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IN THE SUPREME COURT OF THE STATE OF UTAH

T. VAL CHRISTIANSEN

Plaintiff-Appellant

vs.

UTAH-IDAHO SUGAR COMPANY, a corporation, and UNION PACIFIC RAILROAD, a corporation

Defendants-Respondents

Case No. 15751

BRIEF OF PLAINTIFF-APPELLANT

Appeal from the Summary Judgment of the Fourth District Court for Utah County
Hon. J. Robert Bullock

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STATEMENT OF POINTS

POINT I - Plaintiff-Appellant's cause of action is not barred by the applicable statute of limitations in that Plaintiff-Appellant's Complaint was filed within six (6) years from the date that this cause of action arose.

POINT II - Under Utah law, this claim for the breach of a covenant implied under a Warranty Deed does not accrue until the Grantee is damaged or put on notice of the breach.

POINT III - A covenant against encumbrances is a covenant to indemnify and is not breached until the Grantee is damaged and a cause of action cannot accrue until that damage occurs.

POINT IV - Plaintiff's Complaint sufficiently sets forth a cause of action for the breach of covenant under a Special Warranty Deed.

POINT V - The District Court erred in granting summary judgment because material issues of fact are still in dispute, and factual issues must be considered in a light most favorable to the party opposing the motion.

POINT VI - The Marketable Record Title Act, Title 57, Chapter 9, Utah Code Annotated, 1953, as amended, would not extinguish the claimed easement by Defendant, UNION PACIFIC RAILROAD COMPANY, and thus Plaintiff's title was not free and clear of the spur track easement because of the Marketable Record Title Act.

POINT VII - The Complaint, on its face, shows that Plaintiff has been substantially damaged by reason of the claimed encumbrance upon his title.

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IN THE SUPREME COURT OF THE STATE OF UTAH

T. VAL CHRISTIANSEN

Plaintiff-Appellant

vs.

UTAH-IDAHO SUGAR COMPANY, a corporation, and UNION PACIFIC RAILROAD, a corporation

Defendants-Respondents

Case No. 15751

NATURE OF THE CASE

This is an action for damages and indemnification for the breach of the covenants under a Special Warranty Deed.

DISPOSITION IN LOWER COURT

The Defendants-Respondents' Motion to Dismiss was treated as a Motion for Summary Judgment. The Defendants' Motion for Summary Judgment was granted and from that Summary Judgment, the Plaintiff-Appellant appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks a reversal of the Summary Judgment.

STATEMENT OF FACTS

On or about the 8th day of June, 1945, Defendants-Respondents did sell and convey to Plaintiff-Appellant a parcel of real property situated in Utah County, State of Utah by Special Warranty Deed. (Affidavit of Plaintiff dated August 5, 1977, Page 1, Paragraph 5.)

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On or about the 13th day of March, 1973, while Plaintiff-Appellant was attempting to negotiate the sale or the re-financing of the subject property, the Plaintiff-Appellant first received notice that the Defendant, UNION PACIFIC RAILROAD claimed an interest in the subject property, to wit: a twenty-five (25) foot right-of-way. Notice was first received by verbal communication on March 13, 1973 and Plaintiff-Appellant was first shown a Plat Map showing the claimed interest on May 22, 1973. (Affidavit of Plaintiff dated August 5, 1977, Pages 1 and 2, Paragraphs 6, 7, 8 and 11.)

The interest of the Defendant, UNION PACIFIC RAILROAD COMPANY, was a twenty-five (25) foot right-of-way for additional trackage. Said right-of-way was so situated that it would go directly through a building that Plaintiff-Appellant had constructed on the subject property. The right-of-way had been granted in 1916 by Defendant-Respondent UTAH-IDAHO SUGAR COMPANY to SAN PEDRO LOS ANGELES AND SALT LAKE RAILROAD COMPANY. The easement had subsequently been acquired by Defendant, UNION PACIFIC RAILROAD COMPANY. The right-of-way was not visable and no railroad tracks were located thereon. (Affidavit of Plaintiff dated August 5, 1977, Page 2 Paragraphs 7 and 8. Defendant's Affidavit of John Wenderli dated January 6, 1978, Page 3, Paragraph 6.)

Plaintiff-Appellant had received an abstract of title, but the abstract failed to uncover said easement. (Affidavit of Plaintiff dated August 5, 1977, Page 2, Paragraph 10. Defendant's Affidavit of John Wenderli dated January 6, 1978, Page 2, Paragraph 5.)

Upon discovery of the claimed interest, Plaintiff-Appellant immediately on or about May 22, 1973, notified Defendant-Respondent, UTAH-IDAHO SUGAR COMPANY, of the breach of warranty resulting from this defect in title, but Defendant-Respondent UTAH-IDAHO SUGAR COMPANY, refused to indemnify Plaintiff-Appellant. Plaintiff-Appellant was told that he would have to go to the Railroad Company for any relief. At the time of notification, Plaintiff-Appellant notified Defendant-Respondent

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of the urgency of clearing this matter up so that the property could be sold or re-financed. (Affidavit of Plaintiff dated August 5, 1977, Pages 2 and 4, Paragraphs 12, 13, 14 and 19.)

Plaintiff-Appellant then contacted Defendant, UNION PACIFIC RAILROAD COMPANY, who originally agreed to quit-claim its right-of-way interest and Plaintiff-Appellant did then forward a check as compensation for this interest. Defendant, UNION PACIFIC RAILROAD COMPANY, later refused to quit-claim as previously agreed upon. (Affidavit of Plaintiff dated August 5, 1977, Pages 3 and 4, Paragaphs 14, 15, 16, 17, 18 and 19.)

The action of the Defendants prevented the Plaintiff from selling or re-financing the subject property due to the fact that no buyer or lender was willing to buy or re-finance this property because of the claimed right-of-way. As a direct result of these events, Plaintiff-Appellant was evicted from the property in a foreclosure action and was unable to redeem the property. Plaintiff-Appellant then commenced this action against the Defendants. The Complaint was filed November 11, 1976. Defendants-Respondents have never filed an Answer to the Complaint. (Affidavit of Plaintiff dated August 5, 1977, Page 4, Paragraphs 20-25.)

ARGUMENT

POINT I

PLAINTIFF-APPELLANT'S CAUSE OF ACTION IS NOT BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS IN THAT PLAINTIFF-APPELLANT'S COMPLAINT WAS FILED WITHIN SIX (6) YEARS FROM THE DATE THAT THIS CAUSE OF ACTION AROSE.

This is an action based upon an instrument in writing, to wit: a Special Warranty Deed. Section 78-12-23 (2), Utah Code Annotated, 1953, as amended provides that:

> "An action upon any contract obligation or liability founded upon an instrument in writing .... be brought within six (6) years".

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In Soderberg vs. V. Holt, 86 Utah 485, 46 P. 2nd 428 (1935), this Court applied the six (6) year statute of limitations to a claim for breach of a covenant under a Warranty Deed. Plaintiff-Appellant submits that under Utah law, the cause of action arose or accrued on or about the 13th day of March, 1973. This is the point in time that Plaintiff-Appellant was first notified of the defect in subject property and was consequently prevented from selling or re-financing his property because of the easement which had been granted by Defendant-Respondent. This action was commenced November 11, 1976 clearly within the six (6) year statute of limitations set forth in Section 78-12-23 (2).

POINT II

UNDER UTAH LAW, THIS CLAIM FOR THE BREACH OF A COVENANT IMPLIED UNDER A WARRANTY DEED DOES NOT ACCRUE UNTIL THE GRANTEE IS DAMAGED OR PUT ON NOTICE OF THE BREACH.

The conveyance at issue was by Special Warranty Deed. Section 57-1-12 Utah Code Annotated, as amended, 1953, provides that when a Warranty Deed is used according to the statutory form, the Grantor by the use of such Deeds, warrants the following:

(a) that he is lawfully seized of the premises;

(b) that he has good right to convey the same;

(c) that he guarantees to the grantee, his heirs and assigns, the quiet possession thereof;

(d) that the premises are free from all encumbrances;

(e) that the grantor, his heirs and personal representatives, will forever warrant and defend the title thereof in the grantee, his heirs and assigns against all lawful claims whatsoever.

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This statute duplicates and is identical to its predecessors, to wit: Section 4881, Com. Laws Utah 1917, and was codified originally in Section 78-1-11 R.S. Utah 1933. The same covenants are implied in a Special Warranty Deed as in a General Warranty Deed the major distinction between the two being that in a Special Warranty Deed, the Grantor only warrants that he has not done anything to breach these implied covenants. In the case before the Court, the Grantor himself did convey this right-of-way and consequently breached the covenants of the Special Warranty Deed.

Thus, the easement which had been granted by the Defendant-Respondent in this case was, in fact, a breach of the last three (3) warranties of the Special Warranty Deed granted to the Plaintiff-Appellant, depending upon how it is characterized. This conveyance resulted in a breach of the following:

(a) Quiet Enjoyment. In that Plaintiff-Appellant was prevented from selling or re-financing the subject property. This effectively prevented him from the lawful quiet use and possession of his property.

(b) Encumbrances. The land when conveyed was encumbered by a previous right-of-way or easement and thus a clear breach of the covenant against encumbrances took place.

(c) General Warranty. This covenant was breached in that Defendant-Respondent failed to defend Plaintiff-Appellant's title against this encumbrance after being notified by Plaintiff-Appellant of the defect in title.

It seems beyond dispute that under the Utah law, covenants of quiet enjoyment and general warranty are not personal covenants and thus, "run with the land". The Court has twice held:

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> "The covenants of general warranty and quiet enjoyment are covenants running with the land".

Van Cott vs. Jacklin, 63 U. 412, 226 P. 460 (1924); East Canyon Land & Stock Company vs. Davis & Weber Counties Canal Company, 65 U. 560, 238 P. 280 (1925).

They are not breached at the time of the conveyance and the statute of limitations can only begin to run at the time that the cause of action accrues, i.e. the time that the grantee was put on notice of the breach. Plaintiff-Appellant was put on notice of the breach and was damaged because of his inability to sell or re-finance the land in March of 1973. Plaintiff-Appellant submits that Plaintiff's cause of action accrued in March of 1973; that he commenced this action in November of 1976, well within the six (6) year period of the statute of limitations. The District Court erred in granting summary judgment on the issue of statute of limitations.

POINT III

A COVENANT AGAINST ENCUMBRANCES IS A COVENANT TO INDEMNIFY AND IS NOT BREACHED UNTIL THE GRANTEE IS DAMAGED AND A CAUSE OF ACTION CANNOT ACCRUE UNTIL THAT DAMAGE OCCURS.

This Court has determined that a covenant against encumbrances should be seen as a covenant to indemnify. In Soderberg vs. Holt, supra, this Court states:

> "If on the other hand the covenant against encumbrances is looked at according to its true content and its true intention, it should be looked at as a covenant to indemnify ...."

The Court further states on Page 433:

> "We believe that the logical fabric and the law will be better maintained and yet justice be done by holding that a covenant against encumbrances is in effect a covenant to indemnify where the encumbrance is a charge or lien against the land which can be extinguished by payment. Thus, the statute can be held to run only when the Grantee is damnified".

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In this case, the Plaintiff-Appellant was not damnified until he received notice in March of 1973 and was prevented from selling or obtaining financing on his land. The statute of limitations did not begin to run until 1973 and thus Plaintiff-Appellant's action is not barred.

This Court has recognized the split of authority concerning covenants against encumbrances and the modern trend to hold these covenants as not being personal covenants, but running with the land. This is specifically set forth in detail in the case of Soderberg vs. Holt, supra, in which this Court does a thorough analysis of the law of other jurisdictions and specifically rejects the theories used by some states in treating a covenant against encumbrances as a personal covenant.

The Soderberg vs. Holt analysis has been upheld in a more recent case before this Court. In the case of Pacific Bond & Mortgage Company vs. Ruhn, 101 U. 335, 121 P. 2nd 635 (1942), the Court re-emphasized the holding in Soderberg vs. Holt by stating that:

> "We there held if on the other hand the covenant against encumbrances is looked at according to its true content and its true intention, it should be looked at as a covenant to idemnify".

The very nature of a covenant to indemnify would not give rise to a cause of action until the Grantor has refused to indemnify. In the context of this case, that time would have to be in March of 1973 when Plaintiff-Appellant notified Defendant-Respondent of this encumbrance and Defendant-Respondent refused to indemnify.

This case can easily be distinguished from those cases involving a breach of covenant of seisin, which in many jurisdictions has been held to be a personal covenant and breached upon conveyance. In this case, the Defendant-Respondent

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was seized of the land and an interest was transferred to the Plaintiff-Appellant, but that interest was defective because of a prior right-of-way that had been conveyed by Defendant-Respondent.

Plaintiff-Appellant submits that despite how this cause of action is characterized, this case involves a covenant that runs with the land. Plaintiff's cause of action did not accrue until 1973. The action in no way is barred by the applicable statute of limitation and summary judgment on this particular point would have been improper.

POINT IV

PLAINTIFF'S COMPLAINT SUFFICIENTLY SETS FORTH A CAUSE OF ACTION FOR THE BREACH OF COVENANT UNDER A SPECIAL WARRANTY DEED.

Plaintiff's Complaint alleges the following:

1. That Defendant-Respondent conveyed real estate to Plaintiff, (Paragraph 5 of Plaintiff's Complaint).
2. That at the time of conveyance, Defendant-Respondent did not have clear title to said real estate because of the previous conveyance of the right-of-way (Paragraph 6 of Plaintiff's Complaint).
3. That Plaintiff-Appellant placed Defendant-Respondent on notice of this defect in title (Paragraph 9 of Plaintiff's Complaint).
4. That the Plaintiff was unable to obtain financing on the property because of the right-of-way previously conveyed by Defendant-Respondent (Paragraph 10 of Plaintiff's Complaint).
5. That as a result the property was foreclosed (Paragraph 10 of Plaintiff's Complaint).

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Clearly the allegations set forth in Plaintiff's Complaint, establish a cause of action for breach of covenant under a Special Warranty Deed.

This Court has decided that allegations as to actual eviction is not necessary in order to establish a valid cause of action under the breach of a covenant. In the case of East Canyon Land & Stock Company vs. Davis & Weber Counties Canal Company, supra, a case involving an action to recover on the covenant of warranty, this Court stated:

> "On appeal it was contended in support of the demure, that the action was barred; the Court held as above indicated:
>
> 1. That an actual eviction was not necessary, and that the statute of limitations had not begun to run until Plaintiff recognized and yielded to the paramount title....to that effect, it is also the holding of nearly all other cases hereinbefore cited, that is, it is held that where the title is in the sovereign, no actual eviction is necessary and that a constructive eviction occurs when the purchaser recognizes the paramount title and yields to it."

Although the above case dealt with paramount title in the sovereign of the United States, it sets forth what allegations are sufficient in a breach of covenants action. Plaintiff has alleged in his Complaint that he lost his property as a direct result of there being an apparent valid right-of-way or easement on the subject property. This amounts to an actual eviction. Plaintiff-Appellant has alleged that no buyer or finance company would deal with this property because of the title defect. This would certainly amount to a constructive eviction.

A more recent case as cited by this Court, Creason vs. Peterson, 24 U. 2nd 305, 470 P. 2nd 403 (1970), which also involved a breach of the covenant of warranty, this Court held:

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> "Defendant's argument as to No. 1 (above) is that there was no breach of warranty because the Plaintiff had peaceable possession and enjoyment of the property without an eviction or threat thereof. With this we do not agree. The majority rule, with which we are in accord, is that there is a breach of warranty when it is shown that the Grantor did not own the land that he purported to convey by the warranty deed description".

The Creason case involved a variance of a few feet between the property lines as described in the deed and the actual fence lines on the property. Allegations in Complaint were sufficient to establish a cause of action for breach of warranty. The Plaintiff-Appellant respectfully submits that the allegations contained in the Complaint are sufficient to establish a cause of action for breach of covenant.

The Supreme Court of Kansas in the case of Wilder vs. Wilhite, 190 Kn. 564, 376 P. 2nd 797 (1962), specifically dealt with questions regarding sufficiency of pleading a cause of action for the breach of a covenant of warranty. In that case, the Appellant had conveyed the real property in question by mesne conveyance to Appellant; at the time of the conveyance, the Appellant conveyed a defective ti and this defect was not discovered until Appellant attempted to sell the land, and in so doing, he discovered the adverse claim and as a result thereof, litigati ensued. The Kansas Supreme Court held that a general pleading of these facts and circumstances was sufficient to state a cause of action for the breach of warranty

In this case, an actual eviction of the Plaintiff-Appellant took place as a direct result of the defect in title. Plaintiff was unable to obtain financi or to sell the subject property and thus lost the land in a foreclosure action.

The Plaintiff-Appellant respectfully submits that the District Court erred in granting summary judgment as to the sufficiency of the Complaint. In li

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of the foregoing analysis, it appears that the Plaintiff's Complaint is sufficient to set forth a valid cause of action.

POINT V

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE MATERIAL ISSUES OF FACT ARE STILL IN DISPUTE, AND FACTUAL ISSUES MUST BE CONSIDERED IN A LIGHT MOST FAVORABLE TO THE PARTY OPPOSING THE MOTION.

This Court has determined that summary judgment is proper only when the moving party is entitled to judgment as a matter of law. In the case of Welchman vs. Wood, 9 Utah 2nd 25, 337 P. 2nd, 410 (1959) the Court held:

> "Summary judgment is a drastic remedy and Courts should be reluctant to deprive litigants of an opportunity to fully present their contentions upon a trial, and therefore, summary judgment should be granted only when under the facts viewed in the light most favorable to the Plaintiff, he could not recover".

See also Controlled Receivables Inc. vs. Harman, 17 Utah 2nd 420, 413 P. 2nd 807 (1966), to the same effect.

Summary judgment is improper if there is a dispute as to any issue of fact which could determine the dispute between the parties. In Burningham vs. Ott 525 P. 2nd 620 (1974), this Court held:

> "Summary judgment can be given only in case there is no dispute on material evidentary matter".

Also in the case of Transamerica Title Insurance Company vs. United Resources Inc., 24 Utah 2nd 346, 471 P. 2nd 165 (1970) this Court held:

> "but if it appears from such summation that there is dispute as to any issue of fact which would be determinative of the rights of parties, it should be denied and a trial had to resolve the disputed issues".

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The case at bar has several material issues of fact in dispute that remain unresol

and could be determinative of the rights of the parties. One material issue of fa

in dispute is whether Plaintiff-Appellant upon discovery of the title defect conta

the Defendant-Respondent giving Defendant-Respondent the opportunity to defend agai

the title defect and avoid litigation. The Plaintiff-Appellant has stated on Page

Paragraph 12 of his first Affidavit dated August 5, 1977, that upon discovery of th

title defect, he immediately contacted Defendant-Respondent and notified him of th

defect in title. The Affidavit of John Wenderli, dated January 6, 1978, submitted

on behalf of the Defendant-Respondent on Page 5, Paragraph 13 alleges that Plaintif

Appellant never contacted Defendant-Respondent concerning this issue. These two

contradictory allegations on their face show a dispute as to a material fact. The

materiality of this dispute goes to a basic issue of this case, i.e. whether the

Defendant-Respondent had an opportunity to cure this defect and minimize the resulti

damages. Plaintiff-Appellant should be entitled to produce evidence in this regard

as the resolution of this could be determinative.

A second dispute over a material issue of fact surrounds the question of when Plaintiff-Appellant first became aware of the title defect. In Plaintiff-Appellant's first Affidavit on Page 1 and 2, Paragraphs 6, 8 and 11, Plaintiff stat

that the first time that he received notice of this defect was in March of 1973.

The Affidavit of John Wenderli on Page 5, Paragraph 13 states:

> "....it is Defendant U & I SUGAR's position that Plaintiff was aware of the easements in 1951".

This clearly shows a dispute on its face and the resolution of this dispute could certainly be determinative of this case especially due to the defense set forth by

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the Defendant-Respondent as to the statute of limitations. Plaintiff-Appellant's cause of action, as set forth and more fully expanded in Point II above, could not accrue until Plaintiff-Appellant was notified of the title defect and the statute of limitation would commence to run from that date. Plaintiff-Appellant should be allowed to produce evidence on the issue of when he received notice of this defect in title.

A third material issue of fact exists on the question of whether the actions of Defendant-Respondent prevented the Plaintiff-Appellant from selling or re-financing the subject property. The Plaintiff-Appellant has alleged that his loss of the property was a result of his inability to sell or re-finance the property which was due to the newly-discovered defect in title. The Defendant-Respondent on the other hand, in the Affidavit of John Wenderli, alleges that Plaintiff-Appellant lost the property to foreclosure for other reasons, to wit: the unemployment and the lack of income of the Plaintiff (see Page 5, Paragraph 12 of Wenderli's Affidavit). Plaintiff-Appellant should be allowed to produce evidence on this issue and the resolution of this issue could be determinative of the case in that it would show whether actions of the Defendant-Respondent caused Plaintiff's damage or whether other causes intervened or superseded to cause Plaintiff's damage.

This partial list shows that material issues of fact are still in dispute and unresolved. Summary judgment in this particular case was improper and the District Court erred in granting summary judgment. The Plaintiff-Appellant should be allowed the opportunity to produce evidence on these disputed issues of material fact.

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POINT VI

THE MARKETABLE RECORD TITLE ACT, TITLE 57 CHAPTER 9, UTAH CODE ANNOTA 1953, AS AMENDED, WOULD NOT EXTINGUISH THE CLAIMED EASEMENT BY DEFENDANT, UNION P RAILROAD COMPANY, AND THUS PLAINTIFF'S TITLE WAS NOT FREE AND CLEAR OF THE SPUR T EASEMENT BECAUSE OF THE MARKETABLE RECORD TITLE ACT.

Section 57-9-2 Utah Code Annotated as amended 1953 in Subsection 4 st

> "That the marketable record title shall be subject to: any interest arising out of the title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title of record is started ...."

Under the Marketable Record Title Act in Utah, it is necessary then to determine t root of title in order to determine which easements are extinguished by the forty (40) year period in question, Subsection 5 of 57-9-8 Utah Code Annotated as amende 1953, defines the term "root of title" as follows:

> "The words 'root of title' mean that the conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon such (sic) he relies as a bases for the marketability of his title, and which was the most recent to be recorded as of the date forty (40) years prior to the time when marketability is being determined. The effective date of the 'root of title' is the date on which it is recorded".

At the time in which an attempt was made to determine the marketability of title, i.e. 1973, the 1945 conveyance to the Plaintiff could not serve as the root of title because the root of title must be the conveyance prior to the time of the expiration of the forty (40) year period. Forty (40) years had not expired betwee 1945 and 1973. The only conveyance in this chain of title which could be seen as

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the root of title under the Marketable Record Title Act in Utah would necessarily then be the conveyance from Hyrum I. Wright and Mary J. Wright to Utah-Idaho Sugar Company dated September 9, 1915. Under the provisions of the Marketable Record Title Act in Utah, if the conveyance from the Wrights to the Utah-Idaho Sugar is seen as the root of title, then the easement in question here would not be extinguished by the forty (40) year limitation period. It was granted after the date of the root of title and the marketable record title would still be subject to that easement under the provisions of Section 57-9-2, Subparagraph 4. Any easements or encumbrances of title prior to 1915 would be extinguished under Section 57-9-1 and 57-9-2, but easements conveyed after that would not.

Plaintiff submits that the forty (40) year period established in the Marketable Record Title Act does not in and of itself extinguish all easements or clouds of title older than forty (40) years. The Act, however, only extinguishes those easements or clouds on title which occurred prior to the forty (40) year limitation. Thus, under the facts and circumstances of this case, the claimed easement by Defendant, UNION PACIFIC RAILROAD COMPANY, would not be extinguished under the provisions of said Act.

Even, assuming arguendo, that the easement had in fact been extinguished by the Marketable Record Title Act, Plaintiff-Appellant has alleged that both potential buyers and lending institutions treated this as a title defect as valid and resulting in a cloud on Plaintiff-Appellant's title. Consequently, Defendant-Respondent's failure to clear this matter up resulted in Plaintiff-Appellant's damage.

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POINT VII

THE COMPLAINT, ON ITS FACE, SHOWS THAT PLAINTIFF HAS BEEN SUBSTANTIALL DAMAGED BY REASON OF THE CLAIMED ENCUMBRANCE UPON HIS TITLE.

The Complaint and the Affidavits of Plaintiff clearly set forth the fact that Plaintiff was unable to sell his property or to obtain additional financi on such property due to the cloud on his title. His inability to use his property in a manner which would allow him to gain benefit of the property resulted in fore- closure on subject property and substantial damages to Plaintiff. None of this would have occurred had Plaintiff obtained free and clear title to the subject prem Defendant, UTAH-IDAHO SUGAR COMPANY has thus caused damage to the Plaintiff by its failure to convey marketable title and by its failure to defend Plaintiff-Appellant on this title defect.

CONCLUSION

Plaintiff-Appellant had done everything he could have done to uncover any hidden easements. Defendant-Respondent had encumbered this property. Defendar Respondent had failed to inform Plaintiff-Appellant of this encumbrance. Plaintiff- Appellant should not be made to suffer for acts committed by Defendant-Respondent over which they had no knowledge of or control over. Defendant-Respondent refused to indemnify Plaintiff-Appellant and they should bear the cost of the resultant damages.

Plaintiff-Appellant respectfully submits that the trial Court erred in granting summary judgment in favor of Defendant-Respondent and should be reversed. Plaintiff-Appellant's action is not barred by the statute of limitations, the

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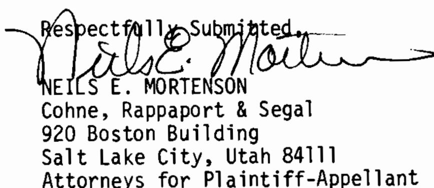
Complaint sufficiently sets for a cause of action for breach of covenant under a Special Warranty Deed, there is still several determinative material issues of fact unresolved, the Marketable Record Title Act did not extinguish this right-of-way, and Plaintiff has been substantially damaged by the actions of Defendants-Respondents.



Respectfully Submitted,

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