

1940

# Robert B. Swaner v. Union Mortgage Company : Brief of Respondent

Utah Supreme Court

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Rex J. Hanson; Jesse R. S. Budge; Attorneys for Respondent;

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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ROBERT B. SWANER,

*Respondent,*

vs.

UNION MORTGAGE COMPANY, a corpo-  
ration,

*Appellant.*

No. 6234

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Appeal from the Third Judicial District Court of the  
State of Utah in and for Salt Lake City, Utah, Before  
Hon. Herbert M. Schiller.

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RESPONDENT'S BRIEF

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REX J. HANSON,  
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ROBERT B. SWANER,

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UNION MORTGAGE COMPANY, a corporation,

*Appellant.*

No. 6234

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RESPONDENT'S BRIEF

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**STATEMENT OF THE CASE**

This action was brought by respondent, Robert B. Swaner, against appellant, Union Mortgage Company, to compel the cancellation of respondent's promissory note in favor of appellant for the sum of \$3000, and a mortgage securing said note which covers certain real

estate in Salt Lake County, Utah, and to recover damages under Section 78-3-8 Revised Statutes of Utah 1933.

On or about the first day of November, 1938, respondent applied to appellant for a loan of \$3000, for the purpose of constructing a residence on the property in plaintiff's complaint described, located on Sixteenth East Street, Salt Lake City, Utah. Appellant agreed to make said loan provided it could secure a commitment for insurance of the same under the regulations of Federal Housing Administration, and said commitment was obtained November 6, 1938 (Exhibit 6), provided respondent's father and mother would sign the papers. (Ab. 30-31, Tr. 105.)

It is admitted by the pleadings that the note and mortgage were executed and delivered to appellant on or about November 14, 1938, and that on or about said date said mortgage was recorded in the office of the County Recorder of Salt Lake County. (Ab. 2, 6; Tr. 19, 30.) At the time the note and mortgage were executed it was agreed that 10% of said loan would be advanced when the foundation was completed and the floor joists set, and the work had received F.H.A. inspection; 15% when the roof was on; 20% when the house was ready for plastering; 25% when the house was ready to be decorated; and 30% when the structure was completed and had been approved by F.H.A. (Exhibit A.) (Ab. 28, Tr. 85.)

Respondent proceeded with the work of construction and after *the foundation had been completed and the floor joists set* the F.H.A. made its first inspection, approved the work (Ab. 28, 32; Tr. 179), and left on the

premises its "Memorandum of Compliance Inspection," under date of December 21, 1938, certifying that "the work then completed has passed the first inspection." (Exhibit 3.)

After the inspection respondent made repeated demands for the 10%, but appellant made excuses for non-payment, first, that there was something wrong with the cement, and later that they had not received the Inspection Report from F.H.A. (Tr. 113-114.) Respondent then went to F.H.A. and was informed that the report had been mailed to appellant. Respondent again went to appellant and a Mr. Chambers, to his apparent surprise (Tr. 120) finally found the report (Exhibit 1) in the file, and stated that he would take it up with Mr. Billings, the manager of appellant company. The following day when respondent called again to see about the 10%, he was informed that appellant would not pay the money until respondent had complied with certain conditions respecting an entirely different loan covering property on Tenth Avenue. (Ab. 32-33; Tr. 116-120.)

Respondent was obliged to cease work on the building because of his inability to pay for materials and labor (Ab. 28-29; Tr. 94-98); and it has at all times since remained in its unfinished condition, as shown by Exhibits B and C.

Upon refusal of appellant to advance any money on the loan, as it agreed to do, respondent made written demand on appellant (Exhibit D) for the cancellation and return of his note and the release of said mortgage, which appellant refused to do unless respondent would pay

appellant \$114.10, alleged costs of procuring the F.H.A. commitment for the insurance of said loan. Thereupon respondent filed this action. The jury rendered an advisory verdict and the court, adopting said verdict, made Findings of Fact, Conclusions of Law and Judgment, directing the release and cancellation of the note and mortgage and awarding respondent damages in the sum of \$225, and his costs. (Tr. 57-58, 68-69.) This appeal is from said judgment.

## ARGUMENT

It manifestly appears from the evidence that appellant violated its agreement to advance the money it agreed to loan respondent.

On this appeal the technical defense is raised that there was no F.H.A. approval of the work so as to entitle respondent to the 10% payment which became due when the foundation was completed and the floor joists set. There is no merit to this contention, for the evidence is clearly to the contrary.

Swaner testified on direct examination:

“Q. Now you testified, Mr. Swaner, when the floor of this building was constructed and the joists were constructed, I think they are, they were to have an F.H.A. inspection?

A. Yes.

Q. Did it have an F.H.A. inspection?

A. Yes.

Q. Was that inspection approved by F.H.A.?

A. Yes, it was passed by F.H.A. at that time.”

(Ab. 28, Tr. 91-92.)



On re-direct examination he testified:

“Q. Mr. Swaner, I think you testified on cross-examination that the house had received its first F.H.A. inspection?

A. That is right.

Q. Now, after that time, and that was after the floor had been completed and joists set—

A. Yes.

Q. Now, after that time, did you at any time subsequent to that, have a conversation with defendant mortgage company, or its officers, with respect to the advancement of the ten per cent of the original loan?

A. Yes.

Q. With whom did you have that conversation?

A. Mr. Frank Conners.

Q. And about when did you have it—that is, approximately, to the best of your recollection?

A. Well, approximately the first of December.

Q. About how long after the F.H.A. inspection had been made?

A. Immediately after the F.H.A. inspection, the day after or so, I started to ask for the ten per cent.

Q. What was the conversation?

A. I told them that it had passed the F.H.A. inspection and I wanted my ten per cent. They said to begin with that there was something wrong with the cement in the foundation, and after that they said they had received no notice from F.H.A.

Q. What was done with reference to the cement after you had had this conversation?

A. I called up my cement contractor and told him that.

Q. State what was done?

A. It was taken care of.

Q. What do you mean taken care of?

A. As I remember they were afraid the cement was freezing and they wanted to wait and see.

MR. SHIELDS: Now if the court please—

A. They—meaning F.H.A.

Q. Did the F.H.A. afterwards inspect the cement?

A. Yes.

. . .

Q. Now Mr. Swaner, what did the F.H.A. finally do with reference to the cement and flooring?

A. The cement and floors?

Q. Joists, or whatever it was?

A. Why, they were passed.” (Tr. 113-116.)

A. J. Dean, a witness for plaintiff, testified:

“Q. Do you know whether or not this structure was inspected by the F.H.A.?

A. I know that it was.

Q. How do you know that?

A. Because when I came there on the job there was a ticket fastened to one of the wires on the forms, which it said on it—Well, it was an F.H.A. approval slip of the forms there.” (Tr. 143, Ab. 36.)

Mr. Anderson, Chief Architect for F.H.A., testified that Exhibit 3 is a copy of the document found in his file, which in the course of business of F.H.A. inspection is left upon the structure, and that at the date the slip bears an inspection was made, and that Exhibit 3 is the only slip or document which is delivered to the property owner

or left on the place, and that said exhibit is a copy of the inspection slip left on the respondent's premises. (Ab. 42, Tr. 172-173.)

We respectfully submit that there is no conflict in the evidence that there was an approval by F.H.A. Exhibit 1, which was the "Compliance Inspection Report," mailed to appellant, shows nothing to the contrary. It contains nothing by way of exception to the unconditional approval shown by Exhibit 3. The statement: "Concrete to be checked for freezing after it has had more time to set up," appearing on Exhibit 1, is not an objection to the concrete work, and there is not a scintilla of evidence in the record that the concrete work was defective in any way, and as appears from the testimony of Mr. Swaner, after some fear was expressed that the cement might freeze, it was afterwards passed. (Tr. 113-116.)

As a matter of fact appellant raised the question of the sufficiency or validity of the inspection and approval at the trial purely as an afterthought. That never was really the ground upon which it refused to advance the 10%. The real reason is set forth in paragraphs 2, 3, 4, 5 and 6 of defendant's answer and counter-claim to plaintiff's amended complaint (Tr. 30-33), which defense was stricken as irrelevant and redundant upon motion of the plaintiff. (Tr. 47.) The allegations in these paragraphs are to the effect that appellant had contracted with respondent for a similar loan covering property on Tenth Avenue, and that respondent had been delinquent in carrying out the terms of the contract with reference to that property, and that therefore appellant "had notified

plaintiff that it would not further advance on the first loan *and that it was no longer interested in continuing the second loan above described.*”

Counsel’s failure to discuss in his brief the ruling of the court in striking this defense indicates that he has no confidence in its validity. He does cover the matter by his Assignment of Error No. 10, but he has evidently concluded that the assignment is without merit.

Of course, the failure of respondent (if he did fail) to comply with the contract with reference to the 10th Avenue property, could furnish no excuse for appellant’s breach of the contract to advance money on the 16th East property.

As stated in 13 Corpus Juris 613:

“One contract cannot be rescinded for breach of another and independent contract.”

In *Rock vs. Gaede* (Kan.), 207 Pac. 323, it is said:

“The buyer has no right to rescind or refuse to perform a contract for the purchase of a quantity of flour upon the ground that a shipment of the same brand, made under a separate contract between the same parties, had proved unfit for use.”

In *Hanson vs. Parker-Wittenberg* (Mass.), 91 N. E. 383, it is said:

“Where there were two independent contracts between the same persons for the furnishing of certain goods of the same kind and quality, at different times, the fact that the seller has committed a breach of the first contract, by furnishing goods inferior to those required by the contract, and by failing, upon demand, to furnish goods of the kind and quality re-

quired, does not justify the buyer in assuming that the seller will also break his second contract for a further supply of like goods, and, although the buyer may be reasonably apprehensive of a like breach of the second contract, he has no right to rescind or repudiate the second contract before it has been broken by the seller.”

There was absolutely no justification for appellant’s refusal to advance the ten per cent. Respondent had complied with every condition entitling him to the payment of the money, and because of appellant’s refusal to make the payment respondent could not pay his material and labor bills and was obliged to cease work on the building. (Ab. 28, Tr. 92.)

Now we come to the next step in the proceedings. The property was covered by the mortgage, so that it was impossible for respondent to secure any other loan. (Ab. 29, Tr. 98.) Respondent demanded in writing that the mortgage be released, and this appellant refused to do, unless respondent would pay the following items of expense, which it claimed to have incurred:

Federal Housing Administration appraisal fee .....	\$ 10.00
Mortgagee appraisal fee and credit report.....	6.00
Initial service mortgagee.....	75.00
Recording fee .....	7.10
Abstracting .....	5.00
Fire Insurance .....	21.00
Total.....	\$124.10
Less credit which appellant appears to have given respondent .....	10.00
Net amount claimed.....	\$114.10

That appellant offered to release the mortgage if respondent would pay the foregoing items is set forth in paragraph 8 of appellant's counterclaim (Tr. 33), which paragraph, on plaintiff's motion, was stricken as constituting no defense (Tr. 47), and appellant assigns the ruling of the court as error. (Ass. Error No. 10.)

Counsel argues that appellant was under no obligation to execute the release until these items were paid, and especially the insurance item, which he says inured to the benefit of the property owner. Respondent was to pay these items in part consideration for the making of the loan to him, and yet appellant takes the position that, even though appellant refused to make the loan as it agreed to do, respondent ought, nevertheless, to pay the expenses. This is an unusual brand of logic which we think the court will not adopt. Why is respondent under any obligation to pay the expenses of securing the F.H.A. commitment, when, after the commitment was obtained, appellant breached its contract by refusal to pay over the money? The charge for insurance is no more valid than any other item. What use is the insurance to respondent when he has no house, and is prevented by the lien which appellant holds from securing means elsewhere with which to complete the house? To say that appellant can breach its agreement to pay over the money, and yet require respondent to pay the expense of appellant in arranging for the money, seems to us preposterous. The court committed no error in striking paragraph 8 of the counterclaim.



We now come to a consideration of the right of respondent to recover damages awarded by the judgment.

Sec. 78-3-8 Revised Statutes of Utah 1933, provides:

“If the mortgagee fails to discharge or release any mortgage after the same has been fully satisfied, he shall be liable to the mortgagor for double the damages resulting from such failure. Or the mortgagor may bring an action against the mortgagee to compel the discharge or release of the mortgage after the same has been satisfied, and the judgment of the court must be that the mortgagee discharge or release the mortgage and pay the mortgagor the costs of suit *and all damages resulting from such failure.*”

In Kelley vs. Narregang (S. D.), 162 N. W. 386, it was alleged in plaintiff's complaint that the plaintiff and his wife executed to the defendant their note for \$7000, secured by a mortgage; that defendant caused said mortgage to be recorded, but defendant refused to pay over or deliver to the plaintiff any money, whatsoever; that thereafter plaintiff demanded a release of the mortgage; that defendant refused to cause said mortgage to be satisfied of record, and that plaintiff was compelled to commence an action to have the same cancelled and was compelled to employ an attorney and incurred large expense. It was further alleged that at the trial of the case for the cancellation of the mortgage the court entered judgment that defendant execute a satisfaction of the mortgage; that in prosecuting such action plaintiff was compelled to incur expenses and attorney's fees amounting to the sum of \$350. Upon demurrer to the complaint it was held that it stated a cause of action.

It will be noted that the case just referred to was prosecuted for the recovery of the damages, after the cancellation suit had been concluded. An appeal from the judgment in favor of the plaintiff was prosecuted (170 N. W. 131), and the judgment was sustained. Says the court:

“All points raised by appellant, save one, became *res adjudicata* by the judgment of the court in a former action brought by the present respondent against the present appellant, to compel the cancellation of the mortgage. The only question before us is whether the words ‘all damages which he or they may sustain by reason of such refusal,’ as found in Sec. 2061, Civil Code, include the fees paid by respondent to his attorneys in the former action, and respondent’s personal expenses in connection with the preparation and trial of that action.”

Continuing the court says:

“By the same token it would seem that if he were liable for costs in that action, he would have been liable for the counsel fees paid by the successful party in that action, if claim had been made therefor.

In our opinion the situation is analogous to that arising in actions upon undertakings given in injunction proceedings, where it has been decided that the injunction was improvidently granted. While in that action the action is *ex contractu* and the damages measured by Sec. 2295, Civil Code, and in this action the action is *ex delicto* and the damage measured by Sec. 2312, Civil Code, yet, if counsel fees are properly allowable in the one case, they certainly are in the other. In each case the question is: Was such claimed element of damage ‘proximately caused thereby?’ ”



The court will observe that in the Kelley-Narregang case the facts are almost identical with those in the case at bar. A note and mortgage were executed and the mortgage recorded *and no money was advanced*, and yet the court held that the statute, which is very similar to our Sec. 78-3-8, applied. The South Dakota statute provided that the plaintiff might recover “*damages which he or they may sustain by reason of such refusal*,” while our statute provides that plaintiff may recover “*all damages resulting from such failure*.” The only difference between the two cases is that the Kelley-Narregang case was one to recover the damage in a separate suit after the suit to compel cancellation of the mortgage had been decided. But on the second appeal the South Dakota court used this language:

“By the same token it would seem if he were liable for the costs in that action, he would also have been liable for the counsel fees paid by the successful party in *that action if a claim has been made therefor*.”

In the case of McClure vs. Scates (Kan.), 67 Pac. 856, the statute provided that in mandamus cases:

“If judgment be given for plaintiff he shall recover damages which he shall have sustained, to be ascertained by the court or jury or by referees as in civil actions, and costs; and a peremptory writ of mandate shall also be granted to him without delay.”

The court held that “damages” included attorney’s fees, and that they were recoverable in the same action in which the writ of mandate was sought.

Appellant relies upon the early case of *Openshaw vs. Haflin*, 24 Utah 426, 68 Pac. 138 (and we might also refer the court to the similar case of *Brubaker vs. Bennett*, 19 Utah 401, 57 Pac. 170), wherein this court held that a statute which contained a special provision for the recovery of “costs of suit, *including attorney’s fees*, and all damages resulting from such failure, etc.,” was held to be unconstitutional, *insofar as it provided for the recovery of attorney’s fees*, and appellant argues that under this decision attorney’s fees cannot be recovered. This contention is untenable, because after these decisions were rendered the statute upon which we rely was amended to read:

“the judgment of the court must be that the mortgagee discharge or release the mortgage and pay the mortgagor the costs of suit and *all damages* resulting from such failure.”

Under this statute we are entitled to recover such damages. We do not ask for the recovery of attorney’s fees *as such*, which was objectionable under the old statute, but the attorney’s fee is simply an item of *damages*, just as any other item of expenses would constitute damages.

That attorney’s fees, as an element of damages, may be recovered, we have only to call the court’s attention to the case of *Colorado Development Company vs. Creer*, 96 Utah 1, 80 Pac. (2) 914, wherein this court construed Sec. 104-68-12 Revised Statutes of Utah 1933, relating to actions for a writ of mandate. This statute contains the provision:

“If judgment is given for appellant he may recover the damages which he has sustained, as found by the jury or as may be determined by the court.”

This court held that under this statute attorney's fees incurred in an action for a writ of mandate may be recovered as damages, and uses this language:

“The case of *State ex rel vs. Cocking, Mayor*, 66 Mont. 169, 213 Pac. 594, and cases there cited, are authority for the construction of the Montana Statute, which is practically identical with Revised Statutes 1933, Sec. 104-68-12, that in a mandamus proceeding the word ‘damages’ includes the expense for the services of an attorney to bring the proceeding.”

Other cases where attorney's fees are allowed as damages in mandamus cases are:

*Columbia Knickerbocker Tr. Co. vs. Finney*, (Kan.) 144 Pac. 222;

*Larabee Flour Mills Co. vs. Ry. Co.*, (Kan.) 116 Pac. 901.

There can be no good reason why if “damages,” *including attorney's fees*, is an item of expense in a mandamus proceeding, the word “damages” should not cover attorney's fees as an item of expense in a suit to cancel a mortgage. It is so held, not only in the *Kelley-Narrengang* case, *supra*, but in *Cornelius vs. United States Bldg. & Loan Ass'n (Ida.)*, 292 Pac. 243; *Vaught vs. Pettyjohn Co. (Kan.)*, 178 Pac. 623.

Counsel cites authorities (among them *Matheiu vs. Boston (S.D.)*, 216 N. W. 361), that a mortgagee is not

liable for damages for refusal to release a mortgage when it acts in good faith and on advice of counsel. The authorities cited by counsel cannot aid appellant in this case. It entered into a definite, positive agreement to loan respondent \$3000, subject, of course, to securing the commitment from F.H.A. insuring the loan. That commitment was obtained. In reliance upon the arrangement he made with appellant, respondent proceeded with the work and incurred bills for material and labor. When the work had progressed so as to require F.H.A. inspection, that inspection was made and the work approved. Respondent applied for 10% of the loan and appellant refused to pay over the money. Respondent is left with a lien on his property, the house only partially constructed, and unable to secure money elsewhere because of the cloud upon the title. Under such circumstances, can it be said that there is any good faith on the part of appellant in refusing to keep its agreement? It acted without the slightest justification and, as we have heretofore pointed out, its only reason for not paying the money was because it claimed to be dissatisfied with respondent's conduct with relation to the loan on the Tenth Avenue property.

Counsel complains of the allowance of \$25.00 for damages to the building, by reason of its being left throughout the winter in an uncompleted condition. There is evidence to justify far more than that amount of damages, and the amount was that which was determined by the jury, and the court adopted the jury's finding.

We respectfully submit that the judgment should be affirmed.

Respectfully submitted,

REX J. HANSON,

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*Attorneys for Respondent.*