

2007

# Greg Anderson v. T. Richard Davis : Brief of Appellant

Utah Court of Appeals

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T. Richard Davis; Thomas B. Price; Attorneys for Defendant/Appellee.

Greg Anderson; Pro Se.

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**IN THE UTAH COURT OF APPEALS**

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GREG ANDERSON

Plaintiff and Appellant

vs.

T. Richard Davis and  
John Does 1 through 10

Defendant and Appellee

**BRIEF OF APPELLANT**

Case number: 2007-00000000

District Court number: 070904196

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AN APPEAL FROM A MEMORANDUM DECISION AND ORDER  
ENTERED BY THE THIRD JUDICIAL DISTRICT COURT, SALT  
LAKE COUNTY, STATE OF UTAH, SALT LAKE DEPARTMENT,  
the honorable Kate A. Toomey, presiding.

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**ORAL ARGUMENT REQUESTED**

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**ORAL ARGUMENT REQUESTED**

**LIST OF THE PARTIES IN THE COURT BELOW**

The following is a complete list of the parties in the proceeding before the Third Judicial District Court:

**JUDGE**

The HON KATE A. TOOMEY, Judge presiding, Third Judicial District Salt Lake Department.

**PARTIES**

1. Plaintiff, Greg Anderson, pro se, represented by John McCoy in oral argument.
2. Defendant, T. Richard Davis, represented by himself and Thomas Price.



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### **JURISDICTION**

This appeal is in regards to a Memorandum Decision and Order from Third District Court. The Memorandum Decision and Order was rendered by Judge Toomey. This court has jurisdiction pursuant to [Utah Code Ann §78-2-2(3)(j)] (1953 as amended)

### **STATEMENT OF THE ISSUES**

**( a) That the statute of limitations for written contracts in Utah is 6 years, and it begins to run as soon as a person is capable of maintaining an action.**

*Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) *Lipscomb v. Chilton* 793 P.2d 379 (Utah 1990) *Cooper v. Deseret Federal Sav. and Loan* 757 P. 2d. 483 (Utah App 1988) *F.M.A. Fin Corp. v. Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670, 673 (1965). *Clarke v. Living Scriptures, Inc.* 114 P.3d 602 (Utah App 2005)

**Standard of Review: Matter of Law:** The standard of review for when the statute of limitations expires is a question of law which is reviewed for correctness: *Quick Safe-T Hitch, Inc v. RSB Sys. L.C.* 2000 Ut 84 ¶ 10, 12 P. 3d 577; also see *State v. Lusk* 2001 UT 102, ¶ 11, 37, P.3d 1103.

**(b) That an 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 an optional acceleration clause.** *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) *Lipscomb v. Chilton* 793 P.2d 379 (Utah 1990) *Cooper v. Deseret Federal Sav. and Loan* 757 P. 2d. 483 (Utah App 1988) *F.M.A. Fin Corp. v. Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670, 673 (1965).

**Standard of Review: Matter of Law:** The standard of review for when the statute of limitations expires is a question of law which is reviewed for correctness: *Quick Safe-T Hitch, Inc v. RSB Sys. L.C.* 2000 Ut 84 ¶ 10, 12 P. 3d 577; also see *State v. Lusk* 2001 UT 102, ¶ 11, 37, P.3d 1103.

**( c) That if 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 3<sup>rd</sup> parties who have not formally assumed the liabilities of the trust deed note. *Taylor Bros. Co. V. Duden et at.***

(Supreme Court of Utah Jan 27, 1948) 188 P.2d 995, See also *Graves v. Seifried*, 31 Utah 203, 87 p 674; *Boucofaki v. Jacobsen*, 36 Utah 165, 104 P. 117, 26 L.R.A., N.S, 898.

**Standard of Review: Matter of Law:** The standard of review for when the statute of limitations begins to accrue is a question of law which is reviewed for correctness: *Quick Safe-T Hitch, Inc v. RSB Sys. L.C.* 2000 Ut 84 ¶ 10, 12 P. 3d 577; also see *State v. Lusk* 2001 UT 102, ¶ 11, 37, P.3d 1103.

**(d) That a trustee has a duty to all people with a equity position in a property in which he has an official position as a trustee on a deed of trust.**

**Standard of Review: Matter of Law:** *Blodgett v. Martsch* 590 P.2d 298 (Utah 1978), *Winters v. Schulman*, 977 P.2d 1218 (Utah 1999 App), certiorari denied 994 P.2d 1271.

**(e) That a Trustee has a duty to check the applicable law of the statute of limitations, before foreclosing on a persons property.**

**Standard of Review: Matter of Law:** *Blodgett v. Martsch* 590 P.2d 298 (Utah 1978), *Winters v. Schulman*, 977 P.2d 1218 (Utah 1999 App), certiorari denied 994 P.2d 1271.

**(f) That a notice of default filed on an owners property where 8 ½ years have passed since the last payment was made, and that trustee was given**



**written notice that the notice of default does constitutes a wrongful lien; trustee is liable to the property owner for treble damages pursuant to Utah Code.**

**Standard of Review: Matter of Law:** *Blodgett v. Martsch* 590 P.2d 298 (Utah 1998), *Winters v. Schulman*, 977 P.2d 1218 (Utah 1999 App), certiorari denied 994 P.2d 1271.

**(g) That defendant T. Richard has personal knowledge that the statute of limitations in the state of Utah for written contracts is six years, which includes contracts with acceleration clauses, inasmuch as he unsuccessfully litigated, *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) a detailed statute of limitations case, in front of the Utah Supreme Court.**

**Standard of Review: The Court accepts the factual allegations in the complaint as true and consider all reasonable inferences to be drawn from those facts in a light most favorable to the plaintiff.”** *Ramsey v. Hancock*, 2003 UT App 319, ¶ 1, 79 P.3d 423.

**(h) That judge Toomey erred by stating that:**

“Thus, as a vendee, the Plaintiff has standing to assert the same defense to the obligation that Carman, LLC could have asserted, but has no rights or defenses greater that the debtor merely by virtue of his status as a vendee.”

**Standard of Review: Matter of Law:** *Taylor Bros. Co. V. Duden et at.*

(Supreme Court of Utah Jan 27, 1948) 188 P.2d 995, 996. See also *Graves v. Seifried*, 31 Utah 203, 87 p 674; *Boucofaki v. Jacobsen*, 36 Utah 165, 104 P. 117, 26 L.R.A., N.S,

898.

**(i) Judge Toomey erred when she stated:**

“In Utah, when an obligation is met by installment payments, the statute of limitations generally begins to run on each defaulted payment as they come due.”

**Standard of Review: Matter of Law:** *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) *Lipscomb v. Chilton* 793 P.2d 379 (Utah 1990) *Cooper v. Deseret Federal Sav. and Loan* 757 P. 2d. 483 (Utah App 1988) *F.M.A. Fin Corp. v. Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670, 673 (1965)

**(j) Judge Toomey erred when she stated:**

The court of appeals has since interpreted Johnson as adopting the rule used in the majority of jurisdictions on governing installment contracts.

**Standard of Review: Matter of Law:** *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) *Lipscomb v. Chilton* 793 P.2d 379 (Utah 1990) *Cooper v. Deseret Federal Sav. and Loan* 757 P. 2d. 483 (Utah App 1988) *F.M.A. Fin Corp. v. Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670, 673 (1965)

Judge Toomey used *Nilsen Newey & Co. v. Utah Resources Intern*, 905 P.2d 312 (Utah App. 1995) as her source for her above statement. *Nilson Newey & Co. v. Utah Resources Intern.*, is a case where the trial court dismissed plaintiff’s complaint on laches, and it was affirmed by the Court of appeals on that basis. In *Nilson Newey*, Plaintiffs lost, they did not win, so it could not have been adopted by the Court of Appeals.

**(k) Judge Toomey erred when she stated:**

“Although the Plaintiff argues that “It does not matter whether or not the contract is an installment contract or a contract with one payment,” none of the cases he cited supports his assertion.”

Plaintiff cited: *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983)

Plaintiff's Reply Memo filed May 23, 2007, page 5) also see: *Lipscomb v. Chilton* 793 P.2d 379 (Utah 1990), *Cooper v. Deseret Federal Sav. and Loan* 757 P. 2d. 483 (Utah App 1988), *F.M.A. Fin Corp. v. Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670, 673 (1965).

**Standard of Review:** Matter of Law, and the Court accepts the factual allegations in the complaint as true and considers all reasonable inferences to be drawn from those facts in a light most favorable to the plaintiff.” *Ramsey v. Hancock*, 2003 UT App 319, ¶ 1, 79 P.3d 423.

**(l) Judge Toomey erred when she stated:**

“Because the Plaintiff has not cited any case supporting his argument that “It does not matter whether or not the contract is an installment contract or a contract with one payment,” the Court will apply the long-standing rule 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 breached.”

Plaintiff cited: *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983), (Plaintiff's Reply Memo filed May 23, 2007, page 5). See *Graves v. Seifried*, 31 Utah (1906) 203, 87 p 674; *Boucofaki v. Jacobsen*, 36 Utah 165, 104 P. 117.

**Standard of Review:** Matter of Law, and the Court accepts the factual allegations in the complaint as true and consider all reasonable inferences to be drawn from those facts

in a light most favorable to the plaintiff.” *Ramsey v. Hancock*, 2003 UT App 319, ¶ 1, 79 P.3d 423.

**(m) Judge Toomey erred when she stated:**

. . . . . “the Court has not found a Utah case that directly considers the impact of an optional acceleration clause upon the accrual of a cause of action on an installment contract.”

Plaintiff pointed out *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) in District Court, a case which Defendant took to the Utah Supreme Court, and the case states that the statute of limitations accrues when a complete cause of action arises. The case also states that the courts may presume from the lapse of an unreasonable time that a demand was made and refused. Also see *Lipscomb v. Chilton* 793 P.2d 379 (Utah 1990) *Cooper v. Deseret Federal Sav. And Loan* 757 P.2d 483 (Utah app. 1988).

**Standard of Review: Matter of Law:** *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) *Lipscomb v. Chilton* 793 P.2d 379 (Utah 1990) *Cooper v. Deseret Federal Sav. and Loan* 757 P. 2d. 483 (Utah App 1988) *F.M.A. Fin Corp. v. Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670, 673 (1965)

**(n) Judge Toomey erred when she stated**

“Mr. Simmons forbearance should not be penalized by applying the statute of limitations to the date that Carman defaulted on its installments. The statute of limitations began to run from the date that the last part of Carman, LLC’s performance was due, June 1, 2006.”

In Utah an optional acceleration clause, may possible give a Beneficiary an extra month to foreclose, which plaintiff pointed out in District Court. See *Fredericksen v.*

*Knight Land Corp.*, 667 P.2d 34 (Utah 1983) a case which Defendant took to the Utah Supreme Court, and the case states that the statute of limitations accrues when a complete cause of action arises. Also see *Lipscomb v. Chilton* 793 P.2d 379 (Utah 1990) *Cooper v. Deseret Federal Sav. And Loan* 757 P.2d 483 (Utah app. 1988).

**Standard of Review: Matter of Law:** *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983), *Lipscomb v. Chilton* 793 P.2d 379 (Utah 1990), *Cooper v. Deseret Federal Sav. and Loan* 757 P. 2d. 483 (Utah App 1988), *F.M.A. Fin Corp. v. Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670, 673 (1965),

(o) **Sanctions:** Defendant T. Richard Davis made several statements in his memorandums that he knew were untrue when they were made. The statements were made to defraud plaintiff, and to confuse the court. Defendant Davis as a trustee had a duty to plaintiff pursuant to: *Blodgett v. Martsch* 590 P.2d 298 (Utah 1998). Defendant Davis had a duty to the court not to mislead the court pursuant to Rule 3.3. Candor Toward the Tribunal, Supreme Court Rules of Professional Practice, and Rule 4.1. Truthful in Statements to Others. ( a) Make a false statement of material fact or law to a third person; . . . Supreme Court Rules of Professional Practice

**Standard of Review: Matter of Law, and a decision by the court as to the facts:** U.C.A. § 25-5-1 (1953 as amended) *Cady v. Johnson* 671 P. 2d 149 Utah 1983). The claim or claims must be (1) without merit, (2) and lacking in good faith.

(p) **Impeachment:** Defendant's memorandums should have been

impeached pursuant to issues discussed above, and in this brief. *Schocker v. Milton O. Bitner Co.*, 30 Utah 2d 173, 176, 514 P.2d 1290,1292 (1973) *Utah R.Evid.* 801(d)(1)(A). **Standard of Review:** a matter of fact to be tried by the trier of fact *Cady v. Johnson* 671 P.2d 149 (Utah 1983)

#### **(q) Constructive Fraud**

The court should have found that Defendant Constructively Defrauded plaintiff

**Standard of Review:** . . . constructive fraud is an equitable doctrine employed by the courts to rectify injury resulting from breach of obligations implicit in the relationship. *Blodgett v. Martsch*, 590 P.2d 298, 302 (Utah 1978), *Blodgett* further explained that “[o]bviously, a trust deed trustee may not . . . defraud a trustor.” *First Security Bank of Utah N.A. v. Banberry Crossing*; 780P.2d 1253 (Utah 1989)” (page 108 footnote 4, *Five F., L.L.C. v. Heritage Savings Bank* 81 P.3d 105 (Utah App. 2003)) In Utah “every contract is subject to an implied covenant of good faith,” *Brehany v. Nordstrom*, 812 P.2d 49, 50 (Utah 1991) .

#### **(r) Breach of Fiduciary Duty**

Inasmuch as Defendant knew that he could not legally sell Plaintiff’s property because he was rebuked by the Supreme Court and knew the statute of limitations law, he had a fiduciary duty to Plaintiff, but chose to sell plaintiff’s property to satisfy his personal ambition and greed.

**Standard of Review:** Breach of Fiduciary Duty is a question for the trier of

fact, unless the circumstances are reason for a directed verdict. *In Blodgett v. Martsch*, 590 P.2d 298, 302 (Utah 1978) *Five F., L.L.C. v. Heritage Savings Bank* 81 P.3d 105 (Utah App. 2003)

## **DETERMINATIVE STATUTES and RULES**

### **§ 78-12-23. Within six years—Mesne profits of real property—Instrument in writing.**

**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.

### **§ 38-9-4. Civil liability for filing wrongful lien—Damages:**

(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 ten 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 attorneys 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;
- (c) contains a material misstatement or false claim.

**§ 78-27-56 attorneys fees—Award where action or defense in bad faith—Exceptions.**

(1) In civil actions, the court shall award reasonable attorney's fee's to a prevailing party if the court determines that the action or defense to the action was without merit and not brought in good faith, . . . .

Plaintiff is entitled to attorneys fees's because there is no question that defendants defense was brought in bad faith, and is without merit because of defendants rebuke by the Supreme Court in *Fredricksen*.

**Utah Rules of Civil Procedure. Rule 11.**

**Signing of pleadings, motions, and other papers, representations to court; sanctions.**

(a) *Signature.* Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's name, or if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signers address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representation to the court. By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or later advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,



(b)(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b)(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

(b)(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;

( c) *Sanctions.* If after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, *impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.*

#### **[1] Preamble: A Lawyer's Responsibilities.**

[1] A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility to observe the law and the Rules of Professional Conduct, shall take the Attorneys Oath upon admission to the practice of law, and shall be subject to the Rules of Lawyer Discipline, and Disability.

#### **Attorney's Oath**

I do solemnly swear that I will support, obey and defend the Constitution of the United States and the Constitution of Utah; and that I will discharge the duties of attorney and counselor at law as an officer of the courts of this State with honesty and fidelity, and that I will strictly observe the Rules of Professional Conduct promulgated by the Supreme Court of the State of Utah.

#### **Rule 3.1 Meritorious Claims and Contentions**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, . . . .

**Rule 3.3 Candor Toward the Tribunal.**

(a) A lawyer shall not knowingly:

(a)(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer,

(a)(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyers client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer, shall take reasonable remedial measures, including, if necessary disclosure to the tribunal.

**Rule 4.1. Truthfulness in Statements to Others.**

In the course of representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; . . .

**UTAH RULES OF EVIDENCE**

**Rule 601. General rule of competency.**

( c ) (2) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

**Rule 607. Who may impeach.**

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 608 Evidence of bias. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

## **STATEMENT OF THE CASE**

On or about May 10, 1996, Roy W. Simmons sold to Carman, LLC certain real property located at 136 East 2100 South in Salt Lake County, and received in connection with said sale a Trust Deed securing a debt in the amount of \$59,500. Carman LLC and/or Carolyn Manning made payments, the last of which was made on July 15, 1998. Appellant received his deed on the subject property via a Sheriff's deed, and was not a party to the original transaction between Carman LLC, and Roy W. Simmons. On November 8, 2006, Appellee filed a "Notice of Default" on Appellant's property. Appellee admits that on January 2, 2007, Appellee received a letter from Appellant demanding that he remove the "Notice of Default" within twenty days or that, "an action would be filed against him for treble damages" pursuant to §38-9-1, Utah Code. Instead of acknowledging his duties to Plaintiff as a Trustee, Defendant T. Richard Davis caused to have written a "Scam Memorandum," which was faxed to Plaintiff, in an obvious attempt to defraud Plaintiff of his property. Plaintiff should have been granted summary judgment by the District Court as follows: (1) that Defendants "Notice of Default" constitutes "Slander of Title", is a "Wrongful Lien" pursuant to §38-9-4-(3), and (2) that Defendants' actions amount to Constructive Fraud, (3) and that the statute of limitations in this action, is a six year statute that begins to accrue as to plaintiff, appellant in mid 1998, when the last payment was made by original trustor, as a matter of law. The fact of the matter is that there is a long-standing rule in Utah, and that rule is, that the statute of limitations accrues at the moment

that a cause of action arises.

Appellee argued in District Court that in Utah “Installment Contracts” are different, and that the statute of limitations begins to run on each installment as it becomes due. The statute makes no exception for installment contracts, which appellee knows inasmuch as he used the same argument in *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) in District Court, which he appealed to the Utah Supreme Court. (See Exhibit “F”) appellee’s brief in the above case pages, 21, 22, and 23). Appellee’s argument was soundly rejected by the Supreme Court which stated in the last paragraph of the decision:

“Fredricksen raises additional arguments which we deem to be without merit”

The opinion was written by the Honorable Justice Durham, and Hall, C.J. Stewart, Oaks, and Howe, JJ., concurred.

Now, twenty plus years later Appellee has decided to use the same argument as a way to defraud Appellant of his property even though the exact same argument was used and rejected as being “without merit” by the Utah Supreme Court. Furthermore, the Court of Appeals has since further expounded upon the issue of when the statute of limitations begins to run on a note and trust deed in *Cooper v. Desert Federal Sav. And Loan* 757 P.2d 483 (Utah App. 1988). Finally, the case that most relates to this action is *Taylor Bros. Co. v. Duden et al.* (Supreme Court of Utah Jan 27, 1948) 188 P.2d 995, 996.

This action started as a simple statute of limitations case, but was so convoluted by defendant and the District Court ruling, that there now other issues all relating back to, or

contingent upon the ruling as to the statute of limitations. The issue of sanctions also is now a big issue. Judge Toomey ruled against Plaintiff on each and every issue.

### **RELEVANT FACTS**

1. On or about May 10, 1996, Roy W. Simmons sold to Carman, LLC certain real property in Salt Lake County, Utah, located at 136 East 2100 South, and received in connection with said sale a Trust Deed securing a debt in the amount of \$59,500.00. The Trust Deed was recorded with the Salt Lake County recorder on September 10, 1996.

2. Carman L.L.C. made payments on the note until mid 1998.

3. In about 1997 or 1998 the property was deeded from Carman L.L.C. to E. L. Whitehead.

4. On or about March 23, 2000, Plaintiff received a Judgment against E. L. Whitehead in the amount of \$147,000.00 from the Third District Court, Salt Lake County, State of Utah.

5. On or about January 20, 2006, plaintiff received a Sheriff's Deed on the subject property, which was sold by the Sheriff, and purchased by plaintiff pursuant to plaintiff's judgment.

6. On or about November 11, 2006 Appellee T. Richard Davis filed a Notice of Default on Plaintiff's property, and claimed a total of \$104,209.63 was still due on the note.

7. On or about December 29, 2006, plaintiff sent defendant a letter demanding that

he take the Notice of Default of plaintiff's property because it constituted a wrongful lien pursuant to the Wrongful Lien Act, Utah Code, inasmuch as the note had been paid, and/or the statute of limitations had ran because more that eight and one half years had passed since the last payment had been made by the original mortgagor. (See Exhibit "A")

8. On January 11, 2007, Defendant wrote a letter to Plaintiff in which he stated: "Since mid 1998, however no payments have been made". When the last payment was made in "mid 1998", and Plaintiff believes is the day that the six year statute of limitations began to accrue pursuant to Utah Law. (Exhibit ("B"))

9. Defendant refused to take the unlawful lien off of plaintiff's property, and in February of 2007, unlawfully noticed plaintiff's property up for a Trustee's Sale.

10. On March 20, 2007 Plaintiff faxed to defendant case law clearly showing that the statute of limitations had ran its course because plaintiff was not a party to the contract pursuant to *Taylor Bros. Co. V. Duden et at.* (See Exhibit "C")

11. On March 20, 2007 T. Richard Davis sent plaintiff a memorandum that was for the purpose of defrauding plaintiff of his property, even though he had a duty to plaintiff because he was acting as plaintiff's trustee. The memorandum was authored by Nathan Scharton, an attorney in the firm of Callister, Nebeker, and McCullough. Inasmuch as the memorandum cited cases that had nothing to do with plaintiff's case, that memorandum was at all times characterized by plaintiff as a "scam memorandum" to put defendant and his attorney on notice that his case was without merit, and that he had no authority to be a

Trustee because the Statute of Limitations had ran. (Exhibit “D”)

12. On or about March 16, 2007 appellant filed this action against T. Richard Davis in Third District Court in Salt Lake City, and filed a lis pendens on the subject property.

13. On or about the 13<sup>th</sup> day of April, 2007, Plaintiff filed a motion for summary judgment against Defendant and Appellee T. Richard Davis.

14. On or about the 27<sup>th</sup> day of April Defendants T. Richard Davis and Thomas B Price filed a Memorandum of Points and Authorities in Opposition to Plaintiff’s Motion for Summary Judgment and a Memorandum of Points and Authorities in Support of Defendants Cross-Motion for Summary Judgment. The documents purposely convoluted the facts pertaining to the action, and also the case law on at least three occasions pertaining to the action. None of the cases that defendants presented had anything to do with plaintiff’s case, and their claims as to what their cases meant is without merit and presented in bad faith, which will be shown.

15. On or about the 14 day of May, in order to get Defendants attention, Plaintiff sent to defendant a Motion and Memorandum for Sanctions pursuant to Rule 11. Rule 11 precludes Plaintiff from filing the Motion and Memorandum with the court clerk for 21 days.

16. On or about the 21<sup>st</sup> day of May, Plaintiff filed a motion to impeach defendants’ memorandums.

17. On May 14, Plaintiff faxed to Gary R. Howe, a partner in the law firm of Callister Nebeker and McCullough a letter in regarding Rules of Professional Conduct, and Specifically Rules 5.1, and 5.2 respectively, which is Responsibilities of Partners, Managers, and Supervisory Lawyers, and Responsibilities of a Subordinate Lawyer. Plaintiff told Mr. Howe in the fax that he knew that Defendant T. Richard Davis knew the statute of limitations law. Mr Howe did not respond, or act pursuant to his responsibilities as defined by the Rules of Professional Conduct, as a senior partner in the firm of Callister, Nebeker, and McCullough. (Exhibit E)

18. Plaintiff knew that defendant T. Richard Davis had personal knowledge of when the statute of limitations begins to accrue in the State of Utah, because he unsuccessfully litigated a case in the Utah Supreme Court that explained when the statute of limitations begins to accrue. He was soundly rebuked by the Supreme Court. The case was *Fredrickensen v. Knight Land Corp* 667 P.2d 34 (Utah 1983). This was one of the cases pointed out in plaintiff's memorandums in Third District Court, but Judge Kate A. Toomey disregarded all Utah Supreme Court precedent setting cases, and went all over the United States to find installment cases.

19. In Plaintiff's motion for summary judgment, plaintiff made the following statement:

“12. The material facts are clear and not disputed in this case, and so the case is simply a matter of law with two legal questions before the court which are: **(a) What is the statute of limitations in the State of Utah on a written**



**contract that a vendee is not party to, and; (b) Did Defendant overstep his bounds, and duty to Plaintiff by placing a “Notice of Default” on Plaintiff’s property when the last payment to beneficiary was more that eight years prior.”**

On page 6 of defendants opposition memorandum **defendants purposely misstated plaintiff’s memorandum** by claiming plaintiff said:

**“(a) What is the statute of limitations in the state of Utah under writs and contract that a vendee is not party to, and;”**

20. After Plaintiff moved the court to impeach defendant’s motion for summary judgment, defendant Defendant T. Richard Davis apologized to the court for the above mistake, but did not apologize for any of the other claims or misstatements of case law, and acted as though they never happened. Plaintiff believes that he can prove that the above statement by defendant, and his attorney was not a mistake, but a calculated misstatement in order to defraud plaintiff of his property.

21. On page 9 of defendants opposition memorandum **defendants purposely misstated plaintiff’s memorandum** by claiming plaintiff argued he had the same rights as the mortgagor, even though case law in the below case, and others, states he has superior rights to the original mortgagor.

“Plaintiff argues that Taylor Bros. Co. v. Duden et al, 188 P. 2d 995 (Utah 1948) allows him the same rights as Carman, LLC, relative to the Note and assert the statute of limitations claim attempting to bar the foreclosure proceedings. Even if Taylor does allow Plaintiff the same rights as Carman, LLC, the Note became due on 01 June 2006,

and the applicable statute of limitations began as well.”

22. Plaintiff never made the above argument that Defendants claims he made in defendant’s above statement. The statement is a misrepresentation of plaintiff’s position, and was fabricated for the purpose of claiming that plaintiff did not have superior rights to the mortgagor as is stated by the Utah Supreme Court in the above case. Defendants never apologized to the court for the above statement even though it was pointed out by plaintiff in his motion to impeach defendants motions. Judge Toomey used a version of the above statement in her memorandum and decision.

23. On the first paragraph of page nine of defendant’s opposition to plaintiff’s motion to impeach defendants Davis, and Price stated:

“It cannot be disputed that the statute of limitations began on 01 June 2006 and Defendants actions to foreclose on the Property and conduct a trustee sale falls well within the applicable Statute of Limitations.”

The fact of the matter is that *Taylor* does dispute that the statute began in June of 2006 as defendants claim pursuant to Plaintiff’s superior rights as stated below.

[1,2] . . . . This Court has held that such a vendee may plead the bar of the Statute of Limitations at the expiration of six years after the cause of action against the mortgagor has arisen. See *Graves v. Seifried*, 31 Utah 203, 87 p 674; *Boucofaki v. Jacobsen*, 36 Utah 165, 104 P. 117, 26 L.R.A., N.S, 898. . . . This is so because as stated in 34 Am.Jur. Page 294, Sec. 397:

Plaintiff also countered as follows:

*Taylor* is very clear in stating that a vendee may plead the bar of the Statute of Limitations at the expiration of six

years after the cause of action against the mortgagor has arisen. In Utah the statute of limitations begins to run at the time when a complete cause or right of action accrues or arises. Thus the period of limitations begins to run as soon as a right to institute a suit arises. *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) *Hill v. Allred* 28 P.3rd 1271 Utah (2001).

24. T. Richard Davis as an attorney appealed *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) to the Utah Supreme Court, and was thoroughly rebuked. The case states that the statute of limitations accrues when a complete cause of action arises.

25. In his brief in *Fredericksen v. Knight Land Corp.*, Mr. Davis used the same argument as he used in this action, that the statute of limitations begins to accrue on a installment contract on each installment as it becomes due, and was soundly rebuked by the Supreme Court. (Exhibit "F")

26. The fact of the matter is that the Court of Appeals decided Nilson-Newey & Co. on the Doctrine of laches in favor of defendants, and not in favor of plaintiffs, the party who claimed Johnson was similar to their case. The Court of Appeals discussed the *Johnson* case, and rejected *Johnson* argument in the above case, and never adopted any such rule, and the claim that the Court of Appeals adopted the *Johnson* case was a total fabrication. The fact of the matter is that the accrual of the Statute of Limitations law in 1904 is the same as it is today, which is, the statute begins to run when a action can be maintained. In *Graves v. Seigfried, et al* 87 P. 674, 677 (Utah 1906), with a note payable in installments, the Supreme Court of Utah stated:

When the association was declared insolvent and a receiver

appointed to wind up its affairs, the mortgage became immediately due and collectible, and the receiver could have maintained an action for a recovery. The cause of action accrued at that time, and the statute then began to run. The association was adjudged insolvent and a receiver appointed January 8, 1898. The action was commenced April 29, 1904, a period of time longer than six years.

26. On or about August 21, 2007 plaintiff demanded from T. Richard Davis an accounting on plaintiff's property pursuant to defendant Judge Toomey's decision in the second paragraph of page 8 of the Judge's Order dated August 14, 2007. On or about August 22, 2007, Defendant Thomas B Price sent a letter to Plaintiff refusing an accounting, and rejecting the judges declaratory findings, and even though they are not in accordance with Utah Law, nor did the declaratory findings give plaintiff the relief that he should have been granted in the first place.

### **DETAIL OF THE ARGUMENT**

**A. The statute of limitations for written contracts in the State of Utah is six years, and that it begins to run as soon as a person is capable of maintaining an action.**

#### **THE REAL UTAH LAW CONCERNING THE STATUTE OF LIMITATIONS**

The statute of limitations in the state of Utah for written contracts reads as follows:

**§ 78-12-23. Within six years -----Mesne profits of real property-----Instrument in writing.**

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.

It is noteworthy that the statute has the single exception of §78-12-22, and there is no exception for installment contracts in the statute as defendant claims.

On page 8 Defendant stated in his Memorandum of Points and Authorities for his Cross-Motion for Summary Judgement he states: “Furthermore, the Utah Supreme Court addressed the specifics of installment payments and when the statute of limitations begins.

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.

In her Memorandum Decision and Order in regards to the above statement judge Toomey stated:

The Court of Appeals has since interpreted Johnson as adopting the rule used in the majority of jurisdictions governing installment contracts. See *Nilson-Newey and Co. v. Utah Resources Int’l* 905 P.2d 312, 316 (Utah Ct. App. 1995)

The Fact of the matter is that the Court of Appeals in *Nilson-Newey* stated: With respect to plaintiff’s claim for recovery of its share in any profits, plaintiff argues that this case is like *Johnson v. Johnson* 31 Utah 408, 88P. 230 (Utah 1906) and then stated:

Thus on the facts before the trial court, there is no basis for applying the rule set forth in Johnson.

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*Nilson- Newey* was decided by the Court of Appeals in favor of defendant on the

defense of laches. (See Footnote 1). Inasmuch as the case was decided by laches in favor of defendant, it therefore seems a bit strange that the court adopted plaintiff's argument as Judge Toomey claims.

The Court of Appeals actually did rule on mortgages with acceleration clauses in *Cooper v. Deseret Federal Sav. And Loan*, 757 P.2d 483 (Utah App. 1988) where it stated:

The prevailing rule is that under an ordinary acceleration clause in a mortgage or trust deed, 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. Accordingly, where . . . no definite time is specified by which the election to accelerate must be exercised, such election to do so must be exercised within a reasonable time. . . . Of course, each case must be considered on its own facts, and certainly, an election to accelerate a year or years in the future, . . . could not be considered reasonable under ordinary circumstances.

In *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) the court stated:

Unless a delay in making a demand is expressly contemplated by the parties, the courts may presume from the lapse of an unreasonable time that a demand was made and refused.

Defendant Richard Davis was an attorney for the Plaintiff/Appellant in *Fredericksen* and used the same argument in his brief in that case, that: "Installment sales are treated uniquely by statutes of limitations" (See Brief of Appellant Case No. 18131, pages 21-23, Exhibit "F") The Utah Supreme Court soundly rebuked his argument by simply stating:

*Fredericksen* raises additional arguments which we deem to be without merit.  
Page 38.

Also see, *Lipscomb v. Chilton* 793 P.2d 379 (Utah 1990) *F.M.A. Fin Corp. v. Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670, 673 (1965).

**An 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 an optional acceleration clause.** In *Fredericksen* the court went on to say

. . . . However, when a provision in a contract requires an act to be performed without specifying the time, the law implies that it is to be done within a reasonable time under the circumstances; and in case of controversy, that is something for the trial court to determine.” *Bradford v. Alvey & Sons*, Utah, 621 P.2d 1240, (1980) (footnotes omitted).

In *Cooper v. Deseret Federal Sav. and Loan* 757 P. 2d. 483 (Utah App 1988) the court stated:

There are ample facts in the record to support the trial courts conclusion that Desert’s failure to enforce the due on sale option for more than four years after it learned of the sale is unreasonable. See *Malouff*, 509 P.2d at 1246 (one month is reasonable, but not one year). Accordingly, we affirm the trial court’s conclusion.

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**If 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 3<sup>rd</sup> parties who have not formally assumed the liabilities of the trust deed note.** In *Taylor Bros. Co. v Duden et al.* the Supreme Court of Utah Stated:

. . . . This court has held that such a vendee may plead the bar of the Statute of Limitations at the expiration of six years.

After the cause of action against the mortgagor has arisen. See *Graves v. Seifried*, 31 Utah 203, 87 P.674 and *Boucofaki v. Jacobsen*, 36 Utah 165, 104 P. 117, 26 L.R.A.,N.S. 898. In those cases it was held that the statute of limitations inured to the benefit of a third party who was not a party to the contract even though the mortgagor had waived or could not avail himself of that defense. This is so because as stated in 34 Am Jur. Page 294, Sec. 379.

*Taylor Bros. Co. V. Duden et at.* (Supreme Court of Utah Jan 27, 1948) 188 P.2d 995.

**A trustee has a special duty to all people with a equity position in a property in which he has an official position as a trustee pursuant to a deed of trust.**

In *Blodgett v. Martsch* 590 P.2d 298 (Utah 1978) regarding a trustee's sale the Utah Supreme Court stated:

[5] The duty of the trustee under a trust deed is greater than the mere obligation to sell pledged property in accordance with the default provision of the trust deed instrument, it is a duty to treat the trusted fairly in accordance with a high punctilio of honor. In discussing the difference between the duties of a mortgagee and the trustee under a trust deed, the Court of Appeals of District of Columbia in *Spruill v. Ballard*, 61 App D.C. 112, 58 F.2d 517, made this statement:

The practice of securing money by deed of trust on real estate is the nearly universal method in effect in the District of Columbia. The ease and facility of foreclosure under it commends it over the more cumbersome form of mortgage which must be foreclosed in court, but this very fact imposes upon courts the duty of scrutinizing all sales had under it which are questioned, and of setting those aside in which fraud or overreaching has been practiced by the trustee. In *Church Inv. V. Holmes*, 60 App. D.C. 27, 46 F.2d 608, we said a trustee named in a deed of trust to secure a loan sustains a fiduciary relation to the debtor as well as the creditor.

[6] The breach of duty by the dominant party in a



confidential relationship may be regarded as constructive fraud. It is unnecessary for the plaintiff to show an intent to defraud; constructive fraud is an equitable doctrine employed by the courts to rectify injury resulting from breach of obligations implicit in the relationship.

[7] . . . . . Finally, there is room for inference that trust companies, if they use the trust deed mechanism with no intent to be protective of borrowers, exploit the euphoria engendered by the word "trust" The statutes permits only entities with credentials of trustworthiness to act as "trustees," (footnote omitted) and the instrument of transfer is denominated a "trust" deed. It may not be generally understood by those who convey by trust deed that the only entity to which the trustee feels fiduciary obligation is itself.

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*In this action, defendant T. Richard Davis is a prime example of a trustee who is unprotective of borrowers, (namely, plaintiff, appellant) and exploited the euphoria engendered by the word "trust", but went way beyond exploiting, by defrauding plaintiff-appellant of his property with an argument that he had soundly lost in Fredricksen. Defendant would have the court believe that if he complied with the outline by the legislature that he has no other liability concerning the foreclosure of trust deeds. However the Utah Court of Appeals has a very different outlook., and stated:*

Thus, we are not convinced that the applicable standard has been established in Utah "as a matter of law." Accordingly, the standard must be established factually in the course of ultimate resolution of this case, with a emphasis on standard-of-care-in-the-industry evidence.

(Although the footnotes are very detailed as to legislative intent, and standard of care, they have been omitted).

**A Trustee has a duty to check the applicable law of the statute of limitations, before foreclosing on a persons property.**

In this action, defendant T. Richard Davis placed a notice of default on plaintiffs property and fraudulently foreclosed on the property, all the time knowing that he had no right to do so because of his being rejected by the Supreme Court of Utah in *Fredricksen*. Therefore, there was absolutely no question in Defendant's mind that the statutes of limitations had long ago ran in regards to plaintiffs property, In *Wycalis v. Guardian Title of Utah* 780 P.2d 821, a trustee filed a notarized reconveyance, acknowledged by a notary who was either duped or corrupted (p. 822) The request for reconveyance was accompanied by a letter that was also forged. Even though defendant had nothing to do with the notarization of the document the Utah Court of appeals granted a trial for plaintiff in order to decide the issue of whether or not defendant exercised an appropriate standard of care. In . *Blodgett v. Martsch* 590 P.2d 298 (Utah 1998) the Supreme Court of Utah stated:

The duty of the trustee, under a trust deed is greater than the mere obligation to sell the pledged property in accordance with the default provisions of the trust deed instrument, it is a duty to treat the trustor fairly and in accordance with a high punctilio of honor.

It is not honorable for a trustee to place a notice of default on a persons property when he has personal knowledge that the statute of limitations has ran and that he has no right to sell the property. The fact of the matter is that under Utah law a trustee pursuant

to a Deed of Trust, is the technical owner of the property. When the statute of limitations has accrued, he no longer has any claim to the property. In *Five F, LLC v. Heritage Savings Bank* 81 P. 3d 105 (Utah App 2003) “The trial court found that Heritage owed Five F a fiduciary duty by assuming the role of both trustee and beneficiary” (page107). The court went on to state when a trustee owes a fiduciary duty to a trustor as was explained in *First Security Bank of Utah N.A. v. Banberry Crossing*; 780P.2d 1253 (Utah 1989) (3) “where the trustee stands in a dominate position to the trustor.” Defendant T. Richard knew that his argument involving installment contracts was without merit because of his rebuke by the Utah Supreme Court, but pursued that argument in the District Court. The fact is that Defendant was in a dominate position to Plaintiff because he refused to disclose the true law to Plaintiff. Plaintiff became aware of Defendants Brief in *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) after the District Court Memorandum and Order, however with Defendant being in a dominate position, he had a fiduciary duty to disclose the real law to Plaintiff. *Winters v. Schulman*, 977 P.2d 1218 (Utah 1999 App), certiorari denied 994 P.2d 1271.

### **WRONGFUL LIEN**

**A “notice of default” filed on an owners property where 8 ½ years have passed since the last payment was made, and that trustee was given written notice that the “notice of default constitutes a wrongful lien,” trustee is liable to the property owner all damages for trebled pursuant to Utah Code.**

*Blodgett v. Martsch* 590 P.2d 298 (Utah 1998), *Winters v. Schulman*, 977 P.2d 1218 (Utah 1999 App), certiorari denied 994 P.2d 1271.

In Utah, “[t]rust deed’ means a deed . . . conveying real property to a trustee in trust to secure the performance of an obligation of the trustor or other person named in the deed to a beneficiary.” Utah Code Ann. §57-1-19-19(3) (2000). Five F, L.L.C. v. Heritage Savings Bank 81 P.3d 105 (Utah App. 2000).

In order to be a trustee in Utah, the Trustee must be the technical owner of the property, as mentioned above. **However, a purported Trustee is not a trustee at all after the statute of limitations has ran, because he owns nothing nor can anything be transferred to him by a beneficiary who owns nothing because the statute of limitations has ran, therefore the beneficiary has no equity, and therefore has nothing to sell.** T. Richard Davis has personal knowledge that the statute of limitations in the State of Utah for written contracts is six years, which includes contracts with acceleration clauses, inasmuch as he unsuccessfully litigated, *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983), a detailed statute of limitations case, in front of the Utah Supreme Court. (See Exhibit “F”) Therefore, defendant had no legal right to place a notice of default on plaintiff’s property, and no right to sell plaintiff’s property. The notice of default on plaintiff’s property constitutes a wrongful lien, because the statute of limitations had ran about two and a half prior to him becoming the purported trustee. In *Commercial Inv. Corp. v. Siggard* 936 P.2d 1105 (Utah App. 1997) “purchasers notice of interest in entire 38 acre tract of land could be considered “groundless,” under statute

authorizing damages award against party who groundlessly claims an interest in document filed in office of county recorder.” By virtue of Defendants Notice of Default, he claimed an interest in Plaintiff’s property, when he had none, and he knew it, because of his rebuke by the Supreme Court in *Fredricksen*, which constitutes malice. In *Russell v. Thomas* 999 P. 2d 1244 (Utah App.2000), the court stated: [3,4] ¶ 13 To file a Notice of Interest under section 57-9-4, the person must minimally “claim [ ] to have an interest in land” Id § 57-9-4(1) (1994) Plaintiff is entitled to treble damages in the minimal amount of \$1,440,000 together with costs and attorney’s fees.

**Judge Toomey erred by stating that:**

“Thus, as a vendee, the Plaintiff has standing to assert the same defense to the obligation that Carman, LLC could have asserted, but has no rights or defenses greater than the debtor merely by virtue of his status as a vendee.”

Page 6 footnote 4 Memorandum Decision and Order.

*Taylor Bros. Co. V. Duden et al.* (Supreme Court of Utah Jan 27, 1948) 188 P.2d 995, 996. See also *Graves v. Seifried*, 31 Utah 203, 87 p 674; *Boucofaki v. Jacobsen*, 36 Utah 165, 104 P. 117, 26 L.R.A., N.S, 898.

**Judge Toomey erred when she stated:**

“In Utah, when an obligation is met by installment payments, the statute of limitations generally begins to run on each defaulted payment as they come due.”

Page 7, Memorandum Decision and Order.

Judge Toomey has no Utah cases to back up the above statement. And admitted so when she stated. “. . . . “the Court has not found a Utah case that directly considers the

impact of an optional acceleration clause upon the accrual of a cause of action on an installment contract.” Plaintiff cited: *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) Also see, *Lipscomb v. Chilton* 793 P.2d 379 (Utah 1990) *Cooper v. Deseret Federal Sav. and Loan* 757 P. 2d. 483 (Utah App 1988) *F.M.A. Fin Corp. v. Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670, 673 (1965) The fact of the matter is that Judge Toomey was unable to find a case that considers the impact of an optional acceleration clause in conjunction with an installment contract is because it is not the law, so it makes sense that she could not find such a thing. An optional acceleration clause gives a person at best up to one month to make a decision before the statute of limitations begins to run, unless special circumstances are involved.

**Judge Toomey erred when she stated:**

The court of appeals has since interpreted Johnson as adopting the rule used in the majority of jurisdictions on governing installment contracts.

Page 8, Memorandum Decision and Order.

Plaintiff cited: *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) also see : *Lipscomb v. Chilton* 793 P.2d 379 (Utah 1990) *Cooper v. Deseret Federal Sav. and Loan* 757 P. 2d. 483 (Utah App 1988) *F.M.A. Fin Corp. v. Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670, 673 (1965)

Judge Toomey used *Nilsen Newey & Co. v. Utah Resources Intern*, 905 P.2d 312 (Utah App. 1995) as her source for her above statement. *Nilson Newey & Co. v. Utah Resources Intern.*, is a case where the trial court dismissed plaintiff’s complaint on laches,

and it was affirmed by the Court of appeals on that basis. In *Nilson Newey*, Plaintiffs lost, they did not win, so it could not have been adopted by the Court of Appeals.

**Judge Toomey erred when she stated:**

“Although the Plaintiff argues that “It does not matter whether or not the contract is an installment contract or a contract with one payment,” none of the cases he cited supports his assertion.”

Page 10 Memorandum Decision and Order

Plaintiff cited: *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) also see: *Lipscomb v. Chilton* 793 P.2d 379 (Utah 1990), *Cooper v. Deseret Federal Sav. and Loan* 757 P. 2d. 483 (Utah App 1988), *F.M.A. Fin Corp. v. Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670, 673 (1965).

**Judge Toomey erred when she stated:**

“Because the Plaintiff has not cited any case supporting his argument that “It does not matter whether or not the contract is an installment contract or a contract with one payment,” the Court will apply the long-standing rule 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 breached.”

page 12 Memorandum Decision and Order

The long standing rule in Utah is that the statute of limitations begins to accrue, “at the moment that a cause of action arises” *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) (page 36), Furthermore, the Supreme Court rebuked T. Richard Davis’s argument in his brief in *Fredricksen* by stating; “Fredrickensen raises additional arguments

which we deem to be without merit.” *Graves v. Seifried*, 31 Utah (1906) 203, 87 p 674 shows that the Supreme Court had the same position in 1906 in a mortgage foreclosure which states “Section 2875 provides that an action upon any contract; obligation or liability founded upon an instrument of writing shall be brought within six years.” In *Boucofaki v. Jacobsen*, 36 Utah 165, 104 P. 117, 26 L.R.A., N.S, 898. (Utah 1909) the Supreme Court stated: . . the statute of limitations in favor of the junior claimant begins to run from the time the right of action against the original debtor accrued; . . (page 122, 123)

**Judge Toomey erred when she stated:**

. . . . . “the Court has not found a Utah case that directly considers the impact of an optional acceleration clause upon the accrual of a cause of action on an installment contract.”

(Page 13 Memorandum Decision and Order.)

The reason that the court could not find a case in Utah that considers the impact of an optional acceleration clause upon the accrual of a cause of action on an installment contract is because it is not Utah law, and therefore would obviously not exist. Plaintiff pointed out in, *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) (page 34, 36) in District Court, a case which Defendant took to the Utah Supreme Court, that the case states that the statute of limitations accrues when a complete cause of action arises. The case also states that the courts may presume from the lapse of an unreasonable time that a demand was made and refused (page 38). Also see *Lipscomb v. Chilton* 793 P.2d 379 (Utah 1990) *Cooper v. Deseret Federal Sav. And Loan* 757 P.2d 483 (Utah app. 1988). *F.M.A. Fin Corp. v. Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670, 673 (1965)



**Judge Toomey erred when she stated**

“Mr. Simmons forbearance should not be penalized by applying the statute of limitations to the date that Carman defaulted on its installments. The statute of limitations began to run from the date that the last part of Carman, LLC’s performance was due, June 1, 2006.”  
(Page 17, 18 Memorandum Decision and Order.)

In Utah an optional acceleration clause, may possible give a Beneficiary an extra month to foreclose, which plaintiff pointed out in District Court. See *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) a case which Defendant took to the Utah Supreme Court, and the case states that the statute of limitations accrues when a complete cause of action arises. Also see *Lipscomb v. Chilton* 793 P.2d 379 (Utah 1990) *Cooper v. Deseret Federal Sav. And Loan* 757 P.2d 483 (Utah app. 1988. *F.M.A. Fin Corp. v. Build, Inc.*, 17 Utah 2d 80, 404 P.2d 670, 673 (1965),

**Sanctions:**

Defendant T. Richard Davis made several statements in his memorandums that he knew were untrue when they were made. See “Relevant Facts”, 19-26) The statements were made to defraud plaintiff, and to confuse the court. Defendant Davis as a trustee had a duty to plaintiff pursuant to: *Blodgett v. Martsch* 590 P.2d 298 (Utah 1998) Defendant Davis had a duty to the court not to mislead the court pursuant to Rule 3.3. Candor Toward the Tribunal, Supreme Court Rules of Professional Practice, and Rule 4.1. Truthful in Statements to Others. ( a) Make a false statement of material fact or law to a third person; . . . Supreme Court Rules of Professional Practice. Because of Defendant’s argument in

*Fredricksen* where he was rebuked by the Utah Supreme Court he knew that he had no legal or moral right to make the same argument again, and should be sanctioned. His claims as to the statute of limitations are (1) without merit, (2) and lacking in good faith. Because of being rebuked there is no way that he could have an honest belief in his claims that the statute of limitations begins to run with each installment missed. Because of being rebuked by the Supreme Court it is obvious that he fully intended to defraud plaintiff of his property. Furthermore there is no question that he knew that his frivolous and without merit arguments would hinder, delay and defraud plaintiff, and constitutes bad faith. In *Cady v. Johnson* 671 P.2d 149 (Utah 1983) the Supreme Court stated:

In addition to finding the claim to lack merit, the trial court must also find that plaintiff's conduct in bring suit was lacking in good faith. In *Tacoma Assoc. Of credit Men v. Lester*, 72, Wash 2d. 453, 458, 433 P.2d 901, 904 (1967, the court defined "good faith" as:

(1) An honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will, [sic] hinder delay or defraud others.

To establish lack of good faith, one must prove that one or more of these factors is lacking. *Sparkman and McLean Co. v. Derber*, 4 Wash. App. 341, 481 P.2d 588 (1971)

Although Sanctions were not evoked in *Cady*, the Court of Appeals in *Taylor v.*

*Estate of Taylor* 770 P. 2d 163 (Utah App. 1989) stated:

Further consideration of *Cady v. Johnson* 671 P.2d 149 (Utah 1983), highlights the importance of the amendment to Rule 11. See also note 10 supra. In *Cady*, which arose prior to the amendment, the trial court awarded fees pursuant to Utah

Code Ann. §78-27-56, which provides for attorney fees where an action is without merit and “not brought in good faith.” The Supreme Court agreed that the claim had “no legal basis”, and therefore was “without merit.” 671 P.2d at 151. The Supreme Court disagreed, however, with the trial court’s view that a lack of good faith had been established “because had plaintiffs researched the issue as instructed at pre-trial conference, they would have discovered they had no valid claim. . . .” *id.* At 152. The supreme Court held that such “conduct does not rise to lack of good faith.” *id.*, which it defined in terms of purely subjective intentions. *id.* at 151. Had amended Rule 11 applied in Cady, the analysis would no doubt have been different and the imposition of a fee sanction affirmed instead of reversed. Very simply, counsel’s failure to research the validity of his clients’s claim meant counsel had not made “reasonable inquiry” into whether the claim was “warranted by existing law.” Utah R.Civ.P. 11.

(Footnote 10)

11. Rule 40(a) is to this court what Rule 11 is to the trial courts. Both rules require attorneys and parties to reasonably inquire as to the facts and law before a document is signed and filed. Rule 40(a) is substantially similar to Rule 11 and provides in part:

The signature of an attorney or a party constitutes a certificate that the attorney or the party has read the motion, brief, or other paper; that to the best of the attorney’s or the party’s knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law. . . . If a motion, brief, or other paper is signed in violation of this rule, the court . . . . Shall impose . . . an appropriate sanction, which may include . . . a reasonable attorney fee.

(Footnote 11)

It is clear that Defendant T. Richard would have been sanctioned under either the old Rule 11, or the amended rule, because he knew the law on the statute of limitations

because of his rebuke by the Utah Supreme Court in regards to his brief in *Fredricksen v. Knight Land Corporation*. (See Exhibit “F” Defendants brief in *Fredricksen*)

On May 14, Plaintiff faxed to Gary R. Howe, a partner in the law firm of Callister, Nebeker, and McCullough a letter in regarding Rules of Professional Conduct, and Specifically Rules 5.1, and 5.2 respectively, which is Responsibilities of Partners, Managers, and Supervisory Lawyers, and Responsibilities of a Subordinate Lawyer. Plaintiff told Mr. Howe in the fax that he knew that defendant T. Richard Davis knew the statute of limitations law. (See Exhibit “E”). Therefore the law firm of Callister, Nebeker, and McCullough should also be sanctioned. Finally Nathan Scharon, the person who wrote the “Scam Memorandum”, should also be sanctioned inasmuch as the memorandum cited cases that had nothing to do with plaintiff’s case, and the “scam memorandum” was the beginning of the conspiracy to defraud plaintiff. The “Scam Memorandum” was also without merit, because it also claimed that the statute of Limitations began to accrue on an installment contract with each installment, which is in violation of the Professional Rules of Conduct. Whether specific conduct amounts to a violation of Rule 11 is a question of law. See e.g., *Golden Eagle Distrib. Corp.*, 801 F.2d at 1538. If a Rule 11 violation is shown, an appropriate sanction is mandated, and we will affirm the particular sanction imposed by the trial court, including the reasonableness of any fee award., absent an abuse of discretion. *Id. Taylor v. Estate of Taylor* 770 P.2d 163 (Utah App. 1989)

## IMPEACHMENT

Defendant's memorandums should have been impeached pursuant to prior issues discussed above, of purposely manufacturing facts, and misstating what the case law said. In *Miller v. Archer* 749 P.2d 1274 (Utah App. 1988) the court ruled that "After determining that the receipt of \$5,000 recited in real estate option agreement was not true consideration for option trial court could consider parol evidence to disclose the true meaning of provisions in the agreement." Also see *Schocker v. Milton O. Bitner Co.*, 30 Utah 2d 173, 176, 514 P.2d 1290, 1292 (1973) Utah R.Evid. 801(d)(1)(A). *Cady v. Johnson* 671 P.2d 149 (Utah 1983) *Taylor v. Estate of Taylor* 770 P.2d 163 (Utah App. 1989).

## CONSTRUCTIVE FRAUD

"The *Banberry Crossing* court cited *Blodgett v. Martsch*, 590 P.2d 298, 302 (Utah 1978), to explain that "[o]bviously, a trust deed trustee may not . . . defraud a trustor." *First Security Bank of Utah N.A. v. Banberry Crossing*; 780P.2d 1253 (Utah 1989)" (page 108 footnote 4, *Five F., L.L.C. v. Heritage Savings Bank* 81 P.3d 105 (Utah App. 2003)) In Utah "every contract is subject to an implied covenant of good faith," *Brehany v. Nordstrom*, 812 P.2d 49, 50 (Utah 1991) ." Forcing Plaintiff to defend the title to his property for over a year by a Trustee, when the Trustee knew the law because of his rebuke by the Supreme Court of Utah is obviously Constructive Fraud. The 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 had ran.. In *Blodgett* the Court stated:

[6] The breach of duty by the dominate party in a confidential relationship may be regarded as constructive fraud. It is unnecessary for the plaintiff to show an intent to defraud; constructive fraud is an equitable doctrine employed by the courts to rectify injury resulting from the breach of the obligations implicit in the relationship.

Page 302

It is obvious that Defendant constructively defrauded Plaintiff.

### **BREACH OF FIDUCIARY DUTY**

Inasmuch as Defendant knew that he could not legally sell Plaintiff's property because he was rebuked by the Supreme Court and knew the statute of limitations law, he had a fiduciary duty to Plaintiff. Breach of Fiduciary Duty is a question for the trier of fact, unless the circumstances are reason for a directed verdict. *Five F., L.L.C. v. Heritage Savings Bank* 81 P.3d 105 (Utah App. 2003) The court found that Defendant had a fiduciary to Plaintiff, by assuming the role of both trustee and beneficiary. In this case, Defendant knew that he had no right to sell Plaintiff's property because he was rebuked by the Utah Supreme Court in *Fredricksen*, thereby breaching the covenant of good faith and fair dealing. Also see *Blodgett v. Martsch*, 590 P.2d 298, 302 (Utah 1978).

### **SUMMARY OF THE ARGUMENT**

**Even though the Court of Appeals rejected the argument of plaintiff Nilsen-Newey, in regards to the “installment nature of the contract”, Defendant T. Richard Davis and Judge Toomey used Nilsen-Newey as a springboard as a way for defendant**

to take his defense of this action out of the Utah statute of limitations case law. By using Nilsen-Newey as a springboard, Defendant side stepped the Utah appellant court case law rulings, which enabled the use of out of Utah jurisdictional cases to support of Defendant's claims thereby defrauding Plaintiff of his property. This all happened with Defendant personally knowing the real Utah Law because of his rebuke by the Utah Supreme Court in *Fredricksen*. There is not a brief that Defendant can write concerning the statute of limitations, in defense of his claims in District Court that the statute accrues with each installment; because of his brief in *Fredricksen*, and rebuke by the Utah Supreme Court; that will not subject him to additional mandatory sanctions pursuant to R Utah Ct. App. 40a. (See Defendants losing brief in *Fredricksen* Exhibit "F"). Because the statute of limitations has ran in this action Defendant's Notice of Default is a Wrongful lien, because neither defendant or the purported beneficiary has any interest in the property. (a) Defendant knows it is a Wrongful lien because of his rebuke by the Utah Supreme Court in *Fredricksen*; (b) is groundless because neither Defendant or the purported Beneficiary has any interest in the property, ( c) the Notice of Default contains a material false statement which is "Notice of Default." Plaintiff never defaulted on any provision of the original trust deed note, because he purchased the property via a sheriff's deed after the statute of limitations had ran. Plaintiff's purchase date was July 12, 2005. July 12, 2005 is three days short of seven years, when Defendant states was the last day that any payments were made on the property. The statute of

limitations is six years, thus, plaintiff should be awarded treble damages because defendant refused to remove the unlawful lien from plaintiff's property.

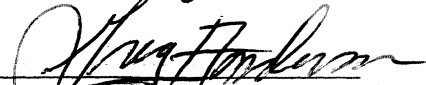
## **CONCLUSION**

In the State of Utah the statute of limitations accrues when a complete cause of action arises. The statute of limitations for written contracts including installment contracts is six years. The Notice of Default by Defendant constitutes a Wrongful lien because it was filed more than eight years after the statute of limitations began to accrue. Inasmuch as Defendant failed to remove the lien within twenty days after receiving notice, and actually sold Plaintiff's property, Plaintiff is entitled to treble damages as a matter of law. As a trustee pursuant to a Trust Deed, Defendant had a special obligation to Plaintiff. Because of Defendants misstatements, the "scam memorandum", and his rebuke by the Utah Supreme Court, it is clear that Defendant was dead set on defrauding Plaintiff of his property. Therefore, Defendant must be sanctioned. Because Nathan Scharon authored the "scam memorandum" he should also be sanctioned. Because Gary Howe refused to intervene after plaintiff faxed him a notice that as a senior partner, he had duty to Plaintiff pursuant to the Rules of Professional Conduct, he should be sanctioned. Because Defendant T. Richard Davis and Gary Howe are senior partners, in the law firm of Callister, Nebeker, and McCullough, and that law firm should also be sanctioned pursuant to the Rules of Professional Conduct. Because Plaintiff was unable to sell his property because of the Wrongful Lien by Defendant he was damaged in the amount of at least



\$480,000.00 trebled, plus costs and attorneys fees. Plaintiff is entitled to three times that amount pursuant to the Wrongful Lien Statute. The court should find that Defendant “constructively defrauded Plaintiff” of his property, and Plaintiff should also be awarded punitive damages pursuant to the egregious nature of Defendants actions.

Dated this 27<sup>th</sup> day of November 2007.

  
Greg Anderson

Note: Plaintiff, Greg Anderson believes it is highly likely that the Memorandum Decision and Order in this action signed by Judge Toomey was for the most part authored by defendant T. Richard Davis, and his attorney, Thomas Price. There are many factors that point in that direction.

## **CERTIFICATE OF SERVICE**

**I Greg Anderson hereby certify that on November 26, 2007, that I served two copies of the attached Appellants Brief upon the party listed below by mailing it by first class mail to the following address:**

T. Richard Davis  
Gateway Tower East Suite 900  
10 East South Temple  
Salt Lake City, UT 84133

Dated this 26<sup>th</sup> day of November 2007

  
Greg Anderson

## **FROM THE DESK OF GREG ANDERSON**

Route 3, Box 8049  
Roosevelt, Utah 84066  
Telephone: 435 725-0048

December 8, 2006

T. Richard Davis  
Zions bank Building  
10 East South Temple  
Salt Lake City Utah

RE: Notice of Default dated November 1, 2006 - Roy Simmons

Dear Mr. Davis:

Please be advised that the Notice of Default that you filed on November 6, 2006 on Lots 17, and 18 Hollywood Tract constitutes a wrongful lien pursuant to Title § 38-9-1 Utah Code (Wrongful Liens.), in that the promissory note has been paid and/or the six year statute of limitations for written agreements has ran years ago.

Therefore if you do not remove the unlawful lien within 20 days an action will be filed against you in Third District Court for Wrongful Lien, together with other causes of action.

I am the legal owner of the property, and it was given to Dan Kitchen for a loan, and I hereby demand, an accounting, and a copy of the Trust Deed Note.

Govern Yourself Accordingly

  
Greg Anderson

9902030  
11/8/2006 8:43:00 AM \$16.00  
Book - 9377 Pg - 6496-6498  
Gary W. Ott  
Recorder, Salt Lake County, UT  
OLD REPUBLIC TITLE  
BY: eCASH, DEPUTY - EF 3 P.

**WHEN RECORDED MAIL TO:**

**CALLISTER NEBEKER & McCULLOUGH**

Zions Bank Building,  
10 East South Temple, Suite 900  
Salt Lake City, Utah 84133  
ATTN: T. Richard Davis

CRT 06160006

Tax Identification No. 16-19-106-008

**NOTICE OF DEFAULT**

NOTICE IS HEREBY GIVEN that T. RICHARD DAVIS is Successor Trustee under that certain Trust Deed With Assignment of Rents dated May 10, 1996, executed by CARMAN LLC, as Trustor, to secure certain obligations in favor of ROY W. SIMMONS, as Beneficiary, and recorded in the official records of Salt Lake County, State of Utah, on September 10, 1996, as Entry No. 6452338, in Book 7486, beginning at Page 1597 (the "Trust Deed").

The Trust Deed encumbers certain real property located in Salt Lake County, State of Utah, which real property is more particularly described in as follows (the "Property").

See Exhibit A attached hereto and by this reference made a part hereof.

The obligations secured by the Trust Deed include a Trust Deed Note dated May 10, 1996, executed by Trustor in the original principal amount of \$59,500.00 (the "Note").

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. Taxes for the years 1996 through 2005 are also delinquent.

In order to cure the default, Trustor must pay the above amounts together with any and all payments which hereafter become due and payable, including interest, late charges, trustee's and attorneys fees, costs and expenses actually incurred.

That by reason of said default, T. Richard Davis, Successor Trustee, has declared and does hereby declare all sums secured by the Trust Deed immediately due and payable and has elected and

does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby. The default is subject to reinstatement in accordance with the statutes of the State of Utah.

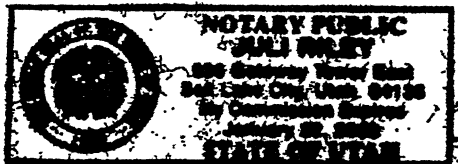
DATED this 1<sup>st</sup> day of November, 2006.



T. Richard Davis  
Successor Trustee  
CALLISTER NEBEKER & McCULLOUGH  
Zions Bank Building  
10 East South Temple, Suite 900  
Salt Lake City, Utah 84133  
Telephone: (801) 530-7421  
Business Hours: 8:30 a.m. to 5:00 p.m

STATE OF UTAH                    )  
  :SS.  
COUNTY OF SALT LAKE    )

The foregoing instrument was acknowledged before me this 1<sup>st</sup> November, 2006, by  
T. Richard Davis, Successor Trustee.

  
NOTARY PUBLIC

**EXHIBIT A**

That certain real property situated in Salt Lake County, State of Utah, more particularly described as follows:

All of Lot 17 and 18, Block 1, HOLLYWOOD TRACT.  
TOGETHER WITH and subject to a right-of-way over the following  
described tract:

COMMENCING 10 feet South and 5 feet East of the Northwest  
corner of Lot 17, Block 1, HOLLYWOOD TRACT and running  
thence South 140 feet; thence East 9 feet; thence North 140 feet;  
thence West 9 feet to place of BEGINNING.

CALLISTER NEBEKER & MCCULLOUGH

A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW  
GATEWAY TOWER EAST SUITE 900  
10 EAST SOUTH TEMPLE  
SALT LAKE CITY, UTAH 84133  
TELEPHONE 801-530-7300  
FAX 801-364-9127

TO CONTACT WRITER DIRECTLY

(801) 530-7421

trdavis@cnmlaw.com

T. Richard Davis

January 11, 2007

File No.: 91953.13

Mr. Greg Anderson  
Route 3, Box 8049  
Roosevelt, UT 84066

Re: Notice of Default dated November 1, 2006 - Roy Simmons

Dear Mr. Anderson:

Your letter dated December 8, 2006, was apparently not post-marked until December 28, 2006 and failed to arrive in my office until January 2, 2007. Since my receipt of your letter, I have reviewed my client's loan file as well as the wrongful lien statute you cite in your letter.

According to our foreclosure report issued by Old Republic Title Company of Utah, your interest in the subject property is merely that of a judgment lien creditor having obtained a judgment against E.L. Whitehead on or about March 23, 2000 in the amount of \$147,000.00. The report shows Mr. Daniel W. Kitchen as the fee title owner of the property, having received title by Warranty Deed dated February 14, 2006. The predecessor in interest to my client, The Estate of Roy W. Simmons, loaned \$59,500.00 to Carman LLC on or about May 10, 1996. The obligation to repay that loan was evidenced by a Trust Deed Note dated May 10, 1996, executed by Caroline Manning, Manager of Carman LLC and secured by a Trust Deed with Assignment of Rents of the same date which is the instrument referred to in the Notice of Default. Because you are not the original obligor of the Promissory Note, you may not understand that the Promissory Note was an installment obligation, the first payment of which was due on July 1, 1996 and the final balloon payment was due on June 1, 2006. Over the first three years of the loan term, some but not all of the loan payments were made. At no time was the principal balance ever reduced below \$49,000.00. Since mid-1998, however, no payments have been made. And, the outstanding balance was required to be paid on July 31, 2006. I have enclosed a copy of the Promissory Note and the Trust Deed for your review.

Your understanding of the effect of the statute of limitations and the Utah Wrongful Lien statute upon Trust Deed foreclosures is, unfortunately, in error. I would strongly encourage you to obtain qualified legal counsel to instruct you in these areas. Undoubtedly, you will thereupon be informed that because the Promissory Note continued to have installment payment obligations through July of 2006, the statute of limitations will not barr the pending foreclosure of the Trust Deed. Further, because the Notice of Default does nothing more than accurately declare a default in the repayment obligation

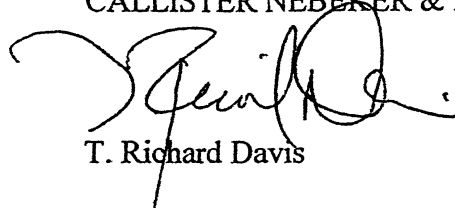
Greg Anderson  
January 11, 2007  
Page 2

secured by a properly filed Trust Deed, neither the Trust Deed nor the Notice of Default constitute a wrongful lien under the Utah Code.

Should you or your legal counsel desire further to discuss this matter, do not hesitate to call me at this office.

Very truly yours,

CALLISTER NEBEKER & McCULLOUGH

A handwritten signature in black ink, appearing to read "T. Richard Davis", is written over the printed name.

T. Richard Davis

TRD:jr  
Enclosures  
cc: Mr. Harris Simmons

482286 1



## FROM THE DESK OF GREG ANDERSON

DATE: March 20, 2007

TO: T. Richard Davis

Fax: (801) 364-9127

FROM: Greg Anderson Phone: 435 621-6762

Fax: (435) 725-0048

RE: **Property at 136 East 2100 South**

Dear Richard:

In Your Letter Dated January 11, 2007, second paragraph, you have stated that no payments were made since mid 1998 which is approximately 8 1/2 years since the last payment, from Carman L.L.C. The property was then transferred to E. L. Whitehead, then in 2006 to Two Street, Inc., then to Dan Kitchen as security for a loan, and then to me.

**Under Utah law when a vendee has not assumed the obligation, the statute of limitations expires 6 years after the cause of action has arisen. See *Taylor Bros. Co. V. Duden et al.* (Supreme Court of Utah Jan 27, 1948) 188 P.2d 995, See also *Greves v. Seifried*, 31 Utah 203, 87 p 674; *Boucofaki v. Jacobsen*, 36 Utah 165, 104 P. 117, 26 L.R.A., N.S, 898. *Taylor Bros. Co. V. Duden et al.***

The court stated: **In those cases it was held that the statute of limitations inured to the benefit of a third party who was not a party to the contract even though the mortgagor had waived or could not avail himself of that defense.**

In this case, if no payments were made since mid 1998, that is when the 6 year statute begin to run. The 6 year statute would have expired in Mid 2004. If the property would have remained in the name of Carman L.L.C., the statute may not have ran.

However, I believe the note has been paid in full.

Sincerely,



Greg Anderson

MEMORANDUM

TO: Rick Davis

FROM: Nathan Scharton

DATE: March 20, 2007

RE: Applicability of 6 Year Statute of Limitations to Installment Contracts

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As requested, I have researched the following issue:

**Does the 6 year statute of limitations provided in Utah Code 78-12-23 begin running anew from each missed payment in an installment contract?**

Yes. As a general statement, a party's failure to make an installment payment as promised is a breach of contract, and a cause of action for recovery of that particular installment accrues immediately. Thus, in the case of an obligation payable by installments, the statute of limitations **runs against each installment from the time it becomes due**. See Buell v. Duchesne Mercantile Co., 231 P. 123 (1924). See also Lund v. Hall, 938 P.2d 285 (1997) (subsequent authority to Buell, changing the rule that the statute of limitations is tolled during a party's absence from the jurisdiction); And see 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).

It has been suggested that when a vendee assumes an obligation, that statute of limitations expires 6 years after the cause of action has arisen. While it is generally true that a third party purchaser may take advantage of a statute of limitations argument otherwise available to the original obligor, this does not change the fact that the statute of limitations only begins running when the obligation accrues. The cases cited by Greg Anderson only relate to the general rule that the statute can inure to the benefit of a third party, they do not change the rules regarding when the statute begins running.

## FROM THE DESK OF GREG ANDERSON

DATE: May 14, 2007

TO: Gary R. Howe

Fax: (801) 364-9127

FROM: Greg Anderson Phone: 435 621-6762

Fax: (435) 725-0048

**RE: RULES OF PROFESSIONAL CONDUCT, AND SPECIFICALLY RULES 5.1. and 5.2 respectively, Responsibilities of Partners, Managers, and Supervisory Lawyers; and Responsibilities of a Subordinate Lawyer.**

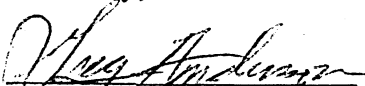
Dear Mr. Howe:

I am faxing you a copy of the Memorandum in Support of Motion to sanctions that I have forwarded to T. Richard Davis by first class mail. I think the document speaks for its self..

I tried to reason with Mr. Davis concerning this matter, but all he wanted to talk about is that he been to the Supreme Court of Utah on the Statute of Limitations, and that he knows the law on the statute of limitations. However, I am sure he knows the statute of limitations in this matter is 6 years, beginning in mid 1998..

At any rate, I thought it only fair that I apprise your firm of the situation, in case you are not familiar with the action because I plan on taking this matter to the bar counsel in the next few days. If you have any questions or suggestions, you can reach me on my cell phone at 435 621-6762, or FAX me at the above number.

Sincerely,

  
Greg Anderson

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

ROBERT S. FREDERICKSEN, aka :  
ROBERT S. FREDERICKSON, :  
Appellant, : BRIEF OF APPELLANT  
vs. : Case No. 18131  
KNIGHT LAND CORPORATION, :  
a Corporation, :  
Respondent. :

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I. NATURE OF THE CASE

This is an action by Appellant on a written agreement made between the parties whereby, for compensation received, Respondent, Knight Land Corporation, promised to pay to Appellant, Robert Fredericksen, the sum of \$10,000.00 plus 10% thereon or, at Appellant's option, convey to him sufficient acreage of certain property known as Jeremy Ranch at a rate of \$85.00 per acre to satisfy said payment obligation.

II. DISPOSITION IN LOWER COURT

The Third Judicial District Court, Honorable Peter F. Leary, entered judgment of "no cause of action" against Appellant on all claims set forth in his Complaint based on a Stipulated Statement of Facts and various legal memoranda submitted by the parties.

### III. NATURE OF RELIEF SOUGHT ON APPEAL

Appellant asks this Court to reverse the judgment of the District Court and to remand for entering of judgment in favor of Appellant pursuant to the claims in his Complaint.

### IV. STATEMENT OF FACTS

On or about the 1st day of November, 1961, Respondent, Knight Land Corporation, as buyer, entered into an agreement with East Salt Lake Investment Company (ESLIC), as seller, whereby Respondent was given the option to purchase approximately 16,500 acres of land known as the Jeremy Ranch (R. 231). Pursuant to said agreement, Respondent took possession of the entire Jeremy Ranch property, received the right to purchase said property for \$1,400,000.00, and agreed to make annual installment payments to ESLIC toward satisfaction of said purchase price (R. 231, 244-264). However, Respondent did not hold nor could it deliver title to any of the property to any other party until money was received by ESLIC sufficient to release a portion of the property (R. 59).

Sometime prior to the 31st day of December, 1963, Appellant contributed \$10,000.00 to and became a limited partner in a partnership known as Huntington Park Investment Company. Said partnership entered into an agreement with Respondent whereby the Partnership would make the downpayment on Respondent's contract with ESLIC and pay by installments certain sums to Respondent as consideration for conveyance from Respondent of approximately

5,000 acres of Jeremy Ranch. After making the required down payment, the Partnership defaulted in its agreement with Respondent (R. 231-232).

On the 31st day of December, 1963, Respondent entered into a written Agreement with Appellant and other members of the Partnership by the terms of which Appellant agreed to release his interest in and to the Jeremy Ranch property, and Respondent agreed to pay to Appellant the sum of \$10,000.00 together with 10% thereon (R. 233). A copy of said Agreement was received in evidence, attached to the Stipulation of Facts (R. 276-285). Said Agreement provides, inter alia: That Appellant had "individually" paid to Respondent \$10,000.00; that Respondent promised to repay that sum together with 10% thereon from "50 percent of the gross profits actually realized by Knight from the resale of lands acquired by Knight from the Jeremy Ranch"; that "all sums received by Knight from the resale of any of the Jeremy Ranch land in excess of \$85.00 per acre shall be considered to be gross profits"; that Appellant acknowledged familiarity with the terms of Respondent's contract with ESLIC because of which Appellant's right to repayment was conditioned upon the payments to ESLIC being kept current allowing the release of resellable land to Respondent; that if all sums had not been advanced by Respondent by July 1, 1968, Appellant "may request Knight to convey . . . sufficient of the acreage theretofore released to Knight . . . at the rate of \$85.00 per acre to satisfy and discharge any remaining unpaid balance"; and that any breaching party thereto should pay all court costs and a reasonable

attorney's fee incurred for enforcement of the agreement (R. 276-285), Sections 1, 2, 3, 8, 16).

Between the 31st day of December, 1963 and the 8th day of May, 1970, there were a number of sales of the land by Respondent, all of which were for more than \$85.00 per acre. Said sales were necessitated by the annual payments due under the ESLIC agreement. Each year, only so much property was released and sold as would provide Respondent with sufficient funds to meet the annual obligation. All proceeds from the said sales were completely exhausted by costs of sales or in satisfaction of the ESLIC obligation (R. 239). In fact, there were no proceeds received by the Respondent from any of these sales which were not required by ESLIC as a condition to the release of the sold property. In each instance of sale, the deed either went directly from ESLIC to the third-party buyer or was transferred through Respondent immediately to the third-party buyer, and the money similarly was transferred either directly from said buyer to ESLIC, or through Respondent immediately to ESLIC. Respondent did not ever have control of the proceeds of said sales, nor could it deliver title to the released properties to Appellant (R. 59, 236).

On the 8th day of May, 1970, Respondent entered into a written agreement with Emigration Land Company (Emigration) by the terms of which Respondent sold on contract all of its interest in Jeremy Ranch for the sum of \$2,100,000.00. The remaining acreage was approximately 12,500 acres. Pursuant to

that agreement, Respondent received the sum of \$500,00.00 as downpayment on or about the date of execution of the contract and payments of \$75,000.00 in 1971 and 1972. In 1973, Respondent discounted the balance of the purchase price which was thereupon paid in full (R. 237-238).

Upon receipt of the \$500,000.00 downpayment from Emigration pursuant to the aforementioned agreement of sale, Respondent had, for the first time, more proceeds than were required to pay to ESLIC on the option obligation (R. 59, 60). However, the subject Agreement with Appellant allowed Respondent to "retain the first \$85.00 per acre paid" on each sale before any gross profits would be realized (R. 277, Section 2(c)). Appellant was only to be paid out of 50 percent of the gross profits of each sale. Furthermore, Respondent had no title to any of the property until October, 1974, at which time Emigration transferred 10 acres to Respondent in final settlement of the contract balance (R. 55).

Neither Appellant nor any other partners of the Partnership received any sums of money or any land from Respondent pursuant to the subject Agreement prior to the year 1973 (R. 194, paragraph 1(x)). In 1974, former partners of Appellant, also parties to the subject Agreement, were paid certain sums of money and given land by Respondent for settlement of a civil action filed by those individuals on the subject Agreement (R. 233-234, paragraph 5(a-d)). Appellant asserted before the Court herein that prior to said settlement, he had been encouraged by Respondent's agent, James L. Knight, not to become a party to



that lawsuit and was verbally assured that he would be paid (R. 332).

After numerous attempts to receive satisfaction of the contractual debt and subsequent to a period of convalescing from a severe heart attack, Appellant caused a written demand to be served upon Respondent on the 7th day of February, 1978. A copy of said demand was received in evidence, attached to the Stipulation of Facts (R. 324-327). In said demand, Appellant exercised his contractual option to request payment in the form of land as provided in the subject Agreement (R. 41, paragraph 20). Appellant at all times performed all of the stipulations, conditions, and agreements stated in the subject Agreement in the manner therein specified. However, Respondent refused either to pay the sum of \$10,000.00 together with 10% thereon or to convey to Appellant sufficient acreage to discharge the indebtedness.

On the 20th day of March, 1978, Appellant filed this action in the Third Judicial District Court in and for Summit County against Respondent praying for conveyance of property, or in the alternative, for repayment of the \$10,000.00 plus 10% thereon. Pursuant to stipulation of the respective counsel, a joint Stipulation of Facts was submitted to the Court (R. 231-327) followed by various memoranda of law and argument. The parties agreed to dismiss the action against James L. Knight individually. The District Court, Honorable Peter F. Leary, awarded Respondent a judgment of "no cause of action" against Appellant on all causes of action set forth in his Complaint, finding that said "claims are barred by the statute of

limitations" (R. 387-388, 391-396). Appellant appeals from said judgment.

## V. ARGUMENT

### A. APPELLANT'S CONTRACTUAL RIGHT TO RECEIVE PROPERTY FROM RESPONDENT SHOULD BE ENFORCED.

Section 3 of the subject Agreement begins:

If Knight has not reimbursed each of the Parties of the First Part in full for all sums advanced by him as aforesaid, plus 10 percent, by July 1, 1968, each or any of the Parties of the First Part may request Knight to reconvey to said requesting party sufficient of the acreage theretofore released to Knight from the Jeremy Ranch, at the rate of \$85.00 per acre to fully satisfy and discharge any remaining unpaid balance to said requesting party.

It does not, however, stipulate as to when this election should take place. When a provision in a contract requires that an act be performed without specifying any time, Utah law implies that it is to be done within a reasonable time under the circumstances. Bradford v. Alvey & Sons, 621 P.2d 1240, 1242 (Utah 1980).

A "reasonable time" is defined as "so much time as is necessary, under the circumstances, to do conveniently what the contract or duty require should be done in a particular case." Commercial Security Bank v. Johnson, 10 Utah 342, 173 P.2d 277, 281 (1946). The only contractual requirements for Appellant's exercise was that he be not fully reimbursed by Respondent before July 1, 1968, and that he choose acreage from property

theretofore released. Thus, the option came into existence on that date.

As stipulated and admitted by Respondent, any attempted exercise by Appellant of the option prior to October, 1974 would have been undisputedly futile. Although title may have on occasion technically passed through Respondent, it had no alienable title to the property which it could give Plaintiff (R. 235, paragraph 6(b)). In May, 1970, Respondent became a beneficiary to a Trust Deed executed for the purchase of the property by Emigration (R. 238, paragraph 11). Respondent still had no legal title to the property such as could be transferred to Appellant in lieu of installment payments. The first date to which Respondent admits holding clear title to any of the property is approximately October, 1974, when it received 10 acres as a settlement with Emigration (R. 240, paragraph 19(a)). Although October of 1974 was the first time that Appellant could effectively exercise any portion of its option, sufficient acreage to satisfy the full obligation was yet unavailable.

Between 1970 and 1973, the Respondent was involved in a lawsuit with other parties to the subject Agreement. Those parties were also seeking payment in land or money pursuant to their rights under the Agreement. At that time, Appellant was encouraged by Respondent not to join in that action and was given assurances that he would be paid in full if he would be patient. In view of the facts that Respondent had no property until late 1974, that Respondent had persuaded Appellant not to join the earlier action promising full payment later, and that Appellant

was thereafter temporarily incapacitated by a serious heart attack, Appellant's demand of February 7, 1978 must be considered to be an exercise of that option within a reasonable time. The circumstances of this case dictate that a reasonable period must extend at least until the option holder is aware of either the ability of the obligor to perform or the obligor's intent not to do so. Any finding of the trial court to the contrary must be overturned as against the evidence.

Before the lower Court, Respondent construed Section 3 as giving Appellant the right to request property only from acreage released prior to July 1, 1968, regardless of when said option is exercised. The Section is not unambiguous, but Appellant asserts that its intended and more logical meaning is to allow Appellant to request property from acreage released prior to that request. The date of July 1, 1968 clearly indicates the date upon which the option is first exercisable, but does not limit the property which may be chosen. Appellant has a contractual right to select from property, "theretofore" released by ESLIC, in lieu of repayment from Respondent. That right first came into existence on July 1, 1968 and continued as an available option for a reasonable time.

Appellant has reason to believe that Respondent presently has or has had, during the pendency of this lawsuit, title to a certain amount of the subject property (R. 240, paragraph 19(b,c)). However, Respondent has not been willing to disclose the description of the specific property so held. Appellant,

thus, is entitled to have Security Title Company, the escrow holder, select from the acreage held by Respondent "sufficient of the acreage . . . to fully satisfy and discharge any remaining unpaid balance" to Appellant (R. 278, Section 3).

1. If 129 4 acres are not presently available, Appellant has a right to money damages equal to the fair market value of the unavailable acreage at Jeremy Ranch.

Respondent, at various times through this lawsuit, claimed that it presently owns few, if any, acres of the Jeremy Ranch property. If true, specific performance of the option provision in Section 3 of the Agreement would be impossible.

[S]ince equity does not undertake to do a vain and useless thing, and does not grant a decree of specific performance when it appears that the Defendant is unable to comply with his contract - no decree of specific performance will issue against a vendor in a land contract who has no title or interest in the land that he contracted to convey . . . .

71 Am. Jur. 2d, Specific Performance, §126 (1973).

Applying the rule to an option contract in Lowe v. Harmon, 115 P.2d 297, 302 (Or. 1941), the court said, "specific performance will not be deemed against an optionor who is not able, for want of title, to comply with the option contract."

In this case, however, Respondent admits to its present ownership of various interests in the Jeremy Ranch property but is allegedly unable to convey the full title or the full amount of proprrty which it contracted to sell (R. 240, paragraph 19(b,c)). Nevertheless, Appellant may elect to take any acreage to which Respondent currently holds title; the remainder of the

judgment will be left to remedies at law. 71 Am. Jur. 2d, Specific Performance, §§116, 117 (1973).

Remedies at law for the vendor's breach of a contract include the purchaser's loss of bargain plus any special damages foreseeable at the time of contract. The measure of damages for breach of contract is described as "the amount which would have been received if the contract had been performed, which means the value of the contract, including the profits and advantages which are its direct results and fruits." 22 Am. Jur. 2d, Damages, §47 (1965). This general rule was recognized by the Utah Supreme Court in Stewart v. Hansen, 62 Utah 281, 218 P. 959, 961 (1923), and applied to land sale contracts in Smith v. Warr, 564 P.2d 771, 772 (Utah 1977).

The damages caused by breach of contract are to be measured as of the date of the breach. Bunnell v. Bills, 13 Utah 2d 83, 368 P.2d 597, 601 (1962). Appellant's demand for acreage was made in February, 1978 (R. 241, paragraph 20). It was not until that date that Respondent breached its promise to convey land. Since Respondent breached its contractual obligation to convey 129.4 acres to Appellant, and it contends that it does not now have any interest in the Ranch beyond a few acres, Appellant is entitled to any acreage currently owned by Respondent plus a money judgment for the fair market value as of the date of breach of the average remaining property such as would total 129.4 acres. Both Appellant and Respondent agree that as of February, 1978, the approximate value of the property in question was \$375.00 per acre (R. 241, paragraph 21).

2. Appellant's claim for land or fair market value thereof is not barred by the statute of limitations.

Respondent's only defense to this action is that the statute of limitations has lapsed and left Appellant without a legal remedy (R. 209). Section 78-12-23 of the Utah Code Annotated (1953, as amended) prescribes "an action upon any contract, obligation or liability founded upon an instrument in writing, except those mentioned in the preceding section" to be brought within six years. The statute of limitations begins to accrue on the date of the breach of contract, not the date on which it was signed or the date that performance provided therein might be completed.

This Court declared that the statute of limitations does "not begin to run until a suit or cause of action exists," Kimball v. McCornick, 80 Utah 189, 259 P. 313, 317 (1926). The Court dealt with the question as to when a cause of action accrues in State Tax Commission v. Spanish Fork, 99 Utah 177, 100 P.2d 575, 577 (1940):

Ordinarily, a cause of action for a debt begins to run when the debt is due and payable because at that time an action can be maintained to enforce it. But when some controlling statute or a contract existing between the parties provides that an additional thing be done before action may be brought, such as a statutory provision that a return must be filed, or, as in some insurance contracts, a provision that suit may not be brought before a certain time after the claimed loss, the statute of limitations does not start to run until the time when suit may be maintained even though interest on the amount of the liability may begin to run from the time it is due and payable. (Emphasis added)

Accordingly, a cause of action on a contract debt does not accrue against the debtor until all of the requirements for payment to the creditor have been met.

Appellant's contractual right to request property in satisfaction of any outstanding amount due and owing from Respondent first arose on July 1, 1968 (R. 278, Section 3). The Agreement gave Appellant the option to choose from any property theretofore released by ESLIC. Each year from 1964 to 1967, Respondent secured a release of property from ESLIC. However, these annual releases were only for so much property as would garner proceeds on resale to pay each annual payment due to ESLIC. In fact, no releases would have been given at all if ESLIC were not given all proceeds (other than transaction costs). Transfer of the property through Respondent to the third party would not be made until and unless all proceeds were paid to ESLIC.

From 1964 through 1970, Respondent was unable to deliver title to any of the property to Appellant. There was no property which had been released by ESLIC but not simultaneously sold to a third party to meet the annual payment obligation on the 1961 Agreement (R. 236, paragraph 7). Appellant's right to select property first arose in 1968 since Respondent had not repaid him in full. But his election right was then hollow; there was no available land which had yet been released to Respondent.

Section 3 required an affirmative "request" to be made by Appellant to obligate Respondent to convey released property. Until such request was made, Respondent had no duty to transfer



title. A cause of action could not accrue until this last requirement was fulfilled by Appellant. The statute of limitations could likewise not begin to run until the cause of action accrued.

B. APPELLANT IS ENTITLED TO MONEY DAMAGES FOR BREACH OF CONTRACT.

In the event that Appellant's claim for property pursuant to Section 3 of the subject Agreement is conclusively found to be without merit, Appellant is entitled to money damages from Respondent for breach of contract.

Section 2 of the subject Agreement states:

2. As consideration of the release given by each of the parties of the first part, as set forth herein below, Knight agrees to pay to Security Title Company, Salt Lake City, Utah, as escrow holder for Parties of the First Part 50 percent of the gross profits actually realized by Knight from the resale of lands acquired by Knight from the Jeremy Ranch until each of the Parties of the First Part has been repaid the sum of money advanced by him, as is set forth above, plus 10 percent thereof, with said repayment to be made without interest. The term "gross profits", as used herein, shall be computed as follows:

(a) The cost of the land to Knight shall be considered to be \$85.00 per acre, which is the average per acre price Knight has contracted to pay for the entire 16,500 acres.

(b) All sums received by Knight from the resale of any of the Jeremy Ranch land in excess of \$85.00 per acre shall be considered to be gross profits.

(c) Knight will retain the first \$85.00 per acre paid as his cost of the land and 50 percent of the gross profits, to reimburse him for legal expense, development expense, sales expense, etc.

(d) The other 50 percent of the gross profit will be paid to Security Title Company of Salt Lake City, as escrow holder for the use and benefit of the

Parties of the First Part, and said escrow holder will be instructed to forthwith distribute pro rata all sums received by the escrow holder to Parties of the First Part. The monies so disbursed by the escrow holder shall be pro rated among the Parties of the First Part, so that each of said parties receives the same proportion of each disbursement as the money paid by him to Knight, as aforesaid, bears to the total money paid by all of the Parties of the First Part to Knight.

Respondent admits to the validity of the original debt and its nonpayment thereof (R. 239-240) and asserts the statute of limitations as its sole defense (R. 209).

1. Appellant's claim for \$10,000.00 plus ten percent thereon is not barred by the statute of limitations.

The subject Agreement provides that Respondent was obligated to repay to Appellant \$10,000.00 plus 10% thereon only out of the proceeds from the resale of Jeremy Ranch land (R. 282), Section 12). If no sales were made nor proceeds received, Respondent had no obligation to Appellant. Furthermore, Respondent's obligation to Appellant was only to be repaid out of "50 percent of the gross profits actually realized" by Respondent from each resale of land (R. 277, Section 2). Finally, Appellant was made to acknowledge the terms of Respondent's underlying contract with ESLIC, which required annual principal payments of \$160,000.00, and that unless Respondent made those payments, Appellant would receive no repayment except from pre-default gross profits (R. 279, Section 5).

Appellant could not maintain a suit for the breach of this contract until and unless (1) Respondent continued to make timely payments to ESLIC, (2) Respondent was able to resell portions of the land released by ESLIC, (3) proceeds from the resales would

include gross profits, and (4) those proceeds were not otherwise required to fulfill payment obligations to ESLIC. Until these requirements were met, Respondent was not obligated to repay Appellant, nor could Appellant enforce the contract through legal action.

The first proceeds free from obligation to the underlying contract with ESLIC were received in the sale of land to Emigration in 1970. All sales prior to that date were of only so much land as would be released by ESLIC to generate sufficient funds to allow Respondent to make its annual \$160,000.00 payments.

In the lower Court, Respondent asserted that because each resale of property, beginning in 1964, produced proceeds in excess of \$85.00 per acre, and since none of said proceeds were paid to Appellant, each resale also constituted an actual breach of contract and started the statute of limitations to run (R. 214-217). This contention ignores the clear intent of the contracting parties as evidenced in the Agreement. The paramount concern of the parties was to keep the contract with ESLIC current. Without the option on the land, neither party could enjoy anticipated profits. The apparent purpose of Section 5 of the Agreement was the acknowledgment of the primacy of that ESLIC obligation.

In May of 1970, Respondent received \$500,000.00 down and a schedule of installments for the outstanding balance of \$1,600,000.00 pursuant to the sale of 12,500 acres to Emigration.

This was the first receipt of proceeds by Respondent from the resale of land, which proceeds were not required to be immediately transferred to ESLIC. However, Appellant was not entitled to be repaid until gross profits on the sale were actually realized (R. 277, Section 2). According to the Agreement, Respondent was to "retain the first \$85.00 per acre and 50 percent of the gross profits" before Appellant was entitled to any payment. Defined as "sums received . . . in excess of \$85.00 per acre," no gross profits would be realized on the 1970 sale until \$1,062,500.00 was received from Emigration. Appellant, therefore, was not entitled to any repayment, nor could the Agreement be considered breached by Respondent until the first realization of "free" gross profits in 1973. Considering the date of actual breach, the institution of these proceedings in 1978 is well within the six-year statute of limitations.

2. Any potential disabling statute of limitations tolled with Respondent's payment to Appellant's co-obligees under the subject Agreement.

The earliest time a breach of contract by Respondent could have occurred was 1973 when "free" gross profits were first received. However, in 1974, two of Appellant's fellow investors were paid pursuant to the same contract. Utah Code Annotated §78-12-44, 1953, as amended, states that:

In any case founed on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the

period prescribed for the same after such payment acknowledgment or promise . . . .

Payments pursuant to litigation were made to J. Kent Buehler and Richard D. Madsen in 1974, within the six-year statute of limitations of any possible breach (R. 233-234, 286-289). The payments were made by Respondent with a written settlement pursuant to the same Agreement that is contested in this case. Madsen and Buehler were partners with Appellant at the time the original debt arose, and all were treated as an entity entitled "Parties of the First Part" throughout the Agreement.

In Dixon v. Bartlett, 176 Cal. 572, 169 P. 236 (1917), a letter acknowledging a contract debt addressed to one partner was held sufficient to toll the statute against all the partners. In Krause v. Spurgeon, 256 S.W. 1072 (Mo. App. 1923), part payment to one of two joint holders of a note was sufficient to toll the statute of limitations against both holders. In Hiscock v. Hiscock, 240 N.W. 50 (Mich. 1932), payment to one of several co-owners of a mortgage which had been barred by the statute of limitations acted to revive the mortgage to all mortgagees.

The payments of cash and land accompanied by written settlements to Madsen and Buehler tolled the statute of limitations against Appellant. Thus, the period of limitation began anew in 1974. The action brought in 1978 was within the six-year period.

3. Even if applicable, the statute of limitations would bar only a portion of Appellant's claim.

Section 4 of the subject Agreement allows Appellant to "continue to receive his pro-rated share of the gross profits until he has been reimbursed if he has not been fully reimbursed by July 1, 1968." The alternative opinion was to recover sufficient land at the rate of \$85.00 per acre to satisfy his account. The language of this alternative requires a "request to reconvey" whereas the desire to continue in profit participation necessitates no such notice. No request was made by Appellant prior to the 1978 demand, and Respondent apparently assumed Appellant's election was to wait for payment from gross profits.

Section 13 of the Agreement anticipates Respondent selling its interest in the property "as an entity" and outlines Appellant's rights in such a sale. The sale to Emigration on May 8, 1970 was, indeed, the sale of Respondent's entire remaining interest in the Ranch and would apparently be subject to this section. However, the particular clauses of this section specify sales consummated by December 31, 1968:

(c) If Knight receives an installment sale contract which would be paid off in full before December 31, 1968, then Knight will, from each payment he receives, pay to First Parties (i.e., Fredericksen), as aforesaid, the same proportion of the amount due to each of them as payment made to Knight bears to the total purchase price to Knight.

(d) If the installment payments are accepted by Knight extending the term of payment beyond 1969, then Knight will, nevertheless, pay First Parties in full from the funds so received by December 31, 1968. The annual payments shall be equal.

In the lower Court, Respondent contended that although inapplicable to the Emigration sale, subsection (d) offers

guidance in the interpretation of the intent of the parties to not "string out the payments for the Plaintiff." Certainly, the Agreement was not intended to indefinitely postpone payments to Appellant. Neither was the intent to force full payment to Appellant and his co-associates upon the initial installment payment which may have had a crippling effect on Respondent's cash flow. This factor is especially relevant in light of Respondent's admission that there were liens against the property exceeding the \$500,000.00 down payment made by Emigration in May, 1970 (R. 237, paragraph 10).

The only reasonable interpretation of Sections 2, 4, and 13 extended to 1970 and beyond is that Appellant should have the option to continue to wait for profits to be realized by Respondent; that receipts from the installment contract between Respondent and Emigration should be first used to recover its cost of land (\$85.00 per acre), and that only then should Appellant get his total amount due out of one-half the gross profits received. Thus, the controlling provisions for payments to Appellant would be Sections 2 and 4 continuing until gross profits were realized. Section 13 is inapplicable since it contemplates only an exception to Section 4 which did not arise. Nevertheless, Section 13 is useful as a tool in understanding the intentions of the contracting parties.

In the event that the first breach of Respondent's obligation to Appellant is found to have occurred in 1970 upon Appellant's sale to Emigration and receipt by Respondent of the

\$500,000.00 down payment, and it is further held that the prior payments to Madsen and Buehler did not toll the statute of limitations, it must also be found that the breach of contract was not singular but a repeated breach which created a new cause of action each time Respondent failed to pay out of the gross profits from each installment payment received. This reasoning appears consistent with Appellant's installment sale treatment of the 1970 sale (R. 220-222). The provisions of subsection 13(c) offer guidance for such an installment sale. Respondent had a duty to pay to Appellant the same proportion of the amount due him as Emigration's installment payment made to Responent bears to the total \$2,100,000.00 purchase price.

Installment sales are treated uniquely by statutes of limitation.

In case of an obligation payment by installments, the statute of limitations runs against each installment from the time when an action might be brought to recover it . . . [T]he rule that the statute of limitations begins to run against each installment of an obligation payable by installments only from the time the installment becomes due applies although the debtor has the option to pay the entire indebtedness at any time.

51 Am. Jur. 2d, Limitation of Actions §133 (1970).

Oklahoma Supreme Court recognized this principle in Indian Territory Illuminating Oil Co. v. Rosamond, 190 Okla. 146, 120 P.2d 349 (1941). The court held that a continuing covenant to make payments when breached gives rise to a cause of action each day breached.



The reason for the rule is while the repeated and successive breaches of the implied covenant continue, the right of action for subsequent breaches does not accrue upon the first breach, but accrues and the statute begins to run as and when each breach occurs. Like an account not mutual in nature, but all on one side, the cause of action arises on the date of each item or breach, and the items within the statutory period of limitations do not draw after them those of longer standing.

120 P.2d at 352-53.

In Bank of America Trust & Savings Ass'n. v. McLaughlin, 152 C.A. 2d 911, 313 P.2d 220,223 (1957), the court ruled on a note payable in installments, several of which had not been paid and against which the statute had run. "Where money is payable in installments, the statute of limitations begins to run against the cause of action for the recovery of an unpaid installment at the time it is payable."

Section 4 of the subject Agreement states that if Appellant had not been fully reimbursed by July 1, 1968, he was entitled to "receive his pro-rated share of gross profits until he has been reimbursed." The sale to Emigration on May 8, 1970 was an installment contract. Appellant was thereby entitled to payments on a pro rata basis out of the 50 percent of the gross profits realized from each installment. If it is held that Respondent did not have a right to keep the first \$85.00 per acre, but that the payments to Appellant should be proportionate to Emigration's installment payments, the amounts due Appellant, based on \$11,00.00 due in 1970, are listed below:

SCHEDULE OF RECEIPTS AND AMOUNT DUE

	Receipt from <u>Emigration</u>	<u>Percent</u>	<u>Amount Due</u>
May, 1970	\$ 500,000.00	23.8	\$ 2,618.00
April, 1971	75,000.00	3.6	396.00
April, 1972	75,000.00	3.6	399.00
April, 1973 (Remainder)	1,449,000.00	69.0	7,590.00

Under this installment approach, even if the statute of limitations began to run for a breach of the contract by Respondent in 1970, this running would not affect the payments made in 1972 and 1973 since the Complaint was filed in March, 1978. Approximately \$7,986.00 is within the statute and accessible.

This determination of installment contract applicability is one which avoids a forfeiture by Appellant. The courts are usually eager to construe contracts to avoid forfeitures "which are regarded as odious to the law." Morgan v. Sorenson, 3 Utah 2d 428, 286 P.2d 229 (1955). In Russell v. Park City Utah Corporation, 29 Utah 2d 184, 506 P.2d 1274 (1973), this Court inferred that a party who seeks to enforce a forfeiture should be in strict compliance of forfeiture prerequisites. "[T]he general rule that one who seeks to invoke a forfeiture must strictly comply with the prerequisites thereof because forfeitures are not favored in the law." Although this is not a case of contractual forfeiture provisions, the principle should be extended. A court in equity will not construe a contract in favor of a party which is continually defaulted in its payments over one who has already given its consideration and is in danger of losing its entire cause of action.

C. APPELLANT IS ENTITLED TO INTEREST AT THE LEGAL RATE ACCRUING SINCE THE MATURITY DATE OF THE OBLIGATION PLUS ALL COURT COSTS INCURRED INCLUDING A REASONABLE ATTORNEY'S FEE.

The subject Agreement provides that Appellant receive his contribution of \$10,000.00 plus 10% thereon, but includes no interest. This Agreement and its obligations were obviously intended to be satisfied and fulfilled by December 31, 1968. It was not anticipated by the contracting parties nor is it reasonable to assume that Respondent should have had use of Appellant's \$10,000.00 for more than 17 years with only 10% added thereto.

Utah Code Annotated, §14-1-1 (1953, as amended) provides: "The legal rate of interest for the loan or forbearance of any money, goods, or things in action shall be six percent per annum." This statute was amended in 1981, but the amendment has no effect on this obligation. The majority of ruling jurisdictions have supported the rule that the rate of interest after maturity upon an obligation, reciting a certain rate expressly until maturity and silent as to the rate thereafter, is the legal rate. 16 A.L.R. 2d 902. In Allen v. Miller, 84 N.W. 2d 571 (N.D. 1957), the court held that a note payable without interest before maturity and silent as to interest after maturity bears interest at the legal rate from the date of default to date of payment or to date that judgment is entered.

In Bjork v. April Industries, Inc., 560 P.2d 315, 317 (Utah 1977), this Court commented on the availability of prejudgment interest:

As to the allowance of interest before judgment, this Court has heretofore spoken, and the law in Utah is clear, viz: where the damage is complete and the amount of the loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time and not from the date of the judgment.

Appellant's right to repayment in cash matured in 1973 when Respondent had sufficient "free" gross profits to satisfy their contractual obligation. If the Court finds that the Respondent breached its contractual obligation, Appellant is entitled to interest on the \$11,000.00 accruing at 6% per annum from 1973 until the entry of judgment herein.

Appellant's right to property or the fair market value of same matured in February, 1978 when Appellant exercised his contractual option to demand 129.4 acres. If the Court decides that Appellant is entitled to a conveyance of property, he is also entitled to interest on the fair market value of that property as of 1978, from February, 1978 until the entry of judgment herein.

Utah law is clear that attorney's fees are chargeable to an opposing party only if there is a contractual or statutory liability therefor. Stubbs v. Hemmert, 567 P.2d 168, 171 (Utah 1977). The Agreement provides:

Should any of the parties breach this agreement, and the other be required to secure legal counsel to enforce it, the defaulting party agrees to pay all court costs incurred and a reasonable attorney's fee for the enforcement of the agreement.

(R. 284, paragraph 16).

Respondent has admitted breaching the Agreement (R. 239-241, paragraphs 14-17, 20). It is clear that Appellant was required to secure legal counsel to enforce the Agreement. If the Court finds in favor of Appellant on any of his claims, he is also entitled to a reasonable attorney's fee.

## VI. CONCLUSION

The District Court's ruling is contrary to law and equity. The District Court has, without legally valid grounds, undertaken to relieve Respondent from the burden of a lawful and valid contract.

Based on the analysis set forth above, Appellant is entitled, pursuant to the subject Agreement and his request of February 6, 1978, to a conveyance of 129.4 acres of the property known as Jeremy Ranch. Said conveyance is authorized by the 1963 Agreement at Appellant's option in lieu of payments on Respondent's acknowledged unpaid contractual debt. Appellant's request, therefor, was reasonably made under the circumstances and was the last act required of Appellant before Respondent's obligation to convey matured.

If Respondent does not now have title to 129.4 acres of the subject property, it should be required to convey to Appellant so much of said property as is now in its ownership. The balance of his obligation should then be satisfied by the payment to Appellant of the 1978 fair market value of so many of the 129.4 acres which are not so conveyed.

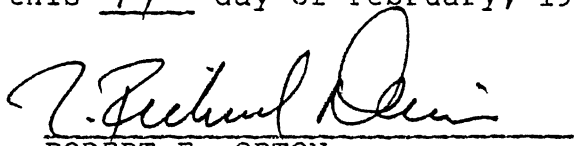
In the event that Respondent is not found to be obligated to convey property to Appellant, Appellant is entitled to the acknowledged contract debt in his favor in the amount of \$11,000.00.

Finally, only if the Court finds that Appellant is not entitled to a conveyance of property and that Respondent breached its contractual obligations giving rise to a valid cause of action prior to 1973, Appellant is entitled to the proceeds of each installment not lost by any alleged running of the statute of limitations.

In any event, Appellant is entitled to interest accruing at the legal rate since maturity of the obligation, all Court costs, and a reasonable attorney's fee incurred in these proceedings for the enforcement of the subject Agreement as provided in that Agreement.

The District Court's judgment should be reversed and remanded for entry of judgment in favor of Appellant.

RESPECTFULLY SUBMITTED this 17 day of February, 1982.

  
ROBERT F. ORTON  
T. RICHARD DAVIS  
Marsden, Orton & Liljenquist  
Attorneys for Appellant

AUG 14 2007

By Killeford SALT LAKE COUNTY  
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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GREG ANDERSON	:	MEMORANDUM DECISION
		AND ORDER
Plaintiff,	:	
		CASE NO. 070904196
vs.	:	
RICHARD DAVIS	:	
Defendant.	:	

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The Parties submitted cross-motions for summary judgment, which were before the Court for hearing on July 13, 2007. Having considered the motions, memoranda and argument submitted by the parties, the Court enters the following order:

**BACKGROUND<sup>1</sup>**

This matter concerns the interests in and conveyances of real property located at 136 East 2100 South in Salt Lake City, Utah (the "Property"). In 1996, owner Roy Simmons conveyed the Property to Carman, LLC for \$60,000. Carman, LLC paid down \$500

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<sup>1</sup> The following facts were not disputed by the parties in their opposing memoranda, and are deemed admitted for the purpose of this motion pursuant to Utah Rule of Civil Procedure 7(c)(3)(A) ("Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment, unless controverted by the responding party") and 7(c)(3)(B) ("A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted . . .").

and signed a Trust Deed Note ("Note") for \$59,500 and a Trust Deed, with an Assignment of Rents. The Note was an installment obligation, requiring Carman, LLC to make monthly payments of specified amounts, with two balloon payments in the first year, and the principal balance and accrued interest coming due on June 1, 2006 (See Trust Deed Note Exhibit 'A'). The Deed was recorded on September 10, 1996.

Carman, LLC made regular payments on the Note through December 1997, and irregular installments thereafter, the last of which was made on July 15, 1998. The Note is still in arrears, and was not assigned to any other person or entity. Although the Note contained an optional acceleration clause, Mr. Simmons never exercised that option.

At some point, Carman, LLC conveyed the Property to E. L. Whitehead, against whom the Plaintiff previously obtained a judgment of \$147,000 (See Third District Court No. 980912048). On or about January 20, 2006, the Plaintiff received the deed to the Property through a Sheriff's sale.<sup>2</sup>

On or about October 24, 2006, the Defendant was appointed as Successor Trustee under the Trust Deed to secure obligations in

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<sup>2</sup> Because Mr. Simmons properly filed the Trust Deed in 1996, the Plaintiff had at least constructive notice of the Note. See Utah Code Ann. § 57-3-102 (2006).



favor of Mr. Simmons, who is now deceased. The Defendant, in his capacity as Successor Trustee, filed a Notice of Default on November 1, 2006 and sought to foreclose on the Property. The Defendant also gave notice of the Trustee's sale, which was scheduled for March 21, 2007.

In December, 2006, the Plaintiff sent a letter to the Defendant, asserting that the Notice of Default was a wrongful lien because "the promissory note ha[d] been paid in full and/or the six year statute of limitations for written agreements ha[d] r[u]n years ago." The Defendant responded to the Plaintiff's letter in January, 2007, asserting that the Plaintiff's interest in the property was that of a judgment lien creditor, and that the statute of limitations would not bar the pending foreclosure sale. The Plaintiff responded to the Defendant's letter on March 20, 2007, and asserted that the statute of limitations barred Mr. Simmons's actions, citing *Taylor Bros. Co. v. Duden*, 188 P.2d 995 (Utah 1948). The Defendant faxed the Plaintiff that afternoon, expressing his intention to go forward with the Trustee's sale, and attaching a memorandum examining the effect of the statute of limitations on installment contracts. However, the Plaintiff had filed a Lis Pendens on the property on March 16, 2007, and the Trustee's sale has not gone forward.

The Plaintiff brought suit in this court, alleging that the statute of limitations barred the Defendant's appointment as successor trustee and his right to foreclose on the Property, and seeking judgment against the Defendant under the Wrongful Lien Statute, for Slander of Title, and for Constructive Fraud. Each of the parties has moved for summary judgment.

#### DISCUSSION

A moving party is entitled to summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). When considering cross-motions for summary judgment, the Court must consider each motion separately, viewing the facts and reasonable inferences drawn therefrom in favor of the non-moving party. *Prince, Yeates & Geldzahler v. Young*, 2004 UT 26, ¶10, 94 P.3d 179.

The parties agree that Utah Code Ann. § 78-12-23(2) (2006) is the statute of limitations applicable to the interests created by the Note. They further agree that the Plaintiff has standing, as a party holding an interest in the Property, to plead the statute of limitations against the foreclosure proceeding.

The Plaintiff's Motion for Summary Judgment

The Plaintiff moves for summary judgment for three of his four claims.<sup>3</sup> First, he argues that the Defendant's foreclosure sale is barred by the statute of limitations, which is six years for "any contract, obligation, or liability founded upon an instrument in writing." Utah Code Ann. §78-12-23(2) (2006). He also asserts that he is entitled to judgment as a matter of law on his wrongful lien and constructive fraud claims. The Court will address each in turn.

A. Statute of Limitations

The thrust of the Plaintiff's argument is that, as noted in *Taylor Bros. Co. v. Duden*, "a vendee may plead the bar of the Statute of Limitations at the expiration of six years after the cause of action against the mortgagor has arisen." 188 P.2d 995, 996 (Utah 1948). The Plaintiff asserts that when Carman, LLC missed an installment in 1998, the Statute began to run against the obligation because that is when Mr. Simmons's right to institute a suit arose. The Defendant responds that because the Note was payable in installments, the statute did not run from

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<sup>3</sup> The Plaintiff did not move for summary judgment on his claim for slander of title.

the first missed payment, but only attached when the entire Note came due.

The parties phrase the issue before the court differently, but they call for the Court to determine the same thing: when did the cause of action accrue on the Note, triggering the statute of limitations?<sup>4</sup>

(i) General Rule

The Plaintiff correctly asserts that "an action based on a written contract must be commenced within six years after the cause of action has accrued," and that the statute of limitations "begins to run at the moment that a cause of action arises." *Fredericksen v. Knight Land Corp.*, 667 P.2d 34, 36 (Utah 1983). "'Ordinarily, a cause of action for a debt begins to run when the debt is due and payable because at that time an action can be maintained to enforce it." *Id.*

Under a Note with a single payment date, the date upon which

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<sup>4</sup> Pursuant to *Taylor Bros.*, the Plaintiff, as a purchaser, has standing to assert the statute of limitations because it "inure[s] to the benefit of a third party [the Plaintiff] who was not a party to the contract." *Taylor Bros.*, 188 P.2d at 996. Thus, as a vendee, the Plaintiff has standing to assert the *same defense* to the obligation that Carman, LLC could have asserted, but has no rights or defenses greater than the debtor merely by virtue of his status as vendee.

the cause of action accrues is "when the note becomes due."

*Bracklein v. Realty Ins. Co.*, 80 P.2d 471, 478 (Utah 1938).

However, Carman, LLC and Mr. Simmons did not execute a Note with a single due date. The Note was for monthly installment payments, which are governed by specific case law.

(ii) Installment Contracts

In Utah, when an obligation is met by installment payments, the statute of limitations generally begins to run on each defaulted payment as they come due. Such defaulted obligations "may be enforced by proper action whenever and as often as an installment falls due and remains unpaid." *Johnson v. Johnson*, 88 P. 230, 232 (Utah 1906); accord *Moab Nat'l Bank v. Keystone-Wallace Resources*, 517 P.2d 1020, 1023 (Utah 1973); *Buell v. Duchesne Mercantile Co.*, 231 P. 123, 124 (Utah 1924).

In *Johnson*, the defendant entered into a lifetime contract, promising to provide half of his annual crop yield to the plaintiff. *Johnson*, 88 P. at 230. The defendant previously failed to deliver the crops in 1901 and 1902, and the plaintiff had sued for those installments. *Id.* When the defendant again refused to deliver crops in 1903 and 1904, the plaintiff sued on those installments. The defendant asserted that the four-year

statute of limitations barred recovery on the 1903 and 1904 obligations. *Id.* at 231. The Utah Supreme Court held that the argument was "clearly without merit" and recognized that the action "was not founded upon a breach of the entire contract, but upon the breaches only arising from the failure to pay the installments due for [1903 and 1904]." *Id.* at 231-32. The court further explained that while the plaintiff in 1901 "might possibly have sued for an entire breach and recover[ed] damages therefor, he did not choose to do so." *Id.* at 232. The Court of Appeals has since interpreted *Johnson* as adopting the rule used in the majority of jurisdictions governing installment contracts. See *Nilson-Newey & Co. v. Utah Resources Int'l*, 905 P.2d 312, 316 (Utah Ct. App. 1995).

In other words, in Utah, each missed installment generally creates its own cause of action, and the statute only begins to run against the particular defaulted installment as the default occurs. Because the debtor cannot default on his future installments by his delinquency in paying one that is currently due, the statute does not run against future installments until *they* become individually due.

This rule is widely accepted throughout the United States. One court examined the rule's historical underpinnings in *Cadle*

*Co. v. Prodoti*, 716 A.2d 965 (Conn. Super. Ct. 1998), and traced the rule from mid-eighteenth century France to its wide acceptance today. *Id.* at 966-67. New York's highest court has also explained the sound policy behind the rule: "If a creditor's action against a [debtor] accrues wholly and immediately at the point of the first default in payment . . . then creditors would be left with no alternative or incentive but to accelerate the entire debt or risk losing all opportunity to pursue [it]." *Phoenix Acquisition Corp. v. Campcore, Inc.*, 612 N.E.2d 1219, 1222 (N.Y. 1993). In contrast, under the majority rule "parties might be able to work toward amicable and fair resolutions between themselves rather than immediately drawing litigation swords and marching off to a courthouse." *Id.*

Carman, LLC executed an installment note with Mr. Simmons on May 10, 1996, with monthly obligations and balloon payments distributed over the next ten years. Although Carman, LLC first failed to meet its monthly obligations in mid-1998, its obligations to pay future monthly installments were not yet triggered. Without such an obligation, Mr. Simmons's cause of action had not accrued as to those future installments, and he could not enforce judgment on them unless he opted to accelerate

the payments.<sup>5</sup>

Although the Plaintiff argues that "it does not matter whether or not the contract is an installment contract or a contract with one payment," none of the cases he cited supports his assertion. In *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983), the court cited the general rule of accrual, but did not address when a cause of action accrues for installment contracts. Rather, in *Fredericksen*, the contract arose from a 1963 settlement in which Knight promised to periodically distribute profits from land sales to Fredericksen in reimbursement for his \$10,000 investment. *Id.* at 35. Knight's obligation under the contract was triggered when it sold parcels of land for more than \$85 per acre. *Id.* The court held that Knight clearly breached the entire contract in 1968 when it failed to reimburse Fredericksen the remainder of his share after Knight received sufficient profits that year to fulfill the contract. *Id.* at 37. Because Fredericksen did not bring his suit until 1978, the entire obligation was barred by the statute of limitations. *Id.*

At oral argument the Plaintiff asserted that *Fredericksen*

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<sup>5</sup> The Court will address the effect of the contract's optional acceleration clause, *infra*.



held that Knight breached the contract when it first failed to distribute Mr. Fredericksen's share of the profits. However, the Utah Supreme Court did not hold that Knight defaulted on the contract when it *first* made a profit. Rather, the court recognized that "[d]uring the period from 1963 through 1968," Knight generated sufficient profits to meet its obligations under the contract. *Id.* at 37. It then held that Fredericksen's cause of action accrued by 1969, when Knight certainly earned sufficient profits to reimburse Fredericksen. *Id.*

The other cases cited by the Plaintiff are similarly unavailing. In *Clarke v. Living Scriptures, Inc.*, 2005 UT App 225, 114 P.3d 602, the court stated the general rule, and then considered when a cause of action accrued for breach of an employment contract. *Hill v. Allred*, 2001 UT 16, 28 P.3d 1271, holds that a cause of action for fraud accrues when a plaintiff reasonably could have discovered the fraud. Although they state the general rule, these cases are otherwise inapplicable.

Finally, in *Butcher v. Gilroy*, 744 P.2d 311 (Utah Ct. App. 1987), the contract arose from a settlement in which the defendant promised to sell land and distribute the proceeds by April 1976. *Id.* at 312. The defendant secretly sold the land and kept the proceeds himself. *Id.* The court held that the

plaintiffs' claim was barred by the statute of limitations because the defendant breached by failing to tender the full amount in 1976, and the plaintiffs had asserted their claim in 1984. *Id.* at 313. *Butcher* did not discuss when a cause of action accrues for an installment contract, but dealt solely with obligations that ripen on a particular date.

Because the Plaintiff has not cited any case supporting his argument that "it does not matter whether or not the contract is an installment contract or a contract with one payment," the Court will apply the long-standing rule 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.

(iii) Acceleration Clause

The Plaintiff points to the existence of the acceleration clause in the contract, and argues that because of this, there was a complete cause of action when Carman, LLC breached its obligation to pay the 1998 installments. The Plaintiff apparently argues that the contractual right to invoke the acceleration clause and demand the remainder of the installments

is equivalent to an accrued cause of action.

Although the Utah Supreme Court referenced the lack of an acceleration clause in *Moab Nat'l Bank v. Keystone-Wallace Resources*, 517 P.2d 1020, 1021 & 1023 (Utah 1973), the Court has not found a Utah case that directly considers the impact of an optional acceleration clause upon the accrual of a cause of action on an installment contract. Therefore, the Court has considered cases from other jurisdictions that have addressed the issue.

One such case is *Navy Federal Credit Union v. Jones*, 930 P.2d 1007 (Ariz. Ct. App. 1996). In that case, Jones and her husband executed a promissory note with NFCU in 1981, and agreed to make monthly installments of \$203.54 for fifteen years. *Id.* at 1008. Jones and her husband divorced in 1983, and the husband agreed to pay the note in their divorce settlement. *Id.* In 1989, the husband died, and Jones discovered that he was in arrears on the note. *Id.* NFCU sent a written demand for full payment in February 1994, and filed suit in June 1994. *Id.* Jones contended that the demand was barred by Arizona's six-year statute of limitations because the entire obligation was breached when her husband first failed to make an installment payment, which she asserted was before June, 1988. *Id.* NFCU claimed that

the action did not accrue until it exercised the optional acceleration clause by making its demand in February 1994. *Id.* at 1008-09.

The Arizona Court of Appeals followed the majority rule that "the statute of limitations runs against each installment from the time it becomes due," noting that when the husband defaulted on a particular installment, "NFCU could have sued for the amount of that installment any time within the six-year limitations." *Id.* at 1009. However, it also adopted 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." *Id.* The court explained that "[i]f 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.'" *Id.* (quoting 54 C.J.S. LIMITATIONS OF ACTIONS § 153 (1987)).

However, an acceleration clause generally does not extend the statute of limitations as applied to previously defaulted installments, "since an acceleration clause only accelerates the due date of future installments." *Id.* (quoting 54 C.J.S.

LIMITATIONS OF ACTIONS § 153 (1987)). The court therefore applied the statute of limitations to all defaulted installments prior to June 15, 1988, six years before NFCU filed suit, but allowed suit for the defaulted installments falling within the six years, and for the future installments demanded by NFCU. *Id.* at 1010.

This Court is persuaded by the rule applied in *Navy Federal Credit Union*, and applies it to this case.<sup>6</sup> 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.<sup>7</sup> Here, Mr. Simmons never exercised the acceleration clause. Thus, the statute would not run on future installments until they came due.

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<sup>6</sup> Numerous other jurisdictions follow this rule. *E.g.*, *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1490 (9th Cir. 1993); *United States v. Gilmore*, 698 F.2d 1096, 1097 (10th Cir. 1983); *Greene v. Bursey*, 733 So.2d 1111, 1115 (Fla. Ct. App. 1999); *Wall v. Citizens & Southern Bank of Houston County*, 274 S.E.2d 486, 487 (Ga. 1981); *National Bank of Commerce Trust & Sav. Ass'n v. Ham*, 592 N.W.2d 477, 480 (Neb. 1999); *Buckman v. Hill Military Academy*, 189 P.2d 575, 579 (Ore. 1948); *Farmers & Merchants Bank v. Templeton*, 646 S.W.2d 920, 923 (Tenn. Ct. App. 1982).

<sup>7</sup> This rule would not apply if the acceleration clause was automatic, rather than optional. *See e.g.*, *Federal Recovery of Washington, Inc. v. Wingfield*, 986 P.2d 67, 71 (Ore. Ct. App. 1999).

(iv) Continuing Performance

Under *Navy Federal Credit Union*, the Defendant in this case would be permitted to foreclose on the property and collect the outstanding obligations accrued after November 1, 2000, but precluded from collecting against the obligations which were defaulted upon prior to that date. However, the payment terms of the Note in issue here required a June 1, 2006 payment of "the entire principal balance and accrued interest."

Again, the Court has considered cases from other jurisdictions. In *Vreede v. Koch*, 380 S.E.2d 615 (N.C. Ct. App. 1989), the court held that a clause similar to the one in this Note runs the statute from the date the balance is due. In *Vreede*, the plaintiffs loaned \$15,000 to a corporation in October 1978, and the defendants guaranteed the Note. The Note was to be repaid in installments until the principal and interest were paid in full. *Id.* at 615. The Note also provided a deadline for the payments, calling for "any unpaid balance, including any unpaid interest, [to] be due and payable" in October, 1985. *Id.* The plaintiffs filed suit in June 1987 and sought the entire balance and interest due under the Note. *Id.* The defendants answered that the state's three year statute of limitations governing guaranties barred recovery. *Id.* The trial court granted summary

judgment for the plaintiffs, and the North Carolina Court of Appeals affirmed. *Id.*

The Vreede court noted that under the general rule of installment contracts, the plaintiff "would be barred . . . from recovering installment payments due before 16 June 1984, three years before the date plaintiff filed suit," but recognized an exception to this general rule. *Id.* at 617. The court reasoned that the "[p]laintiff should not be penalized and barred from recovering the unpaid balance of the debt because plaintiff elected to wait to see whether defendants could fulfill their obligation in the future." *Id.* at 618. It therefore held that when a note contemplates the possibility of future performance, as when the unpaid balance and interest are due on a specific date, then the statute of limitations runs "'from the time when the last part of the performance was due.'" *Id.* (quoting 18 S. Williston, *Contracts* § 2028 at 811-12 (3d ed. 1978)).

The Court is persuaded by Vreede's policy analysis. Creditors 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.

The statute of limitations began to run from the date that the last part of Carman, LLC's performance was due, June 1, 2006. The Defendant filed the Notice of Default on November 1, 2006, well within the six-year statute of limitations. The Court accordingly denies the Plaintiff's motion for summary judgment as to the statute of limitations.

#### B. Wrongful Lien Statute

Because the estate of Mr. Simmons retains a valid security interest in the real property at issue, and Carman, LLC has breached its obligations, the Defendant was authorized to file the Notice under Utah Code Ann. § 57-1-23 (2006). Therefore, it 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) (2006).

The Court denies the Plaintiff's motion for summary judgment as to his wrongful lien claim.

#### C. Constructive Fraud

The facts alleged by the Plaintiff in his first argument defeat his motion for summary judgment on his claim for



Constructive Fraud. The Plaintiff asserts, and the Defendant does not dispute, that "[The Plaintiff] never signed or assumed any note concerning the subject property" (Verified Memorandum in Support of Plaintiff's Motion to Impeach Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Together with Defendant's Cross-Motion for Summary Judgment, at 7).

The Plaintiff cites *Blodgett v. Martch*, 590 P.2d 298 (Utah 1978), in support of his claim. However, *Blodgett* simply holds that a trustee owes a fiduciary duty to the grantor and trust beneficiary. *Id.* at 302. In *Blodgett*, the court held that the trustee bank owed a fiduciary duty to the trustors, and that the bank breached that duty when it failed to explain the contents of the trust deed, falsely told them that they had assumed a secondary liability, refused to provide copies of loan documents, and did not disclose that their property was subject to foreclosure. *Id.* at 300-301. A substitute trustee also breached his duty to the trustors when he failed to comply with the notice statutes. *Id.* at 301.

As the substitute trustee the Defendant owes a fiduciary duty to the Roy Simmons estate (the beneficiary) and Carman, LLC (the trustor). The Plaintiff has not cited any case that extends

the same fiduciary duties to a third party who acquires an interest in the encumbered property. The Plaintiff is not entitled to judgment as a matter of law.

To the extent that the Defendant owes a duty to the Plaintiff as an interest-holder in the Property, he has honored that duty by complying with the notice statutes governing trustee sales. The Court denies the Plaintiff's motion for summary judgment on his claim of constructive fraud.

#### The Defendant's Motion for Summary Judgment

The Defendant moves the Court to grant summary judgment against each of the Plaintiff's claims. He treats each claim on the merits, and also argues that the Plaintiff lacks standing to assert each claim. The Court will address each argument in turn.

##### A. Statute of Limitations

The Defendant argues, and the Court agrees, that "when contract obligations are payable by installments, the statute of limitations begins to run only with respect to each installment when it becomes due." (Defendant's Cross Motion for Summary Judgment at 8) (citing *Nilson-Newey & Co.*, 905 P.2d at 316-17). The Defendant further argues that because the Note had

installment payments through June 2006, the Note was not "due" until that date, and the statute of limitations began to run against the entire Note on that date. As discussed above, the Court agrees with the Defendant that the statute began to run on June 1, 2006, but for different reasons.

The Defendant's argument is essentially that the statute of limitations does not run against an installment contract until the last installment is due. This argument does not comport with the authorities discussed, *supra*, however. See e.g., *Buell v. Duchesne Mercantile Co.*, 231 P. 123, 124 (Utah 1924) (when obligations payable in installments, "the statute of limitations begins to run against it from the time fixed for the payment of each installment *for the part then payable*") (emphasis added) (internal quotations and citation omitted). The fact that the Note contained obligations up until June 1, 2006 would not extend the statute of limitations on previously defaulted obligations. Because the terms of the contract clearly required Carman, LLC to make monthly installments, the statute would generally begin to run on those installments as each came due.

The Defendant cites *Hemar Ins. Corp. of America v. Ryerson*, 200 S.W.3d 170 (Mo. Ct. App. 2006), and argues that "the statute of limitations commences to run on an installment note on the due

date of the last installment." However, the Missouri Court of Appeals's decision rested on a statute of limitations crafted specifically to govern installment contracts. See Mo. Rev. Stat. § 516.100 (2000). The Missouri Supreme Court had previously interpreted section 516.100 in *Sabine v. Leonard*, 322 S.W.2d 831 (Mo. 1959):

[I]n suits upon contracts where there is more than one item of damage (installment) the cause of action shall not be deemed to accrue until the last item of damage is sustained (last installment becomes due) so that all damages (installments) may be recovered and full and complete relief obtained in one action.

322 S.W.2d at 838.

In contrast, Utah's Legislature has not enacted such a provision for installment contracts, and *Hemar Ins. Corp. of America* is easily distinguished. In Utah, the statute simply states that "[a]n action may be brought within six years . . . upon any contract, obligation, or liability founded upon an instrument in writing." Utah Code Ann. § 78-12-23(2) (2006).

As explained above, however, this Court is persuaded by the exception recognized by *Vreede v. Koch*, 380 S.E.2d 615 (N.C. Ct. App. 1989). Under *Vreede*, 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 runs from that date.

Therefore, in this case the statute began to run from June

1, 2006. Because the Defendant filed the Notice of Default on November 1, 2006 - well within the six-year limitations period - the Court grants his motion for summary judgment against the Plaintiff's claim that the statute of limitations prevents the Defendant from becoming successor trustee, and prevents his foreclosing on the Property.

B. Wrongful Lien

The Defendant argues that the Notice of Default was not a wrongful lien. Rather, it simply declares a default in the repayment obligation secured by a properly filed Trust Deed. He further notes that under Utah Code Ann. § 57-3-102, the Plaintiff purchased the Property at the Sheriff's sale subject to the previously recorded lien. The Court agrees, and grants his motion for summary judgment on that claim.

C. Slander of Title

The Defendant also moves for summary judgment against the Plaintiff's slander of property title claim, arguing that the Plaintiff has failed to allege facts sufficient to prove several elements of the claim, and that "a complete failure of proof concerning an essential element of the non-moving party's case

necessarily renders all other facts immaterial." *Burns v. Cannon. The Bicycle Comp.*, 876 P.2d 415, 419 (Utah Ct. App. 1994).

To prove Slander of Title, a plaintiff must demonstrate that "(1) there was a publication of a slanderous statement disparaging [the] claimant's title, (2) the statement was false, (3) the statement was made with malice, and (4) the statement caused actual or special damages." *Spencer v. Pleasant View City*, 2003 UT App 379, ¶23, 80 P.3d 546 (internal quotations and citation omitted). "A slanderous statement is one that is derogatory or injurious to the legal validity of an owner's title or to his or her right to sell or hypothecate the property." *Bass v. Planned Management Servs.*, 761 P.2d 566, 568 (Utah 1988).

The Defendants correctly indicate that the Plaintiff has failed to allege any facts to support the first element. In his Complaint, the Plaintiff did not allege any facts demonstrating that the statement was derogatory or injurious to the legal validity of his title, or to his right to sell or hypothecate the property. The Plaintiff purchased the deed with at least constructive notice of the senior lien. The fact that the Plaintiff's Sheriff's deed is worthless is of no effect. Its value has not changed since he acquired it.

Nor has the Plaintiff alleged any facts to support the

fourth element of special or actual damages. "Absent a specific monetary loss flowing from a slander affecting the saleability or use of the property, there is no damage." *Bass*, 761 P.2d at 568. The Defendant is therefore entitled to summary judgment on the claim.

Furthermore, the Plaintiff did not respond to the Defendant's motion regarding this claim. Under Rule 56(e):

When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

Utah R. Civ. P. 56(e). In this case, the Court concludes that summary judgment is appropriate, and enters judgment against the Plaintiff's slander of title claim. Judgment is warranted both on the merits and under Rule 56(e).

#### D. Constructive Fraud

As discussed above, the Defendant does not owe a fiduciary duty to an interest-holder in secured collateral. The Defendant holds no confidential relationship with the Plaintiff. The Court therefore grants the Defendant's motion for summary judgment

against the Plaintiff's claim for constructive fraud.

E. Standing

The Defendant finally asserts that all of the Plaintiff's claims are barred because the Plaintiff lacks standing to file a complaint against the successor trustee for the Trust Deed. Because the Court has already granted summary judgment against all of the Plaintiff's claims, it need not consider the Defendant's argument that the Plaintiff lacks standing to assert those claims.<sup>8</sup>

**CONCLUSION**

The Trust Deed, which secured the purchase of the Property, represents a purchase-money security interest. See Utah Code Ann. § 70A-9a-103 (2006). The Plaintiff asserts that he is a vendee who did not assume the contract between Carman, LLC and

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<sup>8</sup> It should be noted, however, that the Defendant would be precluded from asserting this argument against the Plaintiff's first cause of action, in light of his concession that the Plaintiff has standing to assert the statute of limitations. (See Defendant R. Richard Davis' Reply Memorandum to Plaintiff's Verified Memorandum in Support of Plaintiff's Motion to Impeach Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Together with Defendant's Cross-Motion for Summary Judgment, at 5-6) ("Plaintiff claims that he may have standing, pursuant to his interest in the subject real property, to file a complaint and allege a statute of limitations claim against a foreclosure proceeding. Defendant has not denied Plaintiff's standing.") (emphasis added).



Mr. Simmons. However, a purchaser's interest in collateral is only superior to a perfected purchase-money security interest if the buyer purchases the collateral in the ordinary course of business. See Utah Code Ann. § 70A-9a-320(1); *id.* § 70A-9a-324(1). A purchase from a Sheriff's auction is not a purchase in the ordinary course of business. Therefore, if the Defendant forecloses on and sells the property, his greater security interest in the property allows him to recover the outstanding balance of the Note against the foreclosure proceeds.

Because the Defendant is entitled to dispose of the Property in the trustee's sale, the Court also removes the Lis Pendens on the Property.

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## ORDER

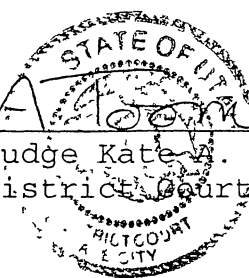
For the reasons discussed above, the Court DENIES the Plaintiff's motion for summary judgment, and GRANTS the Defendant's cross-motion for summary judgment. The Defendant's motion for summary judgment disposes of the case.

The Court immediately REMOVES the Lis Pendens on the Property, described as 136 East 2100 South, tax number 16-19-106-008, also described as Lots 17 and 18, Block 1 Hollywood Tract, Salt Lake City, Utah.

The Court finds that the Plaintiff acted with substantial justification in placing the Lis Pendens, and therefore declines to impose costs and attorney fees ordinarily mandated by Utah Code Ann. § 78-40-2.5(7) (2006).

DATED this 14<sup>th</sup> day of August, 2007.

  
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Judge Kate A. Toomey  
District Court Judge



**CERTIFICATE OF MAILING**

I certify that I mailed a true and correct copy of the foregoing, postage-paid, to the following:

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DATED this 14 day of August, 2007.

  
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Court Clerk