

2008

# Kang S. Park and Marsha Park v. Gary B. Stanford : Brief of Appellee

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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KANG S. PARK and MARSHA PARK,

Plaintiffs/Appellees,

vs.

GARY B. STANFORD,

Defendant/Appellant.

**APPELLEES' BRIEF  
(Oral Argument Requested)**

Court of Appeals Case No. 20080574-CA

District Court Civil Case No. 050900073

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Appeal from the Judgment of the Third Judicial  
District Court of Salt Lake County, State of Utah, Honorable Anthony B. Quinn

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## **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this matter pursuant to Utah Code section 78A-4-103(2)(j). This case was poured over from the Utah Supreme Court.

## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE.**

This is an action to determine the extent of Gary B. Stanford's, Appellant herein ("Stanford"), liability under a personal guarantee which was part of a second trust deed note executed by him in favor of the Parks in July 1995.

### **II. THE COURSE OF PROCEEDINGS.**

In December 2005, the Kang S. Park and Marsha Park, Appellees herein ("Parks"), moved for summary judgment asking the court to determine that none of the payments that had been received by them to date applied to Stanford's obligation under the guarantee. Upon the completion of briefing, the court determined (R. 781, p. 13, 14) that none of the payments that had been received by Parks reduced Stanford's \$500,000 personal guarantee. (The trial court also stated that it could not determine as a matter of law that there would not be a deficiency judgment in favor of Security Mutual on their underlying first trust deed, and refused to fix the amount of Stanford's liability under his guarantee of the second trust deed obligation owed to Parks at this time. (R. 781, p. 13.))

In a second motion for summary judgment initiated in August 2006 ( R. 402), the Parks asked the trial court to fix the amount of Stanford's liability on the basis that the value

of the property was such that the trial court could determine as a matter of law that there would be no deficiency judgment against Stanford in favor of the holder of the first trust deed, Security Mutual Life Insurance. The trial court denied Parks' motion. ( R. 781, p. 29, l. 12-20.)

In December 2007, as a result of a bankruptcy filed by Snowmass, LLC (United States Bankruptcy Court, District of Utah, Case No. 07-23458 GEC, petition attached as Exhibit 4) and a notice from Security Mutual (Exhibit 5 attached), the Bank of Utah, as custodian of the Kang S. Park IRA, purchased the first trust deed note and first trust deed interest of Security Mutual Life in the property, and waived its right to pursue a deficiency action against Stanford based on the first trust deed. (Affidavit of Kang S. Park, R. 616.) Thereafter, the Parks filed the final motion for summary judgment which led to the determination of the amount owed by Stanford pursuant to his guarantee. ( R. 598.)

After judgment was entered in June, 2008 (R. 765), the interest of Security Mutual which had been purchased by the Bank of Utah as Custodian for the Kang S. Park IRA, was foreclosed at a trustee's sale of the property. (Trustee's Deed, Exhibit 1 attached.) No deficiency action has been pursued based on the first trust deed, consistent with paragraph 4 of the Judgment ( R. 765) which provides in part as follows:

4. IT IS FURTHER ORDERED that the plaintiffs endorse on the face of the original Note given by Snowmass, LLC to Security Mutual Life Insurance Company the following: "The right to obtain a deficiency judgment based on this Note has been waived pursuant to the judgment entered in Civil No. 050900073 in the Third District Court, Salt Lake City, State of Utah in the matter entitled *Kang S. Park*



*and Marsha Park v. Gary B. Stanford.*” The endorsement shall be placed on the Note as reflected in Exhibit “A” attached to this judgment.

### **III. STATEMENT OF FACTS**

Parks acknowledge that this matter was resolved in the trial court on summary judgment ( R. 765.) Accordingly, there can be no dispute of material facts. However, Stanford’s statement of facts (Brief, p. 10-15) fails to include a number of undisputed material facts critical to this Court’s review of the judgment, including the following:

1. The initial Real Estate Purchase Contract between Parks and Snowmass which conveyed commercial property in Ogden, Utah (the “property”) provided in Addendum 2, paragraph 3 (R. 213), that Stanford “will personally guarantee the payment of \$500,000 plus interest . . .”

2. Stanford acknowledged that during the period between the October 1994 letter (Stanford’s statement of facts, ¶11, p. 11) and the July, 1995 Trust deed Note (Stanford’s Statement of Facts, ¶21), there had been discussions between his co-member (in Snowmass), Richard (Dix) Buckway, and Parks’ counsel, Frederick Prince, about the transaction. Stanford conceded that he did not know what the nature of these discussions had been, and doubted that any changes were designed to enhance his position. (Stanford deposition, p. 85; R. 124, 341.)

3. In July 1995, a new (second) trust deed note and trust deed were executed by Stanford both as a member of Snowmass, LC, and in his individual capacity as a guarantor.

The July 1995 Trust Deed Note (“Note”) provides in part as follows:

By his signature, individually, on this Note, Gary B. Stanford agrees to unconditionally guarantee the payment of this Note, but in no event shall Gary B. Stanford’s liability **(excluding portions thereof attributable to interests and costs)** when added to any deficiency judgment which may be entered against him by virtue of his guarantee of the Security Mutual Life Insurance Co. Note (excluding interest and costs), exceed the sum of FIVE HUNDRED THOUSAND DOLLARS (\$500,000). (R. 106, 2<sup>nd</sup> para.)

4. Stanford acknowledged that he did not discuss his understanding of the guarantee with Parks or their counsel. (Stanford depo. p. 86, 88; R. 123, 341.) In fact, Stanford did not have any discussions with anyone about the language in his guarantee in the Note. (Stanford depo., p. 83, l. 6-9; pp. 33, 136; R. 126, 130, 117.) Stanford acknowledged that “I probably had a fairly lax attitude in signing these documents and things. Which I wish I had never done, of course. I didn’t go over them with a lawyer or, anyone else having to do with it, so.” (Stanford depo., p. 83-84; R. 340.)

5. If Stanford had some different understanding about the extent of his guarantee apart from the language in the 1995 Note, he did not reveal it to the Parks. In addition to the testimony referred to in the preceding paragraph, Stanford testified that he was not present when Mr. Buckway negotiated the Note (Stanford depo., p. 33, 85; R. 337,341); he never discussed the scope of his guarantee with Dr. Park or his wife (Stanford depo. p. 88; R. 341); he doesn’t remember the scope of his guarantee ever being a matter of discussion (Stanford

depo. p. 35; R. 337); he had no discussions with anyone about the language of the guarantee in the Note even though it was inconsistent with his understanding (Stanford depo. p. 83; R. 340); when he signed the Note, he expressed no concern to anyone about the guarantee language in the Note (Stanford depo. p. 84; R. 340); Buckway kept telling him Parks were asking for changes, he signed them, and he regrets doing so (Stanford depo. p. 83-84; R. 340).

6. Stanford expressly acknowledged that he did not tell anyone that he had any problem with any of the language in the 1995 Trust deed Note. (Stanford depo., pp. 33 and 84; R. 337, 340.)

7. Stanford's statement of facts refers to the affidavit of J. R. Christensen. (Para. 21, page 6.) There is no evidence that J.R. Christensen played any role in the negotiation of any aspect of the note or the guarantee, or that he was involved in the 1995 transaction.

8. During calendar year 1998, Richard Buckway and Stanford terminated their business relationship as it related to Snowmass. Stanford became the sole member of Snowmass, LLC at that time. (Stanford affidavit, R. 201, at ¶ 40.) For many years, Stanford was the only member of Snowmass, LLC.

9. There is no evidence that Stanford ever advised Parks at any time that any payments being made to the Parks were being made "based on Dr. Stanford's personal guarantee." (Cf. ¶ 26, p. 14 of Stanford's Opening Brief ("Stanford's brief").)

10. In 1997, an Amendment was made to the 1995 Note and Trust Deed. In that amendment, Stanford, as the Managing Member of Snowmass, and personally, agreed that in the event of any default under the Note, Parks were to give notice of the default to "...Gary B. Stanford at the following address: Gary B. Stanford, M.D., 1250 East 3900 South, Ste. 310, Salt Lake City, Utah 84124." (See the Amendment, R. 330, ¶ 5.)

11. The property has not had a tenant in it since approximately 2002. (Stanford depo., p. 28.) No payments of any type have been made by Snowmass to Parks for many years. (Fraidenburg affidavit, R. 416.)

12. In March, 2007, Security Mutual filed a notice of default against Snowmass and the property based on its first trust deed. (See Trustees Deed, pg. 2, para. (a), Exhibit 1 attached.) Security Mutual set a sale on its foreclosure on July 31, 2007. (See Notice of Sale, Exhibit 3 attached.) On July 27, 2007, Snowmass, acting through its sole member, Stanford, filed bankruptcy. (See Petition, Exhibit 4.) On November 15, 2007, Security Mutual (now, Equitable Life and Casualty) solicited offers to sell its trust deed and note and claims in the Snowmass bankruptcy. (See Exhibit 5.) In December 2007, the Bank of Utah as Custodian for the Kang S. Park IRA ("Bank of Utah") purchased the interest of Security Mutual (which included the first trust deed against the Snowmass property) for a sum slightly in excess of \$250,000. (Kang Park affidavit, para. 2, R. 616.)

13. Thereafter, the IRA and Parks sought and obtained relief from the automatic stay in the Snowmass bankruptcy, and the Bank of Utah as Custodian noticed and conducted

a non-judicial foreclosure of the property based on the first trust deed originally held by Security Mutual dated March 12, 1992. (R. 618, and Trustees' Deed, Exhibit 1 attached.) The sale was conducted on July 31, 2008. (Stanford's brief, Exhibit A.) The sole bidder at the sale was the Bank of Utah, as Custodian, who purchased the property by bidding \$200,000. (Trustee's deed, Exhibit 1 attached hereto.)

14. No deficiency action has ever been pursued by the Bank of Utah against Stanford.

### **SUMMARY OF ARGUMENTS**

Because far more than \$500,000 in principal remained owing on the second trust deed note that Stanford guaranteed, and because the language of that guarantee specifically excluded interest from the \$500,000 limitation, the trial court properly determined that Stanford owed Parks \$500,000 in principal, plus interest.

Next, Stanford cannot show that the trial court erred when it refused to credit certain payments against his guarantee. The unexpressed subjective beliefs of Stanford or his colleagues about his guarantee cannot alter or affect the unambiguous language in the final Note. Indeed, the argument that all payments made by Stanford should have been credited to his guarantee ignores applicable case law, and is without any factual support.

Last, given the circumstances of Snowmass' default on the first trust deed, their bankruptcy, and the foreclosure, Stanford is not entitled to any offset against the judgment, which is based on a separate note and trust deed.

## ARGUMENT

### **I. SUMMARY JUDGMENT WAS APPROPRIATELY USED TO DETERMINE THE FACT AND EXTENT OF STANFORD'S LIABILITY.**

The “major purpose of summary judgment is to avoid unnecessary trial by allowing the parties to pierce the pleadings to determine whether there is a genuine issue to present to the fact finder.” *Reagan Outdoor Advertising, Inc. v. Lundgren*, 692 P.2d 776, 779 (Utah 1984); *see also Brown v. Jorgensen*, 2006 UT App 168, ¶ 20, 136 P.3d 1252. Summary judgment is appropriate when there is “no genuine issue as to any material fact” and the “moving party is entitled to a judgment as a matter of law.” Utah R. Civ. P. 56(c). When a motion for summary judgment is properly supported, an adverse party may not rest on allegations only, but “by affidavits or as otherwise provided ... must set forth specific facts showing that there is a genuine issue” of fact. *Id.*

Here, the material facts are not in dispute. The dispositive provision of the 1995 Note provides that Stanford

agrees to unconditionally guarantee the payment of this Note, but in no event shall Gary B. Stanford's liability (excluding portions thereof attributable to interests and costs) when added to any deficiency judgment which may be entered against him by virtue of his guarantee of the Security Mutual Life Insurance Co., Note (excluding interest and costs), exceed the sum of FIVE HUNDRED THOUSAND DOLLARS (\$500,000).

(R. 105 at 106.) Stanford concedes that this provision is facially unambiguous, but argues that it is rendered ambiguous by the terms of certain prior correspondence. (*See* Stanford's brief, pp. 18-20.) This argument is without merit.

“In Utah, a court may grant summary judgment enforcing a contract when the contract terms are ‘complete, clear, and unambiguous.’” *Young v. Wardley Corp*, 2008 UT App 104, ¶ 9 (*quoting Aspenwood, LLC v. C.A.T., LLC*, 2003 UT App 28, ¶ 30, 73 P.3d 947). “If the language within the four corners of the contract is unambiguous, then a court does not resort to extrinsic evidence of the contract's meaning, and a court determines the parties' intentions from the plain meaning of the contractual language as a matter of law.” *Id.* (*quoting Bakowski v. Mountain States Steel, Inc.*, 2002 UT 62, ¶ 16, 52 P.3d 1179. “In analyzing the language in the [contract], ‘[i]t is [the trial] court's duty to enforce the intentions of the parties as expressed in the plain language of the [contract's] covenants.’” *Id.*, ¶ 10 (*quoting Holladay Duplex Mgmt. Co. v. Howells*, 2002 UT App 125, ¶ 2, 47 P.3d 104. “The trial court is to consider “[e]ach contract provision ... in relation to all of the others, with a view to giving effect to all and ignoring none.” *Id.* (*quoting Plateau Mining Co. v. Utah Div. of State Lands & Forestry*, 802 P.2d 720, 725 (Utah 1990)).

Recently, the Utah Supreme Court held that, “before permitting recourse to extrinsic evidence, a court must make a determination of facial ambiguity.” *Daynes v. Vincent*, 2008 UT 51, ¶ 25, 190 P.3d 1269 (citing *Ward v. Intermountain Farmers Assoc.*, 907 P.2d 264, 268 (Utah 1995)). Moreover, even if a judge decides to consider extrinsic evidence, he or she must ensure that “the interpretations contended for are reasonably supported by the language of the contract.” *Id.*, ¶ 26 (*quoting Ward*, 907 P.2d at 268). “Thus, a correct

application of the Ward rule to determine what the writing means begins and ends with the language of the contract.” *Id.*, ¶ 30.

Here, in order to determine that Stanford’s guarantee in the 1995 Note is ambiguous, this Court must first conclude that the language of the guarantee is “capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms or other facial deficiencies.” *Peterson v. The Sunrider Corporation*, 2002 UT 43, ¶ 19, 43 P.3d 918. Stanford does not argue that this is the case. To the contrary, the language of the guarantee states in two separate instances that the \$500,000 cap “excludes interest.” ( R. 106.)

The only way this language regarding interest, when compared to any other document, can create an ambiguity is if it is *read out of* the Note altogether. This expressly contradicts the rule of contract interpretation that a trial court give effect to all contract provisions and ignore none, *see Young v. Wardley Corp*, 2008 UT App 104, ¶ 10, as well as the rule that parole evidence may not be used to distinguish or contradict the terms of the contract, *see Hall v. Process Instruments and Control, Inc.*, 866 P.2d 604, 607 (Utah Ct. App. 1993). Nowhere in the language of the guarantee is there any hint of ambiguity regarding the fact that interest is excluded from the \$500,000 cap.

Stanford presents no facts to support his argument that the language recited above is ambiguous. In this case, as in *Daynes*, Stanford relies on a series of prior communications which were contrary to express language in the final agreement. Indeed, Stanford attempts



to rely on letters exchanged more than eight months prior (September and October 1994) to the time that the Note and trust deed were ultimately executed (July 1995).

More specifically, Stanford contends that the guarantee is rendered ambiguous by virtue of the following language in the second Trust deed Note:

Such security instruments and all other instruments evidencing or securing the indebtedness hereunder are hereby made part of this Note and are deemed incorporated herein in full.

In effect, Stanford is arguing that the September and October, 1994 letters “evidence . . . the indebtedness.” (Stanford’s brief, p. 19-21.)

This argument fails in light of Stanford’s own concessions about the events between October 1994 and July 1995. Stanford acknowledged that between the October 1994 letter, and the July 1995 Note, his partner, Dix Buckway, told him that there had been changes made in the documents. (Stanford depo., p. 132, R. 343.) Stanford himself recognized that he did not know the nature of the discussions that took place between the date of the correspondence and his execution of the Note and Trust deed. (Stanford depo., p. 85, 86, R. 341.) Stanford acknowledged that he did not participate in these negotiations, that he never discussed his understanding of the terms of his guarantee with Parks, nor did he tell Parks that his understanding was different than what was expressed in the terms of the Note he signed. (Stanford depo., p. 86, R. 341.) Indeed, Stanford acknowledged that he did not express any problem with the language in the 1995 Note that excluded interest from his cap (Stanford depo., p. 83, 84, l. 7-10; R. 340), and acknowledged that it was part of the process

that allowed the purchase obligation for the property to be reduced from \$1 million to \$900,000 (Stanford depo., p. 85, l. 5-8; R. 341). Stanford's characterization of events was that "Park seemed delighted in making small changes to enhance their position, but I went ahead and signed nevertheless." (Stanford depo., p. 85, l. 1-4; R. 341.) Stanford acknowledged that he knew that the changes were not going to enhance his position, and that when he signed the Note, he had not discussed his understanding of the guarantee with anyone other than his partner, Dix Buckway. (Stanford depo., p. 84, l. 3-10; p. 85, p. 86, l. 7-11; R. 334-343.)

Whatever Stanford and Buckway talked about outside of the Parks' presence, and what Stanford and JR Christensen discussed in private is inadmissible hearsay. These discussions fail to comply with Utah R. Evid. 801 and 802, are inadmissible, and therefore cannot be used to defeat a motion for summary judgment under Utah R. Civ. P. 56. *See Wayment v. Clear Channel Broadcasting, Inc.*, 2005 UT 25, 116 P.3d 271 ("statements that are 'not ... admissible in evidence ... may not be considered on summary judgment under Rule 56(e)' (quoting *Norton v. Blackham*, 669 P.2d 857, 859 (Utah 1983)); *see also Walker v. Rocky Mtn. Recreation Corp.*, 508 P. 2d 538, 542 (Utah 1973) (affidavits must "set forth facts that would be admissible in evidence...Hearsay and opinion testimony that would not be admissible if testified to at the trial may not properly be set forth in an affidavit.")).

Stanford argues that his guarantee is rendered ambiguous by its reference to "all other instruments evidencing or securing the indebtedness hereunder are hereby made part of this

Note and are deemed incorporated herein in full.” The prior letters are not “instruments,” and do not “evidence” the “indebtedness;” indeed, nowhere does this clause refer to earlier correspondence.<sup>1</sup> At best, the Real Estate Purchase Contract ( R. 93), which expressly *includes* interest (at R. 96, ¶ 3), the September, 1994 letter ( R. 225, ¶ 5), which again expressly *includes* interest, the October 1994 letter, and the many conversations and discussions that occurred in between, of which Stanford had no knowledge and did not ask any questions, reflect the back and forth of discussions culminating in a final agreement signed in July 1995, and not part of the contract itself. Other “instruments” evidencing or securing the indebtedness, in this case, would have included the (second) 1995 Trust Deed in favor of Parks, and Stanford’s assumption of the underlying first trust deed evidencing Snowmass and Stanford’s obligations to Security Mutual, and the separate guarantees that Stanford executed in favor of Security Mutual. Accordingly, this argument must fail.

As a matter of law, Stanford’s intention is found in the four corners of the unambiguous 1995 Note. *Ron Case Roofing v. Blomquist*, 773 P.2d 1382,1385 (Utah 1984).

What Stanford may have silently “intended” is immaterial, unless that intention was

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<sup>1</sup> The argument that this clause somehow leads to the conclusion that the 1995 Note is not an integrated document, is incorrect and without basis. This clause, like the clause in *Daynes v. Vincent*, 2008 UT 51, ¶ 23, 190 P.3d 1269, specifies that all other “instruments evidencing or securing the indebtedness hereunder are hereby made part of this Note and are deemed incorporated herein in full.” This satisfies the integration clause standard described in *Daynes*. *See id.* In any event, Stanford fails to explain why, either legally or factually, lack of an integration clause would necessarily affect the plain language of the Note itself.

expressed by him and agreed to by Parks. *See Zions First Natl. Bk. v. B. Jensen Interiors*, 781 P.2d 478, 480 (Ut. Ct. App. 1989) (“It is well established in the law that unexpressed intentions do not affect the validity of a contract. . .”).

Thus, this Court can conclude, as did the trial court, that the language of Stanford’s guarantee is unambiguous as a matter of law, and that the cap does not include interest as Appellant now claims.

## **II. STANFORD FAILS TO SHOW THAT THE TRIAL COURT ERRED WHEN IT REFUSED TO GIVE HIM CREDIT TOWARD HIS GUARANTEE.**

Section II of Stanford’s brief, at p. 22, argues that the trial court erred “by not giving [Stanford] credit toward his \$500,000 guarantee.” However, Stanford fails to establish any error in connection with this ruling.

In its June 5, 2006 Order, the trial court determined, “as a matter of law, that none of the payments made to date by Stanford or Snowmass can be applied so as to reduce the \$500,000 personal guarantee from Stanford to the plaintiffs.” R. 391. Stanford argues that reversal is appropriate because every payment made by him must be construed as performance upon his guarantee. This argument ignores applicable case law, and is without any factual support from the record.

Stanford’s first argument - that all payments received by Parks should necessarily have been applied to his guarantee, *see* Stanford’s brief, pp. 23-27, is contrary to applicable case law. Absent some clear contractual language, subsequent agreement, or specific instruction by the guarantor, Parks were entitled to apply payments received in the manner

most beneficial to them. *See Lee v. Yano*, 997 P.2d 68, 75-76 (Hawaii Ct. App. 2000) (citing, et alia, *Mid-Continent Supply Co. v. Atkins & Potter Drilling Corp.*, 229 F.2d 68, 69 (10<sup>th</sup> Cir. 1956)); *Wyandotte Coal & Lime Co. v. Wyandotte Pav. & Constr. Co.*, 154 P.1012 (Kansas 1916); *Standard Accident Ins. Co. v. Copper Hills Motor Hotels, Inc.*, 424 P.2d 154, 156 (Ariz. 1967) (“Neither sureties nor guarantors have the right to control the application which either the debtor or creditor makes of the payment.” (citations omitted)).

Rather than address this general rule, Stanford relies heavily on a 1929 New Jersey decision, *Monmouth Plumbing Supply v. McDonald*, 147 A. 627, to support his argument that Parks were obligated to credit payments against Stanford’s guarantee. *Monmouth* has never been favorably cited by any court in this country, and presents a unique set of facts not helpful in this case. In *Monmouth*, the creditor extended new credit to the guarantor’s son after the guarantee limit had been paid by the guarantor. Here, there is no assertion, and certainly no facts of record to show, that the amount of the loan was increased, as occurred in *Monmouth*. In *Monmouth*, the claim by the creditor was that the guarantee was a continuing guarantee, and could continue to apply to new purchases even after the father of the borrower had paid the maximum guarantee amount. Here, the creditor had no reason to know or believe that the payments were to be applied to the guarantee, because the guarantor never asked or directed that they be applied to the guarantee. The *Monmouth* case is therefore inapposite.

There is no record evidence of an agreement by Parks to apply any payments made before this dispute arose to the guarantee, and Stanford alleges no facts whatsoever to support his argument. “When a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Rule 56(e), the trial court may properly conclude that there are no genuine issues of fact.” *Busch Corp. v. State Farm Fire & Casualty Co.*, 743 P.2d 1217, 1219 (Utah 1987). Absent a genuine issue of material fact, “the Court need only decide whether, on the basis of the applicable law, the moving party is entitled to judgment.” *Id.* “[B]are contentions, unsupported by any specification of facts in support thereof, raise no material questions of fact as will preclude the entry of summary judgment.” *Massey v. Utah Power & Light*, 609 P.2d 937, 938 (Utah 1980).

The *only* fact asserted in this regard is paragraph 28 of Stafford’s “Statement of Facts,” Stanford’s brief, p. 14, which alleges “[w]hen [Stanford] made personal payments to the [Parks], he did so believing that the Parks would credit those payments towards his \$500,000 guarantee.” If Stanford “believed” that payments were to be credited against his guarantee, and if it was critical to his decision to continue funding Snowmass, he had a legal obligation to tell Parks that the payments were to be credited against his guarantee, and obtain their consent to this request. *See Lee v. Yano*, 997 P.2d 68, at 76; *Weston Group Inc. v. A.B. Hirschfeld Press, Inc.*, 845 P. 2d 1162, 1167 (Colo. 1993). It is undisputed that Stanford never did make such a request, nor did Parks assent to it. Conspicuously absent

from Stanford's lengthy affidavit (R. 201) is any statement that he ever advised or requested of Parks that any of the payments being made on the Note be credited against his personal guarantee. None of the letters from Park to Stanford attached to the affidavit make any reference to the guarantee. (R. 241- 261.) There is simply no statement of record that Stanford *ever* advised or requested of Parks that any of the payments being made on the Note were to be credited against the personal guarantee. Thus, Stanford offers no facts that support his argument that summary judgment was improperly granted.

Next, Stanford argues that certain payments should have been credited to his guarantee because Parks knew that these payments came from Stanford, and were to be so applied. *See* Stanford's brief, pp. 27-29. Stanford argues that summary judgment was improper because, "when a lender knows the source of its payment is the guarantor, the lender must apply that payment to the guarantor's guaranteed debt." Once again, this assertion is neither legally nor factually supported.

As set forth above, the general rule is that a guarantor cannot control the application the creditor makes of its payment. *See Lee v. Yano*, 997 P.2d at 75-76. The exception to this rule is where contrary direction is provided pursuant to clear contractual language, or specific instruction by the guarantor. *Id.* The Miller Act cases cited by Stanford, *St. Paul Fire & Marine Co. v. Dakota Electric Supply Co.*, 309 F.2d 22, 25 (8<sup>th</sup> Cir. 1962) and *Broward County v. Continental Gas Co.*, 243 F.Supp.118 (S.D. Fla. 1965) do not alter this general rule. In *St. Paul Fire*, the court recognized the general rule ("If the debtor fails so to indicate,

the payment is applied as the creditor, within a reasonable time, determines”), 309 F.2d at 25, but held that the particular facts allowed for application of an *equitable exception* to the general rule, due to the particular knowledge and control of the creditor, which had taken over control of the debtor through a voting trust. *Id.* at 30. Stanford makes no attempt to show how this “exception” could apply here. In the *Broward County* case, another action on a surety bond under the Miller Act, the court declined to apply payments to the benefit of the guarantor where “the evidence fell far short of showing circumstances that were such as to make it reasonable to know from whence the funds came.” 243 F.Supp. at 124. Stanford’s reliance on the *Central Blacktop v. Town of Cicero*, 519 N.E.2d 972 (Ill.App. 1988) and *Hyland Electric Supply v. Franchi Bros. Constr.*, 378 F.2d 1344 (CA2 1967) cases fail for the same reason. Parks were never told the source of the funds or asked to apply them to the guarantee. Accordingly, the case law cited by Stanford does not support his conclusion that the trial court erred in some fashion.

In any event, Stanford apparently cites these cases for the proposition that “the operative inquiry is whether the lender knows the payment it receives is from a guarantor.” Stanford’s brief, p. 28. Even if this argument was legally sound, it is without any factual support. Stanford fails to set forth *any* record facts that could answer this question in the affirmative. Stanford instead relies on the following allegations:

The facts show that [Stanford] gave [Parks] over \$750,000 in payments at their request and on behalf of Snowmass. Stanford either made those payments personally or transferred his funds into Snowmass’ account who then made the payment to [Parks].



Stanford's brief at p. 25. Stanford then asserts that "[Appelles] denied that [Stanford] was making payments to them in his capacity as guarantor" and that Parks "asserted that while they did receive payments from [Stanford], there was no reference to his guarantee." *Id.* at p. 26. Of course, what is missing from such allegations is any fact that Parks knew any particular payment was being made by Stanford personally, for application to his guarantee. Stanford's blanket assertion is not only without factual basis, but is in *distinct contrast* to the actual evidence of record, to wit: that Parks had no knowledge of the same; that, as of 1998, Stanford was the *sole member* of Snowmass, the primary debtor (R. 207, ¶ 40); and that the 1997 Amendment to the Trust deed required notices of default to be sent to Stanford's personal attention (R. 330).

The argument that demands for payment were sent to he and Mr. Buckway personally adds nothing to this analysis. *See* Stanford's brief, p. 27. As discussed previously, none of these letters make any reference to any guarantee (R. 241-261). There is simply no evidence that Parks knew payments came from Stanford, as guarantor, as opposed to Stanford as a member of Snowmass, the debtor.

In short, there is no mention in Stanford's brief, nor in the record, of any fact supportive of the assertion that Parks knew or agreed that any payments made to them were from Stanford's personal funds and that such funds were to be applied to his guarantee. Accordingly, Stanford's argument that a genuine issue of material fact existed on this point

is without basis, and Stanford fails to set forth any reason, whether factual or otherwise, to reverse the trial court's determination.

**III. STANFORD IS NOT ENTITLED TO ANY OFFSET AS A RESULT OF THE FORECLOSURE ON THE FIRST TRUST DEED (THE SECURITY MUTUAL TRUST DEED).**

Stanford argues that he is entitled to an offset against his guarantee on Parks' second Trust Deed Note (the 1995 Note) by virtue of his and Snowmass' default on and the subsequent foreclosure of the first trust deed (originally held by Security Mutual) against the same property.

In making this argument, Stanford relies principally upon the Utah decision in *Surety Life Insurance Co. v. Smith*, 892 P.2d 1 (Utah 1995), and upon Utah Code Ann. § 57-1-32. As discussed hereinafter, neither of these authorities have application to the facts at hand or require an offset in this case.

When this action began, the property was subject to two trust deeds. The first trust deed was held initially by Security Mutual Life Insurance Company. This first trust deed secured an obligation, beginning in March 1994, of approximately \$265,000 and was recorded on March 17, 1992. (R. 433, para. C.) The second trust deed, the trust deed that secured Parks, was junior to the interest of Security Mutual Life Insurance Company. (Park's second trust deed was recorded on September 12, 1995. R. 566.) In December 2002, (effective March 2002) Snowmass, LC, and Stanford as a guarantor, entered into a Loan Extension Agreement with Security Mutual which, among other things, finally released Parks from

liability on the underlying obligation to Security Mutual, and confirmed and ratified the priority and encumbrance of the first trust deed. (R. 433, ¶¶ 14 and 6.)

At some point in time, Snowmass and/or Stanford stopped paying Security Mutual (now Equitable Life) and in March, 2007, Security Mutual filed a Notice of Default (Exhibit 2) against Snowmass and the property on their first trust deed. (See certified copy of Trustee's Deed, Exhibit 1 attached. Pursuant to Utah Code Ann. § 57-1-28(2)(c), the recitals in the Trustee's Deed on the subjects of the notice of default and the notice of sale are "conclusive evidence" in favor purchasers.) Security Mutual set a sale based on Snowmass' default for July 31, 2007. (See Notice of Sale, Exhibit 3 attached to this brief.) On July 27, 2007, Snowmass, acting through its sole member, Stanford, filed bankruptcy to avert the sale. (See petition, Exhibit 4 attached.) In December, 2007, the Bank of Utah as Custodian for the Kang S. Park IRA (Bank of Utah) purchased the interest of Security Mutual for a sum slightly in excess of \$251,000 (see R. 616). Thereafter, the Bank of Utah sought and obtained relief from the automatic stay and conducted a non-judicial foreclosure sale of the first Trust Deed on July 31, 2008. (See Trustee's Deed, Exhibit 1 attached.)

The factors that distinguish this case from the *Surety Life Insurance Co. v. Smith*, *supra*, case and from any restrictions in U.C.A. § 57-1-32 are many. First and foremost, the Bank of Utah foreclosure sale was not of the same trust deed and note that are the subject of Stanford's guarantee in this action. Parks' action against Stanford is based upon the **second** trust deed and Stanford's guarantee thereof.

A second distinction is that Kang and Marsha Park were not the owners of both the first and the second trust deeds. The first trust deed and the related debt were owned by the Bank of Utah as custodian. ( R. 616 and Exhibit 1 attached.)

Finally, the foreclosure of the first trust deed by the Bank of Utah actually had the effect of eliminating the second trust deed (which secured the Parks' 1995 Note) as an encumbrance against the property.

Stanford offers no authority, statutory or otherwise, that supports his claim that he is entitled to credit against the second trust deed because of a separate foreclosure by a senior encumbrance holder on a first trust deed. And logically, such a claim would not make sense. The foreclosure of the first trust deed by the Bank of Utah as Custodian eliminated any security interests that the second trust deed may have created.

In the *Surety Life* case, the trust deed that was foreclosed was the same one to which the guarantee applied. That circumstance does not exist in this case. In the *Surety Life* case, the debt guaranteed was the same debt that was the subject of the foreclosure. That is not the case here. It was Stanford's and Snowmass' default on a separate obligation, the first trust deed, that led to the foreclosure on the first.

In this case, the second trust deed, the obligation that was guaranteed by Stanford, was never foreclosed.

The restrictions in U.C.A. § 57-1-32 are also inapposite to this case. That statute provides in part that it applies to an action “. . . to recover the balance due upon **the**

**obligation** for which the trust deed was given as security . . . .” As discussed in *Surety Life*, 892 P.2d at 3, this limitation applies both to the trust deed and the guarantee. The flaw in Stanford’s attempt to fall within the protection of the statute is that the guarantee which is the focus of this action is not his guarantee of the first trust deed (which is the trust deed that was foreclosed).<sup>2</sup>

Stanford’s discussion at pp. 31-33 also attempts to obfuscate the participants. As previously discussed, Stanford had separate guarantees on the Security Mutual Note ( R. 702) and on the Park Note, and not a single guarantee as Stanford suggests (at p. 32). Contrary to Stanford’s assertion, it was not the Parks who purchased the Security Mutual Note and declared it in default. The note was already in default in July, 2007, when Snowmass filed bankruptcy to avoid the foreclosure by Security Mutual. (See Exhibit 1.) Thereafter, the Bank of Utah as Custodian of the Kang S. Park IRA purchased the interest of Security Mutual. ( R. 616.) The Parks did not sell the Ogden property nor did they purchase it at the sale that occurred on July 31, 2008. The property was sold by Bank of Utah and the property was purchased at the sale by the Bank of Utah as Custodian. (See Exhibit 1.)

The judgment that the Parks received in this action against Stanford did not include any amounts attributable to the obligation separately guaranteed by Stanford to Security Mutual. (See R. 413 at 414 (para. 4) and 416 (Summary of Balance, Column 1).) Stanford next argues

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<sup>2</sup> Stanford also personally guaranteed payment of the first trust deed. Bank of Utah acquired this guarantee as well as the note and trust deed. (See Exhibit 4.) Bank of Utah did not and cannot pursue Stanford on this separate guarantee.

that because he has lost the right to look to the property, Parks should be denied any recovery against him. (Page 33.) In effect, Stanford's argument is that the guarantor of any junior encumbrance should be relieved from liability on his guarantee if a senior encumbrance forecloses. This result is not warranted by logic, or supported by *Mead Corp. v. Dixon Paper Co.*, 907 P.2d 1179 (Utah Ct. App. 1995).

The *Mead Corp.* case deals with letters of credit and equitable subrogation, and has no factual relationship to this case. The actual holding in *Mead Corp.* is that equitable subrogation does not apply to letters of credit. *See id.* at 1188. The language quoted by Stanford is actually from another Utah case, *Valley Bank & Trust v. Rite Way Concrete*, 742 P.2d 105, 108 (Utah Ct. App. 1987), cert denied 765 P.2d 1277 (Utah 1988). The *Valley Bank* case offers no factual or legal support for Stanford. In this case, Parks did not do anything that impaired Stanford's ability to get at the collateral. Indeed, it was Stanford and Snowmass, by virtue of their default on the first trust deed, that impaired the collateral for the second trust deed. Stanford and Snowmass, by their default, triggered the inevitable foreclosure of the first trust deed.


Where Stanford and Snowmass created the default on the first trust deed, they are not entitled to any equitable protection or offset based on the doctrine of equitable subrogation (or any other theory) on their guarantee of the now unsecured second trust deed held by Parks. *Mead Corp.*, 907 P.2d at 1186.

### CONCLUSION

There are no issues of fact material to the trial court's ruling, and its ruling was correct as a matter of law. Parks therefore respectfully submit that the decision of the trial court should be affirmed.

DATED this 13 day of January, 2009.

COHNE, RAPPAPORT & SEGAL, P.C.

  
\_\_\_\_\_  
Keith W. Meade  
Bradley M. Strassberg  
Attorneys for Appellees

## **ADDENDUM**

Exhibit 1	Trustees' Deed
Exhibit 2	Notice of Default
Exhibit 3	Notice of Sale
Exhibit 4	Bankruptcy Petition
Exhibit 5	Solicitation of Offers



Exhibit 1  
Trustee's Deed



\*W2357017\*

When Recorded, Mail to:  
Keith W. Meade, Esq.  
P. O. Box 11008  
Salt Lake City, Utah 84147-0008

EN 2357017 PG 1 OF 3  
ERNEST D ROWLEY, WEBER COUNTY RECORDER  
31-JUL-08 317 PM FEE \$15.00 DEP SPY  
REC FOR: CONNE RAPPORT & SEGAL

## TRUSTEE'S DEED

Keith W. Meade, (herein called "Successor Trustee" or "Grantor"), as Successor Trustee under the Trust Deed hereinafter particularly described, does hereby bargain, sell, and convey without warranty to Bank of Utah as Custodian of the Kang S. Park IRA, 711 South State Street, Salt Lake City, Utah 84111 (hereinafter called "Grantee"), all of the real property situated in the County of Weber, State of Utah, described as follows:

### PARCEL 1:

Part of Lots 2 and 3, Block 30, Plat "A", of Ogden City Survey: Beginning at a point 2 feet East from the Southwest Corner of said Lot 2 and running thence West 67.485 feet; thence North 330 feet; thence East 65.485 feet; thence South 206 feet; thence East 2 feet; thence South 124 feet to the point of beginning.

Together with  $\frac{1}{2}$  of the vacated street abutting thereon.

01-026-0011 *th*

### PARCEL 2:

Part of Lot 2, Block 30, Plat "A", Ogden City Survey: Beginning at a point 2 feet East of the Southwest Corner of said Lot 2 and running thence East 66.5 feet; thence North 234 feet; thence West 2.5 feet; thence North 96 feet; thence West 66 feet; thence South 206 feet; thence East 2 feet; thence South 124 feet to the point of beginning.

TOGETHER WITH a perpetual right to use the following described tract of land for a road way to wit: a part of Lot 9, Block 30, Plat "A", Ogden City Survey:

Beginning at a point 2 rods West of the Northeast Corner of said Lot 9 and running thence South 20 rods; thence West 3 rods; thence North 12 feet; thence East  $37 \frac{1}{2}$  feet; thence North 318 feet; thence East 12 feet to the point of beginning. As created by Warranty Deed recorded December 17, 1884, in Book S of Deeds at Page 107.

Tax Parcel No: 01-026-0010 *th*

Said property is also known by the street address of:  
550 24th Street, Ogden, UT 84401

This conveyance is made pursuant to the powers conferred upon Successor Trustee by the Trust Deed dated March 12, 1992, executed by Kang S. Park, as Trustor, in which Associated Title Company was named as Trustee and Mutual Life Insurance Company of Lincoln, Nebraska as Beneficiary, filed for record on March 17, 1992 as Entry No. 1170790 in Book 1621, Pages 1098-1122, Records of the County Recorder of Weber County, Utah; and after the fulfillment of the conditions specified in said Trust Deed authorizing this conveyance as follows:

(a) Default occurred in the obligations for which such Trust Deed was given as security and the Beneficiary made demand upon said Successor Trustee to sell said property pursuant to the terms of said Trust Deed. Notice of Default was recorded on March 29, 2007 as Entry No. 2252429 in the Office of the Weber County Recorder (and in the Office of the Recorder of each county in which the property described in said Trust Deed, or any part thereof, is situated), the nature of such default being as set forth in said Notice of Default, and a copy of such notice was mailed by certified mail to each person who recorded a request therefor and as otherwise required by law. Such default still existed at the time of sale which was held July 31, 2008.

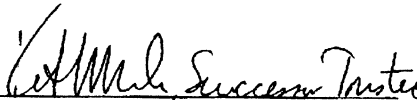
(b) More than three months after recordation of said Notice of Default, Successor Trustee gave notice of the time and place of the sale of said property by certified mail, by posting in a conspicuous place on the property to be sold and at the office of the County Recorder of each county in which the property described in said Trust Deed or any part thereof is situated, and by publishing in a newspaper having a general circulation in each county in which the property is situated.

(c) The provisions, recitals and contents of the Notice of Default referred to in paragraph (a) supra, shall be and they are hereby incorporated herein and made an integral part hereof for all purposes as though set forth herein at length.

(d) All requirements of law, including those set forth in UCA §57-1-1, et. seq., regarding the mailing, posting, publications and recording of the Notice of Default, and Notice of Sale and of all other notices have been complied with.

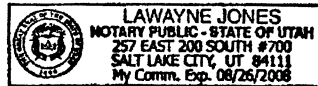
(e) Successor Trustee at the time and place of sale fixed by said notice, at public auction in one parcel struck off to Grantee, being the highest bidder therefor, the property herein described for the sum of \$ 200,000.00 subject, however, to all prior liens and encumbrances. No person or corporation offered to take any part of said property less than the whole thereof for the amount of principal, interest, advances and costs.

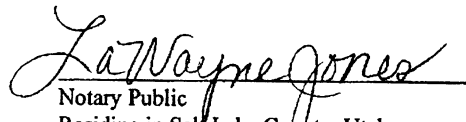
IN WITNESS WHEREOF, the Grantor has caused his name to be hereunto subscribed this 31<sup>st</sup> day of July, 2008.

  
Keith W. Meade, Successor Trustee

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

On the 31<sup>st</sup> day of July, 2008, personally appeared before me, Keith W. Meade, who being by me duly sworn did say that he is the Successor Trustee and that the said Keith W. Meade acknowledged that he executed the foregoing instrument as such Trustee.



  
Notary Public  
Residing in Salt Lake County, Utah  
My Commission Expires: 8/26/08

F:\LAWAYNE\1 KETH\Park/Snowmass/Trustees Deed vpd

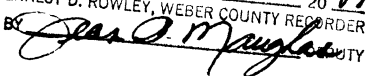
STATE OF UTAH                     )  
COUNTY OF WEBER                ) ss  
I HEREBY CERTIFY THAT THIS IS A TRUE COPY  
OF THE DOCUMENT THAT APPEARS ON  
RECORD IN MY OFFICE.  
WITNESS MY HAND AND SEAL  
THIS 18 DAY OF Dec. 20 08  
ERNEST D. ROWLEY, WEBER COUNTY RECORDER  
BY  COUNTY

Exhibit 2  
Notice of Default

4853194



\*W2252429\*

E# 2252429 PG 1 OF 2  
ERNEST D ROWLEY, WEBER COUNTY RECORDER  
29-MAR-07 3:11 PM FEE \$14.00 DEP JM  
REC FOR: FIRST AMERICAN TITLE INSURANCE  
ELECTRONICALLY RECORDED

AFTER RECORDING RETURN TO:  
Stuart T. Matheson, Esq.  
Matheson, Mortensen, Olsen & Jeppson, P.C.  
648 East First South  
Salt Lake City, Utah 84102  
Telephone: (801) 363-2244  
Title Co. No.  
MMOJ No.. 010772m

### NOTICE OF DEFAULT AND ELECTION TO SELL

On or about March 12, 1992, Kang S. Park, as trustor, executed and delivered to Associated Title Company, as Trustee, for the benefit of The Security Mutual Life Insurance Company of Lincoln, Nebraska, as Beneficiary, a trust deed to secure the performance by the trustor of the obligations under a promissory note. The Trust Deed was recorded in the office of the Weber County Recorder, State of Utah, on March 17, 1992, as Entry No. 1170790, in Book 1621, at Page 1098 and covers the following real property:

PARCEL 1: PART OF LOTS 2 AND 3, BLOCK 30, PLAT "A", OF OGDEN CITY, SURVEY: BEGINNING AT A POINT 2 FEET EAST FROM THE SOUTHWEST CORNER OF SAID LOT 2 AND RUNNING THENCE WEST 67.485 FEET; THENCE NORTH 330 FEET; THENCE EAST 65.485 FEET; THENCE SOUTH 206 FEET; THENCE EAST 2 FEET; THENCE SOUTH 124 FEET TO THE POINT OF BEGINNING.

TOGETHER WITH 1/2 OF THE VACATED STREET ABUTTING THEREON.

PARCEL 2: PART OF LOT 2, BLOCK 30, PLAT "A", OGDEN CITY SURVEY: BEGINNING AT A POINT 2 FEET EAST OF THE SOUTHWEST CORNER OF SAID LOT 2 AND RUNNING THENCE EAST 66.5 FEET; THENCE NORTH 234 FEET; THENCE WEST 2.5 FEET; THENCE NORTH 96 FEET; THENCE WEST 66 FEET; THENCE SOUTH 206 FEET; THENCE EAST 2 FEET; THENCE SOUTH 124 FEET TO THE POINT OF BEGINNING.

TOGETHER WITH A PERPETUAL RIGHT TO USE THE FOLLOWING DESCRIBED TRACT OF LAND FOR A ROAD WAY TO-WIT: A PART OF LOT 9, BLOCK 30, PLAT "A", OGDEN CITY SURVEY: BEGINNING AT A POINT 2 RODS WEST OF THE NORTHEAST CORNER OF SAID LOT 9 AND RUNNING THENCE SOUTH 20 RODS; THENCE WEST 3 RODS; THENCE NORTH 12 FEET; THENCE EAST 37 1/2 FEET; THENCE NORTH 318 FEET; THENCE EAST 12 FEET TO THE POINT OF BEGINNING. AS CREATED BY WARRANTY DEED RECORDED DECEMBER 17, 1884, IN BOOK S OF DEEDS AT PAGE 107.

Tax Parcel No.: 01-026-0011

The Security Mutual Life Insurance Company of Lincoln, Nebraska is the current holder of the beneficial interest under the trust deed and Stuart T. Matheson is the current trustee. The obligations under the promissory note and trust deed are in default for failure to make the monthly payments. The principal balance is accelerated and due, together with any other obligations including interest, late charges, costs and trustees' and attorneys' fees. Accordingly, the trustee has elected to sell the property described in the trust deed as provided by law.

THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED  
WILL BE USED FOR THAT PURPOSE. FOR QUESTIONS, CALL (801) 363-2244.  
OFFICE HOURS ARE 8:30 AM to 4:30 PM, MONDAY THROUGH FRIDAY.

DATED: March 28, 2007.

Stuart T. Matheson  
Stuart T. Matheson, Successor Trustee

State of Utah

)  
:ss.

County of Salt Lake

)

The foregoing instrument was acknowledged before me this 28th day of March, 2007, by  
Stuart T. Matheson, Successor Trustee.

Kathleen K. Curtis  
Notary Public

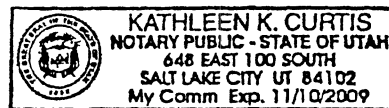


Exhibit 3

Notice of Trustee's  
Sale



## NOTICE OF TRUSTEE'S SALE

The following described property will be sold at public auction to the highest bidder, payable in lawful money of the United States at the East Main Entrance, Weber County Second District Courthouse, 2525 Grant Ave., Ogden, Utah, on **July 31, 2007 at 11:30 AM**, for the purpose of foreclosing a Trust Deed dated March 12, 1992 executed by Kang S. Park, as Trustor, in favor of The Security Mutual Life Insurance Company of Lincoln, Nebraska, as Beneficiary, covering real property located in Weber County and described as follows:

PARCEL 1: PART OF LOTS 2 AND 3, BLOCK 30, PLAT "A", OF OGDEN CITY, SURVEY: BEGINNING AT A POINT 2 FEET EAST FROM THE SOUTHWEST CORNER OF SAID LOT 2 AND RUNNING THENCE WEST 67.485 FEET; THENCE NORTH 330 FEET; THENCE EAST 65.485 FEET; THENCE SOUTH 206 FEET; THENCE EAST 2 FEET; THENCE SOUTH 124 FEET TO THE POINT OF BEGINNING.

TOGETHER WITH 1/2 OF THE VACATED STREET ABUTTING THEREON.

PARCEL 2: PART OF LOT 2, BLOCK 30, PLAT "A", OGDEN CITY SURVEY: BEGINNING AT A POINT 2 FEET EAST OF THE SOUTHWEST CORNER OF SAID LOT 2 AND RUNNING THENCE EAST 66.5 FEET; THENCE NORTH 234 FEET; THENCE WEST 2.5 FEET; THENCE NORTH 96 FEET; THENCE WEST 66 FEET; THENCE SOUTH 206 FEET; THENCE EAST 2 FEET; THENCE SOUTH 124 FEET TO THE POINT OF BEGINNING.

TOGETHER WITH A PERPETUAL RIGHT TO USE THE FOLLOWING DESCRIBED TRACT OF LAND FOR A ROAD WAY TO-WIT: A PART OF LOT 9, BLOCK 30, PLAT "A", OGDEN CITY SURVEY: BEGINNING AT A POINT 2 RODS WEST OF THE NORTHEAST CORNER OF SAID LOT 9 AND RUNNING THENCE SOUTH 20 RODS; THENCE WEST 3 RODS; THENCE NORTH 12 FEET; THENCE EAST 37 1/2 FEET; THENCE NORTH 318 FEET; THENCE EAST 12 FEET TO THE POINT OF BEGINNING. AS CREATED BY WARRANTY DEED RECORDED DECEMBER 17, 1884, IN BOOK S OF DEEDS AT PAGE 107.

Tax Parcel No.: 01-026-0011

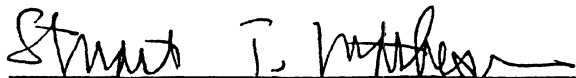
The street address of the property is purported to be 550 East 24th Street, Ogden, UT 84401. The undersigned disclaims any liability for any error in the street address. The current Beneficiary of the trust deed is The Security Mutual Life Insurance Company of Lincoln, Nebraska and the record owners of the property as of the recording of this notice of default is reported to be Kang S. Park.

Bidders must be prepared to tender to the trustee \$5,000.00 at the sale and the balance of the purchase price by 12:00 noon the day following the sale. Both payments must be in the form of a cashier's check or money order, cash and Bank "Official Checks" are not acceptable. A trustee's deed will be made available to the successful bidder within three business days following receipt of the bid amount. The sale is made without any warranty whatsoever, including but not limited to any warranty as to title, liens, possession, taxes, encumbrances, or condition of the property. The sale is subject to a workout reinstatement, payoff, sale cancellation or postponement, incorrect bidding instructions, bankruptcy, or any other circumstance of which the trustee is unaware. In the event any of the foregoing apply, the sale will be void and the successful bidder's funds will be returned without any liability to the trustee or beneficiary for interest or any other damages.

FORWARDED TO YOU BY  
COURT REPORT & RECORDS

**NOTICE IS HEREBY GIVEN THAT THIS FIRM IS ATTEMPTING TO COLLECT A DEBT  
AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.**

Dated July 2, 2007.

A handwritten signature in black ink, appearing to read "Stuart T. Matheson", is written over a solid horizontal line.

Stuart T. Matheson, Successor Trustee  
Matheson, Mortenson, Olsen & Jeppson, P.C.  
648 East First South  
Salt Lake City, Utah 84102  
(801) 363-2244  
Office Hours 8:30 am to 4:30 pm, Mon -Fri.  
MMOJ File No.: 010772m

# Exhibit 4

## Petition

7.27.07  
1

Official Form 1 (4/07)

<b>United States Bankruptcy Court District of Utah, Central Division</b>				<b>Voluntary Petition</b>																					
Name of Debtor (if individual, enter Last, First, Middle): <b>Snowmass, L.C.</b>			Name of Joint Debtor (Spouse) (Last, First, Middle)																						
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names):			All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names):																						
Last four digits of Soc. Sec. /Complete EIN or other Tax ID No. (if more than one, state all): <b>87-0541124</b>			Last four digits of Soc. Sec. /Complete EIN or other Tax ID No. (if more than one, state all):																						
Street Address of Debtor (No. and Street, City, and State): <b>c/o Gary B. Stanford 1250 East 3900 South, Suite 310 Salt Lake City, UT</b> <div style="text-align: right; font-size: small;">ZIP Code <b>84124</b></div>			Street Address of Joint Debtor (No. and Street, City, and State): <div style="text-align: right; font-size: small;">ZIP Code</div>																						
County of Residence or of the Principal Place of Business: <b>Salt Lake</b>			County of Residence or of the Principal Place of Business:																						
Mailing Address of Debtor (if different from street address): <div style="text-align: right; font-size: small;">ZIP Code</div>			Mailing Address of Joint Debtor (if different from street address): <div style="text-align: right; font-size: small;">ZIP Code</div>																						
Location of Principal Assets of Business Debtor (if different from street address above): <b>550 East 24th Street Ogden, UT 84401</b>																									
<b>Type of Debtor</b> (Form of Organization) (Check one box)  <input type="checkbox"/> Individual (includes Joint Debtors) <i>See Exhibit D on page 2 of this form.</i> <input checked="" type="checkbox"/> Corporation (includes LLC and LLP) <input type="checkbox"/> Partnership <input type="checkbox"/> Other (If debtor is not one of the above entities, check this box and state type of entity below.)		<b>Nature of Business</b> (Check one box)  <input type="checkbox"/> Health Care Business <input checked="" type="checkbox"/> Single Asset Real Estate as defined in 11 U.S.C. § 101 (51B) <input type="checkbox"/> Railroad <input type="checkbox"/> Stockbroker <input type="checkbox"/> Commodity Broker <input type="checkbox"/> Clearing Bank <input type="checkbox"/> Other  <b>Tax-Exempt Entity</b> (Check box, if applicable) <input type="checkbox"/> Debtor is a tax-exempt organization under Title 26 of the United States Code (the Internal Revenue Code).		<b>Chapter of Bankruptcy Code Under Which the Petition is Filed</b> (Check one box)  <input type="checkbox"/> Chapter 7 <input type="checkbox"/> Chapter 9 <input checked="" type="checkbox"/> Chapter 11 <input type="checkbox"/> Chapter 12 <input type="checkbox"/> Chapter 13  <input type="checkbox"/> Chapter 15 Petition for Recognition of a Foreign Main Proceeding <input type="checkbox"/> Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding		<b>Nature of Debts</b> (Check one box)  <input type="checkbox"/> Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose." <input checked="" type="checkbox"/> Debts are primarily business debts.																			
<b>Filing Fee</b> (Check one box)  <input checked="" type="checkbox"/> Full Filing Fee attached <input type="checkbox"/> Filing Fee to be paid in installments (applicable to individuals only). Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form 3A. <input type="checkbox"/> Filing Fee waiver requested (applicable to chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B.			<b>Chapter 11 Debtors</b> Check one box: <input type="checkbox"/> Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D) <input checked="" type="checkbox"/> Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D). Check if: <input checked="" type="checkbox"/> Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than \$2,190,000.  Check all applicable boxes: <input type="checkbox"/> A plan is being filed with this petition. <input type="checkbox"/> Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).																						
<b>Statistical/Administrative Information</b> <input checked="" type="checkbox"/> Debtor estimates that funds will be available for distribution to unsecured creditors. <input type="checkbox"/> Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.				THIS SPACE IS FOR COURT USE ONLY																					
<b>Estimated Number of Creditors</b> <table style="width: 100%; border-collapse: collapse;"><tr><td style="text-align: center;">1- 49</td><td style="text-align: center;">50- 99</td><td style="text-align: center;">100- 199</td><td style="text-align: center;">200- 999</td><td style="text-align: center;">1000- 5,000</td><td style="text-align: center;">5001- 10,000</td><td style="text-align: center;">10,001- 25,000</td><td style="text-align: center;">25,001- 50,000</td><td style="text-align: center;">100,001- 100,000</td><td style="text-align: center;">OVER 100,000</td></tr><tr><td style="text-align: center;"><input checked="" type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td><td style="text-align: center;"><input type="checkbox"/></td></tr></table>						1- 49	50- 99	100- 199	200- 999	1000- 5,000	5001- 10,000	10,001- 25,000	25,001- 50,000	100,001- 100,000	OVER 100,000	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1- 49	50- 99	100- 199	200- 999			1000- 5,000	5001- 10,000	10,001- 25,000	25,001- 50,000	100,001- 100,000	OVER 100,000														
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>														
<b>Estimated Assets</b> <table style="width: 100%; border-collapse: collapse;"><tr><td style="text-align: center;"><input type="checkbox"/> \$0 to \$10,000</td><td style="text-align: center;"><input type="checkbox"/> \$10,001 to \$100,000</td><td style="text-align: center;"><input type="checkbox"/> \$100,001 to \$1 million</td><td style="text-align: center;"><input checked="" type="checkbox"/> \$1,000,001 to \$100 million</td><td style="text-align: center;"><input type="checkbox"/> More than \$100 million</td></tr></table>				<input type="checkbox"/> \$0 to \$10,000	<input type="checkbox"/> \$10,001 to \$100,000	<input type="checkbox"/> \$100,001 to \$1 million	<input checked="" type="checkbox"/> \$1,000,001 to \$100 million	<input type="checkbox"/> More than \$100 million																	
<input type="checkbox"/> \$0 to \$10,000	<input type="checkbox"/> \$10,001 to \$100,000	<input type="checkbox"/> \$100,001 to \$1 million	<input checked="" type="checkbox"/> \$1,000,001 to \$100 million	<input type="checkbox"/> More than \$100 million																					
<b>Estimated Liabilities</b> <table style="width: 100%; border-collapse: collapse;"><tr><td style="text-align: center;"><input type="checkbox"/> \$0 to \$50,000</td><td style="text-align: center;"><input type="checkbox"/> \$50,001 to \$100,000</td><td style="text-align: center;"><input checked="" type="checkbox"/> \$100,001 to \$1 million</td><td style="text-align: center;"><input type="checkbox"/> \$1,000,001 to \$100 million</td><td style="text-align: center;"><input type="checkbox"/> More than \$100 million</td></tr></table>				<input type="checkbox"/> \$0 to \$50,000	<input type="checkbox"/> \$50,001 to \$100,000	<input checked="" type="checkbox"/> \$100,001 to \$1 million	<input type="checkbox"/> \$1,000,001 to \$100 million	<input type="checkbox"/> More than \$100 million																	
<input type="checkbox"/> \$0 to \$50,000	<input type="checkbox"/> \$50,001 to \$100,000	<input checked="" type="checkbox"/> \$100,001 to \$1 million	<input type="checkbox"/> \$1,000,001 to \$100 million	<input type="checkbox"/> More than \$100 million																					

**Voluntary Petition***(This page must be completed and filed in every case)*

Name of Debtor(s):

**Snowmass, L.C.****All Prior Bankruptcy Cases Filed Within Last 8 Years** (If more than two, attach additional sheet)

Location

Where Filed: **- None -**

Case Number:

Date Filed:

Location

Where Filed:

Case Number:

Date Filed:

**Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor** (If more than one, attach additional sheet)

Name of Debtor:

**- None -**

Case Number:

Date Filed:

District:

Relationship:

Judge:

**Exhibit A**

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.)

☐ Exhibit A is attached and made a part of this petition.

**Exhibit B**

(To be completed if debtor is an individual whose debts are primarily consumer debts )

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I delivered to the debtor the notice required by 11 U.S.C. §342(b)

**X**

Signature of Attorney for Debtor(s)

(Date)

**Exhibit C**

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.

☒ No.

**Exhibit D**

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.)

☐ Exhibit D completed and signed by the debtor is attached and made a part of this petition.

If this is a joint petition:

☐ Exhibit D also completed and signed by the joint debtor is attached and made a part of this petition.

**Information Regarding the Debtor - Venue**

(Check any applicable box)

- ☒ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.
- ☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.
- ☐ Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

**Statement by a Debtor Who Resides as a Tenant of Residential Property**

(Check all applicable boxes)

- ☐ Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following.)

\_\_\_\_\_  
(Name of landlord that obtained judgment)

\_\_\_\_\_  
(Address of landlord)

- ☐ Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and
- ☐ Debtor has included in this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.

**Voluntary Petition**

(This page must be completed and filed in every case)

Name of Debtor(s):  
**Snowmass, L.C.****Signatures****Signature(s) of Debtor(s) (Individual/Joint)**

I declare under penalty of perjury that the information provided in this petition is true and correct.  
 [If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.  
 [If no attorney represents me and no bankruptcy petition preparer signs the petition] I have obtained and read the notice required by 11 U.S.C. §342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X \_\_\_\_\_  
 Signature of Debtor

X \_\_\_\_\_  
 Signature of Joint Debtor

\_\_\_\_\_  
 Telephone Number (If not represented by attorney)

\_\_\_\_\_  
 Date

**Signature of Attorney**

X /s/ Anna W. Drake  
 Signature of Attorney for Debtor(s)

Anna W. Drake A0909

Printed Name of Attorney for Debtor(s)

Anna W. Drake, P.C.

Firm Name

215 South State

Suite 550

Salt Lake City, UT 84111

\_\_\_\_\_  
 Address

Email: annadrake@att.net

801-328-9792 Fax: 801-530-5955

\_\_\_\_\_  
 Telephone Number

July 27, 2007

\_\_\_\_\_  
 Date

**Signature of Debtor (Corporation/Partnership)**

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X /s/ Gary B. Stanford  
 Signature of Authorized Individual

Gary B. Stanford

Printed Name of Authorized Individual

Managing Member

Title of Authorized Individual

July 27, 2007

\_\_\_\_\_  
 Date

**Signature of a Foreign Representative**

I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition.

(Check only one box.)

☐ I request relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by 11 U.S.C. §1515 are attached.

☐ Pursuant to 11 U.S.C. §1511, I request relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached.

X \_\_\_\_\_  
 Signature of Foreign Representative

\_\_\_\_\_  
 Printed Name of Foreign Representative

\_\_\_\_\_  
 Date

**Signature of Non-Attorney Bankruptcy Petition Preparer**

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19B is attached.

\_\_\_\_\_  
 Printed Name and title, if any, of Bankruptcy Petition Preparer

\_\_\_\_\_  
 Social Security number (If the bankruptcy petition preparer is not an individual, state the Social Security number of the officer, principal, responsible person or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)

\_\_\_\_\_  
 Address

X \_\_\_\_\_  
 Date

Signature of Bankruptcy Petition Preparer or officer, principal, responsible person, or partner whose Social Security number is provided above.

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

*A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. §110; 18 U.S.C. §156.*

Exhibit 5

Notice from Security  
Mutual, re: Sale



3 Trad Center  
Salt Lake City, Utah 84180-1200

November 15, 2007

To Whom it May Concern:

RE: *Solicitation of Offers to Purchase Loan and Claim in Bankruptcy Proceeding*

Assurity Life Insurance Company, formerly known as The Security Mutual Life Insurance Company of Nebraska ("Assurity Life") is soliciting offers to purchase Assurity Life's interest in a loan secured by real property located in Weber County, Utah, (the "Loan") which loan is evidenced by the following documents:

1. Promissory Note dated March 12, 1992 in the sum of \$270,000.00 executed by Kang S. Park, as Borrower, in favor of Assurity Life, as Lender.
2. Deed of Trust and Security Agreement dated March 12, 1992 executed by Kang S. Park, as Trustor, in favor of Assurity Life, as Beneficiary, recorded March 17, 1992 in the Office of the Weber County Recorder as Entry No. 1170790 in Book 1621 at Page 1098.
3. Assignment of Rents and Leases dated March 12, 1992 executed by Kang S. Park, as Assignor, in favor of Assurity Life, as Assignee, recorded March 17, 1992 in the Office of the Weber County Recorder as Entry No. 1170791 in Book 1621 at Page 1123.
4. Modification of Trust Deed dated August 28, 1995 executed by Snowmass, L.C., as Assignee, and Assurity Life, as Lender, recorded November 14, 1995 in the Office of the Weber County Recorder as Entry No. 1373490 in Book 1779 at Page 2854.
5. Assumption Agreement dated August 28, 1995 by and among Kang S. Park, as Borrower, Snowmass, L.C., as Assignee, Marsha Park as original Guarantor and Richard Buckway and Dr. Gary B. Stanford as Additional Guarantors and Assurity Life, as Lender.
6. The Guaranty of Dr. Gary B. Stanford undated, but making reference to the Assumption Agreement dated August 28, 1995.
7. March 2002 Modification of Trust Deed recorded in the Office of the Weber County Recorder on December 31, 2002 as follows:



<u>Entry No.</u>	<u>Book</u>	<u>Page</u>
1901429	2303	1702
1901430	2303	1707
1901431	2303	1713
1901432	2303	1719

and

The Proof of Claim dated September 12, 2007 and filed September 21, 2007 in that certain bankruptcy case pending in the United States Bankruptcy Case for the District of Utah entitled In re: Snowmass, LLC, Case No. 07-23458GEC (the "Bankruptcy Case").

Subject to receipt of an offer acceptable to Assurity Life, Assurity Life will assign its position in the Loan and the Proof of Claim by assignment, as is and without warranty or representation of any kind or nature.

Offers to purchase shall be submitted in writing to the following:


Equitable Life & Casualty Insurance Co.  
3 Triad Center  
Salt Lake City, UT 84180-1200  
Attention: John C. Pitcher, Director of Mortgage Services

such that they are received by not later than 5:00 p.m. M.S.T., November 26, 2007. All offers shall be unconditional and for cash, payable within forty-eight (48) hours of written acceptance of the offer.

The minimum offer which Assurity Life will consider is \$250,489.69, plus \$53.83 per diem from and after November 30, 2007 to the date of closing of the sale. It is Assurity Life's intention to interplead with the Bankruptcy Court in the Bankruptcy Case all funds received from the highest offerer in excess of the minimum offer, less legal fees and costs associated with such interpleader, which funds are to be held, administered and distributed to the person or persons entitled thereto as the Bankruptcy Court may determine in the Bankruptcy Case.

Very truly yours,

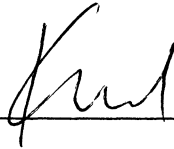
EQUITABLE LIFE & CASUALTY INSURANCE  
COMPANY

By:   
John C. Pitcher  
Director of Mortgage Services  
Agent for Assurity Life Insurance Company

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing **APPELLEE'S BRIEF** was mailed, postage fully prepaid, on the 14th day of January, 2009, to the following:

Russell S. Walker  
Reid W. Lambert  
Anthony M. Grover  
WOODBURY & KESLER  
265 East 100 South #300  
Salt Lake City, UT 84111

  
\_\_\_\_\_