

1979

Ute Cal Land Development Corp. v. Robert R. Sather and Bonnie Lee Sather : Appellants' Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH
STATE OF UTAH

UTE CAL LAND DEVELOPMENT CORPORATION, :
 :
Plaintiff, Respondent :
and Cross-Appellant, : Case No. 16017
 :
vs. :
 :
ROBERT R. SATHER and :
BONNIE LEE SATHER, :
 :
Defendants, Appellants :
and Cross-Respondents. :
 :
 :

APPELLANTS' PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF

PETITION FOR REHEARING FROM DECISION OF
THE UTAH SUPREME COURT FILED JANUARY 11,
1980, SUSTAINING A JURY VERDICT OF THE
FOURTH DISTRICT COURT FOR UTAH COUNTY,
UTAH, THE HONORABLE DAVID SAM, JUDGE

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POINT I

THE SUPREME COURT ERRED IN FAILING TO RULE THAT THE EVIDENCE REQUIRED A FINDING BY THE JURY THAT DEFENDANTS SATHER WERE ENTITLED TO BE PAID THE SUM OF \$46,560.00, FROM THE PLAINTIFF RATHER THAN ONLY THE SUM OF \$21,500.00.	8
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IN THE SUPREME COURT OF THE STATE OF UTAH

UTE CAL LAND DEVELOPMENT
CORPORATION,

Plaintiff, Respondent
and Cross-Appellant,

vs.

ROBERT R. SATHER and
BONNIE LEE SATHER,

Defendants, Appellants
and Cross-Respondents.

Case No. 16017

PETITION FOR REHEARING

COME NOW the defendants and appellants and hereby petition the Supreme Court of Utah for a rehearing of the above cause in the particulars hereinafter noted upon the grounds and for the reasons contained herein and in support thereof, respectfully show:

1. The appeal in this case was argued before this Court on October 10, 1979.

2. On January 11, 1980, this Court filed its decision affirming the Special Verdict of the Jury as returned in the Court below, and in particular with reference to this Petition for Rehearing, affirming the Jury Verdict as to Point II raised in appellant's original Brief on Appeal, wherein the jury determined that plaintiff owed defendants the sum of \$21,500.00 instead of the sum of \$46,560.00 as contended by the defendants.


3. The defendants seek a rehearing upon that point upon the following grounds:

- (a) The evidence does not support the Jury Verdict.
- (b) The jury and the Supreme Court have overlooked or ignored plaintiff's own admission that it owed at least \$46,000.00 in connection with the land in question.

For the foregoing reasons, it is urged that this Petition be granted.

DATED this 31st day of January, 1980.

Respectfully submitted,


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APPELLANTS' BRIEF IN SUPPORT OF
PETITION FOR REHEARING

STATEMENT OF NATURE OF THE CASE

This Petition for Rehearing involves the interests of the parties in and to real property situate in Uintah County, State of Utah. Defendants SATHER claim reimbursement from the plaintiff for money advanced for plaintiff's benefit by defendants SATHER in connection with said land.

DISPOSITION IN LOWER COURT AND ON APPEAL

The case was tried to a jury upon special interrogatories. The jury found that plaintiff was the owner of the real property and was entitled to possession thereof upon its paying to the defendants SATHER, the sum of \$21,500.00. This position was affirmed by the Supreme Court in its decision filed January 11, 1980.

RELIEF SOUGHT ON PETITION FOR REHEARING

Defendants seek a determination that the plaintiff owes defendants the sum of \$46,560.00 for money advanced for plaintiff's benefit by the defendants. Defendants, in the alternative, seek a new trial on such issue.

STATEMENT OF FACTS

Defendants will restate the facts insofar as they pertain to the point raised on this Petition for Rehearing.

On October 11, 1972, the plaintiff signed a note in favor of the FIRST SECURITY BANK OF UTAH (Ex 22-P; Tr-29), which note was secured by a trust deed to the real property involved in this suit. This real property is referred to by the parties as the Moss Ranch. In a separate transaction, but also on October 11, 1972, plaintiff and the defendant ROBERT R. SATHER entered into an Agreement which in essence provided that since the defendants SATHER had guaranteed plaintiff's payment of said note to the FIRST SECURITY BANK, if plaintiff failed to pay such note according to its terms and the defendants were required to pay off that note by reason

of the said guarantee, defendant SATHER was to receive a Warranty Deed to the same property as that covered by the Trust Deed to the FIRST SECURITY BANK (Ex 22-P). The said Agreement was delivered to the FIRST SECURITY BANK in conjunction with said Trust Deed (Tr-62).

The note of October 11, 1972, was subsequently refinanced and additional money was loaned by the FIRST SECURITY BANK to the plaintiff on September 15, 1973. On that date, plaintiff signed another Trust Deed Note in the sum of \$50,000.00 in favor of the FIRST SECURITY BANK (Ex 24-P; Tr-98), \$20,000.00 of which constituted a renewal of the earlier note and \$30,000.00 of which was a new loan (Ex 23-P; Tr-31). The new note was likewise secured by a Trust Deed dated September 15, 1973, covering the Moss Ranch upon which the FIRST SECURITY BANK was designated as beneficiary (Ex 37-D; Tr-67,68). The \$30,000.00 of new money was credited to the account of the plaintiff at FIRST SECURITY BANK, Roosevelt, Utah (Tr-67). Also, on September 15, 1973, plaintiff and defendant ROBERT R. SATHER entered into an Agreement similar to their earlier arrangement, which Agreement provided that in consideration of the defendant's guarantee of payment, should the plaintiff default in timely payment to the FIRST SECURITY BANK, and should the defendants pay off the note pursuant to their guarantee, the FIRST SECURITY BANK was to deliver the Warranty Deed of October 11, 1972, to defendant SATHER (Ex 3-P; Tr-24). The original of this second Agreement between plaintiff and defendant ROBERT R. SATHER was

concurrently delivered to the FIRST SECURITY BANK with the Trust Deed and Note signed by the plaintiff (Tr-24).

In furtherance of the said Agreement, the defendants SATHER on September 21, 1973, executed and delivered to the FIRST SECURITY BANK a guaranty document in favor of the FIRST SECURITY BANK, whereby the defendants agreed to absolutely guarantee payment of all sums the plaintiff then owed or should ever owe to the FIRST SECURITY BANK. This guaranty was for an unlimited amount (Ex 42-D; Tr-31).

On September 25, 1973, plaintiff issued its check payable to defendant ROBERT R. SATHER for the sum of \$25,000.00, which check was drawn on the Roosevelt, Utah office of the FIRST SECURITY BANK (Ex 31-P). Plaintiff contended at the trial that this money was a loan to enable defendant SATHER to buy diamonds and to cover some overdraft checks (Tr-64-66). Defendant SATHER contended that the money was given to him by plaintiff toward repayment of prior debts owed to the defendant SATHER by the plaintiff and plaintiff's president, PETE BUFFO (Tr-257,258; Ex 60-D; Tr-106).

On September 25, 1973, defendant SATHER, using said check given him by the plaintiff, purchased Savings Certificate No. 19479 in the amount of \$25,000.00 from the FIRST SECURITY BANK (Ex 56-P; Tr-30,31), and immediately pledged said certificate to the FIRST SECURITY BANK as additional security for the plaintiff's \$50,000.00 loan which had been guaranteed by the defendants (Ex 24-P; Ex 23-P; Ex 68-P; Tr-161,162,258,259).

By March 1974, plaintiff was in default in making timely payments on the note of September 15, 1973, to the FIRST SECURITY BANK (Tr-136,261). On March 15, 1974, defendant SATHER paid off the existing unpaid balance of said note to the FIRST SECURITY BANK in the sum of \$46,560.00 pursuant to defendants' guaranty (Ex 49-P; Tr-39,143,194,260,261; Ex 27-P). In making said payoff, defendant SATHER cashed in and applied the said Savings Certificate No. 19479 (Ex 56-P), and drew the rest of the money from his business accounts (Ex 58-P; Ex 68-P; Tr-261).

After paying off said note, defendant SATHER requested the FIRST SECURITY BANK to deliver to him a deed dated October 11, 1972 (ex 32-P), then being held by the FIRST SECURITY BANK under the provisions of the Agreement between plaintiff and defendant SATHER dated September 15, 1973 (Ex 3-P). The FIRST SECURITY BANK, in compliance with said request, on or about March 15, 1974, delivered said Warranty Deed to defendant SATHER (Ex 27-P; Tr-194).

On or about March 15, 1974, defendant ROBERT R. SATHER entered into some arrangements with James A. Sheya to borrow the sum of \$70,000.00, which arrangements contemplated that defendant SATHER would deed the Moss Ranch property to Sheya as security for that loan. Such a deed was recorded by defendant SATHER on March 25, 1974, in the office of the Uintah County Recorder (Ex 9-P; Ex 72-P). However, no money was ever actually advanced by Sheya to SATHER because it was then discovered by defendant SATHER before he obtained any money from Sheya that

plaintiff on November 2, 1973, had caused a Trust Deed to be recorded against the Moss Ranch ostensibly to secure a loan from Silvio Fassio to plaintiff for the sum of \$150,000.00 (Ex 59-D; Tr-181,183,262,263). A deed back from Sheya to defendant SATHER was later recorded on May 15, 1975 (Ex 10-P; Tr-263).

When defendant ROBERT R. SATHER discovered the said \$150,000.00 Trust Deed on the county records in favor of Silvio Fassio, he requested and received from the FIRST SECURITY BANK an assignment of plaintiff's \$50,000.00 Trust Deed dated September 15, 1973, which had been paid off by defendant SATHER on or about March 15, 1974. This Assignment was dated and delivered to defendant SATHER by FIRST SECURITY BANK on or about April 5, 1974 (ex 48-P; Tr-195,262).

During or about the month of April 1974, plaintiff learned that the Deed of October 11, 1972 (Ex 32-P) had been delivered to the defendant SATHER by the FIRST SECURITY BANK (Tr-82,262). Plaintiff at that time demanded a reconveyance of the property, but defendant SATHER declined to do so until he was paid the sum of \$46,560.00 by plaintiff, which amount is the sum defendant SATHER paid to the FIRST SECURITY BANK in connection with defendant SATHER'S guarantee of plaintiff's \$50,000.00 Trust Deed Note (Tr-86,261,264,265).

Plaintiff did not at any time tender any sum to defendant SATHER for a reconveyance of the Moss Ranch (Tr-264-266), although plaintiff did by letter addressed to defendant SATHER on September 25, 1974, acknowledge a responsibility for the sum

of \$46,000.00 in connection with the property in question (Ex 71-D), and plaintiff's president did testify at the trial that the plaintiff was willing to pay back to SATHER the \$45,000.00 paid to the bank (Tr-108).

Plaintiff filed suit on or about January 29, 1976, against defendants SATHER (R 1-17) seeking to regain the Moss Ranch by its paying to the defendant SATHER the amount of the plaintiff's Trust Deed to the FIRST SECURITY BANK (Ex 37-D), which had been assigned by the FIRST SECURITY BANK to defendant SATHER (Ex 48-P). The case was tried to a jury and was submitted to the jury upon special interrogatories (R 598-601). The jury found as to matters germane to the Petition for Rehearing that the plaintiff owed only the sum of \$21,500.00 to the defendant SATHER in order to regain possession of the Moss Ranch (R 600-601). This finding was affirmed by the Supreme Court upon appeal and it is in connection with this affirmation that the defendants seek a rehearing and further consideration by this Court.

ARGUMENT

POINT I

THE SUPREME COURT ERRED IN FAILING TO RULE THAT THE EVIDENCE REQUIRED A FINDING BY THE JURY THAT THE DEFENDANTS SATHER WERE ENTITLED TO BE PAID THE SUM OF \$46,560.00 FROM THE PLAINTIFF RATHER THAN ONLY THE SUM OF \$21,500.00.

Defendants concede that in seeking a rehearing in this matter their burden is heavy and that a strong case must be made

to convince the Court that an error has been made in failing to reverse the jury verdict (Brown vs. Pichard, 4 Utah 292; 11 Pacific 512). However, defendants do believe that such a case does exist in this matter now before the Court and they respectfully restate their position.

With respect to the Moss Ranch, the real property involved in this action, the jury found that the plaintiff was the owner thereof and that the plaintiff was entitled to regain possession upon payment of the sum of \$21,500.00 to the defendants SATHER (R 600-601). Defendants SATHER contend that there was no credible evidence received at the trial to justify limiting defendants' entitlement to \$21,500.00, and that the only substantial evidence before the Court requires a finding that defendants SATHER were entitled to be awarded the sum of \$46,560.00 as their security interest in the Moss Ranch.

Defendants again recognize that the evidence on appeal after a jury verdict is to be viewed and construed most strongly in support of the jury's findings and that the Supreme Court should not change the findings of the jury where there is competent evidence to sustain them. (Nelson vs. Watts, 563 P2d 798).

The evidence in the record of the trial cited by this Court to sustain and justify reducing defendant SATHER'S claim under the said security arrangement to \$21,500.00, rather than the \$46,560.00 actually paid by defendant SATHER on plaintiff's note to the FIRST SECURITY BANK, arises from the circumstances whereby defendant SATHER received \$25,000.00 from

plaintiff in the form of a check shortly after plaintiff received the proceeds of plaintiff's loan from the FIRST SECURITY BANK and whereupon defendant SATHER used said check to purchase a \$25,000.00 savings certificate and pledged said certificate with the FIRST SECURITY BANK as additional security for plaintiff's loan. Defendant SATHER thereafter used the proceeds of such savings certificate toward paying off the plaintiff's note to FIRST SECURITY BANK after such note became delinquent. The Court in its decision cited the testimony of Mr. Buffo, president of plaintiff, wherein Mr. Buffo contended that the \$50,000.00 loan from the bank was arranged solely for the benefit of SATHER so that plaintiff could loan SATHER \$25,000.00 from the loan proceeds and thus sustained the jury's apparent reasoning that this being true, if SATHER used the money borrowed from plaintiff to pay on plaintiff's debts, it was nothing more than a repayment of SATHER'S debt to plaintiff to that extent.

Mr. Buffo testified that the \$25,000.00 given to SATHER was a loan, while SATHER testified that it was a repayment on a prior debt due SATHER. If this conflicting testimony were the only evidence in the record, and it appears from the decision of the Supreme Court that only this testimony was used as a basis for upholding the jury verdict, then defendants would have to concede that the jury having chosen to believe the testimony of Mr. Buffo, the Supreme Court ought not to substitute their judgment for that of the jury even if the Court disagreed with the jury. However, defendant believes that additional

evidence in the record, furnished by the plaintiff itself, eliminates any real conflict in the evidence on the point herein under consideration and compells a finding in support of defendants' position that defendant used his money to pay off plaintiff's loan in the amount of \$46,560.00. Contrary to the testimony of Mr. Buffo at the trial, the plaintiff, through Mr. Buffo, did as late as September 25, 1974, acknowledge a debt of \$46,000.00 to defendant SATHER in connection with the property in question (Ex 71-D). This exhibit, a letter from Mr. Buffo to Mr. Sather, reads as follows:

"September 25, 1974

"Mr. Bob Sather
P. O. Box 608
Roosevelt, Utah 84066

Dear Bob:

"In reply to your message of September 14, 1974, which you mailed on the 19th, as you know, if payments are to be made to Mr. Sheya, I am only responsible for a total amount of \$46,000 or a \$23,000 payment. As I told you Friday, I am making arrangements to try to pay off my entire payments of \$46,000 which I have a commitment for. Actually, both as myself and the Fassios have told you, the second is not a phony and is not to be regarded as one.

"I will notify you as to my closing date to pay Mr. Sheya off. If not, I suggest the two of us go see Mr. Sheya together. The Fassios are also too good of friends for me to "screw around with" so let's sit down and get this taken care of in a proper manner.

"Sincerely yours,

s/ Pete Buffo
Pete J. Buffo
President"

While the exhibit does indicate that payment by plaintiff will be made to a Mr. Sheya, the admission of liability

was made at a time when plaintiff believed defendant SATHER had actually borrowed money on the property from Mr. Sheya and given the property in question as security (Tr 83-84). Although SATHER did attempt to borrow money from Sheya and to use the property as security, he was never able to do so because plaintiff had previously encumbered the property with a \$150,000.00 Trust Deed to Mr. Fassio (Tr 262-263).

It is obvious that in September 1974 plaintiff recognized a liability and debt for essentially the amount of money (\$46,560.00) SATHER had paid the bank to discharge plaintiff's loan from the bank, which loan had been guaranteed by SATHER. The admission was made at a time when no lawsuit was pending and when the circumstances of the arrangement between the parties were doubtless considerably more fresh in the mind of Mr. Buffo than at the time of the trial, more than four years later. Attention is also directed to the fact that plaintiff did not offer any evidence to rebut defendant's Exhibit #71 after its admission without objection (Tr 266). A fair interpretation of defendant's Exhibit #71 does not disclose a mere offer to compromise, but is a clear acknowledgment of a debt owing by plaintiff in consideration of SATHER'S payment of plaintiff's loan from the FIRST SECURITY BANK.

Defendants respectfully submit that the jury and the Supreme Court on appeal overlooked or ignored evidence, which if properly considered would make the finding of the jury in the respect under consideration untenable. Defendant's Exhibit

#71 is a voluntary admission of liability by plaintiff that it owed at least \$46,000.00 in connection with the reacquisition of the property in question and it was made at a time when plaintiff was not under the circumstances of trying to sustain a contradictory position during the course of the trial. Plaintiff's failure to in any way repudiate such admission after the introduction of defendant's Exhibit #71 into evidence constitutes the strongest kind of evidence against the plaintiff's contention that the \$25,000.00 was merely a loan to defendant SATHER rather than repayment on a pre-existing debt. (Volume 2, Jones on Evidence, page 738, Fifth Edition). The situation is similar to that where a party's testimony is deliberately self-contradictory, in which case the Trier of Fact is justified in considering that party's position from the version of the evidence which is least favorable to him. (Wilson vs. Blair, 211 P. 289; 65 Montana 155).

Defendants respectfully submit that the present case is one in which the Court should exercise its inherent supervisory powers to administer justice and determine that because of the evidence before the Court, defendants' basic entitlement from the plaintiff is the sum of \$46,560.00, rather than the sum of \$21,500.00 as found by the jury.

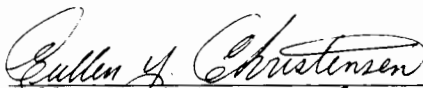
CONCLUSION

The verdict of the jury with respect to its finding that the defendants SATHER are only entitled to reimbursement from the plaintiff for the sum of \$21,500.00 of the \$46,560.00

paid by the defendants on plaintiff's past due Trust Deed Note, guaranteed by the defendants, is not supported by competent or substantial evidence in view of plaintiff's own admission and evidence to the contrary. Rehearing on this point would be in the interests of justice and within the prerogatives of this Court.

In any event, should this Court decline to grant the affirmative relief sought herein by the defendants SATHER, the defendants SATHER should be granted a new trial on the issue and point herein raised.

Respectfully submitted,



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55 East Center Street
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CERTIFICATE OF MAILING

Two copies of the foregoing were mailed, postage prepaid, to McRae & Deland, attorneys for plaintiff and respondent, 317 West 1st South Street, Vernal, Utah 84078, this 31st day of January, 1980.



CULLEN Y. CHRISTENSEN, Attorney