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SECOND
DISTRICT COURT

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Attorneys for Plaintiffs Dale D. Clark and Ruth E. Clark

**IN THE SECOND JUDICIAL DISTRICT COURT
DAVIS COUNTY, STATE OF UTAH**

DALE D. CLARK, an individual; and
RUTH E. CLARK, an individual,

Plaintiffs,

vs.

MARK B. ARCHER, an individual;
**BONNEVILLE SUPERIOR TITLE
COMPANY, INC.**, a Utah corporation d/b/a
BONNEVILLE TITLE COMPANY; and
BONNEVILLE EXCHANGE, LLC, a
purported limited liability company,

Defendants.

**FINAL JUDGMENT
ON PLAINTIFFS' SECOND CAUSE
OF ACTION**

Judge Hon. Thomas L. Kay

Civil No.: 060601640

Final judgment on plaintiffs' second cause of action @



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060601640 ARCHER, MARK B

Plaintiffs Dale D. Clark and Ruth E. Clark (collectively "Clark"), filed a motion for summary judgment on their second cause of action. This motion sought declaratory and quiet title relief in favor of Clark based on the failure of legal and effective delivery of a warranty deed possessed by defendant Mark B. Archer ("Archer") to certain identified property at issue in this case. The Court originally received oral argument on Clark's motion for summary judgment on the second cause of action on September 24, 2007. On October 15, 2007, the Court issued a

Ruling on Cross Motions for Summary Judgment, wherein the Court provisionally denied Clark's motion for summary judgment due to a possible statute of limitations defense, but in doing so, the Court indicated that it required additional briefing on that issue, *viz*, whether Clark's second cause of action for failure of delivery had expired under any applicable statute of limitation. In that regard, Archer had filed a cross motion for summary judgment asserting the defense that Clark's second cause of action had indeed expired pursuant to the applicable statute of limitation.

Supplemental briefs were submitted to the Court by the parties on the issue of whether the Clark's failure of delivery claim remained timely and thus viable. With respect to that supplemental briefing, the Court scheduled an additional hearing, which was held on January 28, 2008. After considering all of the briefing submitted by the parties, and further taking into account the arguments of counsel, the Court hereby enters this final judgment granting summary judgment in Clark's favor on the second cause of action of the amended complaint.

Accordingly, the Court hereby rules, orders, and declares as follows:

1. Clark's motion for summary judgment on the second cause of action of the amended complaint is hereby GRANTED in its entirety.
2. Archer's cross motion for summary judgment on the statute of limitation defense in relationship to the second cause of action of the amended complaint is hereby DENIED in its entirety.

3. The court finds that no issue of material fact precludes the entry of summary judgment on the second cause of action of the amended complaint in favor of Clark, and that Clark is further entitled to judgment as a matter of law as mandated by Rule 56 of the Utah Rules of Civil Procedure.
4. Utah law, like the law of other states, is clear. For a deed to be valid, and thus capable of conveying title from a grantor to a grantee, it must be supported by legal and effective delivery. "For a deed to be valid and legally enforceable, the grantor must intentionally and knowingly deliver that deed to the grantee." *Givan v. Lambeth*, 351 P.2d 959, 961 (Utah 1960). Hence, a deed that is not supported by such delivery, is of no legal consequence, and as such shall be invalidated by the Court. An executed and recorded deed is presumed to be valid and supported by legal delivery, but this presumption can be overcome by clear and convincing evidence. See *Baker v. Pattee*, 684 P.2d 632, 635 (Utah 1984).
5. As a factual matter, Clark has overcome the presumption of validity accorded the warranty deed that is possessed by Archer. As previously ruled by the Court:

Although closing (and thus the transfer of title) was conditioned on the payment of the purchase price as well as the approval of certain development plans by Syracuse City, Archer was somehow able to gain possession of a general warranty deed and record it in his favor. Additionally, the escrow instructions provide that no documents, including the warranty deed, were to be delivered to or recorded by Archer until Bonneville title received the purchase price. Little evidence has been presented to the court on how Archer came into possession of the warranty deed. Clark, a man 96 years old, apparently cannot remember. Archer has not offered an explanation. Given the failure of conditions, Clark now alleges failure of delivery and, alternatively, adverse possession. * * * Clark steadfastly denies that he ever intended to deliver a deed to Archer. "For a deed to be valid and legally enforceable, the grantor must

intentionally and knowingly deliver that deed to the grantee." *Givan v. Lambeth*, 351 P.2d 959, 961 (Utah 1960). The preceding rule is well-settled, and Clark correctly asserts that Archer's deed could have been invalidated on failure of delivery grounds. Indeed, Archer can point to no piece of evidence which demonstrates a present intent to deliver a deed. Although he notes that a letter written prior to the recording evidences an intent to deliver the deed in the future, no evidence of present intent exists. Despite the questionable nature of Archer's deed, Clark's instant action may be barred by the statute of limitations.

(Ruling re cross S.J. Motions at 1- 2).

6. All of the documentary and affidavit evidence submitted to the Court supports the finding, as an undisputed fact, that no legal and effective delivery occurred with respect to the warranty deed currently possessed by, and that was recorded in favor of Archer regarding the subject property. Mr. Clark has stated that he never intended to deliver the warranty deed to Archer and does not how or why it is that Archer came into possession of the disputed warranty deed. "Thus, I have not delivered, and never knowingly agreed to the delivery of that deed naming Mark B. Archer as Grantee. To this day, I do not understand how or why that deed was recorded in violation of the Escrow Instructions and the Contract." (Clark Aff'd at ¶ 9).
7. Moreover, critically, Archer's affidavit too supports the conclusion that he came to possess the warranty deed under the "conditional" requirement to later obtain development approvals for the subject property, and that Archer would then pay for the property on a per lot basis once such development approvals were obtained and the lots were sold. (See Archer Aff'd at ¶¶ 4-6, 10).

8. Thus, the "delivery" described by Archer does not constitute legal and effective delivery as required by the law. "A deed will not be regarded as delivered while anything remains to be done by the parties who propose to deliver it." See Den-Gar Enterprises v. Romero, 611 P.2d 1119, 1122 (N.M. 1980).
9. All of the facts before the Court prove, as an undisputed factual conclusion, that the warranty deed possessed by, and that was recorded in favor of Archer was not supported by legal and effective delivery as required by law. The presumption of validity has been overcome, and thus the Court hereby rules that the no legal and effective delivery supports the warranty deed possessed by, and that was recorded in favor of Archer.
10. The second cause of action for failure of delivery remains timely and viable today as well. The timeliness of this cause of action was the issue addressed by the supplemental briefing of the parties as requested by the Court. The second cause of action for failure of delivery remains timely based on the content of Archer's Affidavit. Originally, the Court was focused on the principle or doctrine of the discovery rule in relationship to the application of the statute of limitations to the second cause of action of the amended complaint. However, the Court need not rely upon or analyze the application of the discovery rule because of the content of Archer's Affidavit.
11. In paragraph 10 of his Affidavit, Archer testifies as follows:

Neither party intended that I pay \$362,700.00 in cash to Clark the day of the closing, prior to the transfer of the Warranty Deed. Rather it was the intent that I not pay but on a lot release program. It simply does not make

sense for me to not have the Warranty Deed prior to attempting to sell any developed lots in the Syracuse Meadow Property. Otherwise, I would not have been able to get financing for development to be able to sell the lots when the property was in my name. Syracuse refused to allow me to move forward due to the older, prior phase problems. I reached an oral agreement with Clark wherein it was agreed that their written agreement would be tolled until other phase problems were in compliance with drainage through Phase 6 (which still is not complete) and interest would be tolled as well with lots sold and payment released at \$27,900.00 per lot plus my efforts to assist would be deducted against the note amount of \$362,700.00.

(Archer Aff'd at ¶ 10).

12. Archer's testimony, as set forth above, renders the second cause of action timely under the terms of Utah Code Ann. § 78-12-44. Having agreed and represented to the Court to the existence of a "tolling" understanding between the parties, Archer is precluded under Utah statutory law and otherwise from claiming that Clark's second cause of action for failure of delivery has now expired. Archer cannot, in a sworn Affidavit submitted in opposition to a summary judgment motion, claim that a "tolling" agreement exists between the parties, but then assert, contrary to that representation, that Clark's rights have nevertheless expired.

13. Based on the above, the Court hereby quiets title to the following described property in favor of Dale D. Clark and Ruth E. Clark:

Part of the Northwest Quarter of Section 21, Township 4 North, Range 2 West, Salt Lake Base and Meridian, U.S. Survey: Beginning at a point which is North 89°40'58" West 343.49 feet and South 00°19'02" West 396.00 feet from the North Quarter corner of said Section 21; thence South 89°43'54" East 700.00 feet; thence South 00°19'02" West 278.40 feet; thence South 89°40'58" East 39.53 feet; thence South 211.50 feet; thence North 89°40'58" West 214.60 feet; thence North 88°37'08" West 60.02 feet; thence West 213.57 feet; thence South 73°57'58" West 215.52

feet; thence North 211.39 feet; thence North 42°16'31" West 65.83 feet; thence North 00°19'02" East 290.19 feet to the point of beginning.

14. The Court hereby further declares that the following warranty deed recorded in favor of Mark B. Archer is of no legal consequence whatsoever: Entry No. 1561621 recorded in the office of the Davis County Recorder in Book 2235 at Page 367 with Dale D. Clark and Ruth E. Clark as Grantor and Mark B. Archer as Grantee. This invalid warranty deed possessed by, and that was recorded in favor of Archer shall be stricken from the public record, and is of no legal consequence whatsoever.
15. Pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, the Court expressly finds that no just reason exists to delay the entry of a final judgment in this case and with respect to Clark's motion for summary judgment on the second cause of action of the amended complaint. Thus, this judgment is a final judgment on the second cause of action of the amended complaint in favor of Clark. The second cause of action is the only claim of the amended complaint to address the legal invalidity of Archer's warranty deed *ab initio*. In this regard, this claim stands alone and factually separate from the remaining claims of the amended complaint. Moreover, for this reason too, no just reason exists to delay the entry of this final judgment in favor of Clark to quiet title to the subject property, particularly given the advanced age of the plaintiffs.

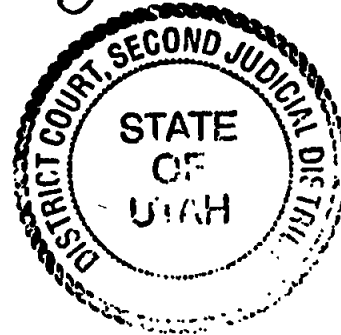
16. Having prevailed on its motion for summary judgment and the claim for quiet title relief, Clark is entitled to an award of costs, and this Final Judgment shall be augmented to include the same. Based on a proper showing and as provided for by applicable Utah procedure, Clark is awarded prevailing party costs in the amount of 0.

DATED this 10th day of March, 2008.

BY THE COURT:

Thomas L. Kay

Honorable Thomas L. Kay



STATE OF UTAH }
COUNTY OF DAVIS } ss

I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE
ORIGINAL ON FILE IN MY OFFICE

DATED THIS 7th DAY OF April 20 08

ATTEST: J. L. BROWN
CLERK OF THE COURT

BY J. L. Brown DEPUTY



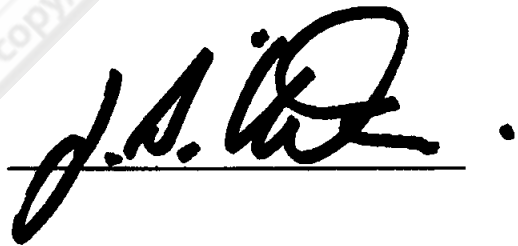
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **FINAL JUDGMENT ON PLAINTIFFS' SECOND CAUSE OF ACTION** was served via U.S. first-class mail, postage prepaid, this 12th day of February, 2008, upon:

B. Ray Zoll
B.RAY ZOLL, P.C.
8941 South 700 East, Suite 204
Sandy, Utah 84070

Stephen F. Noel
SMITH KNOWLES, P.C.
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