

1988

Milton H. Woodward and Thelma P. Woodward v. Utah Title and Abstract Company : Brief of Appellant

Utah Court of Appeals

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Richard A. Rappaport; Cohne, Rappaport and Segal.

Dwight Epperson; Attorney for Plaintiffs Appellants.

Recommended Citation

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

880290-CA

IN THE SUPREME COURT
OF THE STATE OF UTAH

MILTON H. WOODWARD and
THELMA P. WOODWARD,

Plaintiffs/Appellants,

vs.

UTAH TITLE AND ABSTRACT
COMPANY,

Defendant/Respondent.

:
:
:
:
:
:

Civil No. 860480

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un

BRIEF OF PLAINTIFFS/APPELLANTS

Richard A. Rappaport
Cohne, Rappaport & Segal
66 Exchange Place
Salt Lake City, Utah 84111

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Appellants
36 South State Street
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JAN 26 1987

IN THE SUPREME COURT
OF THE STATE OF UTAH

MILTON H. WOODWARD and	:	
THELMA P. WOODWARD,	:	
Plaintiffs/Appellants,	:	
vs.	:	Civil No. 860480
UTAH TITLE AND ABSTRACT	:	
COMPANY,	:	
Defendant/Respondent.	:	

BRIEF OF PLAINTIFFS/APPELLANTS

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STATEMENT OF ISSUES PRESENTED ON APPEAL

I. DID DEFENDANT/RESPONDENT UTAH TITLE OWE A FIDUCIARY DUTY TO THE WOODWARDS BY REASON OF ITS NAMING ITSELF AS TRUSTEE ON A TRUST DEED WHICH NAMED THE WOODWARDS AS BENEFICIARIES AND BY REASON OF ASSURANCES MADE TO THE WOODWARDS BY AGENTS OF UTAH TITLE?

II. DID UTAH TITLE BREACH ITS FIDUCIARY DUTY TO THE WOODWARDS BY FAILING TO INFORM THE WOODWARDS THAT, BEFORE A TRUST DEED COULD SECURE AN INTEREST IN UTAH REAL ESTATE AGAINST SUBSEQUENT LIEN HOLDERS, THE TRUST DEED MUST FIRST BE RECORDED?

IN THE SUPREME COURT
OF THE STATE OF UTAH

MILTON H. WOODWARD and
THELMA P. WOODWARD,
Plaintiffs/Appellants,

vs.

UTAH TITLE AND ABSTRACT
COMPANY,

Defendant/Respondent.

:
:
:
:
:
:
:

Civil No. 860480

BRIEF OF PLAINTIFFS/APPELLANTS

STATEMENT OF FACTS

On September 9, 1980 Plaintiffs/Appellants (hereinafter "Woodwards") beneficiaries on a trust deed dated September 9, 1980 which secured an obligation to them of \$13,815.85. Said trust deed specifically named Defendant/Respondent Utah Title and Abstract Company (hereinafter "Utah Title") as trustees. A correct copy of said trust deed is attached hereto as Exhibit "A" as part of the addendum. The Woodward's September 9, 1980 transaction with Utah Title was their first experience with a

trust deed. Depo. Thelma P. Woodward, p.9. While at the closing, agents of Utah Title made assurances to the Woodwards that a trust deed would be "as good as gold" in securing their priority interest in the subject real estate. Depo. Thelma P. Woodward, p.9,34,43 and 47. Approximately one month later, after receiving no instructions from Utah Title as to what to do with the Trust Deed, the Woodwards established an escrow with Zions Bank. Depo. Thelma P. Woodward, p.26-27, p.47-48.

In 1985, the trustors on said trust deed defaulted in their payments to the Woodwards. When the Woodwards consulted legal counsel regarding what action could be taken the Woodwards were advised that their trust deed had not been recorded and that it should be recorded immediately. Shortly thereafter on about November 5, 1985, the Woodwards received notice that ICA Mortgage was foreclosing on its trust deed against the subject property, which trust deed was dated June 19,1984 and recorded June 26, 1984. A copy of the Notice of Default giving the Woodwards this notice is attached hereto as Exhibit "B" as part of the addendum. The Woodwards were present at the Trustee's sale in early 1986 and bid \$12,000 by ICA Mortgage bid approximately \$126,000, the amount of their liens, and acquired the property. Depo. Thelma P. Woodward, P.29-30.

At the time this action was commenced the Mandrells, Trustors on the subject trust deed, had left the State of Utah and their whereabouts are unknown to the Woodwards.

SUMMARY OF THE ARGUMENT

The trust deed, the subject of this action, created an express trust relationship between Utah Title and the Woodwards, or at least a duty in Utah Title to advise the Woodwards to do what is necessary to protect their interests as beneficiaries, i.e., record the trust deed. Contrary to Utah Statutes and to the weight of authorities, and ignoring inferences from the facts undisputed which favor the finding of a fiduciary relationship in the instant action, and lower court incorrectly granted Utah Title's Motion for Summary Judgment.

ARGUMENT

I. UTAH TITLE OWED A FIDUCIARY DUTY TO THE WOODWARDS, BY REASON OF ITS BEING NAMED AS TRUSTEE ON A TRUST DEED NAMING THE WOODWARDS AS BENEFICIARIES AND BY REASON OF ASSURANCES MADE TO THE WOODWARDS BY AGENTS OF UTAH TITLE

The Woodward's' damages in the instant action entirely result from the fact that their trust deed against the subject property, dated September 9, 1980, was not recorded until after foreclosure of a trust deed, dated June 19, 1984 and recorded June 26, 1984 was initiated. The Woodward's' trust deed was properly acknowledged and entitled to be recorded, which recording would "impart notice . . . to all persons, including subsequent purchasers and encumbrances . . ." pursuant to U.C.A. Section 57-1-36 (1953). See also Exhibit "A". This Court has acknowledged that the first trust deed recorded will subordinate other subsequently recorded trust deeds. See Tracy Collins Bank & Trust v. Seigel, 546 P.2d 237 (Utah 1976).

In light of this, Defendant/Appellant Utah Title owed a duty to the Woodward's to record the September 9, 1980 trust deed or suggest that the deed be recorded. The Court in Continental Bank & Trust Co. v. Country Club Mobile Estates, Ltd., 632 P.2d 869 (Utah 1981) stated that a trust form of ownership vests legal title in a trustee, and therefore the trustee has an equitable duty to hold and manage the Trust for the benefit of the beneficiaries. Utah Title successfully argued at the hearing of its Motion for Summary Judgment that Utah Title's preparing the

subject trust deed in its offices and naming itself as trustee, did not create any duty to the Woodwards. Tr. at p. 3. The Woodwards have not been able to find evidence that they paid a fee to Utah Title for preparation of the subject documents dated September 9, 1980. Depo. Thelma P. Woodward, p. 50. Even so, the law is clear and it was acknowledged by the lower court that the lack of an identifiable amount of consideration passing from the Woodwards to Utah Title for services is irrelevant since consideration is not necessary to the creation of a trust. 113 ALR 441; Restatement, Trusts 2d, p. 30; Tr. at p. 7.

No Utah case has specifically addressed the question at hand. But a case on point was decided in a Federal Appellate Court in New York. In Miles v. Vivian, 25 C.C.A. 208, 51 U.S. App. 194, 79 Fed. 848 (1897), the Court held that a mortgage trustee did have a duty to see that the trust deed be recorded where liens of subsequent date could obtain priority if the deed was not recorded. The Miles Court stated as follows:

"Among the implied duties of a mortgage trustee, one of the most imperative is to use requisite diligence to protect the security he has taken for the [beneficiaries]. Being the grantee in the trust deed this duty of vigilance requires him to exercise the care which a prudent grantee would deem to be necessary for his own protection; and in this behalf we do not doubt that he should see to it that the trust deed is duly recorded, so that no liens of a subsequent date will attach and obtain priority over the mortgage lien. He is chargeable with any loss resulting from his neglect to record the trust deed."

Id. See also 57 ALR 474, 90 ALR 2d 506, Mortgage Trustee - Duty and Liability, Section 2. The relationship existing between the Woodward and Utah Title, as beneficiaries and Trustee on the subject trust deed, did require that Utah Title conduct itself with certain diligence and prudence. At the least, this Court should find that a duty existed in Utah Title to inform the Woodward the trust deed needed to be recorded to preserve the Woodward's priority interest in the lot described on said deed. The non-recorded trust deed afforded the Woodward no protection from subsequently dated but recorded deeds.

What aggravates the wound to the Woodward is that Utah Title knew that the Woodward were not familiar with trust deeds, and had reason to know that the Woodward were unaware that the deed had to be recorded to be afforded priority. Thelma P. Woodward stated throughout her deposition that she openly expressed a lack of familiarity with trust deeds at the time in question and that agents of Utah Title, apparently feeling compelled to give reassurances to Mrs. Woodward, stated more than once that the trust deed would effectively protect the Woodward's interests. Depo. Thelma P. Woodward, pp.9,34,43 and 47. One statement negligently omitted by the comments of Utah Title's representatives was the need to record the trust deed. Depo. Thelma P. Woodward, p.47-48.

Utah Title did not file any affidavits with its Motion for Summary Judgment. Its conclusion in its Memorandum in

Support of Motion for Summary Judgment that Utah Title had no duty, under the trust deed or otherwise, to record the trust deed is not supported by the facts. Pursuant to Rule 56 of the Utah Rules of Civil Procedure and Frisbee v. K&K Constr. Co., 676 P.2d 387 (Utah 1984), even though no affidavits are filed in opposition to a motion for summary judgment, summary judgment is still improper where the supporting documents show no support for conclusions and evidence unresolved issues.

The Woodward's' depositions show unresolved issues exist and in Utah Title's answer, it denied it had even participated in preparing the documents the subject of this action. It also denied the documents were executed in its offices, and denied that its agents reassured the Woodward's regarding the trust deed's ability to secure an interest in real property. Then at the hearing on its motion, Utah Title decided that the subject documents were prepared by it in the offices of Utah Title. No doubt whatsoever has been cast on the allegations of the Woodward's that assurances were made that the trust deed would be as good as gold in securing an interest in real property, yet Utah Title continues to insist it owed no duty to even mention to the Woodward's the trust deed should be recorded.

Despite Utah Title's contentions that no duty exists, Utah law at least implies support for the outcome in Miles v. Vivian, supra, finding the existence of such a duty. In U.C.A. Section 57-1-21, only certain "persons" under the law can serve

as trustees on a trust deed. Most likely, reasons for limiting the parties who may so serve was intended to protect the public and to avoid unnecessary litigation where a trustee is unaware of his duties created by the operation of law. As a title insurance and abstract company authorized to do business in Utah, Utah Title was one of a small group of persons given the confidence of the State of Utah to serve as a trustee on a trust deed. Citizens of the State who rely upon the expertise of Utah Title and the assurances of its agents regarding the validity and nature of a trust deed should have the benefits inuring to them as other beneficiaries of express trusts.

II. UTAH TITLE BREACHED ITS FIDUCIARY DUTY TO THE WOODWARDS BY FAILING TO INFORM THE WOODWARDS THAT, BEFORE A TRUST DEED COULD SECURE AN INTEREST IN UTAH REAL ESTATE AGAINST SUBSEQUENT LIENHOLDERS, THE TRUST DEED MUST FIRST BE RECORDED.

Utah Title has not disputed that its agents made assurances to the Woodwards regarding the effectiveness of a trust deed in securing an encumbrance against real property, nor has it disputed that it failed to record the subject trust deed, and failed to even suggest that said trust deed which was prepared and executed in its offices should have been immediately recorded by the Woodwards. If in fact any duty was owed to the Woodwards by Utah Title, that duty most certainly was breached by Utah Title's failure to take any action and failure to communicate information to the Woodwards so critical to

protecting the interests of trust deed beneficiaries as that of recording the trust deed.

Pursuant to Rule 56 of the Utah Rules of Civil Procedure and as stated by this Court in Webster v. Sill, 675 P.2d 1170 (Utah 1983), any doubts, uncertainties or inferences drawn from the facts are to be construed in a light favorable to the party opposing summary judgment. If these inferences are to favor the Woodward, unresolved issues of fact and law require that the summary judgment rendered in favor of Utah Title be reversed.

CONCLUSION

In light of the express trust prepared by Utah Title in its offices naming Utah Title as trustee and the Woodward as beneficiaries, and the uncontradicted evidence of assurances made to the Woodward by agents of Utah Title regarding the protection afforded their encumbrance by a trust deed, and the Woodward's justified reliance on such representations, Utah Title should be found to be a fiduciary to the Woodward. The fact that Utah Title made no mention to the Woodward of the need to record the subject trust deed to preserve their priority interest evidences

a breach of that duty, and the dismissal of the Woodward's' action against Utah Title by summary judgment should be reversed.

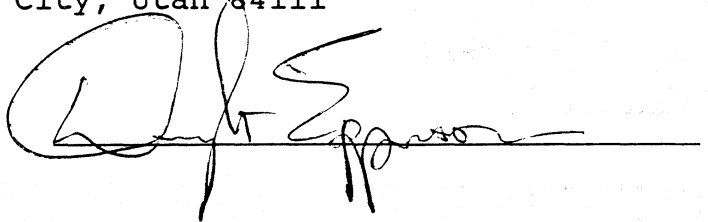
RESPECTFULLY SUBMITTED this 23rd day of January, 1987.

Dwight J. L. Epperson
Attorney or Plaintiffs/Appellants

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Plaintiffs/Appellants, in the United States Mail, postage prepaid, this 23rd day of January, 1987, to:

Richard A. Rappaport
Cohne, Rappaport & Segal
66 Exchange Place
Salt Lake City, Utah 84111

A handwritten signature in dark ink, appearing to read "Dwight J. L. Epperson", is written over a horizontal line.

By Karen Buzal
Deputy Clerk

Space Above This Line for Recorder's Use

Trust Deed

THIS TRUST DEED is made this 9th day of September, 19 80
between LARRY D. MANDRELL and SANDRA J. MANDRELL, his wife, as Trustor,
whose address is (Street and Number) (City) (State)
UTAH TITLE & ABSTRACT COMPANY, as Trustee,* and
MILTON H. WOODWARD and THELMA P. WOODWARD, his wife, as joint tenants, as Beneficiary.
Trustor hereby CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER
OF SALE, the following described property situated in Summit County, Utah:

Lot 75, SUMMIT PARK PLAT "A", according to the official
plat thereof, recorded in the office of the County Recorder
of Summit County, Utah.

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way,
easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances
thereunto now or hereafter used or enjoyed with said property, or any part thereof;

FOR THE PURPOSE OF SECURING payment of the indebtedness evidenced by a promissory
note of even date herewith, in the principal sum of \$ 13,815.85, payable to the order of
Beneficiary at the times, in the manner and with interest as therein set forth, and payment of any
sums expended or advanced by Beneficiary to protect the security hereof.

Trustor agrees to pay all taxes and assessments on the above property, to pay all charges and
assessments on water or water stock used on or with said property, not to commit waste, to maintain
adequate fire insurance on improvements on said property, to pay all costs and expenses of collec-
tion (including Trustee's and attorney's fees in event of default in payment of the indebtedness se-
cured hereby and to pay reasonable Trustee's fees for any of the services performed by Trustee
hereunder, including a reconveyance hereof.

The undersigned Trustor requests that a copy of any notice of default and of any notice of sale
hereunder be mailed to him at the address hereinbefore set forth. (See Exhibit "A" attached
hereto and by this reference made a part hereof.)

Larry D. Mandrell

Sandra J. Mandrell

STATE OF UTAH

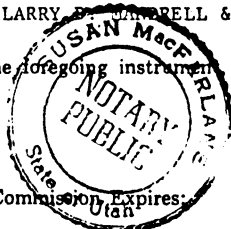
COUNTY OF Salt Lake

ss.

On the 9th day of September, 19 80, personally appeared before me

LARRY D. MANDRELL & SANDRA J. MANDRELL, his wife, the signer.

of the foregoing instrument, who duly acknowledged to me that they executed the same.



Susan MacFarland
Notary Public

My Commission Expires 11-28-83

Residing at: Salt Lake City, Utah

*NOTE: Trustee must be a member of the Utah State Bar; a bank, building and loan association or savings and
loan association authorized to do such business in Utah; a corporation authorized to do a trust business in
Utah; or a title insurance or abstract company authorized to do such business in Utah.

Utah Title and Abstract Company

Salt Lake 355-7533

Tooele 882-3511

Sevier 896-6418

Summit 336-5679

Zenith 864
Weber 399-3373

STATE OF UTAH ss.
COUNTY OF

On the day of, A.D. 19....., personally
appeared before me, who being by me duly sworn,
says that he is the of
the corporation that executed the above and foregoing instrument and that said instrument was
signed in behalf of said corporation by authority of its by-laws (or by authority of a resolution
of its board of directors) and said acknowledged
to me that said corporation executed the same.

My Commission Expires:

.....
Notary Public residing at:
.....

(NOT TO BE RECORDED)

REQUEST FOR FULL RECONVEYANCE

(To be used only when indebtedness secured hereby has been paid in full)

TO: TRUSTEE.

The undersigned is the legal owner and holder of the note and all other indebtedness secured
by the within Trust Deed, Said note, together with all other indebtedness secured by said Trust
Deed has been fully paid and satisfied; and you are hereby requested and directed, on payment to
you of any sums owing to you under the terms of said Trust Deed, to cancel said note above men-
tioned, and all other evidences of indebtedness secured by said Trust Deed delivered to you here-
with, together with the said Trust Deed, and to reconvey, without warranty, to the parties desig-
nated by the terms of said Trust Deed, all the estate now held by you thereunder.

Dated....., 19.....

Mail reconveyance to

EXHIBIT "A"
REQUEST FOR NOTICE OF DEFAULT

Request is hereby made that a copy of any notice of default and a copy of notice of sale under the trust deed filed for record _____, 19 80, and recorded in Book _____, Page _____, Records of SUMMIT County, (or filed for record _____, 19 _____, with recorder's entry number _____, _____, County) Utah, executed by LARRY D. MANDRELL & SANDRA J. MANDRELL, his wife, _____, as Trustor, in which _____ GUILD MORTGAGE COMPANY is named as Beneficiary and UTAH TITLE & ABSTRACT COMPANY _____, as Trustee, be mailed to MILTON H. WOODWARD & THELMA P. WOODWARD, his wife, _____, at _____.

Signature

Milton H. Woodward
Milton H. Woodward

Thelma P. Woodward

Copy

TRUST DEED NOTE

DO NOT DESTROY THIS NOTE: When paid, this note, with Trust Deed securing same, must be surrendered to Trustee for cancellation, before reconveyance will be made.

\$ 13,815.85

Salt Lake City, Utah

September 9, 1980

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of
MILTON H. WOODWARD & THELMA P. WOODWARD, his wife,

THIRTEEN THOUSAND, EIGHT HUNDRED FIFTEEN and 85/100-----DOLLARS (\$ 13,815.85),

together with interest from date at the rate of TWELVE per cent (12%) per annum on the unpaid principal, said principal and interest payable as follows:

\$200.86 each month commencing September 19, 1980, and monthly thereafter on the 19th day of each month until the entire unpaid principal balance, together with interest is paid in full.

The undersigned agrees to pay the General property taxes when they become due. It is agreed that this Trust Deed Note cannot be paid off before May 19, 1985.

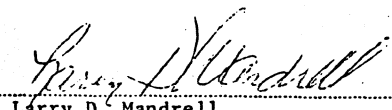
Each payment shall be applied first to accrued interest and the balance to the reduction of principal. Any such installment not paid when due shall bear interest thereafter at the rate of THIRTEEN per cent (13%) per annum until paid.

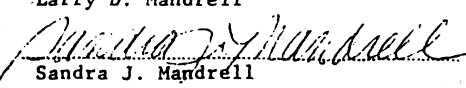
If default occurs in the payment of said installments of principal and interest or any part thereof, or in the performance of any agreement contained in the Trust Deed securing this note, the holder hereof, at its option and without notice or demand, may declare the entire principal balance and accrued interest due and payable.

If this note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee.

The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment, demand and notice of dishonor and nonpayment of this note, and consent to any and all extensions of time, renewals, waivers or modifications that may be granted by the holder hereof with respect to the payment or other provisions of this note, and to the release of any security, or any part thereof, with or without substitution.

This note is secured by a Trust Deed of even date herewith.


Larry D. Mandrell


Sandra J. Mandrell

UTAH TITLE AND ABSTRACT COMPANY

Salt Lake 355-7533

Tooele 882-3511

Davis 867-2273

773 1653

534-0422

Weber 621-7542

ESC 102

After Recording Return To:

J. Scott Lundberg, Esq.
PRINCE, YEATES & GELDZAHLER
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Recorded November 1, 1985
Entry No. 241145

NOTICE OF DEFAULT AND ELECTION TO SELL

On or about June 19, 1984, LARRY D. MANDRELL and SANDRA J. MANDRELL, his wife, as Trustors, executed and delivered to ATTORNEY'S TITLE GUARANTY FUND, INC., as Trustee, for the benefit of ICA MORTGAGE CORPORATION, as Beneficiary, a certain Trust Deed to secure the performance by said Trustors of their obligations under a certain Promissory Note executed and delivered for valid and sufficient consideration to ICA MORTGAGE CORPORATION on or about June 19, 1984. Said Trust Deed was recorded in the office of the Recorder of Summit County, State of Utah, on June 26, 1984, as Entry No. 221905 in Book 303 at Page 728.

Said Trust Deed covers real property situated in Summit County, State of Utah, more particularly described as follows:

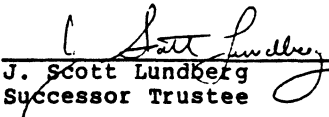
All of Lot 75, SUMMIT PARK, PLAT "A", according to the official plat thereof, on file and of record in the office of the Summit County Recorder.

HOMESTEAD SAVINGS is presently the owner and holder of the beneficial interest under said Trust Deed and the obligations secured thereby, and J. SCOTT LUNDBERG, Attorney, is the successor Trustee.

Notice is hereby given that the obligation evidenced by the Promissory Note, the performance of which is secured by said Trust Deed, is in default in that the Trustors have failed to pay all sums due and owing for the months of April, 1985 through July, 1985, in the amount of \$1,051.74 and for the months of August, 1985 through October, 1985 in the amount of \$1,150.00. Under the provisions of said Promissory Note and Trust Deed, the total loan amount of \$112,131.34 is accelerated and now due and owing, together with accruing interest, late charges, costs and trustees' and attorneys' fees. HOMESTEAD SAVINGS has demanded and does hereby demand payment of all sums necessary to cure said default. No such payment has been tendered.

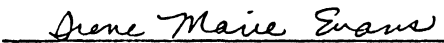
The undersigned successor Trustee has elected and does hereby elect to sell or cause to be sold the property described in the aforesaid Trust Deed, all as provided for by Title 57, Chapter 1, Utah Code Annotated (1953), as amended and supplemented.

DATED this 29th day of October, 1985.


J. Scott Lundberg
Successor Trustee

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

On the 29th day of October, 1985, personally appeared before me J. SCOTT LUNDBERG, the signer of the above instrument, who duly acknowledged to me that he executed the same.


Irene Marie Evans
Notary Public
Residing at Salt Lake City, Utah

My Commission Expires:

9/3/89
1632u