1982

Ned O. Gregerson and Dixie Gregerson v. James L. Jensen and Nedra Jensen : Brief of Appellants

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

NED O. GREGERSON and DIXIE GREGERSON. his wife, Plaintiffs/Appellants, vs. JAMES L. JENSEN and NEDRA JENSEN, his wife, Defendants/Respondents.	Case No. 18354

APPEAL FROM JUDGMENT OF SIXTH JUDICIAL DISTRICT
COURT FOR SANPETE COUNTY, STATE OF UTAH,
THE HONORABLE ALLEN B. SORENSEN,
DISTRICT JUDGE BY APPOINTMENT, PRESIDING

BRIEF OF APPELLANTS

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IN THE SUPREME COURT OF THE STATE OF UTAH

NED O. GREGERSON and DIXIE GREGERSON, his wife, Plaintiffs and Appellants, vs. JAMES L. JENSEN and EDRA JENSEN, Defendants and Respondents.	Case No. 18354

BRIEF OF DEFENDANTS-RESPONDENTS
JAMES L. JENSEN and EDRA JENSEN

QUESTIONS PRESENTED

1. May an unsigned undelivered deed which was not prepared by vendor nor any agent thereof be used to supplement an endorsed check with the notation "1/2 payment on land as agreed, other 1/2 payment upon delivery of the deed", to satisfy the Statute of Frauds.

2. Does partial payment constitute sufficient part performance to entitle vendee to specific performance of an alleged real estate sale.

3. Is appellants claim barred for failing to discharge his duty under the doctrine of inquiry notice.

STATEMENT OF THE FACTS

In the latter part of September of 1971 the Appellant herein Ned Gregerson met with Respondent herein James Jensen at a service station located in Gunnison, Utah, which Jensen managed. Appellant was desirous of purchasing a piece of property owned by Respondent James Jensen in Gunnison (T1-11, 12).

After this initial conversation the parties, along with Appellant's father, went to the property in question. The Property Appellant sought to purchase was part of the lot upon which Respondent had his home and also bordered the community hospital. While on the property Respondent James Jensen indicated that he needed to retain a certain amount of the property for his cesspool and drain fields. Jensen indicated approximately how much of the property he would be willing to sell by kicking the dirt and indicating that from that point to the property line he would consider selling (T1-14, T2-23).

Appellant indicated to Respondent that he was desirous of building a dental clinic on the property once he was released from military service (T1-13). He also indicated to Respondent that he was going to establish an AmWay business in which Respondent could participate (T2-21). Respondent indicated to Appellant that he would need to obtain a partial release of his mortgage on the property (T1-12).

The parties agreed on a price of $700.00 and on the following day Appellant tendered a check to Respondent James Jensen for $350.00. The check offer as exhibit at trial bears the notation "1/2 payment on land as agreed, other 1/2 payment upon delivery of deed" (T1-17). Appellant obtained a tax notice from Respondent Edra Jensen which contained a description of the entire parcel owned by Respondents (T1-15). Mrs. Jensen at no time participated in the negotiations (T2-26, 2741). Appellant along with two others went to the property in question and measured it to ascertain if it would be large enough for his needs and to check the accuracy of the description in the tax notice (T1-13, 31).

Appellant then returned to Texas and had no further contact with Respondent except upon two occasions when he

returned to Gunnison for brief visits. At these times Respondent indicated to Appellant that he would need to come by and finish their transaction, which Appellant never did. Appellant also had changed his mind regarding the building of a dental clinic and establishing his business in Gunnison (T2-21, 22).

Sometime after Appellant's initial departure a warranty deed prepared by some third party, and according to Respondent's testimony was delivered to him by Appellant's father, said deed listed both Respondents as grantors although Mrs. Jensen's first name was misspelled (T2, 7, 26). Respondents never signed nor delivered this deed awaiting Appellants return to Gunnison to consummate the deal, and in order to check the description in the deed. (T2-9)

Appellant brought suit against Respondents for specific performance, the trial court ruled against him. Appellant moved for a new trial upon the basis of new evidence, the warranty deed above mentioned, this motion was denied, Appellant appealed and was granted a new trial at this second trial judgment was entered for Respondents. And it is the review of this judgment that is presently before the court.

ARGUMENT

POINT I

THE WARRANTY DEED WITH WHICH APPELLANT SEEKS TO CHARGE RESPONDENTS IS DEFECTIVE AND MAY NOT BE USED TO SUPPLEMENT THE ENDORSED CHECK.

Respondents do not dispute the conclusion that two or more writings may be construed together as containing the terms of a contract for the purpose of satisfying the Statute of Frauds even though all are not signed by the party sought to be charged. Respondents do contend however that not any writing may be used for this purpose. The Court has defined the conditions under which an unsigned writing may be used as supplement as being when there exists some nexus between the two either by express reference of inference. Admittedly the check offered by Appellant as exhibit refers to a deed to be delivered in the future; however, no specific deed is referred to, the parties could not have had any specific deed in mind since none existed at that time, the notation on the check even if binding on Respondents, discussed infra, refers to an event to happen in the future and not to a particular writing which the parties could be

seeking to incorporate therein by reference. By inference the notation indicates that the Respondent James Jensen was to prepare and deliver a deed which event never occurred; therefore, said notation refers to a document which never existed i.e. one prepared and delivered by Jensen; therefore, no real nexus exists between the two documents.

Further Respondents contend that due to the uncertain origin of said deed it is not of sufficient quality to be used as supplement. 73 Am. Jur. 2d Statute of Frauds §§ 379, 380, 381.

State that a party may be bound by the writing of an agent acting with proper authorization and that in some instances a party may be bound by a writing subscribed by the other if delivered to the party sought to be charged; however, the trial court ruled that neither of these instances occurred in this case but rather that the deed was prepared by a third party. How then could a document not subscribed by either of the parties nor any agent thereof possibly contain the essential terms of a contract between them? And how could such a document be used to satisfy the Statute of Frauds. Even if, as testified by Respondent James Jensen, the deed was in some manner prepared by Appellant or someone

acting on his behalf, the court should not allow such a writing to be used to bind Respondents. The record clearly shows that Respondent James Jensen refused to sign and deliver said deed for reasons more substantial than the misspelling of his wife's name, in fact he testified that one; he was awaiting Appellants return and two; that he wished to have the description verified. To allow a document subscribed by one party to bind the other party when the latter clearly indicated no intent to be bound thereby would result in the perpetration of the fraud that the law seeks to prevent.

Furthermore, some jurisdictions have held that an unsigned, undelivered deed may not be used to constitute sufficient memoranda for satisfying the Statute of Frauds, 73 Am. Jur. 2d Statute of Frauds §§ 369, 377.

POINT II

HOLDING THAT THE STATUTE OF FRAUDS HAS NOT BEEN SATISFIED IN THIS CASE IS NOT INCONSISTENT WITH THE COURT'S DECISION IN THE FIRST APPEAL.

In that Appeal Gregerson v. Jensen, 617 P. 2d 369 (Utah 1980) the court merely held that the deed could be

used to supplement another writing and was sufficient to establish a prima facie case entitling Appellant to a new trial. The evidence, as discussed above, clearly shows that the quality of the deed as a supplemental writing is of uncertain origin and that no evidence supports the conclusion that Respondent ever acquiesced to be bound thereby.

POINT III

RESPONDENTS ARE NOT BOUND BY THE NOTATION "1/2 PAYMENT OF LAND AS AGREED, OTHER 1/2 PAYMENT UPON DELIVERY OF DEED" WHICH APPEARS ON THE CHECK ENDORSED BY JAMES JENSEN.

The endorsement of check on the back by the payee thereof does not necessarily bind him to the terms of any notation on the front thereof. 2 Corbin on Contracts § 520, Williston on Contracts Third Edition § 585, Restatement 1, Contracts § 210 and 73 Am. Jur 2d Statute of Frauds § 362 and 360. State that a signature must be affixed with the intent to authenticate the writing. Appellant James Jensen testified at trial that he did not see the above-referred to notation on the check at the time of depositing it. To allow an endorser/payee of a check to be bound by a notation on a check without sufficient proof to establish that said

endorsement was intended as a ratification of said notation would allow a party to unilaterally set the conditions of a contract and bind the other party thereby.

The net result of not allowing the endorsed check to be used by Appellant as a signed document would be that there is not any signed memoranda with which to satisfy the statute of frauds requirement.

POINT IV

APPELLANTS ARE NOT ENTITLED TO SPECIFIC PERFORMANCE UNDER THE DOCTRINE OF EITHER PART PERFORMANCE OR SUFFICIENT MEMORANDA TO SATISFY THE STATUTE OF FRAUDS.

Appellant further claims that under the doctrine of part performance he is entitled to have the alleged oral contract with Respondent James Jensen specifically enforced; however, Appellant has failed to meet the requirements for specific performance under the doctrine of part performance in the following three (3) ways.

1. The doctrine of part performance was fashioned so as to prevent the statute of frauds from being used by a vendor to perpetrate a fraud on a vendee, Coleman v. Dillman, 624 P. 2d 713 (Ut. 1981) further 73 AM. Jur. 2d

Statute of Frauds § 405 states that as a prerequisite to invoking the doctrine of part performance the party claiming such relief must show that unless the oral contract is enforced he will be defrauded. Appellant has made no such showing, the evidence shows that Appellant is in no way subject to being defrauded. Admittedly Appellant paid to Respondent James Jensen $350.00 which Respondent has been willing to return to Appellant subject to an appropirate interest rate and which Respondent has tendered to the court. Appellant has shown no benefit which would accrue to Respondents nor any detriment which he would incur without the enforcement of the alleged oral contract.

2. Utah case law has overwhelmingly ruled that the terms and conditions of the oral contract sought to be specifically enforced must be specific, clear, certain and unambiguous and nothing is to be left to the court to supply, and it is the responsibility of the party claiming specific performance to show that such is the case. Ryan v. Earl, 618 P. 2d 54 (Ut. 1980), In Re Roth's Estate, 2 U.2d 40, 269 P. 2d 278 (1954) Montgomery v. Barrett, 40 U. 385, 12 P. 569 (1912) Ferris v. Jennings, 595 P. 2d 857 (Ut. 1979) to cite a few, also 73 Am. Jur. 2d Statute of Frauds § 401.

Again Appellant has failed to carry this burden. In fact the record shows that if the parties ever reached any agreement conclusive enough to be considered a contract that the parties understanding of its terms differ greatly. Respondent James Jensen has stated on many occassions that Appellant has to perform more than payment i.e. the building of a dental clinic on the property and the establishing of an AmWay business in which Respondent was to participate. Since Appellant has failed to clearly establish what the terms of any oral contract with Respondent James Jensen were he is not entitled to specific performance.

3. 73 Am. Jur. 2d § 406 supra further states that the acts upon which a party bases his claim of part performance must be sufficient. The court on many occassions has set forth the criteria for evaluating the acts of part performance. In Holmgren Brothers Inc. v. Ballard, 534 P. 2d 611 (Ut. 1975) the court enunciated these criteria; improvements must be substantial, valuable or beneficial, any consideration given must be of value, possession must be actual, open, noncurrent with vendor and with vendors consent and any act must be exclusive referable to the contract and

in reliance thereon. No clear cut formula has been established for determining exactly what vendee must do to claim part performance each case must be judged on its own facts. In this case the only substantial act done by Appellant was the payment by check of $350.00 any other act is merely preparatory e.g. Surveying, attempting to obtain financing, Baugh v. Logan City, 27 U. 2d 291, 495 P. 2d 814. In no Utah case has partial payment alone been sufficient to remove the statute of frauds defense. Only by way of dictum in Holmgren Bros. supra has the court ever mentioned partial payment alone as sufficient. 73 Am. Jur. 2d Statute of Frauds § 435 states that most jurisdictions have held partial payment alone insufficient to satisfy part performance. Again Appellant has failed to show acts in reliance on the contract sufficent to involve the doctrine of part performance.

The same burden of proof would bar Appellant from specific performances on his first claim of sufficient memoranda discussed, supra. Even if such a conclusion were to be made by this court Appellant has still failed to clearly establish what the terms of the contract were to have been.

POINT V

PAROL EVIDENCE SUPPORTS FINDING THAT NO ORAL CONTRACT AS SUCH WAS EVER MADE BETWEEN THE PARTIES AND THAT IF, ARGUENDO, ANY CONTRACT COULD BE IMPLIED, APPELLANT FAILED TO COMPLY WITH THE PROVISIONS THEREOF.

Since this case involves issues of equity i.e. specific performance and part performance, the court may review both the facts and the conclusions of law. A reading of the two transcripts of oral testimony reveals that the parties never reached any "meeting of the minds" as to the terms of the contemplated contract. Respondent James Jensen has repeatedly stated that he considered Appellants building a dental clinic on the property and establishing an AmWay business as provisions of the anticipated agreement. The testimony also differs greatly as to who was responsible for the breakdown of negotiations. Appellant claims Respondent James Jensen in essence did not exercise good faith in proceeding to consummate the contract. Respondent James Jensen; however, states that Appellant failed to follow through with his promise to return and consummate the transaction. Again a reading of this testimony indicates that any complete agreement between the parties was to have been reached at sometime

after their original negotiations. The trial court held that indeed no contract was ever reached between the parties.

Further the evidence given at trial strongly supports the conclusion that even if an oral contract could be inferred from the dealings of the parties that the terms thereof included more than just payment of money by the Appellant.

POINT VI

APPELLANT FAILED TO DISCHARGE HIS DUTY UNDER THE DOCTRINE OF INQUIRY NOTICE.

Appellant was on notice and failed to inquire diligently as to Respondent Edra Jensen's interest in the property and therefore his claim is barred for the simple reason that he had no direct negotiation with her and has no signed memoranda with which to charge her. In Holmgren, supra the court ruled that there is no husband and wife exception to the Statute of Frauds and that a wife is not bound by the actions of her husband.

Record title is admittedly always been in James Jensen's name only; however, the trial court properly held that legal title is in Edra Jensen's name by virtue of an unrecorded

warranty deed from her husband. The evidence clearly shows that Appellant failed to discharge his duty to diligently inquire as to Respondent Edra Jensen's interest. Because if he had he would have found ample evidence that she indeed had an interest. By checking the records he would have found a mortgage listing her as having an interest. Both Respondents stated at trial that they have always believed that Edra Jensen held some interest in the property. Indeed the party who drafted the very deed with which Appellant seeks to charge Respondents recognized that Edra held an interest in the property and listed her as a grantor. Appellant's only claim to having discharged his duty of inquiry notice was the obtaining of a tax notice which listed James Jensen only. However, Appellant admittedly sought such a document for the purpose of getting a description of the property and it is Respondents contention that any claim to having inquired as to Edra's interest, is merely an after thought on his part.

CONCLUSION

Appellant's claim is barred by the Statute of Frauds and he has failed to establish a claim under a theory of part performance or signed memoranda. Under either

doctrine Appellant would not be entitled to specific performance due to the vagueness and ambiguities in the provisions and terms contemplated by the parties. Parol evidence shows that no contract as such was ever reached by the parties. Appellant failed to discharge his duty under the doctrine of inquiry notice and is barred by virtue of Respondent Edra Jensen's interest.

For these reasons and all others set forth above Respondents respectfully request that the judgment of the trial court be affirmed.

DATED this 13 day of July, 1982.

Respectfully submitted,

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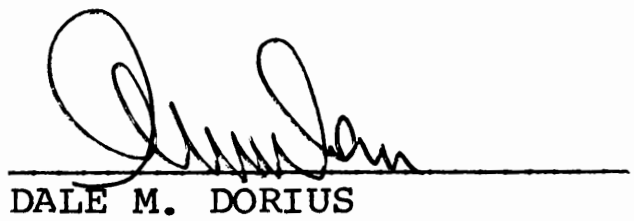
CERTIFICATE OF MAILING

SERVED the foregoing Brief of Respondents by mailing copies thereof, postage prepaid, to HANS Q. CHAMBERLAIN, attorney for Plaintiffs-Appellants, at 110 North Main St., Suite "G", P. O. Box 726, Cedar City, Utah 84720, this 13 day of July, 1982.



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