2001

Freed Finance Company v. Stoker Motor Company, a Utah corporation; Roland E. Gisnburg and James A. Kohn; Utah State Tax Commission; Uted States of America; and ATEX Corporated, a Utah Corporation : Brief of Appellant

Utah Supreme Court

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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 Appellant.

Case No.
13925

APPELLANT'S BRIEF

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

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APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

Mortgage foreclosure suit.

DISPOSITION IN LOWER COURT

District Court granted summary judgment foreclosing mortgage.

RELIEF SOUGHT ON APPEAL

Vacating of summary judgment and remanding of the case for trial.

STATEMENT OF FACTS

Although this case was filed in Tooele County Court, by agreement between the parties the hearing of the motion for summary judgment was heard by Judge Stewart M. Hanson, Jr. in Salt Lake County. In his affidavit in opposition to Plaintiff's motion for summary Judgment (R. 14, Par. 5 & 6) Mr. Stoker referred the Court to cases 201,206, 201,278, 202,577 and 204,255 pending in the District Court of Salt Lake County, to the suit for an accounting pending in those actions, which accounting involves the note and mortgage sued on herein, asserted that said accounting suits must be concluded before the amount of indebtedness of Stoker Motor Company to Plaintiff in this action could be determined, and that the note and mortgage which are the subject matter of this lawsuit were executed subject to a later accounting between the parties to determine the actual amount of the indebtedness. Stoker Motor Co. alleges that it is entitled to an accounting and that the credits due per that accounting equals or exceeds the amounts claimed by Plaintiff. (R. 9).

The entire files in cases 201,206, 201,278, 202,577 and 204,255 were presented to the Court at the hearing of the motion for summary judgment. The Court can also

take judicial notice of facts appearing in it's files. See Utah Rule of Evidence 9 and 9(2)(e); *Warren v. Robinson,* 21 U. 429, 61 P. 28.

Plaintiff and an affiliated corporation, Freed Investment Company, provided a line of credit for Stoker Motor Company, an automobile agency, over an extended period ending about November, 1969, when the line of credit was terminated. Stoker Motor Company, it's officers and affiliated companies executed various notes, mortgages, security instruments, etc. and pledged or mortgaged certain reserves for losses held by Plaintiff, certain real and personal property, securities, etc. as security for the obligations created in connection with the hundreds of transactions that occurred between the parties prior to termination of the line of credit. No accounting has been accomplished between the parties, nor has the amount of the endebtedness between the parties, if any, been determined. The note and mortgage which are the subject matter of this lawsuit were executed as a part of the various transactions involved in said line of credit and were executed subject to said later accounting betwen the parties (R. 14, Par. 5 & 6).

Plaintiff and it's affiliate, Freed Investment Company, commenced the following lawsuits based upon said notes, accounts, guarantees, mortgages, etc. in the District Court of Salt Lake County, and in each of those cases Stoker Motor Company asserted it's right to an accounting;

Case #	*Date Filed*	*Nature of claim*
#201,206	9- 3-71	replevin action for boat purchased by Caldwell and allegedly guaranteeed by Stoker Motor Company and others
201,278	9- 9-71	Suit on promissory notes for $6,866.94 and $13,129.75.
202,577	11-23-71	Suit on promissory note for $10,798.26.
204,255	3 -2-72	Suit on promissory note for $25,000.00 and to foreclose chattel mortgage.

Defendants in their answers in these cases alleged that they were entitled to an accounting of the transactions between the parties, and in answers to interrogatories (filed Nov. 6, 1972, case #204,255) asserted that an accounting was necessary to identify all payments, offsets and claims and amounts to which defendants were entitled, but asserted among other things that they believed that Stoker Motor Company was entitled to credits as follows:

(a) That credit had not been properly and fully allowed for the $400,000.00 note which is the subject matter of this lawsuit (claim that only $4,000.00 credit had been allowed for that note — see exhibit 11 atached to plaintiffs answers to interrogatories in case #204,255).

(b) Claim that approximately $50,000.00 dealer reserve held by Plaintiff has not been credited.

(c) Claim for accounting of securities delivered to

Plaintiff, including credits for proceeds of sale and for value of unsold securities held by plaintiff.

(d) Claim for $100,000.00 credit under written contract for services in assisting plaintiff in obtaining possession of yacht.

(e) Claim of credit for $32,000.00 due for conveyance of real property to Plaintiff.

(f) Claim credit for $60,000.00 funds not advanced on loan.

(g) Claimed credit for $39,745.20 in connection with sale of aircraft pledged as security for obligations to Plaintiff.

(h) Claimed credit of $150,000.00 paid to Plaintiff for letter of credit to be issued by Plaintiff which was not used.

(i) Claimed credit for $11,000.00 currency paid to plaintiff.

(j) Claimed credit for automobiles of Defendant's subsidiary, O'Bannon Auto Sales, taken by Plaintiff but believed to have not been credited by Plaintiff.

(k) Claimed credit for alleged conversion by Plaintiff of stock of Baltra, S.A. Value alleged as approximately $900,000.00.

(l) Claimed credit of $210,000.00 for 120 acres of land conveyed to Plaintiff as security for obligations and not foreclosed.

(m) Claim that Defendant is entitled to an accounting to determine accuracy of balance of $705,-

885.41 brought forward by Plaintiff in it's accounting (Exhibit 11 to Plaintiff's answers to interrogatories filed 7-28-72 in case #204,255).

Those cases were ordered consolidated by the Court and a master was appointed by the court to accomplish an accounting. (See order filed 1-11-73 in cases #202,577, 201,278, 201,206, and 204,255). In that order the Honorable G. Hal Taylor stated in part as follows:

> "*Because of the extremely complex nature of the accounting required to resolve various issues of fact* in the aforesaid consolidated actions the Court pursuant to Rule 53 of the Utah Rules of Civil procedure hereby appoints the firm of Willard G. Smith of Haynie, Tebbs & Smith, C.P.A.'s, to act as Special Masters in the consolidated actions and directing the Special Masters to obtain from the representatives of both the plaintiff and the defendant any and all information necessary to fully audit the books and records of the parties with reference to any matters relevant and material to the above transactions. The Master shall then prepare a report of their findings, serve a copy on all parties to the action and file such with the above-entitled Court. . . ."

No further action has been taken to complete that accounting or to bring those four cases to trial. The responsibility for payment of the master was imposed upon Plaintiff under the terms of said order of Judge Taylor (indentified above).

The parties thereafter about July 31, 1973, entered into a compromise agreement, a copy of which is at-

tached to Plaintiff's motion for summary judgment (R. 12), wherein the parties, among others things, recited that approximately $56,000.00 was *owed* by Stoker to Plaintiff on various notes and accounts listed therein, and that there was a promissory note *"outstanding" "in the original principal amount of* $400,000.00;" agreed that the $56,000.00 obligation could be satisfied by paying approximately $28,00.00 plus interst, to be paid in installments, and that the $400,000.00 note could be settled by paying $125,000.00 plus interest in installments. Plaintiff reserved it's rights against Caldwell (Par. 4), obtained a waiver by Stoker of it's right to credit for Arizona property conveyed to Plaintiff by Stoker [item (e), page 5 above) (Par. #6), but left unresolved all of the other claims, credits, offsets and defenses asserted by Stoker in it's answer herein, (R. 9) in the Salt Lake County cases (itemized in paragraphs (a) thru (d) and (e) thru (m), page 4 and 5 above). It is important to observe that the July 31, 1973, agreement releases Freeds' claims against Stoker but contains no release by Stoker of said claims against Freeds.

ARGUMENT

POINT I

JULY 31, 1973, AGREEMENT IS NOVATION AND PRECLUDES SUIT ON NOTE

It is clear that the agreement of July 31, 1973, was intended to compromise and settle the claims asserted by Plaintiff against Stoker in this case, as well as Plaintiffs' claims in the four Salt Lake County cases. Accordingly, that agreement constitutes a novation and an

action can thereafter only be maintained for breach of that contract, the rights of Plaintiff under the original $400,000.00 note and mortgage attached to Plaintiff's complaint herein having been extinguished and/or merged into the July 31, 1973, agreement. See 58 Am. Jur. 2d Sec. 12 and cases there cited; *Mackelprang v. Mackelprang*, 426 P.2d 10, 19 U. (2d) 63.

That the July 31, 1973, agreement was intended to replace or to merge the claims of Freeds against Stoker is further demonstrated by the language of that agreement, which agreement provides for the payment of attorney fees in the event of default by either party (R. 12, Par. 9 of agreement); and provides the following remedy to Plaintiff (Freeds) in the event of default by Stokers. (Par. #1):

> ". . . in the event of a default and failure to remedy said default in accordance with the terms of paragraph 3 hereof, *the full unpaid balance as reflected by the terms hereof shall be due and payable, and FREEDS shall have the option to declare the same in default and STOKERS agree to pay the unpaid balance thereof in accordance herewith. . . .*"

In paragraph #7 of the Freed Affidavit in support of the motion for summary judgment (R. 16) Freed states that Plaintiff exercised that option. Accordingly, if Plaintiff has a claim against Defendant it would be for the unpaid balance owed on the $56,030.00 and $125,000.00 settlement amounts provided in the July 31, 1973, agree-

ment, which precludes Plaintiff's lawsuit based upon the original $400,000.00 note which has been extinguished and replaced by that agreement.

In the event that Plaintiff disputes that construction of the July 31, 1973, agreement, then obviously said agreement is ambiguous and a trial is necessary to resolve that ambiguity, thereby precluding summary judgment.

In the event that Plaintiff contends that it has a right to elect the remedy contained in paragraph #3 of the July 31, 1973, agreement (to declare that agreement void), then an issue of fact remains which requires a trial to determine whether or not Plaintiff by service of the notice mentioned in paragraph #7 of the Affidavit of Freed (R. 16) elected the remedy contained in paragraph #1, thereby precluding a lawsuit based upon the original note and mortgage. see *Estate Counseling Service, inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.* (CA10 Utah) 303 F2d 527; *Cook v. Covey-Ballard Motor Co.*, 69 U. 161, 253 P. 196; *Kennedy v. Griffith*, 68 U. 183, 95 P.2d 752. 25 A.J. 2d Election of Remedies Sec. 8, P. 652.

POINT II

THE RECORD BEFORE THE COURT DOES NOT SUPPORT THE JUDGMENT AWARDED

The July 31, 1973, agreement acknowledges that Plaintiff is holding various securities as security for the performance of that agreement and that Defendant is

entitled to credit for proceeds should the securities be sold and to return of unsold securities when the obligation was paid (R. 12, Par. 7 of attached agreement). That agreement also provides for the payment of $2,-000.00 at the time of execution with monthly payments thereafter of $1,500.00 or more. No credit appears to have been allowed for the payments made pursuant to the July 31, 1973, agreement, (Freed acknowledges that payments were made in par. #6 of his affidavit R. 16) or for in excess of $23,000.00 which appears to have been paid previously on the $400,000.00 note (see case #202,-577, Exhibit 1 attached to Freed's answers to interrogatories filed about 7-28-72). No affidavit or other document was filed by Plaintiff from which the amount of the claimed indebtedness could be determined by the Court, thereby precluding the granting of summary judgment. It appears that the judgment was entered for the full amount of the $400,000.00 note plus accrued interest from the date of the note without allowing any credits. The record simply does not support the judgment.

The judgment also includes $30,000.00 attorney fees. No hearing was held concerning the amount of attorney fees, if any, to be awarded, and no affidavits or other information were filed from which the Court could determine what amount, if any, should be awarded. Since the record is devoid of any sworn testimony which would support the award of judgment for $400,000.00 or attorney fees of $30,000.00, those judgments must be reversed. See *Aiken v. Burrows*, 30 U.(2d) 116, 514 P.2d 533.

POINT III

UNRESOLVED ACCOUNTING PRECLUDES SUMMARY JUDGMENT

Defendant's seventh defense (R. 9) asserts that Defendant is entitled to offsets for finance reserves of Defendant held by Plaintiff, for securities, assets, and property of Defendant held by Plaintiff, with interest thereon, and to an accounting of the transactions between the parties, and alleges that such an accounting establish that credits due to Defendant would be equal to or in excess of the amounts claimed by Plaintiff. The affidavit of Stoker (R. 14, Par. 5 & 6) refers to the Salt Lake County cases mentioned in the statement of facts (above) and to the accounting ordered by the Court in those cases of the transactions between the parties, and asserts that the note and mortgage which are the subject matter of this lawsuit are involved in that accounting. The note and mortgage sued upon in this matter are in fact a part of the accounting involved in those Salt Lake County cases. See Plaintiff's (Freeds) answers to interrogatories in case #204,255 filed about July 28, 1972, and in particular paragraph 4(e) thereof, and exhibits 1, 11, 13, etc. attached thereto. See also items concerning which Stoker has not yet received the accounting ordered by Judge Taylor and as detailed by Stoker's answers to interrogatories in case #204,255 (filed Nov. 6, 1972), and as summarized on page 4 and 5 of statement of facts (above), items (a) thru (m).

If Plaintiff is entitled to maintain an action on the original $400,000.00 note and mortgage, then that claim

is subject to completion of the accounting ordered by Judge Taylor so as to determine what amount, if any, remains unpaid on the note. Defendant is entitled to credit for such amount as is determined by the accounting. The affidavit of Freed (R. 16, Par. 6) that "Plaintiff is not indebted to Stoker Motor Company" is wholly insufficient to justify the granting of summary judgment since that statement constitutes a conclusion and the affidavit does not affirmatively show that Freed was competent to testify on that subject as required by Rule 56(e), URCP. See also *Preston v. Lamb,* 20 U.(2d) 260 436 P.2d 1021; *Rainford v. Rytting,* 22 U. (2d) 252, 451 P.2d 769.

This is particularly true in our situation where there has been an express finding by Judge Taylor that the issues of fact between an express finding by Judge Taylor that the issues of fact between the parties creates an "*extremely complex . . . accounting*" problem which required the appointment of a master. (See page 6 above). The affidavit of Stoker (R. 14) disputes the affidavit of Freed and creates an issue of fact which requires a trial and precludes summary judgment, as do the Salt Lake County cases, the files concerning which are included in the record in this matter and were presented to the Court for consideration in connection with the motion for summary judgment.

Since disputed issues of fact exist which, if resolved in favor of Defendant, would entitled Defendant to prevail or to reduce the amount of the judgment awarded, the granting of summary judgment in this matter was

improper, and the summary judgmen should be vacated and the case remanded to complete the accounting and for trial. *DAV v. Hendrixson,* 9.(2d) 152, 340 P.2d 416; *Hatch v. Sugarhouse Finance Co.,* 20 U.(2d) 156, 434 P.2d 758. All disputed issues of fact should, for purposes of this appeal, be considered in the manner most favorable to Appellant. *Thompson v. Ford Motor Co.,* 16 U.(2d) 30, 395 P.2d 62; *Green v. Garn,* 11 U.(2d) 375, 359 P.2d 1050; *Richard v. Anderson,* 9 U.(2d)17, 19, 337 P.2d 59; *In re Williams Estate,* 10 U.2d) 83, 348 P.2d 683; *Dupler v. Yeates,* 10 U.(2d) 251, 351 P.2d 624. The Court should have considered all evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to the min determining whether or not issues of fact remain which require a trial. See *Bullock v. Deseret Truck Center, Inc.,* 11 U.(2d) 1, 354 P.2d 559. The Court cannot weigh the evidence on a motion for summary judgment as appears to have been done in our case, since that is for a jury at a trial if there is conflicting evidence or disputes as to the construction or effect of instruments such as the July 31, 1973, agreement which appears to have been the basis of the summary judgment. *Singleton v. Alexander,* 19 P.(2d) 292, 431 P.2d 126.

POINT IV

THE JULY 31, 1973, AGREEMENT DOES NOT CONSTITUTE AN ADMISSION THAT THE ENTIRE $400,000.00 FACE AMOUNT OF THE NOTE IS OWED

Plaintiff's motion for summary judgment (R. 12) is

based primarily upon the alleged admissions contained in the July 31, 1973, agreement, Plaintiff asserting that said agreement constitutes an admission that the entire $400,000.00 note is in fact owed by Defendants (Plaintiff's memorandum of authorities, R. 15, Par. 3). Plaintiff simply misreads that agreement. The agreement simply acknowledges that a promissory note is *"outstanding"* which had an *"original principal amount of* $400,000.00." There is no acknowledgement in that agreement as to the amount remaining unpaid on that note, as to the defenses or offsets available to Defendant as defenses thereto, and there is no waiver of those defenses (except as to the offset for the Arizona Land — see par. (e) of that agreement — R. 12), or statement that in the event of default that the entire $400,000.00 would be owed. The reduction from $412,175.80 plus costs and attorney fees included in the judgment (R. 19) to the $125,000.00 provided in the July 31, 1973, agreement indicates that there is substance to the defenses and offsets asserted by Stoker. Because Stoker defaulted in making the payments under the July 31, 1973, agreement does not entitled Plaintiff to recover more than $287,000.00 (plus $30,000.00 attorney fees) more than the parties determined by that agreement to be owed.

Paragraph #3 of the July 31, 1973, agreement, provides in part as follows:

> *". . . In the event that the same (default by Stokers) is not corrected within sixty (60) days from notice thereof, then this agreement to be of*

> *no further force and effect* and the original amounts set forth herein shall be due and payable, together with attorney's fees." (R. 12, Par. #3 of attached agreement).

Obviously the foregoing provision is in direct conflict with the provisions in paragraph #1 thereof (discussed in page 8 above), which provides that the unpaid balance owed on the settlement amount provided by that agreement would be accelerated with attorney fees for enforcement. Since the contract was drafted by counsel for Plaintiff and the ambiguous wording was selected by Plaintiff that ambiguity should be most strongly construed against Plaintiff. See *Skousen v. Smith,* 493 P.2d 1003, 37 U.(2d); *Seal v. Tayco, Inc.,* 16 U(2d) 323, 400 P.2d 503; *General Mills v. Cragun,* 103 U. 239, 134 P.2d 1089 (especially as in our case where draftsman is lender of money); *Wingets, Inc. v. Bitters,* 28 U(2d) 231, 500 P.2d 10007 (forfeiture).

If that language means what it purports to say, (and the contrary language in paragraph #1 is disregarded) then the entire agreement of July 31, 1973, is void and the parties are then left in the same position as they would have been in had that agreement not been executed. Under those circumstances since the note which is the subject matter of this lawsuit is involved in the accounting ordered by the Court in the Salt Lake County cases (see discussion on page 7 - 9 above), and since a master was appointed by the Court to determine the accounting *"Because of the extremely complex nature of the accounting required to resolve various issues of*

fact . . .", in the language of the order of Judge Taylor (see Page 6 above), which order was drafted by counsel for Freeds (Filed about 1-11-73 in Salt Lake County cases). The filing and prosecution of this action without completing that accounting is a direct violation of the terms and spirit of the order appointing a master to accomplish an accounting in the Salt Lake County cases and by reason thereof the judgment entered herein should be reversed and the case remanded for trial after completion of said accounting. That accounting involves a determination of the isues raised by Defendant's answer and the Stoker claims detailed on page 4 - 5 above.

Issues of fact raised by the accounting problem, offsets and credits claimed by Stoker and the amiguity concerning available remedies and effect of default inherent in the contract of July 31, 1973, requires a trial and precludes summary judgment.

POINT V

STOKER MOTOR COMPANY IS NOT BOUND BY THE NOTE, MORTGAGE OR AGREEMENT

The affidavit of H. D. Stoker (R. 14) to the effect that no resolution of the board of directors or of the stockholders of Stoker Motor Company were asked for or obtained authorizing the execution of the promissory note, the mortgage or the agreement of July 31, 1973.

Plaintiff claims that Stoker Motor Company is estopped to assert the invalidity of those instruments (R. 15), however the record is insufficient to conclude that as a matter of law such an estoppel has occurred.

16-10-33, UCA, 1953, provides in part as follows:

> ". . . The business and affairs of a corporation shall be managed by the board of directors . . ."

The president of a corporation ordinarily has only those powers that are directly conferred upon him by the board of directors. *Lochwitz v. Pine Tree Min. & Mill. Co.*, 37 U. 349, 108 P. 1128. For example the president has no power to do such unusual acts as the selling of treasury stock. *Copper King Min. Co. v. Hanson,* 52 U. 605, 176 P. 623. In the absence of provisions in the charter or by-laws, the authority to mortgage corporate real estate is vested in the board of directors and no officer or agent has such authority by virtue solely his office or appointment. 19 Am Jur 2d Corporations Sec. 1153, 1228 and 1533 and cases there cited.

Plaintiff cites the case of *Lumber Mart Company v. Buchanan,* 419 P.2d 1002 (Wash.) in support of it's claim that Stoker as president of Stoker Motor Company had apparent authority to mortgage the corporate property (R. 15, Par. #2) which simply is not in point since that case involved the sale of building materials within the usual course and scope of the authority of a corporate officer. The property mortgaged by Stoker Motor Company constituted substantially all of the assets of that

corporation (Stoker Affidavit R. 14 Par. #3) and is not within the usual course of scope of the authority of a corporate officer. Plaintiff also cites 16-10-6, UCA, 1953, as standing for the proposition that a conveyance is not invalid because of lack of capacity or power to make the conveyance. We do not contend that Stoker Motor Company was without power or authority to mortgage it's property and acknowledge that if such a mortgage had been authorized by the stockholders that it would be valid, however no such authorization was sought or obtained (Stoker Affivadit, R. 14, par. #1) and accordingly the mortgage given is not the act of the corporation and it is not bound thereby.

Sec. 16-10-73, UCA, 1953, requires that the mortgage of substantially all of the assets of the corporation in the usual course of business of the corporation be authorized by its board of directors, and 16-10-74, UCA, 1953, requires that such a mortgage not made in the usual course of the business of the corporation be recommended to the stockholders by a resolution of the board of directors, and be adopted by a resolution of the stockholders. No authorization for the mortgage or agreement of July 31, 1973, was obtained from either the stockholders or directors of Stoker Motor Company (R. 14). Plaintiff cites *Grover v. Garn,* 23 U. (2d) 441, 464 P.2d 598 and *Amoss v. Bennion,* 18 U. (2d) 251, 420 P.2d 47, as standing for the proposition that Stoker is bound by the mortgage without formal authorization from the stockholders or directors. Both of those cases had been tried (unlike our case which involves summary judgment) and

both involved alter ego fact situations, thereby rendering the action of the officer to be that of the corporation. Plaintiff has not claimed alter ego in our case and no facts are before the court from which an alter ego situation could be inferred. The Plaintiff is a finance company which is knowledgeable about the necessity of obtaining authorization from the directors and stockholders to mortgage substantially all of a corporation's property, and was represented by an attorney in these transactions. It would be dangerous precedent in corporate law to permit an officer to sell or to mortgage all of the corporate assets without specific authorization from the directors and stockholders.

If Plaintiff claims that Soker Motor Company is the alter ego of H. D. Stoker then it should be required to plead and to prove facts which would support that theroy, which would require a trial and preclude the granting of summary judgment.

CONCLUSION

Four separate lawsuits were commenced in Salt Lake County Courts, each of which was defended claiming offsets and requesting an accounting. The Salt Lake County Court appointed a master to accomplish that account, which accounting involved the promissory note which is the subject matter of this lawsuit. The parties thereafter entered into a settlement agreement which provided for payment of only a small part of the amounts claimed in the Salt Lake County cases and

claimed under the note which is the subject matter of this lawsuit. Stoker defaulted in making payments on the settlement agreement and Freed then filed this lawsuit in Tooele County on the note and mortgage, and was granted summary judgment in the Tooele County Court without the master completing the accounting so as to determine what credits or offsets were available to Stoker. Stoker claims that the credits and offsets which would be shown by that account would substantially reduce or extinguish the claims of Freed in this lawsuit. Issues of fact remain unresolved concerning those offsets which preclude the granting of summary judgment and require a trial on the merits. This lawsuit is contrary to the order of the Salt Lake County Court appointing a master to complete that accounting which Judge Taylor found necessary in the Salt Lake County cases "*Because of the extremely complex nature of the accounting required to resolve various issues of fact . . .*" (filed 1-11-73 in Salt Lake County cases — see attachment to record herein).

Other issues of fact which preclude the granting of summary judgment and which require a trial on the merits include:

1. Whether or not the July 31, 1973, settlement agreement constituted a novation which extinguished the original note sued upon and limited Plaintiff's right to sue to a suit for breach of that agreement (see Point I).

2. Whether or not the record before the court is

sufficient to support the judgment awarded, particularly in view of award of $30,000.00 attorney fees without any sworn testimony or affidavit in support thereof; without credit being allowed for over $23,000.00 paid on the note prior to the July 31, 1973, agreement, and without allowing credit for payments made on the July 31, 1973, agreement ($2,00.00 down and $1,500.00 per month for an indefinite period), etc. (Point II).

3. Whether or not the July 31, 1973, agreement constitutes an admission that the entire $400,000.00 note remained unpaid, when that agreement merely referred to the note as being "outstanding" and and states that he had an "original principal amount of $400,000.00." (Point IV).

4. Whether or not the July 31, 1973, agreement is ambiguous as to the remedies available to Plaintiff in the event of default by Defendant, whether such ambiguity should be construed strongly against Plaintiff since it was drafted by Plaintiff, and whether or not by it's actions Plaintiff elected to claim a breach of the July 31, 1973, contract and thereby limited it's remedy to a suit for the unpaid balance of that contract, thereby precluding suit for several times that amount on the note.

5. Whether or not Stoker Motor Company is the alter ego of H. D. Stoker so as to validate the note, mortgage and July 31, 1973, agreements without resolutions by the directors and/or stockholders.

Stoker Motor Company has substantial defenses to

Plaintiff's claim. The fact that it defaulted in the performance of the settlement agreement does not divest it of it's defenses or authorize Freed to recover judgment for several times the amounts actually due. Either the July 31, 1973, agreement is valid and Freeds are limited to suit on that contract for the unpaid balance plus attorney fees, or it is invalid and Freed can sue on the original obligation, subject to credit for the payments made and the defenses and offsets available to Stoker. The summary judgment as granted is wholly unfair and should be reversed and the case remanded for trial on the merits.

Respectfuly submitted,

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