

2005

Marjean A. Deakin v. Bernard Gomez and Ramona Gomez : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARJEAN A. DEAKIN,

Plaintiff/Appellee

vs.

BERNARD GOMEZ and

RAMONA GOMEZ,

Defendants/Appellants

BRIEF OF THE APPELLEE

Case No.: 20050953 CA

APPEAL FROM THE THIRD DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH, JUDGE JOHN PAUL KENNEDY

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JUN

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. §78-2a-3(2)(j).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

ISSUE No. 1

Should this Court affirm the trial court's Findings of Fact and Conclusions of Law because Mr. and Mrs. Gomez failed to marshal the evidence as required by Rule 24 of the Utah Rules of Appellate Procedure and applicable appellate case law?

STANDARD OF REVIEW FOR ISSUE No. 1

The trial court's Findings of Fact are subject to a clearly erroneous standard of review. Rule 52(a) of the Utah Rules of Civil Procedure states, "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." (Utah R. Civ. P. 52(a)). An appellate court "will not reverse the findings of fact of a trial court sitting without a jury unless they are . . . clearly erroneous." (Orton v. Carter, 970 P.2d 1254, 1256 (Utah 1998); citations omitted) The "clearly erroneous" standard applies whether the case is one in equity or one at law. (Baker vs. Francis, 741 P.2d 548 (Utah Ct. App. 1987))

ISSUE No. 2

Were the trial court's Finding of Fact correct that the four-year statute of limitations started to run on October 27, 2004, when Ms. Deakin learned for the first time in 28 years that Mr. Gomes was going to sell the house and thus, take action inconsistent with his gift of the duplex to her?

STANDARD OF REVIEW FOR ISSUE No. 2

The trial court's Findings of Fact are subject to questions of law, fact, and a clearly erroneous standard of review. (Spears vs. Warr, 44 P.3d 742, 753 (Utah 2002)). "The applicability of a statute of limitations and the applicability of the discovery rule are questions of law, which [are] review[ed] for correctness. However, the applicability of the statute of limitations and the discovery rule also involves a subsidiary factual determination – the point at which a person reasonably should know that he or she has suffered a legal injury. This is a question of fact. Accordingly, we review for correctness, incorporating a clearly erroneous standard of review for the subsidiary factual determination of when the plaintiffs should have known of their alleged legal injuries." (Spears vs. Warr, 44 P.3d 742, 753 (Utah 2002); citations omitted)

ISSUE No. 3

Did the trial court correctly find that Ms. Deakin had actual, adverse, exclusive, open, notorious, visible, continuous, and undisturbed possession for a period of greater than seven-years and that she has continuously paid the property

taxes for the property for 28 years, and that she has made and paid for all improvements to the property for more than seven-years?

STANDARD OF REVIEW FOR ISSUE No. 3

The trial court's Findings of Fact are subject to a clearly erroneous standard of review. Rule 52(a) of the Utah Rules of Civil Procedure states, "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." (Utah R. Civ. P. 52(a)). An appellate court "will not reverse the findings of fact of a trial court sitting without a jury unless they are . . . clearly erroneous." (Orton v. Carter, 970 P.2d 1254, 1256 (Utah 1998); citations omitted) The "clearly erroneous" standard applies whether the case is one in equity or one at law. (Baker vs. Francis, 741 P.2d 548 (Utah Ct. App. 1987))

DETERMINATIVE RULES AND STATUTES

Rule 24 of the Utah Rules of Appellate Procedure requires the Appellant to marshal all the evidence in its argument section. Failure to marshal the evidence requires a dismissal of the appeal.

Rule 52(a) of the Utah Rules of Civil Procedure sets forth that the Findings of Fact shall not be set aside unless they are clearly erroneous.

The relevant statute of limitations is four-years pursuant to U.C.A. §78-12-25.

The relevant statutes for adverse possession are U.C.A. §78-12-5 to §78-12-14.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a dispute over ownership of a duplex located in Salt Lake City, Utah that was gifted by Mr. Gomez to Ms. Deakin in 1977. More specifically, Ms. Deakin's action was to quiet title to the property in Ms. Deakin through theories of adverse possession, unjust enrichment, detrimental reliance/promissory estoppel, fraud, interference with contract and contempt of court. After granting a Temporary Restraining Order and a Preliminary Injunction, the trial court held a one-day bench trial. Following the trial, the trial court ruled that Ms. Deakin met all the elements to prevail on her claims of adverse possession and detrimental reliance/promissory estoppel, thus, quieting title in her. (R. 314-325)

B. COURSE OF PROCEEDINGS

On November 8, 2004, Ms. Deakin, through counsel, filed her original Complaint to Quiet Title. (R. 1-11) On November 9, 2004, Ms. Deakin filed with the trial court a Motion for a Temporary Restraining Order, with accompanying memorandum and affidavit, pursuant to Rule 65A of the Utah Rules of Civil Procedure. (R. 20-26, 30-47) On November 9, 2004, Ms. Deakin also filed an Amended Lis Pendens Notice with the Salt Lake County Recorder's Office and a copy with the trial court. (R. 17-19)

The Motion for a Temporary Restraining Order sought to restrain Mr. Gomez from selling the real estate in question and from evicting Ms. Deakin and her tenant from the premises until the trial court had adjudicated the Complaint. (R. 31) Mr. Gomez's attorney was personally served with the motion, memorandum, and affidavit for a Temporary Restraining Order. (R. 33, 44) On November 10, 2004, Mr. Gomez's attorney filed his Memorandum in Opposition to the Temporary Restraining Order. (R. 27-29)

On November 10, 2004, the trial court heard oral argument and granted Ms. Deakin's Motion for a Temporary Restraining Order pursuant to Rule 65A of the Utah Rules of Civil Procedure. (R. 48-50; see also Addendum, Exhibit 1 to Appellee's Brief) The trial court restrained Mr. Gomez from evicting Ms. Deakin from the property and from selling the property (Id.) Mr. Gomez was ordered to appear before the trial court on November 22, 2004 for a preliminary injunction hearing. (R. 50; see also Addendum, Exhibit 1 and 2 to Appellee's Brief)

On November 18, 2004, Mr. Gomez filed a Motion to Dismiss with an accompanying memorandum. (R. 54-59) Ms. Deakin filed a Memorandum in Opposition to Defendant's Motion to Dismiss. (R. 91-106) In his Motion to Dismiss, Mr. Gomez argued that Ms. Deakin's claim to quiet title was barred by the four-year statute of limitations as set forth in Utah Code. Ann. §78-12-25 – the same argument Mr. and Mrs. Gomez assert in this appeal. (R. 55-58; see Appellant's Brief 3, 6-9) Mr. Gomez also presented a statute of frauds argument in

his Motion to Dismiss; however, the trial denied the statute of frauds argument when it denied the Motion to Dismiss. (R. 55-58, 91-106, 120)

The trial court denied Mr. Gomez's Motion to Dismiss finding that the statute of limitations did not commence to run until October 27, 2004, the date Mr. Gomez first put Ms. Deakin on notice of his intent to sell the property. (R. 120, 317, 320, 324; see Transcript of Preliminary Injunction Hearing p. 111-115; see also Addendum Exhibit 2) The trial court found that Mr. Gomez admitted that Ms. Deakin did not receive any notice of a legal injury prior to October 27, 2004. (R. 319, 320, 324)

On November 22, 2004, the trial court held the Preliminary Injunction Hearing pursuant to Rule 65A of the Utah Rules of Civil Procedure. (R. 72-74) Ms. Deakin and her attorney were present. (Id.) Mr. Gomez failed to appear for the hearing though he was ordered by the trial court to appear. (R. 55-58, 72-74) Mr. Gomez's attorney was present at the hearing. (Id.) Pursuant to Rule 65A of the Utah Rules of Civil Procedure, the trial court heard testimony and received documentary evidence. (Transcript of Preliminary Injunction Hearing; see also Addendum Exhibits 2 and 3).

The trial court heard the testimony of Ms. Deakin and Mr. Ed Aho stating Mr. Gomez had gifted the property to Ms. Deakin, and she had openly and adversely held the property for the more than seven years. (R. 72-74; see Transcript of Preliminary Injunction Hearing p. 111-115; see also Addendum, Exhibit 2) The trial court also received documentary evidence showing Ms.

Deakin had paid the taxes, paid the mortgage payments, and paid for all improvements to the property for the past 28 years. (R. 72-74; see Transcript of Preliminary Injunction Hearing p. 111-115; see also Addendum Exhibits 2, 3, and 4) On November 22, 2004, the trial court granted Ms. Deakin's Preliminary Injunction and the matter was set for trial. (R. 72-74; Transcript of Preliminary Injunction Hearing)

During the course of this case, the Complaint and the Answer were amended several times by stipulation. (R. 114-115, 148-169, 210-233, 245-248)

Mr. and Mrs. Gomez did not attend any of the pre-trial hearings in this matter. (R. 72-74, 314)

On February 25, 2005, this matter came before the trial court for a bench trial. (R. 314) Ms. Deakin and her attorney and Mr. Gomez and his attorney were present at the trial. (R. 314) Mrs. Gomez failed to appear at the trial. (R. 314) All of the evidence and testimony admitted at the respective Temporary Restraining Order and Preliminary Injunction hearings were admitted for the purpose of the bench trial pursuant to Rule 65A of the Utah Rules of Civil Procedure. (R. 314) After hearing and receiving the parties' stipulations of fact and hearing the testimony of various witnesses, and receiving evidence, the trial court found in favor of Ms. Deakin on her claims of adverse possession and detrimental reliance/promissory estoppel. (R. 314-325) The trial court quieted title to the property to Ms. Deakin. (R. 306, 314-325; see Addendum Exhibits 5 and 6)

C. DISPOSITION OF TRIAL COURT

On April 5, 2005, the trial court issued its initial Findings of Fact and Conclusions of Law and Order quieting title to the property to Ms. Deakin (R. 264-277) The trial court specifically found that Ms. Deakin had prevailed on her claim for quiet title by adverse possession and her claim of detrimental reliance/promissory estoppel. (R. 264-277)

On April 15, 2005, Mr. Gomez, through counsel, filed a Motion to Amend Findings of Fact with an accompanying memorandum. (R. 285-291) In his Motion to Amend the Findings of Fact, Mr. Gomez asked the trial court to add a findings that the Statute of Limitations defense raised in Defendants' pleadings was denied based upon detrimental reliance by Plaintiff. (R. 285) Ms. Deakin opposed the Motion to Amend arguing that the trial court had already denied the defendants' the Statute of Limitations argument and ruled on the issue three different times – at the Preliminary Injunction hearing, the denial of the Motion to Dismiss, and at trial. (R. 292-297; see also R. 120, 317, 320, 324; see Transcript of Preliminary Injunction Hearing p. 111-115; see also Addendum) The trial court consistently ruled that the Statute of Limitations did not start to run until October 27, 2004. (Id.) Ms. Deakin also argued that Mr. Gomez was preparing for an appeal by requesting the Findings of Fact and Conclusions of Law be amended. (R. 292-297)

On June 3, 2005, the Court heard oral argument on the Motion to Amend. (R. 314) The trial court granted the Motion to Amend, and the trial court amended

its Findings of Fact and Conclusions of Law on June 3, 2005 to include a statement on the Statute of Limitations commencing to run on October 27, 2004. (R. 314-325) The trial court's unpublished opinion can be found on pages 314-325 of the record as well as a copy of the June 3, 2005 Findings of Fact and Conclusions of Law is included in the Addendum hereto as Exhibit 6.

RELEVANT FACTS

From 1973 to 1993, Mr. Gomez engaged in a prolonged romantic relationship with Ms. Deakin while he was married to Ramona Gomez. (R. 316, Admitted Facts 319, 320; see also Transcript of Preliminary Injunction Hearing) Mr. Gomez gave Ms. Deakin a number of expensive gifts during their 20 year relationship, including two automobiles, a ring, love letters, and a duplex. (R. 314, 320) In 1976, Mr. Gomez told Ms. Deakin that he wanted to improve her living conditions so she could have a better quality of life. (R. Admitted Facts 319)

In 1977, Mr. Gomez bought a duplex located at 468 E. and 470 E. Sherman Ave., Salt Lake City, Utah, as a gift for Ms. Deakin (R. 316) In April 1977, Mr. Gomez gave Ms. Deakin the keys to the duplex, and he gave her possession and exclusive control of the duplex. (R. 316) Ms. Deakin testified that Mr. Gomez told her the house was hers, and she could do with it as she chose. (R. 316) When Mr. Gomez gave Ms. Deakin the keys, possession, and exclusive control of the duplex, he told her to pay the mortgage to the mortgage company, to pay the taxes through the mortgage escrow account, to pay for all of the improvements, to pay for all of the utility bills, and so forth. (R. 316)

Sometime after 1977, Mr. Gomez added his wife, Ramona Gomez, to the Certificate of Title. (R. 316) Though Ms. Deakin states that the Certificate of Title speaks for itself, neither Mr. nor Mrs. Gomez offered a copy of the Certificate of Title or a copy of the Mortgage or any such evidence at trial proving that they are in fact the recorded titleholders of the property in question. (R. 316) Mr. and Mrs. Gomez did not submit any evidence to the trial court which would indicate that Mrs. Gomez's name was placed on the title at any time or that she ever took any action in the property. (R. 316)

Since 1977, Ms. Deakin has acted consistently with her position as owner of the property in regard to paying the mortgage, the taxes, the improvements, and the utility bills. (R. 317, 320, 321) For 28 years, Ms. Deakin has relied on Mr. Gomez's commitment and statements that the property was hers. (R. 317) She believed in good faith that Mr. Gomez had given the property to her. (R. 321)

For nearly 28 years, Ms. Deakin has leased the other half of the duplex to tenants without any restraint, objections, or requirements from Mr. or Mrs. Gomez. (R. Admitted Facts 319) Mr. Gomez admitted that he has never been in any lease agreement with Ms. Deakin or any tenant to the property. (R. Admitted Facts 319) Neither Mr. nor Mrs. Gomez has ever asked or required Ms. Deakin for an accounting of the collected rents, the mortgage payments, the tax payments, or the improvements or to make the payments to them. (R. 317, R. Admitted Facts 319-320)

Ms. Deakin is an unsophisticated, uninformed, and inexperienced person when it comes to real estate. (R. 316) Nonetheless, Ms. Deakin asked Mr. Gomez numerous times for him to put the title of the duplex in her name as he had promised. (R. 317) Each time she followed up with him, Mr. Gomez would say, "I'll get around to it, babe, I'll get around to it." (R. 317; see Transcript of Preliminary Injunction Hearing, p. 11-115; see also Addendum Exhibit 2) Ms. Deakin has never made such requests in writing because she relied on Mr. Gomez's promise that he would get around to putting title in to her name. (R. 317) The parties did not consider a formal deed to be essential to completing the gift. (R. 317)

For 28 years, Ms. Deakin has paid for all of the improvements to the property. (R. 316-322) She has made and paid for the following improvements to the duplex: new roof, new water/sewer main line, new back porch and railings, tore down garages, new 220 volt electrical wiring, new air conditioning units, new water heaters, new light fixtures, new ceiling fans, new carpet, several coats of new paint, new storm doors, several new stoves, several new refrigerators, and new pipes and drains for clothes washers. (R. 318) The trial court received into evidence that Ms. Deakin paid for these repairs. (R. 318) Ms. Deakin never requested permission from Mr. Gomez to do any of these repairs, because she relied on his statements that the property was hers. (R. 318) On one occasion, Ms. Deakin did ask Mr. Gomez for financial assistance for a repair, but he refused

because he told her that the house was hers and she could do with it as she pleased.
(R. 318)

Mr. Gomez testified to the following: He did not pay for any of the improvements to the house listed above. (R. Admitted Facts 319, 320) He did not know that the garages had been torn down within the past ten years. (R. 320; Trial Transcript p. 55) He has not paid for, known of, or made any improvements to the house for the past ten years. (R. 320, Trial Transcript p. 55) He did not even know that the locks to the house had been changed. (Trial Transcript p. 55-57) He has not visited the property within the past ten years. (R. 320, Trial Transcript p. 55)

Since 1977, Ms. Deakin has paid all of the taxes on the property. (R. 317, 321) Mr. Gomez admitted that neither he nor Mrs. Gomez ever paid the property taxes for the duplex. (R. 316-318, R. Admitted Facts 319, R. 320) Mr. Gomez admitted that all mortgage payments and tax notices have been sent to 468 E. Sherman Ave., where Ms. Deakin resides. (R. Admitted Facts 319)

For 28 years, Ms. Deakin has relied on Mr. Gomez's commitment and statements that the property was hers. (R. 317) She believed in good faith that Mr. Gomez had given the property to her. (R. 321) Ms. Deakin has paid all the mortgage payments, improvements, and taxes for 28 years. (R. 316-321) Mr. and Mrs. Gomez have never possessed or occupied the property in question. (R. Admitted Facts 319) Ms. Deakin never heard anything contrary to Mr. Gomez's commitment that the property was hers until October 27, 2004 when Mr. Gomez's real estate agent abruptly informed Ms. Deakin he was selling the property. (R.

317) This was the first action inconsistent with Mr. Gomez's gift of the property.

(R. 317)

Mr. Gomez admitted that prior to October 27, 2004, he had not informed Ms. Deakin that he was going to sell the property. (R. Admitted Facts 319, 320)

Mr. Gomez admitted that Ms. Deakin did not receive any notice of legal injury prior to October 27, 2004. (R. Admitted Facts 319, 320)

The trial court found:

Based on all of the evidence and the Court's evaluation of the demeanor and credibility of Plaintiff and Defendant Mr. Gomez on the witness stand, the Court further finds based on clear, convincing, and unequivocal evidence, that in the context of Defendant Mr. Gomez's actions, the extended relationship of the parties, the statements made to Plaintiff by Defendant Mr. Gomez in April 1977 and thereafter, and Plaintiff's consistent behavior for 28 years, Defendant did make a gift of the property to the Plaintiff in April 1977 and the Plaintiff reasonably believed in good faith that such a gift had been made, and Plaintiff acted in good faith reliance upon that belief. Moreover, acting upon her belief that such a gift had been made, the Plaintiff made valuable, substantial, and beneficial improvements to the property along with paying the costs of such improvements and paying the mortgage on the property for 28 years. Further, the Court finds, that revoking the gift or rescinding the gift at this time would be inequitable to the parties, and specifically to Plaintiff who, for 28 years has detrimentally relied upon her good faith belief that a gift was made to her by Defendant Mr. Gomez. (R. 321-322)

SUMMARY OF THE ARGUMENT

First, this Court should affirm the trial court's Findings of Fact and Conclusions of Law because the Appellants failed to marshal the evidence as required by Rule 24 of the Utah Rules of Appellate Procedure and applicable appellate case law. Mr. and Mrs. Gomez have not marshaled the evidence to demonstrate why the trial court's specific finding that the statute of limitations began to run on October 27, 2004 was in error. Furthermore, Appellants have not marshaled any evidence to explain why the trial court's findings and conclusions that Ms. Deakin met the statutory and case law elements for quiet title and adverse possession should be reversed.

Second, this Court should affirm the trial court's finding that the statute of limitations commenced to run on October 27, 2004. In Appellant's brief, Mr. and Mrs. Gomez do not give any reasons, cite to any evidence, or cite to any detailed finding of fact to support their claim that all the elements to prove a cause of action were present in 1978. Mr. Gomez completely ignores his admission that prior to October 27, 2004, he had not informed Ms. Deakin that he was going to sell the house. For 28 years, she detrimentally relied on his statements that the house was hers. Since 1977, she acted consistently with Mr. Gomez's statements that she was responsible to pay for the mortgage, the taxes, the utilities, and all improvements to the property. Neither Mr. nor Mrs. Gomez gave Ms. Deakin any notice of legal injury prior to October 27, 2004.

Third, this Court should affirm the trial court's findings and conclusions that Ms. Deakin has met the statutory and case law elements for quiet title and adverse possession. She has shown that in 1993, Mr. Gomez ended their relationship. Since 1993, she has had actual, adverse, exclusive, open, notorious, visible, continuous, and undisturbed possession for a period of seven-years or greater. She has continuously paid the property taxes on the property during a period exceeding seven-years, and she has made and paid for all improvements to the property.

For the reasons stated above, this Court should affirm the trial court's Findings of Fact and Conclusions of Law.

ARGUMENT

ISSUE No. 1

MR. AND MRS. GOMEZ FAILED TO MARSHAL THE EVIDENCE AS REQUIRED BY RULE 24 OF THE UTAH RULES OF APPELLATE PROCEDURE AND APPLICABLE APPELLATE CASE LAW TO DEMONSTRATE THAT THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD BE REVERSED. THUS, APPELLANTS' APPEAL MUST FAIL, AND THE FINDINGS AFFIRMED.

If the appellant has not met the marshalling requirement, the appellate court is required to affirm that the Findings of Fact are correct, and the appeal must fail.

(Valcarce vs. Fitzgerald, 961 P.2d 305, 312 (Utah 1998); see also Johnson vs.

Higley, 989 P.2d 61, 72 (Utah Ct. App. 1999)). The trial court's Findings of Fact

must be affirmed and this appeal must fail because Mr. and Mrs. Gomez did not

marshal the evidence to demonstrate why the Findings of Fact and Conclusions of

Law are clearly erroneous. There are clear procedural requirements outlined in the Utah Rules of Civil Procedure, the Utah Rules of Appellate Procedure, and applicable case law for marshalling the evidence.

Rule 24(a) of the Utah Rules of Appellate procedure states:

[t]he brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(9) An Argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented ... A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.
(Utah R. App. P. 24(a))

This Court has held that the appellant must clearly marshal the evidence in the “argument section” of appellant’s brief. (Fitzgerald vs. Critchfield, 744 P.2d 301, 304 (Utah Ct. App. 1987)) “To comply with the marshalling requirement, appellants must marshal all the favorable evidence at the point at which they challenge the factual finding.” (Roderick vs. Ricks, 54 P.3d 1119 (Utah 2002)) The marshalling requirement, which is to be found in the argument section of the brief, is “neither elective nor optional.” (Fitzgerald vs. Critchfield, 744 P.2d 301, 304 (Utah Ct. App. 1987))

The marshalling requirement entails a “listing [of] all the evidence supporting the finding that is challenged. Once the evidence is listed ... with appropriate citations to the record, the appellant must then show that the marshaled evidence is legally insufficient to support the findings ...” (Judge

Norman H. Jackson, “Utah Standards of Appellate Review: Revised,” 12 Utah Bar J. 8, 13 (1999))

Rule 24 of the Utah Rules of Appellate is to be read in conjunction with Rule 52(a) of the Utah Rules of Civil Procedure. Rule 52(a) states, “Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” (Utah R. Civ. P. 52(a)).

In interpreting Rule 52, the Utah Supreme Court has held an appellate court “will not reverse the findings of fact of a trial court sitting without a jury unless they are . . . clearly erroneous.” (Orton v. Carter, 970 P.2d 1254, 1256 (Utah 1998); citations omitted) The Court of Appeals will review the trial court's conclusions of law “for correctness, according the trial court no particular deference.” (Orton, 970 P.2d at 1256). The “clearly erroneous” standard applies whether the case is one in equity or one at law. (Baker vs. Francis, 741 P.2d 548 (Utah Ct. App. 1987)) If the appellant has not met the marshalling requirement, the appellate court is required to affirm that the Findings of Fact are correct, and the appeal must fail. (Valcarce vs. Fitzgerald, 961 P.2d 305, 312 (Utah 1998); see also Johnson vs. Higley, 989 P.2d 61, 72 (Utah Ct. App. 1999)).

Mr. and Mrs. Gomez fail to marshal any of the extensive oral and documentary evidence taken at the Temporary Restraining Order hearing, the Preliminary Injunction hearing, or at the bench trial in their argument section. (Appellants’ Brief 3, 6-10) The trial court relied on the testimony, documentary

evidence, and pleadings presented at each of these proceedings to make its Findings of Fact and Conclusions of Law. (R. 314) However, in lieu of marshalling the evidence, Mr. and Mrs. Gomez's brief first reargues their position that the four year statute of limitations bars Ms. Deakin's claims. (Appellant's Brief 6-9) The trial court rejected the Gomez's statute of limitations argument at least three times – first, at the Preliminary Injunction hearing (Transcript of Preliminary Injunction p. 111-122), second, on Mr. Gomez's Motion to Dismiss (R. 54-59, 91-106, 120), and third, at trial (R. 314-325).

After the trial court entered its initial Findings of Fact and Conclusions of Law in April 2005, Mr. and Mrs. Gomez filed a Motion to Amend the Findings of Fact for a specific finding to add a paragraph finding that the Statute of Limitations defense raised in Defendants' pleadings was denied based upon detrimental reliance by Plaintiff. (R. 285) On June 3, 2005, the trial court amended its Findings of Fact and Conclusions of Law to include a statement on the Statute of Limitations commencing to run on October 27, 2004. (R. 320, 321, 324)

The trial court specifically found Ms. Deakin never heard anything contrary to Mr. Gomez's commitment that the property was hers until October 27, 2004 when Mr. Gomez's real estate agent informed Ms. Deakin he was selling the property. (R. 317; Transcript of Preliminary Injunction p. 111-114) This was the first action inconsistent with his gift of the property. (R. 317) Mr. Gomez admitted that prior to October 27, 2004, he had not informed Ms. Deakin that he was going to sell the property. (R. Admitted Facts 319, 320) Mr. Gomez admitted

that Ms. Deakin did not receive any notice of legal injury prior to October 27, 2004. (R. Admitted Facts 319, 320)

None of these facts appears in the Appellants' argument section to marshal the evidence as to why the trial court's findings should be reversed. (Appellant's Brief 6-9) Not only do Appellants fail to marshal any evidence as to the findings that the statute of limitations began to run on October 27, 2004, but they also do not marshal any evidence for their argument that the adverse possession finding must be reversed. (Appellant's Brief 10)

Mr. and Mrs. Gomez simply make a blanket assertion without any citation to the record that the trial court erred in finding that Ms. Deakin gained title to the property through adverse possession. (Appellant's Brief 10) Mr. and Mrs. Gomez ignore the findings and conclusions that Ms. Deakin had actual, adverse, exclusive, open, notorious, visible, continuous, and undisturbed possession for a period greater than seven years, and she paid for all taxes and improvements to the property for the past 28 years. (R. 316-325) Mr. Gomez has not visited the property, made any improvements thereto, and he was not aware of any of the improvements Ms. Deakin made to the property – especially her changing the locks on the doors. (R. 320; see Trail Transcript 55-57) Because Mr. and Mrs. Gomez have failed to marshal the evidence, the appellate court is required to affirm that the Findings of Fact are correct, and the appeal must fail. (Valcarce vs. Fitzgerald, 961 P.2d 305, 312 (Utah 1998); see also Johnson vs. Higley, 989 P.2d 61 (Utah Ct. App. 1999)).

ISSUE No. 2

TRIAL COURT CORRECTLY FOUND AND CONCLUDED THAT THE FOUR-YEAR STATUTE OF LIMITATIONS STARTED TO RUN ON OCTOBER 27, 2004, WHEN MS. DEAKIN LEARNED FOR THE FIRST TIME IN 28 YEARS THAT MR. GOMES WAS GOING TO SELL THE HOUSE AND THUS, TAKE ACTION INCONSISTENT WITH HIS GIFT OF THE DUPLEX TO HER.

The statute of limitations for oral contracts is four years. (U.C.A. §78-12-25) Mr. and Mrs. Gomez argue that the Mr. Gomez entered into an oral contract with Ms. Deakin in 1976 and that the statute of limitations ran in 1982 thus, barring Ms. Deakin's suit. (Appellant's Brief p. 3, 6) Mr. and Mrs. Gomez assert their argument without any citation to the record. Furthermore, Mr. Gomez did not own the property in 1976, thus, an oral contract could not have been formed in 1976, and the statute of limitations could not commence to run in 1976.

Ms. Deakin counters that the trial court correctly found that statute of limitations did not commence to run until October 27, 2004, the date that Mr. Gomez's real estate agent abruptly informed Ms. Deakin that Mr. Gomez was selling the property. (R. 317; Transcript of Preliminary Injunction p. 111-115) Mr. Gomez admitted that prior to October 27, 2004, he had not informed Ms. Deakin that he was going to sell the house. (R. Admitted Facts 320) Ms. Deakin did not receive any notice of legal injury prior to October 27, 2004. (R. Admitted Facts 320) None of these correct and relevant facts appear in the Appellants' argument section to marshal the evidence as to why the trial court's findings should be reversed. (Appellant's Brief 6-9)

Though Mr. and Mrs. Gomez and Ms. Deakin cite different case law in their respective briefs, each agree, the statute of limitations begins to run when the last event necessary to complete the cause of action arises. (Spears vs. Warr, 44 P.3d 742, 753 (Utah 2002); citations omitted) The Supreme Court and this Court have articulated exceptions to the last event necessary rule, where, “the discovery rule tolls the limitations period until facts forming the basis for the cause of action are discovered (Id.) In the case of Spears vs. Warr, the Utah Supreme Court stated:

The discovery rule applies (1) in situations where the discovery rule is mandated by statute; (2) in situations where a plaintiff does not become aware of the cause of action because of the defendant’s concealment or misleading conduct; and (3) in situations where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action. Under the discovery rule, the limitations period does not begin to run until the discovery of facts forming the basis for the cause of action. (Spears vs. Warr, 44 P.3d 742, 753 (Utah 2002); citations omitted)

It is undisputed that the first scenario where the discovery rule is mandated by statute is inapplicable to this case. However, the second scenario where a plaintiff does not become aware of the cause of action because of the defendant’s misleading conduct is applicable to this case.

During the course of their relationship, Ms. Deakin asked Mr. Gomez numerous times to have the title of the duplex put in her name as he had promised.

(R. 317, See Transcript of Preliminary Injunction Hearing p. 111-115; see also Addendum) Each time she followed up with him, Mr. Gomez would say, “I’ll get around to it, babe, I’ll get around to it.” (R. 317, see Transcript of Preliminary Injunction Hearing p. 111-115; see also Addendum Exhibit 2) Ms. Deakin never made such requests in writing because she relied on Mr. Gomez’s promise that he would get around to putting title in to her name. (R. 317) The parties did not consider a formal deed to be essential to completing the gift. (R. 317)

Ms. Deakin is an unsophisticated, uninformed, and inexperienced person when it comes to real estate. (R. 316, see Transcript of Preliminary Injunction Hearing p. 111-115; see also Addendum Exhibit 2) For 28 years, Mr. Gomez led Ms. Deakin to believe that he had made a gift of the duplex to her. (R. 321; see Transcript of Preliminary Injunction Hearing p. 111-115; see also Addendum, Exhibit 2) He caused her to rely on his statements that he would get around to putting the title of the duplex in her name as he promised. (R. 321, see Transcript of Preliminary Injunction Hearing p. 111-115; see also Addendum Exhibit 2) In reliance upon Mr. Gomez’s assurances, Ms. Deakin continued to act consistently with her good faith belief that Mr. Gomez had given her the property by paying the mortgage, the taxes, insurance, and for improvements for 28 years. (R. 321)

It is critical to remember that Mr. Gomez admitted that prior to October 27, 2004, he had not informed Ms. Deakin that he was going to sell the property. (R. Admitted Facts 319, 320) Ms. Deakin did not receive any notice of legal injury prior to October 27, 2004. (R. Admitted Facts 319, 320) Again, none of these

facts appears in Appellants' argument section. Appellants completely ignore the facts – especially their admitted facts. (R. Admitted Facts 319, 320) If the statute of limitations was to have run prior to October 27, 2004, it was tolled because Mr. Gomez mislead Ms. Deakin and caused her to rely upon his words.

The third scenario of exceptional circumstances is also applicable to Ms. Deakin's case, "where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action." (Spears vs. Warr, 44 P.3d 742, 753 (Utah 2002); citations omitted) After receiving all the testimony and evidence from the Temporary Restraining Order hearing, the Preliminary Injunction hearings, and from the trial, the trial court found:

Based on all of the evidence and the Court's evaluation of the demeanor and credibility of Plaintiff and Defendant Mr. Gomez on the witness stand, the Court further finds based on clear, convincing, and unequivocal evidence, that in the context of Defendant Mr. Gomez's actions, the extended relationship of the parties, the statements made to Plaintiff by Defendant Mr. Gomez in April 1977 and thereafter, and Plaintiff's consistent behavior for 28 years, Defendant did make a gift of the property to the Plaintiff in April 1977 and the Plaintiff reasonably believed in good faith that such a gift had been made, and Plaintiff acted in good faith reliance upon that belief. Moreover, acting upon her belief that such a gift had been made, the Plaintiff made valuable, substantial, and beneficial improvements to the property along with paying the costs of such improvements and paying the mortgage on the property for 28 years. Further, the Court finds, that revoking the gift or rescinding the gift at this time

would be inequitable to the parties, and specifically to Plaintiff who, for 28 years has detrimentally relied upon her good faith belief that a gift was made to her by Defendant Mr. Gomez. (R. 321-322)

The trial court correctly found that it would be inequitable, or in other words unjust, to revoke or rescind the gift, especially given Ms. Deakin's detrimental reliance and good faith actions for 28 years. (R. 321-322) Thus, if the statute of limitations was to have expired prior to October 27, 2004, it was tolled because of the exceptional circumstances and the unjust result it would cause.

The trial court's findings that the statutory period began to run on October 27, 2004 should be affirmed because Mr. Gomez led Ms. Deakin to believe he gifted the house to her, he led her to believe he would transfer title in her name, and he caused her to believe that by paying the mortgage, the taxes, and the improvements the house was hers. Mr. Gomez admitted that he did not tell Ms. Deakin prior to October 27, 2004 that he was going to sell the house. (R. 314-325; see Transcript of Preliminary Injunction Hearing 111-115; see also Addendum Exhibit 2). Mr. and Mrs. Gomez did not give Ms. Deakin any notice of legal injury prior to October 27, 2004. (R. 320) It would be unjust to revoke the gift after Ms. Deakin has paid the mortgage, the taxes, and all improvements for 28 years. This Court should affirm the trial court's findings.

ISSUE No. 3

THE TRIAL COURT CORRECTLY FOUND AND CONCLUDED THAT MS. DEAKIN HAD ACTUAL, ADVERSE, EXCLUSIVE, OPEN, NOTORIOUS, VISIBLE, CONTINUOUS, AND UNDISTURBED POSSESSION FOR A PERIOD OF GREATER THAN SEVEN-YEARS. SHE HAS CONTINUOUSLY PAID THE PROPERTY TAXES FOR THE PROPERTY FOR 28 YEARS, AND SHE HAS MADE AND PAID FOR ALL IMPROVEMENTS TO THE PROPERTY FOR MORE THAN SEVEN YEARS.

Ms. Deakin claims quiet title by adverse possession not founded on a written instrument. Mr. and Mrs. Gomez make a blanket statement that “the conclusion of law based on adverse possession is unsupported by the facts” without marshalling any evidence to support their argument. (Appellants’ Brief p. 10) The record on appeal and the Findings of Fact and Conclusions of Law support the trial court’s finding of adverse possession. (R. 314-235)

A. Elements for Adverse Possession

Ms. Deakin asserts title by adverse possession not founded on a written instrument. One who claims title by adverse possession must bring themselves within the statutory provisions. (Jenkins vs. Morgan, 196 P.2d 871 (Utah 1948) “Possession of the real property is presumed to be in the legal title holder and that occupancy by any other is deemed to be subordinate to that title unless the occupant can show that the property has been held and possessed adversely for seven-years.” (Olwell vs. Clark, 658 P.2d 585, 587 (Utah 1982); U.C.A. §78-12-7) “It is widely recognized that in order to show successful adverse possession, the claimant must intend to acquire title, must by declaration or conduct give actual or

constructive notice to the legal title holder, and must possess the property in a manner variously called ‘open,’ ‘notorious,’ or ‘hostile’ for a period of seven years.” (Olwell vs. Clark, 658 P.2d 585, 587 (Utah 1982); U.C.A. §78-12-7, 78-12-10, 78-12-11, 78-12-12) “In order for a claimant to give notice, it must be conduct that is inconsistent with the rights of the owner.” (Olwell vs. Clark, 658 P.2d 585, 587 (Utah 1982) The claimant must also have paid all taxes levied against the property for seven-years prior to filing the action. (U.C.A. §78-12-12)

B. Legal Title

The person establishing legal title to the property is presumed to be the owner unless it appears that a person has held and possessed adversely to such right for a period of seven-years. (Olwell vs. Clark, 658 P.2d 585, 587 (Utah 1982); U.C.A. §78-12-7)

In the present case, neither Mr. nor Mrs. Gomez marshaled any evidence that they are in fact the legal title holders to 468 E. and 470 E. Sherman Ave., Salt Lake City, Utah. (R. 316; see Appellant’s Brief 10) In 1977, Mr. Gomez bought the duplex located at 468 E. and 470 E. Sherman Ave., Salt Lake City, Utah, as a gift for Ms. Deakin (R. 316) In April 1977, Mr. Gomez gave Ms. Deakin the keys to the duplex, and he gave her possession and exclusive control of the house. (R. 316) Ms. Deakin testified that Mr. Gomez told her the house was hers, and she could do with it as she chose. (R. 316) When Mr. Gomez gave Ms. Deakin the keys, possession, and exclusive control of the duplex, he told her to pay the mortgage to the mortgage company, to pay the taxes through the mortgage escrow

account, to pay for all of the improvements, to pay for all of the utility bills, and so forth. (R. 316)

Sometime after 1977, Mr. Gomez added his wife, Ramona Gomez, to the Certificate of Title. (R. 316) Though Ms. Deakin states that the Certificate of Title speaks for itself, neither Mr. nor Mrs. Gomez offered a copy of the Certificate of Title or a copy of the Mortgage or any such evidence during any of the hearings or at trial proving that they are in fact the recorded titleholders of the property in question. (R. 316) Mr. and Mrs. Gomez did not submit any evidence to the trial court which would indicate that Mrs. Gomez's name was placed on the title at any time or that she ever took any action in the property. (R. 316)

Ms. Deakin is an unsophisticated, uninformed, and inexperienced person when it comes to real estate. (R. 316) Nonetheless, Ms. Deakin asked Mr. Gomez numerous times for him to put the title of the duplex in her name as he had promised. (R. 317) Each time she followed up with him, Mr. Gomez would say, "I'll get around to it, babe, I'll get around to it." (R. 317) Ms. Deakin has relied on Mr. Gomez's promise that he would get around to putting title in to her name. (R. 317)

Ms. Deakin has held herself out as the owner of the house. (R. 316-325) The trial court received into evidence Ms. Deakin's testimony and copies of canceled checks for at least the past 20 years proving her payment of the mortgage and taxes. (R. 314-317) At the Preliminary Injunction hearing, Mr. Ed Aho testified that Ms. Deakin has always claimed to be the owner of the duplex. (R.

316; see also Transcript of Preliminary Injunction Hearing) The clear weight of the evidence shows Ms. Deakin has held the property for the past 28 years. (R. 316-319)

C. Open, Notorious, Continuous, Adverse, Hostile, Exclusive Possession with Notice of Adverse Interests and Improvements (Olwell vs. Clark, 658 P.2d 585, 587 (Utah 1982))

In 1993, Mr. Gomez ended his relationship with Ms. Deakin. (R. 317, 319, 320) Thus, the elements of hostility, adverseness, open, notorious, exclusive possession, and notice of adverse interests commenced.

Mr. Gomez testified to the following: He did not pay for any of the improvements to the house listed above. (R. Admitted Facts 319, 320) He did not know that the garages had been torn down within the past ten years. (R. 320; Trial Transcript p. 55) He has not paid for, known of, or made any improvements to the house for the past ten years. (R. 320, Trial Transcript p. 55) He did not know that the locks to the house had been changed. (Trial Transcript p. 55-57) He has not visited the property within the past ten years. (R. 320, Trial Transcript p. 55) Neither Mr. nor Mrs. Gomez have ever occupied or possessed the duplex. (R. Admitted Facts 319) Because Mrs. Gomez did not appear at any of the proceedings in this case, it is questionable whether she ever knew of the duplex and Mr. Gomez's romantic relationship with Ms. Deakin.

Mr. and Mrs. Gomez argue that they were not put on notice of an adverse interest. (Appellant's Brief p. 10) However, they do not marshal any evidence to

support their claim. (Id.) The Utah Supreme Court has set forth the requirement that notice, whether actual or constructive, must be given. (Olwell vs. Clark, 658 P.2d 585, 587 (Utah 1982) “In order for a claimant to give notice, it must be conduct that is inconsistent with the rights of the owner.” (Olwell at 587)

Since at least 1993, when Mr. Gomez stopped contacting Ms. Deakin, she has taken the following actions: she tore down the garages, she changed the locks, new roof, new water/sewer main line, new back porch and railings, new 220 volt electrical wiring, new air conditioning units, new water heaters, new light fixtures, new ceiling fans, new carpet, several coats of new paint, new storm doors, several new stoves, several new refrigerators, and new pipes and drains for clothes washers. (R. 318) The trial court received into evidence proof that Ms. Deakin paid for these repairs and improvements. (R. 315, 318) Ms. Deakin never requested permission from Mr. Gomez to do any of these repairs. (R. 318) On one occasion, Ms. Deakin did ask Mr. Gomez for financial assistance for a repair, but he refused because he told her that the house was hers, and she could do with it as she pleased. (R. 318) Ms. Deakin’s conduct is clearly inconsistent with the rights of Mr. and Mrs. Gomez. She has made significant and substantial changes to and improvements to the duplex. Mr. Gomez has been on notice, but neither he nor his wife have visited or taken any interest in the property since at least 1993. (R. 320) Ms. Deakin’s conduct has been inconsistent with the rights and interests of Mr. and Mrs. Gomez for more than seven-years.

D. Taxes

The claimant must have paid all taxes levied against the property for seven-years prior to filing the action. (U.C.A. §78-12-12) Mr. Gomez admitted that he has never paid any of the property taxes for the duplex. (R. Admitted Facts 319, 320) Mrs. Gomez also has not paid property taxes for the duplex. (Id.) Ms. Deakin has paid the taxes along the mortgage payments for more than seven-years. (R. 315-317, 319-324) The copies of all of Ms. Deakin's cancelled checks for the past 20-years clearly proves that Ms. Deakin has paid all taxes levied and assessed against the property. (R. 314-325; see Transcript to Preliminary Injunction Hearing)

The trial court correctly found and concluded that:

... the statutory and case law elements for quiet title and adverse possession have been met by Plaintiff in that she has shown that she was given the property in question and thereafter has had actual, adverse, exclusive, open, notorious, visible, continuous, and undisturbed possession for a period of seven-years or greater and that she has continuously paid the property taxes on the property during a period exceeding seven-years, and that she has made and paid for improvements to the property. (R. 322)

For the reasons stated above, the trial court's findings and conclusions should be affirmed on the issue of adverse possession.

CONCLUSION

This Court should affirm the trial court's Findings of Fact and Conclusions of Law. Mr. and Mrs. Gomez failed to marshal the evidence as required by Rule 24 of the Utah Rules of Appellate Procedure. Thus, Appellant's appeal must fail, and the Findings of Fact affirmed. The trial court correctly found in accordance with Mr. Gomez's admission that the statute of limitations did not commence to run until October 27, 2004 when Ms. Deakin learned for the first time that Mr. Gomez intended to sell the duplex. The trial court also correctly found and concluded that Ms. Deakin met all of the elements of adverse possession, and thus, the trial court quieted title in her.

June 7, 2006

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Christian W. Clinger', written over a horizontal line.

Christian W. Clinger
Attorney for Appellee Marjean Deakin

Certificate of Service

I hereby certify that two true and accurate copies of the **BRIEF OF THE APPELLEE** were mailed via hand delivery on June 7, 2006 to the following:

Mr. James Deans
Law Offices of James Deans
440 S 700 E Ste. 101
Salt Lake City, UT, 84102

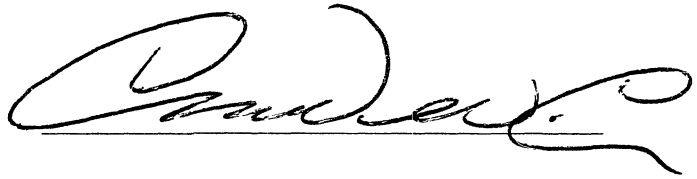
A handwritten signature in black ink, appearing to read "James Deans", written over a horizontal line.

Exhibit 1

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

MARJEAN A DEAKIN,	:	MINUTES
Plaintiff,	:	TEMP RESTRAIN ORDER
	:	
	:	
vs.	:	Case No: 040923578 PR
	:	
BERNARD GOMEZ,	:	Judge: JOHN PAUL KENNEDY
Defendant.	:	Date: November 10, 2004

Clerk: lym

PRESENT

Plaintiff's Attorney(s): CHRISTIAN W CLINGER

Defendant's Attorney(s): JAMES H. DEANS

Video

Tape Number: video Tape Count: 1204

HEARING

TAPE: video COUNT: 1204

On record counsel only are present to argue plaintiff's Motion for a Temp Restraining Order. The court grants the motion for a temporary restraining order and a bond must be posted for \$15,000 by the plaintiff within a week.

The court orders a Preliminary Injunction Hearing on November 22, 2004 @ 11:00 a.m.

PRELIM INJUNCTION is scheduled.

Date: 11/22/2004

Time: 11:00 a.m.

Location: Third Floor - W35
THIRD DISTRICT COURT
450 SOUTH STATE
SLC, UT 84114-1860

Before Judge: JOHN PAUL KENNEDY

FILED DISTRICT COURT
Third Judicial District

NOV 12 2004

By SALT LAKE COUNTY Lyn
Deputy Clerk

CLINGER LEE CLINGER, LLC
CHRISTIAN W. CLINGER (8695)
9117 West 2700 South, Ste. A
Magna, UT 84044
Telephone: (801) 250-8200
Facsimile: (801) 250-8201
Attorneys for Plaintiff Marjean Deakin

IN THE THIRD DISTRICT COURT SALT LAKE COUNTY STATE OF UTAH

MARJEAN A. DEAKIN,

Plaintiff,

vs.

BERNARD GOMEZ,

Defendant

**TEMPORARY RESTRAINING
ORDER**

Case No.: 040923578

Judge John Paul Kennedy

Plaintiff Marjean A. Deakin's Motion for a Temporary Restraining Order pursuant to Rule 65A of the Utah Rules of Civil Procedure came before this Court on November 10, 2004. Christian W. Clinger, counsel for Plaintiff, and James Deans, counsel for Defendant, were present. After reviewing the pleadings submitted and after hearing oral argument from Plaintiff's counsel and Defendant's counsel, the Court finds that there is substantial harm posed to Plaintiff. As such, the Court finds that Plaintiff's Motion for a Temporary Restraining Order should be and the same herein granted.

IT IS HEREBY THE ORDER OF THE COURT THAT,

1. Defendant Bernard Gomez and his real estate agents, ERA Legacy Realtors, are restrained from the following activities:

a. Evicting Plaintiff and Plaintiff's tenant from the duplex located at 468 E. and 470 E. Sherman Ave., Salt Lake City, Utah; and,

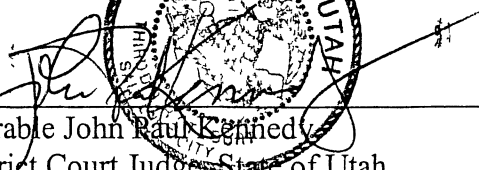
b. Entering on, inspecting, and selling the real estate in question located at 468 E. and 470 E. Sherman Ave., Salt Lake City, Utah; and,

c. Defendant and his real estate agents, ERA Legacy Realtors, and any prospective buyers are restrained from direct contact with the Plaintiff. All communications shall be directed through the Parties' attorneys.

2. Plaintiff is ordered to post a bond in the amount of \$15,000.00 with the Court by 5:00 p.m. on November 18, 2004 as security pursuant to Rule 65A U.R.C.P. If Plaintiff cannot post the bond by November 18, 2004, Plaintiff's counsel is required to inform the Court and opposing counsel.

3. The parties and their attorneys are ordered to appear before this Court on November 22, 2004 at 11:00 a.m., courtroom W35, Third District Court, Salt Lake County, 450 South State Street, Salt Lake City, Utah for a review hearing on the Temporary Restraining Order and a determination whether the Temporary Restraining Order shall be made a permanent injunction.

Dated November 12, 2004


The Honorable John Paul Kennedy
Third District Court Judge, State of Utah

Approved to form and content:



Dated: November 11, 2004
Christian W. Clinger
Attorney for Plaintiff Marjean Deakin

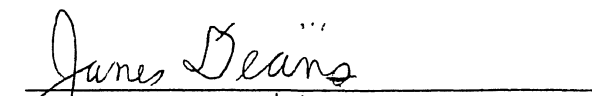

Dated: November 11, 2004
James Deans
Attorney for Defendant Bernard Gomez

Exhibit 2

0500 NMh A ∞ ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MARJEAN A. DEAKIN,

Plaintiff,

vs.

BERNARD GOMEZ,

Defendant.

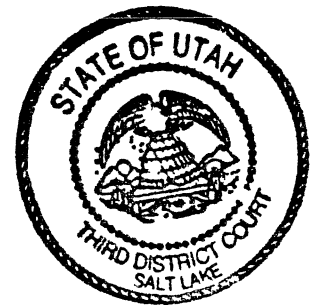
Case No. 040923578 PR

TEMPORARY RESTRAINING ORDER

November 10, 2004

PRELIMINARY INJUNCTION HEARING

November 22, 2004



FILED DISTRICT COURT
Third Judicial District

NOV 16 2005

SALT LAKE COUNTY

By _____
Deputy Clerk

BEFORE THE HONORABLE JOHN PAUL KENNEDY
District Court Judge

Jen Kearbey
Certified Court Transcriber

1230 Gaylene Circle
Sandy, Utah 84094
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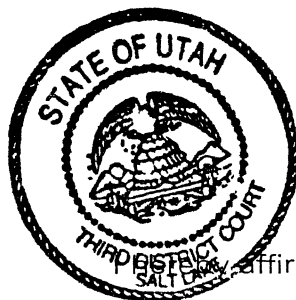
C E R T I F I C A T E

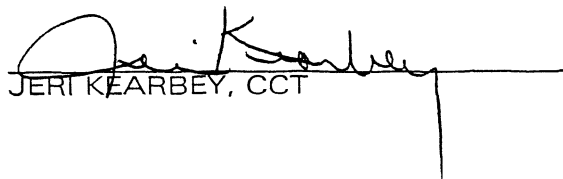
STATE OF UTAH]
] ss.
COUNTY OF SALT LAKE]

I, JERI KEARBHEY, Certified Court Transcriber in and for the State of Utah, do hereby certify that the foregoing electronically-recorded proceedings were transcribed by me from CDs furnished by the Third Judicial District Court in and for Salt Lake County, State of Utah;

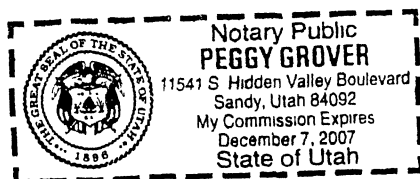
That pages 1 through 123, both inclusive, represent a full, true and correct transcript of the proceedings had on November 10 & 22, 2004, and that said transcript contains all of the evidence, objections of counsel and rulings of the Court, and all matters to which the same relate.

DATED this 8th day of November 2005.




JERI KEARBHEY, CCT

I, _____, do hereby affirm that the foregoing transcript was prepared under my supervision and direction.




Peggy Grover, CSR, RPR / Notary

1 obviously, expecting the follow-up of a deed. Let's just
2 suppose that Ms. Deakin had, as they say —

3 THE COURT: Well, not only expecting it, he promised
4 that he was going to do that.

5 MR. DEANS: At this point in the evidence, that's —
6 and that's actually favorable to the statute of limitations.
7 Let's make that assumption, because it's unrebutted by
8 Mr. Gomez not being here today, Your Honor. I had asked him
9 to be and I got a call this morning that he wasn't coming,
10 and —

11 THE COURT: You're fighting a difficult battle when
12 your client doesn't come to respond —

13 MR. DEANS: I know.

14 THE COURT: — to the allegations, basically, of the
15 complaint.

16 MR. DEANS: I understand that.

17 THE COURT: Let me tell you what I'm concerned
18 about. There are a number of theories that I think — legal
19 theories that the parties could have in this case. And we're
20 early in the case in terms of pleadings, and so they may or
21 may not be modified to incorporate all the theories. But just
22 listening to the facts that have come in today, one-sided
23 primarily facts, admittedly, my concern is you have a client
24 who has made a promise that he's going to put a title into her
25 name. She's followed up. He says, "I'm going to get around

1 to it. I'll get around to it." And he's reiterated that on
2 a number of occasions.

3 She is an uninformed, unsophisticated person when it
4 comes to real property and taxes, and she's doing what she was
5 told that she had to do as a part of this arrangement; and
6 that is pay the mortgage payments, pay the improvement
7 payments, rent the property, receive the rents, pay all the
8 bills indicated, so forth. And so she has, I think in Mr.
9 Clinger's words, she's detrimentally relied for 28 years on
10 the commitment. She never hears anything contrary to that
11 commitment until this year, when, all of a sudden, it appears
12 that your client no longer is going to do what he told her he
13 was going to do.

14 And I would assume that he could get around to it
15 any time up until the mortgage was paid off, maybe, but he
16 hasn't. And now he comes in and says, "I want the property
17 back." That's how I see the facts in this case.

18 Now, I see another theory as adverse possession.
19 She moves in, she's told it's hers; he says, "Okay." She acts
20 like it's hers. She does everything that an owner, but again,
21 an unsophisticated owner, would do for all these years. And,
22 all of a sudden, he comes back and says, "I'm going to sell
23 the property and you don't have any right here. You've got
24 three days to get out."

25 I think you have a very steep hill to climb with

1 those facts to try to maintain your position. I know you've
2 got a statute of limitations argument. My concern would be
3 that, as far as triggering the statute in the detrimental
4 reliance, there's nothing that would trigger it until he says,
5 "I'm not going to — you've got to get out." That's the first
6 time she knows that he's not going to live up to her — his
7 promise to her. And that's recent. That's well within the
8 statute.

9 As far as the adverse possession, I don't see a
10 statute running on adverse possession. It's — I mean, she
11 has — she has to establish that she was at least seven years
12 adverse, open, notorious, paying taxes, which she's been
13 doing, either directly or indirectly for that time. So,
14 again, I think that's a tough one to argue.

15 If you're just going under breach of contract and
16 you're proposing that there was some contract that was created
17 back in 1977, you may have an argument. But I think the
18 arguments on detrimental reliance, which I see being asserted,
19 and adverse possession, which I see being asserted are — are
20 possible arguments.

21 I think there's another theory that I haven't heard
22 yet except maybe indirectly with some of the references, and
23 that's fraud. That he fraudulently told her, "I'm going to
24 give this to you. You make the payments." And then he sits
25 back and he waits for 25 — 27 years, whatever it is, and then

1 he comes in and says, "Now I'm going to take the property
2 back And I didn't give you the deed Too bad." You know?
3 So I think there's — there's some pretty heavy causes of
4 action that the plaintiff has here that I think make it
5 difficult for you, without evidence and with your client not
6 being here, to — to resist at least the preliminary
7 injunction.

8 Now, as far as — as far as the security is
9 concerned, I'm not — I mean, if we look at damages in this
10 case and who's going to suffer the irreparable damage, on the
11 plaintiff's side, it seems to me that she's got all of the
12 issues regarding "I've been relying on the fact that I'm the
13 owner for all these years and now I'm going to be thrown out
14 on the street," and I think those are legitimate irreparable
15 damages.

16 His irreparable damages might be that he would lose
17 the opportunity to — to sell. We know there's a buyer out
18 there who wants to buy the property, but, on the other hand,
19 there's been a number of — been a lot of interest shown in the
20 property. And so I don't think it's clear to me that — that
21 this has been the only — the only buyer that is going to come
22 down the aisle. It may be that he is, but there's no evidence
23 that that would be the case at this point.

24 Other than that, his damages would be financial,
25 which I don't see as irreparable. She would have some

1 irreparable damages if she proves her theories — I mean have
2 some monetary damages, just like he would have monetary
3 damages. So in terms of weighing those issues, I don't — I
4 don't see it tipping towards your client's side, and as far as
5 security's concerned, you may want to address that. But I
6 think my inclination at this point would be to — to either
7 order a very nominal amount of security or none at all.

8 So with my having said that, if you could address
9 those issues and let me know what you think I should be
10 thinking about —

11 MR. DEANS: All right.

12 THE COURT: — in trying to decide those questions.

13 MR. DEANS: Hopefully, I can do it with my own
14 gallows, Your Honor, but I'll do my best to respond to your —

15 THE COURT: You're very capable and I know, if
16 anybody could respond, you can.

17 MR. DEANS: And I would respond in the most
18 respectful way that I think you've stated the problems with
19 the case.

20 I developed a sick feeling in my stomach when I came
21 into work and my secretary says, "Mr. Gomez called and he's
22 not coming." That's obvious and I — but, doggone it, I'm
23 going to come here and do my best for a client, whether I —

24 THE COURT: And you've done very well. I think your
25 questioning has been good, your arguments have been excellent.

Exhibit 3

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

MARJEAN A DEAKIN,	:	MINUTES
Plaintiff,	:	PRELIMINARY INJUNCTION
	:	
	:	
vs.	:	Case No: 040923578 PR
	:	
BERNARD GOMEZ,	:	Judge: JOHN PAUL KENNEDY
Defendant.	:	Date: November 22, 2004

Clerk: marcyt

PRESENT

Plaintiff(s): MARJEAN A DEAKIN
Plaintiff's Attorney(s): CHRISTIAN W CLINGER
Defendant's Attorney(s): JAMES H. DEANS
Video
Tape Number: 11:06

HEARING

TAPE: 11:06 The above-entitled case comes before the Court for hearing on the temporary restraining order. The Court hears an opening statement from counsel for plaintiff.

TAPE: 11:08 Marjean A. Deakin is sworn and examined.

TAPE: 12:26 Edward J. Aho is sworn and examined.

TAPE: 12:36 Plaintiff rests. Defendant calls Jill Johnson who is sworn and examined.

TAPE: 1:01 Defendant rests. Both sides rest. The case is argued to the Court by respective counsel and submitted.

TAPE: 1:20 Based on the evidence and argument of counsel, the Court grants the preliminary injunction. Plaintiff shall file a bond in the amount of \$1500 of the injunction shall be resolved.

Case No: 040923578
Date: Nov 22, 2004

This case is set for a one day bench trial on January 28, 2005 at 9:00 a.m.

BENCH TRIAL is scheduled.

Date: 01/28/2005

Time: 09:00 a.m.

Location: Third Floor - W35
THIRD DISTRICT COURT
450 SOUTH STATE
SLC, UT 84114-1860

Before Judge: JOHN PAUL KENNEDY

Exhibit 4

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

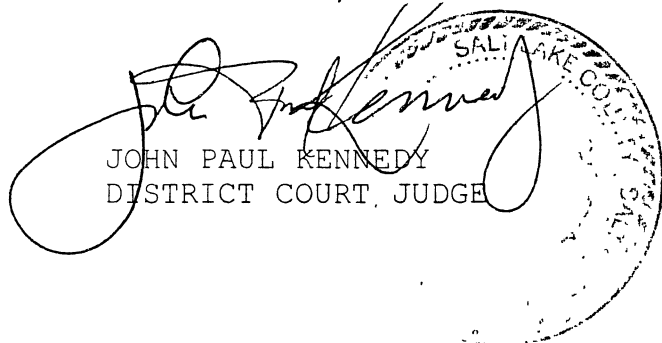
MARJEAN A. DEAKIN, Plaintiff, vs. BERNARD GOMEZ, Defendant.	MINUTE ENTRY Case No. 040923578 Honorable JOHN PAUL KENNEDY Court Clerk: Marcy Thorne January 3, 2005
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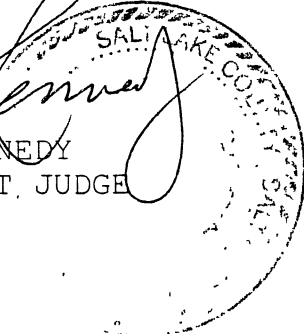
The above-entitled case comes before the Court pursuant to Rule 4-501 of the Utah Code of Judicial Administration. Specifically, Defendant's Motion to Dismiss has been submitted for decision.

Based upon the arguments of the parties, the documents in the file and the testimony at the Preliminary Injunction hearing, Defendant's motion is denied without prejudice.

DATED this 3rd day of January, 2005.

BY THE COURT,


JOHN PAUL KENNEDY
DISTRICT COURT, JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 040923578 by the method and on the date specified.

METHOD NAME

Mail	CHRISTIAN W CLINGER ATTORNEY PLA 9117 W 2700 S STE A MAGNA, UT 84044
Mail	JAMES H. DEANS ATTORNEY DEF 440 South 700 East Suite 101 SLC UT 84102-0000

Dated this 3rd day of Jan, 2005.


Deputy Court Clerk

Exhibit 5

3RD DISTRICT COURT - WV DEPT. COURT
SALT LAKE COUNTY, STATE OF UTAH

MARJEAN A DEAKIN,	:	
Plaintiff,	:	COURT RULING
	:	
	:	
vs.	:	Case No: 050100573
	:	
BERNARD GOMEZ,	:	Judge: JOHN PAUL KENNEDY
Defendant.	:	Date: 06/03/2005

Clerk: deniseo

It is hereby ordered, adjudged, and decreed that title in and of the property described below is hereby quieted in and to MARJEAN A DEAKIN, subject to any mortgage existing on the property as of the date hereof and further subject to any valid lien of any third party, but free and clear of any claim by Bernard Gomez and/or Ramona Gomez:

Exhibit 6

IN THE THIRD DISTRICT COURT SALT LAKE COUNTY STATE OF UTAH

WEST VALLEY DEPARTMENT

6/3/05

MARJEAN A. DEAKIN,

Plaintiff,

vs.

BERNARD GOMEZ AND RAMONA GOMEZ

Defendants.

**AMENDED FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND ORDER
QUIETING TITLE IN PLAINTIFF**

Case No.: 050100573

Judge John Paul Kennedy

The above referenced case came before the Court for a bench trial on February 25, 2005. Present at trial was Plaintiff Marjean A. Deakin (hereinafter referred to as "Plaintiff") represented by and through her counsel, Christian W. Clinger, and Defendant Bernard Gomez (hereinafter referred to as Defendant Mr. Gomez), represented by his attorney, James Deans. Defendant Ramona Gomez (Mr. Gomez's wife) failed to appear at any of the hearings or the trial, but was properly a party to this action and was represented by Mr. Gomez's counsel. Hearings on Plaintiff's motion for a temporary restraining order and preliminary injunction were held in November and December 2004. The evidence admitted therein was stipulated to be admitted for the purpose of the bench trial. After the initial issuance of the Court's Findings, Conclusions, and Order in April 2005, Defendants moved that an amendment be made thereto addressing Defendants' statute of limitations contentions. Argument on the Defendants' motion was heard on June 3, 2005. These Amended Findings, Conclusions, and Order are issued in response thereto.

The Court has heard and received the parties' stipulations of fact, the testimony of various witnesses for the Plaintiff and the Defendants and has received into evidence the following exhibits from the parties:

Plaintiff's Exhibits and Evidence

1. Plaintiff's Exhibit 1, Love letter and pictures from Defendant to Plaintiff
2. Plaintiff's Exhibit 2, Love letter and pictures from Defendant to Plaintiff

3. Plaintiff's Exhibit 3, pictures of Plaintiff on car given by Defendant
4. Plaintiff's Exhibit 4, Notarized letter from Defendant transferring car to Plaintiff
5. Plaintiff's Exhibit 5, copies of cancel checks evidencing mortgage payments from 1980 to 2004
6. Plaintiff's Exhibit 6, Mortgage statement showing balance
7. Plaintiff's Exhibit 7, Receipt and payment for new water main line
8. Plaintiff's Exhibit 8, compilation of receipts for repairs and improvements to the duplex paid for by Plaintiff
9. Plaintiff's Exhibit 9, November 2004 Eviction Notice
10. Plaintiff's Exhibit 10, copy of October/November 2004 mortgage payment
11. Plaintiff's Exhibit 11, Notice to show house
12. Plaintiff's Exhibit 12, copy of lease from Plaintiff
13. Plaintiff's Exhibit 13, copy of lease between Plaintiff and Tralaye Procelle
14. Plaintiff's Exhibit 14 copy of audiotape of messages left on Tralaye Procelle's voicemail at work and at home, produced with these Initial Disclosures.
15. Plaintiff's Copies of checks to Mortgage company for December 2004 mortgage and tax payment, January 2005 mortgage and tax payment, and February 2005 mortgage and tax payment.

Defendant's Exhibits and Evidence

1. Defendant's Exhibit 4, part of Mr. Gomez's 2001, 2002, and 2003 tax returns
2. Defendant's Exhibit 5, 1984 receipt from Chris & Dick's
3. Defendant's Exhibit 6, receipt for nails

Based upon the parties' stipulations, testimony, and the evidence received, the Court now enters the following Findings of Fact:

FINDINGS OF FACT

1. In April 1977, Defendant Bernard Gomez bought the duplex located at 468 E. and 470 E. Sherman Ave, Salt Lake City, Utah, as a gift for Plaintiff Deakin. Mr. Gomez asserted that at an uncertain date sometime after April 1977, he added his wife's name to the title. Though Plaintiff agrees that the Certificate of Title speaks for itself as to the names thereon, neither a copy of the Certificate of Title nor the Mortgage was offered into evidence by the Defendants as evidence that Mrs. Gomez's name was added to the title to the property in question. While no evidence was introduced on this point, Mrs. Gomez appeared in this case as a party defendant and was represented by counsel. There was no evidence submitted which would indicate that Mrs. Gomez's name was placed on the title at any time materially prior to the filing of this action, nor was any evidence submitted which would indicate that Mrs. Gomez ever took any actions of her own which were contrary to the actions of her husband in this matter.

2. In April 1977, Mr. Gomez gave Plaintiff the keys to the duplex and gave her possession and exclusive control of the house. Based on the testimony of Plaintiff, Defendant Mr. Gomez told her the house was hers and she could do with it as she chose. Plaintiff has never filed a Notice of Interest with the Salt Lake County Recorder since 1977. Plaintiff did file and record a Lis Pendis Notice and an Amended Lis Pendis Notice with the Salt Lake County Recorder on November 8, 2004, at the same time she commenced this lawsuit.

3. Plaintiff Deakin has continuously resided and occupied the premises located at 468 E. Sherman Ave., Salt Lake City, Utah (hereinafter "the property"), since 1977. Since 1977, she has openly claimed that the duplex was hers. She has told people and held out to the public that she was the owner of the house. Plaintiff's brother, Ed Aho, testified at the Preliminary Injunction Hearing that Plaintiff has always believed that the duplex was hers, and she has always claimed to be the owner. Defendants have never occupied the premises.

4. In 1977, when Defendant Mr. Gomez gave the keys, possession, and exclusive control of the duplex to Plaintiff Deakin, he told her to pay the mortgage on the duplex to the mortgage company, pay the taxes through the mortgage escrow account, pay for all of the improvements, pay for all of the utility bills, and so forth. Plaintiff is an unsophisticated, uninformed, and inexperienced person when it comes to real estate and taxes. There is no evidence that she was represented by counsel with respect to this property until this action was

commenced. Plaintiff has never claimed any deductions for the payment of property taxes or interest on her tax returns since 1977. Plaintiff has never reported any rental income from the duplex on her tax returns since 1977.

5. Nonetheless, for 28 years Plaintiff has paid the mortgage, paid the taxes, paid for all of the improvements, and paid the utility bills. Plaintiff has detrimentally relied on Mr. Gomez's commitment for 28 years. The Court received into evidence copies of checks for at least 20 years proving payment of the mortgage. In regard to the monies Plaintiff has received on the property, Plaintiff has never sent the Defendants any monies she has collected for rent on the duplex. All monies have gone to the Plaintiff. Plaintiff has never sent the Defendants any accounting for the monies collected at the duplex.

For 28 years, Defendants have never asked Plaintiff to send them any of the monies from the duplex. Furthermore, the Defendants have never asked Plaintiff for any accounting.

6. For 28 years, Plaintiff has acted consistently with her position as owner of the property in regard to her paying the mortgage, the taxes, and the improvements.

7. Plaintiff has asked Mr. Gomez numerous times for him to put the title of the duplex in her name as he promised. Plaintiff has followed up with Mr. Gomez in regard to putting the title in her name, and he has responded to her, "I'll get around to it, Babe; I'll get around to it." Plaintiff has never requested in writing that the Defendants send her a deed conveying ownership to her. Plaintiff has never sent the Defendants any proposed deed for them to sign conveying the property to Plaintiff. The reason Plaintiff never requested in writing for such a deed was that she relied on Mr. Gomez's promises that he would get around to putting the title in Plaintiff's name. No evidence was presented which would indicate that the parties regarded the conveyance of a formal deed to be essential to completing the gift of the property or anything more than a mere formality. In fact, the actions of the parties indicated to the contrary.

8. Mr. Gomez stopped contacting Plaintiff in about 1993. Plaintiff had not heard anything contrary to Mr. Gomez's commitment until Mr. Gomez abruptly informed her through a real estate agent on October 27, 2004, that he was planning to sell the duplex, implicitly indicating for the first time to Plaintiff that he was taking action inconsistent with the gift. On that date, for the first time, Defendant Mr. Gomez, through his agent, stated he wanted the property back.

9. Plaintiff has made the following improvements to the property: new roof, new water/sewer main line, new back porch and railings for 468 E., new porch railings for 470 E., torn down the garages for 468 E. and 470 E., new 220 volt electrical wiring for 468 E. and 470 E., new air conditioning units for 468 E. and 470 E., new water heaters for 468 E. and 470 E., new light fixtures and ceiling fans for 468 E. and 470 E., new carpet for 468 E. and 470 E., several coats of new paint for 468 E. and 470 E., new storm doors for 468 E. and 470 E., 2 stoves and 2 refrigerators for 470 E., 2 stoves and 3 refrigerators for 468 E., and new pipes and drains for clothes washers in 468 E. and 470 E. The Court received into evidence copies of receipts and proof of payment of many of the improvements listed above.

Plaintiff never requested orally or in writing permission to do any repairs. This was because she primarily relied on Mr. Gomez's statements that, because the property was hers, she was responsible for all improvements, repairs, and the payments therefor. When Ms. Deakin did ask on one occasion for Mr. Gomez to provide some financial help to pay for repairs or improvements, it was her testimony that he refused because he told her that it was her house and she could do with it as she pleased. Furthermore, in regard to tearing down the garages, the notices from Salt Lake City and Salt Lake County to tear down the garages came to Plaintiff and not to Mr. Gomez.

10. On October 27, 2004, Plaintiff learned for the first time through Mr. Gomez's real estate agent that he was planning to sell the duplex in question.

10. Plaintiff -- not the Defendants -- has rented the other side of the duplex for at least the past 28 years. Plaintiff is currently in a lease with Tralaye Procelle.

11. On November 22, 2004, two weeks after this action was filed, Ms. Procelle received several telephone messages from Mr. Gomez and his daughter. They both instructed Ms. Procelle to send her monthly rental payment to Mr. Gomez and not to pay Plaintiff. There was no evidence that such a request had been submitted to this or to any other tenant prior to November 22, 2004.

**DEFENDANT HAS ADMITTED THE FOLLOWING FACTS THROUGH HIS ANSWER
AND ADMISSIONS:**

12. In 1973, Plaintiff met the Defendant, Bernard Gomez, in Salt Lake City, Utah.

13. In 1976, Mr. Gomez had talked a lot about improving Plaintiff's living conditions and getting her out of her rental apartment. He wanted Plaintiff to have a better quality of life.

14. Mr. Gomez admitted that from 1977 to the present, there has never been any understanding or conversation between him and Plaintiff that Plaintiff was in a lease agreement with Mr. Gomez for the duplex in question.

15. Mr. Gomez admitted that he has never had a lease agreement from 1977 to the present with any tenant in 470 E. Sherman Ave.

16. Mr. Gomez admitted that he has never personally collected any rent from the duplex.

17. Mr. Gomez admitted that he has never paid any of the property taxes for the duplex in question.

18. Mr. Gomez admitted that for at least the past ten years the monthly mortgage invoices and tax notices have been sent to 468 E. Sherman Ave.

19. Mr. Gomez admitted that he has never paid for any of the following improvements or repairs: new roof, new water/sewer main line, new back porch and railings for 468 E., new porch railings for 470 E., torn down the garages for 468 E. and 470 E., new 220 volt electrical wiring for 468 E. and 470 E., new air conditioning units for 468 E. and 470 E., new water heaters for 468 E. and 470 E., new light fixtures and ceiling fans for 468 E. and 470 E., new carpet for 468 E. and 470 E., several coats of new paint for 468 E. and 470 E., new storm doors for 468 E. and 470 E., 2 stoves and 2 refrigerators for 470 E., 2 stoves and 3 refrigerators for 468 E., and new pipes and drains for clothes washers in 468 E. and 470 E.

20. From 1993 to the present, Plaintiff has not seen Mr. Gomez. They have had very limited telephone contact.

21. Prior to the commencement of this action, the monthly mortgage invoices and the annual payment and interest notices were mailed to 468 E. Sherman Ave.

22. Neither Mr. Gomez nor Mrs. Gomez have ever lived in or occupied the duplex.

23. For nearly 28 years, Plaintiff has leased 470 E. Sherman Ave. without any restraint or objections from Mr. Gomez or Mrs. Gomez.

24. Plaintiff has never been required to send Mr. Gomez the rent collected from 470 E. Sherman, and during the past 28 years, Mr. Gomez has not asked for the rent.

25. Mr. Gomez admitted that prior to October 27, 2004, he had not informed Plaintiff that he was going to sell the house. Plaintiff did not receive any notice of legal injury prior to October 27, 2004.

TESTIMONY RECEIVED

26. Though Mr. Gomez testified that he had paid two or three monthly mortgage payments over 28 years, he did not remember specifically when those payments may have been made and he did not offer any documentary evidence of proof of such payments or their timing.

27. Mr. Gomez testified that neither he nor Mrs. Gomez has ever paid the property taxes on the duplex.

28. In regard to Mr. Gomez's tax returns, Mr. Gomez testified that he has never collected any rent from the property. However, he did report some rental income on his taxes (for the years 2001–2004), though he did not know the monthly rental amount collected. He merely estimated what he thought the rental income was and then reported it on those tax returns. No tax return evidence, however, tied the income reported therein to the property in this case.

29. In regard to improvements made to the property, Mr. Gomez testified that he has not made or paid for any improvements to the property during at least the last ten years. He also testified that he did not know of the improvements made by Plaintiff during at least the past ten years because he has not visited the property during that time.

30. Mr. Gomez did testify that sometime in 1984 he made repairs to the roof of the duplex and he offered two receipts which were received into evidence. However, the receipts do not identify Mr. Gomez's name and there is no proof of payment. Only one of the receipts even refers to the property's address, but the telephone number on that receipt is not that of Defendant.

31. Prior to April 1977, and continuing thereafter until sometime prior to 1993, Plaintiff and Defendant engaged in a prolonged romantic relationship. During that relationship, Mr. Gomez gave Plaintiff a number of expensive gifts, including two automobiles and a ring. In

view of the fact that the gift of the duplex was subject to a mortgage, the value of that gift was not out of proportion to the value of the other gifts given by the Defendant Mr. Gomez to the Plaintiff.

32. In April 1977, Defendant's prior statements and prior and continuing actions led Plaintiff to believe that Defendant had also made a gift of the real property at issue in this case to Plaintiff, and Plaintiff acted in detrimental reliance upon those statements and actions, reasonably believing that the property was her own property commencing in April 1977.

33. Since April 1977 Plaintiff acted consistent with her good faith belief that the Defendant had given the property to her. Nothing in Defendants' actions until October 2004 would be contrary to such belief.

34. For 28 years, because she believed in good faith that the Defendant had given the property to her, Plaintiff paid the mortgage, the taxes, other bills, and the costs of the improvements on the property.

35. Acting in reasonable reliance upon Defendant's statement that he would "get around to" putting title in Plaintiff's name, Plaintiff never requested in writing that the Defendant send her a deed conveying ownership to her. In further reliance upon that assurance, Plaintiff continued to act consistently with her good faith belief that the property had been given to her by paying the mortgage, taxes, insurance, for improvements, etc.

36. Based upon all the evidence and the Court's evaluation of the demeanor and credibility of Plaintiff and Defendant Mr. Gomez on the witness stand, the Court further finds based on clear, convincing, and unequivocal evidence, that in the context of Defendant Mr. Gomez's actions, the extended relationship of the parties, the statements made to Plaintiff by Defendant Mr. Gomez in April 1977 and thereafter, and Plaintiff's consistent behavior for 28 years, Defendant did make a gift of the property to the Plaintiff in April 1977 and the Plaintiff reasonably believed in good faith that such a gift had been made, and Plaintiff acted in good faith reliance upon that belief. Moreover, in acting upon her belief that such a gift had been made, the Plaintiff made valuable, substantial, and beneficial improvements to the property along with paying the costs of such improvements and paying the mortgage on the property for 28 years.

37. Further, the Court finds that revoking the gift or rescinding the gift at this time would be inequitable to the parties, and specifically to Plaintiff who, for 28 years, has detrimentally relied upon her good faith belief that a gift was made to her by Defendant Mr. Gomez.

CONCLUSIONS OF LAW

Based on the Findings of Fact as stated above, the Court now enters the following Conclusions of Law.

Plaintiff has specifically alleged the following six causes of action: 1. Quiet Title/Adverse Possession pursuant to U.C.A. 78-25-5 through 14 and U.C.A. 78-40-1 et seq.; 2. In the Alternative, Unjust Enrichment pursuant to the Utah Occupying Claimant Act, U.C.A. 57-6-1 et seq.; 3. Detrimental Reliance/Promissory Estoppel; 4. Fraud; 5. Interference with Contract; and 6. Violation and Contempt of Court. Because the Court concludes that Plaintiff has prevailed on her first and third causes of action, as indicated below, it is not necessary to address the other causes of action.

As set forth below, the statutory and case law elements for quiet title and adverse possession have been met by Plaintiff in that she has shown that she was given the property in question and thereafter has had actual, adverse, exclusive, open, notorious, visible, continuous, and undisturbed possession for a period of seven years or greater and that she has continuously paid the property taxes on the property during a period exceeding seven years, and that she has made and paid for improvements to the property.

1. Since 1977 to the present date, Plaintiff Deakin has paid substantially all mortgage payments, paid all taxes, and made and paid for substantially all improvements and repairs to the duplex located at 468 E. and 470 E. Sherman Ave., Salt Lake City, Utah.
2. Defendants have never paid taxes for the property or made or paid for any repairs or improvements for at least the past 10 years.
3. Defendant Mr. Gomez intended to give and indeed did make a gift of the property to the Plaintiff in April 1977. The actions of the parties with respect to each other and with

respect to the property since that date until October 2004 are entirely consistent with such gift and those actions would remove the transaction from the Statute of Frauds.

4. With respect to Defendants and all others, Plaintiff has had actual, adverse, exclusive, open, notorious, visible, continuous, and undisturbed possession of 468 E. and 470 E. Sherman Ave., Salt Lake City, Utah for at least the past 10 years.
5. Mr. and Mrs. Gomez have never possessed or exclusively occupied the premises in question.
6. Ms. Deakin and Defendants have never been in a lease agreement for the premises in question.
7. Defendant Mr. Gomez initially purchased the property so he could make a gift of the property to Plaintiff. In April 1977, before changing title to the property, Defendant Mr. Gomez in fact gave the property to Plaintiff. As between Mr. Gomez and Ms. Deakin, the following matters, established by clear, convincing, and unequivocal evidence, constituted the elements of the gift: Mr. Gomez expressed his intent to give the property to Plaintiff, he delivered the gift by presenting to her the keys to and exclusive possession and control of the premises, and she accepted the keys and took exclusive possession and control of the property. These facts occurred in April 1977. Plaintiff believed that the gift occurred at that time based upon those events. Thereafter, the conduct of the parties over 28 years reaffirmed that the gift had occurred when Mr. Gomez advised the Plaintiff that the property was hers and when he continuously acquiesced in her on-going actions wherein she performed consistently with the occurrence of the gift by paying the mortgage, insurance, and taxes, collecting and keeping the rents, dealing with tenants and the City, and arranging for and paying for significant improvements and maintenance of the property.

8. At all relevant times since April 1977, Plaintiff has understood in good faith reliance upon the statements and actions of Defendant Mr. Gomez that she was the owner of the duplex that Mr. Gomez gave her.
9. Because Plaintiff was given the duplex located at 468 E. and 470 E. Sherman Ave., Salt Lake City, Utah, and because she has had exclusive, continuous, open, notorious, and adverse possession since 1977, and because she has paid all taxes and mortgage payments and because she has made substantial valuable improvements to the property, the Court concludes she is entitled under the doctrine of adverse possession to an Order quieting title to the property in question in her, subject to any existing mortgage balance and subject to any valid third-party lien. Neither Mr. Gomez nor anyone else ever took any action which would constitute conduct which contradicted or breached the intent to make a gift of the property until October 2004. Hence, no statute of limitations began to run against Plaintiff until that time. Because Defendants took no action contrary to Plaintiff's interest until October 2004, Plaintiff's continuing belief that Defendants would not attempt to revoke the gift was justified until October 2004. Plaintiff timely filed this action immediately thereafter.
10. Defendants are equitably estopped from any action to revoke the gift and from taking any action which may be inconsistent with said gift.
11. The Court concludes that Ms. Deakin is the prevailing party. As such, she is entitled to have the title in the said property quieted in her name and also to receive an award of her costs in this action pursuant to Rule 54 of the Utah Rules of Civil Procedure. In view of the fact that no deed was recorded in favor of Plaintiff Deakin, her right and interest in and to the said property is subject to the existing first mortgage and any other valid lien of a third party. No evidence of any such third-party lien was presented at the trial. Ms.

Deakin and her attorney are to prepare an affidavit of costs and submit it to the Court and opposing counsel pursuant to the Utah Rules of Civil Procedure

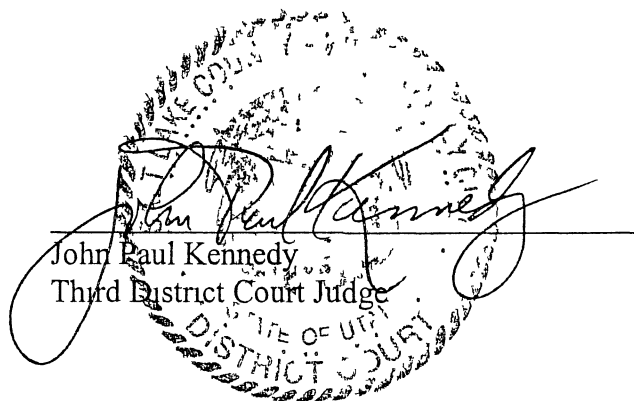
- 12 The Court concludes that because Ms Deakin has prevailed on the merits of her case, the \$1,000 00 cash bond that she deposited with the Third District Court, Salt Lake City Department, in conjunction with the Preliminary Injunction Order, shall be released to her
- 13 No award of attorneys' fees is made at this time

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that title in and to the property described below is hereby quieted in and to MARJEAN A DEAKIN, subject to any mortgage existing on the property as of the date hereof and further subject to any valid lien of any third party, but free and clear of any claim by Bernard Gomez and/or Ramona Gomez

**Lots 53, and 54, Block 2, WASHINGTON PLACE, a subdivision of Lots 12, and 13, Five Acre Plat "A", A Big Field Survey,
Together with ½ of the vacated alley abutting on the South and East.
Tax ID No. 16-07-460-013
Commonly known as 468--470 East Sherman Avenue, Salt Lake City, Utah
84115.**

Dated June 3, 2005


John Paul Kennedy
Third District Court Judge
DISTRICT COURT
STATE OF UTAH