

1997

Harrington Properties, Inc., a Utah corporation;
Robert L. Harrington and Jane R. Harrington v.
Marilyn Hamilton Petersen; and Global Motor
Inns, a Utah corporation : Petition for Rehearing

Utah Court of Appeals

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DOCKET NO.

970717-CA

IN THE UTAH COURT OF APPEALS

HARRINGTON PROPERTIES, INC., a Utah
corporation; ROBERT L. HARRINGTON and
JANE R. HARRINGTON,

Plaintiffs/Appellees,

v.

MARILYN HAMILTON PETERSON; and
GLOBAL MOTOR INNS, a Utah corporation,

Defendants/Appellants

APPELLEES' PETITION FOR
REHEARING

Case No. 970717-CA

Priority No. 15

Appeal from Declaratory Judgment Entered by
the Third Judicial District Court, Salt Lake County,
the Honorable Sandra Peuler

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FILED
Utah Court of Appeals
DEC 11 1998

Sanford
Court

IN THE UTAH COURT OF APPEALS

HARRINGTON PROPERTIES, INC., a Utah
corporation; ROBERT L. HARRINGTON and
JANE R. HARRINGTON,

Plaintiffs/Appellees,

v.

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INTRODUCTION

Pursuant to Rule 35 of the Utah Rules of Appellate Procedure, the plaintiffs and appellees, Harrington Properties, Inc. ("HPI"), Robert L. Harrington ("Harrington"), and Jane R. Harrington hereby petition the Court for a rehearing in this matter. As set forth below, on the key point of whether additional loans were secured by an earlier deed of trust between the parties, the Court's opinion, which was filed on November 27, 1998, is predicated specifically on the Court's misapprehension of two facts critical to its holding and on a misapprehension of the actual language of the trust deed.

COURSE OF PROCEEDINGS AND FACTUAL BACKGROUND

This appeal arises from HPI's purchase of a residential building lot from Marilyn Peterson ("Peterson"). Mrs. Peterson sold the lot to HPI pursuant to a promissory note that was secured by a second-position trust deed (the "Trust Deed") on the property. The principal question before this Court on appeal was whether on motion for partial summary judgment the district court correctly ruled that, as a matter of law, certain additional loans by Mrs. Peterson were not secured by the Trust Deed because they were not evidenced by a promissory note reciting that they were secured by that Trust Deed.

Harrington's motion for partial summary judgment sought a declaration that the monies advanced by Peterson in and after February 1993 were not secured by the 1991 Trust Deed because there was no writing evidencing such a securitization as required by clause (3) of the Trust Deed. In partial response to the summary judgment motion, Peterson argued that \$4,898.81 of the advances was secured by paragraph 5 of the Trust Deed because it represented funds paid directly to Guardian State Bank for interest due on the note secured by the first-place

As a matter of undisputed fact in the record, no part of the loans at issue on appeal was used to pay any encumbrance, charge, or lien. Any such uses of the loans were excluded from the Order by the district court. Indeed, on the legal issue, the district court agreed with this Court's view of the operation of paragraph 5.

Except for the \$4,898.81 noted above, Peterson did not contend below or on appeal that the loans in question paid any encumbrance, charge, or lien. For that reason, Peterson made no argument below or on appeal that the district court erred by failing to find that the loans were secured by the Trust Deed under clause (2) with reference to paragraph 5.

Thus, because the Court misapprehended a fact critical to its holding, rehearing is proper.

2. The Court Misapprehended the Reason for the Requested Additional Loans in February 1993, Thus Warranting a Rehearing.

In its Opinion, this Court recited as factual background that “[i]n February 1993, Peterson, at Harrington’s request, made another advance to Harrington of \$69,626.84 to ensure construction could be completed and to prevent foreclosure of the Guardian Bank construction loan.” (emphasis added). Opinion at 3. The Court then held that “Peterson advanced the construction money to Harrington under these circumstances because the alternative was to allow foreclosure of the Property, thereby impairing her own security interest,” concluding “[t]hus Peterson’s 1993 advance to Harrington was made to protect her security interest in the Property.” Id. at 5.

That conclusion is predicated on a misapprehension of a fact critical to the conclusion. As noted above, there was no notice of default to Harrington on the Guardian State Bank note. Moreover, Peterson did not contend before the district court or on appeal that Harrington was about to default on that Note or that foreclosure was imminent. The Court’s misapprehension of

that fact is therefore fatal to its conclusion quoted above, and for that reason a rehearing is warranted.

3. The Court's Consideration of Dragnet Clause Analysis Was Based on a Misapprehension of the Trust Deed's Language, Thus Warranting a Rehearing.

Because it misapprehended the nature of the additional advances, this Court did not correctly analyze the applicability of clause (3) of the Trust Deed except in its analysis concerning "dragnet" clauses.² Opinion at 5. However, this was an incorrect interpretation of the Trust Deed and of the requirements in clause (3) for securing additional indebtedness, and a misapprehension of the actual language of the Trust Deed.

A dragnet clause is one which makes real estate security for subsequent additional debts. Such clauses typically are drafted with extremely broad language. For example, the dragnet clause in the case cited by this Court stated that it was "to secure the payment of any and all claims or demands now due or to become due now or hereafter contracted or incurred which the said mortgagee or the holder hereof, from time to time, may have or hold against the mortgagors or either of them." First Sec. Bank v. Shiew, 609 P.2d 952, 953 (Utah 1980). The question before the Utah Supreme Court in Shiew was whether the extremely broad language of the dragnet clause in that case was enforceable to secure a subsequent additional debt. The Supreme Court held that such clauses would not be enforced unless "the advances are of the same kind and quality or relate to the same transaction" as the principal obligation or unless "the document evidencing the subsequent advance refers to the mortgage as providing security therefor." Id. at 954 (citation omitted).

²While the Court does not identify the specific provision that it believed constitutes a dragnet clause, the Court apparently relied on clause (3) because the Court refers to "additional advances".

Under this authority, a court must make a two-step analysis when analyzing whether subsequent advances are secured by a trust deed. First, the court must make the threshold determination of whether there is a dragnet clause that purports to cover the subsequent loans. If so, the second question is whether the dragnet clause is enforceable under Shiew.

This Court failed to make the first inquiry. In fact, there is no dragnet clause in the Trust Deed, either similar to or functionally equivalent to the provision in Shiew, and this Court does not point to one. More importantly, clause 3 in the Trust Deed is in fact an anti-dragnet clause. Rather than stating that the trust deed secures all other indebtedness as in Shiew, under clause (3) the trust deed secures additional loans only "when evidenced by a promissory note or notes reciting that they are secured by this Deed of Trust." (emphasis added). The absence of any dragnet clause and the express contrary language ends the first prong of the Shiew analysis. It was therefore unnecessary for the Court to consider the next question of whether the clause would be enforceable because the additional advances were "related" to the original loan. Under this analysis, the district court correctly held that the monies loaned by Peterson pursuant to the February 18 Letter Agreement were not secured by the Trust Deed.

CONCLUSION


For the foregoing reasons, this Court should reconsider this matter and either affirm the declaratory judgment of the district court or grant a rehearing.

CERTIFICATE OF GOOD FAITH

Counsel for the petitioners hereby certifies that this petition is presented in good faith and not for delay.

DATED this 1/14 day of December, 1998.

RAY, QUINNEY & NEBEKER


James S. Jardine
Brent D. Wride
Eric D. Barton
Attorneys for Plaintiffs/Appellees


CERTIFICATE OF SERVICE

I certify that on the 1/14 day of December, 1998, I have caused to be mailed by United States mail, postage prepaid, two true and correct copies of the foregoing APPELLEES'

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440863

Exhibit A

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SALT LAKE COUNTY
By R. G. [Signature]

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

-----ooOoo-----

HARRINGTON PROPERTIES, INC.,	:	
a Utah corporation; ROBERT L.	:	
HARRINGTON and JANE R.	:	ORDER
HARRINGTON,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	Civil No. 940904680CN
MARILYN HAMILTON PETERSON; and	:	
GLOBAL MOTOR INNS, a Utah	:	
corporation,	:	Judge Sandra Peuler
	:	
Defendants.	:	

-----ooOoo-----

Plaintiffs' Motion for Partial Summary Judgment on Their Fourth Cause of Action and Defendants' Motion for Summary Judgment came on for hearing before the Court on November 4, 1996. Plaintiffs were represented by James S. Jardine. Defendants were represented by John K. Mangum. Based upon the memoranda and affidavits filed by the parties and the arguments of counsel at the hearing, and the orders of the court,

IT IS HEREBY ORDERED as follows:

1. Defendants' Motion for Summary Judgment is denied on the basis that there remain material issues of fact in dispute.

1042

2. Plaintiffs' Motion for Partial Summary Judgment on the Fourth Cause of Action of their Third Amended Complaint is granted, except for \$4,898.81 in funds paid to Guardian State Bank. Therefore, plaintiffs are entitled to a declaratory judgment that monies advanced to Robert L. Harrington and/or Harrington Properties, Inc. by defendant Peterson beyond their Agreement dated December 8, 1992, and pursuant to an agreement made in February, 1993, were not secured by the Deed of Trust, dated June 21, 1991, and referred to by the plaintiffs as the "Sunset Oaks Trust Deed II", except for \$4,898.81 in funds paid to Guardian State Bank.

3. Pursuant to Rule 52(a), the following is a brief written statement of the grounds for the Order:

a. The Sunset Oaks Trust Deed II, dated June 21, 1991, provides in part that it is given for the purpose of securing ". . . (3) the payment of such additional loans or advances as hereafter may be made to Trustor or his successor or assigns, when evidenced by a promissory note or notes reciting that they are secured by that deed of trust . . ." Sunset Oaks Trust Deed II, p. 2.

b. The Court finds that the monies advanced by defendant Peterson pursuant to the February 18, 1993 letter were "additional loans or advances" within the meaning of clause (3), and that clause (3) applies to the monies loaned or advanced by Peterson pursuant to the February 18, 1993 letter agreement, except as to the \$4,898.81 paid to Guardian State Bank, which

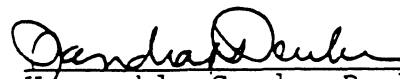
payments were secured under clause (2) of the Sunset Oaks Trust Deed II by reference to paragraph 5 thereof.

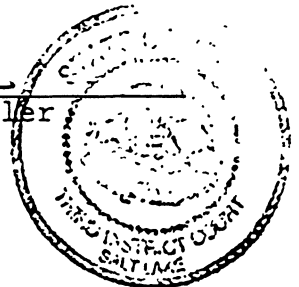
c. Except as to the \$4,898.81 paid to Guardian State Bank, the Court finds that clauses (1), (2) and (4) of the Sunset Oaks Trust Deed II do not apply to the new advances made after those covered by the December 8, 1992 Agreement, as contended by defendants, and that the interpretation of those clauses asserted by defendants is artificial.

d. The Court finds that the February 18, 1993 letter from Robert L. Harrington to Marilyn Hamilton Peterson is the only document which reflects the agreement between the parties with respect to the advances made by defendant Peterson after those covered by the December 8, 1992 Agreement. The Court does not decide whether the February 18, 1993 letter constitutes a "promissory note" within the meaning of clause (3) of the Sunset Oaks Trust Deed II. The Court does conclude that the February 18, 1993 letter does not recite that the monies advanced thereunder are secured by Sunset Oaks Trust Deed II, as required by clause (3).

DATED this 10 day of December, 1996.

BY THE COURT:


Honorable Sandra Peuler
District Judge



Approved As To Form:



John K. Mangum
NIELSEN & SENIOR, P.C.
201345.03

Exhibit B

FAY GUINNEY
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& MLBEKER

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

Judge Sandra Peuler

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INTRODUCTION

The principal persons to this dispute are a businesswoman without any formal legal training (Defendant Marilyn Peterson) and a member of the Utah State Bar (Plaintiff Robert Harrington), who agreed to buy a single lot from Mrs. Peterson in an arm's-length credit transaction. Mr. Harrington gave Mrs. Peterson a Promissory Note in payment of the full purchase price of the lot which was secured by a Purchase Money Trust Deed. Mr. Harrington then proceeded on his own, through his closely held corporation, Harrington Properties, Inc., to attempt to build a luxury spec home on that property (the "Sunset Oaks Property").

Peterson was not, and should not properly be viewed in any way as a joint venturer with Harrington. Had Harrington been able to adequately finance the construction project he undertook on his own, as he originally projected and represented, Mrs. Peterson would have had no further involvement in the transaction, other than to collect payment of her Promissory Note. However, Harrington later filed a personal bankruptcy and then lacked the means, contrary to his original representations, to complete his undertaking.

Knowing that Mrs. Peterson had access to substantial sums of money, and apparently lacking other ready means of financing, Harrington requested additional funding from Mrs. Peterson to complete his original project. Fearing the potential loss of her ability to collect the money owed her if the project were not properly completed, Mrs. Peterson obliged and advanced the remaining funds necessary to substantially complete the construction of the luxury home which Mr. Harrington had already partly built to the point that plans could not easily be changed.

While the narrow issue presented by Plaintiffs' motion is whether monies loaned in 1993 by Mrs. Peterson were secured by her Purchase Money Trust Deed of June 1991 (usually referred to by Plaintiffs as the Sunset Oaks Trust Deed II, because recorded after the trust deed securing the construction loan from Guardian State Bank to Harringtons), the resolution of this issue is not properly made by looking only at one small phrase of the Purchase Money Trust Deed, as Plaintiffs suggest. Mischaracterizing the nature of those 1993 advances as separate and unrelated loans, Plaintiffs focus on the only language they can find to support their strained interpretation, and totally ignore the multitude of other provisions of the Purchase Money Trust Deed which clearly secure, independent of any later writing, the further advances made by Mrs. Peterson to complete construction.

ADDITIONAL UNDISPUTED FACTS

Paramount among the material facts which are undisputed, even undisputable, are the following provisions of the Purchase Money Trust Deed (the "Trust Deed" or "Deed of Trust"), which provides, in relevant part, on page two of that Trust Deed, as follows:

For the purpose of securing:

(1) payment of the indebtedness evidenced by a promissory note of even date in the principal sum of \$95,000.00, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or renewals or modifications thereof;

(2) the performance of each agreement of Trustor [Mr. Harrington] herein contained;

(3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Deed of Trust; and

(4) the payment of all sums expended or advanced by Beneficiary [Mrs. Peterson] under or pursuant to the terms hereof, together with interest thereon as herein provided.

To Protect the Security of this Deed of Trust, Trustor Agrees:

(1) To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon; . . . to do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general; and, if the loan secured hereby or any part hereof is being obtained for the purpose of financing construction of improvements on said property, Trustor further agrees:

(a) to commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary, and

(b) to allow Beneficiary to inspect said property at all times during construction.

. . .

(7) Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or, trustee but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, . . . and in exercising any such powers,, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

(8) To pay immediately and without demand all sums expended hereunder by Beneficiary or trustee, with interest from date of expenditure at the rate of _____ percent per annum until paid, and the repayment thereof shall be secured hereby.

Purchase Money Deed of Trust dated June 21, 1991, at p. 2. [Emphasis added]

OBJECTION TO PLAINTIFFS' PURPORTED UNDISPUTED FACTS

Defendants object to the following numbered paragraphs from Plaintiffs' Memorandum which were claimed by Plaintiffs to be undisputed, but which Defendants do in fact dispute:

Defendants object to the last sentence of paragraph 6 of Plaintiffs' statement of claimed undisputed facts. Mrs. Peterson did not propose to advance new money for construction, but rather agreed to Mr. Harrington's request that she advance such funds. Peterson's Supplemental Affidavit at ¶¶ 20 and 23.

Defendants object and assert that paragraph 7c of Plaintiffs' statement of claimed undisputed facts mischaracterizes the December 8, 1992 Agreement. Paragraph 8 of that 1992 Agreement reads: "8. Collateral. This Agreement is secured by a Trust Deed dated June 21, 1991 more particularly referred to in paragraph 1 [Recital "A"] above." Recital "A" more completely describes the Purchase Money Trust Deed which Mr. Harrington signed in favor of Mrs. Peterson. As explained more fully below, Defendants contend that the language of the Purchase Money Trust Deed was sufficient in and of itself to secure the monies advanced under the December 8, 1992 Agreement. However, the language from paragraph 8 of that December 8, 1992 Agreement makes it clear that the parties to the December 8 Agreement, at the time of its execution, intended and expressly provided that the provisions of that Agreement also be secured by the Purchase Money Deed of Trust. No new Promissory Note or other document was necessary to accomplish said result.

Defendants next object to the characterization of certain aspects of the understanding reached by the parties in February of 1993, as set forth in paragraph 8 of Plaintiffs' claimed

statement of undisputed facts. In response to further requests from Mr. Harrington for additional funds to complete construction, Mrs. Peterson agreed to provide them under the same terms as those stated in the December 8, 1992 Agreement. Mr. Harrington's letter of February 18, 1993, which nowhere mentions HPI, was unsolicited, and only incompletely addresses the understanding then reached by the parties, seemed to Mrs. Peterson to be correct to the extent the Agreement was covered, and Mrs. Peterson, after receiving it, took no further action to respond thereto, except to advance additional funds as she then believed she needed to do to protect her interests in the collateral which secured her original promissory note from Mr. Harrington. Peterson's Supplemental Affidavit at ¶ 23.

Defendants object to the unsupported conclusion in paragraph 9 of Plaintiffs' purported undisputed facts, that no other document evidenced the February 1993 agreement of the parties. All of the checks signed by Mrs. Peterson advancing further funds in 1993 are additional documents reflecting and memorializing the agreement made by the parties in February, 1993 for Peterson to loan additional funds which totaled a principal of \$70,076.44. Peterson's Supplemental Affidavit at ¶ 24, and Exhibit "R" thereto.

Defendants further object to the statements of Plaintiffs in their paragraphs 11 and 12 of their claimed statement of purported undisputed facts, wherein Plaintiffs erroneously claimed that Mr. Harrington never agreed in any document that any monies loaned in connection with the February 18, 1993 letter were secured by the Purchase Money Trust Deed. Those monies were so secured, according to the provisions of both the Purchase Money Trust Deed itself, and by

virtue of the last sentence of the first paragraph of the February 18, 1993 letter, as more fully explained below.

Defendants next object to that part of paragraph 13 of Plaintiffs' statement of purported undisputed facts asserting that Harrington's acceptance of the Clinger's offer was based on a prior conversation with Mrs. Peterson. Mr. Harrington accepted the offer of the Clingers on December 5, 1993, and then subsequently notified Mrs. Peterson that he had so acted. Peterson's Supplemental Affidavit at ¶ 27.

Paragraph 14 of Plaintiffs' statement of purported undisputed facts is totally irrelevant to this motion of Plaintiffs. It also erroneously suggests that the later subordination agreement required some consent of Mr. Harrington, which it did not, to be effective, as explained in the Memorandum of Defendants dated the 6th day of September, 1995, at pages 26-28. Moreover, the original agreement to subordinate the Purchase Money Trust Deed to the trust deed Harringtons gave Guardian State Bank was only initially intended to be for a period of nine months. See Purchase Money Trust Deed Note, evidenced by Exhibit "C" to First Affidavit of Mrs. Peterson.

Defendants next object to paragraph 15 of Plaintiffs' statement of purported undisputed facts, insofar as it erroneously states that the supposed payoff amount of \$251,897.32 was a figure supplied by Mrs. Peterson, which it was not, and insofar as Plaintiffs claim that amount contains the entirety of the 1993 advances, which advances were not all included in that amount. See Peterson Supplemental Affidavit at ¶¶'s 24, 30 and 31.

Again, paragraph 16 of Plaintiffs' Statement of Purported Undisputed Facts is entirely irrelevant to their present motion since there never was any kind of a joint venture arrangement between Mr. Harrington and Mrs. Peterson. See Peterson Affidavit at ¶ 52, and Peterson Supplemental Affidavit at ¶ 17.

ARGUMENT

I.

The 1993 Advances by Mrs. Peterson Were Secured by Express Provisions of the Purchase Money Trust Deed. Those Advances Were Not New or Additional Loans of a Character Unrelated to the Original Transaction and Therefore Are Not Governed by the Language Relied Upon by Plaintiffs.

The Purchase Money Trust Deed, at the top of its page 2, lists four general categories of items that are secured by that Trust Deed, as quoted above. Plaintiffs focus only on the third of those four categories, and totally ignore all the remaining categories as though they did not exist. To support their desired outcome, Plaintiffs isolate the language of that third category and take it out of context, pretending that the other provisions do not exist. Only by doing so can it be made to appear, improperly, that the 1993 advances were "additional loans" of the type intended to be covered by that third category.

When one views all four of the categories together and in context, as they were meant to be, it becomes clear that the third category addresses only new subsequent loans which are unrelated and have nothing to do with the original amount secured by the Trust Deed. As thus properly understood, it makes good sense that such new loans should not be secured by the

original Trust Deed unless there is a new promissory note which expressly recites that it also is secured by that original Trust Deed.

By contrast, categories one, two and four, addressing other amounts which are all secured by the original Deed of Trust, without the necessity of new promissory notes referring to the Trust Deed, comprise obligations which do relate and are tied to the original transaction. Because Mrs. Peterson's later advances related to the purpose of the original transaction, and fit one or more of the other three categories, they require no new promissory or other writing to be secured by the Purchase Money Trust Deed.

Category one is the amount originally secured, but also extends to and includes "modifications" of the original note. Mrs. Peterson's later advances are properly viewed as such a modification.

The second category of items secured by the original Trust Deed relates to the performance of each of the provisions of the Trust Deed which the Trustor, Harrington, agreed to perform. Among other such provisions, Harrington agreed in paragraph one of the following section "to complete . . . any building which may be constructed" on the property secured by the Trust Deed. Further in that same paragraph, Harrington agreed "to pursue [construction of improvements on the subject property] with reasonable diligence to completion" Because Mrs. Peterson's advances fulfilled the performance of Harrington's obligations, these advances are also secured by the Purchase Money Trust Deed under this second category.

The fourth category of items secured by the Trust Deed is "the payment of all sums expended or advanced by Beneficiary under or pursuant" to the terms of the Trust Deed, with

interest thereon. Paragraph 7 of the following section of the Trust Deed expressly authorizes Mrs. Peterson to take such action as she "may deem necessary to protect the security" of the Trust Deed, including the expending of "whatever amounts in [her] absolute discretion [she] may deem necessary," whenever Harrington failed to do any act which he obligated himself in the Trust Deed to take. Seeing that construction remained incomplete when Harrington exhausted his own resources, it was entirely reasonable for Mrs. Peterson to deem it necessary to protect her security by making new advances, to complete that construction.

Finally, paragraph 8, at the bottom of page 2 of the Trust Deed, expressly obligated Harrington to repay "all sums expended [under the Trust Deed] by the Beneficiary," and further provided that said repayment was secured by the Trust Deed.

That clearly was the intention of Mrs. Peterson. Having naturally become apprehensive about whether a premature sale of the property in its distressed condition, before construction was substantially completed, would pay off the construction loan to which the Purchase Money Trust Deed had temporarily been subordinated, and still leave enough to pay the obligation owing to her, (1st Affidavit of Mrs. Peterson at ¶ 21) she reacted in the way that any junior lender with the ability would: she advanced further sums to complete construction, improve the likelihood that the maximum market value of the subject property could be realized by sale, and thereby sought to protect the security of the property which secured the obligations owing to her. Had she ever believed that those advances would not have been thus secured by the subject property, she had no reason to make those later advances. According to her Supplemental

Affidavit, she would not have advanced those additional monies unless she believed them secured by the property. Supplemental Affidavit of Mrs. Peterson at ¶ 23.

That reasonable understanding and expectation of Mrs. Peterson is fully supported by the language of the Purchase Money Deed of Trust.

The express language described above from the Purchase Money Trust Deed signed by Mr. Harrington clearly was adequate, without any further writing of any kind, to cause all sums which Mrs. Peterson advanced to complete construction of the home on the subject property to be secured by that property, by virtue of the quoted provisions of the Deed of Trust. To accomplish that result, it was not even necessary that there be any later writing of any kind. Thus, even without the December 8, 1992 Agreement and without the February 18, 1993 letter, the sums of money advanced by Mrs. Peterson for the purpose of completing the construction of the home on the subject property were all secured by that Purchase Money Trust Deed.

The only legal necessity for the December 8 Agreement and the February 1993 letter is to supply the one item missing from the Purchase Money Deed of Trust: a stated rate of interest for the later advances. Paragraph 8 at the bottom of page two of the Purchase Money Trust Deed has a blank for an interest rate to be inserted, which was not filled in at the time it was signed and recorded. This interest rate was supplied by the later writings. The later writings also memorialized the agreements of the parties to this action that the later advances were only to be used for purposes of finishing construction on the subject property, not for other purposes. Those later writings thereby confirmed that the later advances are within the provisions of the first, second and fourth categories of items expressly secured by the Deed of Trust. Plaintiffs'

arguments, which entirely overlook and ignore the provisions of the Purchase Money Trust Deed quoted above, therefore miss their intended mark.

II.

Alternatively, the February 1993 Letter is Sufficient to Cause the Advances Described Therein to be Secured.

Moreover, even if it could be seriously argued, contrary to the clear language of the Purchase Money Deed of Trust, that Mrs. Peterson's later advancements required a new writing in addition to the Purchase Money Deed of Trust to be secured by it, Plaintiffs have misconstrued the February 8, 1993 letter. An examination of that letter shows it should properly be viewed as the equivalent of both a promissory note and a grant of a security interest.

In relevant part, it recites that it confirms an agreement of Mr. Harrington, who signed the letter, "that any money advanced by you [Mrs. Peterson] above and beyond the \$75,000.00 (December 8, 1992 Agreement), for the purpose of construction of the home located at 1656 South Sunset Oaks Drive, will be returned to you with interest consistent with the rate of interest in our Agreement dated December 8, 1992" [Emphasis added]. That language clearly conveys an undertaking by Mr. Harrington promising that any such loan by Mrs. Peterson would be repaid to her in the manner described in the remainder of the letter. Such an engagement meets the requirements necessary to constitute a promissory note.

The last sentence of the first paragraph states: "The sale of the house will be the sole source of the return of this money." Any lay person reading that sentence would understand that language to be the equivalent of a grant of a security interest in the property which is the subject of the Deed of Trust, and was so understood by Mrs. Peterson. Merely because more traditional

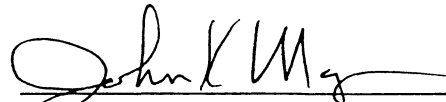
language typically used by lawyers in granting a deed of trust was not used, is no reason to construe this language otherwise.

Accordingly, under any reasonable view of the documents which Mr. Harrington signed, there is but one conclusion: the subject property described in the Purchase Money Trust Deed secured not only the original purchase money, but also the later advances made by Mrs. Peterson.

CONCLUSION

For all of the foregoing reasons, the Court should deny the Motion of Plaintiffs for Partial Summary Judgment and should, instead, declare that all funds advanced by Mrs. Peterson were secured by the Purchase Money Deed of Trust and thus enter an Order granting the Cross Motion of Defendants on this point.

DATED this 27th day of September, 1996.

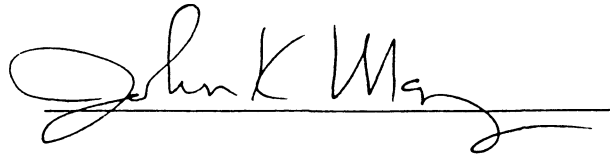


John K. Mangum
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Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that on the 27th day of September, 1996, I served a true and correct copy of the foregoing **MEMORANDUM OF DEFENDANTS OPPOSING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**, by causing the same to be mailed, via first-class United States mail, postage prepaid, to the following:

James S. Jardine
RAY, QUINNEY & NEBEKER
79 South Main Street, Suite 500
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "John K. May", is written over a horizontal line.