

1986

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

Utah Supreme Court

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## Recommended Citation

Reply Brief, *Rasmussen v. Deseret Federal Savings*, No. 860105.00 (Utah Supreme Court, 1986).  
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DOCKET NO. 860105, 860106-CA

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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VAUGHN RASMUSSEN,

Plaintiff/Appellant,

*860105, 860106-CA*

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,

No. 20512

and

No. 20755

Defendants/Respondents.

---

REPLY BRIEF OF APPELLANT

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**FILED**

JAN 27 1986

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Clerk, Supreme Court, Utah

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REPLY BRIEF OF APPELLANT

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Appellant Vaughn Rasmussen ("Rasmussen") submits the following reply to the briefs of Respondents Deseret Federal Savings & Loan Association ("Deseret Federal") and Crossroads Plaza Associates ("Crossroads").

### INTRODUCTION

Rasmussen claims in this case that Deseret Federal and Crossroads breached their agreement with him under which Deseret Federal agreed to release to Rasmussen a portion of its leased space at Level One of Crossroads Plaza and Crossroads in turn agreed to relet that space to Rasmussen. The lower court granted summary judgment in favor of Crossroads and Deseret Federal on the basis of the statute of frauds. The lower court also granted summary judgment on Crossroads' counterclaim that Rasmussen is liable for unpaid rent.

This reply first addresses the arguments of both Crossroads and Deseret Federal that (1) their acts and conduct do not give rise to the application of promissory estoppel to prevent their reliance on the statute of frauds; (2) there were insufficient memoranda of the parties' agreement to satisfy the statute of frauds; and (3) Rasmussen's acts and conduct in reliance on the promises of Crossroads and Deseret Federal are insufficient performance to satisfy the statute of frauds. As shown below, there remain issues of fact as to whether promissory estoppel, memoranda of the parties, or Rasmussen's part performance satisfies the statute of frauds.

The final section of the brief addresses Crossroads' argument that the lower court correctly granted summary judgment on

its counterclaim for unpaid rent. As shown below, there remain issues of fact relating to the counterclaim as well.

The lower court's grant of summary judgment in favor of respondents must be reviewed in light of the following standard announced by this Court:

Summary judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law, and the evidence, when viewed in the light most favorable to the loser, must show that there is no genuine issue as to any material fact.

Heath Techna Corp. v. Zions First National Bank, 609 P.2d 1334, 1336 (Utah 1980). Viewing the facts of record in the light most favorable to Rasmussen, the lower court's grant of summary judgment in favor of respondents on both Rasmussen's claims and Crossroads' counterclaim must be reversed.

#### POINT I

##### ISSUES OF FACT REMAIN CONCERNING THE ISSUE OF PROMISSORY ESTOPPEL.

The issue before the court is whether promissory estoppel bars application of the statute of frauds with respect to the agreement of the parties under which Deseret Federal agreed to release certain space on Level One of Crossroads Plaza to Rasmussen and Crossroads agreed to relet that space to Rasmussen. Both respondents cite McKinnon v. Corporation of the President of the Church of Jesus Christ of Latter-day



Saints, 529 P.2d 434, 436-37 (Utah 1974), for the proposition that promissory estoppel does not bar application of the statute of frauds unless "[t]he acts and conduct of the promisor . . . 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." Rasmussen recognizes that in order for him to prevail on the estoppel issue, there must be genuine issues of material fact under that standard.

Here, there is no question but that fact issues remain as to whether respondents' acts and conduct induced Rasmussen to act and manifested that they did not intend to assert statute of frauds. It is undisputed that Deseret Federal, by its January 13, 1983, letter (R 175, Exhibit 2), appointed Crossroads its agent to consummate the agreement the parties had reached concerning the lease of Level One space to Rasmussen. (See Deseret Federal Brief at p. 13.) After receipt of that letter, Bruce Barcal, acting as agent for both Crossroads and Deseret Federal, repeatedly represented to Rasmussen that the lease documents would be forthcoming and everything was in order. R. 158, 175 (Rasmussen Depo. at 26, 31). Barcal also assured Rasmussen that he could proceed with financing, remodeling plans, and purchase of inventory in reliance on the parties' agreement and Rasmussen did so in reliance on those assurances. R. 157-158. In February, 1983,

Barcal told Rasmussen that the leases were coming by Federal Express on two separate occasions. R. 175 (Rasmussen Depo. at 45). Later, in a letter dated March 9, 1983, Barcal advised Deseret Federal and Rasmussen that a lease surrender form and leases would arrive in approximately five business days. R. 161. Barcal's promises of forthcoming lease documents and repeated assurances that he could take action in reliance on those promises, which are not disputed in the record before this court, raise a genuine issue of fact as to whether Barcal's statements and conduct as agent for both respondents manifest an intention that respondents would not assert the statute of frauds and preclude respondents from relying on the statute.

Deseret Federal's argument that promissory estoppel was not raised in the court below is without merit. The elements of estoppel were all set forth in Rasmussen's Complaint. R. 2-7.

#### POINT II

##### **THERE WAS A SUFFICIENT MEMORANDUM TO SATISFY THE STATUTE OF FRAUDS.**

Both respondents dispute that the documents relied on by Rasmussen constitute sufficient memoranda to satisfy the statute of frauds. In making that determination, the court should consider the documents together along with parol

evidence relating to them. Estate of Bonny, 600 P.2d 548, 549-50 (Utah 1979).

The letter of January 13, 1983, from Howard Swapp of Deseret Federal to Bruce Barcal (Crossroads' agent), clearly manifests Deseret Federal's agreement to release the subject space. R. 175, Exhibit 2. The reference in the agreement to negotiation of a proposal clearly relates to the past; the letter is a manifestation that as between Deseret Federal and Rasmussen an agreement had been reached as set out in the letter. The March 9, 1983, letter from Bruce Barcal to Bruce Cundick of Deseret Federal evidences Crossroads' agreement (which had been reached initially in August 1982) to release Deseret Federal from its lease of the subject space and to relet the space to Vaughn Rasmussen. R. 161. The terms of the Deseret Federal's agreement to release its space are set forth in the AGREEMENT it delivered to Rasmussen on March 9, 1983. R. 175, Exhibit 14. The terms of the lease are all memorialized in the lease documents finally delivered to Rasmussen in April 1983, and are the same as those agreed to orally in August 1982. R. 9-45, 155-159.

The discrepancy between Deseret Federal's January 13, 1983 letter (950 sq. ft.) and Barcal's March 19, 1983 letter (790 sq. ft.) as to the amount of space to be leased is insignificant. The parties certainly had no question as to the location

of the space to be leased to Rasmussen and parol evidence would be admissible to precisely define the exact description of the space. Estate of Bonny, 600 P.2d 548, 549-50 (Utah 1979).

Crossroads' brief quotes Rasmussen as acknowledging at his deposition that whatever documents were generated by Barcal as leasing agent would have to be approved by the owner. Crossroads Brief at 17. Crossroads fails to explain, however, that at the time that testimony was given it was in the context of a discussion of meetings with Barcal in July 1982 before an agreement with Crossroads was reached. R. 175 (Rasmussen Depo. at 26-27). Crossroads omits Rasmussen's testimony that later "Mr. Barcal assured both me and Mr. Matheson on various occasions that the lease and everything was in order and that we could proceed with our loan, inventory and plans." R. 175 (Rasmussen Depo. at 28). Rasmussen added that as of December 1982 Barcal "had said previously on many occasions that everything was in order - the landlord had approved the terms of the lease." R. 175 (Rasmussen Depo. at 31).

The failure of the lease to finally be signed was due to Barcal's failure, as agent for both parties, to timely deliver the lease documents to Rasmussen. After March 15, Barcal finally provided the lease, but by that time Deseret Federal would agree only to a sublease, which was unacceptable to Crossroads. R. 46-50.

In sum, Rasmussen innocently took actions to his detriment as a result of written manifestations of agreements made by both Deseret Federal and Crossroads, as well as the promises continually made to him by their agent Bruce Barcal. Respondents unfairly whipsawed Rasmussen. Both of them failed to perform as promised. Certainly questions of fact exist in this case as to whether the documents referred to and relied on by Rasmussen constitute sufficient memoranda to satisfy the statute of frauds. Failure to so find would result in the statute of frauds being used to perpetrate a fraud against Rasmussen.

### POINT III

#### RASMUSSEN'S PARTIAL PERFORMANCE OF THE PARTIES' AGREEMENT SATISFIES THE STATUTE OF FRAUDS.

Both respondents also dispute that Rasmussen's part performance satisfies the statute of frauds. As shown in Rasmussen's opening brief, the doctrine of part performance is satisfied when the following standard is met:

First, the oral contract must be clear and definite; second, the acts done in performance of the contract must be equally clear and definite; and third, the acts must be in reliance on the contract.

Martin v. Scholl, 678 P.2d 274, 275 (Utah 1983). The doctrine of part performance, as its name indicates, requires only partial performance of the parties' agreement, not full performance as maintained by Deseret Federal. Id.; Utah Code Ann. § 25-5-8.

The parties' agreement contemplated, among other things, that Rasmussen obtain plans for remodeling of the subject space and obtain funds sufficient to accomplish the remodeling. R. 156, 175 (Rasmussen Depo., Ex. 14). At a bare minimum, Rasmussen performed in accordance with those conditions by obtaining plans for remodeling and obtaining an SBA loan to provide sufficient funds for the remodeling. There is no evidence whatever that Rasmussen undertook those efforts for any purpose other than to perform under his agreement with Crossroads and Deseret Federal. The argument that those acts were merely preparatory acts and are not exclusively referable to the performance of the oral lease agreement is specious; as the agreement Deseret Federal delivered to Vaughn Rasmussen in March of 1983 indicates, those acts went to the essence of the parties' agreement. Crossroads' suggestion in its brief at p. 18 that Rasmussen's obtaining plans and incurring remodeling expenses were equally consistent with Rasmussen's obtaining a sublease from Deseret Federal might make sense except that when those acts were performed there had been no discussion of any agreement but the agreement to lease from Crossroads; the sublease proposal was made after March 15, 1983, following Barcal's failure on behalf of both respondents to timely deliver the leases. R. 175 (Rasmussen Depo. at 65-66). In any event, there exist questions of fact as to the precise terms

of the agreement and whether Rasmussen's acts constituted part performance of those terms.

#### POINT IV

##### **SUMMARY JUDGMENT ON CROSSROADS' COUNTERCLAIM WAS IMPROPER.**

The court below granted Crossroads' summary judgment for unpaid rent over the unrefuted affidavit of Vaughn Rasmussen stating facts showing fraud in the inducement of the subject lease. Crossroads argues that summary judgment was proper because (1) Rasmussen's reply to its counterclaim raising the fraud defense was untimely; (2) Rasmussen waived the right to raise the defense; and (3) the statute of limitations bars the defense. None of these arguments is meritorious.

Crossroads cites not a single authority for the proposition that the delay in submission of a reply to a counterclaim results in a waiver of the defenses raised in the reply. As required by the rules, Rasmussen raised the defense of fraud in his reply to Crossroads' counterclaim. Even if he had not, under the liberal policy of the rules of procedure, Rasmussen should have been entitled to amend his original pleading to assert the defense, and even to amend his pleadings to raise the defense following trial to conform with the evidence. Rule 15, Utah Rules of Civil Procedure. Crossroads was put on notice. There is simply no basis for finding a waiver.

Crossroads would have this court in effect grant it a default judgment without it having timely taken any action to obtain one. See Rule 55, Utah Rules of Civil Procedure. It is simply too late for Crossroads to complain at this stage.

With respect to the issue of waiver, Crossroads has the burden of showing that Rasmussen intentionally relinquished its right to raise the defense. Such requires Crossroads to offer proof of that Rasmussen, after obtaining knowledge of the fraud, continued to perform or otherwise ratify the contract. Crossroads has failed to furnish such evidence.

Moreover, as in Dugan v. Jones, 615 P.2d 1239, 1247, "[i]t is only when there is a new agreement between the parties, after discovery of the fraud, the court may find a waiver of the fraud action [for damages]." There is no such new agreement in this case. Hence, Rasmussen's affirmative defense of set-off, being in substance a claim for damages, cannot have been waived.

Crossroads contends Rasmussen's pleading is deficient for failure to allege that he commenced performance prior to discovery of the fraud. Rasmussen's fraud claim is raised by way of affirmative defense. Under normal rules of pleading, all that is required is a short and plain statement of the defense, rather than the detailed statement required when a claim is



made affirmatively. See, Rule 8(b), Utah Rules of Civil Procedure. Rasmussen's defense is adequately pleaded.

Crossroads' final argument is that Rasmussen's fraud defense is barred by the statute of limitations. However, the statute of limitations, by its own terms, applies only to the maintenance of actions, not defenses. Utah Code Ann.

78-12-26(3). The general rule concerning application of statutes of limitation to matters of defense is as follows:

The ultimate purpose of a limitations lies to bar actions rather than to suppress or deny matters of defense. Hence, as a general rule, limitation statutes are not applicable to defenses, but apply only where affirmative relief is sought.

51 Am. Jur. 2d, Limitation of Actions, § 76 (1970). The numerous cases cited in Rasmussen's opening brief are to the same effect.

Moreover, in Jacobsen v. Bunker, 699 P.2d 1208, 1210 (Utah 1985), this court stated that a counterclaim could be set-off against the plaintiff's claim notwithstanding the statute of limitations. Even if Crossroads is correct that for the statute of limitations not to apply to Rasmussen's fraud claim for set-off, his claim must not have been time-barred at the time Crossroads' claim arose, Crossroads has failed to offer any proof as to when Rasmussen discovered the fraud. Therefore, there is no basis for determining whether or not the claims of Rasmussen and Crossroads at some point overlapped. Summary judgment, therefore, was improper.

CONCLUSION

For the reasons stated above, fact issues remain both with respect to Rasmussen's claims against Crossroads and Deseret Federal, and also with respect to Crossroads' claim for unpaid rent against Rasmussen. The lower court's grant of summary judgment to Crossroads and Deseret Federal should be reversed.

RESPECTFULLY SUBMITTED this 27th day of January, 1986.

SNOW, CHRISTENSEN & MARTINEAU

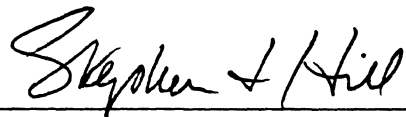
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Certificate of Service

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