

2001

Kenneth L. Rothey v. Walker Bank and Trust Company aka First Interstate Bank of Utah : Brief of Appellant

Utah Supreme Court

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

DOCKET NO. 19570

KENNETH L. ROTHEY, Trustee of
the Belnap Family Trust,

Respondent and Plaintiff,

vs.

WALKER BANK & TRUST COMPANY,
aka FIRST INTERSTATE BANK OF
UTAH, a Utah Banking corporation,

Appellant and Defendant.

Case No. 19570

FIRST INTERSTATE BANK OF UTAH,
a Utah banking corporation,

Appellant and
Counterclaim Plaintiff,

vs.

KENNETH L. ROTHEY, Trustee of
the Belnap Family Trust,
BARBARA SINE, JAYNIE BELNAP,
LeGRANDE P. BELNAP, ARLENE B.
WALDRON, LESLIE W. KING, PETTY
INVESTMENT COMPANY, PETTY MOTOR
COMPANY, RACHEL LUNT, DORIS
BAGLEY BELNAP, and FIRST SECURITY
BANK OF UTAH, N.A.,

Respondents and
Counterclaim Defendants.

BRIEF OF APPELLANT-DEFENDANT

Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Kenneth Rigtrup, Judge

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Defendant

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BRIEF OF APPELLANT-DEFENDANT

NATURE OF THE CASE

This action concerns the right of appellant to recover certain costs and attorney's fees incurred by appellant in defending against two actions that challenged the validity of the trust deed under which appellant was trustee and beneficiary.

DISPOSITION IN THE LOWER COURT

Following a trial, the district court held that appellant was estopped from collecting, as a part of the obligation secured by the subject trust deed, any attorney's fees or costs incurred by appellant in defending against two actions which had unsuccessfully challenged the validity of the subject trust deed.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the trial court's judgment that appellant is estopped from collecting its costs and attorney's fees under the subject trust deed, this Court's determination that appellant is entitled to collect such amounts, and an order remanding this case to the Third Judicial District Court of Salt Lake County for a determination of the amount of costs and attorney's fees due appellant under the trust deed and further proceedings to foreclose the trust deed.

STATEMENT OF FACTS

On May 13, 1963, appellant First Interstate Bank of Utah, formerly named Walker Bank & Trust Company (hereinafter referred to as the "Bank"), extended a loan in the amount of \$30,000.00 to Utahna P. Belnap. The loan was evidenced by a Promissory Note in the amount of \$30,000.00 (the "Note") and was secured by a Trust Deed (the "Trust Deed") covering all of Lot 6, Indian Hills Plat B-1 (hereinafter referred to as

the "Property"). (Finding No. 1; R. 340-341). On July 28, 1972, Utahna P. Belnap died while married to LeGrande L. Belnap. The probate of the estate of Utahna P. Belnap followed. The Bank was appointed and served as the Special Administrator of the estate of Utahna P. Belnap. (Finding Nos. 2, 3; R. 341).

During the probate proceeding, Utahna's husband, LeGrande L. Belnap, initiated two lawsuits, both of which were either a direct or indirect attack on either the validity of the title of the reputed owner, Utahna Belnap, or an attack on the Trust Deed (those two suits are hereinafter sometimes referred to as the "Actions"). (Finding No. 4; R. 391). The Bank incurred costs and attorney's fees in successfully defending against the Actions. (Finding No. 5; R. 342). Both of the Actions were ultimately resolved in favor of the Bank. In one of the Actions, the district court determined that the Trust Deed was a subsisting and valid lien in favor of the Bank against the Property. (Finding No. 6; R. 342). This Court affirmed that determination. (R. 382-383).

The Trust Deed, at paragraph 4, provides that the Trustor agrees:

4. To appear in and defend any action or proceeding purporting to affect the security hereof, the title to said property, or the rights or powers of Beneficiary or Trustee; and should Beneficiary or Trustee elect to also appear in or defend any such action or

proceeding, to pay all costs and expenses, including costs of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee.

(Plaintiff's Exhibit No.2; T., 2/7/83, at 3-5; R. 375-377).

During the probate of the estate of Utahna P. Belnap, the ownership of the Property encumbered by the Trust Deed was, pursuant to an agreement, awarded to LeGrande Belnap, and LeGrande Belnap agreed, as a part of that agreement, to assume and discharge the Trust Deed. (Finding No. 7; R. 342). Through a series of conveyances, plaintiff-respondent in this case, Kenneth L. Rothey as Trustee of the Belnap Family Trust (hereinafter referred to as "Rothey"), acquired title to the Property covered by the Trust Deed. (Conclusion No. 2; R. 347).

For in excess of five years, none of the scheduled payments under the Note were made to the Bank. (Finding No. 17; R. 346). Accordingly, the Bank initiated a non-judicial foreclosure under the Trust Deed, and Rothey initiated this action seeking (i) to enjoin that non-judicial foreclosure and (ii) a determination that the Bank was not entitled to recover its costs and attorney's fees incurred in defending against the Actions. (Verified Complaint; R. 6-7). Rothey then secured a Temporary Restraining Order restraining the subject trustee's sale. (R. 29-30). The Temporary Restraining Order issued by the district court on July 28, 1981, provided as follows in Paragraph 2:

That as a condition precedent to the issuance hereof and in lieu of the posting of security or bond as required by Rule 65(a)(c), Plaintiff be and hereby is required to tender to Defendant the sum of \$15,094.70, the amount of principal and interest due on the subject Trust Deed and Note.

Following the district court's entry of the Temporary Restraining Order, Rothey served upon the Bank a "Tender of Payment" in "the sum of \$15,094.70 representing the amount of the principal and interest due according to the Notice of Trustee's Sale filed and published by the Defendant." (R. 16, 27). Rothey delivered to the Bank his counsel's Trust Account check in that amount, and the Bank negotiated the check with the following endorsement:

Endorsement does not constitute accord and satisfaction. Payee reserves all claims and rights it has to collect its full administrative charges and attorney's fees under the Note and Trust Deed.

First Interstate Bank (formerly known as Walker Bank & Trust Company)

By: s/
Assistant Vice President

(Defendant's Exhibit 19; T., 2/8/83 at 4-5; R. 500-501).

The Bank counterclaimed seeking a judicial foreclosure of its Trust Deed and a determination that it is entitled to recover the costs and attorney's fees expended in defending against the Actions (Answer and Counterclaim; R. 54-57). In his Reply to the Counterclaim, Rothey pleaded the following two defenses:

a. That the Bank's receipt of principal and interest precludes it from recovering attorney's fees and costs. (Reply to Counterclaim, Third and Fourth Defenses; R. 80; Answers of Plaintiff to Defendant's First Set of Interrogatory Nos. 6 and 7; R. 152-153).

b. That the Bank's failure to make a claim against the estate of Utahna Belnap for the costs and attorney's fees incurred while acting as Special Administrator of the estate bars its recovery of such costs and attorney's fees. (Reply to Counterclaim, Fifth and Sixth Defenses; R. 80-81).

At trial, the parties agreed that their only dispute was over whether the Bank could in this action recover its costs and attorney's fees incurred in defending against the Actions. (T., 2/7/83, at 21; R. 393). After evidence had been introduced and testimony given, Rothey's counsel presented to the trial court "three theories that the Court has now heard something about which the Court could find that Walker Bank & Trust is simply not entitled to those fees." (T., 2/8/83, at 52; R. 548).

The first theory was that the Bank is barred in this action under principles of res judicata from seeking its costs and attorney's fees incurred in defending against the Actions because the Bank should have requested such costs and attorney's fees in the Actions. (T., 2/8/83, at 52-72; R. 548-568). This theory was not pleaded in Rothey's Reply to

Counterclaim and was presented over the Bank's objection. (See T., 2/8/83, at 91-92; R. 587-588). Rothey's second theory corresponds to the Third and Fourth Defenses set out in his Reply to the Bank's counterclaim; that is, that the Bank's receipt of principal and interest due under the Note and Trust Deed precludes it from recovering attorney's fees. (T., 2/8/83, at 72-75; R. 568-571). Rothey's third and final theory was that the Actions did not attack the title to the Property or the interests of the Trustee, and that, consequently, the Bank could not recover its costs and attorney's fees incurred in defending against the Actions. (T., 2/8/83, at 75-76; R. 571-572). Rothey's counsel never argued or offered evidence upon any other theory or defense that would preclude the Bank's recovery of its costs and attorney's fees in the Actions.

The trial court rendered its judgment from the bench. The trial court found every fact and element that was necessary for it to rule for the Bank. The trial court also rejected every theory or defense that Rothey had offered or argued. First, the trial court ruled that it did not have to address Rothey's res judicata theory because it had not been pleaded by Rothey. (T., 2/8/83, at 118; R. 614). Second, the trial court dispensed with Rothey's argument that the Bank's receipt of principal and interest precludes it from recovering attorney's fees. The court stated that "this is

not a case of accord and satisfaction" (T., 2/8/83, at 118; R. 614; see also Conclusion No. 8; R. 349). Finally, the trial court rejected Rothery's third theory by construing the Trust Deed to mean that "if they [the Bank] advance monies in behalf of the trustor, or if they elect in their own behalf to defend the sanctity or the sacredness of their security, that they may do so and charge those amounts against the trustor, and they thereby become secured by the trust deed document." (T., 2/8/83, at 119-120; R. 615-616; see also Conclusion No. 3; R. 347-348). In connection with this statement the trial court also found that the Actions were "either a direct or indirect attack . . . on either the validity of the title of the reputed owner, Utahna Belnap, . . . or an attack on the integrity of the underlying security document, namely, the trust deed." (T., 2/8/83, at 120-121; R. 616-617; see also, Finding No. 4; R. 341). The trial court accordingly concluded that the Bank's costs and attorney's fees incurred in defending against the Actions were recoverable under the Trust Deed. (Conclusion Nos. 3 and 4; R. 347-348).

The trial court could, indeed should, have stopped at this point. All of the requirements for the Bank's recovery of its costs and attorney's fees had been found by the court. More importantly, all of Rothery's defenses had been rejected by the court. Since all defenses to the Bank's

counterclaim were cleared away, the trial court should have granted the counterclaim and allowed the Bank to recover its costs and attorney's fees as amounts secured by the Trust Deed. However, the trial court reached beyond the pleadings and beyond the record to make its final disposition.

The trial court found that the Bank "failed to give LeGrande L. Belnap, or his successors or assigns, including Plaintiff herein, any meaningful or substantive notice that it had claimed, was claiming, or would claim the attorney's fees incurred in connection with [the Actions] as due and payable under the Trust Deed." (Conclusion No. 6; R. 348). From this finding, the court concluded that "[t]he bank is estopped by such failure to claim or collect the fees as a part of the foreclosure of the subject Trust Deed." (Conclusion No. 7; R. 348).

ARGUMENT

The trial court's judgment must be reversed because (i) the trial court's own rulings entitle the Bank to recover the disputed costs and attorney's fees; (ii) the sole basis for the judgment was neither pleaded nor argued by Rothery; (iii) the trial court's holding requiring that the Bank give Rothery notice of its claiming attorney's fees is contrary to the law, (iv) no evidence supports the dispositive factual findings of the trial court relating to that holding; and (v) even assuming the correctness of the trial court's theory,

other essential factual elements of estoppel were neither proved nor found by the trial court. Each point will be addressed in turn.

POINT I

BASED UPON THE TRIAL COURT'S FINDINGS,
THE BANK IS ENTITLED TO RECOVER THE
DISPUTED FEES AND EXPENSES.

In its Counterclaim in this action, the Bank prayed for the following: (i) that the court determine the amount due under the Note and secured by the Trust Deed, including costs and attorney's fees incurred by the Bank, and (ii) that the Trust Deed be foreclosed to satisfy said amount. (R. 56-57). The trial court found each and every element that was necessary for it to grant the relief prayed for in the Bank's Counterclaim. First, the trial court found that Utahna Belnap executed and delivered the Note and executed, acknowledged and delivered the Trust Deed to the Bank. (Finding No. 1; R. 340-341). Second, the trial court concluded that the Trust Deed is a valid and enforceable first lien and encumbrance against the Property. (Conclusion No. 1; R. 347). Third, the trial court found that the Trust Deed allows the Bank, as Trustee and Beneficiary, to appear in and defend any action purporting to affect the security of the Trust Deed, the title to the Property, or the rights and powers of the Bank under the Trust Deed. (Conclusion No. 3; R. 347-348). Fourth, the trial court determined that costs

and attorney's fees expended by the Bank in defending such actions are secured by the Trust Deed. (Id.). Fifth, the trial court concluded that the Actions were both either a direct or indirect attack on either the validity of title to the Property or on the validity of the Trust Deed.

(Conclusion No. 4; R. 348). Sixth, the trial court found that the Bank appeared in and defended against the Actions and expended attorney's fees in so defending. (Finding No. 5; R. 348). Seventh, the trial court found that none of the scheduled payments due under the Note were made between February, 1976 and July, 1981 --- the Bank did not commence trustee's sale proceedings under the Trust Deed until the Note had been in default for more than five years. (Finding No. 17; R. 346).

In short, the Bank succeeded in establishing to the trial court's satisfaction a prima facie case entitling it to recover the disputed attorney's fees under the Trust Deed. Every single fact and element that the Bank was required to prove was proved by the Bank and the trial court's findings and conclusions so state. Absent an effective affirmative defense by Rothey, the trial court should have proceeded to determine the amount of costs and attorney's fees incurred by the Bank in defending against the Actions and to decreed the foreclosure of the Trust Deed to recover those costs and fees. The trial court rejected all of Rothey's defenses.

As will be shown below, the theory of defense adopted by the trial court was neither pleaded nor argued by Rothery, is not supported by the evidence, and is contrary to law. Because the Bank has established its case, because the trial court rejected all of Rothery's defenses, and because the defense created by the trial court cannot be sustained, the trial court should be reversed and this case should be remanded for a determination of the amount of fees and costs due the Bank under the Trust Deed and further proceedings to foreclose the Trust Deed.

POINT II

THE TRIAL COURT ERRED IN BASING ITS
RULING ON AN AFFIRMATIVE DEFENSE
NEITHER PLEADED NOR ARGUED BY ROTHEY.

Rothery's Reply to the Bank's Counterclaim seeking judicial foreclosure of the Trust Deed, and inclusion of the disputed attorney's fees in the amount secured by the Trust Deed, raised only the following two affirmative defenses: (i) that because the Bank has accepted the payment of all principal and interest owed under the Trust Deed, it is precluded from proceeding to foreclose the Trust Deed to recover its costs and attorney's fees (Reply to Counterclaim, Third and Fourth Defenses; R. 80; see also Answers of Plaintiff to Defendant's First Set of Interrogatories, Nos. 6 and 7; R. 152-153), and (ii) that the Bank, as Special Administrator of the estate of Utahna P. Belnap, was entitled

to seek payment for all services rendered in that capacity as a part of that probate proceeding and that due to the Bank's failure to apply for such payment it is estopped from seeking those fees as part of the foreclosure of the Trust Deed.

(Reply to Counterclaim, Fifth and Sixth Defense, R. 80-81; see also Answers of Plaintiff to Defendant's First Set of Interrogatories, Nos. 8 and 9; R. 153-54).

It is true that in his Fourth Defense to the Bank's Counterclaim, Rothey pleaded generally that the Bank is "estopped" to claim the subject costs and attorney's fees. (R. 80). When asked by interrogatory what facts supported that Fourth Defense, however, Rothey stated only that the Bank failed to request payment for costs and attorney's fees in the probate proceeding. (Answers of Plaintiff to Defendant's First Set of Interrogatories, No. 7; R. 153). At no time prior to the trial court's announcement of its judgment did the Bank receive notice that anyone was placing reliance on a theory that the Bank is estopped by its failure to advise Rothey that it would claim the subject costs and fees.

Both at trial and in defending against the Bank's Motion for Partial Summary Judgment during the month prior to trial, Rothey argued only the following three theories: (i) that the Bank is barred by res judicata from claiming the disputed attorney's fees because the Bank had failed to claim

them in connection with the Actions (T., 2/8/83, at 52-72; R. 548-568; R. 253-259); (ii) that the Bank had waived any right to claim the disputed attorney's fees by accepting payment of principal and interest due under the Note (T., 2/8/83, at 72-75; R. 568-571; R. 259-263); and (iii) that the Actions did not challenge title to the Property and that, therefore, the Bank's expenses incurred in defending against the actions were not recoverable under the terms of the Trust Deed (T., 2/8/83, at 75-76; R. 571-572; R. 252-253).

The trial court rejected each and every one of Rothey's arguments. The trial court found specifically (i) that res judicata was inapplicable;¹ (ii) that the Bank did not waive its right to claim attorney's fees by accepting payment of principal and interest due under the Note (Conclusion No. 8; R. 349); and (iii) that the Bank's

¹Res judicata was not pleaded by Rothey in his Reply to the Bank's Counterclaim. The Bank's counsel objected to any evidence offered to support this affirmative defense. (T., 2/8/83, at 92-93; R. 588-580). Under Rule 8(c), Utah Rules of Civil Procedure, the plea of res judicata must be pleaded affirmatively, and if not so interposed is waived. See Board of County Commissioners v. City and County of Denver, 547 P.2d 249, 251 (Colo. 1976). The lower court ultimately agreed with the Bank:

"[T]his is not a case of res judicata, there having been no affirmative defense raised and the Court not having received a motion nor granted a motion about res judicata."
(T., 2/8/83, at 118; R. 614).

expenses incurred in the Actions were recoverable by the terms of the Trust Deed (Conclusions No. 3 and 4; R. 347-348).

Two glaring and dispositive facts emerge from the foregoing review of the pleadings, arguments and ruling in this case. First, the trial court rejected explicitly each and every defense that was either pleaded or argued by Rothery. Second, and this fact emerges inescapably from the first, Rothery never pleaded nor did he ever argue that the Bank had a duty to give LeGrande L. Belnap, or his successors or assigns, including Rothery, meaningful or substantive notice that it was claiming the attorney's fees incurred in defending against the Actions, (Conclusion No. 6, R. 348; T., 2/8/83, at 125, R. 621), neither did Rothery ever plead or argue that the Bank's breach of such duty estopped it from recovering the disputed attorney's fees. The trial court's reliance on this unpleaded and unargued defense, of which the Bank had absolutely no notice, is plain reversible error.

Rule 8(c), Utah Rules of Civil Procedure, provides as follows:

In pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel . . . , and any other matter constituting an avoidance or affirmative defense.

Plainly, Rothery's Reply to the Bank's Counterclaim is the type of "pleading to a preceding pleading" contemplated by

Rule 8(c). See Resources Engineering, Inc. v. Siler, 94 Idaho 935, 500 P.2d 836 (1972); Bowers v. Edwards, 79 Nev. 384, 385 P.2d 783 (1963). Just as clearly, the trial court's theory that (i) the Bank had a duty to keep the Trustor under the Trust Deed advised of the Bank's expenses incurred in defending against the action and (ii) that the Bank's breach of that duty estops the Bank from claiming such expenses, must be affirmatively pleaded under Rule 8(c) as "estoppel [or] any other matter constituting an avoidance or affirmative defense."² Rothey's failure to plead estoppel based on the Bank's breach of its purported duty to inform the Trustor of the disputed attorney's fees precluded the

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"A general and almost universal identifying criterion of an affirmative defense is one in avoidance, or stated alternatively a direct or implicit admission of plaintiff's claim and assertion of other facts which would defeat a right to recovery."

Texas Gulf Sulphur Company v. Robles, 511 P.2d 963, 965 (Wyo. 1973). See Roberts v. Mitchell Bros. Truck Lines, 289 Or. 119, 611 P.2d 297, 301 (1980). The theory invented by the trial court falls well within this definition of the phrase "any other matter constituting an avoidance or affirmative defense" in Rule 8(c). The trial court found that the Bank was entitled to the disputed attorney's fees under the terms of the Trust Deed, but that the Bank's breach of its duty to keep the Trustor advised of such fees estopped the Bank from recovering them.

trial court from relying on such a theory to dispose of this case.

Rothey's Reply to the Bank's Counterclaim did utilize the word "estopped." (Reply to Counterclaim, Fourth, Fifth and Sixth Defenses; R. 80). Rothey's answers to the Bank's interrogatories, however, make clear that Rothey did not plead or intend to assert the estoppel theory adopted by the lower court. The "estoppel" pleaded in Rothey's Reply to the Bank's Counterclaim referred only to the following:

(a) that the Bank's acceptance of principal and interest due under the Note and Trust Deed "estopped" it from claiming the disputed attorney's fees. (Answers of Plaintiff to Defendant's First Set of Interrogatories, Nos. 7, 8 and 9; R. 153-154), and

(b) that the Bank, "as special administrator of the estate of Utahna P. Belnap, was entitled to seek the payment for all services rendered in that capacity as a part of said proceeding. By reason of the fact that [the Bank] failed to make application for reimbursement for all services rendered as part of this proceeding [the Bank] is thereby estopped from seeking those fees as part of the foreclosure of the subject Trust Deed." (Id.) (Emphasis added).

Most persuasively, however, Rothey's counsel, in argument at trial and in defending against the Bank's Motion for Partial Summary Judgment in the month prior to trial,

never stated or even hinted that Rothey asserted any defense, estoppel, or theory based upon the Bank's failure to advise the Trustor or her successor of the Bank's claims for expenses and attorney's fees. (R. 248-271; T. 2/8/83, at 50-81, 111-118; R. 546-577, 607-614).

Rothey simply never pleaded the estoppel theory adopted by the trial court. Consequently, Rothey could not rely on that theory and the trial court erred in adopting it. The law is clear that estoppel must be pleaded with particularity, and pleading one kind of estoppel does not permit proof of another. Kirk v. Kirk, 205 Okla. 482, 238 P.2d 808, 810 (1951); In re Anderson's Estate, 121 Mont. 515, 194 P.2d 621, 626-627 (1948). As this Court stated in Tracy Loan & Trust Co. v. Openshaw Investment Co., 102 Utah 509, 132 P.2d 388, 391 (1942), "Where a party seeks to raise an estoppel to a claim set forth in the pleadings, facts constituting an estoppel must be pleaded." (Emphasis added). See also Collett v. Goodrich, 119 Utah 662, 231 P.2d 730, 733 (1951). The only facts pleaded by Rothey with respect to estoppel concerned the Bank's acceptance of principal and interest due under the Note and Trust Deed and costs and expenses incurred by the Bank in connection with probate of the estate of Utahna P. Belnap. No facts were ever pleaded or presented at trial which constituted the estoppel found by the trial court.

In this state as in others, theories of estoppel or avoidance and affirmative defenses must be affirmatively pleaded or they are waived. In Collett v. Goodrich, 119 Utah 662, 231 P.2d 730 (1951), for example, the Court stated "the majority view [which] requires a party who has the opportunity to do so to specially plead an equitable estoppel. Where the estoppel is not pleaded, it is inadmissible." 231 P.2d, at 733. The court quoted the following from Homberger v. Alexander, 11 Utah 363, 40 P. 260, 262 (1895) as the obvious reason for the rule: "The object of the declaration is to give the defendant fair notice of the case he is called into court to meet." So here, counsel for the Bank prepared for trial unaware that he would be called upon to rebut the novel theory eventually adopted by the trial court. Indeed, since the theory adopted by the trial court was neither raised in Rothey's pleadings nor argued at or prior to trial, counsel for the Bank was not even called upon to rebut or offer evidence as to that theory. As will be more fully explained in the following sections of this Brief, counsel for Rothey was similarly caught off guard by the trial court's creative jurisprudence --- Rothey's counsel neither pleaded, argued nor produced any evidence to support the trial court's theory.

The trial court's error in adopting a theory of estoppel that was neither pleaded nor argued below requires

reversal of its judgment and a remand for a hearing to determine the appropriate amount of costs and attorney's fees that the Bank is entitled to under the Trust Deed. Maxey v. Jefferson County School District, 158 Colo. 583, 408 P.2d 970 (1965), is instructive in this regard. Plaintiff in that case sought a retroactive pay increase based upon certain teacher salary schedules. The case was tried and the trial court thereafter dismissed the complaint on the grounds of laches and estoppel since the plaintiff had neither complained about nor sought to enforce payment of the salary differential. In reversing the trial court's dismissal of the complaint, the Colorado Supreme Court noted the following:

Although defendant's Answer admits the employment and denies the claimed coverage, yet it fails affirmatively to plead laches or estoppel as required by Rule 8(c), R.C.P. Colo.

Nor does this record show any waiver by plaintiff in error of her right to object to defendant raising these issues at a later time. In this connection, the record discloses that such defenses were first urged upon the court orally at trial. Not having been pled, as required, we hold that the trial court erred in considering such defenses, especially over the objections of counsel for plaintiff in error.

408 P.2d, at 971.

The facts of the instant case are, of course, even more egregious than those which prompted the reversal in

Maxey. In that case, the party benefitting from the estoppel theory ultimately relied on by the trial court at least presented such theory to the court at trial. Here, in contrast, Rothery neither pleaded nor argued the estoppel theory utilized by the trial court. The Bank was consequently never accorded any opportunity to respond, even after the close of the evidence, to such theory. As the Court stated in Lagoon Co. v. Utah State Fair Association, 117 Utah 213, 214 P.2d 614, 616 (1950), "[t]he claim of estoppel must fail because of the lack of pleadings and evidence to allege and show such a defense."

POINT III

THE TRIAL COURT ERRED IN HOLDING THAT
THE BANK HAD A DUTY TO GIVE
NOTICE OF THE DISPUTED ATTORNEY'S
FEES TO THE TRUSTOR AND HER SUCCESSORS.

The novel, dispositive estoppel theory created without warning by the trial court is contrary to law. The trial court ruled that the Bank was estopped from claiming the disputed attorney's fees only because it breached a purported "duty" to give the Trustor under the Trust Deed "meaningful or substantive notice that it had claimed, was claiming, or would claim the attorney's fees" (Conclusion No. 6, R. 348; see T., 2/8/83, at 125, R. 621). No such duty exists in the law. It is difficult to disprove the existence of such a duty because neither Rothery nor the trial court offered any authority for its existence.

Rothey's failure in this regard is understandable since he never pleaded or argued for the imposition of such a duty.

As the trial court expressly concluded, the Trust Deed allows the Bank to defend against actions like the Actions and to add costs incurred in such defense to the amount secured by the Trust Deed. (Conclusions Nos. 3 and 4; R. 347-348). The relationship between the Trustor and its successors and the Bank that is established by the Trust Deed with respect to such costs is that of, or closely analogous to, indemnitor (the Trustor) and indemnitee (the Bank). As was stated in Rossmoor Sanitation, Inc. v. Pylon, Inc., 119 Cal. Rptr. 449, 532 P.2d 97, 100 (1975): "Indemnity may be defined as the obligation resting on one party to make good a loss or damage another party has incurred."

The trial court's imposition of a duty on the Bank, as indemnitee, to notify the Trustor or its successor, as indemnitor, of expenses incurred in defending against the actions is contrary to the law of those jurisdictions that have addressed this issue. The general rule is that unless specifically required by the terms of the indemnification agreement itself, an indemnitee has no duty to notify his indemnitor that he is incurring expenses for which the indemnitor may ultimately be liable.

In Boston and Maine Railroad v. Bethlehem Steel Co., 311 F.2d 847 (1st Cir. 1963), plaintiff-railroad

maintained a spur track for the convenience of Bethlehem. Bethlehem agreed to indemnify the railroad for any injury or damage arising out of the railroad's operation of the spur. A Bethlehem employee was injured on the spur and sued the railroad. The railroad notified Bethlehem of the suit but did not attempt to force Bethlehem to defend the suit. The railroad settled the case and looked to Bethlehem for indemnification. Bethlehem resisted on that ground that it should have been called on to defend the suit. The court disagreed with Bethlehem, stating:

Unless the indemnity agreement so specifies, neither Massachusetts, nor any other court that we have been able to discover, requires an indemnitee to notify an indemnitor to come in and defend. Indeed, he need not even give notice of the claim.

311 F. 2d, at 849 (emphasis added).

The court in Tillman v. Wheaton-Haven Recreation Association, 580 F.2d 1222 (4th Cir. 1978), also states the general rule as follows:

We know of no authority to support the proposition that notice to a primary obligor of the basic claim, and an invitation to defend the same, is a condition precedent to the obligation of a primary obligor to indemnify a secondary obligor, who has paid the basic claim.

580 F.2d, at 1230.

Premier Corp. v. Economic Research Analysts, 578 F.2d 551 (4th Cir. 1978), is similarly instructive.

Plaintiff, an issuer of securities, sued a broker for indemnification. Plaintiff and the broker had agreed that the broker would sell certain of plaintiff's investment contracts. The broker promised to abide by applicable securities laws and agreed to indemnify plaintiff in the event that the broker violated such laws. The broker sold some of the investment contracts in a state, North Carolina, in which the offering was not registered. North Carolina threatened to indict plaintiff but agreed to forestall indictment in return for plaintiff's reimbursement of all buyers in the state. Plaintiff paid out a substantial sum and looked to the broker for indemnification. The broker defended on the ground that he had not been notified of plaintiff's settlement with the state. The court rejected the brokers argument, stating:

Nor is [plaintiff's] claim barred by the absence of formal notice to the broker that [plaintiff] was required to rescind the sales to North Carolina residents. Although no North Carolina precedent dealing precisely with this issue has been called to our attention, we believe that the state's Supreme Court would adhere to the general rule that notice is unnecessary unless the contract of indemnity requires it.

578 F.2d, at 554.

As these cases make clear, an indemnitee is not under any duty, absent a contrary indication in the indemnity agreement, to notify his indemnitor of claims that may bind

the indemnitor. The Trust Deed in this case makes no provision for the giving of notice to the Trustor in the event the Bank exercises its right to defend against attacks on the Trust Deed. Consequently, and contrary to the trial court's assumption, the Bank was under no duty to inform the Trustor of the subject attorney's fees.

Besides being contrary to the law on this issue, the Bank respectfully submits that the estoppel theory created by the trial court is both ill-founded and almost universal in its application --- a dangerous combination. The Trust Deed's covenant that the Trustor shall pay certain attorney's fees and expenses incurred by the Beneficiary is not in principle different than any party's agreement in any contract to be liable for another's prescribed expenses that may be incurred over time. The unprecedented "duty" created by the trial court requires that any party to such a contract must establish, as a condition precedent to recovery, that he has given the responsible party "meaningful" and "substantive" notice that it "had claimed, was claiming, or would claim" the damages which the responsible party had agreed to reimburse. Just a few of the results of that preposterous principle are offered as examples:

1. All contracts containing a covenant that one party will pay specified expenses of another party are as a matter of law supplemented by an unwritten

condition precedent to recovery that the party seeking reimbursement must give the other party "meaningful" and "substantive" notice of the claim for reimbursement as reimbursable expenses are incurred --- an obligation for which the parties did not contract, to which the parties did not agree, and over which the parties have no control. The trial court's theory imposes a material provision in all contracts, which the parties never considered and to which the parties never agreed.

2. If the party entitled to reimbursement cannot locate the responsible party to give him notice, the party's contractual right to reimbursement is extinguished.

3. In every lawsuit where such damages are sought, the party entitled to reimbursement must not only prove his entitlement to damages and the amount thereof, he must also prove that he gave the other party "meaningful" and "substantive" notice of his damages as they were incurred --- a fact-intensive finding that will practically eliminate the possibility of summary judgment in such contract cases and will complicate and protract all contract trials.

4. If this Court adopts the trial court's theory, this Court can reasonably expect an avalanche of litigation directed at the nature, form, content,

frequency and timeliness of notice that is required in such cases. The new defense of insufficient form, content, frequency or timeliness of notice of the claimant's damages will become a standard affirmative defense in contract actions.

5. In cases where attorney's fees are the item for reimbursement (in all cases where the prevailing party is entitled to recover his attorney's fees), the party claiming recovery must "meaningfully" advise his opponent of his attorney's fees as he incurs them, thereby giving to his opponent information as to the amount of time being expended and the economic burden to which the claimant is being subjected in the litigation --- otherwise confidential information that the opponent can use to his strategic advantage in settlement discussions and otherwise.

6. A multitude of innocent parties who are entitled to damages will be deprived of their due by a hypertechnical principle that the average, reasonable person would never follow or expect. Even Rothery's counsel, for example, who is plainly able and was motivated to avoid payment here, never conceived of this principle.

The trial court's theory, being both devoid of support in the law and lacking in logic or common sense, must be rejected.

POINT IV

THE TRIAL COURT ERRED IN FINDING
THAT THE BANK FAILED TO NOTIFY THE
TRUSTOR OF THE DISPUTED ATTORNEY'S FEES.

Assuming that the trial court properly considered its "estoppel" theory despite Rothery's failure to plead it and that the trial court properly held that the Bank had a duty to notify the Trustor or its successor of its attorney's fees despite the fact that the law states plainly that no such duty exists, the fact remains that no evidence produced at trial supports either (i) the finding that the Bank breached the asserted "duty" or (ii) the finding that the Trustor or her successor relied to his or her detriment upon that breach.

A. No Evidence Supports the Finding that the Bank Failed to Apprise the Trustor or her Successor of the Bank's Claim to or Magnitude of Attorney's Fees.

The finding which supports the trial court's estoppel theory was first stated by the district court as follows:

That none of the statements [reflecting the disputed attorney's fees] were ever delivered to or shown to Utahna P. Belnap, LeGrande L. Belnap or any of their successors or assigns. The Court specifically finds that neither Plaintiff nor anyone claiming by, through or under him had knowledge of the nature, extent or amount of the attorney's fees being paid by the bank, nor were any such

persons given an opportunity to review such statements or fees at the time they were incurred or within a reasonable time thereafter.

(Finding No. 14; R. 307). After counsel for the Bank protested that there was no evidence to support this finding, the trial court amended its finding as follows:

That all of the statements were addressed to and received by the bank and there is no evidence that any of the statements were delivered to or shown to Utahna P. Belnap, LeGrande Belnap or any of their successors or assigns including plaintiff. The Court therefore specifically finds that there were no meaningful or substantive discussions between the bank, or any of its agents, and the Plaintiff or anyone claiming by, through or under him concerning the amount or nature of the attorney's fees which the bank intended to charge as a part of the Trust Deed. . . .

(Finding No. 14; R. 345) (Emphasis added).

The trial court thus amended itself and, instead of finding that the statements were not delivered to the Trustor, finally found that there was "no evidence" that the statements had been delivered. It is, perhaps, commendable that the trial court was candid in this regard. But, of course, the fact that there was no evidence that any statements were delivered to the Trustor carries with it the necessary finding that there was no evidence that such statements were not delivered. The lack of evidence as to delivery or non-delivery of the statements is not surprising. Rothery had no incentive to produce such evidence because he

had neither pleaded nor argued any legal theory that relied on such evidence. Similarly, the Bank presented no evidence concerning delivery of the statements to the Trustor or her successors because such evidence did not affect either its claim to foreclose the Trust Deed or Rothery's defenses to that claim.

As has already been discussed, neither the "duty" first conceived by the trial court nor the estoppel that supposedly follows from a breach of that duty was either pleaded or argued by Rothery. The trial transcript in this case can be searched in vain, therefore, for any discussion of, or evidence relating to, such a "duty" or estoppel. A synopsis of the evidence offered and the testimony taken, however, reveals just how far the trial court was stretching to find factual support for its unprecedented theory.

Rothery himself was the first witness. He testified that he was involved in both of the Actions as counsel to LeGrande Belnap. (T., 2/7/83, at 27-33; R. 401-405). In light of this clear testimony, it is difficult to understand the trial court's finding that the Trustor under the Trust Deed or her successor was unaware of the Bank's efforts in defending against the Actions. Rothery is the successor to the Trustor and has been since January 13, 1978. (Verified Complaint, Paragraph 12; R. 4). Prior to that time, Rothery acted as counsel to the Trustor's successor. Rothery even

testified that the issue of the Bank's attorney's fees in relation to the Actions was specifically brought to his attention. (T., 2/7/83, at 32; R. 404).

James Lowrie, one of the attorneys who represented the Bank in its defense against the Actions, was the next witness. (T., 2/7/83, at 36-120; R. 408-491). Mr. Lowrie testified primarily to a set of statements offered by the Bank to support its claim to the disputed attorney's fees. Rothey's counsel questioned Mr. Lowrie extensively as to whether the statements actually related, in their entirety, to the Actions, or whether they included attorney's fees for other matters as well. Mr. Lowrie was never asked, and never stated, whether or not he or his law firm communicated with the Trustor with respect to the Bank's defense of the Actions or the amount of attorney's fees incurred as a result.

Donn Clarkin was the next witness. Mr. Clarkin is employed by the Bank and testified about the Note, Trust Deed and the Bank's acceptance of the principal and interest due thereunder. (T., 2/8/83, at 5-13; R. 501-509).

Bruce Maak, counsel for the Bank herein, then testified as to attorney's fees incurred herein. (T., 2/8/83, at 14-24; R. 510-520).

Rothey was then called as a rebuttal witness. (T., 2/8/83, at 24-44; R. 520-540). His counsel inquired as to his fees charged with regard to the Actions.

Kay Lewis was then called. He testified as to a "typical" attorney's fee for a trustee's sale. (T., 2/8/83, at 44-49; R. 540-545).

The foregoing summary makes clear that there was no evidence offered on the issue whether the Bank gave its counsel's statements to Rothery or his predecessors.

Since estoppel is an affirmative defense, its proponent, Rothery, has the burden of proving it. Corporation Nine v. Taylor, 30 Utah 2d 47, 513 P.2d 417, 420 (1973). No evidence having been offered on the issue, the defense fails.

Taken as a whole, however, the undisputed evidence establishes that Rothery and his predecessors knew that the Bank claimed an entitlement to recover the subject fees and were advised of the amount thereof. That the Bank claimed the right to recover such fees is plainly spelled out in paragraph 4 of the Trust Deed itself (Plaintiff's Exhibit 2), which was a matter of public record and was the very object of dispute in the Actions. Rothery testified that during his representation of LeGrande Belnap in the Actions, he had occasion to discuss settlement with the Bank's counsel "several times." (T., 2/7/83, at 31-32; R. 403-404). As Rothery stated:

The settlement always involved the question of the trust deed as it affected the property which Mr. Belnap claimed title to and it always involved the propriety of attorney's fees growing out of Walker Bank's defense of any claims that Mr. Belnap had raised against them.

(T., 2/7/83, at 32; R. 404).

In addition to advice received during settlement discussions, Rothey was advised of the amount of attorney's fees then claimed by the Bank and the fact that the Bank claimed the fees in question in pleadings in the Actions. The Bank's Amended Counterclaim in one of the Actions alleges in part at paragraph 12:

That the plaintiff in this action by the filing of this Complaint in this action and in the case of LeGrande L. Belnap v. Walker Bank and Trust Company, et al., Civil No. 209266, and the prosecution of said complaints caused defendant and counterclaimant to incur fees, costs and expenses including attorney's fees in excess of \$10,000.00 in defense of the validity of said Trust Deed and Promissory Note, which sum constitutes an interest in and lien upon the property sought to be foreclosed hereunder.

(Plaintiff's Exhibit 5; T., 2/7/83, at 14; R. 386). The Amended Counterclaim was received by Rothey. (T., 2/8/83; R. 558-559). Rothey therefore knew during the course of the Actions that the Bank had incurred and claimed to recover at least \$10,000.00 in fees and expenses. Finally, since Rothey was counsel to LeGrande Belnap in the Actions, he (and his client) obviously had firsthand knowledge of the Bank's counsel's efforts and activities in defending against the Actions. (T., 2/7/83, at 27-31; R. 399-403).

The evidence outlined above is the only evidence at trial that bears on whether Rothey or his predecessor knew of

the Bank's claim to attorney's fees. That evidence establishes that Rothery and his predecessors did know of the Bank's claim to the fees in question, did know of an exact amount of fees claimed by the Bank on at least one occasion, and did "several times" during settlement discussions discuss attorney's fees incurred by the Bank in the Actions. There was no evidence that further "meaningful" and "substantive" discussions did not occur. No evidence supports the trial court's finding to the contrary on an issue upon which Rothery had the burden of proof. The trial court's finding of insufficient notice cannot be sustained.

B. The Trial Court did not Find, and No Evidence Supports, the Existence of Detrimental Reliance, an Essential Ingredient of Estoppel.

Even if there was evidence to support the finding that the Bank failed to inform the Trustor of the disputed attorney's fees, there was no evidence that the Trustor or her successors relied on such failure. Indeed, the trial court failed to even make a finding as to reliance. Since reliance is an essential element of equitable estoppel under Utah law, the trial Court's "estoppel" theory fails.

In Jones v. Department of Employment Security, 641 P.2d 156, 161 (Utah 1982), this Court set out the following:

Elements of equitable estoppel are as follows: conduct by one party which leads another party, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is

permitted to repudiate his conduct.
(Emphasis added).

Leaver v. Grose, 610 P.2d 1262, 1264 (Utah 1980) is also
instructive. This Court stated there:

The doctrine of estoppel has application
when one, by his acts, representations,
or conduct, or by his silence when he
ought to speak, induces another to
believe certain facts exist and such
other relies thereon to his detriment.
(Emphasis added).

See also Celebrity Club v. Utah Liquor Control Commissioner,
602 P.2d 689, 694 (Utah 1979).

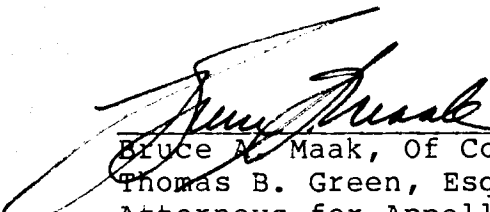
As these cases make clear, even if (i) Rothery had
pleaded the trial court's estoppel theory, (ii) the law
imposed upon the Bank a duty to inform the Trustor of the
disputed attorney's fees, and (iii) there was evidence that
the Bank had breached said duty, the trial court should still
be reversed because it failed to find that the Trustor relied
on such a breach to his detriment and because there is no
evidence to support such a finding. The record can be
searched in vain for any evidence that Rothery or his
predecessors in interest would have acted any differently
than they did had the Bank notified them of its claims and
the amounts of the disputed attorney's fees. A finding and
evidence of such reliance are essential elements of an
estoppel theory. Since there is neither any finding nor any
evidence of the essential element of detrimental reliance,
the trial court's judgment must be reversed.

CONCLUSION

The trial court's judgment cannot be sustained and must be reversed for six independently sufficient reasons: First, the trial court found every fact necessary to support the Bank's recovery of its attorney's fees and costs incurred in the Actions. Second, the trial court expressly rejected each defense advanced by Rothery. Third, the trial court based its ruling upon a defense and theory that was never pleaded or argued by Rothery and of which the Bank had absolutely no notice. Fourth, the trial court's theory is contrary to law and good sense. Fifth, no evidence supports the finding, essential to the trial court's dispositive theory, that the Bank failed timely to advise Rothery or his predecessors that it claimed the subject fees. Sixth, the trial court made no finding, and no evidence establishes the essential requirement, that Rothery or his predecessors relied in any respect upon the Bank's conduct. A plainer case for reversal cannot be conceived.

RESPECTFULLY SUBMITTED this 23 day of February, 1984.

ROOKER, LARSEN, KIMBALL & PARR



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First Interstate Bank of Utah

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing BRIEF OF APPELLANT-DEFENDANT were served this 24 day of February, 1984 by mailing on said date two copies thereof by United States Mail, first class postage prepaid, addressed to:

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