2001

Trees v. Lewis : Unknown

Utah Supreme Court

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Mr. Geoffrey Butler
332 State Capitol Bldg.
Salt Lake City, Utah 84114

April 21st, 1987

IN RE: Trees v. Lewis, case no. 19333

Dear Mr. Butler:

Pursuant to Rule 27(j), Utah Rules of Appellate Procedure, I submit the following citation of supplemental authorities in reference to the alleged signature requirement of my client Mr. Trees.

At oral argument on the 10th day of February, 1987, Appellant's counsel, Mr. Bell, implied that Trees had not in fact signed Exhibit P15, which both parties stipulated was part of the "option" referred to throughout the trial.

This point was argued in my brief at pages 26-27, but may also be further moot pursuant to the case of Baldwin v. Vantage Corporation, 676 P.2d 413, 417 (Utah 1984). Indeed, perhaps the Appellant Lewis was the only party, who in fact needed to have signed P15 in the first instance. See Williams v. Singleton, 723 P.2d 421, 424 (Utah 1986).

Yours Very Truly,

Michael D. Hughes

MDH/sm
cc
encl.

MAILING CERTIFICATE

I hereby certify that on the 21st day of April, 1987, I did mail a true and correct copy of the above and foregoing letter to Mr. J. Richard Bell, Appellant's counsel, 303 East 2100 South, Salt Lake City, Utah 84115, postage prepaid.

SECRETARY

open container violation; that he was not a prisoner within the scope of § 76–5–102.5 (assault by a prisoner); and that without his admission the State will be unable to prove the corpus delicti of assault by a prisoner. Although the defendant's claims may be meritorious, they are not relevant to the issue of suppression of the statement.

In sum, the district court's suppression of the container is affirmed; the suppression of the defendant's verbal statements is reversed; and the case is remanded for further proceedings.

HALL, C.J., and OAKS, HOWE and DURHAM, JJ., concur.

Carl BALDWIN and Larry Gleim, Plaintiffs and Appellants,

v.

VANTAGE CORPORATION, a Utah corporation, Defendant and Respondent.

No. 18202.

Supreme Court of Utah.

Jan. 18, 1984.

Purchasers brought action against vendor for rescission of contract for sale of seven lots and restitution of all amounts paid under the contract. The Fourth District Court, Utah County, J. Robert Bullock, J., entered judgment for vendor, and purchasers appealed. The Supreme Court, Howe, J., held that: (1) trial court properly exercised discretion in relieving vendor of judicial admission, made in pleading, that agent of vendor had guaranteed availability of construction financing to purchasers, where conduct of both parties throughout remainder of proceedings showed that question was material issue for judge to determine; (2) trial court did not abuse its discretion in disbelieving purchasers' testimony that agent of vendor extended to them guarantee of construction financing, even though agent was able to testify only that he could not remember making such guarantee; (3) trial court distinguished between standard of proof for misrepresentation and standard of proof for fraud, and properly held purchasers to preponderance of evidence standard in attempt to prove misrepresentation; (4) oral contract for sale of land was sufficiently performed to remove contract from statute of frauds; and (5) vendor would not be unjustly enriched by foreclosure sale.

Affirmed.

Stewart, J., dissented.

1. Evidence ⇐265(8)

Admission of a fact in pleading is a judicial admission and is normally conclusive on party making it.

2. Evidence ⇐265(8)

Trial court may relieve party from consequences of a judicial admission.

3. Evidence ⇐265(8)

In action for rescission of contract for sale of land and restitution of amounts paid under the contract, trial court properly relieved defendant vendor from consequences of admission, made in pleading, that its agent guaranteed availability of construction financing to purchasers, since conduct of both parties to remainder of proceeding showed that question of guarantee was a material issue for judge to determine, purchasers did not rely on admission nor were they misled by it, resolution of that issue would weigh heavily in determining outcome of case, and defendants denied existence of guarantee in another part of answer and in deposition.

4. Principal and Agent ⇐190(2)

Trial court did not abuse its discretion in rejecting purchasers' testimony that vendor's agent extended them guarantee of

construction financing, even though agent was able to testify only that he could not remember making such guarantee, where vendor presented testimony that agent did not have authority to make such guarantee and that such guarantees were rarely made, and no evidence was presented that details of alleged guaranteed loan were discussed.

5. Evidence ⇐588

Testimony of witnesses is to be given such weight and credibility as trier of fact may find reasonable under circumstances.

6. Fraud ⇐58(1)

In regard to purchasers' claim for misrepresentation based on alleged guarantee of construction financing by agent of vendor, trial court properly held purchasers to preponderance of evidence standard, not to clear and convincing evidence standard, in their attempt to prove misrepresentation.

7. Frauds, Statute of ⇐129(5)

Part performance of oral contract for sale of seven lots was sufficient to remove contract from statute of frauds, where both parties admitted existence of contract where there was no dispute over material terms except alleged guarantee of construction financing, and where purchasers had made down payment, two interest payments, and fully paid for and received conveyances from defendant to three of seven lots. U.C.A.1953, 25-5-1.

8. Implied and Constructive Contracts ⇐3

Vendor would not be unjustly enriched by foreclosure sale on lots, notwithstanding fact that purchasers had paid ten percent of principal and interest for two years on contract balance, since any amount derived from sale of lots and foreclosure sale over and above amount owing vendor was directed to be paid to purchasers, and purchasers were given six months to redeem lots from foreclosure sale.

Ray M. Harding, Jr., Pleasant Grove, for plaintiffs and appellants.

Edward M. Garrett and Joseph E. Hatch, Salt Lake City, for defendant and respondent.

HOWE, Justice:

Plaintiffs Carl Baldwin and Larry Gleim, partners in the construction business, bring this appeal from an adverse judgment in a suit which they brought for the rescission of a contract and the restitution of all amounts they had paid under it. Defendant Vantage Corporation is a wholly-owned subsidiary of Deseret Federal Savings and Loan Association. Vantage was engaged in the development of Blackhawk Estates in Pleasant Grove, Utah. Doug Boulton was the project manager of Vantage and also a vice-president of Deseret Federal.

In the spring of 1978, plaintiffs met with Boulton and negotiated a contract to purchase seven lots in Plat C of the Blackhawk Estates from Vantage. No written contract was ever presented at trial; however, most of the terms of the sale were undisputed. Plaintiffs paid $8,950 as a 10% down payment on lot numbers 18, 19 and 28 (at $13,500 per lot) and on lot numbers 34, 35, 49 and 58 (at $12,500 per lot). The interest rate was 11% per annum for the first year after electrical power was made available to the lots and 13% per annum thereafter. No duration of the contract was set; however, it can be assumed that it was short-term given its high interest rate and considering Vantage's objectives for entering into the sale. In addition, Vantage agreed to subordinate its interest in the lots so that plaintiffs could secure construction financing, provided that such financing came from Deseret Federal. There was likewise no dispute that plaintiffs made interest payments of $4,278.59 and $2,990.32 and sold three of the seven undeveloped lots to third parties in 1979.

In the spring of 1980, plaintiffs sought a construction loan from Deseret Federal to build "spec homes" on two of the remaining four lots. Deseret Federal denied the request for a loan pursuant to its policy, then in force, to lend no money for building speculation; that is, building homes to put

on the market as opposed to building homes for particular buyers. When they could not obtain construction funds elsewhere, plaintiffs sought to rescind the contract to purchase the lots and to recover the amounts they had paid in principal and interest. Defendants counterclaimed to foreclose plaintiffs' interest in the four lots.

At trial, both plaintiffs testified that during the 1978 negotiations Boulton "guaranteed" that construction financing would be available from Deseret Federal when they were ready to build. Boulton, who admitted that only he and the plaintiffs were present, could not remember making any guarantee. He stated further that he neither had authority to bind Deseret Federal to grant a loan in the future nor to process real property loans. In addition, there was evidence that guaranteeing the availability of future loans was not a normal practice of officers of either Vantage or Deseret Federal.

The trial court found that plaintiffs failed to prove that defendant's agent Boulton made a guarantee as to the availability of construction financing. It then concluded that the statute of frauds, U.C.A., 1953, § 25–5–1, could not be used by the plaintiffs as a basis for rescission because there was either sufficient memoranda or part performance to take the contract out of the statute. Rescission was denied plaintiffs and foreclosure was granted to the defendant.

[1–3] Plaintiffs first contend that the trial court erred in finding that no guarantee existed because defendant had admitted the guarantee in its answer to the plaintiffs' complaint. Therefore, plaintiffs argue, the existence of the guarantee should stand as a stipulated fact. An admission of fact in a pleading is a judicial admission and is normally conclusive on the party making it. *Yates v. Large*, 284 Or. 217, 585 P.2d 697 (1978). See also *Paul Schoonover, Inc. v. Ram Construction, Inc.*, 129 Ariz. 204, 630 P.2d 27 (1981). However, this rule is not absolute. The trial court may relieve a party from the consequences of a judicial admission. See 9 Wigmore on Evidence (1981), § 2590. See also McCormick on Evidence, 2nd Ed. 1972, § 265. In the instant case, the defendant admitted the guarantee in answering the plaintiffs' first cause of action. However, in answering the plaintiffs' fourth cause of action, which was based on fraud, the defendant denied that it had represented that it would guarantee financing. Thus the defendant's answer was contradictory. Further, subsequent to the filing of the defendant's answer, the plaintiffs propounded interrogatories to the defendant, one of which inquired whether the defendant ever stated that it would guarantee construction loans on the lots. Defendant answered this interrogatory with an unequivocal "No." At the pretrial hearing, counsel for the defendant stated that his client had made no promise to make construction loans. Counsel for the plaintiffs made no response to that statement, but indicated that "it will be a factual issue." At the trial, both parties presented testimony regarding the guarantee as though it had not been admitted in the pleadings. It was clear that the resolution of this issue would weigh heavily in determining the outcome of the case. Defendant tried to establish that Boulton did not make the guarantee and that such procedure was uncommon among its personnel. Plaintiffs, with equal vigor, adduced testimony both to establish the guarantee's existence and to show its importance in their determination to make the purchase. It was not until counsel for the plaintiffs was making his final argument to the judge after the close of the evidence that he pointed out the admission in the defendant's answer. Under these facts it is clear that while defendant may have negligently admitted its existence in answering the complaint, the conduct of both parties throughout the remainder of the proceeding showed that this question was a material issue for the judge to determine. Plaintiffs did not rely on the admission nor were they misled by it. There is authority that an admission may be waived where the parties treat the admitted fact as an issue. *In Re Withing-*

ton's Estate, 99 Cal.App. 617, 279 P. 196 (1929); 71 C.J.S. § 161, pg. 335. Therefore, we decline to interfere with the trial court's discretion in not holding defendant to its admission in its answer.

Plaintiffs further contend that the trial court abused its discretion by arbitrarily finding that no guarantee had been made; that the uncontradicted testimony of the plaintiffs established its making, and Boulton did not testify that he did not make a guarantee but only that he "could not remember" making a guarantee. Plaintiffs rely upon *McClellan v. David*, 84 Nev. 283, 439 P.2d 673 (1968), where the Nevada Supreme Court found an abuse of discretion by the trial court in setting aside a default judgment. There, a secretary in the office of the plaintiff's attorney testified with exactness that she had conversed three times with the defendant by telephone soon after he had been served with summons about the necessity of his filing an answer to the complaint. Her recollection of the conversations was refreshed from written notes made by her at the time. The defendant did not deny the conversations, but simply testified that he did not recall them. The trial court relieved the defendant of his default, but that ruling was reversed on appeal. After the court held that there was no fundamental conflict in the testimony requiring it to adhere to the trial court's finding in favor of the defendant, the court said:

> Testimony of a witness that he does not remember whether a certain event took place does not contradict positive testimony that such event or conversation took place. *Bender v. Roundup Mining Co.*, 138 Mont. 306, 356 P.2d 469, 471 (1960); *Tennent v. Leary*, 81 Ariz. 243, 304 P.2d 384, 387 (1956). See also: Comment Note—Comparative value of positive and negative testimony. 98 A.L.R. 161. Therefore, we hold that there was no credible evidence before the lower court to show that the neglect of [the defendant] was excusable under the circumstances.

We have no quarrel with the rule nor with its application to the facts of that case. However, in *Bender v. Roundup Mining Co.*, supra, one of the cases cited by the Nevada court in support of the rule, the court there recognized that even though a witness's testimony is not directly controverted by other verbal testimony, the credibility of the witness and the weight to be given his testimony are questions to be determined by the trial court. In the McClellan case, there was no doubt cast upon the credibility of the secretary's testimony since she had made written notes of her conversations with the defendant (which conversations the defendant could not remember). In the *Bender* case, however, the court upheld the trial court, which chose to disbelieve the testimony of an injured miner and his wife that the miner had reported an accident to an employee in the mining company's office. The employee testified that he had no recollection of any such report being made to him by the miner and that if he had made such a report he would have referred him to his foreman and that he had no recollection of doing that. Other factors which cast doubt upon the credibility of the miner's testimony were that he did not complain to his foreman or anyone else in the mine on the night the alleged accident happened; although he was absent from work for a brief period, neither the foreman's absentee report nor the miner's physician's report indicated that he had reported the suffering of any accidental injury. In view of these and other factors which reflected doubt on the plaintiff's testimony, the Montana court held that the Industrial Accident Board and the trial court were not compelled to believe the plaintiff's testimony that he had sustained an accident and had reported it to his employer as he claimed.

[4, 5] We likewise find in the instant case that the trial court was not compelled to believe the plaintiffs' testimony that Boulton extended to them a guarantee of construction financing even though Boulton was only able to testify that he could not remember making such a guarantee.

Defendant presented testimony that Boulton had no authority to make a guarantee of a loan, and guarantees were rarely made by officials of Deseret Federal or Vantage. Details of the loan, such as the maximum or minimum amounts, qualifications, interest rates, payback schedules or even the length of this loan, were not discussed. Under these circumstances the trial court may well have doubted the credibility of the plaintiffs' testimony. We believe that this case is controlled by the general rule that the testimony of witnesses is to be given such weight and credibility as the trier of fact may find reasonable under the circumstances. *Guinand v. Walton*, 25 Utah 2d, 253, 480 P.2d 137 (1971). Considering all the evidence in a light most favorable to the successful party and indulging in all reasonable inferences to be drawn therefrom in support of the judgment, we find no arbitrariness on the part of the trial court in rejecting the plaintiffs' testimony.

[6] Plaintiffs further assert that one of their claims against the defendant was based on misrepresentation which they had the burden of proving only by a preponderance of the evidence. They complain that the trial court held them instead to proving all of the elements of a cause of action for fraud by clear and convincing evidence. Assuming for the purposes of this case that the plaintiffs are correct in their assumption that proof of misrepresentation and proof of fraud require different standards of proof, we find no error. The trial court in its findings of fact found that "plaintiffs did not sustain the burden of proof that any ... guarantee was made to them." The court did not there specify what degree of proof it was imposing on the plaintiffs. However, the court remarked from the bench at the conclusion of the trial that "it cannot find by a preponderance of the evidence the agreement to provide construction financing." We interpret this finding of fact and statement from the bench to mean that the court did not believe that any such representation was ever made by the defendant. Furthermore, both in a subsequent finding of fact and in other remarks from the bench, the trial court stated that clear and convincing proof was required to prove fraud and that the plaintiffs had failed to sustain that burden. Thus the record indicates that the trial court distinguished between the two standards of proof and held the plaintiffs only to the preponderance standard in their attempt to prove misrepresentation.

Since no guarantee of construction financing was found, the plaintiffs' performance on the contract was not conditional. Therefore, their failure to make payments as required by the contract constituted a breach. Plaintiffs contend, however, that because the contract was oral it came within the statute of frauds, U.C.A., 1953, § 25–5–1, and was unenforceable. Being unenforceable, the plaintiffs argue, they are entitled to rescind the contract and recover their payments made thereunder.

[7] We need not here decide whether a buyer of real estate may use the statute of frauds to effect a rescission and recover his payments. Plaintiffs concede that would be an uncommon use of the statute since generally the statute is relied upon by a vendor to bar a purchaser from enforcing an oral contract. Assuming for the purposes of this case that a buyer has such a remedy, it clearly was not available to the plaintiffs in this case since there had been part performance of the contract, thereby removing it from the statute of frauds, § 25–5–8. Both parties admitted the existence of the contract and had no dispute over its material terms except for the guarantee. The plaintiffs had made a down payment and two interest payments and had fully paid for and received conveyances from the defendant to three of the seven lots. This part performance was sufficient to remove the contract from the statute of frauds under these circumstances where the existence of the contract was admitted. *Martin v. Scholl*, Utah, Case No. 17542, filed November 14, 1983. We find no merit in plaintiffs' assertion that there were really seven separate contracts for the purchase of the lots and any part performance

related only to the contracts on the three lots the plaintiffs paid for and for which they received conveyances. The trial court found against this contention, and we sustain that finding. See *Sears v. Riemersma*, Utah, 655 P.2d 1105 (1982).

[8] Plaintiffs lastly complain that they had paid ten percent of the principal and two years' interest on the contract balance, and they will lose those amounts in the foreclosure by the defendant. They charge the defendant will thereby be unjustly enriched at their expense. We disagree. By foreclosure, the defendant cannot receive more than what the plaintiffs promised to pay in the contract, an amount not disputed by the plaintiffs. Any amount derived from the sale of the lots at foreclosure sale over and above the amount owing to the defendant was directed to be paid to the plaintiffs. In addition, plaintiffs were given six months to redeem the lots from the foreclosure sale. Under these circumstances there is no element of unjust enrichment present.

The judgment is affirmed. Costs are awarded to defendant.

HALL, C.J., and OAKS and DURHAM, JJ., concur.

STEWART, J., dissents.

phernalia), together with the two twenties and a ten in Darla Espinoza's apron, the previous sale to the confidential informant, and Darla Espinoza's statements when the police searched the house all support defendants' convictions.

EXPERT WITNESS

[2] Defendants claims that the trial court erred in allowing Officer Olsen to give his opinion on whether defendants possessed the drug paraphernalia and the four and one-half ounces of marijuana with the intent to distribute the marijuana for value. The record reflects, however, that the court did not permit the officer to give his opinion regarding defendants' purpose in possessing the marijuana. Qualification of a person as an expert witness under the Utah Rules of Evidence, Rule 702, is in the discretion of the trial court. *State v. Locke*, 688 P.2d 464 (Utah 1984); *see State v. Clayton*, 646 P.2d 723 (Utah 1982) (decided under the now superseded Utah Rules of Evidence, Rule 56). We find no abuse of discretion in the court's allowing the officer to testify as an expert. Officer Olsen had been involved in the drug culture as a user and a seller for four or five years prior to becoming a police officer. He had worked for several years as an investigator and demonstrated to the court his knowledge of the current drug culture before the court qualified him as an expert.

SEARCH WARRANT

[3] Defendants attack the search warrant on the ground that it was issued in violation of the *Aguilar-Spinelli* two-pronged standard. *See Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). We abandoned the *Aguilar-Spinelli* test in *State v. Anderson*, 701 P.2d 1099 (Utah 1985), and followed the United States Supreme Court's more recent decisions in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), and *Massachusetts v. Upton*, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984). The new standard looks at the totality of the circumstances and holds that the affidavit should be viewed in its entirety and in a common sense fashion. Under the *Anderson* standard, the affidavit was sufficient. The officer had recently received information from two confidential informants who were in a position to have information about drug trafficking in the community. One of the informants had previously given the officer reliable information. The officer's investigation had also revealed that defendants had returned from a drug run to Colorado and were receiving an abnormal number of guests into their residence who were staying but a few minutes. Finally, one of the confidential informants purchased approximately one-quarter of an ounce of suspected marijuana from defendants on the day the warrant was issued. Viewed in its entirety and in a common sense fashion, the affidavit set out sufficient facts to support the reliability and credibility of the informants relied upon by the officer as well as the conclusions of the officer.

Defendants' convictions are affirmed.

HALL, C.J., and DURHAM and ZIMMERMAN, JJ., concur.

STEWART, J., concurs in the result.

Samuel M. WILLIAMS and Shelley Thomas Williams, Plaintiffs and Appellants,

v.

Clarie SINGLETON; C.A., Inc., a Utah corporation, dba, C.A. Limited; Americap Realty, Inc., a Utah corporation; and Robert L. Monson, Defendants and Respondents.

No. 20041.

Supreme Court of Utah.

Aug. 5, 1986.

Co-owners of property held in joint tenancy brought action against persons who

offered to buy property who later decided not to purchase property. The Third District Court, Salt Lake County, Kenneth Rigtrup, J., found no binding agreement had been reached between parties under earnest money receipt and offer to purchase and thus offerors were entitled to return of their earnest money deposit. Owners appealed. The Supreme Court, held that: (1) joint tenant did not have authority to accept on cotenant's behalf or as her agent without written authority first obtained; (2) offer to purchase when accepted created interest in real estate within statute of frauds; and (3) offer to purchase failed to ripen into contract to when cotenant did not ratify in writing joint tenant's acceptance within one-day period contemplated by offeror, thus entitling offerors to return of earnest money deposit.

Affirmed.

1. Husband and Wife ⇐14.10

Husband could not bind his wife, who was joint tenant of property, by contract he made with agent regarding common property; thus agent could not accept on wife's behalf or as her agent without written authority first obtained.

2. Frauds, Statute of ⇐74(1)

An offer to purchase when accepted creates an interest in real estate and is within statute of frauds. U.C.A.1953, 25–5–3.

3. Frauds, Statute of ⇐115(4)

Language requiring that every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation had to be subscribed by party to be charged therewith did not apply to real estate transactions between parties, as it dealt instead with claims for commissions by agents or brokers. U.C.A.1953, 25–5–1, 25–5–3, 25–5–4(5).

4. Joint Tenancy ⇐13

Offer to purchase property owned in joint tenancy never ripened into contract where joint tenant failed to ratify in writing cotenant's acceptance of offer within one-day period contemplated by offer; thus, offerors were entitled to return of earnest money deposit.

Cary D. Jones, John T. Anderson, Salt Lake City, for plaintiffs and appellants.

Ronald L. Poulton, David R. Blaisdell, Salt Lake City, for C.A. Limited and Singleton.

Gregory B. Wall, Salt Lake City, for Monson and Americap Realty, Inc.

PER CURIAM:

Plaintiffs appeal from a summary judgment in favor of defendants. The trial court found that no binding agreement had been reached between the parties under an earnest money receipt and offer to purchase (the contract) and that defendants were entitled to the return of their earnest money deposit. We affirm.

On appeal from a summary judgment, we review the evidence in a light most favorable to the losing party. *Geneva Pipe Co. v. S & H Insurance Co.*, 714 P.2d 648 (Utah 1986). Summary judgment is proper if the movant is entitled to it as a matter of law on the undisputed facts. Utah R.Civ.P. 56(c); *Bushnell Real Estate, Inc. v. Nielson*, 672 P.2d 746 (Utah 1983). The controlling facts are as follows:

On August 16, 1983, defendants offered to purchase from plaintiffs property owned by plaintiffs in joint tenancy. The offer was accompanied by a $5,000 earnest money deposit and required plaintiffs to accept within one day. Jodie Bennion, the real estate agent for plaintiffs, contacted them in California on August 17 and informed them of the terms and conditions of the offer. In response, Bennion received a telegram worded as follows:

> I, Sam Williams, hereby authorize Jodie Bennion of Gump & Ayers Real Estate to accept an offer to sell my home located at 1040 East 1st Avenue Salt Lake City $205,000 all of the terms acceptable.
>
> (Signed) Samuel M. Williams.

Bennion then accepted the offer by signing "Sam Williams by Jodie Bennion agent telegram attached." Defendants decided not to purchase the property, and plaintiffs demanded that defendants' earnest money deposit be forfeited to plaintiffs. Defendants refused, and this suit followed. In opposition to the motion for summary judgment by defendants, plaintiff Shelley Williams stated by affidavit that she had instructed her husband to accept the offer on her behalf and that Bennion had likewise been informed of her willingness to sell. The trial court ruled that Bennion had accepted the offer on behalf of Sam Williams only and that without Shelley Williams' signature on the contract the accepted offer was unenforceable under the statute of frauds. The court also held that Bennion had no authority to accept the offer on plaintiffs' behalf as plaintiffs did not give her a written power of attorney to so act. Plaintiffs assign both those rulings as errors. Inasmuch as we hold that Shelley Williams' failure to sign, either personally or through her agent, rendered the contract unenforceable, we do not reach the merits of the second issue.

Section 25–5–1 of our statute of frauds controls the creation of estates or interests in real property:

> No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing *subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.*

(Emphasis added.) Similar requirements govern contracts for leases and sales of lands. Section 25–5–3 provides:

> Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing *subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.*

(Emphasis added.)

[1] A contract made by telegraph is deemed written under section 25–5–7, and an agent may sign for his or her principal, section 25–5–9, so long as the authority is given in writing. *Bradshaw v. McBride,* 649 P.2d 74 (Utah 1982). Bennion received her written authority from Sam Williams by telegram and accepted the offer as his agent with the telegram attached. Consequently, Sam Williams properly accepted the offer of defendants within the time required by defendants. However, Sam Williams was a joint tenant with Shelley Williams and could not have accepted on her behalf or as her agent without written authority first obtained. There is no husband-wife exception to the statute of frauds. *Holmgren Bros., Inc. v. Ballard,* 534 P.2d 611 (Utah 1975); *Coombs v. Ouzounian,* 24 Utah 2d 39, 465 P.2d 356 (1970). One joint tenant or tenant in common cannot bind his cotenant by a contract which he may make relating to the common property. *Carbine v. Meyer,* 126 Cal.App.2d 386, 272 P.2d 849 (1954).

Plaintiffs advance several arguments in urging us to recognize Sam Williams' acceptance on behalf of both plaintiffs as enforceable against defendants. They claim that Shelley Williams expressly authorized her husband and later expressly ratified that authorization to sell by approving and consenting to the filing of their complaint against defendants. They also claim that only the signature of the party to be charged is required on a contract and that the parties to be charged in this case were defendants. They conclude that in any event the offer here does not purport to create, grant, assign, or surrender an interest in real property and is therefore not a "conveyance" embraced by the statute of frauds.

[2] Contrary to plaintiffs' argument, an offer to purchase when accepted creates an interest in real estate and is within the

statute of frauds. U.C.A., 1953, § 25–5–3, *supra; Coombs v. Ouzounian, supra; Knight v. Chamberlain*, 6 Utah 2d 394, 315 P.2d 273 (1957).

[3] Plaintiffs' reliance on statutory language that "the party to be charged" in this case should be defendants is misplaced. That language does not appear in the sections pertinent to their situation. Section 25–5–3 specifically requires that the contract be "in writing subscribed by the party by whom the sale is to be made." Certainly this section governing land contracts, as well as section 25–5–1 governing conveyances by deed, mandates expressly that a document to be enforceable under the statute of frauds must be subscribed by the party granting the conveyance. *Le-Vine v. Whitehouse*, 37 Utah 260, 109 P. 2 (1910). The provision in section 25–5–4(5) that "[e]very agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation" must be subscribed by the party to be *charged therewith* is inapplicable. It was designed to protect owners of land from fraudulent and fictitious claims for commissions, *Fowler v. Taylor*, 554 P.2d 205 (Utah 1976), and has no bearing on real estate transactions between parties.

Finally, plaintiffs may not use their joint complaint against defendants as a written ratification by Shelley of Sam's acceptance. An offeror may restrict the manner of acceptance, provided his or her intention to do so is clearly expressed. *Cochran v. Connell*, 53 Or.App. 933, 632 P.2d 1385 (1981), *citing* 1 Corbin on Contracts § 88, 373–74 (1963). At the time the offeror makes the offer, he or she has full control of its terms and may specify the time within which acceptance is limited. *McKibben v. Mohawk Oil Co., Ltd.*, 667 P.2d 1223 (Alaska 1983). Defendants' offer read in pertinent part:

> This payment is received and offer is made subject to the written acceptance of the seller endorsed hereon within *one* days from the date hereof and unless so approved, the return of the money herein receipted shall cancel this offer without damages to the undersigned agent.

Shelley did not join or ratify in writing her husband's acceptance within the one-day period. Where an offer has expired by lapse of time, an attempt to accept is ineffectual to create a contract. *Morrison v. Rayen Investment, Inc.*, 97 Nev. 58, 624 P.2d 11 (1981). As a corollary, an attempt to ratify after the offer has expired by lapse of time is equally ineffectual to revive the contract. The open-ended ratification urged by plaintiffs would play havoc with the laws of offer and acceptance and allow joint tenants to effectively withhold their joint contractual commitment while bargaining individually until the most attractive offer was made, all the while holding several offerors to their commitments. In *Burg v. Betty Gay of Washington, Inc.*, 423 Pa. 485, 225 A.2d 85 (1966), a similar claim of ratification was rejected by the Supreme Court of Pennsylvania. The lessor there claimed to have ratified the signing of a lease by his agent by instituting suit on the lease agreement. The tenant under the purported lease had disavowed any obligation under the lease and had never taken possession or paid rent to the lessor. Said the court in affirming the judgment against the lessor:

> If ratification is relied upon in order to establish the authority of the agent, it must be in writing and executed prior to any effective renunciation by the lessee of the lease agreement. Otherwise, the defense of statute of frauds will be available only to the lessor, which result would be totally inconsistent with the requirement of mutuality of obligation of contracts and with the settled policy that either party may raise the defense of the statute of frauds.

Id. 225 A.2d at 86 (citation omitted).

[4] A similar result is dictated here. Under the concept of mutuality of obligation, defendants could not have prevailed in enforcing a sale by plaintiffs, had Shelley's failure to join in the acceptance within one day been the result of her refusal to sell. *Coombs v. Ouzounian, supra;*

'randsen v. Gerstner, 26 Utah 2d 180, 487 .2d 697 (1971); *Lee v. Polyhrones*, 57 tah 401, 195 P. 201 (1921). Defendants ffered to purchase the joint interest of laintiffs, and Sam negotiated for the sale f the joint interest. When Shelley did not atify in writing Sam's acceptance within ie one-day period contemplated by the of-er, the offer never ripened into a contract, nd defendants were entitled to have the arnest money deposit returned to them. ee *Walk v. Miller*, 650 P.2d 1286 (Colo. pp.1981).

Affirmed.

RANSAMERICA CASH RESERVE, INC., a Maryland Corporation, and First National Bank of Boston, Plaintiffs,

v.

arrell G. HAFEN; Transworld Securities, S.A., a Corporation, Does 1 through 100 inclusive; and Dixie Power and Water, Inc., Defendants.

No. 20450.

Supreme Court of Utah.

Aug. 5, 1986.

Summary judgment was awarded in vor of plaintiffs in the Fifth District ›urt, Washington County, J. Harlan ırns, J., and defendants appealed. The ıpreme Court held that: (1) one defend-t's objections to unsigned findings and clusions of law in support of summary ent were abortive, and thus, subse-ler striking unsigned findings was to dispose of defendant's motion nmary judgment, and (2) one ›tion to amend summary be resolved before any appeal could be taken from summary judgment.

Appeals dismissed; case remanded.

1. Appeal and Error ⇐428(2)

Notice of appeal filed before disposition of proper postjudgment motion is ineffective to confer jurisdiction upon Supreme Court. Rules App.Proc., Rule 4(b).

2. Appeal and Error ⇐344

Finality of judgment is suspended upon timely filing of postjudgment motion, and time for appeal does not commence until final disposition of such motion. Rules App.Proc., Rule 4(b).

3. Judgment ⇐189, 325

Defendant's objections to unsigned findings and conclusions of law in support of summary judgment were abortive, and thus, subsequent order striking unsigned findings was ineffective to dispose of defendant's motion to amend summary judgment. Rules Civ.Proc., Rule 52(a); Rules App.Proc., Rule 4(a, b).

4. Appeal and Error ⇐346(2)

Defendant's motion to amend summary judgment had to be resolved before any appeal could be taken from summary judgment. Rules Civ.Proc., Rule 52(a); Rules App.Proc., Rule 4(a, b).

5. Appeal and Error ⇐78(1), 345(1)

Untimely motion for "reconsideration" had no effect upon either finality of summary judgment or running of time for any appeal. Rules Civ.Proc., Rule 52(a); Rules App.Proc., Rule 4(a, b).

Scott A. Gubler, St. George, for plaintiffs.

John L. Miles, MacArthur Wright, St. George, Darrell G. Hafen, Upland, Cal., for defendants.

PER CURIAM:

Defendants separately appeal a summary judgment award of $93,400 against them and in favor of plaintiffs. In the absence