

1997

John Armijo. Andrea Armijo v. William Figueroa, Karen Figueroa, John Does 1-10 : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 970492-CA

IN THE UTAH COURT OF APPEALS

JOHN ARMIJO and ANDREA ARMIJO,

Plaintiffs/Appellees

VS.

WILLIAM FIGUEROA, KAREN FIGUEROA,
and JOHN DOES ONE THROUGH TEN,

Defendants/Appellants

DOCKET NO.: 970492-CA

PRIORITY NO.: 15

BRIEF OF THE APPELLANT

APPEAL OF THE FINAL ORDER AND JUDGMENT FOR EVICTION
ENTERED JUNE 3, 1997 IN THE THIRD JUDICIAL DISTRICT
COURT BY THE HONORABLE JUDGE PHILLIP K. PALMER,
PRESIDING.

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STATEMENT OF JURISDICTION

The Utah Supreme Court poured-over this case to the Utah Court of Appeals for disposition on August 7, 1997. The Utah Supreme Court had jurisdiction pursuant to U.C.A. § 78-2-2(g). The Utah Court of Appeals has jurisdiction pursuant to U.C.A. § 78-2a-3(2)(j).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Did the trial court err in its conclusions that there was no verbal agreement between the Plaintiffs and the Defendants?

Standard of review is subject to the correction of error standard. *Herm Hughes & Sons, Inc. v. Quintek, Inc.* 834 P.2d 582 (Utah App. 1992) (whether a contract exists between parties).

DETERMINATIVE LAW

The following constitutional provisions, statutes, and rules are determinative in this appeal or are of central importance to this appeal.

§ 25-5-3, U.C.A. (1953)

"Every contract for the ... sale, of any lands, or 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 ... sale is to be made, or by his lawful agent thereunto authorized in writing."

§ 25-5-8, U.C.A. (1953)

"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." §25-5-8, U.C.A. (1953) as amended.

§ 57-12-7(1), U.C.A. (1953)

"(1) No person shall be required to move or be relocated from land used as his residence and acquired under any of the condemnation or eminent domain laws of this state until he has been offered a comparable replacement dwelling

which is a decent, safe, clean, and sanitary dwelling adequate to accommodate this person, reasonably accessible to public services and places of employment, and available on the private market.

STATEMENT OF THE CASE

A. Nature of the Case

The Plaintiffs filed a complaint for unlawful detainer of real property based upon Defendants unwillingness to pay an increase in rent on November 1, 1996. The Defendants filed a counter-claim asserting an interest as purchasers in the real property pursuant to a verbal contract.

B. Course of Proceedings

On March 11, 1997, the Plaintiffs served upon the Defendants a 3-Day Notice to Pay Rent or Quit and Notice of Termination of Month-to-Month Tenancy. On March 24, 1997, the Defendants were served with a 3-Day Summons and an Eviction Complaint. Defendants responded on March 26, 1997 to Plaintiff's Eviction Complaint when they filed their Answer and asserted a Counter-Claim. On March 31, 1997, the Plaintiffs sought a possession bond which the court ultimately set at \$1,500.00. On April 4, 1997, the Plaintiffs replied to the Defendants' Counter-Claim. On this same day, Plaintiffs mailed the Notice of Plaintiffs' possession bond to the Defendants with such Notice reflecting that the possession bond had been filed with the Court on April 3, 1997. On April 9, 1997, the Defendants objected to the manner of service of the notice of the setting of a possession bond and demanded a hearing. On April 14, 1997, the trial court, instead of addressing the setting of the possession bond, conducted a

hearing to determine whether the property in question was rental property or not. At this hearing, all parties involved were subject to direct, cross, and redirect examination. Because of time constraints, the hearing was continued to April 22, 1997. At the conclusion of testimony on April 22, 1997, the trial court requested memorandums from both parties to address certain questions. Specifically, the trial court asked the following questions to be addressed:

- (1) Whether a verbal agreement to purchase is enforceable under the statute of frauds;.
- (2) What evidence of partial performance had been submitted to the trial court;
- (3) If an agreement to purchase existed, when were the Defendants required to exercise their option;
- (4) Whether the Defendants breached the agreement by failing to purchase the property within one year of possession; and
- (5) What, if any, were Plaintiffs' remedies for breach of the agreement by the Defendants.

In concluding the hearing on April 22, 1997, the trial court expressed that it would issue its judgment on May 20, 1997 at 11:00 a.m. based on the merits after reviewing the parties Memorandums. On May 20, 1997, the trial court disposed of the case as indicated below. On May 29, 1997, the Defendants requested, by ex parte motion, a stay of the order and judgment. On May 29, 1997, the Defendants filed their notice of appeal. On June 3, 1997, the trial court published its findings of fact and conclusions of law as well as its final Order and Judgment.

C. Disposition of the Case

The Plaintiffs were granted judgment for possession and restitution of the property as of midnight on May 31, 1997 with the Defendants being ordered to vacate the property by that same time and date. The trial court terminated the month-to-month lease and declared that any verbal option to purchase the property which may have been given had expired. The trial court also quieted title to the Plaintiffs by declaring that the Defendants had no further rights or interest in the property. The trial court granted judgment against the Defendants, jointly and severally, in the amount of \$217.80 for unpaid rent and \$224.00 for Plaintiff's court costs as well as reserving the issues of waste and damages for further determination. The Plaintiffs' possession bond was ordered to be returned to the Plaintiffs and the trial court ordered that the Plaintiffs were entitled to recover any after-accruing costs associated with the eviction and any additional rent accruing after May 31, 1997.

STATEMENT OF FACTS

The following statement of facts recited herein are taken from the transcripts of April 12, 1997 and April 22, 1997, hearings as well as the Exhibits introduced thereat.

Mr. Figueroa was notified in writing letter on June 8, 1987, by the Salt Lake City Airport Authority that he and his family would have to relocate because the Airport Authority would be acquiring their residence. At this time, the Airport Authorities indicated to Mr. Figueroa that he would receive either \$3,752 for if he moved to a rental or \$4,500 if he purchased a home rather than choosing a replacement rental. He was given until July 10,

1987 to inform the Salt Lake City Airport Authority as to which option he wished to exercise. (Def. Exhibit No. 6)

During July of 1987, Mr. Figueroa contacted Mr. Armijo about renting the property in question. (Tr. 4/12/97, p. 6). Mr. Armijo indicated to Mr. Figueroa that he was tired of renters and that he wanted to sell the property. (Tr. 4/12/97, p. 6). Mr. Figueroa indicated that maybe they could work out a deal and asked how much Mr. Armijo wanted as a "down" payment. (tr. 4/12/97 p. 7). Mr. Armijo indicated that all he wanted was what he had put into "cleaning" the rental property which was about \$3,800 and that if the Figueros decided to buy the house, they could take over the payments. (tr. 4/12/97 p. 21).

On August 25, 1987, Mr. Figueroa indicated to the Salt Lake City Airport Authority that he had made an offer to purchase a home under a contract. The Airport Authority then scheduled a meeting for September 1, 1987 to finalize the transaction. On September 1, 1987, Mr. Armijo, Mr. Figueroa and Mrs. Figueroa met with the Airport Authority. (Tr. 4/12/97, p. 59). Mr. Figueroa indicates that at this meeting, the Airport Authority was told that they were purchasing the property under contract from the Armijos. (Tr. 4/12/97, p. 59). While this was confirmed by Mrs. Figueroa (Tr. 4/12/97, p.76), Mr. Armijo indicates that although he attended this meeting, no one spoke with him and that he had no idea as to why he went with the Figueros to meet with the Airport Authorities. (Tr. 4/12/97 p. 19). The Airport Authority was apparently sufficiently satisfied that the Figueros were purchasing the property under contract from the Armijos in that

they subsequently issued a check voucher in the amount of \$4,500 to the Figueroas. (Tr. 4/12/97, p. 59) A few days later, Mr. Figueroa tendered \$4,000 to Mr. Armijo and subsequently took possession of the property shortly thereafter. (Tr. 4/12/97 p. 61). Although Mr. Armijo indicated that he believed that he had a receipt in his records showing the amount of the down received, he contends the amount was only \$3,000 and was simply a security deposit/cleaning fee. (Tr. 4/12/97 p. 21) Mr. Armijo stated that Mr. Figueroa asked if he could have one year to build up his credit in order to obtain a loan to pay the balance owing. (Tr. 4/12/97 p. 8, 21). The Armijos agreed. (Tr. 4/12/97, p. 8). During this period of negotiation as to the purchase agreement, it was agreed by the parties that because the Figueroas were purchasing the property, the Figueroas would also be responsible for paying the taxes and insurance on the property. (tr. 4/12/97 p. 13, 27, 62, 77).

Under the terms of the agreement, the Figueroas, after having taken possession of the property on October 1, 1987, commenced paying to the Armijos a monthly payment of \$306.44. (tr. 4/12/97 p. 65, 12). This amount was based on the amortization schedule provided to the Figueroas by the Armijos. (Def. Exhibit No. 1) The Figueroas continued to pay this amount until December 31, 1992. (Tr. 4/22/97, p. 5). On January 1, 1993 the amount of the monthly payment was increased to \$350.00, (\$306.44 for the mortgage payment and \$43.56 to be held by the Armijos for payment of annual property taxes and insurance). (Tr.

4/22/97, p. 5). This increase was directly contributed to preclude future problems surrounding delinquent property taxes.

The Figueroas claim that before taking possession of the property, they were required to paid \$500 to the Armijos for property taxes due for 1986. (Tr. 4/12/97, p. 62, 63). This was paid in cash to the Armijos. (Tr. 4/12/97, p. 74) The Armijos argue that they were never delinquent in payment of the property taxes until after the Figueroas took possession. (Tr. 4/12/97, p. 25) Evidence however shows that on October 7, 1987, the Armijos were issued a redemption certificate after payment of \$478.55 was tendered to the Salt Lake County Treasurer. This redemption amount is also close to what the Figueroas claimed they paid right after they acquired possession of the property. It is evident that property taxes for 1987 also became delinquent. When notified that the property was to be sold for these delinquent taxes, Mr. Armijo and the Figueroas appeared at the Salt Lake County Treasure's office to save the property from tax sell. (tr. 4/12/97, P. 27). Sufficient details were given to the clerk to reflect that the Figueroas were purchasing under contract the property and that the property tax notices should continue to be mailed to the Armijos but in care of the Figueroas. The record shows that this was accomplished. (Tr. 4/12/97, p. 64) The Armijos do not dispute that the Figueroas paid the property taxes but argue that this requirement was agreed upon because the Armijos were letting the Figueroas make a smaller rent payment and that this was the same option given to other prior tenants. (Tr. 4/12/97, p.12) While no facts were

ascertained at the hearing to discern the exact method in which the Figueroas were notified as to the amount of the annual tax assessments or their due dates for the years of 1987 through 1992, starting January 1, 1993, if the notices of annual property tax and insurance premiums to be paid were greater than the amount of the monies held for the benefit of the Defendants, the Plaintiffs notified the Defendants as to the difference with the Defendants paying directly to the Plaintiffs said difference. This method of paying taxes and insurance was testified to by Defendant William Figueroa (Tr. 4/12/97, p.62) and collaborated by Plaintiff John Armijo (Tr. 4/12/97, p. 44).

On September 30, 1996, the Plaintiffs gave notice to the Defendants that because of an increase in taxes and insurance, the rent would now be increased to \$450.00 per month which such increase becoming effective on November 1, 1996. (Tr. 4/12/97, p.36). Testimony elicited at the hearing reflects that this is a direct contradiction to the statements made by both Plaintiffs.

Extract of testimony by Plaintiff John Armijo, answering:

- Q. And then you -- is it correct that you contacted me to serve them with an eviction notice for nonpayment of rent?
- A. Yeah. We passed by the house, me and my wife, and it was literally run down. And we were afraid that the board of health would close it down. So we decided, well, we'd up the rent and we have to, we'll fix it that way. We paint it and stuff like that." (Tr. 4/12/97 p. 12)

Extract of testimony by Plaintiff Andrea Armijo, answering:

- Q. Okay.
- A. No. We just figured they were renting and, you know, as long as they just kept making their rent payments

and stuff. And then when we found out how run down it was, I told my husband, "We've got to do something about it, you know, it's really in need of painting and stuff like that." (Tr. 4/12/97, p.52)

It was testified to that from January 1, 1993 until October 31, 1996, the Defendants contributed to the Plaintiffs the \$43.56 per month for both property taxes and insurance. (Tr. 4/12/97, p. 44). Defendants returned to the terms of the original agreement and tendered to the Plaintiffs the monthly mortgage payment of \$306.44. (Tr. 4/12/97 p. 12).

In October of 1996, the Defendants submitted a letter to the Plaintiffs asserting that they were not "tenants" and any increase in the monthly payment violated the original agreement. (Tr., 4/12/97 pp. 30-33). If the property taxes and insurance had increased as claimed by the Plaintiffs, the Plaintiffs would simply notify the Defendants as to the amount outstanding after the monies held by the Plaintiffs had been applied to the amount owing and the Defendants would tender the difference.

In November 1996 the Plaintiffs served upon the Defendants a 3-Day Notice to Pay or Quit and a Notice of Termination of Month-to-Month Tenancy. (Tr. 4/12/97, p.35). Shortly thereafter the both parties entered into a period of settlement negotiations. (Tr. 4/12/97, p.) Under the terms being discussed during this negotiation period, the Defendants were permitted attempt to qualify for loan to pay the balance owing on the mortgage. A draft settlement was submitted by the Plaintiffs to the Defendants to clarify the Plaintiffs possession. At the same time the negotiations were going on, Defendant William Figueroa was unemployed for a period of about a week. This change of jobs

impacted his ability to qualify for financing. These facts were stipulated to by both parties at the hearing. (Tr. 4/12/97, pp. 40-41)

When Plaintiffs heard nothing as to their settlement negotiations, they served a new 3-Day Notice to Pay or Quit and a Notice of Termination of Month-to-Month Tenancy upon the Defendants as well as an Eviction Complaint. (Tr. 4/12/97 p.41)

Shortly thereafter the Plaintiffs filed a possession bond with the court on April 3, 1997 and subsequently served notice of this possession bond on April 4, 1997 upon the Defendants by mail. The Defendants filed an objection to the manner in which this notice was served on April 9, 1997 and on April 10, 1997, requested a hearing. At the hearing, the trial court elected to hear testimony as to whether the home was "rental property" or not (Tr. 4/12/97, p. 3) and never addressed Defendants' objection to the manner in which the notice of this possession bond was given.

SUMMARY OF ARGUMENTS

The Plaintiffs are attempting to unilaterally convert a contract for sale of land into a rental agreement and thus hold the Defendants in breach of a non-existence lease agreement for unpaid rent. The Defendants were offered an option to purchase real property held by the Plaintiffs under an oral agreement. The Defendants exercised their "option to purchase" and have been in exclusive possession of this real property since October 1, 1987. Defendants submit that pursuant to the terms of this agreement, they are "purchasers" and not "tenants" and that the trial court

erred in permitting the Plaintiffs to proceed with a unlawful detainer action based on unpaid rent.

ARGUMENTS

POINT I. THE TRIAL COURT ERRED IN NOT FINDING THE EXISTENCE OF ORAL CONTRACT TO PURCHASE AN INTEREST IN LAND

A. The Trial Court's Conclusions

The trial court, in its conclusions, found that the Defendants were not purchaser the subject property from the Plaintiffs and that there was no such verbal agreement with the Plaintiffs. It then concluded that if a verbal agreement had existed, it was barred by the statute of frauds and that the Defendants had not met the requirements under the doctrine of part performance. The trial court then concluded that at most, the Defendants had a rental agreement with the Plaintiffs and a one year option to purchase the real property. The trial court concluded that the Defendants had failed to exercise their option to purchase the property in the required time period. The trial court then concluded that the Defendant's right to possession was terminated as well as any verbal rental agreement as of March 15, 1997.

Excepting the responsibility to marshal the evidence in support of such conclusions, the Defendants could not find any evidence which supports the trial court's conclusions. Such conclusions by the trial court were clearly erroneous. The Defendants submit the following points to support their contention that the trial court's conclusions are erroneous.

B. Evidentiary Requirements to Show Existence of Oral Contract to Purchase an Interest in Land.

The evidentiary requirements to show existence of an oral contract to purchase an interest in land is well established in Utah. The Utah Supreme Court has held that certain conditions must exist before an oral contract for the sale of an interest in land can be enforced. First, in order to have an oral contract, its terms must be clear, definite, mutually understood and established by clear, unequivocal and definite testimony or other evidence of the same quality. Second, there must be acts of part performance sufficient to take the contract out of the statute of frauds. The courts hold that under the doctrine of part performance, part performance is established by acts of (1) substantial or valuable or beneficial improvements; (2) the giving of valuable consideration; (3) actual, open, definite possession with the consent of the owner; and (4) acts relied upon by the purchaser must be referable to the contract itself. *Holmgren Brothers, Inc. v. Ballard*, 534 P.2d 611 (Utah 1975)

The Utah Supreme Court holds that the evidentiary burden is upon the party asserting the existence of the oral contract and that such party has to establish the existence of the oral contract by clear, convincing and definite evidence as well as showing that acts of part performance done were pursuant to this oral contract with such acts being clear, definite and referable exclusively to the oral contract. *Ryan v. Earl*, 618 P.2d 54 (Utah 1980).

The Defendants assert that the essential terms of the verbal agreement between the parties consisted of only three terms which both parties agreed upon. These terms consisted of (1) the

amount of the "down" payment; (2) the purchase price of the real property itself; and (3) the party which would be responsible for the payment of the taxes and insurance on the property.

C. Meeting with Salt Lake City Airport Authority as Other Supporting Evidence of Existence of Oral Contract to Sale.

On September 1, 1987 a meeting occurred with the Defendants, Mr. Armijo and the Salt Lake City Airport Authorities. This fact is not in dispute in that testimony by the parties concerned reflect that this meeting took place. (Tr. 4/12/97, p. 7, 19-20, 58-59, & 76). At this meeting, the Figueroas testified to the fact that Mr. Armijo told the Airport Authority that the Figueroas were purchasing the home and that he would be holding the contract. (Tr. 4/12/97, p. 7, 19-20, 58-59, & 76). Mr. Armijo contends that no one from the Airport Authority spoke with him and that he did not even know why he was there. (Tr. 4/12/97, p. 19). Prior to issuance of this check the Airport Authority is required to inspect the replacement dwelling and to certify that it meets the "decent, safe and sanitary" requirements of the Relocation Act. U.C.A. § 57-12-7(1) (1953). Whether this was accomplished or not is unknown due to the limited time for discovery. It is known however, that the Salt Lake City Airport Authority subsequently issued a check in the amount of \$4,500 to Mr. Figueroa on September 3, 1987. (Def. Exhibit 6).

Based on the amount that the check was issued for, the Salt Lake City Airport Authority was sufficiently satisfied after this

meeting that any check it issued was to be used to purchase a replacement dwelling.

D. Testimony by Mr. Armijo as Evidence in Support of the Existence of Oral Contract to Sale.

Mr. Armijo, when asked to tell exactly what the purchase agreement was that he had with the Figueroas, testified that the purchase agreement between him and the Defendants consisted of receiving a down payment equal to "what I put into the house, and then you guys -- "If you guys decide to buy it, take over the payments" (Tr. 4/12/97, p. 21). This testimony corresponds similarly with earlier testimony when Mr. Armijo was describing a conversation between himself and Mr. Figueroa after Mr. Figueroa asked how much "down" and he stated: "Look, all I want is a cleaning charge ... If you decide to buy it, that will go down on the payment." (Tr. 4/12/97, p.7). Mrs. Figueroa confirmed this agreement when she testified that her "understanding was we gave them the \$4,000 down and we would just take over the house payment and pay the taxes and the insurance, which we have been doing." (Tr. 4/12/97, p. 77).

These terms are clear, mutually understood, and a positive agreement of both parties as to the terms of the contract. Additional terms between the parties were to clarify and not designed to modify the initial agreement, i.e., responsibility for the payment of annual taxes and insurance which was subsequently modified to a monthly installment tendered to the Armijos to preclude delinquent taxes.

E. Payment of "Down" by the Defendants to the Plaintiffs was Acceptance of Plaintiffs' Offer to Sell

Mr. Armijo testified to receiving the "down" payment from the Defendants a few days after the parties met with the Airport Authorities. (Tr. 4/12/97, p. 7 & 21). The Plaintiffs contend that this "down" was only a security deposit and a cleaning fee tendered by the Defendants until the Defendants decided to purchase the property at which time it would be applied to the balance of the underlying mortgage. (Tr. 4/12/97, pp. 14-15). Plaintiffs' contention that Defendants were renting the real property under an option to purchase to be exercised within the first year of possession is contrary to the terms testified to by Mr. Armijo.

The Defendants exercised their option to purchase by tendering to the Plaintiffs the required "down" based on the terms of the purchase agreement with Defendants exercised their option in accordance with its terms. See *Coombs v. Ouzounian*, 465 P.2d 356, 357 (1970) (holding that tender of payment is necessary where option requires payment for exercise).

F. The Purchase Price of the Real Property is Clear and Definite

Testimony by the Plaintiffs reflects that the purchase price of the real property was to be the amount owing at the time the Defendants took possession of the property. Mr. Armijo confirmed that if "Mr. Figueroa had purchased the property, then the purchase price was going to be the balance on your underlying mortgage, plus the \$3,000 that he had paid as a deposit for cleaning and damage ..." (Tr. 4/12/97, p. 15) He further testified that his intent was "... if you could sell the

property, you'd have someone come in and pay you enough to basically take out that mortgage and get [him], basically out of the picture." (Tr. 4/12/97, p. 16). Plaintiff Andrea Armijo confirmed the purchase price as being "[w]hatever we owed on it." (Tr. 4/12/97, p. 54).

G. Responsibility for Payment of Property Taxes and Insurance

Testimony by Mrs. Figueroa reflects that from time of possession until January of 1993, the Defendants were responsible for paying the taxes. She further testified that from January 1993 until November of 1996, the Defendants tendered \$350 a month to the Plaintiffs with an agreement that \$43.56 each month would be put aside to pay property taxes and insurance. (Tr. 4/12/97, p. 79 & Tr. 4/22/97, pp. 3-6) Testimony by Mr. Figueroa reflects that Mr. Armijo told him that Mr. Figueroa was to "pay all your taxes and pay the insurance." (Tr. 4/12/97, p. 62). In addition Mr. Figueroa testified that after having experienced difficulty in coming up with the money to pay the taxes and insurance, he talked to Mr. Armijo and they both agreed that the Figuerosas would start paying \$350 per month with Mr. Armijo taking \$40 some odd dollars out and putting into a separate account to pay the year-end taxes and insurance. (Tr. 4/12/97, p. 62). Mr. Armijo testified to this separate account for the payment of taxes. (Tr. 4/12/97, p. 44). Payment of taxes by the Figuerosas for the years 1987 through 1992 was introduced in evidence as Defendants Exhibit 12.

POINT II - The Oral Agreement to Purchase Real Property is Enforceable under the Statute of Frauds and Through Part Performance Thereof, Removed from the Statute of Frauds.

Under the statute of frauds, the purpose is well established that it is designed to protect and preserve property interests and to avoid real property disputes.

Our statute of frauds provides that:

"Every contract for the ... sale, of any lands, or 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 ... sale is to be made, or by his lawful agent thereunto authorized in writing." §25-5-3, U.C.A. (1953) as amended.

A companion statute to the preceding statute provides that:

"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." §25-5-8, U.C.A. (1953) as amended.

In order to have an enforceable oral contract for the sale of an interest in land, the terms of the contract must be clear, definite, mutually understood and established by clear, unequivocal and definite testimony or other evidence of the same quality. In addition to the actual existence of an oral agreement, there must be acts of part performance sufficient to remove the agreement out of the statute of frauds. Under the doctrine of part performance, there must be acts of (1) substantial or valuable or beneficial improvements; (2) the giving of valuable consideration; (3) actual, open, definite possession with the consent of the owner; and (4) acts relied upon by the purchaser must be referable to the contract itself. *Holmgren Brothers, Inc. v. Ballard*, 534 P.2d 611, 614 (Utah 1975).

Both testimony and other evidence introduced at the hearing supports the existence of an oral agreement enforceable under the statute of frauds. By his own testimony, Mr. Armijo established what the terms of the oral agreement are. These terms, while being clear, definite and mutually understood by the Figueroas as they so testified, were simply that all Mr. Armijo wanted was a down payment equal to what he had just put in the home with the Figueroas to "assume" the balance of the mortgage payments then owing at the time of possession. Other evidence supporting a oral agreement was testimony elicited from the Figueroas as well as Mr. Armijo as to their meeting with the Salt Lake City Airport Authority. Based on this meeting and the representation of the parties thereat as to the existence of an offer to sell, the Salt Lake City Airport Authority issued a check to Mr. Figueroa for a replacement dwelling. This check and the amount thereon, represents that sufficient information was gleaned from Mr. Armijo by the Airport Authority to believe that the Figueroas were purchasing a replacement dwelling from Mr. Armijo.

Addressing the second criterion under the *Holmgren* test relating to part performance, no evidence was given or ascertained as to any substantial or valuable or beneficial improvements on the part of the Defendants. Through affidavits submitted on behalf of the Defendants, the trial court was capable of being appraised of the premises therein to be adequately informed as to the improvements made by the Defendants to the real property. While these improvements were estimated to have cost \$8,500 and were accomplished over a nine year period,

the cost of these improvements is not so great as to preclude compensation. However, such improvements were not those that would have been made by a tenant in the ordinary use of the premise, but were instead of a character permanently beneficial to the land. *Ryan v. Earl*, 618 P.2d 54, 56 (Utah 1980).

Of the second requirement to support part performance, dealing with valuable consideration, the Defendants paid directly to the Plaintiffs an amount of \$4,000 as a "down".

As to the third requirement, Defendants' possession of the property was open and known to the Plaintiffs with their consent. And to the last criteria to establish sufficiency of part performance, the substantial or beneficial or valuable improvements, the valuable consideration, and the possession of the real property are all referable to the contract and this last criteria is fully met.

CONCLUSION

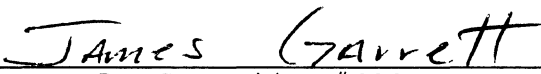
Defendants acquired an interest in the real property in question from the Plaintiffs by means of a verbal agreement to purchase. This verbal agreement was clear, definite, and mutually understood by both parties. Under the statute of frauds and the doctrine of part performance, the Defendants made substantial improvements to the real property which an ordinary tenant would not have done, delivered to the Plaintiffs valuable consideration, and had been in exclusive possession of the real property after tendering a substantial "down" to the Plaintiffs to exercise their option to purchase. It is apparent that the term "option to purchase" as used by the Plaintiffs referred to

the Defendants acquiring a loan or financing to "assume the balance owing on the mortgage by the Plaintiffs. It was not until after the Defendants refused to pay the "rent" increase that the Plaintiffs asserted this "option to purchase."

Upon the Defendants exercising the option to purchase in September 1987 by delivering to the Plaintiffs a "down" payment and subsequent to this, taking possession of the property, the relationship of landlord-tenant never existed to permit the Plaintiffs to bring an unlawful detainer action based on unpaid rent.

WHEREFORE the Defendants pray for a reversal of the trial court's order and judgment and to restore Defendants to the home, or in the alternate, to order the trial court to publish new findings and conclusions as this Court may deem proper.

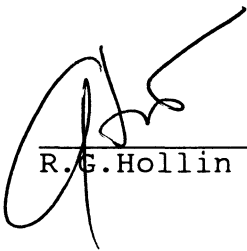
RESPECTFULLY SUBMITTED this 23 day of October, 1997.

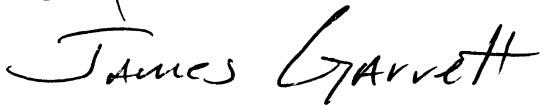

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CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of October, 1997, a true and correct copy of the foregoing BRIEF OF THE APPELLANT was personally delivered to the following:

Stephen B. WATKINS, #3400
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Salt Lake City, Utah 84111



R.G. Hollin


NO ADDENDUM IS REQUIRED
OR NECESSARY