

2016

**KYLE D. ASHWORTH AND JAMIE ASHWORTH, husband and wife,
Plaintiff, vs. RIKI L. LEWIS AND BRENDA H. LEWIS, husband and
wife, Defendants. : Principle Brief of Appellees**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KYLE D. ASHWORTH AND JAMIE ASHWORTH, husband and wife,

Plaintiff,

vs.

RIKI L. LEWIS AND BRENDA H. LEWIS, husband and wife,

Defendants.

Case No.: 201611027-CA

PRINCIPLE BRIEF OF APPELLEES

Appellants' Appeal From Final Order in the Eight District Court, Utah County Honorable Clark A. McClellan Presiding

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UTAH APPELLATE COURTS

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JURISDICTION STATEMENT

None.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The District Court correctly ruled on the following issues: (1) Appellants' breach of written contract failed because of the merger doctrine; (2) the collateral rights exemption did not apply; (3) Appellants' part performance doctrine and estoppel argument failed because (i) Appellants never alleged an oral contract existed, (ii) Appellants' evidence did not refer exclusively to the contract alleged; and (4) Utah Code Annotated § 73-1-7 did not apply.

To preserve a substantive issue for appeal, a party must first raise the issue before the trial court. *Hart v. Salt Lake County, Com'n*, 945 P.2d 125, 129-130 (App. 1997). "In an equity review of facts if the record shows a fair preponderance, or even if the evidence is balanced evenly, the trial court finding should be sustained. *Martin v. Scholl*, 678 P.2d 274, 275 (Utah 1983).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS DETERMINATIVE OF THE APPEAL

None.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE COURT BELOW

Appellants' complaint alleged a breach of the Real Estate Purchase Agreement ("REPC"), part performance in the alternative or Utah Code Ann. §73-1-7. (R.1-8).

Appellees contend that they never agreed to transfer shares of water at any time. (R.12-36). Appellees further alleged that Appellants' entire lawsuit is predicated upon a forgery that still failed to create a contract to transfer shares of water. (R.12-36). Appellees' contentions of forgery were never adjudicated because the District Court granted their motion for summary judgment. (R.12-36).

The District Court ruled that the merger doctrine extinguished the REPC and that the operative document, the warranty deed, contained no transfer of water shares. (R.242-249). The District Court further held that the phrase "negotiate shares at closing," by itself, could not create a contract; or in other words, no agreement to transfer shares of water ever existed as a matter of law. (R.242-249).

The District Court also held that part performance failed as a matter of law because Appellants neither presented facts that Appellants' actions exclusively referred to a contract nor alleged the existence of an oral agreement in any of Appellants' pleadings, sworn statements or otherwise. (R.242-249). The Appellants only referenced one agreement, the REPC, which was bereft of any agreement or condition to transfer shares of water. (R.1-8, 172-228, 242-249).

Now, Appellants' brief attempts to argue new issues not presented to the District Court. First, Appellants argue that shares of water might be appurtenant to the land. Second, Appellants essentially ditch their argument that Appellees breached the REPC and argue that Appellees breached an "oral easement agreement." Appellants initially argued that all evidence supported a written contract to transfer shares of water. And in this appeal, Appellants argue that the REPC is evidence of a breach of an "oral easement

agreement.” Appellants never made mention of the existence of an “oral easement agreement” or appurtenant water rights. Appellants’ brief is an attempt to add new causes of action to their complaint. Even if Appellants had presented these angles to the District Court, their complaint would still fail as a matter of law.

Finally, the District Court acknowledged that Appellants did not allege any facts to entertain an action under Utah Code Ann. § 73-1-7. Based upon these simple indisputable facts, the District Court’s ruling should be upheld.

II. STATEMENT OF FACTS

1. Appellants and Appellees entered into a Real Estate Purchase Agreement (“REPC”). (R.242-249).
2. The District Court ruled that the merger doctrine applied and the warranty deed became the operative document and the final agreement. (R.242-249).
3. The REPC no longer applies and the deed did not transfer water. (R.242-249).
4. The REPC contained both an abrogation and integration clause. (R.242-249).
5. The statement “negotiate shares at closing” did not establish that agreement was made. (R.242-249).
6. The collateral rights exception did not apply. (R.242-249).
7. Part performance and estoppel do not apply because Appellants do not contend an oral contract exists and Appellants’ evidence did not meet the exclusive referability requirement. (R.242-249).
8. Appellants never alleged the water shares were appurtenant to the land nor did they present any evidence with respect to this issue. (R.1-8, 172-228, 242-249).

9. Appellants never alleged a breach of “oral easement agreement” at any time. (R.1-8, 172-228, 242-249).
10. Appellants never sought to enforce continued use of an irrigation pipeline as a basis for their complaint. (R.1-8, 172-228, 242-249).
11. The REPC never stated that the purchase price included water rights. (R.1-8, 172-228, 242-249).
12. Appellants claim under Utah Ann. Code § 73-1-7 failed as a matter of law because Appellants never presented an argument or evidence to the District Court that it applied. (R.1-8, 172-228, 242-249).

SUMMARY OF ARGUMENTS

The Trial Court correctly ruled that Appellants’ complaint does not hold water as a matter of law. The District Court held that Appellants’ own admissions, evidence and pleadings established that no contract related to the transfer shares of water ever existed.

Now, Appellants for the first time in this appeal argue new causes of action claiming that the shares of water were appurtenant to the land, that Appellants sought continued use of a water pipeline, and that Appellees breached an “oral easement agreement.” Appellants never raised these issues prior to this appeal.

Furthermore, Appellants never presented any evidence to the District Court for consideration of appurtenant water rights, continued use of a water pipeline or breach of an “oral easement agreement.” These arguments should not be allowed at this stage because Appellants never preserved them at the District Court level and even if considered, Appellants’ complaint still falls woefully short of a valid complaint.

ARGUMENT

III. THE DISTRICT COURT PROPERLY APPLIED THE MERGER DOCTRINE, THE DOCTRINE OF PART PERFORMANCE, AND RELATED LAW.

From the beginning, Appellants tactic has been to confuse the issues in an attempt to create a contract out of whole cloth. Appellees' entire complaint arises from the Real Estate Purchase Agreement ("REPC"); however, the District Court ruled that the merger agreement abrogated the REPC. The District Court also held that Appellants could not apply the collateral rights exemption because the issues relating to title were central rather than collateral. Appellants' part performance argument failed because there was neither an oral contract nor evidence exclusively referring to an oral agreement. Finally, Appellants' arguments of appurtenant water rights, breach of an "oral easement agreement" and continued use of a pipeline all fail as a matter of law.

A. The District Court Correctly Ruled that the Merger Doctrine Vitiates Appellants' Complaint.

Utah Courts follow the merger doctrine which directs that the "deed is the final agreement and all prior terms, whether written or verbal, are extinguished and unenforceable." *Stubbs v. Hemmert*, 567 P.2d 168, 169 (Utah 1977).

Appellants claim that Appellees agreed to transfer water shares and breached the REPC. However, the REPC contained an abrogation clause and the warranty deed extinguished any prior agreements upon closing. As the District Court correctly ruled, the warranty deed became the final agreement when the parties closed and recorded the deed. Thus, the merger doctrine is sufficient to wipe out Appellants entire complaint.

B. The District Court Correctly Held that the Language “Negotiate Shares at Closing” Did Not Constitute an Agreement to Transfer Shares of Water.

Appellants argue for specific performance claiming “The REPC clearly constitutes an agreement to transfer water shares.” But, the District Court disagreed. The District Court held, “even if the REPC was somehow still a valid, enforceable contract, the statement “negotiate shares at closing” could not transfer shares of water. The District Court stated at best, the statement expresses a future intent to enter into the contract. The REPC does not constitute a contract to transfer the shares of water or an irrigation pipeline.” (R.242-249).

The Appellants argue:

Trial Court failed to consider the ambiguity inherent in Section 1.2 which states that water rights/shares are included in the purchase price but which is followed by language which the trial court deems merely an expression of future intent. Nevertheless, the REPC terms are reasonably certain in that it sets forth the intent of the Defendants to sell a lot to the Plaintiff which includes water rights.

(Appellants’ Brief, page 5.).

Contrary to Appellants’ argument, the District Court did consider the ambiguity and found Appellants’ extrinsic evidence utterly void of any agreement that required Appellees to transfer shares of water or an irrigation pipeline.

Appellants’ reliance on *Alvey v. Reed*, 610 P.2d 1374 (Utah 1980), is completely misplaced and incorrect. The *Alvey* court dealt with an entirely different scenario. For one, the merger doctrine played no part in *Alvey*. In addition, the *Alvey* court had an actual agreement that merely lacked incidental details. In *Alvey*, the court ordered that defendant honor the contract to sell land and supply key terms.

Here, the District Court ruled that there was no contract to transfer shares of water. The District Court did not state that an agreement existed, but lacked key terms to specifically enforce the contract.

Appellants point to extrinsic facts in an attempt to create an agreement that the District Court ruled never existed as a matter of law. The District Court correctly ruled with respect to specific performance.

C. The District Court Correctly Held that the Collateral Rights Exception to the Merger Doctrine Does Not Apply as a Matter of Law.

This District Court gave two reasons that the collateral rights exception did not apply in this case. First, the District Court held that the collateral rights exception “applies when the seller’s performance involves some act collateral to the conveyance of title” and “that issues relating to title are central rather than collateral to agreements for the sale of real estate;” and second, the statement in the REPC did not create an agreement to transfer shares of water, and at a minimum, Appellants need an agreement.

Appellants’ brief never presented anything to show that Appellees’ performance involved an act collateral to the conveyance of title. Appellants only argue that the collateral rights exception applies because the *Alvey* case created a contract. However, as previously stated, *Alvey* did not establish new law that a party can create a contract where none originally existed.

The District Court correctly held that the collateral rights exception did not apply in this case.

D. Appellants' Argument Related to Water Being Appurtenant to the Land Fails as a Matter of Law Because Appellants Did Not Raise the Issue with The District Court and Appellants Present No Legal Basis to Establish this Claim.

To preserve a substantive issue for appeal, a party must first raise the issue before the trial court. *Hart v. Salt Lake County, Com'n*, 945 P.2d 125, 129-130 (App. 1997).

Appellants now argue that the water shares are appurtenant to the land. Appellants failed to preserve this issue for appeal and Appellees' request that the Appeals Court not allow this argument.

In any event, Utah Code Ann. § 73-1-11(5) states that for purposes of land conveyances only, a water right evidenced by any of the following documents is appurtenant to the land: (1) a decree entered by a court; (2) a certificate issued under Section 73-3-17; (3) a diligence claim for surface or underground water filed pursuant to Section 73-5013; (4) a water user's claim executed for general determination of water rights proceedings conducted pursuant to Title 73, Chapter 4, Determination of Water Rights, or pursuant to Section 73-3-16; (5) an approval for an application to appropriate water issued under Section 73-3-10; (6) an approval for an application to permanently change the place of use of water issued under Section 73-3-10; or (7) an approval for an application to exchange water issued under Section 73-3-20.

Appellants do not present any evidence in the record that demonstrates that water shares are appurtenant to the land. Appellants make a faint mention of "water certificates," but, Appellants neither presented any evidence to the District Court nor this Court to establish that the water is appurtenant to the land.

Based upon the foregoing, Appellants' new argument should not be considered and the District Court's ruling should be affirmed.

E. The District Court Properly Applied *Spears* Because of a Clear Integration Clause.

The District Court held *Spears v. Warr*, 43 P.3d 742 had been overruled in part and that *Tangren Family Trust v. Tangren*, 183 P.3d 326, 331 (Utah 2008) did not allow extrinsic evidence in the face of a clear integration clause. Appellants argue that transfer of water by certificate is a collateral right but present no legal argument to support this contention, nor do Appellants present evidence of any water certificates.

Appellants next argue that *Alvey* states that extrinsic evidence may be looked at to clarify uncertainty in a contract. However, as previously stated, the District Court did look at extrinsic evidence, but found no agreement. It further ruled that no agreement to specifically enforce existed, hence, there is no reason to look to extrinsic evidence.

The District Court indicated that the REPC contained a clear integration clause and also correctly ruled that extrinsic evidence is not allowed.

IV. THE DISTRICT COURT CORRECTLY RULED THAT THE PART PERFORMANCE DOCTRINE DID NOT PROVIDE A LEGAL CAUSE OF ACTION.

The Trial Court correctly ruled that part performance did not apply because (1) appellants never contended that an oral contract ever existed; and (2) appellants' acts did not exclusively refer to a contract to possess water. Also, Appellants again present a new issue never raised before the District Court.

A. Appellants Never Contended Appellees and Appellants Entered into an Oral Contract.

The part performance doctrine requires an oral contract that is clear and definite. *Spears*, 44 P.3d at 751. The District Court ruled that Appellants neither presented any evidence of an oral contract nor produced any clear and definite terms. In all of Appellants' pleadings, sworn statements and evidence, Appellants never identified any oral agreement or clear and definite terms of an agreement. Appellants only alleged the breach of the REPC. Appellants never argued breach of a different agreement. The District Court also ruled that the phrase "negotiate shares at closing" undeniably vague and impossibly ambiguous. This alone vitiates Appellants' argument for part performance.

B. Appellants Never Presented Evidence that Satisfied Exclusivity.

Acts of part performance must be exclusively referable to the contract in that the possession of the party seeking specific performance and the improvements made must be reasonably explicable only on the postulate that a contract exists. *Martin v. Scholl*, 678 P.2d 274, 275 (Utah 1983). "In an equity review of facts if the record shows a fair preponderance, or even if the evidence is balanced evenly, the trial court finding should be sustained." *Scholl*, 678 P.2d at 274.

After weighing Appellants' extrinsic evidence, the District Court still held that Appellants' acts were not exclusively referable to a contract to possess water shares or the irrigation pipeline. The District Court concluded that the Appellants' actions could have been done because the Appellees' allowed the Appellants use of the Appellees'

water and irrigation pipeline in exchange for the Appellants' contribution to the cost of the construction, and payment of the water assessments they used. The Appellants never contradicted this statement.

Appellants now argue that the District Court got it wrong because the Appellants should have been allowed to force Appellees to grant Appellants "continued use of the water pipeline." (See Page 12, §12 of Appellants' Brief). But, Appellants never raised this issue before the District Court. Appellants argued to the District Court that Appellees breached the REPC by not transferring shares of water, not that Appellees breached an agreement to grant a "pipeline easement across the back of [Appellees'] property."

Furthermore, Appellants' brief misapplies *Scholl's* rule of relaxing the exclusive referability requirement because Appellants leave out the requirement that the contract must have great clarity and definiteness. *Scholl*, 678 P.2d at 278. The District Court held that Appellants' lack of clarity to be the least of Appellants' problems because Appellants never even contended that an oral contract existed. Thus, Appellants could never meet the burden that allows a court to avoid the exclusivity rule.

C. Appellants Now Claim Breach of an "Oral Easement Agreement."

Strangely enough, for the first-time, Appellants attempt to conjure up a different contract as a basis that the District Court made a mistake. Appellants now argue that "the referable contract" was an "oral easement agreement" and not the REPC. Appellants argue that the REPC is not the operative document but merely evidence of an "oral easement agreement."

On page 14, paragraph 2 of Appellants' brief, Appellants now claim the REPC is evidence of an "oral easement agreement." This is extremely disingenuous. Throughout all of Appellants' pleadings, evidence and sworn statements, never at any time do Appellants argue that Appellees breached an "oral easement agreement." That contention is misleading and a misstatement of the facts.

The Appellants appear to be arguing that the issue before the District Court was "to allow Plaintiffs the continued use of the water pipeline after [Appellees] shut off Plaintiffs from using it..." **That was never an issue before the District Court.** So now, Appellants argue that instead of the REPC being the contract at issue, the referable agreement was the "an oral easement agreement." Appellants never once argued to the District Court that an oral easement agreement on Appellees' property was the contract at issue. This is clear because the District Court pointed out that, "the Plaintiffs do not contend that an oral contract was ever made."

Appellants merely attempt to cloud the issues at hand in an effort to create some cause of action. The District Court's ruling and order should be upheld.

D. **The District Court Correctly Ruled that Utah Code Ann. § 73-1-7 Did Not Apply because Appellants Did Not Allege a Ditch or Canal.**

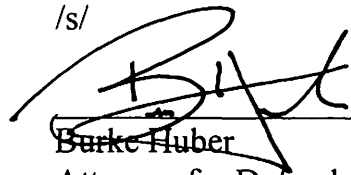
Appellants never argued or presented evidence that the complaint arose from a ditch or canal. Appellants cause of action under Utah Code Ann. § 73-1-7 could not provide a basis for relief as a matter of law. Thus, the District Court's ruling and order should be upheld.

CONCLUSION

Based upon the statutes, case law and arguments herein, the District Court correctly ruled in granting Appellees' motion for summary judgment. Therefore, Appellees respectfully request that the District Court's ruling be affirmed and that they be allowed to seek additional attorney's fees and costs associated with opposing this appeal.

Dated this 15th day of August, 2017. Burke Huber, Esq.

/s/



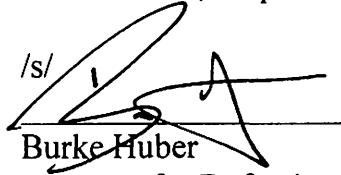
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CERTIFICATE OF COMPLIANCE

I, Burke Huber, certify that this brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 3,079 words, 292 lines, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B). This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in font size 13 and style Times New Roman.

Dated this 15th day of August, 2017.

Burke Huber, Esq.

/s/ 

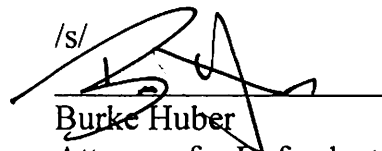
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CERTIFICATE OF SERVICE

I, Burke Huber, certify that I served two (2) true and correct copies of the foregoing Appellees' Brief by UPS Mail on August 15, 2017 on the following persons:

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Dated this 15th day of August, 2017. Burke Huber, Esq.

/s/ 
Burke Huber
Attorney for Defendants/Appellees

ADDENDUM

Ruling and Order dated October 24, 2017

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UINTAH COUNTY, STATE OF UTAH

Kyle D. Ashworth and Jamie Ashworth,
husband and wife,

Plaintiffs,

vs.

Riki L. Lewis and Brenda H. Lewis, husband
and wife,

Defendants.

RULING AND ORDER

Case No. 150800137

Judge CLARK A. McCLELLAN

This matter is before the Court on the Defendants' Motion for Summary Judgment.

Undisputed Material Facts

1. The parties are neighbors whose yards share a common border in Maeser, Uintah County.
2. The Plaintiffs reside at 2919 W. 1000 N. The Defendants reside at 2943 W. 1000 N.
3. In approximately 2006 or 2007, the Defendants subdivided their property which resulted in several new lots, both to the east and west of the Defendants' current residence.
4. The Plaintiffs purchased the lot directly to the east of Defendants' residence from the Defendants and closed on that purchase in February 2007.
5. Paragraph 1.2 of the Real Estate Purchase Contract (the "REPC") concerning water

rights/water shares states “negotiate shares at closing.”

6. The REPC was agreed to by the parties and dated November 1, 2006.
7. The REPC is an integrated document with an abrogation clause.
8. The Warranty Deed was signed and recorded on February 7, 2007.
9. The Warranty Deed does not reference any water shares or water rights to the Plaintiffs.
10. An irrigation pipeline was built in a five foot easement directly west of Defendants’ property in July of 2009.
11. The Plaintiffs paid for a portion of the construction cost of the irrigation pipeline so that they could receive water from the Defendants. The Plaintiffs paid \$1,077.30 for the cost of construction, which was half of the total price paid.
12. The Plaintiffs paid for the water assessments charged to the Defendants by the water company.
13. In the spring of 2013, the Defendants ceased providing water to the Plaintiffs and shut off the water.

Analysis

Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Ehlers & Ehlers Architects v. Carbon County*, 805 P.2d 789, 791 (Utah App. 1991); Utah R. Civ. P. 56(c). The facts and evidence are viewed in a light most favorable to the nonmoving party. *America Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 957 (Utah App. 1989).

The Plaintiffs are seeking title to certain water shares, as well as use of the irrigation

pipeline. The Plaintiffs' Complaint sets forth three causes of action: (1) breach of the REPC; (2) alternatively, part performance and equitable estoppel; and (3) also in the alternative, Utah Code § 73-1-7 which applies to use of a canal or ditch.

The Plaintiffs allege that during negotiations for the purchase of the real property, they believed that the Defendants would transfer to them water shares the Defendants owned. The Plaintiffs also allege that the parties agreed that an irrigation pipeline would be built so water could be delivered to the Plaintiffs' property. The Plaintiffs claim the agreement is memorialized in paragraph 1.2 of the REPC. Paragraph 1.2 pertains to the transfer of water and contains the handwritten statement "negotiate water shares at closing."

The warranty deed was signed and recorded on February 7, 2007. The warranty deed does not reference the transfer of any water shares or the use or ownership of an irrigation pipeline.

Utah courts follow the merger doctrine which directs that the "deed is the final agreement and all prior terms, whether written or verbal, are extinguished and unenforceable." *Stubbs v. Hemmert*, 567 P.2d 168, 169 (Utah 1977).

The warranty deed constitutes the parties' final agreement. The written REPC agreement and any oral agreement the parties may have made were extinguished when the warranty deed was signed and recorded. The REPC and any oral agreements are unenforceable. The extent of the property the Plaintiffs purchased and own is limited to that which is described in the warranty deed. The Plaintiffs had a duty to ensure that the property described in the warranty deed reflected what they intended to purchase and was fully included in the final document. Consequently, the doctrine of merger applies, and any other agreement the Plaintiffs may have made concerning the disputed property is subsumed by the warranty deed.

Additionally, even if the REPC was somehow still a valid, enforceable contract, the statement “negotiate shares at closing” does not establish that an agreement was made. At best, the statement expresses a future intent to enter into a contract. The REPC does not constitute a contract to transfer the shares of water or an irrigation pipeline.

The Plaintiffs argue that they should be allowed to present extrinsic evidence to show the existence of a contract. The Plaintiffs claim that their contribution to the cost of construction of the irrigation pipeline, as well as their use of the pipeline, and payment of water assessments, supports a finding that an agreement was made. The Plaintiffs argue the warranty deed was not an integrated document, and according to *Spears v. Warr*, 43 P.3d742 (Utah 2002), extrinsic evidence must be considered to determine if the warranty deed is in fact an integrated document.

The Plaintiffs’ argument on this point fails. *Spears* has been overruled to the extent that it supports allowing extrinsic evidence on the issue of integration where an integration clause is present in the contract. See *Tangren Family Trust v. Tangren*, 183 P.3d 326, 331 (Utah 2008)(“[W]e will not allow extrinsic evidence of a separate agreement to be considered on the question of integration in the face of a clear integration clause.”) The parties’ REPC contains a clear integration clause in paragraph 14. Consequently, any extrinsic evidence of an agreement is barred by the parties’ contract.

The Plaintiffs also argue that the transfer of water shares was collateral to the sale of the lot to the Plaintiffs. Therefore, the Plaintiffs argue that the collateral rights exception to the merger doctrine applies.

The collateral rights exception “applies when the seller’s performance involves some act collateral to the conveyance of title.” *Maynard v. Wharton*, 912 P.2d 446, 450 (Utah App. 1996).

“Issues relating to title are central rather than collateral to agreements for the sale of real estate.”

Id. Even if the collateral rights exception applied, the statement in the REPC concerning the negotiation of shares of water at closing does not establish an agreement was made to transfer water or ownership of the irrigation pipeline. The REPC does not support a finding that an agreement to transfer water was made, only that it would be negotiated in the future. For that reason, the Plaintiffs’ argument on the collateral rights exception also fails.

The Plaintiffs’ first cause of action fails because of the merger doctrine.

The Plaintiffs argue in the alternative that the doctrines of part performance and equitable estoppel apply. The Plaintiffs argue that the Statute of Frauds does not prevent recognition of an oral contract because of the partial performance doctrine.

“Generally, a conveyance of real property is within the statute of frauds and unenforceable absent a writing.” *Martin v. Scholl*, 678 P.2d 274, 275 (Utah 1983). “However, the doctrine of part performance allows a court of equity to enforce an oral agreement, if it has been partially performed, notwithstanding the statute [of frauds].” *Id.*; Utah Code Ann. § 25-5-8 (1998).

The part performance doctrine requires:

[1] the oral contract and its terms must be clear and definite; [2] the acts done in performance of the contract must be equally clear and definite; and [3] the acts must be in reliance on the contract. Such acts in reliance must be such that (a) they would not have been performed had the contract not existed, and (b) the failure to perform on the part of the promisor would result in fraud on the performer who relied, since damages would be inadequate. Reliance may be made in innumerable ways, all of which could refer exclusively to the contract.

Spears, 44 P.3d at 751.

However, in *Martin v. Scholl*, 678 P.2d 274 (Utah 1983), the Court explained:

[A]cts of part performance must be exclusively referable to the contract in that the possession of the party seeking specific performance and the improvements made

by him [or her] must be reasonably explicable only on the postulate that a contract exists. The reason for such a requirement is that the equitable doctrine of part performance is based on estoppel and unless the acts of part performance are exclusively referable to the contract, there is nothing to show that the plaintiff relied on it or changed hi [or her] position to his prejudice

Scholl, 678 P.2d at 275.

Here, the acts of the Plaintiffs are not exclusively referable to a contract to possess water shares or the irrigation pipeline. The Plaintiffs point to paying half the cost of construction for the pipeline, paying the water assessments, and using the pipeline, as evidence of part performance. A lease agreement between the parties could also reasonably explain the Plaintiffs' actions. The Plaintiffs' actions could have been done because the Defendants allowed the Plaintiffs use of the Defendants' water and irrigation pipeline in exchange for the Plaintiffs' contribution to the cost of the construction, and payment of the water assessments they used. Consequently, the Plaintiffs' actions are not exclusively referable to a contract to transfer water shares, and ownership of the irrigation pipeline.

Furthermore, the Plaintiffs do not contend that an oral contract was ever made. Therefore, the terms of a non-existent oral contract are obviously not definite and clear. The Plaintiffs only claim that the written REPC constitutes the parties' agreement, or that a contract can be implied based on the Plaintiffs' actions. The Plaintiffs offer no facts supporting the finding of an oral contract between the parties.

The Plaintiffs' part performance claim fails because there are no facts establishing an oral contract, and because the Plaintiffs actions are not exclusively referable to a contract.

Finally, the Plaintiffs third cause of action relies on Utah Code Ann. § 73-1-7 which prohibits blocking the use of a canal or ditch. Utah Code Ann. § 73-1-7 states "[t]his section is

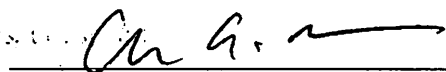
not applicable to any type of water conveyance infrastructure other than a canal or ditch described in this section.” Canal or ditch is not defined in this particular code section. The Utah legislature has defined “water conveyance” in Utah Code Ann. § 57-13a-101 as a “canal, ditch, pipeline, or other means of conveying water.” Clearly, based on that definition the Utah legislature understood there is a difference between a canal, ditch, and a pipeline. If the legislature intended Utah Code Ann. § 73-1-7 to apply to pipelines, as well as a canal or ditch, the legislature would have simply used the term water conveyance. The fact that the legislature did not use the term water conveyance in Utah Code Ann. § 73-1-7 indicates it was the legislature’s intent not to have that particular code section apply to pipelines, but specifically to canals and ditches.

The Plaintiffs’ Complaint does not allege a ditch or canal is involved as it is understood pursuant to Utah Code Ann. § 73-1-7. The Complaint alleges facts concerning a pipeline. Therefore, the Plaintiffs claim pursuant to Utah Code Ann. § 73-1-7 fails as a matter of law.

The Defendants’ Motion for Summary Judgment is granted. Pursuant to *Code v. Utah Dept. of Health*, 162 P.3d 1097 (Utah 2007), and Utah R. Civ. P. 7(f)(2), the parties are notified that this is the final ruling and order in this case. The parties need not prepare or submit any other order.

Dated this 20th day of October, 2016.

BY THE COURT:



CLARK A. McCLELLAN, District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 150800137 by the method and on the date specified.

EMAIL: BURKE L HUBER burke@hsattorneys.com

EMAIL: DANIEL S SAM dsam@srelaw.net

10/24/2016

/s/ JILL SHEFFIELD

Date: _____

Deputy Court Clerk