

1986

George S. Perkins and Lillie Perkins v. Interlake Thrift, a Utah corporation, et al. : Reply Brief

Utah Court of Appeals

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DOCKET NO. 860306-CA IN THE SUPREME COURT OF THE STATE OF UTAH

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District Court No. C82-6009

860306-CA

APPEAL FROM BENCH TRIAL IN
SALT LAKE COUNTY DISTRICT COURT
JUDGE PHILIP R. FISHLER

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DEC 9 1985

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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.

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE S. PERKINS and)	
LILLIE PERKINS,)	
)	
Plaintiffs and)	
Appellants.)	
vs.)	Supreme Court No. 20642
)	
INTERLAKE THRIFT, a Utah)	District Court No. C82-6009
corporation, et al.)	
)	
Defendants and)	
Respondents.)	

APPELLANTS' REPLY BRIEF

APPEAL FROM BENCH TRIAL IN
SALT LAKE COUNTY DISTRICT COURT
JUDGE PHILIP R. FISHLER

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TABLE OF CONTENTS

	<u>Page</u>
Table of Contents.....	i
Table of Authorities.....	ii
Introductory Statement.....	1
Argument	
Point I. Clarification of Statement of Facts	2
Point II. Kemp May Be Controlling, But Interlake's Analogy is Unfounded	7
Point III. Terms of Earnest Money's Conditional Subordination Not Vague or Surplusage	8
Point V. Mitigation of Damages	11
Conclusion.....	13
Mailing Certificate.....	14

TABLE OF AUTHORITIES

<u>Cases Cited:</u>	<u>Pages</u>
<u>Kemp v. Zion's First Nat'l Bank</u> ,.....	7 - 8
24 Utah 2d 288, 740 P.2d 390 (1970)	
<u>Troj v. Chesebro</u> , 30 Conn. Supp. 30.....	11
296 A.2d 685 (1972)	

INTRODUCTORY STATEMENT

Appellant wishes to bring to the attention of the court vital discrepancies in facts as stated by Appellant's Brief and by Respondent's Brief.

Respondent chose not to respond to the Statement of Facts in Appellant's Brief. Rather, respondent wrote its own Statement of Facts with no reference to Appellant's Brief. Rule 75(p)(2), Utah Rules of Civil Procedure required that the Respondent's Brief in stating facts must address itself specifically to the Appellant's Brief and, if it disagreed with the facts stated in such brief, to specify the facts disagreed with, the basis of the disagreement, and precise citations from the transcript to rebut the Appellant's statement and to support the Respondent's.

Rule 75(p)(2) was repealed when the Utah Rules of Appellate Procedure were enacted. It would seem to have been replaced by the requirement of Rule 40(a) of URAP that the attorney's signature to a pleading before the Utah Supreme Court constitutes a certificate that the attorney's pleading is well founded in fact and law, is a good faith argument, and is not interposed for any improper purpose.

In this case the loss of 75(p)(2), URCP is felt. Instead of having the two briefs directly relate to each other in regard to the facts, there is no such confrontation so as to guide the court as to who has accurately stated the facts, because Respondent's Brief, in its Statement of Facts, simply

ignores Appellant's Brief.

This leaves the reviewing court with the burden of independently checking the transcript to determine whose Statement of Facts is accurate.

This Brief is intended to assist in that determination.

ARGUMENT

POINT I

CLARIFICATION OF STATEMENT OF FACTS

PHASE I

Appellants (Perkins) take the position that if in their Statement of Facts they alleged certain facts, supported by citations to the Record, and Respondent (Interlake) neither admits nor denies those facts, but simply ignores them, that the facts are deemed admitted, as this conforms to the general rule of pleadings, Utah Rules of Civil Procedure, Rule 8(d).

The basis for this assumption of Appellant, is that if Appellant had stated facts inaccurately, not supported by the Record, the Respondent would have rebutted the misstatements. Lacking rebuttal to such specific, documented facts, they should retain standing as being uncontested.

Certain factual matters need to be addressed for clarification. Three will be reviewed in this Point, and another in Point III.

1. Interlake's Knowledge, or Lack Thereof, that Perkins were Retaining An Interest in the Property.

Interlake states repeatedly in its Brief that it had no actual, nor constructive, notice of Perkins' retained interest. Interlake states in its Respondent's Brief at Point III: "The lender received no actual or constructive notice of seller's retained interests."

This Point states in part "... no information was given to the lender (Interlake) as to the subsequent retained interest by the seller in the property by any of the parties or fiduciaries involved...There was nothing to alert the lender of any subsequent retained interest in the property by the seller." (Respondent's Brief, P. 22-23)

These statements by Interlake are not factually accurate. Rather, Interlake had an indifference to Perkins' retained interest as Mr. Adams testified (R 1331, L4-7) in an apparent attempt to insure itself of a first position regardless of the Perkins' interest. Mr. Adams, who handled all transactions for Interlake as its branch manager, testified on this point. He tacitly admitted that he knew Perkins had a retained sellers' interest to which he was indifferent.

"Q. And you wanted all of this to constitute a lien standing ahead of the Perkins?"

A. Yes, that's true.

Q. And you never considered whether Perkins would agree to be second to those amounts or interest rates?

A. I never considered whether anyone would. My specific instructions were to be solely in a first position with no other liens or encumbrances in front of us."

(R. 1039, L. 10-25) [Emphasis added]

Nor did Mr. Adams, Interlake's manager, specifically deny that he did have actual knowledge of Perkins' retained interest:

"Q. Mr. Adams, tell me again when it was that you first found out about the second mortgage position of the Perkins'?"

A. To my knowledge, it was approximately October of 1981.

Q. Are you absolutely certain that Mr. Coombs did not inform you about that prior to October?

A. He could have possibly mentioned it at the time of the initial loan. I truthfully cannot remember. And if he-- and if he had, it is of no consequence to me at that time anyway.

Q. But you are not suggesting that he didn't inform you; is that correct?

A. No. I'm not saying that he didn't. I don't recall that he did."

(R. 1329, L. 7-21) [Emphasis added.]

Perkins believe that the question of Interlake's knowledge of Perkins' retained interest is in dispute. The trial court made no specific finding as to Interlake's knowledge, actual or constructive. Perkins believe that the facts and the law applied to the facts show that Interlake had at least a constructive knowledge of Perkins' retained interest. Although not determinative of the issue of priority, Perkins believe this point to be important in determining the allocation of duties between the parties involved.

2. Interlake's Representation That The Recording of the Documents Followed the Intent of the Parties.

Interlake asserts that the recording of the Trust Deeds involved, Interlake's first, Perkins' second, "... followed the intent of the parties" (Respondent's Brief, P. 14, Section (d)). This is apparently part of Interlake's continuing efforts to blind itself to integral portions of Perkins' Earnest Money Agreement regarding the limitations which would apply to a loan to which they would agree to subordinate. It is curious how Interlake can assert that this particular sequence of recording was its intent when it also states: "Lender was not aware of the ... fact that Buyer intended to grant Seller a second trust deed." (Interlake's Brief, P. 7, Section 5).

3. Alleged Insignificance and Immateriality of Differences Between Interlake's Loan and Authorization of Earnest Money.

From Interlake's incomplete statement of the provision of the Earnest Money Agreement (Respondent's Statement of Facts, paragraph 13), to its suggestion that CIC's actual loan did not have material or substantial differences from the earnest money terms (Respondent's Brief, P. 25), Interlake ignores the complete language of the earnest money document and infers that the only real term was that Perkins would subordinate to the lender. This is contrary to the trial court's specific findings that Perkins had agreed to subordinate to a loan of approximately \$17,000 at 14% interest (Findings of Facts, Section 3, Perkins' Brief, Addendum 1, p. 4), and that the loan Interlake made to CIC "was not approximately \$17,000 at 14% interest." (Findings of Fact, Section 12, p. 5).

It is also in contradiction of the only expert testimony offered, that by Rodney Pipella, in-house counsel for Security Title Company. Mr. Pipella testified that an interest rate difference of 4% is significant and not approximately the same (Pipella testimony, R. 1122, L. 14-16), and that a loan for \$20,000 is a significant variation to the "approximately \$17,000" as in Perkins' Earnest Money Agreement (Pipella testimony, R. 1195, L. 2-11).

PHASE II

The discrepancies in fact between Appellant's and Respondent's Brief are sufficiently clear cut in the original Briefs that response here is not needed.

II. KEMP MAY BE CONTROLLING, BUT INTERLAKE'S ANALOGY IS UNFOUNDED

Interlake's excerpting a portion of the Kemp v. Zion's First Nat'l Bank, 24 Utah 2d 288, 470 P.2d 390 (1970) opinion and highlighting various phrases therein is an excellent illustration of one "failing to see the forest for the trees."

Interlake attempts to identify isolated factual similarities between Kemp and the instant case in an effort to persuade the court that the total factual circumstances of this action warrants the court's abandonment of the general rule of purchase money vendor priority, as was found in Kemp. Interlake attempts to clothe itself in the role of the bank in Kemp by attempting to draw parallels between specific facts in Kemp with facts in the instant action. The parallels are illusory at best.

Numerous factual distinctions between Kemp and this case were addressed in Perkins' Appellants' Brief, however, a few points made in Respondent's Brief should be addressed.

For example, Interlake makes much of the similarity of an unrestricted warranty deed from the sellers which was relied on by the lenders. A closer look at the two situations shows the importance of the timing of the transactions plays in the

analysis. In Kemp, sellers conveyed their property to buyers by an unrestricted warranty deed, failed to record their own trust deed which would have given notice, and subsequently negotiated with the lender the terms of the buyer's loan without disclosing their interest. In the instant action, Interlake had negotiated its loan with CIC prior to Perkins having executed any warranty deed, which was executed contemporaneously with their vendor's trust deed and both were immediately recorded. No notice could be given from this, a major difference from Kemp. It is inconceivable how Interlake, which eagerly seeks to convince the court of its complete ignorance of any terms of the agreement between Perkins and CIC, could have placed reliance upon documents not yet in existence.

Further, although the sellers in Kemp accepted proceeds directly from the lender after involvement in negotiating buyers' loan, Perkins merely received funds at the closing which conformed to the expectations under the Earnest Money Agreement, and had no contact with Interlake whatsoever, let alone participate in the loan negotiations.

POINT III.

TERMS OF EARNEST MONEY'S CONDITIONAL

SUBORDINATION NOT VAGUE OR MERE SURPLUSAGE

In its Brief (P. 24-26, Point 5), Interlake appears to

suggest that the court should affirm the trial court's ruling either because the differences between the loan made to CIC and that authorized in the earnest money were insignificant and immaterial, or that the terms in the earnest money were vague or overly broad and unenforceable.

The court found that the Perkins had agreed to subordinate to a loan of approximately \$17,000 at 14% interest (Findings of Fact, Section 12, Perkins' Brief, Addendum 1, p. 6), and that the actual loan of \$20,700+ at 18% interest was not approximately \$17,000 at 14% interest. The length of the loan CIC could take was not spelled out in the earnest money. Based on this, Judge Fishler found:

"14. The Earnest Money Agreement of September 25, 1980, was vague with no definite terms and conditions so as to compute an exact amount of the Subordination Agreement. Mr. and Mrs. Perkins had a duty to clarify those terms as the Earnest Money Agreement of September 25, 1980, was used as the escrow instructions for the Perkins to the title company to prepare the closing papers. In addition, Mr. and Mrs. Perkins had a duty to speak up and to clarify those areas where they may have had any question or concern. They failed to inquire as to the terms and conditions at the closing, in light of the fact that the amount of the subordination had not been fully agreed upon."

(Findings of Fact, paragraph 14, Addendum I, Appellants' Brief.)

In this, Perkins believe, Judge Fishler erred. None of the experts at the closing, including Mr. Williams, commented

on the unknown term of the CIC loan. A reasonable period was assumed and that particular term has never been a point of dispute.

In regard to the Earnest Money Agreement's language of "approximately \$17,000 at 14%," this does not constitute vagueness.

The evidence before the court established that this type of language in earnest money agreements was quite a common practice. Expert witness Rodney Pipella, in-house counsel for Security Title Company, indicated that in his experience in closing real estate transactions, he would "constantly" have occasions where such language as "apprximately \$17,000 at 14%" was used to describe loan authorizations. (Pipella testimony, R. 1108, L. 11-15), and that this is used for people to estimate the amount of the debt burden that they are willing to subordinate to. (Pipella testimony, R. 1107, L. 19-24). Mr. Paul Scott, CIC's real estate agent, further testified that the language in the earnest money was to place a limitation on the loan CIC could obtain that Perkins would subordinate to (Scott testimony, R. 1235, L. 1235 ?, L 16-20; R. 1236, L. 18-22) and that "approximately" would mean less than a \$1,000 variance (Scott testimony, R. 1266, L. 16-18; R. 1272, L. 20-21).

Nor can it be argued that the language used, "approximately \$17,000 at 14% interest," in any way effected the actions of Interlake in making its loan to CIC, for it

repeatedly insists that it made its loan to CIC without any knowledge of what CIC's agreement was with the Perkins.

Interlake's suggestion that Perkins, by their Earnest Money Agreement actually consented to subordinate to any loan obtained by CIC is, therefore, seen as contrary to the court's specific ruling that \$17,000 at 14% is not \$20,700 at 24% (Findings of Fact, Section 12). As a point of interest, the case of Troj v. Chesebro, Conn., 269 A.2d 685 (1972), which Interlake alleges does not support Perkins' position herein (see Respondent's Brief, P. 22), stands for the proposition that a real estate sales agreement is unenforceable under the statute of frauds where it merely provides for the seller to subordinate to development and construction mortgages, without specifying terms of limitation on those mortgages. That is, a vague, incomplete, loan authorization is not a basis for a lender to obtain priority over the seller.

POINT IV.

MITIGATION OF DAMAGES

At page 27 of Interlake's Brief it argues "Seller had a duty to mitigate his damages in the foreclosure of the Trust Deed of November 27, 1981."

The argument of Interlake is based on a ruling made by the trial court that Perkins were limited in their damages because they had failed to mitigate them by bidding in and buying the home back after Coombs defaulted. (Findings of Fact, Phase II, Section 12, Perkins' Brief, Addendum II, Page 6)

In his Bench Ruling on this point the trial court stated:

"The Court: One other thing. The court is going to allow an amendment to the pleadings in the case the court just ruled upon, and that's on the issue of mitigation of damages.

Mr. Hunt did not plead mitigation of damages, but it's readily apparent to the court that the mitigation of damages is an affirmative defense must be plead. And it has not been plead, but the court on its own motion is going to amend the pleadings. Because the evidence is, had the Perkins come in after the second default, and redeemed their property, they could have mitigated their damages totally."

R. 982, L. 3-4.

Perkins have addressed the question of mitigation in its Appellant's Brief, pp. 49-51. However, Perkins believe it was particularly improper in light of the agreement made between counsel as to the disposition of the property.

Interlake and Perkins, through their attorneys, made an agreement, when Coombs had defaulted, that Interlake would sell the property and hold the proceeds in Trust until a decision by the court was made as to which party, Interlake or Perkins was entitled to the basic priority. Based on that agreement Perkins filed a release of their lis pendens.

At the time of the ruling of Judge Fishler, the Perkins' attorney brought to the attention of the trial court that this arrangement existed (R 984, L 7-16) and in all candor, Mr. Hunt acknowledged that the agreement existed (R 987, L 1-6).

In addition, Mr. Adams in his testimony had acknowledged that Perkins and Interlake had an agreement that Perkins would allow Interlake to sell the property, subject to the ultimate judicial disposition of the sale proceeds (R. 1382, L. 4- R. 1383, L. 6).

It is perhaps because of this agreement between the parties that Interlake did not plead nor pursue the issue of mitigation.

Appellant's complaint now is that Interlake, having agreed that it had made the arrangement cannot now properly take advantage of the trial court's erroneous ruling, and pursue this as being a ground for limitation of Perkins' damages on appeal. That is, Interlake made the agreement that it would sell the property and be good for the money if Perkins prevailed. Perkins relied on that agreement, withdrew its lis pendens and let Interlake sell, and now Interlake takes advantage of the trial court's error to breach its agreement with Perkins.

CONCLUSION

In Phase I, Perkins believe the trial court came to erroneous conclusions of law as to the determination of priority between Perkins and Interlake. Although there are various side issues involved, such as whether Interlake had knowledge of Perkins' retained interest, it is clear that the trial court's ruling is pegged to the imposition of a duty upon

the Perkins to verify that the loan actually obtained by CIC conformed to the restrictions of the Earnest Money Agreement. Perkins believe that the trial court erred on that point, and that the facts, and law applied to those facts, demand a reversal of the trial court and entry of judgment in favor of the Perkins.

In Phase II, Perkins believe the trial court erred in its calculation of damages, and abused its discretion in failing to award punitive damages.

DATED December 9, 1985.

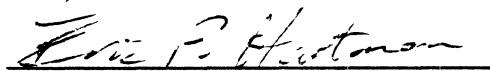
Respectfully submitted,



ERIC P. HARTMAN

MAILING CERTIFICATE

I certify I mailed four copies of the foregoing Reply Brief to Hollis Hunt, attorney for defendant/respondent, 243 East 4th South, Suite 200, Salt Lake City, Utah 84111, U. S. mail, postage prepaid, December 10, 1985.



Eric P. Hartman