

1986

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

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Rasmussen v. Deseret Federal Savings*, No. 860105.00 (Utah Supreme Court, 1986).
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BRIEF

IN THE SUPREME COURT
OF THE STATE OF UTAH

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.

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FILED
SEP 25 1985

Clerk, Supreme Court, Utah

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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 (collectively referred to as "Crossroads") (defendants below)

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| LIST OF ALL PARTIES TO PROCEEDINGS | i |
| TABLE OF CASES AND AUTHORITIES | iii |
| STATEMENT OF ISSUES PRESENTED FOR REVIEW | 1 |
| DETERMINATIVE AUTHORITIES | 2 |
| STATEMENT OF THE CASE | |
| Nature of the Case | 2 |
| Course of Proceedings Below | 3 |
| Statement of Facts | 3 |
| SUMMARY OF ARGUMENT | 9 |
| ARGUMENT | |
| POINT I | |
| SUMMARY JUDGMENT WAS IMPROPER BECAUSE THERE IS A QUESTION OF FACT WHETHER RESPONDENTS ARE ESTOPPED FROM ASSERTING THE STATUTE OF FRAUDS | 11 |
| POINT II | |
| EVEN IF RESPONDENTS ARE NOT ESTOPPED TO ASSERT THE STATUTE OF FRAUDS, FACTUAL ISSUES REMAIN REGARDING THE OPERATION OF THAT DEFENSE | 17 |
| A. Sufficient Memoranda | 18 |
| B. Partial Performance | 22 |
| POINT III | |
| SUMMARY JUDGMENT ON CROSSROADS' COUNTERCLAIM WAS IMPROPER BECAUSE THE STATUTE OF LIMITATIONS DOES NOT BAR ASSERTION OF A DEFENSE | 26 |
| CONCLUSION | 30 |

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page</u> |
|--|-------------|
| <u>Ackmann v. Merchants Mortgage & Trust Corp.</u> , 645 P.2d 7 (Colo. 1982) | 28 |
| <u>Aetna Finance Co. v. Pasquali</u> , 128 Ariz. 471, 626 P.2d 1103 (1981) | 28 |
| <u>Christenson v. Akin</u> , 183 Kan. 207, 326 P.2d 313 (1958) | 27 |
| <u>Dawe v. Merchants Mortgage & Trust Corp.</u> , 683 P.2d 796 (1984) | 29 |
| <u>Easton v. Wycoff</u> , 4 Utah 2d 386, 295 P.2d 332 (1956) | 12 |
| <u>Estate of Bonny</u> , 600 P.2d 548 (Utah 1979) | 19, 21 |
| <u>Goldberg v. Sanglier</u> , 27 Wash. App. 179, 616 P.2d 1239 (1980) | 28 |
| <u>Gregerson v. Jensen</u> , 617 P.2d 309 (Utah 1980) | 18, 19 |
| <u>Hartwell Corp. v. Smith</u> , 686 P.2d 79 (Idaho 1984) | 28 |
| <u>Hawkeye-Security Insurance Co. v. Apodaca</u> , 524 P.2d 874 (Wyo. 1974) | 27 |
| <u>Jacobsen v. Bunker</u> , 699 P.2d 1208 (Utah 1985) | 26, 27, 29 |
| <u>Lacy v. Wozencraft</u> , 188 Okla. 19, 105 P.2d 781 (1940) | 15 |
| <u>Martin v. Scholl</u> , 678 P.2d 274 (Utah 1983) | 23, 24 |
| <u>Maula v. Milford management Corp.</u> , 559 F.Supp 100 (S.D.N.Y. 1983) | 14 |
| <u>Peterson v. Hendricks</u> , 524 P.2d 321 (Utah 1974) | 19, 20, 21 |
| <u>Powers v. Sturgeon</u> , 100 Kan. 604, 376 P.2d 904 (1962) | 27 |
| <u>Randall v. Tracy Collins Bank & Trust</u> , 6 Utah 2d 18, 305 P.2d 480 (1956) | 23 |

| | <u>Page</u> |
|---|-------------|
| <u>Ravarino v. Price</u> , 123 Utah 559, 260 P.2d 570 (1953) | 13 |
| <u>State Board of Regents v. Holt</u> , 8 Kan. App. 436, 659 P.2d 836 (1983) | 28 |
| <u>Viehweg v. Thompson</u> , 103 Idaho 265, 647 P.2d 311 (App. 1982) | 28 |

Statutes

| | |
|--|----|
| Utah Code Ann. § 25-5-1 (1953) | 18 |
| Utah Code Ann. § 25-5-3 (1953) | 18 |
| Utah Code Ann. § 25-5-8 (1953) | 22 |

Addendum

| | |
|---|------------|
| Applicable Statutes | A-1 - A-2 |
| Summary Judgment and Order of Dismissal as to Deseret Federal Savings and Loan Association | A-3 - A-4 |
| Summary Judgment and Order of Dismissal as to The Equitable Life Assurance Society of the United States and Okland-Foulger Company d/b/a Crossroads Plaza Associates | A-5 - A-7 |
| Order | A-8 |
| Summary Judgment on Counterclaim of the Equitable Life Assurance Society of the United States and Okland-Foulger Company, d/b/a Crossroads Plaza Associates | A-9 - A-11 |

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BRIEF OF APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented for review are whether, when the law is properly applied, there are genuine issues of fact regarding:

1. Estoppel of respondents from asserting the statute of frauds because of Vaughn Rasmussen's detrimental reliance on their representations;

2. Whether there are sufficient memoranda of the agreements of the parties;

3. Whether Vaughn Rasmussen's partial performance entitles him to present his claim for equitable relief; and

4. Whether the defense of fraud, as asserted by Vaughn Rasmussen against the counterclaim, was barred by the statute of limitations.

DETERMINATIVE AUTHORITIES

There are no authorities directly dispositive of the issues presented. The applicable statutes of fraud are Utah Code Ann. §§ 25-5-1 and 3. The applicable statute of limitations is Utah Code Ann. § 78-12-26(3). Additional authorities which bear on the issues are quoted or appropriately referenced in the argument.

STATEMENT OF THE CASE

NATURE OF THE CASE

Vaughn Rasmussen claims breach of an agreement by respondents Deseret Federal and Crossroads to lease to him space on Level One of the Crossroads Mall. Respondent Crossroads counterclaims for rent claimed to be due and owing on Vaughn Rasmussen's Level Two space in the Mall.

Appeal No. 20512 is an appeal from final orders of the District Court granting summary judgment in favor of both respondents. Appeal No. 20755 is an appeal from a final order of the District Court granting summary judgment in favor of respondent Crossroads on its counterclaim against appellant.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On December 10, 1984 District Judge Sawaya entered summary judgment in favor of Deseret Federal based on the statute of frauds. Notice of intention to appeal that ruling was filed December 11, 1984.

On January 22, 1985 District Judge Sawaya entered summary judgment in favor of Crossroads based on the statute of frauds. Notice of appeal was filed regarding that judgment on February 20, 1985

On May 20, 1985 the lower court entered summary judgment in favor of Crossroads on its counterclaim after hearing oral argument which focused on whether Vaughn Rasmussen's asserted defense of fraud would lie. Notice of appeal of that judgment was filed June 19, 1985.

STATEMENT OF FACTS

Beginning in 1980 Vaughn Rasmussen operated a shoe store on Level Two of the Crossroads Mall. R. 154-55. Deseret Federal operated a bank on Level One of the Mall. R. 155. Both parties were tenants of respondent Crossroads who owned the Mall. Crossroads conducted its leasing operations in the Mall through its leasing agent, Kravco, Inc.

Level Two Lease. In May of 1980 Vaughn Rasmussen entered into a lease agreement with Crossroads for lease of space on

Level Two of the Mall. R. 182-225. That agreement is a 43-page form lease provided by the lessor containing all the terms of leasing in the mall such as use and modification of the space and use of common areas. Id. Prior to the execution of this lease Vaughn Rasmussen was told by agents of Crossroads that the Level Two space was a prime location because Crossroads would be constructing an elevated walkway between Crossroads Mall and the ZCMI Mall which would open up into Crossroads Mall right in front of Vaughn Rasmussen's space. R. 239-40.

This representation was made to induce Vaughn Rasmussen to lease the Level Two space. R. 240. It was a material representation which Vaughn Rasmussen relied on in signing the Level Two lease. R. 240. Vaughn Rasmussen subsequently learned that Crossroads never intended to construct a walkway entering on Level Two and that the planned walkway was to enter on Level Three. R. 240-41. In response to respondent Crossroad's counterclaim for rent on the Level Two space, Vaughn Rasmussen asserted fraud in the inducement as an affirmative defense. R. 239.

Level One Lease. Vaughn Rasmussen nevertheless attempted to make his business successful in the Mall. Still anxious to obtain the traffic flow he thought would be passing the Level Two space, Vaughn Rasmussen approached Deseret Federal and

Crossroads about expanding his store downward into Level One.

R. 175, pp. 20-21. The approval of both respondents was necessary because Deseret Federal was occupying the space wanted by Vaughn Rasmussen. Deseret Federal had to agree to surrender a portion of its leased space to Crossroads so Crossroads could lease the space to Vaughn Rasmussen.

In July of 1982 Vaughn Rasmussen received Deseret Federal's promise to surrender the Level One space on certain terms. R. 155. In August of 1982 Vaughn Rasmussen reached an agreement with Crossroads that Crossroads would lease the Level One space to for \$20 per square foot, for the duration of Vaughn Rasmussen's lease on the Level Two space and on the same terms as were found in the 43-page Level Two lease. R. 155-156. As additional consideration Vaughn Rasmussen also promised to pay previously disputed construction costs relating to the Level Two space. R. 156.

Crossroads also promised in August of 1982 to provide Vaughn Rasmussen with a written lease for the Level One space. R. 157.

Based on the agreements and the representations they include, Vaughn Rasmussen proceeded to perform the deal and make necessary arrangements to occupy the space. Between August of 1982 and January of 1983 he paid Crossroads over \$2,400 in disputed construction costs. R. 157. This was done

in reliance on Crossroads' repeated assurances to Vaughn Rasmussen that a written lease was forthcoming. R. 158.

In January of 1983 Vaughn Rasmussen advised Crossroads' leasing agent, Bruce Barcal, that he needed to take bids on the construction work that was planned and also needed to provide funds for remodeling at Deseret Federal's location on 3900 South. (This remodeling was one of the considerations Deseret Federal received for its promise to surrender the Level One space.) R. 175, pp. 40-42. Mr. Barcal was also advised at that time that Vaughn Rasmussen had applied for a Small Business Administration loan in the amount of \$250,000 which was contingent on Vaughn Rasmussen occupying the Level One space and that he wanted the written lease before committing to the loan. Mr. Barcal assured him it was safe to proceed with the loan and that Vaughn need not worry about the lease because it would arrive shortly. Id. Based on Mr. Barcal's representation that the parties had agreement and that a written lease would be provided shortly, Vaughn Rasmussen obligated himself on this loan in January of 1983. R. 157.

The documents exchanged between the parties provide further evidence that the agreements existed and that the representations were made. As to Deseret Federal the terms of its agreement to relinquish the space are fully delineated in a letter dated January 13, 1983, written to Bruce Barcal by Deseret

Federal's vice president Howard Swapp. R. 175, Exhibit 2. The letter advises Mr. Barcal that Deseret Federal will vacate approximately 950 square feet on Level One only if (1) the space is released to Vaughn Rasmussen, (2) Deseret Federal is released from responsibility for the space and (3) Deseret Federal and Vaughn Rasmussen execute additional agreements. Id. The additional agreement referred to in the letter was drafted by Deseret Federal and delivered to Vaughn Rasmussen on March 9, 1983. R. 175, Exhibit 14. This 5-page agreement provides for Vaughn Rasmussen to arrange and pay for the remodeling and relocation associated with the change. Mr. Swapp's letter also authorizes Mr. Barcal's office to act as Deseret Federal's agent to close the transaction. This authority lasted only until March 15, 1983 according to the letter.

After January 13, 1983, when Bruce Barcal had the authority of Deseret Federal and Crossroads, Vaughn Rasmussen asked him where the written lease was. Barcal told him again and again that it would be produced any day. Specifically, Barcal told Vaughn Rasmussen the leases were coming by way of Federal Express to Vaughn Rasmussen's home on two separate occasions in February of 1983. R. 175, p. 45. On one of those occasions Vaughn Rasmussen stayed home all weekend waiting for these documents to arrive. Id.

More specifically, in a letter dated March 9, 1983, addressed to Deseret Federal and copied to Vaughn Rasmussen, Mr. Barcal represented that "Kravco, Inc. is presently preparing leases and lease surrender forms for the square footage discussed. You should be receiving the lease surrender forms in approximately five (5) business days." R. 161. This letter merely restates what Barcal had orally promised to Vaughn Rasmussen on numerous occasions since August of 1982 period. R. 158.

Crossroads provided a written lease to Vaughn Rasmussen but after Bruce Barcal's authority to act for Deseret Federal had terminated. On April 13, 1983 Crossroads delivered the lease to Vaughn Rasmussen at his home. R. 159. This written lease incorporated all the essential terms of the agreement of the parties as reached in August of 1982. R. 9-45. Crossroads has previously represented in writing that the written lease document would be provided before Barcal's authority from Deseret Federal terminated.

Mr. Barcal failed to provide the documents by March 15 when his authority to act as agent for Deseret Federal expired. After that time Deseret Federal refused to surrender the space despite the undisputed fact that it had appointed Bruce Barcal its agent for this precise purpose.

After March 15, both respondents provided Vaughn Rasmussen with documents which represented their independent attempts to complete the transaction. Crossroads provided Vaughn Rasmussen with the complete written lease document with the same terms the parties had agreed on all along. R. 159. Deseret Federal, on the other hand, attempted to bypass Crossroads by subleasing the space directly to Vaughn Rasmussen. R. 46-50. Crossroads refused to consent to the sublease and Deseret Federal refused to consent to a surrender of the space to Crossroads and, because neither respondent cooperated, Vaughn Rasmussen never obtained possession of the Level One space.

Vaughn Rasmussen spent a great deal of money to close the SBA loan, to prepare construction plans for the store and for the Deseret Federal space and to purchase inventory for the new store. Because of respondents' refusal to honor their agreements with him, combined with Crossroads misrepresentations about the Level Two Space, Vaughn Rasmussen has been unable to earn the money needed to pay the expenses mentioned above and he has been driven to financial ruin.

SUMMARY OF ARGUMENT

None of the lower court's summary judgments in this matter were appropriate. In each instance the law was not properly applied to the facts in the record. The genuine factual issues

were avoided by a misapplication of the statute of frauds defense and by a misunderstanding of how the statute of limitations operates against affirmative defenses.

Respondents should not even have been allowed to assert the statute of frauds. Their leasing agent continuously represented to Vaughn Rasmussen that a written lease would be provided and Vaughn Rasmussen acted to his detriment in reliance on that representation by borrowing money, purchasing inventory and preparing to occupy the Level One space. Utah law clearly allows promissory estoppel to overcome the statute of frauds if the elements of the doctrine are satisfied. Here, sufficient evidence of each element was presented against respondents to raise genuine issues of fact which should be presented to the finder of fact and which make the lower court's summary judgment improper.

Notwithstanding that respondents should have been estopped to assert the statute of frauds, Vaughn Rasmussen submits that the defense should not have been applied as a matter of law in favor of either respondent. A genuine factual issue exists whether there are sufficient memoranda of respondents' agreements which satisfy the requirement of a writing. Further, the oral agreements of the parties should have been considered by a jury for equitable relief based on Vaughn Rasmussen's partial performance.

With respect to Crossroads' counterclaim for rent, summary judgment was also improper. The lower court erred in refusing to allow Vaughn Rasmussen to assert the defense of fraud. The statute of limitations does not operate to bar assertion of fraud as a defense even though it might be time barred as an affirmative claim. The uncontradicted facts of Vaughn Rasmussen's affidavit clearly raise a factual question of whether Crossroads committed fraud in obtaining its original lease with Vaughn Rasmussen and Vaughn Rasmussen should be allowed to assert and prove that defense to a jury.

ARGUMENT

POINT I

SUMMARY JUDGMENT WAS IMPROPER BECAUSE THERE IS A QUESTION OF FACT WHETHER RESPONDENTS ARE ESTOPPED FROM ASSERTING THE STATUTE OF FRAUDS.

Vaughn Rasmussen had an agreement with Crossroads and Deseret Federal. They agreed to lease him space on the Level One of the Mall, and the terms of that lease were fully negotiated, specified and agreed. Through their joint agent, Bruce Barcal, Crossroads and Deseret Federal also repeatedly promised Vaughn Rasmussen something else - a written lease. Respondents never took the simple actions necessary to provide that lease until after one or the other of respondents decided not to honor their contract. Then, when Vaughn Rasmussen took this

action to enforce the lease agreement, respondents raised the statute of frauds as a defense. They convinced the lower court to dismiss Vaughn Rasmussen's claim because the lease agreement was not in writing. It was error to allow Crossroads and Deseret Federal to assert that defense as a matter of law after Barcal had repeatedly promised to provide a written lease and lease surrender form and had induced Vaughn Rasmussen to act in reliance on those promises to his substantial detriment.

In Easton v. Wycoff, 4 Utah 2d 386, 295 P.2d 332 (1956), this Court established that the doctrine of promissory estoppel is available to overcome the statute of frauds and enforce a contract. There, the plaintiff sought breach of contract damages when his lessor refused to honor their oral lease agreement. The parties had orally agreed to the terms of the lease, and the lessor promised to have the agreement drawn up by his attorney. The lessor gained summary judgment in his favor by asserting the statute of frauds as a defense.

On appeal, this Court acknowledged the rule which governs the present case. It ruled that the doctrine of promissory estoppel applies to avoid the statute of frauds if there has been a promise to provide a written lease and if there has been detrimental reliance on that promise. Id. at 295 P.2d 333. In Easton the summary dismissal was affirmed only because no showing had been made of detrimental reliance by the lessor.

Here, such detrimental reliance by Vaughn Rasmussen is proved by the record and respondents should have been barred from even asserting the statute of frauds as a defense.

The facts in the record now before the Court also satisfy the requirements of Ravarino v. Price, 123 Utah 559, 260 P.2d 570 (1953). There a purchaser sought to enforce an oral promise to sell real property. The seller raised the statute of frauds as a defense, and the purchaser responded by claiming that the seller was estopped from doing so. This Court again upheld the applicability of promissory estoppel to a promise to provide a written contract:

The binding thread which runs through these cases, distinguishing them from the general rule that a mere promise as to future conduct will not work an estoppel, is the promise is designedly made to influence the conduct of the promisee, tacitly encouraging the conduct, and although the conduct of the promisee constitutes no performance of the oral contract itself, it is something that must be done by plaintiff before he could begin to perform, as was known to the defendants.

Id. at 260 P.2d 576.

Here Bruce Barcal did much more than tacitly encourage Vaughn Rasmussen. Over the course of six months he affirmatively and repeatedly assured Vaughn Rasmussen that it was all right to proceed with the financing, remodeling plans and purchase of inventory because written documents were being

prepared. Barcal also obtained payment of \$2,400 in disputed construction charges from Vaughn Rasmussen in this manner. During the time when Barcal was the agent of both respondents he went so far as to specify a weekend when Federal Express would deliver the promised documents to Vaughn Rasmussen. When these facts are viewed in a light most favorable to Vaughn Rasmussen, reasonable minds could clearly find that respondents promised to provide a written contract and that Vaughn Rasmussen relied upon that promise to his substantial detriment.

This was the conclusion reached in Maula v. Milford Management Corp., 559 F. Supp. 1000 (S.D.N.Y. 1983), under a similar fact situation. There, the parties had an oral agreement for the lease of an apartment at the Biltmore Plaza. The lessees viewed the apartment, delivered three checks each representing one month rent, and also paid a security deposit and brokerage fee. Just as in the present case, a written lease was drafted but never signed by the lessor. The lessees were given occupancy of the apartment for a short period, were permitted to store their belongings in the apartment, and were given keys to it. They ordered custom made rugs and furniture and arranged for electricity to be transferred into their name. The court ruled that these facts created genuine questions as to whether the lessors had misrepresented that they would deliver a lease for the apartment and whether the lessees

had suffered substantial injuries in reliance on this representation. The same factual questions are presented here and they require that the summary judgment be reversed.

In Lacy v. Wozencraft, 188 Okla. 19, 105 P.2d 781 (1940) the lessee's showing of reliance on the promise of a written lease was much less than that of Vaughn Rasmussen. Nevertheless, the Oklahoma Supreme Court reversed the ruling of the lower court in favor of the lessor. There, the lessee had occupied the premises under a written lease contract for a term of three years. She continued to occupy the premises after expiration of the lease and during that time the lessor orally agreed to lease the premises to her for another three year term and to reduce that agreement to a writing. The lessee's only evidence of reliance was that she expended the sum of \$1,000 in remodeling to suit her stock of merchandise and invested approximately \$5,000 in additional merchandise.

At trial, the jury was instructed that some benefit to the lessor had to be shown before the defense of estoppel was available. This was found to be error on appeal. It was sufficient to remove the oral lease agreement from the statute of frauds that the lessee had suffered the material detriment mentioned above in expectation of the promised written lease. On remand, the question for the jury was whether the lessee, with the knowledge of the lessor, had so altered her position in

reliance on the oral agreement that to invoke the statute of frauds would permit a fraud or other injustice to be perpetrated.

In the present case, Vaughn Rasmussen has shown significantly more detriment, has shown that respondents promised to provide the Level One space and to put their promises in writing, and has shown that he acted in reliance on those promises. He obtained an SBA loan, purchased inventory for the new store, prepared construction and remodeling plans and paid disputed construction costs. His affidavit is uncontradicted on these facts. R. 156-58. The affidavit also establishes that respondents' leasing agent, Bruce Barcal, represented numerous times to Mr. Rasmussen that a written lease would be delivered to him. Barcal's representations are further proven by his letter to Deseret Federal in March of 1983, stating that the lease and surrender were presently being prepared and would arrive before March 15, 1983. Mr. Rasmussen incurred very significant detriment in reliance upon Barcal's representations and did so at a time when Barcal was the agent of both respondents. Also, some of that detriment directly benefited Crossroads when Vaughn Rasmussen paid directly to Crossroads over \$2,400 in disputed costs pertaining to his Level Two lease with Crossroads.

The record does not contradict any of these facts, much less overwhelm them with the weight of contrary evidence. As to each element of the doctrine of promissory estoppel there is, at the very least, a factual question whether the doctrine should apply to estop respondents from asserting the statute of frauds. A jury could easily find that allowing respondents to use the defense would result in perpetration of a fraud on Vaughn Rasmussen and for that reason, the summary judgment in respondents' favor should be reversed so that the evidence can be considered by a jury.

POINT II

EVEN IF RESPONDENTS ARE NOT ESTOPPED TO
ASSERT THE STATUTE OF FRAUDS, FACTUAL ISSUES
REMAIN REGARDING THE OPERATION OF THAT
DEFENSE.

The statute of frauds is designed to prevent fraud by requiring certain contracts to be evidenced by a writing. Because of that design there are numerous limitations on the statute so that oral contracts may be enforced when the facts of the case satisfactorily show that enforcing the contract will not perpetrate a fraud. Appellant submits that there are significant factual questions about whether some of those limitations apply to the agreements among Vaughn Rasmussen, Crossroads and Deseret Federal. More particularly, respondents' promises are sufficiently evidenced by signed writings to make

them enforceable. Further, Vaughn Rasmussen was at least entitled to specific performance based on his partial performance of the oral agreements.

A. Sufficient Memorandum - To be enforceable, Deseret Federal's promise to surrender its space and Crossroads' promise to lease the space to Vaughn Rasmussen had to be evidenced by writings subscribed to their agents. Utah Code Ann. §§ 25-5-1 and 3 (1953). The documents presented to the lower court satisfy this requirement.

Gregerson v. Jensen, 617 P.2d 369 (Utah 1980), demonstrates that the writings relied on in this case were sufficient to entitle Vaughn Rasmussen to a trial. There the parties had an oral contract to sell certain land. This contract was shown by a combination of two documents: a check endorsed by the seller and an unexecuted deed showing the seller as grantor and the buyer as grantee. This court ruled that these two writings could be read together because the signed writing, the check, impliedly referred to the specific deed when it stated that the payment was for "1/2 payment on the land as agreed - other 1/2 payment when deed delivered." Id. at 373.

Similar documents prove the existence of Crossroads' lease. Like the check in Gregerson, Crossroads' agent Bruce Barcal signed the March 9, 1983 letter acknowledging the agreement and specifically referring to the lease and surrender

which were being prepared. As with the deed in Gregerson, Crossroads also provided a complete but unexecuted lease of the Level One space to Vaughn Rasmussen. These documents should have been read together to constitute a sufficient writing of Crossroads' promise to lease the premises.

In Estate of Bonny, 600 P.2d 548 (Utah 1979), receipts of payment satisfied the statute of frauds even without reference to a deed. The receipts simply described the property as "11-acre property at Alpine." This was adequate because parol evidence combined with this description to leave no uncertainty as to which property was the subject of the transaction.

In Peterson v. Hendricks, 524 P.2d 321 (Utah 1974), letters, such as that written by Howard Swapp of Deseret Federal in this case, were treated as sufficient memoranda of a contract. There the parties were partners in a mining joint venture. The oral contract provided that the plaintiff would work and explore the property and the defendant would, in turn, convey to the plaintiff a one-half interest in the claims. This agreement was shown by some letters between the parties, including one letter signed by the defendant which stated:

I think we should go ahead as fast as possible on a government loan, however, if Slim gets the necessary money to reach our objective

Then if we hit and form a company. If there is only two of us then you shall have a half interest and myself a half interest We don't have anything

yet going in order to form a company, and I know I trust you and you trust me, but keep this letter as a legal paper because this is written down in my handwriting and everyone wants something written down spelling out their interests. Once we can really start mining I think it will make us well off and it might make us rich. Until then, we will have to keep plugging away.

Id. at 322.

Here, the documents signed by Deseret Federal are substantially more certain and specific than those creating a sufficient memorandum in the preceding cases. In particular, Deseret Federal's senior vice-president signed a letter dated January 13, 1983 which states:

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

In order to provide you with the authority necessary to manage this proposal, Deseret Federal grants permission to your office to act as our 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's additional agreements are fully executed.

If for any reason Vaughn Rasmussen should choose to discontinue his plans to occupy the subject space, Deseret Federal Savings is not interested in any further proposals. R. 175 Ex. 2.

Just as in Estate of Bonny, Mr. Swapp's reference to 950 square feet of space on the main plaza level leaves no question about what space Deseret Federal had agreed to surrender when it is considered in light of parol evidence. Further, the specific terms of Deseret Federal's agreement to surrender the space are spelled out in itemized form in this letter. The letter shows that Vaughn Rasmussen had the agreement of Deseret Federal to surrender its space on the terms provided. Despite the use of the word "proposal," the language of Mr. Swapp's letter is substantially more certain than the language of the letter in Peterson v. Hendricks, which speaks entirely in terms of if the joint venturers discovered ore. Here, the only reason Mr. Swapp used the term "proposal" is because the agreement also required the participation of Crossroads. There is, at the very least, a factual question raised by the letter as to whether Deseret Federal had committed itself to Vaughn Rasmussen.

The Utah law pertaining to writings sufficient to overcome the statute of frauds is satisfied by the record. This becomes very clear when the purpose of the statute of frauds is considered. Mr. Swapp's letter is independent proof of Vaughn

Rasmussen's claim that he and Deseret Federal had reached an agreement regarding the space on Level One. Even if the single letter of January 13, 1983, was not adequate, there is additional documentation of the agreement. In particular, Exhibit 14 of the Deposition of Vaughn Rasmussen is a document entitled AGREEMENT which was delivered to Vaughn Rasmussen by Howard Swapp in March of 1983. This five page document prepared by Deseret Federal, shows all of the specifics of the agreement as they were understood by Deseret Federal, including the contemplated remodeling and relocation of Deseret Federal at the expense of Vaughn Rasmussen. Likewise the letter of Bruce Barcal combined with the unsigned lease provided by Crossroads show, independent of Vaughn Rasmussen's testimony, that an agreement existed. For these reasons it was inappropriate for the lower court to rule as a matter of law that there were not sufficient memoranda of Vaughn Rasmussen's agreements with Crossroads and Deseret Federal.

B. Partial Performance - Summary judgment also should not have been granted for either respondent because there was sufficient evidence of partial performance of the oral agreement to entitle Vaughn Rasmussen to the equitable remedy of specific performance as prayed for in the Amended Complaint. Utah Code Ann. § 25-5-8 (1953) provides: "Nothing in this chapter contained shall be construed to abridge the powers of courts to

compel the specific performance of agreements in case of part performance thereof." Vaughn Rasmussen performed parts of his side of the bargain by paying disputed construction costs, obtaining the financing necessary to properly remodel and operate in the Level One space, providing Deseret Federal with remodeling plans for its offices on 3900 South and obtaining plans for remodeling of the Level One space itself. These acts are exclusively referable to the oral contract and they support equitable enforcement of the lease.

This court recently addressed partial performance of an oral contract in Martin v. Scholl, 678 P.2d 274 (Utah 1983), where a ranch laborer sought to enforce an oral promise of the ranch owner to convey certain real property. The three elements of the doctrine were stated from a prior Utah case:

First, the oral contract and its terms 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.

Id. at 275 citing Randall v. Tracy Collins Bank & Trust Company, 305 P.2d at 484.

Elaborating on the second element, this Court noted that the acts in reliance must have a direct connection to the oral contract. As explained by Professor Corbin: "The performance must be one that is in some degree evidential of the existence of a contract and not readily explainable on any other

ground." Id. at 275 citing 2 Corbin on Contracts § 425 (1950). In Martin, relief was not granted because the ranch laborer's work at the ranch for a salary and the other acts of partial performance could be explained equally as well by reasons other than the oral promise to convey property.

Here, however, Vaughn Rasmussen has presented evidence of actions he took which can only be explained by the existence of an oral contract. He obtained an enormous Small Business Administration loan which, on its own terms, was for the expansion of his business. He provided Deseret Federal with architectural plans for its office remodeling at 3900 South, something he would have absolutely no reason to do were it not part of the deal for Deseret Federal's surrender of the space. Further, Vaughn Rasmussen paid construction costs pertaining to his existing space. This might be explained in other ways except that prior to the oral contract for additional space, Vaughn Rasmussen had flatly refused to pay the costs. His action in paying them was directly tied to Crossroads' promise to lease him additional space. Also, Vaughn Rasmussen obtained architectural remodeling plans for the first floor space, another action he had no reason to take were it not for the contract that he lease the space.

In Martin this Court also looked to independent evidence of the oral contract to support its enforcement. It was critical

that the ranch laborer had no admission of an oral agreement or independent acts pointing to such an agreement. Here, there is such evidence. In particular, Crossroads delivered the written lease complete with all its terms to Vaughn Rasmussen on April 13, 1983. The only reason the deal could not be closed at that time was that Deseret Federal had reneged. Deseret Federal's actions also independently proved the existence of the agreement. Howard Swapp provided the letter dated January 13, 1983, both to Crossroads and Vaughn Rasmussen outlining the essential terms of the surrender agreement. By the letter Deseret Federal also took the independent action of appointing Bruce Barcal as its agent for consummating the transaction. It also prepared and delivered the five-page surrender agreement containing all terms of Deseret Federal's agreement with Vaughn Rasmussen.

These facts show that equitable relief is owed to Vaughn Rasmussen because of his partial performance. The existence of the terms of the contract is substantially proven independent of Vaughn Rasmussen's own actions. The lower court's refusal to enforce the contract, at least in equity, allows respondents to perpetrate a fraud against Vaughn Rasmussen, in particular, by taking his \$2400 in disputed construction costs. The statute of frauds becomes a sword for perpetrating fraud rather than a shield from it. The decisions of the lower court should

be reversed so that Vaughn Rasmussen has the opportunity to prove more fully the existence of the oral agreement and the fraud that was perpetrated by respondents' refusal to perform.

POINT III

SUMMARY JUDGMENT ON CROSSROADS' COUNTERCLAIM WAS IMPROPER BECAUSE THE STATUTE OF LIMITA- TIONS DOES NOT BAR ASSERTION OF A DEFENSE.

The Utah Supreme Court has held that the statute of limitations bars only claims for affirmative relief. Jacobsen v. Bunker, 699 P.2d 1208 (Utah 1985). When a legal theory such as fraud is raised as a defense, or counterclaim for offset or recoupment, then the statute of limitations does not defeat the defense. Id. at 1210. This Court's reasoning is that a statute of limitations is designed to prevent stale claims from being asserted, preserve evidence, and discourage inattention to claims. When a prayer for relief is timely and the statute of limitations has served its purpose, then any defense that might be raised to the claim is also timely and the statute of limitations has no effect. Fairness and justice demand that a party should be granted the full opportunity to defend himself against any attacks made upon him.

Vaughn Rasmussen did not commence an action alleging fraud against respondents. Rather, when Crossroads counterclaimed against him for rent payments allegedly due, he asserted fraud

as a defense to the amounts sought. He entered the Level Two lease in reliance on the fraudulent misrepresentations of Crossroads. In Jacobsen, this Court indicated its concern that parties have a full opportunity to defend themselves against any timely claims asserted. 699 P.2d at 1210. That is all Vaughn Rasmussen seeks to do in response to the counterclaim.

The overwhelming majority of other jurisdictions follows and supports the position taken by the Utah Supreme Court. A party may plead any legal theory as a defense and prove damages so as to reduce the plaintiff's ultimate judgment. Christenson v. Akin, 183 Kan. 207, 326 P.2d 313 (1958). See also Powers v. Sturgeon, 100 Kan. 604, 376 P.2d 904 (1962). Any affirmative defense or claim to an offset or recoupment will not be destroyed by a statute of limitations if the legal theory arises "out of the transactional subject of the suit . . . and the main action is timely." Hawkeye-Security Insurance Co. v. Apodaca, 524 P.2d 874, 879 (Wyo. 1974). Even though the claim would be barred if asserted as a cause for affirmative relief, it is allowed as a defense as long as the affirmative action is timely. The reason for this, as simply stated in Hawkeye-Security, is that the purpose of a statute of limitations is to bar actions, not to suppress or deny matters of defense. 524 P.2d at 879.

Since 1980, every state high court in the Pacific region has held that when a legal theory is raised as a matter of pure defense, or as a basis for recoupment or offset, it will not be barred by a statute of limitations even though the theory would be barred if it was asserted as an affirmative cause of action. See Goldberg v. Sanglier, 27 Wash. App. 179, 616 P.2d 1239 (1980) (statutes of limitations apply to actions, but not pure defenses to actions); Aetna Finance Co. v. Pasquali, 128 Ariz. 471, 626 P.2d 1103 (1981) (a statute of limitations is not a bar to a recoupment defense and such a defense survives as long as plaintiff's claim can be asserted); Ackmann v. Merchants Mortgage & Trust Corp., 645 P.2d 7 (Colo. 1982) (a statute of limitations bars the use of a claim for affirmative relief, but is not a bar to asserting that claim as a defense); Viehweg v. Thompson, 103 Idaho 265, 647 P.2d 311 (1982) (statute of limitations does not bar a counterclaim that seeks an offset interposed defensively against a complaint arising from the same incident); State Board of Regents v. Holt, 8 Kan. App. 436, 659 P.2d 836 (1983) (the running of a period of limitations will not preclude a defendant from asserting an otherwise meritorious claim by way of setoff or recoupment to the extent of the plaintiff's claim, so long as the claims co-exist); Hartwell Corp. v. Smith, 686 P.2d 79 (Idaho 1984) (when a defense arises out of the same factual setting the

claim is based on, the theory upon which the defense is based will not be barred by a limitation on actions); and Dawe v. Merchants Mortgage & Trust Corp., 683 P.2d 796 (Colo. 1984) (statute of limitations is not a bar to assert any claim as a defense when the claim would otherwise be untimely if asserted as a cause of action).

The lower court based its decision in favor of Crossroads on its opinion that the defense of fraud asserted by Mr. Rasmussen "will not lie." R. 244. It appears that the court did not consider the fraud defense to have been timely raised. Jacobsen and the other case law cited above demonstrates that this is simply not the case.


If the claim or counterclaim to which the defense is asserted is timely, then the evidence will be preserved, the claim will receive appropriate and timely attention and justice will be best served because the complete matter will be disposed of in a timely fashion. Vaughn Rasmussen should not be penalized because, for whatever reason, he chose not to sue Crossroads for fraud in connection with the Level Two lease. His decision does not eliminate the uncontradicted facts in his affidavit that Crossroads blatantly misrepresented to him the location of the planned walkway and did so to induce him to enter the Level Two lease. The summary judgment on Crossroads' counterclaim should be reversed so that Mr. Rasmussen can present evidence of fraud as a defense to the counterclaim.

CONCLUSION

Appellant submits that the lower court's treatment of this case was improper for several reasons. Because of their promise to provide a written contract, respondents are estopped to assert the statute of frauds. Furthermore, the merits of that defense were not established as a matter of law because of the written evidence of the agreements and because of Vaughn Rasmussen's partial performance. Finally, it was wholly improper to deny Vaughn Rasmussen the opportunity to assert fraud as a defense. For these reasons appellant respectfully submits that the rulings of the District Court should be reversed in all respects.

DATED this 23rd day of September, 1985.

SNOW, CHRISTENSEN & MARTINEAU

By 
Reed L. Martineau
Rex E. Madsen
Stephen J. Hill
John R. Lund
Attorneys for Appellant

ADDENDUM

- (1) To a partner, whether with or without a promise by him to pay partnership debts; or,
 (2) To a person not a partner without fair consideration to the partnership, as distinguished from consideration to the individual partners. 1953

25-1-11. Trust for grantor void.

All deeds, gifts, conveyances, transfers or assignments, verbal or written, of goods, chattels, or things in action made in trust for the use of the person making the same shall be void as against the existing or subsequent creditors of such person. 1953

25-1-12. "Creditors," "purchasers" includes heirs.

Every conveyance, charge, instrument or proceeding declared to be void by the provisions of this chapter as against creditors and purchasers shall be equally void as against the heirs, successors, personal representatives or assigns of such creditors or purchasers. 1953

25-1-13. Bona fide purchasers not affected.

The provisions of this chapter shall not be construed to affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor. 1953

25-1-14. Sales without change of possession.

Every sale made by a seller of goods or chattels in his possession or under his control, and every assignment of goods and chattels, unless the same is accompanied by a delivery within a reasonable time, and is followed by an actual and continued change of the possession of the things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the seller or assignor, or subsequent purchasers in good faith. The word "creditors" as used in this section shall be construed to include all persons who shall be creditors of the seller or assignor at any time while such goods and chattels shall remain in his possession or under his control. 1953

25-1-15. Rights of creditors with matured claims.

Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person, except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase or one who has derived title immediately or mediately from such a purchaser:

- (1) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim; or,
- (2) Disregard the conveyance, and attach, or levy execution upon, the property conveyed.

A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation may retain the property or obligation as security for repayment. 1953

25-1-16. Rights of creditors with claims not matured.

Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured, he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded, had his claim matured, and the court may:

- (1) Restrain the defendant from disposing of his property;
- (2) Appoint a receiver to take charge of the property;

- (3) Set aside the conveyance or annul the obligation; or,
- (4) Make any order which the circumstances of the case may require. 1953

Chapter 2. Sale of Merchandise in Bulk

25-2-1 to 25-2-5. Repealed. 1965

Chapter 3. Leases and Sales of Livestock

25-3-1 to 25-3-4. Repealed. 1965

Chapter 4. Marketing Wool

25-4-1 to 25-4-3. Repealed. 1965

Chapter 5. Statute of Frauds

25-5-1. Estate or interest in real property.

25-5-2. Wills and implied trusts excepted.

25-5-3. Leases and contracts for interest in lands.

25-5-4. Certain agreements void unless written and subscribed.

25-5-5. Representation as to credit of third person.

25-5-6. Promise to answer for obligation of another - When not required to be in writing.

25-5-7. Contracts by telegraph deemed written.

25-5-8. Right to specific performance not affected.

25-5-9. Agent may sign for principal.

25-5-1. Estate or interest in real property.

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. 1953

25-5-2. Wills and implied trusts excepted.

The next preceding section [25-5-1] shall not be construed to affect the power of a testator in the disposition of his real estate by last will and testament; nor to prevent any trust from arising or being extinguished by implication or operation of law. 1953

25-5-3. Leases and contracts for interest in lands.

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. 1953

25-5-4. Certain agreements void unless written and subscribed.

In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

(1) Every agreement that by its terms is not to be performed within one year from the making thereof.

(2) Every promise to answer for the debt, default or miscarriage of another.

(3) Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry.

(4) Every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate

out of his own estate.

(5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation. 1953

25-5-5. Representation as to credit of third person.

To charge a person upon a representation as to the credit of a third person, such representation, or some memorandum thereof, must be in writing subscribed by the party to be charged therewith. 1953

25-5-6. Promise to answer for obligation of another - When not required to be in writing.

A promise to answer for the obligation of another in any of the following cases is deemed an original obligation of the promisor and need not be in writing:

(1) Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise, or by one who has received a discharge from an obligation in whole or in part in consideration of such promise.

(2) Where the creditor parts with value or enters into an obligation in consideration of the obligation in respect to which the promise is made in terms or under circumstances such as to render the party making the promise the principal debtor and the person in whose behalf it is made his surety.

(3) Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancel the antecedent obligation, accepting the new promise as a substitute therefor; or upon the consideration that the party receiving it releases the property of another from a levy or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation; or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation or from another person.

(4) Where a factor undertakes for a commission to sell merchandise and to guarantee the sale.

(5) When the holder of an instrument for the payment of money upon which a third person is or may become liable to him transfers it in payment of a precedent debt of his own, or for a new consideration, and in connection with such transfer enters into a promise respecting such instrument. 1953

25-5-7. Contracts by telegraph deemed written.

Contracts made by telegraph shall be deemed to be contracts in writing, and all communications sent by telegraph and signed by the person sending the same, or by his authority, shall be deemed to be communications in writing. 1953

25-5-8. Right to specific performance not affected.

Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof. 1953

25-5-9. Agent may sign for principal.

Every instrument required by the provisions of this chapter to be subscribed by any party may be subscribed by the lawful agent of such party. 1953

C. Keith Rooker, Esq. (A2796)
Robert S. Clark, Esq. (A4015)
ROOKER, LARSEN, KIMBALL & PARR
Attorneys for Defendant
185 South State Street
Suite 1300
Salt Lake City, Utah 84111
Telephone: (801) 532-7840

FILED
DEC 19 11 56 AM '84
H. B. GONZALES, CLERK
BY _____
DEPUTY CLERK

IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH

| | | |
|-----------------------------|---|----------------------------|
| VAUGHN RASMUSSEN, |) | SUMMARY JUDGMENT AND ORDER |
| |) | OF DISMISSAL AS TO DESERET |
| Plaintiff, |) | FEDERAL SAVINGS AND LOAN |
| |) | ASSOCIATION |
| vs. |) | |
| |) | |
| DESERET FEDERAL SAVINGS |) | |
| & LOAN ASSOCIATION, et al., |) | Civil No. C83-6988S |
| |) | |
| Defendant. |) | |

A hearing was conducted on November 19, 1984, on the Motion of Defendant Deseret Federal Savings and Loan Association ("Deseret Federal") for Summary Judgment. Plaintiff was represented by Stephen J. Hill and Rex E. Madsen of Snow, Christensen and Martineau. Deseret Federal was represented by Robert S. Clark of Rooker, Larsen, Kimball & Parr. After reviewing the motion and the pleadings and file in this matter, and after hearing the argument of counsel thereon, and good cause appearing therefor,

IT IS HEREBY ORDERED:

1. Defendant Deseret Federal's Motion for Summary Judgment is granted.

2. All claims for relief and causes of action asserted against Deseret Federal Savings and Loan Association are dismissed with prejudice.

James S. Sawaya
Honorable James S. Sawaya
District Judge

ATTEST
H. DIXON
Clerk

Approved as to form:

SNOW, CHRISTENSEN & MARTINEAU

By:

Stephen J. Hill
Stephen J. Hill, Esq.
Attorneys for Plaintiff

ROOKER, LARSEN, KIMBALL & PARR

By:

Robert S. Clark, Esq.
Robert S. Clark, Esq.
Attorneys for Defendant

Addendum A-4

Robert M. Anderson, 0108
Richard D. Parry, 4112
BERMAN & ANDERSON
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144
Telephone: 328-2200

Attorneys for Defendants
The Equitable Life Assurance Society
of the United States and Okland-Foulger
Company, d/b/a Crossroads Plaza Associates

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

| | | |
|---------------------------------|---|----------------------------|
| VAUGHN RASMUSSEN, |) | |
| |) | |
| Plaintiff, |) | SUMMARY JUDGMENT AND ORDER |
| |) | OF DISMISSAL AS TO THE |
| vs. |) | EQUITABLE LIFE ASSURANCE |
| |) | SOCIETY OF THE UNITED |
| DESERET FEDERAL SAVINGS |) | STATES AND OKLAND-FOULGER |
| & LOAN ASSOCIATION, a Utah |) | COMPANY d/b/a CROSSROADS |
| corporation, and THE EQUITABLE |) | PLAZA ASSOCIATES |
| LIFE ASSURANCE SOCIETY OF THE |) | |
| UNITED STATES, a New York |) | |
| corporation, and OKLAND- |) | Civil No. C83-6988 |
| FOULGER COMPANY, a Maryland |) | Judge James S. Sawaya |
| joint venture, d/b/a CROSSROADS |) | |
| PLAZA ASSOCIATES, |) | |
| |) | |
| Defendants. |) | |

A hearing was conducted on January 7, 1985, on the Motion of Defendants The Equitable Life Assurance Society of the United States and Okland-Foulger Company, d/b/a Crossroads Plaza Associates for Summary Judgment. Plaintiff was represented by Stephen J. Hill of Snow, Christensen and Martineau, Crossroads Plaza Associates was represented by

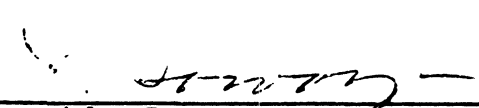
Richard D. Parry of Berman & Anderson. After reviewing the motion and the pleadings on file in this matter, and after hearing the arguments of counsel thereon, and good cause appearing therefor,

IT IS HEREBY ORDERED:

1. Defendants', The Equitable Life Assurance Society of the United States and Okland-Foulger Company, d/b/a Crossroads Plaza Associates, Motion for Summary Judgment is granted.

2. All claims for relief and causes of action against defendants The Equitable Life Assurance Society of the United States and Okland-Foulger Company, d/b/a Crossroads Plaza Associates are dismissed with prejudice.

DATED this 15th day of January, 1985.

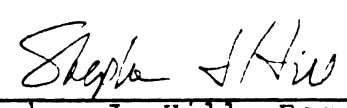


Honorable James S. Sawaya
District Judge

Approved as to form:

SNOW, CHRISTENSEN & MARTINEAU

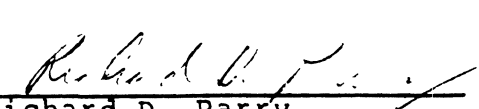
By:



Stephen J. Hill, Esq.
Attorneys for Plaintiff

BERMAN & ANDERSON

By:



Richard D. Parry
Attorneys for Defendants

Addendum A-6

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Summary Judgment and Order of Dismissal were mailed, postage prepaid, this 21st day of January, 1985, to:

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

Attorneys for Plaintiff

C. Keith Rooker, Esq.
Robert S. Clark, Esq.
ROOKER, LARSEN, KIMBALL & PARR
185 South State Street, Suite 1300
Salt Lake City, Utah 84111

Attorneys for Deseret Federal Savings & Loan

Cindy B. Jensen

1078P
011185

County of Salt Lake - State of Utah

FILE NO. C83-6988

FILE: (✓ PARTIES PRESENT)

COUNSEL: (✓ COUNSEL PRESENT)

Vaughn Rasmussen

Ref E. Madsen

Desmet Fed. Savings,
et. al.

Richard D. Parry

CLERK

REPORTER

BAILIFF

HON.

DATE:

Sowaga

JUDGE

May 7, 1985

Matter heard re Motion of deft. Crossroads Plaza
for Summary Judgment on its
Counterclaim.

Ruling of the Ct. re The motion is granted as prayed -
Deft's affidavit is uncontroverted
and the P's claimed defenses
will not lie.

J.S.

Addendum A-8

241

Copies to counsel re

May 7, 1985

PAGE 1 OF 1

Robert M. Anderson, 0108
Richard D. Parry, 4112
BERMAN & ANDERSON
50 South Main Street, Suite 1250
Salt Lake City, Utah 84144
Telephone: 328-2200

MAY 20 12 12 PM '85

h. c. 3849
BY *[Signature]*

Attorneys for Defendants
The Equitable Life Assurance Society
of the United States and Okland-Foulger
Company, d/b/a Crossroads Plaza Associates

BL. 197 NO. 3849
5-20-85 - 3.15 P.m.

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

| | | |
|-----------------------------|---|------------------------------|
| VAUGHN RASMUSSEN, |) | |
| |) | |
| Plaintiff, |) | SUMMARY JUDGMENT ON COUNTER- |
| |) | CLAIM OF THE EQUITABLE LIFE |
| vs. |) | ASSURANCE SOCIETY OF THE |
| |) | UNITED STATES AND OKLAND- |
| DESERET FEDERAL SAVINGS |) | FOULGER COMPANY, d/b/a |
| & LOAN ASSOCIATION, et al., |) | CROSSROADS PLAZA ASSOCIATES |
| |) | |
| Defendants. |) | Civil No. C83-6988 |
| |) | Judge James S. Sawaya |

A hearing was conducted on May 6, 1985, on the Motion of The Equitable Life Assurance Society of the United States and Okland-Foulger Company, d/b/a Crossroad Plaza Associates for summary judgment on their Counterclaim. Plaintiff Vaughn Rasmussen was represented by Rey E. Madsen and John R. Lund of Snow, Christensen and Martineau, Crossroads Plaza Associates were represented by Richard D. Parry of Berman & Anderson. After reviewing the motion and the pleadings on file in this matter, and after hearing the arguments of counsel thereon, and good cause appearing therefor,

ADdendum A-9

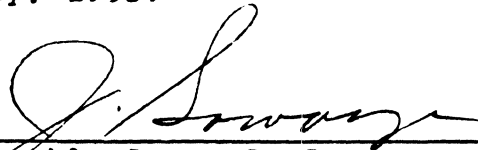
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IT IS HEREBY ORDERED:

1. The Motion of the Equitable Life Assurance Society of the United States and Okland-Foulger Company, d/b/a Crossroad Plaza Associates for summary judgment on their Counterclaim is granted.

2. Judgment is rendered against Vaughn Rasmussen and in favor of Crossroad Plaza Associates in the amount of Seventeen Thousand Six Hundred Ninety-Eight Dollars and Eighty-Four Cents (\$17,698.84) which represents the full amount of payments due to Crossroads Plaza Associates as of the date of this judgment after the subtraction of \$399.72 in tenant improvements disputed by Vaughn Rasmussen, together with interest thereon from the date of judgment at the rate of 10% per annum.

DATED this 20 day of May, 1985.

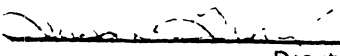


Honorable James S. Sawaya
District Judge

ATTEST
H. DIXON HINDLEY
Clerk

Approved as to form:

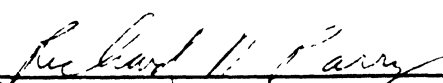
SNOW, CHRISTENSEN & MARTINEAU

By 

Deputy Clerk

By _____
Stephen J. Hill
Attorneys for Vaughn Rasmussen

BERMAN & ANDERSON

By 

Richard D. Parry
Attorneys for The Equitable Life Assurance Society
of the United States and Okland-Foulger
Company, d/b/a Crossroads Plaza Associates

Addendum A-10

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 1985, a true and correct copy of foregoing SUMMARY JUDGMENT ON COUNTERCLAIM OF THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES AND OKLAND-FOULGER COMPANY, d/b/a CROSSROADS PLAZA ASSOCIATES was hand delivered to the following:

Reed L. Martineau, Esq.
Rex E. Madsen, Esq.
Stephen J. Hill, Esq.
SNOW, CHRISTENSEN & MARTINEAU
Ten Exchange Place, Eleventh Floor
P.O. Box 3000
Salt Lake City, Utah 84110

Attorneys for Plaintiff

Reed L. Martineau

1463P
050985

Addendum A-11

CERTIFICATE OF SERVICE

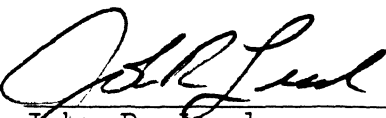
I hereby certify that on the 23rd day of September, 1985, four true and correct copies of Brief of Appellant were hand delivered to each of the foregoing:

Robert S. Clark
Larsen, Kimball, Parr & Crockett
185 South State Street, Suite 1300
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Attorneys for Defendant/Respondent
Deseret Federal

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Attorneys for Defendant/Respondent
The Equitable Life Assurance
Society and Okland-Foulger Company

DATED this 25th day of September, 1985.

SNOW, CHRISTENSEN & MARTINEAU

By 
John R. Lund
Attorneys for Plaintiff/
Appellant