

1978

Melvin A. Cook and Wanda O. Cook v. Noel L. Cook : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MELVIN A. COOK
WANDA G. COOK

PLAINTIFFS- RESPONDENTS

Case No. 15811

vs.

MOEL L. COOK, et al,

DEFENDANT - APPELLANT

APPELLANT'S BRIEF

NATURE OF THE CASE

Plaintiffs - Respondents, Melvin A, Cook and Wanda G Cook, his wife, brought an action in two counts against Appellant. One count was to foreclose on a mortgage on the real property of the Appellant. The Respondents joined as defendants in this action. Lien holders Vera O. Cook (Baacher); Thomson Electrical Co.; Lila A. Cook, Janis B. Smith and Martin Smith as guardians ad litem for Cameron R. John, a minor; and Credit Bureau of Logan. Defendants answered setting forth docketed claims. In addition Defendant Vera O. Cook cross- claimed for support payments due since she last docketed a judgment for same.

In the second count Plaintiffs - Respondence set forth a claim for money lend to Appellant, which Appellant denied in his answer, but now concedes admitting to have paid twenty five hundred of this money to Respondents in one lump sum.

RELIEF SOUGHT

Appellant motions for a new trial on all issues and before all litigants and in addition requests the Court to consider Newly Discovered Evidence.

DISPOSITION IN THE LOWER COURT

The Trial Judge, Honorable VeNoy Christoffersen, found that Respondents were entitled to foreclose mortgage, and ordered a sale and set forth the priorities of lien holders. Additionally the Court granted Plaintiffs Respondents motion for partial summary judgment on the second count for money lent, and granted Co-Defendant Vera O. Cook's cross claim for past due support payments. These judgments were added to the list of liens against the Appellant's property.

Appellant had judgment set-aside for investigation of fraud. The judge sustained the judgment ruling on affidavits only. A new sheriff sale was set and executed, funds distributed with notice of need of return of same in event a new trial led to reversal.

STATEMENT OF FACTS

Appellant has had difficulty engaging dependable counsel to represent him due to indigent circumstances. On the occasion of the foreclosure his legal council was not informed of the facts thus appellant was stipulated to facts adverse to his case and contrary to his pleadings.

Appellant is a farmer owning land irrigating 80 acres in Box Elder Co.

On May 22, 1972 Respondent loaned \$12,500.00 to Appellant to pay off existing debts. This note was retired marked "paid" and in 1973 a new note was drawn up by Respondent for \$13,000.00 to be repaid over a ten year period. In newly discovered evidence a third and subsequent mortgage was found in the form of an extension of time agreement or a new modus operandi.

Only the second of these mortgages was considered before the court as follows:

This mortgage is given to secure the following indebtedness: Note on

loan to N.L. Cook of Thirteen Thousand and No/100 Dollars, said note carrying a date of May 22, 1972 and carrying a rate of 6% interest per annum to be paid in ten equal installments at the rate of \$1300.00 per year simple interest payable quarterly.

The Mortgagor agrees to pay all taxes and assessments on said premises and a reasonable attorney's fee in case of foreclosure. See Respondents exhibit "D"

Thus we see that this mortgage gave no right to accelerate the payments in case of default.

In 1973 a hail storm totally destroyed the crops of Appellant who at the same time was refused further credit by Respondent in which to purchase needed sprinkler equipment. Neither would Respondent accept full return of the loan when tendered by way of a Federal Land Bank loan. Under these conditions the Appellant tried unsuccessfully to flood irrigate sandy land during 1973-74. In the spring of 1975 Appellant leased his farm for three years.

In 1974 Respondent loaned Appellant additional funds in which to purchase main line buried and permanent 8" plastic pipe, and (\$2,500.00 of which was repaid in one lump sum.) The Appellant had also made some interest payments on the first loan as shown by exhibit

In this time of hardship Respondent did not press for payments and refused to accept offer of Appellant to return the loan in full with all interest in 1974 and again in 1975. In each case the tender was rejected by Respondent when he replied: "No, I don't need the money."

This failure to require payment continued by various waivers and refusals for another three years.

On January 8, 1976 in a newly discovered letter from Respondent to the Appellant he repeated his past lienency by writing:

"We want you to clear up all your debts as rapidly as possible and then it will be time enough for you to start paying us off." Signed Mel and Wanda.

Appellant accepted this forbearance acting on it and implementing its terms as evidenced by a large supply of canceled checks to pay farm costs and

pressing obligations. At the same time Appellant trusted word of Respondent that they would wait until other creditors were paid first. A Chattel Mortgage was given by Appellant unsolicited to Respondent as further evidence of his intention to complete an equitable settlement of all claims. This was accepted by the Respondent in the same spirit. It then became mandatory for Respondent to sign each and every check from the farm production which he faithfully did from 1975 thru 1977 handing the check back to Appellant each time saying: "Here, go and pay other people first."

During this period Appellant had to rely on his working wife for household expenses traveling to the farm in a 1963 Ford pick-up truck using funds only to recover from the losses from the hail storm and to pay pressing notes and bills. Even while exercising extreme frugality farm taxes went unpaid for 1976 adding two payments with added costs which were finally made in November of 1977 all of which was an added worry to the Appellant.

Under these conditions creditors whose payments were unfulfilled docketed Respondents foreclosure or were sued in and among the foremost was his ex-wife, Vera O. Cook(Baacher), who has been well employed at around \$15,000.00 per year.

Appellant was unable to get other work due to his age of sixty years and the necessity to work during the spring, summer and fall on the farm. The year 1975 was a good one as lessee spent his full time on lessors land, but in 1976 and 1977 production was a disappointment since lessee took the most of the water from the irrigation well to his adjacent land leaving Appellant's land short on irrigation water resulting in low production.

In the late fall of 1976 the Appellant was jailed for contempt for his failure to consistently pay child support while he claims they were paid at least in part for many months during this period. Upon his release on afternoon of December 10, 1976 he went directly to obtain council of attorney Omer Call of Brigham City who took the case on condition that Appellant would come Monday morning December 13, 1976 and spend the day in preparation for the hearing

Respondent Melvin A. Cook did in fact phone Appellant at exactly 6:00 a.m. on December 13, 1976 stating emphatically thus: "THERE WILL BE NO FORECLOSURE... come to Salt Lake City now and I will loan you sixty thousand dollars to be repaid in a year by your refinancing. Bring your farm deed and your wife Helen as she will need to sign papers." Appellant responded with the following: "That is good news. I don't have a deed just now but I do have an abstract of title from which a deed could be made." To this the Respondent replied: "Then bring that." Appellant said: "I have engaged an attorney for the hearing shall I release him?" The Respondent, Melvin A Cook replied: "You might as well."

Within two hours time and at the Cross-road Texico Service Station south intersection in Brigham City Appellant phoned attorney Call who said: " I'm glad to hear that there will be no foreclosure since I have had no time to look at the case and I am in no way prepared for the trial had it been held tomorrow."

Appellants then went directly to Respondents office in the Beneficial Life Tower 35 South State Street placing the Abstract of Title directly in the hand of the Respondent who placed it in the right hand drawer of his desk. Appellant returned to the same office some three weeks later for the express purpose of recovering his abstract of title and this time it was located in the office of Respondents Attorney across the hall in the same building.

Nothing but hollow promises and delaying tactics proceeded throughout the remainder of the day to the effect that matters so important as had been promised needed time to work them out. This Appellant clearly understood trusting explicitly in a long standing fiduciary relationship with the respondent. At length Respondent said his council was in Coalville and he had called and would not be back to Salt Lake until 11:00 p.m. and it then would be necessary for the Appellants to remain overnight at the home of the Respondents for the first time in history. His council did not return that night at all and about 9:00 a.m. December 14, 1976 Respondent announced: "I

seemed obvious rushed to Brigham City Court house entering confused, disoriented, surprised, uninformed as to their legal rights and entered the courthouse without council of any kind.

Of these happenings Respondent has faithfully denied in continuous effort to defend the judgment he seized that day by circumvention.

Later Appellant shall demonstrate that basic contradictions do in fact exist in signed statements by letter and under Court Oath in Respondents Counter-Affidavit presented before the Court of Box Elder County March 10, 1978. On that occasion the District Judge had openly announced earlier that judgment would be by affidavit only, that testimony would not be allowed nor would the Appellant be permitted to cross-examine the Respondent. Since this was the essence of Appellants defense action to obtain permission for certain subpoena information defendant-Appellant was thus severely penalized.

ARGUMENT

POINT I

Appellant was denied his constitutional rights to a fair trial when the Plaintiff-Respondent circumvented the law, practiced fraud upon the court, misled the Appellant by use of artifice or trick representing that he need not prepare for the hearing as there would be none, seizing a judgment and otherwise generally making a mockery of justice.

When Appellant realized he had been deceived by what he thought was a loyal brother he immediately objected by using the word "trick" in a request for a new trial. The exact happenings of December 13 and 14th 1976 are made available for careful study

Appellant now seeks a new trial based on perjured affidavits before the Court and on Newly Discovered Evidence contained in an amendment which was rejected by the district judge. This rejection was contrary to the spirit of federal rules of civil procedure which permits amendments of a material nature to be accepted " anytime".

POINT II

Motivation prompting this court to address to the court the facts and other litigants found

fatal defect appearing on the face of the mortgage.

Motivated by the fact that acceleration of the entire amount of the Mortgage was contrary to the terms of the mortgage and thus improper as a matter of law Respondent and other litigants acted to prevent presentation of available defense by Appellant by means of deception and false imprisonment having never investigated claims of Appellant that he was in very deed without means to support himself during this, his economic depression. The actions of Respondent on December 13th and 14th 1976 are thought to have been motivated not only by what has already been related but by a desire to prevent Appellant from seeking and obtaining a continuance following his 30 days in jail.

The initial note of May 22, 1972 was exchanged on November 30, 1973 for a Mortgage with installment payments and an express provision for foreclosure upon default. Thus the parties modified the original note by a subsequent agreement. This subsequent agreement while providing for foreclosure did not provide for acceleration of payment upon default.

Upon failure to provide for such a right no right exists. In Bank v. Boherty 29 Wash. 233, 69 P. 732 (1902) the Court held that where no provision in the contract for acceleration of principal upon failure to pay interest that no right to acceleration and subsequent foreclosure could exist because of failure to pay interest. See generally 54 A.L.R. 1230

In Walker Bank and Trust Company v. Neilson, 26 Utah 2d 383, 490 P. 2d 328 (1971) this Court said that an acceleration clause was not self-executing, but that it was the mortgage option to declare the full amount due. Since an existent acceleration clause cannot operate unless exercised, one certainly cannot be imposed when it does not exist. This is an axiom to the proposition that there can be no default until after the amount is due. Thus, the foreclosure by the Respondent if proper at all should have been limited as a matter of law to an action for amounts then owing and should not have been allowed for amounts not yet due.

POINT III

A statutory question is involved in a waiver or extension of time agreement submitted as Newly Discovered Evidence since it was accepted by Appellant, was totally implemented, later forgotten having eluded thorough search by Appellant and his family as they sought all memoranda, papers, letters and etc. related to the case. This particular letter was not remembered at the trial and was not recalled again until it was actually discovered after the trial.

This Extension of Time agreement appeared in this letter dated January 8, 1976 and took the form of a new contract or new modus operandi and the latest dated and is thus stated in clear and unquestionable terms as follows: "We want you to clear up all your debts as rapidly as possible, then it will be time enough for you to start paying us off." Record P. 129. Three months later Respondent declared the entire amount due and subject to foreclosure. The Appellant was surprised and because of the short time and the amounts accelerated he could not then tender the amount due.

The District Court erred in not holding that by such continual forbearance the Respondent thus waived their right if any existed to accelerate the amount due and to foreclose the property.

In American Savings and Loan Assoc. v. Blomquist, 21 Utah 2d 239, 445 P.2d 1968, this Court said that a waiver of the default may preclude the party from acceleration of the indebtedness. Although in that case there was no basis for the claim of waiver, but in this case there was substantial evidence to show that the Respondents did in fact waive the default. The rule expressed by Blomquist supra is that a waiver must be an intentional relinquishment of a known right, distinctly made expressly or impliedly.

The letter of January 8, 1976, expressly waives the default for the present and for sometime in the future. The four year period of forbearance without demand, but with reassurances is of itself significant evidence of a waiver. The refusal of tendered payments or full repayment in 1974 and again 1975 are

further evidence of Respondents intent to waive the debt.

In the winter of 1976 a time when the money earned from the farm was spent, the Appellant was in a position of having relied on the waiver and was unable to cure his default after the acceleration was made. The waiver having been definite then, as a matter of equity and according to Blomquist, supra the Respondent should have been estopped from accelerating the amounts due and from thus benefiting from their past waiver of complaine. Payments were due yearly in May and having waived them in early 1976 Respondent should have given until May 1977 before default and foreclosure could be sought. The waiver having been definite, knowing and intentional there was no right to demand payment at that time, and no right to accelerate the debt(had the agreement provided for such a remedy which it did not.)

This rule is consistent with that of other jurisdictions. In Cambell v. Werner, Fla.232 So. 2d (252) (1970) the Court citing cases said:

The decisions disclose that foreclosure on an accelerated basis may be denied where the right to accelerate has been waived or the mortgagee estopped to assert it, because of conduct of the mortgagee from which the mortgagor..reasonably could assume that the mortgagee, for or upon a certain default, would not elect to declare the full mortgage indebtedness to be due and payable or foreclose therefor;....

In D'Orazio v Mascianto, 345 Pa. 428, 29 A 2d 43. (1942) the Court held the mortgagee was precluded from foreclosing the mortgage by a written agreement allowing the principal to be paid when able if the interest were paid.

Waiver by agreement has been found to be effective as to past defaults or to those occurring before notice has been given of an intention to insist upon strict performance in the future. See 148 A.L.R. 686 at 690 citing cases.e.g. Lettereri v. Mistretta 102 N.J. Eq 1, 139 A 514 (1927) where an oral agreement for payment of interest semi- annually instead of quarterly waived the right to require quarterly payments without giving notice of intent to insist on strict performance. See also 97 A.L.R. 2 d 9 38 at 1007 and case cited.

Appellant was given no notice of an intention to depart from the past acts of forbearance, or from the waiver notice given in the letter of that year. Thus, there was no right to foreclose based on the past defaults, those defaults having

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been waived, and no notice of strict performance in payment of interest or of payments having been given.

Extension of Time is binding on mortgagee and may be asserted by mortgagee as well as by the purchaser of the mortgaged property who has assumed the mortgaged debt. 115 A.L.R. 1038, 1054, 1055 To give such an Extension of Time and then to foreclose is tantamount to fraud 115 A.L.R. 1038. This is especially true where Appellant offered to pay the debt, accepted the extension, acted on using his means to abide by its terms,

Demand note came due after first default in payment. Respondent did nothing about it for four years then before the term of the mortgage the Respondent was a newly created situation had a legal right to then and there foreclose, but instead of insisting upon that right, he entered into a written concession for the payment of the balance due which concession contained within itself the conditions upon which parties on the one side extended and on the other side accepted the concessions which created a new modus operandi. See 115 A.L.R. 1054 By such representation to the effect that the time to pay was to be extended, he may not thus take advantage of him by declaring the whole mortgage due. It would be contrary to equity and good conscience to allow such a result. This would be especially true where mortgagor offered to pay the mortgage. See 124 A.L.R. 1051

Appellant used reasonable diligence to discover and produce evidence at the trial. Failure to do so was not the result of negligence and had the newly discovered evidence been before the court in all likelihood the verdict would have been different.

Due to a series of unavoidable circumstances surrounding the trial Appellant was surprised, misled, and acted contrary to what he otherwise would have done relying on a strong fiduciary and confidential relationship to the effect that there would be no foreclosure and was injured thereby.

Under Utah Code Rule 59 (a) an insufficiency of evidence where verdict was plainly wrong in light of newly discovered evidence sufficient to materially affect results in a new trial warrants Court to set aside the verdict judgment and grant a new trial. People v. Swazer, 5 Utah 93, 21 P. 400; U.S. v. Brown, 6 Idaho

POINT IV

Perjured testimony under oath and evidences of misconduct of other litigants is brought out in the following counter-affidavit before the Court.

"I am pleased that you are taking considerable pride in making your farm venture pay off, and especially what you have done with Boyd Marble..to get everything under Boyd and raise such a fine, large beet crop. I surely wish you success." See Par 3 of Letter dated January 8, 1976

In contrast: "Prior to January 1976, plaintiffs were aware that defendant Noel L. Cook was not managing and farming said real property in such a manner as to enable him to pay his debts and plaintiffs did encourage said defendant to pay his other debts before paying plaintiffs...." See par. 12 Respondents Counter Affid.

Thus we see the waiver supported again but two opposing points of view.

Again Appellant represented in reviewing happenings of December 13, 1976 that Respondent requested bringing the Abstract of Title to Salt Lake City placing it in the very hand of Respondent at his office. In Respondents Counter-affidavit he states: "When affiant asked defendants if they had brought title to their property with them, Noel L. Cook said that he could not find it."

This was a perjured statement since it had been discussed earlier that day and why the question at all if Respondent had not been informed earlier that day as to a new course of action and the need for the title. The district court totally failed to put together the simplest construction which is one main assigned duties of courts of equity when real property is involved.

Another example of perjured testimony Respondent said: None of the sums loaned by plaintiffs to defendant Noell. Cook as aforesaid were repaid and on or about the 25th of March, 1976 plaintiffs filed suit against defendant Noel L. Cook and the other parties above named seeking in Count I of their complaint to foreclose the mortgages referred to in par. 3 and 4 hereof and in Count II to collect the amount referred to in paragraphs 5 hereof." See par 6 Counter Affid.

Amounts paid are on exhibit The latest agreement was a waiver or extension of time.

Thereafter, plaintiffs learned through discussions with creditors of

Defendant Noell. Cook that said defendant was not paying his debts..." See par 14 c.a.
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money coming to Appellant was being used to pay his bills.

Respondent wrote: "After the 8th day of January, 1976 but before the commencement of this action, affiant learned that said real property was being sold at a foreclosure sale, whereupon affiant caused his attorney to contact the attorney for the party who was causing said property to be sold and to persuade him ... (toward consolidation) See par 15 C.A.

Fact was Appellant told Respondent that Family Services was foreclosing and asked Respondents advice as to what he thought Appellant should do about it. Respondent said: "Tie up your property and don't contest the court cases." Later Respondent sued all the creditors in on the action to clear the title.

Appellant then borrowed \$1234.00 from the Bear River State Bank paying off Family Services even though Appellant had paid three years longer than needed for his daughter Carolyn, and had actually built up a credit. Respondent then said about the payment to family services "Why did you do that?"

Problems which Respondent encountered and discussed in paragraphs 22 and 23 of his counter-affidavit are those which Respondent should have worked out ahead of the announcement that "There would be no foreclosure." The fact that it did not work out for Respondent was not the fault of the Appellant but defendant had put his trust in the promises dismissing his council supported by Respondent to do so resulting in injury and harm to his cause and hardship in making a living.

No attempt at settlement either in Salt Lake City or at the court house as far as Appellant was involved was given. Appellant was excluded and any discussions going on were behind closed doors. See par. 29 counter-affidavit. Respondent hired an attorney to represent Appellant when he arrived at the Court House, but this attorney was not informed as to facts and Appellant was stipulated to facts adverse to his case and contrary to his pleadings.

POINT IV

EVIDENCE THAT OTHER LITIGANTS KNEW OF FATAL DEFECT AND ACTED TO HINDER APPELLANT

Attorney for Vera O. Cook who was himself to profit by the foreclosure and

an appropriate time to jail Appellant immediately before the trial for thirty days. Especially where it is the duty of an attorney to know the strengths and the weaknesses of a contract some concern should be involved in motive in this case. The words used by this attorney before the district judge of the case was that Noel L. Cook was hiding money. He knew this to be false when he made it.

Another litigant Smith Vs Cook there is fraud involved in State Farm Ins. Group claiming thousands of dollars in medical and dental bills from a collision where Mr. S. Smith ran broadside into the pick-up truck of Appellant totalling it out when it was junked for \$25.00. This should be looked upon with suspicion when in fact Mrs. Smith said at site of wreckage and collision: "Let's each take care of our own damage since no one has been hurt and fog prevented each one of us from seeing the other."

POINT V

Divorce decree provided no lien on the real property in this action and a judgment should not be permitted to determine the contract or supercede it. Vera O. Cook took her lien on other property which she and Appellant acquired together.

The judgment by the lower court for child support when visitation rights are denied and when father is without income was improper.

Appellant has been without sufficient income to provide for himself since the entry of her divorce which she alone wanted when Appellant lost his teaching job. The district Court nevertheless granted a judgment for support for the period of the last judgment to the time of the trial. Appellant denied that he had sufficient income to pay the support payments of \$100.00 per month.

The inability to be able to make payments because of lack of income is a proper basis for excusing contempt or for reducing the amount of support to be paid. For example, in MacDonald v Superior Court, 40 Cal. APP 2d 517, 104 P. 2d 1071 (1940) the Court ordered the trial Court to hear such motion based on the fact that the husband was unemployed while the wife was employed with a satisfactory income. This rule has been followed in a majority of cases. See 6 A.L.R. 2d 845

There are numerous Utah cases dealing with the authority of the Courts to reduce support decrees in accordance with the provisions of U.C.A. (1953) § 30-26 when there are changed circumstances. See e.g. Columbo v Walker Bank and Trust 26 Utah 2d 350, 489 P 2d 998 (1971); Peters v Peters 15 Utah 2d 413, 394 P. 2d 71 (1964)

In Earl v Earl 17 Utah 2d 156, 406 P. 2d 302 (1965) this Court said that in proper circumstances a Court might make payments for support dependent upon a custodian making the child available for visitation rights.

In this case, the Respondent Vera O. Cook (Baacher) wife, has arbitrarily refused summer visitation rights given by divorce decree for up to six weeks, Appellant father. In addition, other rights of visitation were refused based on a claimed need for prior notice. Under such circumstances the Court erred in excusing the failure to pay. This is particularly so where the ex-wife is well employed while the father is heavily in debt and unable to obtain sufficient income from his farm to meet his own needs.

POINT VI

Evidence of abuse of discretion is shown below:

- a. Judge refused to accept an only amendment which violates the spirit of the federal rules of civil procedure.
- b. At no time was Appellant permitted to take the witness stand to present an available defense.
- c. The judge refused the Appellant opportunity sought to cross-examine the Respondent in set-aside hearing on fraud without a jury where the sole purpose was to obtain permission of Respondent for certain subpoena information essential to his defense.
- d. The judge made little effort at simple construction of circumstantial evidence in possible fraud which violates the principal duty of courts of equity dealing with real property.
- e. Early in the hearing the judge stated that he was ready at that time to rule on the case thus pointing up possible bias, prejudice and which he was not able to overcome.

District Court in Logan, Utah by all the docketed claims except one against him.

Due to indigency and negative rating given by a litigant Credit Bureau of Logan Appellants financial ability was impaired pointing up a weakness of our Court system. This resulted in bias of the judge toward the appellant.

Under Utah Rules of Civil Procedure Rule 59 New Trials: Amendments of judgments the grounds for a New Trial are set forth.

(1) Irregularity in the proceedings of the Court, jury or adverse party, or any order of the court to abuse of discretion by which either party was prevented from having a fair trial.

(2) Accident or surprise which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application which he could not, with reasonable diligence, have discovered and produced at trial.

Appellant presented to the Trial Court evidence of his detention in jail on contempt prior to the hearing, of Respondents false representation of settlement, of his inability to participate at the trial, in his inadequate attempt to represent himself, and further evidence of the Respondent's waiver of compliance with the terms of the mortgage.

The proper presentation of this evidence at a new trial would have presented to the Court the question of whether Respondent waived his rights to accelerate and foreclose. The evidence showed that the failure to properly present this issue was due to Appellant's last minute attempt to obtain an attorney and his lack of preparation. He tried unsuccessfully to obtain said council while in jail as evidenced by a call to a Clearfield, Utah Attorney who refused for economic reasons. The poor presentation was due to the short time between trial and his release from jail and suggestions of settlement which caused Appellant, already pressed for money to release his attorney obtained December 10, 1976

or one business day before the trial doing this with the statement of Respondent

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The Court with this evidence constituted "Irregularity in the proceedings of the Court.. by which..(a) party was prevented from having a fair trial."

Furthermore, the letter of January 8, 1976, made definite allegations of forebearance that were otherwise mere allegations by Appellant. Thus under subdivision (4) of Rule 59 the new evidence presented made a material difference in the case since this was Appellant's main defense.

In Van Dyke v. Ogden Savings Bank, 48 Utah 606, 161 P. 50 (1916) the Court said that where such evidence makes clear that which, without it, was obscure and extremely doubtful, especially where it is direct....then a new trial should be awarded. In this case the letter to Appellant from Respondent was direct evidence of past waivers which were material part of Appellant's defense.

Unfortunately this evidence was not properly presented to the trial Court. Such a failure was excuseable where it was caused by misrepresentations by the other party that there would be no foreclosure and that there would be another plan of repayment and where the Court was fully aware of Appellants inadequate representation of his case and need to obtain proper council;

Appellant should be awarded Attorney's fee necessary to bring this appeal.

In Swain v Salt Lake Real Estate and Investment Co., 3 Utah 2d 121, 279 P 2d 709 (1955) this Court said that the awarding of attorney's fees on appeal is discretionary with the Court. Such discretion is to be exercised in light of the equities of the case.

Appellant has been forced to do without proper representation because of lack of income while being charged with the attorney's fees for the Respondents. The little money he had, being in the land to be foreclosed, Appellant was forced by the terms of the contract to finance his foreclosure when he couldn't borrow enough money to cure default or defend himself had he been given the opportunity.

Based on the argument of Appellant setting forth the improper and unlawful nature of Respondents foreclosure, the Appellant asks the Court to award attorney's fees to Appellant for the appeal and to deny attorney's fees to Respondents for bringing this action. Machine-generated OCR, may contain errors.

CONCLUSION

In the set-aside of judgment on hearing on fraud without jury the judge and trial court erred in pre-announcement that judgment would be by affidavit only. The judge stated early in the hearing that he was at that time prepared to rule on the case thus pointing out a pre-judgment prompted by prejudice.

Appellant was denied acceptance of an only amendment, Not permitted to cross-examine the Respondent and was denied opportunity to testify.

Appellant was clearly misled due mainly to a reliance on a strong fiduciary and brotherly relationship where wrongdoing was easily accomplished.

As a matter of law trial court erred in allowing Respondent to accelerate payments and to foreclose when there was no provision in the mortgage for it.

Newly discovered evidence must be heard in the district court where it is material and holds a possibility of reversal.

Tortfeasor activity permeates the entire case motivated by error affecting substantial and constitutional rights of Appellant adversely.

Finally the trial court erred in awarding judgment for support to Respondent Vera O. Cook (Baacher) when Appellant was without income and was being denied his proper visitation rights.

Right of all parties intermingled with injustice and interdependent due to tort activity and the need to protect deed of trust for benefit of the principal mortgage holder.

Respectfully submitted:

Noel L. Cook
Appellant