

2005

Michael C. Posner v. Equity Title Insurance Agency, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL C. POSNER,

Plaintiff/Appellant,

vs.

EQUITY TITLE INSURANCE AGENCY,
INC., a Utah Corporation,

Defendant/Appellee.

Appeal No. 20050556-CA
District Court No. 040901853

BRIEF OF APPELLEE

Appeal from the Order Issued by the Third Judicial District Court,
The Honorable Tyrone E. Medley, Presiding
Granting Equity Title's Motion for Summary Judgment Against Plaintiff

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ORAL ARGUMENT NOT REQUESTED

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PARTIES TO THE PROCEEDINGS BELOW

1. The plaintiff-appellant is Michael C. Posner, referred to herein as “Mr. Posner.”
2. The defendant-appellee is Equity Title Insurance Agency, Inc., referred to herein as “Equity Title.”
3. The defendant Independence Title Insurance Agency, referred to herein as “Independence Title,” was a defendant below. Independence Title was granted summary judgment in the district court’s ruling that also granted summary judgment to Equity Title. Mr. Posner did not appeal the grant of summary judgment to Independence Title.
4. The defendant NRT, Inc. dba Coldwell Banker Residential Brokerage, referred to herein as “Coldwell Banker,” was named as a defendant when Mr. Posner filed his First Amended Complaint. Coldwell Banker was not party to the Motions for Summary Judgment filed by Equity Title and Independence Title, and is not party to Mr. Posner’s appeal.

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STATEMENT OF JURISDICTION

Pursuant to Utah Code Ann. §78-2a-3(2)(j), and the Order from the Utah Supreme Court dated June 29, 2005, this Court has jurisdiction over this appeal from the Order on Equity Title's and Independence Title's Motions for Summary Judgment Against Plaintiff, entered by the district court on or about June 15, 2005, dismissing Mr. Posner's claims against Equity Title with prejudice.

ISSUES PRESENTED FOR REVIEW

Equity Title offers the following statement of issues in lieu of that contained on page one of the Brief of Appellant, as it more accurately captures the essence of the issues before this Court:

ISSUE NO. 1: Did the district court correctly rule that Mr. Posner's agent, Kandis Christoffersen, was acting with the scope of her actual and/or apparent authority when she communicated plaintiff's approval of the Financial Guarantee and instructed Equity Title to close the transaction with the Financial Guarantee in place?

ISSUE NO. 2: Did the district court correctly rule that Equity Title breached no duty owed to Mr. Posner by following the directions given to Equity Title by Mr. Posner's agent, Kandis Christoffersen?

Mr. Posner appeals from a summary judgment. Therefore, the standard of review with respect to both of these issues is that an appellate court will review the trial court's conclusions of law for correctness and will affirm summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *AMS Salt Indus. v. Magnesium Corp.*, 942 P.2d 315, 319 (Utah 1997).

STATEMENT OF THE CASE

Equity Title is satisfied with Mr. Posner's Statement of the Case, including Mr. Posner's description of the course of proceedings below.

STATEMENT OF FACTS

In 2002, Mr. Posner, a Florida resident, listed for sale two parcels of property he owned in Park City, Utah. R. 326. His real estate agent in Park City was Kandis Christoffersen of defendant NRT, Inc. dba Coldwell Banker Residential Brokerage ("Coldwell Banker"), which not a party to this appeal. *Id.* In July, 2002, Mr. Posner began negotiations to sell the parcels to Strachan & Associates, LLC ("Strachan") (R. 327), which resulted in the execution of a Real Estate Purchase Contract (the "REPC") between Mr. Posner and Strachan. R. 287-98.

Strachan financed its purchase of Mr. Posner's property by borrowing part of the purchase price from a third-party lender and borrowing the remainder from Mr. Posner. R. 324. Addendum No. 4 to the REPC requires Strachan to provide a "Surety Bond" for the seller financing. R. 297. The REPC does not specify who would issue the bond, does not impose any eligibility requirements on the bond provider, nor does it state any other requirement for the bond. R. 287-98. The REPC does not require Mr. Posner's personal approval of the surety bond. *Id.*

The transaction was closed through a "split closing," with Equity Title acting as Mr. Posner's escrow agent, and defendant Independence Title Insurance Agency ("Independence Title"), which is not a party to this appeal, acting as Strachan's escrow agent. R. 327. On or about August 23, 2002, Mr. Posner signed closing documents, but

Strachan was not able to close the transaction at that time, and had not yet supplied a bond. *Id.* After signing the closing documents, on August 23, 2002, Mr. Posner returned to his home in Florida. *Id.*

In Mr. Posner's absence, he delegated to his agent, Ms. Christoffersen, responsibilities relating to closing the transaction and the surety bond. R. 285-86. Specifically, in response to his own attorney's question regarding Ms. Christoffersen's "role at closing," Mr. Posner testified:

The only reason Kandis was at the closing was to get her commission. And my contact with her as being I guess *my agent* was to *make sure* that it [the subject transaction] *closed*. And she was the one that was *negotiating back and forth with the contract* as far as *making sure that we had a surety bond and how much it was and everything else*.

R. 286 (emphasis added).

On or about August 28, 2002, Strachan supplied Independence Title with the documents necessary to close Strachan's side of the transaction, including a six-page document entitled "Financial Guarantee," issued by American Natural Resources Corporation. R. 21, 317-22. Pursuant to the Financial Guarantee, American Natural Resources Corporation guaranteed payment of Strachan's loan from Mr. Posner in the event Strachan defaulted on the seller financing. R. 317-22. On the same day, August 28, 2002, Independence Title delivered the Financial Guarantee and the other closing documents to Helen Smith at Equity Title. R. 310. Ms. Smith faxed the Financial Guarantee to Ms. Christoffersen, who acknowledged receipt thereof in a telephone conversation with Ms. Smith on August 28, 2002. R. 302-03, 312, 314.

On August 30, 2002, Ms. Christoffersen told Ms. Smith that she had spoken with Mr. Posner, and that Mr. Posner had approved the Financial Guarantee, and had instructed her to have Ms. Smith complete the closing. R. 314 (Smith Depo.), 306 (Christoffersen Depo.). In his First Amended Complaint at ¶ 25, Mr. Posner directly admits that “. . . *Ms. Christoffersen informed Ms. Smith that Mr. Posner had approved the Financial Guarantee written for the amount of \$260,000 and stated that Equity could proceed with the closing.*” R. 328-29 (emphasis added).

Consistent with Mr. Posner’s instructions communicated through Ms. Christoffersen, Equity Title closed the transaction on August 30, 2002 with the Financial Guarantee in place. R. 308, 329. After the closing, Strachan failed to make any payments to Mr. Posner. R. 329. Despite demand from Mr. Posner, American Natural Resources Corporation failed to make good on the Financial Guarantee. *Id.*

SUMMARY OF THE ARGUMENT

The district court’s summary judgment in favor of Equity Title should be affirmed because Mr. Posner’s instructions to Equity Title, conveyed through his agent, Ms. Christoffersen, are binding upon Mr. Posner. Two days after Equity Title faxed the Financial Guarantee to Ms. Christoffersen, Ms. Christoffersen informed Equity Title that Mr. Posner had approved the Financial Guarantee and specifically instructed Equity Title that it should close the transaction. Ms. Christoffersen’s statements to Equity Title in this regard were within the scope of her actual and/or apparent authority, and are binding upon Mr. Posner. Equity Title cannot be liable for a breach of duty to Mr. Posner for following the specific instructions of his agent.

Mr. Posner's argument that the district court's ruling violates the Statute of Frauds, Utah Code Ann. § 25-5-3, is without merit.¹ The Statute of Frauds is a *defense* available to a person who is a party to an oral contract against whom the enforcement of the contract is being sought *by the other party*. That is not the situation in this case. Mr. Posner is the plaintiff; he is not availing himself of the provisions of the Statute of Frauds as a defense to liability to the other party to a real estate contract. Moreover, a third-party guarantee contract, whether it is called a "surety bond" or "financial guarantee," is neither a lease agreement nor a contract for the sale of land or interest in land. Therefore, § 25-5-3 is inapplicable to it. There is no requirement under § 25-5-3 that such a contract, including changes thereto, must be in writing and signed by Mr. Posner.

Mr. Posner is also incorrect in arguing that the REPC was materially changed because the guarantee contract was called "Financial Guarantee" rather than "surety bond," and had a face amount of \$260,000 rather than \$263,900. These differences are substantively immaterial. If the Financial Guarantee had been entitled "surety bond," Mr. Posner would be in no different position than he is today. A surety bond is simply a performance bond, which is precisely what the Financial Guarantee purports to be. The

¹ Whether a violation of the Statute of Frauds occurred is not even an issue presented for review by Mr. Posner. *See* Brief of Appellant at 1. Mr. Posner did not make any argument regarding the Statute of Frauds in his memorandum in opposition to Equity Title's Motion for Summary Judgment. R. 455-80. He improperly raised this issue for the first time in a letter (which is not even included in the Record) Mr. Posner's attorney sent to the district court on the eve of the summary judgment hearing. Brief of Appellant at 5, n.3. Equity Title objected to Mr. Posner's tactic at the hearing (R. 644 at p. 28), and does so again here. Out of an abundance of caution, Equity Title addresses Mr. Posner's improper Statute of Frauds argument below, but requests the Court to disregard Mr. Posner's unpreserved and improper argument.

cause of Mr. Posner's loss was not the title of the document; it was the selection of the guarantor, which is a matter that that did not involve Equity Title.

Likewise, the \$3,900 difference between the face amount of the Financial Guarantee and Mr. Posner's belated revision to Addendum No. 9 to the REPC is also immaterial. Mr. Posner admitted that neither Strachan nor the guarantor, American Natural Resources Corporation, ever made a single payment to Posner. R. 329. Thus, there is no causal connection between Strachan's default (or the guarantor's default) and the fact that the Financial Guarantee had a face amount of \$260,000 rather than \$263,300.

Moreover, Mr. Posner changed Addendum No. 9 to the REPC, crossing out the figure \$260,000 and interlineating the figure \$263,900, *after* Strachan had closed his side of the transaction and *after* American Natural Resources had executed the Financial Guarantee for \$260,000. R. 411, 317-22; Brief of Appellant at 5, n.2. Mr. Posner's change to Addendum No. 9 was not initialed by Strachan. If the Statute of Frauds has any application in this case, it would be to void Mr. Posner's unilateral change to the REPC. This issue is moot, however, because Mr. Posner's agent expressly instructed Equity Title that Mr. Posner had approved the Financial Guarantee and that Equity Title should close the transaction.

ARGUMENT

I. THE DISTRICT COURT SHOULD BE AFFIRMED BECAUSE MR. POSNER IS BOUND BY HIS AGENT'S INSTRUCTION TO EQUITY TITLE THAT MR. POSNER HAD APPROVED THE FINANCIAL GUARANTEE AND THAT EQUITY TITLE SHOULD CLOSE THE TRANSACTION.

The district court properly granted summary judgment in Equity Title's favor because Mr. Posner's agent told Equity Title that Mr. Posner had approved the Financial Guarantee, and that Equity Title should proceed with the closing. Thus, Equity Title's actions in closing the transaction with the Financial Guaranty in place were taken on the express consent, approval and instruction of Mr. Posner's agent. Ms. Christoffersen's statements to Equity Title were within the scope of her actual and/or apparent authority to act in Mr. Posner's behalf, and therefore are binding against Mr. Posner.

A. Mr. Posner Is Bound by the Statements of His Agent to Equity Title Regarding His Approval of the Financial Guarantee and Instruction to Proceed with the Closing.

Ms. Christoffersen was Mr. Posner's agent with respect to the subject transaction, and had Mr. Posner's actual and/or apparent authority to accept the Financial Guarantee supplied by Strachan and to instruct Equity Title to proceed with the closing of the transaction. Accordingly, Mr. Posner is bound by the representations and instructions Christoffersen conveyed to Equity Title. *See Producers Livestock Loan Co. v. Miller*, 580 P.2d 603, 605-606 (Utah 1978) ("It is fundamental that where one authorized another to act for him and for his intended benefit that, insofar as the latter is doing acts within the scope of the authority given, or acts reasonably calculated to further that purpose, the principal so authorizing is deemed to be performing those acts himself.").

“Actual authority can be either express or implied.” *Diston v. EnviroPak Med. Products, Inc.*, 893 P.2d 1071, 1076 (Utah App. 1995). In *Zions First Nat’l Bank v. Clark Clinic Corp.*, 762 P.2d 1090 (Utah 1988), the Utah Supreme Court explained that:

Actual authority incorporates the concepts of express and implied authority. Express authority exists whenever the principal directly states that its agent has the authority to perform a particular act on the principal’s behalf. Implied authority, on the other hand, embraces authority to do those acts which are incidental to, or are necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to the agent.

Zions First Nat’l Bank v. Clark Clinic Corp., 762 P.2d 1090, 1095 (Utah 1988).

In contrast to actual authority, “[a] finding of apparent authority requires that the acts or conduct of the principal, [Mr. Posner], creates an appearance which causes a third party, [Equity Title], to reasonably believe that a second party, [Ms. Christoffersen], has authority to act on the principal’s behalf.” *Diston*, 892 P.2d at 1076. “Basic agency law dictates that a principal is bound by the acts of an agent clothed with apparent authority.” *Horrocks v. Westfalia Systemat*, 892 P.2d 14, 15 (Utah App. 1995). See also *Watson v. Tom Growney Equip., Inc.*, 721 P.2d 1302, 1304 (N.M. 1986) (seller’s agent who told buyer that approval had been granted for sale of backhoe and who had apparent authority to make representation bound seller to contract with buyer); *Au v. Au*, 626 P.2d 173, 178 (Haw. 1981) (“[A]n owner is responsible for the representations of his agent made within the scope of his agent’s selling authority.”).

B. Ms. Christoffersen Acted Within the Scope of the Actual and/or Apparent Authority Granted to Her by Mr. Posner.

The district court correctly found that Ms. Christoffersen was acting within the scope of her actual implied and/or apparent authority when she communicated to Equity Title that Mr. Posner had approved the Financial Guarantee and that he had instructed that Equity Title should proceed with the closing. R. 619-24. The undisputed facts in the Record below confirm that Ms. Christoffersen had actual and/or apparent authority over all aspects of the closing, including determinations regarding the adequacy of “surety bond.” Mr. Posner admitted in his First Amended Complaint that Ms. Christoffersen was his agent for this transaction. R. 326, at ¶ 13. The Real Estate Purchase Contract identifies Ms. Christoffersen as Mr. Posner’s agent in the transaction. R. 288. Mr. Posner admitted under oath that Christoffersen was his agent with specific authority over the closing and the terms of the “surety bond”:

Q. Can you just elaborate on what your -- what her [Ms. Christoffersen’s] role at closing was? Was there an agreement in place that she would be contacted?

A. The only reason Kandis was at the closing was to get her commission. And my contact with her as being I guess *my agent* was to *make sure that it closed*. And she was the one that was *negotiating back and forth with the contract* as far as *making sure that we had a surety bond* and *how much it was and everything else*.

R. 285-86 (emphasis added). Ms. Christoffersen also testified that she was Mr. Posner’s agent. R. 300-01. Ms. Smith also testified that she understood Ms. Christoffersen to be Mr. Posner’s agent relating to issues beyond merely listing the properties for sale. R. 316; *see also* 312-14.

When Mr. Posner was confronted with the above-cited testimony in Equity Title's Motion for Summary Judgment, he responded by asserting that he had hired Ms. Christoffersen for the limited purpose of listing his property, but not to act as his agent at the closing. R. 462, 465, 468. He also submitted an affidavit to that effect, notwithstanding the fact that it was substantively inconsistent with his prior deposition testimony. R. 481-84. Mr. Posner's affidavit contains the following statements that are both inconsistent with his prior deposition testimony and are internally inconsistent:

2) I retained Kandis Christoffersen as my real estate agent at Colwell Banker to assist in locating a buyer and in preparing the Real Estate Purchase Contract for the sale.

3) I did not request that Kandis Christoffersen attend or participate in my closing at Equity on August 30th

10) I directed both Kandis Christoffersen and Helen Smith to make sure that the buyer supplied a "surety bond" at closing.

11) In making this instruction, I expected both Kandis Christoffersen and Helen Smith to act on my behalf in a manner consistent with the fiduciary level of duty that real estate agents and escrow agents owe respectively to their principal and to each party to the escrow agreement. This included the expectation that, if Ms. Christoffersen or Ms. Smith had any doubts or questions as the legitimacy of the buyer's surety bond, they would notify me of the problem. . . .

12) I never authorized Kandis Christoffesen [sic] to act as my *agent* at my closing, nor did I ever take any steps to give her apparent authority to act in my behalf.

R. 481-83 (emphasis original).

Thus, Mr. Posner testified in deposition that he authorized Ms. Christoffersen “to make sure that [the transaction] closed” (R. 286), and that Ms. Christoffersen “was one that was negotiating back and forth with the contract as far as making sure that we had a surety bond and how much it was and everything else.” R. 286. He also testified in his affidavit that he expected Ms. Christoffersen to determine whether she “had any doubts or questions as the legitimacy of the buyer’s surety bond” (R. 483), evidencing his delegation to her of a continuing role and his grant of discretion to her regarding the matter.

Notwithstanding these clear admissions, Mr. Posner, citing the affidavit he submitted after his deposition, states in his Brief of Appellant at 12 that “he expressly authorized Christoffersen to help find a buyer for his land *and nothing more.*” (Emphasis added.) The truth, however, is not like “a nose of wax, which may be turned and twisted in any direction.” *See White v. Dunbar*, 119 U.S. 47, 51 (1886). Mr. Posner’s claim that he limited the scope of Ms. Christoffersen’s agency to the sole function of finding him a buyer is belied by his own prior inconsistent testimony quoted above. Mr. Posner apparently believes that he, alone, can create a genuine issue of material fact by offering inconsistent testimony: “Indeed, Posner’s explicit denial that he granted Christoffersen express authority in and of itself raises a factual issue mandating rejection summary judgment.” Brief of Appellant at 10 (citing Mr. Posner’s Affidavit).

To the contrary, it is well recognized that “a party may not create a question of material fact, and thus forestall summary judgment, by submitting an affidavit contradicting his own sworn statements in a deposition.” *Dotson v. Delta Consol. Indus.*,

Inc., 251 F.3d 780, 781 (8th Cir. 2001). *See also Disc Golf Ass’n, Inc. v. Champion Discs, Inc.*, 158 F.3d 1002, 1008 (9th Cir. 1998); *Bohn v. Park City Group, Inc.*, 94 F.3d 1457, 1463 (10th Cir. 1996); *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986); *Boswell v. Jasperson*, 266 F.Supp.2d 1314, 1320-21 (D. Utah 2003).² In such cases, “it is the deposition testimony, and not the affidavit, which is given credence.” *Valleza v. City of Laredo*, 331 F. Supp. 2d 579, 583 (S.D. Tex. 2004).

In summary, Ms. Christoffersen’s instruction to Equity Title that Mr. Posner had approved the Financial Guarantee and that Equity Title should go forward with the closing was well within the scope of the express authority Mr. Posner had granted to her,³ and in any event was certainly within the authority implicit to the main authority he had granted. Mr. Posner identified Ms. Christoffersen as his real estate agent in a writing signed by him, the REPC. R. 288.⁴ He also identified Ms. Christoffersen as his real

² Some courts have allowed an exception that, “[a]lthough a deposition may be more reliable than an affidavit, it does not mean that the affidavit may be ignored, especially if the affidavit explains the apparent inconsistency.” *Van Zweden v. Southern Pac. Trans. Co.*, 741 F.Supp. 209, 211 (D. Utah 1990). However, Mr. Posner’s affidavit does not fit within this exception. As shown above, Mr. Posner did not seek merely to clarify, supplement or complete his prior deposition testimony, or to offer any explanation for the inconsistencies. Rather, he sought to retract or change his prior statements, to create a better record and a better case for himself, which is not allowed under the cases cited above.

³ Although the district court ruled that Ms. Christoffersen was acting within the scope of her “actual implied and/or apparent authority when she communicated plaintiff’s approval of the Financial Guarantee” (R. 620), the record on appeal also supports affirmation of the summary judgment order on the ground that Ms. Christoffersen was acting within the scope of her actual *express* authority. *See Salt Lake County v. Bangerter*, 928 P.2d 384, 386 (Utah 1996) (appellate court may affirm summary judgment order on any ground appearing in the record, whether relied upon by the district court or not).

⁴ Equity Title is uncertain what Mr. Posner means by the statement, “Equity has not

estate agent in his Amended Complaint. R. 326. After Ms. Christoffersen found a buyer for Mr. Posner, her agency continued through the closing of the transaction and encompassed details relating to approval of the “surety bond.” Specifically, Mr. Posner authorized Ms. Christoffersen to “negotiate[e] back and forth with the contract as far as making sure that we had a surety bond and how much it was *and everything else*.” R. 286 (emphasis added). He also authorized her to determine if she “had any doubts or questions as the legitimacy of the buyer’s surety bond” R. 483. He further authorized her “to make sure that [the transaction] closed.” R. 286. Thus, Ms. Christoffersen had express authority because her principal, Mr. Posner, directly stated that she had his authority to perform the particular acts at issue in this case on his behalf. *See Zions First Nat’l Bank*, 762 P.2d at 1095. In the alternative, Ms. Christoffersen had implied authority to perform the acts at issue because those acts were “incidental to, or [were] necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to [her]. *Id.*

Moreover, Mr. Posner’s acts and conduct created an appearance which caused Equity Title to reasonably believe that Ms. Christoffersen had authority to act on Mr. Posner’s behalf. The indicia of agency with which Mr. Posner clothed Ms. Christoffersen as his agent included his acts of identifying her as his listing agent on the REPC (R. 288), using her to negotiate the purchase contract (R. 286), returning to Florida before the

offered the agency contract between Posner and Christoffersen into evidence.” Brief of Appellant at 6. The REPC was marked as Exhibit 1 to Mr. Posner’s deposition, which Equity Title attached as Exhibit C to the Memorandum in Support of Equity Title’s Motion for Summary Judgment. R. 263, 287-298.

closing while leaving Ms. Christoffersen to handle the details of transaction leading up to and including the closing (including, at Mr. Posner's instruction, her communications with Equity Title regarding those details) (R. 327-28), delegating to Ms. Christoffersen the responsibilities of making sure that the transaction closed (R. 286) and verifying that the buyer supplied a surety bond in the correct amount (*id.*). Ms. Christoffersen's statements and instructions to Equity Title regarding Mr. Posner's approval of the Financial Guarantee and instruction to close the transaction were fully consistent with her apparent authority. *See Horrocks v. Westfalia Systemat*, 892 P.2d 14, 15 (Utah App. 1995).⁵

Accordingly, Ms. Christoffersen's statements to Equity Title regarding the Financial Guarantee and the closing were within the scope of her actual and/or apparent authority, and are binding upon Mr. Posner. Mr. Posner correctly states that it is the duty of the escrow agent (Equity Title) to follow the instructions of its principal (Mr. Posner). The Brief of Appellant at 17-18. Therefore, following such instructions, as Equity Title did in this case, cannot be a breach of Equity Title's duty. The district court's order granting summary judgment in Equity Title's favor was proper and should be affirmed.

⁵ Mr. Posner's conduct clothed Christoffersen with apparent authority in a manner analogous to, and well beyond, the principal's acts in *Horrocks* (allowing agent to travel in car bearing principal's insignia and cashing check which agent obtained from plaintiff). Furthermore, and "[p]erhaps most importantly, [Mr. Posner] failed to give [Equity Title] notice of any limitations on [Ms. Christoffersen's] authority." *Horrocks*, 892 P.2d at 16.

II. THE DISTRICT COURT'S RULING DOES NOT VIOLATE THE UTAH STATUTE OF FRAUDS.

Mr. Posner's argument that the district court's ruling violates the Utah Statute of Frauds is procedurally defective because Mr. Posner did not properly raise the issue before the district court or preserve it for appeal, and, in any event, the argument is substantively without merit. Mr. Posner did not make any argument regarding the Statute of Frauds in his memorandum in opposition to Equity Title's Motion for Summary Judgment. R. 455-80. He improperly raised this issue for the first time in a letter, not included in the Record, that his counsel sent to the district court just two days before the oral argument on Equity Title's Motion for Summary Judgment. Brief of Appellant at 5, n.3. Equity Title objected to Mr. Posner's tactic at the hearing (R. 644, at p. 28), and repeats that objection here. Mr. Posner does not even identify the Statute of Frauds argument as an issue for review in his opening brief. *See* Brief of Appellant at 1. Equity Title requests that the Court disregard Mr. Posner's unpreserved and improper argument. In the alternative, if the Court elects to consider Mr. Posner's Statute of Frauds argument, Equity presents the following response.

Mr. Posner's Statute of Frauds argument is premised on Utah Code Ann. § 25-5-3, which is inapplicable to the facts presented here. This section provides:

Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

Utah Code Ann. § 25-5-3 (1998).

Section 25-5-3 is inapposite to the to the facts of this case because the Statute of Frauds is a defense to an action to enforce an oral contract; it is not an offensive tool for plaintiffs to who seek to impose a damages claim against another party, as Mr. Posner is attempting here. The Utah Supreme Court explained:

It is the intent and purpose of the Statute of Frauds to give the party to an oral contract against whom the enforcement of the contract is sought *by the other party* the right to avail himself of the provisions of the Statute as a defense to his liability.

Garland v. Fleischmann, 831 P.2d 107, 109 (Utah 1992) (quoting 3 Samuel Williston, *A Treatise on the Law of Contracts* § 530, at 746 (3d ed. 1960) (italics added by Utah Supreme Court)). Mr. Posner is not a party to an oral contract against whom enforcement is being sought *by the other party*. Nor has he availed himself of the provisions of the Statute of Frauds *as a defense to his liability*. To the contrary, Mr. Posner is the plaintiff, seeking to foist upon Equity Title liability for following the instructions of Mr. Posner's agent with respect to the Financial Guarantee—which is neither a lease agreement nor a contract for the sale of land or interest in land. Moreover, the “other party” to Mr. Posner's contract for the sale of lands is Strachan, a non-party to this lawsuit. Thus, the Statute of Frauds is simply inapplicable in this case.

Furthermore, Utah Code Ann. § 25-5-3 provides that contracts for the sale or lease of land, if not in writing and signed by the seller or lessor, are “void.” It makes no sense to argue, as Mr. Posner does, that the district court's ruling “violates” the Statute of Frauds. *See* Brief of Appellant at 7. If a violation of the Statute of Frauds had occurred, the effect of the Statute would be to render void and unenforceable the hypothetical

unwritten or unsigned agreement for the sale of the land sought to be enforced against Mr. Posner. Utah Code Ann. § 25-5-3 (1998). Again, nobody has sought to enforce any such agreement against Mr. Posner. Indeed, if the REPC (which is the only contract for the sale of land at issue in this case) were void, Mr. Posner would not have had to repurchase the property from Strachan's primary lender after Strachan defaulted and the property went into foreclosure.

Mr. Posner cites case authority for the proposition that when the law requires a contract to be in writing, any changes to the contract must also be in writing. *See* Brief of Appellant at 7-8. Equity Title does not dispute this principle. However, even assuming that the Statute of Frauds is applicable to the REPC (*i.e.*, if it been unwritten or unsigned *and* someone had been trying to enforce it against Mr. Posner), it is inapplicable to the Financial Guarantee. The Financial Guarantee is the only agreement that was arguably "changed" in this case. According to Mr. Posner, this document was called "Financial Guarantee" instead of "surety bond," and it guaranteed payment of \$260,000 rather than \$263,900. Brief of Appellant at 8. The Financial Guarantee, however, is neither a lease nor a contract for the sale of land or interest in land. Indeed, Mr. Posner is not even a party to the Financial Guarantee. R. 317-22. Therefore, there is no requirement under § 25-5-3 or the cases cited by Mr. Posner that the Financial Guarantee (or changes thereto) had to be in writing and signed by Mr. Posner.

Moreover, even where the Statute of Frauds is applicable to an underlying contract, such as the REPC, it is not applicable to agreements collateral to such contract if the collateral agreement, such as the Financial Guarantee, is not itself a type of contract

within the Statute of Frauds. *See, e.g., Golden Key Realty, Inc. v. Mantas*, 699 P.2d 730, 732-33 (Utah 1985) (accord and satisfaction need not be in writing even though the original contract was within the statute of frauds); *Crown Life Ins. Co. v. Haag Ltd. Partnership*, 929 P.2d 42, 45 (Colo. App. 1996) (Colorado statute of frauds, which requires that surrender of interest in land be in writing, did not apply to lender's deficiency action on note secured by deed of trust; deed of trust did not create interest in land, and liability at issue arose under promissory note, which did not itself create any interest in land); *Bowart v. Bowart*, 625 P.2d 920, 924 (Ariz. App. 1980) (oral agreement concerning the division of profits on sale of property was not covered by statute of frauds because agreement was not for sale of real property or an interest therein, but was an agreement setting forth the parties' rights and responsibilities in connection with the acquisition of the property).

Mr. Posner erroneously argues that Equity Title accepted a Financial Guarantee that "materially departed" from this REPC requirement in two ways: "it was designated 'Financial Guarantee', rather than 'surety bond' and it was written for \$3,900 less than the REPC required." Brief of Appellant at 8-9. Mr. Posner relegates his entire argument concerning the materiality of the title "Financial Guarantee" to seven lines in two footnotes. *See* Brief of Appellant at 8, notes 5 and 6. Those footnotes fail to establish a genuine issue of material fact or that, as a matter of law, the designation "Financial Guarantee" versus "surety bond" warrants reversal of the district court. As Mr. Posner states in footnote 5, the district court did not determine whether these terms are

synonymous. Indeed, the district court granted summary judgment on an entirely unrelated principle, the doctrine of agency. *See* R. 619-20.

More importantly, Mr. Posner's claim in footnote 6 that, under Utah Code Ann. §§ 31A-22-103 and 31A-5-211, a surety bond must be issued by a licensed insurance company authorized by "the state insurance department," and must comply with the Insurance Code's minimum capital requirements, is flat wrong. To the contrary, Utah Code Ann. § 31A-22-103 does not purport to impose requirements or limitations on surety bonds,⁶ but rather provides an affirmative statement of validity and acceptability with respect to a specific type of surety bond, *i.e.*, those issued by authorized insurers:

Validity of surety bonds.

(1) An undertaking to stand as surety *which is issued by an insurer authorized to do a surety business in this state* is complete compliance with any qualification requirement in Utah law respecting surety bonds. This undertaking is acceptable to any state official or court-appointed fiduciary authorized to receive or empowered to require the undertaking. . . .

Utah Code Ann. § 31A-22-103 (emphasis added). This language simply means that surety bonds that *are* issued by an insurer authorized to do a surety business in Utah are deemed valid in any setting in which a surety bond is called for under Utah law.⁷ The statute does not include any negative corollary to the effect that a surety bond not issued by an insurer authorized to do surety business in Utah would be invalid in every (or any)

⁶ Section 31A-5-211 likewise contains no limitations or restrictions relating to surety bonds.

⁷ Mr. Posner has not asserted, and there is no basis for asserting, that Utah law *required* a surety bond in conjunction with the subject transaction; the requirement and what the parties intended by it was a matter of contract between Mr. Posner and Strachan.

circumstance in which one is required. To the contrary, the implication of the statute is that, in addition to surety bonds issued by insurers authorized to do surety business in Utah, the Legislature recognizes the existence of surety bonds issued by other persons, which § 31A-22-103 by no means limits or restricts.

For example, contrary to Mr. Posner's unfounded assertion that all surety bonds must be issued by "a licensed insurance company authorized by the state insurance department" (Brief of Appellate at 8, n.6), the Utah Code sets forth the general powers of a business development corporation, including, *inter alia*:

- (a) To borrow money from lenders, and otherwise incur indebtedness for any of its purposes; ***to issue its bonds***, debentures, notes, or other evidences of indebtedness . . .
- (b) To lend money to, and to guarantee, indorse, ***or act as surety on the bonds***, notes, contracts or other obligations of, or otherwise assist financially, any person, firm, corporation, or association

Utah Code Ann. § 16-13-4 (2005) (emphasis added). There is no requirement that such corporations be licensed insurance companies, as Mr. Posner baldly asserts. *See also* Utah Code Ann. § 34A-2-201.5(a), of the Utah Workers' Compensation Act, in which the term "Acceptable security" is defined as:

[O]ne or more of the following:

- (i) cash;
- (ii) a ***surety bond*** issued:
 - A. by a person ***acceptable to the division*** [Division of Industrial Accidents]; and
 - B. in a form approved by the division

Utah Code Ann. § 34A-2-201.5(a) (2005) (emphasis added). Again, contrary to Mr. Posner's argument, there is no limitation that only licensed insurance companies may issue such surety bonds.

These two provisions are offered merely as examples, and not an exhaustive list, of statutes in which the Legislature implicitly contemplated or expressly provided for the issuance of surety bonds by parties other than licensed insurance companies. There is no merit to Mr. Posner's argument that Equity Title "materially departed" from the terms of the REPC by accepting (per the instructions of Mr. Posner's agent) a document called "Financial Guarantee" rather than "surety bond." Mr. Posner was not harmed in any way by the title of the document. The problem with the Financial Guarantee was not its title; it was the choice of the guarantor, which was a matter between Strachan and Mr. Posner, and did not involve Equity Title in any way.

Likewise, Mr. Posner's argument that the discrepancy between the figures \$263,900 and \$260,000 is a violation of the Statute of Frauds is also erroneous. The \$3,900 difference is immaterial. Mr. Posner admitted that Strachan never made a single payment to Posner (R. 329), and neither did the guarantor, American Natural Resources Corporation. *Id.* Thus, there is no causal connection between Strachan's default and the guarantor's default, on the one hand, and the fact that the Financial Guarantee had a face amount of \$260,000 versus \$263,300, on the other. Moreover, Mr. Posner unilaterally changed Addendum No. 9 to the REPC, crossing out the figure \$260,000 and interlineating the figure \$263,900, *after* Strachan had closed his side of the transaction and *after* American Natural Resources had executed the Financial Guarantee for

\$260,000. R. 411, 317-22; Brief of Appellant at 5, n.2. Thus, even if the Statute of Frauds applied in this case, which it does not, the face amount of the Financial Guarantee, \$260,000, was not inconsistent with the REPC before Mr. Posner unilaterally changed it.

Mr. Posner's Statute of Frauds argument is without merit and should be disregarded.

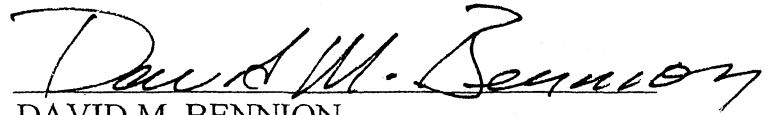
CONCLUSION

Mr. Posner's agent, Kandis Christoffersen, was acting within the scope of her actual and/or apparent authority when she told Equity Title that Mr. Posner had approved the Financial Guarantee and instructed Equity Title to close the transaction. Therefore, her instructions are binding upon Mr. Posner, and Equity Title cannot be held liable to Mr. Posner for following those instructions.

Mr. Posner did not properly raise or preserve the Statute of Frauds issue, so the Court should disregard Mr. Posner's arguments relating to it on appeal. Mr. Posner is not availing himself of the Statute of Frauds as a defense, and, in any event, the Financial Guarantee is neither a lease nor a contract for the sale of land, and therefore the Statute of Frauds is inapplicable to it. The title "Financial Guarantee" and the face amount of \$260,000 are not causally connected to Mr. Posner's claimed loss.

Accordingly, Equity Title respectfully requests that the district court's order granting summary judgment in Equity Title's favor be affirmed.

DATED this 3rd day of January, 2006.

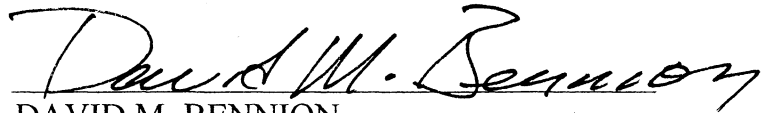
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DAVID M. BENNION

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Pearson Construction*

DATED this 3rd day of January, 2006.

A handwritten signature in cursive script, reading "David M. Bennion". The signature is written in dark ink and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2006, I caused to be mailed, first class, postage prepaid, two true and correct copies of the foregoing **BRIEF OF APPELLEE**, to:

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