

1977

W. W. & W. B. Gardner, Inc. A Utah Corporation v.
Summit Limited, A California Limited Partnership,
Et Al. : Brief of Defendant-Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Timothy R. Hanson, Craig S. Cook; Attorneys for Defendant-Appellant

Recommended Citation

Brief of Appellant, *Gardner, Inc. v. Summit LTD*, No. 14814 (Utah Supreme Court, 1977).
https://digitalcommons.law.byu.edu/uofu_sc2/503

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH

W. W. & W. B. Gardner, Inc.)
a Utah Corporation,)
)
Plaintiff &)
Respondent,)
)
vs.)
)
SUMMIT LIMITED, a California)
limited partnership, et al.)
)
Defendant &)
Appellant.)
)

Case No. 14814

BRIEF OF DEFENDANT-APPELLANT

Appeal from Judgment of the Third Judicial
District Court, ^{SUMMIT COUNTY} ~~Salt Lake County~~, State of Utah
The Honorable Peter F. Leary, Judge

TIMOTHY R. HANSON of
HANSON, WADSWORTH & RUSSON
702 Kearns Building
Salt Lake City, Utah

CRAIG S. COOK, of counsel
3645 East 3100 South
Salt Lake City, Utah

FILED

FEB 23 1977

Attorneys for Defendant-
Appellant Summit Limited

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	3
ARGUMENT	8
I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT PURSUANT TO RULE 37(d) OF THE UTAH RULES OF CIVIL PROCEDURE	8
II. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56, UTAH RULES OF CIVIL PROCEDURE, IN THAT SUBSTANTIAL QUESTIONS OF MATERIAL FACT PRECLUDED SUMMARY DISPOSITION	15
A. Plaintiff's theory of land ownership and agency	18
B. Plaintiff's fraudulent conveyance theory	19
C. Plaintiff's theory of agency	20
CONCLUSION	27
APPENDIX	App.1 - 70
Second Amended Complaint	App.1
Answer of Summit	App.9
Motion for Summary Judgment	App.12
Wheelwright Affidavit	App.15
Bauer Affidavit	App.20
First Set Interrogatories Ans.	App.30
Request for Admissions Ans.	App.41
Third Set Interrogatories Ans.	App.48
Reporter's Transcript	App.59
Judgment	App.66

CASES CITED

	Page
Brandt v. Springville Banking Company, 10 Utah 2d 350, 353 P.2d 460 (1960)	15
Bullock v. Desert Dodge Truck Center, Inc. 11 Utah 2d 1, 354 P.2d 559 (1960)	24
Carman v. Slavens, 546 P.2d 601 (Utah, 1976)	12
Dunn v. Pennsylvania Railway Company, 96 F.Supp. 597 (D. Ohio, 1951)	11
Fox v. Allstate Insurance Co., 22 Utah 2d 383, 453 P.2d 701 (1969)	18
G. M. Leasing Corporation v. Murray First Thrift and Loan Co., 534 P.2d 1244 (Utah, 1975)	15
Gillmor v. Carter, 15 Utah 2d 280, 391 P.2d 426 (1964)	16
Hatch v. Renzo, 21 Utah 2d 144, 442 P.2d 467 (Utah, 1968)	15
Holbrook Company v. Adams, 542 P.2d 191 (Utah, 1975) .	16, 24
Howick v. Bank of Salt Lake, 28 Utah 2d 64, 498 P.2d 352 (1973)	18
Kearns v. 7-Up Company, 30 F.R.D. 333 (D. Penn., (1962)	11
Kidman v. White, 14 Utah 2d 142, 378 P.2d 898 (1963) .	16
Rena-ware Distributors, Inc. v. State, 463 P.2d 622 (Wash. 1970)	21
Russell v. Park City Utah Corporation, 29 Utah 2d 184, 506 P.2d 1274 (1973)	23

	Page
Schlecht v. Equitable Builders, Inc. 535 P.2d 86 (Ore. 1975)	23
Surgical Supply Center v. Industrial Commission, 223 P.2d 593 (Utah, 1950)	23
Tangren v. Ingalls, 12 Utah 2d 388, 367 P.2d 179 (1962)	15
Welchman v. Wood, 9 Utah 2d 25, 337 P.2d 410 (1959) . . .	15
Westinghouse Electric Company v. Paul W. Larsen, Contractors, Inc., 544 P.2d 876 (Utah, 1975)	13, 14

STATUTES CITED

Rule 33, Utah Rules of Civil Procedure	8, 10, 13, 14, 1
Rule 37, Utah Rules of Civil Procedure	9
Title 24, U.C.A. (1953)	16, 19, 1

OTHER AUTHORITIES

26A C.J.S., <u>Depositions</u> §81-82, pp. 420-421	17
--	----

IN THE SUPREME COURT OF THE STATE OF UTAH

- - - - -

W. W. & W. B. GARDNER, INC.,
a Utah Corporation,

Plaintiff and Respondent,

vs.

Case No. 14814

SUMMIT LIMITED, a California
limited partnership, et al.,

Defendant and Appellant.

BRIEF OF DEFENDANT-APPELLANT

NATURE OF THE CASE

This is an action commenced by Plaintiff-Respondent against some 60 defendants (including appellant) for work performed by plaintiff on property located in Park City, Utah. Plaintiff claims that it entered into an agreement with certain defendants to pave the property and further claims that such work was duly performed but that compensation has not been received. Plaintiff sought a judgment against the various defendants on differing legal theories claiming that it was entitled to a total compensation of \$40,000 for the work performed.

DISPOSITION IN THE LOWER COURT

The original Complaint filed by plaintiff named approximately 60 defendants. Throughout the course of proceedings, several defendants were dismissed. On September 3, 1976, plaintiff moved for Summary Judgment and for Entry of a Default Judgment against defendant Summit Limited. On September 20, 1976, both motions were heard before the Honorable Peter F. Leary, judge in the Third Judicial District. Defendant Summit Limited was not represented at the hearing and after listening to arguments advanced by counsel for plaintiff, both the Motion for Summary Judgment and the Motion for Entry of Default were granted. A Judgment was prepared by plaintiff's counsel and executed by the court on September 22, 1976. (R. 668-691).

On November 30, 1976, defendant Summit Limited obtained local counsel who then moved for relief from judgment under Rule 60(b). (R. 703). The court denied the motion on the grounds that the lower court lacked jurisdiction. (R. 709-710).

A Notice of Appeal from the September 22nd judgment was filed with the Summit County Court Clerk on October 12, 1976.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks a reversal from this Court of the lower court's order granting Summary Judgment in favor of

of respondent and Default Judgment against appellant and requests that this Court remand the action to the lower court for trial on the merits.

STATEMENT OF FACTS

The record filed with this Court contains over 700 pages. The majority of this record is irrelevant to this appeal since it concerns pleadings of the other some 50 defendants. For this reason, an Appendix has been prepared to this brief which excerpts those portions of the record which appellant believes are relevant to the issues presented. Attachments to pleadings, however, have been omitted from the Appendix. References, whenever possible, will be made to both the record and to the Appendix page.

This action involves property located in Park City, Utah. In 1973, a subdivision was built in this area by a group of developers. In November of 1973, this property was conveyed to National Property Management, Inc., a Utah corporation. Several days thereafter, an agreement was entered into between National Property Management, Inc. and Summit Limited, a California limited partnership. (R. 663-667; App. 24-29). This agreement provided that \$736,000 would be paid to National

Property Management, Inc. in yearly installments as provided by the agreement. National Property Management, Inc. agreed to release certain parcels of land on a determined basis according to the amount of money paid. (R. 663; App. 25).

On July 1, 1974, plaintiff-respondent, W. W. Gardner, Inc., entered into a contract with Ski Park West, Inc. for the asphaltic concrete paving at Park West Village. (R. 545; App. 47). This agreement was signed by J. C. Wheelwright, agent for plaintiff, and Richard Hallmark, Vice-President of Ski Park West, Inc.

At the time of this contract, National Property Management, Inc. was a wholly owned subsidiary of Ski Park City West, Inc. (R. 542 and 668; App. 43). It is alleged by plaintiff that Richard Hallmark, the officer executing the contract with plaintiff, was also a vice-president of National Property Management. (App. 62). Between November 15, 1973 and July 10, 1975, the general partner of Summit Limited was a California corporation known as Condor International Corporation. (R. 537 and 671; App. 55). Plaintiff alleges that Richard Hallmark was also President of Condor International during this time. (App. 62).

Plaintiff commenced this suit on July 10, 1975 and named

approximately 60 individual defendants in the original Complaint. (R. 1-16). On October 23, 1975, plaintiff mailed its First Set of Interrogatories to the majority of defendants, including appellant, Summit Limited. (R. 309-322).

On August 28, 1975, plaintiff amended its Complaint to delete some defendants and add others. (R. 280-308). On July 21, 1976, the trial court granted an order allowing plaintiff to again amend its Complaint to include an Eighth and Ninth Cause of Action. (R. 605). On July 6, 1976 and August 9, 1976, plaintiff served by mail upon defendant Summit Limited its Third Set of Interrogatories. (R. 532-538). Similarly, on July 6, 1976 and August 9, 1976, plaintiff served by mail upon defendant Summit Limited its Request for Admissions of Facts. (R. 541-544).

During these entire proceedings, Summit Limited was not represented by counsel but was represented by Stephen H. Bauer, a general partner "in pro per." (R. 615; App. 9; R. 670; App. 48). On September 7, 1976, Mr. Bauer filed an "Answer of Summit Limited to Second Amended Complaint." (R. 615-619; App. 9-11). On the same day, September 7, 1976, plaintiff filed with the clerk a "Motion for Summary Judgment and Motion for Entry of Default Judgment." (R. 620-622; App. 12-14).

Included with this Motion was the Affidavit of John C. Wheelwright, an employee of the plaintiff. (R. 623-626; App. 15-18).

On September 17, 1976, three days before the plaintiff's motions were to be heard, Mr. Bauer filed four separate pleadings with the Summit County Clerk, These pleadings were served on the plaintiff on September 15, 1976. (App. 67). These pleadings included the following:

1. The "Affidavit of Stephen H. Bauer in Opposition to Motion for Summary Judgment and Default Judgment." (R. 660-662; App. 20-23).

2. Answers to Request for Admissions of Fact.* (R. 668-669; App. 41-45).

3. Answer to First Set of Interrogatories Propounded by Plaintiff.* (R. 643-645; App. 30-40).

4. Answer to Third Set of Interrogatories Propounded by Plaintiff.* (R. 670-672; App. 48-58).

* It should be noted that while Mr. Bauer complied with Rule 33 of the Utah Rules of Civil Procedure, he was unaware of Rule 9.1 of the Rules of Practice in the District Courts of the State of Utah requiring the question to be restated in the response to discovery. For this reason, and for the convenience of the parties and the Court, appellant has combined the questions with the answers in the Appendix with appropriate record references to both questions and answers.

On September 20, 1976, a hearing was held by the Honorable Peter F. Leary upon plaintiff's Motion for Summary Judgment and for Entry of Default Judgment. Defendant Summit Limited was not represented at this hearing. Plaintiff's counsel informed the Court of various facts and argued that no issue as to any material fact existed. Plaintiff's counsel also argued that the delay in discovery justified sanctions under Rule 37. Upon hearing no objection, the trial court granted both motions without comment. (Reporter's transcript of proceedings, September 20, 1976, pp. 1-7; App. 59-65).

A Judgment was prepared by plaintiff's counsel and submitted to the trial court. It was executed on September 22, 1976. (R. 688-691; App. 66-70).

On October 12, 1976, Stephen Bauer, on behalf of defendant Summit Limited filed a Notice of Appeal from the September 22nd judgment. (R. 694). Defendant then obtained local counsel who moved for relief from Judgment pursuant to Rule 60(b). (R. 703). After a short hearing the trial court denied this motion on the grounds that it lacked jurisdiction because of the pending appeal. (R. 709-710).

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT PURSUANT TO RULE 37(d) OF THE UTAH RULES OF CIVIL PROCEDURE.

As stated previously, the trial Court granted both a default judgment based upon Rule 37 of the Utah Rules of Civil Procedure and summary judgment based upon Rule 56. The Rule 37 default was granted by the Court because of the alleged discovery non-compliance by defendant-appellant Summit Limited. The motion for default was originally granted at the hearing "for failure to respond to discovery" (Reporter's transcript at proceedings, September 20, 1976, p. 6; App. 65). However, in the judgment prepared by plaintiff's counsel and signed by the Court on September 22, 1976, the "failure" to respond was modified into "delay". The judgment reads as follows:

6. The Court finds that the failure of Summit Limited timely to respond to said discovery request was without excuse or justification, particularly because responses to plaintiff's said First Set of Interrogatories were served ten months late and because defendant Summit Limited at no time sought leave of this Court tardily to file responses to said Interrogatories as required by Rule 33, Utah Rules of Civil Procedure. The Court further finds that the failure by defendant Summit Limited timely to respond to plaintiff's said discovery requests caused delay in the prosecution of these proceedings and substantial additional expense to plaintiff.

* * *

10. Defendant Summit Limited failed timely to serve answers or objections to said interrogatories submitted by plaintiff after proper service of said interrogatories. Based upon the foregoing determinations, together with the persistent failure of defendant Summit Limited timely or properly to respond to plaintiff's discovery requests, the Court determines pursuant to Rule 37(d), Utah Rules of Civil Procedure, that judgment by default shall be rendered against defendant Summit Limited. (R. 689-690; App. 67-69) (emphasis added).

It is undisputed that appellant Summit Limited responded to all of respondent's discovery requests before the motion for summary judgment was heard by the trial court. The trial court's judgment reflects that on September 15, 1976 responses were served upon plaintiffs. (R. 689; App. 67). These same responses were filed with the clerk of Summit County on September 17, 1976, three days before the summary judgment hearing. (R. 643-645; App. 30-40; R. 668-669; App. 41-45; R. 670-686; App. 48-58). For this reason Rule 37 is inapplicable and cannot be used as a basis for imposing a default judgment.

Rule 33 of the Utah Rules of Civil Procedure concerns the use of interrogatories as a discovery device. This rule provides "the party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory." (emphasis added). Rule 37, the sanction provision of the Utah Civil

Rules, outlines the procedure to be used once the requesting party makes its motion for discovery pursuant to Rule 33.

The applicable portions of Rule 37 are as follows:

37(a)(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33 . . . the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. (Emphasis added).

* * *

37(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Requests for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who was to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Rule 37(d) (Emphasis added).

A cursory examination of Rule 37 discloses that the mere delay of filing discovery requests is not sufficient grounds

for sanctions. This is not to say, however, that expenses or costs cannot be assessed against a delinquent party since Rule 37(a)(4) and 37(d) provide for reasonable expenses in bringing the motion to compel discovery. Since the court in this case specifically found "that the failure by defendant Summit Limited timely to respond to plaintiff's said discovery request caused delay in the prosecution of these proceedings and substantial additional expense to plaintiff" the court had discretion to award costs for such delay. In any event, however, the court erred in granting a default judgment when it clearly had no authority to do so.

The United States District Court of Pennsylvania in Kearns vs. 7-Up Company, 30 F.R.D. 333 (D. Penn. 1962) refused to issue sanctions under Rule 37 for a delay in answering interrogatories. The court stated "Rule 37, by its terms, does not impose sanctions for delay in answering interrogatories, and the Courts have generally not so interpreted the provisions of the Rule." Id. at 334. (Emphasis added). This reasoning is especially applicable in cases where the answering party may be ignorant of the Civil Rules of Procedure. Dunn vs. Pennsylvania Railway Company, 96 F.Supp. 597 (D. Ohio, 1951).

In addition to these legal reasons prohibiting a default judgment from being entered, other considerations also

prevail. Defendant Summit Limited, acting through its general partner Steven Bauer, immediately responded to the discovery requests upon receipt of the plaintiff's motion for summary judgment outlining the previous discovery failures. (R. 620-621; App. 12-19; R. 660-667; App. 20-29; R. 643-645; App. 30-40; R. 668-669; App. 41-45; R. 670-686; App. 48-58). Moreover, the judgment reflects that except for the initial ten-month delay as to the first set of interrogatories, the third set of interrogatories and request for admissions were only delayed four days from the last service. It should be noted that plaintiff amended its complaint on two separate occasions, the last amendment being as late as July 19, 1976 (R. 597), and that under the Utah Rules no discovery response is required until 45 days have elapsed. Since this action originally involved sixty separate defendants (R. 1) it is understandable how the voluminous pleadings sent to all parties could especially confuse an out-of-state layman who foolishly attempted to represent the appellant partnership.

This Court has repeatedly held that a default judgment should not be imposed for discovery purposes unless the circumstances clearly warrant this extreme remedy. In Carman vs. Slavens, 546 P.2d. 601 (Utah, 1976) an appeal was

taken from an order directing that an answer be stricken and summary judgment entered because of the defendant's failure to appear at his deposition and produce documents. Justice Crockett, in the opinion, succinctly interpreted the sanction provision of Rule 37(d). He stated:

The language of the rule as presently worded is permissive, rather than mandatory, wherein it states: that the court "may make such orders. . . as are just, and . . . may take any action. . ." etc. This grants the court discretionary authority to impose the sanctions mentioned. It is true that where the authority to perform a proposed action rests within the discretion of the court we must allow considerable latitude in which he may exercise his judgment. But this does not mean that the court has unrestrained power to act in an arbitrary manner. Fundamental to the concept of the rule of law is the principle that reason and justice shall prevail over the arbitrary and uncontrolled rule of any one person; that this applies to all men in every status: to courts and judges, as well to autocrats or bureaucrats. The meaning of the term "discretion" itself imports that the action should be taken within reason and good conscience in the interest of protecting the rights of both parties and serving the ends of justice. It has always been the policy of our law to resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy. Id. at 603. (Emphasis added).

Likewise, in Westinghouse Electric Company vs. Paul W. Larsen, Contractors Inc., 544 P.2d 876 (Utah, 1975) this Court vacated an order entered by the trial court dismissing a suit for failure to diligently prosecute. Part of the contentions raised by the defendants in that case bordered around the failure of plaintiffs to supply interrogatories in

a timely manner. This Court held that the granting of the dismissal motion was unreasonable and that injustice would result from such dismissal. This Court also observed that the defendants themselves were not overly diligent nor manifested any particular haste in getting the pre-trial discovery procedures completed. Justice Crockett in the opinion again stated the considerations in reviewing a dismissal case:

It is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up-to-date. But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principle the courts generally tend to favor granting relief from default judgments where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party. Id. at 879.

The record is clear that no prejudice will result from vacating this dismissal order since there are presently approximately forty other defendants remaining in the lawsuit who have not yet had their day in court. The record is also clear that plaintiff made no effort under Rule 37(a) to seek an order compelling discovery and therefore, just as in the Westinghouse case, plaintiff cannot complain about delay when it failed to utilize the judicial machinery provided to prevent such problems.

For these reasons, the judgment of the trial court

granting default under Rule 37(d) of the Utah Rules of Civil Procedure was improper and should be vacated. See also Hatch vs. Renzo, 21 Utah 2d 144, 442 P.2d 467 (Utah, 1968); G.M. Leasing Corporation vs. Murray First Thrift and Loan Co., 534 P.2d 1244 (Utah, 1975).

II. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56, UTAH RULES OF CIVIL PROCEDURE, IN THAT SUBSTANTIAL QUESTIONS OF MATERIAL FACT PRECLUDED SUMMARY DISPOSITION.

In paragraph 9 of the judgment, the trial court made the following determination:

The pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavit of J. C. Wheelwright show that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law as moved against defendant Summit Limited. (R. 690; App. 69).

This conclusion of the judgment is unsupported by the record as will be discussed in this section of the brief. Before such discussion, however, it is well to remember the admonitions concerning summary judgment as pronounced by this Court. Summary judgment is a drastic remedy and courts should be reluctant to deprive litigants of an opportunity to fully present their contentions upon a trial. Tangren vs. Ingalls, 12 Utah 2d 388, 367 P.2d 179 (1962); Brandt vs. Sprinville Banking Company, 10 Utah 2d 350, 353 P.2d 460 (1960); Welchman vs. Wood, 9 Utah 2d 25, 337 P.2d 410 (1959). Summary judgment should be granted only when, taking the view

most favorable to the losing party's claims and any proof that he might properly adduce thereunder, it is determined that he in no event can prevail. Holbrook Company vs. Adams, 542 P.2d 191 (Utah, 1975); Gillmor vs. Carter, 15 Utah 2d 280, 391 P.2d 426 (1964); Kidman vs. White, 14 Utah 2d 142, 378 P.2d 898 (1963).

Applying these principles to this record clearly reveals that material questions of facts have not been resolved and that summary disposition was error. Plaintiff has plead three specific theories allegedly giving rise to a cause of action against defendant-appellant Summit Limited. These theories are: (1) As an owner of property Summit Limited was aware that plaintiffs were providing labor and materials to improve the property and did not advise plaintiffs that such improvements were not desired, (R. 10-11); (2) Appellant Summit Limited is liable to plaintiffs because it entered into a fraudulent purchase of said lots in violation of Title 25 of the Utah Code Annotated (R. 599-601; App. 3-5); (3) Summit Limited entered into a contract with plaintiff by and through its agent Ski Park City West Inc. for the performance of asphaltting which work was duly performed and is now owing (R. 600-602; App. 5-6). The record shows that material facts still remain to be decided as to each theory propounded by plaintiff. Before focusing on the record, however, several

preliminary matters should be raised.

This Court should take judicial notice that the "depositions" referred to in paragraph 9 of the judgment are inadmissible for purposes of this appeal. (R. 690; App. 68). The depositions of John Rose, J. C. Wheelwright, and Harold W. Richy (contained in the Supreme Court record) were neither opened nor published and as such could not be properly considered by the trial court nor by this court. 26A C.J.S., Depositions §§ 81-82, pp. 420-421. The depositions of Hallmark and Krause referred to by plaintiff's counsel during the motion for summary judgment are also inadmissible. (P. 3 of Reporter's transcript; App. 60). The Krause deposition has never been filed, opened, nor published by the district court. The Hallmark deposition was not filed with the district court clerk until October 12, 1976, some twenty-two days after the summary judgment hearing and also was not opened nor published by the trial court.

On September 17, 1976 appellant filed with the Summit County clerk The Affidavit of Steven H. Bauer In Opposition to Motion for Summary Judgment and Default Judgment. (R. 660-662); App. 20-29). Although plaintiff's counsel attempted to eliminate this affidavit from consideration in paragraph 8 of the judgment (R. 690; App. 68) the affidavit is still valid (except for a deposition transcript quotation)

since it was based on personal knowledge and since no motion to strike was made at the time of the summary judgment proceeding thereby waiving any deficiency which could be claimed. Fox vs. Allstate Insurance Co., 22 Utah 2d 383, 453 P.2d 701 (1969); Howick vs. Bank of Salt Lake, 28 Utah 2d 64, 498 P.2d 352 (1973).

A. Plaintiff's theory of land ownership and agency.

Plaintiff originally named Summit Limited as a defendant on the theory that Summit, along with some forty other land owners, were aware that plaintiff was providing materials to improve their property but did not object nor inform plaintiff that such services were not desired. (R. 11). In addition, plaintiffs claimed that Ski Park City West Inc., the corporation which signed the agreement with plaintiff, was acting as agent for each of the property owners. (R. 11).

There is no evidence in the record that defendant Summit Limited was aware that plaintiff was paving the property during July of 1976. Appellant's answer to interrogatory No. 15 states that Summit Limited was not aware of the grading and paving until the late summer of 1974. (R. 644; App. 36). Since plaintiff's own affidavit showed that the project was completed before July 29, 1974, (R. 624-625; App. 15-18), there is a question of fact whether this defendant knew the paving was to be undertaken or that it ac-

quiesced in allowing the completion of such work. Similarly, defendant specifically denied that Ski Park City West was an agent for Summit Limited. (R. 660; App. 20-23). For these reasons, material facts exist as to the claims made under plaintiff's first theory of liability and summary judgment was improper.

B. Plaintiff's fraudulent conveyance theory

Plaintiff claimed under its Eighth Cause of Action that defendant Summit Limited conspired with National Property Management Inc. and received lots 1, 4, 23, and 25 without receipt of fair consideration. (R. 597-600; App. 1-5). Plaintiff further claimed that such conveyance was in violation of Title 25 of the Utah Code Annotated. Plaintiff introduced no affirmative evidence aside from these bare allegations of any fraudulent conveyance.

Defendant Summit Limited, on the other hand, through its acting general partner stated under oath that \$132,000 was paid for the property. (R. 660; App. 20). Moreover, Summit Limited specifically denied plaintiff's statement that no consideration was received in the Request for Admissions. (R. 542, 669; App. 43). It again asserted valuable consideration in its answers to the Third Set of Interrogatories. (R. 533-534, 670-671; App. 50-51). The record is devoid of any showing by plaintiff that such consideration is not to be deemed

"fair consideration" as defined in Section 25-1-3 Utah Code Annotated.

For these preceding reasons, therefore, plaintiffs claim of fraudulent conveyance is not supported by the present record and is a question to be resolved at trial or upon appellant's motion for summary judgment.

C. Plaintiff's theory of agency

Plaintiff in its Ninth Cause of Action alleges that Ski Park City West, Inc. was acting as agent for defendant Summit Limited when Ski Park City West, Inc. entered into the pavement contract with plaintiff. (R. 600-602; App. 5-6). Appellant Summit Limited in its affidavit of Steven Bauer specifically denied that Ski Park City West, Inc. acted in the capacity of an agent. (R. 660-662; App. 20-23). This was also denied in Summit Limited's answers to request for admissions. (R. 543-544, 669; App. 44-45).

In addition to these firm denials, it is obvious from an examination of the pleadings and contracts that there is no legal or factual reason why defendant Summit Limited is bound by the agreement entered into with plaintiff. To clarify the various companies involved in this transaction the following synopsis is offered: Summit Limited is a California limited partnership. During the time of this lawsuit its general partner was Condor International. (R. 537, 671; App.

55). Richard Hallmark was then the president of Condor and was also vice president of a Utah corporation known as Ski Park City West, Inc. The wholly owned subsidiary company of Ski Park City West, Inc. was National Property Management, Inc. (R. 542; App. 43).

Thus, plaintiff claims under its Ninth Cause of Action that Summit Limited is liable for the acts of Ski Park City West, Inc. when the only link between these two companies was that Mr. Hallmark was both the president of its general partner, Condor International, and vice president of Ski Park City West.

If defendant Summit Limited were a corporation rather than a limited partnership and the allegation were made that the common officer created a single entity, a court would require a clear showing of fraud being worked upon third parties before such an allegation would be allowed to stand. Rena-ware Distributors, Inc. vs. State, 463 P.2d 622 (Wash., 1970).

In this case, however, defendant Summit Limited is even one more step removed from such a conclusion of agency. Here, Summit Limited is a limited partnership and is insulated from most liability caused from the actions of its general partner not to mention a mere officer of the general partner. See Uniform Limited Partnership Act, Title 48, chapter 2,

Utah Code Annotated.

The record is completely devoid of any showing of fraud or any acts giving rise to an agency relationship as plead in plaintiff's Ninth Cause of Action. Since Summit Limited, under oath of its general partner, specifically denied such agency it was clear error for the trial court to grant summary judgment on this theory.

A fourth cause of action theory was argued before the trial court during the motion for summary judgment but had not been previously plead in either the original complaint or the subsequent amendments. It goes without saying that such statements by plaintiff's counsel were inadmissible and that a summary judgment motion could not be based upon an unpleaded cause of action. However, in order for this Court to more fully understand the transactions which transpired among the various companies a brief discussion of this argument is in order.

Plaintiff's attorney at the hearing argued that National Property Management was obligated to install the paving on the subdivision under a previous agreement entered into with Park West Village, the original owners of the land. Plaintiff's argument continued that since defendant Summit Limited entered into a second agreement with National Property Management which allowed it to assume National Proper-

ty's "position" in the event of the latter's default, that therefore Summit Limited was liable for the paving on the subdivision. (Transcript of proceedings 2-3; App. 60-62).

Plaintiff's counsel failed to point out to the court that the original contract with plaintiff was entered into by Ski Park City West, Inc. which was the parent company of National Property Management. The law is clear that only in the case of moral culpability in the form of fraud or other injustice can a parent corporation and its subsidiary be considered as the same entity and that absent such moral culpability the two corporations will be considered as two independent legal entities. Without such showing appellant is in no way bound by the acts of the parent company. Schlecht vs. Equitable Builders Inc., 535 P.2d 86 (Ore. 1975). See also Surgical Supply Center vs. Industrial Commission, 223 P.2d 593 (Utah, 1950).

In addition to the fact question of the interrelationship between Ski Park City West, Inc., National Property Management, Inc., and Summit Limited there exists the factual question of what "position" Summit Limited would be assuming in the Property Management contract. (R. 667; App. 29). This too would be a question of fact based upon the surrounding circumstances of the agreements and would be improper for judgment without a factual determination. Russell vs. Park

City Utah Corporation, 29 Utah 2d 184, 506 P.2d 1274 (1973).

It is thus apparent that the three plead legal theories and the one unplead theory were not supported by evidence in the record allowing a court to conclude that no issue existed as to material facts. Plaintiff failed to produce any proof as to these legal theories and merely relied upon its pleadings and counsel's statement. The record as it presently exists supports appellant's defenses and as such it cannot be said as a matter of law that there is no reasonable possibility that appellant will not prevail on the merits at trial. Bullock vs. Desert Dodge Truck Center, Inc. 11 Utah 2d 1, 354 P.2d 559 (1960).

The case of Holbrook Co. vs. Adams, 542 P.2d 191 (Utah, 1975) should be considered by this Court because of its close analogy to the present action. In Adams a construction company sued three defendants alleging that it had done work for them and had not been paid. Defendants asked the trial court for a judgment of dismissal or summary judgment. In support they filed affidavits stating that they had not contracted with the plaintiff to have any work performed. The plaintiff filed a counter-affidavit stating that the plaintiff's president had specifically dealt with the three individuals and had received certification from the Secretary of State that they were acting under an assumed

name. The trial court granted defendant's motion for summary judgment.

On appeal this Court remanded to the district court on the basis that the counter-affidavit had raised a sufficient question of fact to require a trial. As this Court said:

[I]t only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact. This is analogous to the elemental rule that the fact-trier may believe one witness as against many, or many against one.

* * *

It is not the purpose of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact [I]f there is any dispute as to any issue, material to the settlement of the controversy, the summary judgment should not be granted. Id. at 193.

In the instant case there is a serious dispute as to agency, interpretation of contracts, and fraudulent conveyances. While admittedly Summit Limited's lack of Utah legal counsel caused some confusion and non-compliance with the Utah discovery rules, the appellant made a good-faith effort to show, at the time of the summary judgment proceeding, that material facts were in dispute. Because of appel-

lant's failure to hire local counsel it was not represented at the summary judgment proceeding and the trial court did not have the benefit of an advocate to challenge the assertions made by plaintiff's counsel. (Transcript of proceedings p. 5; App. 64). Appellant Summit Limited has obviously learned the folly of attempting to represent itself and now is prepared to professionally litigate this action.


CONCLUSION

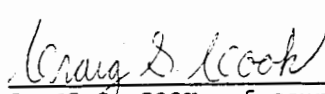
Defendant-appellant Summit Limited responded to the discovery requests before respondent-plaintiff's motion for default was heard. As such, therefore, the trial court could only award expenses caused by the delay and could not grant a default judgment.

At the time of the hearing there was substantial documentation in the form of an opposing affidavit and sworn interrogatories and admissions indicating that material facts were in dispute. Even though appellant had no advocate before the trial court, the pleadings contained in the file itself were sufficient to preclude a summary judgment motion from being granted. For these reasons, this Court must remand this action to the lower court for a trial on the merits.

Respectfully submitted,

HANSON, WADSWORTH & RUSSON


TIMOTHY R. HANSON
702 Kearns Building
Salt Lake City, Utah


CRAIG S. COOK, of counsel
3645 East 3100 South
Salt Lake City, Utah

A P P E N D I X

MARTINEAU & MAAK
C. Keith Rooker
Bruce A. Maak
Attorneys for Plaintiff
1800 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: 532-7840

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY
STATE OF UTAH

W. W. & W. B. GARDNER, INC.,)	
a Utah corporation,)	
)	
Plaintiff,)	
)	
vs.	)	<u>SECOND AMENDED</u>
	)	<u>COMPLAINT</u>
PARK WEST VILLAGE, INC., et al.,)	
	)	Civil No. 4800
Defendants.)	
)	

(R. 598)

Plaintiff complains of defendants and alleges as follows:

1. Plaintiff by this reference incorporates herein each and every allegation and prayer for relief that is contained in its Amended Complaint, which is on file herein.

EIGHTH CAUSE OF ACTION

2. National Property Management, Inc. is a corporation organized by and under the laws of the State of Utah, having its principal place of business in Summit County, Utah. At

all times material hereto, National Property Management was a wholly owned subsidiary of Ski Park City West, Inc., a Utah corporation.

3. Ski Park City West, Inc. is a corporation organized by and under the laws of the State of Utah.

4. Summit Limited is a limited partnership organized under the laws of the State of California having its principal place of business in Summit County, Utah, having transacted substantial business in the State of Utah, and presently purporting to hold title to lots 1, 4, 23, and 25, Park West Village, Plat "A," according to the official plat thereof which is of record with the County Recorder of Summit County, State of Utah. At all times material hereto, Ski Park City West, Inc. was the sole general partner of Summit Limited.

5. On or about July 8, 1974, plaintiff, on the one hand, and National Property Management, Inc. as principal through its duly authorized agent, Ski Park City West, Inc., on the other hand, entered into a contract, a copy of which is attached hereto marked Exhibit "A" and by this reference incorporated herein (hereinafter referred to as the "Contract"), by the terms of which plaintiff agreed to perform certain grading, asphaltic concrete paving, and related work upon a subdivision known as Park

(R. 599)

West Village, "Plat "A," which is located in Summit County,

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.

Machine-generated OCR may contain errors.

Utah, and National Property Management, Inc. through its duly authorized agent, Ski Park City West, Inc. agreed to pay plaintiff therefor in full within ten (10) days following completion of the said work.

6. On or about July 26, 1974, plaintiff completed performance of all work required to be performed by plaintiff under said Contract.

7. All conditions precedent to plaintiff's right to payment in full from National Property Management, Inc. have been performed and have occurred.

8. National Property Management, Inc. is a debtor of plaintiff and owes to plaintiff the principal sum of \$38,199.65, together with interest thereon at the rate of twelve percent per annum from and after August 5, 1974, until paid, less the sum of \$1,007.09, which latter sum plaintiff has been paid heretofore in connection with said work and contract as alleged above.

9. Between December, 1973 and October, 1974, National Property Management, Inc., without receipt of fair consideration therefor, conveyed to Summit Limited various realty located in Summit County, State of Utah, including lots 1, 4, 23, and 25, Park West Village, Plat "A," according to the plat thereof which is of record in the office of the County Recorder of Summit County, State of Utah.

10. At the time(s) and as the result of said conveyances of realty, National Property Management, Inc. was or was thereby rendered insolvent within the meaning of Section 25-1-2, Utah Code Annotated.

11. At the time(s) of the said conveyances, National Property Management, Inc. was engaged and was about to engage in

(R. 600)

various businesses and transactions, including the development and resale of realty located in said Park West Village, Plat "A," for which the property and assets remaining in its hands following the said conveyances were unreasonably small capital.

12. At the time(s) of said conveyances, National Property Management, Inc. intended to and believed that it would incur debts beyond its ability to pay as they mature.

13. National Property Management, Inc. effected said conveyances with the actual intent to hinder, delay, and defraud its present and future creditors, including plaintiff.

14. The conveyances by National Property Management, Inc. to Summit Limited of the said realty, including said lots 1, 4, 23, and 25, Park West Village, Plat "A," and each of them, were fraudulent as to plaintiff, and plaintiff is entitled to have said conveyances set aside to the extent necessary to satisfy its claims, to disregard said conveyances, and to levy execution upon the said property conveyed.

NINTH CAUSE OF ACTION

As an alternative to Eighth Cause of Action, plaintiff alleges as follows:

15. Plaintiff by this reference incorporates in this Ninth Cause of Action paragraphs 2, 3, and 4 of Eighth Cause of Action above.

16. On or about July 8, 1974, plaintiff, on the one hand, and Summit Limited as principal through its duly authorized agent, Ski Park City West, Inc., on the other hand, entered into a contract, a copy of which is attached hereto marked Exhibit "A," and by this reference incorporated herein (hereinafter referred to as the "Contract"), by the terms of which plaintiff

(R. 601)

agreed to perform certain grading, asphaltic concrete paving, and related work upon a subdivision known as Park West Village, Plat "A," which is located in Summit County, Utah, and Summit Limited through its duly authorized agent, Ski Park City West, Inc. agreed to pay plaintiff therefor in full within ten (10) days following completion of the said work.

17. On or about July 26, 1974, plaintiff completed performance of all work required to be performed by plaintiff under said Contract.

18. All conditions precedent to plaintiff's right to pay-

ment in full from Summit Limited have been performed and have occurred.

19. Summit Limited owes to plaintiff the principal sum of \$38,199.65, together with interest thereon at the rate of twelve percent per annum from and after August 5, 1974, until paid, less the sum of \$1,007.09, which latter sum plaintiff has been paid heretofore in connection with said work and contract as alleged above.

WHEREFORE, Plaintiff prays judgment as follows:

1. Under Eighth Cause of Action,

(a) For a judgment and decree setting aside with respect to plaintiff the purported conveyance of realty by National Property Management, Inc. to Summit Limited, including lots 1, 4, 23, and 25, Park West Village, Plat "A," according to the plat thereof, which is of

(R. 602)

record with the County Recorder of Summit County, Utah, and such other conveyances by National Property Management, Inc. to Summit Limited as may prove to be fraudulent as to plaintiff and adjudging that plaintiff may disregard and levy execution

upon the said property conveyed, and

(b) For such other and further relief
as the Court deems appropriate.

2. Under Ninth Cause of Action, in the alternative to
Eighth Cause of Action,

(a) For a judgment against Summit
Limited in the sum of \$38,199.65, to-
gether with interest thereon at the
rate of twelve percent per annum from
and after August 8, 1974, until paid,
less the sum of \$1,007.09,

(b) For plaintiff's costs incurred here-
in, and

(c) For such other and further relief
as the Court deems appropriate.

MARTINEAU & MAAK

s/Bruce A. Maak

Bruce A. Maak
1800 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiff

No 2158

PROPOSAL SUBMITTED TO SKI PARK WEST
 STREET C/O CONDOR INTERNATIONAL
 CITY, STATE AND ZIP CODE 647 CAMINO DE LOS MARES
SAN CLEMENTE, CALIFORNIA 92672

DATE JULY 1, 1974

WE PROPOSE hereby to furnish material and labor — complete in accordance with below specifications.

ASPHALTIC CONCRETE PAVING AT PARK WEST VILLAGE,
 PARK CITY, UTAH AND TO INCLUDE:

APPROXIMATELY 10,119 SQUARE YARD.

1. ROAD BASE IN PLACE BY OTHER.
2. PROCESS AND COMPACT EXISTING ROAD BASE GRAVEL.
3. TWO AND ONE-HALF INCHES (2½") OF FINE THREE BIN ASPHALTIC CONCRETE SURFACE COAT.

BID:

\$2.58 PER SQ YD
 OR
 \$26,107.02

NOTE:

1. CONTRACT PRICE IS CONTINGENT ON OUR PURCHASE OF ASPHALT OIL AT THE REFINERY FOR \$63.00 PER TON, TAX NOT INCLUDED. ANY INCREASE IN THAT PRICE WILL RESULT IN AN ADDITIONAL CHARGE. ANY DECREASE IN THAT PRICE WILL RESULT IN A CREDIT.
2. ANY ROAD BASE USED WILL BE ADDED AT \$2.85 PER TON DELIVERED.
3. AREA TO BE MEASURED, FOR FINAL BILLING AT ABOVE SQUARE YARD PRICE.

INTEREST charged on past due accounts at 12% per year.

ROUGH GRADING must bring area within .2 ± of finished grade.

FINE GRADING means bring area to finished grade requiring no material to be moved in or out.

Authorized
 Signature

J. C. Wheelwright
 J. C. WHEELWRIGHT

NOTE: This proposal may be withdrawn by us if not accepted
 within 15 days.

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Terms: Net 10 days after completion of work.

Date of Acceptance: _____

Accepted: _____

By: _____

Summit Ltd., a
Limited Partnership
By Steven H. Bauer,
General Partner
25942 Via Viento
Mission Viejo, California
In Pro Per

FOURTH JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

W. W. & W. B. GARDNER, INC.,)	
a Utah corporation,)	
)	
)	
Plaintiff,	)	CIVIL NO. 4800
)	
v.	)	ANSWER OF SUMMIT LIMITED,
	)	A General Partnership, to
PARK WEST VILLAGE, INC., a	)	SECOND AMENDED COMPLAINT
Utah corporation, et al.,)	
)	
)	
Defendants.))	

COMES NOW SUMMIT LTD., and for itself alone and for no
other Defendant named herein and for answer to the Second Amend-
ed Complaint admits, denies and alleges as follows:

EIGHTH CAUSE OF ACTION

I

For answer to Paragraph 1 of this answering Defendant in-
corporates its previously filed answer in this matter as if set
forth in full herein.

II

For answer to Paragraphs 2 and 3, this answering Defendant
has no sufficient information or belief sufficient to make an

answer and on that ground denies the allegations thereof.

(R. 616)

III

For answer to Paragraph 4 this answering defendant admits that it is a limited partnership organized under the laws of the State of California and holds title to lots 1,4, 23 and 25, Park West Village, but denies that its principal place of business is in Summit Co., Utah and that Ski Park City West Inc., was its sole general partner.

IV

For answer to Paragraph 5 this answering Defendant admits that there was a purported contract attached as Exhibit "A" to the Complaint, but has no information or belief sufficient to make an answer to the remaining allegations of said Paragraph and on that ground denies said remaining allegations.

V

For answer to Paragraphs 6,7,8,10,11,12 and 13, this answering Defendant has no sufficient information or belief sufficient to make an answer and on that ground denies each individual Paragraph and the whole thereof.

VI

For answer to Paragraph 9 this answering Defendant admits it was conveyed lots 1, 4, 23 and 25 of Park West Village between December '73 and October '74 but denies that said conveyances were without fair consideration.

VII

For answer to Paragraph 14 this answering Defendant denies each and every allegation and the whole thereof.

NINTH CAUSE OF ACTION

For answer to Paragraph 15 this answering Defendant incorporates

(R. 617)

its answers to Paragraphs 2, 3, and 4 of the Eighth Cause of Action.

II

For answer to Paragraphs 16, 17, 18, and 19 this answering Defendant denies each and every allegation of all of said Paragraphs and the whole thereof.

WHEREFORE, Defendant Summit Limited, prays judgment as follows:

1. That Plaintiff take nothing by its complaint herein;
and
2. For costs of suit, herein;
3. For such other and further relief as the Court may deem just and proper.

SUMMIT LIMITED, a Limited
Partnership

By s/Steven H. Bauer
General Partner
In Propria Persona

MARTINEAU & MAAK
C. Keith Rooker
Bruce A. Maak
Attorneys for Plaintiff
1800 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: 532-7840

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY
STATE OF UTAH

W. W. & W. B. GARDNER, INC.,)	
a Utah corporation,	)	<u>MOTION FOR SUMMARY JUDGMENT</u>
	)	<u>AND</u>
Plaintiff	)	<u>MOTION FOR ENTRY OF</u>
	)	<u>DEFAULT JUDGMENT</u>
vs.	)	<u>AND</u>
	)	<u>NOTICE</u>
PARK WEST VILLAGE, INC., a)	
Utah corporation, et al.,	)	Civil No. 4800
)	
Defendants.)	
)	

M O T I O N

Plaintiff W. W. & W. B. Gardner, Inc. hereby moves the
Court as follows:

1. For summary judgment against defendant Summit
Limited, a California Limited Partnership, under
Ninth Cause of Action of the Second Amended Com-
plaint of plaintiff in the amount of \$38,199.65,
together with interest thereon at the rate of
twelve percent per annum from and after August 8,

1976, until paid, less the sum of \$2,018.60.

2. For entry of a default judgment against defendant Summit Limited, a California

(R. 621)

Limited Partnership, under Ninth Cause of Action of the Second Amended Complaint herein.

The first motion advanced above is brought by plaintiff pursuant to Rule 56, Utah Rules of Civil Procedure, and is based upon the Affidavit of J. C. Wheelwright and the pleadings and depositions on file herein. Based upon the said affidavits, pleadings, and depositions, there exists no genuine issue of material fact as to plaintiff's entitlement to the judgment prayed for, and plaintiff is entitled to said judgment as a matter of law.

The second motion advanced above is brought by plaintiff pursuant to Rule 37(d) and Rule 55, Utah Rules of Civil Procedure and is based upon the following grounds: (a) On October 23, 1975, plaintiff duly served upon defendant Summit Limited its First Set of Interrogatories to Defendants Other Than Park West Village, et al., answers to which were due on November 25, 1975 and answers to which have not to date been served or filed; and (b) On July 6, 1976 and again on August 9, 1976, plaintiff duly served upon defendant Summit Limited its Third Set of Interrogatories, answers to which were due

on August 8, 1976 and/or September 11, 1976 and answers to which have not to date been served or filed.

N O T I C E

TO: DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the undersigned will bring the above motion on for hearing before this Court at the courtroom thereof in the Courthouse at Coalville, Utah, on the 20th day

(R. 622)

of September, 1976 at 10:00 A.M. or as soon thereafter as counsel can be heard.

DATED this 3 day of September, 1976.

MARTINEAU & MAAK

s/C. Keith Rooker bam
C. Keith Rooker

s/Bruce A. Maak
Bruce A. Maak

1800 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiff

MARTINEAU & MAAK
C. Keith Rooker
Bruce A. Maak
Attorneys for Plaintiff
1800 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: 532-7840

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

W. W. & W. B. GARDNER, Inc.,)
a Utah corporation,)

Plaintiff,)

vs.)

PARK WEST VILLAGE, INC., a)
Utah corporation, et al,)

Defendants.)

AFFIDAVIT OF
JOHN C. WHEELWRIGHT

Civil No. 4800

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

JOHN C. WHEELWRIGHT, being first duly sworn upon oath,
deposes and states as follows:

1. Affiant is and since the summer of 1971 has been
employed by W. W. & W. B. Gardner, Inc. ("Gardner") in the ca-
pacity of an estimator and project supervisor. In that ca-
pacity, Affiant is responsible for bidding or negotiating

paving contracts on behalf of Gardner, overseeing any work that results, ascertaining the amount of labor and material utilized in completed work, and preparing final invoices for work so completed.

2. On July 1, 1974, Affiant prepared and executed on behalf of Gardner a proposal to furnish certain paving, compact-

(R. 624)

ing, and grading services and materials upon certain real estate located in Summit County, State of Utah known as Park West Village, Plat "A." A true and correct copy of said proposal, which was thereafter executed by one Richard Hallmark is attached hereto marked Exhibit "A."

3. Pursuant to said proposal and directions of employees and agents of Ski Park City West, Inc. Affiant caused Gardner to process, compact, install additional road base gravel upon, grade, sterilize, and pave the roads, parking lots, and areas around a fire station located in or around the said real estate known as Park West Village, Plat "A."

4. Gardner performed three general areas of such paving work: (a) the streets, (b) the fire stations, and (c) the parking lots. Following the completion of each of the said three areas, Affiant measured the paving so installed, computed the surface area of same, ascertained the quantity of

road base gravel installed, and determined the price of asphalt oil paid by Gardner for oil utilized in each area.

5. With respect to the said streets, Affiant on or about July 29, 1974 prepared the document, a true and correct copy of which is attached hereto marked Exhibit "B," which document reflects that 11,098.5 square yards of paving were installed upon said streets. Affiant ascertained that 792.25 tons of road base gravel were installed upon said streets and that soil sterilization expenses in the amount of \$950.00 were incurred. Based upon the foregoing quantities, an invoice for street paving was prepared by Affiant on or about July 31, 1974, a true and correct copy of which is attached hereto marked Exhibit "C."

6. With respect to the said fire station areas, Affiant ascertained that 247.33 square yards of paving were installed thereon and that 1.6 tons of asphalt oil was utilized in install-

(R. 625)

ing said paving. On or about November 19, 1974, Affiant prepared an invoice based upon the foregoing quantities and the amount that Affiant determined had been charged to Gardner in excess of \$50.00 per ton for said oil, a true and correct copy of which is attached hereto marked Exhibit "D."

7. With respect to the said parking lots, Affiant on

or about July 29, 1974 prepared the document, a true and correct copy of which is attached hereto marked Exhibit "E," which document reflects that 1756.67 square yards of paving were installed upon said parking lots. Affiant ascertained that 356.0 tons of road base gravel were installed upon said parking lots. Based upon the foregoing quantities, an invoice for such parking lots was prepared by Affiant on or about July 31, 1974, a true and correct copy of which is attached hereto marked Exhibit "F."

8. Affiant has computed the sums of the total amounts reflected in Exhibits "C," "D," and "F," and the total sum of same is \$38,199.65. Said total sum represents an accurate computation of the total amount owed to Gardner pursuant to the terms of Exhibit "A" hereto.

9. Affiant has reviewed the records of Gardner and has ascertained that Gardner has received, to and including the date hereof, the total sum of \$2,081.60 from various property owners in return for partial releases of the mechanic's lien of Gardner upon said property, which total sum has been applied to reduce the amounts owed to Gardner for its services as set forth above.

DATED this 3 day of September, 1976

s/John C. Wheelwright
JOHN C. WHEELWRIGHT

(R. 626)

Subscribed and sworn to before me this 3rd day of September, 1976.

s/Sue Belman

Notary Public

Residing at: Salt Lake City, Ut.

My Commission Expires:

July 29, 1979

(R. 660)

Summit Ltd., a
Limited Partnership
By Steven H. Bauer,
General Partner
25942 Via Viento
Mission Viejo, California 92675

In Pro Per

THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

W. W. & W. B. GARDNER, INC.,)	
a UTAH Corporation,	)	CIVIL NO. 4800
	)	AFFIDAVIT OF STEVEN H. BAUER
Plaintiff,	)	IN OPPOSITION TO MOTION FOR
	)	SUMMARY JUDGMENT AND DEFAULT
vs.	)	JUDGMENT
)	
PARK WEST VILLAGE, INC., a)	
UTAH Corporation, et al.,)	
)	
Defendants.)	

STEVEN H. BAUER being first duly sworn deposes and
says:

1. I am the general partner of SUMMIT LTD. At no
time did SKI PARK CITY WEST, INC. act in the capacity of an
agent for SUMMIT LTD.

2. The consideration paid by SUMMIT LTD. for the
property it now owns in PARK WEST VILLAGE, Plot "A" was
\$132,000. This money was paid to SKI PARK CITY WEST, INC.
and/or its wholly owned subsidiary NATIONAL PROPERTY MANAGE-

MENT.

3. At no time did SUMMIT LTD. assume the liability to Plaintiff herein nor did it except said liability from NATIONAL PROPERTY MANAGEMENT or SKI PARK CITY WEST, INC. ROBERT KRAUSE a Vice President of SKI PARK CITY WEST, INC. during his deposition

(R. 661)

stated (at page 33 and 34 of the Transcript) on April 14, 1976 at San Clemente, California.

"Q Okay. You were going to sell all the land to Summit Limited under Exhibit 4 yet you were going to retain the obligation to pave the road?

A I felt \$300,000 profit was sufficient to sustain a \$30,000 obligation.

Q Was that part of your agreement in Exhibit 4 that National Property Management would retain the obligation to do the paving?

A Under Exhibit 4 there was no passing through of the obligation to do anything to the buyers of the property, National Property Management. National Property Management retained its obligations, whatever they would be, didn't pass them through.

Q So it was your intent then to keep the obligation in National Property Management to do the paving; is that

right?

A That's correct."

4. In its answer to the Ninth Cause of Action, SUMMIT LTD. has denied the allegations of Paragraph 16 of the Second Amended Complaint which alleges that SKI PARK CITY WEST, INC. was SUMMIT LTD'S. agent. It is my information and belief that at no time did SKI PARK CITY WEST, INC. act in the capacity as an agent or in any other capacity on behalf of SUMMIT, LTD.

5. In accordance with Paragraph 7 of the Agreement of November 15, 1973 between NATIONAL PROPERTY MANAGEMENT and SUMMIT LTD. certain parcels within PARK WEST VILLAGE, Plot A was to be released upon payment. This was accomplished as to

(R. 662)

those lots and parcels set forth as owned by SUMMIT LTD. in the complaint on file herein. A copy of this agreement was sent to Attorney Maak in response to his Request for Production of Documents dated July 12, 1976. A copy of said agreement is attached hereto marked Exhibit A and incorporated herein by this reference. A copy of the cover letter sent to Mr. Maak is attached hereto marked Exhibit B and incorporated herein by this reference.

6. At this time I am in the process of obtaining

legal advice and responding to the discovery requests of Mr.
Maak.

Executed at Santa Ana, California, this 15 day of
September, 1976.

s/Steven H. Bauer
STEVEN H. BAUER

Subscribed and sworn before me
on this 15th day of September,
1976.

s/Agnes B. Larsen
Notary Public

AGREEMENT

1. THIS AGREEMENT made this 15th day of November, 1973, by and between NATIONAL PROPERTY MANAGEMENT, INC., a Utah corporation herein after designated as "Seller", and SUMMIT LIMITED, a Limited Partnership, hereinafter designated as "Buyer" of 647 Camino De Los Mares, San Clemente, California 92672.

2. WITNESSETH: That the Seller for the consideration herein mentioned agrees to sell and convey to the Buyer and the Buyer for the consideration herein mentioned agrees to purchase the real property situate in Summit County, State of Utah known as Park West Village and more particularly described in the Title Policy attached hereto as Exhibit A. Seller represents that a portion of said real property is included in a subdivision more particularly described on the Plat, recorded as entry #116341 with the Summit County Recorder and that said subdivision consists of certain sold and unsold lots as more particularly set forth on the Inventory attached hereto as Exhibit B. The lot numbers on said Inventory relate to said Plat and the unsold lots designated there are included within the real property which is the subject of this Agreement. The lots designated as having been sold on said Inventory include lots sold by deed and by contract and are not part of the subject of this sale.

3. Said Buyer hereby agrees to enter into possession and pay for said premises the sum of \$736,000.00, payable at the office of Seller his assigns or order, 647 Camino De Los Mares, San Clemente, California 92672, strictly within the following terms, to-wit:

\$9,000.00 cash on or before December 31, 1973, and the balance of \$727,000.00 shall be paid as follows:

\$31,000.00 plus interest accrued on the total balance as of the date of the payment on March 1, 1974:

\$31,000.00 plus interest accrued on the total balance

as of the date of the payment on the 15th day of August and the 15th day of December of each of the years 1974, 1975, 1976, 1977, 1978 and for August 15, 1979, with a payment of the principal balance plus interest accrued to date as of December 15, 1979.

The Buyer may prepay all principal or any interest at any time. Buyer shall also pay to Seller the sum of \$72,200.00 as a loan fee to Seller. Possession of said premises shall be delivered to Buyer on the date of the first payment. From the date hereof until possession is delivered or until Buyer has defaulted under this Agreement, Buyer shall have access to the property to make surveys, soil tests and to conduct other engineering activities.

4. Interest shall be charged from the date hereof on all unpaid portions of the purchase price at the rate of 8-1/2% per annum.

5. It is understood and agreed that if the Seller accepts payment from the Buyer on this Contract less than according to the terms herein mentioned, then by so doing it will in no way alter the terms of the Contract as to the forfeiture hereinafter stipulated or as to any other remedies of the Seller.

6. It is understood that there presently exists an obligation against said property in favor of Earl and Anna Pressler which has been assigned to Downey State Bank with an unpaid balance of \$18,000.00 as of December 1, 1973, which obligation is to be paid by Seller's predecessor in interest, Park West Village, Inc.

7. The Seller agrees to cause the release of and convey fee simple title to parcels of land to the Buyer upon receipt of amounts listed with respect to each parcel as set forth on Exhibit C and in accordance with the terms specified therein.

8. Seller represents that there are no unpaid special improvement district taxes covering improvements to said premises now in the

process of being installed or which have been completed and not paid for.

9. Buyer and Seller agree that they will not mortgage or otherwise encumber any unreleased property which is the subject matter of this Contract; however, Buyer may record a notice of this Contract at its election.

10. The Buyer agrees to pay all taxes and assessments of every kind and nature which are or which may be assessed and which may become due on these premises during the life of this Agreement.

664

11. The Buyer agrees to pay the general taxes due and payable after the date hereof.

12. The Buyer further agrees to keep all insurable buildings and improvements on said premises insured in a company acceptable to the Seller in an amount not less than the appraised value thereof and to insure the shop for a minimum amount of \$20,000.00 and to include the Seller as a co-insured party as his interest may appear and to deliver a certificate with respect to such an insurance policy to Seller.

13. In the event the Buyer shall default in the payment of any special or general taxes, assessments, or insurance premiums as herein provided, the seller may, at his option, pay said taxes, assessments and insurance premiums or either of them, and if Seller elects so to do, then the Buyer agrees to repay the Seller upon demand, all such sums so advanced and paid by him, together with interest thereon from date of payment of said sums at the rate of 3/4 of one percent per month until paid.

14. Buyer agrees that he will not commit or suffer to be committed any waste, spoil, or destruction in or upon said premises, and that he will maintain said premises in good condition.

15. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within sixty (60) days thereafter, the Seller, at his option shall have the following alternative remedies:

A. Seller shall have the right, upon failure of the Buyer to remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the nonperformance of the contract, and the Buyer agrees that the Seller may at his option reenter and take possession of said premises without legal processes as in its first and

665

former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land and become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller; or

B. The Seller may bring suit and recover judgment for all delinquent installments, including costs and attorney's fees. (The use of this remedy on one or more occasions shall not prevent the Seller, at his option, from resorting to one of the other remedies hereunder in the event of a subsequent default); or

C. The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this Contract as a note and mortgage, and pass title to the Buyer subject thereto and proceed immediately to foreclose the same in accordance with the laws of the State of Utah, and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorney's fees; and the Seller may have a judgment for any deficiency which may remain. In the case of foreclosure, the Seller hereunder, upon the filing of a Complaint, shall be immediately entitled to the appointment of a receiver to take possession of said mortgaged property and collect the rents, issues and profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to order of the court; and the Seller, upon entry of judgment of foreclosure, shall be entitled to the possession of the said premises during the period of redemption.

16. It is agreed that time is the essence of this Agreement.

17. Seller will make available to Buyer all cost accounting

666

information relating to construction of improvements on the subject property.

18. The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's

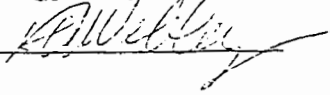
fee, which may arise or accrue from enforcing this Agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

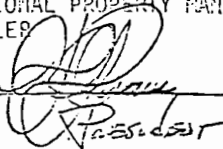
19. This Contract is assignable by the Buyer. However, Buyer shall give written notice of any such agreement and provide a copy thereof to Seller.

20. As of the date of this Contract, Buyer shall have the right to tie in and connect to Park West Water Association, a nonprofit Utah corporation and to acquire and to have the ability to acquire water at association rates in effect from time to time, and Buyer shall have the right to tie in and connect to the sewer system of Ski Park City West, Inc., its subsidiaries, or a County Special Services Area formed to provide sewer services to Park City West.

21. The parties hereto understand that Seller has acquired the subject property from Park West Village, Inc., under an installment sale contract. In the event of an anticipated default by Seller in its obligations under said contract, Seller hereby agrees to assign all of its right, title and interest in and to said contract to Buyer hereunder such that Buyer can assume Seller's position in said contract.

IN WITNESS WHEREOF, the said parties to this Agreement have hereunto signed their names, the day and year first above written.

SUMMIT LIMITED, BUYER
By: CONCOR INTERNATIONAL Corp.
By: 

NATIONAL PROPERTY MANAGEMENT, INC.
SELLER
By:  President

667

Summit Ltd., a
Limited Partnership
By Steven H. Bauer,
General Partner
25942 Via Viento
Mission Viejo, California 92675

In Pro Per

THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

W. W. & W. B. GARDNER, INC.,)	
a Utah corporation,)	
	)	CIVIL NO. 4800
Plaintiff,)	
	)	ANSWER TO
vs.	)	FIRST SET OF INTERROGATORIES
	)	PROPOUNDED BY PLAINTIFF TO
PARK WEST VILLAGE, INC., a	)	DEFENDANTS OTHER THAN PARK
UTAH Corporation, et al.,	)	WEST VILLAGE, INC., ELWOOD L.
	)	NIELSEN, LOIS L. NIELSEN, AND
Defendants.	)	SKI PARK CITY WEST, INC.

COMES NOW SUMMIT LTD., and for itself alone and for no other Defendant named herein and for Answer to First Set of Interrogatories Propounded by Plaintiff to Defendants Other Than Park West Village, Inc., Elwood L. Nielsen, Lois L. Nielsen, and Ski Park City West, Inc., admits, denies and alleges as follows: (R. 643)

DEFINITIONS

The term "Property," as used herein, shall mean and refer to that certain parcel of realty, or any portion thereof, which is located in Summit County, Utah, being more particu-

larly described in paragraph 11 of the Complaint herein, including the Park West Village Resort Condominiums, which are located thereon.

INTERROGATORIES

1. Have you at any time had or claimed any interest in the Property? (R. 309, 310)

ANSWER: Yes (R. 643)

2. If your answer to Interrogatory No. 1 is affirmative, state the legal description of each portion of the Property in which you have any time held or claimed any interest. (R. 310)

ANSWER: See attached deeds for Lots 1, 4, portion of 5, portion of 16, 23 and 25. (R. 643)

3. Separately with respect to each portion of the Property described in your answer to Interrogatory No. 2,

(a) State the date upon which you first acquired an interest in such portion of the Property;

(b) Identify the person or entity from whom you acquired any interest in such portion of the Property;

(c) List and describe (by date, parties thereto, content, and nature of interest conveyed) each document evidencing or concerning your acquisition of an interest in such portion of the Property;

and

(d) State the date upon which you first acquired legal or beneficial title to such portion of the Property. (R. 310)

ANSWER: See attached deeds for Lots 1, 4, portion of 5, portion of 16, 23 and 25. (R. 643)

4. Separately with respect to each portion of the Property described in your answer to Interrogatory No. 2, state whether you have at any time conveyed or contracted to convey to any person or entity any interest in such portion of the Property. (R. 310)

ANSWER: No. (R. 643)

5. Separately with respect to each portion of the Property as to which your answer to Interrogatory No. 4 is affirmative,

(a) Identify by name and address each person or entity to whom you conveyed or contracted to convey any interest in such portion of the Property;

(b) Separately with respect to each person or entity identified in your answer to Interrogatory No. 5(a), state (1) the date of such conveyance or contract to convey, (2) the nature of the interest so conveyed (i.e., lease, fee simple, etc.), and (3) the form of such conveyance or contract to con-

vey (i.e., land sale contract, deed, etc.). (R. 310, 311)

ANSWER: Not applicable. (R. 643)

6. Separately with respect to each portion of the Property identified in your answer to Interrogatory No. 2, describe in detail the nature of your interest in such portion on (a) July 11, 1974 and (b) the date of service of your answers to these Interrogatories. (R. 311)

ANSWER: Fee Title. (R. 644)

7. Identify by name each person or entity with whom you communicated, corresponded, negotiated, or dealt in connection with your acquisition of an interest in any portion of the Property. (R. 311)

ANSWER: National Property Managements Robert Krause, Richard Hallmark, Roy Webley. (R. 644)

8. Separately with respect to each person and entity identified in your answer to Interrogatory No. 7, describe in detail your understanding of the relationship of such person or entity to the transaction whereby you acquired an interest in any portion of the Property and to the parties to said transaction. (R. 311)

ANSWER: I am informed and believe that Robert Krause, Richard Hallmark, and Roy Webley were officers of National Property Management Inc., and Ski Park City West, Inc. (R. 644)

9. Separately with respect to each person and entity identified in your answer to Interrogatory No. 7, state whether such person or entity at any time made any representation, reference, statement, promise, or agreement concerning the improvement, grading, or paving of street(s), road(s), or parking lot(s) located upon the Property. (R. 311)

ANSWER: Not to my knowledge. (R. 644)

10. If your answer to Interrogatory No. 9 is affirmative with respect to any person or entity identified in your answer to Interrogatory No. 7, separately with respect to each such person or entity,

(a) Describe in detail the substance of each representation, reference, statement, promise, or agreement made by such person or entity concerning the improvement, grading, or paving of street(s), road(s), or parking lot(s) located upon the Property;

(b) State the approximate date of each such representation, reference, statement, promise, or agreement;

(c) List and describe (by date, author, recipient, present custodian, content, and number of pages) each document that concerns, reflects, or refers to any such representation, reference, statement, promise, or agreement. (R. 312)

ANSWER: Not applicable. (R. 644)

11. Did you at any time prior to July 10, 1975 receive or examine a copy of that certain document, a copy of which is attached hereto marked Exhibit "A"? (R. 312)

ANSWER: No. (R. 644)

12. If your answer to Interrogatory No. 11 is affirmative,

(a) State the date upon which you first received or examined a copy of Exhibit "A"; and

(b) Describe in detail the manner by which and identify the person through whom such copy of Exhibit "A" was made available for your receipt or examination. (R. 312)

ANSWER: Not applicable. (R. 644)

13. At the time that you first acquired an interest in any portion of the Property, was it your understanding that the street(s), road(s), or parking lot(s) located upon the Property would be improved in some manner? (R. 312, 313)

ANSWER: Yes. (R. 644)

14. If your answer to Interrogatory No. 13 is affirmative,

(a) State the name of each person or entity who you understood would procure the paving, grading, or other improvement of the street(s), road(s),

and/or parking lot(s) upon the Property;

(b) State the date (or approximate date) upon which you understood that said improvements would be completed;

(c) State your understanding as to who was to be responsible for paying the cost of said improvements; and

(d) Describe in detail the nature and extent of the improvements that you understood would be made to the street(s), road(s), and/or parking lot(s) upon the Property. (R. 313)

ANSWER: I do not know as I was not the general partner at that time. (R. 644)

15. State the date upon which you first became aware that grading, paving, or related work was being performed or had been performed upon the Property, and describe in detail how you became so aware on such date. (R. 313)

ANSWER: I believe I became aware of grading, paving in the late summer of 1974, via conversations with Messrs. Hallmark, Webley, and others whom I don't recall. (R. 644)

16. State your regular residence address (a) on July 11, 1974 and (b) on the date of service of your answers to these Interrogatories. (R. 313)

ANSWER: 25942 Via Viento, Mission Viejo, California

17. Identify each Respect in which any service or material performed or provided by plaintiff in connection with the Property was defective, inadequate, or otherwise unsatisfactory to you. (R. 313)

ANSWER: I have no knowledge of any defects. (R. 644)

18. Separately with respect to each Respect identified in your answer to Interrogatory No. 17,

(a) Describe in detail each defect or inadequacy entailed in such Respect;

(b) State whether you at any time communicated to plaintiff any dissatisfaction with such Respect, and, if so, state the date of such communication, the name of the person making such communication, the name of the person to whom such communication was directed, and the substance of such communication;

(c) State the name and last known address of each person who can verify or who has any knowledge concerning the substance of your answer to Interrogatory No. 18(a), and separately with respect to each such person, state the nature and substance of his or her knowledge. (R. 313, 314)

ANSWER: Not applicable. (R. 644)

19. State whether you are related (by marriage or other-

wise) to Elwood L. Nielsen or Lois L. Nielsen and whether you have become acquainted with Elwood L. Nielsen or Lois L. Nielsen in any context other than the acquisition of an interest in the property identified in your answer to Interrogatory No. 2. (R. 314)

ANSWER: No. (R. 644)

20. If your answer to Interrogatory No. 19 is affirmative, describe in detail (a) your relationship to Elwood L. Nielsen and Lois L. Nielsen and (b) each circumstance or context within which you became or have become acquainted with or dealt with either of said persons. (R. 314)

ANSWER: Not applicable. (R. 644)

21. Have you, since July 10, 1975, had any communication, conversation, discussion, or conference with Elwood L. Nielsen, Lois L. Nielsen, Lowell V. Summerhays, or David M. Swope concerning, reflecting, or referring to this lawsuit, the improvement of the street(s), road(s), or parking lot(s) upon the Property, or your interest in any portion of the Property. (R. 314)

ANSWER: Yes. (R. 644)

22. If your answer to Interrogatory No. 2 is affirmative,

(a) State the date of each such communication, conversation, discussion, or conference;

(b) State the names of each party to each such communication, conversation, discussion, or conference;

(c) State in detail the substance of the statements made by each such party during the course of each such communication, conversation, discussion, or conference; and

(d) In the event that any document concerns, reflects, or refers to any such conversation, communication, discussion, or conference, list and describe (by date, author, recipient, present custodian, content, and number of pages) each such document. (R. 315)

ANSWER: (a) As a limited partner I was not aware or involved with the initial activities of Summit Limited other than as an investor. Thus, I was not involved with communications, discussions, or conferences.

(b) To the best of my knowledge, the names Krause, Hallmark, Webley, Nash and others.

(c) Not applicable.

(d) I do not have any documents other than those already transmitted. (R. 644, 645)

23. State whether you will voluntarily produce the documents requested in Interrogatory Nos. 3(c), 10(c), and 22(d),

and, if so please attach copies of such documents to your answers to these Interrogatories. (R. 315)

ANSWER: See attached copies. (R. 645)

Dated: September 15, 1976.

s/Steven H. Bauer
STEVEN H. BAUER
General Partner
In Propria Persona

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

Subscribed and sworn to before me this 15th day of
September, 1976.

s/Agnes B. Larsen
Notary Public

Summit Ltd., a
Limited Partnership
By Steven H. Bauer,
General Partner
25942 Via Viento
Mission Viejo, California 92675

In Pro Per

THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

W. W. & W. B. GARDNER, INC.,)	
a Utah corporation,	)	CIVIL NO. 4800
)	
Plaintiff,	)	ANSWERS TO REQUEST FOR
)	
vs.	)	ADMISSION OF FACTS
)	
PARK WEST VILLAGE, INC., a)	
Utah corporation, et al.,)	
)	
Defendants.)	

COMES NOW SUMMIT LTD., and for itself alone and for
no other Defendant named herein and for Answer to Request for
Admission of Facts, admits, denies and alleges as follows: (R.668)

REQUEST FOR ADMISSIONS

1. Prior to December 1, 1973, defendant National Property Management, Inc. held legal and beneficial title to lots 1, 4, 23, and 25, which lots are located in Park West Village, Plat "A," according to the official plat thereof which is of record with the County Recorder of Summit County, State of Utah. (R. 541, 542)

ANSWER: I am informed and believe that National Property Management did not hold title legal or beneficial.
(R. 668)

2. Between December, 1973 and October, 1974, National Property Management, Inc. conveyed to Summit Limited lots 1, 4, 23, and 25, which lots are located in Park West Village, Plat "A," according to the official plat thereof which is of record with the County Recorder of Summit County, State of Utah. (R. 542)

ANSWER: Yes. (R. 668)

3. At the times of the conveyances referred to in Request No. 2, the fair salable value of the assets of National Property Management, Inc. was less than the amount of its then-existing debts. (R. 542)

ANSWER: Unknown. (R. 668)

4. After National Property Management, Inc. conveyed to Summit Limited the realty described in Request No. 2, National Property Management, Inc. had various debts and liabilities but no assets. (R. 542)

ANSWER: Unknown. (R. 668)

5. At the times of the conveyances identified in Request No. 2, Ski Park City West, Inc. was the only general partner of Summit Limited. (R. 542)

ANSWER: No. (R. 668)

6. At the times of the conveyances identified in Request No. 2, National Property Management, Inc. was a wholly owned subsidiary of Ski Park City West, Inc. (R. 542)

ANSWER: I am informed and believe National Property Management Inc. was a wholly owned subsidiary of Ski Park City West, Inc. (R. 668)

7. At the times of each of the conveyances identified in Request No. 2, National Property Management, Inc. was not indebted to Summit Limited. (R. 542)

ANSWER: Correct. (R. 668)

8. National Property Management, Inc. at no time received any property, funds, or assets in consideration for its conveyances to Summit Limited of lots 1, 4, 23, and 25, which lots are located in Park West Village, Plat "A," according to the official plat thereof, which is of record with the County Recorder of Summit County, State of Utah. (R. 542)

ANSWER: Not correct. National Property Management or Ski Park City West, Inc., its parent corporation received valuable consideration for said conveyances. (R. 669)

9. National Property Management, Inc. did not receive from Summit Limited property, assets, funds, or obligations fairly equivalent in value to lots 1, 4, 23, and 25, Park West Village, Plat "A," according to the official plat thereof which is of record with the County Recorder of Summit County,

State of Utah, in exchange for the conveyance by National Property Management, Inc. of said lots to Summit Limited.
(R. 543)

ANSWER: Not true. (R. 669)

10. At the times of the conveyances identified in Request No. 2, Summit Limited had knowledge that National Property Management, Inc. had substantial debts and liabilities, but had no assets other than the property identified in Request No. 2. (R. 543)

ANSWER: Not true. (R. 669)

11. National Property Management, Inc. conveyed to Summit Limited lots 1, 4, 23, and 25, Park West Village, Plat "A," according to the official plat thereof, which is of record with the County Recorder of Summit County, State of Utah, for the purpose of preventing the creditors of said National Property Management, Inc. from attaching or executing upon said lots to satisfy their claims against said National Property Management, Inc. (R. 543)

ANSWER: Not true. (R. 669)

12. On or about July 8, 1974, plaintiff, on the one hand, and Summit Limited as principal through its duly authorized agent, Ski Park City West, Inc., on the other hand, entered into a contract, a copy of which is attached hereto marked Exhibit "A," and by this reference incorporated herein (hereinafter

referred to as the "Contract"), by the terms of which plaintiff agreed to perform certain grading, asphaltic concrete paving, and related work upon a subdivision known as Park West Village, Plat "A," which is located in Summit County, Utah, and Summit Limited through its duly authorized agent, Ski Park City West, Inc. agreed to pay plaintiff therefor in full within ten (10) days following completion of the said work. (R. 543, 544)

ANSWER: Not true. (R. 669)

13. On or about July 26, 1974, plaintiff completed performance of all work required to be performed by plaintiff under said Contract. (R. 544)

ANSWER: Unknown. (R. 669)

14. All conditions precedent to plaintiff's right to payment in full from Summit Limited have been performed and have occurred. (R. 544)

ANSWER: Not true as Summit Ltd. owes plaintiff nothing.
(R. 669)

Dated: September 15, 1976.

SUMMIT LIMITED, a Limited
Partnership

By s/Steven R. Bauer
STEVEN R. BAUER
General Partner
In Propria Persona

STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss

On September 15, 1976, before me, the undersigned, a Notary Public in and for said County and State, personally appeared SEVEN (sic) H. BAUER known to me to be one of the partners of the partnership that executed the within instrument, and acknowledged to me that such partnership executed the same.

s/Agnes B. Larsen
Notary Public (R. 669)

No 2158

PROPOSAL SUBMITTED TO SKI PARK WESTBY C/O CONCOR INTERNATIONALSTATE AND ZIP CODE 647 CAMINO DE LOS MARESDATE JULY 1, 1974SAN CLEMENTE, CALIFORNIA 92572

WE PROPOSE hereby to furnish material and labor — complete in accordance with below specifications.

ASPHALTIC CONCRETE PAVING AT PARK WEST VILLAGE,
PARK CITY, UTAH AND TO INCLUDE:APPROXIMATELY 10,119 SQUARE YARD.

1. ROAD BASE IN PLACE BY OTHER.
2. PROCESS AND COMPACT EXISTING ROAD BASE GRAVEL.
3. TWO AND ONE-HALF INCHES (2½") OF FINE THREE BIN ASPHALTIC CONCRETE SURFACE COAT.

BID:

\$2.58 PER SQ YD
OR
\$26,197.02

NOTE:

1. CONTRACT PRICE IS CONTINGENT ON OUR PURCHASE OF ASPHALT OIL AT THE REFINERY FOR \$63.00 PER TON, TAX NOT INCLUDED. ANY INCREASE IN THAT PRICE WILL RESULT IN AN ADDITIONAL CHARGE. ANY DECREASE IN THAT PRICE WILL RESULT IN A CREDIT.
2. ANY ROAD BASE USED WILL BE ADDED AT \$2.85 PER TON DELIVERED.
3. AREA TO BE MEASURED, FOR FINAL BILLING AT ABOVE SQUARE YARD PRICE.

INTEREST charged on past due accounts at 12% per year.

ROUGH GRADING must bring area within .2 ± of finished grade.

FINE GRADING means bring area to finished grade requiring no material to be moved in or out.

Authorized
Signature

J. C. Whelan
J. C. WHELAN

NOTE: This proposal may be withdrawn by us if not accepted
within 15 days.

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Terms: Net 10 days after completion of work.

Date of Acceptance: _____

Accepted:

By:

John Park City, Utah
Robert M. Hall

Summit Ltd., a
Limited Partnership
By Steven H. Bauer,
General Partner
25942 Via Viento
Mission Viejo, California 92675

In Pro Per

THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

W. W. & W. B. GARDNER, INC.,)	
a UTAH Corporation,	)	CIVIL NO. 4800
)	
Plaintiff,	)	ANSWER TO THIRD SET OF
	)	INTERROGATORIES PROPOUNDED BY
vs.	)	PLAINTIFF
)	
PARK WEST VILLAGE, INC., a)	
UTAH Corporation, et al.,)	
)	
Defendants.)	

COMES NOW SUMMIT LTD., and for itself alone and for
no other Defendant named herein and for Answer to THIRD SET OF
INTERROGATORIES PROPOUNDED BY PLAINTIFF, admits, denies and
alleges as follows: (R. 670)

DEFINITIONS

A. "National Property Management, Inc.," as used herein,
shall Mean and refer to National Property, Inc., a Utah cor-
poration, defendant herein.

B. "Ski Park City West, Inc.," as used herein, shall
mean and refer to Ski Park City West, Inc., a Utah corpora-

tion, defendant herein.

C. "Summit Limited, " as used herein, shall mean and refer to Summit Limited, a California limited partnership, defendant herein.

INTERROGATORIES

1. Did National Property Management, Inc. between November 15, 1973 and July 10, 1975 convey to Summit Limited any realty located in Summit County, State of Utah? (R. 532, 533)

ANSWER: Yes. (R. 670)

2. If your answer to Interrogatory No. 1 is affirmative, state the legal description of each separate tract of realty so conveyed. (R. 533)

ANSWER: See attached deeds (R. 670)

3. Separately with respect to each tract of realty described in your answer to Interrogatory No. 2,

(a) State the date upon which Summit Limited first acquired an interest in such tract;

(b) Describe the nature of the interest acquired by Summit Limited in such tract on the date identified in your answer to Interrogatory No. 3(a);

(c) Describe each change in the interest of Summit Limited in such tract following the date identified in your answer to Interrogatory No. 3(a), and state the date upon which each such change occurred or became effective;

(d) Describe in detail the consideration that Summit Limited obliged itself to give to National Property Management, Inc. for the conveyance by the latter to the former of such tract;

(e) Describe in detail each thing of value (including the dollar value thereof) actually received by National Property Management, Inc. from Summit Limited as consideration for the conveyance of such tract and state with respect to each such thing of value the date of receipt of same by National Property Management, Inc.;

(f) List and describe (by date, parties thereto, content, and nature of interest conveyed) each document that concerns, reflects, or refers to the acquisition by Summit Limited from National Property Management, Inc. of an interest in such tract;

(g) List and describe (by date, parties thereto, content, and nature of interest conveyed) each document that concerns, reflects, or refers to the conveyance by Summit Limited of any interest in such tract to any person or entity;

(h) List and describe (by date, obligor, obligee, nature of obligation, and amount of obligation)

each document that concerns, reflects, or refers to any transfer to or obligation to transfer to National Property Management, Inc. by Summit Limited any thing of value as consideration for the transfer to Summit Limited of such tract. (R. 533, 534)

ANSWER: (a) See attached deeds

(b) Fee title

(c) None

(d) \$132,000

(e) Presumably National Property Management received the \$132,000, but its parent corporation SKI PARK CITY WEST, INC. may have received said consideration.

(f) See attached deeds and the Agreement of November 15, 1973 also attached.

(g) No interest was transferred to any person or entity by Summit Ltd.

(h) See attached Agreement of November 15, 1973.

(R. 670, 671)

4. Separately with respect to lots 1, 4, 23, and 25, Park West Village, Plat "A," according to the official plat thereof, which is of record with the County Recorder of Summit County, State of Utah,

(a) State the date upon which Summit Limited first

acquired an interest in such lot;

(b) Describe the nature of the interest acquired by Summit Limited in such lot on the date identified in your answer to Interrogatory No. 4(a);

(c) Describe each change in the interest of Summit Limited in such lot following the date identified in your answer to Interrogatory No. 4(a), and state the date upon which each such change occurred or became effective;

(d) Describe in detail the consideration that Summit Limited obliged itself to give to National Property Management, Inc. for the conveyance by the latter to the former of such lot;

(e) Describe in detail each thing of value (including the dollar value thereof) actually received by National Property Management, Inc. from Summit Limited as consideration for the conveyance of such lot and state with respect to each such thing of value the date of receipt of same by National Property Management, Inc.;

(f) List and describe (by date, parties thereto, content, and nature of interest conveyed) each document that concerns, reflects, or refers to the acquisition by Summit Limited from National Property Man-

agement, Inc. of an interest in such lot;

(g) List and describe (by date, parties thereto, content, and nature of interest conveyed) each document that concerns, reflects, or refers to the conveyance by Summit Limited of any interest in such lot to any person or entity;

(h) List and describe (by date, obligor, obligee, nature of obligation, and amount of obligation) each document that concerns, reflects, or refers to any transfer to or obligation to transfer to National Property Management, Inc. by Summit Limited any thing or value as consideration for the transfer to Summit Limited of such lot. (R. 534, 535, 536)

ANSWER: (a) See attached deeds.

(b) Fee Title

(c) None

(d) The exact release prior per lot is unknown to me at this time as I was not the general partner when the purchase was made and I do not have those partnership records.

(e) Same as the answer to 4(d). The total consideration was \$132,000.

(f) See attached deeds.

(g) See attached deeds and agreement of Novem-

ber 15, 1973.

(h) See attached Agreement of November 15, 1973. (R. 671)

5. Separately with respect to each tract of realty described in your answer to Interrogatory No. 2, state whether Summit Limited has at any time conveyed or contracted to convey to any person or entity any interest in such tract of realty. (R. 536)

ANSWER: No. (R. 671)

6. Separately with respect to each tract of realty as to which your answer to Interrogatory No. 5 is affirmative.

(a) Identify by name and address each person or entity to whom Summit Limited conveyed or contracted to convey any interest in such tract; and

(b) Separately with respect to each person or entity identified in your answer to Interrogatory No. 6(a), state (1) the date of such conveyance or contract to convey, (2) the nature of the interest so conveyed (i.e., lease, fee simple, etc.), and (3) the form of such conveyance or contract to convey (i.e., land sale contract, deed, etc.). (R. 536, 537)

ANSWER: Not applicable. (R. 671)

7. Identify by name and address each person who can veri-

fy or who has knowledge concerning the substance of your answers to Interrogatory Nos. 1 through 6 and with respect to each such person, state the nature and substance of his or her knowledge. (R. 537)

ANSWER: Steven H. Bauer, 25942 Via Viento, Mission Viejo, California 92675. (R. 671)

8. Identify by name and last known address each person or entity that has been a general partner of Summit Limited between November 15, 1973 and July 10, 1975, and separately with respect to each, state the dates between which such person or entity was a general partner of Summit Limited. (R. 537)

ANSWER: Condor International Corporation, 647 Camino De Los Mares, San Clemente, California from inception of partnership to July 10, 1975. (R. 671)

9. Describe each asset owned by National Property Management, Inc. on each date identified in your answer to Interrogatory No. 3)a), and state separately the value of each such asset owned by National Property Management, Inc. on each such date. (R. 537)

ANSWER: The assets are the various parcels of real property. I do not know the values. (R. 671)

10. Describe each liability and debt of National Property Management, Inc. on each date identified in your answer to Interrogatory No. 3(a), and separately with respect to each

such liability and debt state the total dollar amount owed by National Property Management, Inc., the date(s) upon which such amount or a part thereof was to be paid, and the amounts that National Property Management, Inc. was required to pay on each such date. (R. 537)

ANSWER: I have no information regarding National Property Management, Inc. (R. 671, 672)

11. Separately with respect to each date identified in your answer to Interrogatory No. 3(a), describe in detail each transaction and business in which National Property Management, Inc. was then engaged. To the extent that such transaction(s) and/or business(es) included or pertained to the purchase, development, or sale of realty, describe in reasonable detail the nature of the sales or development contemplated by National Property Management, Inc., and state the approximate total dollar amount required by National Property Management, Inc. to effectuate its contemplated sales or development of such realty. (R. 537, 538)

ANSWER: Unknown (R. 672)

12. List and describe (by date, author, recipient, and content) each document that concerns, reflects, or refers to the substance of your answers to Interrogatory Nos. 8, 9, 10, and 11, and identify each person who can verify or who has knowledge concerning the substance of your answers to Inter-

rogatory Nos. 8, 9, 10, and 11, and separately with respect to each such person, state the substance of his or her knowledge. (R. 538)

ANSWER: The attached deeds. The officers of Condor International and Roy Webley. The officers of National Property Management, Inc. (R. 672)

13. Identify by name and last known address each person or entity that has been a limited partner of Summit Limited between November 15, 1973 and July 10, 1975, and separately with respect to each, state the dates between which such person or entity was a limited partner of Summit Limited and the nature and extent of such person or entities' limited partnership interest in Summit Limited. (R. 538)

ANSWER: The names and last known address of each person or entity that has been a limited partner of Summit Limited from its beginning to the present are as follows:

Mr. Steven H. Bauer, 25942 Via Viento, Mission Viejo,

Ca. (92675) 30.303%

Mrs. Catherine Engelhard, c/o Mr. Frank Schemer, Esq.

17772 E. 17th Street, Tustin Ca. (92680) 24.242%

Mr. George Oakley, 1465 Rodeo Drive, La Jolla, Ca.

(92037) 7.575%

Miss Patricia Oakley, 612 W. Deming Pl., Chicago, Ill.

(60614) 15.152%

Mr. William Talbet, 120 Monarch Bay, Laguna Niguel,
Ca. 11.365%

Mr. Stanley Fowler, 1401 No. Kroeger, Fullerton, Ca.
(92631) 7.575%

Mr. Jack E. Mason, 1041 Flamingo, Glendora, Ca. (91740)
3.787% (R. 672)

Dated: September 15, 1976.

SUMMIT LIMITED, a Limited
Partnership

By s/Steven H. Bauer
STEVEN H. BAUER
General Partner
In Propria Persona

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

Subscribed and sworn before me this 15th day of September,
1976.

s/Agnes B. Larsen
Notary Public

*

*

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

W. W. & W. B. GARDNER, INC.,	:	
a Utah corporation,	:	<u>MOTION FOR SUMMARY</u>
	:	<u>JUDGMENT AND MOTION FOR</u>
Plaintiff,	:	<u>ENTRY OF DEFAULT</u>
	:	<u>JUDGMENT</u>
vs.	:	
	:	<u>REPORTER'S</u>
PARK WEST VILLAGE, INC., a	:	<u>TRANSCRIPT OF PROCEEDINGS</u>
Utah corporation, et al.,	:	
	:	Civil No. 4800
Defendants.	:	

BE IT REMEMBERED, that the above-entitled matter came on for hearing in the courthouse at Coalville, Summit County, Utah, on the 20th day of September, 1976, commencing at the approximate hour of 10:45 a.m.; said cause being heard by the Honorable Peter F. Leary, Judge in the Third Judicial District, State of Utah.

APPEARANCES

Mr. Bruce A. Maak, Attorney-at-Law, 1800 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111, Telephone 532-7840.

(Whereupon, the following proceedings were had in open court:)

THE COURT: All right, we'll take the Motion for Summary

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.

Machine-generated OCR, may contain errors.

Judgment in the Gardner versus Park West Village matter, case No. 4800.

MR. MAAK: Bruce Maak, I'm here representing the plaintiff in this matter, and it is our motion. The nature of

the claim of my client in this case is fairly simple. My client purchased extensive paving on a subdivision in Summit County called Park West Village, Plat A. A number of California based organizations were involved in this and adjoining developments. One was Condor International, which is the general partner--or was at the time--the general partner of Summit Limited. Another is Ski Park City West, which had common officers with Condor. Another is National Property Management, which is a wholly owned subsidiary of Ski Park City West. And the last is Summit Limited, the party against whom the motion is sought today.

As I mentioned just a moment ago, the general partner of Summit Limited was Condor International. The transactions concerned in my motion can be broken down into four.

On November 15, 1973, the owner of the subdivision--then owner of it--Park West Village, conveyed the entire subdivision to National Property Management.

THE COURT: National what?

MR. MAAK: Excuse me?

THE COURT: To National--.

MR. MAAK: National Property Management.

THE COURT: Thank you.

MR. MAAK: That agreement was embodied in Exhibit No. 1 to the Hallmark and Krause depositions, which I would move be published for the purposes of this motion.

The agreement imposed on National Property Management the obligation to install the paving on the subdivision. Saturday, the same day, November 15th, 1973, National Property Management via an almost identical agreement conveyed the same subdivision to Summit Limited, a limited partnership.

That agreement is embodied in Exhibit 4 to the Hallmark and Krause depositions.

In Paragraph 21 of that agreement, your Honor, it is stated:

In the event of an anticipated default by National Property Management in its obligations under said contract--

referring now to the contract of the same date between Park West Village and National Property Management

--National Property Management hereby agrees to assign all of its right, title and interest in said contract to Summit Limited hereunder such that Summit Limited can assume National Property Management's position in said contract.

Thereafter, National Property Management defaulted as had been predicted in the agreement that was entered into on the same day that National Property Management entered into its agreement.

On July 1, 1974, some eight months following this transaction, and after the default of National Property Management, my client, W. W. and W. B. Gardner, entered into a contract that was executed by one Richard Hallmark, who was the president of Condor, the then general partner of Summit Limited, the vice president of Ski Park City West, and a vice president of National Property Management.

My client performed the services pursuant to its contract; there's no contest about that on the record before the Court. The affidavit of J. C. Wheelright is uncontroverted on that point.

The discovery in this case is significant to my motion, your Honor. I first propounded interrogatories to Summit Limited on October 23rd, 1975. At that time, we had no knowledge that Summit Limited had obtained title to the entire subdivision on the same day that National Property Management had obtained title. Those interrogatories went unanswered until a couple of days ago following the making of this motion. It was because of the failure of Summit Limited to answer those interrogatories that my client was required

to send me to California to depose the various officers of Summit Limited, of National Property Management, of Ski Park City West, and of Condor International, at substantial expense. We served our third set of interrogatories on Summit Limited on July 6th of this year, and again on August 9th of this year. Likewise, those went unanswered until after this motion.

Finally, we served Requests for Admissions on Summit Limited in July of this year and again in August of this year, and likewise those were unanswered until following the making of this motion. Although we don't believe it's necessary, your Honor, Requests for Admissions are deemed admitted if they're not answered within 30 days. Summit Limited didn't see fit to answer these until after our Motion for Summary Judgment was made.

I think it's also important to point out, your Honor, that Summit Limited has made a general appearance through its now general partner, Mr. Steven Bauer, who has purported to represent it in this connection, has filed an answer on its behalf on stationery which includes the firm name of Rimel and Helsing, a Santa Ana, California law firm. That firm has not entered an appearance, although I'm advised

having spoken with Mr. Heising by telephone last week he has

been advising him in this matter. So, it's not the case of the unrepresented client; it's the case of the client who has been representing himself with the advice and consent of counsel.

If your Honor would like me to address myself to the factual support in the record for each of the points in the argument that I've made today, I'd be pleased to do that.

THE COURT: Well, what's the primary thrust of your argument for support; that the answers haven't been filed?

MR. MAAK: No, your Honor.

THE COURT: Or that the factual matter is you're entitled to relief?

MR. MAAK: We're entitled to relief. Summit Limited in its answers is taking a very inconsistent position. First of all, they claim ownership of property by virtue of the contract that I mentioned earlier. That very contract imposes on them the obligation to assume National Property Management's position in that contract. National Property Management in that very contract undertook the obligation to get the paving done. An agent, a person who was an officer of both National Property Management and of the general partner of Summit Limited, signed the contract with my client.

Now, it's taken us over a year to find out what happened, mainly because these various California organizations cannot

see fit to respond to discovery. In my mind, your Honor, there is no issue of fact on the record; we're entitled to the relief we seek.

THE COURT: Okay, who's here on behalf of Summit Limited, anyone? Anyone representing any of the other

parties in this matter? (No response) Motion for Summary Judgment will be granted. What are you asking for; default judgment also?

MR. MAAK: Yes, your Honor.

THE COURT: Who's that against?

MR. MAAK: The same party, for failure to respond to discovery.

THE COURT: Well, you may have judgment as prayed in your motion.

MR. MAAK: Thank you, your Honor.

(Whereupon, at the hour of 11:00 a.m., the above-entitled hearing came to a close.)

W. W. & W. B. GARDNER, INC.,)
a Utah corporation,)
)
Plaintiff,)
)
vs.) Civil No. 4800
)
)
PARK WEST VILLAGE, INC., a)
Utah corporation, SUMMIT)
LIMITED, a California)
limited partnership, et al.,)
)
Defendants.)

Plaintiff's Motion for Summary Judgment and Motion for Entry of Default Judgment, by and through its counsel of record, Bruce A. Maak, came on regularly for hearing before the Court, the Honorable Peter F. Leary presiding, at 10:00 a.m. on September 20, 1976, the plaintiff appearing through its attorney, Bruce A. Maak, and neither defendant Summit Limited, a California Limited partnership, nor anyone on its behalf appearing at said hearing, and it appearing that the parties herein, and particularly defendant Summit Limited having been duly and regularly served with plaintiff's Motion for Summary Judgment and Motion for Entry of Default Judgment, one Affidavit attached thereto, and a Notice of said hearing.

NOW, THEREFORE, the Court having reviewed the materials on file herein, having heard the arguments of counsel, and

being fully advised in the premises makes the following determination:

1. Plaintiff on October 23, 1975 duly served by mail upon defendant Summit Limited its First Set of Interrogatories to Defendants Other than Park West Village, et al., answers to

(R. 689)

which were due on November 25, 1975.

2. Plaintiff on July 6, 1975 and again on August 9, 1976 duly served by mail upon defendant Summit Limited its Third Set of Interrogatories, answers to which were due on August 8, 1976 and September 11, 1976 respectively.

3. Plaintiff on July 6, 1976 and again on August 9, 1976 duly served by mail upon defendant Summit Limited its Requests for Admission of Facts, responses to which were due on August 8, 1976 and September 11, 1976, respectively.

4. Plaintiff on September 3, 1976 duly served by mail upon defendant Summit Limited plaintiff's Motion for Summary Judgment, together with the Affidavit of John C. Wheelwright and a Notice setting the hearing of said motions for September 20, 1976 at 10:00 A.M.

5. On September 15, 1976, defendant Summit Limited for the first time served upon plaintiff responses to the discovery requests identified in paragraphs 1 through 3 hereof.

6. The Court finds that the failure of Summit Limited timely to respond to said discovery requests was without ex-

cuse or justification, particularly because responses to plaintiff's said First Set of Interrogatories were served ten months late and because defendant Summit Limited at no time sought leave of this Court tardily to file responses to said interrogatories as required by Rule 33, Utah Rules of Civil Procedure. The Court further finds that the failure by defendant Summit Limited timely to respond to plaintiff's said discovery requests caused delay in the prosecution of these proceedings and substantial additional expense to plaintiff.

7. Because defendant Summit Limited failed timely to serve responses to plaintiff's said Request for Admission of Facts, which were twice served upon defendant, the matters

(R. 690)

contained therein are deemed admitted pursuant to Rule 36, Utah Rules of Civil Procedure. Further, the tardy responses of defendant Summit Limited in various respects are at variance with the requirements of Rule 36, Utah Rules of Civil Procedure.

8. The Affidavit of Steven H. Bauer dated September 15, 1976 in large part may not be considered by the Court for failure to comply with Rule 56(e), Utah Rules of Civil Procedure, which requires that "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible

in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

9. The pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavit of J. C. Wheelwright show that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law as moved against defendant Summit Limited.

10. Defendant Summit Limited failed timely to serve answers or objections to said interrogatories submitted by plaintiff after proper service of said interrogatories. Based upon the foregoing determinations, together with the persistent failure of defendant Summit Limited timely or properly to respond to plaintiff's discovery requests, the Court determines pursuant to Rule 37(d), Utah Rules of Civil Procedure, that judgment by default shall be rendered against defendant Summit Limited.

Based upon the foregoing determinations, the Court being fully advised in the premises and good cause appearing therefor, it is hereby

ORDERED, ADJUDGED, and DECREED that plaintiff W. W. & W. B. Gardner, Inc. do have and recover from defendant Summit Limited, a California limited partnership, the sum of THIRTY-EIGHT

(R. 691)

THOUSAND ONE HUNDRED NINETY-NINE and 65/100 DOLLARS
(\$38,199.65), together with interest thereon at the rate of
twelve percent (12%) per annum from and after August 8,
1976, until paid, less the sum of TWO THOUSAND EIGHTY-ONE
and 60/100 DOLLARS (\$2,081.60).

MADE AND ENTERED this 22nd day of September, 1976.

BY THE COURT:

s/Peter F. Leary
HONORABLE PETER F. LEARY
DISTRICT JUDGE