

1988

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

Utah Court of Appeals

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BRIEF

UTAH
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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 CO.,

Defendant/Respondent.

88-0280-CA

Supreme Court
Appeal No. 860480

District Court
Civil No. C86-517

* * * * *

BRIEF OF RESPONDENT

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Abstract Company

FILED

MAR 13 1987

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

MILTON H. WOODWARD and)	
THELMA P. WOODWARD,)	
)	Supreme Court
Plaintiffs/Appellants,)	Appeal No. <u>860480</u>
)	
vs.)	District Court
)	Civil No. C86-517
UTAH TITLE AND ABSTRACT CO.,)	
)	
Defendant/Respondent.)	

* * * * *

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES

1. Under the facts of this case, did Utah Title have a duty to record a trust deed?

2. Under the facts of this case, did Utah Title have a duty to instruct the plaintiffs to record a trust deed?

NATURE OF THE CASE

This is an appeal from a final Order granting defendant's Motion for Summary Judgment under Rule 56 of the Utah Rules of Civil Procedure. Jurisdiction is proper under Art. VIII § 9 of the Utah Constitution and U.R.A.P. 3(a). The Order dismissed plaintiff's action on the grounds that Utah Title had no duty to record the trust deed.

STATEMENT OF THE FACTS

1. On May 19, 1980 Plaintiffs executed a Uniform Real Estate Contract and Warranty Deed covering "Lot 34, Summit Park", naming Ingemann Bendtsen as Buyer. See Exhibit 8, Depo. Milton Woodward, R. p. 73; Depo. Thelma Woodward, R. p. 74-7.

2. Mrs. Woodward placed the Warranty Deed in escrow at Zions First National Bank in May, 1980. Depo. Thelma Woodward, R. p. 74-8.

3. Mr. Bendsten owned a purchase money mortgage interest in "Lot 75, Summit Park". The Mandrells were the mortgagors of Lot 75.

4. In order to facilitate Mr. Bendtsen's desire to build on Lot 34, the Woodwards agreed to Bendtsen's request that they convey Lot 34 to him free and clear in exchange for a note and trust deed on Lot 75 from the Mandrells. Depo. Thelma Woodward, R. p. 74-9.

5. On September 9, 1980, Plaintiffs, Bendtsen and the Mandrells came to Utah Title and asked that a trust deed be prepared.

6. Utah Title prepared the trust deed by filling in the blanks as the parties directed.

7. While at Utah Title, Mrs. Woodward asked whether a trust deed is a valid security document. She was told yes, it is. Depo. Thelma Woodward, R. p. 74-47.

8. When the documents had been completed, the Woodwards

left Utah Title's offices, taking the trust deed with them.

9. On October 10, 1980, Plaintiffs closed the original escrow and delivered the Warranty Deed covering Lot 34 to Bendtsen. The closing was apparently conducted at the office of Associated Title, who recorded the Warranty Deed on lot 34. Associated Title did not, however, record the trust deed on lot 75. Instead, Mrs. Woodward placed the trust deed on lot 75 in a second escrow with Zions.

10. The trust deed did not expressly impose any duty to record on Utah Title and Abstract as trustee. See Exhibit 1, Depo. Thelma Woodward, R.p.74.

11. The plaintiffs did not give Utah Title any special instructions regarding the preparation of the trust deed, depo. Thelma Woodward, R.p. 74-25, lns. 5-9, nor did they ask whether it needed to be recorded.

12. There were no mistakes or deficiencies in the preparation of the trust deed, and had plaintiff recorded it, plaintiffs' interest would have been prior to the interests that plaintiffs claim have caused them damage. Depo. Thelma P. Woodward, R.p. 74-48, lns. 7-12.

13. Utah Title received no payment or other remuneration to prepare, record, or act as trustee of the trust deed. Plaintiffs' Answer to Defendant's Request for Admission No. 1, Appendix, p.1.

Appellant's brief states that Utah Title had told the Woodwards that a trust deed would secure a "priority interest" in Lot 75. At p. 2. This mischaracterizes the facts as established

by Plaintiff's own deposition testimony:

Q [By Mr. Rappaport] Did Al Newman ever tell you that he had researched the title for you on lot 75?

A [Mrs. Woodward] No.

Q In fact, the only thing that you had asked him was whether taking a trust deed because you had never seen a trust deed before.

A Yes. I asked him if that was good.

Q Whether that would be a valid way of securing your loan?

A If that would be -- that I could get the money from the people that was selling it.

Q Okay. That's what you were asking him is whether a trust deed is a valid document for that.

A Yes. Should I take this deed.

Q Okay.

A He said yes, that's good.

Depo. Thelma Woodward, R.p. 74-46, 47, lns. 20-25, 1-10.

It is uncontroverted that there were no errors in the preparation of the document and that it was a valid means of securing a loan. This action arose solely because plaintiffs failed to record the trust deed. Instead, Mrs. Woodward took it with her and put it in escrow at Zions First National Bank on October 10, 1980. Id., R.p. 74-48, lns. 1-12.

SUMMARY OF ARGUMENT

The duties of a trustee of a trust deed are defined and limited by the terms of a trust deed. The trustee has no "implied" duty to record the trust deed. The terms of the trust deed at issue imposed no duty upon Utah Title to record the instrument. Therefore, Utah Title had no duty to record the deed.

No facts have been alleged that support an assertion that Utah Title had a duty to anticipate the specifics of the transaction and gratuitously render legal advice to the parties. In fact, Utah Title is prohibited from doing so. Further, the facts of the transaction indicate that Utah Title might have misadvised the parties had it told plaintiffs to record the trust deed. Therefore, Utah Title breached no duty to the plaintiffs.

The lower Court's order granting summary judgment was proper and must be affirmed.

ARGUMENT

THE UNCONTROVERTED EVIDENCE NEGATES THE EXISTENCE
OF ANY RELATIONSHIP WHEREBY UTAH TITLE HAD A DUTY TO RECORD
THE TRUST DEED OR TO TELL PLAINTIFF THAT THE TRUST DEED
WOULD HAVE TO BE RECORDED.

POINT I

The Trustee of a Trust Deed Has No Duty to Record the
Trust Deed Absent an Express Instruction to Do So.

"[U]nder the general rule a trustee's certificate, that is silent as to recording, does not render the trustee liable in case the mortgage is not recorded." Bell v. Title Trust & Guarantee Co. of Johnstown, 292 Pa. 228, 140 A. 900,902 (1928), citing 4 Cook on Corporations, p.364. This is because "[t]he powers and duties of a trustee in a deed of trust . . . are limited and defined by the instrument under which [the trustee] acts." Powell v. Adams, 18 S.E.2d 261, 262-3 (Va.1942). See also, Sawyer Grant Land Co. v. McPherson, 19 F.Supp. 709, 713 (W.D. Mich. 1935); Benton v. Safe Deposit Bank of Pottsville, Pa., 255 N.Y.260, 174 N.E. 648, 649 (Ct.App. 1931) (no liability for failure to record) (applying Pennsylvania law).

It is undisputed that the terms of the trust deed did not require that defendant record the trust deed. Further, not only did Mrs. Woodward not request Utah Title to record the document, she took it with her, precluding defendant from doing so. Thus, the lower court's order granting summary judgment was proper.

Plaintiffs cite Continental Bank v. Country Club Mobile Estates, Ltd., 632 P.2d 869, 872 (Utah 1981), arguing that a trustee has an equitable duty to hold and manage "trust property"

for the "benefit of the trust beneficiaries." Plaintiffs' Brief, p.4. Plaintiffs' reliance on Continental Bank and Restatement of Trusts, Second, §2 (1959) is misplaced, as these authorities pertain to the trustee of a traditional trust agreement, not a trustee under a trust deed. It is well established, as noted in the defendant's memorandum below, that a "trustee under a deed of trust does not assume the important obligations which are in some instances cast upon a trustee by operation of law." Ainsa v. Mercantile Trust Co., 174 Cal. 504, 510 163 P.898, 900 (1917). This is because "[a]n ordinary trust deed is little more than a mortgage with power to convey." Id. See also, In re Guaranty Trust Co., 113 S.W.2d 1053, 1057 (Mo.App. 1938). Rather, the trustee of a deed of trust is more a "common agent" of the parties, who must follow express instructions, act impartially, and make reasonable efforts upon default to satisfy the debt while minimizing the trustor's loss. See Randall v. Valley Title, 681 P.2d 219, 222 (Utah 1984). The responsibilities of a trustee under a trust deed are obviously not analogous to those of a trustee under a traditional trust who acts as the legal owner of the property for the benefit of others.

Plaintiffs next cite Miles v. Vivian, 79 F. 84 (2d. Cir. 1897) as authority for the proposition that a mortgage trustee has a duty to see that the instrument is recorded. Although superficially more pertinent to the instant situation than plaintiffs' cases dealing with express trusts, the facts in Miles are such that it offers little support for plaintiffs' position.

The Miles case concerns a breach of an express representation. In Miles, Roberts, a director of the issuing railroad company, certified that an issue of "first mortgage bonds" was secured by a deed of trust which he possessed. Roberts never recorded the mortgage. A subsequent bond issue which was signed by Roberts as company president was secured by a second mortgage on the same property. The second mortgage was recorded and thus accorded priority over the first. The salient facts in Miles were that Roberts had certified that the mortgage was "first", had personally held the mortgage, and was relied on to record it. Thus, it was not unreasonable to impose a duty upon Roberts as "trustee" to see to the accuracy of his representation and to record a document which he represented would be recorded. However, absent an express representation such as was present in Miles, the cases have refused to "imply" a duty to record. See Bell v. Title Trust & Guarantee Co. of Jamestown, 140 A. 900 (Pa. 1928); Green vs. Title Guarantee & Trust Co., 227 N.Y.S. 252 (Sup. Ct. 1928). Under the instant facts, it is undisputed that plaintiffs did not request or pay for a title search or policy, nor did they inquire into any other possible encumbrances. Answer to Defendant's Request for Admission No. 2, Appendix, p.1. Further, plaintiffs took the trust deed with them when they left -- defendant could not have recorded it. Thus, Miles provides no precedent for finding an implied duty to record the trust deed in this case. Finally, Miles has not been followed for its statement that a mortgage trustee has an implied duty to record the mortgage.

POINT II

Utah Title Had No Duty to Advise

Plaintiffs to Record the Trust Deed

Plaintiffs offer no other authority or facts to support their assertion that a relationship existed whereby defendant had a duty to record the trust deed. Thus, plaintiffs' position on appeal is reduced to an unsupported argument that because defendant provided the parties with a form and agreed to act as trustee, it had an affirmative duty to gratuitously render unrequested advice. No facts are alleged to support the existence of this duty. Defendant was asked to fill in the blanks in a standard trust deed form. It did so. It had no duty to do anything else. The absence of a duty precludes liability for negligence. See Hughes vs. Housley, 599 P.2d 1250, 1253 (Utah 1979).

Plaintiffs' position on this issue would require that people who are not members of the Bar give legal advice. The unauthorized practice of law is prohibited in Utah. Utah Code Ann. §78-51-25 (1953 as amended). Thus, plaintiffs' contention that defendant's failure to engage in such conduct subjects it to liability is ill founded.

The trust deed statute authorizes banks, title companies and others to be trustees of trust deeds. Utah Code Ann. § 57-1-21(1) (1953, as amended, 1986 Supp.) Many of these institutions are prohibited from practicing law. Plaintiffs' argument would impose upon them the obligation to practice law without a license by requiring them to provide gratuitous legal

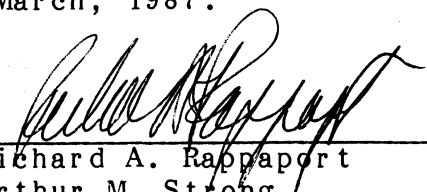
advice to both trustor and beneficiary merely because they were named as a trustee. Plaintiff's argument urges this Court to compel the trustees to violate the law, and is therefore clearly against public policy.

It is not always appropriate to record trust deeds at the time of preparation. There may be other aspects to a transaction which renders immediate recording improper. It would appear that the trust deed in this case was not to be immediately recorded. The actual transaction apparently took place one month after preparation of the trust deed when the first escrow at Zions was closed, a second was opened and the warranty deed on Lot 34 was delivered and recorded. Therefore, not only did Utah Title not have a duty to render legal advice, it may have misadvised the parties if it had done so.

CONCLUSION

The District Court's order granting defendant's motion for summary judgment was proper and must be affirmed.

DATED this 13th day of March, 1987.



Richard A. Rappaport
Arthur M. Strong
COHNE, RAPPAPORT & SEGAL
Attorney for Defendant/Respondent
Utah Title and Abstract Company

(jan/Woodward-1)

MAILING CERTIFICATE

Richard A. Rappaport hereby certifies that a true and correct copy of Defendant/Respondent's Brief was mailed, postage fully prepaid, on the 13th day of March, 1987, to:

Dwight Epperson
Attorney for Plaintiffs/Appellants Woodward
36 South State Street, Suite 1200
Salt Lake City, Utah 84111

A handwritten signature in cursive script, reading "Richard A. Rappaport", is written over a horizontal line.

(jan/Woodward-1)

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Utah Title and Abstract Company

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

MILTON H. WOODWARD, and
THELMA P. WOODWARD,

Plaintiffs,

vs.

UTAH TITLE AND ABSTRACT COMPANY,
a Utah corporation,

Defendants.

REQUESTS FOR ADMISSION

Civil No. C86-517

Judge Scott Daniels

* * * * *

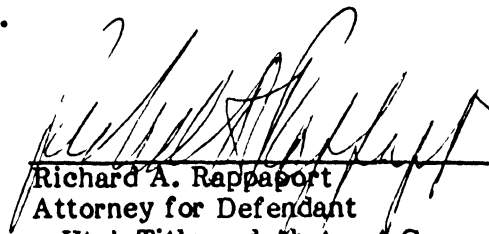
Defendant, pursuant to Rule 36 of the Utah Rules of Civil Procedure, requests the plaintiff to respond to the following Requests for Admissions by admitting or denying the same within thirty (30) days hereof. Failure to respond to said Requests for Admission within the thirty day period provided by Rule 36 shall result in a conclusively deemed admission of each such request.

1. Admit that plaintiff has no documents or other records evidencing that any payment or other consideration was ever requested by or paid to Utah Title with respect to the preparation of the September 9, 1980 Trust Deed or Trust Deed Note by Utah Title.

2. Admit that plaintiffs never requested or paid for the preparation of a title report by Utah Title on the property that is the subject of the September 9, 1980 Trust Deed and Trust Deed Note.

3. Admit that plaintiffs have not at any time commenced legal proceedings against the Trustors of the September 9, 1980 Trust Deed to collect on the September 9, 1980 Trust Deed Note.


DATED this 6 day of June, 1986.


Richard A. Rappaport
Attorney for Defendant
Utah Title and Abstract Company

MAILING CERTIFICATE

The undersigned hereby certifies that a true and correct copy of the foregoing REQUESTS FOR ADMISSION was mailed, postage fully prepaid, on this 6th day of June, 1986 to the following:

Dwight J. L. Epperson
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Salt Lake City, Utah 84102



vic/Utah-2

Dwight Epperson - A4316
Attorney for Plaintiffs
530 East 500 South Suite 10
Salt Lake City, Utah 84102
Telephone (801)322-5056

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

MILTON H. WOODWARD, and	:	
THELMA P. WOODWARD,	:	ANSWERS TO REQUESTS
	:	FOR ADMISSIONS
Plaintiffs,	:	
	:	
vs.	:	
	:	
UTAH TITLE AND ABSTRACT	:	Civil No. C86-517
COMPANY, a Utah Corporation	:	Judge Scott Daniels
	:	
Defendant.	:	
	:	

Plaintiffs, pursuant to Rule 36 of the Utah Rules of civil Procedure, and through their counsel, hereby respond to Defendant's Requests for Admissions dated June 6, 1986 as follows:

1. Admit.
2. Admit.
3. Deny. Plaintiffs have twice initiated legal proceedings to pursue claims against the Trustors of the September 9, 1980 Trust Deed to collect on the September 9, 1980 Trust Deed Note but, due to a foreclosure on the real property

the subject of said trust deed and note contemporaneous to the instant action, and again after being advised by counsel that a search of both the real and personal property of the Trustors revealed no likelihood of satisfying a judgment and of the Trustor's subsequent disappearance from the Wasatch front area, Plaintiffs were resigned to pursue the Trustee on the said note and deed.

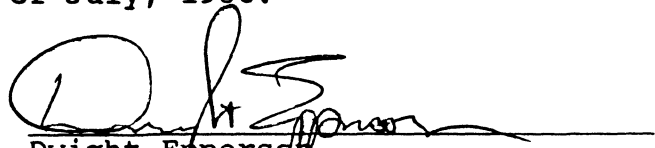
DATED this 7th day of July 1986.

MAILING CERTIFICATE

Plaintiffs hereby certify that a true and correct copy of its Answers to Requests for Admissions to Defendants was mailed, postage fully prepaid, to Defendant's counsel:

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

DATED this 7th day of July, 1986.


Dwight Eppersch
Attorney for Plaintiffs

Recorded at Re st of Utah - 3040 S. 200 E SL, Utah 84115
at _____ M. Fee Paid \$ _____
by _____ Dep. Book _____ Page _____ Ref. _____
Mail tax notice to _____ Address _____

WARRANTY DEED T-68313

MILTON H. WOODWARD and THELMA P. WOODWARD, his wife, grantor
of Salt Lake City, County of Salt Lake, State of Utah, hereby
CONVEY and WARRANT to

INGEMANN H. BENDTSEN

of Salt Lake City, County of Salt Lake, State of Utah grantee
TEN DOLLARS and other good and valuable consideration for the sum of
~~DOLLARS~~

the following described tract of land in Summit County,
State of Utah:

Lot 34, SUMMIT PARK, PLAT "G", according to the official
plat thereof, recorded in the office of the County Recorder
of _____ County, Utah.

Subject to easements, restrictions and rights of way appearing
of record or enforceable in law and equity.

Entry No. <u>174189</u>	Book <u>1168</u>
RECORDED <u>10-10-80</u>	at <u>1:00 PM</u> Page <u>848</u>
RECEIVED of ASSOCIATED TITLE COMPANY.....	
FEES <u>4.00</u>	WARRANTY DEED SUMMIT CO RECORDER
by <u>Wanda J. Spang</u>	
INDEXED	ABSTRACT

WITNESS, the hand s of said grantor s, this 19th day of
May, A. D. 19 80

Signed in the Presence of

Milton H. Woodward
Milton H. Woodward

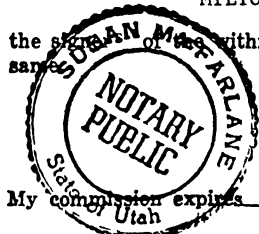
Thelma P. Woodward
Thelma P. Woodward

STATE OF UTAH,

County of Salt Lake ss.

On the 19th day of May, A. D. 19 80
personally appeared before me

MILTON H. WOODWARD and THELMA P. WOODWARD, his wife,
the signers of the within instrument, who duly acknowledged to me that they executed the



Susan MacFarlane
Notary Public.

My commission expires 11-28-83 Residing in Salt Lake City, Utah

STATE OF UTAH)

County of Summit)

I, Alan Spriggs, County Recorder in and for Summit County, State of Utah,
do hereby certify that the attached and foregoing is a full, true and correct copy
of that certain *Warranty Deed*

which appears of record in my office in Book *M168* . Page *848*
being Entry No. *171489*

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my
official seal, this *3rd* day of *March*, 1987

Edna A. Mills Deputy
Summit County Recorder