

1989

Valley Bank and Trust Company v. Wesley Sine : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

890592-CA

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

* * * * *

VALLEY BANK AND TRUST COMPANY,)	
)	BRIEF OF RESPONDENT
Plaintiff/Respondent,)	
)	
vs.)	Docket No. 890592-CA
)	
WESLEY SINE,)	
)	Priority Classification
Defendant/Appellant.)	14B

* * * * *

APPEAL FROM THE RULING OF
THE HONORABLE MICHAEL R. MURPHY
OF THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1989). The Utah Supreme Court is authorized to transfer this case to the Utah Court of Appeals pursuant to Rule 4(A), Rules of the Utah Supreme Court.

NATURE OF PROCEEDINGS

Respondent Valley Bank and Trust Company ("Valley") commenced this action to enforce a guaranty executed by appellant Wesley Sine ("Sine") whereby Sine guaranteed a promissory note executed by Jerry Sine and Dora Sine in favor of Valley.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Does a statement by Valley concerning bidding at a trustee's sale for which Sine is not a trustor or a party constitute a defense to Sine's unconditional guarantee of payment?

II. Is a separate, alleged agreement entered into by Valley and Sine to release Sine from his guarantee within the statute of frauds so that the agreement must be in writing to be enforceable?

III. May Sine raise for the first time on appeal the doctrines of part performance, promissory estoppel and waiver to defeat Valley's action?

IV. Does the doctrine of part performance apply in this case so that Valley's alleged statement to release Sine need not be in writing?

V. Does the doctrine of promissory estoppel apply in this case to prevent Valley from obtaining a judgment against Sine?

STATEMENT OF THE CASE

Nature of the Case

Sine appeals from the "Summary Decision" entered by the Honorable Michael R. Murphy on March 24, 1989, wherein Judge Murphy granted Valley's motion for summary judgment against Sine.

Course of Proceedings

On December 12, 1988, Valley filed a complaint to enforce a guaranty executed by Sine, in which Sine guaranteed the obligations owed by his parents, Jerry Sine and Dora Sine, to Valley. (R. 002) Sine filed an answer (R. 009), and Valley filed a motion for summary judgment. (R. 012) After briefing and oral argument, the Honorable Judge Michael R. Murphy issued a Summary Decision, granting summary judgment in favor of Valley. (R. 088) On April 10, 1989, the court entered judgment against Sine. (R. 095) On the same day, Sine filed an "Objection to Order, Motion for a New Trial or to Correct Decision and

Memorandum of Authorities." (R. 092) After briefing by the parties and on June 12, 1989, the court entered an order denying Sine's Objection to Order and Motion for a New Trial. (R. 124) Judgment was again entered against Sine on July 3, 1989. (R. 126) Sine filed a Notice of Appeal on August 2, 1989. (R. 133)

STATEMENT OF FACTS

1. On July 16, 1986, Jerry Sine and Dora Sine executed a Commercial Promissory Note in favor of Valley in the principal sum of \$317,797.21. (R. 019-020)

2. On the same date, Sine executed and delivered to Valley an unconditional guaranty, guaranteeing the payment and performance of Jerry Sine's and Dora Sine's present and future obligations to Valley ("Guaranty"). (R. 020)

3. On July 16, 1987, Jerry Sine and Dora Sine executed another Commercial Promissory Note ("Note") in favor of Valley in the principal sum of \$973,261.20, which sum encompassed the unpaid balance due under the July 16, 1986, Commercial Promissory Note. (R. 020)

4. As security for the Note, Jerry Sine and Dora Sine as trustors executed a Trust Deed, dated July 16, 1987, encumbering real property in Salt Lake County, Utah, which is commonly known as the Se Rancho Motel ("Motel"). (R. 020)

5. Jerry Sine and Dora Sine failed to pay the monthly installments due under the Note. (R. 021)

6. Despite demand upon Sine, Sine failed and refused to honor his Guarantee. (R. 021)

7. The trustee under the Trust Deed recorded a Notice of Default of the Trust Deed on December 31, 1987, and provided Sine with a copy of the Notice. (R. 021)

8. On December 18, 1988, Valley filed a complaint against Sine in the Third Judicial District Court in and for Salt Lake County, seeking the amount then due under the Note in principal sum of \$981,407.00, together with \$197,461.80 in accrued but unpaid interest. (R. 002)

9. As a result of the default of the Note, the trustee of the Trust Deed sold the Motel at a public trustee's sale on December 29, 1988. (R. 021)

10. As of the date of sale, the total amount due under the Note was in the sum of \$1,225,145.00. (R. 035)

11. Valley bid the sum of \$842,704.02 at the trustee's sale. (R. 021)

12. Valley credited the amount due with its bid and reduced its claim against Sine to a principal amount of \$342,441.00. (R. 021)

13. Sine was not a party to the Note or the Trust Deed given as security for the Note. Sine was a party only to the Guarantee. (R. 023, 024, 025, 026)

14. The affidavit of Wesley Sine filed in opposition to Valley's motion for summary judgment states in part as follows:

2. Purpose of the meeting was to discuss possible extension of a Sheriff's sale [sic, it was a non-judicial trustee's sale] of the Se Rancho Motel property which was scheduled to take place the following day. The property is owned by my parents Jerry & Dora Sine. I am the General Manager of the Se Rancho Motel and manage that property for them.

I was concerned that some party other than Valley Bank, would purchase the property at the trustee's sale, thereby denying Jerry and Dora Sine of their previously agreed upon redemption rights.

3. After considerable discussion, Mr. Doctorman, in the presence of Mr. Zollinger, and with his acquiescence, stated that I need not worry that Valley Bank would bid on the property at the amount owed on the note plus interest, costs and attorneys's fees.

4. I was asked if I planned to attend the sale. Relying upon this assurance from Mr. Doctorman and Mr. Zollinger I told them I probably would not and did not attend the trustee's sale. We then shook hands and Mr. Cundick & myself left the meeting.

(R. 057)

15. There is no evidence of an agreement requiring Sine to not attend the sale or to refrain from seeking other bidders.

16. There is no evidence that Sine had the financial resources to purchase the property himself; that Sine had sought other bidders in the 12 months since the filing of the Notice of Default on December 31, 1987; that during the final twenty-four hour period before the sale, Sine could have found a person to bid in a cash amount of over \$1,200,000 to purchase the Motel; or that Sine could have himself obtained financing to purchase the Motel himself.

17. There is no evidence that Sine's action in not attending the sale during the last day before the sale harmed Sine any way.

18. There is no evidence that Sine attempted to exercise his rights of subrogation or Jerry Sine and Dora Sine's rights of redemption.

19. Although it is not in the record, it is undisputed that Valley granted Jerry and Dora Sine rights of redemption, though it was not required to do so under trust deed foreclosure laws, and that the Sines did not exercise those rights. Valley has attempted, but has been unable to sell the Se Rancho Motel. Additionally, as of the date of filing this Brief, the Sines

continue in possession of the Se Rancho Motel through a rental agreement with Valley.

20. In the Brief of Appellant it states that for the purpose of the appeal, Valley admits it agreed to do certain things. Sine mischaracterizes Valley's admission for the purpose of this appeal. Although Valley disagrees with the statements set forth in the Affidavits of Wesley Sine and David Cundick, for the purpose of this appeal only Valley admits the statements in the Affidavits to be true. Valley does not admit Sine's mischaracterization of the Affidavits as argued in his Brief.

SUMMARY OF ARGUMENT

Valley contends that the district court properly granted summary judgment in favor of Valley because there is no genuine issue of material fact and Valley is entitled to judgment as a matter of law. Sine argues under a variety of theories that a statement made by Valley that it intended to bid the full balance due under the Note at the trustee's sale prevents Valley from obtaining judgment against Sine on the Guaranty. Valley's position is that regardless of how its statement is construed, as a statement or as an agreement, Valley is entitled to judgment as a matter of law. Valley's specific arguments are as follows:

I. Valley's action is a simple action to enforce the Guaranty. On appeal, the existence and validity of the Guaranty

is undisputed as is the default of and the amount due under the Note executed by Jerry and Dora Sine.

II. Because Sine executed an unconditional, absolute guaranty of payment, Utah Code Ann. § 57-1-32 (1988) does not apply. Strevell-Paterson Co., Inc. v. Francis, 646 P.2d 741 (Utah 1982) provides authority for Valley proceeding directly against Sine as a guarantor to recover the balance due under the Note.

III. Throughout his brief, Sine misrepresents the ruling made by the Honorable Michael R. Murphy in his Summary Decision and the facts as they appear in the record. Sine repeatedly refers to the statement made by Valley that it intended to bid the full amount due under the Note at the trustee's sale as a "contract" or an "agreement." The Summary Decision does not make a finding of a contract or agreement. Valley's statement does not satisfy the elements necessary to prove a contract or agreement.

IV. Assuming, arguendo, Valley's statement constitutes an agreement and that agreement is characterized as an agreement to release Sine as a guarantor, that agreement is within the statute of frauds and must be in writing to be enforceable.

V. If Valley's statement is construed as an agreement to do something other than release Sine as a guarantor, that agreement does not constitute a legal defense to Sine's Guaranty.

Relief for the breach of such an agreement includes traditional contract remedies and does not include the "nullification" of the Guarantee as argued by Sine.

VI. Sine argues that if Valley's statement is construed as an agreement to release Sine as a guarantor, that agreement need not be in writing because it was partially performed by Sine. Because Sine did not timely raise the issue of part performance in the trial court, the court may not now consider that issue on appeal.

VII. Even if the doctrine of part performance were properly before the court, because the doctrine is available only in actions in equity, the doctrine cannot be applied to this case as this case is an action at law for damages.

VIII. Assuming that the doctrine of part performance is available on appeal, the facts of this case do not satisfy the elements required to prove part performance.

IX. The defense of promissory estoppel may not be properly considered by this court as it was not raised at the trial level. Sine is prevented from raising on appeal any matter which Sine failed to argue at the trial level.

X. Even if the defense of promissory estoppel were properly before the court, the facts of this case do not satisfy the elements necessary to prove promissory estoppel.

ARGUMENT

In reviewing a district court's ruling on a motion for summary judgment, the appellate court applies the same standard as was applied at the district level. Thornock v. Cook, 604 P.2d 934, 936 (Utah 1979). Accordingly, the appellate court must determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Id. Because Sine has failed to demonstrate the existence of a genuine issue of material fact and because Valley is entitled to judgment on Sine's Guaranty as a matter of law, the district court's grant of summary judgment in favor of Valley should be upheld.

The district court, as grounds for the decision, ruled that the alleged oral statement which Sine asserts to have been made by Valley to bid in the full amount of Jerry and Dora Sine's obligation at the trustee's sale, would have constituted a release from the Guaranty and as such was unenforceable because it was not in writing. Though the language of the Summary Decision is somewhat ambiguous, the district court did not make a specific finding that Valley's statement constituted an agreement. The language of the Summary Decision suggests that the district court did not reach the issue of whether an agreement actually existed because, assuming that there was such an

agreement, Valley is still entitled to judgment as a matter of law because the alleged agreement was not in writing. Valley argues that to the extent the district court implied the existence of an oral agreement as the basis for its ruling, such an implication is unfounded and erroneous.

It is well settled that a lower court's ruling should be affirmed if the correct result is reached even though a trial court may have assigned an incorrect reason for its ruling. Jespersion v. Jespersen, 610 P.2d 326, 328 (Utah 1980). Furthermore, the reviewing court will affirm a trial court's decision on any ground, even though that ground was not one relied upon by the trial court in its ruling, Bill Nay & Sons Excavating v. Neeley Construction Co., 677 P.2d 1120, 1123 (Utah 1984), and even where that ground is argued for the first time on appeal. Buehner Block Co. v. UWC Assoc., 752 P.2d 892, 895 (Utah 1988).

Regardless of whether Valley's statement is construed as an agreement or as a mere statement, Valley is entitled to judgment as a matter of law. If construed as an agreement to release Sine as a guarantor, the agreement is unenforceable because it was not in writing. If the agreement is construed as an agreement for something other than the release of Sine as a guarantor, such an agreement does not constitute a legal defense to Valley's action on the Guaranty and must be sued upon to

obtain any kind of relief. Finally, Sine argues that if the statement is construed as a mere statement, that statement equitably estops Valley from obtaining judgment against Sine on the Guaranty. Sine is barred, however, from raising the doctrine of equitable estoppel for the first time on appeal.

I. ON APPEAL, SINE DOES NOT CHALLENGE THE EXISTENCE OR VALIDITY OF THE GUARANTY OR THE DEFAULT OF AND THE AMOUNT DUE UNDER THE NOTE.

This case is an action to enforce the guarantee of payment executed by Sine, wherein Sine guaranteed the obligations owed by Jerry and Dora Sine to Valley. In connection with its motion for summary judgment, Valley proved the existence and validity of the Guaranty and the default of and the amount due under the Note owing by Jerry and Dora Sine to Valley. The uncontested affidavits of John R. Hanson and Richard Thomsen submitted by Valley in support of its motion for summary judgment establish that Jerry and Dora Sine were indebted to Valley pursuant to the terms of the Note (R. 020-021); that Sine executed and delivered to Valley a guarantee of payment of the debts of his parents (R. 047-048); that the Note was in default (R. 021); and that demand was made upon Sine for the payment of the balance due and that Sine failed to make payment. (R. 021) Sine did not contest these facts in responding to Valley's motion. According to the terms of the Guaranty, Sine is personally liable to Valley

for the balance due under the Note and the trial court properly granted Valley's motion for summary judgment.

II. THE PROVISIONS OF UTAH CODE ANN. § 57-1-32,
DO NOT APPLY TO AN ACTION TO ENFORCE AN
UNCONDITIONAL GUARANTEE OF PAYMENT.

Sine contends that the provisions of Utah Code Ann. § 57-1-32 (1988) apply to proceedings to enforce unconditional guarantees of payment and that because Valley allegedly did not comply with those provisions, Valley is now precluded from obtaining judgment against Sine on his guarantee. Contrary to Sine's assertion, the provisions to § 57-1-32 do not apply to the facts of this case to an action to enforce an unconditional guarantee of payment.

This action is not an action against the makers of the Note to obtain a deficiency judgment after the trustee's sale of the real property. This is an action against Sine to enforce his individual, unconditional guarantee of payment. Sine is not a party to the Note or to the Trust Deed. Sine is a guarantor. He did not pledge security for Jerry and Dora Sine's obligations to Valley. His guarantee is security for those obligations.

In seeking to recover from Sine as a guarantor, Valley proceeded in accordance with the clear pronouncement of the Utah Supreme Court in Strevell-Paterson Co., Inc. v. Francis, 646 P.2d 741 (Utah 1982), relating to the liability of a guarantor to the

obligee. In Strevel, the court drew a distinction between guarantees of collection and guarantees of payment. Where a guaranty is a guarantee of collection, the guaranty is conditional and the guarantor's liability is dependent on the creditor's first exhausting its remedies against the primary obligor and against any collateral. Strevel, 646 P.2d at 743.

Guarantees of payment, on the other hand, unconditionally guarantee payment so that the creditor has no duty to pursue the primary obligor or the security as a precondition to pursuing the guarantor. Id. Whether a guaranty is a guarantee of collection or a guarantee of payment depends on the nature of the guarantor's promise as evidenced by the provisions of the particular guaranty. Id.

In Strevel, the court found that the guaranty involved in that case was an absolute guarantee of payment for the reason that

it contains no express or implied condition on liability and no contractual requirement that the creditor seeks satisfaction elsewhere before commencing action on the guarantee.

Id. at 744. Similar to the guaranty involved in Strevel, Sine's Guaranty provides that Sine agrees to

guarantee payment when due of any and all obligations of [Jerry and Dora Sine] to Bank
...

(R. 024) Sine's Guaranty contains no preconditions to Sine's liability. The Guaranty is clearly an absolute guarantee of payment. As such, Strevell authorized Valley to proceed directly against Sine without pursuing its remedies against Jerry and Dora Sine and without first having foreclosed its interest in the Motel. Accordingly, Valley commenced its action against Sine as the guarantor prior to foreclosing its interest in the real property. Section 51-1-32 does not apply to Valley's action against Sine and Valley is entitled to judgment against Sine as a matter of law.

III. THE AFFIDAVITS OF SINE AND DAVID CUNDICK DO NOT ESTABLISH AN AGREEMENT ENTERED INTO BY VALLEY AND SINE.

In his Brief of Appellant, Sine repeatedly refers to the statement made by Valley that it would bid the full amount of the obligation as a "contract," an "agreement," an "oral agreement" and a "promise." Sine's characterization of Valley's statement as an agreement or contract misrepresents and finds no support in the record. The only statement made in Sine's affidavit relating to Valley's statement is as follows:

After considerable discussion, Mr. Doctorman, in the presence of Mr. Zollinger, and with his acquiescence, stated that I need not worry that Valley Bank would bid on the property at the amount owed on the Note plus interest, costs and attorney's fees.

(R. 057). The only reference in the affidavit of David C. Cundick ("Cundick") to Valley's statement is as follows:

Towards the end of the meeting and in response to concerns raised by Mr. Sine, Mr. Doctorman represented that at the sheriff's [sic, it was a trustee's sale] sale (which was to be held and was held on the following day) Valley Bank would bid on the property at the amount owed, plus interest, plus attorneys fees.

(R. 059) There is absolutely no reference in either of the affidavits that Valley and Sine entered into an agreement which bound Valley to bid in the full amount of the debt and which required Sine to not appear at the trustee's sale.

When Valley's statement is viewed in context, it is apparent that it was not made in connection with a discussion relating to Sine's liability under his guarantee. Rather, it was made in connection with Sine's concern that Jerry and Dora Sine's right to redeem the Motel after the trustee's sale would be extinguished if Valley did not buy the property. (R. 057) Sine states in his affidavit that he was:

concerned that some party other than Valley Bank, would purchase the property at the trustee's sale, thereby denying Jerry and Dora Sine of their previously agreed-upon redemption rights.

(R. 057) Valley did in fact purchase the property at the sale (R.021) and as a result Jerry and Dora Sine retained their redemption rights to the property.

Contrary to Sine's assertion, Valley's statement does not constitute a contract because it does not satisfy the elements needed to prove a contract. To establish the existence of a contract, albeit oral, there must be an offer, acceptance and valuable consideration. Hall v. Add-Ventures, Ltd., 695 P.2d 1081, 1087 (Alaska 1985). In the instant case, none of these essential elements are present.

There is nothing in the affidavits indicating that Valley or Sine made an offer or an acceptance. Furthermore, the affidavits of Sine and Cundick do not show that Sine gave any kind of valuable consideration for Valley's alleged promise.

Consideration is defined as an act or a promise, bargained for and given in exchange for another act or promise. Resource Management Co. v. Weston Ranch and Livestock Co., Inc., 706 P.2d 1028, 1036 (Utah 1985). The type of promise which qualifies as consideration must contemplate a benefit to the promisor or a detriment to the promisee. Id. Regardless of how articulated, Sine did not make a promise to Valley which resulted in a detriment to Sine or a benefit to Valley.

Sine represents in his Brief of Appellant that the affidavits of Cundick and Sine demonstrate that the parties agreed that Sine would not attend or cause others to attend or bid at the trustees sale of the motel." Brief of Appellant, p.

1. Sine misrepresents the facts as stated in the affidavits. There is no evidence in the record that at the time of Valley's alleged statement, Sine in fact "agreed" to not attend the sale or to obtain bidders for the property. In his affidavit, Sine merely states that "I told them that I probably would not and did not attend the trustees sale." (Emphasis added.) (R.058) Sine's statement that he probably would not attend is not a promise. Rather, it is a mere statement of likelihood or of intention. Cundick's affidavit makes absolutely no reference to whether Sine stated that he would or would not attend the sale. (R.059-060)

Sine fails to show how his inaction was in any way valuable to Valley. Sine also fails to show how his failure to attend the trustee's sale or to locate a buyer during the one day period between Valley's statement and the trustee's sale caused Sine a detriment. There is no evidence in the record that Sine had, at any time during the twelve months after the filing of the Notice of Default, sought bidders for the Motel. There is nothing in the record to show that Sine had the financial ability or desire to bid at the sale himself. There is also no evidence in the record that Sine could have found during the last 24 hours before the sale, a buyer to bid in cash to purchase the Motel.

In view of the total absence in the record of any evidence of an offer, acceptance or consideration, the alleged statement of Valley does not rise to the level of a contract. Valley was entitled to summary judgment as a matter of law.

IV. ASSUMING VALLEY'S STATEMENT CONSTITUTED AN AGREEMENT TO RELEASE SINE FROM THE GUARANTY, THAT AGREEMENT MUST BE IN WRITING TO BE ENFORCEABLE.

Assuming, arguendo, that Valley's statement that it intended to bid in the full amount of the obligation constitutes an agreement, such an agreement is, as stated in the Summary Decision, in effect an agreement to release Sine from his Guaranty. The obligation which was secured by the Se Rancho Motel was Jerry and Dora Sine's only obligation owing to Valley. The July 16, 1987, Note encompassed within it the unpaid balance due under the earlier July 16, 1986, Commercial Promissory Note. The record does not evidence any other obligations owing by Jerry and Dora Sine to Valley. By agreeing to extinguish Sine's liability under the July 16, 1987, Note, Valley in effect agreed to extinguish any and all obligations Sine might have under the Guaranty and therefore to release Sine from his Guaranty.

Strevel-Paterson Co., Inc. v. Francis, 646 P.2d 741 (Utah 1982), establishes that an agreement to release a guarantor must be in writing to be enforceable. According to the court:

The release or revocation of an agreement to answer for the debt of another must also be in writing. It is well settled that if an original agreement is within the Statute of Frauds, any subsequent agreement which alters or amends it must also satisfy the requirement of the Statute.

Strevel, 646 P.2d at 742. Because Valley's alleged agreement was in effect an agreement to release Sine from his Guaranty, it falls within the Statute of Frauds and is therefore unenforceable because it is not in writing.

V. BECAUSE SINE DID NOT TIMELY RAISE THE ISSUE OF PART PERFORMANCE IN THE TRIAL COURT, SINE IS NOT ENTITLED TO RELY ON THE DOCTRINE ON APPEAL.

Sine contends that if Valley's statement is construed as an agreement to release Sine as a guarantor, that agreement need not be in writing because it was partially performed. Sine asserts that his failure to attend the sale constitutes part performance.

It is well established that an appellate court cannot consider as grounds for an appeal issues which were not raised at the trial level. Franklin Financial v. New Empire Development Co., 659 P.2d 1040, 1044 (Utah 1983). Sine failed to timely raise the doctrine of part performance in the trial court. Sine did not mention the doctrine in his Answer or in his Response to Motion for Summary Judgment. (R. 051) Sine did, however, raise

the doctrine of part performance in his Objection to Order Motion for a New Trial or to Correct Decision (the "objection"), mailed to opposing counsel on the same day that Judge Murphy entered final judgment against Sine. (R. 094,095-096)

Sine's objection, in so far as it was premised on Rule 4-504(2), Utah Code of Judicial Administration, was not timely. Rule 4-504(2) requires that notice of objections to a proposed judgment must be submitted to the court and to counsel within five days after service of the proposed order. Valley mailed the proposed judgment to Sine's counsel on March 28, 1989. (R. 097) Taking into account the three day mailing rule contained in Rule 6(e), Utah Rules of Civil Procedure, Sine must have objected to the proposed judgment on or before April 5, 1989. Sine did not mail his objection until two days later, on April 7, 1989 (R.094), and did not file the objection until April 10, 1989 (R.092). As a result, the objection was untimely and could not have been properly considered by the court.

Sine purported to base his objection also on Rule 59(a)(7), and 59(b) Utah Rules of Civil Procedure. Rule 59(a)(7) provides that upon a motion for new trial where the action has been tried without a jury, the court may open the judgment on the basis of an error in law. Rule 59(b) sets forth the time to

file. However there was not a trial. The case was decided by motion.

Because Sine did not raise the doctrine of part performance until the court had entered judgment, that doctrine may not be considered on appeal. Franklin Financial v. New Empire Development Co., 659 P.2d 1040 (Utah 1983) involved facts similar to those involved in this case. In Franklin, the plaintiff Franklin Financial ("Franklin"), commenced an action to foreclose a contract of sale on an apartment building and to recover amounts due under the contract. The trial court granted summary judgment in favor of Franklin.

On appeal, the defendant-lienholders argued that summary judgment in favor of Franklin was precluded as a matter of law because certain amendments to the contract of sale constituted new agreements which had priority as of the date they were executed. The Utah Supreme Court rejected the lienholders' arguments as having been presented too late. The court noted that the lienholders raised their argument for the first time in their Objection to the Summary Judgment and Order of Sale filed after the judgment had been entered by the trial court. Noting that the lienholders had failed to argue the creation of the new contracts to the trial court prior to the court's ruling on the motion for summary judgment, the court refused to consider the

lienholder's arguments raised on appeal. Id. at 1045. According to the court:

Generally, issues raised for the first time in post-judgment motions are raised too late to be reviewed on appeal.

Id. See also Cunningham v. Cunningham, 690 P.2d 549 (Utah 1984) (refusing to consider on appeal an issue not raised at the trial level until a post trial memorandum). The part performance defense was not raised timely and should not be considered on appeal.

VI. IF VALLEY'S "AGREEMENT" WERE AN AGREEMENT TO DO SOMETHING OTHER THAN RELEASE SINE AS A GUARANTOR, THAT AGREEMENT DOES NOT CONSTITUTE A DEFENSE TO THE GUARANTY, BUT WOULD ONLY GIVE RISE TO AN ACTION BY SINE TO ENFORCE THE ALLEGED AGREEMENT.

Sine attempts to characterize Valley's oral statement that it would bid the full amount due under the Note at the trustee's sale as something other than an agreement to release Sine as a guarantor. He does this to avoid the effect of the statute of frauds which requires that in order to be enforceable, the release of a guarantor must be in writing. Strevell-Paterson Co., Inc. v. Francis, 646 P.2d 741, 742 (Utah 1982). If, however, Valley's statement is characterized as an "agreement" to do something other than release Sine from the guarantee, that agreement is not a defense to the Guaranty. Provided that such an agreement is enforceable as a matter of law, it is simply a

separate agreement. To enforce that agreement, Sine would have to commence an independent action. Relief for the breach of an oral agreement includes traditional contract remedies, such as damages or specific performance. The remedies for the breach of a contract do not include the rescission of other independent contracts. Sine argues, however, that the alleged agreement somehow "nullifies" the Guaranty. Sine fails to provide the court with any authority whatsoever for his theory. Respondent is not aware of such authority. Sine has not commenced an action based on Valley's alleged independent "agreement." Even if Sine were to have commenced such an action, the "nullification" of one contract is not a remedy for the breach of another contract.

VII. EVEN IF THE COURT WERE TO CONSIDER THE DOCTRINE OF PART-PERFORMANCE ON APPEAL, BECAUSE THE DOCTRINE OF PART-PERFORMANCE IS AVAILABLE ONLY IN ACTIONS IN EQUITY, IT IS NOT AVAILABLE TO SINE IN THIS CASE.

It is well established in Utah law that the doctrine of part performance is purely equitable in nature and is therefore unavailable in an action at law for damages. McKinnon v. Corp. of President of Church of Jesus Christ of Latter Day Saints, 529 P.2d 434 (Utah 1974); Baugh v. Logan City, 495 P.2d 814 (Utah 1972); Baugh v. Darley, 184 P.2d 335 (Utah 1947). In the instant case, Valley's action is an action at law. Valley's complaint consists of one cause of action and only requests money damages

against Sine. As a result, the doctrine in part performance is not available to Sine and should not be considered on review.

VIII. ASSUMING, ARGUENDO, THAT THE DOCTRINE OF PART PERFORMANCE WERE AVAILABLE TO SINE AND APPLIES IN THIS CASE, THE FACTS OF THIS CASE DO NOT SATISFY THE ELEMENTS REQUIRED TO PROVE PART PERFORMANCE.

To qualify for the part performance exception to the statute of frauds, a number of elements must be satisfied: (1) the terms of the alleged oral agreement must be clear and definite and established by unequivocal and definite evidence; (2) valuable consideration must have been given; and (3) the acts of part-performance must be exclusively referable to the alleged oral agreement. Bradshaw v. McBride, 649 P.2d 74, 79 (Utah 1982); Holgren Brothers, Inc. v. Ballard, 534 P.2d 611, 614 (Utah 1975). The undisputed facts in this case demonstrate that none of the above elements have been satisfied.

Most significantly, the evidence adduced in the trial court failed to unequivocally and definitely establish the existence of an agreement entered into by Valley and Sine. The affidavits of Sine and Cundick establish two facts and only two facts: (1) Valley made a statement; and (2) Sine probably, but might not have taken action as a result of Valley's statement.

Furthermore, and as argued above, Sine did not give valuable consideration to Valley, either in the form of a benefit

to Valley or in the form of a detriment to Sine. Additionally, Sine's alleged act of part performance was not substantial enough to take the case outside of the statute of frauds. Finally, Sine's failure to attend the trustee's sale was not exclusively referable to Valley's statement. Sine states in his affidavit only that he probably would not attend the trustee's sale. (R. 058)

IX. BECAUSE SINE FAILED TO PROPERLY PRESENT THE DEFENSE OF PROMISSORY ESTOPPEL TO THE TRIAL COURT, HE IS NOW BARRED FROM RAISING THAT DEFENSE IN THIS APPEAL.

In points 6 and 8 of the Brief of the Appellant, Sine argues that the doctrine of promissory estoppel prevents Valley from pursuing Sine as a guarantor. Sine failed to raise the defense of promissory estoppel in his Response to Motion for Summary Judgment. (R.051-056) However, the Second Defense contained in Sine's Answer states as follows:

Plaintiff has by its act and/or omissions may have waived its claim against defendant and/or by reason thereof plaintiff may be estopped to assert said claim and/or may have released defendant from his obligation to plaintiff.

Despite the generic reference in Sine's Answer to estoppel as a defense, he is now precluded from raising that defense on appeal because he failed to submit evidence or legal authority supporting the defense at the trial level.

A 1988 case from the Utah Supreme Court involves facts nearly identical to those involved in this case. Zions First National Bank v. National American Title Insurance Co., 749 P.2d 651 (Utah 1978), involved an action commenced by Zions against National based on a policy of title insurance issued by National. On appeal, National argued that Zions was estopped from enforcing the policy for the reason that Zions had created the situation giving rise to liability under the policy. While National had pleaded estoppel in its answer, the court emphasized that the theory was neither argued to the trial court nor supported by any evidence. Quoting its opinion in Turtle Management, Inc. v. Haqqis Management, Inc., 645 P.2d 667, 672 (Utah 1982), the court stated:

This court will not consider on appeal issues which were not submitted to the trial court and concerning which the trial court did not have the opportunity to make any findings of fact or law.

Zions, 749 P.2d at 657. See also James v. Preston, 746 P.2d 799, 802 (Utah App. 1987) (refusing to consider a theory that was not supported by a factual showing or by legal authority at the trial level). Sine is now prevented from raising on appeal the doctrine of estoppel and any other matter which Sine failed to argue at the trial level.

X. EVEN IF THE COURT WERE TO CONSIDER THE DEFENSE OF PROMISSORY ESTOPPEL, BECAUSE THE FACTS OF THIS CASE DO NOT SATISFY THE ELEMENTS OF PROMISSORY ESTOPPEL, THAT THEORY DOES NOT PRESENT A DEFENSE TO VALLEY'S ACTION.

In his brief, Sine argues that Valley is estopped from obtaining a judgment against Sine because of Valley's alleged statement that it intended to bid in the full amount of the balance due under the Note. Because the facts of this case do not satisfy the elements required to establish promissory estoppel, Valley remains entitled to summary judgment as a matter of law.

The doctrine of promissory estoppel applies where (1) a promise is made; (2) which can reasonably be expected to induce action or forbearance; (3) which promise in fact induces action or forbearance; (4) from which detriment is suffered. Topik v. Thurber, 739 P.2d 1101, 1103 (Utah 1987). Initially, and as argued throughout this brief, Valley did not promise to bid in the full amount of the debt. Furthermore, the record does not establish that Valley's statement of intention that it would bid the full amount of the obligation in fact induced Sine to not attend the sale. As stated above, Sine represented in his affidavit that he "probably would not" attend the sale. (Emphasis added.) (R. 057) Finally, Sine did not suffer a detriment as a result of his failure to attend the sale or to seek bidders during the final 24 hour period before the sale. Jerry and Dora

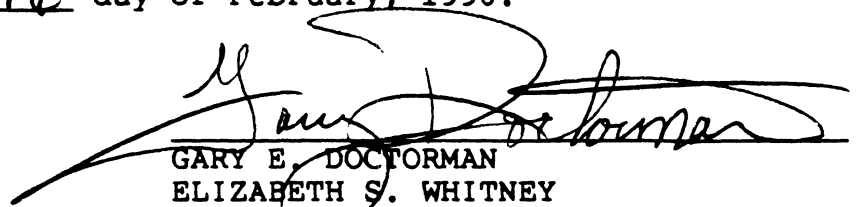
Sine in fact received their redemption rights which was Sine's stated concern. (R.057) There is no evidence in the record that during the 12 month period after the filing of the Notice of Default on December 31, 1988, that Sine sought purchasers for the Motel; that during the final 24 hour period before the sale, Sine could have found a person to bid in the cash to purchase the Motel; or that Sine had the financial resources to purchase the Motel himself. In the absence of such evidence, the fact that Sine did not appear at the sale and did not seek bidders during that last day before the sale, demonstrates that his inaction did not result in any injury. Having not relied on Valley's statement and having suffered no damage from his inaction, the doctrine of promissory estoppel does not apply and Valley is entitled to judgment against Sine as a matter of law.

CONCLUSION

Sine's approach in arguing a bevy of legal theories and defenses, many of which were not raised at the trial level, confuses a simple case. Sine is a guarantor under an unconditional guarantee of payment. Valley's statement that it intended to bid in the balance due under the Note does not "nullify" or modify Sine's obligation to Valley. Regardless of how Valley's statement is characterized, as a statement, as an agreement to release Sine as a guarantor, or as some other agreement, Valley remains,

in all cases, entitled to judgment as a matter of law. Valley respectfully requests that this court affirm the district court's grant of summary judgment in favor of Valley and grant Valley costs and attorneys' fees as provided in the Guaranty.

DATED this 16 day of February, 1990.

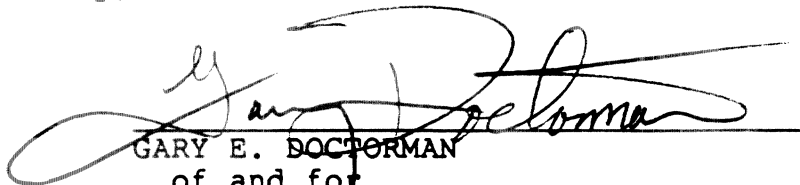


GARY E. DOCTORMAN
ELIZABETH S. WHITNEY
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Plaintiff/Respondent

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the foregoing BRIEF OF RESPONDENT to the following on this 16 day of February, 1990:

Ronald C. Barker
Mitchell R. Barker
2870 South State Street
Salt Lake City, Utah 84115-3692

A handwritten signature in black ink, appearing to read "Gary E. Doctorman", is written over a horizontal line.

GARY E. DOCTORMAN
of and for
PARSONS, BEHLE & LATIMER
Attorney for Plaintiff/Respondent

390:012990A

RECEIVED

Third Judicial District

MAR 28 1989

MAR 24 1989

BIELE, HASLAM
B. HATCH

SALT LAKE COUNTY

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

VALLEY BANK AND TRUST COMPANY,	:	SUMMARY DECISION
a Utah corporation,	:	
	:	CIVIL NO. C-88-7962
Plaintiff,	:	
	:	
vs.	:	
	:	
WESLEY SINE,	:	
	:	
Defendant..	:	
	:	

Plaintiff has moved for summary judgment and defendant opposes the motion on three grounds: (1) defendant guaranteed partnership debts only; (2) plaintiff has failed to comply with Section 57-1-32, Utah Code Ann.; and (3) plaintiff orally waived a claim for deficiency judgment and is thus estopped from proceeding against defendant. The court's resolution of each of the specified grounds in opposition are as follows.

(1) The underlying debts are those of Jerry Sine and Dora Sine. The fact that one of the notes references Jerry Sine and Dora A. Sine, dba Jerry Sine Investment does not convert that debt to a partnership debt. Correspondingly, the dba reference on the guaranty does not convert the guaranty of the individuals' debt to a guaranty of partnership debt. The guaranteed debt was that of the individuals Jerry and Dora Sine.

ADDENDA "A"

(2) Plaintiff's failure to adhere to Section 57-1-32, Utah Code Ann., is not pertinent to a proceeding, such as this, against a guarantor of a secured debt.

(3) Defendant's assertion of an oral agreement that plaintiff would bid the property at a level that would avoid a deficiency is presented in the Second Defense of the Answer as a waiver and/or estoppel and/or release. Additionally, the Third Defense alleges accord and satisfaction, novation, laches, and election of remedies along with a litany of eleven other defenses "and/or possibly other affirmative defenses." Notwithstanding this plethora of legal theories by which defendant seeks to avoid his guaranty, the court must analyze the defendant's theory as it is presented in his opposition to the Motion for Summary Judgment. Defendant asserts that the statements concerning plaintiff's intent to bid the full amount owed plus interest, costs and attorney fees constituted an agreement. (Defendant's Response to Plaintiff's Motion for Summary Judgment, pp. 2-3 and 5). Furthermore, defendant testified that the alleged oral agreement was the basis of his defense. (Supplemental Affidavit of Wesley Sine, para. 2).

Such an oral agreement would negate the consequences of the guaranty and, regardless of the characterization of the legal theory, work a release from or an amendment or revocation of the guaranty. As such, this oral agreement comes within the Statute

of Frauds. Strevell-Patterson Co. v. Francis, 646 P.2d 741 (Utah 1982). While there is consideration for the oral agreement in the form of defendant's purported failure to attend or encourage others to attend the trustee's sale, there is no writing signed by the party to be charged. The alleged oral agreement, then, fails to comply with the Statute of Frauds and is voidable.

For the foregoing reasons, plaintiff's Motion for Summary Judgment is granted. There has been no objection to the request for fees or the affidavit establishing their reasonableness. Plaintiff shall prepare a form of judgment and submit the same pursuant to Rule 4-504, Code of Judicial Administration.

Dated this 24th day of March, 1989.

/s/
MICHAEL R. MURPHY
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Summary Decision, postage prepaid, to the following, this 24th day of March, 1989:

Gary Doctorman
Elizabeth S. Whitney
Attorneys for Plaintiff
50 W. Broadway, 4th Floor
Salt Lake City, Utah 84101

Ronald C. Barker
Attorney for Defendant
2870 S. State Street
Salt Lake City, Utah 84101

Mark B. L.

STATE OF UTAH)
 : ss.
County of Salt Lake)

I, Wesley F. Sine, being first duly sworn on oath deposes and says as follows:

1. On the 28th day of December, 1988 I attended a meeting with M. Craig Zollinger, Assistant Vice President of the Supervised Loan Department for Valley Bank and Trust Company, at his office located at 80 West Broadway, Salt Lake City, Utah. Also present at the meeting were my attorney David C. Cundick and Gary E. Doctorman, legal counsel for Valley Bank.

2. Purpose of the meeting was to discuss possible extension of a Sheriff's sale of the Se Rancho Motel property which was scheduled to take place the following day. The property is owned by my parents Jerry & Dora Sine. I am the General Manager of Se Rancho Motel and manage that property for them.

I was concerned that some party other than Valley Bank, would purchase the property at the trustee's sale, thereby denying Jerry and Dora Sine of their previously agreed upon redemption rights.

3. After considerable discussion, Mr. Doctorman, in the presence of Mr. Zollinger, and with his acquiescence, stated that I need not worry that Valley Bank would bid on the property at the amount owed on the note plus interest, costs and attorney's fees.

4. I was asked if I planned to attend the sale. Relying upon this assurance from Mr. Doctorman and Mr. Zollinger I told them that I probably would not and did not attend the trustee's sale. We then shook hands and Mr. Cundick & myself left the meeting.

Dated the 7th Day of February, 1989.

Wesley F. Sine
Wesley F. Sine

SUBSCRIBED AND SWORN to before me this 7th day of February, 1989.

Elaine A. Hartshorn
Notary Public residing at Salt
Lake City, Utah

My commission expires: August 15, 1991.

STATE OF UTAH)
 :ss.
COUNTY OF SALT LAKE)

I, David C. Cundick, being first duly sworn on oath deposes
as says as follows:

1. I am an attorney licensed to practice law in the State of
Utah.

2. On the 28th day of December, 1988 I attended a meeting at
the request of Mr. Wesley Sine with representatives of Valley
Bank and as such I have personal knowledge of statements made by
people in attendance at that meeting.

3. The meeting was held in early afternoon. Those who were
in attendance include myself, Mr. Wesley Sine, Mr. Craig
Zollinger (represented to be a vice-president of the supervised
loan department) and Mr. Gary Doctorman (represented to be
attorney for Valley Bank).


4. The meeting lasted approximately one-half hour. The
purpose of the meeting was to discuss the possibility of
postponing a pending sheriff's sale of certain property that Mr.
Sine holds an interest in.

5. Towards the end of the meeting and in response to
concerns raised by Mr. Sine, Mr. Doctorman represented that at
the sheriff's sale (which was to be held and was held on the
following day) Valley Bank would bid on the property at the
amount owed, plus interest, plus attorneys fees.

6. At no time during the meeting did Mr. Zollinger dispute the statements made by Mr. Doctorman concerning the price at which Valley Bank would bid.

Further affiant saith naught.

DATED this 7th day of February, 1989.


David C. Cundick

SUBSCRIBED AND SWORN to before me this 7th day of February, 1989.


NOTARY PUBLIC

Residing in Salt Lake County, State of Utah.

My commission expires: *August 15, 1991*