

1988

Zion's First National Bank, a National Association v. Barbara Jensen Interiors, Inc., Lowell N. Jensen and Barbara W. Jensen : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 880207

UTAH COURT OF APPEALS

ZIONS FIRST NATIONAL BANK,
a National Association,

Plaintiff-Respondent,

v.

BARBARA JENSEN INTERIORS, INC.,
LOWELL N. JENSEN and BARBARA W.
JENSEN,

Defendants-Appellants.

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Docket No. 880207-CA

Argument Priority 14B

BRIEF OF THE RESPONDENT

An appeal from a Final Order of Judge Raymond S. Uno

Judge of the Third District Court

Salt Lake County, State of Utah

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UTAH COURT OF APPEALS

ZIONS FIRST NATIONAL BANK,	:	
a National Association,	:	
Plaintiff-Respondent,	:	Docket No. 880207-CA
v.	:	
BARBARA JENSEN INTERIORS, INC.,	:	
LOWELL N. JENSEN and BARBARA W. JENSEN,	:	Argument Priority 14B
Defendants-Appellants.	:	

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II. STATEMENT OF ISSUES

The issues on appeal are:

(1) Did the District Court err when it enforced an oral settlement agreement based on the uncontroverted facts before it?

(2) If a party by word and conduct consents to a settlement agreement, is that settlement agreement void because that party had unexpressed reservations?

(3) Must a District Court hold an evidentiary hearing in determining whether to compel a settlement when there are no conflicting facts in the submitted affidavits?

(4) Did the District Court err in denying Appellants' Motion to Disqualify Counsel where Respondent's law firm had ceased representing Appellants more than six months prior to the execution of the guarantees on which this suit is based and there was no other relationship between the representation and the issues of this case?

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE.

Zions First National Bank ("Zions") filed its Complaint suing Barbara Jensen Interiors to recover on a promissory note and suing Lowell and Barbara Jensen individually on Continuing Guarantees of Credit which they had signed. As defense to that action, Appellants contend that their individual Continuing Guarantees were released when they paid off a prior loan with

Zions and dispute the facts surrounding their execution of new Continuing Guaranties. Appellants also counterclaimed against Zions alleging breach of oral promises to extend credit to Appellants and for wrongfully recording in January 1984 a trust deed given by Appellants.

B. COURSE OF PROCEEDINGS.

Zions filed its Complaint on June 3, 1986. The Court scheduled the trial to begin on March 18, 1987. On February 10, 1988, the parties entered into an oral settlement agreement and cancelled the trial date. Shortly thereafter, Zions' counsel submitted to Appellants a written settlement agreement. Appellants did not respond to that draft in any way for two months, whereupon Zions filed a Motion to Compel Settlement. Thereafter, Appellants opposed that motion and filed a Motion to Disqualify Ray, Quinney & Nebeker as Zions' counsel.

C. DISPOSITION AT TRIAL COURT.

On July 28, 1987, the trial judge denied Appellants' Motion to Disqualify counsel and granted Zions' Motion to Compel Settlement. (Exhibit A; Tr. 228-230.) Appellants filed an untimely objection to the form of the Order, arguing as to the Order's compelling the settlement agreement that by releasing Appellants' claims against "agents" of Zions, the Order erroneously released claims against Lee McCullough of Callister,

Duncan & Nebeker, Appellants' former counsel. Appellants' objections to the Court's Order were heard on September 28, 1988, despite the fact that the Order had been signed.

On November 23, 1987, the district court entered an Amended Order which added a paragraph 4 clarifying that the settlement agreement makes no release of any attorneys who have represented Appellants. (Exhibit B; Tr. 239-241.)

D. RELEVANT FACTS.

1. Zions' original Complaint was filed June 3, 1986. (Tr. 2-8.)

2. On October 20, 1986, Ray, Quinney & Nebeker ("RQ&N") was substituted as trial counsel for Zions. (Tr. 38-40.)

3. On January 20, 1987, pursuant to a Motion to Compel, the Court ordered Appellants to answer Zions' outstanding interrogatories and requests for production of documents not later than January 30, 1987. The Court also ordered the Jensens to submit themselves for depositions on February 10 and 11, 1987. Because of Appellants' delays, the Court awarded Zions \$200.00 under Rule 37. The trial date of March 18, 1987 was not disturbed. (Tr. 109-110.)

4. Zions properly noticed the depositions of each of the Appellants for February 10, 1987 at the offices of Ray, Quinney & Nebeker. (Tr. 102-103, 104-105, 106-108.)

5. The Jensens arrived for the depositions on February 10, 1987 but then requested time before beginning the

depositions to consult with their attorney. Following their consultation, Lowell N. Jensen and Barbara W. Jensen, together with their attorney, Jeffrey B. Brown, met with Donald M. Bennett of Zions and Zions' counsel, James S. Jardine and John A. Adams, to discuss settlement. (Affidavit of Donald M. Bennett, ¶¶ 6-9; Exhibit C; Tr. 168.)

6. At the conclusion of these negotiations, the parties agreed to settle their dispute on specific terms. James S. Jardine summarized and repeated the material terms of the Settlement Agreement before the meeting concluded and each side agreed to the terms stated. (Affidavit of Donald M. Bennett, ¶¶ 10, 14-15; Exhibit C; Tr. 168-170.)

7. It was agreed by both sides that Zions' counsel would draft the Settlement Agreement, Mutual Release and Waiver Agreement and Judgment by Confession and Verified Statement. (Exhibit D; Tr. 145-163. Affidavit of Donald M. Bennett, ¶ 13; Tr. 170.) By cover letter dated February 18, 1987, James S. Jardine had copies of the draft settlement papers mailed to Jeffrey B. Brown. (Tr. 165.)

8. In their Affidavit filed in opposition to the Motion to Compel Settlement, Appellants do not assert that they made any statement or took any action at the February 10, 1987 settlement discussions to indicate they were not agreeing to settle the case. Rather, they assert only that they "believed no firm settlement was reached." (Affidavit of Lowell Jensen, Barbara Jensen, and Barbara Jensen Interiors, ¶ 4; Tr. 184.)

9. Based upon the oral settlement agreement reached by the parties, Mr. Jardine notified the District Court on February 10, 1987 of the settlement agreement so that the pending trial date could be vacated.

10. Between February 18, and the first of April 1987, counsel for Zions wrote to and called Appellants' counsel asking for some response to the written settlement draft. No response was received. (Tr. 141.)

11. On April 13, 1988, Zions filed a Motion to Compel Settlement and Affidavit of Donald M. Bennett. (Tr. 136-137, 167-171.)

12. On May 20, 1988, one day before the scheduled hearing on the Motion to Compel Settlement, Appellants filed a Motion to Disqualify Counsel and a Memorandum in Opposition to Motion to Compel Settlement. (Tr. 177-182, 197-198.)

13. Stephen H. Anderson, formerly a member of the law firm of Ray, Quinney & Nebeker ("RQ&N"), represented the Appellants in several matters in the years 1979 through December 1983. In 1983, Mr. Anderson represented Appellants in a buy-back of Barbara Jensen Interiors Associates and, in that connection, Mr. Anderson represented the Appellants in certain discussions with officers of Zions Bank, which included the substitution of collateral for an ongoing loan which Appellants had with Zions and the pay-back schedule of that loan. (Affidavit of Stephen H. Anderson, ¶¶ 3, 4; Tr. 214-215.)

14. Mr. Anderson does not recall nor do his files reflect his ever discussing with Appellants, with Zions or with other RQ&N attorneys, then-existing Continuing Guarantees of Credit which the Appellants signed or the circumstances under which they would be cancelled. (Affidavit of Stephen H. Anderson, ¶ 4; Tr. 214-215.)

15. The last legal work performed by Mr. Anderson for Appellants was in October 1983 and the last bill was sent in December 1983. (Affidavit of Stephen H. Anderson, ¶¶ 4, 5; Tr. 214-215.)

16. The Continuing Guarantees of Credit, on which Zions sues in this action, were signed by Appellants Lowell and Barbara Jensen in July 1984. (Exhibit to Complaint; Tr. 7-8.)

17. Appellants claim that, despite RQ&N being counsel of record since October 1986, they first realized that Mr. Anderson had been a member of RQ&N on February 10, 1987, the date on which the settlement agreement was negotiated and concluded. However, Appellants said nothing at the time and did not file their Motion to Disqualify until May 20, 1987. (Tr. 193-196.)

IV. SUMMARY OF ARGUMENT

Zions contends that the trial court correctly granted the Motion to Compel Settlement because the uncontroverted evidence before it showed that an actual, unambiguous oral settlement agreement was reached on February 10, 1987. The affidavits of

Appellants create no factual issue because they do not controvert Zions' affidavit account of the actions and words spoken by them at the settlement negotiations. Rather, Appellants' affidavits only assert that Appellants had an unexpressed reservation about settlement. Given the uncontroverted words spoken and actions taken, and the related actions such as cancelling the trial date, the trial judge correctly compelled the settlement without an evidentiary hearing.

The trial court also correctly denied Appellants' Motion to Disqualify RQ&N as counsel for Zions. RQ&N's representation of Zions was not substantially related to its prior representation of Appellants because the guarantees on which Zions sues here were executed by Appellants at least seven months after RQ&N ceased its representation of Appellants. In addition, the district court also correctly ruled that Appellants' Motion was untimely since it was filed seven months after RQ&N entered its appearance in this case.

V. LEGAL ARGUMENT

I.

THE TRIAL JUDGE DID NOT ERR IN COMPELLING THE SETTLEMENT ON THE UNCONTROVERTED FACTS BEFORE THE COURT WHICH REFLECTED AGREEMENT BETWEEN THE PARTIES.

a. The Trial Judge's Decision Should Not Be Set Aside Unless It Was An Abuse of Discretion.

In Utah a trial court has the discretion to summarily enforce settlement agreements entered into by litigants while

litigation is pending before it. See Millerberg v. Steadman, 645 P.2d 602, 604 (Utah 1982); Tracy-Collins Bank and Trust Co. v. Travelstead, 592 P.2d 605, 608 (Utah 1972). It was pursuant to this discretionary authority that the court in the underlying action granted Zions' Motion to Compel Settlement. That decision can be upset on appeal only if it is shown that the trial court abused its discretion. See Bambrough v. Bethers, 552 P.2d 1286, 1290 (Utah 1976). The burden of establishing such an abuse is on the Appellants, Petty v. Gindy Manufacturing Corp., 404 P.2d 30, 33 n.9 (Utah 1965), and a strong showing it required that the courts exercise of discretion was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Himango v. Prime Time Broadcasting, Inc., 680 P.2d 432, 438 (Wash. Ct. App. 1984); see also Safeco Ins. Co. of America v. Honeywell, 639 P.2d 996, 999 (Alaska 1981). Appellants have not and cannot meet that burden.

b. The Court Had Before It Sufficient Facts to Properly Order Specific Enforcement of the Agreement.

The leading Utah case on judicial enforcement of settlement agreements is Tracy-Collins Bank and Trust Co. v. Travelstead, 592 P.2d 605 (Utah 1979). In that case, the court relied on affidavits submitted by the parties and oral argument of their counsel to summarily enforce a settlement agreement. On appeal, the appellant argued that the trial court erred by not

requiring an evidentiary hearing to determine certain unresolved issues of fact. In response, the Supreme Court wrote:

The critical issue is whether the court had before it sufficient facts to properly order specific enforcement according to the terms of the agreement.

Id. at 608. The Court went on to hold that on the basis of the facts before it no evidentiary hearing was required. Id. at 608.

Travelstead establishes that an evidentiary hearing is not required when there is no real dispute as to the facts or when the factual issues are not complex. This holding was later reemphasized by the Supreme Court in Robinson v. State of Utah, 620 P.2d 519, 520 (Utah 1980) and is supported by case law from other jurisdictions. See e.g., U. S. v. Newport News Shipping & Dry Dock Co., 571 F.2d 1283, 1286 (4th Cir. 1978); Meetings & Expositions Inc. v. Tandy Corp., 490 F.2d 714, 717 (2nd Cir. 1973).

(i) There Was No Factual Conflict in the Affidavits Before the Lower Court.

The lower court here correctly determined not to hold an evidentiary hearing because there were no controverted facts in the affidavits and because the issue was not otherwise complex. The question presented to the district court was whether the parties had reached an oral settlement agreement on February 10, 1987. Zions submitted the Affidavit of Donald M. Bennett, who reported the events and statements made at the settlement meeting, including the terms of the settlement repeated and agreed to by the parties. (Tr. 167-182.) Appellants

submitted in opposition the Affidavit of Lowell Jensen, Barbara Jensen and Barbara Jensen Interiors (hereinafter "Jensen Affidavit"). (Tr. 183-187.) However, the Jensen Affidavit nowhere contradicts Mr. Bennett's account of the settlement meeting or the statements made in that meeting agreeing to the settlement. Rather, the Jensen Affidavit only asserts that the Jensens had a different intent or understanding than they expressed in the meeting. The affidavit also suggests that the Jensens changed their minds about settlement, a change not specifically communicated to Zions for over 60 days after the settlement.

The trial judge thus concluded that the evidence of the verbal settlement agreement was not contradicted. He also concluded that a written agreement was not a condition of settlement but merely a memorialization thereof, and that the cancellation by the parties of the depositions and the trial was extrinsic evidence of such actual agreement, as was Appellants' failure to communicate any disagreement with the settlement for over two months.

- (ii) An Oral Agreement Whose Terms Are Unambiguously Expressed Is Not Defeated Because One Party Has An Unexpressed Differing Intent.

Appellants contend that they are not bound by the settlement agreement because there was never a "meeting of the minds", arguing in essence that the Jensens had a different intent or understanding than they expressed in the settlement meeting.

However, "[i]t is well established in the law that unexpressed intentions do not affect the validity of a contract." Jaramillo v. Farmers Ins. Group, 669 P.2d 1231, 1233 (Utah 1983).

Therefore, even assuming Appellants had undisclosed intentions, by manifesting their intent to settle the dispute on specific, unambiguous terms, and by assenting to such terms while James S. Jardine summarized and repeated those terms to them at the conclusion of the negotiations, (Tr. 168-170), the Appellants bound themselves to the terms of the settlement agreement. See City of Everett v. Estate of Sumstad, 631 P.2d 366, 367 (Wash. 1981). Appellants cannot now rely on unexpressed reservations to defeat the existence of the settlement agreement when by their words and conduct they reasonably lead Zions to believe the agreement had been entered into. See Zeman v. Lufthansa German Airlines, 699 P.2d 1274, 1281 (Alaska 1985).

(iii) All of Appellants' Actions Support the Existence of an Agreement.

In addition to the affidavit testimony of what transpired in the settlement negotiations, the lower court found that the Appellants' subsequent conduct evidenced their intent to enter into the settlement agreement. It is a well accepted rule of construction that "in determining whether a contract exists and what its terms are, [courts] examine the objective manifestations of intent, as evidenced by the parties' communications and acts." Real Estate Loan Fund v. Heuner, 709 P.2d 727, 730 (Or. Ct. App.

1985). See also, Praggastis v. Sandner, 595 P.2d 520, 524 (Or. Ct. App. 1979).

In the court's view, the uncontested facts that the Appellants' depositions were cancelled and the court informed of settlement supported the conclusion that a settlement agreement had been reached. Moreover, the two months that passed after the February 10, 1987 settlement meeting without Appellants ever indicating any disagreement with settlement also suggests that there was a change of mind rather than an absence of original agreement. Finally, the Appellants' actions, including their delay in responding to the draft settlement agreement, are similar to Appellants' earlier failure to respond to discovery and their apparent attempts to delay the trial of the case.

(iv) Settlement Agreements Will Be Enforced Even Where the Agreement Was Not Arrived At in the Presence of the Court Nor Reduced to Writing.

The settlement agreement is binding on Appellants even though it was not arrived at in the presence of the court and it was never reduced to writing. See Kukla v. National Distillers Products Company, 483 F.2d 619, 621 (6th Cir. 1973). The Supreme Court made it clear in Travelstead that whether the parties negotiated the settlement in private or in the presence of the court is immaterial. 592 P.2d at 608. Furthermore, once parties orally agree upon the terms of an agreement, a contract exists even though one or both of the parties contemplated that the terms thereof would be reduced to writing as evidence of the agreement.

Lawrence Construction Co. v. Holmquist, 642 P.2d 382, 384 (Utah 1982); Stotilemyre v. Reed, 665 P.2d 1383, 1385 (Wash.Ct.App. 1983); Restatement (Second) of Contracts § 27 (1979). It is undisputed that the Jensens agreed at the February 10, 1987 meeting to settle their dispute on specific terms and that counsel for Zions would draft the settlement agreement. (Tr. 168-170.) Therefore, the subsequent failure of Appellants to execute the written agreement does not act to nullify that oral contract. Lawrence Const. Co., 642 P.2d at 384.

- (v) The Question of the Agreement's Release of Zions' Former Law Firm, Reflected in the Amended Order, Was Not Material Such as to Preclude the Agreement.

Appellants argue in their brief that the fact of settlement is contradicted by the dispute over and eventual resolution in the Amended Order of the non-waiver by Appellants of any claim they might have "against any attorneys who have represented [Zions]." Appellants' Brief, pp. 17-18. The background of this issue shows the fallacy of Appellants' argument.

At the settlement discussions on February 10, 1987, part of the agreement was that Appellants' claims against Zions and its officers would be waived. (Affidavit of Donald M. Bennett, ¶ 10; Tr. 169.) No mention at the settlement negotiations was made of Zions' usual counsel, Lee McCullough of Callister, Duncan & Nebeker ("CD&N"), who had previously also represented Appellants. The draft settlement agreement extended its release and waiver of claims language to Zions' "agents" without further specification.

The Court compelled the settlement and after the Order was entered, Appellants submitted an Objection to the form of the Order, raising the issue of the apparent or purported release of CD&N. Appellants' objections were argued to the Court on September 28, 1987. At that hearing and in its response to Appellants' Objections, Zions indicated that it did not regard the Settlement Agreement's language as extending to or releasing CD&N, that it was never intended that it do so, and that Zions was willing to reflect that understanding in any appropriate way. Thus, at Appellants' request, that understanding was included as paragraph 4 in the Amended Order entered by the district court.

As the foregoing demonstrates, there has never been any dispute over whether CD&N was to be released because it was never intended by any party that CD&N be released. Moreover, while Zions did not think that the original language of the written Settlement Agreement effected such a release, Zions has at all times been willing to change the written agreement's language to more clearly reflect the understanding of the parties.

Thus, Appellants' argument on this point is wrong for three reasons. First, there was no dispute on this term between the parties in the oral agreement. Second, the language in the draft written agreement did not create a dispute on its face, and did not undermine the effectiveness of the oral settlement agreement. Third, Zions' willingness at all times to clarify or amend the written agreement to reflect the parties' understanding reflects the lack of real dispute on this point.

c. The Trial Court Has the Inherent Power to Enforce the Settlement Agreement Entered into Between the Parties.

It is well settled that a trial court possesses inherent power to summarily enforce a settlement agreement entered into by litigants while an action is pending before the court.

Tracy-Collins and Trust Co. v. Travelstead, 592 P.2d 605, 607 (Utah 1979); Miller v. Steadman, 645 P.2d 602, 604 (Utah 1982); Kukla v. National Distillers Products Co., 483 F.2d 619, 621 (6th Cir. 1973); Massachusetts Casualty Insurance Co. v. Forman, 469 F.2d 259, 260 (5th Cir. 1972). Because both the law and public policy favor the resolution of disputes without litigation, settlement agreements are to be upheld whenever possible. Tracy-Collins Bank & Trust Co., 592 P.2d at 607; Echols v. Nimmo, 586 F. Supp. 467, 468-69 (W.D. Mich. 1984).

Thus, the order here was clearly within the district court's power. For the reasons set forth above, the order was proper because the extrinsic terms were clearly unambiguous, and the parties relied upon them.

II.

THE TRIAL JUDGE DID NOT ERR IN DENYING APPELLANTS' MOTION TO DISQUALIFY BECAUSE THE PRIOR REPRESENTATION WAS UNRELATED TO THIS LITIGATION.

As more fully set forth below, the trial judge's denial of the Motion to Disqualify was correct because Ray, Quinney & Nebeker ("RQ&N") does not presently represent any of the Appellants and because RQ&N's prior representation of defendants

was not related to the issues in this suit. Indeed, the Continuing Guarantees of Credit which are at issue in this case were signed by Appellants more than seven months after the last legal work performed for them by Ray, Quinney & Nebeker. In addition, Appellants were on notice of RQ&N's representation of Zions beginning October 20, 1986, but failed until May 20, 1987,¹ on the eve of a hearing on Plaintiff's Motion to Compel Settlement, to raise the issue of a purported conflict, which delay rendered untimely Appellants' Motion.

a. There Are No Circumstances Which Would Give Rise to Disqualification of Plaintiff's Counsel.

In Margulies by Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985), the Utah Supreme Court defined the grounds upon which a law firm would be disqualified for violation of the canons of ethics. Under its teaching, there is no basis for disqualification in this case. In Margulies, the Court noted that the test for disqualification is whether there was a "substantial relationship" between the prior representation and the issues of the present case. Id. at 1202. As noted above, RQ&N finished its actual representation of Appellants in October 1983 and sent its

¹On or about April 7, 1986, counsel for Defendants mentioned to Zions' counsel in a phone call the prior representation of Defendants by Mr. Anderson, and by letter dated April 15, 1987, sent a copy of a 1983 letter to Zions signed by Mr. Anderson on behalf of Defendants. However, Defendants did not assert an actual conflict existed in those communications, but only made inquiry as to whether a conflict might exist.

last bill in December 1983. The Continuing Guarantees on which Zions has sued the Appellants were signed in July 1984.² In addition, Defendants' counterclaim involves events after December 1983 as to which RQ&N had no involvement on behalf of Appellants.

There is thus no substantial relationship between this case and the prior representation. Moreover, the gap in time demonstrates the lack of a "substantial relation" between RQ&N's representation of Defendants and the issues of this suit. Appellants present no evidence, nor is it evident on the pleadings, that RQ&N in its prior representation of Defendants could, let alone did, obtain confidential information regarding matters relating to the issues of this action.

For these reasons, there is no relationship between the issues in this case and RQ&N's past representation of Appellants.

b. Defendants' Motion Was Untimely.

Because motions to disqualify opposing counsel are sometimes used as a tool to harass and delay the opposition, such motions must be filed at the onset of litigation, International Brotherhood of Teamsters, Etc. v. Hoffa, 242 F. Supp. 242, 257

²The Appellants assert in their Affidavit that Mr. Anderson had done some work on their sale of property from which proceeds went to Zions, and that those proceeds were "to have released the continuing guaranties upon which Zions now brings suit." (Jensen Affidavit, ¶ 7; Tr. 185.) However, the facts belie that assertion, since the continuing guaranties on which Zions sues here were signed in July 1984, and Mr. Anderson could not have been present for any discussion on their potential release inasmuch as his representations had ended some nine months earlier.

(D.D.C. 1965), or with promptness once the facts upon which a motion to disqualify is based become known. Milone v. English, 306 F.2d 814, 818 (D.C. Cir. 1962). The failure promptly to so act has been held to warrant the denial of the motion. See United Nuclear Corp. v. General Atomic Co., 629 P.2d 231, 320 (N.M. 1980) and cases cited therein.

The case most often cited for this rule, Redd v. Shell Oil Co., 578 F.2d 311 (10th Cir. 1975), illustrates that the Appellants' motion was not timely. In Redd, the Court of Appeals held that a motion to disqualify was untimely where it was not filed until the Friday afternoon before a Monday trial, although the information upon which the motion was based had been known for five months. In this case, RQ&N had been counsel of record for seven months and by their own admission Appellants knew of the purported conflict prior to the settlement discussions and more than 60 days prior to filing the Motion to Disqualify, which was filed one day prior to the hearing on Zions' Motion to Enforce Settlement. Under those circumstances, Appellants' motion was clearly untimely.

VI. CONCLUSION

The trial court correctly granted Zions' Motion to Compel Settlement. The uncontroverted evidence shows that an unambiguous oral settlement agreement was reached on February 10, 1987. Appellants' affidavits do not contradict that fact nor do they create any factual issues regarding whether settlement was

reached. The trial court also correctly denied Appellants' Motion to Disqualify Zions' counsel. Ray, Quinney & Nebeker's representation of Appellants ceased six months prior to the execution of the guaranties upon which the original action was based and was therefore not substantially related to its representation of Zions. Furthermore, Appellants' motion was untimely since it was filed seven months after Ray, Quinney & Nebeker entered its appearance. Therefore, Zions respectfully requests that this Court affirm the District Court's Order which granted Zions' Motion to Compel Settlement and which denied Appellants' Motion to Disqualify Counsel.

DATED this 6TH day of July, 1988.

RAY, QUINNEY & NEBEKER

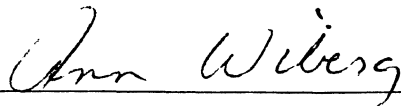


James S. Jardine
Rick L. Rose

CERTIFICATE OF SERVICE

I hereby certify that on the 6TH day of July, 1988, a true and correct copy of the foregoing Brief of the Respondent was mailed, postage prepaid, to the following:

Charles C. Brown
Jeffrey B. Brown
City Center I, Suite 401
175 East 400 South
Salt Lake City, Utah 84111



2039j

FILED IN CLERK'S OFFICE
Salt Lake County Utah

JUL 28 1987

By Barbara Jensen Clerk Third Dist Court
Deputy Clerk

JAMES S. JARDINE (A1647) and
JOHN A. ADAMS (A0023) of
RAY, QUINNEY & NEBEKER
Attorneys for Plaintiff Zions
First National Bank
400 Deseret Building
79 South Main Street
P. O. Box 45385
Salt Lake City, UT 84145-0385
Telephone: (801) 532-1500

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

-----oo0oo-----

ZIONS FIRST NATIONAL BANK,
a national association,

Plaintiff,

v.

BARBARA JENSEN INTERIORS,
INC. and LOWELL N. JENSEN
and BARBARA W. JENSEN,

Defendants.

:

:

:

:

:

:

ORDER DENYING MOTION
TO DISQUALIFY COUNSEL AND
GRANTING PLAINTIFF'S
MOTION TO COMPEL SETTLEMENT

Civil No. C-86-4044

Judge Raymond S. Uno

-----oo0oo-----

Defendant's Motion to Disqualify Counsel and Plaintiff's
Motion to Compel Settlement came on for hearing before the Court
on July 6, 1987. Plaintiff was represented by James S. Jardine;
defendants were represented by Charles S. Brown. Based upon the
memoranda and affidavits filed by the parties and the presenta-
tions of counsel, and good cause appearing,

IT IS HEREBY ORDERED as follows:

1. Defendant's Motion to Disqualify Counsel is denied. The Motion to Disqualify was filed nearly seven months after Ray, Quinney & Nebeker entered an appearance as counsel in this case, two months after the scheduled trial date and three months after settlement in this case. The motion was not timely. In addition, the Affidavit of Stephen H. Anderson and plaintiff's memorandum indicate that Ray, Quinney & Nebeker does not presently represent any of the defendants and that its prior representation of the defendants was not related to the guarantees on which plaintiff is suing in this case.


2. Plaintiff's Motion to Compel Settlement is granted. Based upon the affidavits and memorandua filed, the Court finds that the parties agreed on February 10, 1987, to a settlement of the issues and disputes reflected in the above-referenced lawsuit on the terms set forth in Exhibits "A" through "C" to Defendant's Memorandum in Support of Motion to Compel Settlement. The Court further finds that the fact of this agreement is reflected and confirmed by the parties' cancellation of the depositions scheduled for February 10 and 11, 1987, and the striking of the trial date of March 15, 1987, in reliance on the agreement of settlement.

3. Pursuant to the Court's granting of Plaintiff's Motion to Compel Settlement, the Settlement Agreement attached as Exhibit "A" to Memorandum in Support of Plaintiff's Motion to Compel Settlement shall be deemed signed by defendants as of the

date of this Order, the Mutual Release and Waiver Agreement attached as Exhibit "B" to the Memorandum shall be deemed signed by defendants and plaintiff as of the date of this Order, and the Judgment by Confession and Verified Statement attached as Exhibit "C" shall be deemed signed by the defendants thereto as of the date of this Order, with the accrued interest amount to be determined by plaintiff, filled in on said Judgment and filed with the Court and opposing counsel within 10 days of the date of this Order.

DATED this 28 day of July, 1987.

BY THE COURT:



Raymond S. Uno
District Judge

Approved As To Form:

ATTEST

H. DIXON HINDLEY

Clerk

By 
Dci

Charles C. Brown
Attorney for Defendants

1700j

Charles C. Brown (1446)
Jeffrey B. Brown (0457)
BROWN, SMITH & HANNA, P.C.
Attorneys for Defendants
City Centre I, Suite 401
175 East 400 South
Salt Lake City, Utah 84111
Telephone: (801) 355-5656

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

-----oo0oo-----

ZIONS FIRST NATIONAL BANK,	:	
a national association,	:	
	:	AMENDED ORDER
Plaintiff,	:	
	:	
v.	:	
	:	
BARBARA JENSEN INTERIORS, INC.,	:	
and LOWELL N. JENSEN and	:	Civil No. C-86-4044
BARBARA W. JENSEN,	:	
	:	Judge Raymond S. Uno
Defendants.	:	

-----oo0oo-----

Defendant's Objections to this Court's Order Denying Motion to Disqualify Counsel and Granting Plaintiff's Motion to Compel Settlement, dated July 28, 1987, came on for hearing before the court on September 28, 1987. Plaintiff was represented by James S. Jardine and defendants were represented by Charles C. Brown. Based upon the memoranda filed by the parties and the presentations of counsel, and good cause appearing,

IT IS HEREBY ORDERED and the Court's Order of July 28, 1987 is superseded as follows:

1. Defendant's Motion to Disqualify Counsel is denied. The Motion to Disqualify was filed nearly seven months after Ray, Quinney & Nebeker entered an appearance as counsel in this case, two months after the scheduled trial date and three months after settlement in this case. The Motion was not timely. In addition, the Affidavit of Stephen H. Anderson and plaintiff's Memorandum indicate that Ray, Quinney & Nebeker does not presently represent any of the defendants and that its prior representation of the defendants was not related to the guarantees on which plaintiff is suing in this case.

2. Plaintiff's Motion to Compel Settlement is granted. Based upon the Affidavits and Memoranda filed, the court finds that the parties agreed on February 10, 1987, to a settlement of the issues and disputes reflected in the above-referenced lawsuit on the terms set forth in Exhibits "A" through "C" to defendant's Memorandum in Support of Motion to Compel Settlement. The court further finds that the fact of this Agreement is reflected and confirmed by the parties' cancellation of the depositions scheduled for February 10 and 11, 1987, and the striking of the trial date of March 15, 1987 in reliance on the agreement of settlement.

3. Pursuant to the court's granting of plaintiff's Motion to Compel Settlement, the Settlement Agreement attached as Exhibit "A" to Memorandum in Support of Plaintiff's Motion to

Compel Settlement shall be deemed signed by defendants as of the date of this Order, the Mutual Release and Waiver Agreement attached as Exhibit "B" to the Memorandum shall be deemed signed by defendants and plaintiff as of the date of this Order, and the Judgment by Confession and Verified Statement attached as Exhibit "C" shall be deemed signed by the defendants thereto as of the date of this Order, with the accrued interest amount to be determined by plaintiff, filled in on said Judgment and filed with the court and opposing counsel within 10 days of the date of this Order, except that defendants shall be bound by the terms of paragraph 7 of the Settlement Agreement from and after July 28, 1987.

4. Notwithstanding the language of the documents identified in paragraph 3, nothing thereon shall be construed to release any claims of defendants against any attorneys who have represented plaintiff.


DATED this 23rd day of ^{November}~~October~~, 1987.

BY THE COURT:

/s/

Raymond S. Uno
District Court Judge

APPROVED:


James S. Jardine
RAY, QUINNEY & NEBEKER
Attorneys for Plaintiff
Zions First National Bank

~~Filed 12-1-87~~

2786j

JAMES S. JARDINE (A1647) and
JOHN A. ADAMS (A0023) of
RAY, QUINNEY & NEBEKER
Attorneys for Plaintiff Zions
First National Bank
400 Deseret Building
79 South Main Street
P. O. Box 45385
Salt Lake City, UT 84145-0385
Telephone: (801) 532-1500

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

-----00000-----

ZIONS FIRST NATIONAL BANK,
a national association,

Plaintiff,

v.

BARBARA JENSEN INTERIORS,
INC. and LOWELL N. JENSEN
and BARBARA W. JENSEN,

Defendants.

:

:

:

:

:

:

AFFIDAVIT OF DONALD M.
BENNETT

Civil No. C-86-4044

Judge Raymond S. Uno

-----00000-----

Donald M. Bennett, having been duly sworn, deposes and
states as follows:

1. I am a resident of Salt Lake County, Utah.
2. I have personal knowledge of the matters set forth in
this Affidavit.
3. I have been employed by Zions First National Bank
("Zions") in excess of twenty (20) years.

4. I currently serve as a second vice president in Zions' Credit Management Group.

5. Sometime after the account of Barbara Jensen Interiors, Inc. at Zions went into default the account was assigned to me for handling.

6. On February 10, 1987, I was present in the offices of Ray, Quinney and Nebeker in Salt Lake City for the taking of the depositions of Barbara Jensen Interiors, Inc., Lowell N. Jensen, and Barbara W. Jensen (referred to collectively herein as the "Jensens.")

7. The depositions did not begin as scheduled because the Jensens requested time to consult with their attorney about the possibility of settlement.

8. After a delay of approximately one hour, Lowell N. Jensen and Barbara W. Jensen entered the conference room with their attorney, Jeffery B. Brown, and stated that they desired to discuss a possible settlement of Zions' claims against the Jensens instead of proceeding with the deposition. The reporter left and negotiations began.

9. James S. Jardine and John A. Adams of the law firm of Ray, Quinney and Nebeker acted as Zions' legal counsel during the settlement discussions.

10. After a period of discussion that exceeded one hour, during which time the parties and their respective counsel consulted privately with one another, Zions and the Jensens agreed to settle their dispute on the following terms:

(a) The Jensens agreed to sign a judgment by confession in the amount of \$61,600.00 in principal, plus interest accrued to the date of execution of the settlement agreement, and cause the same to be filed with the Clerk of the Third Judicial District Court of Salt Lake County within five days of the execution of a settlement agreement.

(b) Zions would have the right to register or have docketed the judgment by confession in any other counties of its choosing.

(c) Zions agreed not to take any action to execute upon or collect against the judgment by confession until 120 days after entry of the judgment.

(d) In the event that the Jensens within 60 days of the execution of the settlement agreement paid Zions the full principal amount of \$61,600, Zions agreed to forgive both the prejudgment and postjudgment interest associated with the judgment.

(e) In the event that the Jensens within 120 days of the execution of the settlement agreement paid less than the full amount owed to Zions under the judgment, any such cash payments would result in a credit of 110% for each dollar received. For example, if \$1,000.00 were paid, Zions would apply a credit of \$1,100.00 to Jensens' outstanding balance.

(f) Jensens agreed to provide Zions certified personal financial statements within 15 days of the execution of the settlement agreement.

(g) The Jensens agreed not to transfer or cause to be transferred any personal assets with a value of or in an amount greater than \$2,500 by any means without first providing advance written notice of at least ten days to Zions of the proposed transfer or disposition of property.

(h) Zions and the Jensens agreed to execute a mutual release.

(i) Each side agreed to bear its own attorneys' fees and costs.

11. I personally took notes of the terms of the settlement agreement entered into by Zions and the Jensens.

12. I observed other persons in the room also taking notes of the terms agreed to.

13. It was agreed that the law firm of Ray, Quinney & Nebeker would draft settlement papers memorializing the terms of the settlement agreement entered into.

14. Before the end of the session, Mr. Jardine repeated and summarized each of the terms of the settlement agreement entered into.

15. I agreed to the terms of the settlement agreement on behalf of Zions as its duly authorized representative and observed each of the plaintiffs agree to the terms of the settlement agreement.

DATED this 10th day of April, 1987.

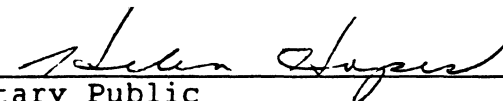

Donald M. Bennett

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

On the 10th day of April, 1987, personally appeared before me Donald M. Bennett, known by me to be the signer of the foregoing document, who duly acknowledged to me that he executed the same.

My Commission Expires:

7-10-89


Notary Public
Residing at Salt Lake County, Utah

1127A

SETTLEMENT AGREEMENT

WHEREAS, Zions First National Bank, a national association ("Zions"), has filed an action, Civil No. C-86-4044, in the Third Judicial District Court of Salt Lake County against Barbara Jensen Interiors, Inc. ("BJI"), a Utah corporation; Lowell N. Jensen and Barbara W. Jensen, individuals (collectively referred to herein as the "Jensens");

WHEREAS, BJI and Jensens answered the above-referenced action and filed a Counterclaim;

WHEREAS, the parties to the above-referenced action now desire to resolve their differences and dispute by entering into this Settlement Agreement;

WHEREAS, in consideration of the mutual covenants and promises of the parties hereto to perform the duties and to be bound by the rights and obligations described below,

IT IS THEREFORE AGREED:

1. BJI and Jensens simultaneous with the execution of this Settlement Agreement, will execute the Judgment by Confession, a copy of which is attached hereto as Exhibit "A", and cause the same together with a proposed Judgment to be filed with the Clerk of the Third Judicial District Court of Salt Lake County within five (5) days of the date of execution of this Settlement Agreement.

2. Zions shall have the right to register, file or have docketed said Judgment by Confession and/or any accompanying Judgment in any other county(ies) of its choosing.

3. Zions agrees not to take any action to execute upon or collect against said Judgment by Confession and/or accompanying Judgment until 120 days after entry of said Judgment by Confession and/or accompanying Judgment.

4. In the event that BJI and/or Jensens within sixty (60) days of the execution of this Settlement Agreement pay Zions the full principal amount (\$61,600.00) stated in said Judgment by Confession and/or accompanying Judgment, Zions will forgive both the pre-judgment and post-judgment interest associated with said Judgment by Confession and/or accompanying Judgment.

5. In the event that BJI and/or Jensens pay within 120 days of execution of this Settlement Agreement less than the full amount owed to Zions (i.e., principal, pre-judgment interest and accruing post-judgment interest) under said Judgment by Confession and/or accompanying Judgment, any such cash payments will result in a credit of 110% for each dollar received. For example, if \$1,000.00 were paid, a credit of \$1,100.00 would be given by Zions to the outstanding balance of BJI and the Jensens.

6. BJI and Jensens will provide to Zions certified personal financial statements within fifteen (15) days of execution of this Settlement Agreement.

7. The Jensens will not transfer, cause to be transferred or allow to be transferred any personal assets with a value or in an amount greater than \$2,500.00 by any means, be it by gift, sale or otherwise, or allow any personal assets to be

pledged, mortgaged, or otherwise encumbered, without first providing advance written notice of at least ten (10) days to Zions of the proposed transfer, sale, gift, pledge or encumbrance.

8. Zions, on the one hand, and BJI and the Jensens, on the other hand, will execute simultaneously with the execution of this Settlement Agreement, the accompanying Mutual Release and Waiver Agreement, a copy of which is attached hereto as Exhibit "B".

9. All parties will bear their own attorneys' fees and costs.

DATED this _____ day of February, 1987.

ZIONS FIRST NATIONAL BANK,
a national association

BARBARA JENSEN INTERIORS, INC.

By: _____
Its: _____

By: _____
Its: _____

Lowell N. Jensen, an individual

Barbara W. Jensen, an Individual

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

On the _____ day of February, 1987, personally appeared before me _____ of Zions First National Bank known by me to be a signer of the foregoing Settlement Agreement who duly acknowledged to me that he has read the foregoing Settlement Agreement, knows and understands its contents, and voluntarily signed the same on behalf of and with authority from Zions First National Bank.

Notary Public
Residing at _____

My Commission Expires:

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

On the _____ day of February, 1987 personally appeared before me _____ of Barbara Jensen Interiors, Inc. known by me to be a signer of the foregoing Settlement Agreement who duly acknowledged to me that (s)he has read the foregoing Settlement Agreement, knows and understands its contents, and voluntarily signed the same on behalf of and with authority from Barbara Jensen Interiors, Inc.

Notary Public
Residing at _____

My Commission Expires:

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

On the _____ day of February, 1987 personally appeared before me Lowell N. Jensen known by me to be a signer of the foregoing Settlement Agreement who duly acknowledged to me that he has read the foregoing Settlement Agreement, knows and understands its contents and voluntarily signed the same.

Notary Public
Residing at _____

My Commission Expires:

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

On the _____ day of February, 1987 personally appeared before me Barbara W. Jensen known by me to be a signer of the foregoing Settlement Agreement who duly acknowledged to me that she has read the foregoing Settlement Agreement, knows and understands its contents and voluntarily signed the same.

Notary Public
Residing at _____

My Commission Expires:

1072A

MUTUAL RELEASE AND WAIVER AGREEMENT

THIS AGREEMENT is entered into as of this ____ day of February, 1987, by and between Zions First National Bank, a national association ("Zions") and the following parties (referred to hereinafter individually and collectively as the "Jensens"):

- a. Barbara Jensen Interiors, Inc.
- b. Lowell N. Jensen
- c. Barbara W. Jensen

RECITALS

WHEREAS, Zions and the Jensens executed that Settlement Agreement dated February __, 1987 (the "Settlement Agreement"); and

WHEREAS, pursuant to the terms of the Settlement Agreement, certain releases and waivers of claims are to be accomplished in connection with certain compromises and settlement arrangements relating to indebtedness of Jensens to Zions; and

WHEREAS, in connection with this Agreement, the documentation of the compromises and settlement arrangements related to the aforesaid indebtedness is being completed:

AGREEMENT

NOW THEREFORE, in consideration of the foregoing and of the mutual covenants, promises and agreements herein contained, it is hereby agreed as follows:

1. Release and Waiver by Jensens. Jensens and each of them, jointly and severally, do hereby waive, release, relinquish and forever disavow any and all claims, interests, rights, remedies, and causes of action assertable, directly or indirectly against Zions or any of its agents, employees, officers, advisers, directors or consultants (whether or not any of the same were acting within or without the scope of their employment, agency or engagement with Zions) for any acts, actions, failures to act, representations, commitments, statements, warranties, failures to disclose or make representations, covenants, promises or agreements, taken, arising out of or in connection with (directly or indirectly) or otherwise contemplated or associated in any way with the lending transactions which are the subject of the Settlement Agreement and which are described on Exhibit "A" attached hereto and incorporated herein. The waiver, release, relinquishment and disavowal herein made shall be construed broadly in favor of Zions, its agents, employees, officers, advisers, directors and consultants, and any ambiguity, doubt or

question as to applicability of the same shall be resolved in all events in favor of waiver, release, relinquishment and disavowal. Jensions agree that the waivers, releases, relinquishments and disavowals herein granted shall be with respect to claims, interests, rights, remedies and causes of action known or unknown, matured or unmatured, contingent or direct, existing or hereafter arising. Jensions' agreements herein are made without reliance upon any warranty, representation or statement of Zions with respect to any of the matters herein, except and to the extent set forth in the Settlement Agreement and in documentation which is executed in connection therewith.

As part and parcel of this Agreement, Jensions agree not to initiate any actions, court proceedings, arbitration, administrative agency actions or otherwise with respect to any of the matters waived, released and relinquished hereunder. Jensions hereby affirm, acknowledge and agree that Zions is fully discharged of performance under the terms of all of the agreements, documents, instruments and contracts (oral or written) associated with any of the transactions listed on Exhibit "A" and is fully discharged of performance under the same except and to the extent that obligations are continuing under the said transactions after the date hereof.

2. Jensions Fully Advised. Jensions and each of them do, by their respective signatures hereto, warrant and represent that they have been fully advised (to the extent that they have each deemed prudent and necessary) by competent legal counsel and other advisers of the nature and extent of this Agreement and, notwithstanding the fact of the potential for the waiver and release of valuable rights, remedies, claims and causes of action (and the consequential potential for sustaining unremedied losses and damages by reason of this Agreement), do hereby express and agree that this Agreement is entered voluntarily and intentionally and without reservation, and that no fraud, coercion or duress of any kind has been employed in connection with the same.

3. Adequate and Valuable Consideration to Jensions. Jensions and each of them do hereby acknowledge and agree, further, that good and valuable consideration has been given for the covenants and agreements set forth herein, the same being in the form of the compromises and settlement arrangements with respect to their indebtedness to Zions (including the discharges and releases hereinafter described) and benefits obtained in connection with the Settlement Agreement.

4. Prospective Inapplicability. Zions agrees that nothing herein contained shall be construed to be a waiver of claims, rights, interests, remedies or causes of action which arise as the result of acts, inactions, representations,

warranties, agreements or covenants which have their origin on a date subsequent to the date of this Agreement.

5. Waiver and Release of Claims by Zions. In accordance with the provisions therefor in the Settlement Agreement, Zions does hereby waive, release, relinquish and forever disavow any and all claims, interests, rights, remedies, and causes of action assertable, directly or indirectly against one or more of the Jensens for any acts, actions, failures to act, representations, commitments, statements, warranties, failures to disclose or make representations, covenants, promises or agreements, taken, arising out of or in connection with (directly or indirectly) or otherwise contemplated or associated in any way with the lending transactions which are the subject of the Settlement Agreement and which are described on Exhibit "A" attached hereto and incorporated herein except for that certain Small Business Administration Loan No. GP 339, 418-2006-SLC, dated September 3, 1980. The waiver, release, relinquishment and disavowal herein made except for said Small Business Administration Loan shall be construed broadly in favor of the Jensens, and any ambiguity, doubt or question as to applicability of the same shall be resolved in all events in favor of waiver, release, relinquishment and disavowal. Zions agrees that the waivers, releases, relinquishments and disavowals herein granted shall be with respect to claims, interests, rights, remedies and causes of action known or unknown, matured or unmatured, contingent or direct, existing or hereafter arising. Zions' agreements herein are made without reliance upon any warranty, representation or statement of the Jensens with respect to any of the matters herein, except and to the extent set forth in the Settlement Agreement and in documentation which is executed in connection therewith.

As part and parcel of this Agreement, Zions agrees not to initiate any actions, court proceedings, arbitration, administrative agency actions or otherwise with respect to any of the matters waived, released and relinquished hereunder. Zions hereby affirms, acknowledges and agrees that Jensens are fully discharged of performance under the terms of all of the agreements, documents, instruments and contracts (oral or written) associated with any of the transactions listed on Exhibit "A" and is fully discharged of performance under the same except for said Small Business Administration Loan.

6. Zions Fully Advised. Zions, by its signatures hereto, warrants and represents, that it has been fully advised (to the extent that it has deemed prudent and necessary) by competent legal counsel and other advisers of the nature and extent of this Agreement and, notwithstanding the fact of the potential for the waiver and release of valuable rights, remedies, claims and causes of action (and the consequential potential for sustaining unremedied losses and damages by reason of this

Agreement), does hereby express and agree that this Agreement is entered voluntarily and intentionally and without reservation, and that no fraud, coercion or duress of any kind has been employed in connection with the same.

7. Adequate and Valuable Consideration to Zions. Zions does hereby acknowledge and agree, further, that good and valuable consideration has been given for the covenants and agreements set forth herein, the same being in the form of the compromises and settlement arrangements with respect to the Jensens' obligations to Zions and benefits obtained in connection with the Settlement Agreement.

8. Prospective Inapplicability. Jensens agree that nothing herein contained shall be construed to be a waiver of claims, rights, interests, remedies or causes of action which arise as the result of acts, inactions, representations, warranties, agreements or covenants which have their origin on a date subsequent to the date of this Agreement.

9. Miscellaneous. This Agreement shall be governed by and subject to the terms, requirements and obligations of the Settlement Agreement and the documents executed in connection therewith. This Agreement is entered into and shall be governed by the laws of the State of Utah. The terms and provisions hereof are intended to be severable and divisible, the beneficial terms and provisions of the same, to survive any invalidation of other terms or provisions. Time is of the essence hereof. No waiver of any of the rights and remedies hereunder or amendment of the terms of this Agreement shall be valid or binding unless in writing signed by the party to be charged with the same. Accordingly, no waiver or amendment shall be implied by course of conduct or by action or inaction of any party hereto. In the event that any party hereunder shall find it necessary to take action (judicial or otherwise) for the enforcement of the provisions of this Agreement, such party shall be entitled to payment by the nonprevailing party of costs of court and all expenses, including reasonable attorneys' fees, incurred in connection with any such action. This Agreement is binding upon the heirs, successors and assigns of the parties hereto.

IN WITNESS WHEREOF the parties cause this Agreement to be executed upon the date and day first set forth hereinabove.

ZIONS FIRST NATIONAL BANK, a
National Association

By: _____
Its: _____

BARBARA JENSEN INTERIORS, INC.

By: _____
Its: _____

Lowell N. Jensen, individually

Barbara W. Jensen, individually

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

On the _____ day of February, 1987 personally appeared before me _____ of Zions First National Bank, known by me to be a signer of the foregoing Mutual Release and Waiver Agreement who duly acknowledged to me that he has read the foregoing Mutual Release and Waiver Agreement, knows and understands its contents, and voluntarily signed the same on behalf of and with authority from Zions First National Bank.

My Commission Expires:

Notary Public
Residing at _____

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

On the _____ day of February, 1987 personally appeared before me _____ of Barbara Jensen Interiors, Inc., known by me to be a signer of the foregoing Mutual Release and Waiver Agreement who duly acknowledged to me that (s)he has read the foregoing Mutual Release and Waiver

Agreement, knows and understands its contents, and voluntarily signed the same on behalf of and with authority from Barbara Jensen Interiors, Inc.

My Commission Expires: _____

Notary Public
Residing at _____

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

On the _____ day of February, 1987 personally appeared before me Lowell N. Jensen, known by me to be a signer of the foregoing Mutual Release and Waiver Agreement who duly acknowledged to me that he has read the foregoing Mutual Release and Waiver Agreement, knows and understands its contents and voluntarily signed the same.

My Commission Expires: _____

Notary Public
Residing at _____

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

On the _____ day of February, 1987 personally appeared before me Barbara W. Jensen, known by me to be a signer of the foregoing Mutual Release and Waiver Agreement who duly acknowledged to me that she has read the foregoing Mutual Release and Waiver Agreement, knows and understands its contents and voluntarily signed the same.

My Commission Expires: _____

Notary Public
Residing at _____

1073A

Exhibit "A"

**Promissory Note in the amount of \$61,600 dated May 31, 1985
executed by Barbara Jensen Interiors, Inc.**

**Continuing Guarantee of Credit dated July 1984 in the amount of
\$250,000 executed by Lowell N. Jensen.**

**Continuing Guarantee of Credit dated July 1984 in the amount of
\$250,000 executed by Barbara W. Jensen.**

CHARLES C. BROWN (A1446) and
JEFFREY B. BROWN (A0457) of
BROWN & BROWN, P.C.
Attorneys for Defendants
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, UT 84111
Telephone: (801) 355-5656

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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ZIONS FIRST NATIONAL BANK, a national association,	:	
	:	JUDGMENT BY CONFESSION
Plaintiff,	:	AND VERIFIED STATEMENT
	:	
v.	:	
	:	
BARBARA JENSEN INTERIORS, INC. and LOWELL N. JENSEN and BARBARA W. JENSEN,	:	Civil No. C-86-4044
	:	
Defendants.	:	Judge Raymond S. Uno

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Defendants Barbara Jensen Interiors, Inc., Lowell N. Jensen and Barbara W. Jensen, by and through their counsel of record, Jeffrey B. Brown of Brown & Brown, P.C., pursuant to Rule 58A(f) of the Utah Rules of Civil Procedure and Utah Code Annot. § 78-22-3, submit the following Judgment by Confession and Verified Statement which are agreed to by each of the foregoing Defendants.

We, Lowell N. Jensen and Barbara W. Jensen, both in our individual capacities and as officers of Barbara Jensen Interiors, Inc., having been duly sworn, state and depose as follows:

1. We are residents of the State of Utah.

2. Plaintiff Zions First National Bank, a national association, has asserted a claim against Barbara Jensen Interiors, Inc. on a May 31, 1985 Promissory Note in the principal amount of \$61,600.00 together with interest thereon from May 31, 1985 at the rate of base rate plus 3%, which as of this date amounts to \$_____. Zions First National Bank also has asserted claims against Lowell N. Jensen and Barbara W. Jensen on separate forms of a Continuing Guarantee dated in July, 1984 to guarantee payment of overdrafts of Barbara Jensen Interiors, Inc. These claims arise from the failure of Barbara Jensen Interiors, Inc. to pay overdrafts which resulted in execution of said Promissory Note by Barbara Jensen Interiors, Inc. and the guaranteeing of payment for said Promissory Note by Lowell N. Jensen and Barbara W. Jensen.

3. The claims asserted against Barbara Jensen Interiors, Inc. and us in our individual capacities by Zions First National Bank are justly due.

4. Therefore, we in both our individual and corporate capacities, authorize that judgment be entered against us in the sum of \$_____ (which includes \$61,600.00 in principal and \$_____ in interest as of this date) with interest accruing hereafter at the statutory rate of 12% per annum.

DATED this _____ day of February, 1987.

BARBARA JENSEN INTERIORS, INC.

By: _____
Barbara W. Jensen

Its: _____

BARBARA JENSEN INTERIORS, INC.

By: _____
Lowell N. Jensen

Its: _____

Barbara W. Jensen, Individually

Lowell N. Jensen, Individually

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

On the _____ day of February, 1987 personally appeared before me Lowell N. Jensen of Barbara Jensen Interiors, Inc. known by me to be a signer of the foregoing Judgment by Confession and Verified Statement who duly acknowledged to me that he has read the foregoing Judgment by Confession and Verified Statement, knows

and understands its contents, and voluntarily signed the same on behalf of and with authority from Barbara Jensen Interiors, Inc.

Notary Public

Residing at _____

My Commission Expires:

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

On the _____ day of February, 1987 personally appeared before me Barbara W. Jensen of Barbara Jensen Interiors, Inc. known by me to be a signer of the foregoing Judgment by Confession and Verified Statement who duly acknowledged to me that she has read the foregoing Judgment by Confession and Verified Statement, knows and understands its contents, and voluntarily signed the same on behalf of and with authority from Barbara Jensen Interiors, Inc.

Notary Public

Residing at _____

My Commission Expires:

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

On the _____ day of February, 1987 personally appeared before me Lowell N. Jensen known by me to be a signer of the

foregoing Judgment by Confession and Verified Statement who duly acknowledged to me that he has read the foregoing Judgment by Confession and Verified Statement, knows and understands its contents and voluntarily signed the same.

Notary Public
Residing at _____

My Commission Expires:

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

On the _____ day of February, 1987 personally appeared before me Barbara W. Jensen known by me to be a signer of the foregoing Judgment by Confession and Verified Statement who duly acknowledged to me that she has read the foregoing Judgment by Confession and Verified Statement, knows and understands its contents and voluntarily signed the same.

Notary Public
Residing at _____

My Commission Expires:

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