1975

Merrill B. Anderson, Dorothy M. Anderson, and Ralph Bitner Morris v. Capitol Thrift and Loan Co, James B. Mason, and Midvalley Investment : Brief of Appellant

Utah Supreme Court

Graham Dodd; Attorney for Appellants.
Ralph R Mabey; Robert D Merrill; Attorneys for Respondents.

IN THE SUPREME COURT OF

THE STATE OF UTAH

MERRILL B. ANDERSON, DOROTHY M. ANDERSON and RALPH BITNER MORRIS,

Plaintiffs + ~~Petitioners~~, Appellants,

- vs -

Case No. 14144

CAPITOL THRIFT AND LOAN COMPANY, JAMES B. MASON, as Trustee, and MIDVALLEY INVESTMENT,

Defendants + ~~Respondents~~.

BRIEF OF ~~PETITIONER~~ Appellants

Action to Review the Proceedings and Summary Judgment of the Third District Court of the State of Utah awarded to Respondent, Midvalley Investment

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MERRILL B. ANDERSON, DOROTHY M. ANDERSON and RALPH BITNER MORRIS, :

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- vs - :

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Respondents. :

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BRIEF OF PETITIONERS

STATEMENT OF THE NATURE OF THE CASE

This is an action to review a Summary Judgment of the Third District Court, Judge Stewart M. Hanson, Jr., presiding, awarded to the Respondent, Midvalley Investment, on the 10th day of April, 1975. This is also an action to review an order of Judge Stewart M. Hanson, Sr., of the same Court, requiring the

Petitioners to remove from their home, dated April 18, 1975, which order was based upon the Summary Judgment aforementioned.

DISPOSITION OF THE THIRD DISTRICT COURT

The Respondent, Midvalley Investment, filed a motion for a summary judgment before the Law and Motion Division of the Third District Court. The motion was heard and argued on the 18th day of February, 1975. The other Respondents also argued for the motion and were represented by Attorney Robert B. Merrill. The Third District Court, Judge Stewart M. Hanson, Jr., presiding, granted the motion on the 10th day of April, 1975. Judge Stewart M. Hanson, Sr., at a subsequent hearing, awarded the Respondents the sum of $300.00 in judgment and required the Petitioners to remove from the premises by the 10th day of May, 1975. The counterclaim and other claims of the Respondents were dismissed.

RELIEF SOUGHT ON APPEAL

That the Summary Judgment heretofore issued by the Third District Court be removed and the matter removed to the Third District Court for trial and that that part of Judge Hanson, Sr.'s order to have the Petitioners remove from their home be vacated until trial inasmuch as it is based on the Summary Judgment. In

the alternative, that the Court determine that the alleged sale was inequitable and improper; and also in violation of the statute 57-1-27 and 52-1-28 and order the Trustee to notice the property up for resale according to the tenor and language of the aforementioned statutes.

STATEMENT OF FACTS

The Petitioners herein are all residents of Salt Lake City, Salt Lake County, State of Utah. They are the owners of three separate parcels of property located in Salt Lake City, more particularly described as follows:

> Commencing at the Northwest corner of Lot 4, Block 161, Plat "D", Salt Lake City Survey, and running thence East 55 feet; thence South 165 feet; thence West 55 feet; thence North 165 feet to the place of beginning.
>
> ALSO:
>
> PARCEL 1: Commencing at the Northwest corner of Lot 8, Block 28, Plat "F", Salt Lake City Survey and running thence South 40.5 feet; thence West 130 feet; thence North 40.5 feet; thence East 130 feet to the point of beginning.
>
> PARCEL 2: Commencing at a point 40.5 feet South of the Northeast corner of Lot 8, Block 28, Plat "F", Salt Lake City Survey, and running thence South 36 feet; thence West 130 feet; thence North 36 feet; thence East 130 feet to the place of beginning.

The first legal description above describes the home in which the Petitioners live, the address of which is 474 East 12th Avenue, Salt Lake City. Parcels 1 and 2 describe an apartment house with several apartments, located at 246 South 11th East, Salt Lake City, Utah. The total appraised value of these properties is approximately $179,000.00.

On July 30, 1973, the Petitioners borrowed from the Respondent, Capitol Thrift and Loan Company, the total sum of $31,000.00. On the same day, said Petitioners signed two Trust Deeds covering their property above-described. These deeds were duly recorded by the Salt Lake City Recorder on August 1, 1973, Page 64, Book 3385 and Page 61, Book 3385, respectively.

On December 21, 1973, the Petitioners borrowed $32,496.00 from the same Respondent. The proceeds from this loan paid off the former loan. Again, two separate Deeds of Trust were signed by the Petitioners and were duly recorded in Salt Lake City Recorder's office on December 28, 1973, Page 157, Book 3487 and Page 160, Book 3487, respectively.

Respondent, James B. Mason, was appointed trustee on all of the Trust Deeds above-mentioned by the Respondent, Capitol Thrift and Loan Company.

Petitioners, through business reversals, were unable to make the payments under the loan agreement and defaulted upon the same. The default of the Petitioners was duly entered by the trustee and the three-month redemption period expired as is allowed under 57-1-24, Utah Code Annotated, 1953. The trustee then prepared to sell the property, but was temporarily stopped by an order of the Third District Court as a result of a suit commenced by the Petitioners. This lawsuit, Case No. 223415, was settled by stipulation between the parties and on November 25, 1974, the case was dismissed.

The Trustee then published the property for sale according to 57-1-25 on January 16, 1975 and stated that the sale would take place "at public auction, to the highest bidder, for cash (emphasis added) in lawful money of the United States, all payable at the time of sale . . . " (See Trustee's Notice, Exhibit "C" attached to Affidavit of James Mason). Both of the Petitioners have stated that they thought this meant that cash had to be available at the time of the sale. (See Affidavits of Dorothy M. Anderson and Merrill B. Anderson.)

At the alleged sale, there were only two bidders, the Respondent Beneficiary under the Deed of Trust, Capitol Thrift and Loan Company and the Respondent, Midvalley Investment. Midvalley

made the highest bid of $36,750.00; however, did not have cash available. It was not until the next day that Respondent, Midvalley Investment, delivered the bid price to the Trustee, in the form of a check.

According to the affidavits of the Petitioners, Mrs. Anderson did not attend because she thought cash was necessary at the time of sale as per the Notice. (See affidavit of Dorothy M. Anderson.) Mr. Anderson did not appear because he was unable to find the location. However, Mr. Anderson did meet an officer of Respondent, Midvalley Investment, Mr. Merlin Hanks, who told him no money had changed hands at the sale and the bidder at the sale had been given 24 hours to come up with the money. That if the Petitioners could come up with the money before that time, he would accept it, and hoped they could. (See affidavit of Merrill B. Anderson.)

Mr. Larry Hill, a real estate investor, contacted the Respondent, Capitol Thrift and Loan Company, on the morning of the 17th of January, 1975, with a view to buying and bidding on the property. (See affidavit of Larry Hill). He was told by the said Respondent that the property had been sold and he could not bid upon the property.

Petitioner, Dorothy M. Anderson, states she would have appeared to bid on the property had she known "cash on the spot" was not necessary. Respondent, Capitol Thrift and Loan Company,

had advised her that the purchaser at the sale would have to pay cash at the time of the sale. (See affidavit of Dorothy M. Anderson.) In addition to this, said Petitioners' sister, Barbara M. Nelson, made an offer on the property on the morning of January 16, 1975, but was advised by Respondent, Capitol Thrift and Loan Company, that she had to come up with the money "in the next 20 minutes". (See affidavit of Dorothy M. Anderson.)

According to the affidavit of Ross and Helen Broadbent for the Respondent, Midvalley Investment, they did not have the cash at the time of the sale on January 16, 1975, and that by prior arrangement with the Respondent Trustee, James Mason, he knew they did not have cash for the properties at the time of the sale. (See affidavit of Ross and Helen Broadbent.) No "cash" changed hands on the day at which the sale had been noticed up. (emphasis added.)

It was not until 11:55 a.m. on the 17th of January, 1975 that Respondent, James Mason, accepted a check from Midvalley Investment (see affidavit of Ross and Helen Broadbent), after he had refused to accept a bid from Messers Belnap and Doxey at 11:30 a.m. of the same morning. (See affidavit of Mr. Doxey, item 14.) This was also after the Respondent, Capitol Thrift and Loan Company, had turned down bids from Mr. Hill and Mrs. B. M. Nelson.

Subsequent to the trial of this case before Stewart M. Hanson, Sr., the Petitioners herein have tendered the $300.00 judgment to the Respondent, Midvalley. Midvalley has refused the same.

ARGUMENT

POINT I

IN ORDER TO BE AWARDED A SUMMARY JUDGMENT, THE MOVING PARTY HAS TO PROVE THAT THERE IS NO "GENUINE ISSUE AS TO ANY MATERIAL FACT AND THAT THE MOVING PARTY IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW. THIS THE RESPONDENT, MIDVALLEY INVESTMENT, FAILED TO DO.

The pertinent law with regards to summary judgments in the State of Utah is found under the Utah Rules of Civil Prodedure at Rule 56. Subsection (c) of that rule states as follows:

> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (emphasis added)

This Court, in interpreting the above rule, has strictly held that the moving party in a motion for summary judgment must carry the burden of showing "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". See In re Williams' Estates, 10 U. (2d) 83, 348 P. 2d 683, 685; Reliable Furniture Co. v. Fidelity & Guaranty Ins. Underwriters, 16 U. (2d) 211, 398 P. 2d 685; Diamond T. Utah, Inc. v. Travelers Indemnity Co., 21 U. (2d) 124, 441 P. 2d 705; Willden v. Kennecott Copper Corp., 25 U. (2d) 96, 476 P. 2d 687; Young v. Felornia, 121 U. 646, 244 P. 2d 862; Bullock v. Desert Dodge Truck Center, Inc., 11 U. (2d) 1, 354 P. 2d 559; Tanner v. Utah Poultry and Farmers Co-op, 11 U. (2d) 353, 359 P. 2d 18; Frederick May & Co., Inc., v. Dunn, 13 U. (2d) 40, 368 P. 2d 266; Robinson v. Robinson, 16 U. (2d) 2, 394 P. 2d 876;

Not only has this Court enforced a very strict interpretation of Rule 56 (c), it has indicated its reluctance to invoke its remedy. In Brandt v. Springville Banking Co., 10 U. (2d) 350, 353 P. 2d 460, this Court said:

> For the reason that a Summary Judgment prevents litigants from fully presenting their case to the Court, courts are, and should be, reluctant to invoke this remedy.

The above language was followed in Reliable Furniture Co.,

v. Fidelity & Garantee Ins. Underwriters (Supra) when this Court outlined the purpose of the said Rule.

> The sole purpose of Summary Judgment is to bar from the courts unnecessary and unjustified litigation, and only where it clearly appears that the party against whom the judgment would be granted cannot possibly establish a right to recover should such judgment be granted. Any doubts should be resolved in favor of such party when summary judgment against him is being considered.
> (emphasis added)

The above case followed Thompson v. Ford Motor Co., 16 U. (2d) 30, 395 P. 2d 62, which held the same.

It is clear then, that if there were disputed material facts, or if as a matter of law the Respondent, Midvalley Investment, couldn't recover, then the judgment of the Third District Court should be reversed.

There are some vital issues of fact and law which are material to Petitioners' case, which are in dispute. They are as follows:

A) Respondent Trustee, James Mason, states he never, at any time, received an offer from the Petitioners on the property. (See Affidavit of James Mason, Page 2, Paragraph 8.) But the affidavit of Messers Doxey and Belnap indicate that said Trustee refused to accept any offers. (See affidavit of David Doxey, item 14.)

B) The affidavit of Petitioners, Merrill B. and Dorothy M. Anderson, indicate that offers on the property were made to

Capitol Thrift and Loan Company, and also that said Respondent refused said offers and declined them indicating that "cash" was needed at the sale. These facts are undisputed.

C) The affidavit of Mr. Hill also indicates similar dissuasion from bidding on the property by the Respondent, Capitol Thrift and Loan. This affidavit was undisputed.

D) Further, the affidavit of Petitioner, Dorothy M. Anderson, indicates that an agreement settling Petitioners' delinquency had been reached with Respondent, Capitol Thrift and Loan, on January 9, 1975. These allegations were also undisputed.

It is clear that the Third District Court took the position that the contacts between Petitioners and the Respondent, Capitol Thrift and Loan, were immaterial, and as long as the Trustee was not a direct party to them, they are not material.

Petitioners urge this Court to reverse this position for the following reasons:

A) In a Trust Deed sale, the Trustee must represent both parties and do equity.

B) The trustee is the apointee and, therefore, the agent of the beneficiary.

C) It would be inequitable for the beneficiary to be guilty of acts which hindered the bidding at the sale, and then hide behind

the fiction that because Trustee acted as a third party, the sale was valid.

D) The intent of Title 57-1-19 and sequel is to allow the Trustor as great a recovery as possible by having as many bidders at the sale as possible. Actions by the beneficiary discouraging bids after the sale was continued 24 hours, frustrated the intent of the statute and was inequitable to the Trustors.

It is the contention of the Petitioners that the law requires equity in the sale and that for the reasons stated in Points 2 through 5 below enumerated, not only were there material issues of fact in dispute; but that the moving party, Respondent, Midvalley Investment, was not entitled to a judgment as a matter of law. Accordingly, the summary judgment of the Third District Court should be refersed.

POINT II

THE ALLEGED SALE HELD ON JANUARY 16, 1975 WAS IMPROPER UNDER 57-1-28 AS THE SALE WAS NOT CONSUMMATED FORTHWITH.

Section 57-1-28 of the Utah Code Annotated, 1953, in its pertinent parts, states as follows:

> 57-1-28. Sale of trust property by trustee - Payment of bid - Trustee's deed delivered to purchaser - Recitals - Effect. -- (1) The purchaser at the sale shall forthwith pay the price bid and upon receipt of payment the trustee

> shall execute and deliver his deed to such purchaser. The trustee's deed may contain recitals of compliance with the requirements of this act relating to the exercise of the power of sale and sale of the property described therein, including recitals concerning any mailing, personal delivery and publication of the notice of default, any mailing and the publication and posting of notice of sale, and the conduct of sale; and such recitals shall constitute prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.
> (emphasis added)

The Petitioners know of no decisions of this Court interpreting this particular statute. However, it has been interpreted in other jurisdictions as follows:

re. Application of County Collector, 266 N. E. 2d 383, 387.

> Term "Forthwith" within Revenue Act providing that person purchasing any tract or lot shall forthwith pay collector amount charged and that purchase will be void if purchaser fails to complete same, means that purchaser at a tax sale must make payment on date of sale; thus when payment is made after date of sale, sale and orders based thereon are voidable and subject to direct attack.

Dettmer v. Mayo, Fla., 61 So. 2d 192, 194

> The words "Forthwith" and "thereupon" when used with reference to time are generally construed to mean without delay or lapse of time.

Above followed in Bottle Min. and Mill. Co. v. Kern, 99 p. 994, 996, Lewis v. Hojer, 16, N.Y.S. 534, 536; Harbel Oil Co. v. Steele, 298 p. 2d 789, 791, 80 Ariz. 368; Sheldon v. Steele, 87 N.W. 683, 685, 114 Iowa 616.

According to the facts as contained in both the affidavits of Respondent Trustee, James Mason, and Respondent, Midvalley Investment, indicate that the bid price was not paid "Forthwith" under the meaning of the cases above. That is, no money changed hands at the time and place of the sale. In fact, it was not until 24 hours later that the sale took place. This gives rise to another disputed fact. The Trustee claims that the sale took place on the 16th day of January, 1975. (See affidavit of James Mason, Trustee.) The Petitioners urge that under the language of 57-1-27, the Trustee, in fact, and as a matter of law, postponed the sale for 24 hours. The section in question reads as follows:

> 57-1-27. Sale of trust property by trustee - Pulbic auction - Conduct by attorney for trustee - Trustor may direct order in which trust property sold - Bids - Postponement of sale. -- On the date and at the time and place designated in the notice of sale, the trustee shall sell the property at public auction to the highest bidder. The attorney for the trustee may conduct the sale and act at such sale as the auctioneer for the trustee. The trustor, or his successor in interest, if present at the sale, may direct the order in which the trust property shall be sold when such property consists of several known lots or parcels which can be sold to advantage separately and the trustee shall

> follow such directions. Any person, including the beneficiary, may bid at the sale. Every bid shall be deemed an irrevocable offer, and if the purchaser refuses to pay the amount bid by him for the property struck off to him at the sale, the trustee may again sell the property at any time to the highest bidder. The party refusing to pay shall be liable for any loss occasioned thereby and the trustee may also, in his discretion, thereafter reject any other bid of such person.
>
> The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every such case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale. No other notice of the postponed sale need be given unless the sale is postponed for longer than one day beyond the day designated in the notice of sale in which event notice thereof shall be given in the same manner as the original notice of sale is required to be given.
>
> (emphasis added)

There is no record as to the language used by the Trustee at the time of the alleged sale; but his actions in not accepting the money of Midvalley Investment until 24 hours later, and allowing them to bring it in later, and the statement of Capitol Thrift and Loan's officer, who had been at the sale, to Petitioner, Merrill B. Anderson, shortly after the sale, that no money had changed hands and that said Petitioner could still bring in his own money (see affidavit of Merrill B. Anderson) indicates, at least, a dispute as to this material fact and if taken in favor of the Petitioner as this Court has ruled it must (see Reliable Furniture Co. v. Fidelity, etc.

and Thompson v. Ford Motor Co.,) supra, then the Court must find that there is a material fact at issue and also it must follow that if the Trustee did, in fact, postpone the sale for 24 hours, then refuse to accept the offer from Messers Doxey and Belnap (see affidavit of Mr. Doxey), he violated the statute and as a matter of law, the sale was invalid and Respondent, Midvalley Investment, cannot recover on a motion for Summary Judgment.

Even if this Court defines the term "Forthwith" loosely, or in a manner so as to allow the Trustee additional time in which to make the sale -- how can it escape the fact that the sale did not, in fact, take place until the 17th day of January, 1975. (See affidavit of Ross and Helen Broadbent.) Hence, it follows that the Trustee should not have discouraged any bids until the sale was over.

POINT III

THE ALLEGED SALE HELD ON JANURAY 16, 1975 WAS IMPROPER AS IT DID NOT COMPLY WITH THE OFFICIAL NOTICE OF THE TRUSTEE, AND WAS SOLD IN VIOLATION THEREOF.

The applicable statute is found at 57-1-25, Utah Code Annotated, 1953, which states as follows:

57-1-25. Notice of trustee's sale - Description of property - Time and place of sale, -- (1) The trustee shall give written notice of the time and place of the sale particularly describing the property to be sold (a) by publication of such notice, at least three times, once a week for three consecutive weeks, the last publication to be at least ten days but not more than thirdy days prior to the sale, in some newspaper having a general circulation in each county in which the property to be sold, or some part thereof, is situated, and (b) by posting such notice, at least twenty days before the date of sale, in some conspicuous place on the property to be sold and also in at least three public places of each precinct or city in which the property to be sold, or some part thereof, is situated.

(2) The sale shall be held at the time and place designated in the notice of sale which shall be between the hours of 9 o'clock a.m. and 5 o'clock p.m. and at the courthouse of the county in which the property to be sold, or some part thereof, is situated.

(3) The notice of sale shall be sufficient if made in substantially the following form:

Notice of Trustee's Sale

The following described property will be sold at public auction to the highest bidder at the _____ door of the county courthouse in _____ County of _____, Utah, on _____, 19____, at _____ o'clock ___m. of said day:

(insert description)

Purchase price payable in lawful money of the United States. Dated _____, 19___.

(Name of trustee)

The above essentially lays out the statutory requirements to the Trustee concerning the notice he must give. The notice

given by the Respondent Trustee, James Mason, is attached to his affidavit as Exhibit C. (See affidavit of James Mason.)

The notice proclaims to the world that the following will occur:

A) That the sale is to be on January 16, 1975.

B) That it will be a public auction.

C) That it will be to the highest bidder at time of sale.

D) That the sale will be for cash at the time of sale.

According to the statute above, the Trustee did not need to require that the property be sold for "cash" nor did he need to require that it be "all payable at the time of the sale". But, at his own choosing, he published these requirements to the world in his notice, and at least Petitioner, Dorothy M. Anderson, believed them and did not attend the sale because she believed "cash" would be necessary on the spot. (See affidavit of Mrs. Dorothy M. Anderson.)

The Respondents' own affidavits clearly show that there were only two persons at the sale and that, in fact, "cash" was not paid on the 16th day of January, 1975 as was required by the notice. Also, the affidavit of Petitioner, Dorothy M. Anderson, indicates that her sister phoned Respondent, Capitol Thrift and Loan, with an

offer but was told she had to get the cash within 20 minutes. (See affidavit of Dorothy M. Anderson.) So it appears that the beneficiary also believed that "cash" would be required.

It is submitted to this Court that on the face of it, the Trustee did publish to the world that "cash" would be required, and that cash had to be produced at the time of the sale -- January 16, 1975. What other interpretation can be given from the document.

Petitioners further submit that the Trustee is bound by his own notice. In the case of Kleckner v. Bank of America Nat'l Trust & Savings Association, et al, 217 P. 2d 28, 97 C.A. 2d 30, the District Court of Appeal, Division I, of California, held:

at page 31

> Where realty was sold under a power of sale in second trust deed terms of which were prescribed in deed and recited in notice of sale as cash payable at time of sale, trustee was justified in peremptorily demanding instantaneous payment in cash or entire amount bid on behalf of plaintiff owner of third trust deed, and trustee was not obligated to adjourn sale to afford bidder opportunity to obtain currency to meet bid, especially since plaintiff could have tendered amount due on second trust deed and terminated power of sale.
>
> Once sale under a trust deed has started it is duty of trustee to continue with reasonable dispatch, and, terms being cash, trustee is not required to hold up sale while sundry bidders leave place to go to banks or elsewhere to get cash.

In Kleckner, supra, the Court dealt with the same problem that now faces this Court. The trustee had noticed up a sale of property under a trust deed. The notice of sale contained in it language identical to the notice before this Court, i.e. "cash in lawful money of the United States, payable at time of sale". (See Kleckner supra at pg. 30) The trustee received a bid at the sale and accepted it. The bidder tendered him a check. Trustee refused it and requested "cash" as per the notice. Bidder then drove immediately to his bank and returned 15 to 20 minutes later with the cash. In the meantime, the trustee sold the property. The bidder brought the suit and the Court rejected his contention that the Trustee had acted improperly and said:

> (5) In execution sales it is the duty of the sheriff to require immediate payment in cash of the bid. Kelly v. Barnet, 24 Cal. App. 119, 140 P. 605. Civil Code Section 1657 provides that if an act consists in the payment of money only it must be performed immediately upon the thing to be done being exactly ascertained. In Wiltsie, Real Property Mortgage Foreclosure, 5th Ed., 1939, Vol. 2, at page 1081, appears the following: "But if any person other than the mortgagee becomes the purchaser, where the sale is for cash, he must comply strictly with the terms of sale, and pay the price bid in cash; a note to the party entitled to the proceeds of the sale is not cash, and the tender of such note will not be a compliance with the term of the sale. It has also been held that the officer may refuse to receive checks."
>
> (at page 31 of Kleckner, Supra)

Petitioners respectfully submit that the Trustee was bound to accept "cash" as per the terms of his notice. That if, in fact, he was willing to accept checks and allow time for bidders to come up with the price, then this should have been included in the notice, or at least the notice should have been silent on the subject. By requesting that "cash" be paid on the day of the sale, the Trustee stiffled competition and at least two known persons, Mrs. Dorothy M. Anderson and her sister, would have bid (See affidavit of Dorothy M. Anderson); and how many more unknown persons may have attended and bid had they known that "cash" was really not necessary on the day of the sale?

These actions of the Trustee run contrary to law, as will be seen in C. J. S. Section 572 beginning at page 572:

> The mortgagee or trustee in selling the property, must act fairly and justly. Likewise, the mortgagee or trustee must act openly, reasonably, in good faith, with the strictest impartiality and integrity, with due or reasonable diligence, and in the exercise of sound discretion and of the caution and prudence which may fairly and reasonably be expected from a provident owner with respect to the sale of his own property. Accordingly, the mortgagee or trustee must exercise good faith and a just and fair discretion in protecting the rights and interest of the mortgager and others having an interest in the premises, using all reasonable efforts to make the sale beneficial to such parties by obtaining the full value of the property or the best price possible, or a reasonable amount.
>
> (with full annotations)

This fact of the law is also recognized in such a well-known authority on the subject as Thompson on Real Property (1957 replacement) Section 5181 at page 241 wherein it is stated:

> The trustee, under a trust deed, must act fairly to protect all parties and use a sound discretion to render the sale beneficial to the mortgager.

And a majority of jurisdictions have followed the fact and rule of law that "the trustee is trustee for both debtor and creditor, and he must use the utmost good faith toward all, perform all duties with the strictest impartiality and look to the interest of both parties." Bennett v. Union Bank, 5 Humph (24 Tenn.) 612.; Davenport v. Vaughn, 193 N. Car. 646, 137 S.E. 714 (liable for negligence); Simpson v. Fry, 194 N. Car. 623, 140 S. E. 295; Bell v. Scranton Trust Co., 282 Pa. 562, 128 Atl. 494; Dillard v. Serpell, 138 Va. 694, 123 S.E. 343; Schroeder v. Berlin Arcade Real Estate Co., 175 Wis. 79, 184 N.W. 542; Thomsen v. Genrich, 186 Wis. 76, 202 N. W. 168. See State v. Tidball, 35 Wyo.496, 252 Pac. 499; Speers Sand & Clay Works, Inc. v. American Trust Co., 20 Fed. (2d) 333; Davenport v. Vaughn, 193 N. Car. 646, 137 S.E. 714; Schroeder v. Berlin Arcade Real Estate Co., 175 Wis, 79, 184 N.W. 542; Ainsa v. Mercantile Trust Co., 174 Cal. 504, 163 Pac. 898; Brown v. Oriental University, 44 App. D.C. 414; Central Trust Co. v. Owsley,

188 Ill App. 505; Hurst Automatic Switch & Signal Co. v Trust Co. (Mo.), 216 S.W. 954; Hinton v. Pritchard, 120 N. Car. 1, 26 S.E. 627, 58 Am. St. 768; Bell v. Scranton Trust Co., 282 Pa, 562, 128 Atl. 494; Hartman v. Evans, 38 W. Va. 669, 18 S.E. 810.

Some Courts and authorities have even gone further and have declared that:

> Courts of equity, bacause of the possibility of abuse in this form of foreclosure, jealously watch the sales and are inclined to set them aside on slight proof of unfair conduct.

Thompson on Real Property, supra, at page 230; Py v. Pleitner, 70 Cal. App. 2d. 28, 161 P. 2d 393; Reisenberger v. Hankins, Tex. C.V. App. 258 S.W. 904.

The Petitioners respectfully submit that the actions of the Trustee in advertising the property for sale in one manner and then selling it in another, was unfair and detrimental to the Petitioners herein inasmuch as it discouraged attendance and bids at the sale. This is contrary to law, as cited above, and as a matter of law, the Respondent, Midvalley Investment, could not recover a summary judgment, based upon the actions of the Trustee.

Petitioners respectfully request that the Summary Judgment be set aside and the property be re-noticed up and resold with the Trustee ordered to accept all bids so as to obtain the best possible price for the property.

POINT IV

THE ALLEGED SALE HELD ON JANUARY 16, 1975 WAS IMPROPER AND INEQUITABLE BECAUSE THE ACTS OF THE TRUSTEE AND BENEFICIARY COMBINED DISSUADED ATTENDANCE AT THE SALE, AND THIS LED TO AN INADEQUATE PRICE.

It is clear under 57-1-29 that the Trustor is entitled to any surplus money for the sale after costs and indebtedness has been retired.

According to the evidence before the Third District Court at the hearing on the Summary Judgment, the one property alone on 11th East was worth $70,000.00, (See last page of affidavit of Dorothy M. Anderson.) with no value being given for the other property. Petitioners' brief then had attached to it a signed appraisal from one Gerald B. Higgs, a member of the American Society of Appraisers, who indicated that the same property was worth $98,950.00. No appraisal was had on the home located at 474 East 12th Avenue, Salt Lake City,

The affidavit of Ross Broadbent indicates he purchased the property for $36,750.00. Even disregarding the value of the entire property located at 474 East 12th Avenue, it would appear from the evidence before the Third District Court that the property was sold

for approximately fifty percent of its value. When the home at 474 East 12th Avenue is considered, then the amount received was wholly insufficient and inadequate. Petitioners respectfully point out that the actions of both the Trustee and Beneficiary in advising people they had to have "cash" at the time of the sale, then not selling for "cash", then continuing the sale for 24 hours, and still refusing to advise people of this and allowing them to bid -- constitutes the type of inequity that, when combined with the inadequate price, is sufficient to have the sale set aside. That the law so holds cannot be in doubt. In Foge v. Schmidt, 226 P. 2d 73, 101 C.A. 2d 681, the court held:

> . . . but gross inadequacy of price coupled with even slight additional evidence of unfairness is sufficient to authorize setting the sale aside.

This was followed Crofoot v. Tarman, 305 P. 2d 56, 147 C.A. 2d 43:

> . . . but gross inadequacy of price in conjunction with irregularities which had the effect of conducing to the inadequacy of price or which have in some other way contributed to injury to trustor will afford such support.

And the most recent case which Petitioners have found on the subject puts it very bluntly and states:

> Trial court may set aside a trustee's sale, under deed of trust, upon grounds of fraud or unfairness.

Nevada Land and Management Co., v. Hidden Wells Ranch 435 P. 2d 198, 83 Nev. 501. The above fiat of the law is reiterated in C.J.S. Section 601 at pages 1051 and 1052 wherein a miriad of cases too numerous to review here, establish the right and power of a court to set aside a trustee's sale where there has been inadequacy of price coupled with circumstances showing unfairness.

This being the case, then how could the Respondent, Mid-valley, as a matter of law, (emphasis added) be entitled to a summary judgment.

POINT V

THE BENEFICIARY IS THE REAL PARTY IN INTEREST AND THE TRUSTEE IS HIS AGENT. BENEFICIARY MAY NOT ACT IN SUCH A WAY SO AS TO INTERFERE WITH THE SALE AND PROHIBIT BIDDING AND ATTENDANCE.

It is beyond dispute that under the terms of a trust deed, the Trustee acts upon the instructions of the beneficiary. While our statute covering trust deeds, beginning at 57-1-19 through 57-1-36, permits the Trustee to file notice of default, as a practical matter, the trustee only does this upon instructions from the beneficiary. The trustee, in his own right, never knows when and if the mortgager

is in default, as the payments to retire the indebtedness, for which the trust deed is given as security, is nearly always made to the beneficiary. Likewise, while our statutes permit the trustee to notice up the property and sell it, it is the beneficiary who instructs the trustee when to do so. Therefore, it cannot be said that the trustee acts in isolation of the beneficiary and the practical application of the business world would tend to indicate that in reality, they act in concert with the trustee acting upon the instructions of the beneficiary. This is especially true, where as in our Utah statute, the beneficiary appoints the trustee and may change him at will. Thus, in effect the trustee and beneficiary act as one and there is very little practical effect upon the regular mortgager-mortgagee relationship by the insertion of a third person called the trustee.

Thompson on Real Property (1958 Replacement) at page 35, Section 4660, has this say about this relationship:

> In a number of jurisdictions the practice is followed of having the mortgager convey to a third person as "trustee" for both the mortgager and the owner of the obligation which the trust deed secures. There is no magic in the fact that this is called a "deed". It still remains a mortgage with a power of sale but the addition of the power of sale no more changes the character of such an instrument than does a power of sale attached to any mortgage. (emphasis added)

Thus, while the statutes in Utah were evidently passed to circumvent the difficulties inherent in the judicial foreclosure and sale of a mortgage -- the trust deed is, in fact, a mortgage and the beneficiary the mortgagee. Thus, the courts have held:

> The trustee in the deed of trust is not a trustee in the ordinary sense, but a mere functionary of a limited power acting as an agent for both the lender and the borrower.

Fleisher v. Continental Auxiliary Co., 215 Cal App. 2d 136, 30 Cal Reptr 137. And again, with respect to the trustee-beneficiary relationship, a federal court has held:

> But the "trustees" in a "deed of trust" are, to a certain degree, in a fiduciary capacity with respect to the mortgager as well as the mortgagee. So, in a deed of trust, the trustees may be liable in damages to the mortgager for breach of duty caused by their too close connection to the mortgagee.

Sheridan v. Perpetual Building Assn., 322 F 2d. 418

Thus, where the trustee acts upon the instructions of the beneficiary, and the trustee is held to a strict standard of conduct by the courts, it must be that the beneficiary or mortgagee is held to the same standard.

Thompson on Real Property, supra, makes this clear at Page 228, Section 5179, when he states:

> Any act by the mortgagee which has tended to discourage bidding at the sale will invoke the protection of the equity court.
>
> Bracewell v. Colman, 191 Ea. 35, 11 S.E. (2d) 198; Williams v. Van Dam, 246 Mass, 61, 140 N.E. 265.

It is clear from the affidavit of Mrs. Dorothy M. Anderson that her sister was advised by the mortgagee, Capitol Thrift and Loan Company, that she would have to come up with the money in 20 minutes in order to bid at the sale. (See affidavit of Dorothy M. Anderson.) It is equally clear that Mr. Hill wanted to bid on the property and was told by the mortgagee, Capitol Thrift and Loan, that he could not, (See affidavit of Mr. Hill.) and this was a real estate man who thought the property on 11th East was worth $70,000.00 alone. (See brief of Dorothy M. Anderson, last page). In addition, the trustee turned down the bid of Messers Doxey and Belnap. (See affidavit of Mr. Doxey and Belnap.)

Petitioners respectfully submit that these combined actions of the trustee - mortgagee worked to effect a poor attendance at the sale and also a lower price on the bid than could otherwise have been obtained. Under the law, these actions of the trustee and mortgagee should have precluded the granting of the motion for Summary Judgment and this Court should order the property to be re-noticed and re-sold in order for a fair and equitable sale, and should set the

Summary Judgment aside.

CONCLUSION

In conclusion then, the thrust of the Petitioners' case is that they have not been dealt with fairly and a better price could have been obtained at the sale.

Their case is made up of a series of acts and omissions by the trustee and mortgagee which, when taken alone and isolated, may not be sufficient to void the sale, but when taken together, worked a gross inequity upon the Petitioners. These acts and omissions are as follows:

A) The notice requiring cash on the day of the sale.

B) Actually not receiving cash, but allowing Midvalley Investment to come in 24 hours later.

C) Trustee's refusal to entertain bids from Doxey and Belnap, just prior to accepting a check from Midvalley Investment.

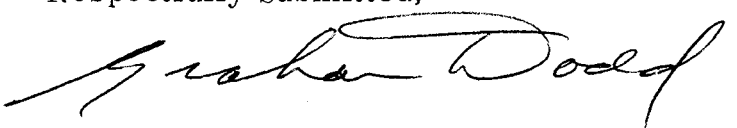
D) The inequity of the price as against the value of the property.

E) The dissuading and refusal to allow Mr. Hill to bid by mortgagee.

F) The insistance by mortgagee that Mrs. Anderson's sister get the money in 20 minutes in order to bid.

It is respectfully submitted that these acts, taken as a whole, worked an inequity upon the Petitioners. An inequity so great as to require the intervention of this Court to set aside the Summary Judgment heretofore granted, and to order that the property be re-noticed up and re-sold at a public sale so that a fairer value may be obtained for it.

Respectfully Submitted,



Graham Dodd
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 1975, I personally served copies of the Petitioners' foregoing Brief upon attorneys for Respondents, Ralph R. Mabey and Robert D. Merrill, by leaving copies of the same at their respective offices.