2016

KYLE D. ASHWORTH AND JAMIE ASHWORTH, husband and wife, Appellants/Plaintiffs, vs. RIKI L. LEWIS AND BRENDA H. LEWIS, husband and wife, Appellees/Defendants. : Reply Brief of Appellants

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

KYLE D. ASHWORTH AND JAMIE ASHWORTH, husband and wife, Appellants/Plaintiffs, vs. RIKI L. LEWIS AND BRENDA H. LEWIS, husband and wife, Appellees/Defendants.	Case No. 20161027-CA

REPLY BRIEF OF APPELLANTS

Appeal from a Final Order
in the Eighth District Court, Uintah County
Honorable Clark A. McClellan presiding

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ARGUMENT

I. Merger Doctrine.

The Defendants/Appellees ("Defendants") argue that the deed is the final expression of the parties as to the claims raised by the Plaintiffs/Appellants ("Plaintiffs") in their complaint, that being that the agreement to transfer water shares merged into the deed for the transfer of the real estate. Defendants further argue that the collateral rights exception to the merger doctrine does not apply to Plaintiffs' claims because there is no evidence of contract. This is despite the fact that there was evidence placed before the court of the parties' prior negotiations regarding transfer of the water rights and the future construction of a pipeline to transfer the water to the Plaintiffs' property, plus the evidence of construction of the pipeline, the payment for the construction of the pipeline by the Plaintiffs and the use of the water and payment of assessments on the water by the Plaintiffs for three years. The fact that following the recording of the deed, the parties followed through on their agreement with the construction of the pipeline and the use by the Plaintiffs of the water, until it was unilaterally shut off by the Defendants, shows that the parties' agreement was collateral to the deed.

Under *Maynard v. Wharton*, 912 P.2d 446, 450 (Utah App. 1996), for the collateral rights exception to not apply, the right claimed must relate to the conveyance of title to the realty. In the case of *Stubbs v. Hemmert*, 567 P.2d 168, 169-70 (Utah 1977), the Utah Supreme Court stated:

> However, if the original contract calls for performance by the seller of some act collateral to conveyance of title, his obligations with respect thereto survive the deed and are not extinguished by it. Whether the terms of the contract are collateral, or are part of the obligation to convey and therefore unenforceable after delivery of the deed, depends to a great extent on the intent of the parties with respect thereto. When seller's performance is intended by the parties to take place at some time after the delivery of the deed it cannot be said that it was contemplated by the parties that delivery of the deed would constitute full performance on the part of the seller, absent some manifest intent to the contrary.

(footnotes omitted).

The Utah Supreme Court's treatment of situations similar to the case at had as noted in the *Stubbs* case above, is consistent with similar treatment by courts in other states on similar facts. For instance, in *Brennan v. Carvel Corp.*, 929 F.2d 801, 807 (1st Cir. 1991), the court cited in support of its ruling the case of *Durkin v. Cobleigh*, 156 Mass. 108, 30 N.E. 474 (1892). Regarding the *Durkin* case, the *Brennan* court stated:

> [T]he plaintiff purchased certain real property from the defendant. The deed to the real property did not contain any covenants requiring the defendant to build a street or to provide water service to the property. Plaintiff sued for breach of contract, contending that "in order to induce him to buy the lot, the defendant orally promised to grade and build the street so as to connect with a certain public street already built and open, and also to cause the city water to be put into the street by a certain specified time." *Id.* at 108–09, 30 N.E. at 474. The trial court granted a directed verdict to the defendant, and the plaintiff appealed to the Supreme Judicial Court of Massachusetts.
>
> The Supreme Judicial Court stated that "[a] rule has been established which may be stated in general terms to be that an agreement by parol, which is collateral to the written contract and on a distinct subject, may be proved." *Id.* at 109, 30 N.E. at 474. The court added that:
>
> > "The existence of any separate oral agreement as to any matter on which a document is silent, and which is not

> inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole transaction between them," may be proved.
>
> *Id.* (quoting Steph.Dig.Evid. (Amer.Ed.) 163). The court concluded that the oral agreement to build the street and connect the property to a water line may have constituted a collateral agreement, and, hence, reversed the trial court's directed verdict for the defendant.

Brennan, 929 F.2d at 807. The above cases demonstrate that contracts can be modified orally or by subsequent actions of the parties, notwithstanding statements to the contrary in merger clauses contained in those contracts.

Thus, in the case at hand, the fact that there is an integration clause in the REPC is not conclusive of whether the Plaintiffs claim that an agreement to transfer water shares and to provide a pipeline easement to the Plaintiffs exists and is enforceable between Plaintiffs and the Defendants. An extinguishment of such an agreement by the integration clause in the REPC, if in fact this happened, is cancelled out by the subsequent conduct of the parties of building and sharing in the cost of construction of the pipeline and in the 3-year use of the pipeline and the water and the payment of the water assessments for 3 years by the Plaintiffs.

There is certainly an issue of material fact on these issues which makes the trial court's dismissal on summary judgment in error.

II. Part Performance.

Likewise, the contention by the trial court and the Defendant that there was no evidence of a contract to support the claim based on part performance is flawed.

Paragraphs 9 and 13-14 of the Plaintiffs' complaint clearly sets forth the terms of an agreement regarding the pipeline, which was further supported by affidavits of the Plaintiffs. On page 6 of the trial court's ruling (Addendum B of Appellants' Brief), the trial court stated that,

> 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' contributions for the cost of the construction, and payment of the water assessments they used. Consequently, the Plaintiffs' actions are not exclusively referable to ta contract to transfer water shares, and ownership of the irrigation pipeline.

Id. (Addendum B to Appellants' Brief). This is completely unreasonable in light of the facts referred to in the Ruling and Order, in the affidavits and in the Complaint. Plaintiffs' deserve a trial on these issue based on the clears issues of fact raised by the facts on record. If it is not an enforceable contract, it is surely an issue of part performance or of other equitable considerations, also raised in the Complaint, of unjust enrichment, equitable lien, etc.

For this reason the trial court's decision should be reversed and the case remanded for trial.

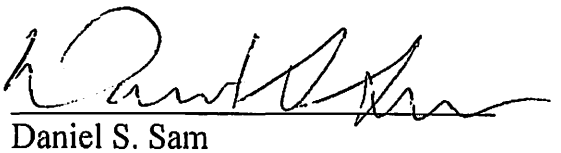
CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant respectfully asserts that the

Ruling and Order dated October 20, 2016, and the Judgment and Order dated April 13, 2017, should be reversed.

Dated this 28 day of September, 2017.

SAM & REYNOLDS, P.C.



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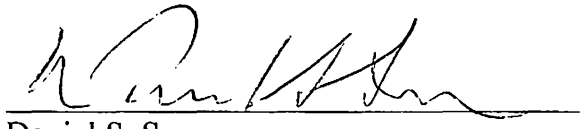
CERTIFICATE OF COMPLIANCE

I, Daniel S. Sam, certify that this brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 1,241 words, 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 Word Perfect 11 in font size 13 and style Times New Roman.

DATED this 28 day of September, 2017.

SAM & REYNOLDS, P.C.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two (2) true and correct copies of the foregoing REPLY BRIEF OF APPELLANT were served by U.S. Mail on September 28, 2017, as follows:

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