1977

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

Utah Supreme Court

Martineau & Maak; Attorneys for Plaintiff-Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiff and Respondent,

Case No. 14814

vs.

SUMMIT LIMITED, a California limited partnership, et al,

Defendant and Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

Appeal from the Third Judicial District Court
of Summit County, State of Utah,
The Honorable Peter F. Leary, Judge

MARTINEAU & MAAK
Bruce A. Maak
1800 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiff and
Respondent,

Case No. 14814

vs.

SUMMIT LIMITED, a California
limited partnership, et al,

Defendant and
Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

Appeal from the Third Judicial District Court
of Summit County, State of Utah,
The Honorable Peter F. Leary, Judge

MARTINEAU & MAAK
Bruce A. Maak
1800 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Respondent

TABLE OF CONTENTS

STATUTES AND RULES CITED

CASES CITED

CASES CITED (continued)

IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiff and Respondent,

vs.

SUMMIT LIMITED, a California limited partnership, et al,

Defendant and Appellant.

Case No. 14814

BRIEF OF PLAINTIFF-RESPONDENT

NATURE OF THE CASE

This is an action brought by plaintiff against the owners and developers of Park West Village, a subdivision located in Summit County, Utah, to recover compensation for plaintiff's installation of asphalt paving throughout the subdivision.

DISPOSITION IN THE LOWER COURT

On motion of plaintiff, the trial court on September 22, 1976 entered default judgment and summary judgment against defendant Summit Limited. [R. 688-91]. On October 12, 1976,

Summit Limited filed a Notice of Appeal with the district court. [R. 694]. On November 30, 1976, Summit Limited moved the lower court for relief from the judgment theretofore entered by that court. On December 8, 1976 the district court denied the motion of Summit Limited for relief from judgment. [R. 709-10].

RELIEF SOUGHT ON APPEAL

Plaintiff-respondent requests that the district court's order granting summary judgment and default judgment against defendant Summit Limited be affirmed.

STATEMENT OF FACTS

In July of 1972, Park West Village, Inc., a Utah corporation, created a subdivision known as "Park West Village" in Summit County, Utah. [Depo. Elwood L. Nielsen pp. 10-11; R. 523[1]; R. 121-22 (requests 1, 2, and 3); R. 249-51 (interrogatories 7, 8, 11, 18)]. The Park West Village subdivision contained approximately thirty-nine lots of varying sizes. [R. 523[1]]. On July 6, 1972, Park West Village, Inc. and others executed a certain Subdivision Bond, which ran in favor of Summit County and secured the completion of all improvements upon the subdivision required by Summit County, including streets and roads. [Depo. Elwood L. Nielsen, pp. 22-23; R. 64; R. 122 (requests 4, 5)].

Thereafter, Park West Village, Inc. conveyed the

1/ The subdivision plat found at $. 523 is filed out of order and is Exhibit "A" to plaintiff's answers to interrogatories found at R. 518-521.

subdivision to National Property Management, Inc., a California corporation, pursuant to a certain "Agreement" dated November 15, 1973. [Deposition of Elwood L. Nielsen, p. 54, Exh. P-21; R. 636-639]. For the convenience of the Court, this Agreement is reproduced following the body of this Brief.[2] The Agreement in part provided that National Property Management would perform all obligations to comply with the requirements of Summit County concerning subdivisions, including the construction of roads. [Agreement, paragraph 21.E, Plaintiff's App. 9-10]. Paragraph 23 of the said Agreement further provided that the Subdivision Bond was assigned to National Property Management and that National Property Management "agrees to perform all requirements of construction of said improvements as required by Summit County" and "agrees to render said improvements as required by this Paragraph and complete the same in a manner acceptable to Summit County by July 15, 1974." The vast majority, in dollar value, of improvements required by Summit County was represented by installation of streets and roads upon the subdivision. [Depo. Elwood L. Nielsen, pp. 14, 22-23, 26-27; Exh. P-3; Depo. Robert Krause, p. 7-8.] As of the time that the Agreement was executed, therefore, National Property Management undertook to complete the paving of streets and roads within the subdivision. [Depo. Elwood L. Nielsen, p. 32]. The Agreement contemplated that Park West Village, Inc. would convey fee title to various parcels as National Property Management made

---

2/ Defendant Summit Limtied included in its Brief an Appendix of various portions of the record, which Appendix will hereafter be referred to and cited as "Defendant's Appendix".

certain payments. Pursuant to this arrangement, Park West Village, Inc. conveyed Lots 1. 4, 5, a portion of 16, 21, 23. and 25 of the subdivision and an adjoining 3.6 acre tract to National Property Management. [R. 636].

On November 15. 1973, the same date upon which the Agreement referred to above (hereinafter, the "NPM Agreement") was executed, National Property Management conveyed the subdivision to Summit Limited. This second contemporaneous conveyance was accomplished through an "Agreement" strikingly similar to the NPM Agreement, which second agreement will hereinafter be referred to as the "Summit Limited Agreement." The following provisions are contained in paragraph 21 of the Summit Limited Agreement:

> 21. The parties hereto understand that Seller [National Property Management] 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 [Summit Limited] hereunder such that Buyer can assume Seller's position in said contract. (Emphasis added) [Defendant's App. 29; R. 667].

As Summit Limited and National Property Management accurately predicted, National Property Management did default in its obligations under the NPM Agreement. [Depo. Elwood L. Nielsen, pp. 63-65]. Thereafter, National Property Management regarded the subdivision as the property of Summit Limited, [Depo. Richard Hallmark, p. 23], and Steven Bauer (then a limited partner and now the general partner of Summit Limited) was in charge of the Park West Village Subdivision development. [Depo. Robert Krause, pp. 9-10]. Pursuant to the Summit Limited Agreement,

National Property Management then conveyed lots 1, 4, 5, 16, 23, and 25 of the subdivision to Summit Limited. [R. 643]. Following the execution of the Summit Limited Agreement, National Property Management ceased development of the subdivision, and Summit Limited was to commence improvement of the subdivision. [Depo. Robert Krause, pp. 13-14]. National Property Management is now insolvent and has no assets. [Depo. Richard Hallmark, p. 11].

After the foregoing machinations had been concluded, plaintiff W. W. & W. B. Gardner, Inc. entered into a contract to install asphaltic concrete paving throughout the subdivision. [R. 623-27]. On its face, the contract purported to be between plaintiff and Ski Park City West, Inc., but in fact Ski Park City West, Inc. had absolutely no interest in or connection with the subdivision. [Depo. Robert Krause, p. 34; Depo. Richard Hallmark, pp. 21-22, 28]. Rather, Ski Park City West, Inc. was an entity closely related to Summit Limited and National Property Management. Plaintiff performed its obligations under its agreement and is owed approximately $38,000.00 therefor. [R. 625].

Critical to this case is the relationship between a myriad of California-based organizations: Condor International Corp., Ski Park City West, Inc., National Property Management, Inc., and Summit Limited.

Condor International Corp. ("Condor") is a California corporation. At all times material to this action, Richard Hallmark was the president of Condor [Depo. Richard Hallmark, p. 6] and Roy Webley was an officer of Condor [Depo. Robert

Krause pp. 35-36]. At all times material hereto, Condor was the sole general partner of Summit Limited. [Depo. Richard Hallmark, p. 7; R. 671, Defendant's App. 55].

Ski Park City West, Inc. is a Utah corporation having common officers with Condor. Hallmark was a director and Vice-President [Depo. Richard Hallmark, p. 3], Webley was an officer [Depo. Robert Krause, pp. 35-36], and Robert Krause was a Vice-President [Depo. Robert Krause, pp. 3-4, 25].

National Property Management is a Utah corporation that is a wholly owned subsidiary of Ski Park City West, having common officers with both Condor and Ski Park City West. [Depo. Richard Hallmark, pp. 4, 6; Depo. Robert Krause, p. 4]. Hallmark was an officer [Depo. Richard Hallmark, p. 3], and Krause was the President [Depo. Robert Krause, pp. 3-4, 25] of National Property Management. Ski Park City West and National Property Management acted as one entity, and had directors and managers that functioned in common. [Depo. Richard Hallmark, p. 28; Depo. Robert Krause, p. 4].

Summit Limited is a California limited partnership that was organized by Roy Webley (an officer of both Condor and Ski Park City West) and Steven H. Bauer. [Depo. Robert Krause, p. 5]. As already noted, Condor was the sole general partner of Summit Limited [Exhibit 3 to Depos. Hallmark and Krause; R. 672; Defendant's App., 57-58]. The Certificate of Limited Partnership of Summit Limited indicates its principal place of business as the same address as that of Condor and Messrs. Bauer, Webley, Hallmark, and Krause. [Depo. Robert Krause, pp. 3, 36-37; Depo. Richard Hallmark, p. 3].

It is obvious from the foregoing that Summit Limited, Ski Park City West, National Property Management, and Condor International are all but component parts of an integrally connected maze of California-based entities. Hallmark, who signed the contract with plaintiff, was the President of Condor, the general partner of Summit Limited. Hallmark signed that document at the behest of Roy Webley, also an officer of Condor and, not coincidentally, an organizer and limited partner of Summit Limited. At a time when "Ski Park and National Property Management were having their own financial problems," (both are now insolvent), Webley (a limited partner of Summit Limited) caused Hallmark (the President of the general partner of Summit Limited) to execute the contract with plaintiff, purportedly on behalf of Ski Park City West, which had absolutely no interest in the subdivision! [Depo. Richard Hallmark, p. 11, 23].

The foregoing is the factual complex out of which this action arises. A discussion of the proceedings below that culminated in the judgment on appeal is reserved for the arguments that follow.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT.

Rule 37(d), Utah Rules of Civil Procedure, provides in pertinent part as follows:

> If a party . . . fails . . . (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after

> proper service of the request, 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), and (C) of subdivision (b)(2) of this rule.

Subdivision (b)(2), paragraph C of Rule 37 prescribes that the court may render "a judgment by default against the disobedient party." The trial court, pursuant to the rule just quoted, entered a default judgment against defendant Summit Limited for its persistent failure timely or properly to respond to plaintiff's discovery requests. [R. 690].

The actions of defendant Summit Limited below reflect a persistent, knowing, and deliberate refusal to comply with the rules of civil procedure:

1. On October 23, 1973, plaintiff duly served upon Summit Limited its First Set of Interrogatories. [R. 309; R. 688].

2. On July 6, 1976, plaintiff duly served upon Summit Limited its Third Set of Interrogatories. [R. 532; R. 689].

3. On July 6, 1976, plaintiff duly served upon Summit Limited its Request for Admissions of Facts. [R. 541; R. 689].

4. On July 12, 1976, plaintiff duly served upon Summit Limited its Request for Production of Documents. [R. 587].

5. On August 9, 1976, plaintiff again duly served upon Summit Limited its Third Set of Interrogatories. [R. 608; R. 689].

6. On August 9, 1976, plaintiff again duly served upon Summit Limited its Request for Admission of Facts. [R. 608; R. 689].

7. On August 9, 1976, plaintiff again duly served upon Summit Limited its Request for Production of Documents. [R. 608].

As of September 3, 1976, Summit Limited had responded to none of the above-described discovery requests. On that date, plaintiff served upon Summit Limited and filed its Motion for Summary Judgment and Motion for Entry of Default Judgment. [R. 620]. On September 15, 1976, after receipt of plaintiff's Motion, but prior to the hearing thereon, Summit Limited served upon plaintiff responses to (1) First Set of Interrogatories -- ten months late, (2) Third Set of Interrogatories -- one and one-half months late, and (3) Requests for Admissions of Fact -- one and one-half months late. [R. 655].. Summit Limited to this day has not filed a response to plaintiff's Request for Production of Documents.

Summit Limited in its Brief does not and reasonably cannot question the truth of the foregoing recitations of facts. Those facts conclusively demonstrate that Summit Limited simply ignored plaintiff's discovery requests until it received plaintiff's motion to enter the default of Summit Limited, at which time Summit Limited in short order responded to all discovery requests save plaintiff's Request for Production of Documents. The trial court properly concluded that "the failure of Summit Limited timely to respond to said discovery requests was without excuse or justification," and 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."

[R. 689]. The trial court accordingly entered a default judgment against Summit Limited.

Summit Limited raises a number of obviously erroneous arguments in an effort to invalidate the lower court's order. Most of its arguments are spurious and can be disposed of summarily.

Summit Limited first argues that since plaintiff amended its complaint on July 19, 1976, no response to any discovery request was due until 45 days thereafter. [Appellant's Brief, p. 12]. Rules 33(a), 34(b), and 36(a), Utah Rules of Civil Procedure, all prescribe that responses to interrogatories, document requests, and requests for admissions, respectively, are due 30 days after service of same except that a defendant is not required so to respond until "45 days after service of summons and complaint upon that defendant." Thus, the 45 day period for response only applies in the case of original service of summons and complaint upon the defendant.[3] Summit Limited was served with summons and complaint on October 2, 1975 [R. 185] -- eleven months prior to service of Summit Limited's responses. Thus, the 45 day rule is obviously inapplicable here. Even assuming (as Summit Limited does throughout its Brief) that the 45 day period was applicable, Summit Limited was still substantially late in responding to those requests to which it did respond.

Summit Limited secondly argues that Rule 37(d) authorizes imposition of sanctions only for no responses, and not

---

3/ The purpose of additional time for response following initial service is clear -- to enable defendant to engage counsel and prepare to defend. That object is clearly absent in the case of subsequent service of an amended complaint.

for tardy responses, to discovery requests. [Appellant's Brief, pp. 8-11]. This Court's adoption of that absurd argument would advise parties and counsel that they may cavalierly ignore discovery requests until a motion for sanctions is filed without fear of repercussion. Predictably, the courts and the language of Rule 37(d) reject Summit Limited's argument. Rule 37(d) prescribes that a trial court can impose sanctions upon a party's failure to serve responses to discovery requests. The court in Naive v. Jones, 353 S.W. 2d 365 (Ky. 1961) construed that clear language in the context of facts strikingly similar to those here presented. In Naive, plaintiff filed answers to interrogatories three months late, after receiving a motion for sanctions but before the hearing of same. The trial court dismissed plaintiff's case and on appeal plaintiff, like Summit Limited, argued that the court lacked authority to dismiss under those circumstances. The appellate court, affirming, responded:

> Plaintiff's principal contention seems to be that the trial court lacked authority to proceed as it did. He contends there cannot be a violation of Rule 33 by mere delay in answering, and the words "fails to serve answers" means that the party must absolutely and positively refuse to answer. This argument is not persuasive. Rule 33 requires answers to be served within a specified number of days. If no answer is served within that time, then the party has failed to answer. Such a failure is itself a positive refusal to comply as required. Consequently it constitutes a violation of Rule 33 in the manner condemned by CR 37.05, which empowers the court to dismiss the action. Id. at 366 (Emphasis original).

Similarly, in Merrill Lynch, Pierce, Fenner & Smith v. Echols, 138 Ga.App. 593, 226 S.E.2d 742 (1976), the court, affirming a

dismissal for tardy responses to interrogatories, observed:

> Nor is there any significance in the fact that the plaintiff allegedly submitted answers to the propounded questions before the hearing on defendant's motion for sanctions. "[O]nce the motion for sanctions has been filed, the opposite party may not preclude their imposition by making belated response at the hearing." This applies as well to responses made in the interim between the filing of a motion for sanctions and the hearing on the motion. 226 S.E.2d at 743. (Citations omitted).

A number of other appellate courts have likewise affirmed dismissals or defaults imposed for tardy responses to interrogatories served after receipt of a motion for sanctions, but before the hearing of same. E.g., United States v. Continental Cas. Co., 303 F.2d 91, 92-93 (4th Cir. 1962); Houston General Ins. Co. v. Stein Steel & Supply Co., 134 Fla.App. 624, 215 S.E.2d 511 (1975); Lynch v. R. E. Tull & Sons, Inc., 251 Md. 260, 247 A.2d 287 (1968). Therefore, Judge Leary clearly had the power to enter the default of Summit Limited for its tardy filing of interrogatory responses, not to mention its complete failure to file a response to the request to production of documents as required by Rule 34(b), Utah Rules of Civil Procedure.

Third, Summit Limited seeks this Court's indulgence because Summit Limited was purportedly represented by a layman -- Mr. Steven H. Bauer, its general partner. [Appellant's Brief, pp. 11, 12]. As plaintiff advised the lower court, Summit Limited's ostensible lay representation is nothing more than a fiction -- plaintiff's counsel at various times during these proceedings communicated with the law firm of Rimel & Helsing of Santa Ana, California concerning Summit Limited's role in this case and indeed concerning the hearing of plain-

tiff's motion for default judgment. [Defendant's App. p. 63-64]. Each and every pleading filed in this case by Summit Limited is filed on pre-printed pleading paper [R. 328, 615, 643, 656, 660, 668, 670, 694, 696], and many bear the name of the Santa Ana, California law firm of Rimel & Helsing in the lower left-hand corner, [R. 329, 615 (masked), 694], and many utilize pre-printed mailing certificates. [R. 618, 619, 655, 659, 694-. Finally, each paper filed in this case by Summit Limited bears the unmistakeable index of a lawyer's presence -- legal jargon and legalease. If Mr. Bauer would have this Court belive that he prepared those papers, he will concurrently convince this Court that he is quite learned in the law and not entitled to any leniency that might otherwise attach to his being ignorant of the law. At the very least, Mr. Bauer demonstrated that he knew how to respond to discovery when a default judgment was threatened.

Finally, Summit Limited raises the only genuine issue concerning the propriety of the lower court's default judgment -- Did the lower court abuse its discretion? [Appellant's Brief, pp. 12-15].

Appellant Summit Limited has a difficult burden on this facet of its appeal. In Tucker Realty, Inc. v. Nunley, 16 Utah 2d 97, 396 P.2d 410 (1964), a case where as here defendant sought to reverse a default judgment entered for failure timely and fully to respond to discovery requests, this Court stated:

> We first note the basic premise on appeal: That the judgment is presumed to be correct, and that the burden of establishing its invalidity is upon the party attacking it. 396 P.2d at 412-13.

Further, a court's imposition of sanctions pursuant to Rule 37 is discretionary with the trial court and will not be disturbed on appeal unless a clear abuse of discretion is demonstrated:

> Sanctions for refusal to comply with an order of court or for failure to respond are set out in Rule 37, U.R.C.P., and are discretionary with the court.
>
> * * *
>
> In the absence of an absue of discretion, we should not undertake to substitute our idea of what is proper for that of the trial court. The law is stated in 5 Am.Jur 2d, Appeal and Error, as follows:
>
> * * *
>
> . . . [A] discretionary determination may be "reviewed" only in the case of a "gross," "clear," "plain," "palable," or "manifest" abuse of discretion. G.M. Leasing Corp. v. Murray First Thrift & Loan Co., 534 P.2d 1244, 1245 (Utah 1975).

Under the circumstances presented in this case, no such abuse of discretion can be demonstrated.

The record in this case demonstrates that Summit Limited was duly served with two sets of interrogatories, one request for production of documents, and one request for admissions. Further, after Summit Limited was out of time in responding to the third set of interrogatories, requests for admission, and request for production, plaintiff for the second time duly served those pleadings on Summit Limited. The time for response pursuant to the second service of those pleadings also expired without response from Summit Limited. Only after Summit Limited was served with plaintiff's motion for summary judgment and to enter default judgment did Summit Limited respond to any discovery. In some cases, Summit Limited's responses were ten

months late. Summit Limited never filed a response to plaintiff's request for production of documents. Summit Limited's belated responses indicate that it knew how to respond, but did not choose to do so until faced with a default judgment. Summit Limited never sought an extension from either plaintiff or the Court. Moreover, it should be noted that each discovery request plainly stated on the first page the time within which a response was required. Finally, Summit Limited did not even bother to appear at the hearing of plaintiff's motion, but now argues that the trial judge erred in various respects that were never presented to the trial court. Upon the foregoing compelling facts and the authorities discussed below, it cannot be said that the trial court abused its discretion in entering the default of Summit Limited.

This Court has twice affirmed the sanction of dismissal or default where a party fails fully or timely to respond to discovery requests. In Tucker Realty, Inc. v. Nunley, 16 Utah 2d 97, 396 P.2d 410 (1964), plaintiff moved the court for and obtained an order of production.[4] At the pretrial conference, the court directed defendant to produce pursuant to the prior order. Thereafter, the defendant produced some documents, but did not produce others that defendant had theretofore indicated existed. Plaintiff moved for a default judgment, which the trial court granted. On appeal, this Court affirmed, emphasizing

---

4/ Prior to the 1972 amendments to the Utah Rules of Civil Procedure, a request for production absent an order of the court was not permitted; presently, of course, no such order is required. Utah Rules of Civil Procedure Rule 34 (Volume 9, Utah Code Ann. (1953) and 1975 Supp.).

the discretionary character of a trial court's imposition of sanctions:

> Whether the failure to comply with the court's order had been wilful and whether the circumstances are so aggravated as to justify the action taken is primarily for the trial court to determine. Unless it is shown that his action is without support on the record, or is a plain abuse of discretion, it should not be disturbed. 396 P.2d at 412-13.

Likewise, in Barber v. Calder, 522 P.2d 700 (Utah 1974), plaintiffs brought an action against defendants, husband and wife. Defendants' son ("not an attorney of record in Utah," 522 P.2d at 701) prepared an answer, which his parents signed, served, and filed. Thereafter, plaintiffs served interrogatories and requests for admissions upon defendants. One and one-half months after such service, plaintiffs served defendants with a motion for sanctions, pursuant to which the court ordered that answers be filed within ten days. One and one-half months later, defendants not having answered, the court on motion entered the default of defendants. Defendants then retained counsel, who filed a petition to set aside the default, which petition was denied by the trial court. This Court affirmed the trial court, reasoning as follows:

> It is true as defendants assert that this court has on numerous occasions declared as a matter of general policy that whenever the interests of justice and fair play will be served thereby, the trial court should exercise its discretion liberally in favor of giving the parties an opportunity for a hearing on the merits of a case. However, discretion is not a one way street. As is sometimes said: No pancake can be fried so thin that it does not have two sides. Both parties have rights which it is the responsibility of the trial court to protect. In situations where the exercise of discretion

> is appropriate, considerable weight should be given to the determination of the trial court, whichever way it goes. This is true because due to his close involvement with the parties, the witnesses, and the total circumstances of the case, he is in the best position to judge what the interests of justice require in safeguarding the rights and interests of all parties concerned. Id. at 701-02 (Emphasis added).

Significantly, in Barber, defendants were apparently represented by a layman and only four and one-half months elapsed between service of two discovery requests and entry of defendants' default. Here, four discovery requests were served -- most were served twice -- and eleven months elapsed between service of some and the entry of default judgment. Although in Barber no responses were filed by defendants, and hence the Court had no way of knowing whether the lay defendants understood the necessity of response, here Summit Limited proved that it knew how to respond, but only after being faced with the prospect of default.

It has been demonstrated above that the district court clearly had the power to enter a default judgment against Summit Limited for its eleventh hour responses to some requests and its outright failure to file a response to the request for production of documents. Summit Limited emphasizes that it did eventually respond to the requests.[5] Nevertheless, compelling considerations of policy demand that the lower court be affirmed.

If a lower court abuses its discretion by imposing sanctions under the circumstances presented here, the recipients

---

5/ Summit Limited consistently overlooks the fact that it has never filed a response to the request for production as required by Rule 34(b), Utah Rules of Civil Procedure.

of discovery requests in the future may safely ignore the same until served with a motion for sanctions, at which time they may serve their tardy responses without fear of substantial detriment. If the discovery rules are to serve their purpose without constant participation by and imposition upon the courts, those rules must be respected. Such considerations have motivated the courts to uphold default judgments under circumstances less aggravated than those presented here.

In Spradling v. Boone County Planning Comm., 461 S.W. 2d 548 (Ky. 1970), the Supreme Court of Kentucky affirmed a trial court's dismissal against a plaintiff that served answers to interrogatories only one month late, after a motion for sanctions but before the hearing of same. The court noted that defendant had sought no extension and reasoned as follows:

> In the case of Baltimore & Ohio Railroad Company v. Carrier, Ky., 426 S.W.2d 938. the court said there is a presumption that the Rules of Civil Procedure are designed to provide litigants with swift and speedy relief. In sustaining the default judgment because of delay, this court said at page 941: "If the Rules of Civil Procedure are to serve the purpose for which they are designed, they must be respected." Id. at 550 (Emphasis added).

Similarly, in Lynch v. R.E. Tull & Sons, Inc., 251 Md. 260, 247 A.2d 287 (1968), the court affirmed the trial court's entry of a default judgment against a defendant that served answers to interrogatories only four months late, after service of a motion for sanctions but before the hearing of same, reasoning that defendant was flagrantly dilatory. That defendant's dilatoriness was minor compared to that of Summit Limited. Again, in Houston General Ins. Co. v. Stein Steel & Supply Co., 134 Ga. App. 624, 215 S.E.2d 511 (1975), United States v. Continental

Cas. Co., 303 F.2d 91 (4th Cir. 1962), and Naive v. Jones, 353 S.W.2d 365 (Ky. 1961), the courts under virtually identical circumstances affirmed default judgments entered after tardy responses were filed. In none of the foregoing cases had the trial court entered any order compelling responses prior to entry of the default judgment.

Rule 37(d) authorizes the action taken by the district court. The district court found that Summit Limited's conduct was "without excuse or justification" and "caused delay in the prosecution of these proceedings and substantial additional expense to plaintiff." [R. 689]. Those determinations find substantial support on the record. Summit Limited, which did not see fit even to appear at the hearing of plaintiff's motion and give the district court the benefit of its views, is in no position now to argue that the district court abused its discretion. Further, after hearing the arguments of Summit Limited's present counsel at the motion for relief from the default judgment, the trial court found that "Summit Limited has failed to demonstrate any mistake, inadvertence, surprise, excusable neglect, or any other reason justifying relief from this operation of the judgment. [R. 710].

II. THE DISTRICT COURT PROPERLY GRANTED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

Before addressing the propriety of the district court's summary judgment, the body of facts to be considered, as revealed by the record, must first be ascertained. The statement of facts contained in the beginning of this Brief derive only from the depositions, affidavits, and answers to interrogatories

on file in this case -- no reliance was there placed upon the deemed admissions of Summit Limited, which are discussed below. We submit that those facts, unaided by the deemed admissions of Summit Limited, support the lower court's judgment. However, if this Court concludes, as did the lower court, that by failing timely to answer plaintiff's requests for admission, the requests were admitted, plaintiff is unquestionably entitled to its judgment.

A. Summit Limited is bound by its failure to respond to plaintiff's requests for admissions of fact.

Rule 36, Utah Rules of Civil Procedure, provides in pertinent part as follows:

> (a) * * *
>
> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. . . .
>
> * * *
>
> (b) Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. (Emphasis added).

On July 6, 1976, and again on August 9, 1976, plaintiff duly served upon Summit Limited its Request for Admission of Facts. [R. 541, 608, 689]. That pleading on the first page contained the following language:

> Each matter hereinafter set forth will be deemed admitted unless, within 30 days after the service of this Request for Admission upon

> said defendant, said defendant serves upon the undersigned a written answer or objection addressed to the matter, signed by said defendant or its attorney.

Summit Limited did not respond to plaintiff's request for admissions until after plaintiff served its motion for summary judgment. [R. 668]. Summit Limited's response was served 71 days after the first service and 47 days after the second service by plaintiff. Summit Limited at no time sought leave of the court to file tardy responses, nor did Summit Limited move the court pursuant to Rule 36(b) to withdraw or amend its admissions that occurred upon its failure timely to respond.

This Court on a number of occasions has affirmed summary judgments based upon a party's admissions arising from his failure to respond to requests for admissions. In Bennion v. Amoss, 28 Utah 2d 216, 500 P.2d 512 (1972), this Court utilized such a failure to respond to establish the admissions there in question and observed:

> Rule 36 provides that each matter of which an admission is requested is deemed admitted if not answered within the time required. 500 P.2d at 516 n. 10 (emphasis added).

Again, in Williams v. Greene, 29 Utah 2d 141, 406 P.2d 64 (1973), the Court stated:

> [D]efendant, under the discovery process, requested admission of facts (Rule 36, Utah Rules of Civil Procedure). Plaintiff did not respond thereto and the court accepted the facts requested, as he properly was supposed to do, as being true, under Rule 45 [sic]. Defendant filed a motion for Summary Judgment, which, we conclude, properly was granted. 500 P.2d at 65.

Finally, in Utah Sand & Gravel Products Corp. v. Salt Lake County Comm., 14 Utah 2d 151, 379 P.2d 379 (1963) (per curiam),

the Court affirmed the trial court's summary judgment, which was based upon admissions arising from defendant's failure to respond, stating:

> Under Rule 36, the facts requested are deemed to be admitted. Summary Judgment accordingly was entered for plaintiff. 379 P.2d at 379.

There exists no question, therefore, that in this jurisdiction deemed admissions arising from a party's failure to answer may properly provide the basis for a summary judgment. The language of Rule 36 and the decisions of other courts conclusively establish that the same result obtains with respect to tardy responses.

In Weva Oil Corp. v. Belco Petroleum Corp., 68 F.R.D. 63 (N.D.W.Va. 1975), Belco served requests for admission on Weva and, one and one-half months thereafter, moved for summary judgment based upon Weva's deemed admissions. Prior to the hearing of the motion for summary judgment, Weva filed responses and moved the court for leave tardily to file such responses, asserting that the delay was caused by a clerical error in the office of Weva's attorney. The court entered summary judgment reasoning that permitting such tardy responses would prejudice Belco by requiring it to prove the deemd admissions and stated:

> [W]ere the court to grant relief on the facts here presented, i.e., an alleged procedural error, unsupported by affidavit, deposition, or otherwise, in the office of a non-responding party's attorney, the result would be to totally nullify the time requirements set forth in Rule 36(a). The court has been directed to and can locate no decision, with a fact situation similar to those presented in this action, where relief was granted for untimely response. Id. at 667 (Emphasis added).

Similarly, the Supreme Court of New Mexico offered the following analysis respecting responses to requests that were

filed seventeen days late.[6]

> "It is clear that, under our Rule 36 and the identical federal rule, either the unexcused late filing of an answer to requests for admissions or the filing of an unsworn answer is equivalent to the filing of no answer according to the terms of the rule itself and to innumerable decisions on that question. . . . Robinson v. Navajo Freight Lines, Inc., 70 N.M. 215, 372 P.2d 80, 804 (1962).

Likewise, in Lawrence v. Southwest Gas Corp., 89 Nev. 446, 514 P.2d 869 (1973), the Supreme Court of Nevada affirmed a summary judgment upon facts strikingly similar to those here presented:

> Pursuant to NRCP 36(a), the appellant's (plaintiffs below) were served with a formal request to admit certain facts. Appellants served neither timely answers nor timely objections, and then they admitted facts that negatived the existence of the claims alleged in their Amended Complaint. Thereafter, without moving for permission to withdraw or amend their admissions, appellants filed a belated "Answer to Demand for Admissions," purporting to deny the matters already admitted by operation of NRCP 36. On motion, the district court granted summary judgment, from which appellants have appealed, contending that the district court "abused its discretion."
>
> Assuming the district court had discretion to relieve appellants of their admissions, on its own motion, our review of the record satisfies us that in this case the court was justified in not doing so. 514 P.2d at 869.

To the same effect, on almost identical facts, see Salem v. Lawyers Co-Operative Pub. Co., 137 Ga.App. 536, 224 S.E.2d 502 (1976).

6/ The court, however, did not consider the deemed admissions because they were never offered into evidence at trial.

Based both upon the express langauge of Rule 36(a) and the foregoing authorities, Summit Limited's failure timely to respond to plaintiff's requests for admission effected a conclusive admission of the facts requested and provides an unassailable basis for the trial court's summary judgment. Any argument that Summit Limited may advance that its tardy responses negated its deemed admissions is refuted by the express language of Rule 36(b), Utah Rules of Civil Procedure: "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." (Emphasis added). Summit Limited never so moved the court below.

In Sims Motor Transportation Lines v. Foster, 293 S.W. 2d 226 (Ky. 1956), the Supreme Court of Kentucky held that the trial court properly refused to permit the recipient of requests for admission to file tardy responses because the recipient party had never moved the court to withdraw his deemed admissions pursuant to Rule 36(b). The appellate court in Mountain View Enterprises v. Diversified Systems, 133 Ga.App. 249, 211 S.E. 186 (1974) squarely held that a trail court has no discretion to accept tardy responses as negating deemed admissions unless the responding party so moves the court pursuant to Rule 36(b). There, the appellate court reversed the trial court's denial of a motion for summary judgment because the trail court improperly ignored deemed admissions:

> Code Ann. §81A-136(a) [almost identical to U.R.C.P. Rule 36(a)] . . . states clearly that as to request for admissions the matter is admitted unless answers or objections are filed to such request within 30 days after service of said request. . . . The defendant waited until motion for summary judgment was filed before answering.

> The court has discretion in such matter only when a party moves to determine the sufficiency of answers or objections filed to the request. Here there were no timely objections nor answers until after the passage of 30 days, and the reqeusts were admitted as a matter of law. [Citation omitted]. When defendant finally filed his answers to request for admissions, 63 days after service, he made no motion that he be granted the privilege of filing at that late day. 211 S.E. 2d at 187 (Emphasis added).

Accordingly, because Summit Limited never moved the trial court to withdraw its deemed admissions or to file its tardy response, the trial court did not even have the power to ignore the deemed admissions.

Summit Limited seeks to generate a "genuine issue of material fact" through the Affidavit of Steven H. Bauer. [R. 660]. That Affidavit, however, as a matter of law, cannot affect the conclusive effect of Summit Limited's deemed admissions. Rule 36(b) provides that "[a]ny matter admitted under this rule is conclusively established." The courts have construed that clear language to preclude modification of an admission by affidavit or otherwise. In Creel v. Government Employees Ins. Co., 313 So.2d 772 (Fla.App. 1974), rev'd on other grounds, 336 So. 2d 1170 (Fla. 1976), for example, defendant served requests for admissions upon plaintiff, who did not respond but rather filed an affidavit controverting part of the requests. Thereafter the trial court granted defendant's motion for summary judgment. Plaintiff appealed, arguing that his affidavit, which controverted his deemed admissions, precluded summary judgment. The appellate court held that the plaintiff's deemed admissions were conclusive, and the affidavit was legally ineffectual to vary or con-

trovert the deemed admissions. The Supreme Court of Nevada similarly concluded in Western Mercury Ins. v. The Rix Co., 84 Nev. 218, 438 P.2d 792 (1968). There, the court held that deemed admissions, in the context of a motion for summary judmgnet, cannot be varied by the party's contrary answers to interrogatories. By the express terms of Rule 36 and the authorities just discussed, the Bauer Affidavit cannot, as a matter of law, affect the conclusive effect of the admissions of Summit Limited. The trial court properly relied upon the admissions of Summit Limited in granting summary judgment against Summit Limited:

> 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 contained therein are deemed admitted pursuant to Rule 36, Utah Rules of Civil Procedure. * * * [R. 689-90].

Based upon those admissions, plaintiff is unquestionably entitled to its summary judgment against Summit Limited.

B. There exists no genuine issue of fact respecting the liability of Summit Limited to Plaintiff.

Rule 56(c), Utah Rules of Civil Procedure, prescribes that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any moving fact and that the moving party is entitled to judgment as a matter of law." The trial court found, as required by Rule 56(c), as follows:

> 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. [R. 690].

The Affidavit of Mr. Wheelwright and the admissions of Summit Limited, without more, establish that the district court was correct in its ruling. The admission by Summit Limited of request numbers 12, 13, and 14 [R. 543-44] conclusively establish the following facts:

1. On July 8, 1974, plaintiff and Summit Limited through its agent, Ski Park City West, entered into the contract attached as Exhibit "A" to the admissions. [Request 12, R. 543, R. 545].

2. Under the parties' said contract, plaintiff agreed to perform various grading, paving, and related work upon the subdivision. [Request 12, R. 543].

3. Under the terms of the parties' contract, Summit Limited agreed, through its agent Ski Park City West, Inc., to pay plaintiff for such work within ten days of the completion of same. [Request 12, R. 543-44].

4. Plaintiff has completed its agreed performance under the parties' contract and all conditions precedent to plaintiff's right to compensation have been satisfied. [Requests 13, 14; R. 544].

5. Pursuant to the terms of the parties' contract, Summit Limited owes to plain-

tiff the sum of $38,196.65, together with interest thereon at the rate of twelve percent per annum from and after August 8, 1976, until paid, less the sum of $2,081.60. [R. 623-26].

As established in the preceding section, the matters established through Summit Limited's admissions (items 1, 2, 3, and 4 above) are conclusively established and cannot be varied by affidavit or otherwise. With respect to the matters contained in item 4 above, the affidavit of J. C. Wheelwright is uncontroverted. Based only upon the admissions of Summit Limited and the Wheelwright Affidavit, therefore, summary judgment was properly granted to plaintiff. The balance of the record likewise supports that conclusion.

The Statement of Facts contained in this Brief, which, as noted therein, places no reliance on Summit Limited's admissions, establishes that Condor International, Summit Limited, Ski Park City West, and National Property Management had common officers, organizers, and partners. In many cases, these organizations' officers functioned in common and did not distinguish the affairs of one entity from another. By the NPM Agreement, National Property Management purchased the subdivision and committed itself to pay for the installation of paved streets throughout the subdivision. [Plaintiff's App. p. 9 , paragraph 21.E]. Pursuant to the Summit Limited Agreement, which was executed concurrently with the NPM Agreement, Summit Limited "[i]n the event of an anticipated default by [National Property Management]" could "assume [National Property Management's]

position" in the NPM Agreement. [Defendant's App. 29, paragraph 21; R. 667]. National Property Management did default, and Summit Limited assumed its position in the NPM Agreement, receiving from National Property Management a conveyance of all subdivision lots therefore conveyed to National Property Management. [R. 643]. Thereafter, National Property Management ceased development of the subdivision, and Steven Bauer and Summit Limited were to commence development of the subdivision. [Depo. Richard Hallmark, p. 23; Depo. Robert Krause, pp. 9-10, 13-14]. Plaintiff then entered into a contract executed by Ski Park City West, the agent of Summit Limited. [R. 543, 545]. Hallmark, who signed the contract with plaintiff, was the President of Condor, the then-general partner of Summit Limited. Hallmark signed the contract pursuant to instructions by Roy Webley, also an officer of Condor and organizer and limited partner of Summit Limited. At the time that the contract was executed, Ski Park City West had absolutely no interest in the subdivision and both it and National Property Management were having financial difficulties -- both are now insolvent. [Depo. Richard Hallmark, p. 11, 23]. Thus, it is clear that both factually and contractually, Summit Limited, the owner of the subdivision, through its agent, Ski Park City West, which had no interest in the subdivision, entered into and became responsible to pay pursuant to the contract with plaintiff. Although Summit Limited, through the Bauer Affidavit, states that "[i]t 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." [R. 661], Mr. Bauer's affi-

davit is not credible -- In answers to interrogatories, Mr. Bauer indicates that because he was not the general partner of Summit Limited at the time, he does not know who was to procure or be responsible to pay for the paved roads upon the subdivision. [Interrogatory No. 14; Defendant's App. 35-36; R. 313, 644]. It must be again emphasized, however, that neither affidavit nor interrogatories may vary the conclusive admissions of Summit Limited, which entitle plaintiff to the summary judgment now on appeal.

CONCLUSION

Summit Limited did not appear at the hearing that resulted in the judgment here on appeal, nor did it present any written argument to the district court in connection with that hearing[7]. Each and every argument presented in the Brief of Summit Limited was not presented to the district court. Under well established principles of appellate review, those arguments cannot properly be considered for the first time by this Court. State v. Larkin, 27 Utah 2d 295, 495 P.2d 818 (1972); Simpson v. General Motors Corp., 24 Utah 2d 301, 470 P.2d 399 (1970).

The trial court properly found that Summit Limited, without excuse or justification, persistently refused to respond to plaintiff's four separate discovery requests, most of which were served twice, in a timely fashion. Summit Limited has still not

---

7/ Seventeen days passed between service of Notice of the hearing and the hearing itself. [R. 620, 633, 688]. The record is devoid of any explanation why Summit Limited did not attend the hearing.

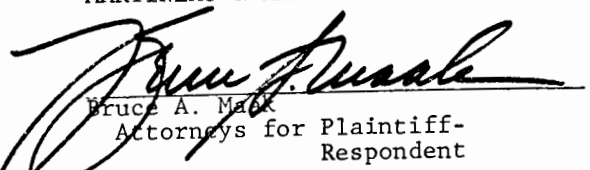
filed a response to plaintiff's request for production of documents, and Summit Limited's response to plaintiff's first interrogatories was ten months late. Rule 37(d) empowered the trial court to enter the default of Summit Limited both for its outright failure to respond and its tardy responses which were prompted by plaintiff's motion for sanctions. Under the circumstances presented here, Summit Limited's assertion that the entry of default against it amounted to an abuse of discretion cannot be taken seriously.

The record reflects that Summit Limited did not respond timely to plaintiff's requests for admissions and never moved the court, as clearly required by Rule 36(b), to be relieved of its admissions effected by operation of Rule 36(a). Those conclusive admissions, which cannot be varied by eleventh hour affidavits and interrogatory responses, unquestionably entitle plaintiff to summary judgment, as the district court found. Summit Limited, which never moved below to be relieved of its admissions and never complained below of the nature or character of its admissions, cannot properly now deny or seek to be relieved of those admissions by this Court.

Both the default judgment and the summary judgment entered by the district court are supported by the record. The district court's Judgment should be affirmed.

RESPECTFULLY SUBMITTED this 15 day of April, 1977.

MARTINEAU & MAAK



Bruce A. Maak
Attorneys for Plaintiff-Respondent

A P P E N D I X

[R. 558]

AGREEMENT

1. THIS AGREEMENT made this 15th day of November, 1973, by and between PARK WEST VILLAGE, INC., a Utah corporation hereinafter designated as "Seller", and NATIONAL PROPERTY MANAGEMENT, INC., a Utah corporation, 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 thereon 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 $485,000.00, payable at

the office of Seller his assigns or order, 24 South Main Street, Logan, Utah 84321, strictly within the following terms, to-wit:

> $110,000.00 cash on or before December 13, 1973, and the balance of $375,000.00 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; $30,000.00 plus accrued interest accrued on the total balance

[R. 559]

> 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, and 1978 and for August 15, 1979, with a payment of $14,000.00 plus interest accrued to date as of December 15, 1979.

The Buyer may pay a maximum of $120,000.00 principal plus any interest accrued, per year. In the event that pre-payment of any amount above this is made, the Buyer shall pay a penalty of an additional $21,250.00 in any given year in which said maximum requirement of payment is exceeded. 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.

7. The Seller agrees to release and convey fee simple title to parcels of land to the Buyer upon receipt of amounts listed with respect to each parcel as set froth 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.

[R. 560]

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: (The sixty (60) day grace period shall not apply to the Buyer's obligation to pay $110,000.00 cash on or before December 13, 1973).

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

[R. 561]

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 mortgage 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

[R. 562]

information relating to construction of improvements on the subject property.

18. It is hereby expressly understood and agreed by the parties hereto that the Buyer accepts the said property in its present condition and that there are no representations, covenants, or agreements between the parties hereto with reference to said property, except as herein specifically set forth or contained in the attached exhibits.

19. 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 fees, 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.

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

21. The parties acknowledge that there are certain outstanding liquidated and unliquidated potential liabilities

or liens or encumbrances relating to the property which is the subject of this Contract, all of which Seller represents are described below. An itemization of these matters is not to be construed as an admission by the Seller that any said claim is in fact a valid or existing liability but is merely a statement as to the manner in which any such potential problem will be handled as between the Buyer and the Seller.

A. Title Insurance Policy.

The Buyer accepts the property, subject to the liens and encumbrances set forth in the Title Insurance Policy.

B. Building and Occupancy Restrictions and Declaration of Covenants, Conditions and Restrictions of Park West Village Condominium -- Phase I and Phase II.

[R. 563]

The Seller has previously caused to be filed with the County Recorder of Summit County, Building and Occupancy Restrictions, a copy of which is attached hereto as Exhibit D and Declarations, Covenants, Conditions and Restrictions of Park West Village Condominium (the "Declarations") attached hereto as Exhibit E. Seller represents that identical Declarations are recorded against both Phase I and Phase II of the Park West Village Condominium project. The Seller hereby assigns all of its right, title and interest in and to the Building and Occupancy Restrictions and the Declarations to the Buyer including, but not limited to, the right to appoint the member-

ship of the Subdivision Management Committee and agrees to deliver to Buyer a certified copy of the resolution of its Board of Directors effecting such appointments. In the event of a default hereunder, all rights under said Building and Occupancy Restrictions and the Declarations shall immediately revert back to the Seller and the Seller shall have the sole right to exercise all powers set forth therein. The Buyer agrees with Seller and for its benefit that while there is any portion of the real property not released pursuant to Section 7 hereof, it shall abide by and enforce all of the provisions, covenants and obligations of the Building and Occupancy Restrictions and the Declarations and to pay all costs and expenses incidental thereto.

D. Subdivision Master Plan.

The Buyer acknowledges that a Subdivision Master Plan, attached hereto as Exhibit F and incorporated herein by reference has been used in the promotion and development of the subject property. The Buyer agrees to comply with said Master Plan insofar as may be necessary to prevent the Seller from accruing liability which may result from a deviation from the Master Plan and to hold the Seller harmless from any liability accruing in the event that the Buyer chooses to deviate from the Master Plan.

E. Summit County Subdivision Rules, Regulations and Requirements.

The Buyer agrees that it is purchasing the project as is and that it will perform all duties, responsibilities and

obligations to comply with the rules and regulations of Summit County as it may generally apply to

[R. 564]

subdivisions and with the specific requirements imposed by Summit County with respect to this subdivision project, including, but not limited to, the construction of roads.

22. The Seller hereby conveys to the Buyer the sole right to use the name Park West Village and agrees to change its name. In the event of an unrectified default by the Buyer, the rights to the name shall revert to the Seller.

23. The Seller presently has an arrangement with Tracy Collins Bank & Trust whereby it has borrowed $30,000.00 and deposited the same in the form of a Certificate of Deposit which is the subject of a contract whereby the Certificate of Deposit is pledged to guarantee the performance of the construction of lots as required by Summit County for the Park West Village subdivision. The Buyer agrees to perform all requirements of construction of said improvements as required by Summit County. The Certificate of Deposit, which is guaranteeing the construction of these improvements and the loan at Tracy Collins Bank & Trust, is hereby assigned to the Buyer, who agrees to pay the interest on the $30,000.00 loan. The interest will be paid to the Seller at its address stated herein, and the Seller will then pay Tracy Collins Bank & Trust. The Buyer agrees to hold the Seller harmless from any claim by

Tracy Collins Bank & Trust for this obligation, and the Buyer agrees to pay the $30,000.00 loan in full, which it may do by offsetting the Certificate of Deposit against said loan upon the completion of the requirements of Summit County and the receipt from Summit County of the discharge of the bond obligation. Seller agrees to cooperate in the preparation of any supplemental documentation or in any other way reasonably necessary to complete the provisions of this Paragraph. The Buyer agrees to render said improvements as required by this Paragraph and complete the same in a manner acceptable to Summit County by July 15, 1974. In the event that the Buyer fails to complete the improvements by that date, then the Seller may complete said improvements and in that event, the Buyer agrees to pay to the Seller $15,000.00 liquidation damages and costs of the improvements, with the $15,000.00 payable on July 20, 1974, and the costs of improvements payable upon the completion of the same. In the event of a default, the default shall

[R. 565]

constitute a reassignment to the Seller of the Certificate of Deposit at Tracy Collins Bank & Trust, and the Buyer shall thereupon reassign the obligation to pay the loan balance and the Certificate of Deposit, or the proceeds thereon may be used to render the required improvements. In the event of a default by the Buyer, under the terms of this Contract, the Buyer shall remain liable to pay all interest accruing after the date of this Contract at Tracy Collins Bank & Trust.

24. All water rights appertaining to the subject property shall be conveyed to the Buyer at the time the property parcels are released. The parties who own dwelling units on lots in Park West Village subdivision as of the date of this Contract shall have the right to tie in and connect to Park West Water Assocation, a nonprofit Utah corporation, and to acquire and to have the ability to acquire water at association rates in effect from time to time. The Buyer agrees to assume any obligation which the Seller may have and to hold the Seller harmless therefrom to provide water to the buyers of lots in Park West Village Subdivision which have not yet constructed a dwelling thereon. The right of the existing dwelling owners under this Paragraph shall not be abrogated in the event that the Seller exercises its rights under Paragraph 15.

25. The payment due on or before December 13, 1973, from Buyer to Seller is subject to the Seller providing Warranty Deeds subject to existing mortgages at First Security Bank and Title Insurance Policies on the five condominium units, numbers 4, 10, 12, 14, and 16, which are the subject of a Uniform Real Estate Contract of even date herewith. The Seller's duty under this Paragraph is to deliver said Warranty Deeds and Title Insurance Policies to Summerhays, Hatch & Lawrence, and Summerhays, Hatch & Lawrence shall deliver said Warranty Deeds and Title Insurance Policies to the Buyers upon the receipt of payment of the cash difference between the mortgage balances and $34,700.00 on units 4, 14, and 16, and $36,700.00 on units 10 and 12.

IN WITNESS WHEREOF, the said parties to this Agreement

have hereunto signed their names, the day and year first above written.

PARK WEST VILLAGE, INC., Seller

By: /s/ Elwood L. Nielsen
President

NATIONAL PROPERTY MANAGEMENT, INC., Buyer

By: /s/ Robert Krause
President

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Brief of Plaintiff-Respondent were served this 14 day of April, 1977, by mailing on said date two copies thereof, United States Mail, first class postage prepaid, addressed to:

Timothy R. Hanson, Esq.
HANSON, WADSWORTH & RUSSON
Attorneys for Defendant-Appellant
702 Kearns Building
Salt Lake City, Utah 84101

Bruce A. Maak