

1986

Vaughn Rasmussen v. Deseret Federal Savings and Loan Association, the Equitable Life Assurance Society of the United States, Okland-Foulger Company : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

DOCKET 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

DESERET FEDERAL SAVINGS & LOAN ASSOCIATION

Appeal from a Summary Judgment of the Third Judicial District
Court for Salt Lake County, Utah
Honorable James S. Sawaya, Judge

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Clerk, Supreme Court, Utah

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vs.)	
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LIST OF ALL PARTIES TO PROCEEDINGS

Appellant

Vaughn 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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STATEMENT OF ISSUES

Respondent Deseret Federal is involved in only one basic issue on appeal. The issue presented to this Court for review, as to Deseret Federal, is whether the District Court properly found that the statute of frauds precludes the enforcement of an alleged oral agreement between Rasmussen and Deseret Federal. That issue involves consideration of the following:

1. Is the doctrine of promissory estoppel available under these facts to defeat the statute of frauds?
2. Are there sufficient memoranda of the alleged oral agreement with Deseret Federal to remove the agreement from the statute of frauds?

3. Are there any acts of part performance to justify the enforcement of the alleged oral agreement between Rasmussen and Deseret Federal?

DETERMINATIVE AUTHORITIES

As the district court recognized, the Utah statute of frauds is dispositive of Rasmussen's claims against Deseret Federal. 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.

STATEMENT OF THE CASE

This action was brought by appellant Rasmussen against Deseret Federal and Crossroads alleging breach of an oral agreement to lease a portion of the space occupied by Deseret Federal at the Crossroads Plaza Mall in Salt Lake City. District Judge Sawaya ruled that the alleged oral agreement was void under the statute of frauds. Appeal No. 20512 seeks a reversal of a

summary judgment entered in favor of Deseret Federal on December 10, 1984.

STATEMENT OF FACTS

Deseret Federal disagrees with Rasmussen's Statement of Facts in many respects. Further, many of the facts asserted pertain only to a dispute between Rasmussen and Crossroads. Consequently, Deseret Federal submits the following statement of facts that were not controverted by Rasmussen. Because this appeal requires the Court to review a summary judgment, the facts are stated in a light most favorable to Rasmussen.

In 1981, Rasmussen approached Deseret Federal with the desire to lease or sublet a portion of the space Deseret Federal was then leasing from Crossroads on the main mall level of the Crossroads Plaza shopping center in Salt Lake City, Utah. R. 175 (Rasmussen Depo. 59). Discussions ensued and continued for a substantial period of time. Deseret Federal, principally through Howard Swapp, a Vice President of Deseret Federal, discussed with Rasmussen the possibility of an arrangement whereby Deseret Federal would be released by Crossroads of the subject space and all attendant responsibilities, allowing Rasmussen to lease the space directly from Crossroads. R. 175 (Rasmussen Depo. 60).

Rasmussen contemplated a lease of approximately 10 years but there were also discussions of a 12 year lease. R. 175 (Rasmussen Depo. 69-70). Additionally, Deseret Federal and Rasmussen discussed that the space involved would include

releasing 790 square feet or possibly 950 square feet. R. 175 (Rasmussen Depo. 22-23).

In a letter dated July 6, 1982, Rasmussen reiterated his desire to lease a portion of the space then occupied by Deseret Federal. R. 175 (Rasmussen Depo. 58; Exhibit 28). At all pertinent times, Rasmussen understood that a written release of Deseret Federal's leasehold interest in the subject space was a condition to any agreement between Deseret Federal and Rasmussen. R. 175 (Rasmussen Depo. 22-23). Further, Rasmussen fully understood that a written lease between Crossroads and Rasmussen was a condition to any agreement between Deseret Federal and Rasmussen. R. 175 (Rasmussen Depo. 25-26).

On January 13, 1983, Howard Swapp, on behalf of Deseret Federal, wrote a letter to Kravco, Inc. ("Kravco"), Crossroads' leasing agent, authorizing Kravco to act as Deseret Federal's agent in the negotiations to release Deseret Federal from its obligations with respect to the subject space and to re-let such space to Rasmussen. R. 175 (Rasmussen Depo., Exhibit 2). A copy of that letter is attached hereto as Addendum 1 for the convenience of the court. The January 13 letter states, "for several months Deseret Federal Savings and Vaughn Rasmussen have been negotiating a proposal that Deseret Federal would vacate and Vaughn Rasmussen would occupy approximately 950 square feet of our space on the main plaza level." R. 175 (Rasmussen Depo., Exhibit 2) (emphasis added). The letter further states that the

following conditions would apply to any arrangement among Deseret Federal, Crossroads, and Rasmussen:

- (1) The subject space was available only to Rasmussen;
- (2) Deseret Federal would be unconditionally released from all tenant responsibility for the space;
- (3) Deseret Federal was not to pay any fees, charges, etc., relative to the transaction; and
- (4) Deseret Federal and Rasmussen were to fully execute additional agreements.

Id. Further, the January 13 authorization letter also stated that Kravco's authority to act as agent in the negotiations with Rasmussen would expire on March 15, 1983. R. 175 (Rasmussen Depo. 3, Exhibit 2). At his deposition in this case, Rasmussen acknowledged that the terms of the January 13 letter from Deseret Federal to Kravco were fully consistent with the terms discussed in negotiations between Deseret Federal and Rasmussen. R. 175 (Rasmussen Depo. 76).

On March 9, 1983, Bruce Barcal sent a letter to Deseret Federal stating that it was Crossroads' "intent" to release Deseret Federal from its obligations with respect to the subject space. R. 175 (Rasmussen Depo., Exhibit 4). A copy of that letter is attached hereto as Addendum 2. The letter further states that formal documents would be sent for execution by the parties. Such documents, however, were not provided to Deseret Federal prior to the March 15, 1983 deadline. R. 129 (Swapp Affidavit). On April 13, 1983, long after the deadline,

Crossroads delivered a proposed lease agreement to Rasmussen. R. 159. However, no agreements were executed concerning the subject space between Deseret Federal and Rasmussen before the March 15 deadline or at any time thereafter. R. 129 (Swapp Affidavit).

Following the March 15, 1983 deadline when Kravco's authority to act as Deseret Federal's agent expired, Rasmussen and Deseret Federal discussed details of a possible sublease whereby Deseret Federal would directly sublease the subject space to Rasmussen. R. 175 (Rasmussen Depo. 69-70). Deseret Federal indicated to Rasmussen they would consider subletting the subject space instead of completely releasing the space. R. 175 (Rasmussen Depo. 51, Exhibit 12). The proposed sublease contemplated a period of 12 years with rent "somewhere in the neighborhood" of \$25.00 a foot. R. 175 (Rasmussen Depo. 66-67). Any agreement to sublease was conditioned upon, among other things, the consent of Crossroads. Indeed, Rasmussen understood that no sublease arrangement was possible unless Deseret Federal and Rasmussen obtained Crossroads' consent to such an arrangement. R. 175 (Rasmussen Depo. 68-69). Rasmussen requested the consent of Crossroads for the sublease but such consent was denied. R. 175 (Rasmussen Depo. 3, 58, Exhibits 6, 22). No written agreement for a sublease of the subject space was ever executed between Deseret Federal and Rasmussen. R. 129 (Swapp Affidavit).

Rasmussen asserts that he spent a great deal of money to obtain a loan from the small business administration in

connection with the subject space, to prepare construction plans for the subject space and for space that Deseret Federal was to occupy in lieu of the subject space, and to purchase inventory for the new store. However, Rasmussen never took possession of the subject space, paid any rents to Deseret Federal or Crossroads for the subject space, made any repairs or improvements to the premises, or purchased and installed any fixtures.

SUMMARY OF ARGUMENTS

The district court properly concluded that, as a matter of law, any alleged oral agreement between Rasmussen and Deseret Federal is void under the statute of frauds. Rasmussen argues that there are factual issues concerning the operation of the statute of frauds. Specifically, Rasmussen contends that factual issues exist with respect to (1) whether the statute of frauds should not be applied under the doctrine of promissory estoppel, (2) whether there are sufficient memoranda of the alleged oral agreement, or (3) whether Rasmussen's conduct constitutes part performance. Each of those arguments must be rejected.

Promissory estoppel was not raised in the district court and may not be raised for the first time in this appeal. Moreover, under Utah law the acts and conduct of the promisor must clearly manifest an intention not to assert the statute of frauds that to permit him to do so would work a fraud on the other party. The undisputed facts do not even hint at such an intention. Further, this Court has recognized that written

memoranda must expressly or impliedly acknowledge or recognize that a contract has been entered into to satisfy the statute of frauds. To the contrary, the writings relied upon by Rasmussen refer to the alleged agreement as a "proposal" in the process of negotiation.

Finally, the acts of past performance relied upon by Rasmussen are simply insufficient to establish the alleged agreement. Rasmussen did not take possession of the subject space, make any valuable improvements, or pay any consideration to Deseret Federal. The district court properly entered summary judgment in favor of Deseret Federal and that ruling should be affirmed.

ARGUMENT

Appellant Rasmussen seeks to enforce an alleged oral agreement between Rasmussen and Deseret Federal that Deseret Federal would surrender its leasehold interest in a portion of its space and would consent to a lease of that space by Crossroads to Rasmussen. This alleged oral contract is squarely within the first section of the Utah Statute of Frauds which provides:

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) (emphasis added). The alleged agreement also comes within the language of Section 3 of the Utah Statute of Frauds. See Id. § 25-5-3.

Rasmussen concedes that the alleged oral agreement comes within the statute of frauds but asserts that the statute should not be enforced in this case. As the district court properly concluded, however, the exceptions to the statute urged by Rasmussen are unavailable as a matter of law.

I. THE DOCTRINE OF PROMISSORY ESTOPPEL IS INAPPLICABLE UNDER THE FACTS OF THIS CASE.

Rasmussen first contends that there are factual issues concerning the doctrine of promissory estoppel. A review of the record in this matter does not reveal that this theory was before the trial court at any time prior to entry of summary judgment in favor of Deseret Federal. This Court should therefore refuse to consider this issue. See, e.g., Berrett v. Stevens, 690 P.2d 553, 557 (Utah 1984) ("Where an issue is not raised in the trial court, this court will not consider it on appeal."); Franklin Financial v. New Empire Development Co., 659 P.2d 1040, 1044 (Utah 1983).

In any event, the doctrine of promissory estoppel is unavailable under the facts in this case. Promissory estoppel historically has been used as a substitute for consideration but has been extended by most courts, including this Court, to act as a bar to a statute of frauds defense. See Ravarino v. Price, 123

Utah 559, 260 P.2d 570 (1953). This Court, however, has recognized a very limited application of the doctrine.

In McKinnon v. Corporation of the President of the Church of Jesus Christ of Latter Day Saints, 529 P.2d 434 (Utah 1974), this Court reaffirmed a limited application of the promissory estoppel doctrine recognized in an earlier case:

[T]he doctrine of promissory estoppel [was] extended, in a limited form, to those cases concerned with . . . the Statute of Frauds where the promise as to future conduct constituted the intended abandonment of an existing right of the promissor. However, 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 on the other party.

Id. at 436-37 (emphasis added). The limitations recognized in McKinnon are essential to prevent the statute of frauds from becoming meaningless. See Easton v. Wycoff, 4 Utah 2d 386, 295 P.2d 332 (1956). Consequently, under Utah law the party attempting to assert promissory estoppel to enforce an oral promise must prove: (1) a promise, (2) which the promissor should reasonably expect to induce action or forbearance on the part of the promisee, (3) which does induce the action or forbearance, (4) injustice can be avoided only by enforcement of the promise, (5) the promise as to future conduct constituted the intended abandonment of an existing right of the promissor, and

(6) the acts and conduct of the promisor 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 on the other party. Id.; Ravarino, 260 P.2d at 575; see also Restatement (Second) Of Contracts § 139 (1981); 3 S. Williston & W. Jaeger, The Law of Contracts § 533A (1960). In this case, the undisputed facts demonstrate that these requirements have not been satisfied.

A. The Undisputed Facts Demonstrate that Deseret Federal Made No Unconditional Promise.

There is no evidence that Deseret Federal unconditionally promised to surrender its leasehold interest in the subject space to Rasmussen. Indeed, the undisputed evidence in the record indicates that several conditions existed to any promise by Deseret Federal to Rasmussen, that Rasmussen fully understood such conditions, and that the conditions were not satisfied.

In the letter of January 13, 1983, relied upon by Rasmussen, Deseret Federal refers to the alleged oral agreement as a "proposal" that the parties had been "negotiating." The letter then sets forth the specific conditions required by Deseret Federal to be met prior to releasing its leasehold interest in the subject space. Those conditions were: (1) that Deseret Federal be unconditionally released from any responsibility for the subject space by Crossroads, (2) that Deseret Federal not be required to pay any fees, charges, or commissions in connection with the transaction, and (3) that

Deseret Federal and Rasmussen fully execute the relevant agreements. Rasmussen testified that he understood that a written lease between Crossroads and Rasmussen was a condition to any agreement between Deseret Federal and Rasmussen for release of the subject space. R. 175 (Rasmussen Depo. 25-26, 74-75). Similarly, Rasmussen understood that no sublease arrangement was possible between himself and Deseret Federal unless he obtained Crossroads' consent to the sublease. R. 175 (Rasmussen Depo. 68-69).

A binding contract cannot exist when the agreement depends on the satisfaction of conditions precedent which admittedly have not been satisfied. See, e.g., Clayton v. Crossroads Equipment Co., 655 P.2d 1125 (Utah 1982). For example, in Welch Transfer and Storage, Inc. v. Oldham, 663 P.2d 73 (Utah 1983), the parties agreed to exchange certain real property conditioned upon obtaining a release from third parties with interests in the land. A release was not obtained and the Court held the contract invalid. In so holding, the Court stated: "Where fulfillment of a contract is made to depend upon the act or consent of a third person over whom neither party has any control, the contract cannot be enforced unless the act is performed or the consent given." Id. at 76.

The facts here are indistinguishable from those in Welch Transfer. Rasmussen has admitted that any agreement with Deseret Federal was conditioned upon an unconditional and complete release of Deseret Federal by Crossroads, a written

lease between Crossroads and Rasmussen, and the execution of final agreements. Because these conditions have not been satisfied, there simply is no enforceable promise, which is an essential requirement of the doctrine of promissory estoppel.

B. Deseret Federal Always Maintained its Right to Rely Upon the Protection of the Statute of Frauds.

No promise of Deseret Federal as to future conduct constituted the intended abandonment of an existing right. Deseret Federal had the right to require a final written agreement between itself and Rasmussen and to require a written release from Crossroads prior to consummation of the transaction. There is no evidence in the record that Deseret Federal ever abandoned its right to assert the statute of frauds or held such an intention. Indeed, Deseret Federal retained and exercised its full and complete right to assert the statute of frauds. The conditions stated in the January 13 letter plainly indicate that Deseret Federal required a written release from Crossroads and that Deseret Federal and Rasmussen fully execute final agreements before consummation of the transaction.

The acts and conduct of Deseret Federal do not manifest an intention that it would not assert the statute. Rasmussen contends that Bruce Barcal (presumably acting as agent for Crossroads and Deseret Federal) encouraged Rasmussen to take action in reliance on the existence of a lease. Rasmussen claims that Barcal assured Rasmussen that it was alright to proceed with financing, remodeling plans, and purchase of inventory because

documents were being prepared. Further, Rasmussen contends that Barcal specified a weekend when final lease documents were to have been delivered. Such conduct, however, is insufficient as a matter of law under the standard set forth by this Court to justify avoidance of the statute of frauds.

As set forth in Easton v. Wycoff, 4 Utah 2d 386, 295 P.2d 332, 334 (1956):

In most instances of negotiations for transactions included within the statute a reduction of the contract to writing is contemplated, and, in all probability, the parties will discuss who will draw the instrument and when and where it will be signed. The mere refusal to execute a written contract as agreed does not constitute "Fraud" within the rule that the Statute of Frauds will not be enforced where the effect would be to perpetrate a fraud, . . . and to hold otherwise would, in effect, completely nullify the Statute of Frauds.

This case comes within the analysis of this Court in Easton. The parties contemplated a reduction of their proposed agreement to writing and discussed who would draft the agreement. As was its right, however, Deseret Federal refused to proceed with the transaction when the documents did not arrive within the period set forth in the January 13, 1983 letter to Bruce Barcal. Such a refusal cannot be construed to constitute the perpetration of a fraud. To the contrary, the acts and conduct of Deseret Federal in setting a condition that final written documents be required before finalization of the proposed agreement and in ultimately requiring Crossroads to prepare final agreements for the signature of all parties suggests an intent to assert the

full protection of the statute of frauds. The testimony of Rasmussen indicates a complete awareness that none of the parties would be bound to the proposed agreement in the absence of final written documents.

The cases cited by Rasmussen in support of his argument that promissory estoppel should be applied in this case do not apply the standard required by Utah law and in fact support the position of Deseret Federal. Indeed, Rasmussen's brief conspicuously lacks any Utah cases that are supportive of his argument.

Rasmussen first relies upon Maula v. Millford Management Corp., 559 F. Supp. 1000 (S.D.N.Y. 1983). The standard applied in that case is similar to the Utah standard in that the court required a "fraudulent oral promise." However, the Maula court found that sufficient evidence of fraud existed in that case for the matter to go to a jury. In Maula, the parties had an oral agreement for the lease of an apartment and in fact a written agreement was signed by the plaintiff and sent to the defendant but never returned. The plaintiff entered into possession, painted the apartment in accordance with the color specifications set by the defendant, and was merely waiting to move into the apartment. In fact, the defendant had received a substantial benefit and gave no indication that it intended to rely upon the statute of frauds. By contrast, there is no evidence of fraud in the instant case. Deseret Federal has always taken the position that there would be no agreement until

the final written documents were signed. Rasmussen was fully aware of that condition. Moreover, there is no evidence here that Deseret Federal received any benefit from Rasmussen's alleged actions taken in reliance on the oral agreement which would support an inference of fraud as in Mauala.

The second case relied upon by Rasmussen, Lacy v. Wozencraft, 188 Okla. 19, 105 P.2d 781 (1940), is also inapplicable. The Lacy court applied a standard much different from the standard established by the Utah cases. In addition, the only issue before the court was whether the party against whom the promise is sought to be enforced must receive some benefit or consideration.

The facts in this case indicate that Deseret Federal never made an unconditional promise to release the subject space to Rasmussen. Any agreement was conditioned upon Crossroads' approval and the execution of final lease documents. Deseret Federal never manifested any intention that it would not assert the statute of frauds and to permit it to do so does not work a fraud upon Rasmussen. Promissory estoppel is therefore unavailable as a matter of law.

II. THERE ARE NO MEMORANDA OF ANY AGREEMENT BETWEEN RASMUSSEN AND DESERET FEDERAL WHICH PRECLUDE APPLICATION OF THE STATUTE OF FRAUDS.

Rasmussen next attempts to avoid application of the statute of frauds by arguing that there are sufficient memoranda

of Deseret Federal's promise to surrender its space and Crossroads' promise to lease the space to take the alleged oral agreement out of the statute of frauds. The trial court properly rejected this argument, concluding as a matter of law that the documents relied upon by Rasmussen do not constitute a sufficient memorandum of any agreement between the parties.

Under Utah law, written memoranda of an oral agreement, which are subscribed by the party to be charged, are sufficient to remove such an agreement from the application of the statute of frauds if: (1) the memorandum acknowledges or recognizes that a contract has been entered into by the parties, and (2) the memorandum contains all the essential terms and provisions of the contract. The documents relied upon by Rasmussen fail to satisfy these requirements.

A. The Documents Fail to Acknowledge or Recognize that a Contract Had Been Entered Into by the Parties.

This Court has long recognized the general rule that to constitute a sufficient memorandum, a writing or a group of writings taken together must contain "an acknowledgement or recognition that a contract has been entered into by the parties." Birdzell v. Utah Oil Refining Co., 121 Utah 412, 242 P.2d 578, 580 (1952). The Restatement (Second) of Contracts adopts the same standard. See Restatement (Second) of Contracts § 131(b) & comment f (1979). In the Birdzell case, the plaintiff attempted to enforce an oral contract for a lease based on a letter written by the defendant. The letter, however, indicated

that the parties were "negotiating" for a lease and stated the terms upon which a lease would be available. The Court concluded that the letter did not suffice as an adequate memorandum because it lacked an acknowledgement or recognition that the parties had reached an agreement.

The facts in this case are strikingly similar to those in Birdzell. None of the writings relied upon by Rasmussen contain an acknowledgement or recognition of any oral agreement. Instead, the writings state that the parties had been negotiating a proposal and that any agreement was subject to certain specified conditions, including the receipt and execution of final documentation.

Rasmussen specifies four writings which allegedly constitute a memorandum of an agreement between the parties: (1) a letter from Howard J. Swapp to Bruce Barcal dated January 13, 1983, (2) an unsigned agreement concerning remodeling of certain space to be used by Deseret Federal, (3) a letter from Bruce Barcal to Bruce Cundick dated March 9, 1983, and (4) the unsigned lease agreement delivered to Rasmussen by Crossroads. See Appellant's Brief 18-22. The January 13 letter from Howard Swapp to Bruce Barcal states that Deseret Federal had been "negotiating a proposal" concerning the subject space. See Addendum "1". Additionally, as previously discussed, the letter sets forth four conditions that needed to be met prior to consummation of any such proposal. Finally, the letter grants authority to Bruce Barcal to act on behalf of Deseret Federal to finalize the

proposal but provides that such authority would expire on March 15, 1983. Nowhere in that letter is it even implied that a binding agreement had been reached concerning the subject space.

The March 9 letter from Bruce Barcal to Bruce Cundick states "please accept this letter, as an expression of intent for Crossroads Plaza to release Deseret Federal Savings from approximately 790.5 square feet of their space at Crossroads Plaza." See Addendum "2". The letter also states that Kravco, Inc., Crossroads' leasing agent, was preparing leases and lease surrender forms. Thus the letter expresses an intent to consummate the negotiations of the parties but in no way states or implies that any agreement had already been reached.

The two unsigned agreements relied upon by Rasmussen cannot be construed to acknowledge or imply that the parties had reached an agreement and entered into a contract. Indeed, the agreements are unsigned and the parties intended the same to remain unsigned until an agreement was finally reached.

Rasmussen relies on three Utah cases in support of his argument that sufficient memoranda of the agreement existed in this case. In each of those cases, however, the writings relied upon contained an express acknowledgement that the parties had reached an agreement. In Gregerson v. Jensen, 617 P.2d 369 (Utah 1980), the court concluded that a check and an unsigned deed constituted sufficient memoranda of an oral agreement to convey a parcel of land. The check relied upon stated "one-half payment on land as agreed - other one-half payment when deed delivered."

With that language, there was no doubt that the parties were not merely negotiating for the purchase and sale of the land but had in fact reached an agreement.

Similarly, in Estate of Bonny, 600 P.2d 548 (Utah 1979), receipts of payment actually received by the seller of property were held to be sufficient to satisfy the statute of frauds. The receipts specifically referred to the transaction as a "sale" and acknowledged receipt of part payment for the property in question. The only issue in the case was the adequacy of the property description.

In Peterson v. Hendricks, 524 P.2d 321 Utah (1974), also relied upon by Rasmussen, the oral contract between the parties was specifically acknowledged in certain letters. The parties were partners in a mining venture and a letter from the defendant to the plaintiff expressly acknowledged the agreement and stated only a condition that if ore were discovered, that a one-half interest in the claims would be conveyed to the plaintiff.

As stated by Professor Corbin,

Letters and other memoranda are not sufficient to satisfy the statute, even though they contain explicit references to each other, unless they amount to an acknowledgement by the party to be charged that he has assented to the contract that is asserted by the other party. If, when interpreted together, they show no more than preliminary negotiations suggesting terms to be later agreed upon, they are insufficient to establish a contract. This would be equally true, even if no statute of frauds existed.

2 A. Corbin, Corbin on Contracts § 517 (1950) (emphasis added). This rule recognizes that there must be a contract between the parties before such a contract can be enforced. The rule makes it possible for parties to negotiate without the fear of liability for agreements not yet made. That purpose for the statute of frauds is well-established and has been expressed by various courts. For example, in Yacobian v. J. D. Carson Co., 205 S.W. 2d 921 (Mo. App. 1947), the court stated, "parties having in contemplation a lease contract are and should be privileged to negotiate and truly discuss the terms and conditions that each will agree to and neither be bound by their tentative agreements until they are placed in writing and signed." Id. at 925 (emphasis added).

The undisputed facts show that Rasmussen was well aware that any agreement with Deseret Federal was predicated upon a written release of Deseret Federal and a new written lease by Crossroads to Rasmussen. No such documents were ever executed. Rasmussen's reliance on preliminary negotiations that were contingent on execution of final written agreements are insufficient to satisfy the requirements of a written memorandum.

B. The Memoranda Relied Upon Do Not Identify the Essential Terms of the Alleged Oral Agreement.

This court has consistently recognized that "It is fundamental that the memorandum which is relied upon to satisfy the statute of frauds must contain all the essential terms and provisions of the contract." Birdzell v. Utah Oil

Refining Co., 121 Utah 412, 242 P.2d 578, 580 (1952); see, e.g., McDonald v. Barton Brothers Investment Corp., 631 P.2d 851, 854 (Utah 1981). At a minimum, a contract for a lease in excess of one year must specify the amount of property to be leased, a definite and agreed term, and a fixed rental rate. See, e.g., Pingree v. Continental Group of Utah, Inc., 558 P.2d 1377 (Utah 1976) (invalidating a contract to renew a lease because the parties had not agreed on a rental rate); Birdzell, 242 P.2d at 580.

In the present case, Rasmussen admits that the parties discussed a lease of both 790 square feet and 950 square feet. The term of years for the purported release/re-let agreement was equally ambiguous -- possibly 10 years, possibly 12. And according to Rasmussen's own testimony, rent for a sublease was discussed as "somewhere in the neighborhood" of \$25.00 a foot, certainly not words of agreement. The letters relied upon by Rasmussen as constituting memoranda of the agreement contain no reference to any terms. Moreover, the other unexecuted agreements relied upon by Rasmussen contain terms at variance with the terms testified to by Rasmussen in his deposition. Because the documents do not contain an adequate description of the terms of the alleged oral agreement, the trial court properly ruled that the statute of frauds is applicable in this case.

III. THE ACTS ALLEGEDLY TAKEN BY PLAINTIFF IN ANTICIPATION OF AN AGREEMENT FOR A LEASE DO NOT CONSTITUTE PART PERFORMANCE.

Rasmussen further attempts to avoid the application of the statute of frauds by alleging that the acts taken by him in anticipation of an agreement to lease the subject space constitute part performance. Rasmussen argues that factual issues remain concerning whether specific performance is available in this case based on the alleged part performance. As will be demonstrated, however, the acts taken by Rasmussen cannot legally constitute sufficient part performance to avoid the statute.

In McDonald v. Barton Brothers Investment Corp., 631 P.2d 851 (Utah 1981), this Court recognized that the doctrine of part performance is generally available only in two specific circumstances: (1) "where valuable improvements have been made to property by a plaintiff who has taken possession," or (2) "where the contract terms have been fully performed by the party seeking enforcement of a clear and definite oral contract." Id. at 853. In these two instances, "failure to enforce the oral contract would work a fraud on the person who performed pursuant to the terms of the agreement." Id. In this case, Rasmussen's acts were not part performance at all, but were merely preparatory acts taken with the hope that the transaction would be consummated.

A. Rasmussen Did Not Enter Into Possession of the Subject Space or Make Valuable Improvements.

The first category of cases in which this Court has recognized the applicability of the doctrine of part performance involves cases where valuable improvements have been made and the plaintiff has taken possession of the property. See, e.g., Ryan v. Earl, 618 P.2d 54 (Utah 1980). In such cases, the oral contract must be clear and definite and established by clear and definite testimony:

In addition, part performance requires that (1) any improvements made on the property must be substantial and valuable; (2) valuable consideration must be given; (3) possession must be actual and open; and (4) the acts of part performance must be exclusively referable to the contract.

Bradshaw v. McBride, 649 P.2d 74, 79 (Utah 1982); see Coleman v. Dillman, 624 P.2d 713, 715 (Utah 1981). These requirements reflect the general rule that, "Acts . . . which are merely preliminary, preparatory, or ancillary to the contract to be enforced, are not sufficient as part performance." 73 Am. Jur. 2d Statute of Frauds § 409, at 36 (1976).

An analysis of the alleged acts of part performance in this case reveals that none of the foregoing requirements have been satisfied and that the acts were merely preparatory. Rasmussen alleges that he obtained a small business administration loan to expand his business, he prepared plans and specifications to remodel the subject space and to remodel certain space owned by Deseret Federal at a separate location,

and paid certain disputed construction costs to Crossroads which were unrelated to the subject space. Rasmussen did not take possession of the subject space or make any improvements thereon, much less improvements that are "substantial and valuable." Additionally, there is no evidence in the record that Rasmussen paid any valuable consideration to Deseret Federal. Rasmussen implies that somehow the payment of disputed construction costs to Crossroads might satisfy the consideration requirement. However, that sum was paid to Crossroads, not to Deseret Federal.

The preliminary acts taken by Rasmussen are not exclusively referable to an alleged contract that the parties had already made. See Martin v. Scholl, 678 P.2d 274 (Utah 1983). The loan obtained by Rasmussen could have been used for expansion of his business into any space or his existing space. Moreover, prudent parties frequently prepare plans, secure financing, or make other arrangements in preparation for an agreement to be consummated. The payment of disputed construction costs to Crossroads is not exclusively referable to the alleged oral contract. Crossroads and Rasmussen certainly could have resolved a dispute about construction costs unrelated to the subject space without regard to any oral agreement that the subject space would be leased to Rasmussen.

The analysis and result in Pacific Cascade Corp. v. Nimmer, 25 Wash. App. 552, 608 P.2d 266 (1980), should control in this case. In Nimmer, an owner of land sent a letter to a prospective lessee expressing an intent to lease a portion of the

land, setting forth the general terms for the lease and stating that the terms remained subject to appropriate documentation. The letter was accompanied by a 58 page draft of the lease. In anticipation that the lease would be finalized, the prospective lessee conducted a survey and soil test of the property, but did not take possession of any part of the property or make any improvements thereon or tender the payment of any rentals. Id. at 670. The court held that the preliminary acts of obtaining a survey and soil test did not constitute part performance.

This Court has repeatedly reaffirmed that the doctrine of part performance is not available in cases, such as the instant case, involving the purchase, sale, or lease of land where the party does not take possession of the land, does not make any payments, and does not make any valuable improvements. See, e.g., Bradshaw v. McBride, 649 P.2d 74 (Utah 1982), McDonald v. Barton Brothers Investment Corp., 631 P.2d 851 (Utah 1981), Holmgren Brothers, Inc. v. Ballard, 534 P.2d 611 (Utah 1975). Because Rasmussen did none of the foregoing acts, part performance is unavailable under Utah law.

In sum, the acts relied upon by Rasmussen were preparatory or ancillary to the alleged agreement and were merely based on Rasmussen's expectation that the transaction would be consummated.

B. Rasmussen Has Not Fully Performed the Alleged Oral Agreement.

The second category of cases in which this court has applied the doctrine of part performance includes cases where a clear and definite oral contract has been fully performed. See McDonald v. Barton Brothers Investment Corp., 631 P.2d 851, 853 (Utah 1981). For example, in Randall v. Tracy Collins Bank & Trust Company, 6 Utah 2d 18, 24, 305 P.2d 480, 484 (1956), an elderly aunt promised to devise property to her nephew if her nephew took care of her. The nephew fully performed the contract by changing his residence from Ogden to Provo, taking care of his aunt, and managing her affairs. Because the nephew had fully performed the contract, the Court concluded that equity required that the contract be specifically enforced.

Another case in this category is Martin v. Scholl, 678 P.2d 274 (Utah 1983), the only case relied upon by Rasmussen on this issue. In Martin, a ranch laborer sought to enforce an oral agreement by a ranch owner to convey certain real property. The laborer fully performed by working long, hard hours for the owner and declining other and better offers of employment. Those acts may have been sufficient, except the Court concluded that the acts were not exclusively referable to the contract. Consequently, the Court held the agreement void under the statute of frauds.

The facts in this case are not even remotely similar to the facts in Randall or Martin. In this case, Rasmussen at best

performed various preparatory acts in anticipation that the transaction would be finalized and the lease documents signed. Rasmussen did not make lease payments, complete the remodeling of space for Deseret Federal, remodel the subject space, or otherwise perform the alleged agreement. Because Rasmussen has not fully performed the alleged agreement, the part performance argument must fail as a matter of law.

CONCLUSION

Rasmussen's disappointment from negotiations that did not come to fruition cannot sustain this action. Deseret Federal's expression of a willingness to release its leasehold interest in space at Crossroads Mall was not a legally binding promise. Even if it were construed as a promise, the terms of the promise were expressly conditioned upon execution of final written documentation and upon other events that never took place.

As Judge Sawaya properly concluded, the alleged oral agreement is void under the Utah statute of frauds. The doctrine of promissory estoppel is unavailable in this case for the simple reason that no agreement was ever made upon which reliance could be placed. Moreover, there is no evidence of an intent by Deseret Federal to abandon its right to assert the statute of frauds. The documents expressly reaffirmed that Deseret Federal fully intended to rely upon the protection of the statute. Finally, there are no sufficient memoranda of the alleged oral agreement to satisfy the statute of frauds and the preparatory

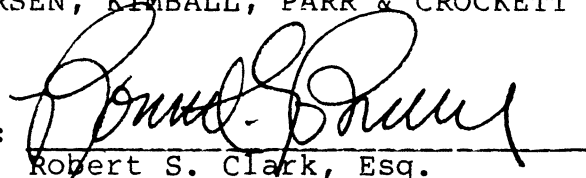
acts taken by Rasmussen do not constitute part performance sufficient to bar the statute's application.

The facts in the record fully support the district court's conclusion that summary judgment is proper in this case. Deseret Federal therefore respectfully requests this Court to affirm the summary judgment entered in its favor and dismiss this appeal.

DATED this 24th day of October, 1985.

LARSEN, KIMBALL, PARR & CROCKETT

By:



Robert S. Clark, Esq.

Ronald G. Russell, Esq.

Attorneys for Respondent

Deseret Federal Savings

& Loan Association

CERTIFICATE OF SERVICE

I hereby certify that on this 34th day of October, 1985, I caused to be hand-delivered copies of the foregoing BRIEF OF RESPONDENT to:

Reed L. Martineau
Rex E. Madsen
Stephen J. Hill
John R. Lund
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 3000
Salt Lake City, Utah 84110

Robert M. Anderson
Richard D. Parry
BERMAN & ANDERSON
50 South Main, Suite 1250
Salt Lake City, Utah 84144

Wendy von Kraum

FEDERAL SAVINGS AND LOAN ASSOCIATION

94 SOUTH MAIN STREET / SALT LAKE CITY, UTAH 84144 (801) 521-7530

DEPOSITION
EXHIBIT2

Rasmussen

1983

Barcal

INC.

Plaza Associates

Main Street

City, Utah 84144

Mr. Barcal:

Several months Deseret Federal Savings and Vaughn Rasmussen have been negotiating a proposal that Deseret Federal would vacate space on the main plaza level. Vaughn Rasmussen would occupy approximately 950 square feet of space on the main plaza level.

Deseret Federal to provide you with the authority necessary to manage this proposal, Deseret Federal grants permission to your office to act as agent under the following conditions;

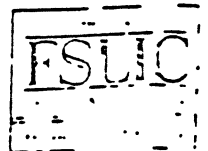
1. The space is available only to Vaughn Rasmussen.
2. Deseret Federal Savings is unconditionally released from all tenant responsibility for the subject space.
3. Deseret Federal Savings will not pay any fees, charges or commissions to any party for any reason relative to the subject transaction.
4. Deseret Federal and Vaughn Rasmussen additional agreements are fully executed.

For any reason Vaughn Rasmussen should choose to discontinue plans to occupy the subject space, Deseret Federal Savings is interested in any further proposals.

Authority granted herein shall expire March 15, 1983.

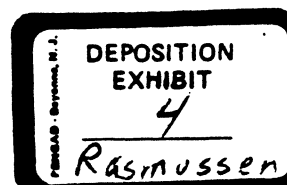
Sincerely,

Edward J. Swapp
Edward J. Swapp
Vice President





March 9, 1983



Mr. Bruce Cundick
Deseret Federal Savings & Loan
500 South Main
Salt Lake City, Utah 84144

E: Partial Surrender of Premises

Dear Mr. Cundick:

Please accept this letter, as an expression of intent for Crossroads Plaza to release Deseret Federal Savings from approximately 790.5 square feet of their space at Crossroads Plaza. The purpose of this surrender will be solely used for Mr. Vaughn Rasmussen and the establishment of an additional shoe store at Crossroads Plaza.

It is understood that Mr. Rasmussen will absorb all expenses regarding the demising and reconstruction of the premises.

KRAVCO, Inc. is presently preparing leases and lease surrender forms for the square footage discussed. You should be receiving the lease surrender form in approximately five (5) business days.

If you have any questions please do not hesitate to contact my office.

Sincerely,

[Signature]
Bruce Barcal
KRAVCO, INC.

cc: Mr. Howard Swapp
Mr. Vaughn Rasmussen
KRAVCO, Lease File
Deseret Federal Lease File