1988

William M. Masters, Helen C. Masters, Reid Evans, Norma T. Evans, James R. Loosemore and Barbara J. Loosemore v. The Lake View Heights Homeowners Association, Honolulu Federal Savings and Loan Association, Ben Lomond Estates, and P. Clay Thomas : Brief of Appellant

Utah Court of Appeals

Douglas M. Durbano; Kenlon W. Reeve; John H. Geilmann; Durbano, Smith & Reeve; Attorneys for Appellants.
John A. Snow; Donald L. Dalton; Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Respondents.

IN THE UTAH COURT OF APPEALS

WILLIAM M. MASTERS and HELEN C. MASTERS, husband and wife, REID EVANS and NORMA T. EVANS, husband and wife, and JAMES R. LOOSEMORE and BARBARA J. LOOSEMORE, husband and wife,	Case No. 880465-CA
Plaintiffs/Appellants,	Category No. 14b
vs.	
THE LAKEVIEW HEIGHTS HOMEOWNERS ASSOCIATION, a Utah Non-Profit Corporation, HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a Hawaii Corporation, BEN LOMOND ESTATES, a Utah General Partnership, and P. CLAY THOMAS,	
Defendants/Respondents.	

APPEAL FROM A SUMMARY JUDGMENT GRANTED
IN THE SECOND JUDICIAL DISTRICT COURT,
WEBER COUNTY, STATE OF UTAH
JUDGE RONALD O. HYDE

BRIEF OF APPELLANT

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LIST OF PARTIES TO PROCEEDINGS IN LOWER COURT

REID EVANS,	PLAINTIFF/APPELLANT
NORMA T. EVANS,	PLAINTIFF/APPELLANT
WILLIAM M. MASTERS	(NOT PARTY TO APPEAL)
HELEN C. MASTERS	(NOT PARTY TO APPEAL)
JAMES R. LOOSEMORE	(NOT PARTY TO APPEAL)
BARBARA J. LOOSEMORE	(NOT PARTY TO APPEAL)
THE LAKEVIEW HEIGHTS HOMEOWNERS ASSOCIATION	DEFENDANT/RESPONDENT
HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION	DEFENDANT/RESPONDENT
BEN LOMOND ESTATES	DEFENDANT/RESPONDENT
P. CLAY THOMAS	DEFENDANT/RESPONDENT

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JURISDICTION

This case was transferred by the Utah Supreme Court to the Utah Court of Appeals on August 12, 1988. Jurisdiction is vested in the Utah Court of Appeals pursuant to Utah Code 78-2a-3(2)(h) (Utah Code 1987-1988) and Rule 4A(a) of the Rules of the Utah Court of Appeals.

NATURE OF LOWER COURT PROCEEDINGS

Defendants/Respondents made a motion for summary judgment under Rule 56 of the Utah Rules of Civil Procedure. Said motion for summary judgment was granted and judgment was entered against Plaintiffs/Appellants by the Honorable Ronald O. Hyde in the Second Judicial District Court of Weber County, State of Utah.

ISSUES PRESENTED ON APPEAL

The issues presented on appeal are as follows:

1. Whether the granting of Defendants' motion for summary judgment was proper where material facts were properly raised and a dispute existed with regard thereto.

2. Whether the lower Court erred when it dismissed Plaintiff's claims for negligent

misrepresentation but preserved the claim for fraud, because if the evidence does not support fraud, it may support misrepresentation or deceit.

STATEMENT OF THE CASE

This is an appeal from a summary judgment granted in the Second Judicial District Court, Weber County, State of Utah.

The Plaintiffs sought to recover damages from the Defendants because the Defendants constructed a home that obstructed the view of the Plaintiffs after Defendants had represented to Plaintiffs that Defendants would not construct any buildings which would obstruct the view from Plaintiffs' dwellings in the Lakeview Heights Subdivision, located in North Ogden, Utah. The Plaintiffs' Complaint contained eight separately stated causes of action: fraud; negligent misrepresentation; negligence; breach of fiduciary duty; private nuisance; violations of easements for light, air and view; breach of declaration of covenants, conditions and restrictions; and punitive damages. All but a part of one of Plaintiffs' causes of action were dismissed by the Court when it granted Defendants' motion for summary judgment.

No trial was held on the matter. Plaintiffs appealed to the Utah Supreme Court, and the case was then transferred to the Utah Court of Appeals.

STATEMENT OF FACTS

1. On November 14, 1980, Reid Evans and Norma T. Evans purchased lot 149 in the Lakeview Heights Subdivision located in North Ogden, Weber County, Utah. (R.114). On June 5, 1981, James R. and Barbara W. Loosemore purchased lot 148 of the same subdivision. (R.114). On April 29, 1983, William M. and Helen C. Masters purchased lot 129 of the same subdivision. (R. 114). (The Evans, Loosemores and Masters are hereinafter collectively referred to as "Plaintiffs" or "Purchasers".)

2. The Lakeview Heights Subdivision was platted and filed with the Weber County Recorder on October 19, 1977, and an amended plat of the subdivision was filed with the Weber County Recorder on June 23, 1983. (R.115).

3. The lots in the Lakeview Heights Subdivision were advertised as view lots commanding an unobstructed view of the Great Salt Lake and surrounding valley. (R.117).

4. Prior to the Evans' purchase of lot 149, the Defendants represented to Reid Evans that lot 150 of the Lakeview Heights Subdivision was "too narrow to build on," and that Defendants were never going to take away the Evans' view. (Exhibit G to Defendants' Memorandum in Support, page 32 - no trial record page number is set forth on said exhibit.)

5. Defendants, or their agents, represented on numerous occasions to the Plaintiffs that Defendants would never allow or construct any residential dwelling on lot 150 of the Lakeview Heights Subdivision that would obstruct, impair, or in any way negate the view from the purchasers' dwellings. (R.117).

6. After the Plaintiffs purchased their respective lots, the Defendants or their agents requested the Plaintiffs to sign a petition for a variance on lot 149. (R. 115).

7. As an inducement for the Plaintiffs to sign the variance, the Defendants represented to Plaintiffs that the Defendants would not construct any residential dwelling on lot 150 which would obstruct, impair or in any way negate the view from the Plaintiffs' dwellings. (R.115).

8. The Defendants built, or allowed to be built, a residential dwelling on lot 150 that obstructs, impairs, and negates the Plaintiffs' view from their dwellings. (R.117).

9. On September 9, 1985, the Plaintiffs filed suit against the Defendants (R.1) and on October 3, 1985, the Defendants filed their answer to Plaintiffs' Complaint. (R. 19).

10. On November 7, 1986, the Plaintiffs filed an Amended Complaint (R.112) and on November 24, 1986, the Defendants filed an answer to Plaintiffs' Amended Complaint. (R. 127).

11. The Plaintiffs' Amended Complaint sets forth eight separate causes of action: fraud; negligent misrepresentation; negligence; breach of fiduciary duty; private nuisance; violation of easements for light, air and view; breach of declaration of covenants, conditions and restrictions of the Lakeview Heights Subdivision; and punitive damages. (R.118 through 123).

12. On January 5, 1988, Defendants filed a motion for summary judgment. (R.226). Said motion was supported by a Memorandum in Support. (R. 228). Attached as

Exhibits to the Defendants' Memorandum in Support were excerpts from the depositions of the Plaintiffs.

13. On January 21, 1988, the Plaintiffs filed a Memorandum in Opposition to Defendants' motion for summary judgment. (R.312 and 330). Attached as Exhibits to Plaintiffs' Memorandum in Opposition are excerpts from the depositions of the Plaintiffs.

14. After a hearing on Defendants' motion for summary judgment, Defendants submitted to the Court a Reply Brief in support of their motion for summary judgment. (R.249). The Defendants did not attach any affidavits to their Reply Brief.

15. On January 25, 1988, Plaintiffs filed an objection to Plaintiffs' Reply Brief. (R.260). Plaintiffs attached to their Objection the affidavit of Mr. Robert Ward. (R.257).

16. The material facts as set forth by the Defendants to support their motion for summary judgment, are consistently disputed by the Plaintiffs depositions, attached affidavit, and the submissions on file. (See record numbers as set forth above).

17. On March 16, 1988, the lower court granted

Defendants' motion for summary judgment. (R.380). The Court's ruling on the Defendants' motion dismissed all of the causes of action as set forth in the Plaintiffs' Complaint except fraud in the inducement at the time of purchase. (R.309). The Court ruled there were insufficient facts to show that the representations by the Defendants would be actionable. (R.308).

18. Defendants voluntarily dismissed the remaining partial cause of action to avoid the necessity of trying said claim while the remaining causes of action were being appealed. (R.423).

SUMMARY OF ARGUMENT

The Plaintiffs brought an action to recover damages caused by the fraudulent or negligent representations made by the Defendants or Defendants' employees to Plaintiffs to induce the Plaintiffs to purchase lots in the Lakeview Heights Subdivision, and to induce Plaintiffs to sign a variance regarding what could be constructed on an adjacent lot in the same subdivision. Plaintiffs relied on the representations made by the Defendants to their detriment and purchased their homes.

Summary judgment is appropriate only where the facts, viewed in a light most favorable to the resisting party, show with certainty that no genuine issues of material fact exist and where the moving party is entitled to judgment as a matter of law. In the case at bar, there are genuine issues of material fact and the Defendants are not entitled to judgment as a matter of law.

The record clearly indicates that there are disputes as to material facts regarding whether the Plaintiffs relied to their detriment on substantive and material representations made by Defendants and whether said representations by Defendants were of a tortious nature. The Plaintiffs should have been allowed the opportunity to proceed on a theory of negligent misrepresentation as well as fraud in order to allow a jury to determine whether or not the tortious conduct of the Defendants was intentional or negligent. The lower Court's dismissal of all but the intentional tort of fraud was prejudicial error.

ARGUMENT

POINT I

THE GRANTING OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WAS NOT PROPER WHERE MATERIAL FACTS WERE PROPERLY RAISED AND A DISPUTE EXISTED WITH REGARD THERETO.

The lower Court erred in granting Defendants' Motion for Summary Judgment because there are genuine issues of material fact that must be adjudicated. Further, the lower Court erred in granting Defendants' Motion for Summary Judgment because, under the cloud of uncertainty raised by the depositions and pleadings on file, the lower Court could not grant judgment to Defendants as a matter of law.

The long standing rule in Utah regarding the granting of a motion for summary judgment, is summarized in Payne v. Myers, 743 P.2d 186 (Utah 1987):

> When reviewing the grant of a motion for summary judgment, the facts are to be liberally construed in favor of the parties opposing the motio· and those parties are to be given the benefit of all inferences which might reasonably be drawn from the evidence. Summary judgment is proper only when the defendants are entitled to it as a matter of law on the undisputed facts.

743 P.2d at 187. See also Geneva Pipe Company v. S.H. Ins. Co., 714 P.2d 648, 649 (Utah 1986); Jensen v. Mountain States Tel. & Tel. Co., 611 P.2d 363, 365 (Utah 1980).

The standard of review for the Court to follow in considering a motion for summary judgment is found in Reagan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d 776 (Utah 1984): "In considering a summary judgment, we consider the record in the light most favorable to the party opposing the motion, resolving all doubts in his favor." Id. at 778. See also Concepts, Inc. v. First Security Realty Services, Inc., 743 P.2d 1158, 1159 (Utah 1987); Atlas Corp. v. The Clovis National Bank, 737 P.2d 225 (Utah 1987); Lockhart Company v. Equitable Realty Company, 657 P.2d 1333, 1335 (Utah 1983).

In the case at bar, Defendants moved for summary judgment under Rule 56 of the Utah Rules of Civil Procedure, and supported the motion by a Memorandum of Points and Authority. (R.226 & 228). The Defendants' memorandum listed eleven statements of material fact upon which Defendants claim no genuine issues exist. (R.230-R.233). The Plaintiff's memorandum in opposition listed twelve issues that exist regarding material facts that must be adjudicated by a trier of fact. A comparison of the facts, as set forth in the respective parties' memoranda, considered in a light most favorable to the Plaintiffs as the resisting party, leads to the only

logical conclusion available, that the lower court erred in granting Defendants' motion for summary judgment.

A. Misrepresentations to the Plaintiffs Evans

Plaintiffs and Defendants agree that Plaintiffs purchased their respective lots in the Lakeview Heights Subdivision on certain dates. Plaintiffs and Defendants also agree that Defendants attached an accurate copy of the November 16, 1977, plat of the subdivision. Defendants' omit any reference to the modification of the 1977 plat, but Plaintiffs refer to a modification of the 1977 plat. The modification raises factual issues that must be resolved.

Also, Defendants' admit that when the Evans' purchased their home they remember "someone telling them that Defendants would build a walkway on lot 150, but that a home would be built next to the walkway." (R.231). It was the Defendants who made the representations to the Evans at the time of the purchase of their lot not only that a walkway would be built on lot 150, but that lot 150 was not to be built on because it was part of a common area park. (R.315). Further more, the Evans state uncategorically that Defendants

made subsequent representations to the Evans that any construction on lot 150 would improve the value of the Evans' property, that such construction would not block their view in any way, and that lot 150 was "too narrow to build on" even though the lot was platted for construction. (R. 316 and R.Exhibit G, Deposition Page 32 lines 13 through 15 and R.Exhibit A, the plat map). Defendants represented to the Evans that lot 150 was "too narrow to build on", while the plat map showed that the lot was to have a twin home built on it. This discrepancy not only creates a dispute of material fact, but also points to the pivotal issue regarding the truth or falsity of the representations and the critical effect such have on the outcome of the Plaintiff's case. These issues must be adjudicated.

In Dugan v. Jones, 615 P.2d 1239 (Utah 1980), a purchaser of real property brought suit alleging fraud and deception and negligent misrepresentation arising out of negotiations for the purchase of a particular parcel of property. The Utah Supreme Court reversed the dismissal of the Jones' suit, stating that the trier of fact must determine the issues of misrepresentation and

deception. Id at 1246. The Dugan case is directly on point with the case at bar. The discrepancies between representations made by Defendants to Plaintiffs and the descriptions on the plat map create disputes in material facts which must be resolved by the trier of fact.

The factual disputes arise from deposition testimony. Defendants rely on the depositions of Norma Evans, page 47, lines 11 through 17, and of Reid Evans, page 32, lines 2 through 20, page 34, lines 7 through 25, and page 35, lines 1 through 4. (R.231) Plaintiffs rely on the depositions of Norma Evans, page 62, lines 1 through 25, and page 63, lines 1 through 25, and of Reid Evans, page 47, lines 11 through 25, page 48, lines 1 through 25, and page 51 lines 10 through 17. (R.315 & 316).

B. Misrepresentations to the Plaintiffs Masters

Defendants memorandum in support of their motion for summary judgment admitted that when Plaintiffs Masters purchased their home, the Defendants told the Masters that something "low" would be built across the street from them. (R.230). Plaintiffs referred the Court below to the rest of the statements made by the

Defendants to the Masters, i.e., that the "low" buildings would be a rambler and a bungalow, and that the Masters would have the horizon view from about Second Street on. (R. 314 and 315). Whether a certain horizon view existed at the time that Defendants made the representations to the Masters is important here, but was overlooked by the court below. Furthermore, Defendants' representation that Plaintiffs would retain their horizon view from Second Street on, which was contrary to what actually happened, creates an issue of fact regarding justifiable reliance and promissory estoppel which must be tried.

C. Misrepresentations to Plaintiffs Loosemore

Defendants' admitted below that when Plaintiffs Loosemore purchased their home they were told "nothing would be built on lot 150 except a stairway", (R.231) even though the existing plat map showed a twin home was to be built on that specific lot. (R.Exhibit A to Defendants' Memorandum in Support R.222). Subsequent to the purchase of the Loosemore lot, the Defendants represented that some construction would be made on Lot 150 but that the Loosemore's "view was not going to be

obstructed by the construction and the construction would be very expensive." (R. 315). The pattern of misrepresentations and deceit is consistent throughout Defendants' conversations with all the Plaintiffs. Dismissing Plaintiffs' claims without determining the factual disputes arising therefrom was prejudicial error.

D. Summary Judgment was not proper

From a review of the facts in the light most favorable to Plaintiffs and by giving Plaintiffs the benefit of all the inferences which might reasonably be drawn from the evidence, Payne v. Myers, 743 P.2d 186, 187 (Utah 1987), it is clear that the lower court erred when it granted Defendants' Motion for Summary Judgment. In the instant case, there are genuine issues of material fact and law as to whether or not the moving party is entitled to judgment. The Utah Supreme Court has left little doubt for trial judges as to what the proper decision is when confronted with a case like the one at bar:

> It would seem from what has been said that the position stated by the parties are mutually contradictory. Therefore, unless upon the basis of the submissions it appears for a certainty that either one or the other is correct, and therefore, entitled to prevail, it is necessary that there be a trial and resolution of this dispute between them.

Utah Mortgage and Loan Company, Inc. v. Black, 618 P.2d 43, 44 (Utah 1980) (emphasis added).

The submissions by the parties below in the instant case are mutually contradictory and do not indicate for a certainty that either Plaintiffs or Defendants are correct, and therefore entitled to prevail. It is necessary that there be a trial and resolution of the dispute between them. This Court should reverse the decision of the lower Court and remand this matter for trial.

POINT II

THE LOWER COURT ERRED WHEN IT DISMISSED PLAINTIFFS' CLAIMS FOR NEGLIGENT MISREPRESENTATION BUT PRESERVED THE CLAIM FOR FRAUD, BECAUSE IF THE EVIDENCE DOES NOT SUPPORT FRAUD, IT MAY SUPPORT MISREPRESENTATION OR DECEIT.

The Plaintiffs' Complaint is drafted in the alternative. If the trier of fact cannot find fraud, then the trier of fact may find from the evidence produced at trial, that the alleged misconduct of Defendants nevertheless damaged the Plaintiffs and thus entitle the Plaintiffs to compensation. The issues raised in the Plaintiffs second claim for relief is that

Defendants made representations to Plaintiffs that were negligent, reckless, and without regard to their truth or falsity, that the Plaintiffs reasonably relied to their detriment on said representations and were damaged thereby. The claim for relief is a claim grounded in negligent misrepresentation.

The law in Utah is well settled that a claim for relief may be brought under a theory of negligent misrepresentation. Dugan v. Jones, 615 P.2d at 1246; Jardine v. Brunswick Corp., 423 P.2d 659 (Utah 1967); Ellis v. Hale, 13 Utah 2d 279, 373 P.2d 382. The distinction between a claim for relief grounded in fraud and a claim grounded in negligent misrepresentation is that the element of "intent" is removed from the claim under negligent misrepresentation. The Supreme Court declared in Dugan that:

> Thus, in a case where the circumstances impose upon the vendor a special duty to know the truth of his representations or where the nature of the situation is such the vendor is presumed to know the facts to which his representation relates, a misrepresentation is fraudulent even though not made knowingly, willfully or with actual intent to deceive."

Dugan, 615 P.2d at 1246 (emphasis added).

In an earlier case, the Supreme Court held that

"there may be a cause of action for deceit even though the misrepresentation was not willfully false." Jardine v. Brunswick Corp., 423 P.2d at 661. The Jardine Court also noted that an "action for negligent misrepresentation differs from intentional misrepresentation in that in the former the representor makes an affirmative assertion which is false without having used reasonable diligence or competence in ascertaining the verity of the assertion." Id.

Here, the lower court's dismissal of Plaintiffs' cause of action for negligent misrepresentation while preserving Plaintiffs' claim for fraud is reversible error because there remain issues of fact regarding Defendants' intent to deceive, Defendants' carelessness in their representations, and the degree of each. The facts of the case at bar indicate that representations were made that the property was too narrow to build on; that Plaintiffs would always have their view; that there would be no building constructed on lot 150; but if there was a building constructed on lot 150, it would be a low building and it would increase the value, not decrease the value, of the Plaintiffs' property.

Further, the lower court failed to give consideration to the circumstances of the parties in this matter, as it should have. Dugan v. Jones, 615 P.2d at 1248. The Defendants were vendors, sophisticated land developers and professional financiers. They retained or employed licensed real estate salespersons to act as their agents in dealing with Plaintiffs. The Plaintiffs, on the other hand, were not licensed real estate agents, nor were they professional financiers or seasoned real estate developers. The Plaintiffs were merely persons interested in purchasing a home with a panoramic view of the Great Salt Lake and the City of Ogden. There is no question but that the Defendants were much more sophisticated in real estate transactions, and this advantageous circumstance should have been, but was not, considered by the court below.

The result of the lower court's decision, in the case at bar, to dismiss the Plaintiffs' claims for relief alleging negligent misrepresentation, while requiring Plaintiffs to proceed to trial on the claim of fraud (requiring the proof of intent or scienter) is not good law. The Plaintiffs should be allowed to present, for a

juries' consideration, the elements of both causes of action. Then, if the jury finds that scienter (intent) was present, then Defendants' fraud is substantiated. If, however, the jury finds no scienter but nevertheless finds that misrepresentations of Defendants caused injury to Plaintiffs, then the claim for negligent misrepresentation is substantiated. This consideration is for the jury. The decision by the lower court to deny this option to the jury is reversible error.

The separate causes of action as set forth in Plaintiffs' Amended Complaint merely delineate the potential degrees of the egregiousness of Defendants' conduct. Proving the egregiousness of the conduct of the Defendants in this civil case is much like proving the culpability of a defendant in a criminal action. In a criminal action, the Defendant may be charged concurrently with more than one crime for the same criminal act, the additional charges being lesser included offenses. The prosecutor then proves as many elements of each crime as possible, and the trier of fact determines which crime, if any, fits the conduct. The evidence may not support conviction for the more

egregious crime, but may be sufficient to convict for the lesser included offense.

In the case at bar, the Plaintiffs should be allowed the opportunity to present all of the facts, pursuant to the rules of evidence, to the trier of fact for a determination of the egregiousness of the conduct of the Defendants. At the conclusion of the trial, the trier of fact will be able to determine whether or not there was a breach of fiduciary duty, whether there were breaches of covenants, whether there was a breach of easements for air and light, etc., whether the conduct of the Defendants was accomplished with intent to defraud the Plaintiffs, or whether the Defendants' representatives were made negligently and/or recklessly without regard to the truth or falsity thereof.

CONCLUSION

For the reasons set forth above, the lower court erred in granting Plaintiffs motion for summary judgment. Plaintiffs/Appellants therefore pray the Court to reverse the lower court's Order granting Plaintiffs' Motion for Summary Judgment and to remand the matter to the lower court for trial. This Court should grant whatever other relief it deems appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 13 day of September, 1988.

KENLON W. REEVE
DOUGLAS M. DURBANO
JOHN H. GEILMANN
Attorneys for Plaintiffs/
Appellants

CERTIFICATE OF MAILING

I hereby certify that I mailed and/or hand delivered four true and correct copies of the foregoing Appellants' Brief to Donald Dalton and John Snow at Van Cott, Bagley, Cornwall & McCarthy, 50 South Main, Suite 1600, P.O. Box 445340, Salt Lake City, Utah, 84145.

DATED this 13th day of September, 1988.

Dana Gross
Secretary

ADDENDUM A

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IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

WILLIAM M. MASTERS and HELEN C. MASTERS, REID EVANS and NORMA T. EVANS, JAMES R. LOOSEMORE and BARBARA J. LOOSEMORE, Plaintiffs, vs. THE LAKEVIEW HEIGHTS HOMEOWNERS ASSOCIATION, a Utah non-profit corporation, HONOLULU FEDERAL SAVINGS & LOAN ASSOCIATION, a Hawaii corporation, BEN LOMOND ESTATES, a Utah general partnership, and P. CLAY THOMAS, Defendants.	RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Case No. 93329

At oral argument, plaintiff fairly well conceded that, of the seven causes of action, they were relying primarily on the fraud and the breach of fiduciary duty, and that the other causes of action, private nuisance, violation of easements of light, air and view, breach of declaration of convenants, etc., were basically window dressing.

Plaintiff runs together the allegation of fraud in the inducement in regard to the purchase of the property, and an allegation of fraud or misrepresentation in obtaining their, plaintiffs', signing of a variance for change in permissible building on Lot 150. It appears quite clear that they were not required or necessary to the obtaining of the variance, and if there were representations made that were not followed through, there is insufficient facts to show that said representaitons

In regard to the fraud allegation in the representations made at the time of purchase, I must admit that I have had some problem with this. However, in considering a summary judgment, it must be considered in the light most favorable to the party opposing the motion, it appears there is sufficent issue of fact to retain this issue for trial. Defendants' motion in regard to the cause of action for fraud is denied insofar as it has to do with the alleged misrepresentations made at the time of purchase.

As to breach of fiduciary duty, plaintiffs' have shown nothing that would support such an allegation. Plaintiffs tend to cite cases and phrasing of cases which sound good, but do not necessarily support their position. Even taking the facts most favorable to the plaintiffs, they establish nothing that would indicate a fiduciary duty on the part of the defendants. Plaintiffs tend to argue along the lines that they had superior information and did not tell the plaintiffs, and at the same time argue that what they did tell them constitutes fraud. Defendants' motion for summary judgment is granted in all causes of action except for fraud in the inducement at the time of purchase.

In regard to dismissing defendant Honolulu Federal Savings and Loan, I again have a problem with plaintiffs' position and their briefs. They tend to rely upon allegations, and an affidavit that tends to rely upon belief. The affidavit,

however, does make some factual statements that if considered in the best light, might well be considered as sufficient. For the time being, I grant the plaintiffs the benefit of my expressed doubts and the motion is denied.

DATED this 15 day of March, 1988.

RONALD O. HYDE, Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of March, 1988, a true and correct copy of the foregoing Memorandum Decision was served upon the following:

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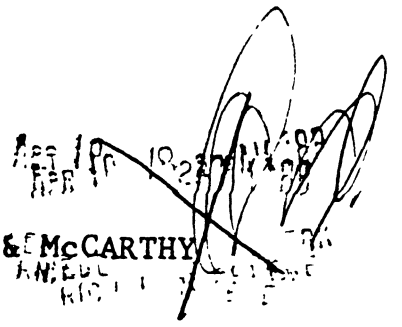
PAULA CARR, Secretary

ADDENDUM B



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IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

WILLIAM M. MASTERS and HELEN C. MASTERS, husband and wife, REID EVANS and NORMA T. EVANS, husband and wife, and JAMES R. LOOSEMORE and BARBARA J. LOOSEMORE, husband and wife, Plaintiffs, vs. THE LAKEVIEW HEIGHTS HOMEOWNERS ASSOCIATION, a Utah Non-Profit Corporation, HONOLULU FEDERAL SAVINGS & LOAN ASSOCIATION, a Hawaii Corporation, BEN LOMOND ESTATES, a Utah General Partnership, and P. CLAY THOMAS, Defendants.	ORDER OF SUMMARY JUDGMENT Civil No. 93329

This matter came before the Court on January 22 and February 19, 1988 on defendants' Motion for Summary Judgment, Donald L. Dalton appearing for defendants and Douglas M. Durbano and Kenlon W. Reeve appearing for plaintiffs. The

Court having heard the arguments of counsel and reviewed the record in this case, and for the reasons stated in the Court's Ruling on defendants' Motion for Summary Judgment signed on March 15, 1988, good cause appearing therefor, it is hereby

ORDERED that defendants' Motion for Summary Judgment is granted and this action is dismissed with prejudice except for the claim appearing in the First Cause of Action of plaintiffs' Amended Complaint based on misrepresentations made at or before the time plaintiffs purchased their homes.

Pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, the Court determines that there is no just reason for delay and directs entry of final judgment as to all of the claims that were dismissed above.

DATED this 19 day of Apr, 1988.

BY THE COURT:

Honorable Ronald O. Hyde
Second Judicial District Court

Approved as to form:

Douglas M. Durbano
Kenlon W. Reeve
Attorneys for Plaintiffs

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