

1986

George S. Perkins and Lillie Perkins v. Interlake Thrift : Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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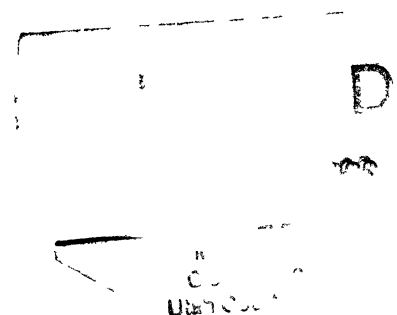
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CKET NO. 860306-CA UTAH COURT OF APPEALS

GEORGE S. PERKINS and LILLIE PERKINS,)	
Plaintiffs and Appellants,)	
vs.)	APPELLANTS'
DICK COOMBS, an individual, COOMBS)	PETITION FOR
INVESTMENT CORPORATION, a Utah corporation,)	REHEARING
respondent, and JOHN DOE FIDELITY COMPANY,)	
Defendants.)	
<hr/>		
DICK COOMBS, COOMBS INVESTMENT CORPORATION,)	
and JOHN DOE FIDELITY COMPANY,)	
Defendants and Third-Party Plaintiff,)	
vs.)	Case No. 860306-CA
CENTURY 21 MONSON & COMPANY, PETER ROBERT)	
LUCERO, and JESSE MONSON,)	
Third Party Defendants.)	
<hr/>		
INTERLAKE THRIFT, a Utah Corporation,)	
Cross-Claimant,)	
vs.)	
DICK E. COOMBS,)	
Cross-Defendant.)	
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INTERLAKE THRIFT, a Utah corporation,)	
Third-Party Plaintiff and Respondent,)	
vs.)	
GUARANTY TITLE COMPANY, a Utah corporation;)	
SOUTHERN TITLE GUARANTY COMPANY, INC.,)	
aka FIDELITY NATIONAL TITLE INSURANCE)	
COMPANY, INC.; MARK J. WILLIAMS, an)	
individual; and RUTH R. COOMBS, an individual,)	
Third-Party Defendants.)	

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LIST OF PARTIES

George S. and Lillie Perkins - plaintiffs and appellants on appeal.

Interlake Thrift - defendant and respondent on appeal.

Dick E. Coombs - defendant, actions by or against whom were stayed by bankruptcy filing; not a party on appeal.

Coombs Investment Corporation - defendant, actions by and against which were stayed by bankruptcy filing, not in business, not a party on appeal.

Century 21--Monson and Company - Third-party defendant, claim against whom stayed by Coombs bankruptcies; not a party on appeal.

Peter Robert Lucero - Third-party defendant, claim against whom stayed by Coombs bankruptcies; not a party on appeal.

Jesse Monson - Third-party defendant, claim against whom stayed by Coombs bankruptcies; not a party on appeal.

Guarantee Title Company - Third-party defendant, not in business; not a party on appeal.

Mark J. Williams - Third-party defendant, dismissed out by trial court; not a party on appeal.

Southern Title Guaranty Company, Inc. - Third-party defendant. Did not appeal judgment against it in favor of Interlake Thrift.

Fidelity National Title Insurance Company, Inc. - Third-party defendant; not a party on appeal.

Ruth R. Coombs - Third-party defendant, actions against whom were stayed by bankruptcy filing; not a party on appeal.

UTAH COURT OF APPEALS

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Plaintiffs and Appellants,)
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DICK COOMBS, an individual, COOMBS) PETITION FOR
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DICK COOMBS, COOMBS INVESTMENT CORPORATION,)
and JOHN DOE FIDELITY COMPANY,)
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LUCERO, and JESSE MONSON,)
Third Party Defendants.)

INTERLAKE THRIFT, a Utah Corporation,)
Cross-Claimant,)
vs.)
DICK E. COOMBS,)
Cross-Defendant.)

INTERLAKE THRIFT, a Utah corporation,)
Third-Party Plaintiff and Respondent,)
vs.)
GUARANTY TITLE COMPANY, a Utah corporation;)
SOUTHERN TITLE GUARANTY COMPANY, INC.,)
aka FIDELITY NATIONAL TITLE INSURANCE)
COMPANY, INC.; MARK J. WILLIAMS, an)
individual; and RUTH R. COOMBS, an individual,)
Third-Party Defendants.)

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Plaintiffs and appellants herein, George and Lillie Perkins, through their counsel, Samuel King and Eric P. Hartman, petition the Court of Appeals (panel: Judges Davidson, Garff and Jackson) for a rehearing to determine the relative priority between Interlake and the Perkins on the Jeremy Street property after Perkins' initial sale of the property in October, 1980.

Perkins are delighted with the Opinion of the court and seek no change in its terms. They do seek ruling on an additional point.

Perkins' problem is that while they have won, they may have no remedy.

Interlake is one of the six failed Utah thrifts and is in the hands of a receiver, Grant Thornton Company.

The Opinion entitles Perkins to more adequate attorney fees. It entitles them also to punitive damages if such are determined appropriate by the evidence at rehearing. Finally, the Appellate Opinion gives them priority over Interlake based on the second phase of their dealings with Interlake, when in 1981 Interlake induced them to sign a subordination agreement by fraud.

Because Interlake is insolvent and its depositors apparently will not be fully paid, and those depositors have priority over ordinary creditors, it is in dispute that Perkins will be paid by Interlake.

In fact, it is possible that there will not even be hearings at all to determine the fee and punitive damages issues. If it is determined there is no source from which to pay the judgment,

the hearings would be an exercise in futility.

In such a situation, so that justice can be done by the victimized party receiving economic recovery, Perkins urge the Opinion be augmented.

What the Perkins desire is a ruling from the court in regard to the "first phase" of the transaction, when CIC in 1980 obtained a loan from Interlake that did not correspond with the Perkins' authorization. The issue to be decided is who had priority then, the Perkins or Interlake?

Interlake obtained a policy of title insurance insuring its priority over Perkins in this first phase. The title company, Southern Title Guaranty Company aka Fidelity National Title Insurance Company, that issued the policy of title insurance, was brought in as a third party defendant interpleaded by Interlake to protect it in the event that it lost the first phase priority dispute with plaintiffs. In fact, when the trial court ruled that Interlake had priority over Perkins on the first phase, the title company paid Interlake's defense fees for that phase.

Perkins' major tangible recoverable claim is the value of their home itself.

If the Appellate Court will amend its decision by enlarging it to include a decision as to priority on the first phase, then Perkins will be in a position to recover the home's value from the title insurer. Without this, Perkins are unsure as to whether they can have the title company pay based on the Appellate Opinion that Perkins acquired priority in the second

phase, the fraud phase, because the title insurance may not reach to acts of fraud on the part of its insured, Interlake.

Perkins believe that the Court of Appeals in its statement of the facts of the case approached making such a ruling concerning priority as to phase one but didn't do so, because awarding the Perkins priority in the second phase appeared adequate.

Perkins believe that such a determination will also be of value to other sellers and lenders seeking guidance in regard to real property transactions in Utah.

The first four paragraphs of the Court's Opinion state most of the facts concerning the first phase that are necessary to make the desired finding of priority.

In phase one, Perkins authorized a loan representing the down payment they were to receive from CIC and instead CIC took a larger loan, larger not only because it was \$3,756 higher than authorized by the Perkins, but because it bore effective interest at 10% greater than the Perkins had authorized. The interest itself when applied to the entire amount of the loan, over its 10-year term, multiplies the differential.

The trial court recognized this. In its Findings of Fact at paragraph 12 it stated:

"12. The loan actually obtained by CIC from Interlake, \$20,756.44 at the effective rate of 24%, is not 'approximately' a loan of \$17,000 at 14% interest (Authorization of the Earnest Money Agreement)." [Emphasis added] (Appellants' Original Brief, Addendum 1, Page 5)

The trial court's error of law is stated by it in the following portion of paragraph 12 of its Findings, that Perkins "waived any objection" because they "attended the closing and failed to ascertain what was ultimately going to be put on the property by way of a trust deed and trust deed note..."

Based on that erroneous conclusion of law, the trial court found Interlake had priority over Perkins for phase one.

References in this Petition are to the parties' original briefs on appeal.

Appellant's original brief at pages 27-33 quotes the appropriate law. Pages 33-44 distinguish this case from the lead case of Kemp v. Zions First National Bank, 24 Utah2d 288, 470 P.2d 390 (1970).

This law is that when a commercial lender loans a buyer down payment money to buy land, it is the duty of such a lender to determine whether its loan complies with the authorization given by the seller. Otherwise, it would be reducing the seller's security by intruding without his authorization into his equity. The seller has expressed his intent in the Earnest Money, that document is available to the lender, and it is the lender's duty to comply with it or seek the seller's consent to a modification.

No law to the contrary was submitted to the trial court, and its finding that even though Perkins should have had priority, they waived it by failing to make inquiry, is not supported by law, and is contrary to good business practice. It is also particularly inappropriate to the striking facts of this case.

In addition to the facts stated in the Appellate Opinion concerning phase one, other persuasive, undisputed facts, also support the basic legal position that Perkins should have priority over Interlake. (See Appellants' Brief, pages 3-16 for recitation of facts in detail).

These include the facts that Interlake knew that Perkins had given CIC an Earnest Money Agreement, yet Interlake made no effort to discover or comply with its terms. Rather Interlake gave a letter of instructions (Appellants' Brief, Addendum V) to the title company to advance the money to CIC only when the closing had been so managed that CIC's loan from Interlake had priority ahead of CIC's obligation to the Perkins, so that the title policy would show Interlake had first priority.

Interlake withheld from the closing officer the actual terms of its loan to CIC.

It was for this reason that, as stated in the Appellate Opinion, "...the closing officer did not advise them (Perkins) of the deviation from the Earnest Money Agreement in both the principle amount and the interest rate."

That is, the closing officer did not advise the Perkins of the deviation because he did not know. This also means that had the Perkins made inquiry, the closing officer could not have advised them of the deviation.

The title insurer, and its agent the title company that handled the closing for it, may have erred by insuring title without learning Interlake's loan terms. These are business

entities whose business is insuring and closing real estate transactions. Having insured the title on the apparent assumption that the Interlake loan was proper, the title insurer should now be liable to pay over to the Perkins the loss its insured, Interlake, should pay.

On their part, Perkins reasonably relied on the professionalism of the title company and the title insurer at the closing that the Interlake loan was proper.

Appellants believe that this conduct of Interlake at the first phase was as unconscionable as its fraud in the second phase. The result was to keep everyone in the dark, except CIC which remained silent because it was getting more money than Perkins had authorized. It was also for this reason that CIC's young salesman, Paul Scott, stated that later, when Perkins' suit was filed, he was "shocked" to find that the CIC loan did not comport with the Perkins' authorization (Appellants' Brief, page 15). He attended the closing, and was himself kept in the dark by Interlake and by Mr. Coombs, the owner of CIC, as to the excessive Interlake loan.

Appellants have a substantial time problem, Mr. Perkins now being over 80.

Accordingly, Perkins do not object to the Appellate Opinion. They simply ask that it be augmented.

The phase one facts are stated in detail in Appellants' original brief at pages 3-16.

Perkins concede that, under ordinary circumstances, the

Court's resolution of priority in the property after subsequent transactions in 1981 would render the question of priority as of October, 1980 moot. However, because of the unusual circumstance of Interlake Thrift's insolvency and liquidation, Perkins believe that either they and/or Interlake's receivers, Grant Thornton Company, may have as their only recourse a claim against the title insurance policy issued in October, 1980, to Interlake, as the insured, by Southern Title Guaranty Company.

DATED December 1, 1988.



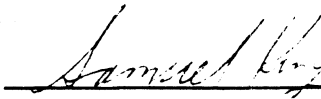
SAMUEL KING

MAILING CERTIFICATE

I certify that on December 1, 1988, I mailed four copies of the foregoing to each of the following persons:

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