

1980

Vilate B. McDonald and Evelyn Brough v. Barton Brothers Investment Corp. et al : Brief of Third-Party Defendant and Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *McDonald v. Barton Brothers Investment Corp.*, No. 16974 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT
OF THE
STATE OF UTAH

VILATE B. MCDONALD and
EVELYN BROUGH,

Plaintiffs-Respondents,

vs.

BARTON BROTHERS INVESTMENT
CORPORATION,

Third-Party Plaintiff-
Respondent,

vs.

GOLDEN WEST DEVELOPMENT
CORPORATION, INC., and
L. A. CAMPBELL,

Third-Party Defendants-
Appellants.

Case No. 16974

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FILED
MAR 19 1980
Clerk, Supreme Court

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VILATE B. MCDONALD and)
EVELYN BROUGH,)
)
Plaintiffs-Respondents,) BRIEF OF THIRD-PARTY DEFENDANT
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)
vs.)
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GOLDEN WEST DEVELOPMENT)
CORPORATION, INC., and)
L. A. CAMPBELL,)
)
Third-Party Defendants-)
Appellants.)

This was an action by plaintiffs for specific performance of real estate contract for two residential lots or for damages against the defendant-third-party plaintiff who interpleaded against third-party defendants for damages, and the latter claim no obligation to provide said lots.

The third-party defendant, L. A. Campbell, seeks reversal of the judgment as against L. A. Campbell.

STATEMENT OF FACTS

Plaintiffs are daughters of B. O. Brough, deceased. The decedent's estate, on December 16, 1970, contracted by Uniform Real Estate Contract (Exhibit A) to sell 22 acres of land at \$3,000 per acre to Barton Brothers Investment Corporation. The agreement further provided that:

"Buyer shall have the option of buying or refusing to buy the acreage west of the oil pipe line except that seller shall have the option of retaining one lot west of said pipe-line, to be adjusted in said payment due June 1, 1975."

The June 1, 1975 payment was to be the balance due under the contract. By Earnest Money Receipt and Offer to Purchase dated June 7, 1974 (Exhibit 1) Barton agreed to sell to Campbell property situated "east of Center Street, Kaysville, Utah, for \$8,500 per acre for approximately 36 acres-50 acres to be determined by survey", payable \$100 down and the balance on delivery of deed on or before July 1, 1974, and no exceptions or reservations were mentioned in Exhibit 1.

On July 29, 1974, Barton as seller contracted with plaintiffs (Brough daughters) by Earnest Money Receipt and Offer to Purchase (Exhibit B) to sell property described as

"2 lots to be chosen in Grand Oaks East subdivision to be recorded by Kaysville City. A part of the B. O. Brough estate. Pick of lots to be done within 10 days after recording."

The purchase price was stated to be \$5,000 payable \$1.00 down and the balance of \$4,999 due 30 days after completion of

offsite improvements in the subdivision immediately adjacent to said lots on the "base of \$2,500 per lot".

A warranty deed from the Brough estate signed also by plaintiffs as grantors to Barton Brothers Investment Corporation as grantee, dated July 15, 1974, was recorded July 30, 1974, (Exhibit 4). This warranty deed described the same 22 acres as set forth in the 1970 contract, Exhibit A, but made no exceptions, limitations or reservations.

Barton, by warranty deed dated July 18, 1974, recorded July 30, 1974, conveyed the same 22 acres to Golden West Development, Inc., again without any reservations or qualifications (Exhibit 3). L. A. Campbell was a principal stockholder in Golden West along with Wayne Parkin and John Duncan. Golden West caused the 22 acre plat to be platted as "Grand Oaks, Plat A" in Fruit Heights City, Davis County, Utah, which was recorded June 24, 1976.

James H. Brough, a brother of the plaintiffs, is a owner-broker of Brough Realty in Kaysville, Utah, and testified that he notified Barton of his deceased father's desire to have his sisters obtain lots in the Brough property, and that Jim drew up the Earnest Money Agreement on July 29, 1974, at the time of closing the Brough estate contract with Barton, in the presence of Gordon Gurr, Barton, and his sister, Vilate (Tr 12). Jim said that at closing \$2,000 was credited to Barton for the two lots his sisters were to get, calculated as 2/3 of an acre at \$3,000 per acre (Tr 14). Brough did not know of any sale by Barton to Golden West until after April, 1976 (Tr 15),

when he saw a preliminary plat of the property. The plat, (Exhibit E) shows a preparation date of January 1976; owner's dedication May 27, 1976, by Golden West Development, Inc., by L. S. Campbell and Wayne F. Parkin; a city council of Fruit Heights City approved June 1, 1976; and a recording on June 24, 1976. Jim testified that within about three to four weeks after April 23, 1976, he had conversations with Campbell and Parkin (Tr 16) and was informed by Parkin that the latter claimed no obligation to furnish the two lots; whereupon Brough called Barton and was advised that there was a misunderstanding and that Barton would see that those lots were delivered. Brough also claimed that his sisters had selected Lots 9 and 10 and were so marked in Brough's office and communicated verbally to Campbell and Parkin by Brough's agent. However, he acknowledged that Parkin said that Lot 9 was already sold. This brings in a conflict as to the time Brough made a selection in that Parkin's records showed that Lot 9 was sold February 8, 1977 (Tr 126) so the conversation with Brough was after February 8, 1977, in which event the Broughs did not make a selection within ten days after the recording date of June 24, 1976. Brough said that in his intital conversations with Campbell, his impression was that:

"At least there was hope of honor. I don't know I would say yes, we are honoring that, I'm not conveying that. He seemed to be aware of the transaction, some of the background to it, and gave me hope that yes, he was working with us." (Tr 29)

Brough said he did not have reason to believe otherwise until Wayne Parkin called. Brough admitted that he never personally advised Parkin (whose Secure Realty was handling the lots) that the two lots had been sold, but only indicated this on Brough's own chart in Brough's office.

Brough also admitted that Lots 9 and 10 in the recorded plat are situated east of the pipeline, whereas Brough intended "to pick west of the pipeline" (Tr 35). The land west of the pipeline is in Kaysville City (Tr 36), the land east of the pipeline was in the county until annexed by Fruit Heights and Brough assumed that the plat Brough's were interested in would be recorded by Kaysville City (Tr 38). Brough had indicated that in April 1976 he had marked Lots 9 and 10 on a copy of a subdivision plat marked Exhibit D, but when it was called to his attention that Exhibit D was signed by the city on June 1, 1976, Brough hedged that it may have been another plat which he could not locate (Tr 46). Brough also admitted on cross-examination that he did not know whether his first conversation with Campbell was before or after June 1, 1976 (Tr 47), and that his first conversation with Parkin was when Parkin told Brough that Lot 9 had already been sold (Tr 49).

Brough testified that the \$5,000 for the two lots was never tendered "because the lots were sold prior to the, to that date of tendering". The plaintiffs' complaint alleges a tender. Attorney Rodney Page, by letter dated February 4,

1977, to Barton advises Barton of the selection of Lots 9 and 10, and that Brough had been trying to work the matter out with Campbell but was unable to resolve the matter (Exhibit F). Page commenced suit on October 12, 1977, against one defendant, Barton Brothers Investment Corporation. On February 27, 1978, Barton moved to bring in Golden West and Campbell as third-party defendants. The Third-Party Complaint alleges:

"5. Defendant and third-party plaintiff purchased the twenty-three acres above mentioned in 1970 and at that time agreed to permit Violate B. McDonald and Evelyn Brough, plaintiffs herein, to select two lots from said twenty-three acres upon the subdivision of the tract. A Uniform Real Estate Contract provided that the plaintiffs would pay defendant and third-party plaintiff the same price tendered by defendant and third-party plaintiff for equivalent ground in the 1970 transaction.

6. Third-party defendant, L. A. Campbell, was informed by Jay Golden Barton of the aforementioned agreement, permitting the plaintiffs to select two lots from the twenty three acre tract.

7. At the closing of the purchase of the said twenty-three acres by the third-party defendants, L. A. Campbell acknowledged the aforementioned agreement between the plaintiffs and defendant and third-party plaintiff as part of the entire purchase and further agreed that the Uniform Real Estate Contract referred to above, would be assumed and honored by the third-party defendants.

8. In connection with the closing, the third-party defendants withheld payment to defendant and third-party plaintiff on one acre of the twenty-three acre tract in order to assure clearance of the original owners. Such payment remains untendered and in escrow at the Farmers State Bank at Woods Cross, Davis County, Utah.

9. Third-Party defendants have subsequently developed and sold most, if not all, of the ground within the twenty-three acres.

10. Third-party defendants have failed to provide two lots for the plaintiffs as agreed in the Uniform Real Estate Contract originally entered into by defendant and third-party plaintiff and subsequently assumed by the third-party defendants.

Said actions of the third-party defendants were intentional and fraudulent on the part of the defendant and third-party plaintiff and as a result thereof said third-party defendants should be liable for court costs, attorneys' fees and punitive damages sustained by said defendant and third-party plaintiff."

Golden West and Campbell answered the third-party complaint by denying the above allegations except Paragraph 9, and alleged as an affirmative defense that the claim was barred by the statute of frauds contained in Title 25, Chapter 5, Section 1.

The trial court made an open court ruling, the initial part of which is as follows: (Tr 183-185)

COURT'S RULING

"THE COURT: As to the defendant, Golden West Development, Inc., one of the third-party defendants, the Court finds no cause of action. I find nothing that would bring them into this. It's a separate entity, though maybe Mr. Campbell's ultra-ego. That certainly hasn't been brought out here and I find no cause of action against Golden West Development, Inc.

The Court has wide latitude. We have from the spring of '76 until the spring of '77, as to when the notice came out. I can just flip a coin and find out when this notice went out, I guess, that's how far apart the testimony is.

The Court thinks it's more reasonable to believe that the finding of the plat in it's preparation and the sale as uncontested by Mr. Brough, that it was sometime in the spring of '76, is the more reasonable date and the Court finds that notice was given at that date.

There seems to be a feeling that the plaintiffs should have gone and completed their performance before it was able to do so. The completion of the project, the off-site improvements as testified to in the fall of '77 as I recall.

The Court finds a Judgment against the defendant, J. Golden Barton -- no, the Barton Brothers Investment Company, and order specific performance. If that is

not possible, and I understand it is not but I think that's an alternative that the Court must do, then the Court finds the damages in the sum of \$22,900. That's the only figures before me. Plus, \$1,450.00 attorney's fees and costs of the court.

The Court finds that the actions of the plaintiff were with due diligence, and was reasonable. That the law would not expect them to offer the \$5,000 to the owners of the property when they had been informed that he absolutely wasn't going to convey it. The testimony, and it's not refuted, was that they stood ready, willing and able to pay that at any time.

The Court has a more difficult time with Mr. Campbell. Mr. Campbell's own testimony was that he knew of the agreement, he entered into an agreement, and indicated that sometime down the line they would take care of it, indicating to the Court that he felt he had a responsibility. He knew of the agreement, and then the question rises, does this take it out of the Statute of Frauds. The Statute of Frauds, of course, indicating that the land must, any contract dealing with land, must be in writing unless it falls within one of the exceptions.

The Court does find that this does fall in one of the exceptions, that Mr. Campbell does have a responsibility in that the agreement that he entered into and testified to as did Mr. Barton, took place prior to the granting of the deed and with discussions thereafter. The Court takes to mean that they would take care of it somewhere down the line, meant that the Broughs would receive that which they have contracted to receive and find for the plaintiffs and against the defendant, L. A. Campbell, the sum of \$22,900 in damages, \$1,450.00 attorneys' fees and costs of court.

The Broughs might understand they are not to get that twice, that's to be as between Mr. Campbell and Mr. Barton, the defendant Barton Brothers Investment Corporation."

Formal Findings of Fact were subsequently filed, which recited that the Barton-Brough transaction was closed on July 29, 1974 at which time Barton gave plaintiffs the choice of two lots to be chosen within ten days of recording of the plat

which was recorded in "the spring of 1976" and plaintiffs gave notice to Barton of the selection "in the spring of 1976"; that plaintiffs were ready and willing at all times to pay \$5,000 for improvements on the lots which were completed in the fall of 1977; that the lots in 1976 were selling for \$13,950 each; that Barton sold the land to third-party defendant in July 1974, subject to the contractual rights of plaintiffs to select two lots as provided in the contract, which was dated December 16, 1970; that at the time of closing between Barton and Golden West the sum of \$8,500 belonging to Barton was retained in escrow; that Campbell verbally agreed with Barton to provide plaintiffs with two lots called for in the contract dated December 16, 1970; and that although the Campbell agreement was "verbal in nature, the Court finds that Barton Brothers Investment Corporation fully performed their obligations under the verbal agreement, which performance constitutes an exception to the Statute of Frauds, which requires that contracts for sale of real property be in writing."

Judgment was entered in favor of the plaintiffs against Barton, ordering Barton to forthwith convey the two lots to plaintiffs who are to pay \$2,500.00 per lot for improvements, or in the alternative for judgment against Barton for \$27,900 less \$5,000 for improvements, and similarly judgment was entered against Campbell to convey the lots or to pay Barton \$27,900 less \$5,000. The \$8,500 in escrow was ordered returned to Barton

unless Campbell paid the judgment in which event Campbell would get the \$8,500.

ARGUMENT

POINT I

THE DOCTRINE OF PART PERFORMANCE IS NOT AVAILABLE IN AN ACTION AT LAW FOR MONETARY DAMAGES FOR BREACH OF AN ORAL CONTRACT TO CONVEY LAND.

Appellant contends there was no oral contract by him to convey the two lots, but assuming the existence of an oral agreement which was otherwise sufficiently definite and certain to be enforceable in an equitable action of specific performance for conveyance of land because of part performance by the obligee, nevertheless, part performance is not available in the alternative remedy for damages.

In Ravarino v. Price, 123 Utah 559, 260 P2d 570 (1953), Justice Wolfe in an opinion which reversed the trial court's judgment for specific performance, added under comments 13 and 14:

"The second count in the complaint is an action at law for money damages; however, plaintiff cannot obtain relief on that basis. It is well settled in this jurisdiction that the doctrine of part performance is not available in an action for damages on an oral contract to convey land. Baugh v. Darley, 112 Utah 1, 184 P2d 335."

This holding was reaffirmed in the case of McKinnon v. Corporation, Etc., Latter-Day Saints, 529 P2d 434 (Utah 1974). In this trial court's oral opinion, he stated that he ordered specific

performance against Barton but,

"If that is not possible, and I understand it is not but I think that's an alternative that the Court must do, then the Court finds the damages in the sum of \$22,900." (Tr 184, lines 15-18)

Then as to Campbell the Court stated that the transaction was an exception to the Statute of Frauds and "find for the plaintiffs and against the defendant, L. A. Campbell, the sum of \$22,900 in damages, \$1,450 attorney's fees and costs of the Court." (Tr 185, Line 12-14)

The written judgment in Paragraph 1 orders specific performance by Barton and payment by plaintiffs of \$2,500 per lot; Paragraph 2 is an "alternate judgment" against Barton for \$27,900 less \$5,000 and \$1,450 attorney's fees against Barton and Campbell; Paragraph 3 is a judgment for Barton against Campbell for specific performance upon payment of \$2,500 per lot; and Paragraph 4 "in the alternative, awards Barton judgment against Campbell for \$27,900 less \$5,000 and for costs.

It is clear that the "alternate" judgment is for money damages for breach of an oral agreement to convey land and is not permissible.

The pleadings did not allege an equitable action. Plaintiffs complaint named only Barton as defendant, and recited an agreement of July 29, 1974, whereby Barton agreed to convey the lots, that the plaintiffs have tendered \$4,999 and defendant failed and refused to provide said lots as agreed. The prayer of the Complaint was:

complaint was:

"1. For an Order of the Court requiring the defendants to provide to the plaintiffs the lots as agreed in the agreement.

2. In the alternative for judgment against the defendants in an amount equal to the present value of the lots in question, together with interest thereon at the legal rate."

The prayer thus requests equitable relief in No. 1 and legal relief in No. 2. However, the third party complaint which is detailed supra pages 6 and 7 contains no equitable allegations and in fact in Paragraph 10 alleges that the failure of Golden West and Campbell to provide two lots for plaintiff was intentional and fraudulent "and as a result thereof said third-party defendants should be liable for court costs, attorneys' fees and punitive damages sustained by said defendant and third-party plaintiff". The complaint did not call for punitive damages against Barton, so it is assumed that the third-party complaint really intended that Campbell be liable for punitive damages and not "punitive damages sustained" by Barton as alleged. The prayer of the third-party complaint was for (1) what plaintiffs may recover from Barton; (2) the sum of \$5,000 as "the value of one acre for which payment was initially withheld; (3) for the sum of \$10,000 as punitive damages, and (4) for cost of court and attorney's fees.

Also, the judgment granting plaintiffs money damages against Campbell was improper for the reasons above stated and for further reason that plaintiffs prayed no relief against

Campbell who in fact was not a party to the Complaint and had no dealings with plaintiffs.

POINT II

THE DOCTRINE OF PART PERFORMANCE AS EXCLUDING THE OPERATION OF THE STATUTE OF FRAUDS IS EXTREMELY LIMITED.

We quote from *Ravarino v. Price*, *supra*, comments 6, 7 and 8:

"The doctrine is to be applied with great care, paying particular attention to the policy expressed in the statute of frauds and historical precedent where the limits have been defined by the process of inclusion and exclusion. In *Price v. Lloyd*, 31 Utah 86, 86 P. 767, 772, 8 L.R.A., N.S., 870, this court said: 'Courts of equity, in establishing the doctrine invoked by plaintiff, have not, by any means, intended to annul the statute of frauds, but only to prevent its being made the means of perpetrating a fraud. In order that a plaintiff may be permitted to give evidence of a contract not in writing, and which is in the very teeth of the statute and a nullity at law, it is essential that he establish [in equity], by clear and positive proof, acts and things done in pursuance and on account thereof, exclusively referable thereto, and which take it out of the operation of the statute.'

And in *Burns v. McCormick*, 233 N.Y. 230, 135 N.E. 273, 274, the Court of Appeals of New York, through Mr. Justice Cardozo announced: 'The peril of perjury and error is latent in the spoken promise. Such, at least, is the warning of the statute, the estimate of policy that finds expression in its mandate. Equity, in assuming what is in substance a dispensing power, does not treat the statute as irrelevant, nor ignore the warning altogether. It declines to act on words, though the legal remedy is imperfect, unless the words are confirmed and illuminated by deeds.'

[7] A careful analysis of the cases will aid in defining what constitutes part performance in the framework of the facts of the instant case. The act relied upon by plaintiff to invoke the doctrine is the purchase of a strip of land to be used as a

railroad spur in conjunction with the land which Mr. Price orally promised to convey. The doctrine, in its broadest scope, is that acts will constitute sufficient part performance if they are clearly referable to some contract existing between the parties, in relation to the subject matter in dispute, and as a result of these acts, the plaintiff has been defrauded. . . . A less liberal view is that the term 'part performance' is to be taken literally, and the performance must be something required in the identical contract.

This doctrine has found little support because many of the strongest cases, those where improvements have been erected on the land by a plaintiff in possession, do not involve any part performance at all, literally speaking. . . . It is also essential that the parol agreement or gift should be established by clear, unequivocal and definite testimony, and the acts claimed to be done thereunder, should be equally clear and definite and referable exclusively to the contract or gift.

[8-10] It is to be noted that possession by the plaintiff is regarded as an important fact, one which is generally directly referable to the contract, and when combined with permanent and valuable improvements which are representative of the existence of an oral contract, virtually every jurisdiction will grant specific performance."

The written Findings of Fact with respect to the alleged oral contract are contained in Paragraphs 16 and 17 thereof as follows:

"16. That the defendant Campbell verbally agreed with Barton Brothers Investment Corporation to provide plaintiffs with the two lots called for in the contract dated December 16, 1970, provided plaintiffs made their selection and paid the monies called for therein.

17. That although the agreement between Barton Brothers Investment Corporation and Campbell was verbal in nature, the Court finds that Barton Brothers Investment Corporation fully performed their obligations under the verbal agreement, which performance constitutes an exception to the Statute of Frauds, which requires that contracts for the sale of property be in writing."

The said "Findings of Fact" are more characteristic of conclusions of law. It is to be noted that the said findings and the third-party complaint both refer to the contract dated December 16, 1970, which was the Uniform Real Estate Contract, Exhibit A, between the Brough Estate (including plaintiffs) as seller and Barton Brothers Investment Corporation. The 1970 agreement gave Barton the option to buy acreage west of the pipeline, and gave Brough the "option of retaining one lot west of said pipeline, to be adjusted in said payment due June 1, 1975". Plaintiffs complaint was for two lots pursuant to the July 29, 1974 agreement, Exhibit B, from a named subdivision in Grand Oaks East Subdivision in Kaysville City. Golden West developed the property east of the pipeline under the name of Grand Oaks subdivision, and plaintiffs claimed to have selected Lots 9 and 10 thereof which were east of the pipeline and in Fruit Heights, not Kaysville City.

Campbell's agreement with Barton, Exhibit 1, dated June 7, 1974, makes no exceptions or references to any other agreements and obligates Barton to furnish good and marketable title. Barton did not contract directly with plaintiffs until July 29, 1974. By warranty deed dated July 18, 1974, recorded July 30, 1974, Barton deeded the 22 acres to Golden West without any restrictions or reservations.

The trial court's oral opinion relating to the oral agreement and its effect stated: (Tr 184-185)

"The Court has a more difficult time with Mr. Campbell. Mr. Campbell's own testimony was that

he knew of the agreement, he entered into an agreement, and indicated that sometime down the line they would take care of it, indicating to the Court that he felt that he had a responsibility. He knew of the agreement, and then the question rises, does this take it out of the Statute of Frauds. The Statute of Frauds, of course, indicating that the land must, any contract dealing with land, must be in writing unless it falls within one of the exceptions.

The Court does find that this does fall in one of the exceptions, that Mr. Campbell does have a responsibility in that the agreement that he entered into and testified to as did Mr. Barton, took place prior to the granting of the deed and with discussions thereafter. The Court takes to mean that they would take care of it somewhere down the line, meant that the Broughs would receive that which they have contracted to receive and find for the plaintiffs and against the defendant, L. A. Campbell, the sum of \$22,900 in damages, \$1,450.00 attorney's fees and costs of the court."

Thus neither the formal findings which were conclusions regarding an entirely different agreement dated December 16, 1970, or the courts oral opinion point to any clear oral agreement, but on the contrary indicate a confusion even as to the general nature of the oral agreement. Barton testified that his agreement with Campbell about the lots for the Brough girls was prior to closing date of August 18 and after his July 29, 1974 agreement with Brough (Tr 89-90). In which event he was already obligated to give Campbell clear title under the June 7, 1974 agreement and had in fact deeded the land free and clear by deed dated July 18, 1974, recorded July 30, 1974. Barton's only performance was what he was obligated by written contract to perform. The trial court, during Barton's testimony, also expressed his concern over the Statute of Frauds and part performance as follows:

"THE COURT: The difficulty I have here, Mr. Smedley, is where is the part performance? I'm, I haven't seen any documents. The documents apparently refer not at all to this two-way agreement or innuendoes.

MR. SMEDLEY: Well the part performance is by deed in that we had property that was under contract to Mr. Barton. By deed -- he transferred all of his interest to Mr. Campbell. Campbell now has the property and as a result of our performance, totally, we are now entitled to explain what the agreement was between the parties in that regard.

THE COURT: I have a tough time getting that out of the Statute of Frauds. The conveyance of the property would not, and if you have some law on that I would be glad to have that. Just the deeding of property would not do that.

MR. SMEDLEY: I think that it would, Your Honor, because I think the deeding of the property is the performance.

THE COURT: In order to get it out of the Statute of Frauds, Mr. Smedley, don't you have to have some indicia of an agreement, and we are talking about an agreement of conveying the property to some third-party in the case of you and Mr. Fadel's client. It's not even an agreement as between the two of you, but to be conveyed for the benefit of some third party who is in a previous agreement situation with your client.

MR. SMEDLEY: Well, I don't know.

THE COURT: Don't you have to have some indication that there is an agreement?"

Nothing in the subsequent testimony, admitted over objection of counsel, appeared to answer the concerns expressed by the trial court as quoted above. In fact, the Court again (Tr 94) asked Barton's counsel how he could get around the Statute of Frauds' stating:

"THE COURT: Well, in other words, we have got to have something that ties it down. Checks, notes, memoranda, something with signatures on it to indicate an acknowledgment, as I understand the Statute of Frauds before that can be brought out.

MR. SMEDLEY: Well, I don't know that it has to be anything with signatures on.

THE COURT: What would prevent me from putting up any kind of a document there is and saying here is a document and this says such and such, and no signatures, no acknowledgment, or no nothing?"

Then at (Tr 106) the Court stated that the document did not appear to be ambiguous as as to allow parole evidence in view of the Statute of Frauds.

Campbell was called to testify by Barton and testified in substance that before he bought the property he made an agreement with Barton "that down the road I was going to make an agreement to take care of the two lots" (Tr 136). However, the agreement as to two lots did not arise until July 29, 1974, as reviewed in the statement of facts, so the discussion as to the two lots would have been after July 29, 1974. And while Campbell may not have been clear as to the time, he was clear that the only agreement with respect to the Brough lots was that it would have to "be worked out", but it was never mentioned how it would be worked out (Tr 137). Campbell said it was up to Barton to negotiate with Golden West to buy the lots for the Brough sisters and Barton never did (Tr 141). Barton was recalled by his counsel. Appellant objected to any oral testimony that went beyond explanation of negotiations and contended that the Statute of Frauds is substantive, not just procedural (Tr 151-152). Over objections of appellant, the Court allowed Barton to testify. Barton said that "in the preliminary closing meeting" at Farmers State Bank, August 30th,

he met Campbell (Tr 153) and told him that Barton had exercised his option with Brough for the land west of the pipeline, and that the girls were to select two lots and Barton escrowed \$8,500 to cover the cost of the ground (Tr 154). When asked what, if any, comment did Mr. Campbell make in this regard, Barton answers: "He said that he understood that it was, he said that because of the necessity of exercising the option on the ground west of the pipeline he would honor that agreement"(Tr 154 line 27-20).

Appellant moved to strike the Barton testimony which was denied by the Court. It is to be noted that Barton had already made a deal with Brough in exercising his option and granting the sisters the right to select two lots before asking Campbell to honor the agreement, but after Campbell had acquired the property by Earnest Money Agreement June 7, 1974, and deed recorded July 30, 1974. However, on cross-examination, Barton changed the date of his conversation with Campbell from August 30th to July 30th (Tr 156). Later, as shown by testimony at (Tr 166-167) Barton said the only reason for the July 29, 1974 agreement with the sisters was to satisfy his obligation under the 1970 Uniform Real Estate Contract, and when asked if Campbell had ever committed himself in writing to any reservations or exceptions, Barton replied: "At the closing, he felt that he had." (Tr 166 line 19). But Barton contended this would have been July 30 even though the unsigned closing statement, Exhibit 2

is dated August 18, 1974. When asked why he didn't demand a written agreement from Campbell the same as Brough required on July 29, 1974, Barton replied that he felt that the escrow agent "would pass that on in title insurance or in title information to Mr. Campbell, and that that would serve as the instrument of agreement, that the title record would do that, on the title insurance" (Tr 167 lines 3-8).

Even allowing the oral testimony, it is clear that at most, Campbell indicated verbally, after he bought the property and had no obligation with respect to the said lots, that he would work something out down the road.

Nothing reviewed in this point or known to be in the transcript shows anything like a part performance or any performance by Barton relating to an alleged oral agreement by Campbell to convey two lots to Broughs. Bartons only performance was fulfilling his legal obligations under his written contract with Campbell for which Barton was paid in full. This court, in *Zions Properties, Inc. v. Holt*, 538 P2d 1319, under Comment 7, stated:

"[7] Plaintiff also claims, in the alternative, that the oral agreement is removed from the statute of frauds due to the equitable principle of part performance, which is part of our law by statute, and decision. The observations just made pertaining to oral modification also apply here. The payments referred to could well be regarded as payments on the written contract and they do not unequivocally relate to any oral contract."

POINT III

ASSUMING THAT CAMPBELL ORALLY PROMISED TO DEED LOTS TO PLAINTIFFS, THIS PROMISE WAS WITHOUT CONSIDERATION AND IS NOT AN ENFORCEABLE CONTRACT APART FROM THE STATUTES OF FRAUD.

Viewing Barton's testimony most favorably, any oral agreement, whatever its terms, came on or after July 30, 1974, "at the closing". The unsigned closing statement was dated August 18, 1974. Barton was already obligated as of June 7, 1974, to convey the land. Any promise by Campbell to deliver two lots to be "chosen" by plaintiffs was without consideration. Campbell received nothing for such an alleged promise.

An analysis of the transaction related by Barton reveals that Brougs lost no money, Barton gained profit, and Campbell would have lost money. Brougs had already retained \$3,000 from Barton for one acre of land, whether to adjust for survey deficiencies or otherwise. Barton was selling to Campbell over 22 acres at \$8,500 per acre which Barton bought in 1970 for \$3,000 per acre. Barton's purported escrow with the bank of \$8,500 for one acre to cover the Brough selection amounts to giving Brougs the right to buy back their choice of a developed 22 acres at Campbell's average cost of \$8,500 per acre. This is a loss to Campbell in many ways. It is common knowledge that although a larger tract of 22 acres might be purchased at \$8,500 per acre, yet to buy just one acre even before development would command a much greater price. If Campbell's actual cost of

improvements were estimated to be \$2,500 per lot, and he was required to sell them to Broughs just for the cost of improvements and his actual average cost of the raw ground, he would get nothing for his effort in getting the land annexed, subdivided and improved, would lose money on his actual cost of the selected acreage, and would have carried the expense of his investment from August 18, 1974 until late 1977 without any interest renumeration or gain, all for the benefit of Broughs and/or Barton, to whom he owed nothing.

POINT IV

PLAINTIFFS MADE NO TENDER STATING THAT THE LOTS WERE SOLD PRIOR TO DATE OF TENDERING, WHICH INDICATES THAT THE ACTION IS ONE AT LAW FOR DAMAGES, NOT IN EQUITY FOR SPECIFIC PERFORMANCE.

Although the plaintiffs alleged in their complaint that plaintiffs "have tendered the \$4,999 as provided" in the agreement of July 29, 1974, no tender was ever made. James Brough testified that he had not tendered any money to Barton (Tr 22 line 11) and that the reason for not tendering was "because the lots were sold prior to the, to that date of tendering." (Tr 24 line 28). The written findings of the court merely stated that:

"11. That plaintiffs were willing and ready, at all times, to pay the Five Thousand (\$5,000) for the improvement on said lots upon conveyance."

This Court held in the case of Zions Properties, Inc. v. Holt, 538 P2d 1319 (1975) that:

"A tender requires that there be a bona fide, unconditional, offer of payment of the amount of money due, coupled with an actual production of the money or its equivalent."

A letter from plaintiff's attorney to Barton dated February 4, 1977 (Exhibit F) requests that Lots 9 and 10 be made available but makes no offer of payment. The street improvements were completed by the fall of 1977 (Tr 184) and the action was commenced against Barton on October 12, 1977, yet no tender was ever made to Barton, Campbell or Golden West.

Tender of payment and the conveyance are to occur simultaneously and are regarded as mutual and concurrent acts. One party cannot hold the other in default until he has himself properly tendered performance. (77 AmJur 2nd, Vendor and Purchaser 665).

Assuming that tender was excused by Brough's belief that the lots were sold to others, this shows that Brough never intended to obtain specific performance and the action was a legal action for damages which as above reviewed would preclude the claim of part performance as a basis for such legal action.

POINT V

A CONTRACT REQUIRED TO BE IN WRITING
CANNOT BE MODIFIED BY ORAL AGREEMENT
OR UNSIGNED DOCUMENTS.

The judgment against Campbell cannot be supported upon any claimed oral agreement which would tend to alter the written agreements and the deed between Barton and Campbell. Under the written agreement, June 7, 1974, and the warranty deed

July 18, 1974, no obligations to Broughs were assumed by Campbell.

This Court held in *Zions Properties, Inc. v. Holt* (supra) that notations on a check were insufficient, and stated:

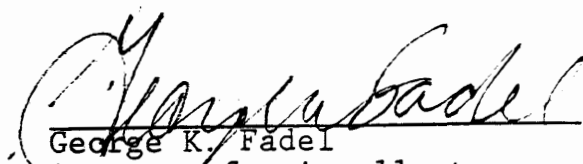
"This, plaintiff argues, is a sufficient memorandum in writing to modify the original contract and satisfy the statute of frauds. It is elementary that when a contract is required to be in writing, the same requirement applies with equal force to any alteration or modification thereof. More importantly here, any such modifying agreement must be sufficiently certain and unequivocal in its terms that the parties will understand what it is and what is to be done under it. Neither the check, nor the quoted notation thereon, make any such recitals and they do not meet that requirement."

CONCLUSION

Campbell at no time agreed in writing to convey lots to Broughs nor was there any part performance on the part of Barton, Brough or otherwise which would support an oral agreement if one had been unequivocally proved. Campbell has not profited whereas Barton will have profited by his failure to perform. Broughs have a claim and judgment against Barton for \$2,000 allowed him on the purchase price, plus damages for loss of anticipated bargain.

The judgment should be reversed as to appellant, L. A. Campbell.

Respectfully submitted,


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L. A. Campbell