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J. W. Edgar and Evelyn Edgar v. Combined Production Associates, Ltd. : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

J. W. EDGAR, a/k/a JIM EDGAR and EVELYN EDGAR, his wife,
Plaintiffs and Respondents,

vs.

COMBINED PRODUCTION ASSOCIATES, LTD., A Utah Corporation,
Defendant and Appellant.

Civil No. 10159

BRIEF OF RESPONDENTS

**Appeal from a Judgment of the District Court of Salt Lake County
Honorable A. H. Ellett, Judge**

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATEMENT OF THE KIND OF CASE

This is an action to collect $9,000.00 on a contract.

DISPOSITION OF LOWER COURT

This case was tried to the court at a pre-trial hearing. From the summary judgment for the plaintiffs, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment in favor of the plaintiffs and seeks judgment in its favor as a matter of law, or that failing, a trial.

STATEMENT OF FACTS

The Plaintiffs were the owners of a one-quarter interest in mining claims, known as Blue Star, Blue Star No. 1 and Blue Star No. 2, located in Eureka County, Nevada. In 1959, Plaintiffs and the other owners leased the claims and by mesne assignments, the Lease came into the possession of the Defendant, Combined Production Associates, Ltd.

On December 9, 1962, Mr. A. B. Thomas, President of Defendant Corporation, met with the Plaintiffs and asked them to sign an Amendment to this Lease. This document was entitled "Amendment to Mining Lease & Options," and shall hereafter be referred to as "Amendment." Plaintiffs refused to sign the Amendment because it placed obligations on them that they did not have under the original Lease. Mr. Thomas then offered Plaintiffs $10,000 for their one-quarter interest in the Blue Star Mining Claims, payable $1,000.00 by check and $9,000.00 by note of Combined Production Associates, Ltd., personally endorsed by him, payable on June 15, 1963. As evidence of this agreement, Mr. A. B. Thomas wrote out the memo which is attached to Plaintiffs' Complaint as Exhibit "A" (R 2-a). The Plaintiffs were still dissatisfied with the

arrangement, because the Amendment still required the Plaintiffs and other Lessors to agree upon the location of the mining claims. Therefore, in order to satisfy this requirement, Mr. Thomas added the paragraph that appears on the bottom of the memo (Exhibit "A"). This satisfied the Plaintiffs and they accepted the check from Mr. Thomas. It was further agreed by the parties at that time that one other person by the name of Travis Edgar had to sign the plat, agreeing to the location of the claims and as soon as that was done, the agreement was to go into effect. A few days later, the Plaintiffs received the telegram (R 41), as follows:

> "Thanks for everything. Morris leaves this afternoon for Albuquerque. Check and note will be good the minute Travis signs, which should be tomorrow. Will work hard for a payout to you before June 15th. Regards. Combined Production Associates, A. B. Thomas."

Then on December 15th, another telegram (R 42) was received by the Plaintiffs, as follows:

> "Travis has signed. Deposit check. Note will reach you in a few days."

The note never arrived and on June 15, 1963, the date the balance of the $9,000.00 became due, Plaintiffs made demand upon Thomas for payment, which was refused and this action was started. Thereafter, Combined Production Associates, Ltd., sold a one-half interest in the Lease to Sierra de Oro, a Nevada Corporation (R 30 to 33).

ARGUMENT

POINT 1. THE COURT ERRED IN GRANTING THE SUMMARY JUDGMENT AGAINST THE DEFENDANT.

The simple handwritten agreement, together with the two telegrams, sets forth a clear, intelligible contract between the parties. The contract was contingent upon the signing of a document by Travis Edgar, but the telegram clearly recites that "Travis has signed" and that the agreement went into effect. The agreement of the parties is simply set out as follows: If the Plaintiffs would sign the Amendment to the Lease which was presented to them, Defendant agreed to buy their one-quarter interest in the claims from the Plaintiffs for $10,000.00, payable $1,000.00 cash and the balance on June 15, 1963. The whole arrangement was contingent upon Travis Edgar signing and the telegram clearly states that Travis had signed. Therefore, there was immediately a binding and enforceable agreement.

POINT 2. THAT PLAINTIFFS' CAUSE OF ACTION IS BARRED BY THE STATUTE OF FRAUDS AND UNENFORCEABLE FOR LACK OF MUTUALITY.

There is more to this action than a simple sale of the claims: The Plaintiffs executed an Amendment, as requested by the President of the Defendant Corporation. This new Amendment placed burdens upon the

Lessors that they had not previously had, so the consideration for the sale was two-fold: (1) The signing of the Amendment, and (2) $10,000.00 represented by $1,000.00 in cash and the balance to be by a promissory note.

Except for the conveyance of the mining leases, the Plaintiffs had complied with the terms of the agreement, and this was certainly a sufficient performance to take the contract out of the Statute of Frauds.

It has long been recognized that part performance of a parol contract for the sale of real estate has the effect of taking such contract from the operation of the Statute of Frauds, so that equity may decree its specific performance or grant other equitable relief. The basis for this doctrine is set out in 49 Am Jur 421 (paragraph 421):

> "The true basis of the doctrine of part performance, according to the overwhelming weight of authority, is that it would be a fraud upon the plaintiff if the defendant were permitted to escape performance of his part of the oral agreement after he has permitted the plaintiff to perform in reliance upon the agreement. The oral contract is enforced in harmony with the principle 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."

Utah has recognized this doctrine and the rule as set out in re Madsen's Estate, 259 P.2d 595 (at page 601):

> "This Court has adopted and followed the general rule laid down by Besse v. McHenry, 89 Mont. 520, 300 P. 199, which states: "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."
>
> (See cases cited therein).

Since the Plaintiffs have now signed the Amendment to the Lease, which Lease has been negotiated to the Corporation, Sierra de Oro (R 30-33), Plaintiffs are precluded from suing for rescission of the contract, since the rights of innocent third parties have intervened. Therefore, if the Defendant were allowed to set up the defense of the Statute of Frauds, then the very thing the Statute tries to guard against would occur—a fraud would be perpetrated on Plaintiffs. They have signed the Amendment and it cannot now be rescinded.

Defendant has set out as a defense that there was no mutuality of remedy. This Court has long recognized the principle that where one person has performed under the contract, the fact that the other person may not have been able to require performance is no defense

to the action. In Utah Mercur Gold Min. Co. v. Herschel Gold Min. Co., 134 P.2d 1094 (at page 1097), this Court said:

> "Respondents contend the prayer if granted would in effect require specific performance in that plaintiffs would be put in possession with leave to continue development. They contend that the principle of mutuality of remedy prevents the court from granting specific performance because if the plaintiffs had refused to go on with the agreed development the court could not compel them to do so. *We see no merit in the court refusing to grant performance to a petitioner where he has performed his part simply because the respondent might not or could not obtain specific performance if the shoe had been on the other foot.*" (Emphasis added).

In Genola Town v. Santaquin City, 96 Utah 88 ,80 P.2d 930, 934, we said "The old doctrine of mutuality of remedy is a concrete example of a rule which has been so eroded by necessary exceptions as to leave it more of a vestige than a substantiality." It is very difficult to see why a person who refuses to perform where the other has performed may stand up in court and say: "Even though he has done what the contract required of him and I have not, you should not make me perform because if he had not performed and I had not performed or tendered performance I could not obtain the remedy of specific performance." The remedy of one should not depend upon the hypothetical case of what another could demand if the situation were different."

POINT 3. THAT PLAINTIFFS FAILED TO TENDER A DEED TO THE CLAIMS OR SHOW OWNERSHIP OF THE CLAIMS AT THE TIME OF THE HEARING.

The Defendant Corporation has been in possession of the claims under the Lease and has been operating them for a long period of time; therefore, was in a better position to know the status of the title than were the Plaintiffs themselves. It was for this reason that the paragraph on the bottom of the agreement was added, relating to the acceptance of the position of the claims. Also, the Vendors under a contract cannot be obligated to assume any greater responsibility than is contained within their contract. The contract does not contain any requirement as to the warranty of the claims; only the statement that they were to "assign" the Blue Star interest (R 2-a). If the Defendant had desired any warranty as to the title, it certainly would have added that to the document. Having failed to make that requirement, it cannot now insist upon anything further than a conveyance of whatever interest the Plaintiffs may have in and to the claims.

Since Defendant is in possession of the property, is it now estopped to deny the Plaintiffs' title. At 55 Am Jur 800 (paragraph 375), the rule is stated as follows:

> "It is a universally recognized rule that no one who has entered into the possession of land under an executory contract of sale is estopped from denying or questioning his vendor's title for the

purpose of defeating the agreement or the rights of the vendor thereunder. The principle upon which the rule rests is that the purchaser is estopped to deny the title of the vendor, because he acknowledged it and gained possession by his purchase, and he ought not then in conscience, as between them, be allowed to enjoy the fruits of his contract and not pay the full consideration."

With regard to the requirement of a tender, there has never been any hesitation on the part of the Plaintiffs to make a deed of the claims available to the Defendant, at such time as the balance of the purchase price was paid. The Plaintiffs will now stipulate with the Defendant that a deed to the claims may be delivered to the Clerk of the Court, to be delivered to the Defendant upon payment of the $9,000.00, plus interest and costs. But certainly, equity does not require that a deed be delivered merely because a Judgment has been entered, since there is no assurance that a Judgment can be or will be collectible against the Defendant.

CONCLUSION

The Judgment against Defendant, Combined Production Associates, Ltd., should be affirmed.

Respectfully submitted,

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