1982

Carl Baldwin and Larry Gleim v. Vantage Corp. : Brief of Respondent

Utah Supreme Court

Ray M. Harding, Jr.; Attorney for Appellants;
Edwar M. Garrett; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

CARL BALDWIN and LARRY GLEIM, Plaintiffs and Appellants, vs. VANTAGE CORPORATION, a Utah corporation, Defendant and Respondent.	Civil No. 18202

BRIEF OF RESPONDENT

Appeal from a Judgment of The
Fourth District Court of Utah County,

Honorable Robert Bullock, Judge

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STATEMENT OF CASE

This is an action brought by the Appellants to rescind a contract for the purchase of seven (7) building lots from the Respondent and to seek restitution of moneys paid by Appellants to Respondent for the purchase of four (4) of the seven (7) building lots. Respondent counterclaimed to foreclose Appellants' interest in the said four (4) building lots.

DISPOSITION OF THE LOWER COURT

The case was tried in a District Court, sitting without a jury, on October 30, 1981. After the close of evidence, the Court entered its Findings of Fact and Conclusions of Law and Judgment against the Appellants and in favor of Respondent.

A Motion to Amend the Findings of Fact and Conclusions of Law and the entry of a new or different Judgment was made

by Appellants on November 25, 1981. The Court denied said Motion on December 30, 1981.

RELIEF SOUGHT ON APPEAL

Respondent respectfully requests this Court to affirm the lower Court's decision.

STATEMENT OF FACTS

Carl Baldwin and Larry Gleim, (hereinafter referred to as the Appellants), were business partners engaged generally in the construction industry. (R.82). The Respondent Vantage Corporation, (hereinafter referred to as "Vantage"), is a wholly-owned subsidiary of Deseret Federal Savings and Loan Association, (hereinafter referred to as "Deseret Federal"). One of Vantage's business ventures was the development of the "Blackhawk Subdivision" in Pleasant Grove, Utah. (R.184).

Sometime in April of 1978, the Appellants met with an employee of Vantage, Doug Boulton, at the offices of Deseret Federal in Orem. The Appellants were considering buying some building lots at Blackhawk Subdivision. At the first meeting, some of the terms and conditions under which lots would be sold were discussed. (R.83).

Later in April of 1978, the Appellants met two more times with Doug Boulton. These meetings took place at a Deseret Federal branch in Salt Lake City. (R.86-88). At

the last meeting, the Appellants gave Vantage a check for the down payment on seven (7) lots at Blackhawk Subdivision. (R.88 and Plaintiff's Exhibit #1). Although there was testimony to the fact that an Earnest Money Agreement may have been entered into by the parties, no evidence of traditional writings that are normally associated with the sale of land was presented to the Court. (R.177).

Despite the apparent lack of existence of a traditional writing, most of the terms and conditions of the contract to sell the seven (7) lots to the Appellants are not in dispute. (Brief of Appellant, p.4). However, one item of the contract to sell the seven (7) lots is disputed. Appellants allege that Vantage unconditionally "guaranteed" to Appellants that Deseret Federal would provide construction loans to Appellants for the building of homes on the seven (7) lots. (R.86-87). Vantage denies that such a condition exists. (R.79). The Trial Court held that the Appellants fail to prove by a preponderance of the evidence the existence of such a guarantee. (R.194-195).

Shortly after the Appellants and Vantage entered into the contract to purchase the seven (7) lots, the Appellants went to Alaska for summer. Upon their return in the fall, the Appellants noted that they had been receiving monthly billings for interest on the outstanding principal on the lots. (R.89). In January of 1979, Appellants gave a check to Vantage for all unpaid interest. (R.90 and Plaintiff's Exhibit #2).

In June of 1979, the Appellants made another interest payment to Vantage. The payment was in the form of a check. Enclosed with the check was a handwritten letter that read:

> BLACKHAWK ESTATES PLAT "D"
> Interest for Lots:
> 18, 19, 28, 34, 35, 49, 58 ,
>
> This check for $2,990.32 should
> pay us through May, 1979.
>
> Thank you,
>
> /s/ Carl B. Baldwin
> Baldwin & Gleim Construction

(R.93, 174-175; Plaintiff's Exhibit #3, and Defendant's Exhibit #7).

Sometime later in June of 1979, the Appellants sold two (2) of the lots to Mr. Mark Stringham and paid Vantage all the unpaid interest and principal attributed to those two (2) lots. Vantage passed titled for those lots to Mr. Stringham. Apparently the Appellants made a profit upon the sale of this property. (R.93-94, 116-117, and Defendant's Exhibit #5).

In November of 1979, the Appellants sold one of the five (5) remaining lots to a Mr. O'Bannon. As with the other sale, the Appellants paid Vantage all unpaid principal and interest that was attributed to that lot and Vantage passed the title to Mr. O'Bannon. Again, the Appellants made a profit on the sale. (R.94, 117, and Defendant's Exhibit #5).

In addition to the above-described three (3) lots sold by the Appellants, they also entered into an agreement to

sell a lot to Mr. Gary Mayo, a former employee of Deseret Federal and neighbor to the Appellants. Mr. Mayo paid to the Appellants approximately the same amount of money that the Appellants had paid to Vantage in interest and principal. (R.112-113).

Two years after entering their contract to purchase the seven (7) lots, the Appellants approached Ms. LaRae Pittman, a loan officer at Deseret Federal's Orem office, about obtaining construction financing to build two speculation homes on two of the lots. Ms. Pittman informed the Appellants that Deseret Federal was not making construction loans on speculation homes at that time. (R.96). The Appellants stated to the loan officer that Vantage had "guaranteed" construction financing from Deseret Federal. The Appellants were then referred to Mr. Preben Nielsen, an officer of Vantage and Deseret Federal. (R.97-98).

The Appellants and Mr. Nielsen had several meetings and conversations during the spring and summer of 1980. However, the parties could not arrive at a mutual agreement. (R.135-136). During this same period, the Appellants did make some unsuccessful effort to sell the remaining lots. (R.128).

On December 8, 1980, the Appellants filed a Complaint seeking the return of approximately $9,000.00 from Vantage. On March 12, 1981, Vantage filed its Answer and Counterclaim seeking a foreclosure of Appellants' interest in the four (4) lots upon which there was still outstanding interest due

Vantage. On November 18, 1981, the Honorable Robert Bullock, one of the Judges of the Fourth Judicial District Court of Utah County, signed a Judgment dismissing Appellants' Complaint and granting a Decree of Foreclosure to Vantage. On January 11, 1982, Notice of Appeal was filed in this Court on behalf of the Appellants.

ARGUMENT

POINT I: THE LOWER COURT CORRECTLY APPLIED THE STATUTE OF FRAUDS.

This case presents an uncommon use of the Statute of Frauds by the Appellants. Traditionally, the Statute of Frauds is used by a seller of real property as a defense against a buyer who seeks specific performance of the agreement to sell said real property. However, in this case, it is not the seller who is using the Statute of Frauds as a "shield", but the buyers who are using the Statute as a "sword". Although such use of the Statute of Frauds is not without legal precedence, it must be remembered that much case law that interprets the Statute of Frauds is addressing a different use of the Statute than is being proposed in this case.

Appellants argue that the contract to purchase the seven (7) lots from Vantage is unenforceable by reason of

Utah's Statute of Fraud, U.C.A. §25-5-3 (1953 as amended).* Because of this alleged unenforceability, Appellants claim that they are entitled to restitution of moneys paid to Vantage on four (4) of the seven (7) lots. However, the Trial Court held 1) that the Statute of Frauds was not applicable since there were sufficient writings and 2) that, even if the Statute was applicable, there was sufficient part performance to grant to the Court the equitable power to enforce the contract. These two points will be discussed separately.

A. Sufficient Memorandum

Whether or not a writing is sufficient to satisfy the requirement of Utah's Statute of Frauds has been an issue that this Court has addressed on numerous occasions. An examination of this Court's opinion on this issue for the last several years clearly reveals the desire of this Court not to establish a bright-line test for determining whether or not a writing is sufficient to satisfy the Statute.

In Birdzell v. Utah Oil Refining Co., 242 P.2d 578 (Utah, 1952), the Court reiterated the then traditional view that "the memorandum which is relied upon to satisfy the Statute of Frauds must contain all the essential terms and

*Appellants, in their Brief, refer to U.C.A. § 25-5-1 (1953 as amended); however, since the subject matter of this case is a contract for the sale of land, §25-5-3 is more applicable. (Brief of Appellant, P.26).

provisions of the Contract". 242 P.2d at 580. However, this holding has been greatly modified.

In Guinand v. Walton, 450 P.2d 467 (Utah, 1969), the Defendants had sent a letter to the Plaintiff "to confirm" the Plaintiff's 10% ownership in certain partnership's assets which included real property. The Plaintiff later sued to receive his 10% and the Defendants raised the defense of the Statute of Frauds. This Court rejected the defense of the Statute of Frauds holding that the wording of U.C.A. §25-5-1 (1953 as amended) does not require that the writing contain all the requirements of a complete contract. Instead, the Court stated:

> All that is required is that the interest be granted or declared by a writing subscribed by the party to be charged. 450 P.2d at 469.

In the recent case of Gregerson v. Jensen, 617 P.2d 369 (Utah, 1980), the buyer sued the sellers for specific performance of a contract for the sale of real property. The Trial Court refused to grant specific performance since there was not before it an adequate written description of the subject real property. Upon a motion for new trial, the buyer produced the newly discovered evidence of an unsigned deed which had the description of the property. The Trial Court refused to grant the new trial since the deed was unsigned. This Court, in reversing the Trial Court's ruling, held that several writings may be construed together in order to satisfy the requirements of the Statute of Frauds.

In order for several writings to be construed together, some "nexus between the writings must be shown". Further, parol evidence may be used to demonstrate the nexus. 617 P.2d at 373.

The standard, established by this Court for determining whether or not there exists sufficient writings to satisfy the requirements of the Statute of Frauds, dictate to a Trial Court: (1) that it must review all the written memorandum as a whole if some nexus can be shown between the writings, (2) that it must find that the party who is being charged has signed, and (3) that it must find that the wording in the writings is of the quality necessary for the Trial Court to grant the relief requested. In applying this standard to the case at hand, the lower Court correctly held that the Statute of Frauds had been satisfied and, thus, was not applicable. The writings in this case consist of three (3) checks, a letter, and detailed ledgers. The wording on these memoranda reveal signatures of both Appellants, legal descriptions of the real property, the purchase price, the amount of the down payment, and the interest rate. The writings were of such sufficiency that the lower Court could not under the law have granted Appellants' requested relief, restitution.

B. Part Performance.

The Doctrine of Part Performance has been used by courts of equity as a means to take a contract outside the

traditionally hard-and-fast rules of the Statute of Frauds. This doctrine has partially been codified in Utah as U.C.A. § 25-5-8 (1953 as amended). Although the lower Court in this matter found sufficient writings to satisfy the requirements of the Statute of Frauds, it also found sufficient part performance by the parties to take the contract outside the scope of the Statute.

The Appellants in their Brief advanced the following rationale as to why the Lower Court errored in its applications of the Doctrine of Part Performance:

1) There were seven (7) separate contracts between the parties; each contract was to purchase one lot;

2) Therefore, performance by Vantage on three (3) of the seven (7) contracts is not part performance on the part of Vantage as to the remaining four (4) contracts; and,

3) Finally, Vantage cannot rely upon the payments made by the Appellants as part performance.

However, this reasoning misinterprets the facts in this case and the law of part performance.

First, Appellants have misapplied the facts by arguing in their brief that there was only one contract. (Brief of Appellants, P.29). As counsel for the Appellants said during the trial, whether the parties in this case entered into one contract covering seven (7) lots or seven (7) contracts each covering one lot is an issue of fact to be decided by the Court. (R.93). The lower Court implicitly found there to be only one contract and there is

substantial evidence of record to support such a finding. The agreement to buy the seven (7) lots was done at the same time. Payments on the seven (7) lots were done with one check. With the exception of the purchase price, all the terms and conditions of sale, (both agreed and disputed terms), were the same. Finally, the Appellants themselves thought of the transaction as one contract. Appellant Carl Baldwin testified at trial as to his meeting with Doug Boulton as follows:

> ...After formally being introduced to Doug, we got down to business and talked about some lots that were being sold only to contractors. We then went into discussion about what lots were available, the terms of a contract agreement. (R.83).

Thus, there is substantial evidence on the record to support the finding that the parties had entered into one contact for the purchase of seven (7) lots.

Second, the lower Court properly applied the laws of the Doctrine of Part Performance to the facts in this case. As was mentioned above, it is usually the buyer of the real property who invokes the Doctrine of Part Performance. In those situations, the buyer is arguing that his actions were of such character that it would violate the principles of equity not to enforce the contract. In a situation in which a seller seeks to invoke the Doctrine of Part Performance, the Courts must be careful not to place the seller in the position of neither being able to enforce the contract by reason of the Statute of Frauds, nor deny the contract by reason of the Doctrine of Part Performance. Thus, if the

Doctrine would be available to buyer, it must also be available to the seller!

This spirit of flexibility and fairness was announced by this Court in Holmgrin Brothers, Inc. v. Ballard, 534 P.2d 611 (Utah, 1975), in which Chief Justice Maughan wrote:

> The Doctrine of Part Performance, in the State of Utah, has not been reduced to a formula, as it has in some of our sister states. Thus, decisions of this Court do not stay the hand of equity in the equitable situations created by oral contracts for the transfer of an interest in land, but the statute is preserved and remains to serve its purpose - the prevention of fraud and injustice. 534 P.2d at 613-614.

The Trial Court in this case was faced with the following facts: (1) Both parties admit to the existence of a contract to buy seven (7) lots; (2) The buyers paid a 10% down payment on the seven (7) lots; (3) The buyers made several interest payments on the lots; (4) The buyers sold four of the lots and paid seller in full for three of the lots; (5) Having been paid in full for three of the lots, the seller transferred its complete interest in those lots; (6) The buyers made a profit in reselling three of the lots; (7) The buyers attempted to sell the three remaining unsold lots; and, (8) The contract between the parties was two and a half years old before the buyers attempted to rescind it. It is clear from these facts that it would have been unjust and tanamount to fraud to invoke the Statute of Frauds in this matter when both parties, over a substantial period of time, relied upon and acted in accordance with their

this matter when both parties, over a substantial period of time, relied upon and acted in accordance with their contractual relationship. See Woolsey v. Brown, 539 P.2d 1035 (Utah, 1975).

Finally, Appellants argue that the mere payment of money by a buyer is not sufficient to remove a contract for the sale of real property from the Statute of Frauds. The Appellants are correctly stating this traditional rule. Maxfield v. West, 23 P.754 (Utah, 1980). See also 9 Utah Law Review 91 (1964). However, this traditional standard has little application to the facts in this case. As stated above, there was only one contract and Vantage did more than just accept Appellants' money. Also, the Appellants exercised dominion over the four (4) lots upon which they are suing by selling one of lots and by trying to sell the other three. Thus, there was more than a "mere payment of money".

The Trial Court correctly rejected Appellants' use of the Statute of Frauds as a "sword" in this case. The Court recognized that there were sufficient writings to demonstrate unequivocably that there existed a contract to sell seven (7) lots. The Court also recognized that both parties had acted in such a manner that the Doctrine of Part Performance would preclude either party from invoking the Statute of Frauds. The Appellants' use of the Statute of Frauds should also be rejected by this Court since such a use is

inconsistent with the principles of equity, and it is based upon a misapplication of the facts in this case.

POINT II: THE TRIAL COURT PROPERLY FOUND THAT VANTAGE DID NOT "GUARANTEE" CONSTRUCTION FINANCING.

The Appellants allege that one of the conditions of the contract to sell the seven lots was that Vantage unconditionally "guaranteed" that Deseret Federal would provide construction financing to the Appellants when they decided to build houses on those lots. The Appellants further allege that, since Deseret Federal did not provide construction financing, they are entitled to restitution of moneys paid on four of the seven lots.

However, the Trial Court, upon hearing all the testimony and reviewing all the evidence found that the Appellants failed to prove by a preponderance of the evidence that Vantage had made such a "guarantee". Thus, the Trial Court rejects, as a matter of law, the four (4) legal theories advanced by Appellants, e.g. breach of contract, unjust enrichment, misrepresentation and fraud, and upon which they claim they are entitled to restitution.

Although the Appellants discuss in their brief why the legal theories they advanced at trial entitled them to restitution, the thrust of their argument on appeal is that the Trial Court erred when it entered its Findings of Fact No. 11:

> Plaintiffs contended that an officer of Vantage Corporation had represented to them at the time of

> purchase that at any time in the future they would be guaranteed construction loan money to build on any of the lots. Plaintiffs did not sustain their burden of proof that any such guarantee was made to them and it further appears the most convincing evidence is that no employee of Vantage Corporation or its parent, Deseret Federal Savings and Loan Association, had authority to bind the Association to make a future loan.

Appellants advance two (2) main reasons for why said finding is improper: 1) Vantage admitted to existence of the "guarantee" in its Answer; and 2) the Trial Court improperly ignored the testimony of the Appellants. These two points, plus a review of the evidence present at trial, will be discussed below separately.

A. Vantage's Answer.

Appellants maintain that, because Vantage admitted to the existence of the guarantee in its Answer, the Trial Court erred when it found that the guarantee had not been made. However, when the admission in the Answer is viewed in light of how the case developed, the Trial Court was within its discretion as to whether or not to hold such an admission as conclusive.

Mr. Garrett, at trial, informed the Court that any admission to the guarantee was an error on his part since the existence of the guarantee was always at issue. (R.210). Mr. Harding, counsel for the Appellants, certainly knew well in advance of trial that the existence of the guarantee was disputed. The first action taken by the parties in this matter after the pleadings had been filed was the Pre-Trial

hearing held on May 22, 1981, before Judge Bullock. At that Pre-Trial, Joseph E. Hatch, counsel for Vantage, stated to the Court that, "We allege that they made no promise to make construction loans." (R.215). Mr. Harding later seemed to recognize the disputed nature of this issue when he stated, "It will be a factual issue, I guess, really." (R.215).

Just prior to trial, the Appellants sent Interrogatories to Vantage. Interrogatory No. 6 read:

> Did the Defendant or any of its officers or employees during discussion upon which the oral contract is based or at any other time state that it would guarantee construction loans on said lots for the Plaintiffs with Deseret Federal Savings and Loan?

Vantage's Answer to Interrogatory No. 6 was "No". (R.24). Further, Mr. Garrett in his opening statement at the trial stated, "The evidence, your Honor, as to guarantee is going to be sharply disputed." (R.79). Thus, there was no question that the Appellants knew in advance of trial and throughout the litigation that Vantage did not "admit" to the existence of the guarantee. The record in this matter reveals the extensive amount of time that was spent on the issue of the guarantee by both parties. It is apparent that the Appellants did not rely on the "admission" in the Answer.

Finally, paragraph 2 of the Fourth Cause of Action of Appellants' Amended Complaint reads:

> That immediately prior to said sale Defendant represented to the Plaintiffs that it would guarantee construction loans with Deseret Federal Savings and Loan Association.

Vantage denied this paragraph in its Answer and it, of course, goes to the same facts. Thus, the tenor of the Answer was to deny the existence of the guarantee.

However, the Appellants argue that the "admission" is conclusive and final. This simply is not the law. Such an admission is a judicial admission. It is not necessarily an evidenciary admission. Thus, the trier of fact has the discretion to place as much weight as he feels is appropriate. See Heth v. Del Webb's Highway Inn, 429 P.2d 442 (Ariz., 1967).

In determining how much weight should be placed upon such an admission, the Trial Court could certainly take into account the fact that Vantage denied the existence at every opportunity subsequent to the filing of the Answer and that the Appellants never raised the fact of the admission in the pleading until closing arguments. Thus, the Trial Court was within its discretion in holding such an admission was not conclusive as to the issue of the existence of the guarantee.

B. Testimony of Appellants.

Appellants also argue that the Trial Court abused its discretion when it found that the "guarantee" was not made because such a finding contradicts the direct testimony of the two Appellants. However, this was not an abuse of the Trial Court's discretion.

In DeVas v. Noble, 369 P.2d 290 (Utah, 1962), the Court affirmed the Trial Court's ruling in favor of the Defendant despite the uncontradicted direct testimony of the Plaintiff. In affirming the Lower Court, Justice Crockett wrote:

> Due to his function as the determiner of the facts and his advantaged position in close proximity to the witnesses and the trial, it is his privilege to be the exclusive judge of the credibility of the witnesses, the weight to be given the evidence and the facts to be found therefrom. This includes appraisal of the ability of the witnesses to know and understand and their capacity to remember. The court's prerogative of course does not go so far as to permit him to stubbornly ignore and refuse to be guided by credible, uncontradicted evidence when all reasonable minds would accept it. That could result in arbitrary and unreasoning denial or distortion of justice. Nevertheless because of the prerogative just mentioned as judge of all aspects of the case, if the testimony of a witness is affected with any frailty which might reasonably be considered as casting suspicion upon it or discrediting its accuracy or truthfulness, the court is not bound to accept such testimony as the fact and so find. And the rule is not otherwise because the witness happened to be a party to the action. 369 P.2d at 293.

The above position was reaffirmed by this Court in Anderson v. State Farm Fire and Casualty Company, 583 P.2d 101 (Utah, 1978), when it stated:

> The testimony of a party or other interested witness is not conclusive, even if it is not contradicted, as here. His testimony is to be given such weight and credibility as the trier of fact finds reasonable under the circumstances. 583 P.2d at 104.

The Appellants argument in this regard relies heavily upon the case of McClellan v. David, 439 P.2d 673 (Nev., 1968). However, that case involves some extremely unusual facts. A Nevada trial Court set aside a default judgment in

favor of Plaintiff. The Plaintiff appealed alleging that the lower Court had abused its discretion in setting aside the judgment. The Supreme Court of Nevada agreed, holding that the only reason the lower Court could set aside the judgment is if it disregarded the testimony of a Mrs. Troxel, an interested witness. Not only is this case controversial, as the excellent descenting opinion points out, but it is dealing with such a completely different set of circumstances that it is of little value.

The Trial Court, as the trier of fact, was within its discretion when it entered a finding that was contrary to the testimony of two interest witnesses. Thus, this Court should affirm that finding.

C. The Evidence Supporting the Lower Court's Finding.

The Appellants seem to be arguing that as a matter of law they are entitled to restitution since the Appellants testified that the "guarantee" was made by Mr. Boulton, Vantage admitted inadvertently in its Answer that guarantee existed, and Mr. Boulton could not remember his conversation with the Appellants. However, such an argument ignores the large amount of evidence that indicates that no "guarantee" was made.

First, it was almost two years after the parties had entered into the contract when the Appellants first approached Deseret Federal about obtaining construction fi-

nancing on any of the lots. Also, during that two year period, the Appellants sold four of the seven lots. Three of those lots were sold at a profit to the Appellants. This is certainly evidence of the fact that the "guarantee" did not exist. Also, it is evidence that the Appellants' dealings in this matter is inconsistent with the "existence" of a guarantee. Such behavior is a waiver by the Appellants of the "guarantee" even if it existed. See Larsen v. Knight, 233 P.2d 365 (Utah, 1951), and Hoke v. Stevens-Norton, Inc., 375 P.2d 743 (Wash., 1962).

Second, Mr. Boulton testified that although he could not clearly remember his conversations with the Appellants, it would be contrary to his training and experience to make such a guarantee. (R.159). This is evidence to support the Trial Court's finding that the guarantee was not made.

Third, Mr. Preben Nielsen, the Executive Vice President and Manager of Vantage, testified that Vantage had no authority to bind Deseret Federal to make loans, that no one at Deseret Federal had authority to commit Deseret Federal to make construction loans in the future, and the Doug Boulton did not have the authority to commit Deseret Federal to make loans in the future. (R.189-190). The lack of authority to make such a "guarantee" is certainly evidence that the Trial Court can consider in finding that no such guarantee was made.

Thus, the Trial Court did not arbitrarily disregard the testimony of the Appellants. There is substantial evidence

to support a Court's finding that no guarantee was made; and there is considerable reasons to support the Court's conclusion that Appellants failed to meet their burden of proof by the preponderance of the evidence.

Finally, the Appellants argue that this Court has the duty to review and to weight all the evidence in this case. However, the two cases cited by the Appellants in support of this view demonstrate that this Court does not have total discretion in reviewing the facts. In Del Porto v. Nicolo, 495 P.2d 811 (Utah, 1972), this Court held:

> It is true, as plaintiff asserts, that this action to avoid deeds is one in equity upon which this court has both the prerogative and the duty to review and weight the evidence, and to determine the facts. However, in the practical application of that rule it is well established in our decisional law that due to the advantaged position of the trial court, in close proximity to the parties and the witnesses, there is indulged a presumption of correctness of his findings and judgment, with the burden upon the appellant to show they were in error; and where the evidence is in conflict, we do not upset his findings merely because we have reviewed the matter differently, but do so only if evidence clearly preponderates against them. 495 P.2d at 812.

In the case of Hatch v. Bastian, 567 P.2d 1100 (Utah, 1977), the Plaintiff brought an action for either rescission or reformation of a deed because of an alleged mutual mistake of the parties. Judge Bullock ruled in favor of the Defendant because he found the evidence did not support the fact that there had been a mutual mistake. This Court affirmed Judge Bullock's decision and held as follows:

> Even though we may review the evidence, the proposition is well grounded in our law that due to the advantaged position of the trial court, we indulge considerable deference to his findings and do not interfere with them unless the evidence so clearly preponderates against them that this court is convinced that a manifest injustice has been done. On the basis of what has been said above concerning the dispute in the evidence and the burdens of proof, we are not persuaded that the findings and judgment should be overturned. 567 P.2d at 1102.

As has been discussed above, the Appellants have failed to meet their burden on appeal and show that the Trial Court erred in finding that Vantage had not made the alleged guarantee.

CONCLUSION

For reasons stated above, Respondent respectfully requests this Court to affirm the trial Court's judgment.

RESPECTFULLY SUBMITTED this 4th day of May, 1982.

GARRETT AND STURDY

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CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing Brief of Respondent was mailed, postage prepaid, this 4th day of May, 1982 to Ray M. Harding, Jr.,

Esq., HARDING AND HARDING, Attorney for Appellants, 58 South Main Street, P. O. Box 532, Pleasant Grove, Utah 84062.

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