

2008

Kang S. Park and Marsha Park v. Gary B. Stanford : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Park v. Stanford*, No. 20080574 (Utah Court of Appeals, 2008).
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IN THE UTAH COURT OF APPEALS

KANG S. PARK and MARSHA PARK

Plaintiffs/Appellees,
vs.

GARY B. STANFORD,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

Court of Appeals Case No. 20080574-CA

District Court Civil Case No. 050900073

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

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(Oral Argument Requested)

FILED
UTAH APPELLATE COURTS
FEB 18 2009

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ARGUMENT

I. STANFORD FULFILLED HIS \$500,000.00 MAXIMUM GUARANTEE OBLIGATION WHERE HE, NOT SNOWMASS, PAID THE PARKS OVER \$750,000.00 IN PAYMENTS AS SNOWMASS' GUARANTOR

Stanford's \$500,000.00 maximum guarantee liability was extinguished when he paid the Parks over \$750,000.00 of his own money in fulfillment of his guarantee. The only relevant case law on this issue demonstrates that when a guarantor makes payment on his guarantee, the law obligates the lender to credit those payments towards the guarantor's guarantee.

The Parks attempt to circumvent this rule by relying on cases which are inapplicable to this case; namely, cases which state that a guarantor is not entitled to dictate how a lender applies a borrower's payments. However, this case does not involve a guarantor seeking to apply a borrower's payments to his guarantee but rather a guarantor seeking credit for his own payments. Accordingly, the Parks' arguments in support of the District Court's conclusion that Stanford was not entitled to a credit for his payments should be rejected.

Moreover, the District Court also erred by failing to give Stanford credit for the payments he made to the Parks where the Parks knew the money they were receiving was from Stanford and not Snowmass. The Parks contend that there are no facts to support this contention. The Parks are mistaken.

In the District Court, Stanford stated that the Parks made demand on him as guarantor for payment once Snowmass missed its requisite payments. Moreover, Stanford made his payments directly to the Parks using personal checks or cashier's checks, not checks drawn on a Snowmass account. At the very least, these facts demonstrate a genuine issue of material fact which should have precluded the District Court's grant of summary judgment.

A. The District Court Should Have Given Stanford Credit For Over \$750,000.00 In Payments He Made To The Parks As A Guarantor

The only case cited in either of the parties' opening briefs which presents identical facts to those of this case is Monmouth Plumbing Supply Co. v. McDonald, 147 A. 627 (N.J. 1929). As in this case, Monmouth Plumbing presented the question of whether a guarantor who makes payments exceeding his guarantee amount is liable to the lender for additional sums unpaid by the debtor. Id. at 627-628. In Monmouth Plumbing, the New Jersey Supreme Court held that a guarantor is discharged from any further liability on his guarantee when he personally makes payments exceeding his guarantee amount. Id. at 628. Monmouth Plumbing is persuasive in this case because unlike the cases cited by the Parks, it involved the application of payments the guarantor made as opposed to payments the borrower made.

In the Parks' opening brief they trot out the same cases they cited in the court below; namely, Lee v. Yano, 997 P.2d 68 (Hawaii Ct. App. 2000), Wyandotte Coal &

Lime Co. v. Wyandotte Pav. & Constr. Co., 154 P. 1012 (Kansas 1916), and Standard Accident Ins. Co. v. Copper Hills Motor Hotels, Inc., 424 P.2d 154 (Ariz 1967). The Parks cite these cases for the general proposition that a guarantor cannot control the application of a payment a borrower made to a lender and contend that this rule is controlling in this case. (Appellees' Op. Br. at 14-15.) However, what the Parks fail to acknowledge to this Court is that those cases involve guarantors seeking to direct the application of payments the borrowers made, rather than payments the guarantors made. This factual difference is integral to the determination of this appeal and distinguishes this case from those on which the Parks rely.

In Yano, an ex-husband had two separate debts with the plaintiff and gave a promissory note, guaranteed by Francis Yano ("Yano"), which promised to pay the plaintiff on one of those debts. Id. The ex-husband made some payments but eventually failed in his obligations and the plaintiff brought an action seeking payment from Yano as the guarantor on her ex-husband's note. Id. The plaintiff did not apply any of her ex-husband's payments towards the note, but rather applied them to his other debts. Id.

The Hawaii Supreme Court noted that in the case of a debtor and creditor "[i]t is elementary that in the absence of agreement and in the absence of direction from the borrower, the creditor may apply payments to any obligation he holds. Equally clear, if there be no provision to the contrary, the debtor may designate the application of payment

and the creditor must comply with such direction.” Id. quoting Reconstruction Finance Corp. v. McCormick, 102 F.2d 305, 315 (1939).

Armed with this language, the Hawaii Supreme Court held that since there was no evidence of any specific agreement covering the application of payments on the ex-husband’s debts or evidence that the ex-husband instructed the plaintiff to apply his payments to the part of his debt guaranteed by Yano, the Plaintiff was authorized to apply her ex-husband’s payments in any manner she wished, even to Yano’s detriment. Id. at 149-150. The court then stated that general rule that “a third person who is secondarily liable on a debt, such as a guarantor . . . cannot control the application which either the debtor or the creditor makes of a payment, and neither the debtor nor the creditor need apply the payment in the manner most beneficial to such persons.” Id. at 150.¹

In Wyandotte Coal & Lime Co. v. Wyandotte Pav. & Constr. Co., 154 P. 1012 (Kansas 1916), the plaintiff brought an action against a guarantor to recover for materials it had furnished. The plaintiff had contracts with two separate companies and claimed balances were due on both accounts. Id. at 1012. The guarantor demanded that one of

¹ The Yano decision cites the Tenth Circuit’s decision in Mid-Continent Supply Co. v. Atkins & Potter Drilling Corp., 229 F.2d 68 (10th Cir. 1956), wherein the court stated the general rule that where a creditor holds different obligations of a debtor, some of which are guaranteed by third-parties, unless otherwise directed by the debtor, the creditor may apply the proceeds of a payment *made by the debtor* to the obligation or obligations not guaranteed. 229 F.2d at 76 (emphasis added).

Like Yano, Mid-Continent Supply Co. is inapposite to this case where Stanford is not seeking to direct application of payments made by Snowmass towards his guarantee; but rather, Stanford is seeking credit for payments he himself made as guarantor.

the payments made by one of the borrowers be applied to the other borrower's account.

Id. Both the trial court and Kansas Supreme Court held that the guarantor had no right to dictate how the plaintiff applied payments it received where the appropriation of payments "belongs exclusively to the debtor and creditor, and a third party cannot be heard to complain of a different appropriation from that agreed upon by the debtor and creditor." Id. at 1013. The Kansas Supreme Court also found important that the payments made to the plaintiff were not from the guarantor's account but rather the borrower's. Id.

Finally, in Standard Accident Ins. Co. v. Copper Hills Motor Hotels, Inc., 424 P.2d 154 (Ariz. 1967), a guarantor attempted to direct how a borrower's payments were applied by the lender. The Arizona Supreme Court affirmed the trial court's judgment against the guarantor and noted that while a debtor may direct how his payment is applied, guarantors do not "have the right to control the application which either the debtor or the creditor makes of the payment." Id. at 156 quoting Valley Nat'l Bank v. Shumway, 163 P.2d 676, 679 (Ariz. 1945).

As set forth above, Yano, Wyandotte, and Standard Accident Ins. Co. each involved facts where a guarantor was attempting to intervene and direct how a borrower's payment was to be applied. None of those cases involved a guarantor seeking credit for payments which he himself had made to the lender. While it is true that in Yano, Wyandotte, and Standard Accident Ins. Co., each court held that a guarantor has no right

to dictate how a borrower's payment is applied, that general rule is inapplicable to this case since Stanford is not seeking credit for payments which Snowmass made, rather, he is seeking credit for payments which he himself made as guarantor. Stanford contends that based on that fact, neither Yano nor Wyandotte nor Standard Accident Ins. Co. is relevant to this issue on appeal.

As set forth in Stanford's opening brief, the only case which is analogous to the present one is Monmouth Plumbing, wherein a guarantor's guarantee was a fixed amount, just like Stanford's was; where the borrower was unable to make his required payments, just like Snowmass was unable to do; where the lender made demand for payment upon the and the guarantor made payments to the lender with his own money in order to honor his personal guarantee, just like Stanford; where the guarantor made payments to the lender in excess of his maximum guarantee amount, just like Stanford did by paying the Parks over \$750,000.00 when his guarantee was capped at \$500,000.00 and where notwithstanding the payments the lender received from the guarantor, the lender still sought a judgment exceeding the guarantor's maximum guarantee amount, just like the Parks have done by seeking \$500,000.00 from Stanford pursuant to his guarantee even though Stanford has already extinguished this guarantee amount. See Monmouth Plumbing, 147 A. at 627.

The Parks attempt to minimize Monmouth's applicability by arguing that there was no evidence of a prior agreement to apply Stanford's payments a certain way. (Appellees'

Op. Br. at 16.) However, in Monmouth, the New Jersey Supreme Court did not rely on this fact, or even make mention, that there was no agreement between the lender and guarantor as to how payments would be applied. Likewise in this case, the issue is not whether there needed to be an agreement between the Parks and Snowmass as to how Snowmass' payments would be applied vis-a-vis Stanford. The issue is when a guarantor makes payments to the lender, should the lender give the guarantor credit for those payments towards his guarantee? The answer is yes.

The District Court erroneously concluded that Stanford was not entitled to credit for the \$750,000.00 in payments he made the made to the Parks pursuant to his guarantee and then held Stanford liable for an additional \$900,000.00 of debt. (R. 391-392.) The Parks contend that the fact Stanford made payments to them rather than Snowmass is irrelevant based on the general rule that a guarantor cannot dictate how payments made by a debtor are applied. (Appellee's Op. Br. at 14-15.) However, as set forth above, that rule, along with the cases that recite it, are inapplicable here. Monmouth Plumbing is most analogous to this case and therefore its reasoning should be followed.

Pursuant to the Monmouth Plumbing decision, the District Court should have given Stanford credit towards his guarantee for the payments he personally made to the Parks in fulfillment of his guarantee. Moreover, the District Court's grant of summary judgment on this issue was inappropriate where at the very least Stanford presented a genuine issue of material fact regarding credit for his payments.

B. The District Court Should Have Given Stanford Credit For His Payments To The Parks Where They Knew The Money They Received Was From Stanford

The Parks cannot dispute the general rule that when a lender accepts a payment from a guarantor, and knows the funds come from the guarantor, the lender is required to apply that payment towards the guarantor's debt. See St. Paul Fire & Marine Inc. Co. v. Dakota Elec. Supply Co., 309 F.2d 22, 25 (8th Cir. 1962); Central Blacktop v. Town of Cicero, 519 N.E.2d 972, 976 (Ill.App.Ct.5th Civ. 1988). In this case, Stanford demonstrated that once Snowmass missed its payments to the Parks, the Parks wrote Snowmass' guarantors, Stanford and Buckway, and demanded payment. (R. 205; 241-261.) Stanford has also established that once contacted by the Parks for payment, he paid them in excess of \$750,000.00 in satisfaction of his guarantee. (R. 160; 206; 263-280.) These facts are undisputed.

In their opening brief, the Parks attempt to escape the aforementioned rule by arguing that there must be an "equitable exception" for that rule to apply. (Appellees' Op. Br. at 18.) The Parks also contend that notwithstanding Stanford's payments to them, he has not alleged that they actually knew those payments came from Stanford as a guarantor and not as an officer of Snowmass. (Appellees' Op. Br. at 18-19.) Both of these arguments fail legally and factually.

1. Stanford's payments to the Parks as a guarantor of Snowmass' loan constitutes an equitable consideration which requires that he be given credit for those payments

An equitable exception does not need to be present to require a lender to apply a guarantor's payments towards his guarantee. The fact that a guarantor, rather than the borrower, makes a payment to the lender constitutes the equitable exception to the general rule that a guarantor may not control the application of a debtor's payment.

In St. Paul Fire & Marine Inc. Co. v. Dakota Elec. Supply Co., 309 F.2d 22 (8th Cir. 1962), the Eight Circuit was faced with a scenario where one debtor had two or more outstanding debts to one creditor. The debtor made a payment to the creditor and the question was whether the creditor properly applied that payment. Id. at 25.

In its analysis, the Eight Circuit stated the general rule that when a borrower makes a payment, he may direct how it is applied if he manifests that intent to the lender before or at the time of payment. Id. The court noted that if the borrower fails to so indicate, the lender may apply the payment however she wants. Id. However, the Eight Circuit then noted that where the surety itself makes a payment to a lender, this fact constitutes an exception to these general rules, an exception which is founded on principles of "equitable considerations." Id. The court noted that another exception occurs where money which comes to the lender from the borrower comes from the guarantor and the lender knows the guarantor is the source. Id.

Consequently, in St. Paul Fire the Eight Circuit did not hold that there must be equitable circumstances to apply the rule that a lender must give a guarantor credit for payments he makes. Rather, the Eight Circuit held that the fact that a guarantor himself makes payments to a lender on behalf of a borrower *is* the equitable circumstance which justifies deviance from the general rules governing how a lender applies payments. Pursuant to the reasoning of the St Paul Fire court, the District Court erred by not giving Stanford credit for the payments he made to the Parks.

The St. Paul Fire court also noted that when a borrower makes payments to a lender using a guarantor's funds, that constitutes an equitable consideration which calls for giving the guarantor credit for that payment. 309 F.2d at 25. In this case, Stanford would at times transfer his own personal funds into Snowmass' bank account so that Snowmass could make its monthly payment to the Parks. (R. 159.) Accordingly, Stanford should have received credit for those payments which Snowmass made using Stanford's money.

The Parks' theory that there is no "equitable exception" to justify giving Stanford credit for the payments he made to the Parks fails where Stanford made payments to the Parks in his capacity as guarantor and where Stanford was also the source of funds which Snowmass used to pay the Parks.

2. *Stanford has alleged that the Parks knew the payments they received came from him in his capacity as guarantor*

The Parks knew the payments they received from Stanford were based on his status as guarantor of Snowmass. The law is clear that when a lender knows the source of funds she receives is from a guarantor, the lender must give the guarantor credit for such payments. See United States v. Franchi Bros. Construction Corp., 378 F.2d 134, 139 (2d Cir. 1967)(stating that when a creditor knows the surety is the source of funds it receives from a debtor, the creditor must apply those funds to the guaranteed debt); Ash Grove Lime & Portland Cement Co. v. Moran Construction Co., 296 N.W. 761 (Neb. 1941) (holding that a lender must apply a debtor's payment to guaranteed debt if the lender knows that the guarantor is the source of those funds.) In this case, the facts demonstrate the Parks knew that Stanford was the source of over \$750,000.00 in payments to them, and therefore the Parks should have given Stanford credit for those payments.

Snowmass was often delinquent with its monthly payments to the Parks. (R. 1.) Once Snowmass was behind on its payments, Mr. Park would contact Stanford requesting that he honor his guarantee and make the payments on behalf of Snowmass. (R. 205; 241-261.) The record contains twenty separate letters that Mr. Park wrote to Snowmass' guarantors, Stanford and Buckway, demanding immediate payments. (R. 241-261.) In each of those letters, Mr. Park addressed Stanford and Buckway who were the guarantors of the loan rather than Snowmass who was the obligor. (R. 241-261.)

While it is true that Mr. Park did not specifically address Stanford and Buckway as “guarantors” in his letters, the only conceivable reason he would address his letters to them personally, rather than to Snowmass, was to demand payment from them individually because they were the guarantors. The Parks’ letters to Stanford and Buckway demanding payment is exactly the type of action one takes when an obligor has failed to make a payment, the creditor demands payment from the guarantors.

Furthermore, when Stanford sent payments to the Parks he often did so using his personal checks, rather than checks drawn on Snowmass’ bank account. (R. 270-273.) A few of the checks Stanford sent were cashier’s checks which included the notation “Gary Stanford” on the check. (R. 274.) One of the cashier’s checks made payable to Mr. Park had the notation “Snowmass Highland/ Dr. Stanford.” (R. 275.) And one check just had the notation “Snowmass” on it. (R. 276.) These checks, none of which was drawn on a Snowmass account, weakens any argument the Parks have made that they had no idea that over \$750,000.00 in payments came from Stanford as a guarantor.

The fact that Mr. Park sent Stanford and Buckway a letter each time Snowmass was delinquent with its payment is evidence that the Parks were demanding payment from Stanford as a guarantor. The fact that Stanford sent money to the Parks using his own personal checks rather than Snowmass checks is evidence that the Parks knew Stanford was paying them as a guarantor. Stanford has also alleged that Mr. Park demanded that Stanford pay him based on Stanford’s personal guarantee. (R. 205; 211-241.) The

cumulative effect of these facts is that the Parks knew the payments they received from Stanford came from him in his capacity as an individual guarantor, not on behalf of Snowmass.

Where this Court must view “the facts and all reasonable inferences in the light most favorable” to Stanford, there is at the very least a genuine issue of material fact regarding whether the Parks did in fact know that Stanford was paying them as Snowmass’ guarantor. See Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600. Given this genuine issue of fact, this Court may remand this case to the District Court with instructions to resolve this issue.

II. STANFORD’S GUARANTEE AMOUNT IN THE JULY TRUST DEED IS AMBIGUOUS

The District Court erred by awarding the Parks a judgment against Stanford which included \$500,000.00 in principal and \$508,463.91 in interest on that principal amount. The July Trust Deed purportedly sets Stanford’s guarantee at \$500,000.00, exclusive of interest and costs. (R. 4.) However, the July Trust Deed also incorporates previous instruments and documents which set Stanford’s guarantee at a maximum of \$500,000.00, inclusive of any interest and costs. These conflicting contract terms render the July Trust Deed ambiguous and should have precluded the District Court’s grant of summary judgment. See Peterson v. The Sunrider Corp., 2002 UT 43, ¶ 14, 43 P.3d 918 (internal quotation omitted.) Furthermore, the District Court erred in awarding the Parks a judgment which is double what Stanford’s maximum liability should have been.

The Parks contend that Stanford's guarantee in the July Trust Deed is not ambiguous because he was allegedly unaware of events surrounding the negotiation of the Snowmass REPC between October 1994 and July 1995. (Appellees' Op. Br. at 11-12.) While Stanford may not have been personally involved in every negotiation and amendment of the July Trust Deed's contract terms, Stanford made clear from the outset of this case that his guarantee was always to be set at a maximum amount of \$500,000.00 and the agreements incorporated into the July Trust Deed reflected that fact. (R. 154; 201-202.)

When Stanford was presented with an addendum to the Snowmass REPC in April of 1994, it included interlineations which purportedly increased Stanford's guarantee from \$500,000.00 total to \$500,000.00 exclusive of interest and costs. (R. 218-222.) Stanford did not agree to that change in his maximum guarantee amount. (R. 153-154.) In September of 1994, the Parks' attorney sent Stanford a letter which memorialized the REPC terms, and that letter corrected the April addendum by capping Stanford's guarantee amount at \$500,000.00. (R. 226.) Moreover, on October 11, 1994, the Parks' attorney sent Stanford an agreement setting forth the REPC's essential terms which also provided that Stanford's "guarantee will be limited to a maximum liability of \$500,000" without any mention of interest. (R. 230-231.) Later in October, the Parks' attorney sent Stanford another agreement which reiterated that while Stanford would personally

guarantee the July Trust Deed, his guarantee “will be limited to a maximum liability of \$500,000.” (R. 233-235.)

Accordingly, all of the relevant documents between the REPC addendum in April of 1994 and the July Trust Deed itself, state unequivocally that Stanford would carry a maximum liability of \$500,000.00. Each of these documents was incorporated into the July Trust Deed, a deed which suddenly included interest and costs in addition to the agreed upon \$500,000.00 amount. Stanford contends that the guarantee amount’s discrepancy constitutes an ambiguity which should have precluded summary judgment in the court below.

The Parks argue that the September 1994 letter, October 11, 1994 letter, and October 24, 1994 letter should not be deemed incorporated into the July Trust Deed because they are not “instruments.” (Appellees’ Op. Br. at 12-13.) However, this argument is contradicted by the documents themselves. Both the October 11, 1994, letter and October 24, 1994, letter include signature lines for Stanford and Buckway. (R. at 221; 225.) In the case of the October 24, 1994, letter, all of the parties signed and dated the contract terms set forth in that letter. (R. 235.) The inclusion of these date and signature lines, as well as the parties’ signatures, demonstrates that these “letters” were legal documents which once executed carried the legal ramifications of a binding contract. The fact that these instruments were couched as letters does not change their

character or legal import. These documents were legal instruments as contemplated by the July Trust Deed and are therefore incorporated as part of the July Trust Deed.

Additionally, the July Trust Deed does not contain an integration or merger clause as the Parks' suggest, but rather an *incorporation* clause. Accordingly, the October 11 & 24, 1994, letters are not replaced, superseded, or extinguished by the July Trust Deed but rather made a part of the Deed. Had the July Trust Deed expressly superseded those prior instruments as in the case of Ford v. American Express Fin. Advisors, Inc., 2004 UT 70, ¶ 27, 98 P.2d 15, then the Parks' argument would be more tenable. However, the July Trust Deed's language does not provide that it supersedes all prior agreements but states that it merely incorporates them in full. (R. 4.)

The Parks rely on the case of Daines v. Vincent, 2008 UT 51, 190 P.3d 1269, in support of their argument that the July Trust Deed supersedes the previous agreements. (Appellees' Op. Br. at 13, n.1.) In Daines, however, the integration clause stated that "[t]his release encompasses and satisfies any prior agreements and discussion whether written or verbal." 2008 UT 51, ¶ 23. In this case, the July Trust Deed does not purport to "satisfy" or supersede any of the previous agreements. Instead, the July Trust Deed merely incorporates and makes them part of the Deed. The July Trust Deed's incorporation clause expands the Deed's terms rather than narrowing them. The Parks' reliance on Daines to support their contention that the July Trust Deed supersedes the previous agreements is misplaced.

As set forth above, the amount of Stanford's guarantee is ambiguous at best. While the July Trust Deed sets his guarantee at \$500,000.00 exclusive of interest and costs, the previous contracts entered into by the parties and incorporated into the Deed clearly limited Stanford's liability to \$500,000.00. Moreover, the July Trust Deed does not contain an integration or merger clause which would have satisfied or superseded the previous agreements which limited Stanford's guarantee liability. Stanford contends that the District Court erred in awarding the Parks a judgment in excess of Stanford's \$500,000.00 guarantee and this Court should vacate the judgment.

III. THE DISTRICT COURT SHOULD HAVE GIVEN STANFORD AN OFFSET FOR THE DIFFERENCE BETWEEN THE MARKET VALUE OF THE OGDEN PROPERTY AND ITS SALE PRICE

Notwithstanding the Parks' assertion to the contrary, they are the owners of the Ogden Property and purchased that property at a trustee's sale. (R. 154; 214; Add. Ex. C.) The Parks contend that the Bank of Utah was actually the purchaser of the Ogden Property. However, this argument is contradicted by the facts in the record.

The Notice of Trustee's Sale states that the Ogden Property was for sale by virtue of Snowmass' default. (Add. Ex. A, Appellees' Add. Ex. C.) The Notice provides that sale was conducted pursuant to the foreclosure of a Trust Deed dated March 12, 1992, executed by Mr. Park as trustor. (Id.) Snowmass' default on its payments of the Ogden Property was the obligation which Stanford guaranteed. Accordingly, the Parks'

argument that Security Mutual foreclosed the Ogden Property based on an obligation not guaranteed by Stanford is erroneous.

Moreover, even if the Bank of Utah submitted the credit bid on the Ogden Property at the foreclosure sale, it purchased the Property for and on behalf of the Parks. The Parks concede that the Bank of Utah purchased the Ogden Property as “Custodian of the Kang S. Park IRA.” (Appellees’ Op. Br. at 23.) Accordingly, in law and equity the Parks as beneficiaries of the Kang S. Park I.R.A. were the purchasers and are the owners of the Ogden Property and their deficiency judgment should have been reduced by the fair market value of the Ogden Property at the time of its sale.

The law in Utah is clear that a lender must credit the fair market value of a property at the time of its sale to offset any alleged deficiency claim. See U.C.A. § 57-1-32 (2008). The reasoning behind this rule is to eliminate the possibility of a judgment creditor’s double recovery by not only obtaining a deficiency judgment but also ending up with equity in the property as well. See Surety Life Ins. Co. v. Smith, 892 P.2d 1, 3 (Utah 1995). The Parks have not, nor can they, dispute that Surety Life extends the protections of U.C.A. § 57-1-32 to guarantors and therefore those protections apply in this case.

§ 57-1-32, as extended by Surety Life, was crafted to protect against the very situation which has transpired in this case. Snowmass defaulted on its obligation to Security Mutual, an obligation which Stanford had guaranteed and assumed from the Parks. (R. 154; 214; Add. Ex. C.) The Parks purchased the Security Mutual Note back

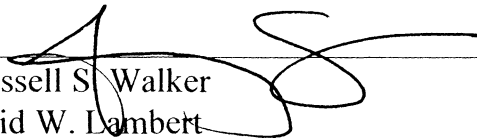
with the intention of foreclosing the Note and regaining possession of the Ogden Property. (R. 616.) The Parks sold the Ogden Property and regained possession of the Property by directing the Bank of Utah to purchase it for them at a foreclosure sale for a credit bid of \$200,000.00. (R. 430-431; Add. Ex. B; Appellees' Statement of Facts at ¶ 13.) The Parks have admitted that at the time of the sale, the Ogden Property had a fair market value of at least \$425,00.00. (R. 430-431.) Accordingly, the Parks' judgment should be reduced by at least \$225,000.00 and the District Court erred by failing to do so.

CONCLUSION

For the foregoing reasons, Stanford respectfully ask this Court to vacate the district court's Judgment and remand the case to the district court for proceedings consistent with its order.

DATED this 17th day of February, 2009.

WOODBURY & KESLER, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of February, 2009, I mailed two true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF** postage prepaid, by First-Class U.S. Mail to the following:

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