

1977

State Bank of Lehi v. Ralph O. Woolsey and Sylvia W. Woolsey : Brief of Plaintiff-Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE BANK OF LEHI,
a Utah corporation,

Plaintiff and
Respondent,

Case No. 14,719

vs.

RALPH O. WOOLSEY and
SYLVIA W. WOOLSEY,

Defendants and
Appellants.

BRIEF OF PLAINTIFF-RESPONDENT

APPEAL FROM A JUDGMENT BY THE FOURTH JUDICIAL
DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH
HONORABLE J. ROBERT BULLOCK, JUDGE

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Appellants

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BRIEF OF PLAINTIFF-RESPONDENT

NATURE OF THE CASE

This is a foreclosure action upon both real and personal property, the property consisting of an operating mink ranch located near Lehi, Utah, and an assignment of a Real Estate Contract upon the home of the defendant, Sylvia W. Woolsey. The trial court properly held that the three promissory notes totaling some \$160,000.00 were due and owing and ordered the appointment of a receiver in view of evidence that the mink were being neglected and that approximately \$25,000.00 in mink skins had been stolen. The trial court ordered the sale of the security and since the Appellants did not post a Superdeseas Bond, the property has been sold with a substantial deficiency resulting.

DISPOSITION IN THE LOWER COURT

The trial court awarded judgment to the Respondent foreclosing the security interests with the subsequent sale resulting pursuant to Foreclosure Decree.

RELIEF SOUGHT ON APPEAL

Respondent seeks to sustain the trial court's judgment as entered.

STATEMENT OF FACTS

The Respondent, State Bank of Lehi, had financed a mink operation near Lehi, Utah, for several years during which time the loan had increased considerably. In 1975 the bank, once again, refinanced the

Appellants with the understanding that additional financing would not be forthcoming and that they must live within their outlined budget, and required additional security consisting of the assignment of a Real Estate Contract on Mrs. Woolsey's home in Provo, Utah.

In December of 1975, the Appellants had been advanced all of the money pursuant to the three notes in question, had incurred an overdraft of approximately \$1,000.00, and at approximately the same time advised the bank that some 981 mink pelts had been stolen from his ranch. In addition, bank authorities observed the mink operation being neglected and, after consulting with counsel, the board of directors determined that the Appellants could not obtain outside financing, and that immediate action was necessary to preserve their collateral.

On January 2, 1976, a receiver was appointed who continued to operate the ranch until the sale of the security was conducted on the 13th day of October, 1976, resulting in a sizeable deficiency.

ARGUMENT ON APPEAL

The Respondent argued that the trial court acted within its discretion in trying this matter without a jury in view of such foreclosure action being an equitable suit and, further, that the court entertained all testimony regarding the documents in question but, further, that no fraud was involved and, therefor, struck testimony violating the parole evidence rule. Such action upon the part of the trial court was well within its discretion and did not constitute error. Respondent believes that the record shows overwhelming evidence to support the Findings, Conclusions and Judgment of Foreclosure.

POINT I

THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT'S
MOTION TO STRIKE DEMAND FOR JURY TRIAL.

This action was for the purpose of foreclosing upon three
(3) promissory notes secured by assignments of contract (Exhibits 12
and 13), and security agreement (Exhibit 15). Originally the Appellants
had requested a jury trial and, subsequent thereto, the Respondent filed
a motion to strike which was granted by Judge Bullock after the filing
of legal memoranda and oral argument. The Order striking the jury stated:

"This Order is based upon the finding by this Court that the
issues to be decided are largely equitable and arise from
an interpretation of written contracts and therefore the
defendants are not entitled to a jury trial."

In Norback v. Board of Directors of Church Extension Soc.,
84 Utah 506, 37 P. 2d 339 P. 345 (1934), this Court stated:

"If the issues are legal or the major issue legal, either
party is entitled upon proper demand to a jury trial; but if
the issues are equitable or the major issues to be resolved
by an application of equity, the legal issues being merely
subsidiary, the action should be regarded as equitable and
the rules of equity apply."

The basic question, therefore, is whether the major issues are
legal or equitable. This court has offered some guidance in the res-
olution of this question in the case of Sweeney v. Happy Valley, Inc.,
18 Utah 2d 113, 417 P. 2d 126 P. 128-129 (1966), wherein the court
stated:

"In circumstances where doubt exists as to whether the cause
should be regarded as one in equity, or one in law wherein
the party can insist on a jury as a matter of right, the
trial court should have some latitude of discretion. In
making that determination it is not bound by the ostensible
form of the action, nor by the particular wording of the
pleadings. It may examine into the nature of the rights
asserted and the remedies sought in the light of the facts
of the case to ascertain which predominates; and from that

determination make the appropriate order as to a jury or non-jury trial. The fact that the division of court hearing the pre-trial indicates that the case is set for a trial by jury is entitled to some consideration and should not be countermanded without good reason. Nevertheless it is the prerogative of the judge who actually tries the case to make the determination. Unless it is shown that the ruling was patently in error or an abuse of discretion, this court will not interfere with the ruling thereon."

The Appellants have attempted to show that the major issues were legal rather than equitable since the trial court's Findings of Fact numerically outnumbered the Conclusions of Law. This is clearly insufficient to show a patent abuse of discretion as required by the Sweeny case, supra. It is true that once a jury trial is found to be proper, issues of fact are for the jury. But the existence of issues of fact does not warrant a conclusion that the Appellants therefore had a right to a jury trial. Before a trial may be had to a jury there must be some legal issue. In Petty v. Clark, 102 Utah, 129 P 2d 568 (1942), a jury was allowed to decide the one legal issue of whether a clause was contained in the instrument at the time it was delivered. In Holland v. Wilson, 8 Utah 2d 11, 327 P. 2d 250 (1958), this court reaffirmed its view in Norback, supra, that if there are subsidiary legal issues in an equitable action the rules of equity would apply. This would appear to restrict somewhat the allowance in Petty v. Clark, supra, of the jury to try one legal issue when the major issues were equitable.

According to 55 Am. Jur. 2d Mortgages §588,

"Since a foreclosure suit is a suit in equity, there is in most jurisdictions no right to a jury trial, unless granted by constitutional or statutory provision, even though a personal judgment or decree for any deficiency remaining after application of the proceeds is sought."

Even in cases in which jury trial is allowed the legal effect to written instruments is to be determined by the court. In the case of Verdi v. Helper State Bank, 57 Utah 564, 196 P. 225 P. 228 (1921), this court stated:

"It is manifest that the court erred in submitting proposition "a" to a jury. In doing that the court required the jury to do what clearly the law requires of the court. The legal effect of written instruments is necessarily a question of law, and hence is one that must be determined by the court. To that rule there is no exception, not even in cases where the facts respecting the terms of the written instruments are in dispute, which arise sometimes where the written instruments have been lost. In the latter class of cases the jury may find what the terms of the instruments were, but the court must, nevertheless, determine the legal effect of the instruments when the terms are found and determined."

In addition, the question of whether the writing is completely integrated is also for the court. In 75 Am. Jur.2d Trial §410, it is stated that:

"The question whether a writing is, upon its face, a complete expression of the agreement of the parties is one for the court, and subject to qualifications where the contract is uncertain and ambiguous, particularly where extrinsic evidence has been introduced of surrounding facts and circumstances bearing upon intention of the parties, the general rule is that where a contract has been reduced to writing, its interpretation, construction, or legal effect is for the court and not for the jury. This is true whether the written agreement is expressed in one document or in several, provided the writings express the complete agreement of the parties and the language used is clear, plain, certain, undisputed, unambiguous, unequivocal, and not subject to conflicting inferences, or where the only doubt as to its meaning arises from the language the parties used, and not from extrinsic matters. In other words, where a clear meaning can be ascertained without resort to extrinsic facts, the interpretation of a writing is for the court. This rule is as applicable to commercial correspondence as to a formal written contract. Thus, the scope and effect of a contract which depends wholly upon written correspondence, and not upon extrinsic circumstances, are to be determined by the court. Whether terms of art were used in their ordinary meaning or not, in a contract between men familiar with

the business to which the terms relate, cannot be left to the jury, although they may determine the meaning of the terms in that business. The court cannot devolve its duty of construing written instruments upon the jury merely because its performance involves possible difficulty."

The major issues in the case at bar were equitable and, therefore those issues, as well as subsidiary legal issues, were rightfully tried without a jury. Since the major issues revolved around the effect to be given the terms of a written contract, there would be little for a jury to decide, even if it were an action at law. Since the foreclosure is a suit in equity there is no jury allowed no matter how many issues of fact there are. Since the Appellants have failed to show that the trial court's Order granting Respondent's motion to strike demand for jury trial was a patent error or abuse of discretion, such Order should be upheld.

POINT II

THE TRIAL COURT DID NOT ERR IN HOLDING THAT THERE WAS NO EXTENSION OF THE DUE DATE OF THE \$115,000 NOTE.

It is generally held that an agreement to extend a due date of a note must possess all of the traditional requirements of any contract. In the landmark case in this area, Tsesmelis v. Sinton State Bank, 53 S.W. 2d 461 P. 462, 85 A.L.R. 319 (Tex. 1932), the court stated:

"To support a contention that the payment of a negotiable instrument has been extended, there must exist all the elements essential to the execution of a contract, and the agreement for the extension must be for a definite time and mutually bind the parties, payor and payee, the one to forbear suit during the time of extension, and the other his right to pay the debt before the end of that time."

In order for the consideration to be sufficient, the creditor

must secure, by reason of the extension, something which he could not otherwise demand. In the case at bar, since the original note of \$115,000.00 was secured by all present and all future animals, no additional benefit was given to the creditor by way of the July 3, 1975 Security Agreement. Any collateral added by the July 3, 1975 Security Agreement was to secure the loan of an additional \$50,000.00 to the Appellants. A predominant authority on contracts offered the following in regard to the sufficiency of consideration for an extension of a due date of a promissory note:

"If, however, the debtor neither promises to refrain from paying the debt until a fixed day in the future, nor to pay interest until that time whether the debt is paid or not, there is no consideration to support the creditor's promise to extend the time of payment." 1 Williston on Contracts §122.

In addition to the lack of consideration, the alleged extension agreement in the case at bar lacked mutuality. In the case of Keefer v. Valentine, 199 Iowa 1337, 203 N.W. 787 (1925), there was not an extension of the due date since the debtor "still had a right to pay the note at any time." Also, in Tolbert v. McSwain, 137 S.W. 2d 1051 (Tex. Civ. App. 1939), the court said, "During the period of the extension provided for the maker cannot have the right to make payment."

Since there was no consideration for the alleged extension agreement, and since there was no showing by the Appellants that he had promised not to pay the note during the period of the alleged extension, there was, as a matter of law, no agreement for the extension of the due date on the \$115,000.00 note. The trial court was therefore right in finding that the \$115,000.00 note was in default at the time this suit was instituted.

POINT III

THE TRIAL COURT DID NOT ERR IN HOLDING ALL THREE NOTES TO BE DUE AND OWING IN THAT THE APPELLANTS DID NOT ESTABLISH LACK OF GOOD FAITH ON THE PART OF THE RESPONDENT IN DECLARING THE NOTES DUE.

Paragraph 8 of the Security Agreement dated July 3, 1975, states the grounds upon which the notes may be declared to be in default.

Subparagraph (1) provides as a ground for declaration of default that, "Debtor fails to pay any of the Obligations when due." Since the \$115,000.00 note was overdue as of February 20, 1975, and since there was no extension of the due date, as amply shown in the previous Point, it is clear that the \$115,000.00 note was due and owing on January 2, 1976, the date the other two notes were declared due and owing.

Subparagraph (4) allows for a declaration of default when the, "Debtor becomes insolvent or unable to pay debts as they mature." It was admitted on page 16 of the Appellant's brief that the Appellants were insolvent on January 2, 1976. In addition, Calvin H. Swenson testified, on page 79 of his deposition, that there had been an overdraft of over \$1,000.00 on an overdue feed bill. On page 80 of his deposition, Mr. Swenson also testified that the bank had to pay feed and supply bills totalling approximately \$10,000.00 in order to keep the mink from becoming worthless and unmarketable.

The third ground upon which the Respondent relied in declaring the notes to be in default was under Subparagraph (10) which states that the debtor shall be in default if "any collateral is lost, stolen or materially damaged. Appellants admitted that some 968 mink pelts were

stolen in late December of 1975, shortly before the bank declared the notes due on January 2, 1976. Subparagraph (10) was not conditional upon a lack of insurance, but stated that any theft or loss would cause the notes to be in default. The Appellants should not now be heard to object to this ground for default since he voluntarily signed the Security Agreement.

The fourth ground for default is Subparagraph (11) which states that the debtor shall be in default if the "Bank shall deem itself insecure for any reason whatsoever." This Subparagraph is subject to Section 70A-1-208, Utah Code Annotated, which provides:

"A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral 'at will' or 'when he deems himself insecure' or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised."

This Court recently construed this statute in the case of Williamson v. Wanlass, 545 P. 2d 1145 (Utah 1976), cited by Appellants, but this case is readily distinguishable. Respondent was clearly justified in believing that the prospect of payment was impaired. Following is a list of various admitted actions of the Appellants which show the Respondent acted in good faith:

1. The threat of suicide on the part of Appellant, Ralph O. Woolsey. (See Testimony of Ralph O. Woolsey, R. 358, lines 1-6; and Testimony of Calvin H. Swenson, R. 300, lines 3-4 and R. 308, lines 1-7);
2. Judgments outstanding against Appellants (See Testimony of Calvin H. Swenson, R. 319, lines 10-22);

3. The neglect of the animals (See Testimony of Calvin H. Swenson, R. 301, lines 1-2, and Testimony of Berl Peterson, R. 486, lines 2-8);

4. The divorces of Appellant, Ralph O. Woolsey, and other marital problems. (See Testimony of Ralph O. Woolsey, R. 358, lines 1-2 and R. 407, lines 23-26); and

5. Appellant Ralph O. Woolsey's conviction for drunk driving during the month preceding the institution of this suit. (See Testimony of Ralph O. Woolsey, R. 407, line 27 through R. 409, line 2).

The foregoing conditions were clearly sufficient to justify the Respondent, through its president Calvin H. Swenson, in having a good faith belief that the prospect of payment was impaired. The Appellants in an attempt to fulfill their burden of showing a lack of good faith, have pointed to a number of Respondent's actions which they consider inequitable. The first of these is that the Respondent made no demand for payment. It is stated in 55 Am. Jur 2d, Mortgages §555:

"The general rule, in the absence of a statute or mortgage stipulation so providing, is that it is not essential that a demand for payment be made before commencement of an action for foreclosure of a mortgage. ... Clearly, where a mortgagor is insolvent, and has no funds at the place of payment, demand there, prior to foreclosure, is unnecessary."

That treatise cites Shaw v. Bill, 95 U.S. 10, 24 L. Ed. 333 (1877); Metropolitan State Bank v. Wright, 72 Colo. 106, 209 P. 804 (1921) and 147 A.L.R. 1109 as support for the preceding statements. In the case of Williamson v. Wanlass, supra, the attorney for the plaintiffs had stated that the plaintiffs might accelerate if they became aggravated.

This Court then stated:

"The question arises as to how the defendants would know that condition came about unless someone so advised them. It is generally true that if there is a condition to be fulfilled, of which one party would be aware and the other would not, it is regarded as fair and proper that the one who knows should be obliged to notify the other party affected thereby, and give him a reasonable opportunity to react thereto. "

This stands for the proposition that notice should be given of conditions such as aggravation prior to the acceleration of the notes. It does not stand for the proposition that a party be obligated to tell the other party that it is in default when the party already knows that it is in default. It is clear that the Respondent acted properly in accelerating without making a demand for payment upon the Appellant. In light of the Respondent's knowledge of Appellant's insolvency and inability to obtain outside financing, such demand would be useless. At any rate, the Respondent's failure to make demand of the Appellant is not a showing that the Respondent lacked a good faith belief that the prospect of payment had been impaired. Indeed, Appellant makes no effort to show that the prospect of payment was even existent, other than Appellant's friendship with someone who might have loaned Appellant some money in the future. It remains that at the time the suit was instituted the prospect of payment was at best dismal. In the *Williamson* case, supra, this Court found a lack of good faith belief that the prospect of payment was impaired. The Court there stated:

"There was no such showing made in this case. From the fact that the plaintiffs had a second mortgage on this extensive property, there can be little doubt that the note would be paid, principal and interest."

The case at bar can be distinguished on the facts from the *Williamson* case. In *Williamson*, the defendants had been consistently late with payments, but payments were always made and accepted. Here

the debt had consistently grown larger with only occasional payments on the principal. In Williamson, the plaintiffs had no good reason to suspect that payments were not forthcoming. In the case at bar, the prospect of payment was in serious doubt.

The Appellant has also stated that it was a lack of good faith for Respondent to accelerate the debt without giving notice of the acceleration to the Appellant. However, many cases have held that notice of acceleration is not required in the absence of a specific provision therefor in the mortgage. See S. D. Walker, Inc. v. Brigantine Beach Hotel Corp., 44 N.J. Super. 193, 129 A. 2d 758 (1957); Thomas v. Foulger, 71 Utah 274, 264 P. 975 (1928); Jacobson v. McClanahan, 43 Wash. 2d 751, 264 P. 2d 253 (1953); and Julien v. Model Bldg. Loan & Invest. Asso., 116 Wis. 79, 92 N.W. 561 (1902). In addition, according to 55 Am. Jur. 2d, Mortgages §387,

"It is generally held that the institution of a suit to foreclose a mortgage is notice of the most unequivocal character that the mortgagee wishes to avail himself of his option for acceleration."

The following cases are cited as authority for this view:

Clark v. Paddock, 24 Idaho 142, 132 P. 795 (1913); Swearingen v. Lahner, 93 Iowa 147, 61 N.W. 431 (1894); S. D. Walker, Inc. v. Brigantine Beach Hotel Corp., *supra*; Hawes v. Detroit F & M Ins. Co., 109 Mich. 324, 67 N.W. 329 (1896); National Life Ins. Co. v. Butler, 61 Neb. 449, 85 N.W. 437 (1901); and Damet v. Aetna Life Ins. Co., 72 Okla. 122, 179 P. 760

Since the notes were in default under four different Subparagraphs of Paragraph 8 of the Security Agreement, and since the Appellants have not fulfilled their burden of showing any lack of good faith in declaring the notes due, the decision of the trial court concerning these issues should be upheld.

POINT IV

THAT CONTRARY TO THE ASSERTIONS OF THE APPELLANTS THE COURT DID NOT STRIKE TESTIMONY FROM THE RECORD CONCERNING THE SECURITY AGREEMENT ASSIGNING MRS. WOOLSEY'S INTEREST IN PROPERTY IN PROVO.

That contrary to the assertions of the Appellants the Respondent can find nothing in the record indicating that the court did not consider all evidence surrounding the assignment of Mrs. Woolsey's interest in her residence in Provo, Utah.

On P 209 R. 461 is the only reference to excluding such testimony. This shows as follows:

MR. IVINS: "Your Honor, for the record, I would like to interpose an objection to this testimony on the grounds that Mrs. Woolsey is attempting to alter the terms of this written document by parol evidence."

THE COURT: "Okay, I'm going to take that motion under advisement. I'll let you proceed, and it will be considered in the nature of a proffer of proof, that at some time I'll rule whether or not that is the case. Go ahead."

Following this exchange with the court all testimony relating to the obtaining of Mrs. Woolsey's security was introduced and the court did not, at any time, indicate that any testimony had been stricken and the court found that there was no evidence to justify a finding of fraud in obtaining such collateral.

This court has held on many occasions that the findings of the lower court on factual matters will not be overruled unless there is a clear abuse of discretion. In the instant case the Respondent knows of no testimony which was excluded and not considered in the findings of the lower court.

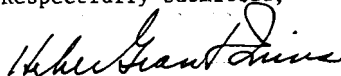
CONCLUSION

The Appellants have failed to prove that the trial judge abused his discretion in striking Appellant's Demand for Jury Trial. The major issues of the trial were equitable; legal issues, if any, were clearly subsidiary to the predominant equitable issues. The trial judge was correct in striking the Appellant's Demand for Jury Trial since no jury is required to try equitable issues.

The Appellants failed to prove the existence of any oral agreement to extend the due date on the \$115,000.00 note and the Respondent properly accelerated the maturity date on the \$45,000.00 and the \$5,000.00 notes since the Appellants were in default under the provisions of four separate Subparagraphs of Paragraph 8 of the Security Agreement dated July 3, 1975. The actions constituting default are detailed on pages 9-10. The Appellants failed to show, as was their burden, lack of good faith on the part of Respondent that their prospects of payment had been impaired. In fact, the weight of the evidence clearly shows that the Respondent acted in good faith and the subsequent sale of collateral with a resulting substantial deficiency conclusively shows the need for taking immediate action to minimize their losses.

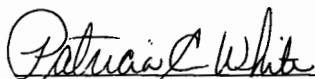
The Respondent respectfully urges the Appellate Court to affirm the trial court's Judgment in this case.

Respectfully submitted,



Heber Grant Ivins
Attorney for Plaintiff and
Respondent

Mailed two copies of the foregoing Brief to S. Rex Lewis
for Howard, Lewis & Petersen, Attorneys for Defendants and Appellants,
120 East 300 North, Provo, Utah 84601, the 13th day of January, 1976.

A handwritten signature in cursive script, reading "Patricia C. White". The signature is written in dark ink and is positioned above a horizontal line.

Secretary