

1986

McCracken v. Downs : Brief of Appellant

Utah Supreme Court

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BRIEF

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DOCKET NO. 860349-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

MARK McCRACKEN, KEDRICK
McCRACKEN, LILA P. McCRACKEN
and DORIS E. McCRACKEN

Plaintiffs,

vs.

JERRY DOWNS and JERALD GREAVES

Defendants.

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DEFENDANTS' AND
APPELLANTS' BRIEF

No. 21067 *860349-CA*

Category 13b

APPEAL FROM A JUDGMENT OF THE FIRST JUDICIAL DISTRICT
COURT IN AND FOR CACHE COUNTY, STATE OF UTAH
The Honorable VeNoy Christoffersen presiding

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FILED

MAR 7 1986

Clerk, Supreme Court, Utah

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

POINT I

The Trial Court erred in granting specific performance of the real estate contract because Plaintiff failed to perform a condition precedent found in the contract and because Plaintiff has not himself failed to discharge his obligations before seeking equitable relief.

POINT II

Plaintiff, at the time of the execution of the purchase agreement had no authority from co-tenants to sell the property, and, therefore, the contract was invalid.

POINT III

The parties, by their conduct, established a relationship as joint venturers.

STATEMENT OF THE CASE

A) Nature of the Case. This is an action by Plaintiffs upon a contract to purchase real property. The Plaintiffs seek damages, costs, attorney's fees and specific performance. The Defendants deny Plaintiffs' allegations and prayer for relief and allege affirmatively among other things that the Plaintiffs did not have the authority to enter into the agreement, and both parties failed to abide by the terms and conditions of the agreement Plaintiff seeks to enforce, when in fact the parties treated the real estate development as a joint venture.

B) Course of Proceedings. The matter was tried before the Honorable VeNoy Christoffersen without a jury.

C) Disposition in the Trial Court. The Trial Court ruled as follows:

(1) That the contract between the parties was binding and enforceable.

(2) The balance due on the contract was \$149,500.

(3) Any possible defect in title or the ability of Plaintiff, Mark McCracken to convey title because of defective power-of-attorney was cured by the execution, delivery of a warranty deed recorded 6 years after the date of the agreement.

(4) That Defendants were required to execute a past due promissory note and a trust deed to secure the promissory note as provided in the agreement.

STATEMENT OF FACTS

Mark McCracken and the Defendants were acquaintances prior to the entry into the agreement which is the subject of this litigation and had had some prior business dealings with each other.

(TR 42) The parties commenced negotiations with each other concerning the property approximately six months prior to the date of the agreement. Although Plaintiffs failed to introduce evidence showing their title to the property, (TR 35 lines 16 - 20, TR 36 lines 2 - 11) Exhibit 1 recites that the owners of the property are Mark McCracken, Doris McCracken and Kedrick and Lila P. McCracken, and Exhibit 6 indicates that Kedrick McCracken and Lila P. McCracken each own an undivided one-fourth interest in the property.

On the 13th day of July, 1978, Kedrick McCracken and Lila P. McCracken conveyed their interest in the subject property to themselves in trust as "trustees" of the Kedrick McCracken Family Revocable Trust. The deed was recorded in Cache County on July 13, 1978. (See Ex. 6) (TR 15 line 18 - 25 sets forth the interest of Plaintiffs)

Plaintiff, Mark McCracken and Defendants by agreement selected Attorney Scott Barrett of Logan, Utah, to draw the agreement between the parties. (Ex. 1) (TR 20) Each party paid one-half of the attorney's fee. (TR 20) The parties testified that they each contributed to the provisions incorporated in the agreement. (TR 41) Mark McCracken indicated that he and Jerry Downs on separate occasions made changes to the agreement. (TR 41) McCracken read and understood the terms of the agreement. (TR 42) Further, Mark McCracken testified at TR page 42 as follows:

Q. And that each of the conditions that were contained in the contract were agreed to in the office and discussed between all of you?

A. Yes.

Jerry Downs essentially confirms this testimony. (TR 72) The agreement was prepared in draft form by Attorney Scott Barrett of Logan, Utah. (TR 12) However, it was not signed in his presence and he was unaware that the agreement had been signed or recorded. (TR 115)

After conveying their undivided one-half interest to themselves as trustees, Kedrick and Lila P. McCracken, as individuals, made and executed a special power of attorney to Mark McCracken

purportedly for the purpose of allowing him to sell their property. The contract was executed on the 19th day of October, 1978 by Mark McCracken in behalf of himself and as an attorney for Kedrick McCracken, Lila P. McCracken individually and Doris E. McCracken.

The contract provided as follows: (See a copy attached as an addendum hereto.)

1. A representation that Mark McCracken was the owner of the property.

2. That the seller agreed to sell the property with a nominal downpayment of \$500.00 and the balance to be paid in the form of a note secured by a deed of trust payable in full on the 1st of September, 1983.

3. Buyers shall be the developers and sub-dividers and the sellers shall have no part in nor control over the sub-division or sale of the lots.

4. Closing of this agreement by the sellers deeding the subject property to the buyers and buyers delivering their note and deed of trust to the sellers shall be on or before November 20, 1978 at the sole election of sellers. (Emphasis ours)

5. Buyers shall pay all sub-division costs.

6. Sellers agree to provide buyers with a policy of title insurance within ninety (90) days after the execution of the agreement.

7. The agreement constituted the entire agreement of the parties. (See addendum attached hereto.)

The agreement was recorded on the day it is dated October 19, 1978, in the office of the Recorder of Cache County, Utah.

On the date specified for closing (November 20, 1978) sellers failed to make an election to proceed with the contract and failed to deed the property to buyers. Buyers in turn failed to execute a note and trust deed to secure the balance due. (Mark McCracken's testimony TR 31, 32, 43) (Jerry Downs' testimony TR 85, 103, 18) (Scott Barrett's testimony TR 115, 118) Attorney Scott Barrett testified upon cross examination that he was never asked to nor did he prepare a deed to Greaves and Downs (TR 114), a promissory note or a trust deed (TR 114), nor did he receive from any of the parties an election that they wanted to proceed with the agreement. (TR 115) Barrett further testified that nothing in his file indicated that a policy of title insurance was ever ordered.

Barrett concedes that the transaction was never completed (TR 14) and that the parties thereafter operated under an arrangement different from the terms and conditions of the contract. (TR 118)

The parties sub-divided the property, not as seller and purchaser, but as joint participants in the management of the venture. (See Ex. 4) Mark McCracken executed the owner's dedication for himself, his mother Doris McCracken and his aunt and uncle, Kedrick McCracken and Lila McCracken. The improvements were made to the property by Greaves and Downs at their expense.

The first sub-divided lot was sold by the parties on the 21st day of August, 1980. (Ex. 8) By reason of the fact that the

property had not been deeded to Greaves and Downs, all parties jointly executed a warranty deed to purchaser Progressive Homes. Mark McCracken signed for himself and as an attorney-in-fact for his mother Doris and as an attorney-in-fact for Kedrick and Lila McCracken individually and as trustees.

On the 19th day of September three more lots were sold to Progressive Homes with Cecil Mark McCracken signing the deeds, for himself and as an attorney-in-fact for Doris McCracken, Kedrick McCracken and Lila P. McCracken. No mention was made of the status of Kedrick and Lila McCracken as trustees. (Although marketable title was not conveyed, no one questioned the fact.)

Checks in payment of the lots were made by Progressive Homes paying one-half to Cecil Mark McCracken directly and one-half to Greaves and Downs directly. (See Ex. 9 and 10) Upon cross examination Mark McCracken testified as follows:

Q. You just received the money didn't you?

A. I received the money. But I gave the lots for the money.

McCracken further testified on direct examination from his counsel as follows:

Q. What if anything did you do with respect to the sale of the lots?

A. I signed some papers to release the lots.

Q. Who presented these papers to you?

A. Jerry Downs.

Q. And, why did you do that?

A. So they could release the lots to sell them... had to be done to sell the lots.

Q. Did you obtain any benefit from that?

A. One-half of the sale of the lots that were sold.

On January 15, 1981, the Plaintiff Mark McCracken and the Defendants went into the office of Attorney Scott Barrett. Exactly which parties went in was not agreed upon by all parties at the trial. However, a note dated January 16, 1981, in Scott Barrett's office indicates that the purchase agreement was picked up in draft form and signed and recorded. (See Plaintiff's Ex. 11) Attorney Barrett testified and Exhibit 11 confirms his testimony and reveals that the transaction was never completed. (McCracken's testimony TR 31, 32, 43; Jerry Downs' testimony TR 85; Barrett's testimony TR 114, 115, 118)

Attorney Barrett explained to the parties that if Exhibit 1 was to be treated as a purchase agreement there should be an escrow account set up. The parties present stated to Attorney Barrett that they "preferred to leave the situation as it was and not have deeds exchange hands at that time and that whenever a lot was sold that the parties would all have to sign so there was no problem passing title in that way". (Third paragraph Ex. 11) McCracken confirms this testimony at TR page 62.

There were no further sales of lots from this tract of ground after January 15, 1981.

On April 23, 1984, 5½ years after the agreement was signed Kedrick McCracken, Lila McCracken and Doris E. McCracken conveyed their interest in the property to Mark Cecil McCracken by special warranty deed. (See Ex. 7)

The property described in the contract which was not subdivided was either farmed by Mark McCracken or was leased to another farmer by Mark McCracken. (TR 32) He retained all profits from the farming operations and paid the water taxes.

(TR 57)

The purchase agreement in paragraph 1 provides that upon the closing of the sale and McCracken deeding the property to the buyers, buyers were to deliver their note and mortgage to McCrackens. However, McCracken at page 33 of the transcript testifies as follows:

Q. Have you been at all times ready and able to deliver clear title to Messrs. Greaves and Downs upon payment of the remaining \$149,500.00?

A. Yes.

Q. And you are capable of doing that even now?

A. Yes.

At a post-judgment hearing to require the Defendants to execute a note and trust deed evidence was presented to the effect that McCracken had assigned his interest to Zions' First National Bank on the 10th day of March, 1982, and further had executed a trust deed encumbering the subject property in the amount of \$92,525.00 on the 27th day of March, 1984. (Ex. 13, 14)

The decree of the Trial Court entered on the 12th day of November, 1985, required the Defendants to execute a trust deed and mortgage that was due and payable on the 1st day of September, 1983, to enable Plaintiffs to have the foreclosure remedies provided by law.

SUMMARY OF ARGUMENTS

Point I.

1. The agreement entered into between the parties in 1978 contains a condition precedent which was never fulfilled by the Plaintiff who now seeks specific performance.

2. Plaintiff has failed to discharge his own obligations under the contract and did not come into the Court having himself done equity.

3. Plaintiffs' acts in mortgaging the property are inconsistent with his present claim of specific performance.

4. The Plaintiffs' 5½ year delay in the commencement of this action during which time there has been an approximate 50% devaluation in the land bars Plaintiff from seeking specific performance constitutes laches.

Point II.

Mark McCracken attempted to negotiate the contract for himself and three other persons. An undivided one-half of the interest in the property was held in a family trust agreement. The trustees of a trust cannot delegate the discretion vested in them to another person, and, therefore, Mark McCracken had no authority to represent all parties in the contract negotiations.

Point III.

The parties, by their conduct, established a relationship as joint venturers and as such the termination of the joint venture by the parties leaves each party with the ownership of the property they had prior to the venture and each having made a profit from the venture.

POINT I

THE TRIAL COURT ERRED IN GRANTING SPECIFIC
PERFORMANCE OF THE REAL ESTATE CONTRACT.

A. The contract contained a condition precedent to be performed by McCrackens prior to seeking performance by Defendants.

Paragraph 3 of the agreement states as follows:

"The closing of this agreement by sellers deeding the subject property to the buyers and buyers delivering their note and trust deed to the sellers shall be on or before November 20, 1978 at the sole election of the sellers."

The contract was dated and recorded on the 19th day of October, 1978.

All parties' indicated that on the closing date of November 20, 1978, the seller McCracken made no election to proceed with the agreement. (See McCracken's Testimony TR 31, 32, and 46)

Therefore, the express condition precedent found in the contract was never fulfilled by the Plaintiff. The Trial Court in its findings found in paragraph 3 as follows:

"Although the contract requires that a note and trust deed would be executed by the buyers evidencing and securing the remaining unpaid balance due under the contract, no such note or trust deed was ever executed or delivered to plaintiffs and consequently no warranty deed was executed and delivered to the defendants conveying the property."

It is apparent that the Trial Court in viewing the matter found that the burden was upon the Defendants, Greaves and Downs to tender a note and trust deed, rather than following the clear import of the paragraph which states that the seller, McCracken shall have the sole election as to whether or not to proceed with the agreement.

On January 15, 1981, the Plaintiff and one or more of the Defendants met in Attorney Barrett's Office. Attorney Barrett advised the Defendants that if they were to have a binding sales agreement the agreement should be placed in escrow with a deed from McCracken to Greaves and Downs.

The parties stated that they preferred to leave the situation as it was and not exchange deeds yet and that upon the sale of any lot all parties were to convey the property. (See Ex. 11 and TR 116 - 118)

The testimony of the parties never attempted to vary the terms of the contract, and, therefore, the contract is not ambiguous. It is further evident from the testimony of the parties that Plaintiff was never willing to convey the property in order to get performance of the contract. Plaintiff, therefore, failed to tender performance under the condition precedent of the agreement and the agreement is therefore unenforceable.

In Kimball v. Campbell, Utah, 699 P.2d 714, (1985), this Court held that a contracts interpretation is a question of law where no extrinsic evidence of intent is introduced. By reason of the fact that the contract's interpretation is a question of law, this Court may review the Trial Court's action under a correctness standard. See Provo City Corp. v. Nielson Scott Co., Utah, 603 P.2d 803 (1974).

A review of paragraph 3 of the agreement shows that the seller, McCracken had the sole election given to him to proceed with the agreement. Having never made that election in writing or

by tendering a deed it is obvious that McCracken failed to perform the condition precedent. We must ask ourselves whether or not Defendants had a right to specific performance absent an election by the Plaintiff to proceed with the sale.

In Baxter v. Camelot Properties, Utah, 622 P.2d 808, (1981), this Court upheld the Trial Court's judgment denying Plaintiff specific performance allowing her to purchase a condominium unit by reason of the fact that Baxter failed to perform as required by the terms of her agreement. See also Huck v. Hayes, Utah 560 P.2d 1142, (1977), where this Court held that:

(I)t is fundamental that a party to a contract should obtain no advantage from the fact that he is himself unable to perform. Since the defendant has not come forth with the agreed title insurance policy demonstrating that he could convey a clear and marketable title as of the proposed closing date, March 8, 1974, he could neither demand payment by the plaintiff on that date, nor claim that the latter was in default for failing to make the payment.

See also Kiahtipes v. Mills, Utah, 649 P.2d 9 (1982). Branstetter v. Cox, Kansas, 496 P.2d 1345 (1972) and Bird v. Casa Royal West, Nevada, 624 P.2d 17 (1981) and Rubber, Inc. v. Jenkins, Colorado, 570 P.2d 1317 (1977).

McCracken testified that he did not rely on anyone else to complete the sale (TR 31), and, therefore, he is responsible for his compliance with the terms and agreements of the contract.

B. Further, the Plaintiff is not entitled to specific performance because he has failed to discharge his own obligations.

Plaintiff brought this action, not upon the promissory note and mortgage contemplated by the agreement, but upon his original

agreement which is an agreement to make a promissory note and mortgage upon his performance by delivering a deed at the time of the execution of the contract. He admits reading the contract and knowing its contents and further admits that he was capable of delivering a deed and title insurance but he failed to proceed further with the contract. (TR 42, 43, 46)

When asked in January of 1981 by Attorney Barrett if he wished to complete the contract as contemplated he indicated that he did not wish to convey the property at that time but wished to operate as they were doing on an informal basis.

The Plaintiff commenced this action seeking the equitable remedy of specific performance. However, Plaintiff had failed to discharge his own obligations prior to seeking such relief.

As indicated in paragraph A above the Plaintiff had failed to make the election under paragraph 3 to close the agreement. Further, Plaintiff failed to draw or have drawn the appropriate deeds, mortgages to complete the transaction. (TR 33, 46) In addition thereto the subsequent conduct of the Defendant violated paragraph 2 in retaining control over the subdivision and sale of the lots. (TR 24, 25, 52, 54) The Plaintiff also violated paragraph 6 of the agreement in failing to provide a policy of title insurance within 90 days after the execution of the agreement or at any other time. The fact of the matter is that the Plaintiff, after executing the contract of sale, encumbered the property to Zions First National Bank thereby making it impossible for clear title to pass to the Defendant. See Fischer

v. Johnson, Utah, 525 P.2d 45 (1974), Creer v. Thurman, Utah, 581 P.2d 149 (1978).

Each of these acts on the part of the Plaintiff is contrary to Plaintiff's obligation to discharge his obligations under the agreement.

Plaintiffs' Complaint seeks a money judgment and for declaratory relief requiring the Defendants to execute a note and trust deed to thereafter be foreclosed. The Trial Court concluded in December of 1985 that the contract was a binding contract and ordered the Defendants to execute a promissory note and trust deed with a due date of September 1, 1983, so that the same might be enforced by a Plaintiff, who prior to that time had failed to perform the agreement himself.

In Bradford v. Alvey & Sons, Utah, 621 P.2d 1240, (1980), this Court held that where a remedy is sought in equity, as a predicate to equitable relief "a party must exercise reasonable efforts to discharge his own obligations." Also Reed v. Alvey, Utah, 610 P.2d 1374 (1980). Wall Street Porperties v. Gossner, Oregon, 632 P.2d 1310 (1981).

Only after it was apparent that a severe devaluation in the property had occurred did the Defendant attempt to enforce the agreement. His performance at that time consisted of filing a complaint. He failed, even then, to tender a deed and title insurance.

C. Acts of Plaintiff are not consistent with the performance of the agreement. Mark McCracken attempted to assign his interest

in Exhibit 1 to Zions First National Bank on the 10th day of March, 1982, (See Ex. 13) and thereafter made a trust deed encumbering the land in question for the sum of \$92,525.00 on the 27th day of April, 1984. (Ex. 14) (Ex. 13, 14 were introduced at a post judgment hearing to require executing the note and trust deed by Defendants)

The act of attempting to assign the contract is inconsistent with his representation that he has the ability to convey good title. The act of mortgaging the property is inconsistent with his ability to give free and clear title, as shown by the policy of title insurance he was obligated to deliver. Each of these acts is consistent with his intention to retain title, ownership and control of the property as manifested in the office of Attorney Barrett. Each of these acts is a repudiation of the agreement and an act which bars Plaintiff from performance of the contract. These acts induced these Defendants into taking a position which is inconsistent with the Plaintiff's present claims. Fischer v. Johnson, Supra.

D. The contract is unenforceable by reason of the fact that the Plaintiff has delayed enforcement of the agreement to the disadvantage of the Plaintiff.

The Plaintiff admits that he made no election to proceed with the contract and that the deed, notes and mortgages were not exchanged between the parties. He further concedes that he has retained the control over the property by taking the crops off the property and/or leasing it out for his personal gain. The

Plaintiff commenced this action in April of 1984 when almost six years after he had failed to elect to proceed and tender a deed and three years after the meeting in Attorney Barrett's Office where he represented to Attorney Barrett that he did not wish to tender a deed but wanted to "leave the situation the way it is and not have any deeds exchange hands yet". The decision of the Trial Court in ordering specific performance raises the issue as to whether or not the Plaintiff can delay his performance for a period of six years, all the while watching the property decline in value to the disadvantage of the purchasers. This action was brought after the note and mortgage would have been payable had such documents been executed. Had the Plaintiff brought this action within a reasonable period of time the Defendants could have complied with the agreement earlier to protect themselves.

It is the Plaintiff's position that the Trial Court's judgment in enforcing the agreement after a delay of six years constitutes error.

See the case of Papanikolas Brothers Ent. v. Sugarhouse Shopping Center, Utah, 535 P.2d 1256, (1975), where the court said as follows:

"Laches is not mere delay but delay that works advantage to another. To constitute laches two elements must be established: (1) lack of diligence on the part of the plaintiff, and (2) an injury to the defendant owing to such lack of diligence. Although lapse of time is an essential part of laches, the length of time must depend upon the circumstances of each case for the propriety of refusing a claim as equally predicated upon the gravity of the prejudice suffered by the defendant and the length of plaintiff's delay."

Since 1981 the property has devalued substantially as subdivision property and the ability to sell the lots for a profit has been reduced by the presence of a substantial recession. If the building boom had continued Plaintiff would have been able to maintain control of his land, farm the undevelopment portion and reaped a profit from the sale of lots.

However, upon the advent of the business recession the Plaintiff realized that his prospect of profit through the sale of lots was diminishing and that his continued ownership of the property was not making a profit as anticipated. He, thereafter, in 1982 and 1984 purportedly assigned his interest in the agreement and mortgaged the property to secure the payment of other indebtedness. (See Ex. 13 and 14) The last trust deed was dated the 27th day of March, 1984 and recorded on April 27, 1984, 3 days prior to the commencement of this action seeking specific performance. The judgment of the Trial Court requires Defendants to make and execute a note and trust deed two years delinquent. Defendants are forced into immediate nonjudicial foreclosure proceedings for the foreclosure of the trust deed and another suit because Plaintiff failed to give marketable title to Defendants. Plaintiff presently enjoys the benefit of a six-year-old bargain in a declining economy. The Plaintiff by virtue of the Trial Court's judgment is given a "peek into the future" to select his remedy regardless of whether or not his conduct is inconsistent or consistent with that remedy. The Supreme Court of the State of Utah in the case of Mawhinney v. Jensen, 120 Utah, 142, 232 P.2d

769, (1951), held that a delay will bar equitable relief in a suit for rescission.

POINT II

PLAINTIFF, AT THE TIME OF THE EXECUTION OF THE PURCHASE AGREEMENT HAD NO AUTHORITY FROM CO-TENANTS TO SELL THE PROPERTY, AND, THEREFORE, THE CONTRACT WAS INVALID.

On October 19, 1978, title to the subject property was vested as follows: One quarter, Mark McCracken; one quarter, Doris E. McCracken; one-half, Kedrick McCracken and Lila P. McCracken as trustees of the Kedrick McCracken Family Revocable Trust.

Mark McCracken claims to have acted as an agent for his aunt and uncle to sell the property. (TR 17)

He possessed a power-of-attorney executed by Kedrick McCracken and Lila P. McCracken as individuals but not as trustees. (See Ex. 2) Deeds for subdivided lots were signed by Mark McCracken sometimes recognizing the trust relationship of Kedrick and Lila P. McCracken and sometimes failing to recognize the trust relationship of Kedrick and Lila P. McCracken. (See Ex. 8) Clear title was not passed to the owners of the lots by virtue of these title defects. Jennings v. Murdock, Infra. On the 22nd day of April, 1984, approximately 8 days prior to the commencement of this action Kedrick McCracken and Lila P. McCracken, individually and as trustees of the Kedrick McCracken Family Revocable Trust executed a warranty deed conveying the property to Mark McCracken. (Note, Mark McCracken encumbered the property to a bank 5 days later.) It is suggested that the real purpose of the deed was to provide a marketable title to facilitate the loan.

See Restatement of Trusts, Section 171 2d Note G. Also see Jennings v. Murdock, Kansas, 553 P.2d 846, (1976), where that court set forth the generally accepted rule as follows:

"Generally speaking, the duty to administer a trust and to exercise the discretion vested in him rests from the trustee and cannot be delegated by him to others."

If the trustees could not delegate their authority to sell the property they could not execute a power-of-attorney as trustees. The power-of-attorney executed by them as individuals is of no force and effect by reason of the fact that the property was held in trust. Therefore, the recitation in paragraph 1 of the agreement that the sellers were the owners of the real property was false. McCracken further represented in paragraph 1 that the sellers agreed to sell all of the property described in Exhibit "A" thus creating a second condition precedent of the sale that all parties agree to the sale. See Branstetter v. Cox, *Infra*, where the court held that the husband's signature was a condition precedent to the contract taking effect.

By the very terms of this agreement to sell "all" of the property the valid execution by "all" of the owners is a condition precedent which has not been met. The subsequent warranty deed five years later does not fulfill the condition. (See Point I(C))

POINT III

THE PARTIES, BY THEIR CONDUCT, ESTABLISHED
A RELATIONSHIP AS JOINT VENTURERS.

The evidence in this case shows that the parties elected to proceed to subdivide the property in the form of a joint venture

the terms of which are evidenced by the actions of the parties. Attorney Barrett, in his memorandum indicates very clearly that the parties elected not to proceed on the original agreement by implementing its terms but elected to "leave the situation as it is and not have any deeds exchange hands yet. "Whenever they sell a lot McCracken and Greaves and Downs all sign so there is no problem passing title in that way". Bassett v. Baker, Utah, 530 P.2d 1 (1974), defines the elements of a joint venture.

Contrary to the real estate agreement the parties mutually subdivided the land with McCracken retaining an ownership interest and control over the property so subdivided as evidenced by the dedication plat. (See Ex. 4) For this Court to reach the conclusion that the parties acted in a joint venture is not unreasonable nor detrimental to the Plaintiff. Plaintiff has received his share of the lots that were sold (TR 25), has retained the ownership of the land for the purpose of taking crops from the land and/or leasing the land to others for monetary gain. He presently benefits by the zoning of the property, engineering and the development that is presently in place. (TR 118) Therefore, a finding by this court of a joint venture places each party in the proximate position they were in prior to the entry into the contract with each party having profited insofar as the land was sold and the profits divided.

CONCLUSION

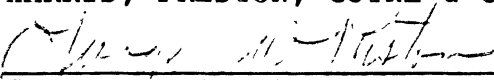
A review of the many cases before this Court relative to a specific performance reveals that in periods of economic

prosperity, purchasers bring the actions for specific performance. In periods of a decline in the economy sellers bring the action. In prosperity the seller retains the benefit of his bargain and the purchaser may be entitled to the gain, in periods of a declining market the seller wants the benefit of his bargain at the expense of the purchasers. The greater period of time a seller in a declining market delays the commencement of the action the greater the potential losses suffered by the buyer. In this action the seller has waited until the market value is approximately 50% of its prior value, as evidenced by the fact that the Plaintiffs' mortgage on the property in 1984 was \$92,525.00 and he acknowledges a value of only \$75,000 to \$78,000.00 at the date of trial. (TR 65)

The Findings of Fact by the Court are not supported by the evidence and the Conclusions of Law are clearly erroneous. The Trial Court's judgment grants to the Plaintiff the right to have his note and trust deed executed pursuant to the terms of a contract he has refused to abide by, and was unwilling to perform.

The Plaintiff, by virtue of the Trial Court's decision, has been given the unique opportunity of delaying his performance under the agreement until the economic climate forecasts his best option and then allowing the Plaintiff to benefit at the expense of Defendants. These Defendants, for the foregoing reasons, request a reversal by this Court in accordance with the facts introduced at the Trial Court and the laws of this State and a finding of no cause of action upon Plaintiffs' Complaint.

RESPECTFULLY SUBMITTED this 1st day of March, 1986.

HARRIS, PRESTON, GUTKE & CHAMBERS
By: 
George W. Preston
Attorney for Defendants & Appellants

MAILING CERTIFICATE

I hereby certify that I mailed four copies of the above and foregoing DEFENDANTS' AND APPELLANTS' BRIEF to JAMES C. JENKINS & ASSOCIATES, Attorney for Plaintiff/Respondent, at 67 East 100 North, P. O. Box 3700, Logan, Utah 84321 on this 1st day of March, 1986.

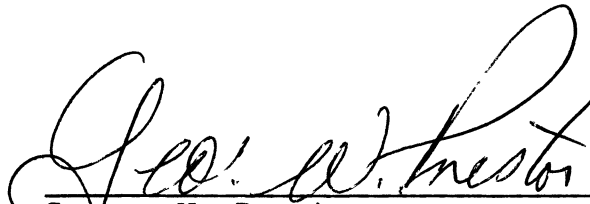

George W. Preston

Exhibit A

repo. 4, D-1
11/19/84

2 #1

Recorded
10/19/78
Bk 234 Pg 778
#4-17846

PURCHASE AGREEMENT

THIS AGREEMENT made and entered into this 19th day of October, 1978, by and between JERRY DOWNS and JERALD GREAVES, hereinafter referred to as Purchasers and MARK McCracken, on behalf of himself and as attorney in fact for KEDRICK McCracken and LILA P. McCracken, husband and wife, and DORIS E. McCracken, hereinafter collectively referred to as Sellers, is made with reference to the following facts:

WHEREAS, Sellers are the owners of certain real property in the City of Smithfield, County of Cache, State of Utah, consisting of 9.57 acres, more or less, a more particular description of which is attached hereto and incorporated herein as Exhibit "A", and

WHEREAS, Buyers are desirous of purchasing said property for development and subdivision and Sellers are agreeable to selling the same.

NOW, THEREFORE, the parties hereto agree as follows:

1. Sellers agree to sell and Buyers agree to purchase all of the property described in Exhibit "A" attached hereto, consisting of 9.57 acres more or less, in the City of Smithfield, County of Cache, State of Utah, and Buyers agree to pay for said described property the amounts, in installments as follows:

a. As a downpayment, Buyers agree to pay to Sellers contemporaneous with the execution of this Agreement, the sum of Five Hundred Dollars (\$500.00), receipt of which is acknowledged by the Sellers.

b. Buyers agree to pay an additional One Hundred Seventy-nine Thousand, Five Hundred Dollars (\$179,500.00) in the form of a Note secured by a Deed of Trust on the described property. Said Note shall be payable in full on the First of September, 1983. Provided, however, that, whenever Buyers shall sell a lot or portion of the described property, they shall pay one-half of the gross sale price less real estate commissions, if any, of

CHASE AGREEMENT

Page Two

said lot to Sellers to apply on said Note.

c. Provided, further, that Buyers and Seller agree that the Buyers are preparing a preliminary plat for subdivision which will subdivide the property into twenty-seven (27) lots and that Buyers will sell said lots at the best available price. If, after all of the lots have been sold, more than a gross sales price of Three Hundred and Sixty Thousand dollars (\$360,000.00), less any real estate commissions, has been realized by the Buyers, then Sellers shall receive as additional compensation for the purchase and sale of their property, one-half (1/2) of all of the proceeds from the sale of said lots exceeding \$360,000.00.

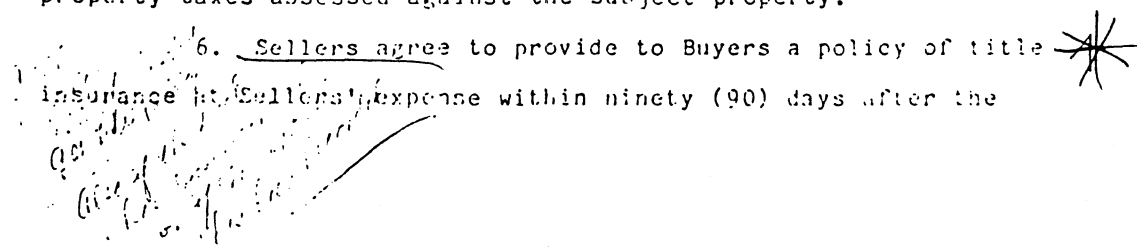
2. It is further understood and agreed that the Buyers shall be the developers and subdividers and that Sellers shall have no part in nor control over the subdivision or sale of the said lots.

3. Closing of this Agreement by Sellers deeding the subject property to the Buyers and Buyers delivering their Note and Deed of Trust to the Sellers shall be on or before November 20, 1978, at the sole election of the Sellers.

4. It is agreed that this entire Agreement is contingent upon approval of a final plat of subdivision being approved by the City of Smithfield. In the event said plat is not approved for any reason within one year from the date of this Agreement, then the Buyers, at their option, may recind the agreement by deeding the described property back to the Sellers in return for the Promissory Note. In such event, the Sellers shall retain the Five Hundred Dollar (\$500.00) downpayment.

5. It is understood and agreed that Buyers shall pay all subdivision and development costs, including real estate taxes after the calendar year 1978. Sellers shall pay the 1978 real property taxes assessed against the subject property.

6. Sellers agree to provide to Buyers a policy of title insurance at Sellers' expense within ninety (90) days after the



CHASE AGREEMENT
Page Three

execution of this Agreement.

7. As Buyers sell any lot or lots, the Seller agrees to execute and deliver to the designated title company a reconveyance from the Deed of Trust on any such lots, releasing said lots from the lien of the Deed of Trust.

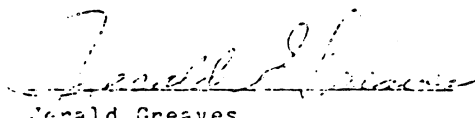
8. This Agreement constitutes the entire agreement of the parties hereto and no amendments or changes may be made except in writing, executed by the party to be charged.

9. This Agreement shall be binding upon the heirs, executors, successors and assigns of the parties hereto.

DATED this 19th day of October, 1978.

BUYERS:


Jerry Downs


Jerald Greaves

SELLERS:

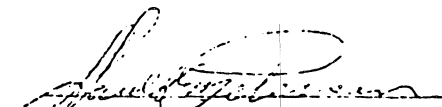

Mark McCracken

On behalf of himself and as
Attorney in Fact for:

Kedrick McCracken and
Lila P. McCracken, husband
and wife, and
Doris E. McCracken

STATE OF UTAH)
: ss.
County of Cache)

On this 19th day of October, 1978, personally appeared before me JERRY DOWNS, JERALD GREAVES and MARK McCRAKEN, the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.


Notary Public

Commission expires: May 13, 1982

Residing in Logan, Cache County, Utah

James C. Jenkins
JAMES C. JENKINS & ASSOCIATES
67 East 100 North
P.O. Box 3700
Logan, Utah 84321
Telephone: (801) 752-4107

IN THE DISTRICT COURT, STATE OF UTAH, COUNTY OF CACHE

MARK McCRACKEN, KENDRICK
McCRACKEN, LILA P. McCRACKEN
and DORIS E. McCRACKEN

Plaintiff

vs.

JERRY DOWNS and JERALD
GREAVES

Defendant

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Civil No. 22759

This matter having been heretofore tried before the honorable VeNoy Christoffersen, in the above-entitled court without jury on July 8, 1985, and pursuant to request of the Court the parties having filed their respective trial briefs and the court having received the same and also having heard oral arguments of counsel for the parties on the 26th day of September, 1985 and the court after oral arguments having rendered its final findings of fact and conclusions of law does hereby reduce the same to writing.

1. This action involves real property located in Smithfield, Cache County, Utah as described in Plaintiff's Complaint and a contract for the sale and purchase of said property between the Plaintiffs and Defendants.

2. Pursuant to negotiations initiated by Defendants, Plaintiffs on or about October 19, 1978, executed that certain Purchase Agreement of even date and admitted into evidence at

trial.

3. Under the contract the sum of \$500.00 was paid to Plaintiffs by Defendants as a down payment and over a period of time an additional \$29,500.00 was paid, leaving an outstanding balance (as of the last payment made in September of 1980) of \$149,500.00. Although the contract requires that a note and trust deed be executed by the Defendant Buyers evidencing and securing the remaining unpaid balance due under the contract, no such note or trust deed was ever executed or delivered to Plaintiffs and consequently no Warranty Deed was executed and delivered to the Defendants conveying the property.

4. The contract further provided that Defendants would pay all subdivision and development costs including real estate taxes after the calendar year 1978. The contract further provided that the Promissory Note was due and payable in full on the first day of September, 1983.

5. Plaintiffs fully performed under the contract except to provide a deed to the property and that had not been provided because Defendants had failed to deliver a note and Trust Deed as required under the contract. In April of 1984, Plaintiffs, Kendrick and Lila McCracken, deeded individually and as Trustees all their interest in the subject real property of this action to Plaintiff Mark Cecil McCracken.

6. On September 1, 1983, the remaining outstanding balance due under the contract was \$149,500.00 which sum has not since been paid by the Defendants. The court having made the following findings of fact makes the following conclusions of law:

1. The contract entered into between the parties on or about October 19, 1978, is binding upon the parties and enforceable.

2. The balance due under the contract as of September 1, 1983, is \$149,500.00.

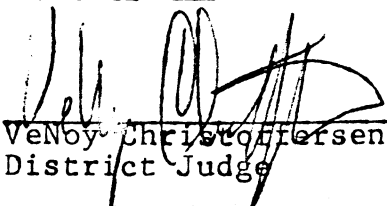
3. Any possible defect in title or the ability of Plaintiff, Mark Cecil McCracken to convey title in a condition as required under the contract, particularly because of defective powers of attorney was cured by the execution, delivery and recording of that certain Special Warranty Deed dated April 23, 1984, from Kendrick and Lila McCracken to Mark Cecil McCracken.

4. Jerry Downs and Gerald Greaves are liable and obligated to execute and deliver a Promissory Note in the principal amount of \$179,500.00 dated October 19, 1978, payable to Mark McCracken and due and payable on the first day of September, 1983, and to execute and deliver a Deed of Trust securing the payment of said note and pledging the subject real property of this action for that purpose and granting a right of deficiency in the event of foreclosure should the sale of the property fail to pay all sums due on or after September 1, 1983.

5. An order of this court should be entered compelling Defendants Jerry Downs and Gerald Greaves to execute a Promissory Note and Deed of Trust in accordance with the provisions of the foregoing conclusion of law, and finding that the balance due

under said note as of September 1, 1983, was \$149,500.00 and that Plaintiffs are entitled to exercise all rights and remedies of foreclosure and collection of deficiency.

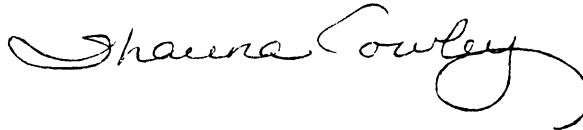
DATED this 12 day of November, 1985.



Venoy Christoffersen
District Judge

CERTIFICATE OF DELIVERY

I do hereby certify that a true and correct copy of the foregoing was hand delivered to George Preston, attorney for Defendant, at 31 Federal Avenue, Logan, Utah this 31st day of October, 1985.



James C. Jenkins
JAMES C. JENKINS & ASSOCIATES
67 East 100 North
P.O. Box 3700
Logan, Utah 84321
Telephone: (801) 752-4107

IN THE DISTRICT COURT, STATE OF UTAH, COUNTY OF CACHE

MARK McCRACKEN, KENDRICK
McCRACKEN, LILA P. McCRACKEN
and DORIS E. McCRACKEN

Plaintiff

JUDGMENT

vs.

JERRY DOWNS and JERALD
GREAVES

Civil No. 22759

Defendant

This matter having come on regularly before the Court after trial and the Court having entered its Findings of Fact and Conclusions of Law, now therefore,

ORDERS, ADJUDGES, and DECREES as follows:

1. Defendant Jerry Downs and Jerald Greaves are hereby ordered to execute forthwith a Note and Deed of Trust in the form and upon the terms set forth in the attached Exhibit "A" and "B" and deliver the same to James C. Jenkins, attorney for Plaintiffs.

2. The remaining outstanding balance due under said Promissory Note as of September 1, 1983, is the sum of \$149,500.00.

3. Plaintiffs are and shall be entitled to exercise and enforce all rights and remedies provided under said Note and Deed of Trust to include rights of foreclosure and recovery of any resulting deficiencies, judicially or non-judicially.

2275

4. Plaintiffs upon delivery of said executed note and Deed of Trust shall cause to be recorded a Warranty Deed conveying the subject property to Defendants and concurrently therewith the Trust Deed pledging said property as security for the payment of said Note. Said Warranty Deed shall be in the form and upon the terms and conditions set forth in the attached Exhibit "C" and incorporated herein by reference.

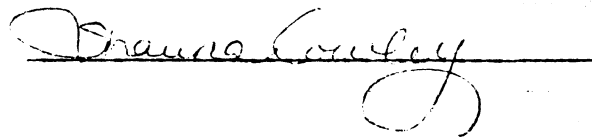
5. In addition to the foregoing Plaintiffs are awarded their costs of Court. The parties shall bear their own attorneys fees and other costs.

DATED this 12 day of November, 1985.


Venby Christoffersen

CERTIFICATE OF DELIVERY

I do hereby certify that a true and correct copy of the foregoing was hand delivered to George Preston at 31 Federal Avenue, Logan, Utah, this 31st day of October, 1985.


Donna Lourey