1997

Penn Harris Smith, Mary Anne Smith, and E.P.S Development v. Richard Tyler, Ina W. Tyler, and Russell J. Limb : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PENN HARRIS SMITH, MARY ANNE SMITH, and E.P.S. DEVELOPMENT, a Utah partnership, Plaintiffs and Appellants, vs. RICHARD H. TYLER, INA W. TYLER, and RUSSELL J. LIMB, Defendants and Appellees,	Case No. 970176-CA Priority 15

BRIEF OF APPELLANT

APPEAL FROM ORDERS GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, DISMISSING COMPLAINT FOR FAILURE TO PROSECUTE, AND DENYING RULE 60(b) MOTION ENTERED IN THE FIFTH JUDICIAL DISTRICT COURT, WASHINGTON COUNTY, HONORABLE J. PHILIP EVES PRESIDING

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APPELLATE JURISDICTION

The power to hear and decide this appeal is conferred upon the court of appeals by provision of Utah Constitution, art. VIII, §§ 3 and 5, and Utah Code Ann. §§78-2-2(3)(j), 78-2-2(4), and 78-2a-3(2)(j).

ISSUES AND STANDARDS

On appeal from a summary judgment, the facts and any inferences arising therefrom are viewed in a light most favorable to the non-moving party. *See Chapman v. Primary Children's Hospital*, 784 P.2d 1181, 1182-83 (Utah 1989). Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Accordingly, whether a party is entitled to summary judgment is a question of law reviewed for correctness. *See Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993).

The issues on this appeal are all presented as questions of law because the factual issues are theoretically undisputed. Even the question of whether there are any genuine issues of material fact, which preclude summary judgment, is an issue of law because those facts which must be proved in order to make out a claim or defense are established by law. The issues presented by this appeal were raised in and considered by the district court. R 539-59, 590-614, 621-32, 650-77, 697-706, 745-72. They include the following:

1. Did the district court err in concluding that there were no genuine issues of material fact which would preclude summary judgment?

2. Was plaintiffs' possession and use of the subject real property insufficient as a matter of law to place the world on inquiry as to any interest plaintiffs claimed therein?

3. Did the public record put defendant Limb on constructive notice of plaintiffs' interest in the subject real property or any part thereof?

4. Was plaintiffs' interest in the subject real property extinguished by post-default agreements?

5. Did the district court err in considering issues relating to the existence, terms, or enforceability of the August 19 agreement on defendants' motions for summary judgment?

6. Did Smiths and Tylers reach an agreement on August 19, 1991, and if so, what were the terms thereof?

7. If plaintiffs and defendants Tyler did not reach an agreement on August 19, 1991, or if such agreement is unenforceable, could plaintiffs' interest in the subject real property have been

extinguished by plaintiffs' attempt to negotiate such an agreement or by entering into an unenforceable agreement?

8. Are plaintiffs estopped to assert any interest in the subject real property?

9. Have plaintiffs waived the right to assert an interest in the subject real property?

10. Did the district court err in considering defendant Limb's motion to dismiss after the court had granted Limb the relief he had sought in the alternative to the dismissal?

11. Did Limb have standing to assert any position in the remaining litigation after the order claim against him had been certified for immediate appeal?

12. Did the district court abuse its discretion in dismissing plaintiffs' third cause of action for failure to prosecute where it appears that the parties were still engaged in settlement negotiations, as the result of which neither plaintiffs nor defendants Tyler requested a trial setting?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

There is no constitutional provision, statute, or rule which plaintiffs consider to be controlling.

STATEMENT OF THE CASE

Nature of the Case. This is an appeal from multiple orders of the Fifth Judicial District Court which (1) granted defendants partial summary judgment quieting title to certain real property against plaintiffs, (2) dismissed plaintiffs' two claims for money damages, and (3) denied plaintiffs' motion to set aside the order which dismissed the second of the damages claims. Plaintiffs' appeal to the supreme court was poured over to the court of appeals.

Proceedings in the Lower Court. Plaintiffs initiated a complaint *pro se* seeking damages sustained by the fact and manner of Tylers' sale of certain real property. R 1-2. Later, through counsel, plaintiffs amended their complaint to assert their unforeclosed equity of redemption in the above-mentioned real property and, in the alternative, to assert a claim for breach of contract. R 382-94. Defendants moved for and were granted summary judgment against plaintiffs on the first cause of action, quieting title in favor of defendant Limb who had purchased the subject real property from defendants Tyler. R 539-59, 590-96, 660-75. Although defendants' motions did not address it, the district court also dismissed plaintiffs' second cause of action. R 674. Later, defendant Limb moved the court to dismiss plaintiffs' third cause of action by which plaintiffs sought damages against defendants Tyler representing unpaid compensation owed in connection the transfer of certain water rights. Limb's motion alleged that plaintiffs had failed to pursue their third cause of action after defendants had been granted partial summary judgment. Limb moved the court, in the alternative, to certify the partial summary judgment which had been entered earlier as a final order under Utah R.Civ.P. 54(b). R 697-704.

Disposition in the Lower Court. The district court ultimately dismissed all three causes of action: the first, on the merits; the second, for reasons which the court never articulated; and the third, for failure to prosecute. Finally, the district court denied plaintiffs' motion to set aside the order which dismissed the third cause of action.

RELEVANT FACTS

In two separate transactions, plaintiffs borrowed a total of $56,500 from defendants Tyler. R 544. As security for the repayment of these loans, plaintiffs and others, at plaintiffs'

instruction or request, conveyed to Tylers the title to four parcels of lands by deeds, which were absolute on their faces. R 544-45. Plaintiffs contend that these properties had a combined fair market value of approximately $161,000.00. R 915-17.

Plaintiffs and Tylers executed certain documents which acknowledged that the real property had been conveyed to Tylers as security for the repayment of the above-mentioned loans. R 544-45. A memorandum describing three of these parcels was recorded in the office of the Washington County Recorder at the request of Security Title Company. R 545, 890. Plaintiffs retained the right of possession of all four parcels and stored miscellaneous items of personal property on the parcel which was not described in the recorded memorandum. R 1199-1200.

Plaintiffs failed to repay the loan obligation according to its terms and sought protection in bankruptcy. R 546, 922. Plaintiffs' bankruptcy attorney listed plaintiffs' equity in the subject real property as an asset of the bankrupt's estate. R 546, 901. Notwithstanding the fact that plaintiffs were in bankruptcy, Tylers continued to press plaintiffs for payment of the obligation or release of the real estate. R 546, 920. Through bankruptcy counsel, plaintiffs negotiated an agreement with Tylers which was signed on June 13, 1990. R 546-47, 895-97. Under the terms of that agreement, plaintiffs and Tylers were to jointly list the subject property and any proceeds from the sales thereof were to be applied first to the discharge of any obligation owed Tylers and "the remaining proceeds and unsold property shall be delivered to and/or conveyed to Debtors [plaintiffs]." R 897. The agreement further provided that if the property had not been sold and or Tylers had not been otherwise satisfied by March 1992, plaintiffs would withdraw any claim they had to the subject property. R 897. The bankruptcy court approved the stipulation by written order. R 898-900.

Nevertheless, Tylers continued to remind plaintiffs that they were in default and that Tylers considered the subject property theirs, contending that they had been damaged by its wrongful inclusion in the bankruptcy proceedings. R 1040-41, 1121-26, 1230-31. Insisting that the property be released from the bankruptcy and any stipulation connecting it thereto, Tylers prepared a letter for plaintiffs' signatures. R 1040-42, 1132-34, 1213-1217, 1228-29, 1269. *See* Addendum. The letter stated that plaintiffs "knew the properties rightfully belonged to the Tylers but upon the suggestion by the lawyer [plaintiffs] entered them in the bankruptcy." Tylers' draft of the letter went on to say: "[Plaintiffs] now believe that the advice we received from [plaintiffs' bankruptcy attorney] to include the Tylers property in our Bankruptcy was bad advice and that they should be released to the Tyler's as they really owned them and have for about a year before the original filing of the chapter 11." R 1269 [*sic*].

Out of a desire to accommodate Tylers and based upon Tylers' assurances that Tylers would continue to recognize plaintiffs' equity if the property were released from the bankruptcy, plaintiffs revised the letter drafted by Tylers and mailed the revised letter to the bankruptcy trustee on or about February 11, 1991. R 901, 1040-41, 1219-20. *See* Addendum.

The events of August 19, 1991, are the subject of considerable controversy. Plaintiffs contend that on that date defendant Richard Tyler advised plaintiff Penn Smith that Tyler had located a purchaser for the property who would be willing to purchase the real estate if certain water rights which plaintiffs owned were included as a Part of the proposed transaction. R 549-50. Plaintiffs agreed that they would relinquish their claim to the subject real property in order to facilitate the sale to Tylers' purchaser and Tylers agreed to pay plaintiffs the sum of $20,000 for plaintiffs' equity in the real property and $20,000 for the water rights. R 549-50, 1038, 1084, 1226.

Tylers, on the other hand, concede that when they entered into the agreement with plaintiffs to get the real property out of bankruptcy and sell it, plaintiffs were to receive all of "the overage," the proceeds of any sale or sales after payment of the costs of any sales and payment of plaintiffs' promissory notes which Tylers still held. R 1219-20. But when defendant Richard Tyler and plaintiff Penn Smith were discussing the proposed sale during their August 19 meeting, Tyler claims that Smith "kept telling me that for 10,000 that would satisfy him." R 1228. Tyler claims that "this 20,000 is an elevated figure." *Id.* Moreover, Tylers attempt to sidestep the question of whether or not they agreed to pay for the subject water rights. Mr. Tyler suggested that the water rights were transferred in order to eliminate an obstacle to the sale of the real property which may be created as a result of plaintiffs' continuing legal right to enter one the parcels to maintain the spring and the water distribution facilities. R 1228. Ultimately, however, it was obvious that Tylers had no intention of paying for the water rights because they believed that plaintiffs had "fooled" them by not having included the water rights as part of their collateral security from the beginning. R 1227. However, the most fundamental and serious controversies concerning the agreement of August 19, 1991, relate to time and order of performances.

Plaintiffs had obviously been concerned with pursuing a coarse of action which would maximize the price the sale of the subject's real property would bring when exposed to the market. That concern was reflected in the terms of the stipulation which had been executed on June 13, 1990. R 895-97. The agreement of August 19, 1991, served to shift the concern about getting the best price for the property to Tylers who would under this agreement be entitled to any proceeds from the sale of the property over and above the sum certain which plaintiffs had agreed to accept as compensation for their equity in the land and the transfer of the water rights. Nevertheless,

defendant Richard Tyler marketed the property without any concern whatsoever that the sale thereof be made at any where near the fair market value of the property.

Defendants Tyler had merely placed "for sale" signs on the property. R 1233-35. No realtor was involved in the sale to Limb. Moreover, once Limb had indicated an interest in the property, Tyler made it abundantly clear that he was willing to sacrifice the property and, according to Limb: "Mr. Tyler kept offering me a better price, you know, it became more enticing." R 1152. It was Tyler who initiated virtually all of the telephone conversations between himself and Limb. Tyler was only interested in selling all four parcels in a single transaction. On the other hand, Limb had no real interest whatsoever in acquiring two of these parcels. Finally, Tyler made Limb an offer he could not refuse, assuming that he could place the entire burden of the sacrifice upon the plaintiffs. R 1152-54.

At about the same time -- on or near August 19, 1991 -- Tylers submitted a written request for abandonment, together with a form of a notice of abandonment to the bankruptcy trustee for his signature. These documents were prepared by Tylers' friend, St. George attorney J. MacArthur Wright. R 548, 911-13, 1204-06. Tylers' request for abandonment stated that the subject property had been deeded to creditors for value prior to the filing of bankruptcy and that the debtors should not have listed it as an asset of the bankruptcy estate. R 912-13. On August 23, 1991, the trustee signed the notice of abandonment, using Wright's form which stated: ". . . I have found the above listed property to not belong to the debtor, not be a part of the bankruptcy estate, therefore, burdensome to the estate, and of inconsequential or no value to the estate." R 913. The executed notice of abandonment was apparently sent directly to Tylers who took it to Security Title Company in order to seek advice and have the document recorded. R 645, 911.

On or about September 16, 1991, Tylers deeded the subject real property to defendant Limb and had Security Title Company record the notice of abandonment. R 549-51. Tylers never told plaintiffs that the transaction had in fact closed. Thereafter, plaintiff Penn Smith contacted defendant Richard Tyler asking if the property should be re-listed with a realtor. Tyler told Smith to go ahead and list the property, apparently attempting to conceal the fact that Tylers had already conveyed the property. R 1097, 1240. At about that same time, plaintiffs' bankruptcy case was dismissed. R 1309.

Plaintiffs later discovered that the real property and water rights had been conveyed to defendant Limb. They then initiated this action, without the assistance of counsel, alleging that Tylers had breached the agreements relating to the sale of the subject property. R 1-2.

After retaining counsel, plaintiffs amended their complaint to seek enforcement of the August 19 agreement alleging that, in the event the court should determine that no agreement had been reached or that such agreement was not enforceable, plaintiffs' equity of redemption in the subject real property had not been foreclosed or otherwise extinguished. Plaintiffs also asserted a claim for the value of the above-mentioned water rights. R 382-94.

Tylers answered the second amended complaint denying the allegations concerning the August 19 agreement and further denying that plaintiffs had any interest in the real property. R 403-07. Limb answered and moved for summary judgment contending (1) that he had given value for the property in good faith and without notice, actual or constructive, of any interest which plaintiffs claimed in the property; (2) that plaintiffs were estopped to claim any interest in the property by reason of the February 11, 1991, letter to the bankruptcy trustee; and (3) that plaintiffs had relinquished their interest in the subject property by virtue of the June 13, 1990, bankruptcy

stipulation and by virtue of the alleged, but contested, agreement of August 19, 1991. R 397-402, 539-59. Tylers joined in Limb's motion and further alleged that plaintiffs had waived any interest in the subject real property. R 590-96.

The district court agreed with Limb and Tylers on all points and on May 2, 1995, orders were entered dismissing plaintiffs' first and second causes of action. R 660-75. *See* Addendum. Plaintiffs' contract claim relating to the conveyance of water rights remained outstanding. R 674.

Plaintiffs appealed the partial summary judgment to the Utah Supreme Court, attempted to have the judgment certified under Utah R.Civ.P. 54(b), and asked the court to treat the notice of appeal and supporting pleadings as a petition for interlocutory appeal if the direct appeal were deemed premature. R 678-79, 754-55. Limb moved for summary disposition arguing that the judgment was not final and had not been certified for immediate appeal. R 755, 764. Plaintiffs' appeal was dismissed and the case was remitted to the district court in November 1995. R 695-96.

During the pendency of the appeal and continuing thereafter, plaintiffs' attorney was engaged in ongoing settlement negotiations with Tylers' attorney, Craig Dunlap of Hughes and Read. R 755-56. These parties were attempting to reach a comprehensive settlement of all claims, including those which had been summarily dismissed. R 755-57. According to Dunlap, all the defendants, as well as Security Title Company,[1] had agreed to contribute to the settlement fund if the parties could come to terms with plaintiffs. R 757. In March 1996, Mr. Dunlap left the firm of Hughes and Read

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[1]Tylers initiated a third-party complaint against Security Title Company alleging negligence and other miscarriages in the discharge of the title company's duties allegedly owed Tylers. R 414-19. The third-party complaint was dismissed on Security Title's motion for summary judgment. R 685-91.

and relocated in Salt Lake County. Tylers' case was reassigned intra-office to Michael D. Hughes.[2] R 755-56.

Plaintiffs' attorney thereafter contacted Mr. Hughes on at least two occasions to see if Tylers had responded to plaintiffs' counter to defendants' most recent settlement proposal. R 756. Within a few days of the second of these contacts, Limb moved the court to certify the partial summary judgment which had been entered in the above-entitled matter on May 2, 1995. R 697, 704, 756. Limb had apparently only recently realized that plaintiffs' notice of *lis pendens* would continue to cloud title until the case was finally resolved. Limb now sought to facilitate the appeal he had earlier moved to dismiss.

Limb's motion actually sought the dismissal of plaintiffs' third and only remaining cause as the relief requested and asked the district court for the Rule 54(b) certification in the alternative. The continuing pendency precluded an immediate appeal from the partial summary judgment. Through counsel, Limb alleged that "[s]ince the court granted summary judgment in favor of defendant Limb in April of 1995, Plaintiffs have taken no action to pursue this case." R 702. Plaintiffs did not resist the Rule 54(b) certification but opposed the dismissal of the pending claim. R 705-06.

On the evening of September 22, 1996, plaintiffs' attorney contacted Mr. Hughes concerning the upcoming hearing. Hughes stated that Tylers would not join in or argue the motion to dismiss. Hughes said that in his opinion it was obvious that the court would deny the motion. He suggested that counsel meet together with their clients and discuss settlement after the hearing.

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[2]Tylers retained Dixon & Truman after the case was the court of appeals and therefore members of that firm had no involvement in proceedings in the district court or in the settlement negotiations conducted while the case was pending in the lower court.

Plaintiffs' attorney was scheduled to be in Manti, Utah, on the afternoon of September 23, and asked Mr. Hughes to again communicate plaintiffs' counter proposal to his clients as Tylers had not yet made any response to it. R 756.

On September 23, Mr. Douglas Terry appeared at the motion hearing for plaintiffs' attorney and advised the court that plaintiffs did not resist the Rule 54(b) certification. R 715, 756. The district court certified the partial summary judgment thus facilitating an appeal from the partial summary judgment. R 715, 732.

After the judgment had been certified, Limb was allowed to pursue his motion to dismiss notwithstanding the fact that dismissal and certification had been sought alternatively. In so doing, Limb took advantage of the district court's impression that there had been virtually no activity in the case since May 1995. R 715. Neither of the attorneys for the defendants advised the court of the ongoing efforts to settle the lawsuit.

Plaintiffs' attorney had not provided Mr. Terry with a complete briefing of the history of the case because counsel assumed that Limb would have no standing to pursue the motion to dismiss once the partial summary judgment was certified for appeal. Limb was not a party to the dispute which was still pending in the district court.

The district court found that partial summary judgment was entered in May 1995 and that since that time "nothing further has been done on this case." R 715. The court ordered plaintiffs' third cause of action dismissed for failure to prosecute. R 732. Plaintiffs moved the court for an order pursuant to the provisions of Utah R.Civ.P. 60(b) setting aside the judgment of dismissal. R 726-29. That motion was denied. R 785-87

Plaintiffs have appealed all adverse rulings. R 773-74, 792-93.

SUMMARY OF ARGUMENT

Plaintiffs possess an unforeclosed equity of redemption in certain real property located in Washington County. Plaintiffs have done nothing which would estop them from asserting this equity, nor have they waived it. Plaintiffs did enter into certain post-default agreements designed to facilitate the sale of the property and the distribution of the proceeds therefrom. However, none of these agreements called for or resulted in the immediate relinquishment of plaintiffs' equity in the subject real property and plaintiffs are guilty of nothing which would deny them the right to continue to assert their equity against any intervening third party, including defendant Limb.

The district court erred in dismissing plaintiffs' second cause of action by which plaintiffs alleged, in the alternative, that they were entitled to money damages as a result of Tylers' contractual breaches. Defendants' motions for summary judgment had not raised the viability of the second cause of action, the issue was not briefed, and the district court has not articulated any basis for its order dismissing the same.

The district court erred in dismissing plaintiffs' third cause of action for failure to prosecute. The motion to dismiss had been framed in the alternative and defendant Limb had been granted alternative relief. At that point, there was no basis for proceeding further and granting additional "relief" which had been requested only as an alternative measure.

Finally, the district court erred in refusing to set the order of dismissal aside once the district court was made aware of the fact that measures had been taken and were still underway to resolve the controversy through compromise and settlement as well as plaintiffs, had not requested a trial setting or done anything else to advance the case as a piece of litigation because all parties were apparently hopeful that a settlement would be reached.

ARGUMENT

POINT I

PLAINTIFFS RETAINED AN INTEREST IN THE SUBJECT REAL PROPERTY WHICH INTEREST HAS NOT BEEN EXTINGUISHED THROUGH STATUTORY FORECLOSURE PROCEEDINGS.

A deed, absolute on its face, may nonetheless operate as a mortgage if the parties thereto intend such an operation and effect *See Kjar v. Brimley*, 27 Utah 2d 411, 497 P.2d 23 (1972); *Willard M. Milne Inv. Co. v. Cox*, 580 P.2d 607 (Utah 1978). *See generally,* Restatement Third, *Property* (Mortgages) § 3.2 (parol evidence admissible to establish deed absolute was intended as security).

In the instant case, the intent that the deed operates as a mortgage is expressed in a document that was and made a matter of public record. *See* R 890. This was a recordable document and accordingly, put the entire world on notice of plaintiffs' continuing interest in three of the four parcels of the subject real property. *See* Utah Code Ann. §§ 57-3-1(1), 57-3-2(1), and 57-4a-2. Tylers are bound by all of the above-mentioned documents and have not advanced any serious argument to the contrary.

At common law, plaintiffs' interest in the real property would have been extinguished when they were unable to repay Tylers on "law day," the day payment was due. *See* Restatement Third, *Property* (Mortgages) § 3.1, comment *a*. Equity abhors a forfeiture and intervened with an equity of redemption (*see id.*) which became so firmly rooted in English and American jurisprudence that it was the money lenders who had to resort to the body politic for relief--legislation which

created a means by which this equity could be extinguished. *See id.* *See also* Dan B. Dobbs, *Remedies* at 38-40; 59 C.J.S., *Mortgages* §§ 1, 813-822.

This "equity of redemption" is recognized as estate in land. *See Commissioner of Internal Revenue v. Freihofer*, 102 F.2d 787 (3rd Cir.1939). It has become as much a part of American jurisprudence that a contract, regardless of its express terms, cannot effectively extinguish a purchaser's or borrower's interest in real property pledged as security for the payment of the purchase price or the repayment of a loan obligation without complying with a statutory mortgage foreclosure procedure which extends to the borrower a statutory right of redemption. *See* Restatement Third, *Property* (Mortgages) § 3.1(b), (c). *Cf.* Utah Code Ann. §§ 78-37-1 *et seq.*

Although Tylers clearly intended the conveyance of the subject real property to serve as a means of securing the repayment of money they had lent plaintiffs, Tylers never initiated proceedings to foreclose plaintiffs' equity therein. *See* Restatement Third, *Property* (Mortgages) § 3.1(a)(right to redeem real property continues until mortgage is foreclosed).

POINT II

PLAINTIFFS ARE NOT ESTOPPED TO ASSERT AND HAVE NOT WAIVED THEIR INTEREST IN THE SUBJECT REAL PROPERTY.

After plaintiffs sought protection in bankruptcy, the automatic stay did not stop Tylers from continually contacting them seeking release of the subject property from the bankruptcy proceedings. R 1040-41, 1121-1126, 1230-31. On or about February 9, 1991, Mr. Tyler approached plaintiffs with a draft of a letter which he wanted them to send to the bankruptcy trustee asking that the property be released from bankruptcy. R 1040-42, 1132-34, 1213-1217, 1228-29. Plaintiff Penn

Smith rewrote Tyler's letter making few changes.[3] R 901, 1041, 1269. In the letter, plaintiffs expressed a legal opinion to the effect that inasmuch as they had defaulted in the payment of their obligations to Tylers, they had forfeited their interest in the subject property. They then blamed their having made any claim to the property on the fact that they had received bad legal advice from their bankruptcy lawyer. R 901. All the while, Tylers assured plaintiffs that if the property were released from the bankruptcy proceedings, Tylers would continue to recognize plaintiffs' interest in the property. R 1040-41, 1219-20.

Plaintiffs' statements constitute nothing more than a layman's expression of a legal opinion. An estoppel does not arise from a statement which represents a mistake of law on the part of the declarant. *Sturm v. Boker*, 150 U.S. 312, 14 S.Ct. 99, 137 L.ed. 1093 (1894).

Moreover, judicial estoppel, like other forms of estoppel, includes an element of detrimental reliance and applies only as between those who are parties to the proceedings wherein the conduct allegedly giving rise to the estoppel occurred. The general principles which Limb attempts to invoke are set out in 28 Am.Jur.2d, *Estoppel and Waiver* §§68-71. Section 70 outlines the general limitations upon the application of such an estoppel.

> A number of limitations upon, or qualifications of, the rule against assuming inconsistent positions in judicial proceedings, have been laid down. Thus, the following have been enumerated as essentials to the establishment of an estoppel under the rule that a position taken in an earlier action estops the one taking such position from assuming an inconsistent position in a later action: (1) The inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his

[3]Photocopies of defendant Richard Tyler's draft letter and Smiths' revision are included in the Addendum.

> position; and (6) it must appear unjust to one party to permit the other to change.

The leading "judicial estoppel" case in Utah is *Tracy Loan & Trust Co. v. Openshaw Inv. Co.*, 102 Utah 509, 132 P.2d 388 (1942). In that case, Tracy initiated the action for the purpose of determining the ownership of 638 shares of stock in Openshaw Investment Company. At trial, one Clarence R. Openshaw prevailed in his claim that he was the beneficial owner of said stock. On appeal, Tracy sought the application of the doctrine of judicial estoppel noting that in his divorce proceedings, Openshaw had denied ownership of any property except a home on Ninth East Street in Salt Lake City and 50 shares of stock in Openshaw Investment Company.

In affirming the judgment declaring Openshaw the owner of the 638 shares of stock in question, the Utah Supreme Court stated:

> The testimony of Clarence R. Openshaw in the divorce proceedings was almost diametrically opposite to his verified pleadings and testimony in the present case. In the present suit he testified that he paid over to the Openshaw Investment Company thousands of dollars and that he owned the 638 shares of stock in addition to the 50 shares, and that he furnished the major part of the property and securities which went into the company. His testimony was positive in both cases. In fact, the testimony indicates that he made his statements as to the purported facts carefully and deliberately. Counsel for appellant contends that inasmuch as he knew the facts all the time, he either perjured himself in the divorce action or in the case; and that the law does not permit a litigant to play fast and loose with the courts so as to give testimony because it is advantageous for him to do so. Appellant contends that the rule of "judicial estoppel" applies to bar Clarence R. Openshaw from asserting ownership of the 638 shares of stock issued to his father as trustee, for the reason his prior testimony amounts to a sworn declaration that he had no stock nor any interest in any stock except the 50 shares which he swore in 1932 he then no longer owned.
>
> The general rule of "judicial estoppel" or "estoppel by oath" is stated in 19 Am.Jur.712. Most of the decided cases hold that the rule may

> be invoked only where the prior and subsequent litigation involves the same parties, and where one party has relied on the former testimony and changed his position by reason of it. In other words, a person may not, to the prejudice of another person deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject-matter, if such prior position was successfully maintained.
>
> A majority of the cases hold that the party invoking the rule of estoppel must show that he has done something or omitted to do something in reliance upon the conduct of the other party by reason of which he will be prejudiced now if the facts are shown to be different from those on which he relied; but there is no estoppel where there was no reliance and the parties had equal knowledge of the facts.

102 Utah, at 514-15 (citations omitted).

Limb was not a party to the bankruptcy proceedings and cannot to claim an estoppel in his own right. Tylers had knowledge of the relevant facts and encouraged plaintiffs to ask the bankruptcy trustee to abandon the property so Tylers could sell it and pay plaintiffs the "overage." Tylers were not misled and are in no position to claim an estoppel. Indeed, when one considers the language of the letter which defendant Tyler drafted to "guide" plaintiffs,[4] Tylers' claims of estoppel and waiver are almost laughable. *See* Addendum.

In the district court, Limb relied upon *Condas v. Condas*, 618 P.2d 491 (Utah 1980). *Condas* is not a judicial estoppel case. The legal issue in that case involved the admissibility of evidence. Defendants challenged the admission of evidence indicating that defendants' predecessor-in-interest had filed an answer and counterclaim in previous litigation wherein the predecessor had

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[4]Richard Tyler testified in his deposition that he drafted a letter which included most of the language, and certainly all of the relevant terms which were incorporated into the letter by which Tylers now seek to estop plaintiffs. It is Mr. Tyler who acknowledges having drafted the letter to "guide" the plaintiffs. R 1229.

contended that there was a public roadway running through and beyond the lands which were the subject of the litigation.

Limb's reliance on *Hill v. State Farm Mutual Insurance Co.*, 829 P.2d 142 (Utah App. 1992), and *Occidental/Nebraska Federal Savings Bank v. Mehr*, 791 P.2d 217 (Utah App. 1990), is likewise misplaced. Both these cases relate to an estoppel in the same proceeding involving the same parties and the same issues.

POINT III

PLAINTIFFS' EQUITY OF REDEMPTION WAS NOT RELINQUISHED BY POST-DEFAULT AGREEMENT.

Ordinarily, an agreement to relinquish an equity of redemption must be in writing. In *Bybee v. Stuart*, 112 Utah 462, 189 P.2d 118 (1948), the defendant lent his brother $1,100. As security for the money advanced, defendant's brother executed a warranty deed, absolute in form, in favor of the defendant. The defendant then executed a document acknowledging that the deed was in fact a security device. Thereafter, defendant's brother became ill and came to stay in the defendant's home. Defendant contended that during his convalescence defendant's brother expressed gratitude for all that the defendant had done for him and his son and orally relieved the defendant of any obligation of reconveying the property which he held as security. When the defendant's brother later contracted to sell the property to plaintiffs, defendant claimed to be the owner of the premises and an action was commenced to compel him to execute and deliver plaintiffs a conveyance to the premises.

The trial court concluded that defendant's brother had in fact orally agreed to surrender any interest he had in the property to the defendant but concluded that the agreement was

unenforceable because it was not in writing. Defendant was ordered to execute a conveyance in favor of plaintiffs. Defendant appealed and the Utah Supreme Court affirmed. This is the minority rule, *see* 65 A.L.R. 771, 777, but it is the Utah rule.

The agreements upon which Limb relies to support his argument that plaintiffs relinquished their equity in the subject real property after they were in default include the June 13, 1990, bankruptcy stipulation and the August 19, 1991, agreement which plaintiffs and defendants Tyler entered into just before Limb purchased the property. The former is in writing and signed. The latter was an oral agreement, but is enforceable to the extent plaintiffs acknowledge the agreement and its terms. *See Bentley v. Potter*, 694 P.2d 617, 621 (Utah 1984).

Bankruptcy Stipulation. Limb contends that the bankruptcy stipulation constituted a relinquishment of plaintiffs' equity of redemption. The language of that stipulation made it clear that the objective of the stipulation was to fashion a method by which the property could be sold to a third party in an arms-length transaction thus generating money to pay the obligation owed Tylers and allowing plaintiffs (or their bankruptcy estate) "to receive the remaining proceeds or unsold property." Rather than constituting a relinquishment of plaintiffs' interest in this agreement is in fact a reaffirmation of that interest. Indeed, the agreement acknowledges plaintiffs' interest and states that plaintiffs will withdraw their claim in the future if the property is not sold or the obligation owed Tylers otherwise satisfied prior to March 1992. Limb purchased the subject property from Tylers in September 1991, long before the bankruptcy stipulation called for the relinquishment of plaintiffs' interest therein.

August 1991 Agreement. On August 19, 1991, Tylers advised plaintiffs that Tylers had located a purchaser for the property and that in exchange for Tylers' agreement to pay plaintiffs the sum of

$20,000, plaintiffs agreed to relinquish their interest "in order to facilitate the sale of the property to Tylers' purchaser." Limb would have the court construe this oral contract as plaintiffs' agreement to immediately relinquish their interest in the subject real property.

The general rules by which the scope of contractual obligations are defined provide that when the contract involves "an exchange of promises [which] can be rendered simultaneously, they are to that extent due simultaneously, unless the language or the circumstances indicate the contrary." Restatement Second, *Contracts* § 234. This rule "applies whenever [simultaneous] performance is possible, consistent with the terms of the contract." *Id.*, comment *b*.

A contract involving the conveyance of an interest in real property in exchange for a promise to pay an agreed upon price provides the classic example of those contracts in which the above-stated rule applies. *See id.*, comment *b*, Illustrations 1 through 4. *Cf. Kimball v. Campbell*, 699 P.2d 714 (Utah 1985) (finding that parties intended that one party would execute and deliver lien release "as soon as" other party tendered agreed upon payment upheld where written agreement required release to be executed and delivered "forthwith" and required consideration of release to be paid on or before date certain which was 22 days after the agreement was signed).

> A requirement that the parties perform simultaneously where their performances are to be exchanged under an exchange of promises is fair for two reasons. First, it offers both parties maximum security against disappointment of their expectations of a subsequent exchange of performances by allowing each party to defer his own performance until he has been assured that the other will perform. . . . Second, it avoids placing on either party the burden of financing the other before the latter has performed. Subsection (1) therefore imposes a requirement of simultaneous performance whenever this is feasible under the contract, in the absence of language or circumstances indicating a contrary intention.

Id., Rest.2d, comment *a*.

The application of general principles of contract law does not result in a construction of the August 19 agreement which instantaneously extinguishes plaintiffs' equity in the subject real property. For the agreement to so operate, it would have to be established that such was the intention of the parties. Such a finding would have to be made as a matter of fact. No such fact was established in the summary judgment proceedings and the case cannot be properly disposed of on that level. *See Kimball*, 699 P.2d, at 716.

POINT IV

DEFENDANT LIMB WAS ON CONSTRUCTIVE NOTICE OF PLAINTIFFS' INTEREST.

Constructive Notice Imparted by Smith's Possession. Possession of land is a fact which places all persons on inquiry as to the nature of the occupant's interest. *See generally*, 77 Am.Jur.2d, *Vendor and Purchaser* §671. In *Toland v. Cory*, 6 Utah 392, 24 P. 190 (1890), the Utah Supreme Court held:

> We think the better doctrine is that an occupant's possession is actual notice of his title, and all persons with notice of such possession must at their peril take notice of his full title in the premises, no difference what the records shows. Until the recording statutes were enacted, possession was notice of ownership, and a conveyance made by a party out of possession was void. The purpose of these statutes was not to change the rule that possession was evidence of title and notice to all the world of ownership, but to afford the means of preserving the chain of title, and give notice of the ownership of unoccupied lands.

6 Utah, at 395.

The possession must be open and visible and may be shown by any use of the land that indicates an intention to appropriate it to the benefit of the possessor. *See generally*, 77 Am.Jur.2d,

Vendor and Purchaser §675. *Cf. Neponset Land & Live Stock Co. v. Dixon*, 10 Utah 334, 37 P. 573 (1894) (harvesting crops from a portion of the land sufficient to give constructive notice). The question of whether or not an occupant's possession is sufficient to impute notice is one of fact. *See* 77 Am.Jur.2d, *Vendor and Purchaser* §672.

In the instant case, plaintiffs continued to enjoy the possession of the subject property after they had executed the warranty deeds in favor of Tylers. R 1198-1200. Note Mr. Tyler's comment regarding Smiths' continuing possession of the property:

> Q. [BY MR. PENDLETON] Okay. My question is, who had the right to the possession of this property after it had been deeded to you?
>
> MR. RUSSELL: Objection. Calls for legal conclusion.
>
> MR. DUNLAP: It's also asked and answered.
>
> [MR. TYLER]: I don't really understand what you mean. I didn't have anything on it. He [plaintiff Penn Smith] was usin' it and everything.

R 1199-1200.

Likewise, Mr. Smith testified that he continued to store personal property on the subject real estate and was continuing to use the real estate for that purpose at the time Limb purchased the property. R 1056-57. Indeed, in questioning Smith, Limb's attorney had Smith identify a letter dated April 28, 1991, wherein Mr. Tyler mentions the personal property which Smiths were storing on the real estate.

> We are showing the properties to people or different parties at times and I think I should mention to you that whatever you have on these properties that you might want to keep should be removed or stored somwhere [*sic*] else.

R 1056, 1305.

Clearly, there is a factual issue as to whether or not plaintiffs' use of the subject real property was of such a nature as to cause any reasonable person to inquire about the extent of the interest which plaintiffs had or claimed in the land. Clearly, if Limb had entered upon the land as a trespasser and converted the scrap metal to his own use, he would have likely exposed himself to criminal liability for theft. Genuine issues preclude summary judgment.

The district court concluded that "there can be no genuine issue of fact that scrap steel on vacant land does not constitute 'open, visible, and *exclusive*' possession that could give notice" that the person making such use of the property may claim some interest therein. R 665. This is not a conclusion of law. If this statement is of any legal significance, it is a finding of fact--one which is completely without evidentiary support. Indeed, all of the evidence in the record weighs against this proposition.

Constructive Notice Imparted by Official Records. Limb acknowledges that he made no inspection of the record and was unaware of the existence or nature of any of the documents which an inspection of the record would have revealed. R 1158-59. The issue is not whether or not Limb justifiably relied upon the notice of abandonment but rather whether or not the recordation of such a document had any effect upon the title to the subject property as a matter of law, *i.e.*, did the notice of abandonment place the world on constructive notice, and if so, notice what fact affecting title to the property?

Without question, the extension and modification agreement recorded on November 3, 1988, gave the world constructive notice of plaintiffs' interest in parcels 1, 2, and 3. Limb contends that the bankruptcy trustee's notice of abandonment was recorded prior to the recordation of Limb's

warranty deed and that any constructive notice arising by virtue of the extension and modification agreement was thereby extinguished as a matter of law. The record does not demonstrate that the notice of abandonment was recorded before Limb's warranty deed[5]. Even if it was, it avails Limb nothing.

The language of Utah Code Ann. §57-3-2 speaks in terms of notice being imparted by each document which has been made a part of the public record. Once a document which has an effect upon title to real property is duly recorded, the effect of that document and the notice imparted thereby must be considered with and harmonized against all other documents affecting title to the same parcel. *See generally, O'Reilly v. McLean*, 84 Utah 551, 37 P.2d 770 (1934)(purchaser with notice of another's interest in real estate may not blindly rely upon representations of persons other than claimant to the effect that claimant's interest has been extinguished).

The notice of abandonment was initiated by a request signed by Tylers. It is in a format created and uses language selected by Tylers or persons whose objective it was to advance Tylers' interests. The portion of the document which is denoted as "notice of abandonment" is in the same format and prepared by the same author and states that the bankruptcy trustee, whose signature appears thereafter, has "found the above listed property to not belong to the debtor, not to be a part of the bankruptcy estate, therefore burdensome to the estate, and of inconsequential or no value to the estate."

Without question, a bankruptcy trustee does not have power to adjudicate interests in real property. *See generally*, 9 Am.Jur.2d, *Bankruptcy* §§289-315. When a bankruptcy trustee

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[5]The notice of abandonment was recorded on September 16, 1991, at 1:40 p.m. MDT, as entry number 0390753 in Book 0618 at page 0794. R 1306-08. Counsel is unable to locate in the record similar information relating to the recording of Limb's warranty deed.

abandons an asset, the asset reverts to the debtor and stands as if no bankruptcy petition had been filed. *See Re Dewsnup*, 908 F.2d 588 (10th Cir.). Indeed, an abandonment under 11 U.S.C. §554 cannot be used as a means of effecting a transfer of title. *See Re R-B-Co of Bossier*, 59 BE. 43 (BC WD La 1986).

Notwithstanding the recordation of the notice of abandonment, the notice imparted by the extension and modification agreement and plaintiffs' possession of the real property continued to put the world upon inquiry as to the nature and extent of the interest which plaintiffs' interest therein. The notice of abandonment was no more effective in extinguishing the notice imparted by the extension and modification agreement than any other instrument executed by a stranger to the title would have been.

POINT V

THE DISTRICT COURT ERRED IN SUMMARILY DISMISSING PLAINTIFFS' SECOND CAUSE OF ACTION.

When plaintiffs initiated their action against Tylers without counsel, their theory of recovery was denominated as a claim for breach of contract. R 1. The theory was that Tylers had breached an agreement with plaintiffs by having sold property which plaintiffs had conveyed to Tylers as security. The complaint alleged that the property was sold for $75,000 under its fair market value and plaintiffs had been wrongfully deprived of their equity therein. R 1-2. In substance and effect, plaintiffs' initial complaint sounded more in property law than in contract law.

After retaining counsel, a second amended complaint was filed which alleged that plaintiffs possessed an unforeclosed equity of redemption, an enforceable interest in the subject real property. R 386-87. The second amended complaint alleged a pure contract claim as second cause

of action. R 385-87. Relief under this second cause of action was sought as an alternative to relief on the first and third causes of action. If Tylers would concede the contract and its breach, plaintiffs would be happy to abide by the agreement of August 19, 1991. If, on the other hand, the agreement were avoided because Tylers successfully denied its formation, its terms, or its enforceability, plaintiffs would be under no obligation to abandon that which they had agreed to relinquish in consideration of the payment they were to have received under the terms of the contract. When Tylers answered the second amended complaint, they denied the allegations concerning the August 19 agreement. R 404-05.

When defendant Limb moved for summary judgment, his motion, of course, did not address any claim other than the first cause of action. This was the only cause that involved the title to the subject real property. R 539-59. The stated objective for Limb's motion was to obtain an order establishing that plaintiffs' equity of redemption had been extinguished by estoppel, waiver, or operation of the Utah Recording Act. R 543. Limb argued that by the virtue of the August 19 agreement, plaintiffs had immediately and irrevocably relinquished their interest in the subject real property. R 555-57.

Although there was no motion before the court for an order summarily dismissing plaintiffs' second cause of action, the district court dismissed all of plaintiffs' claims with prejudice with the sole exception of plaintiffs' third cause of action seeking compensation for certain water rights they had transferred to defendant Tylers. R 674.

Plaintiffs sought clarification of the order and received none. R 676-77. The court's final judgment clearly confirmed that the district court did summarily dismiss plaintiffs' second cause of action as part of the order entered on May 2, 1995. R 731. This was clearly reversible error on

a procedural level. Moreover, the district court has never articulated any basis for concluding that plaintiffs not only lost their equity in the subject real property but failed to acquire an enforceable contract claim in the process.

POINT VI

THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' THIRD CAUSE OF ACTION AND REFUSING TO SET THAT ORDER ASIDE UPON APPLICATION UNDER UTAH R.CIV.P. 60(b).

After the entry of the partial summary on May 2, 1995, Limb had but one legally recognized interest in the litigation that was still pending in the district court; pendency of plaintiffs' unadjudicated third cause of action prevented an appeal from the partial summary judgment thereby extending the cloud on the title which was created by the notice of *lis pendens*. *See Hidden Meadows Dev. Co. v. Mills*, 590 P.2d 1244 (Utah 1979). The time for taking that appeal would not begin to run until the remaining claim was either adjudicate on its merits or otherwise concluded or the partial summary judgment was certified under Utah R.Civ.P. 54(b).

Notwithstanding the fact that Limb's attorney was aware that Mr. Dunlap had been negotiating a comprehensive settlement to which Limb himself had agreed to contribute to, counsel filed a motion on behalf of defendant Limb to dismiss the third cause of action for failure to prosecute and, in the alternative, to certify the partial summary judgment for immediate appeal. Either course of action would provide Limb with the only remedy which he was in a position to seek.

Plaintiffs did not resist the Rule 54(b) certification. Indeed, plaintiffs had themselves sought certification of a partial summary judgment a year and a half earlier. Plaintiffs' attorney asked an associate to appear at the motion hearing and make sure that the district court understood that

plaintiffs did not resist certification. With assurances from Tylers' attorney that they would not join in or argue the motion to dismiss, plaintiffs' counsel left town on other business, confident that Limb would obtain the relief he sought with the certification and that no further action would be taken at the upcoming hearing.

Once the district court had certified the partial summary judgment, Limb had no further legal interest or standing in the litigation still pending in the district court. For all intents and purposes, Limb was a stranger to that litigation. The only thing at stake in that proceeding was a claim for money damages asserted by plaintiffs against defendants Tyler. The pendency, abatement, or termination of that proceeding would have no greater legal effect upon Limb than it did upon any other person who was not a party to the litigation. Nevertheless, he was allowed to pursue the motion to dismiss after the relief which he had sought in the alternative had been granted by stipulation.

The district court erred in allowing this. In so doing, the court entered an order which granted the moving party no "relief" because at that point no further order relating to this litigation had any impact upon Limb or his legal interests. Moreover, the court exceed the scope of the pending motion when one of the *alternative* requests had been granted.

Clearly, a trial court acts within its authority in dismissing cases involuntarily and on its own motion when litigants unreasonably delay the prosecution of a pending case. *See Brasher Motor & Fin. Co. v. Brown*, 23 Utah 2d 247, 461 P.2d 464 (1969). It does not necessarily, nor logically, follow that the court may do so without giving notice of its intention to order dismissal on such a basis and on its own motion.

Moreover, a trial court errors in dismissing, either upon its own motion or the motion of an adverse party, litigation which has been reasonably pursued in ways which might not be apparent in the record of the court. Specifically, it has been held an abuse of discretion for a court to dismiss a plaintiff's claim with prejudice for failure to prosecute where a 16-month lapse in activity in the court's record was attributable to the fact that settlement negotiations were ongoing and defendants had not requested that the matter be reset for pretrial conference or trial. *See Utah Oil Co. v. Harris*, 565 P.2d 1135 (Utah 1977).

"The law has no interest in compelling all disputes to be resolved by litigation. One reason public policy favors the settlement of disputes by compromise, is that this avoids the delay and the public and private expense of litigation." *Utah Dept. of Admin. Serv. v. Pub. Serv. Com'n*, 658 P.2d 601, 613 (Utah 1983)(citations omitted). Indeed, compromise and settlement advances social interests which are seldom addressed in the context of adversarial proceedings. *See generally* 15A Am.Jur.2d, *Compromise and Settlement* §5.

In considering a motion to involuntarily dismiss the pending action, the trial court should consider the conduct of all parties to the litigation and consider the opportunity each has had to move the case forward, what each has done in this regard and what, if any, prejudice has been caused by dilatory tactics of ones adversaries. *See Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor*, 544 P.2d 876 (Utah 1975).

In the instant case, the parties had been engaged in settlement negotiations. No one had requested a trial setting or otherwise sought to advance the controversy in the context of the litigation. The district court could not have reasonably concluded that plaintiffs needed to be

censured for not pursuing litigation rather than negotiation. *Cf. Johnson v. Firebrand, Inc.*, 571 P.2d 1368 (Utah 1977).

Plaintiffs have attempted to move this controversy forward to a final resolution through litigation, appeal, and compromise, as the circumstances dictated.[6] Limb on the other hand, apparently because he is so firmly convinced of the strength of his position, has repeatedly sought the summary dismissal of plaintiffs' claims on the merits or any other basis which seemed to have presented itself on the record as it appeared or as Limb was able to make it appear. He has not participated in settlement negotiations and has, again apparently as a result of what he perceives to be the strength of his position, has been a stumbling block in attempts to resolve this matter outside of court. Moreover, he has resisted plaintiffs' efforts to move the litigation to a final resolution, resisting Rule 54(b) certification when plaintiffs attempted to appeal in 1995, moving to dismiss plaintiffs' third cause of action for failure to prosecute approximately seven months after securing the dismissal of plaintiffs' appeal alleging nothing had been done in the case for over 18 months. He continued to pursue the motion to dismiss after the court had granted the relief he had requested as an alternative and resisted efforts to have that order of dismissal set aside. Finally, Limb resisted the inclusion of the parties' depositions as part of the record on appeal, notwithstanding the fact that the merits of this case cannot be fairly determined without them.

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[6]Given the inter-relationship between the factual predicate underlying all three causes of action and more particularly, the second and third causes, plaintiffs though it expedient to seek appellate review of the dismissal of the first two causes before spending the time and resources necessary to litigate the orphaned third cause of action.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that genuine issues of fact preclude the summary judgment of real property title issues and issues related to enforcement of the contract claims which have been asserted as an alternative to establishing plaintiffs' interests in the real property. Moreover, the district court erred in dismissing plaintiffs' third cause and in denying the motion to set aside that order of dismissal. Accordingly, the orders and judgments of the district court should be reversed in their entirety and the case remanded to the district court for further proceedings. Plaintiffs are entitled to their costs.

RESPECTFULLY SUBMITTED this 13th day of February, 1998.

/S/
GARY W. PENDLETON
Attorney for Plaintiffs and Appellants

MAILING CERTIFICATE

I do hereby certify that on this 13th day of February, 1998, I did personally mail two true and correct copies of the above and foregoing document to:

Ronald G. Russell
Attorney for Limb
185 South State Street, Suite 1300
P. O. Box 11019
Salt Lake City, Utah 84147-0019

Ronald Truman
Attorney for Tylers
923 S. River Road, Suite 201
St. George, Utah 84790

/S/
Gary W. Pendleton

ADDENDUM

February 9th, 1991

Mr. Dwane H. Gillman
Mr. & Mrs. R. H. Tyler
C. C. Judith A. Boulden, Judge

When we filed for a Chapter 11 Bankruptcy, upon the advice of our Lawyer Ralph Petty, we made a mistake and included four parcels of property that we had deeded to the Tyler's in 1987. These were collateral for loans that we made from the Tyler's.

Under the terms of the Loans we made from the Tyler's we deeded with Warrantee Deeds to the Tyler's the properties with the understanding that if we did not pay the payments and Property Taxes and late charges on time the properties would automatically be the Tyler's. We have been unable to repay the Tyler's under the terms of the Notes, Agreements and the properties rightfully belong to the Tyler's, about a year before chapter 11 took place.

At the time of filing chapter 11, we were in default on all three accounts mentioned above for more than a year. We knew the properties rightfully belonged to the Tylers but upon suggestion by the lawyer we entered them in the bankruptcy. In all fairness under the terms of the Loans this should never have been done. They belong to the Tyler's.

We now believe that the advice we received from Mr. Petty to include the Tylers property in our Bankruptcy was bad advice and that they should be released to the Tyler's as they really own them and have for about a year before the original filing of the chapter 11.

Please let this letter be our request to release the properties to the Tyler's who should never have been a part of this to begin with.

This Bankruptcy should not be used to hurt Older People like the Tyler's that tried to help us, when we needed help.

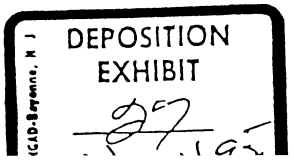
Also, Security Title people here in St. George would testify to this being the truth. Letter enclosed.

These properties have been for sale for 6 or 7 years. There is no reason to continue longer. Please release them and let the Tyler's try to recover there losses.

Thank you,

PENN H. SMITH

MARY ANNE SMITH



Ex. #(

February 11, 1991

To: Mr. Dwayne H. Gillman
Mr. & Mrs. R. H. Tyler

When we filed for a chapter 11 Bankruptcy, upon the advice of our lawyer Ralph Petty, we made a mistake and included four parcels of property that we had deeded to the Tylers in 1987. These were collateral for two loans that we made from the Tylers.

Under the terms of the loans we made from the Tylers, we deeded the properties with Warranty Deeds to the Tylers, with the understanding that if we did not pay the payments, property taxes and late charges on time the properties would automatically be the Tylers. We have been unable to repay the Tylers under the terms of the notes and agreements and the properties rightfully belonged to the Tylers about a year befor we filed our chapter 11.

At the time of filing our chapter 11 we had been in default for more than a year and the properties rightfully belonged to the Tylers but upon the advice of our lawyer he included them in the bankruptcy. This should have never been done.

We now know that the advice we recieved from Mr. Petty to include theese properties in our bankruptcy was bad advice for we really had no claim to them. Please let this letter be our request to release the properties out of our bankruptcy.

Also there is a letter from Security Title concuring in the opinion that we have no furthur claim upon these properties.

Thank You,

PENN H. SMITH

#15 P Smith
EXHIBIT

Mary Anne Smith
MARY ANNE SMITH

IN THE FIFTH JUDICIAL DISTRICT COURT FOR WASHINGTON COUNTY

STATE OF UTAH

PENN HARRIS SMITH, MARY ANNE SMITH, and E.P.S. DEVELOPMENT, a Utah partnership, Plaintiffs, vs. RICHARD H. TYLER, INA W. TYLER, and RUSSELL J. LIMB, Defendants.	MEMORANDUM OPINION and ORDER GRANTING DEFENDANT LIMB'S MOTION FOR SUMMARY JUDGMENT Civil No. 920501015 Judge J. Philip Eves

This matter came before the court on March 27, 1995 for hearing on Defendant Limb's Motion for Summary Judgment dated March 7, 1995. Ronald G. Russell appeared on behalf of defendant Russell J. Limb. Gary W. Pendleton appeared on behalf of plaintiffs. Craig S. Dunlap appeared on behalf of defendants Richard H. Tyler and Ina W. Tyler. Steven D. Burge appeared on behalf of third-party defendant Security Title Company of Southern Utah. Based on the record in this matter, including the pleadings and evidence on file with the court, and the arguments of counsel, the court renders the following opinion and order.

Plaintiffs' Second Amended Complaint seeks a determination that plaintiffs hold an equity of redemption in certain real properties purchased by defendant Limb from defendants Russell H.

Tyler and Ina W. Tyler ("Tylers"). Plaintiffs claim that warranty deeds by which title to the properties was conveyed to the Tylers were actually equitable mortgages and that plaintiffs' equity of redemption arising from those warranty deeds was never extinguished through foreclosure. Defendant Limb has moved for summary judgment on three grounds: (1) plaintiffs are judicially estopped from asserting an equity of redemption because of their specific disclaimer of any interest in the subject properties in prior bankruptcy proceedings; (2) plaintiffs cannot enforce an equity of redemption against defendant Limb who was a bona fide purchaser for value from the Tylers and, therefore, protected by the Utah Recording Act; and (3) the claimed equitable mortgages were abrogated by specific agreements between plaintiffs and the Tylers.

1. Judicial Estoppel.

Under Utah law, judicial estoppel prevents a party who has taken a position in prior litigation and has obtained relief on the basis of it from maintaining the opposite position in another action. Condas v. Condas, 618 P.2d 491, 496 (Utah 1980); see also Hill v. State Farm Mutual Automobile Insurance Company, 829 P.2d 142, 148 n.4 (Utah App. 1992).

In this case, plaintiffs specifically took the position in their prior bankruptcy case that they claimed no interest in the

subject properties and that the properties belonged to the Tylers. The court finds that it is undisputed that on or about February 11, 1991, plaintiffs wrote a letter to Duane H. Gillman, the United States Bankruptcy Trustee, in which plaintiffs specifically represented to the bankruptcy trustee that they claimed no interest in the subject properties. See Depo. Ex. 15; P. Smith Depo. p. 86. Along with the February 11, 1991 letter, plaintiffs filed with the bankruptcy court an Ex Parte Motion to Release Real Property in which plaintiffs again represented that they claimed no interest in the properties. See Depo. Ex. 16; P. Smith Depo. pp. 94-95. Further, plaintiff Penn Harris Smith testified at his recent deposition that the reason such representations were made to the bankruptcy court was so that the properties would be released from the bankruptcy to enable the Tylers to sell the properties. See P. Smith Depo. pp. 95, 100-101.

The court further finds that it is undisputed that the bankruptcy trustee acted upon the representations of plaintiffs and their request that the property be released and signed a Notice of Abandonment in which the trustee found and concluded that plaintiffs had no interest or claim to the subject properties. See Affidavit of Duane H. Gillman ¶¶ 5, 6. The Tylers relied on plaintiffs' disclaimer of any interest in the

properties so they could be sold and warranted title to the properties to defendant Limb pursuant to a Warranty Deed. Tylers and their successor in title, defendant Limb, would be prejudiced if plaintiffs are not estopped from disavowing the position taken in the prior bankruptcy proceedings.

Because defendant Limb is in privity of estate with the Tylers, having received his title to the subject properties by way of a deed from the Tylers, defendant Limb is entitled to invoke the doctrine of judicial estoppel. See Condas v. Condas, 618 P.2d 491 (Utah 1980) (holding that judicial estoppel "is applicable to defendants here, as successors in interest of the real property involved in both cases").

2. Utah Recording Act.

Under Utah law, an unrecorded conveyance is "void as against any subsequent purchaser of the same real property" where the subsequent purchaser "purchased the property in good faith and for valuable consideration" and his conveyance is recorded first. Utah Code Ann. § 57-3-3 (1994). A bona fide purchaser for value entitled to the protection of the recording act is "one who takes without actual or constructive knowledge of facts sufficient to put him on notice of the complainant's equity." Blodgett v. Martsh, 590 P.2d 298, 303 (Utah 1978).

The court finds that it is undisputed that defendant Limb had no actual knowledge that plaintiffs claimed an interest in the properties prior to his purchase and the recordation of the deed conveying title to him. In addition, based on the undisputed facts, defendant Limb did not have constructive notice of plaintiffs' claimed equity of redemption prior to the recordation of his deed. Before the Warranty Deed from Tylers to Limb was recorded, the bankruptcy trustee's Notice of Abandonment was recorded. The Notice of Abandonment specifically stated that the debtors (plaintiffs Penn H. Smith and Mary Anne Smith) had no interest in the subject properties. There is no evidence that defendant Limb examined the county records prior to his purchase. However, if defendant Limb had examined the record, he would have found the recorded Notice of Abandonment from the bankruptcy trustee. Any inquiry to the bankruptcy trustee would have resulted in defendant Limb learning that the bankruptcy trustee's conclusion was based on plaintiffs' specific disclaimer of any interest in the properties. See Affidavit of Duane H. Gillman ¶¶ 5, 6. Defendant Limb would have no duty to disbelieve the bankruptcy trustee's conclusion or to aggressively investigate and set the record straight. See Diversified Equities v. American Savings and Loan Association, 739 P.2d 1133, 1136 (Utah App. 1987).

Plaintiffs argue that constructive notice can also be given by possession and assert that there are disputed fact issues regarding plaintiffs' possession of the properties. Under Utah law, "actual possession . . . when open, visible, and exclusive, will put upon inquiry those acquiring any title to or a lien upon the land so occupied. . . ." Mathis v. Madsen, 1 Utah 2d 46, 261 P.2d 952, 959 (1953). The only evidence of possession submitted by plaintiffs is the testimony of plaintiff Penn H. Smith that there were certain items of "junk" including "scrap steel and things of that nature" on what was otherwise vacant property. See P. Smith Depo. p. 103. The court concludes that there can be no genuine issue of fact that scrap steel on vacant land does not constitute "open, visible, and exclusive" possession that could give constructive notice of a claim against title.

3. Abrogation of Equitable Mortgages.

Even if the court were to assume that the absolute warranty deeds given to the Tylers by plaintiffs were intended to be equitable mortgages, the parties may subsequently abrogate a conditional mortgage by agreement. 55 Am. Jur. 2d, Mortgages § 520, at 508 (1971). Plaintiffs themselves in this case have alleged at least two separate agreements that abrogated the claimed equitable mortgages. First, plaintiffs and the Tylers entered into a stipulation in connection with plaintiffs'

bankruptcy case that provided that the properties would be sold free of any claim of plaintiffs with excess proceeds to be paid to the bankruptcy court. Upon execution of that stipulation, plaintiffs agreed that they no longer had an equity of redemption and that their bankruptcy estate would only have an interest in the proceeds of a sale. Second, plaintiffs allege in their Second Amended Complaint, in affidavits filed in this case, and in deposition testimony that on August 19, 1991 plaintiffs agreed to permit Tylers to sell the properties free of plaintiffs' claims. [See P. Smith Depo. pp. 80-84; Affidavit of Penn H. Smith dated April 28, 1994 at ¶ 11; Second Amended Complaint ¶ 14.] Plaintiffs assert that the statute of frauds would operate to prevent the enforcement of their August 19, 1991 agreement to permit the properties to be sold. The court concludes, however, that by admitting the existence of such an agreement in the pleadings, the plaintiffs have waived any statute of frauds defense. See Bentley v. Potter, 694 P.2d 617, 621 (Utah 1984).

For the foregoing reasons and for the additional reasons identified in the memoranda submitted by the Tylers in support of their motion for summary judgment, the court concludes that there are no genuine issues of material fact and that defendant Limb is entitled to judgment as a matter of law. Accordingly,

IT IS HEREBY ORDERED that Defendant Limb's Motion for Summary Judgment is hereby granted. The court will enter a judgment dismissing the plaintiffs' Second Amended Complaint as against defendant Limb, thereby adjudicating that plaintiffs have no claim to the subject properties and awarding costs as provided by law.

DATED this 27th day of April, 1995.

BY THE COURT:

J. Philip Eves
District Court Judge

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Certificate of Mailing or Hand Delivery

I hereby certify that on this 27th day of April, 19 95, I mailed true and correct copies of the above and foregoing document, first class postage pre-paid to the following, or placed the copies in counsel's folder:

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Carolyn Smitherman

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY

STATE OF UTAH

PENN HARRIS SMITH, MARY ANNE SMITH, AND E.P.S. DEVELOPMENT, a Utah partnership Plaintiff, v. RICHARD H. TYLER, INA W. TYLER, and RUSSELL J. LIMB, Defendants.	MEMORANDUM OPINION and ORDER GRANTING DEFENDANTS RICHARD AND INA TYLERS' MOTION FOR SUMMARY JUDGMENT Civil No. 920501015
RICHARD H. TYLER and INA W. TYLER, Third Party Plaintiffs, v. SECURITY TITLE COMPANY OF SOUTHERN UTAH, a Utah Corporation, Third Party Defendant.	

This matter came before the court on March 27, 1995 for hearing on Defendants Richard and Ina Tyler's Motion for Summary Judgment. Ronald G. Russell appeared for Defendant Russell Limb. Gary Pendleton appeared for Plaintiffs. Craig S. Dunlap appeared for Defendants Richard and Ina Tyler. Steven D. Burge appeared for Third-party Defendant Security Title Company of Southern Utah.

Based upon the documents before the court and the arguments of counsel the court issues the following opinion and order.

Plaintiffs' Second Amended Complaint seeks enforcement of plaintiffs alleged right of redemption in certain real property sold by Defendants Tyler to Defendant Limb. Plaintiffs assert that said property was deeded to the Tylers as part of a loan transaction and that their rights of redemption were not properly extinguished through foreclosure.

Defendants Richard and Ina Tyler move for summary judgment on the grounds of judicial estoppel, equitable estoppel, and waiver.

FACTS[1]

1. In November of 1987 the Smiths filed for bankruptcy under Chapter 11.

2. In their bankruptcy filing the Smiths claimed an interest to the subject property and listed Richard and Ina Tyler as creditors.

3. On June 13, 1990, the Smiths and Tylers signed a Stipulation regarding their interests in the subject property.

4. The Stipulation was drafted by Plaintiffs' attorney and required Bankruptcy Court approval.

5. On August 1, 1990, Judge Judith A. Boulden signed an Order, drafted by Plaintiffs' attorney, approving the Stipulation.

---

[1]Additional facts are set forth in this Court's Order granting Defendant Russell Limb's Motion for Summary Judgment.

6. On February 11, 1991, Plaintiffs wrote a letter to the U.S. Trustee in Bankruptcy, Duane Gillman. Plaintiffs stated that listing the property in the bankruptcy proceeding was a "mistake" and requested that the property be released from the bankruptcy. See Depo. Ex. 15; P. Smith Depo. p. 86.

7. In addition to their letter Plaintiffs signed an "Ex Parte Motion to Release Real Property" in which Plaintiffs assert that the Tylers "should be granted the relief of regaining the control of their property." See Depo. Ex. 16; P. Smith Depo. pp. 94-95.

8. It is clear from the documents in the record and Plaintiff's testimony that Penn Smith wanted the property released from the Bankruptcy Court. See P Smith Depo. pp. 95, 100-101.

9. On August 23, 1991, The U.S. Trustee in Bankruptcy, Duane Gillman signed a Notice of Abandonment regarding the subject property. The Notice stated that the Smiths had no interest in the subject property and that there was no objection or request for a hearing regarding the abandonment. See Affidavit of Duane Gillman at ¶¶ 5-6.

10. Duane Gillman relied on Plaintiffs representations in abandoning the property. See Affidavit of Duane Gillman at ¶ 6.

A. JUDICIAL ESTOPPEL.

Plaintiffs claims are barred by the doctrine of judicial estoppel. Judicial estoppel prevents a party from taking a position in litigation, obtaining relief on it, and then changing

that position in subsequent litigation. See Condas v. Condas, 618 P.2d 491, 496 (Utah 1980); see also Hill v. State Farm Mutual Automobile Ins. Co. 829 P.2d 142 (Utah App. 1992).

In this case Plaintiffs clearly took the position in the Bankruptcy proceeding that they had no interest in the property. As a direct result of Plaintiffs taking this position the property was abandoned by the Bankruptcy Trustee. Now that the property is no longer subject to the claims of creditors in Federal Bankruptcy Court Plaintiffs seek to bring an action in this Court. If this were permitted there would be nothing to stop future debtors from disavowing any interest they may have to their property while in Bankruptcy proceedings, and then later coming into State Court and asserting the interest they previously disavowed. This cannot be tolerated and is the reason judicial estoppel is applied by the Courts.

B. EQUITABLE ESTOPPEL.

The doctrine of equitable estoppel also bars Plaintiffs' claims. In Utah the four elements of equitable estoppel are:

> (1) a statement, admission, act or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first parties statement, admission, act or failure to act; (3) injury to the second party that would result from allowing the first to contradict or repudiate such statement, admission, act or failure to act.

Holland v. Career Service Review Bd., 856 P.2d 678 (Utah App. 1993).

In this case Plaintiffs made clear unequivocal statements

to the Tylers, the Bankruptcy Trustee, and to the Federal Bankruptcy Court that Plaintiffs had no claim to the disputed properties. Furthermore, the Tylers and the Bankruptcy Trustee reasonably relied on those statements. Allowing Plaintiffs to assert a claim to the property that is contradictory to the position they held during the bankruptcy proceedings would be detrimental to Defendants. Plaintiffs therefore, are equitably estopped from asserting their claims.

C. WAIVER.

Plaintiffs waived their claims against Defendants. A waiver is a voluntary and intentional relinquishment of a known right. Beckstead v. Deseret Roofing Co., Inc., 831 P.2d 130 (Utah App. 1992). The intent to relinquish a right can be implied from conduct if the conduct unequivocally evinces an intent to waive or is at least inconsistent with any other intent. B.R. Woodward Mktg., v. Collins Food Serv. Inc., 754 P.2d 99 (Utah App. 1988).

Plaintiffs affirmatively stated that they had no claim to the disputed properties. Plaintiffs actions indicate an intent to abandon any claim to the properties and are inconsistent with any other position. Plaintiffs have therefore, waived their right to assert any claim to the properties which are the subject of this action.

D. CONCLUSION.

For the reasons stated above and the additional reasons presented by the various Defendants in their briefs, this court concludes that summary judgment is appropriate.

IT IS HEREBY ORDERED THAT Defendants Richard and Ina Tylers Motion for Summary Judgment is granted. Plaintiffs' Complaint is dismissed with prejudice as to all claims regarding the subject property. Plaintiffs claims regarding the water rights are reserved.

DATED THIS 27th day of April, 1995.

BY THE COURT:

J. Phillip Eves

J. Phillip Eves
District Court Judge

Certificate of Mailing or Hand Delivery

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IN THE FIFTH JUDICIAL DISTRICT COURT FOR WASHINGTON COUNTY

STATE OF UTAH

PENN HARRIS SMITH, MARY ANNE SMITH, and E.P.S. DEVELOPMENT, a Utah partnership, Plaintiffs, vs. RICHARD H. TYLER, INA W. TYLER, and RUSSELL J. LIMB, Defendants.	FINAL JUDGMENT Civil No. 920501015 Judge J. Philip Eves

This matter came before the court on September 23, 1996 on Defendant Limb's Motion to Dismiss for Lack of Prosecution or, Alternatively, to Certify Partial Summary Judgment as Final. Ronald G. Russell appeared on behalf of Russell J. Limb ("Limb"). Michael B. Hughes appeared on behalf of Richard H. Tyler and Ina W. Tyler ("Tylers"). Douglas D. Terry appeared on behalf of the plaintiffs. Based on the record in this matter, the court having determined to grant said motion, and for good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. For the reasons set forth in the court's Memorandum Opinions dated April 27, 1995 granting the summary judgment motions of defendants Limb and Tylers, the plaintiffs' Second Amended Complaint is dismissed in its entirety and with prejudice as against Limb, and the First and Second Causes of Action in the plaintiffs' Second Amended Complaint are dismissed with prejudice as against Tylers.

2. The court hereby adjudicates and declares that plaintiffs have no right, title, equity, lien, or interest in the following-described real property located in Washington County, Utah:

PARCEL 1:

All of Lot 19 of the CANYON BREEZE R.V. RESORT, according to the Official Plat thereof, recorded in the Office of the County Recorder of said County.

PARCEL 2:

All of Lot 45 of the CANYON BREEZE R.V. RESORT, according to the Official Plat thereof, recorded in the Office of the County Recorder of said County.

PARCEL 3:

Beginning at a point North 89°15'05" East 769.50 feet, along the Section line from the Northwest Corner of the Northeast Quarter of the Northwest Quarter of Section 20, Township 42 South, Range 15 West, Salt Lake Base and Meridian, and running thence South 00°37' East, 356.17 feet; thence North 89°23' East 202.37 feet; thence North 00°37' West, 189.02 feet; thence North 51°03'56" West, 262.49 feet to the point of beginning.

PARCEL 4:

Beginning at a point North 89°23' East 611.05 feet along the 40 line and North 00°37' West 260.00 feet from the Southwest Corner of the Northeast Quarter of the Northwest Quarter of Section 20, Township 42 South, Range 15 West, Salt Lake Base and Meridian, and running thence North 00°37' West 438.46 feet; thence South 89°23' West 43.00 feet; thence North 00°37' West 150.0 feet; thence South 38°04'36" West 179.63 feet; thence South 00°36' East 349.82 feet; thence South 29°25'44" East 114.13 feet; thence North 89°23' East 99.06 feet to the point of beginning.

3. The Third Cause of Action in plaintiffs' Second Amended Complaint is dismissed as against Tylers for lack of prosecution.

4. For the reasons set forth in the court's Order Granting Third-Party Defendant Security Title's Motion for Summary Judgment dated May 31, 1995, the Third-Party Complaint of Tylers is dismissed with prejudice.

5. The court grants judgment in favor of Limb and against plaintiffs in the amount of costs of this action totaling $_____.

6. The court grants judgment in favor of Tylers and against plaintiffs in the amount of costs of this action totaling $_____.

7. The court grants judgment in favor of third-party defendant Security Title Company and against Tylers in the amount of costs of this action totaling $_____.

8. The court having adjudicated all claims in this action and finding no just reason for delay hereby certifies this judgment as a final judgment.

DATED this _____ day of October, 1996.

BY THE COURT:

_____

Honorable J. Philip Eves
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 1996 a true and correct copy of the foregoing FINAL JUDGMENT was mailed, postage prepaid, to:

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