

2007

Greg Anderson v. T. Richard Davis, John Does : 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.

Recommended Citation

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IN THE UTAH COURT OF APPEALS

GREG ANDERSON

BRIEF OF APPELLANT

Plaintiff and Appellant

Case number: 20070739

vs.

T. Richard Davis and
John Does 1 through 10

District Court number: 070904196

Defendant and Appellee

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 AND PUBLISHED OPINION REQUESTED

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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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STATEMENT OF THE ISSUES

The broad issue which should be considered material to the resolution of this appeal is, **“when did the statute of limitations begin to accrue?”** Most or all of the other issues will be determined by the date the accrument of the statute of limitations began and ended in this action. The facts of the case concerning the statute of limitations are not disputed. Plaintiff asserts that the statute of limitations in Utah begins to accrue as soon as a person can maintain an action, and that if an optional acceleration clause is contained in the note, it is automatically invoked, but may extend the accrual of the statute of limitations for about a month. However the optional acceleration clause does not apply to a third party purchaser/vendee, who has not assumed the obligations of the original trustor. Defendant Davis claims that under Utah law, an agreement with an optional acceleration clause in a trust deed note, does not begin to accrue until the beneficiary formally invokes the optional acceleration clause.

ANALYSIS OF DEFENDANT’S CASE LAW

No attorney that has been in the business of being an attorney for more than twenty five years and having his argument soundly rejected and rebuked by the Supreme Court in *Fredericksen v. Knight Land Corp.*, can legitimately and honestly claim the same argument for some undisclosed reason, now holds water.

This claim is without merit, especially and particularly in spite of the fact that the Utah cases he cites, the current case law, and statute of limitations are totally and unanimously against his argument as will be demonstrated. Defendant has cited, and relies on two out of jurisdiction cases that do not involve a third-party vendee/purchaser of mortgaged property, unlike the present case.

The fact of the matter is that realistically, Defendant Davis has no Utah case law to base his argument concerning the statute of limitations upon. Lets analyze Davis' four Utah statute of limitations cases used in his brief. These cases purportedly expound his views concerning installment contracts in relationship to the statute of limitations, which are as follows:

***Nilsen-Newey & Co. v. Utah Resources Intern*, 905 P.2d 312 (Utah App. 1995),**

Davis in this action quotes *Nilson-Newey*, as a way to use *Johnson v. Johnson*, a 1906 case which will be analyzed next. In *Nilsen-Newey* an investor brought an action for accounting and distribution of profits. Defendants filed a motion to dismiss because of Investor's failure to bring an action for 35 years. The trial court dismissed the action on laches and the statute of limitations. The Utah Court of Appeals affirmed the dismissal. The Investor made a similar claim as Defendant Davis makes in this action, and The Court of Appeals stated:

Finally, plaintiff argues that even if laches bars its claims as to earlier years, each new year brings a new cause of action, and laches therefore does not bar its claims as to subsequent years. This argument clearly has **no merit** with respect to Plaintiffs request for an accounting that spans the entire thirty five years since the execution of the syndicate agreement. (emphases Added)

Just as in *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) where the Supreme court stated that Davis' argument was without merit, the Appeals Court analyzed investors argument as to the rule set in *Johnson v. Johnson* 31 Utah 408, 88P. 230 (Utah 1906) and then rejected the argument by stating, **"the argument clearly has no merit,"** that the investors case was like *Johnson v. Johnson*, and found in favor of defendants, and affirmed the trial courts ruling **dismissing the action on laches and the statute of limitations**. Davis would have this court believe the investor was victorious, when in fact the investor lost in district court, and on appeal respectively.

In addition, Plaintiff in this action is a third-party vendee/purchaser that particular case law applies to, concerning the statute of limitations! See *Taylor Bros. Co. v. Duden et al.* 188 P.2d 995, (Supreme Court of Utah Jan 27, 1948), which is addressed further on in this Brief.

***Johnson v. Johnson* 31 Utah 408, 88 P.230. (Utah 1906).**

In this case the parties entered into a verbal agreement, providing that the

Defendant would pay the Plaintiff on an annual basis “one-half of the crops that should be produced upon the land conveyed by the deed during the lifetime of [the plaintiff.]” A person can’t sue if it is not known what he is owed or in what amount he or she has been damaged, and there is no way to determine what is owed until the crops have been harvested. There can be many variables in a contract for half of the crops such as pests, crop disease, floods, early frost, etc., therefore it is impossible to know what the damages would be. In addition, *Johnson* is not a mortgage case, but a case for payment of one half of the crops produced on the land each year, and therefore does not apply to mortgages or deed’s of trust, where the predominate payment to be made in this day and age is in the form of legal tender, not crops. In *Johnson*, the Supreme Court of Utah stated:

The payments were thus to be made in yearly installments, and the amount there of was to be governed by the amount or value of the annual crops raised upon the land, and were to continue during the natural life of the respondent. (Page 231)

Furthermore, Plaintiff in the present action is a third- party vendee/purchaser, that special case law applies to, and if there is any conflict between the cases, *Taylor Bros.*, would be the precedent setting case inasmuch as it is a later case! *Taylor Bros. Co. v. Duden et al.* 188 P.2d 995, (Supreme Court

of Utah Jan 27, 1948). Defendant and judge Toomey used *Johnson v. Johnson* to springboard out of the jurisdiction and look for cases in other states. It may be possible that there are special types of installment contracts with no acceleration clause and or other special circumstances or provisions that under certain circumstances might extend the statute of limitations. However the Trust Deed and Trust Deed note executed in favor of Mr. Simmons are of a garden variety executed on standard printed forms. (Defendants Cross Motion for Summary Judgment Exhibits D & E) Therefore *Cooper v. Deseret Federal Sav. and Loan* 757 P. 2d. 483 (Utah App 1988) a statute of limitations case on point would apply. ***Bracklein v. Realty Ins. Co, et al.* 80 P.2d 471 (Utah 1938).**

Bracklein is actually a case on point for Plaintiff in the current action and not Defendant, and does not state or even infer what Defendant Davis claims it states. The fact of the matter is the case is much like *Taylor Bros.*, and states:

Mortgages

Where note is not originally a debt of grantee of mortgaged premises, and granted does not sign note or mortgage, grantee can only be liable on express or implied promise to pay.

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The allegation that property was conveyed to another is probably sufficient to justify an inference of acceptance of title, but it does not justify inference of

extraneous recitals or terms in an instrument of conveyance. And the assumption clause is such an extraneous recital or term in the deed.

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In this case the note had a single due date and became due on that date. It was not an installment contract, and therefore has no merit as to defendants claim that the statute of limitations begins to run when each installment becomes due. (*Bracklein* page 473) And as in *Johnson*, Plaintiff in *Bracklin* is not a third-party vendee/purchaser that special case law applies to, and if there is any conflict between the cases, *Taylor Bros. Co. v. Duden et al.* (Supreme Court of Utah Jan 27, 1948) , a later decided case would be the precedent setting case!

***Moab National Bank v. Keystone-Wallace Resources* 517 P.2d 1020 (1973)**

In this case the Defendant signed a note with Moab National Bank, and the note was an installment note. However there was no acceleration clause in the note, and the parties, (not the court), decided to treat the note as an installment note. (Page 1023) Although the bank in its action may have inferred that the breach of contract, of not paying an installment on the note timely, made the last installment due, as a matter of law, it decided not to. The Supreme Court never stated that Moab Bank had no right to sue on the balance due of the note. What the parties decide to do in regards to a written contract does not change the statute

or case law on the statute of limitations, unless there is meeting of the minds in writing that effects the date the statute begins to accrue. (*Statute of Frauds* § 70A-2-201 Utah Code) The issue of no acceleration clause is the key issue here, or the court would not have mentioned it. The case before this court has an acceleration clause, so the statute of limitations began to accrue as to Plaintiff pursuant to *Taylor* in mid 1998, and expired in mid 2004. The statute of limitations begins to run as soon as a person can sue, or as soon as there is a complete cause of action, and in this action, there was a complete cause of action in mid 1998. Furthermore the action does not concern mortgages, and does not involve a third party vendee.

Of course, this is an argument for obvious reasons Defendant T. Richard would like to avoid because he 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 was unsuccessful in litigating, *Fredericksen v. Knight Land Corp.*, 667 P.2d 34 (Utah 1983) a detailed statute of limitations case, in front of the Utah Supreme Court, and was soundly rebuked by that court, stating it was “without merit.” Defendant Davis has never denied this, nor can he!

Defendant’s argument that the statute of limitations begins to run when the final payment of the Trust Deed Note was missed makes no sense at all from a

legal point of view under Utah law. Defendant has developed no reasoned analysis of the cases Defendant quotes, nor Utah authority to support his point of view. He has only bald citations to authority, and a subjective claim as to what the cases state by taking quotes out of context. Inasmuch as both parties agree that the statute of limitations for a written contract is six years, in reality the only legal issue before the court is, **“when does the statute of limitations begin to accrue in regards to a third-party, vendee/purchaser of a written contract that vendee did not assume?”** Because of defendant's lack of analysis in his brief, he has not adequately explained how his claim of installment obligations relate to this action, nor can he, using Utah law.

Graves v. Seifried et. al 87 P. 647 (Utah 1906) is a case decided by the Supreme court in the same year as *Johnson v. Johnson* and is right on point. In the first paragraph of the case, the Utah Supreme Court stated:

1. LIMITATION OF ACTIONS - MORTGAGE FORECLOSURE - AVAILABILITY TO THIRD PERSONS. Where a third person acquired an interest in mortgaged property under a tax deed, she could invoke the statute of limitations as against the mortgagee; though it may have been waived by, or not available to the mortgagor.

This is the same standard applied to third parties who acquire mortgaged property, as in *Taylor Bros Co.*, which case for some mysterious or unexplained

reason was not mentioned one time in Defendant's Brief. Graves is much like the present case except that Plaintiff acquired his property through a sheriff's deed.

Cooper v. Deseret Federal Sav. And Loan, is right on point.

The Court of Appeals specifically ruled on mortgages with acceleration clauses in *Cooper v. Deseret Federal Sav. And Loan*, 757 P.2d 483 (Utah App. 1988), quoting the Utah Supreme Court in *Bradford v. Alvey & Sons*, 621 P. 2d 1240, 1242 where it stated:

“[W]hen 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.”

This rule has been applied in the context of acceleration clauses in mortgage instruments, including due-on-sale options: (emphases added)

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.** (emphases added)

Malouff v. Midland Fed. Sav. & Loan Ass'n, 181 Colo. 294, 509 P.2d 1240, 1245-46 (1973). *Accord Dunham v. Ware Sav. Bank*, 384 Mass. 63 423 N.E. 2d 998, 1000(1981); *First Fed. Sav. & Loan Ass'n v. Perry's Landing, Inc.*, Ohio App. 3d. 135, 463, N.E. 2d 636, 648 (1983)

In light of the above cites, it is obvious that on page 23 of Defendant's Brief he purposely left out the statement by the *Cooper* court that **an election to accelerate a year or years in the future, . . . could not be considered reasonable under ordinary circumstances.**

The Cooper Court further stated:

[4] Deseret acted at its peril in delaying to exercise its option to accelerate its option to accelerate the remaining balance on the note.

Furthermore the issue before the court is if Simmons sat on his right after mid-1998, when the last payment was made by Carman L.L.C., and that is the obvious reason that Defendant purposely left out *Taylor Bros Co.*, in his brief. Even if Utah case law allowed Simmons to decide not to exercise his option to foreclose, (which it does not), *Taylor Bros Co.*, would start the six year statute in mid 1998 in regards to Plaintiff.

In as much as the Court of Appeals has quoted Colorado case law in *Malouff; Mortgage Invest v. Battle Mountain* 56 P.3d 1104 (Colo. App. 2001)

may be helpful inasmuch as it is a later case. In that case the court stated:

Six year statute of limitations for actions to foreclose on deed of trust began to run on date of mortgagor's first default on the promissory note secured by the deed of trust. West's C.R.S.A. § 13-80-103.5

page 1105

Where as here, any action to recover payment on a promissory note is barred by the six year statute of limitations, foreclosure on the deed of trust is also barred. (citations omitted)

page 1111

Taylor Bros. Co. V. Duden et al. (Supreme Court. Utah, 1948) 188 P.2d 995.

Utah Case Law concerning optional acceleration clauses in regards to 3rd parties who have not formally assumed the liabilities of the trust deed note, starts the statute running the moment a person can sue. *Taylor Bros. Co. v. Duden et al.*, has been referred to through out this action. It was referred to in Plaintiff's letter to Defendant dated March 20, 2007. See Plaintiff's Motion for Summary Judgment, ("Exhibit "C"). Then, Defendant caused the "scam memorandum" to be written by Nathan Scharton, which referred to *Taylor Bros. Co.*, See Plaintiff's Motion for Summary Judgment, ("Exhibit "D"). Plaintiff referred to *Taylor Bros. Co.*, Plaintiff referred to *Taylor Bros. Co.*, on pages 4 & 5 of his Motion for Summary Judgment. In Plaintiff's Motion to Impeach, Plaintiff referred to *Taylor Bros. Co.*, on pages, 5, 6, 7 & 8. In Plaintiff's Motion For

Sanctions, Plaintiff referred to *Taylor Bros. Co.*, on pages, 5, 10 & 11. In Plaintiff's Reply Memorandum for Motion to Impeach, Plaintiff referred to *Taylor Bros. Co.*, on pages, 3, 4, 9, & 11. In Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment, Defendant referred to *Taylor Bros. Co.*, on pages, 9. In Defendant's Memorandum of Points and Authorities in Support of Defendant's Cross- Motion for Summary Judgment, Defendant does not referred to *Taylor Bros. Co., et al.* In Defendant's Reply Memorandum in 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, Defendant referred to *Taylor Bros. Co.*, on pages 5, 6, 7 and made a copy of the case Exhibit "A." of the above document. In Judge Toomey's *Memorandum Decision and Order*, Judge Toomey referred to *Taylor Bros. Co.*, on pages 3, 5, and in footnote 4 of page six where the essence of *Taylor Bros. Co.*, is misstated. See Plaintiff's opening Brief page, 27, 28, 30, 31, 33, 34 & 39, where Plaintiff clarifies and expounds on the meaning of *Taylor Bros. Co.*, and now, with the full meaning of *Taylor Bros. Co.*, exposed, Defendant in his Brief does not mention *Taylor Bros. Co.* one time. **The obvious reason being that Plaintiff's third party status cannot be refuted, because all of the Utah cases**

that Defendant quotes either agree with *Taylor Bros. Co.*, or are not applicable, as shown above. 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. The two out of jurisdiction cases that Davis cites, *Anton A. Vreede, M.D., P.C. v. Koch* 380 S. E. 2d, 615 (N.C. App. 1989), and *Navy Federal Credit Union v. Jones* 930 P.2d 1007 (Ariz. App. Div. 2. 1996)], do not include a third party vendee/purchaser.

The broad issue which should be considered material to the resolution of this appeal is simply, “when did the statute of limitations begin to accrue?” Most all of the other issues will be determined by this courts’ decision as to the date the accrument of the statute of limitations began.

DEFENDANT DAVIS KNEW THAT THE “NOTICE OF DEFAULT” HE PLACED ON PLAINTIFF’S PROPERTY WAS WRONGFUL, BECAUSE OF HIS REBUKE BY THE UTAH SUPREME COURT IN *FREDRICKSEN*; FURTHERMORE, IF IN REALITY, HE DID NOT KNOW, HE HAD A DUTY TO CHECK THE CURRENT LAW THAT APPLIED TO PLAINTIFF.

Because of Defendants rebuke by the Supreme Court, in *Fredricksen*, Defendant knew that his Notice of Default constituted a wrongful lien, because he knew that the statute of limitations had accrued 2 ½ years earlier, yet in spite of his obvious knowledge of the true statute of limitations, he continues to act as though his argument is correct. In *Centennial Investment Company v. Nuttall* 171 P.3d.

458 (Utah App, 2007), the Court of Appeals stated:

This court has twice considered whether a notice of interest recorded against real property constituted a wrongful lien. See *Russell v. Thomas*, 2000 UT App 82 ¶ 12, 999 P. 2d. 1244 (“The issue is whether defendants’ Notice of Interest was expressly authorized by [statute], and therefore falls within the exception set out in subsection (a) [of the wrongful lien definition].”)

Defendant Davis acknowledges that a person must have an ownership in property in order to sell it quoting, *In re Hoopiaina Trust*, 2006 UT 53 ¶ 30, 144 P.3d 1129. “It is well settled that [a] trust is a form of ownership in which the legal title to property is vested in a trustee. . . .” also see ” *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).

However, because the statute of limitations had ran, Davis owned nothing, and therefore had nothing to sell. In *Wycalis v. Guardian Title of Utah*, 780 P.2d821 (Utah App. 1989) this court 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.

A reading of § 57-1-33 in it’s entirety suggests that it is intended to operate only as a procedural guide

for trustees. We note in drafting § 57-1-33 the Legislature was very explicit and went to great lengths to define the duties of the beneficiary and the resulting liability for breach of those duties.

The footnote stated:

8. Expert testimony may be particularly helpful in elucidating the standard of care applicable here. Where the average person has little understanding of the duties owed by particular trades or professions, expert testimony must ordinarily be presented to establish the standard of care. For instance, expert testimony has been required to establish the standard of care for medical doctors, *Chadwick v. Nielsen*, 763 P.2d 817, 821 (Utah Ct. App. 1988); architects, *Nauman v. Harold K. Beacher and Assocs.*, 24 Utah 2d 172, 467 P.2d 610, 615 (1970); engineers, *National Housing Indust., Inc. v. E. L. Jones Dev. Co.*, 118 Ariz. 374, 576 P.2d 1374, 1377 (Ct. App. 1978); insurance brokers, *cf. Darner Motor Sales, Inc. V. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 628 P.2d 388, 403 (1084) (establishing standard of care “may require expert testimony”)

Defendant Davis claims he can sell property with complete disregard for others rights by simply claiming a duty to the beneficiaries. On page 32 of his Brief he stated:

Davis’ duty was to the beneficiaries and the estate of Roy Simmons. It is clear that the interest of the beneficiaries and the estate of Roy Simmons are in conflict with the interest of Anderson. Davis did precisely what he was suppose to do.

The fact is the 6 year statute of limitations had accrued and was over six

years after the last payment was made by Carman L.L.C. which was in July of 1998. The end of the six year statutory period was therefore in July of 2004. Defendant, as a defacto trustee sold Plaintiff's property in May of 2007, nearly 3 years after the statute had ran. Defendant's claimed allegiance and duty to the Estate of Roy Simmons could very well cause the Estate of Roy Simmons to be named in Plaintiff's federal 42 U.S.C.S §1983, civil rights action, as was explained on pages 14 and 15 (footnotes) of Defendant's brief.

The "Notice of Default," Davis placed on plaintiff's property was wrongful pursuant to the *Wrongful Lien Statute U.C.A.* 1953, 38-9-4 , also see, *Winters v. Schulman*, 977 P.2d 1218 (Utah 1999 App), certiorari denied 994 P.2d 1271.

**ACCELERATION CLAUSES IN UTAH ARE
AUTOMATICALLY AND INVOLUNTARILY INVOKED**

On pages 27 through 29 Davis claims that acceleration clauses are not automatically invoked in Utah, but cites only his two out of jurisdiction cases to try to prove his claims. And as stated above the cases do not involve a third party vendee/purchaser, so even if they were Utah cases they would not apply. In Utah when a thing is to be done, the law implies it is to be done with in a reasonable time. In *Fredericksen* 667 P. 2d 34 (Utah 1983) the Supreme Court stated:

. . . . 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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The Cooper court did not mince words and found, one month is reasonable, one year is unreasonable. Furthermore, pursuant to *Taylor Bros. Co.*, the statute of limitations, as to Plaintiff and his third party purchaser status began to accrue the minute that Simmons could sue, and ended exactly six years later.

On page 34 of Defendant’s Brief, he states, “There is no dispute that the Trust Deed’s lien has priority to Anderson’s purchase.” The fact of the matter is that is exactly what this case is all about. Simmons’ right to foreclose as to Plaintiff ended in July of 2004, six years after the last payment was made by Carman L. L. C. Another case on point is *Graves v. Seifried et al.*, 87 P. 674 where a third party purchased real property in a tax sale. There was an existing

loan through American Savings, Loan & Building Company, which had become insolvent, and was no longer a going concern. A receiver was appointed in Utah and an action was filed. The trial court found that:

. . . plaintiff's action was held barred by the statute of limitations. It was also held that the tax deed was valid, and that the defendant's title thereunder was superior to plaintiff's mortgage lien.

The Utah Supreme Court quoting the California Supreme Court went on to say:

“But it is settled doctrine of this court, as will be seen from the authorities above cited, that when third persons have subsequently acquired interests in the mortgaged property they may invoke the aid of the statute as against the mortgagee, even though the mortgagor as between himself and the mortgagee, may have waived that protection.” The theory of all the cases above cited is that the plea of the statute of limitations is a personal privilege, the rule does not extend to subsequent property rights over which he has no control.” *Brandenstein v. Johnson*, 140 Cal. 29, 73 Pac. 744.”

Because the statute of limitations had run as to plaintiff, Simmons had no right to Plaintiff's property. On page 36 of Davis' Brief, he asks why plaintiff stated that he just claimed to be a trustee. The simple reason is because the statute of limitations had accrued almost three years prior to Davis selling Plaintiff's property; and therefore Davis was not a trustee for Simmons, nor could he be as a matter of law, because Simmons had no interest in Plaintiff's property. However,

Davis had a constructive fiduciary duty to plaintiff. §22-1-1 Utah Code defines

“fiduciary” as:

“Fiduciary” includes a trustee under any trust,
expressed, implied, resulting or constructive
and any other person acting in a fiduciary capacity for
any person, trust or estate.

The key words are “constructive”, and “resulting.” Defendant is a constructive fiduciary to Plaintiff because in reality, he, (by filing a notice of default) forced himself into being a de facto trustee in regards to Plaintiffs property, which by definition is a “wrongful lien” pursuant to the “Wrongful Lien Statute.” (*U.C.A.* 1953, 38-9-4) Then, to add insult to injury, and with the undeniable knowledge of his rebuke by the Utah Supreme Court in *Fredricksen*, Davis unlawfully sold Plaintiff’s property, with total disregard for Plaintiff’s property rights. Because Simmons had no interest in plaintiffs property, Davis’ only duty was to Plaintiff pursuant to common law (*Bogart* § 421); as an involuntary trustee, which by his actions Davis forced upon himself. Under *California Civil Code* , § 2223, a Involuntary trustee, is defined, as “One who wrongfully detains a thing is an involuntary trustee thereof for the benefit of the owner.” Clearly, the simple fact is that the only fiduciary duty owed was, and still is to Plaintiff! Defendant also has a fiduciary duty to Plaintiff pursuant to *Blodgett*

v. Martsch, 590 P.2d 298, 302 (Utah 1978), which stated, “[o]bviously, a trust deed trustee may not . . . defraud a trustor.”

Finally, Plaintiff has at all times stated that he believes that Roy Simmons was paid in full on the note with Carman L.L.C., Defendant claims that Roy Simmons purposely waited to see if he was going to get paid when the last payment was due on the trust deed note, which was approximately eight years later. This argument makes no sense at all, inasmuch as shortly after the original trust deed and note were agreed to by Simmons, and Carman L. L. C., the subject property was deeded to E. L. Whitehead, (Defendants Brief 13), and Carolyn Manning, the signer of the note for Carman L. L. C., was sent to prison for 5 years. (*Manning v. State* 122 P. 3d 628 (Utah 2005) A aging person with serious health problems is not inclined to wait five years for someone to get out of prison to determine whether or not they are going to pay. An aging person is usually trying to get their affairs in order. Roy Simmons is now deceased, which makes this exactly the type of stale claim for which the statute of limitations was enacted.

Finally, pursuant to the Professional Rules of Conduct, and *Rule 11* of the *URCP*, and *Rule 40 (a) URAP* require attorneys and parties to reasonably inquire as to the facts and law before a document is signed and filed. See Appellant’s 1st Brief page 45. Davis has a duty to be straight forward with this court and not

distort what the case law really means. As plaintiff stated in District Court, the way Defendant Davis portrays this case law is a bikini bathing suit. What it shows is surprising, but it hides its vital.

SUMMARY OF THE ARGUMENT

Plaintiff has clearly shown that the statute of limitations in the State of Utah as to Mortgages begins to accrue as soon as a person can sue, and runs for six years. If the Note contains an optional acceleration clause, that clause may extend the note for about another month. However optional acceleration clauses do not apply to third parties-vendee/purchasers, and the statute of limitations begins to run as soon as the beneficiary can maintain an action.

Inasmuch as the statute of limitations had run as to plaintiff, the “notice of default,” placed on plaintiff’s property by Davis constituted a “wrongful lien,” and plaintiff is entitled to treble damages, because Davis refused to remove the wrongful lien.

Defendant Davis, the attorneys that participated in the distortion of the law, and defrauded plaintiff of his property, and the law firm of Callister Nebeker and McCullough should be sanctioned, as a matter of law.

CONCLUSION

This is simply a case of an attorney's ego getting in the way of his good judgment and his highly respected knowledge of the law. In spite of Davis' rebuke By the Utah Supreme Court in *Fredricksen*, he disregarded the Supreme Court's decision in *Fredricksen*, and with his ego strongly intact, and by some yet to be discovered tactic, Davis somehow persuaded Judge Toomey to sign a "memorandum and order," that had nothing to do with Utah law, either statutory or case law. Davis obviously twisted the arms, of his fellow attorneys to go along with his fictional theory as to statute of limitations law, when in fact he had absolute knowledge of the true law because of his above mentioned rebuke by the Utah Supreme Court in *Fredricksen*; which for some strange phenomenon is not mentioned in any of his writings in this action. He has just not accurately stated what the cases he cites mean in regards to the statute of limitations. Furthermore, he completely ignores *Taylor Bros. Co, et al.*, and wants this honorable court to go along with his outlandish legal claim as to when the statute of limitations begins to run in the State of Utah; and tries to persuade all involved by using out-of-the-jurisdiction case law, with complete indifference to Utah case law.

Plaintiff in his pleadings, jokingly stated that Davis could call any first year law student to find out what the law in Utah is in regards to the statute of

limitations, and at all times called the memorandum by Scharon a “scam memorandum.” For these jokes, Davis claims Plaintiff is unprofessional. In fact with the obvious rebuke by the Supreme Court at all times in the back of his head, Davis has the gull to claim he was just trying to assist Plaintiff to understand what was happening with Plaintiff’s property, which seems to Plaintiff, pursuant to Davis’ rebuke by the Supreme Court in *Fredricksen*, as about as unprofessional as a lawyer can get, pursuant to the Rules of Professional Conduct. (Davis’ Brief page 30)

In addition to the grief Davis has caused as mentioned above, he has caused Plaintiff to work on this case for more than a year forcing Plaintiff to spend hundreds of hours, and thousands of dollars, and forcing this court to review this case, which for all intents and purposes was decided in *Fredricksen*. There exists, no public law library in the Uintah Basin, which has caused Plaintiff to travel to Salt Lake City numerous times for his legal research. Davis has sold Plaintiff’s property with no hesitation or any regard as to the position that the unlawful trustee’s sale placed Plaintiff into financially. In light of all of the above, with a giant ego Davis argues that neither he or his attorney Thomas Price, or others should be sanctioned. For the above stated reasons, the District Court’s Decision should be reversed, and Plaintiff should be awarded costs and attorney’s fees.

Dated this 7th day of February 2008


Greg Anderson

CERTIFICATE OF SERVICE

I, Greg Anderson hereby certify that on February 7th, 2008, I served two copies of the attached Appellant's Reply Brief upon the party listed below by mailing it by first class mail to the following address, or by hand delivery:

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

Dated this 7th day of February 2008


Greg Anderson