

2001

Property Improvement Corporation v. CLEON D. TUCKER and MRS. CLEON D. TUCKER, also known as BETTY J. TUCKER, his wife; WILLARD M. TUCKER and MRS. WILLARD M. TUCKER, also known as PHYLLIS O. TUCKER, his wife; CONTINENTAL ACCOUNT SERVICING HOUSE, INC., a Utah corporation; and KEY ACCOUNT COLLECTION HOUSE, INC., a Utah corporation; Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

PROPERTY IMPROVEMENT CORPORATION, )  
 )  
Plaintiff and Respondent, )  
 )  
vs. )  
 )  
CLEON D. TUCKER and BETTY J. TUCKER, )  
his wife; WILLARD M. TUCKER and )  
PHYLLIS O. TUCKER, his wife; )  
EUGENE S. SIMPSON and JANE DOE SIMPSON, )  
his wife; CONTINENTAL ACCOUNT SERVICING )  
HOUSE, INC., A Utah Corporation; and )  
KEY ACCOUNT COLLECTION HOUSE, INC., a )  
Utah Corporation. )  
 )  
Defendants and Appellants, )

Case No.  
14237

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13 JUN 1977

BRIEF OF DEFENDANTS-APPELLANTS  
Cleon D. Tucker, Betty J. Tucker,  
Willard M. Tucker and Phyllis O. Tucker.

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

Appeal from the Third Judicial District Court of  
Salt Lake County, Honorable Bryant H. Croft,  
District Judge

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FILED

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE CASE . . . . .	1
DISPOSITION IN LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	2
STATEMENT OF FACTS . . . . .	2
ARGUMENT . . . . .	6
POINT I. GENUINE ISSUES OF LAW AND FACT PRECLUDING SUMMARY JUDGMENT WERE PRESENTED BY THE PLEADINGS AND BY AFFIDAVIT INCLUDING THE ISSUE OF WHETHER THE AMOUNT OF THE LOAN PROCEEDS RETAINED OR RECEIVED BY AN AGENT OF THE PLAINTIFF SHOULD BE DEDUCTED FROM THE AMOUNT OWED TO PLAINTIFF, THE ISSUE OF THE DOLLAR AMOUNT SO RETAILED, AND THE ISSUE OF THE AMOUNT OF ATTORNEY'S FEES . . . . .	6
POINT II. THE AMENDED ORDER GRANTING SUMMARY JUDGMENT IN PART SHOULD HAVE BEEN VACATED, ALTERED OR AMENDED TO SHOW THE SAME DID NOT CONSTITUTE A FINAL JUDGMENT THAT COULD BE DOCKETED IN SEVERAL COUNTIES TO IMMEDI- ATELY CREATE A JUDGMENT LIEN ON REAL PROPERTY PRIOR TO FORECLOSURE OF THE STOCK SECURING THE OBLIGATION AND THE DETERMINATION OF THE AMOUNT OF ANY DEFICIENCY	9
CONCLUSION . . . . .	16

AUTHORITIES

CASES

<u>Beesley v. Badger</u> , 66 Utah 194, 240 Pac. 458 (1925) . . . . .	13,14
<u>Bell v. Jones</u> , 110 P.2d 327 (Utah 1941) . . . . .	15
<u>Boucofski v. Jacobsen</u> , 36 Utah 165, 104 Pac. 117 (1909) . . . . .	13
<u>Boyle v. Baggs</u> , 10 Utah 2d 203, 350 P.2d 622 (1960) . . . . .	13,14
<u>McClanahan v. Hawkins</u> , 367 P.2d 196 (Ariz. 1961) . . . . .	13,14
<u>Roach v. Roach</u> , 132 N.E.2d 742 (Ohio 1956) . . . . .	13,14
<u>Walker v. Community Bank</u> , 111 Cal. Rptr. 897, 518 P.2d 729 (1974) . . . . .	13

STATUTES

Section 78-22-1, Utah Code Annotated (1953). . . . . 13

Section 78-37-1, 78-37-2, Utah Code Annotated (1953). .13

RULES

Rule 56, Utah Rules of Civil Procedure. . . . . 7

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PROPERTY IMPROVEMENT CORPORATION, )  
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his wife; WILLARD M. TUCKER and )  
PHYLLIS O. TUCKER, his wife; )  
EUGENE S. SIMPSON and JANE DOE SIMPSON, )  
his wife; CONTINENTAL ACCOUNT SERVICING )  
HOUSE, INC., A Utah Corporation; and )  
KEY ACCOUNT COLLECTION HOUSE, INC., a )  
Utah Corporation. )  
 )  
Defendants and Appellants. )

Case No.  
14237

---

BRIEF OF APPELLANTS  
Cleon D. Tucker, Betty J. Tucker,  
Willard M. Tucker and Phyllis O. Tucker.

---

STATEMENT OF THE CASE

Plaintiff brought suit upon a promissory note secured by a pledge of certain stock, seeking judgment and judicial foreclosure of the stock, to which the Defendants raised several defenses.

DISPOSITION IN LOWER COURT

The lower court granted Plaintiff partial summary judgment against the individual Defendants only, in the sum of \$151,878.75, interest, and costs, leaving the amount of attorneys fees to be determined later and authorized the Plaintiffs to proceed to sell the stock securing the note.

The lower court denied the motions of the Defendants Cleon D. Tucker, Betty J. Tucker, Willard M. Tucker and Phyllis O. Tucker (hereinafter called "Defendants Tucker") for an order that the order granting summary judgment in part would not constitute a final judgment for lien purposes until it should be determined whether a deficiency would exist and the amount thereof.

#### RELIEF SOUGHT ON APPEAL

Defendants Tucker seek reversal of the Amended Order Granting Summary Judgment in part and a trial of the outstanding issues of law and fact.

Defendants Tucker further seek a reversal of the lower court's determination that Plaintiff could proceed to obtain a general judgment lien on property of the Defendants Tucker for the full amount of the partial summary judgment without first exhausting the stock securing the note and arriving at a deficiency judgment.

#### STATEMENT OF FACTS

On March 26, 1974, the Defendants Tucker executed a Contract of sale, under which they were to acquire from Defendant Eugene S. Simpson: a) 8,550 shares of stock in Defendant Continental Account Servicing House, Inc. (hereinafter called "Continental") and b) 693,500 shares of stock in Defendant Key Account Collection House, Inc. (hereinafter called "Key") (R. 45, 62)

Under the terms of the Contract of Sale, Defendants Tucker were to pay Defendant Simpson \$902,000.00 for Simpson's stock, (R. 46), which represented nearly all of the issued and outstanding stock of Continental and over 50% of the issued and outstanding stock of Key. (R. 45).

As part of the overall transaction, Defendants Tucker transferred certain interests in land and land contracts to Continental and Continental issued 6,000 additional shares of stock to the Defendants Tucker. (R. 45, 46)

5,700 of such additional shares together with the 8,550 shares in Continental and 693,500 shares in Key the Tuckers were to purchase from Simpson were placed in escrow to secure a loan made by Plaintiff Property Improvement Corporation. (R. 41, 43, 48)

On June 19, 1974, Defendants Tucker filed an action in the United States District Court for the District of Utah against Simpson, Continental and Key alleging that Tuckers were induced by Simpson, Continental and Key to enter into the stock acquisition contract by means of fraud and misrepresentations violating federal and state securities laws.

Such federal court suit remains pending awaiting trial as of the time of the writing of this brief.

Defendants Tucker on the one hand and Defendants Simpson, Continental and Key on the other, are separately represented in this proceeding and have filed separate appeals.

Case No. 14231 is the number assigned to the appeal filed by Defendants Simpson, Continental and Key. Case No. 14237 is the number assigned to the appeal filed by Defendants Tucker.

The Promissory Note upon which Plaintiff Property Improvement Corporation filed suit in the instant suit provides in material part:

In the event that the undersigned shall fail to make the aforesaid payment upon the due date or within a grace period of 45 days thereafter, the entire amount thereof shall be due and payable and said Property Improvement Corporation shall proceed to receive that stock held as security as hereinafter set forth, sell the same at a private sale with five days notice to the undersigned, and proceed to look to any or all of the undersigned for any deficiency remaining thereon. (R. 41)

Plaintiffs Amended Complaint asserted a security interest in the stock of Continental and Key in escrow to secure the note. It also asserted an interest in the real property transferred to Continental by Tuckers. It demanded:

a) judgment on the note; b) a judgment that the stock securing the note be sold at public auction by the Sheriff, c) that the proceeds be applied toward the sums found owing the Plaintiff; d) that if a deficiency remained, that the Tuckers' property which had been transferred to Continental be foreclosed and sufficient be sold to satisfy the obligation, and e) that if any deficiency remained thereafter, that the "Plaintiff have judgment and execution against the Defendants, and each of them, jointly and severally, for the full amount of such deficiency."



Among the matters raised in defense to the Promissory Note by answer and affidavit, was an issue of whether the portion of the loan proceeds retained or paid to Plaintiff's agent or agents should be deducted from the note or offset against any amount found owing to Plaintiff. (R. 27, 77, 86, 90, 120)

In response to Plaintiffs Motion for Summary Judgment, the lower court left the following matters for later determination upon presentation of evidence: a) The amount of any attorneys' fees to be awarded Plaintiff; b) the issue of whether Defendants Continental and Key were liable upon the note; c) the issue of whether Defendants Simpson, Continental and Key were entitled to a deduction or offset in the amount of the loan proceeds received by agents of Plaintiff; d) the issue of whether Plaintiff was entitled to foreclose upon the Tuckers' property interests that had been transferred to Continental. (R 92, 101)

The remaining issues raised by Defendants' Answers and Affidavits were apparently resolved against the Defendants.

The lower court granted Plaintiff a partial summary judgment against the Defendants Tucker and against Defendants Eugene S. Simpson and Jane Doe Simpson for the amount of the note, interest, and costs. The Court also granted Plaintiff a judgment of foreclosure on the stock securing the promissory note. (R. 92, 101)

Defendants Tuckers entitlement to an offset or deduction in the amount of the loan proceeds received by agents of Plaintiff was raised by an Affidavit in opposition to Plaintiff's Motion for Summary Judgment prior to the Court's ruling on Plaintiff's Motion. (R. 86) Such issue was again raised by an amended answer filed by the Defendants Tucker after the court ruled. (R. 115, 120)

Immediately after the lower court entered an Amended Order Granting Summary Judgment in part, Plaintiff recorded such amended order or an abstract or transcript thereof in Utah County, Carbon County, Duchesne County, Sanpete County, Salt Lake County (and Davis County) and perhaps in other counties for the apparent purpose of immediately encumbering the interests in land owned by Defendants Tucker with a judgment lien. (R. 105, 111)

Defendants Tucker filed motions requesting the lower court to vacate, alter, or amend its Partial Summary Judgment to provide it did not constitute a general judgment lien and that no general judgment lien would arise unless and until the stock securing Plaintiff's Promissory Note had been properly exhausted. (R. 105-107, 111-113)

The lower court denied the motions. (R. 130-131)

#### ARGUMENT

#### POINT I

#### GENUINE ISSUES OF LAW AND FACT PRECLUDING SUMMARY

JUDGMENT WERE PRESENTED BY THE PLEADINGS AND BY AFFIDAVIT

INCLUDING THE ISSUE OF WHETHER THE AMOUNT OF THE LOAN PROCEEDS RETAINED OR RECEIVED BY AN AGENT OF THE PLAINTIFF SHOULD BE DEDUCTED FROM THE AMOUNT OWED TO PLAINTIFF, THE ISSUE OF THE DOLLAR AMOUNT SO RETAINED, AND THE ISSUE OF THE AMOUNT OF ATTORNEY'S FEES.

Rule 56, Utah Rules of Civil Procedure provides:

(c) ... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue or to any material fact and that the moving party is entitled to judgment as a matter of law.

Here the lower court itself recognized that there were issues going to the amount of the judgment that should be awarded which could not be resolved without a trial.

The first issue the lower court recognized right in its Minute Entry (R. 92) was whether an offset or deduction should be allowed in the amount of the loan proceeds that never reached any of the Defendants.

By Affidavit the Defendants Tucker averred that the entire amount of the loan proceeds had gone either to agents of the Plaintiff or to the other Defendants. (R. 86)

It is manifest that if an offset is proper in the amount of the loan proceeds retained by a lender's agent, then that reduces the obligation itself and thus automatically inures equally to the benefit of all borrowers. It was manifest error for the lower court to in effect hold that the Defendants, all

of whom signed the note in the same capacity, i.e., as makers, could be liable for different amounts when they all undertook exactly the same obligation to the lender.

The second issue the lower court recognized was the amount of attorney's fees to be awarded. With these issues unresolved it was manifest error for the lower court to direct foreclosure of the stock securing the note. Since the amount of any offset and the amount of attorney's fees on the note remained to be determined, there was no fixed dollar liability of the Defendants to the Plaintiff against which the proceeds of the immediate stock foreclosure sale permitted could be measured. There was no predicate for a proper sheriff's return showing the amount of a deficit or surplus because there was no settled dollar starting point. If the retained loan proceeds amount to \$50,000.00, Defendants could well argue the Sheriff would have to stop selling shares of stock after getting \$100,000.00 since that was the amount of liability to plaintiff that existed.

If the Sheriff sold stock up to \$150,000.00 plus and \$100,000.00 was the total liability, would the Sheriff be liable for wrongful execution or conversion of \$50,000.00 plus worth of stock? How could the Sheriff know how much to add for attorney's fees in arriving at the point at which he should cease selling stock?

The Court obviously erred in granting the partial summary judgment granted when it recognized right in its own partial summary judgment decision, outstanding issues of fact

and law that prevented it from arriving at the actual dollar liability of the Defendants. This manifest error alone requires reversal and remand without a recitation of the further legal issues raised by the defenses to the note set forth in Defendants' respective answers and affidavits.

#### POINT II

THE AMENDED ORDER GRANTING SUMMARY JUDGMENT IN PART SHOULD HAVE BEEN VACATED, ALTERED OR AMENDED TO SHOW THE SAME DID NOT CONSTITUTE A FINAL JUDGMENT THAT COULD BE DOCKETED IN SEVERAL COUNTIES TO IMMEDIATELY CREATE A JUDGMENT LIEN ON REAL PROPERTY PRIOR TO FORECLOSURE OF THE STOCK PLEDGED TO SECURE THE OBLIGATION AND THE DETERMINATION OF THE AMOUNT OF ANY DEFICIENCY.

No provision in the promissory note made Exhibit "A" to Plaintiff's Complaint, (R. 41) no provision in the escrow instructions made Exhibit "B" to Plaintiff's Complaint, (R. 43) and no provision in the contract of sale made Exhibit "C" to Plaintiff's Complaint (R. 45) permits Plaintiff to ignore the stock securing the note in favor of a general lien statewide on the property of the Defendants Tucker right in the middle of a lawsuit brought by Plaintiff specifically demanding that the stock be first sold and then that specific land interests be sold, and then that a personal judgment be rendered for any remaining deficiency.

The court grossly erred in allowing Plaintiff to thus proceed clear outside and beyond not only the terms of the

instruments themselves but even beyond the demands for relief contained in Plaintiff's Complaint and Affidavit in Support of Plaintiff's Motion for Summary Judgment.

The note plainly provides in material part that upon non payment Plaintiff:

"Shall proceed to receive that stock held as security..., sell the same at a private sale with five day's notice... and proceed to look to any or all of the undersigned for any deficiency remaining thereon." (R. 41)

The escrow instructions plainly state that the stock:

"Will be held as security for the performance of the undersigned in the payment of the promissory note owing to Property Improvement Corporation by the undersigned. If on or before May 13, 1975, your office has not received written notification from Property Improvement Corporation that the note has been paid in full together with interest due thereon, then you are to immediately deliver to Property Improvement Corporation all of the said shares together with stock powers relative thereto. This you will do without further notice or demand from any party hereto." (R. 43)

The contract of sale plainly provides that if Plaintiff's note is not paid by Defendant Simpson should Defendants Tucker not pay it:

"... said escrow agent shall forthwith transfer said stock certificates to the individual making said loan who may proceed to exercise the same with full rights of ownership."

The above quoted provisions of the agreements relied upon by Plaintiff are all of the provisions dealing with and setting forth the parties agreements as to what Plaintiff's rights would be upon non payment of the note. No provision in the agreements gives Plaintiff the right to skip ahead to a general judgment

lien on all Defendants' property for the full amount of the note even before finding out whether and to what extent there might actually be a deficiency after sale of the stock.

As mentioned above, Plaintiff's Amended Complaint demands: a) a judgment that the stock be sold; b) if a deficiency should remain after sale of the stock, a foreclosure sale as to the interests in real property Defendants Tucker transferred to Defendant Continental; c) if a deficiency should remain after such foreclosure sale "that Plaintiff have judgment and execution against the Defendant, and each of them, jointly and severally, for the full amount of such deficiency." (R. 39-40)

Plaintiff's Affidavit in support of Plaintiff's Motion for Summary Judgment demands the same thing as Plaintiff's Complaint - judgment and execution against the Defendants for any deficiency only after first a sale of the stock and second, a sale of specific real property. (R. 78-79)

The lower court properly decided a summary judgment would not be proper as to Plaintiff's demand for foreclosure of certain real property belonging to Defendants Tucker without a trial to determine the legal issues involved, but then permitted Plaintiff an end run procedure exactly like full exhaustion of all security had already occurred.

The lower court's Partial Summary Judgment and refusal to prevent the use thereof as a final personal judgment, gave Plaintiff lien rights and imposed upon Defendants Tucker burdens

way beyond that provided by agreement and way beyond that asked by the Plaintiff's own pleadings as well.

In doing so the lower court compounded the manifest legal error that occurred when it granted judgment for a sum, reserving for future resolution issues that would push the judgment amount up or down, yet permitting immediate foreclosure of the stock securing whatever sum was actually owing. Its action placed Defendants Tucker in a totally untenable position. Tuckers were thus faced with being compelled to pay whatever Plaintiff should demand as the cost of obtaining the release of Plaintiff's apparent \$151,000.00 judgment lien on Tuckers' property and closing down Tuckers' land development and sales program while trying to clear Tucker's titles to land of the unwarranted cloud of the order granting summary judgment through this appeal proceeding. This the lower court permitted notwithstanding the fact that stock securing Plaintiff's note could be expected to totally satisfy the same if it brought only a very small fraction of what Defendant Simpson insisted it was worth when selling the same stock to Defendants Tucker for \$902,000.00.

The result reached by the lower court flies squarely in the face of the ordinary principle of contract law that a contract is to be enforced according to its terms.

Such result is unsupported by and beyond Plaintiff's own pleadings.

Further, such result contravenes the policy and purpose of Utah's "one action", "primary fund" rule respecting the



foreclosure of mortgages upon real estate and personal property. Sections 78-37-1, and 78-37-2, Utah Code Annotated, (1953); Boucofski v. Jacobsen, 36 Utah 165, 104 Pac. 117(1909); cf Walker v. Community Bank, 111 Cal Rptr. 897, 518 P.2d 729 (1974).

Finally, Defendants Tucker submit that the lower courts "Amended Order Granting Summary Judgment in Part" was not the kind of "judgment" intended by the judgment lien statute, Section 78-22-1, Utah Code Annotated, (1953).

The latter statute provides:

From the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county in which the judgment is entered, owned by him at the time or by him thereafter acquired during the existence of such lien ...

The statute refers to a "judgment debtor". It provides for a lien continuing for eight (8) years. It obviously contemplates a final personal money judgment upon which a general execution might be levied.

It does not contemplate an interim order authorizing foreclosure of property securing an obligation where the question of whether and the extent to which there will be a deficiency has not yet been determined. See Boyle v. Baggs, 10 Utah 2d 203, 350 P.2d 622 (1960); Roach v. Roach, 132 N.E.2d 742 (Ohio 1956); and McClanahan v. Hawkins, 367 P.2d 196 (Ariz. 1961).

In Boyle v. Baggs, this Court reaffirmed the construction of Utah's judgment creditor lien statute set forth in Beesley v. Badger, 66 Utah 194, 240 Pac. 458(1925).

In the Beesley v. Badger case, this Court held:

"that a money judgment may be a lien, it is essential, not only that there be a valid and subsisting judgment rendered by a court of competent jurisdiction and subject to collection by execution, but the judgment must also be for the payment of a definite and certain sum of money."  
(emphasis added)

The general considerations requiring such a construction were discussed in Boyle v. Baggs:

(a) An indefinite judgment depending on circumstances outside the judgment would put a purchaser of real property at a disadvantage involving possible or probable litigation to definitely determine the facts upon which the existence of the judgment lien depended.

(b) It is the policy of the law to keep land titles clear and to encourage alienability of property rather than the contrary.

(c) The construction placed on the statute should make the statute practical and workable in operation.

The same policy considerations have resulted in other states interpreting and applying their respective judgment credit or lien statutes the same way. See Roach v. Roach and McClanahan v. Hawkins, supra and cases cited therein.

Non final, inconclusive judgments, if liens or if they even appear on the records as possible liens, obviously serve only to cloud titles, create confusion, impel title companies

to make exceptions unacceptable to purchasers and hence to breed quiet title suits and slander of title actions.

The lower court's allowance of Plaintiff's effort to cloud all of the Tuckers' land titles with the order granting summary judgment was and is particularly abusive and inappropriate here for the reason that the Tuckers' business and livelihood was and is land development and sales, hence the cloud created by Plaintiff's recording of the order in county after county was and is particularly harmful to the Tuckers because of its effect to obstruct sales and prevent the making of contracts of sale even though Plaintiffs was not in a position to seek a writ of execution. (R. 111,112) Prospective purchasers obviously would hardly agree to buy with the \$150,000.00 summary judgment appearing on the title report.

No legitimate purpose was served by the lower court's refusal to make it clear that its allowance of a partial summary judgment and foreclosure of stock was not a final fixed dollar judgment for purposes of the creditor lien statute.

This court, in Bell v. Jones, 110 P.2d 327 (Utah 1941) struck a portion of a judgment that could have been construed to cloud title by giving a vendors lien even though this court decided the such would not actually be the effect of the language stricken. Similar action, sought here by Tuckers, was the lower Court's clear duty.

Clearly no purpose was or is to be served by ignoring Tuckers plea thus unnecessarily forcing them either into a thicket of further suits concerning their land titles, shutting down their business or both when sale of the specific security for Plaintiff's note may well satisfy the entire obligation.

#### CONCLUSION

The partial summary judgment should be reversed or vacated.

The lower court should be directed to resolve the issue of offset or deduction and the amount of any attorney's fees so as to fix the actual amount of Defendants' liability to Plaintiff before directing foreclosure of the security.

The lower court should be further directed to insert provisions in any proper judgment of foreclosure of the security hereafter entered, making it clear that such a judgment does not give general creditor judgment lien rights under the statute and that such lien rights will come into existence only upon the docketing of any actual final personal deficiency judgment after proper exhaustion of all property securing the obligation to Plaintiff.

Respectfully submitted,

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