

2007

Greg Anderson v. T. Richard Davis : Brief of Appellee

Utah Court of Appeals

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Greg Anderson; Pro Se.

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Civil No. 070904196

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter under the provisions of Utah Code Annotated § 78-2a-3(j) and pursuant to the Order of the Supreme Court of the State of Utah issued November 15, 2007, transferring this matter to the Utah Court of Appeals for disposition.

Appellant, Greg Anderson (“Anderson”), a pro se litigant, has identified and numbered numerous issues in his Brief of Appellant. Appellee, T. Richard Davis (“Davis”) has addressed each of those identified issues separately in this Statement of Issues, but will combine the treatment of related issues in the Argument section of this Brief.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue 1: Whether the trial court correctly granted Davis’ Motion for Summary Judgment with its determination of the applicable statute of limitations for breach of a written obligation and the time that the statute of limitations began to run?

Standard of Review: A trial court's summary judgment decision and its interpretation of a statute are questions of law that this court reviews for correctness. Barenbrugge v. State, 2007 UT App 263 ¶ 7, 167 P.3d 549, see also Novell, Inc. v. Canopy Group, Inc., 2004 UT App 162, ¶ 7, 92 P.3d 768. The appellate court considers whether the trial court correctly concluded that no genuine issue of material fact exists and whether it correctly applied the law. Id. Whether the trial court erred in applying the six-year limitations period is a question of law. “We accord conclusions of law no

particular deference, but review them for correctness.” McKean v. McBride, 884 P.2d 1314, 1316-1317 (Utah Ct. App.1994).

Issue 2: Whether the trial court correctly determined that the acceleration clause, if involved by the Trustor would have had the effect argued by Anderson, notwithstanding Anderson’s failure to marshal the evidence challenging the trial court’s findings regarding the Trust Deed Note’s acceleration clause and its application to the subject statute of limitations.

Standard of Review: Rule 24(a)(9) of the Utah Rules of Appellate Procedure requires “[a] party challenging a fact finding [to] first marshal all record evidence that supports the challenged finding.” United Park City Mines v. Stichting Mayflower Mountain Fonds, et al, 2006 UT 35, ¶ 24, 140 P.3d 1200 (2006). To pass this threshold, parties protesting findings of fact must “marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below.” Clark, 2005 UT 75, ¶ 17.

Issue 3: Whether the trial court correctly determined that the acceleration clause was not invalid by Trustor or Davis and therefore the theory of relief from the regular six-year statute of limitations sought by Anderson was irrelevant?

Standard of Review: A trial court’s findings of fact are reviewed under a “clearly erroneous” standard. Young v. Young, 1999 UT 38 ¶ 15, 979 P.2d 338; see also Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶ 17, 989 P.2d 1077 (We give deference to

the trial court's factual findings, however, and do not set them aside unless they are clearly erroneous).

Issue 4: Whether the general statement of a trustee's duty as recited by Anderson in his Brief is a cause to reverse the trial court's Order.

Standard of Review: To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits. See Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982); James v. Preston, 746 P.2d 799, 801-02 (Utah Ct. App.1987). "Issues not raised in the trial court in timely fashion are deemed waived, precluding [the appellate court] from considering their merits on appeal." Salt Lake County v. Carlston, 776 P.2d 653, 655 (Utah Ct. App. 1989); accord Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 837 (Utah 1984); Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1045 (Utah 1983). Further, the mere mention of an issue in the pleadings, when no supporting evidence or relevant legal authority is introduced at trial in support of the claim, is insufficient to raise an issue at trial and thus insufficient to preserve the issue for appeal. James v. Preston, 746 P.2d 799, 801 (Utah Ct. App.1987). This rule is "stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial." Id. Accordingly, the court of appeals lack jurisdiction over the appeal and "retain only the authority to dismiss the action." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App.1989).

Issue 5: Whether Anderson’s statement of responsibility of a trustee to “check applicable law of the statute of limitations prior to conduction of a trustee’s sale” is (a) correct, (b) relevant to the trial court’s order of summary judgment, and (c) preserved in the lower court’s proceedings.

Standard of Review: To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits. See Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982); James v. Preston, 746 P.2d 799, 801-02 (Utah Ct. App.1987). “Issues not raised in the trial court in timely fashion are deemed waived, precluding [the appellate court] from considering their merits on appeal.” Salt Lake County v. Carlston, 776 P.2d 653, 655 (Utah Ct. App.1989); accord Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 837 (Utah 1984); Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1045 (Utah 1983). Further, the mere mention of an issue in the pleadings, when no supporting evidence or relevant legal authority is introduced at trial in support of the claim, is insufficient to raise an issue at trial and thus insufficient to preserve the issue for appeal. James v. Preston, 746 P.2d 799, 801 (Utah Ct. App.1987). This rule is “stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial.” Id. Accordingly, the court of appeals lack jurisdiction over the appeal and “retain only the authority to dismiss the action.” Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App.1989).

Issue 6: Whether the trial court correctly granted Appellee’s Motion for Summary Judgment by finding that the Notice of Default filed by Appellee did not constitute a wrongful lien?

Standard of Review: A trial court’s findings of fact are reviewed under a “clearly erroneous” standard. Young v. Young, 1999 UT 38 ¶ 15, 979 P.2d 338; see also Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶ 17, 989 P.2d 1077 (We give deference to the trial court’s factual findings, however, and do not set them aside unless they are clearly erroneous).

Issue 7: Whether Anderson’s statement of Davis’ alleged knowledge of the Utah law of statutes of limitations is (a) correct, (b) relevant to the trial court’s order of Summary Judgment and (c) preserved in the lower court’s proceedings.

Standard of Review: A trial court’s findings of fact are reviewed under a “clearly erroneous” standard. Young v. Young, 1999 UT 38 ¶ 15, 979 P.2d 338; see also Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶ 17, 989 P.2d 1077 (We give deference to the trial court’s factual findings, however, and do not set them aside unless they are clearly erroneous).

Issue 8: Whether the trial court erred in its declaration that Anderson’s rights were no greater than the original obligor under the Note.

Standard of Review: A trial court’s findings of fact are reviewed under a “clearly erroneous” standard. Young v. Young, 1999 UT 38 ¶ 15, 979 P.2d 338; see also Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶ 17, 989 P.2d 1077 (We give deference to

the trial court's factual findings, however, and do not set them aside unless they are clearly erroneous).

Issue 9: Whether the trial court erred when it held that the statute of limitations generally begins to run on each defaulted payment as it comes due.

Standard of Review: A trial court's findings of fact are reviewed under a "clearly erroneous" standard. Young v. Young, 1999 UT 38 ¶ 15, 979 P.2d 338; see also Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶ 17, 989 P.2d 1077 (We give deference to the trial court's factual findings, however, and do not set them aside unless they are clearly erroneous).

Issue 10: Whether the trial court erred when it declared that the "Court of Appeals has since interpreted *Johnson* [Johnson v. Johnson, 88 P. 230 (1906)] as adopting the rule used in the majority of jurisdictions on governing installment contracts."

Standard of Review: A trial court's findings of fact are reviewed under a "clearly erroneous" standard. Young v. Young, 1999 UT 38 ¶ 15, 979 P.2d 338; see also Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶ 17, 989 P.2d 1077 (We give deference to the trial court's factual findings, however, and do not set them aside unless they are clearly erroneous).

Issue 11: Whether the trial court erred when it found that "none of the cases [Appellant] cited supports his assertion.

Standard of Review: Rule 24(a)(9) of the Utah Rules of Appellate Procedure requires "[a] party challenging a fact finding [to] first marshal all record evidence that

supports the challenged finding.” United Park City Mines v. Stichting Mayflower Mountain Fonds, et al, 2006 UT 35, ¶ 24, 140 P.3d 1200 (2006). To pass this threshold, parties protesting findings of fact must “marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below.” Clark, 2005 UT 75, ¶ 17.

Issue 12: Whether the trial court erred in holding that “causes of action generally accrue for each missed installment at the time the obligor defaults on that obligation, but does not accrue on future installments until the obligations on those installments are individually breached.”

Standard of Review: A trial court’s findings of fact are reviewed under a “clearly erroneous” standard. Young v. Young, 1999 UT 38 ¶ 15, 979 P.2d 338; see also Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶ 17, 989 P.2d 1077 (We give deference to the trial court's factual findings, however, and do not set them aside unless they are clearly erroneous).

Issue 13: Whether the trial court erred in holding that an unexercised optional acceleration clause does not make the accrual of a cause of action for all future scheduled payments of an installment contract.

Standard of Review: A trial court’s findings of fact are reviewed under a “clearly erroneous” standard. Young v. Young, 1999 UT 38 ¶ 15, 979 P.2d 338; see also Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶ 17, 989 P.2d 1077 (We give deference to

the trial court's factual findings, however, and do not set them aside unless they are clearly erroneous).

Issue 14: Whether the trial court erred in holding that the applicable “statute of limitations began to run from the date that the last part of Carman, LLC’s performance was due, June 1, 2006.” (R-261).

Standard of Review: A trial court’s findings of fact are reviewed under a “clearly erroneous” standard. Young v. Young, 1999 UT 38 ¶ 15, 979 P.2d 338; see also Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶ 17, 989 P.2d 1077 (We give deference to the trial court's factual findings, however, and do not set them aside unless they are clearly erroneous).

Issue 15: Whether the trial court properly refused to order sanctions against Davis for his conduct as Successor Trustee.

Standard of Review: To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits. See Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982); James v. Preston, 746 P.2d 799, 801-02 (Utah Ct. App.1987). “Issues not raised in the trial court in timely fashion are deemed waived, precluding [the appellate court] from considering their merits on appeal.” Salt Lake County v. Carlston, 776 P.2d 653, 655 (Utah Ct. App.1989); accord Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 837 (Utah 1984); Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1045 (Utah 1983). Further, the mere mention of an issue in the

pleadings, when no supporting evidence or relevant legal authority is introduced at trial in support of the claim, is insufficient to raise an issue at trial and thus insufficient to preserve the issue for appeal. James v. Preston, 746 P.2d 799, 801 (Utah Ct. App.1987). This rule is “stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial.” Id. Accordingly, the court of appeals lack jurisdiction over the appeal and “retain only the authority to dismiss the action.” Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App.1989).

Issue 16: Whether the trial court properly refused to impeach or strike Davis’ Memorandum in Support of his Motion for Summary Judgment due to a typographical error that was found to be immaterial to the issue and corrected by a filed errata prior to the hearing on said Motion.

Standard of Review: To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits. See Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982); James v. Preston, 746 P.2d 799, 801-02 (Utah Ct. App.1987). “Issues not raised in the trial court in timely fashion are deemed waived, precluding [the appellate court] from considering their merits on appeal.” Salt Lake County v. Carlston, 776 P.2d 653, 655 (Utah Ct. App.1989); accord Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 837 (Utah 1984); Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1045 (Utah 1983). Further, the mere mention of an issue in the pleadings, when no supporting evidence or relevant legal authority is introduced at trial in

support of the claim, is insufficient to raise an issue at trial and thus insufficient to preserve the issue for appeal. James v. Preston, 746 P.2d 799, 801 (Utah Ct. App.1987). This rule is “stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial.” Id. Accordingly, the court of appeals lack jurisdiction over the appeal and “retain only the authority to dismiss the action.” Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App.1989).

Issue 17: Whether the trial court erred in denying Anderson’s Motion for Summary Judgment on his claim against Davis for constructive fraud and granting Davis’ Cross-Motion dismissing said claim.

Standard of Review: A trial court’s findings of fact are reviewed under a “clearly erroneous” standard. Young v. Young, 1999 UT 38 ¶ 15, 979 P.2d 338; see also Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶ 17, 989 P.2d 1077 (We give deference to the trial court's factual findings, however, and do not set them aside unless they are clearly erroneous).

Issue 18: Whether the trial Court dismissed any claim by Anderson against Davis for breach of a fiduciary duty.

Standard of Review: To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits. See Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982); James v. Preston, 746 P.2d 799, 801-02 (Utah Ct. App.1987). “Issues not raised in the trial court in timely fashion are deemed

waived, precluding [the appellate court] from considering their merits on appeal.” Salt Lake County v. Carlston, 776 P.2d 653, 655 (Utah Ct. App.1989); accord Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 837 (Utah 1984); Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1045 (Utah 1983). Further, the mere mention of an issue in the pleadings, when no supporting evidence or relevant legal authority is introduced at trial in support of the claim, is insufficient to raise an issue at trial and thus insufficient to preserve the issue for appeal. James v. Preston, 746 P.2d 799, 801 (Utah Ct. App.1987). This rule is “stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial.” Id. Accordingly, the court of appeals lack jurisdiction over the appeal and “retain only the authority to dismiss the action.” Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App.1989).

DETERMINATIVE STATUTES AND RULES

UTAH CODE ANN. § 78-12-23:

An action may be brought within six years:

- (1) for the mesne profits of real property;
- (2) upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.

UTAH CODE ANN. § 38-9-4:

(1) A lien claimant who records or files or causes a wrongful lien as defined in Section 38-9-1 to be recorded or filed in the office of the county recorder against real property is liable to a record interest holder for any actual damages proximately caused by the wrongful lien.

(2) If the person in violation of this Subsection (1) refuses to release or correct the wrongful lien within 20 days from the date of written request from a record interest holder of the real property delivered personally or mailed to the last-known address of the lien claimant, the person is liable to that record interest

holder for \$1,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs.

(3) A person is liable to the record owner of real property for \$3,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs, who records or files or causes to be recorded or filed a wrongful lien as defined in Section 38-9-1 in the office of the county recorder against the real property, knowing or having reason to know that the document:

(a) is a wrongful lien;

(b) is groundless; or

(c) contains a material misstatement or false claim.

STATEMENT OF THE CASE

This case involves various claims by Anderson against Davis, Davis in his capacity as Successor Trustee under a certain Trust Deed with Assignment of Rents dated May 10, 1996, related to the interest in and the conveyances of a certain parcel of real property in Salt Lake County, Utah.¹ (R- 57-61). In 1996, Mr. Roy W. Simmons (“Simmons”), the owner of certain real property conveyed some real property to Carman, LLC. (R- 57-61; 64-65; 68-69 and 244). In consideration therefore, Carman, LLC, through its Member Manager, Carolyn Manning, paid \$500 down and signed a Trust Deed Note for \$59,500

¹ Anderson has made numerous arguments, allegations and charges against Davis, Thomas B. Price, Nathan A. Scharton, and Gary R. Howe, all lawyers with the law firm Callister Nebeker & McCullough, as well as against that firm, and against trial court Judge Mary Kate Toomey in this case and a more recent Complaint now filed in the U.S. District Court for the State of Utah, Civil No. 2:07cv00673. Anderson makes several references in the record and in his Brief regarding the above-named individuals. Davis was appointed the Successor Trustee to the Estate of Mr. Roy Simmons and prepared all documents for the foreclosure which gives rise to this matter. Price is one of the attorneys of record for the matter. Scharton’s only involvement in the matter was preparing a research memorandum regarding case law treatment of the statute of limitations, in the context of an installment obligation, which memo was shared with Anderson several weeks prior to the foreclosure sale. (R- 35). Howe received a faxed letter from Anderson, wherein Anderson made accusations against Davis, Price and Scharton and demanded Howe act and punish the aforementioned attorneys and stop the alleged offenses. Howe has no knowledge or participation in the foreclosure or this appeal.

and delivered to Simmons a Trust Deed, with an Assignment of Rents securing the repayment of the Note. (R- 64-65 and 68-69). The terms of the Trust Deed Note were regular installments, the first of one hundred and twenty monthly payments due on July 1, 1996 and a final payment, for the remaining outstanding amount, was due on June 1, 2006. The Note was not intended to fully amortize over the ten year term. On September 10, 1996, the Trust Deed was duly recorded with the Salt Lake County Recorder. (R- 64-65 and 68-69).

Carman, LLC, made regular payments through December 1997 and thereafter only a few irregular installments on the Trust Deed Note (R- 68-69 and 245), the last of which was made on July 15, 1998. After the final installment payment came due on June 1, 2006, and Carman, LLC had failed and refused to pay the balance of the Trust Deed Note, pursuant to the terms and conditions of the Trust Deed Note, Davis was appointed as Successor Trustee of the Roy W. Simmons Estate and began foreclosure proceedings on the Property. (R- 75-77 and 245-246).

At some point in time, but prior to the foreclosure proceedings, Carman, LLC conveyed the Property to E.L. Whitehead. Anderson had theretofore obtained a judgment against E.L. Whitehead, and on January 20, 2006, proceeded to obtain a sheriff's deed to the subject property through a sheriff's sale, subject to the duly recorded Trust Deed which had been recorded on September 10, 1996. (R- 23 and 245).

After making the required public notices in preparation for the Trustee Sale foreclosing on the subject property, Davis, as Successor Trustee (79 - 88 and 246), was

contacted by Anderson and informed that Anderson claimed a superior interest in the subject property than the Roy W. Simmons Estate and demanded that Davis cease the foreclosure proceedings. (R- 90-91).

On March 16, 2007, Anderson filed a Complaint against Davis complaining of actions taken by Davis in his capacity as Successor Trustee. (R- 1-8). Davis, knowing the outstanding balance of the Note was in excess of \$100,000.00, postponed the proceedings, temporarily accommodating Anderson. The Trustee's Sale was rescheduled and held on May 4, 2007. The Property was sold to an independent third party who has not been made a party to this action.

The parties each filed and briefed cross-motions for summary judgment in the litigation. Following the briefing and oral argument, the trial court denied Anderson's Motion for Summary Judgment and granted Davis' Cross-Motion for Summary Judgment (R- 244-272). In its Memorandum Decision and Order dated August 14, 2007, the trial court essentially held that the applicable statute of limitations began on June 1, 2006 and that Davis' actions in 2006 and 2007 to foreclose were timely. (R- 244-272). Anderson appealed the trial court's written Memorandum Decision and Order.^{2 3} (R- 276-277).

² Anderson filed a complaint with the Utah State Bar's Office of Professional Conduct against Davis, Gary R. Howe, Nathan A. Scharton, and Thomas B. Price. See OPC File No. 07-0615. On December 19, 2007, Margie Wakeham, Assistant Counsel, Office of Professional Conduct, informed Appellant that the OPC, exercising its prosecutorial discretion, would decline to prosecute any of the named attorneys and closed the case. *Id.*

³ Anderson has filed and served an Amended Complaint in the United States District Court, for the District of Utah, Central Division, in the matter Anderson v. Toomey, et al., 2:07-cv-00673. Appellant has filed a civil rights suit against Judge Kate A. Toomey,

STATEMENT OF MATERIAL FACTS

1. On or about May 10, 1996, Simmons sold to Carman, LLC, certain real property located in Salt Lake County, Utah, and received in connection with said sale a Trust Deed, with Assignments of Rents, securing a debt in the amount of \$59,5000.00. (R-57-61 and 136).

2. On September 10, 1996, the Trust Deed was duly recorded with the Salt Lake County Recorder, showing that it was to secure an indebtedness of the amount of \$59,500.00. The Trust Deed was recorded as Entry No. 6452338, in Book 7486 at Page 1597 of the Official Records. (R-57-61).

3. On or about 10 May 1996, Simmons received a Trust Deed Note (the "Note") in the original amount of \$59,500, dated May 10, 1996, executed by Carman, LLC, by Carolyn Manning, its Manager. (R-57-61 and 136).

4. The Note was an installment obligation, the first payment of which was due on July 1, 1996 and the final installment payment was due on June 1, 2006. During the term of the Note, the total amount of \$18,155.00 was paid toward the principal and interest of the Note. At no time was the principal balance of the Note ever below \$49,000.00. According to the express terms of the Note, the outstanding balance was required to be paid on June 1, 2006. (R-57-61; 136-137 and 140-141).

Davis, Gary R. Howe, Nathan A. Sharton, and Thomas B. Price. See Federal Court Records, 2:07CV00673.

5. The general character of the Note was that of an installment obligation, the first payment of which was due on July 1, 1996, and the final installment payment, for the remaining balance owed, was due on June 1, 2006. The Note did not fully amortize under the scheduled installment payments thereof, aside from the final “entire principal balance” payment. The terms of the Note, in part, are as follows:

Monthly payments of \$436.59 beginning on the 1st day of July 1996, and payable on the 1st day of each month thereafter until December 31, 2006, when a balloon payment of \$4,500.00 shall be due and payable. Monthly payments of \$401.48 beginning on the 1st day of January 1997, and payable on the 1st day of each month thereafter until June 30, 1997 when a balloon payment of \$5,000.00 shall be due and payable. Monthly payments of \$362.87 beginning on the 1st day of July 1997 and payable on the 1st day of each month thereafter **until June 1, 2006 when the entire principal balance and accrued interest shall be due and payable.**

(R-69)(emphasis added).

6. As of November 1, 2006, the total amount due on the Note was \$104,209.63, plus collection costs. (R-137 and 141).

7. Neither Carman, LLC, nor any other party paid off the Note. (R-137).

8. Carman, LLC, did not assign any portion of its liability on the Note to anyone or any entity. (R-137).

9. On or about October 24, 2006, Davis was appointed Successor Trustee under that certain Trust Deed with Assignment of Rents, dated May 10, 1996, to secure certain obligations in favor of Simmons. (R-75-77).

10. On or about November 8, 2006, Davis, in his capacity as Successor Trustee, filed a Notice of Default, and it stated, in part, as follows:

Notice is also hereby given that a breach of the obligations for which the trust property was conveyed as security has occurred, in that the Note matured on July 31, 2006, and as of November 1, 2006, principal and interest in the amount of \$104,209.63, had not been paid. (R-79-81).

11. On or about December 29, 2006, Davis received a certain letter from Anderson which was dated December 8, 2006, but was post marked December 28, 2006. (R-90).

12. Davis provided a Notice of Trustee's Sale to all interest holders, including Anderson's owned entity, pursuant to the applicable statutes and Utah Rules of Civil Procedure. The Sale was scheduled to occur on March 21, 2007. (R-83-88).

13. Davis received a second letter from Anderson dated March 20, 2007, which asserted that the scheduled trustee sale was barred due to the statute of limitations. (R-91).

14. On January 11, 2007 and on March 20, 2007, Davis sent letters to Anderson responding to inquiries, offering assistance, providing information, including copies of the Note and Trust Deed, and encouraging Anderson to obtain qualified legal counsel. (R-93-97).

15. On or about March 16, 2007, Anderson filed a Complaint initiating this action and recorded a Lis Pendens with the Salt Lake County Recorder. (R-99).

16. On or about May 4, 2007, Davis caused that a Trustee Sale of the subject property was conducted at the time and place designated.

17. Following the filing of cross-motions for Summary Judgment, on or about July 13, 2007, a hearing was held before Judge Kate Toomey for oral argument of said motions. (R-212-214 and 244).

18. On August 14, 2007, Judge Kate Toomey entered her Memorandum Decision and Order denying Anderson's Motion for Summary Judgment and granting Davis' Cross-Motion for Summary Judgment. (R-244-272).

SUMMARY OF ARGUMENT

Davis' summary of his argument begins and ends with the terms and conditions of the Trust Deed Note given to Mr. Roy Simmons by Carman, LLC. Importantly, one of the main terms of the Trust Deed Note was that it was an installment contract. During the ten-year term of the Trust Deed Note, Carman, LLC missed many installment payments. After each missed payment Mr. Simmons could have invoked the optional acceleration clause included in the terms of the Trust Deed Note, but he did not.

The express terms and conditions of the Trust Deed Note provide for one-hundred and twenty consecutive payments, and that Carman, LLC had continuing obligations to pay "until June 1, 2006 when the entire principal balance and accrued interest shall be due and payable." (R-69). The installment character of the Note together with a balloon remainder payment provide the basis for Davis' argument and the trial court's Order denying Anderson's Motion for Summary Judgment and granting Davis' Cross-Motion for Summary Judgment. The payment terms provide the exact date in which the statute of limitations began to run on Carman, LLC's breach of the installment contract for non-

payment. As long as Mr. Simmons did not invoke the optional acceleration clause, Carman, LLC could theoretically miss all installment payments and still pay the balance of the Trust Deed Note by June 1, 2006, in the last installment payment which was to include, “the entire principal balance and accrued interest.” Approximately six months after the final installment payment was due and the statute of limitations had begun, Davis, for the benefit of Simmons, began foreclosure proceedings on the subject property and completed the same within one year of that final payment obligation. Davis was well within the statute of limitations to foreclose on the Trust Deed Note.

Moreover, Anderson claims that Davis failed and refused to meet his duties and obligations as successor trustee to the Simmons relative to Anderson. First, the successor trustee owes a duty only to the grantor and the trust beneficiary, of which Anderson is neither. At best, Anderson’s interest in the property is that of an owner, subsequent to the grantor, who took ownership subject to the actual notice of the Trust Deed lien, duly recorded with the Salt Lake County Recorder’s Office. Anderson cannot and does not make a claim disputing the nature or priority of his interest in the property, subject to the Trust Deed lien. Anderson only argues that the successor trustee is time-barred from foreclosing on the property due to the statute of limitations which Anderson asserts (1) began to accrue at the time of the first missed installment payment, and (2) automatically triggered the invocation of the optional acceleration clause of all the remaining future installments payments.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THE APPLICABLE STATUTE OF LIMITATIONS ON THE TRUST DEED NOTE IS SIX YEARS AND THAT IT BEGAN ACCRUING ON JUNE 1, 2006.

The trial court, Anderson and Davis are all in agreement that the applicable statute of limitations in this matter is six years as outlined in UTAH CODE ANN. § 78-12-23. (R-247). An action based upon any contract, obligation, or liability founded upon an instrument in writing must be brought within six years from the date of occurrence. See UTAH CODE ANN. § 78-12-23. The Utah Supreme Court has stated the test for determining if a written instrument falls within the six-year statute of limitations is, “if the fact of liability arises, is assumed, or imposed from the instrument itself, or its recitals, the liability is founded upon the instrument in writing.” Empire Land Title, Inc. v. Weyerhaeuser Mortg. Co., 797 P.2d 467, 469 (Utah Ct. App. 1990) (citing Brigham Young Univ. v. Paulsen Const., 744 P.2d 1370, 1372 (Utah 1987) (quoting Bracklein v. Realty Insurance Co., 95 Utah 490, 500, 80 P.2d 471, 476 (1938))). Neither the parties nor the trial court dispute that the Trust Deed Note is a contract and that the subject liability of the purchaser is founded upon the writing and the six-year statute of limitation is applicable. Moreover, neither the parties nor the trial court disagree that the six-year statute of limitation begins to run at the moment that a cause of action arises.

The basis of the controversy and the appeal at bar is Anderson’s disagreement with Davis’ argument and the trial court’s determination of when the six-year statute of limitations began on the subject Trust Deed Note. Anderson asserts that the six-year

statute of limitations began at the time that Carman, LLC missed its first installment payment, in 1998. (R-248). Davis argued and the trial court determined that the six-year statute of limitations did not begin at the earliest, until each installment was missed and only as to that missed installment, and at the latest, until June 1, 2006, when the remaining balance was due. (R-261). The trial court found that the Trust Deed Note was an installment-type contract. (R-245). The Utah Supreme Court addressed when the statute of limitations begins relative to an installment-type contract. It held,

when contract obligations are payable by installments, the statute of limitations begins to run only with respect to each installment when it becomes due. . . . the contract is a continuing one during the life of the plaintiff, but maturing in installments of yearly payments. It . . . may be enforced by proper action whenever and as often as an installment falls due and remains unpaid.

Nilson-Newey & Company v. Utah Resources International, 905 P.2d 312, 316-17 (Utah Ct. App. 1995) (quoting Johnson v. Johnson, 88 P. 230, 232 (Utah 1906). See Bracklein v. Realty Ins. Co et al, v. Realty Ins. Co., 80 P.2d 471, 478 (Utah 1938) (the liability of a purchaser of mortgaged premises, who assumes and agrees to pay the mortgage debt, accrues as to start the statute of limitations running, when the note becomes due.); Moab National Bank v. Keystone-Wallace Resources, 517 P.2d 1020 (1973) (holding that a statute of limitations begins running upon the failure to pay each installment.).

Importantly, however, is the term and condition of the final installment payment in the Trust Deed Note. (R-69). Carman, LLC and Mr. Simmons agreed that the final installment payment by Carman, LLC would include “the entire principal balance and

accrued interest shall be due and payable.” (R-69)⁴. The Trust Deed Note’s June 1, 2006 installment payment (1) was the last installment of the contract and (2) the last opportunity for Carman, LLC, to pay the remaining balance pursuant to the terms of the Trust Deed Note, so the accrual of the statute of limitations began on June 1, 2006.

Based upon Vreede v. Koch, 380 S.E.2d 615 (N.C. CT. App. 1989) the trial court correctly held that the six-year statute of limitations began to run, June 1, 2006, the date the last installment payment was due pursuant to the terms of the Trust Deed Note. The trial court held, “when the terms of a note require a debtor to tender the balance of the unpaid principal and interest on a specific date, the statute [of limitations] run from that date.” (R-265). The facts in Vreede are similar to the facts of the appeal at bar. Both matters focus on payment pursuant to an installment contract, which included an acceleration clause at the creditor’s option. Both installment contracts concluded with an installment payment at the end of the loan term, which provided for any unpaid balance, including interest. Vreed at 616-617. The Vreede court held that the creditor did not invoke the acceleration clause prior to the last installment payment and that the accrual of

⁴ The terms of the Note, in part are as follows:
Monthly payments of \$436.59 beginning on the 1st day of July 1996, and payable on the 1st day of each month thereafter until December 31, 2006, when a balloon payment of \$4,500.00 shall be due and payable. Monthly payments of \$401.48 beginning on the 1st day of January 1997, and payable on the 1st day of each month thereafter until June 30, 1997 when a balloon payment of \$5,000.00 shall be due and payable. Monthly payments of \$362.87 beginning on the 1st day of July 1997 and **payable on the 1st day of each month thereafter until June 1, 2006 when the entire principal balance and accrued interest shall be due and payable.** (R-69)(emphasis added).

the statute of limitations began on the last installment date, specified as the time when any unpaid balance, interest shall be due. Vreed, at 618.

In the present case, Judge Toomey determined that neither Mr. Simmons nor Davis invoked the acceleration clause prior to the last installment payment due date. The trial court held, “[c]reditors should not be penalized for allowing debtors the opportunity to meet their obligations by an agreed date. In this case, the Note allowed Carman, LLC to tender complete performance on the Note by June 1, 2006. Mr. Simmons’s forbearance should not be penalized by applying the statute of limitations to the date that Carman, LLC defaulted on its installments.” (R-260-261).

Anderson argues that the acceleration clause automatically was invoked when Carman, LLC, missed its first installment payment in 1988. (R-202). Anderson misquotes Cooper v. Deseret Federal Savings and Loan, 757 P.2d 483 (Utah Ct. App. 1988) to try to establish that if a creditor is going to invoke the accelerator clause in a loan document, “the obligee has a reasonable time after the default or the event which gives rise to the right to accelerate in which to elect to declare the indebtedness due.” Id. at 485. See Appellant’s Brief, p. 32. Anderson’s reliance upon Cooper is misplaced.

Nowhere in Cooper does the court hold that an optional acceleration clause is automatically exercised when a certain occurrence happens. The Cooper court did declare that the obligee had a “reasonable time” to elect to accelerate if it wanted. The Cooper court specifically held that defendant Deseret’s wait of more than four years after it learned of the sale of the subject property, the only act which would allow Deseret to

invoke the due on sale clause, was beyond a reasonable time. Cooper at 486. The Cooper court, while determining that Deseret was time-barred from exercising the due-on-sale clause, cautioned, “[o]f course, each case must be considered on its own facts, . . .” See Cooper at 485.

This case is clearly distinguishable from Cooper. Carman, LLC missed some installation payments. After each missed installment, Mr. Simmons could have exercised the optional acceleration clause, but elected not to. He did not ever make that election. The final installment payment, the installment which the parties bargained would allow Carman, LLC to pay the balance of principal and interest, occurred on June 1, 2006. Cooper waived his right for waiting in excess of four years after the triggering action and then attempted to make that election. Simmons, unlike Deseret, did not sit on his rights after the triggering event and then attempt to utilize that right. Davis waited only six months after the June 1, 2006 to exercise his rights through foreclosure without resorting to an acceleration clause. The explicit identification of the June 1, 2006 as the last installment payment for the balance owed also distinguishes this matter from Cooper. The specific time requirement lacking in Cooper, which necessitated the court to determine what was reasonable, is not applicable with the Simmons Trust Deed Note. The date certain of the final installment payment establishes to all when the statute of limitations began to accrue and when Simmons or Davis needed to have act to preserve Simmons’ rights.

Anderson cites to Fredericksen v. Knight Land Corporation, 667 P.2d 34 (Utah 1983) throughout his Brief to support his arguments regarding the applicable statute of limitations and how the statute of limitations work with an acceleration clause in the contract. See Appellant's Brief, pp. 32-33; 35-44 and 48-49. Anderson clearly revels in his repeated identification of Davis as counsel for the unsuccessful plaintiff and appellant in Fredericksen. Anderson claims that, as counsel in Fredericksen, Davis has a higher duty and understanding as to his duties as Successor Trustee in the **present** matter. Id. Anderson's reliance upon Fredericksen v. Knight Land Corporation, 667 P.2d 34 (Utah 1983) is incorrect. Fredericksen is also clearly distinguished from the matter at bar. In Fredericksen, the issue was "whether a cause of action accrued against Knight six years or more prior to Fredericksen's commencement" of an action. Fredericksen at 36. The contract between Fredericksen and Knight was based upon the sale of certain acres of real property in excess of \$85.00 per acre in gross profits. Id. The Fredericksen court held that the determining contractual factors had occurred "during the period from 1963 through 1968." Fredericksen at 37. Fredericksen argued that notwithstanding the long past sales of acres, the contract impliedly allowed him to make a formal demand to exercise the option for the conveyance of land instead of payment of money, and did not set a schedule for making such a demand. Fredericksen had not made such a demand until many years following the sales. In response to Fredericksen's argument, the court held,

Where a demand is necessary to start a limitation period running, a party is not permitted to postpone indefinitely or unreasonably, by failing to make demand, the time when the statute will begin to run, for by his laches he may be deemed to have perfected his right of action so as to start the running of the statute although he never actually made demand.

Fredericksen, at 38. The Fredericksen court identified Fredericksen's unreasonable and unjustifiable inaction that prejudiced the other party as a laches issue and would not reward Fredericksen's inactivity. Simmons' decision not to invoke the optional acceleration clause during the period of the loan was reasonable and justifiable and not beyond the statutory period covering the specifically scheduled payments. Simmons could wait until the last installment and allow Carman, LLC every opportunity to meet its obligations to pay the balance of the loan, principal, interest and costs.

Fredricksen and the present case are both based upon a contract with periodic payments, and both trial courts held that the applicable statute of limitations began when the cause of action arose. However, in Fredericksen the court determined the cause of action arose between 1963 and 1968 when the terms of the contract were met and based upon the legal theory of laches, Fredericksen's unreasonable inaction prohibited him from exercising the option. Fredericksen at 37. The case at bar is different in that (1) the Trust Deed Note listed the specific monthly installments at amounts-certain and (2) the Note was for a limited and specified time. These two facts demonstrate that the option to accelerate the Trust Deed Note or begin foreclosure proceedings did not accrue until June 1, 2006.

Additionally, Anderson states, “[w]hen the statute of limitations has accrued, he no longer has any claim to the property.” See Appellant’s Brief, p. 37. Anderson’s statement is not the law. Statute of limitations have nothing to do with the interest in the property conveyed by the trustee deed. The statute only has effect upon the debt which is secured by the encumbering trust deed. The statute of limitation is not an absolute bar, but a conditional bar. The obligor could still make a payment or reaffirm the promise of payment on the trust deed note and statute of limitation for that obligation would start over. Anderson offers no legal support for his contention.

The trial court was correct to determine that the applicable statute of limitations was six years, that the statute of limitations began on June 1, 2006 and that the acceleration clause was not invoked. Therefore, this Appellate Court should deny Anderson’s appeal and affirm the trial court’s ruling.

II. THE ACCELERATION CLAUSE IN THE TRUST DEED NOTE WAS NOT INVOKED AUTOMATICALLY OR FORMALLY BY EITHER SIMMONS NOR HIS SUCCESSOR TRUSTEE.

In asserting his argument regarding the 1998 commencement of the tolling of the statute of limitations and how the Trust Deed Note’s acceleration clause⁵ would not toll or stop the 1998 accrual of the applicable statute of limitations, Anderson argues,

⁵ If default occurs in the payment of said installments of principal and interest or any part thereof, or in the performance of any agreement contained in the Trust Deed securing this note, the holder hereof, at its option and without notice or demand, may declare the entire principal balance and accrued interest due and payable. (R-68).

[a]n acceleration clause in a written contract, at best would add one month to the six year statute of limitations in a written contract that has on optional acceleration clause. . . . [i]f under Utah Law, an optional acceleration clause gives a beneficiary of a trust deed additional time beyond the six year period for contracts in writing, that additional time would not apply to 3rd parties who have not formally assumed the liabilities of the trust deed note.”

Appellant’s Brief, p. 33.

Anderson’s argument regarding the acceleration clause is confusing and incorrect. Neither Davis argued nor the trial court held that the acceleration clause was invoked, nor that the clause, if invoked, would have extended the statute of limitations until November 1, 2006 or later. (R-245 and 255-258). The trial court was persuaded by the holding in Navy Federal Credit Union v. Jones, 930 P.2d 1007 (Ariz. CT. App. 1996), declaring,

[t]his court is persuaded by the rule applied in Navy Federal Credit Union, and applies it to this case. One missed installment in the presence of an optional acceleration clause does not automatically start the statute of limitations for the remaining installments. The statute begins to run on future installments only if the creditor exercises the option.

(R-258). Simmons’ and his Successor Trustee had the choice whether to invoke the acceleration clause whenever Carman, LLC, missed an installment payment, or to wait and allow Carman, LLC to pay the balance with the last installment payment according to the explicit terms of the Trust Deed Note. It was only after Carman, LLC missed the final installment payment that the Davis decided to act upon the legal rights of foreclosure afforded to Simmons as holder of the Trust Deed Note. Moreover, the trial court also addressed Anderson’s argument that the contractual right to invoke the acceleration

clause and demand the remainder of the installments is equivalent to an accrued cause of action. (R-255-258). The trial court's analysis of Navy Federal Credit Union v. Jones, 930 P.2d 1007 (Ariz. CT. App. 1996) addressed and refuted Anderson's argument.

the majority rule that if the creditor opts to invoke the acceleration clause, then the statute of limitations runs as to future installments 'from the date the creditor exercises the acceleration clause.' The court explained that 'if the acceleration clause in a debt payable in installments is optional, a cause of action as to future non-delinquent installments does not accrue until the creditor chooses to take advantage of the clause and accelerate the balance.

(R-257)(internal citations omitted). The trial court's application of Navy Federal Credit Union is directly on point. Simmons and Davis did not exercise the optional acceleration clause during the period of the Trust Deed Note. Therefore the cause of action and relatedly, the start of the statute of limitations, for the missed final installment payment did not accrue until Carman, LLC failed to make the final installment payment, June 1, 2006. Therefore, based upon the trial court's determination that the applicable statute of limitations began to accrue on June 1, 2006, without any consideration of the acceleration clause in the Trust Deed Note, Davis requests this Court uphold the trial court's ruling.

III. ANDERSON'S ASSERTIONS REGARDING A TRUSTEE'S DUTIES WAS NEITHER INCLUDED IN ANDERSON'S COMPLAINT NOR IN ANDERSON'S MOTION FOR SUMMARY JUDGMENT.

Anderson discusses and asserts certain duties that Davis should perform due to his role as Successor Trustee. See Appellant's Brief, pp. 34-37. Davis, as Successor Trustee, does have specific duties to specific groups of individuals, the trust beneficiaries and the trustor. See In re Hoopiaina Trust, 2006 UT 53 ¶ 30, 144 P.3d 1129. It is well settled

that [a] trust is a form of ownership in which the legal title to property is vested in a trustee, who has equitable duties to hold and manage it for the benefit of the beneficiaries. Anderson asserts that Davis owed some type of fiduciary duty to Anderson. See Appellant's Brief, pp. 34-37. Yet, Anderson fails to provide any case law supporting his assertion. Anderson is only a successor in interest to the trustor. As such, he has rights to the subject property, albeit limited. He does not, however, qualify as a beneficiary or even the trustor relative to a fiduciary duty from Davis as successor trustee.

However, despite the lack of a fiduciary relationship with Anderson, Davis at all times fulfilled his duties and demonstrated professionalism in his conduct with Anderson. Despite Anderson's aggressive, demeaning, and unprofessional attacks on Davis, Davis attempted to assist Anderson to understand what was occurring with the subject property and avoid a costly trial and appeal. In response to Anderson's letter, dated December 8, 2006⁶, Davis responded in writing attempted to explain the facts of the matter, strongly encouraged Anderson to obtain qualified legal counsel and offered to discuss the matter further. (R-93-94). Davis, in response to Anderson's letter dated March 20, 2007⁷, forwarded a research memorandum authored by Nathan Scharton, a lawyer of the law firm Callister Nebeker & McCullough. (R-35). The short memorandum provides a general and correct explanation to the issue of the case at bar. Despite the lack of a

⁶ (R-90).

⁷ (R-34)

fiduciary relationship, Davis accommodated Anderson regarding time and encouraged Anderson to seek competent legal counsel regarding this matter.

The trial court held that the case Anderson cites, Blodgett v. Martsch, 590 P.2d 298 (Utah 1978)⁸ simply holds that a trustee owes a fiduciary duty to the grantor and trust beneficiary. (R-262). The trial court further held that Davis, the Successor Trustee, “owes a fiduciary duty to the Roy Simmons estate (the successor to the beneficiary) and Carman, LLC (the Trustor). Despite what the trial court stated, Anderson still asserts that Davis owed Anderson a “special duty” and that Davis was “a prime example of a trustee who is unprotective of borrowers. See Appellant’s Brief, pp. 34-35. However, a trustee’s duties and obligations have been outlined by this Court.

A trustee's primary obligation is to assure the payment of the debt secured by the trust deed. See Five F, L.L.C. v. Heritage Sav. Bank, 2003 UT App 373, ¶¶ 13-15, 81 P.3d 105. In certain circumstances, however “it is possible that the trustee is bound by a fiduciary duty to act in the interest of the trustor.” First Sec. Bank of Utah, N.A. v. Banberry Crossing, 780 P.2d 1253, 1256 (Utah 1989). . . .

While a trustee's primary duty and obligation is to the beneficiary of the trust, ““the trustee's duty to the beneficiary does not imply that the trustee may ignore the trustor's rights and interests.’ ” Five F, L.L.C., 2003 UT App at ¶ 17 (quoting Banberry Crossing, 780 P.2d at 1256). Rather, a trustee has a duty “ ‘to act with reasonable diligence and good faith on [the trustor's] behalf consistent with [the trustee's] primary obligation to assure payment of the secured debt.’ ” *Id.* at ¶ 14 (alterations in original) (quoting Blodgett, 590 P.2d at 303).

⁸ In Appellant’s Brief, p. 34 and (R-27).

Russell v. Lundberg, 2005 UT App 315 ¶¶ 19 and 22, 120 P.3d 541. It would be inappropriate and a likely conflict of interest if Davis treated Anderson as Anderson demands. Davis' duty was to the beneficiaries and the Estate of Roy Simmons. It is clear that the interest of the beneficiaries and the estate of Roy Simmons are in conflict with the interest of Anderson. Davis did precisely what he was supposed to do. Moreover, Anderson has not supported one of his allegations of Davis' failing to perform in maintaining his fiduciary duties.

Anderson did not plead a breach of fiduciary or any other duty by Davis. (R-1-8). Anderson did complain of "constructive fraud" based in part upon Davis' alleged duties to Anderson (R-5-6). In Anderson's Memorandum in Support of his Motion for Summary Judgment, Anderson asserted that Davis had a duty not only to the beneficiary but also to the trustor, implying that Anderson was a trustor. (R-27). However, the trial court held, Davis "does not owe a fiduciary duty to an interest-holder in secured collateral. Successor Trustee holds no confidential relationship with [Anderson]. (R-268). Due to the lack of a confidential relationship between Anderson and Davis, Anderson cannot establish and has not established any element in the cause of action of constructive fraud.

IV. THE TRIAL COURT CORRECTLY HELD THAT THE NOTICE OF DEFAULT FILED BY DAVIS DID NOT CONSTITUTE A WRONGFUL LIEN.

Anderson alleged that the Notice of Default, recorded by Davis, on the subject property on December 29, 2006, constituted a wrongful lien pursuant to Utah's Wrongful

Lien Act. (R-3-4 and Appellant's Brief, p. 37). Anderson further alleges that the Notice of Default is wrongful because the Trust Deed Note "has been paid, and/or the statute of limitations has run." Id. However, the Notice of Default is not a lien, it does nothing more than declare that a default exists in the repayment obligation secured by a properly filed Trust Deed Note. The Notice of Default is not a wrongful lien pursuant to Utah's statute.⁹

Anderson cites to Commercial Inv. Corp v. Siggard, 936 P.2d 1105 (Utah Ct. App. 1997) and attempts to analyze the Commercial Investors facts in his Brief. See Appellant's Brief, p. 38-39. In Commercial Investors, the court was considering a **Notice of Interest** that should have covered a smaller portion of the subject property than it listed. Anderson misunderstands those facts and derives from that case the notion that the Notice of Default (not Notice of Interest), as filed by Davis, creates a lien or an encumbrance on the subject real property unauthorized by law. However, the trial court held that because Simmons retained "a valid security interest in the real property at issue, and Carman, LLC had breached its obligations secured therefore, [Davis] was authorized to file the Notice [of Default] under Utah Code Ann. § 57-1-23 (2006). (R-261). Davis

⁹ A wrongful lien is defined in section 38-9-1(6):
"Wrongful lien" means any document that purports to create a lien or encumbrance on an owner's interest in certain real property and at the time it is recorded or filed is not:
(a) expressly authorized by this chapter or another state or federal statute;
(b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or
(c) signed by or authorized pursuant to a document signed by the owner of the real property.
UTAH CODE ANN. § 38-9-1(6).

fulfilled his duty to provide notice of the debtor's default and the upcoming sale of the Property as prescribed in UTAH CODE ANN. § 57-1-26 *et seq.* The Notice of Default only provides notice that the Trust Deed Note, secured by a previously filed trust deed, is in a condition of default. A Notice of Interest, as considered in Commercial Investors gives notice of a *new* interest in the property. A Notice of Default and a Notice of Interest are very different.

Neither the Trust Deed nor the Notice of Default constitute a wrongful lien under Utah's Wrongful Lien Act nor wrongfully cloud the title in any way. Importantly, Anderson purchased the Property subject to Simmons' duly executed, acknowledged, certified and recorded lien. See UTAH CODE ANN. § 57-3-102. The Trust Deed was recorded on September 10, 1996, several years prior to Anderson's purchase of the property and enjoyed superior priority to Anderson's claims to the subject property. See Homeside Lending v. Miller, 2001 UT App 247, ¶ 17, 31 P.3d 607 (normally, competing interests in land have priority in order of their creation in point of time, following the general rule . . . first in time, superior in right). There is no dispute that the Trust Deed's lien was duly recorded pursuant to the requirements outlined in Utah statutes. There is no dispute that the Trust Deed's lien has priority to Anderson's purchase. Moreover, reasonable minds cannot differ that there was still an outstanding balance on the Trust Deed Note. (R-137 and 141) and UTAH CODE ANN. § 57-1-40.

Anderson's claim that the statute of limitations makes the Notice of Default a wrongful lien is erroneous. As presented above, Davis and Simmons acted well within

the applicable statute of limitations and could lawfully pursue the foreclosure proceeding. The trial court correctly held that the Notice of Default was “‘expressly authorized’ by the Utah Code, and does not fall within the definition of a wrongful lien. Utah Code Ann. § 38-9-1(6).” (R-261).

V. **THE COURT CORRECTLY DENIED ANDERSON’S MOTION FOR SUMMARY JUDGMENT IN THAT ANDERSON FAILED TO ESTABLISH THE ELEMENTS OF CONSTRUCTIVE FRAUD.**

To establish his claim of constructive fraud against Davis, Anderson was required to establish, “two elements: (i) a confidential relationship between the parties; and (ii) a failure to disclose material facts. d’Elia v. Rice Development, Inc., 2006 UT App 416, ¶ 51, 147 P.3d 515 (citing Jensen v. IHC Hospitals, 944 P.2d 327, 339 (Utah 1997)). Anderson failed to establish either of the two elements necessary for constructive fraud. Anderson and Davis do not share a confidential relationship, nor had Davis failed to disclose any material facts to Anderson. Additionally, the only entity to gain from the foreclosure of the property were the beneficiaries. As stated above, Davis’ basic duty was to the beneficiaries of the trust deed and not to a successor in interest to the owner of the property.

Anderson asserted that Davis owed him certain duties similar in that from a trustee to a trustor. (R-5); Appellant’s Brief, p. 47-49. Anderson’s allegations fail to establish either a confidential relationship with Davis or that Davis has failed to provide any information or facts, material or other. (R-148 and 262-263). Anderson cites to First Security Bank of Utah N.A. v. Banberry Crossing, 780 P.2d 1253 (Utah 1989) and

Blodgett v. Martsch, 590 P.2d 298, 302 (Utah 1978) quoting that “a trust deed trustee may not . . . defraud a trustor.” See Appellant’s Brief, p. 47. Anderson fails to establish that he is a trustor, relative to the subject property that Davis is the trust deed successor trustee. Additionally, Anderson states, “[t]he fact of the matter is that defendant T. Richard Davis just claimed to be a trustee, but in reality was not because the statute of limitations ran.” See Appellant’s Brief, p. 47-48. Not only does Anderson fail to establish the necessary relationship, but in places within his brief, even denies that Davis is a trustee.

Davis, in his role as Successor Trustee, has complied with all duties that he may have had with Anderson in that “he has honored that duty by complying with the notice statutes governing trustee sales.” (R-263). Moreover, Davis offered to meet with Anderson and his counsel to discuss the foreclosure proceedings. (R-94). Davis offered to attend an emergency hearing with the court, if Anderson requested such a hearing, to resolve Anderson’s concerns. (R-95). Davis forwarded a copy of the Note and Trust Deed to Anderson for his review. Davis encourage Anderson to seek qualified counsel. Davis had no further duty to Anderson.

VI. THE TRIAL COURT DID NOT ADDRESS ISSUES OF SANCTIONS AGAINST DAVIS AND IMPEACHMENT

Anderson includes arguments for sanctions¹⁰ against Davis and impeachment¹¹ of Davis' memoranda filed with the trial court covering the Cross-Summary Judgment Motions. However, neither issue of sanctions nor the issues of impeachment was included in Anderson's Complaint or Memorandum in Support of his Motion for Summary Judgment, neither were they ruled on by the trial court.

This Court does not have the jurisdiction to decide issues raised for the first time on appeal. Anderson now attempts to raise these issues for the first time on appeal. The trial court did not make any determination as to the issues of sanctions and impeachment. Therefore, Anderson is barred from raising these issue on appeal because it was neither argued nor determined below. See State v. Richins, 2004 UT App 36, ¶ 8, 86 P.3d 759 (“In order to preserve an issue for appeal, it . . . must be specifically raised such that the issue is sufficiently raised to a level of consciousness before the trial court, and must be supported by evidence or relevant legal authority.”); Timm v. Dewsnup, 2003 UT 47, ¶ 39, 86 P.3d 699 (The court “will review issues raised for the first time on appeal only if exceptional circumstances or “plain error” exists.”). See Heideman v. Washington City, 2007 UT App 11, ¶ 15, 155 P.3d 900.

¹⁰ See Appellant's Brief, pp. 43-47 and (R-223-243).

¹¹ See Appellant's Brief, p. 47 and (R-199-211).


Moreover, addressing Anderson's concern regarding his allegations of impropriety and misquotes. Davis filed an Errata with the trial court, correcting the typographical error in the pleading. However, if typographical errors constituted constructive fraud or fraud upon the court, most memoranda, including Anderson's Brief, which contains numerous typos, would fall into the same category and result in unnecessary accusations and disaster.

CONCLUSION

Therefore, based upon the above-stated argument, Davis respectfully requests this Court to affirm the trial court's granting of Davis' Cross-Motion for Summary Judgment and denial of Anderson's Motion for Summary Judgment.

DATED this 14th day of January, 2008.

CALLISTER NEBEKER & McCULLOUGH

By: 
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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing BRIEF OF APPELLEE were served by mailing the same via U.S. Mail, postage prepaid, on this 14th day of January, 2008 to the following:

Greg Anderson
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A handwritten signature in black ink, appearing to read "Richard J. Leedy", is written over a horizontal line.