1982

Carl Baldwin and Larry Gleim v. Vantage Corp. : Appellants' Reply Brief

Utah Supreme Court

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

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

CARL BALDWIN and LARRY GLEIM, Plaintiffs-Appellants, vs. VANTAGE CORPORATION, a Utah corporation, Defendant-Respondent.	)	CASE NO. 18202

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APPELLANTS' REPLY BRIEF

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Appeal from a Judgment of the Fourth
District Court of Utah County,
Honorable Robert Bullock

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RAY M. HARDING, JR.
ATTORNEY FOR APPELLANTS
58 South Main Street
P.O. Box 532
Pleasant Grove, Utah 84062

EDWARD M. GARRETT
ATTORNEY FOR RESPONDENT
311 South State Street
Salt Lake City, Utah 84111

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58 South Main Street
P.O. Box 532
Pleasant Grove, Utah 84062

EDWARD M. GARRETT
ATTORNEY FOR RESPONDENT
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Appellants, having been served with Respondent's Brief, respectfully submit the following Reply Brief, answering the new matters set forth in Respondent's Brief.

REPLY TO RESPONDENT'S STATEMENT OF FACTS

Although Respondent's Statement of the Facts is basically correct, Appellants wish to call attention to some of the misleading and incorrect statements found therein.

First, on page 3 of its Brief, Respondent refers to "the contract to sell the seven (7) lots". This is not correct because this lawsuit does not involve all seven of the original lots, but only four (4). In addition, there are four (4) separate contracts involved in this dispute rather than just one.

Second, Respondent states that VANTAGE denies the existence of a loan guarantee (Brief of Respondent, page 3).

However, the only representative of VANTAGE who was a party to the contract negotiations was DOUG BOULTON and therefore, DOUG BOULTON is the only witness who can affirm or deny, on behalf of VANTAGE, the existence of a loan guarantee. On both direct and cross-examination Mr. BOULTON testified that loan guarantees were periodically made. (Tr. pp. 77, 88).

ARGUMENT

I. REPLY TO POINT I OF RESPONDENT'S BRIEF

Respondent first complains that this case represents an uncommon use of the Statute of Frauds as opposed to a traditional use. Respondent, however, has not cited any authority for the proposition that there is a "traditional use" of the Statute of Frauds. The statutory language of the Utah Statute of Frauds does not limit the application of the statute in any way nor does it indicate a proper or traditional application. The statute simply renders some contracts unenforceable. Therefore, Respondent's argument that this case represents an "uncommon" use of the Statute of Frauds is entirely irrelevant.

A. REPLY TO "SUFFICIENT MEMORANDUM"

In addition to misinterpreting the applicable case

law, Respondent has raised new matters which need some attention.

Respondent cites Guinand v. Walton, 22 Utah 2d 196, 450 P.2d 467 (1967) for the rule that all that is required for a writing to be sufficient "is that the interest be granted or declared by a writing subscribed by the party to be charged" (Brief of Respondent, page 8) (Appellants cite Guinand v. Walton, supra, for the same rule; Brief of Appellants, page 27). Respondent also relies on Gregerson v. Jensen, 617 P.2d 369 (Utah, 1980) for the proposition that where some "nexis" is present, several writings may be construed together in order to satisfy the Statute of Frauds.

Appellants do not dispute these rules of law but the facts of this case establish that the requirements of the Statute of Frauds have not been met even if all of the writings are construed together.

In support of this position, Appellants submit that Respondent has not produced a written instrument, or even several writings construed together, which "grant" or "declare" the property interest conveyed under the oral contract. Appellants also submit that Respondent has failed to establish that the clear requirements set forth in the Utah Statute of Frauds have been met.

Section 25-5-1, U.C.A. 1953, as amended, states that no interest in real property shall be created, granted,

assigned, surrendered or declared otherwise than by deed or conveyance in writing. This section further requires that the writing be "subscribed by the party creating, granting, assigning, surrendering or declaring" the interest or estate conveyed. Similarly, Section 25-5-3 U.C.A. 1953, as amended, states in part:

> "Every contract for . . . the sale, of any lands, or any interest in lands, shall be void unless the contract . . . is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent . . . "

In the case at bar there is no evidence of any written instrument containing the signature of Respondent's agents or respresentatives. The signature of the party conveying the property interest or selling the land is an essential element in order to remove an oral contract from the Statute of Frauds.

One other important clarification must be made. On page 9 of his Brief, Respondent has stated that "the writings in this case consist of three (3) checks, a letter, and detailed ledgers". Even though the ledgers do not "grant" or "declare" the property interest conveyed, Appellants maintain that these writings cannot be construed as part of the contracts for the sale of the subject lots. These writings were introduced into evidence by an accountant (TR p. 97) for DESERET FEDERAL SAVINGS AND LOAN. They were created by the

accountant (after the sale) and not by the parties to the contract negotiations and they only reflect accounting entries. (TR p. 98)

Thus, the only writings which can properly be construed together in an effort to meet the requirements of the Statute of Frauds are the checks and the letter. As stated above, however, even when the ledgers are viewed along with the other writings, the requirements of the Statute of Frauds have not been met since all of the essential terms of the contracts are not contained therein. Specifically, nowhere is the property interest granted or declared (See Brief of Appellants, p. 28) and there is no writing subscribed by the Respondent.

B. REPLY TO "PART PERFORMANCE".

Respondent begins its argument under this issue by restating (inaccurately) Appellants' argument on part performance found in the Opening Brief. Appellants feel that the argument has been properly stated in the Opening Brief and that there is no need for Respondent's recharacterization.

Respondent next argues that rather than seven separate contracts for the seven lots, there was only one contract. Respondent further argues that "there is substantial evidence of record to support such a finding" (Brief of

Respondent, p. 11). This "substantial evidence" is simply not found in the record. The facts set forth on page 11 of Respondent's Brief do not constitute evidence of a single contract.

Appellants' position as to the existence of seven separate contracts is clearly set forth in the Opening Brief (Brief of Appellants, p. 29). It is important to note, however, that even if there was only one contract, the resale of three lots by Appellants still does not constitute part performance which will bring the oral contract out of the Statute of Frauds.

If there was a single contract, both parties proceeded as if the contract was severable as to each lot. Severable or divisible contracts are, in legal effect, made up of independent agreements about different subjects, made at the same time. Swinney v. Continental Bldg. Co., 340 Mo. 611, 102 S.W.2d 111 (1937). Thus, if there is only one contract, that contract is the subject of this lawsuit and it no longer includes that portion of the original agreement which has been completely performed and severed. At this time there is no part performance other than part payment of the purchase price on the contract. This part payment does not remove the oral contract from the Statute of Frauds. (See Brief of Appellants, pp. 30-32)

Respondent also complains that it should not be prevented from enforcing the contract because of the Statute of Frauds and at the same time, prevented from denying the contract by reason of the Doctrine of Part Performance. (Brief of Respondent, p. 11) This statement makes no sense because the situation described by Respondent cannot possibly exist.

First, if the contract is void under the Statute of Frauds, Respondent is permitted to deny it. On the other hand, if the Doctrine of Part Performance is applicable, the Statute of Frauds is not. In other words, the Doctrine of Part Performance and the effects of the Statute of Frauds cannot apply to the same contract. In view of this, Respondent does not need to caution the Court on the application of the Statute of Frauds and the Doctrine of Part Performance. (Brief of Respondent, p. 11)

Another new issue raised by Respondent is that the Doctrine of Part Performance must be available to the seller if it is available to the buyer. Appellants agree that the Doctrine is available to the seller of real property <u>if the seller has done something which constitutes part performance</u>. The seller cannot rely on the part performance of the buyer to enforce an oral contract which falls within the Statute of Frauds. <u>Utah Mercur Gold Min. Co. v. Herschel Gold Min. Co.</u>, 103 Utah 249, 134 P.2d 1094 (1934); <u>Schwedes v. Romain</u>, 587 P.2d 388 (Mont. 1978); Brief of Appellants, pp. 29-30.

Finally, it should be noted that Respondent has misstated the facts in its factual summary found on page 12 of its Brief. Both parties do not admit the existence of one contract.

The undisputed facts clearly establish that the parties entered into an oral contract for the sale of land. The Respondent, as the party seeking to establish that the contract can be saved from the Statute of Frauds, has the burden of so proving. Appellants strongly maintain that the Respondent failed to carry this burden, and that the trial court erroneously found that the Statute of Frauds did not apply. This error alone warrants a reversal.

II. REPLY TO POINT II OF RESPONDENT'S BRIEF

Respondent begins its argument by restating and recharacterizing the arguments set forth in Appellants' Brief. As stated above, Appellants feel that the arguments are properly stated in the Opening Brief and there is no need for Respondent's recharacterization. Moreover, Respondent misstates Appellants' argument by characterizing "the thrust" of all of Appellants' arguments in terms of a single finding of fact. Although Appellants do contend that Finding of Fact No. 11 is erroneous, Appellants' arguments go well beyond the scope of this finding. (i.e., Appellants' argument as to the

Statute of Frauds does not depend upon the finding that the guarantee was made.)

Also, the statement found in Finding No. 11 that "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" is misleading as to the applicable law. (This point is more fully discussed below.)

A. REPLY TO "VANTAGES' ANSWER"

Respondent relies heavily on the argument that Appellants knew all along that Respondent would dispute the existence of the guarantee. (Brief of Respondent, p. 16) This, however, has little or nothing to do with the applicable law since the existence of a judicial admission does not depend on the opposing party's reliance thereon. As Respondent has stated, this admission is a judicial admission (Brief of Respondent, p. 17) and should be given the evidentiary weight accorded to such admissions. (See Appellants' Brief, pp. 18-21)

B. REPLY TO "TESTIMONY OF APPELLANTS"

As more fully explained in the Opening Brief (pages 8-18), the trial court abused its discretion in finding that

no guarantee of construction financing was made. Under point II(B) of its Brief, Respondent argues that this finding was not an abuse of discretion. In support of this argument, Respondent cites DeVas v. Noble, 13 Utah 2d 133, 369 P.2d 290 (1962) and Anderson v. State Farm Fire and Casualty Co., 583 P.2d 101 (Utah, 1978).

On page 18 of its Brief, Respondent states that in DeVas v. Noble, supra, this court affirmed a "ruling in favor of the defendant despite the uncontradicted direct testimony of the plaintiff". This is incorrect. The plaintiff, Hattie DeVas, prevailed in the trial court and the Supreme Court affirmed.

In DeVas, the central question was whether the Statute of Limitations had run before the plaintiff commenced her action. Even though the plaintiff made statements which, under more normal circumstances, would have established that the Statute had run, the court found that the plaintiff's action was timely filed. The trial court found that the plaintiff had "such mental limitations that her testimony is unreliable" and refused to be bound by the prior "erratic statements".

In addition, the trial court did not believe the defendant's testimony stating that his "account of things is obviously false".

Thus, the DeVas decision does not in any way support Respondent's conclusion that a ruling was made (and affirmed)

for one party despite the uncontradicted direct testimony of the other party.

In addition, the rules of law set forth in Devas and in Anderson v. State Farm, supra, do not give the trial judge the prerogative to ignore uncontradicted testimony. In fact, the DeVas court specifically held that credible, uncontradicted evidence cannot be ignored when all reasonable minds would accept it. There is nothing in the record which minimizes the credibility of the Appellants or indicates that their testimony is not trustworthy.

In order to find in favor of the Respondent, the trial court had to first ignore the clear, unequivocal testimony of both appellants and then, despite the absence of substantiating testimony, find that no guarantee was made.

It is important to note here that Appellants did not have to prove the existence of an enforceable guarantee. Appellants are entitled to rescision even where innocent and unintentional representations are made which would lead appellants to believe that construction financing was guaranteed. (See Appellants' Opening Brief, pages 21-25)

Thus, even if the testimony of appellants is given almost no weight or credibility it stands uncontradicted and cannot be completely ignored. At an extreme minimum, the testimony of Appellants establishes that statements were made to them which led them to believe that construction financing

on the Blackhawk Estates lots was guaranteed. DOUG BOULTON, VANTAGE'S agent, made those statements.

C. REPLY TO "THE EVIDENCE SUPPORTING THE LOWER COURT'S FINDING"

Appellants submit that part C of Point II of Respondent's Brief illustrates that there is virtually no evidence to support the lower court's finding that the guarantee was not made.

First, Respondent asserts that a mere passage of time, coupled with the resale of some of the lots, constitutes "evidence" that the guarantee was not made. No authority is cited for this proposition and Appellants submit that if the passage of time is "evidence", it tends to support the fact that the guarantee was made. Appellant, LARRY GLEIM, testified that Respondent guaranteed the availability of construction financing "when we were ready to build homes". (TR p. 60) Also, on cross-examination, Appellant, CARL BALDWIN, testified as follows:

> "Q You didn't expect the conditions that existed in 1978 to exist forever in that situation, did you?
>
> A I never really gave it much thought. I always thought that the loan would be guaranteed.
>
> Q All right. Under any circumstances, right?

A If we went in and asked for that loan and were able to make that loan, yes, I did assume that we would get that loan." (Tr. p. 39)

Thus, a lapse of almost two years is supportive of Appellants' claim that the construction financing would be available to them when they were ready to build.

Respondent's next argument concerning the statements of Mr. DOUG BOULTON (Brief of Respondent, p. 20) again illustrates the absence of evidence contrary to Appellants' claim that a guarantee was made to them. First, Mr. BOULTON did testify as to his training and background but these comments must be viewed in light of Mr. BOULTON'S entire testimony. (Tr. pp. 74-75) In connection with this, Appellants direct the Court's attention to pages 13-15 of their Opening Brief. In view of Mr. BOULTON'S entire testimony, it is clear that his training and background has very little (if any) probative value as to the issue of whether the guarantee was actually made.

Finally, Respondent has heavily relied upon the testimony of Mr. PREBIN NIELSON to establish that neither Respondent nor its agent, DOUG BOULTON, nor anyone else at DESERET FEDERAL SAVINGS AND LOAN ASSOCIATION had the authority to commit the Association to make a loan in the future. (Brief of Respondent, p. 20) Somehow, Respondent interprets this testimony as "evidence" that the guarantee was not made.

In an effort to be brief, the history of the law on apparent and implied authority will not be reviewed. The undisputed facts establish that during the contract negotiations Appellants had reason to believe they were dealing not only with VANTAGE CORPORATION but also with a lending institution: DESERET FEDERAL. All of the meetings were held in the offices of DESERET FEDERAL and Mr. DOUG BOULTON was an employee of both VANTAGE and DESERET FEDERAL. Thus, VANTAGE CORPORATION created circumstances which led Appellants to believe that Mr. BOULTON had the authority to commit VANTAGE and DESERET FEDERAL to provide construction loans for the Blackhawk Estates lots. It is a well settled rule of law that principles are bound by the acts of their agents when the agents' acts fall within the apparent scope of their authority and the principal will be bound where innocent third parties have dealt with the agent in good faith. Skerel v. Willow Creek Coal Co., 92 Utah 474, 69 P.2d 502 (1937); Santi v. Denver and Rio Grande Western Railroad Co., 12 Utah 2d 157, 442 P.2d 921 (1968).

In addition to being clothed with the apparent authority to make a loan guarantee, Mr. BOULTON had the implied authority to do so. Here, VANTAGE CORPORATION was trying to sell subdivision lots to homebuilders. DESERET FEDERAL, the parent corporation of VANTAGE, is a lending institution and carries on a profitable business by extending

loans. This combination of business objectives justifies the guarantee of construction loans as an incentive to persuade potential buyers to purchase the subdivision lots from VANTAGE.

> "The actual authority of an agent may be implied from the words and conduct of the parties and the facts and circumstances attending the transaction in question. Implied authority embraces authority to do whatever acts are incidental to, or are necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to the agent." Bowen v. Olsen, 576 P.2d 862 (Utah, 1978)

In view of the applicable case law and the undisputed facts of this case, it is abundantly clear that Mr. NIELSON'S testimony as to the authority expressly given to Mr. BOULTON does not constitute "evidence" that the guarantee was not made.

CONCLUSION

The record below and the briefs of both counsel filed herein lead to the conclusion that the trial court should have ruled in favor of the Appellants. Therefore, Appellants again respectfully request this court to reverse the trial court's judgment and require the trial court to enter judgment in favor of the Plaintiff's and against the Defendant in the sum of $9,371.80 plus costs of court and interest at the legal rate.

RESPECTFULLY SUBMITTED this 23rd day of July,

1982.

HARDING & HARDING

By _____
RAY M. HARDING, JR.
ATTORNEY FOR APPELLANTS
58 South Main Street
P.O. Box 532

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two (2) copies of the foregoing Appellants' Reply Brief were mailed to:

EDWARD M. GARRETT
ATTORNEY FOR RESPONDENT
311 South State Street
Salt Lake City, Utah 84111

DATED this 26 day of July, 1982.

By _____
RAY M. HARDING, JR.
ATTORNEY FOR APPELLANTS
58 South Main Street
P.O. Box 532
Pleasant Grove, Utah 84062