1980

P. James Coleman v. R. Earl Dillman : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

P. JAMES COLEMAN, Appellant,	:	
vs.	:	Case No. 16666, 16926
R. EARL DILLMAN, Respondent.	:	

BRIEF OF RESPONDENT

CONSOLIDATED APPEALS OF TWO JUDGMENTS ENTERED BY THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE DAVID K. WINDER, JUDGE, AND THE HONORABLE JAY E. BANKS, JUDGE

M. David Eckersley
BLACK & MOORE
500 Ten West Broadway Building
Salt Lake City, Utah 84101

Attorney for Respondent

Richard J. Leedy
610 East South Temple
Salt Lake City, Utah 84102

Attorney for Appellant

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BLACK & MOORE
500 Ten West Broadway Building
Salt Lake City, Utah 84101

Attorney for Respondent

Richard J. Leedy
610 East South Temple
Salt Lake City, Utah 84102

Attorney for Appellant

TABLE OF CONTENTS

CASES CITED

STATUTE CITED

OTHER AUTHORITIES CITED

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STATEMENT OF THE NATURE OF THE CASE AND DISPOSITION BELOW

P. James Coleman is appealling from two adverse judgments rendered by the Third District Court in separate actions. In case number 16666, after trial to the bench, Judge David K. Winder entered a judgment denying Coleman specific performance of an alleged oral contract for the sale of land. In case number 16926, after submission of the matter on stipulated facts, Judge Jay E. Banks entered judgment granting R. Earl Dillman damages and possession of certain real property on his Complaint against Coleman for unlawful detainer.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have both judgments entered below affirmed by this Court.

STATEMENT OF FACTS

The factual contentions of the parties in case number 16 are entirely at odds and appellant's statement of the facts, while accurately representing his contentions at trial, fail to acknowledge the evidence upon which the judgment in that action was based and require supplementation as follows:

P. James Coleman moved into a home owned by R. Earl Dill in late January of 1975. While Coleman testified that he mov in after reaching an oral agreement to purchase the property for $36,000.00, to be paid in monthly installments of $303.29 at 8 1/2 or 9 percent interest, Dillman testified that he mer agreed to rent Coleman the property while he was attempting to sell it if Coleman would make payments of $303.29 per month. (R. 110) The rental payment was the same as the previous tenant had been paying and was equal to the amount Dillman paid monthly on a Deed of Trust to First Security Bank covering the property. (R. 108)

At the time Coleman moved in the home was listed for sal through a realtor for $45,000.00 and was being advertised for sale during the first three months of Coleman's occupancy. (R. 157) Coleman and his co-tenant, however, kept removing t "for sale" signs from the property. (R. 105, 158)

Coleman was deliquent in making his monthly payment from the inception of his occupancy and his payments, when offered, were frequently made with checks drawn on insufficient funds. (R. 111, exhibit P-2) Whe he did make payments he was issued

receipts with the notation of "rent" in them (exhibits P-3,4,5) which he acknowledged he altered prior to trial to eliminate the reference to rent. (R. 42)

While there was dispute regarding what was paid, both parties acknowledged that in November of 1976 a note was signed by Coleman in favor of Dillman which acknowledged that as of 11/7/76 $3,633.00 "rent" was due (R. 116-17, 173), though Coleman at some time before trial corssed out the word "rent" on the document. (R. 174) After December of 1976, Coleman ceased making any monthly payments. (R. 20, 30-32, 62-63) Dillman repeatedly requested rent payments (R. 112, 113, 121, 158, exhibit D-20), but Coleman put him off with representations that he would be inhereting a large sum of cash in the near future from which accounts could be settled. (R. 113)

Finally, on June 5, 1978, Mr. Dillman had Mr. Coleman served with a formal notice to pay rent due or quit the premises. (R. 27) Coleman responded by filing an action for specific performance two days later (R. 2-3), which is the basis of case number 16666, and Mr. Dillman filed a Complaint for unlawful detainer (R. 4) before being served with Coleman's Complaint. The two actions were consolidated for trial purposes but were severed again when the Court ruled that one (16666) was not triable to a jury and the other (16926) was. Case 16666 proceeded to trial on August 8, 1979, with a judgment being rendered against Coleman. On January 24, 1980 case 16926 came up for jury trial but the parties stipulated to the facts, based largely on the Court's earlier decision that no enforceable

contract existed between the parties, and a judgment awarding damages and possession of the property was rendered for Mr. Dillman. (R. 42)

As the appellant only raises issues concerned with the t of case 16666, this brief will be confined to discussion of that action.

ARGUMENT

POINT I

THE COURT BELOW PROPERLY DENIED APPELLANT'S REQUEST FOR A JURY TRIAL IN HIS ACTION FOR SPECIFIC PERFORMANCE.

It is settled law in this jurisdiction that an action se specific performance of an alleged oral contract for the sale of any interest in real property, based upon a claim of part performance of the contract, is purely equitable in nature an that no cause of action at law is even stated by a Complaint which seeks money damages for the alleged breach of such an oral contract. In Baugh v. Darley, 112 Utah 1, 184 P.2d 335 (1947), this Court stated unequivocally that the doctrine whe by part performance of an oral agreement for the sale of land might operate to avoid the affect of the statute of frauds was solely a creation of equity and had no application in an action at law.

> The basis of the doctrine originally was that equity would not permit the statute to be used as an instrument for the perpetration of a fraud. The doctrine is now firmly established

> in the rules of equity jurisprudence of both England and most of our states. It is almost equally well established that the doctrine is purely equitable in nature, and has no place in an action at law.

184 P.2d at 337.

It is equally well established that a party to an action which is primarily equitable in nature has no right to trial of that case before a jury, and that the trial court is vested with broad discretion in making the determination of whether or not an action is equitable or legal. In Sweeney v. Happy Valley, Inc., 18 Utah 2d 113, 417 P.2d 126 (1966), this Court upheld the trial court's denial of a jury trial in a case involving mixed issues of law and equity by noting that

> In circumstances where doubt exists as to whether the cause should be regarded as one in equity, or one in law wherein the party can insist on a jury as a matter of right, the trial court should have some latitude of discretion. In making that determination it is not bound by the ostensible form of the action, nor by the particular wording of the pleadings. It may examine into the nature of the rights asserted and the remedies sought in the light of the facts of the case to ascertain which predominates; and from that determination make the appropriate order as to a jury of non-jury trial. The fact that the division of court hearing the pre-trial indicates that the case is set for a trial by jury is entitled to some consideration and should not be countermanded without good reason. Nevertheless it is the prerogative of the judge who actually tries the case to make the determination. Unless it is shown that the ruling was patently in error or an abuse of discretion, this court will not interfere with the ruling thereon.

18 Utah 2d at 117. See also, Norback v. Board of Directors of

Church Extension Society, 84 Utah 506, 37 P.2d 339 (1934). In the instant case, where the complaint seeks specific performance, there is no question that the primary thrust of the action is equitable and that no right to jury trial attaches. This Court has previously held that there is no right to jury trial in an action for specific performance on a real estate contract. Bradshaw v. Kershaw, 529 P.2d 803 (Utah 1974). This decision is in accord with those rendered in all jurisdictions which have considered the question. See, e.g., Setz v. Dellacroce, 169 Colo. 212, 454 P.2d 804 (1969); Mountain View Corp. v. Horne, 74 N.M. 541, 395 P.2d 676 (1964); Phillips v. Johnson, 266 Or. 544, 514 P.2d 1337 (1973); Goodson v. Smith, 69 Wyo. 439, 243 P.2d 163, rehearing denied 69 Wyo. 439, 244 P.2d 805 (1952).

The only authority cited by the appellant for the contention that the denial of a jury trial was error is Willard M. Milne Investment Co. v. Cox, 580 P.2d 607 (Utah 1978), which case is wholly inapposite here. That case was tried to a jury without objection by either party even though, as an equity case, the jury was not a matter of right. This Court merely noted that, under Rule 39(c) of the Utah Rules of Civil Procedure, a case in which trial by jury doesn't exist as a matter of right but which is tried to a jury by mutual consent should be governed by the same rules applicable to jury trials generally. In this action the respondent filed a specific objection to the jury setting (R. 44) and the Cox decision has no bearing to the issues presented herein.

The clear law of this jurisdiction, and that of all others employing similar rules of procedure, is that no right of trial by jury exists in an action for specific performance and the court below did not err in so ruling.

POINT II

THE EVIDENCE PRESENTED BY THE APPELLANT WAS NOT SUFFICIENT TO SUPPORT A DECREE OF SPECIFIC PERFORMANCE.

In the Findings in case number 16666, the District Court noted that it was not necessary to even reach the question of whether or not there was an oral contract for the purchase and sale of the subject property because the evidence presented by the appellant failed to demonstrate sufficient performance on his part to raise any equities in his favor even if there was a contract as he alleged. This finding is wholly supported by the evidence and should not be disturbed on appeal.

It is undisputed that Mr. Coleman had no written agreement signed by Mr. Dillman sufficient to satisfy the relevant requirements of Utah's Statute of Frauds, Utah Code Ann. §35-5-3 (1953), which provides that:

> 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 same 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)

Coleman asserted, however, that his part performance of the alleged contract was sufficient to allow for an equitable

decree of specific performance. To evaluate this claim in light of the evidence presented at trial it is important to bear in mind the purpose of this equitable exception to the operation of the statute of frauds and the quality and quantity of proof required of the party urging it.

It has long been recognized that the part performance doctrine was created by equity to prevent a seller from usin the statute of frauds to invalidate agreements under which t purchaser had taken substantial steps to carry out his porti of the contract and materially changed his position in relia upon the clearly established terms of such agreement. The purpose of the doctrine is to prevent the statute from being used as a tool to defraud an unwary purchaser. However, it has also been historically acknowledged that this equitable doctrine will no provide the basis for relief in cases where the purchaser's efforts and expenditures on the subject prop do not at least equal the value he has recieved from possess and use of such property and operation of the statute does not work any hardship upon him.

In Hargreaves v. Burton, 59 Utah 575, 206 P. 262 (1922), this Court considered a case wherein the alleged contract purchaser had held possession of the property for four years during which time he had made monthly payments and some mino improvements on the land. The Court, in reversing a decree of specific performance, noted that the total of the buyer's

alleged payments and improvements did not equal the undisputed rental value of the property during his period of possession and held, therefore, that there was an insufficient equitable basis to support an order of specific performance.

> In view of this feature of the case, it cannot be successfully contended that plaintiff's reliance on the statute of frauds as a bar in the instant case operates as a fraud against the defendant. He has to all appearances been the gainer in the transaction instead of a loser, even if a decree had been entered in favor of the plaintiff.

59 Utah at 585.

This formulation of the requirements for specific performance is in accord with Utah's first major decision concerning the part performance doctrine, Price v. Lloyd, 31 Utah 86, 86 P. 767 (1906), wherein the Court held that the acts of part performance, if not at least the equivalent the value received by possession of the property, would not provide a basis for specific enforcement of an oral agreement.

> [I]t must appear that the improvements, relied upon as part performance are of a character permanently beneficial to the land and involving a sacrifice to him who made them because and in reliance of the [contract]. If he has gained more by the possession and use of the land than he has lost by his improvements, or if he has been fully compensated for the improvements, they will not be available to him as a ground for specific performance.

31 Utah at 99.

It was precisely this logic upon which the trial court relied in denying Mr. Coleman's claim for specific performance without even having to reach the question of the existence of a

contract. Because, as the Court found, the sum of all payme and improvements made by Coleman during his period of posses was substantially less than the reasonable rental value of the property during that period there was simply no equity favoring plaintiff and the operation of the statute of limit in voiding any alleged oral contract could not operate as a fraud upon him.

This conclusion was clearly supported by the evidence showing that the defendant resided for over four years in a home with an undisputed rental value of over $300.00 a mon and during that time he made no monthly payment for the las 31 months of occupancy and was already deliquent in payment the amount of $3,633.00 dollars prior to that time (R. 244, exhibit P-7), resulting in a total deficiency of approximate $14,000 as of the time of trial. Even if the value of his alleged improvements is accepted as represented, this total is less than $1,000.00 and the equities still oppose grantin any relief even if an oral agreement is assumed.

In a comprehensive study published in the Utah Law Rei concerning the doctrine of part performance as it applies to oral land contract in Utah, it was noted that before specifi performance of an oral agreement can be justified the party seeking such enforcement must be in compliance with the term of the contract respecting his part of the bargain. As the writer pointed out:

> Although payment of consideration is not a requisite of the part performance doctrine, it is a requisite for specific performance. This is based on the equitable maxim that a plaintiff who seeks equity must do equity. In a case where the performance promised by the plaintiff would not consitute equitable consideration, the court may even require modification of the original terms of the agreement, such as additional consideration by the plaintiff, before granding specific performance.

Note, The Doctrine of Part Performance as Applied to Oral Contracts in Utah, 9 Utah Law Rev. 91, 94 n.24 (1964).

It is axiomatic that any party seeking specific enforcement of a real estate contract bears the burden of showing that he has performed in conformity with the terms of the agreement he alleges before a court of equity will compel performance by the other party. Lincoln Land and Development Co. v. Thompson, 26 Utah 2d 234, 489 P.2d 426 (1971). Far from establishing such fact, the evidence offered in this case shows that Mr. Coleman was in substantial default of the terms of the agreement he alleged he had made with Mr. Dillman, both at the time his action was filed and for years preceding that date. Coleman seeks to avoid that default by asserting that he made a tender sufficient to excuse his performance, which assertion is clearly not supported by the facts established at trial.

Appellant's allegation that he tendered the purchase price is predicated upon certain efforts he made to get a loan. The testimony was clear, however, that he never obtained any funds to pay off the alleged balance and he never tendered any

such amount of cash. This Court has previously noted that "tender requires that there be a bona fide, unconditional offe of payment of the amount of money due, coupled with an actual production of the money or its equivalent." Zion's Properties Inc. v. Holt, 538 P.2d 1319, 1322 (Utah 1975). No such offer was made in this case. Mr. Coleman simply applied for a loan of $43,000.00 to pay off the home, which loan was never made, among other reasons, because there was no written agreement evidencing that Mr. Coleman had any interest in the property. (R. 168)

Appellant's assertion that Mr. Dillman was somehow obligated to take steps to assist Mr. Coleman to perform his pa of the alleged contract, and that his failure to do so relieves Coleman of his duty to perform, it unsupported by any authority and is contrary to law. There was absolutely no testimony presented by Mr. Coleman that performance of the alleged contract was to result in his receiving a warranty de with covenants of title. Even under his version of the contr the agreement was merely that Mr. Dillman would "sell" him the property. Had such an agreement been committed to writin as a conveyance, no warranties would be thereby created by im plication and no duty to convey "clear title" would arise.

> The words 'give, grant, sell, and convey,' or equivalent expressions in a conveyance, do not of themselves imply a covenant of warranty or of title, ... At common law, neither a covenant of seisin, nor a covenant

> against encumbrances is implied in a deed of real property by the use of the words 'grant, bargain, sell, convey, and warrant.'

20 Am.Jur.2d, Covenants, Conditions and Restrictions §13 at 586 (1965).

Therefore, the assertion by appellant that "in a purchase of real estate the seller has the obligation to deliver clear title," Brief of Appellant at pg. 6, is incorrect and the argument built on that premise is without force.

In Holmgren Brothers, Inc. v. Ballard, 534 P.2d 611 (Utah 1975), this Court set forth the requirements for specific performance of an oral real estate contract as follows:

> The oral contract and its terms must be clear, definite, mutually understood, and established by clear, unequivocal and definite testimony, or other evidence of the same quality. In addition, there must be acts of part performance which in equity are considered sufficient to take the case out of the statute of frauds: (1) Any improvements made must be substantial, or valuable, or beneficial. (2) A valuable consideration is demanded by equity. (3) If there is possession, such possession must be actual, open definite not concurrent with the vendor, but it must be with the consent of the vendor. (4) Such acts as are relied on must be exclusively referable to the contract.

534 P.2d at 614.

Under this standard, the relatively trivial improvements made by the appellant could not qualify as sufficient to constitute part performance. The testimony from Mr. Coleman was that in four years he put in some grass at a cost of $25.20 (exhibit P-9, R. 17-18), replaced four windows

at a cost of $205.70 (exhibit P-8, R. 16-17), did repairs to a furnace at a total cost of $133.63 (R. 17, exhibits P-10 & P-11), and had some work done on the pipes on several occass at a total cost of $194.97 (R. 17, exhibit P-12). In short, so-called improvements amounted to less than normal household maintenance at a total cost of $539.50, or an average of less than $10.00 per month for the 55 months of plaintiff's occup prior to trial. Courts recognize that where improvemtns made to property are minor in relation to the value of such prope and are in the nature of upkeep which is to be expected of property residents they will not provide any basis for a dec of specific performance. See, e.g., Anderson v. Whipple, 71 Idaho 112, 227 P.2d 351 (1951). The trial court in the instant case was certainly justified in finding that the cla improvements were so insignificient that they could by no me be held to constitute actions which altered Coleman's positi to such an extent that giving effect to the statute of fraud would impact inequitably upon him.

It should be borne in mind that in reviewing a judgment of the district court in an action for specific performance Court should reverse only if persuaded that the evidence clearly preponderates against the findings. Timpanogos High Inc. v. Harper, 544 P.2d 481 (Utah 1975); Coombs v. Ouzounian 24 Utah 2d 39, 465 P.2d 356 (1970). Where, as here, the testimony and evidence presented by the plaintiff himself sho that he made only the most insignificiant improvements on

the property where he resided and that he was in substantial default of his obligations even under the terms of the agreement he alleged to have been made, there is no basis in equity for a court to avoid the clear pronouncement of the statute of frauds and decree specific enforcement.

Furthermore, because this is an equity action and this Court is at liberty to review the facts presented to determine if they are sufficient to support a decree of specific performance, the respondent asserts that there was a complete failure by appellant to establish the terms of the alleged oral contract by clear, unequivocal and definite testimony or to show that such terms were mutually understood by the parties as required by Utah law.

The only proof of the existence of the contract upon which plaintiff relied was his own assertion of the substance of a conversation he allegedly had with the defendant. Mr. Dillman denied that the conversation was as the plaintiff alleged and affirmatively represented that an oral lease agreement was reached. On such a record, there can be no question that the plaintiff failed to establish the threshold prerequisite for the relief sought.

> The plaintiff in declaring specific performance of an oral contract must establish the terms thereof with a greater degree of certainty than is required in an action at law, and he must show a clear mutual understanding and a positive agreement of both parties to the terms of the contract. (emphasis added)

Christensen v. Christensen, 9 Utah 102, 106, 339 P.2d 101 (1959);

Clark v. Clark, 74 Utah 290, 279 P. 502, 504 (1929).

It is noteworthy that in the cases decided by this Court wherein specific performance of an oral contract concerning land has been granted, the existence of the oral agreement has been admitted by the defendant. When the defendant denies the existence of such an oral agreement, as in the case at bar, the plaintiff bears the burden of proving the agreement by other competent evidence before he can attempt to invoke the doctrine of part performance. As indicated in Note, The Doctrine of Part Performance as Applied to Oral Land Contracts in Utah, 9 Utah L.Rev. 91, 106 (1964),

> An admission by the defendant is, of course, the best parol proof. Short of this, a writing containing the terms of the contract, though insufficient to satisfy the Statute, would provide the next best evidence. If no writing of any kind is available, the terms of the contract would have to be established by the testimony of disinterested witnesses.

Plaintiff has not proffered any of these three species of evidence and therefore has failed to provide proof of this vital first element, thereby forfeiting any claim for specific performance. The need for clear proof of the oral contract is underscored by an additional requirement in actions for specific performance based upon part performance; namely, that the actions of the plaintiff which are claimed as part performance are exclusively referrable to the oral contract. In the landmark Utah case of Price v. Lloyd, 31 Utah 86, 86 P. 767 (1906), and again in the recent Holmgren Brothers

supra, this Court has held that alleged acts of part performance cannot be relied upon to overcome the statute of frauds unless they are acts which clearly were taken as a direct result of the oral contract and would not have been taken for any other reason. Where, as in the case at bar, the acts claimed as part performance (taking possession, making some monthly payment and making minor repairs on the property) are just as consistent with a lease arrangement as with a contract for sale they cannot be relied upon either as evidence of the agreement or to support a finding of sufficient performance to remove the bar of the statute.

The trial court did not address this contention because it felt that the quality of proof regarding the oral contract was a question which need not be reached given the inadequate performance of Mr. Coleman even under his own assertion of the terms of the agreement. However, the respondent respectfully submits that a review of the evidence presented shows this to be a second adequate basis to affirm the judgment entered by the court below.

CONCLUSION

The trial court's denial of a jury trial in an action for specific performance was in accord with the established law of this jurisdiction in equity cases and does not constitute reversable error. While sitting as an equity court it was wholly appropriate for the trial court to find, on the evidence presented, that the appellant's acts of part performance had

had raised no equities in his favor sufficient to support a decree of specific performance without even resolving the que of the existence of the alleged contract. However, the evide presented failed to establish the terms of the purported oral contract in the manner this Court has indicated is necessary and this failure provides an additional basis upon which the judgment of the court below can be supported. For these reasons the respondent respectfully requests that the judgme of the trial court be affirmed.

DATED this _____ day of August, 1980.

M. David Eckersley
BLACK & MOORE
500 Ten West Broadway Building
Salt Lake City, Utah 84101

Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing BRIEF were mailed, postage prepaid this ____ day of August, 1980 to the following:

Richard J. Leedy
610 East South Temple
Salt Lake City, Utah 84102