IN THE SUPREME COURT OF MONTANA

SUPREME COURT CAUSE NO. DA 23-0554

GARY TAYLOR,
Plaintiff and Appellant,
v.
GEORGE ANTHONY TAYLOR and ANNE MARIE TAYLOR,
Defendants and Appellees.

On Appeal from the District Court of the Fifth Judicial District of the State of Montana in and for the County of Jefferson, Cause No. DV-2019-110, the Honorable Luke Berger

APPELLEES GEORGE ANTHONY TAYLOR AND ANNE MARIE TAYLORS' STATEMENT OF POSITION

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3. Whether the District Court properly granted Defendants/Appellees' claims for breach of contract pursuant to Rule 60(a).

4. Whether the District Court's summary denial of Plaintiff/Appellant's equitable claims as a matter of law was proper.

STATEMENT OF THE CASE

The basic facts of the case are that Plaintiff/Appellant, Gary Taylor (hereinafter "Gary"), transferred a parcel of property to his son, Tony Taylor (hereinafter "Tony"), via quitclaim deed, but continued to reside on the Property. At one point, Tony agreed that Gary could remain on the Property if he performed routine property maintenance and installed a road within one (1) year in lieu of rent. Gary failed to do either, so Tony asked Gary to pay rent: $500 a month for the apartment and $1,500 a month for the workshop on the Property. Gary continued to possess the Property but failed to pay rent.

Gary tried to get the Property back by claiming that although he quitclaimed the Property to Tony, that Gary and Tony orally agreed that Tony would transfer the Property back him at some unknown date in the future without consideration. Gary

then filed a complaint claiming title to the Property by way of adverse possession. Gary was unable to prove adverse possession because he could not satisfy all the elements required for adverse possession.

After Gary failed on his claim for adverse possession, he filed an amended complaint containing equitable claims for unjust enrichment and quantum meruit. Gary claimed approximately $90,000 in damages for improvements that he allegedly made to the Property, despite not having color of title to the Property when he made the alleged improvements. Tens of thousands of Gary's claimed expenses turned out to be false claims.

Gary attempts to paint a picture of a loving relationship between Father and Son, where Father gifted Property to Son for "estate planning purposes" and Son promised to reconvey the Property back at some unknown future date. The reality is that Gary was trying to make a quick buck by subdividing the property into two (2) parcels, selling the lower parcel to a friend and then quitclaiming the upper parcel to his Son who he did not have a great relationship with, but was perhaps trying to relationship. The belief could not be further from the truth. No documentation was every produced by Gary at any point in these proceedings to support his claim that Tony was supposed to reconvey the Property back to him after the quitclaim.

STATEMENT OF FACTS

On April 15, 2013, a Certificate of Survey: to Create a Tract for a Member of the Immediate Family ("COS") was issued memorializing the purpose of transferring 10.06 acres with the legal description of Section 20, Township 02 North, Range 05 West, Parcel B-1 of C.O.S. 248752, in Jefferson County, Montana ("the Property") from Plaintiff/Appellant, Gary Taylor (hereinafter "Gary"), to his son Defendant/Appellee, George Anthony Taylor ("Tony"). Dkt #54, p. 1, Ex. A. As a result, the original tract was divided into Parcels B-1 and B-2. Parcel B-1 has the address of 126 Bluebird Lane, Whitehall, Montana. Dkt #54, p. 1-2.. On May 13, 2013, Gary executed a quitclaim deed granting Parcel B-1 to his son, Tony (the "Property"). Dkt #54, p. 2, Ex. B and Dkt #66, p. 2. The quitclaim deed was recorded in Jefferson County on May 17, 2013. *Id.*

Pursuant to a verbal agreement between Gary and Tony on or about September 2017, Gary was permitted to live on the Property (Parcel B-1) in exchange for performing general property maintenance and the installation of a private roadway on the upper part of the Property *by or before September 2018* in lieu of rent or eviction. Also in September 2017, Gary sold the adjacent Parcel B-2 to his neighbor, Brian Supplee. As part of the sale, Tony signed a one-year easement agreement with Mr. Supplee that would allow Gary to access the Property (Parcel B-1) via an easement over Mr. Supplee's property (Parcel B-2). Dkt #54, p.

2, Ex. C.

The one-year easement lease with Brian Supplee was specifically negotiated for that time period because Tony relied on their agreement with Gary to install the private road on the upper part of the Property by September 2018. In Gary's appellate brief, he claims that he never knew about the easement and that it was "unnecessary." Gary was aware of this easement, which is a fact that he conveniently omitted in the district court action and is now omitting in this appellate action before this Honorable Court. *See attached* **Exhibit A.**

On October 11, 2017, Tony quitclaimed the Property to himself and his wife, Anne, as joint tenants with the right of survivorship. Dkt #54, p. 2, Ex. D. This quit claim deed was recorded in Jefferson County on November 3, 2017. *Id.* The Taylors have receipts from as early as 2014 showing that they paid taxes on the Property. Dkt #17, Ex. A to K (Affidavit of Anne Marie Taylor). They also paid all the property taxes on the Property in 2017, 2018 and 2019. *Id.*

As of September 2018, the private road on the upper part of the Property had not been installed by Gary prior to the expiration of the access easement over Brian Supplee's land (Parcel B-2), in violation of the oral agreement entered into between Gary and Tony. Dkt #54, p. 2.

In October 2019, and after several attempts to contact Gary, Tony mailed a letter to Gary via certified mail informing him that he needed to either (a) vacate the property immediately for failure to follow through on installing the road on the upper part of the Property, or (b) if he wished to remain, to enter into a formal written rental agreement and pay rent. Dkt #54, p. 3, Ex. E. Thereafter, on December 19, 2019, Gary filed a Complaint Adverse Possession and Equitable Contract on the Property (Parcel B-1). Dkt #1. Thus, the applicable five-year period in question for an adverse possession claim was from December 19, 2014 to December 19, 2019.

Gary claims that he had a verbal agreement with his son, Tony, to reconvey the Property back to Gary. No such oral agreement was ever entered into, nor was any such agreement ever reduced to writing or signed by the parties.

On June 18, 2020, this Court issued its *Order on Converted Rule 12(b) Motion for Summary Judgment* summarily denying Gary's claim for Adverse Possession. Dkt #18. The Court noted that "[a]dverse possession requires a strict adherence to the elements and it has not been shown there is a question of fact to those elements. As such summary judgment as a matter of law is appropriate." *Id.*

Gary subsequently filed a *Motion to Amend Complaint*, wherein Gary attempted to revive a claim for Equitable Contract and add claims for Unjust Enrichment and Quantum Meruit, even though he *"believes those claims were*

adequately pled" in the original Complaint. Dkt #22.

On August 7, 2020, Tony and Anne then filed an eviction action against Gary in Jefferson County Justice Court (Cause No. CV-465-2020-78). Dkt #30 (Complete Justice Court File) On August 27, 2020, Gary filed his *Answer to Complaint and Counterclaims* and *Motion to Consolidate*. *Id.* On September 9, 2020, Tony and Anne filed their *Answer to Counterclaims* and *Response to Motion to Consolidate. Id.*

The Justice Court case was later consolidated into this pending District Court case by stipulation of the parties "for the interest of judicial economy," and on September 16, 2020, Justice Court granted the *Motion to Consolidate*. *Id.*

On October 16, 2020, Tony and Anne filed their *Amended Complaint for Possession*, wherein they assert the following claims: (1) Action for Possession, (2) Breach of Contract, (3) Unjust Enrichment from Unauthorized Collection of Rent, and (4) Unjust Enrichment from Failure to Abide by Verbal Rental Agreement. Dkt #34.

On March 5, 2021, Gary filed a *Motion for Partial Summary Judgment,* supported by a sworn affidavit signed by Gary. Dkt #44 & 45. In his sworn affidavit, Gary claims that he spent $90,682.25 in improvements of the Property. Dkt #46. Of particular note, several of the claimed expenses are misrepresented and/or fraudulent.

On March 26, 2021, after verifying that the information in Gary's affidavit was false, the Taylor's attorney contacted Gary's attorney to inform him that Geary Construction never performed any work on the Property, which meant that Gary has misled the Court by claiming that he had paid $24,000 for work that was never performed.

On April 23, 2021 and only *after* the fraud was brought to Gary's attention did he *attempt* to correct his fraud upon the Court by filing a "supplemental" affidavit on April 23, 2021. Dkt #51. Gary has since admitted that "Geary Construction did not perform the services describe in Exhibit 9." Dkt #51 (*Suppl. Aff. Gary Taylor,* ¶9). Instead, Gary now claims that he, an elderly man in his mid-70s, "did personally perform the services described in the bid. *Id.* ¶11. Further, Gary affirmatively states – under penalty of perjury – "that the 'pd in full' is not [his] handwriting." *Id.* ¶16. The same "pd" or "pd in full" appears on multiple pages of documents produced in the proceedings. Tony confirmed that it was, without a doubt, his father's handwriting. Dkt #54, Ex. G (*Affidavit of George Anthony Taylor).* So even in correcting his affidavit, Gary still lied to the Court.

On May 28, 2021, Tony and Anne filed their *Combined Response to Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment* on all claims. Dkt #54. On January 11, 2022, the Court issued its *Order on Outstanding Motions.* Dkt #66. The Court ruled as follows: (1) Denied summary judgment on

Gary's claims for Equitable Contract/Promissory Estoppel and Unjust Enrichment; (2) Granted summary judgment the Taylors' claim for Possession of the Property; (3) Denied summary judgment on the Taylors' claims for Breach of Oral Contract, Unjust Enrichment from Unauthorized Collection of Rent, and Unjust Enrichment for Failure to Pay Rent; and (4) Denied summary judgment on Gary's claim for Quantum Meruit. *Id.* Despite this Court Order, Gary continued his possession the Property.

On February 8, 2022, the Taylors filed a Rule 60(a) motion requesting the Court to amend the Order as to their claims for (1) Breach of Oral Contract, and (2) Unjust enrichment for Failure to Pay Rent. Dkt #67. On March 28, 2022, the Court issued an *Order on 60(a) Motion* amending its prior ruling by granting summary judgment in favor of Tony and Anne on those claims. Dkt #72.

On May 18, 2022, the Court then entered a Writ of Assistance directing law enforcement to remove Gary from the Property at the Taylors' request because Gary continued to ignore the Court's orders. Dkt #76.

On June 21, 2022, the Court issued a Judgment against Gary Taylor for unpaid rent in the amount of $60,000, plus judgment interest. Dkt #79. On July 6, 2022, the Court issued a Writ of Execution, directing the Sheriff to seize Gary's property in order to satisfy the judgment amount. Dkt #81. The Taylors have not

been successful in effectuating the writ of execution given Gary's attempts to continue hide and protect his personal assets.

Gary finally vacated the Property on or about July 12, 2024 *on his own accord*, and the Taylors were finally able to regain possession of their Property. *See attached* **Exhibit B**. It is noteworthy that law enforcement did not serve Gary with the Writ of Assistance, but that he nevertheless vacated the Property *himself*.

Gary appeals trial court's rulings on the claims for 1) adverse possession, 2) equitable contract/promissory estoppel, and 3) unjust enrichment. Gary appeals from an Order dated August 28, 2023. Gary filed a Notice of Appeal on September 21, 2023.

STANDARD OF REVIEW

In this case, the trial court's decisions were the result of motions for summary judgment, and prior to that, a Rule 12(b) motion that was converted to a motion for summary judgment. The standard of review for summary judgments is review de novo. *Dick Anderson Constr., Inc. v Monroe Prop. Co.*, 2011 MT 138, paragraph 16, 361 Mont. 30, 255 P.3d 1257.

An action to quiet title is a proceeding in equity. In equity cases, we apply the standard of review set forth in § 3-2-204(5), MCA, which requires this Court to determine all of the issues in the case and to do complete justice. *Milanovich v. Janicich*, 2001 MT 65N, ¶ 11 (citing *Montana Earth Resources Ltd. Partnership v.*

North Blaine Estates, Inc., 1998 MT 254, P17, 291 Mont. 216, 967 P.2d 376) and directs that the appellate court review all questions of fact and law. The appellate court reviews a trial court's legal conclusions for correctness and its findings of fact to determine whether they are clearly erroneous. Statutory interpretation is a question of law and the trial court's interpretation is reviewed for correctness. Mixed questions of fact and law garner de novo review, meaning that while factual conclusions are reviewed for clear error, whether factual circumstances satisfy the applicable legal standard is reviewed de novo. *A.C.I. Constr., LLC v. Elevated Prop. Invs., LLC*, 2021 MT 246, ¶ 1, 405 Mont. 456, 458, 495 P.3d 1054, 1055.

SUMMARY OF THE ARGUMENT

Appellant's failure to succeed on his claim for adverse possession was the catalyst for the lodging of Appellant's derivative equitable claims that were also properly denied by the Court. Appellant failed to present material evidence to the trial court at the summary judgment stage of these proceedings, and instead engaged in duplicitous litigation tactics by holding back certain alleged facts or legal theories, instead choosing the "wait-and-see" approach as to how the Court might rule. By way of example, Appellant's "constructive trust" theory was never raised in the trial court proceedings until *after* the Court issued its ruling on summary judgment motions. The Court properly ruled in Appellee's favor through its reliance upon verified information in the record, including Appellant's claim for unjust

enrichment. Dissatisfied with the ruling, Appellant filed this appeal and is now attempting to introduce new information into the record on appeal that was never introduced at the trial court level.

ARGUMENT

As a preliminary matter, Appellant identifies four (4) issues presented for appeal, but then expands this into 15 issues in the Argument section of his brief. In an effort to keep the briefing orderly and concise for the Court, Appellees have organized their response brief following those same four issues identified in Appellant's opening brief.

1. The District Court's grant of Summary Judgment on Defendants/Appellee's claim for possession prior to dismissing Plaintiff/Appellant's equitable claims was procedurally proper.

Gary failed to establish the elements required for an adverse possession claim. Occupancy and payment of taxes necessary to prove adverse possession, provides as follows:

> In no case shall adverse possessions be considered established under this code unless it shall be shown that the land has been occupied and claimed for a period of 5 years continuously and the party or persons, their predecessors, and grantors have during such period paid **all** the taxes, state, county, or municipal, which have been legally levied and assessed upon said land.

MCA § 70-19-411. The Montana Supreme Court has consistently held that "adverse possession requires the payment of all taxes on the property in question for the

prescribed period." *Luloff v. Blackburn,* 274 Mont. 64, 70 906 P.2d 189, 192 (1995). Here, Gary failed to pay all of the property tax payments on the Property as required by statute. Therefore, Gary cannot prove every element of his adverse possession claim so it cannot survive a de novo review by the Montana Supreme Court. As a result of the Court's denial of Gary's adverse possession claim in its *Order on Converted 12(b) Motion*, it follows that he was not entitled to remain in possession of the Property.

The Taylors were entitled to summary judgment as a matter of law on their claim for possession of the Property. It is undisputed that the Taylors are the legal owners of the Property. It follows that Gary is *not* the legal owner of the Property and, therefore, has no legal right to be there, absent an agreement otherwise. While the parties did have a prior oral agreement wherein Gary would reside on the Property in exchange for maintaining the Property and installing the upper portion of the road prior to the 1-year road easement expiring on the neighboring parcel in lieu of rent, that oral agreement was breached by Gary's failure to perform. Thereafter, the Taylor's never gave Gary permission to continue residing on the Property, at which point Gary became a holdover tenant. Gary has failed to provide any evidence to support his claim that he was entitled to continued possession of said Property.

"One is subject to liability to another for trespass, regardless of whether he or she causes actual harm or damage to any legally protected interest of the other, if he or she obstructs the other's right to the exclusive possession of that property." *Maher v. Colombe*, 2020 MT 139N, P8, 2020 Mont. LEXIS 1530, *4-5, 400 Mont. 559, 463 P.3d 459, 2020 WL 2730842; *Renz v. Everett-Martin*, 2019 MT 251, ¶ 14, 397 Mont. 398, 450 P.3d 892. Gary has no ownership interest in the Property or any other legal right to be on the Property and the Taylors, as title owners, have the right to possess the Property. Gary's claim for possession of the Property fails.

Furthermore, the Court's *Order on Outstanding Motions* granting possession of the Property in favor of the Taylors was procedurally proper. Rule 54(b), M.R.Civ.P. allows the trial court to certify a judgment as final. "[The Rule] is designed to facilitate the entry of judgment on one or more claims, or as to one or more parties, in a multi-claim/multi-party action." *Roy v. Neibauer*, 188 Mont. 81, 84-85, 610 P.2d 1185, 1188 (1980) (citing *Allis Chalmers Corp. v. Philadelphia Electric Co.* (3rd. Cir. 1975), 521 F.2d 360, 363).

Gary improperly relies on *Roy v. Neibauer,* 188 Mont. 81, 84, 610 P.2d 1185, 1188 (1980) in taking the position that the district court should not have issued the order for possession until *after* adjudicating the remaining equitable claims. *Roy v. Neibauer* involved a multi-party action arising out of a dog-biting incident. The plaintiff (guardian of the child that was bitten) filed a complaint against the landlord

and tenant asserting negligence for permitting the tenant's dog to bite the child on premises. The court granted the landlord's motion for summary judgment releasing him from liability but dismissed the guardian's appeal as premature because (1) there was not yet a final determination as to the liability of the tenant and (2) the guardian made no attempts to comply with the certification requirements of M.R.Civ.P. 54(b).

Here, there were not multiple parties, only multiple claims. Further, all of Gary's equitable claims were contingent on the Court's denial of Gary's adverse possession claim. On January 11, 2022, the district court issued its *Order RE Pending Motions* wherein it (1) denied Gary's claims for Equitable Contract/Promissory Estoppel, Unjust Enrichment, and Quantum Meruit, (2) granted the Taylors' claim for possession of the Property, and (3) denied the Taylor's claims for Breach of Oral Contract, Unjust Enrichment for Unauthorized Collection of Rent, and Unjust Enrichment for Failure to Pay Rent. Notably, the *only reason* the district court denied summary judgment on the Taylor's claims for breach of contract and unjust enrichment as because the claims were not supported by authenticated documentation as required by M.R.Civ.P. 56. *Order on Outstanding Motions*, p. 20 (Dkt # 66). However, after bringing to the district court's attention that the exhibits were, in fact, properly authenticated and located in the record, the Court reversed its ruling and granted summary judgment in favor of the Taylors on their claims for

Breach of Oral Contract and Unjust Enrichment for Failure to Pay Rent. Dkt # 72. *Order on 60(a) Motion* (Dkt # 72).

On May 2, 2022, Gary's first attorney withdrew as his counsel (Dkt #73) and the Court granted the withdrawal the same day. On May 9, 2022, the Taylors issued a Rule 10 Notice advising Gary he had 21 days to "appoint an attorney or appear in person" or else the action would proceed and "may result in a judgment or other order being entered against [him] by default or otherwise." Dkt # 75. After the 21 days elapsed, the Taylors requested a judgment on the amount of unpaid rent, and a Judgment was issued on June 21, 2022. Dkt. #79. Gary never attempted to comply with the certification requirements of Rule 54(b) in order to appeal either the order for possession or the judgment for unpaid rent. Based on the foregoing, the district court did not err.

2. The District Court's Issuance of a Writ of Assistance After Plaintiff/Appellant Was Duly Served with Notice Pursuant to Uniform District Court Rule 10 was not clear error.

Gary argues that the Writ of Assistance issued on May 18, 2022 was invalid because (1) the case was automatically stayed at the time of issuance, and (2) the Court should not have allowed the eviction while the quite title action was pending. Gary improperly relies on *Reickhoff v. Consolidated Gas Co.,* 123 Mont 555, 217 P.2d 1076 (1950), where the Defendant (gas company) trespassed and turned a profit on the natural gas production from the property in dispute in the middle of the

litigation. The *Reickhoff* Court went on to admonish the Defendant by stating: "Having acted as it did, the defendant gas company may not now be heard to complain in a court of equity of the unfortunate consequences to it. Equity looks at the whole situation and grants or withholds relief as good conscience dictates." *Reickhoff v. Consol. Gas Co.*, 123 Mont. 555, 568, 217 P.2d 1076, 1083 (1950). Gary is the gas company in this matter and should not be rewarded for his bad faith conduct.

Nevertheless, the Court will note that Gary was never personally served with the Writ of Assistance; in fact, he avoided service and then conspired with his granddaughter, Heather Maloughney, to vacate the Property at night. *See attached* **Exhibit B**. Gary voluntarily vacated the Property on or about July 12, 2022. Thus, Gary's claim that the Writ of Assistance was improperly issued is a non-issue because Gary left the Property himself without being removed from the Property by law enforcement.

3. The District Court properly granted Defendants/Appellees' claims for breach of contract pursuant to Rule 60(a).

Defendants were also entitled to summary judgment as a matter of law on their claim for breach of contract. "Where the language of a contract is doubtful and ambiguous, the conduct of the parties under the contract is one of the best

indications of their true intent." *Watters v. City of Billings*, 2019 MT 255, P22, 397 Mont. 428, 438, 451 P.3d 60, 67, 2019 Mont. LEXIS 667, *15, 2019 WL 5565190.

On September 15, 2027, Gary sold Parcel B-2 to Brian Supplee and moved onto Parcel B-1, which he had already deeded to Tony four (4) years earlier. However, the only way to access Parcel B-1 was to drive over Parcel B-2. Thus, Tony entered into a one-year easement agreement with Brian Supplee at the time Gary sold Parcel B-2 to him so that Gary would have access to Parcel B-1 without trespassing on Brian Supplee's property. Gary's claim that the easement agreement was "unnecessary" because the prospective purchaser, Brian, was a friend has no basis in law.

Here, the Taylors have submitted evidence that the parties entered into an oral agreement in September 2017 wherein Gary would reside on the Property and *in lieu of rent* he would perform property maintenance and install a road on the upper portion of the Property by or before September 2018, at which time the 1-year easement agreement was set to expire. Gary then failed to install the road within the agreed-upon 1-year time period. This Agreement was recited in writing when Tony sent Gary a letter in October 2019 reminding him of the terms of the oral agreement and requested he start paying $2,000 a month in rent ($1,500 per month for the shop and $500 for the apartment). This letter was authenticated and produced as part of the record, and as such, supported the Taylor's claim for breach of oral contract.

Gary received but never responded to the letter. Instead, Gary hastily installed and completed the road right before initiating the action for adverse possession. The conduct of the parties shows that there was, in fact, an oral lease agreement, that Gary understood the terms of the agreement, and that Gary did, in fact, breach the agreement.

Mont. Code Ann. § 70-24-427(1) provides: "If the rental agreement is terminated, the landlord has a claim for possession and for rent and a separate claim for actual damages for any breach of the rental agreement." *Whalen v. Taylor*, 278 Mont. 293, 305, 925 P.2d 462, 469, 1996 Mont. LEXIS 190, *19, 53 Mont. St. Rep. 914. Thus, Gary cannot assemble evidence that might aid him in avoiding his obligation to pay rent.

4. The District Court's summary denial of Plaintiff/Appellant's equitable claims as a matter of law was proper.

a. Equitable Contract/Constructive Trust

Gary claims that he made an *oral* agreement with Tony for the Property to be conveyed back to him at some mysterious date to occur in the future. However, an alleged verbal agreement fails to state a genuine issue of material fact because it is in clear violation of Montana's Statute of Frauds, which provides that "[a]n estate or interest in real property, other than an estate at will or for a term not exceeding 1 year, may not be created, granted, assigned, surrendered, or declared otherwise than

by operation of law or a conveyance or other instrument in writing. . . .” Sec. 70-20-101, MCA.

Sec. 28-2-903(1), MCA, addresses agreements which must be memorialized, and states:

> The following agreements are invalid unless the agreement or some note or memorandum of the agreement is in writing and subscribed by the party to be charged or the party’s agent:
>
> […]
>
> (d) an agreement for the leasing for a longer period than 1 year or for the sale of real property or of an interest in real property. The agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing and subscribed by the party sought to be charged.

A conveyance of real property is governed by the Statue of Frauds. Absent a written agreement memorializing this alleged promise to reconvey the Property, the presence or lack thereof of a verbal agreement is irrelevant. Accordingly, Gary’s claims for equitable contract or promissory estoppel as they relate to the reconveyance of the Property must fail, and summary judgment in favor of the Taylors was appropriate.

Second, Gary incorrectly argued that he was entitled to summary judgment on his claim for promissory estoppel. To assert a claim for promissory estoppel, the claimant must establish the following four elements: "(1) a promise clear and unambiguous in its terms; (2) reliance on the promise by the party to whom the

promise is made; (3) reasonableness and foreseeability of the reliance; [and] (4) the party asserting the reliance must be injured by the reliance." *Turner v. Wells Fargo Bank, N.A.*, 2012 MT 213, P24, 366 Mont. 285, 291, 291 P.3d 1082, 1087-1088, 2012 Mont. LEXIS 290, *12-13, 2012 WL 4364246 (citing *Keil*, 188 Mont. at 462, 614 P.2d at 506).

Gary cannot establish the very first element required, which is that a "*clear and unambiguous promise"* was made. Gary freely admits "it would have been advantageous to all parties if they had signed a written agreement to define their intentions regarding the conveyance of the Property to Tony, and the subsequent agreement to reconvey the Property at a later date." *Pl. Mot. for Partial Summary Judgment,* p. 5. That is exactly the point. Tony never orally promised to reconvey the Property back to Gary.

Now, Gary argues constructive trust. The Court will note that the legal theory of constructive trust was never raised in Gary's Complaint, Amended Complaint, or at any point in time during the summary judgment phase. It was only after Gary hired his current counsel that this brand-new legal theory appeared in the district court action. Gary's failure to raise the theory of constructive trust bars his attempts to raise it now.

b. Unjust Enrichment

Gary argues unjust enrichment regarding improvements that he alleges to have made to the Property while he did not have color of title.

Gary argues that the Taylors are not entitled to the collection of rent for the time the Gary has been a holdover tenant, wrongfully occupying *their* Property, and preventing them from enjoying *their* Property as they choose. To the contrary, Gary has been unjustly enriched by continuing to occupy the Property rent free to the Taylors' detriment. There was no factual dispute that Gary remained on the Property and did not pay rent. Accordingly, the Taylors were entitled to summary judgment on their claim for unjust enrichment for Gary's failure to abide by verbal agreement or pay rent.

Section 70-28-110, MCA, provides:

> When damages are claimed for withholding the property recovered upon which permanent improvements have been made by a defendant or those under whom the defendant claims, holding under color of title adversely to the claim of plaintiff, in good faith, the value of the improvements must be allowed as setoff against the damage.

"Accordingly, before the [claimant] may recover for any improvements to the Property, they must prove: (1) that their possession of the Property was under color of title; and (2) that the improvements were placed on the Property in good faith." *Burmaster v. Radford*, 2020 MT 101N, P10, 2020 Mont. LEXIS 1237, *7, 400 Mont. 557, 461 P.3d 874 (citing *Stevenson v. Owen*, 212 Mont. 287, 295, 687 P.2d 1010, 1015 (1984)). "Color of title means 'something which has the

appearance or gives the semblance of title but is not such in fact'." *Id.* (citing *Owen*, 212 Mont. at 295, 687 P.2d at 1015). Simply stated, a party who has no rights to certain real property, contractual or otherwise, and then takes the risk of improving the property without first ensuring his rights to the property, cannot succeed on a claim for unjust enrichment. Gary quite literally quitclaimed the Property to Tony. Gary cannot establish color of title and, therefore, Gary cannot recover for the improvements he allegedly made to the Property.

CONCLUSION

WHEREFORE and based on the foregoing, Defendants/Appellees respectfully request the Court issue the following relief:

1) Summarily deny Plaintiff/Appellant's request that the Court reverse all of the lower court's judgments;
2) For any other relief the Court deems just and proper.

Dated this 22nd day of April 2024.

PABST LAW FIRM

Caitlin T. Pabst
Attorney for Defendants/Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is proportionally spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word and does not exceed 10,000 words.

DATED this 22nd day of April 2024.

PABST LAW FIRM

Caitlin T. Pabst
Attorney for Defendants/Appellees

CERTIFICATE OF SERVICE

I, Caitlin Terese Pabst, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-22-2024:

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