

2001

Freed Finance Company v. Stoker Motor Company, a Utah Corporation; role E. Ginsburg and James A. Kohn; Utah State Tax Commission; United States of America; and Atex corporated, a Utah corporation : Respondent's Petition for Rehearing

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

W Clark Burt, Louis H Callister, Sr; Callister, Greene & Nebeker; Attorneys for Plaintiff & Respondent.

Ronald C Barker; Attorney for Defendant & Appellant, Stoker Motor company.

Recommended Citation

Legal Brief, *Freed Finance Company v. Stoker Motor Company, a Utah Corporation; role E. Ginsburg and James A. Kohn; Utah State Tax Commission; United States of America; and Atex corporated, a Utah corporation*, No. 13925.00 (Utah Supreme Court, 2001).
https://digitalcommons.law.byu.edu/byu_sc2/1084

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT
OF THE STATE OF UTAH RECEIVED
LAW LIBRARY

FREED FINANCE COMPANY,
a Utah Corporation,

DEC 9 1975

Plaintiff and Respondent,

-vs-

BRIGIAM YOUNG UNIVERSITY
J. Reuben Clark Law School

STOKER MOTOR COMPANY,
a Utah Corporation;
ROLAND E. GINSBURG
and JAMES A. KOHN;
UTAH STATE TAX COMMISSION;
UNITED STATES OF AMERICA;
and ATEX CORPORATED,
a Utah Corporation,

Case No.
13925

Defendants and Appellants.)

RESPONDENT'S PETITION FOR REHEARING

Appeal from Summary Judgment of Foreclosure
of Real Estate Mortgage
District Court of Salt Lake County, Utah,
Honorable Stewart M. Hanson, Jr.,
District Judge

FILED

AUG 12 1975

W. Clark Burt and
Louis H. Callister, Sr.
CALLISTER, GREENE & NEBEKER
800 Kennecott Building
Salt Lake City, Utah 84133
Telephone 531-7676

Clert. Supreme Court, Utah

Attorneys for Plaintiff
and Respondent

RONALD C. BARKER
2870 South State Street
Salt Lake City, Utah 84115
Telephone 486-9636

Attorney for Defendant and
Appellant, Stoker Motor Company

TABLE OF CONTENTS

	Page
PETITION FOR REHEARING -----	1,2,3,4, 5,6,7,8, 9,10

CASES CITED

<u>Amos v. Bennion</u> , 18 U.2d 251, 420 P.2d 47 (1966) -----	6
<u>Brasher Motor and Finance Company, Inc. v. Anderson</u> , 20 U.2d 104, 433 P.2d 608 (1967) --	9
<u>Grover v. Garn</u> , 23 U.2d 441, 464 P.2d 598 (1970) -----	6
<u>U-Beva Mines v. Toledo Mining Company</u> , 24 U.2d 351, 471 P.2d 867 (1970) -----	6

REFERENCE TO THIS COURT'S
MIMEOGRAPHED OPINION HEREIN

Opinion, Page 2, Paragraph 2 -----	4
Opinion, Page 2, Paragraph 3 -----	8

IN THE SUPREME COURT
OF THE STATE OF UTAH

FREED FINANCE COMPANY,
a Utah Corporation,

Plaintiff and Respondent,

-vs-

STOKER MOTOR COMPANY,
a Utah Corporation;
ROLAND E. GINSBURG
and JAMES A. KOHN;
UTAH STATE TAX COMMISSION;
UNITED STATES OF AMERICA;
and ATEX CORPORATED,
a Utah Corporation,

Defendants and Appellants.

Case No.
13925

RESPONDENT'S PETITION FOR REHEARING

Appeal from Summary Judgment of Foreclosure
of Real Estate Mortgage
District Court of Salt Lake County, Utah,
Honorable Stewart M. Hanson, Jr.,
District Judge

Freed Finance Company, Plaintiff and
Respondent herein, respectfully petitions
this Honorable Court for a rehearing in

the above entitled matter upon and for the various reasons hereinafter set forth.

We feel that this Honorable Court in making its decision has not considered certain relevant and important matters in the case, which if considered would change the decision as herein filed.

The first matter to be called to the attention of the Court is the statement and admission of the Appellant in its brief on page 7 in which they clearly state that the Agreement of July 31, 1973 was intended to compromise and settle the claims asserted by Plaintiff, Freed Finance Company, against Stoker, as well as Plaintiff's claims in the four Salt Lake County cases. Accordingly, the Agreement constituted a novation.

This Honorable Court has gone beyond the Agreement of July 31, 1973 which was a settlement of all of the disputes and claims in the matter between the parties,

and has raised issues which go to the note and mortgage which were executed prior to the July 31, 1973 Agreement and which by Defendant's admission constituted a settlement of the differences and constituted a novation. The note and mortgage issue is moot in light of the Agreement of July 31, 1973.

It is true that the complaint in the case was the foreclosure of a real estate mortgage which was security for a promissory note.

However, in the light of the Agreement of July 31, 1973 all questions pertaining to the note and mortgage as to the amount due had been settled and compromised and are contained in the Agreement.

There are no material issues of fact as to the existence and effect of the novation, and there are no issues of fact as to whether or not the Appellant defaulted under the terms and conditions of said novation.

Therefore, the issues raised by this Court of matters that were merged into and made a part of the compromise Agreement are moot, and are of no significance.

This Honorable Court in its Opinion made the statement that the claim of disputed issues of fact is buttressed by an agreement between the parties subsequent to the signing of the note and mortgage. The fact remains that the defendant himself states clearly that all of the claims asserted by the Plaintiff against Stoker, as well as Plaintiff's claims in the four Salt Lake County cases, were compromised and settled by the Agreement of July 31, 1973 between the parties.

Contrary to the Court's Opinion, the Agreement disposes of all material issues of fact and does not buttress Appellant's claims of disputed issues of fact as there

are none.

This because of the novation which the Defendant admits on page 7 of its brief.

Furthermore, the Agreement of July 31, 1973 requires that any monies paid by Stoker were to be first credited to the \$56,030.00 owed by Stokers to Freed. After the \$56,030.00 amount was paid then the remaining payments were to be credited to the \$400,000.00, which by the Agreement was reduced to \$125,000.00 if paid in full. If the \$125,000.00 was not paid in full, however, the original amount of \$400,000.00 was then due and owing by Stoker Motor Company. The Appellant was given credit for payments made on the \$56,030.00, but since no payments were ever made by Appellant on the \$400,000.00, no accounting is necessary and the Agreement as a matter of law so provides. A reading of the July 31, 1973 Agreement makes this clear and,

therefore, there is no issue of fact in this lawsuit.

There is no factual question as to the authority of Harold D. Stoker to execute the note and mortgage.

The question of H. D. Stoker's authority to sign for and on behalf of the Appellant is a legal question and the following Utah cases cited by Respondent in its brief support the proposition of Respondent that as a matter of law the Appellant is estopped to deny Stoker's authority to sign the note, mortgage and the Agreement of July 31, 1973:

Grover v. Garn, 23 U.2d 441, 464
P.2d 598 (1970)

Amos v. Bennion, 18 U.2d 251, 420
P.2d 47 (1966)

U-Beva Mines v. Toledo Mining Company, 24 U.2d 351, 471 P.2d 867
(1970).

The parties certainly have a right to compromise and settle all of their claims.

In the Agreement of July 31, 1973 the following statement is made:

"2. In relation to that certain promissory note in the original principal sum of \$400,000.00, which is secured by a second mortgage on certain real estate and improvements thereon situated in Tooele County, State of Utah, there shall be applied upon the payment thereof \$1,500.00 per month, the same to begin one month subsequent to the payment in full of the aforesaid \$56,030.00 in accordance with the terms and conditions hereof. That subsequent thereto \$1,500.00 on the first day of each and every calendar month thereafter until such time as the present first mortgage on said real property in Tooele County, on which Prudential Federal Savings and Loan Association is the mortgagee, is paid in full. Upon payment of the same, then the monthly installments shall be increased to \$3,000.00 per month. Interest at the rate of 8% per annum to be paid on discounted sum commencing April 1, 1975. Upon payment by STOKERS of the sum of \$125,000.00, plus interest from April 1, 1975, the said note of \$400,000.00 shall be declared paid in full and the mortgage released."

This statement in and of itself is a reaffirmation and confirmation of the validity of the note and mortgage. Therefore, the issue which was discussed by the Court

with regard to the note and mortgage executed prior to the Agreement of July 31, 1973 is moot inasmuch as a novation has occurred, and the parties in that Agreement of July 31, 1973 have reaffirmed the validity of the note and mortgage and the amount due thereon.

The issue which the Court has set forth in its Opinion has no relevancy and, therefore, is moot in light of this subsequent Agreement.

The Court made the following significant statement in its Opinion:

"Even if there were no disputed issue of material fact, the summary judgment could not award an attorney's fee without a stipulation as to the amount, an un-rebutted affidavit, or evidence given as to the value thereof. Without any basis therefor, the trial court awarded plaintiff an attorney's fee in the sum of \$30,000."

The Appellant at this time waives any

right to, and stipulates that there be no attorneys' fees awarded.

In view of this waiver and stipulation the question of attorneys' fees is now moot.

The Court indicated in the case of Brasher Motor and Finance Company, Inc. v. Anderson, 20 Utah 2d 104, 433 P.2d 608 (1967) that summary judgment could be granted by the lower court except as to the award of attorneys' fees.

In view of the fact that this Respondent now stipulates and waives any right to attorneys' fees and agrees that the Summary Judgment may be amended and the \$30,000.00 eliminated, the Court is thereby given the authority now to sustain the Summary Judgment as heretofore made by the Trial Court.

In view of the foregoing we feel that the Court must and should sustain the Summary

Judgment as heretofore made and entered by
this Honorable Court.

Respectfully submitted,

W. Clark Burt and
Louis H. Callister, Sr.
CALLISTER, GREENE AND
NEBEKER

800 Kennecott Building
Salt Lake City, Utah 84133

Attorneys for Plaintiff
and Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy
of the foregoing Respondent's Petition for
Rehearing to Ronald C. Barker, Attorney for
Defendant and Appellant, 2870 South State
Street, Salt Lake City, Utah 84115, this
12th day of August, 1975.

**RECEIVED
LAW LIBRARY**

DEC 9 1975

**BRIGIAM YOUNG UNIVERSITY
J. Reuben Clark Law School**