

2001

Holmgren Brothers Inc v. Gerald Ballard aka Thomas G. Ballard, Winoa Ballard, and Seymour Greaves : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

HOLMGREN BROTHERS, INC., a
Utah Corporation,
Plaintiff and Respondent,

vs.

GERALD BALLARD a/k/a THOMAS
G. BALLARD & WINONA BAL-
LARD, his wife & SEYMOUR
GREAVES, a single man,
Defendants and Appellants.

Case No.

13844

BRIEF OF RESPONDENT

Appeal from Judgment of the First Judicial
District Court for Box Elder County
Honorable VeNoy Christofferson, Judge

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Brigham City, Utah 84302

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and Respondent*

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FILED
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Clerk, Supreme Court, Utah

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GREAVES, a single man,
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Case No.

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Plaintiff in the above entitled case brought action pursuant to an oral contract for the sale of real property between defendants-sellers and plaintiff-buyer. Plaintiff complains that defendants have refused to complete the sale of the property pursuant to that oral contract and asks for specific performance of that contract. Defendants assert that said sale is void under the statute of frauds.

DISPOSITION OF CASE IN LOWER COURT

The District Court of Box Elder County, Judge VeNoy Christoffersen presiding, after determining there was sufficient part performance of the oral contract to take the same out of the Statute of Frauds, ordered that \$18,500.00

be delivered into Court by the plaintiff, and that defendants deliver their Warranty Deed covering the 160 acres to the Clerk of the Court with evidence that the judgments had been satisfied or if not satisfied then a statement showing the amounts for which said judgments could be satisfied. Defendants were further ordered to deliver to the Court, either a deed from Seymour Greaves the record owner, or a statement showing the total amount due the said Greaves, and directed the delivery of the \$18,500.00 to the defendants Ballard, the judgment creditors and Seymour Greaves as their interests appear. The defendants were further restrained from going upon the premises or interfering with plaintiff's possession thereof and plaintiff was awarded costs.

NATURE OF RELIEF SOUGHT ON APPEAL

Plaintiffs seek the affirmance of the lower court herein.

STATEMENT OF FACTS

Gerald Ballard (hereafter defendant) was the purchaser under contract from one, Seymour Greaves the record owner, of land in Box Elder County, Utah, being the NE $\frac{1}{4}$ of Sec 10, T 13 N, R 7 W, SLM, which contract was escrowed at Walker Bank in Logan, Utah, with a balance due under the contract of some \$8,000.00 more or less (Tr-3). Prior to June 15, 1973, discussions between defendant and Nyman Holmgren on behalf of Holmgren Brothers Inc. (hereafter plaintiff) (Tr-10), relative to the sale of this property were had and the escrow deposit examined at Walker Bank and the Abstract picked up and delivered to plaintiff's attorney (Tr-4, 5, 6). Thereafter by defendant's own admission it was agreed that defendant

sell to plaintiff and plaintiff buy from defendant this land for \$18,500.00, defendant to furnish a good, clear title thereto (Tr-10). The \$18,500.00 was paid by plaintiff to defendant by delivering the same to defendant's bank in the presence of defendant (at defendant's request) (Tr-6, 7) on June 15, 1973, and the banker's receipt for payment in full of the purchase price was given plaintiff. (Exhibit 1). Plaintiff took possession of the property, weeded, disked and prepared the same for planting under the assumption that plaintiff had purchased the property (Tr-44), and with the full knowledge and authorization of defendant (Tr-46). Thereafter counsel for defendant proposed as a means of carrying out the sale and in order to avoid payment to defendant's judgement creditors, that a deed directly from the record owner Seymour Greaves, to plaintiff be furnished, referring to this as a by-pass deed (Tr-60). Counsel for the plaintiff insisted that the docketed judgments be released of record on the grounds that without their release, a good title would not be furnished plaintiff, and in fact the defendant's judgment creditors could attach defendant's interest in the subject property since plaintiff had actual knowledge of defendant's interest under his contract of purchase from Greaves (Tr-75). Counsel for defendant appeared to agree with plaintiff's counsels conclusion and acknowledged that the proceeds of the instant sale would not be sufficient to pay off defendant's judgment creditors and that the intent of the defendant was to use such proceeds to clear Snowville property from threatened mortgage foreclosures (Tr-79, 82). The defendant himself continued even late into September 1973

to acknowledge the existence of the parol sales agreement by telling one, Delbert Holmgren, a purchaser of other of defendant's real property, that he could not sell the 160 acre tract here involved to Delbert Holmgren because of his deal with plaintiff (Tr-30). Plaintiff planted the entire 160 acres to wheat in late September or early October (Tr-38) harvested the same and brought this action for specific performance.

ARGUMENT

POINT I

UCA 25-5-8 CONFIRMS THE POWER OF COURTS TO COMPEL SPECIFIC PERFORMANCE OF ORAL AGREEMENTS IN CASES OF PART PERFORMANCE THEREOF.

Even in the absence of statutory provisions therefore, the courts have long recognized the doctrine that part performance of oral contracts justifies the enforcement of specific performance of such contracts which otherwise would be within the Statute of Frauds. The basis for such holdings vary greatly from jurisdiction to jurisdiction, but generally reflect language that part performance puts such performing party in such position that non-performance by the other party would constitute a Fraud, *In re Madsens Estate* 259 Pac 2nd 595, 123 Ut. 327.

POINT II

PART PERFORMANCE MAY CONSIST OF EITHER (A) IMPROVEMENTS OF THE PROPERTY OR (B) POSSESSION AND PART OR FULL PAYMENT OF PURCHASE PRICE.

The Restatement of contracts, Section 197 takes the position that part performance which will entitle the performing party to specific performance of the contract may consist of either, (a) improvements made to the land or (b) taking possession under the contract and payment of all or part of the purchase price; see also *In re Madsens Estate* Supra and *In re Roths Estate* 269 Pac 2nd 278 2 Utah 2nd 40. What constitute improvements, and possession, also varies with the jurisdictions. By what is reported to be the clear weight of authority in the United States, the taking possession of real property by the purchaser under an oral contract is sufficient to take the transaction out of the Statute of Frauds, 101 ALR 1003. Likewise there is a substantial line of authority that cultivation of farm land alone constitutes improvement. *O'Conner v. Enos*, 56 Wash 448, 105 Pac 1039; *Smith v. Yokum* 110 Ill. 142; *Gill v. Newell*, 13 Minn. 462, holding that the plowing of 75 acres is sufficient part performance. In the case at bar both possession under the contract was taken by plaintiff and the two operations of weeding and disking the quarter section were completed before the first suggestion by defendant that he wanted out of his deal. In fact plaintiff continued in possession, planted and harvested the crop, all after having paid the entire purchase price.

POINT III

WHEN EXISTENCE OF THE PAROL AGREEMENT IS ACKNOWLEDGED OR ESTABLISHED BY THE PARTY RESISTING ITS ENFORCEMENT, THE REQUIREMENT THAT IMPROVEMENTS MADE

BE EXCLUSIVELY REFERRABLE TO THE ORAL
CONTRACT IS SATISFIED.

The Roth Case Supra stands for the proposition that where the existence of the parole agreement is established or admitted by the party resisting its enforcement, the requirement that improvements made be exclusively referable to the oral contract is satisfied. The Roth Case not only shows what appears to be the trend in these matters, but also to show the way the courts view facts. In the Roth Case the lower court did not make findings that the oral purchaser took possession or made improvements, but the Supreme Court on appeal held that the evidence nevertheless justified such findings, and this court ordered specific performance of an oral contract for the purchase of one-half interest in a home by one brother from another brother. This court there held that even though the step mother of the two brothers had a life estate in the property and was herself living in the home, that the oral purchaser's moving into the home with his step mother constituted possession. This occurred in 1935 and in 1949 the wife of the oral seller signed a receipt for \$400.00 which she claimed was a loan and to which receipt the oral purchaser admitted adding the words, "\$500.00 balance due", and this was nevertheless held to be part payment under the contract. Finally the court held that the expenditure over a 16 year period by the oral purchaser upon the property of about \$700.00, consisting of a roof on the house, a hot water system in the house, linoleum in two rooms, repairs to the barn roof and

planting lawns and shrubs in the yard constituted "improvements" even though the court conceded such expenditures would probably not equal the value of the use of the premises the oral purchaser had for 16 years. The court in giving its opinion appeared to attach considerable weight to the fact that existence of the oral contract was established by admission of the party resisting specific performance.

POINT IV

DAMAGES FOR BREACH OF CONTRACT FOR SALE AND PURCHASE OF ANY INTEREST IN LAND IS ALWAYS CONSIDERED INADEQUATE.

Damages for the breach of a contract for the sale and purchase of any interest in land is always considered inadequate, Clark, Principles of Equity, Sec 42, *Shaughnessy v. Eidsmo* 23 NW 2nd 362, also reported at 166 ALR 435, which reports the case to be in line with the clear weight of authority that proof of irreparable injury through fraud is not a necessary condition of part performance. The case quotes Clark, "damages for the breach of a contract for the sale and purchase of any interest in land is always considered inadequate without regard to the size, value or location of the land or the possibility of getting other land substantially equivalent—its modern justification is that because there is no open market for land, either for seller or buyer, the number of instances where the buyer could get land substantially as satisfactory or where the vendor could make a ready sale to another purchaser is so small as to be negligible."

In the instant case the plaintiffs have devoted their time, machinery and money to the acquisition, cultivation and improvement of a particular tract of ground, and have thus so changed their position that to deny performance by the seller would constitute a fraud upon plaintiff within the language of the Madsen Case Supra.

POINT V

THE COURTS FINDINGS OF PART PERFORMANCE OF AN ORAL CONTRACT FOR THE SALE OF LAND SHOULD NOT BE UPSET IF THERE IS A FAIR PREPONDERANCE OR IF EVENLY BALANCED EVIDENCE IN THE RECORD TO SUPPORT SUCH FINDINGS.

Randall v. Tracy Collins Trust Company 305 Pac 2nd 480, 6 Utah 2nd 18 and cases therein cited reflect the Utah Law that a court's findings of part performance should not be upset if there is a fair preponderance or if evenly balanced evidence is in the record. In our case the oral contract for sale of land is fully acknowledged by both parties without dispute as to its terms. The only disagreement comes in the implementation, the defendant claiming to furnish good title with a 'by-pass' deed without release of judgments against the parol purchaser Ballard and plaintiff requiring that such judgments be released even if the by-pass deed is used. There continued to be no dispute until the week before planting in late September or early October, and right up to the time when defendant was selling other property to a third party, Delbert Holmgren, and the judgments against him were being released. The oral contract between the parties hereto,

was in the mind of the defendants still in effect and binding upon the parties. Certainly there is a preponderance of the evidence that plaintiff went into possession of the property, made improvements thereon and paid the entire purchase price, all as found by the lower court.

CONCLUSION

CONCLUSION: What defendants appear to be arguing is that even though they made an agreement to sell land, specifically to furnish clear title thereto, directed where and how the purchase price be paid, allowed possession to be taken by the Buyer and improvements made on the ground, if the agreement cannot be carried out by diverting the purchase proceeds away from judgment lien holders for the purpose of forestalling mortgage foreclosures on other of defendant's property, then they want the court to assist them to disavow such oral contract. To refuse to compel specific performance to such contract under such circumstances would constitute a fraud on this plaintiff.

Respectfully submitted,

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