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Utah Supreme Court

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In the Supreme Co

of the State of

MELVIN F. HULET,
Plaintiff-Respondent,

vs.

DANIEL TULLIS and
MARILYN H. TULLIS,
his wife,
Defendants-Appell

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MELVIN F. HULET
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Cedar City, Utah 84720
Respondent

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In the Supreme Court

of the State of Utah

MELVIN F. HULET,
Plaintiff-Respondent,

vs.

DANIEL TULLIS and
MARILYN H. TULLIS,
his wife,
Defendants-Appellants.

Case No. 12615

BRIEF OF DEFENDANTS-APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

This is an action by plaintiff wherein he filed a Complaint seeking restitution or possession of certain real property and improvements thereon, located in Iron County, Utah, and defendants filed Counterclaim for decree of specific performance on an alleged oral buy and sale contract between the parties, the plaintiff contending the case is within the Statute of Frauds, there being no contract due to lack of an executed document, and the

defendants contending that the matter is without the Statute of Frauds, or an exception thereto, because of their action and partial performance pursuant to the alleged oral contract.

DISPOSITION IN THE LOWER COURT

The District Court of Iron County, Utah, entered Judgment on August 5, 1971, ordering that plaintiff have restitution of the realty and improvements and further ordering that the value of improvements made by defendants are an offset against plaintiff's claim for rent and damages, the Court finding that there was not a ing of the minds between the parties hence no enforceable oral buy and sale contract.

RELIEF SOUGHT ON APPEAL

This Appeal is taken by defendants asking this Honorable Court to reverse the ruling of the Trial Court and remand the case back to said Trial Court with a mandate to decree specific performance on the part of plaintiff for the behalf of defendants pursuant to the Counterclaim of defendants.

STATEMENT OF FACTS

Prior to July 24, 1969, plaintiff Hulet and his wife had talked with defendants Tullis on occasion about sell-

ing to defendants a small lot in Newcastle, Iron County, Utah, on which there is located a small frame home (*Tr.* 49, 88-89). However, negotiations had not succeeded for either party (*Tr.* 49-50). Then, on July 24, 1969, at the rodeo grounds at Enterprise, Utah, the Hulets told the Tullis people that they could buy the property for $5,000.00 total purchase price at $200.00 as down payment and $100.00 per month, and further, that they, the Hulets, would get a contract drawn by their attorney but that in the meantime defendants could go ahead and make improvements on the premises and move in (*Tr.* 50, 89). The parents of defendant Daniel Tullis were present and heard the conversation between the Tullis people and Hulets and so testified at the trial (*Tr.* 37-38, 43-44).

The oral agreement made at Enterprise, Utah on July 24, 1969 was that Hulets would sell the home and lot together with 42 shares of Newcastle Town Water for the total price of $5,000.00, with $200.00 down payment and $100.00 per month, with 8% interest on the unpaid balance. The Hulets were to deliver a Warranty Deed and Abstract into escrow whereupon these documents would be delivered to the Tullis people upon full payment of the contract. Plaintiff Hulet testified (*Tr.* 19-23) as did his wife (*Tr.* 116) as to the total price, terms, water and escrow provisions and that they were to obtain a contract covering these terms.

The first part of August, 1969, Tullis began making

improvements on the home and lot (*Tr.* 51-52). However, at this time, the Hulets had not yet obtained a written contract. During the first part of August, 1969, defendant Marilyn Tullis met Mr. Hulet at the Newcastle Post Office. Mr. Hulet advised her that he would bring the contract out as soon as possible (*Tr.* 40, 90). The Tullis people were anxious to obtain the contract and on approximately September 1, 1969, they contacted Mrs. Hulet and were advised by her again to go ahead and move in the house and improve it as if it were their own and that she would get the contract drawn and have them sign it (*Tr.* 91). Included in these improvements were repairs to sewer, sewer line, plumbing, heating system, painting, carpeting, paneling and cement work (*Tr.* 63-64). Aside from their labor beginning in August, 1969, they expended a total sum of $1,454.00 on materials from the date of September 15 to November 15, 1969 (*Exhibit D-3 and Tr.* 65-67). Even though no written contract of sale had been presented or signed by the parties, the Tullis people moved into the premises approximately November 15, 1969, being assured repeatedly by the Hulets that a written contract was forthcoming. At this time the improvements were completed (*Tr.* 52, 64, 98). After the Tullis people had moved into the premises, Mrs. Tullis again met Mr. Hulet at the Newcastle Post Office and inquired about a written contract. She was advised by Mr. Hulet at that time that his wife was "dragging her feet" but

that he would get things "straightened out" (*Tr.* 41). Finally, in latter November or December, 1969, the Hulets presented a contract drawn by their attorney, identified as Exhibit D-1, to the Tullis people (*Tr.* 54, 93). However, this contract did not provide for the water transfer and for an escrow arrangement (Tr. 32-33, 54, 93, 116) as agreed upon by the parties. As a result of this omission, the Tullis people did not sign the contract (Tr. 54). When the Hulets were advised that, because of the lack of water and escrow provisions, the Tullis people would not execute the contract, Mr. Hulet indicated that he would have it changed (*Tr.* 57). Some time thereafter, during latter 1969, the Tullis people had their attorney, Durham Morris, prepare an agreement which provided for the water sale and escrow in addition to the other terms of the agreement between the parties (*Exhibit D-2*). This contract was presented by Tullis to the Hulets (*Tr.* 57), and, as Mr. Hulet testified (*Tr.* 35), at this time the "deal" was still on. In fact, the agreement the Tullis people presented was a true restatement of their oral arrangement (*Tr.* 128) but was not signed by the Hulets because of their feelings toward the attorney who prepared the agreement (*Tr.* 58, 95, 128). Even Mrs. Hulet admitted the contract drawn by Tullis's attorney contained the terms agreed upon (*Tr.* 128).

Plaintiff and wife both indicated they had an agreement with the Tullis people to sell them the property

(*Tr.* 16-23, 116). However, plaintiff testified that he, on November 15, 1969, told the Tullis people that the "deal was all off" (*Tr.* 7). The defendants testified this was not so (*Tr.* 98). In fact, plaintiff gave conflicting testimony in that the "deal" was still on when he was presented with the contract drawn by Mr. Morris which was approximately December, 1969 (*Exhibit D-2, Tr.* 35, 37). From this time on, the plaintiff ignored the Tullis people (*Tr.* 8, 30) even though he passed by the premises in question four times daily in his employment (*Tr.* 11). In December of 1969, defendants borrowed money to pay the $200.00 down payment but never made the payment (*Tr.* 59-60) due to apprehensions caused by Hulets' failure to get a written contract (*Tr.* 60, 73). Even though the defendants had never been personally advised that the deal was off (*Tr.* 96), in the Spring of 1970 they noticed that Hulets had listed the property for sale with a real estate agent who had placed an advertisement in one of the local papers (*Tr.* 96-97). This was the first time defendants suspected that the transaction might not go through (*Tr.* 96, 98). On June 23, 1970, plaintiff had the Iron County Sheriff serve Notice to Quit upon defendants (*Tr.* 10), said Notice being marked Exhibit P-2. Defendants refused to vacate the premises (*Tr.* 9) and Summons was served on Defendants in July of 1970.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING RESTITUTION TO PLAINTIFF AND BY NOT DECREEING SPECIFIC PERFORMANCE ON THE ORAL CONTRACT DUE TO THE PARTIAL PERFORMANCE OF DEFENDANTS.

It is a general rule that the statute of frauds requires a writing for the enforceability of any contract to create or transfer any interest in land. *Simpson on Contracts,* 2nd Ed., sec. 77, p. 153. The Utah Legislature codified this general rule in Section 25-5-1, *Utah Code Annotated,* 1953, which provides, in part, "No estate or interest in real property . . . shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same . . . " However, it is further a general rule that courts will decree specific performance of an oral land contract, despite the statute of frauds, where there has been substantial part performance in reliance on the oral contract, said performance to be referable to the oral contract, and providing the remedy of claimant for the value of his part performance is inadequate so that to deny enforcement would be to work a fraud on the party performing. *Simpson,* supra, sec. 79, page 157. The Utah Legislature has adopted a provision allowing the courts to adopt and enforce this general exception

to the statute of frauds. Section 25-5-8 of *Utah Code Annotated,* 1953, provides that "Nothing in this chapter shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof."

The Supreme Court of the State of Utah has adopted the doctrine of part performance as an exception to the statute of frauds. *Brinton v. Van Cott,* Utah 1893, 8 Ut. 480, 33 P. 218, and *Price v. Lloyd,* Utah 1906, 31 Ut. 86, 86 P. 767. In the *Price* case at page 770, the Court adopted and restated Pomeroy, *Specific Performance of Contracts,* saying:

> "When a verbal contract has been made, and one party has knowingly aided or permitted the other to go on and do acts in part performance of the agreement, acts done in full reliance upon such agreement as a valid and binding contract, and which would not have been done without the agreement, and which are of such a nature as to change the relation of the parties, and to prevent a restoration to their former condition and an adequate compensation for the loss by a legal judgment for damages, then it would be a virtual fraud in the first party to interpose the statute of frauds as a bar to a completion of the contract, and thus to secure for himself all the benefit of the acts already done in part performance, while the other party would not only lose all advantage from the bargain, but would be left without adequate remedy for his failure or compensation for what he

had done in pursuance of it. To prevent the success of such a palpable fraud, equity interposes under these circumstances, and compels an entire completion of the contract by decreeing its specific execution."

The Court in *Price* went on to state, at page 771:

"It must appear that the improvements, relied upon as part performance, are of a character permanently beneficial to the land and involving a sacrifice to him who made them because and in reliance of the gift."

Further, the Court stated, at page 772:

"Courts of equity, in establishing the doctrine (of part performance) 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 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, 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." (Parenthesis mine.)

The *Price v. Lloyd* case was cited numerous times by the Court in *Hargreaves v. Burton*, Utah 1922, 59 Ut. 575, 206 P. 262, as being the outstanding case in Utah pertaining to the doctrine of partial performance.

In the case *In re Madsen's Estate*, Utah 1953, 25 P. 2d 595 at page 601, the Utah Court stated:

> "Part performance which will avoid statute of frauds may consist of any act which puts party performing in such position that nonperformance by other would constitute fraud."

In another case dealing with part performance, the Utah Court stated:

> "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." *Ravarino v. Price*, Utah 1953, 260 P. 2d 570, at page 579.

In *Ravarino*, at page 579, the Court stated that where possession is relied upon "it must be of such nature that it would not have been given without the presence of an oral contract to convey." For other Utah cases wherein the Utah Court affirmed the doctrine of part performance see *Utah Mercur Gold Mining Co., et al., v. Herschel Gold Mining Co., et al.*, Utah 1943, 34 P. 2d 1094, *LeGrand Johnson Corporation v. Peterson, et al.*, Utah 1971, 26 Utah 2d 158, 486 P. 2d 1040, and *Hogan v. Swayze, et al.*, Utah 1925, 65 Ut. 380, 237 P. 1097, where the Court held that where the vendee actually occupied a portion of land making substantial improvements thereon,

he was entitled to specific performance of oral contract, the facts justifying an exception to the statute of frauds. See also *Simpson,* supra, Sec. 79.

The Utah Court has dealt with the sufficiency and types of acts which will satisfy the exception of part performance. In *Randall v. Tracy Collins Trust Company,* Utah 1956, 6 Utah 2d 18, 305 P. 2d 480, at page 484, the Court outlined three general criteria in removing an oral contract from the Statute, they being:

> "First, the oral contract and its terms must be clear and definite; second, the acts done in performance of the contract must be equally clear and definite; and third, the acts must be in reliance on the contract."

In the case of *Latses, et al., v. Nick Floor, Inc.,* Utah 1940, 104 P. 2d 619, the Court held that improvements made upon premises may take a contract relating to such premises out of the statute of frauds even to the extent of requiring a conveyance of the premises pursuant to an oral agreement. The improvements made in the *Latses* case were cement work, repairing floors, repairing the stairs, repairing the toilets and plumbing, painting, paneling, repairing the electric wiring and placing a floor ventilator in the premises. The Court considered these improvements to be permanent. The Court in *Latses* stated:

> "The defense of the statute of frauds may not be used as a means of defrauding a party to a con-

> tract. If he has performed his side of the agreement, the other party may not accept the benefits of that performance and deny the liabilities; but this presupposes that he who accepts those benefits has actual or constructive knowledge of their existance." Page 623.

The Court also stated on page 622 that the improvements must be "something more than repairs that a tenant from month to month might make simply for his own convenience."

Simpson, supra, sec. 79, p. 158, indicates possession coupled with valuable and permanent improvements is considered the strongest and most unequivocal act of part performance.

The theory of the doctrine of part performance is based upon the premise that it would be a fraud upon the vendee if the vendor were permitted to escape the performance of his part of the oral agreement after he has permitted the vendee to perform in reliance upon the oral agreement. 49 *AmJur, Statute of Frauds,* sec. 421, pages 725-6. This section further provides:

> "The oral contract is enforced in harmony with the principal that courts of equity will not allow the statute of frauds to be used as an instrument of fraud. In other words, the doctrine of part performance was established for the same purpose for

> which the statute of frauds itself was enacted, namely, for the prevention of fraud, and arose from the necessity of preventing the statute from becoming an agent of fraud, for it could not have been the intention of the statute to enable any party to commit a fraud with impunity." (Pages 725-6).

See also 37 *C.J.S., Frauds, Statute of,* sec. 248, p. 755.

To summarize, there are six elements which should be discussed regarding the doctrine of part performance. First, the acts relied upon must be such as to change the vendee's position, resulting in fraud, injustice or hardship if the contract is not enforced. 49 *AmJur, Statute of Frauds,* sec. 427, p. 734. Second, the part performance must be prejudicial to the performing party placing him in a situation which will not result in compensation and which situation he would have avoided had there been no contract. 49 *AmJur,* supra, p. 734. Third, the act of the vendee must refer solely to the contract and be substantial, 49 *AmJur* supra p. 734. Fourth, there need *not* (emphasis mine) be payment by vendee where it appears that he had a good reason for not making said payment. 49 *AmJur,* supra, sec. 435, p. 741. Fifth, though there need not be possession of the premises in question by the vendee, possession coupled with valuable improvements is said to be the strongest

act of part performance by which an oral contract to sell land is taken out of the statute of frauds. 49 *AmJur,* supra, sec. 449, p. 755-6. Sixth, in order to constitute part performance, the improvements must be made with the knowledge and consent or acquiescence of the vendor. 49 *AmJur,* supra, sec. 451, p. 758.

The facts indicate that on July 24, 1969, plaintiff and/or his wife told the defendants that they would sell to them the house, lot, and 42 shares of water stock for $5,000.00 to be paid by $200.00 down payment and $100.00 a month to an escrow trustee. Further, the defendants made vast improvements expending a considerable amount of money on the premises from August, 1969 to November, 1969, in reliance on this contract. Defendants moved into the premises, even though they had not signed a contract, on the assurance of plaintiff and his wife. Defendants would not have expended the labor and money on the premises had it not been for the fact that plaintiff and/or his wife told them to move in and do as they wished (Tr. 68, 84). It is clear from the testimony (Tr. 16-23, 37-38, 43-44, 50, 89, 116) that the parties herein had a "meeting of the minds" as to every aspect of the alleged contract. In fact, all testimony by plaintiff, his wife, and the defendants was to the effect that Exhibit D-1 was what they had agreed upon orally, excepting a provision for the water and for the escrow arrangement which was to be set up. Further, all the testimony indi-

cates that the contract obtained by defendants, Exhibit D-2, was a true reflection of their deal but that Hulets would not execute it because of the particular attorney who drafted the agreement. There was testimony by defendants that they were already living in an apartment which was in better condition than these specific premises for a rental of $40.00 per month (*Tr.* 63). It doesn't seem likely that they would have moved into these premises on a rental arrangement where there was a need for vast improvements when they were already living under better conditions.

Appellants submit that the facts of this case fall within, and are governed by, the preceding case law which this Honorable Court has handed down. There is no question but that the acts of defendants were performed in reliance upon a clear and definite oral contract. See *Randall*, supra. Further, there is no question but that the labor and improvements of defendants were permanent, valuable and sufficient to bring this particular case within the exception of partial performance. See *Lasese*, supra.

Each and every requisite or element of the part performance doctrine has been satisfied. First, defendants' acts definitely changed their position which will result in fraud and injustice if the oral contract is not enforced. Second, the defendants are placed in a situation where

there can be no adequate compensation other than specific performance and, also, they are in a situation which definitely would have been avoided had there been no contract. Third, the acts of defendants were brought about by, and refer solely to, the oral contract. Fourth, there is sufficient evidence that defendants were ready, willing and able to make the down payment but that they were completely ignored by plaintiff and his wife, even though payment is not a requirement under the part performance doctrine. Fifth, defendants were in possession of the premises and still are, said possession being coupled with the substantial and valuable improvements made by them and resulting in the strongest and most unequivocal act of part performance. Sixth, there is no question but that the plaintiff and his wife had constructive, if not actual, knowledge of the vast improvements in that there were several phone conversations (*Tr.* 107) between the parties and that the plaintiff's testimony was to the effect that he drove by the premises four times daily in the course of his employment (*Tr.* 11).

CONCLUSION

Defendants respectfully submit that they are clearly entitled to have specific performance decreed of that oral contract made with plaintiff and his wife on July 24, 1969, due to their substantial actions and performance in reliance thereof, and that it would be a fraud against

them to allow plaintiff to act contrary to the oral contract. This matter should therefore be remanded back to the District Court with appropriate instructions.

Respectfully submitted,

CLINE, JACKSON & JACKSON,

By LeRay G. Jackson

Attorney for Appellants