1982

Carl Baldwin and Larry Gleim v. Vantage Corp. : Brief of Appellants

Utah Supreme Court

Ray M. Harding, Jr.; Attorney for Appellants;
Edwar M. Garrett; Attorney for Respondent;

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

CARL BALDWIN and LARRY GLEIM, Plaintiffs-Appellants, vs. VANTAGE CORPORATION, a Utah Corporation, Defendant-Respondent.	)	CASE NO. 18202

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APPELLANTS' BRIEF

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Appeal from a Judgment of The
Fourth District Court of Utah County,
Honorable Robert Bullock

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STATEMENT OF THE NATURE OF THE CASE

The nature of this case is a dispute over the terms of an oral agreement to convey land, with appellants seeking to rescind the agreement because of the failure of respondent to comply with the terms of the agreement.

DISPOSITION OF THE LOWER COURT

In February of 1981 appellants filed an amended complaint against respondent seeking the recovery of amounts paid under an oral contract to convey land. This complaint sought recovery under four causes of action. First, that respondent breached the contract; second, that the oral contract is unenforceable and subject to rescission because it falls within the statute of frauds; third, that respondent has been unjustly enriched; and fourth, that appellants were induced to enter the sales agreement through fraudulent statements and misrepresentations.

After a non-jury trial, the Court held that appellants did not carry their burden of proof in establishing that one of the

terms of the agreement was an enforceable commitment of respondent to provide construction financing to appellants; that the oral agreement was removed from the statute of frauds by part performance; that appellants failed to prove by clear and convincing proof that respondent made a fraudulent representation; and that respondent is entitled to a foreclosure.

RELIEF SOUGHT ON APPEAL

Appellants respectfully request this Court to reverse the Trial Court's decision and award appellants rescission of the agreement and restitution.

PREFATORY NOTE

Upon counsel's request, the court reporter transcribed the trial record into the official trial transcript. However, counsel's closing arguments were not transcribed at that time. Upon further request of counsel the portion of the record containing the closing arguments was transcribed and made a part of the record on appeal. The page numbering in this supplemental portion of the transcript begins with number one. Therefore, in order to distinguish it from the main portion of the trial transcript, the supplemental portion will be identified as "Tr. 2d".

STATEMENT OF THE FACTS

In April of 1978 the appellants, Carl Baldwin and Larry Gleim, met with an employee of the defendant, Vantage Corporation (hereinafter referred to as Vantage) to discuss the purchase of

building lots from Vantage (Tr. pp. 10, 59). The employee of Vantage with whom the appellants met was Doug Boulton (Tr. pp. 11, 59). The appellants, as licensed general contractors wanted to purchase a number of building lots located in a newly developed Utah County Subdivision known as Blackhawk Estates Subdivision (Tr. pp. 9, 10, 60, 77). At that time Vantage owned about 62 lots in Plat "D" of this subdivision (Tr. pp. 78).

During the month of April, 1978, the parties met on three separate occasions and as a result of these meetings, appellants agreed to purchase from Vantage SEVEN (7) particular building lots in Plat "D" of Blackhawk Estates Subdivision (Tr. pp. 14 and 43). These SEVEN (7) lots are numbers 18, 19, 28, 34, 35, 49 and 58 (Tr. p. 43). This agreement was made orally and no contracts of sale or any other memoranda were signed by appellants (Tr. pp. 15, 17, and 73). No written sales contracts, earnest money agreements, trust deed notes, trust deeds or similar documents were produced at trial (Tr. pp. 1 - 124).

The terms of the sales agreement were discussed and agreed upon during the three meetings in April of 1978. When the appellants first met with Doug Boulton, they met in a Deseret Federal Savings and Loan (hereinafter referred to as Deseret Federal) office located in Orem, Utah (Tr. pp. 11, 59). The persons present at this first meeting were Larry Gleim, Carl Baldwin, Doug Boulton and Gary Mayo (Tr. pp. 11, 59, 84). Mr. Mayo was an employee of Deseret Federal and he introduced appellants to Doug Boulton (Tr. p. 84). The second meeting in April of 1978 took place in Doug Boulton's office, which is located in one of Deseret Federal's

offices in Salt Lake City. The persons present at this time were Carl Baldwin, Larry Gleim and Doug Boulton (Tr. pp. 14, 59). The third time the parties met the people present were Larry Gleim and Doug Boulton and again they met in Doug Boulton's office in Salt Lake City (Tr.p. 61). All three of the principal parties to the agreement, Larry Gleim, Carl Baldwin and Doug Boulton, appeared at trial and testified as to the terms of the agreement.

Both appellants testified that one of the fundamental terms of the agreement was that construction loans and long term financing would be provided by Deseret Federal. Specifically, Doug Boulton guaranteed that Deseret Federal would provide the construction financing for homes built on the lots if appellants purchased the lots (Tr. pp. 12, 13, 14, 51, 24, 37, 38, 59, 60, 63, 65, 66, 67, 69, and 70). This guarantee was a fundamental term of the oral agreement and without it, appellants would not have entered the contracts to purchase the lots (Tr. pp. 24, 65). All of the testimony concerning this aspect of the agreement will be discussed in the argument portion of this brief under issue number one. It is sufficient here to state that the testimony of Doug Boulton indicates he does not remember specifically the statements which he made to appellants in April of 1978. Most of the other terms of the agreement are not disputed.

When the parties concluded the contract negotiations, appellants paid Vantage the sum of $8,950.00 as the down payment on all SEVEN (7) lots (Tr. p. 61). This amount represents TEN PERCENT (10%) of the purchase price for each lot. Lots 18, 19, and 28 had a purchase price of $13,500.00 each and lots 34, 35, 49 and 58 had

a purchase price of $12,500.00 each (Tr. p. 43) (See also defendant's Exhibit 5).

The amount of interest accruing on the unpaid balance of the purchase price for each lot is not disputed. The parties agreed that interst on the unpaid balance would start accruing at ELEVEN PERCENT (11%) per annum, from the time power was available to each lot. This interest rate of ELEVEN PERCENT (11%) was to increase to THIRTEEN PERCENT (13%) per annum after one year (Tr. pp. 5, 9, 12, 103, 104).

Some time after the down payment was made, appellants began receiving monthly statements requiring the payment of the accrued interest on the balance of purchase price. Appellants testified that the original agreement did not require them to pay the interest monthly. Rather, this interest was to be paid upon the sale of each home constructed on the lot (Tr. pp. 17, 18, 19, 62). However, in January of 1979, and at the request of Vantage, appellants paid Vantage the sum of $4,278.59. This amount paid all of the accrued interest on each of the SEVEN (7) lots through January 31, 1979 (TR. pp. 100, 101) (See also defendant's Exhibit number 5 and plaintiff's Exhibit number 2). Later in 1979, and at the request of Vantage, appellants again paid the accrued interest on each lot (Tr. pp. 20, 103). This payment, made in June of 1979 and in the amount of $2,990.32, paid the accrued interest through May 31, 1979 (See also plaintiffs' Exhibit 3 and defendant's Exhibit 5).

Appellants chose not to build houses on three of the lots and in the later part of 1979, sold Lots 28, 49 and 58 to third parties (Tr. pp. 21, 22). Upon the sale of each of these

lots the balance of the purchase price, together with the accrued interest was fully paid (Tr. pp. 21, 22) (See also defendant's Exhibit 5). Also upon the sale of each of these lots the documents necessary to clear title to the purchasers were executed (Tr. pp. 22, 91, 92). As to the remaining FOUR (4) lots, numbers 18, 19, 34 and 35, the appellants did not sign any written contract or other documents or memoranda (Tr. pp. 15, 17, 23, 73).

In February of 1980 appellants went to the Orem office of Deseret Federal and met with a loan officer named LaRae Pittman. At that time appellants inquired about obtaining construction loans to build homes on Lots 34 and 35 (Tr. pp. 24, 63). In response to this appellants were denied a loan application and were told that Deseret Federal was not offering construction loans for homes built on speculation (Tr. p. 24). Appellants then explained to the loan officer that construction loans were guaranteed to them, under a previous arrangement with Doug Boulton (Tr. pp. 25, 63). The loan officer then called Mr. Preben Nielsen, a senior vice-president and manager of Vantage (Tr. pp. 111, 112). Mr. Nielsen indicated that he would speak with the person in charge of mortgage lending and find out what the situation was with regards to construction financing (Tr. pp. 25, 117). Appellants then left the Deseret Federal office.

Following this incident in February of 1980; appellants contacted Deseret Fedearl on several occasions to make further inquiry about obtaining construction financing (Tr. pp. 26, 27, 63) These communications culminated in the summer of 1980 with a person meeting between appellants and two representatives of Deseret

Federal. This meeting was held in Mr. Preben Nielsen's office in Salt Lake City (Tr. p. 116). The persons present at this meeting were Carl Baldwin, Larry Gleim, Preben Nielsen and John Cecil. Mr. Cecil is an accountant for Deseret Federal (Tr. p. 97). The substance of the discussion at the meeting is that appellants were informed that it was not possible for Deseret Federal to extend construction loans to them. In response to this, appellants requested that Vantage return to them the down payment and interest which they paid on Lots 18, 19, 34 and 35. This request was denied. Other possible arrangements were discussed but they were not acceptable to appellants (Tr. pp. 2, 64, 110, 115, and 116).

Following this meeting, appellants contacted an attorney, Mr. Ray M. Harding, Jr., and requested him to try and obtain a rescission of the sales contracts on the lots and to get their money back (Tr. pp. 29, 64). In December of 1980 appellants filed a complaint against Vantage seeking rescission of the Sales contracts for Lots 18, 19, 34, and 35 and restitution.

ARGUMENT

POINT I. THE COURT ABUSED ITS DISCRETION IN FINDING THAT NO GUARANTEE OF CONSTRUCTION FINANCING WAS MADE.

A. Scope of Review

Article VIII, Section 9, of the Constitution of Utah states that an appeal to the Supreme Court may be on questions of both law and fact in equity cases.

In the present case, appellants' amended complaint specifically prays for rescission and restitution. This case is

therefore an equitable action and as such the Supreme Court may review the facts as well as the law. Upon a review of the facts, this court may make new findings of fact when the evidence so clearly preponderates against the trial court's findings that a manifest injustice has been done. Hatch v. Bastion, 567 P 2d 1100 (Utah, 1977), Del Porto v. Nicolo, 27 Utah 2d 286, 495 P 2d 811 (1972). It is appellant's position that a review of the facts will establish that a manifest injustice has been done, requiring a reversal of the lower court's findings of fact and conclusions of law.

B. Evidence establishing guarantee.

As noted in the statement of facts there were only three people who were involved in the contract negotiations which resulted in the agreement whereby appellants agreed to purchase SEVEN (7) lots from Vantage. These three people are the appellants Carl Baldwin and Larry Gleim, and a representative of Vantage and Deseret Federal, Doug Boulton. All three of these people appeared at trial and testified about the contract negotiations, including the guarantee of Construction financing. Therefore, the evidence which establishes whether the guarantee was made must come from the testimony of appellants and Doug Boulton. Appellants maintain that the testimony of these three witnessess, taken together, establishes with certainty that a guarantee of construction financing was made to appellants.

In an effort to avoid any mis-statement of the evidence, and in support of their position, appellants submit the following excerpts from the trial transcript:

On direct examination, Carl Baldwin testified as follows:

Page 12, lines 2-16,

Q. (By Mr. Harding) In this conversation that you had, was any discussion had of guarantees?

A. Yes.

Q. And can you tell me specifically what was said and by whom in regards to guarantees?

A. We asked that if we could purchase these lots, that loans would be guaranteed through Deseret Federal. It was answered that yes, they would be.

Q. Who gave that answer?

A. Doug Boulton.

Q. This was in the first meeting that you had?

A. Yes. They reason why we asked the question was that if we went to any other bank besides Deseret Federal, the loans would have to be paid off and that there would be no sub-ordination.

Page 13, lines 4 through 7.

Q. Okay. As you were answering or contemplating the purchase of these lots, which of these terms that proposed to you were the most important to you?

A. That we were guaranteed a loan, . . .

Page 14, lines 10-18 and 23-30

Q. What, specifically, what was said, though, in regard to the terms, and who by?

A. At that time I remember saying to Doug, "Is our loans guaranteed for sure? Because if they are not, then we'd have to go to other financing and those lots would have to be paid off

in full." He said, "Yes". He says that Deseret Federal, the reason why they were doing this was that they wanted the construction money to go through them and also the long-term financing, if possible.

Lines 23 through 30

Q. Onee again, what particulars in regards to subordination were discussed at this meeting?

A. Well, the subordination was that, as I mentioned, that Deseret Federal, as I asked the question, "Are you sure that Deseret Federal would make those loans? Is that guaranteed? Doug said, "Yes". And I mentioned that that was the purpose, because if it wasn't then we would have to go somewhere else and we'd have to pay off the lots.

Page 23 lines 29-30 and page 24, lines 1-9

Q. (By Mr. Harding) What statements of Mr. Boulton did you rely upon in making the purchase?

THE COURT: If any.

Q. (By Mr. Harding) - - If any?

MR. GARRETT: I'm also going to object to it being repetitious, he's covered this ground, your Honor.

THE COURT: He may answer.

A. The thing that was so important to us was the guarante of loan, the subordination and the reasonable interest.

On cross examination, Mr. Baldwin testified as follows:

Page 37, lines 21-29

Q. All right. Isn't it a fact that when you went to Mr. Boulton about the purchase of lots and discussed financing,

all he ever really said to you was that Deseret Federal or Vantage would like the construction loan and the permanent financing, if it were possible; wasn't that what he said to you?

A. No, that's not what he said to me.

Q. Is that a possibility that that's what he said:

A. No, that is not a possiblity, because we made . . .

Page 38, lines 6 - 12

A. Yes. In the conversation that we had with Doug Boulton, I asked specifically if that money was guaranteed.

Q. Well, did you mean that it would be guaranteed to you under all conditions?

A. It was never discussed. We went out there with the feeling that if we wanted to build a home, that that financing was available.

On Direct Examination, appellant Larry Gleim testified as follows:

Page 59, ones 12-16

A. . . . We discussed that Deseret Federal's position as lending institution, and we were told at that time that we would be granted or guaranteed construction loans on those lots.

Q. Who told you this?

A. Doug Boulton.

Page 60, lines 16-25

Q. Did you rely upon any of the statements of Doug Boulton in these two meetings and consumating the sale or in agreeing to purchase these lots?

A. Totally.

Q. Which of the terms were important to you in deciding to purchase the lots?

A. The low down payment of ten percent was appealing, and that they would guarantee us a construction loan when we were ready to build homes on those lots, and they would subordinate the homes that we would build.

Page 65, lines 10-13

Q. Would you have agreed to purchase the lots from Vantage Corporation had they not guaranteed construction financing?

A. No, not with the materials they had.

On cross examination Mr. Gleim testified as follows:

Page 66, lines 19-30 and page 67, line 1

Q. Mr. Gleim, you testified generally concerning some conversations you had with Mr. Boulton concerning a guarantee, you used the word "guarantee," is that correct?

A. Yes, I did.

Q. Did Mr. Boulton use the word "guarantee"?

A. Yes, he did.

Q. And his statement to you then is that he would guarantee construction loan financing, is that right?

A. That's correct.

Q. And he meant by that, to your knowledge, that you could go in and get that loan any time you wanted in the future, is that right?

A. That's right.

These excerpts illustrate the clarity of appellants testimony. Both Carl Baldwin and Larry Gleim remember the contract

negotiations in detail and were able to explain their position and expectations clearly under direct and cross examination.

In addition, there is nothing in the testimony of either appellant which suggests inconsistency or unreliability. Therefore, any evidence upon which the trial court could have based its finding that Vantage did not make a guarantee of construction financing, must be found in the testimony of other witnesses.

The only other party to the contract negotiations is Doug Boulton. Mr. Boulton testified as one of appellants' witnesses and his testimony indicates that he remembers very little about specific statements that were made. However, many of his statements support the testimony of Carl Baldwin and Larry Gleim. Appellants call particular attention to the following excerpts from Mr. Boulton's testimony:

On direct examination Mr. Boulton testified as follows:

Page 78, lines 20-30, and page 79, lines 1-2

Q. Do you recall whether or not you actually said, "I guarantee construction financing"? Do you recall your words in the conversation so that you know whether or not you said that?

A. I--you've got to remember this has been a couple of years ago, and I can't recall of saying it, just to be honest.

Q. Okay. Do you recall not saying it?

A. It's--We used to have a lot of these for, I don't mean to say from your question, but we used to of course offer this to builders if they met the requirements and done the buildling in a timely manner. But I, it's hard for--

On cross examination, Mr. Boulton testified as follows:

Page 86, lines 8-17

Q. Now it's important here, Mr. Boulton, when we talk about this matter of construction loan: I believe you indicated that you do not recall using the word "guarantee" to these people in any of your conversations, is that correct?

A. No.

Q. Would you have used that term to a purchaser?

A. Well, I really didn't have any authority to do so, but I could have by, I may have sometime, I can't say, Ed, I don't like to say that unless we have it in writing it doesn't really mean anything to me, but I--

Page 88, lines 13-18

Q. Do I understand correct then that it would not be either within your authority or within your training and background to make anybody a guarantee that you would make a loan in the future?

A. No. I only think we did that with our better builders.

In contrast to the statements quoted above, there is some testimoy of Mr. Boulton which does not support that of appella However, these statements are inconclusive when standing alone. Moreover, when viewed together with the rest of his testimony, and with the testimony of appellants, these statements are equivoca and inconsistent as well as inconclusive.

The only thing that is certain about Mr. Boulton's testimony is that he cannot remember whether he used the word

"guarantee" in the contract negotiations with appellants. This however, is not the same thing as saying that he did not make a guarantee. An example of this legal principal is found in McClellan v. David, 84 Nev. 283, 439 P 2d 673 (1968). There the trial court granted the defendant's motion to set aside a default judgment. On appeal, the Supreme Court pointed out that one witness, Mrs. Troxel, clearly recalled three critical conversations while the defendant, David, stated that he did not recall the same conversations. In reversing the order to set aside the default the Supreme Court noted the effect of David's testimony when viewed in light of Mrs. Troxel's testimony:

> Her testimony was not impeached in the slightest. David did not deny these conversations. He simply said he did not recall them. Accordingly, there is not fundamental conflict in this testimony requiring us to adhere to the trial court's finding in favor of respondent on this issue. . . . Testimony of a witness that he does not remember whether a certain event took place does not contradict positive testimony that such event or conversation took place. 439 P 2d 673, 677. (emphasis added).

Thus, Mr. Boulton's testimony as to the contract negotiations and the terms agreed upon does not contradict appellants assertion that Vantage did guarantee construction loans to them. In addition to the absence of contradictory statements, Mr. Boulton's testimony corroborates appellant's testimony in some instances.

In reference to guarantees, Mr. Boulton stated on Page 78 that Vantage "use to of course offer this to builders." Mr. Boulton also testified on page 88 that Vantage was in the practice of making guarantees of construction financing to some builders whom they considered to be their "better builders."

It is well settled that the testimony of a witness, whether that witness is interested or disinterested, cannot be arbitrarily disregarded. Guinand v. Walton, 25 Utah 2d 253, 480 P 2d 137 (1971); Corley v. Corley, 92 N.M. 716, 594 P 2d 1172 (1979). In addition, rejection of the testimony of interested witnesses which is corroborated by a disinterested witness amounts to arbitrary action. Ft. Mohave Farms, Inc. v. Dunlap, 393 P 2d 662, 96 Ariz. 193 (1964).

Appellants maintain that before the trial court could find that no guarantee was made, it had to completely reject the testimony of appellants, which testimony is credible and uncontradicted by any other witness. There is also some evidence, provided by the only other party to the contract negotiations which corroborates appellants assertions. Appellants, therefore, submit that the great weight of the evidence (much more than a mere preponderance) establishes that Vantage represented to appellants that should they purchase the building lots from Vantage, construction financing for those lots was guaranteed through Deseret Federal.

The high preponderance of evidence in favor of a guarantee is further supported by Vantage's answer to appellants amended complaint. This issue is discussed in detail under Point II in th brief but it is important to note here that Vantage admitted, in its answer, that construction loans were guaranteed to appellants. (See Amended Complaint paragraphs 3 and 4, and see defendant's answer, paragraph one) Vantage never did amend its complaint and therefore, this admission remains as a judicial admission. It has

been held that admissions of fact in a pleading are normally conclusive on the party making the admission. Yates v. Large, 284 Or. 217, 585 P 2d 697 (1978); McCormick on Evidence 630, Section 262 (2d ed. 1972). During closing arguments, counsel for Vantage indicated that it was an error on his part to admit in his answer, that Vantage guaranteed the construction loans. However, even if Vantage had amended its answer, the previous admission can still be used as evidence to establish appellant's case. Yates v. Large, supra. This admission, coupled with the abundant testimony that Vantage did make a guarantee of construction financing to appellants constitutes a very high species of evidence. American-First Title v. First Federal, 415 P 2d 930 (Okl. 1966)

The trial Court's finding that appellants failed to establish an enforceable agreement to provide construction financing goes against the great weight of the evidence and constitutes a reversable error. As discussed infra, a finding that Vantage made a guarantee to appellants, irrespective of the enforceability of that guarantee would compel a rescission of the sales contracts for the FOUR (4) lots sued upon.

Appellants provided substantial evidence that Vantage did make statements to them which amounted to a guarantee of construction financing. In contrast, Vantage provided no evidence that such statements were not made. In the language of the Supreme Court of Utah, the evidence so "clearly preponderates" against the trial Court's finding that such a finding amounts to a manifest injustice. Hatch v. Bastian, supra. The evidence concerning the

guarantee of construction financing is of sufficient quality and substance that all reasonable minds would conclude that Vantage, through Doug Boulton did make the statements constituting a guarantee of contruction financing. When evidence that a particular fact exists is of this quality and substance, the trial court is compelled to make a finding that said fact does exist. De Vas v. Noble, 13 Utah 2d 133, 369 P 2d 290 (1962).

In view of the foregoing, the trial court's holding that appellants had to establish an enforceable agreement of Vantage to provide construction financing and its finding that appellants did not establish this enforceable agreement, constitutes a reversable error.

POINT II. THE TRIAL COURT ERRED IN FINDING THAT VANTAGE DID NOT GUARANTEE CONSTRUCTION FINANCING WHEN VANTAGE ADMITTED THE GUARANTEE IN ITS ANSWER AND NO AMENDMENT TO THE ANSWER WAS MADE AT ANY TIME.

Paragraph three of appellants amended complaint alleges that appellants agreed to purchase certain building lots from Vantage. Paragraph three also alleges that this agreement was "conditioned upon VANTAGE CORPORATION'S guarantee of a construction loan through DESERET FEDERAL SAVINGS & LOAN for each of said lots." (See amended complaint paragraph three).

Paragraph four of appellants amended complaint also alleges that the "down payment, interest payments, and purchase were conditioned upon VANTAGE CORPORATION'S guarantee of construction loans on said lots." (See amended complaint paragraph four).

Vantage answered the allegations contained in paragraph 1, 2, 3, and 4 of appellants amended complaint as follows:

> "Defendant admits the allegations of paragraph 1, 2, 3, and 4 of plaintiffs' complaint." (defendant's answer, paragraph one)

Without question, Vantage has admitted that construction financing was guaranteed to appellants. Vantage did not amend its answer at any time during pre-trial procedures or during trial.

A factual admission in a pleading filed with the Court is a judicial admission. The weight to be given such admissions varies between jurisdictions but they are always given significant weight. In Yates v. Large, 284 Or. 217, 585 P 2d 697 (1978), the Supreme Court of Oregon explained the conclusive nature of judicial admissions as follows:

> An admission of fact in a pleading is a judicial admission and, as such, is normally conclusive on the party making such an admission.

The Supreme Court of Arizona has also held that when a fact is alleged in the complaint, and then admitted in the answer, this admission binds the defendant and is conclusive as to the admitted fact. Paul Schoonover, Inc. v. Ram Construction, Inc., 129 Ariz. 204, 630 P 2d 27 (1981).

During closing arguments, Vantage's admission that the agreement between the parties was conditioned upon a guarantee of construction financing was pointed out to the Court by counsel for appellants (Tr. 2d pp. 2, 3, 12). Specifically, counsel read the pertinent portions of the amended complaint and answer. This however, did not elicit a response from counsel for Vantage. On rebuttal argument, counsel for appellants again brought attention

to Vantage's admission and asserted: ". . . in regards to this, the guarantee, first of all it's admitted in the pleadings, and I believe it's not in issue because of that." (Tr. 2d p. 12). After this second reference to the admission by Vantage that guarantees of construction financing were made counsel for Vantage did respond:

> Mr. Garrett: Your Honor, I just have one thing . . . I certainly didn't intend in the pleadings to admit any such guarantee. If I did, it was an error on my part, and ask to re-do the pleadings on that reason, (Tr. 2d. p. 14).

This statement may amount to a motion to amend but the Court did not respond to this statement and the pleadings were not amended.

Even if Vantage had amended its answer to exclude the admission of guaranteed construction loans, such an amendment would not eliminate the evidentiary effect of the prior admission.

> Upon filing of an amended answer, however, any admission of fact in the superseded answer is no longer a judicial admission, but is admissible as evidence to establish plaintiff's case. . . . In other words a superseded pleading can be used as an "evidentiary admission," but is no longer conclusive upon the party making such an admission. . . Yates v. Large, 585 P 2d 697, 700.

Thus, until the admission is removed through an amendment, it will remain as a judicial admission and is conclusive on Vantage. The Trial Court's finding that Vantage did not make the guarantee of construction financing is in direct conflict with the Vantage's admission. The Court's finding is also in direct conflict with the great weight of the evidence. The erroneous nature of the Court's finding constitutes a reversible error and

compels a reversal.

POINT III. THE TRIAL COURT ERRED IN REQUIRING APPELLANTS TO PROVE ALL THE ELEMENTS OF FRAUD BY CLEAR AND CONVINCING PROOF ON APPELLANT'S CLAIM OF MISREPRESENTATION.

In Utah, and in may other jurisdictions, a contract, including a contract for the sale of land, is subject to rescission where there has been a material misrepresentation which induced the contract. Under this doctrine, proof of all the essential elements of actionable fraud is not necessary. The only elements which must be established are a misrepresentation as to a material aspect of the agreement which is relied upon by the plaintiff. A review of the case law which supports this doctrine and the application of the doctrine to the abundant evidence of a guarantee (supra) will clearly establish that appellants are entitled to rescission and restitution.

The case which gives the clearest statement of this doctrine is Lehnhardt v. City of Phoenix, 105 Ariz. 142, 460 P 2d 637 (1969). There, a property owner within the City of Phoenix received by mail a quit claim deed and a sketch prepared by the City. These documents were accompanied by a letter requesting the land owner to dedicate a portion of her property to the city for roadway purposes. The quit claim deed was accurate but the sketch, which was intended to illustrate that portion of the property which would be dedicated, was erroneous. The quit claim deed actually conveyed 4,131 square feet more than the sketch indicated. The City was unaware that the sketch did not correspond to the deed and did not intend to deceive the land owner.

Several months later the landowner discovered the actual amount of property she had dedicated to the City. Alleging misrepresentation, she brought an action to rescind the transaction and cancel the deed. The City of Phoenix prevailed at trial but the Supreme Court of Arizona reversed and remanded with instruction to enter judgment in favor of the landowner. The Court stated the basis for recovery as follows:

> Plaintiff contends that a transaction induced by the material though innocent misrepresentation of a party is voidable against that party. We agree . . . It appears to be well-established law that a claim for rescission, as oppsed to a claim for damages, may be granted when "innocent" as well as fraudulent misrepresentations are made, and that accordingly, proof of each of the nine elements of actionable fraud is not essential in a rescission action . . . Conceding the absence of fraud, plaintiff is nevertheless entitled to rescission because of the representation of the city, its falsity, its materiality, and the fact that it was the inducing cause for her execution of the quit claim deed.

In support of this doctrine the Court cited cases from Oregon, New Mexico and Oklahoma.

Watkins v. Grady, 438 P 2d 491 (Ikl. 1968) and Souza v. Jackson, 472 P 2d 272 (Or. 1970) provide further examples of the application of this doctrine. In Watkins, a land owner agreed to grant an easement to a water district for the purpose of constructing a flood control dam. The water district however, misrepresented to the land owner the actual conditions which would exist upon completion of the dam. Although the misrepresentation was "innocent", the court held in favor of the landowner and cancelled the easement. The Court stated:

> "Misrepresentation of material facts, although innocently made, if acted on by the other party to

> to his detriment, will constitute a sufficient ground for rescission and cancellation in equity."

In Souza v. Jackson, supra, the purchaser of a home and surrounding property brought an action for rescission based on misrepresentation. The vendor represented to the purchaser that a well on the property produced sufficient water to supply household needs. This representation however, was erroneous since the well produced almost no water. The Court held for the vendor but the Supreme Court of Oregon reversed with directions to enter a decree granting rescission. The Court stated:

> The trial court found that the representation that the well produced three gallons per minute was innocently made. However, the rule is firmly established that a material misrepresentation although innocently made may be grounds for rescission.

Robinson v. Katz, 94 N.M. 134, 610 P 2d 201 (1980) and Gardner v. Meiling, 280 Or. 665, 572 P 2d 1012 (1977) apply this same doctrine to grant rescission of land contracts.

The doctrine pronounced in Lehnhardt v. City of Phoenix, supra, and in the other cases cited above is also applicable in Utah. Although not stated in express terms, this Court applied the same rule in Smith v. Pearmain, 548 P 2d 1269 (Utah 1976). There the plaintiff purchased a building which was being used as a duplex. Although the real estate agent represented to the plaintiff that this use of the property was authorized, it was discovered, after the sale, that this use violated the local zoning ordinances.

As to the nature of the misrepresentation, the evidence demonstrated that the real estate agent believed the use was authorized and that he did not indulge in bad faith. However,

because of the misrepresentation the plaintiff elected to rescind the sale contract. The trial court entered judgment in favor of plaintiff and defendant appealed.

On appeal, defendant argued that the facts did not establish the grounds necessary for rescission. Defendant argued that the quality of proof required is the same proof required to establish actionable fraud. The Supreme Court disagreed.

> Appellant's counsel urges that the facts here are insufficient to satisfy the necessary grounds for rescission, and the quality of proof interdicted in Pace v. Parrish, (to which we refer without necessity to repeat its language here), with which urgence we are compelled to disagree.

As the Court is well aware, Pace v. Parrish, 122 Utah 141, 247 P 2d 273 (1952), is frequently cited to explain all of the elements of fraud. In addition to the essential elements of actionable fraud, Pace v. Parrish, supra, sets forth the standard of proof which must be met in order to establish fraud. In Schwartz v. Tanner, 576 P 2d 873 (Utah, 1978) this Court cited Pace v. Parrish, supra, for the proposition that fraud must be proved by "clear and convincing evidence". This is the "Quality of Proof" referred to in Smith v. Pearmain, supra, which was rejected as the quality of proof required to rescind a contract based on a material misrepresentation.

In the case at bar, appellants provided substantial evidence that statements were made to them by Vantage that construction financing was guaranteed since they purchased the lots from Vantage. No evidence was presented at trial which directly conflicts with this evidence. Appellants also testified that they relied upon these statements (Tr. p. 60) and that without such

representation, they would not have entered the sales contracts (Tr. p. 65). Whether or not the guarantee was an enforceable agreement is entirely irrelevant.

The representation that construction loans were guaranteed, coupled with appellants reliance thereon constitute grounds for recission and restitution. Appellants were not required to prove all of the elements of fraud nor prove misrepresentation by clear and convincing evidence.

Although the trial court did not expressly rule on appellants claim of misrepresentation, it is apparent that the Court required proof of all the elements of fraud by clear and convincing proof (Tr. p. 123). It is also apparent that the distinction between appellants allegation of fraud and their claim of misrepresentation was made to the trial court (Tr. p. 5 and Tr. 2nd p. 4). With regards to this aspect of appellant's case, it is in direct opposition to the legal stance adopted by the Court in Smith v. Pearmain, supra, to require proof of the elements of fraud by clear and convincing proof. The trial court erred in holding appellants to this quantity and quality of proof. This error alone requires a reversal.

POINT IV. THE TRIAL COURT ERRED IN FINDING THERE WAS SUFFICIENT AND PROPER PART PERFORMANCE, WRITINGS, AND TESTIMONY TO REMOVE THE ORAL AGREEMENT FROM THE STATUTE OF FRAUDS.

Appellants alleged in their amended complaint, and Vantage admitted in its answer thereto, (See amended complaint paragraph 3, and defendant's answer, paragraph 1) that the agreement between appellants and Vantage was made orally. Both appellants

testified at trial that no written contracts of sale or any other written memoranda which might have reduced the oral agreement to writing were ever signed by either appellant (Tr. pp. 23. 15, 17, 73). Also, no written document, signed or unsigned, containing the terms of the agreement was produced at trial. Without questio an oral agreement to convey land is unenforceable under the Utah Statute of Frauds, Section 25-5-1, Utah Code Annotated, 1953, as Amended. However, at the close of all the evidence and closing statements, the trial court stated: "I have some doubt that the statute of frauds under the circumstances of this case is applicable at all. But if it is, then I think that the part-performance did take it out of the statute." (Tr. p. 123). This statement was transcribed into the Court's finding of fact number 13, which states:

> There was sufficient evidence before the Court of payment of the down payment on the purchase price, which was in the form of a writing, and a letter signed by one of the plaintiffs at the time interest was paid and the actual payment of interest and the full payment of the principal and interest on three of the lots to show that the statute of frauds did not apply and that further testimony concerning the terms of sale was accepted by the court as proper.

Appellants maintain that the courts oral statement and its finding of fact number 13 are erroneous. A brief review of the statute of frauds and the doctrine of part performance establish that the facts and circumstances of this case do not bring the oral agreement between appellants and Vantage out of the Utah Statute of Frauds.

A. Statute of Frauds

The statute of Frauds, Section 25-5-1, Utah Code Annotated

(1953) requires every agreement to convey land to be in writing. Such an agreement is not always void or voidable but "can properly be described as unenforceable . . . inasmuch as the ordinary legal remedies are unavailable." 2 Corbin on Contracts 279, pp. 20-21 (1950).

At trial, the only written documents relating to the agreement to purchase the building lots which were introduced into evidence were the checks for the down payment and interest, Vantage's accounting of those payments and a letter from one appellant to Vantage (Tr. pp. 29, 66, 99, 102). There was some testimony as to an earnest money agreement but most of this testimony was stricken (Tr. pp. 110, 121, 122).

In order to remove the agreement from the Statute of Frauds these writings must contain certain provisions. It is a well established principal of law that written memoranda, which are relied upon to satisfy the Statute of Frauds must contain all of the essential terms and provisions of the contract. Birdzell v. Utah Oil Refining Co., 121 Utah 412, 242 P 2d 578 (1952); Baugh v. Logan City, 27 Utah 2d 291, 495 P 2d 814 (1972); Zion's Properties, Inc., v. Holt, 538 P 2d 1319 (1975). This basic statement has been qualified to some extent in Guinand v. Walton, 27 Utah 2d 196, 450 P 2d 467 (1969), appeal after remand 25 Utah 2d 253, 480 P 2d 137 (1971). There this court held that a written instrument will bring an agreement out of the statute of frauds if the interest is granted or declared by the writing and if the writing is subscribed to by the party to be charged.

Under the rule stated in Birdzell v. Utah Oil, supra, and under the rule stated in Guinand v. Walton, supra, the written instruments produced at trial do not bring the oral agreement between appellants and Vantage out of the Statute of Frauds. The checks and the letter (defendant's Exhibit 5) contain signatures but none of these documents refer to the essential elements of a contract to convey land. The most important contractural element which is missing from these documents is a grant or declaration of an interest in property. Without such a grant or declaration the writings cannot be sufficient to take the oral agreement out of the Statute of Frauds.

The absence of any contractural terms regarding the property interest conveyed, and the essential nature of such terms, is emphasized by the Trial Court's reference to a Uniform Real Estate Contract. In response to counsel's argument that there is no evidence of terms which would give Vantage the right to foreclose on the property, the court stated:

THE COURT: Well, that's true, but uniform real estate contracts have this provision in them that they maybe foreclosed as a mortgage (Tr. 2d p. 6).

MR HARDING: But there is no evidence of any uniform real estate contract.

THE COURT: That is true. But I think, inherently, I think the Court has inherent equitable powers in this kind of a case if it wanted to order a foreclosure (Tr. 2d pp. 6-7).

Thus, the Court felt compelled to determine the property interests held by each party by referring to a standard uniform

real estate contract.

B. Part Performance

When partial performance is relied upon to avoid the Statute of Frauds, the nature of that performance must be closely scrutinized. This close review of the acts asserted as part performance is applied with great care and is used only to prevent the Statute of Frauds from being used to perpetrate a Fraud. Ravorina v. Price, 123 Utah 559, 260 P 2d 570 (1953).

Finding number 13 indicates that the performance which supposedly removed the agreement from the effects of the statute of Frauds consists of 1) partial payment of the purchase price, and 2) actual payment of the full interest and purchase price on three of the lots. Vantage however, cannot rely upon either one of these instances of part performance.

First, appellants have not attempted to rescind the sales contracts covering the three lots which were sold to third parties. When full payment for these lots was received, Vantage performed its obligation under those contracts. Since Vantage did not apply the proceeds of the sales (of the three lots) proportionately against the unpaid balance for all seven lots, they cannot now claim that the original agreement contained only one contract. Thus, full performance, by both parties, of the contracts for lots 28, 49 and 58, does not constitute partial performance of the sales contracts covering lots 18, 19, 34 and 35.

Second, as to the contracts for lots 18, 19, 34 and 35, Vantage has done nothing which constitutes partial performance. When one party seeks to remove an oral contract from the Statute

of Frauds, that party may rely only upon its own part performance and not upon the partial performance of others. This principle of law arises from the basic purpose of the doctrine of part performance. In Schwedes v. Romain, 587 P 2d 388 (Mont. 1978), the Supreme Court of Montana cited 73 Am. Jur. 2d P 38, to explain this legal principle.

> Since the basis of the doctrine of part performance is to prevent a fraud upon the plaintiffs, it is true as a general proposition, that if a party who resists the enforcement of a contract chooses not to stand on what he has done under and in pursuance of it, the other party cannot be aided by it.

This same principle has been followed by the Supreme Court of Utah in Utah Mercur Gold Min. Co. v. Herschel Gold Min. Co., 103 Utah 249, 134 P 2d 1094 (1934). There, citing Besse v. McHenry, 89 Mont. 520, 300 P 199 (1931), the Court stated:

> Part performance which will avoid the statute of frauds may consist of any act which puts party performing in such a position that non-performance by other would constitute fraud.

Thus, where one party has not done anything which can be construed as partial performance of an oral contract to convey land, it cannot rely upon the doctrine of part performance to avoid the statute of frauds.

Third, even if Vantage could rely on it, mere payment of a portion of the purchase price is not an act of part performance which will remove an oral contract from the Statute of Frauds. Pugh v. Gilbreath, 571 P 2d 1241 (Okl. App. 1977); Del Rio Land, Inc. v. Havmont, 118 Ariz 1, 574 P 2d 469 (1977); 73 Am. Jur. 2d 66, Statute of Frauds, Section 436.

As early as 1890 the Supreme Court of Utah recognized this precise rule in Maxfield v. West, 6 Utah 327, 23 P 754 (1890). There the court stated, "the fact that a part of the purchase money had been paid was not of itself sufficient in equity to take the parol contract out of the statutes."

The reason for this rule is that ordinarily, the relief obtained through the doctrine of part performance is specific performance of the contract. This remedy is not necessary where only money has changed hands since the equity court can easily restore the status quo by ordering the vendor to return the money. Pugh v. Gilbreath, supra.

In Holmgren v. Ballard, 534 P 2d 611 (Utah 1975) the Supreme Court of Utah outlined four types of acts, all of which should be considered to determine whether sufficient part performance has been accomplished. One of the four acts in payment of a valuable consideration.

Similar to Holmgren v. Ballard, supra, is Powers v. Hastings, 93 Wash. 2d 709, 612 P 2d 371 (1980). There the court explained that part performance has three elements; 1) possession, 2) payments and 3) improvements. If the plaintiff has taken possession of land under an oral contract, has made payments and has made substantial improvements on the land, he is entitled to the benefit of the doctrine of part performance. The Court held that sufficient part performance can be established where two of the elements exist.

In sum the oral statement by the trial court (Tr. p. 123) and finding number 13 of the Findings of Fact and Conclusions of Law are erroneous as a matter of law for FOUR basic reasons. 1) the Statute of Frauds does apply to this oral agreement; 2) the writing offered at trial are insufficient to remove the agreement from the Statute of Frauds; 3) Vantage cannot rely on the part performance of appellants and, even if they could, part payment alone is insufficient to remove an Agreement from the Statute of Frauds; and 4) Full performance of three of the sales contracts does not constitute partial performance on the remaining four.

The erroneous conclusions of the trial court described above require a reversal of the Trial Court's holding. Appellants elected to rescind, they gave proper notice of rescission, and when Vantage refused to return appellants' money, they brought this action.

POINT V. THE TRIAL COURT ERRED IN REFUSING TO FIND THAT VANTAGE HAS BEEN UNJUSTLY ENRICHED AS A RESULT OF THE TRANSACTIONS GIVING RISE TO THIS LAW SUIT.

A cause of action for unjust enrichment arises whenever money or property has been placed in one person's possession under circumstances that in equity and good conscience, he ought not to retain. Heaton v. Imus, 93 Wash. 2d 249, 608 P 2d 631 (1980). Stated another way, by the Supreme Court of Utah, unjust enrichment occurs whenever a person has and retains money or benefits which in justice and equity belong to another. L & A Drywall v. Whitmore, 608 P 2d 626 (Utah 1980).

Whether viewed in light of the Utah rule or in light of the Washington rule, the circumstances of the present case give rise to a cause of action based on unjust enrichment

Here, the appellant's paid a down payment and interest payments to Vantage. According to the agreement between the parties these payments were applied to the purchase of SEVEN (7) building lots owned by Vantage. However, in exchange for these payments appellants received nothing from Vantage. No deeds, trust deeds or trust deed notes were signed by appellants or Vantage and thus, no interest in the property passed to appellants. At this time, Vantage still holds title to the property and has retained appellants down payment and interest payments, but has not performed its obligations under the original agreement. On the other hand, appellants have substantially performed their contractural obligations, suffered a loss in doing so, and, as a result of Trial Court's holding, are precluded from recovering that loss.

The inequities in this case are blatant. Vantage has retained money which in justice and equity belongs to appellants. Vantage has therefore been unjustly enriched at the expense of appellants and should, in equity and good conscience, be required to return the down payment and interest to appellants.

POINT VI. THE TRIAL COURT ERRED IN REFUSING TO FIND THAT VANTAGE BREACHED THE SALES CONTRACTS ON THE FOUR LOTS SUED UPON BY APPELLANTS.

As demonstrated supra, the great weight of the evidence at trial establishes that Vantage did in fact guarantee construction financing to appellants. Therefore, if the agreement to purchase the SEVEN (7) building lots created binding, enforceable sales contracts, the terms of those contracts must include the guarantee of construction financing.

Appellants testified that the guarantee of construction loans was an important factor which induced them to enter the agreement (Tr. p. 65). Therefore, the refusal of Deseret Federal to provide appellants with construction loans for the lots constituted a material and fundamental breach of the sales contracts. A review of the case law establishes that appellants are entitled to rescission and restitution as a result of Vantage's breach.

It is well established that a material breach which destroys or vitiates the entire purpose for entering into the contract gives rise to a right to rescind the contract. Cady v. Slingerland, 514 P 2d 1147 (Wyo. 1973); Polyglycoat v. Holcomb, 591 P 2d 449 (Utah 1979); Abrams v. Financial, 13 Utah 2d 343, 374 P 2d 309 (1962). A good example of this is found in Lane v. Bisceglia, 15 Ariz. App. 269, 488 P 2d 474 (1971). There the appellants agreed to purchase certain real property from the appellees. As part of the consideration, appellants agreed to assume an existing 6% mortgage on the property. The appellants placed $5,000.00 in escrow as earnest money and the appellees prepared the necessary instruments. However, the existing mortgage allowed the mortgagee to increase the interest rate upon assumption. When the appellants were informed of the mortgagee's intent to raise the rate to 6 3/4% they refused to complete the transaction. Thereafter, a law suit was brought by appellants "to rescind the contract and restore the parties to the status quo ante, i.e., return the $5,000.00 to the purchasers."

Although the higher interest rate would result in an increase of only $3.00 per month, the Court determined that by

requiring the purchaser to assume the higher rate, the seller materially breached the contract. This breach gave the purchaser the right to rescind the contract and recover their earnest money. The Court further stated that the motive of a purchaser in rescinding the contract is immaterial where there has been a material breach.

The Arizona Court's holding in Lane v. Bisceglia, supra, is consistent with the present Utah Supreme Court holding in Polyglycoat v. Holcomb, 591 P 2 449 (Utah 1979). Although this case did not involve a contract for the sale of real property, this Court clearly stated the rule of law which is directly applicable and controlling in the case at bar.

> As a general proposition, a party to a contract has a right of rescission and an action for restitution as an alternative to an action for damages where there has been a material breach of the contract by the other party. What constitutes so serious a breach as to justify rescission is not easily reduced to precise statement, but certainly a failure of performance which "defeats the very object of the contract" or "is of such prime importance that the contract would not have been made if default in that particular had been contemplated" is a material failure. Polyglycoat v. Holcomb, 591 P 2d 449, 451.

Appellants testified that they purchased the lots for the purpose of building homes thereon (Tr. p. 13). Appellants knew that the construction of homes would require financing and they agreed to purchase the lots only upon a guarantee that construction financing would be provided. This guarantee was a material provision of the original agreement. Therefore, when appellants were not even permitted to apply for construction financing at Deseret Federal, Vantage failed to perform a material

obligation under the agreement. This failure to perform defeated "the very object of the contract" and compels a reversal of the Trial Court's holding.

CONCLUSIONS

For the reasons stated above, appellants respectfully request this Court to reverse the Trial Court's Judgment and require the Trial Court to enter judgment in favor of the plaintiffs and against the defendants in the sum of $9,371.80 plus costs of Court and interest at the legal rate.

Respectfully submitted.

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CERTIFICATE OF DELIVERY

I hereby certify that I delivered two true and correct copi of the foregoing Appellants' Brief this 17 day of March, 1982, to: Mr. Edward M. Garrett, attorney for defendant-respondent, 311 South State Street, Salt Lake City, Utah 84111.

BRYN JOHNSON