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IN THE SUPREME COURT OF THE STATE OF UTAH

ROGER L. and SHERYL C. BREWER, husband and wife; TED LEE and ANNE G. DAUGHERTY, husband and wife; BERT L. and DIANNA L. DENNIS, husband and wife; ARVEL V. and ZELLA E. HANSEN, husband and wife; KENNETH R. and BARBARA A. HEATH, husband and wife; JAMES A. and JOANNE MOSER, husband and wife; C. LYNN and PAULETTE H. PATTERSON, husband and wife; EDWARD J. and LYNE J. PETERSON, husband and wife; CRAIG G. and FREDA L. TODD, husband and wife; STEPHEN and KAREN URESK, husband and wife; and BARBRA SWAIN, as assignee of MAY ELLISON, Plaintiffs - Respondents, vs. WILLIAM CHAD PEATROSS and CARMA S. PEATROSS, husband and wife, Defendants - Appellants.	CASE NO. 16027

BRIEF OF RESPONDENTS

Appeal From the Judgment of the District Court
of the Fourth Judicial District,
The Honorable J. Robert Bullock, Judge.

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FILED

NOV 30 1978

Clerk, Supreme Court, Utah

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Plaintiffs - Respondents,	)	
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BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This case is an action by plaintiffs for damages caused by defendants breach of the covenant against encumbrances in a warranty deed.

DISPOSITION IN THE LOWER COURT

The district court below ruled as a matter of law that the creation and functioning of the Roosevelt Special Improvement

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District created an encumbrance upon the subject properties and that defendants' subsequent conveyance, by warranty deed, to plaintiffs of their respective lots resulted in a breach of the covenant against encumbrances.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmation of the judgment of the court below.

STATEMENT OF FACTS

In February 1974, pursuant to the requirements set forth by statute, §10-16-4 et. seq., U.C.A., (1953 as amended), Roosevelt City gave notice of intent, and in March 1974, did create a Special Improvement District. The stated purpose of the District was for the installation of curb and gutter, plus the paving of certain streets within the boundaries of the district. It was further provided in the notice of intention that:

> the Mayor and city council will levy or cause to be levied, assessments on all of the property in the District that shall receive improvements to pay (all or any portion) of the improvements according to the benefits that will be derived to the property in the District.

Subsequently, the contracts for the work were let and the actual work of improvement was commenced. After the contracts for improvements were let, but before the assessments were levied, the plaintiffs individually consumated the purchase of an improved lot, and in many cases, a house from the defendants. This was done during the period from December 1974 to October

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1975. All of the conveyances by defendants, of the subject lots to the individual plaintiffs, were by a warranty deed, which contained no restrictions or reservations. At the time of conveyance, the improvements for the involved lots were in various stages of completion. In October 1976, after the improvements for the entire city were completed, Roosevelt City, pursuant to statute (U.C.A. [1953] §10-16-23) levied the costs of the improvements against the properties of the individual plaintiffs. After plaintiffs' unsuccessful request to have the defendants voluntarily satisfy the assessments, plaintiffs brought this action.

ARGUMENT

POINT I

THE CREATION OF THE SPECIAL IMPROVEMENT DISTRICT CREATED AN ENCUMBRANCE WITHIN THE MEANING OF §57-1-12, U.C.A. (1953)

By statute, every warranty deed contains a covenant against liens and encumbrances. The relevant language is as follows:

> Such deed when executed as required by law shall have the effect of a conveyance in fee simple to the grantee . . . with covenants from the grantor . . .that the premises are free from all encumbrances. (U.C.A. 1953, §57-1-12)

The trial court found that the Roosevelt Improvement District constituted an encumbrance from the time of its creation. This finding is consistent with the weight of the authority and with the implied meaning of a warranty of title.

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An encumbrance, within the scope of the covenant against encumbances, includes more than merely liens or mortgages. Black's Law Dictionary, revised fourth edition, making reference to Hoyck v. Andrews, 113 N.Y. 81, 20 N.E. 581 and Miller v. Schwinn, Inc., 113 F2d 748, 72 App. D.C. 282, defines an encumbrance as, "Any right to, or interest in, land which may subsist in another to the diminution of its value, but consistent th the passing of fee." (emphasis added) (See also, Rawle, Cov. §75, 76, 191.)

Thompson on Real Property, in discussing the term "encumbrance" states:

> ..."encumbrance" is more comprehensive than "lien", as it not only includes liens, but any other burden resting either on the real estate itself, or on the title thereto which tends to lessen the value or interferes with its free enjoyment. (§3183, p. 274, emphasis added) (See also, First Church of Christ, Scientist v. Cox, 47 Ind. App. 536, 94 N.E. 1048; Simons v. Diamond Match Co., 159 Mich. 241, 123 N.W. 1132; Texas & P.R. Co. v. El Paso & N.E.R. Co. (Tex. Civ. App.), 156 S.W. 561; Green v. Tidball, 26 Wash. 338, 67 P. 84)

The well accepted, majority view, follows the guidelines set forth above, and examples of interests, rights and burdens which have been held to be encumbrances include: a restriction in a deed, Hyman v. Boyle, 239 Mich. 357, 214 N.W. 163; building restrictions, Roberts v. Levy, 3 Abb. Prac. (N.S.) 311 (N.Y.); covenants prohibiting the sale of spirits on land, Hatcher v. Andrews, 5 Bush (KY.) 561; a restrictive provision concerning the use of firearms, Frazer v. Bentel, 161 Cal. 390, 119 P. 509; an inchoate right of dower, Bigelow v. Hubbard, 97 Mass 195; and

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even a statutory right of redemption, Roy v. F.M. Martin and Son, 16 Ala. App. 650, 81 South 142.

Other cases have held that it is not necessary that the encumbrance be specific or determinable in amount at the time of conveyance. In Clark v. Fisher, 54 Kan. 408, 38 P. 493, a lessor leased some propety to a lessee for the purpose of growing and harvesting wheat. The lease agreement provided that if the property were sold before the expiration of the lease, the lessee would still have the right to harvest the wheat. Shortly thereafter, the land was conveyed to a grantee who promptly conveyed it to a third party. The court held that the lessee's right to harvest the wheat was an encumbrance even though at the time of both conveyances, the amount of that interest, if anything, was not specifically determinable. (See also, Harrison v. Des Moines & Ft. D. R.R. Co., 91 Iowa 114, 58 N.W. 1081; Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; Fritz v. Pusey, 31 Minn. 368, 18 N.W. 94; Chapman v. Kimball, 7 Neb. 399; Carter v. Denman 23 N.J.L. 260; Stanbaugh v. Smith, 23 Ohio St. 584; Lafferty v. Milligan, 165 Pa. 534, 30 A. 1030.)

Situations involving special improvement assessments, which are similar to the present case, have also been considered by other courts. The Kentucky case of O'Shee v. Chandoir, 104 So. 59 (Ky.) involved a dispute between a vendor and vendee concerning liability for just such an the assessment. The court placed the liability on the vendor, stating:

> ...the vendor should pay for the paving. The vendee contracted to purchase a lot of ground on a

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paved street. The mere fact that the street was paved enhanced the value of the property and, doubtless, influenced the vendee in negotiating for its purchase and in determining the price he was to pay for it. The vendee's situation is similar to one who contracts to buy an improved property, but, before the date upon which the deed of sale is to be executed, he discovers that there are outstanding but unrecorded liens for labor and material which affect the property and are certain to be recorded within the time limit prescribed by law. Can anyone successfully contend that, under these circumstances, the vendor could be legally absolved from satisfying the claims of these lien holders?

The weight of authority has also held that if the improvements have already been made, an encumbrance exists by that reason, whether or not the assessments have been levied as a lien according to statutory provisions. (See Tibbits v. Leeson, 148 Mass. 102, 18 N.E. 679; Barnhart v. Hughes, 46 Mo. App. 318; Cadmus v. Fagan, 47 N.J.L. 549, 4 A. 323; Lafferty v. Milligan, supra; Green v. Tidball, supra.) It has also been held that the liability upon land for improvements which had been ordered, but ot yet constructed and for which the assessment had not been levied was still an encumbrance within the meaning of the covenant against encumbrances. In Cotting v. Commonwealth, 205 Mass. 423, 91 N.E. 900, the court stated:

> There was a liability which was sure to become absolute and enforceable against the land as soon as the work was completed and the expense ascertained. This was an incumbrance from which the petitioners were entitled to be protected under the covenant.

This same court later held,

> When there is an actual liability for an assessment which subsequently ripens into an actual amount, such liability constitutes a breach of the covenant of the deed at the time it is delivered. (Engel v. Thompson, Mass. 146 N.E. 2d 657)

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In the present case, there can be no question that the Roosevelt City Improvment District had "a right to or interest in" the properties which were located within the boundaries of the Special Improvement District, and while this interest or right was consistent with the record owner's title or the passing of that title, it nevertheless was a burden which diminished the value of the property. In the Notice of Intent, first published February 7, 1974, in the Uintah Basin Standard, the city indicated that:

> 1. The assessments shall be levied for the purpose of installing curb and gutter, and blacktop paving, on the streets and public rights-of-way in Roosevelt City, except as specifically excluded below.
>
> 2. That said assessments are proposed to be levied, based on the actual cost of the installation of the curb and gutter, and paving, as determined by the total frontage of the property involved and apportioned between all property owners in the improvement district on said basis. (emphasis added)

This intent to create and assess, later developed into an actual right or interest of the city to assess, when the Improvement District was created on March 18, 1974, since from that time the city was,

> ...authorized...to levy assessments upon the property described in the notice of intention, to pay for improvements to be made and the city officials of said city are hereby directed to proceed to construct the said improvements..... (See Appendix to defendants brief, Resolution creating Special Improvement District, March 18, 1974.)

It is to be noted, that when Roosevelt City chose to exercise their assessing authority is not as important as the

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fact that from and after March 18, 1974, the city had a "right and interest" in the subject properties which would allow the city to assess the property. From any equitable point of view, that right to assess surely constituted an actual "encumbrance" to the property.

Furthermore, shortly after the Improvement District was created, the contracts for the improvement work were let, and the actual work of improvement was commenced. All this occured prior to the time that any of the plaintiffs received their individual warranty deed from defendant. In fact, the undisputed testimony was that the improvements were partially or completely finished prior to the time the plaintiffs received their individual warranty deeds from defendants.

Under these circumstances, the district court held that Roosevelt City's interest, though not assessed as a lien at the time defendant conveyed the properties to plaintiff, was nevertheless an encumbrance and therefore, that defendants' conveyances were in breach of the covenant against encumbrances. This is also the view of the majority opinion of jurisdictions in the United States, and especially true under the view espoused by the Massachusetts court in Cotling and Engle (supra). Plaintiffs respectfully submit that this view, is not only supported by the weight of authority, but that it is also the better reasoning. Plaintiffs therefore would hence urge the Utah Supreme Court to adopt the same.

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POINT II

CERTAINITY AS TO THE AMOUNT OF AN ENCUMBRANCE IS NOT A BAR TO THE EXISTENCE OF THAT ENCUMBRANCE

Defendants contend that since the final costs of the improvement work were not fully ascertainable until after all the warranty deeds had been conveyed to plaintiffs, that no encumbrance could exist. However, following the rationale of the Clark case and others, cited above, the later ascertainment of the total costs for the improvements would relate back to the date when the city acquired its right to assess for those costs, that being at the time of the creation of the improvement district. Plaintiff acknowledges that no lien yet existed, but feels that there can be no serious question that an encumberance did then exist.

Defendants further contend that if they are to be held liable for these improvements that they would perpetually be liable for any future improvements which might be assessed. Such logic both begs the question and tortures reasoning. This kind of reasoning overlooks the fact that the resolution creating the Improvement District only authorized assessments for the cost of certain curb, gutter and paving and the ordinance assessing those costs among the various property owners was in fact adopted in October 1976. If any other improvements should thereafter be made, they would have to be authorized by the city first publishing new intent, and thereafter creating a new district and finally letting new contracts. Since defendants have conveyed

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title to the subject land, the plaintiffs or their successors, in interest and not defendants would be liable for any new assessments. Thus the question is not what might be done, but rather what can be done by the old district, and the fact is, it cannot levy any additional assessments.

The mere fact the district had a right to levy assessments against the subject property, did not give the district an "open-checking account" so to speak. The district was limited to the assessments it could levy, by the terms of the Notice of Intent and the ordinance creating the District. The assessments could not exceed the same. The defendants knew of the existence of the Improvement District and watched its progress in installing curb, gutter and paving, while they sold the individual plaintiffs their lots. Since Notice of the Intent to create the District was given to all property owners, including the defendants, as required by law, in February 1974, the defendants should be presumed to know that assessments would be levied for the improvements and that such improvements would not be free. If defendants had not wanted to pay for these improvements, they easily could have excluded the same from each warranty deed they gave plaintiffs. However, they did not, and the power and right of the city to assess for the improvements being installed was an effective encumbrance against the property from and after March 18, 1974. The mere fact that the amount of the assessment was then unknown, did not effect the validity or existance of the same as an encumbrance.

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POINT III

PLAINTIFFS' RIGHTS ARE FOUNDED IN WARRANTY NOT FAIRNESS

Although neither pled in defendants' answer or otherwise tried below, defendants now contend on appeal that they sold "unimproved lots" to the plaintiffs and that since it was the properties which received the benefits, that the "fairness doctrine" should require that plaintiffs pay for the same. In this supposition, defendants have errored.

First, plaintiffs did not negotiate for the purchase of unimproved lots. The decision of the district court, supported further by various loan documents executed by the defendants, would urge the opposite. (These documents are in the Exhibits of or for each of the individual plaintiffs and is identified as Farm Home Document No. 422-8, and is titled "Property Information and Appraisal," which document was prepared by defendants or their agent, and details the improvements included with the lots being sold. It is to be noted that in most instances, defendants represented that the lot had curb, gutter and pavement.)

Second, and notwithstanding the above, it is to be noted that plaintiffs' rights are founded in warranty and are not based on what might or might not be found to be fair. However, under all equitable standards, fairness should require defendants to pay for the improvements they represented to the lending institution were included with the property. Though the question of liability for the costs of the improvements may or may not

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have been discussed by the parties, the fact is, that at all times plaintiffs believed they were contracting to purchase improved lots. If the fairness doctrine is applied to these correctly stated facts, plaintiffs contend that the only reasonable conclusion is that which was reached by the Kentucky Court in O'Shee, supra, namely that the improvement district did constitute an encumbrance against the subject lots, at the time of conveyance. Thus the decision of the trial court must be affirmed.

Plaintiffs submit that the trial court's decision, which is consistent with the greater weight of authority, is the appropriate and better reasoned view which Utah should follow. Hence plaintiffs urge this honorable court to affirm the trial court's decision.

SUMMARY

It is a well accepted principle of Utah law that a warranty deed includes a covenant that the conveyed property is free and clear of all encumbrances, unless expressly excepted in the deed itself. While there are no known Utah guidelines (case law or otherwise) which clearly define an encumbrance, that question has been considered by other jurisdictions, and plaintiffs urges this court to adopt and follow the majority of the same.

Plaintiffs do not claim that a levied or amount certain lien formed the basis for their claim of breach or warranty. Rather, plaintiffs assert that the concept of encumbrances, as defined by

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CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) copies of the foregoing brief of the plaintiffs-respondents, postage prepaid and addressed to: Gayle Mckeachnie, Attorney at Law, 53 South 200 East, Vernal, Utah 84078, this 30th day of November, 1978.

JaNae Jennings

JaNae Jennings, Secretary

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