceased to exist, there is no purpose served by reviving the dead claim. In those circumstances there are no policy considerations for excusing a party from sitting on his rights.

The facts of record establish that Rasmussen's claim of fraud was barred before he stopped paying rent. He alleges that the misrepresentations were made prior to May of 1980. R. 239-240. Crossroads' counterclaim was for unpaid rents beginning with the month of November, 1983. R. 226. Thus Crossroads' claim arose three years and six months after the alleged misrepresentations were made. Even assuming that Rasmussen did not discover the alleged fraud until the Mall was completed and he saw that there was no walkway, his claim would have been barred in August of 1983, still four months prior to the accrual of Crossroads' first claim for rent.

There are no facts or allegations in the record to even suggest that the statute should be tolled beyond August of 1980. Furthermore, the burden of pleading and proving that the statute should be tolled was upon Rasmussen. See, Clawson v.

Boston Acme Mines Development Co., 72 Utah 137, 269 P. 147 (1928). In the absence of factual allegations that Rasmussen did not discover the fraud until after November of 1980, the Court is compelled to conclude that that statute of limitations began to run before that date. See, Valley Bank of Nevada v. Foster & Marshall, Inc., 585 F.Supp 1351, 1353 (D. Utah 1984). Because Rasmussen failed to plead any facts to establish that his claim for fraud did not become time-barred before any of Crossroads' claims for rent accrued, Rasmussen's affirmative defense of fraud was absolutely barred by the statute of limitations.

CONCLUSION

The orders of the district court granting Crossroad's motions for summary judgment were proper.

The facts of record, viewed in the light most favorable to Rasmussen, provide no basis for preventing the application of the statute of frauds to the alleged oral lease agreement. None of the facts alleged by Rasmussen give rise to a promissory estoppel. None of the documents of record constitute sufficient written memoranda of the alleged agreement, and none of Rasmussen's acts constitute part performance. Summary judgment was therefore proper.


Summary judgment was also proper on Crossroad's counterclaim. It was well within the discretion of the district court to reject Rasmussen's untimely attempt to raise

the affirmative defense of fraud. Furthermore, Rasmussen's ratification of the lease, as well as his concealing of his claim during discovery, constituted a waiver of the claim. Rasmussen's belated claim is also barred by the applicable statute of limitations.

For all of the above reasons, defendant Crossroads respectfully requests this Court to affirm the summary judgments entered in favor of Crossroads and to dismiss plaintiff's appeals.

Dated this 25th day of November, 1985.

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CERTIFICATE OF SERVICE

On this 25th day of November, 1985, I hereby certify that I caused to be hand delivered, four true and correct copies of the foregoing BRIEF OF RESPONDENT to the following:

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