

1987

Valley Bank and Trust Company v. Rite Way
Concrete Forming, Inc., Peter Lowe, Jr., J. Randall
Outsen, Tracy M. Jones, Richard H. Lowe, and Don
Bailey Construction, Inc. Peter Lowe, Jr., and
Richard H. Lowe v. Don Bailey Construction, Inc.,
Don Bailey, Draper Bank, and Jacobsen-Robbins
Construction Company : Petition for Writ of
Certiorari

Utah Supreme Court

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K.L. McLiff; Jackson, McLiff & Mower; Attorneys for Respondents.

Paul D. Veasy; Biele, Haslam & Hatch; Attorneys for Petitioner.

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870348

IN THE SUPREME COURT OF THE STATE OF UTAH

VALLEY BANK AND TRUST COMPANY,
a Utah corporation,

Plaintiff and Petitioner,

v.

RITE WAY CONCRETE FORMING,
INC., a Utah corporation,
PETER LOWE, JR., J. RANDALL
OUTSEN, TRACY M. JONES,
RICHARD H. LOWE, and DON
BAILEY CONSTRUCTION, INC.,
a Utah corporation,

Defendants.

Certiorari Docket No. 870348
#13

PETER LOWE, JR., and RICHARD
H. LOWE,

Cross-Complainants, Third-
Party Plaintiffs and
Respondents,

v.

DON BAILEY CONSTRUCTION, INC.,
a Utah corporation,

Cross-Defendants,

and

DON BAILEY, DRAPER BANK, a
Utah corporation, and JACOBSEN-
ROBBINS CONSTRUCTION COMPANY,
INC., a Utah corporation,

Third-Party Defendants.

FILED

SEP 3 0 1987

PETITION FOR WRIT OF CERTIORARI FROM A DECISION
OF THE UTAH COURT OF APPEALS

HONORABLE R.W. GARFF
HONORABLE GREGORY K. ORME
HONORABLE RICHARD C. DAVIDSON

BRIEF OF PETITIONER

Paul D. Veasy (3964)
BIELE, HASLAM & HATCH
Attorneys for Petitioner,
Valley Bank and Trust Company
50 West Broadway, Fourth Floor
Salt Lake City, Utah 84101
Telephone: (801) 328-1666

K.L. McIff (G2193)
JACKSON, McIFF & MOWER
Attorneys for Respondents,
Peter M. Lowe, Jr. and
Richard M. Lowe
151 North Main Street
Richfield, Utah 84701

LIST OF PARTIES

Paul D. Veasy
BIELE, HASLAM & HATCH
Attorneys for Petitioner,
Valley Bank and Trust Company
50 West Broadway, Fourth Floor
Salt Lake City, Utah 84101

K. L. McIff
JACKSON, McIFF & MOWER
Attorney for Respondents,
Peter M. Lowe, Jr. and
Richard H. Low
151 North Main Street
Richfield, Utah 84701

Arthur F. Sandack
Attorney for Tracy Jones
370 East Fifth South
Salt Lake City, Utah 84111

Dwight L. King
Attorney for Draper
Bank and Trust
2121 South State Street
Salt Lake City, Utah 84115

Arthur H. Nielsen
Richard Hincks
NIELSEN & SENIOR
Attorneys for Jacobsen-Robbins
Construction Company
Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COURT OF APPEALS ERRED IN REVERSING THE SUMMARY JUDGMENT GRANTED BY THE TRIAL COURT IN HOLDING THAT AN ISSUE OF FACT EXISTS AS TO THE RIGHTS OF THE RESPONDENTS AS GUARANTORS TO SUBROGATION TO THE COLLATERAL GIVEN AS SECURITY TO THE PETITIONER, VALLEY BANK AND TRUST COMPANY.

2. WHETHER THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN APPLYING PROVISIONS OF THE UNIFORM COMMERCIAL CODE TO THE GUARANTY AGREEMENT OF THE PETITIONER, VALLEY BANK AND TRUST COMPANY.

OPINION OF THE COURT OF APPEALS

The opinion of the Court of Appeals is contained at 64 Utah Adv. Rep. 66, a copy of which is attached as Exhibit "A," in the appendix to this brief.

JURISDICTION OF THE UTAH SUPREME COURT

The jurisdiction of this court to review a decision of the Court of Appeals under a petition for a writ of certiorari is conferred under Rule 42, R. Utah S. Ct., and under Utah Code Ann. § 78-2-2(5) (1986). The date of the entry of the decision of the Court of Appeals is September 1, 1987.

STATUTES, ORDINANCES, RULES, REGULATION, ETC.

Utah Code Ann. § 70A-3-102(1)(e)(1965)

(1) In this chapter unless the context otherwise requires . . .

(e) "Instrument" means a negotiable instrument.

Utah Code Ann. § 70A-3-606(1)(1965) Impairment of recourse or of collateral.

(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder

(a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or

(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse. (emphasis added)

Utah Code Ann. § 78-2-2(5)(1986)

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

STATEMENT OF THE CASE

Petitioner, Valley Bank and Trust Company ("Valley Bank" hereafter), appeals from the decision of the Court of Appeals (See Exhibit "A" in Appendix) which reverses and remands the granting of summary judgment by the trial court as to the liability of the Respondents, Peter Lowe, Jr. and Richard H. Lowe

(collectively "Lowes" hereafter), as guarantors of the Promissory Note executed by Rite Way Concrete Forming, Inc. ("Rite Way" hereafter).

Summary judgment was rendered by the Honorable Dean E. Conder on March 5, 1984. (See Exhibit "B" in the Appendix) The Court of Appeals reversed and remanded the awarding of summary judgment by the trial court. Valley Bank and Trust Company v. Rite Way Concrete Forming, Inc., et al., 64 Utah Adv. Rep. 66, 67 (Ct. App. 1987).

STATEMENT OF FACTS

Rite Way executed a Promissory Note - Security Agreement, dated June 17, 1977, in the principal sum of \$15,000, together with interest at 12.75% per annum, payable in forty-eight (48) equal monthly installments, beginning on July 24, 1977. (R. 53, 54). The Promissory Note was secured by collateral which included concrete forming equipment. Valley Bank v. Rite Way, 64 Utah Adv. Rep. at 67.

On June 1, 1977, the Lowes executed guaranty agreements with Valley Bank guaranteeing the existing and future obligations of Rite Way with Valley Bank. (R. 57, 59).

After execution of the note and security agreement, the Lowes conveyed all of their interest in Rite Way to Don Bailey Construction, Inc., ("Bailey") which assumed the \$15,000 obligation to Valley Bank. In connection with this transaction, Rite Way transferred ownership of the cement forming equipment to Bailey. Bailey subsequently subcontracted to do work for Jacobsen-Robbins Construction Company, a general contractor. Id.

Upon Bailey's failure to complete the subcontract, it surrendered the concrete forming equipment to Jacobsen-Robbins and defaulted on the loan obligation to Valley Bank. Upon Bailey's default, Valley Bank sued and entered default judgment against Bailey. Judgment was not satisfied by Bailey because the corporation ceased doing business without satisfying the debt. Id.

Valley Bank accelerated the note and demanded that the Lowes pay the balance of the obligation of \$4,494.71 because of their personal guaranties. (R. 50-52) Lowes refused to pay the balance, but, instead, met with Valley Bank officers and offered to locate the collateral and assist with its repossession. Lowes asserted that they gave Valley Bank a specific description of the equipment and its location, and authorized Valley Bank to repossess it. Valley Bank never acquired actual physical control over the collateral. Id.

On October 12, 1982, without the Lowes' awareness or consent, and reserving its rights against Rite Way, Valley Bank released its interest in the cement forms in Jacobsen-Robbins' possession after Jacobsen-Robbins notified Valley Bank that Conesco claimed ownership of the forms. ¹

Valley Bank brought a successful motion for summary judgment against the Lowes. The trial court in a memorandum decision (R. 192-194) (see Exhibit "C" in Appendix) found the Lowes' guaranty was absolute and unconditional because it

¹ The Court of Appeals assumed the truthfulness of the Lowes' statement that these cement forms were substantially the same equipment described in Valley Bank's security agreement. Valley Bank v. Rite Way, 64 Utah Adv. Rep. at 67.

provided that the guarantors "severally guarantee payment when due of any and all obligation of Borrowers to Bank when due or any and all obligations of Borrower to Bank now existing of which may hereafter arise of whatsoever nature and however represented, and whether secured or unsecured." (emphasis in original). Id. The trial court entered judgment in favor of Valley Bank for \$4,494.71 principal, \$1,884.78 interest, \$2,800 attorney's fees and \$51.50 court costs.

ARGUMENT FOR ISSUANCE OF THE WRIT

A writ of certiorari should be granted because the decision of the Court of Appeals decides a question of state law that is in conflict with prior decisions of this court. Under the decision, the Court of Appeals allows a claim for subrogation by a guarantor without having the guarantor first make payment of the underlying obligation.

In addition, a writ of certiorari should also be granted because the Court of Appeals applies provisions of the Uniform Commercial Code that, as a matter of law, cannot be applied to Valley Bank's guaranty agreements with the Lowes as the agreements are not subject to the Uniform Commercial Code.

POINT I

THE COURT OF APPEALS ERRED IN REVERSING THE SUMMARY JUDGMENT GRANTED BY THE TRIAL COURT IN HOLDING THAT AN ISSUE OF FACT EXISTS AS TO LOWES' RIGHTS OF SUBROGATION TO THE COLLATERAL GIVEN AS SECURITY TO VALLEY BANK.

The Court of Appeals uses the analysis of Strevell-Patterson Co. v. Francis, 646 P.2d 741 (Utah 1982), in holding that the Valley Bank guaranty agreement is an absolute guaranty of payment. Valley Bank v. Rite Way, 64 Utah Adv. Rep. at 68.

The language in the guaranty agreement states as follows:

"VALLEY BANK AND TRUST COMPANY," a corporation, hereinafter referred to as "Bank," has extended credit and/or agreed to extend credit and/or furnished or agreed to furnish other accommodations to the person hereinafter identified as "Borrower," and the undersigned Guarantors, in consideration of such credit and/or accommodations by Bank to Borrower jointly and severally guarantee payment when due of any and all obligations of Borrower to Bank now existing or which may hereafter arise of whatsoever nature and however represented, and whether secured or unsecured. (emphasis added)

(Copies of the guaranty agreements are attached as Exhibit "D," in the Appendix) The Court of Appeals then states that the Lowes' liability for the loan with Valley Bank became fixed upon the default of the primary obligor, Bailey. Id.

The Court of Appeals next addresses the issue of subrogation. The court states that a guarantor, upon payment of the guaranteed obligation, has a right of subrogation to any collateral pledged as security. (emphasis added) Id. The Court of Appeals erred in reversing the summary judgment because it awards rights of subrogation to the Lowes, as guarantors, even though the Lowes never made payment on the guaranteed obligation. The right of subrogation to the collateral does not exist until the Lowes make payment of the guaranteed obligation.

The very legal sources cited by the Court of Appeals supports the rule that a guarantor does not have the right to subrogation and the corresponding right to the collateral given as security until the guarantor makes payment of the guaranteed obligation. See Behlen Mfg. Co. v. First National Bank, 28 Colo. Ct. App. 300, 472 P.2d 703, 706 (1970). The Court of Appeals relies upon this Colorado case throughout its analysis and yet fails to take into account the facts of the case. In Behlen Mfg. the guarantor first made payment of the underlying obligation in order to have rights of subrogation. Id.

Only when the guarantor makes payment of the guaranteed obligation do the rights of subrogation accrue. Valley Bank v. Rite Way, 64 Utah Adv. Rep. at 68. In the instant action, the Lowes did not pay the underlying obligation and therefore are not entitled to any claim for subrogation. The Court of Appeals fails to acknowledge this important rule of law and therefore gives the Lowes rights of subrogation to the collateral.

The effect of the decision by the Court of Appeals on the issue of subrogation makes Valley Bank's guaranty agreement no longer an "unconditional" guaranty of payment but instead a "conditional" guaranty of collection. The Court of Appeals' analysis is inconsistent with this court's opinion in Strevell-Patterson, supra, which sets forth the distinction between a guaranty of payment and a guaranty of collection. Because the Court of Appeals fails to properly apply the law with respect to subrogation, it errs in ruling that an issue of fact exists to preclude summary judgment from being affirmed on appeal.

POINT II

THE COURT OF APPEALS ERRED AS A MATTER OF LAW
IN APPLYING PROVISIONS OF THE UNIFORM COMMERCIAL
CODE TO THE GUARANTY AGREEMENT OF VALLEY BANK.

After analyzing the general rule of subrogation rights of a guarantor after it has made payment on the guaranteed obligation, the Court of Appeals then supports its conclusion by stating that the general rule has been codified in Utah in the Uniform Commercial Code and as contained at Utah Code Ann. § 70A-3-606(1) (1980). Valley Bank v. Rite Way, 64 Utah Adv. Rep. at 68. The Court of Appeals references this particular section of the Uniform Commercial Code to establish that there are issues of fact that justify reversing the trial court's summary judgment. In remanding the case to the trial court, the Court of Appeals also sets forth the issues for the trial court to review and specifically makes reference to the provisions of the Uniform Commercial Code, § 70A-3-606(1) (1980). Id.

The Court of Appeals erred in applying the Uniform Commercial Code to the guaranty agreement of Valley Bank. The guaranty agreements executed by the Lowes are dated June 1, 1977. (R. 57, 59). The Promissory Note - Security Agreement executed by Rite Way for the loan from Valley Bank is dated June 17, 1977. (R. 53, 54). The guaranty agreements are not a part of nor are they the same document as the Promissory Note - Security Agreement.

The Uniform Commercial Code sections referred to by the Court of Appeals, specifically § 70A-3-606(1), should not be applied to the guaranties executed by the Lowes. In order to

apply the provisions of the Uniform Commercial Code to the guaranty agreements, the "instrument" as referred to in § 70A-3-606(1) must be a negotiable instrument as defined under § 70A-3-102(1)(e). The guaranty agreements are not negotiable instruments but rather separate contracts of guarantee. This argument was raised to the Court of Appeals not only at oral argument but also in the briefs presented to the court. The Court of Appeals did not address the negotiability requirement.

Numerous jurisdictions have held that a guaranty agreement of this nature is not a negotiable instrument but rather a separate contract of guarantee and, as such, the provisions of the Uniform Commercial Code are not applicable. See, e.g., Crown Life Ins. Co. v. LaBonte, 111 Wis.2d 26, 330 N.W.2d 201 (1983); Halpin v. Frankenberger, 231 Kan. 344, 644 P.2d 452, 456 (1982); Kansas State Bank and Trust Co. v. DeLorean, 7 Kan.App.2d 246, 640 P.2d 343, 350 (1982); First Nat. Bank of Albuquerque v. Energy Eq. Inc., 91 N.M. 11, 569 P.2d 421, 426 (1977). ²

The Court of Appeals erred in applying the provisions of the Uniform Commercial Code to the Valley Bank guaranty agreement. The code provisions do not apply to a guaranty agreement that is not by itself a negotiable instrument.

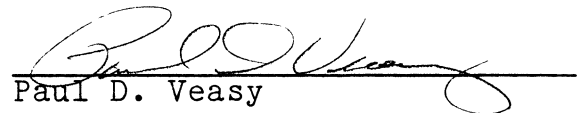
The Utah Supreme Court has addressed the use of the provisions of the Uniform Commercial Code to a guaranty agreement in Continental Bank and Trust Co. v. Utah Security Mortgage, Inc., et al., 701 P.2d 1095 (Utah 1985). In that decision the court never addresses the argument that the provisions of the Uniform Commercial Code were not applicable to the guaranty agreement of Continental Bank and Trust Company.

CONCLUSION

As a matter of law the Court of Appeals erred in its decision. A right of subrogation does not exist for a guarantor until the underlying debt has been paid. The Lowes never paid the underlying obligation to entitle them to rights of subrogation to the collateral. Furthermore, as a matter of law, the Court of Appeals erred in applying the provisions of the Uniform Commercial Code to the guaranty agreement of Valley Bank. The agreement is not a negotiable instrument to be included within the provisions of the Uniform Commercial Code. Petitioner, Valley Bank and Trust Company, respectfully requests that a writ of certiorari be granted.

DATED this 30 day of September, 1987.

BIELE, HASLAM & HATCH


Paul D. Veasy
Attorneys for Petitioner

APPENDIX

the certificates in this form [was] a tacit acquiescence in, and submission to, the bylaw." *Id.* The court concluded:

We know of no rule of law which forbids stock-holders to form with each other a convention of this nature. It is not forbidden by the terms of the charter, and certainly cannot be held to be against public policy [A]lthough the silence of the lawgiver in a particular charter, is a strong argument against the implication of such a power as an incident to the administration of the corporation,* it is no reason for frustrating the wishes and agreement of the stockholders themselves.

Id. at 317-18. See also W. Fletcher, *Cyclopedia of the Law of Private Corporations*, §1858 (rev. perm. ed. 1985).

In more recent cases, courts have reiterated the nature and effect of bylaws. In *Dentel v. Fidelity Sav. and Loan Assoc.*, 539 P.2d 649 (Or. 1975), the Supreme Court of Oregon held, "The bylaws of the corporation have been termed a contract between the members of the corporation, and between the corporation and its members." *Id.* at 650-51. The Court of Appeals of Oregon added, "[A]n invalid bylaw can be enforced as a contract. There are two principal limitations on the enforcement of an invalid bylaw as a contract. First, such indirect enforcement is only possible against a stockholder who has assented to the bylaw ... [and second] the substance of the bylaw must not be inconsistent with public policy." *Jones v. Wallace*, 616 P.2d 575, 577 (Or. App. 1980).

Under the foregoing analysis, article 12 of the bylaws was perhaps invalid as a matter of general corporate law since it arguably allowed for forfeiture of stock without charter authorization. Nevertheless, summary judgment shall be granted only if the evidence before the court shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). As a matter of contract law, several material issues of fact exist which preclude entry of partial summary judgment. Was there a contract between the parties? Plaintiff argues the bylaws were never signed or adopted nor did he or McBride ever agree to them.³ Defendants argue all the parties agreed to the bylaws. What do the ambiguous provisions of the bylaw/contract mean? At trial, defendants argued plaintiff's stock automatically reverted upon termination of his employment with Dalbo, Inc. If so, why did defendants negotiate with plaintiff to purchase his stock and why was McBride paid for his? On appeal, defendants argue article 12 did not provide for a forfeiture, but rather a buy-sell

agreement. Another interpretation of article 12 is that it created a condition precedent, i.e., three years of employment, to the vesting of stockholder status. Such ambiguity creates a material issue of fact, see *Seashores Inc. v. Hancey*, 738 P.2d 645 (Utah App. 1987), and highlights the difficulty in resolving the case on summary judgment.

We hold the trial court erred in granting plaintiff's motion for partial summary judgment and we reverse. Since the partial summary judgment set into play the entire chain of subsequent proceedings, we also reverse all subsequent orders and judgments and remand the case for trial.

Russell W. Bench, Judge

WE CONCUR:

Judith M. Billings, Judge

Gregory K. Orme, Judge

1. "Any person who is a shareholder of record, upon written demand stating the purpose thereof, shall have the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its books and records of account, minutes and record of shareholders and to make extracts therefrom. A proper purpose means a purpose reasonably related to the person's interest as a shareholder."

2. "Any officer or agent who, or a corporation which, shall refuse to allow any such shareholder, or his agent or attorney, so to examine and make extracts from its books and records of account, minutes, and record of shareholders, for any proper purpose, shall be liable to such shareholder in a penalty of 10% of the value of the shares owned by such shareholder, in addition to any other damages or remedy afforded him by law; but no such penalty shall exceed \$5,000."

3. Bylaws need not be signed to be adopted. *Marsh v. Mathias*, 19 Utah 350, 56 P. 1074 (1899).

Cite as
64 Utah Adv. Rep. 66

IN THE UTAH COURT OF APPEALS

VALLEY BANK AND TRUST COMPANY,
a Utah corporation
Plaintiff,

v.

RITE WAY CONCRETE FORMING, INC.,
a Utah corporation, Peter Lowe, Jr. J.
Randall Outsen, Tracy M. Jones, Richard H.
Lowe, and Don Bailey Construction, Inc., a
Utah corporation,
Defendants.

and

Peter Lowe, Jr., and Richard H. Lowe,
Cross-Complainants, Third-Party
Plaintiffs and Appellants,

v.

Don Bailey Construction, Inc., a Utah

For complete Utah Code Annotations, consult Code Co's Annotation Service

EXHIBIT NO. _____

corporation,

Cross-Defendants and Respondents,
and
Don Bailey, Draper Bank, a Utah corporation,
and Jacobsen-Robbins Construction
Company, Inc., a Utah corporation,
Third-Party Defendants.

Before Judges Orme, Davidson and Garff.

No. 860018-CA

FILED: September 1, 1987

THIRD DISTRICT

Honorable Dean E. Conder

ATTORNEYS:

Arthur H. Nielsen, Richard Hincks for
Jacobsen-Robbins.

Dwight L. King for Draper Bank.

Arthur F. Sandack for Tracy Jones.

K. L. McIlff for Lowes.

Paul D. Veasy, W. Jeffery Fillmore for Valley
Bank.

OPINION

GARFF, Judge:

Defendants Peter Lowe, Jr. and Richard H. Lowe appeal from a summary judgment in favor of plaintiff Valley Bank and Trust (Bank) finding defendants liable as guarantors of a promissory note executed by Rite Way Concrete Forming, Inc. (Rite Way) and awarding plaintiff attorney fees. We remand for hearing consistent with this opinion.

Rite Way executed a promissory note for \$15,000.00 at 12.75% interest per annum in favor of the Bank for the purpose of purchasing concrete forming equipment from Conesco, a concrete forming equipment supplier. This note was secured by collateral consisting of the concrete forming equipment and a 1977 Chevrolet two-ton flat-bed truck, and by the personal guarantees of several persons, including Peter and Richard Lowe.

After execution of the note and the security agreements, the Lowes conveyed all of their interest in Rite Way to Don Bailey Construction, Inc. (Bailey), which assumed the \$15,000.00 obligation to the Bank. In connection with this transaction, Rite Way transferred ownership of the flat-bed truck and the cement forming equipment to Bailey, which subsequently subcontracted to do work for Jacobsen-Robbins Construction Co., a general contractor. Upon Bailey's failure to satisfactorily complete the subcontract, it surrendered the secured equipment to Jacobsen-Robbins and defaulted on the loan obligation to the Bank. Upon Bailey's default, the Bank sued and entered default judgment against it. However, Don Bailey, the corporate owner, disappeared and the corporation ceased

doing business without satisfying the debt.

The Bank then accelerated the note and demanded that the Lowes pay the entire balance of \$4,494.71 because of their personal guaranties. The Lowes refused to pay the balance, but, instead, met with Bank officers and offered to locate the collateral and assist with its repossession. They spent a considerable amount of time and effort doing so, and allege that they succeeded in locating virtually all of the secured equipment on the Jacobsen-Robbins job sites. They also assert that they gave the Bank a specific description of the equipment and its location, and authorized the Bank to repossess it. For purposes of reviewing this summary judgment, we review the facts and inferences in the light most favorable to the Lowes. *Atlas Corp. v. Clovis Nat'l Bank*, 737 P.2d 225, 229 (Utah 1987).

Although the Bank never acquired actual physical control over the collateral, it is unclear whether it had the opportunity or the right to do so. On October 12, 1982, without the Lowes' awareness or consent, and reserving its rights against Rite Way,¹ the Bank released its interest in the cement forms in Jacobsen-Robbins' possession after Jacobsen-Robbins notified the Bank that Conesco claimed ownership of the forms. Under the summary judgment standard of review, we assume the truthfulness of the Lowes' statement that these cement forms were substantially the same equipment described in the security agreement. As a consequence of this release, the Bank was unable to satisfy the loan balance from the collateral.

The Bank brought a successful motion for summary judgment against the Lowes. The trial court in a memorandum decision found that the Lowes' guaranty was absolute and unconditional because it provided that the guarantors "severally guarantee payment when due of any and all obligations of Borrowers to Bank when due or any and all obligations of Borrower to Bank now existing or which may hereafter arise of whatsoever nature and however represented, and whether secured or unsecured" (emphasis in original).

The trial court entered judgment in favor of the Bank for \$4,494.71 principal, \$1,884.78 interest, \$2,800.00 attorneys' fees, and \$51.50 court costs.

The Lowes raise the following issues on appeal: (1) In releasing the collateral, did the Bank discharge the Lowes from their guaranty agreements? (2) Was the award of attorney fees against the Lowes improper?

I.

The first issue is whether the Lowes were discharged from their guaranty agreements when the Bank released the collateral securing the loan.

Whether a creditor has a duty to pursue the debtor or the collateral securing the loan as a

precondition to pursuing the guarantor depends "on the nature of the guarantor's promise." *Strevell-Paterson Co. v. Francis*, 646 P.2d 741, 743 (Utah 1982)(quoting *Westinghouse Credit Corp. v. Hydrosswift Corp.*, 528 P.2d 156, 158 (Utah 1974)).

The nature of the guarantor's promise depends upon whether it is absolute or conditional. An absolute guaranty is defined as:

a contract by which the guarantor has promised that if the debtor does not perform his obligation or obligations, the guarantor will perform some act (such as the payment of money) to or for the benefit of the creditor A guaranty of the payment of an obligation, without words of limitation or condition, is construed as an absolute or unconditional guaranty.

38 Am. Jur. 2d *Guaranty* § 21 (1968). This unconditional obligation, sometimes referred to as a guaranty of payment, holds the guarantor liable, without notice, upon the default of the principal. *Mack Fin. Corp. v. Scott*, 100 Idaho 889, 606 P.2d 993, 998 (1980). Such a guaranty is "absolute, and the guaranteed party need not fix its losses by pursuing its remedies against the debtor or the security before proceeding directly against the guarantor." *Strevell-Paterson Co. v. Francis*, 646 P.2d at 743.

On the other hand, a conditional guaranty, or guaranty of collection, is an obligation to pay or perform if payment or performance cannot be first reasonably obtained from the principal obligor. *Id.*

The Utah Supreme Court, in *Strevell-Paterson*, found that the guaranty contract at issue was an absolute guaranty of payment rather than a guaranty of collection, because it "contained no express or implied condition on liability and no contractual requirement that the creditor seek satisfaction elsewhere before commencing action on the guarantee." *Id.* at 743-44.

Likewise, the present guaranty contract contains language that indicates that it is an absolute guaranty of payment rather than only a guaranty of collection:

"VALLEY BANK AND TRUST COMPANY," a corporation, hereinafter referred to as "Bank", has extended credit and/or agreed to extend credit and/or furnished, or agreed to furnish other accommodations to the person hereinafter identified as "Borrower", and the undersigned Guarantors, in consideration of such credit and/or accommodations by Bank to Borrower jointly and severally guarantee payment when due of any and all

obligations of Borrower to Bank now existing or which may hereafter arise of whatsoever nature and however represented, and whether secured or unsecured (Emphasis added).

As in *Strevell-Paterson*, there are no additional clauses stating an "express or implied condition on liability," nor is there a contractual requirement that the creditor seek satisfaction elsewhere on the guaranty. See *Strevell-Paterson*, 646 P.2d at 744. Therefore, the Lowes' liability for the loan became fixed upon the default of the primary obligor, Don Bailey.

However, a guarantor, upon payment of the guaranteed obligation, has a right of subrogation to any collateral pledged as security. *Behlen Mfg. Co. v. First National Bank*, 28 Colo. Ct. App. 300, 472 P.2d 703, 706 (1970); *D. W. Jaquays & Co. v. First Security Bank*, 101 Ariz. 301, 419 P.2d 85, 89 (1966). This is true even of an absolute guarantor. This right to subrogation is a "creature of equity," whose "purpose is the prevention of injustice and is the mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay it." *Behlen Mfg. Co.*, 472 P.2d at 707 (quoting *D. W. Jaquays & Co.*, 419 P.2d at 88). The rationale is that the creditor, having elected to proceed against security for payment of the debt, is deemed to be in a trustee relationship with the guarantor. The creditor may liquidate the security and apply the proceeds to the obligation, or he may forego recourse to the security and proceed against the guarantor of payment, provided he does not subvert the guarantor's subrogation rights against collateral pledged by the principal obligor. If he breaches that trust duty by destroying, losing, or otherwise improvidently dissipating the collateral, he may not hold the guarantor wholly liable because the guarantor would have been subrogated to the creditor's right of resort to that security. 38 Am. Jur. 2d *Guaranty* § 84 (1968). Thus, where a creditor's actions impair the value of collateral in its possession which secures an obligation guaranteed by a guarantor, either absolute or conditional, the guarantor will be discharged from his obligation to the extent of the impairment. *Mack Fin. Corp. v. Scott*, 606 P.2d at 998.

This general rule has been codified in Utah through the Uniform Commercial Code. Utah Code Ann. § 70A-3-606(1)(1980) states:

The holder discharges any party to the instrument to the extent that without such party's consent the holder ... (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has

a right of recourse.

Appellants rely on this general rule to support their argument that they should escape liability on their guaranty contracts because the Bank's release of the collateral was unjustified.

However, as an exception to this general rule, an absolute guarantor may explicitly waive his rights against collateral. Under the language of Section 70A-3-606(1)(b), the holder does not discharge a party to the instrument if the party consents to allow the holder to impair the collateral. Thus, a finding that the guarantors so consented renders Section 3-606 discharge unavailable even if the holder unjustifiably impairs the collateral. The Official Comment to Section 3-606 of the Uniform Commercial Code indicates that such consent may be given in advance in the guaranty agreement:

Consent may be given in advance, and is commonly incorporated in the instrument. It requires no consideration, and operates as a waiver of the consenting party's right to claim his own discharge.

See also *National Acceptance Co. of America v. Demes*, 446 F. Supp. 388, 390 (D. Ill. 1977).

Such consent must be explicit and "should only be by the most unequivocal language in the guaranty agreement." *Behlen Mfg. Co.*, 472 P.2d at 708 (quoting *D. W. Jaquays & Co.*, 419 P.2d at 89); See also *Mack Fin. Corp.*, 606 P.2d at 1000.

For example, an explicit contract was found in *Joe Heaston Tractor & Implement Co. v. Sec. Acceptance Corp.*, 243 F.2d 196, 198 n.1 (10th Cir. 1957):

The undersigned grants to the Finance Company full power to modify or change terms of any of the Liabilities, to agree to forbearance with respect thereto, to consent to the substitution or exchange or release of collateral thereto, and extension of time of payment of the Liabilities.

Likewise, the guaranty agreement in *National Acceptance Co. of America v. Demes*, 446 F. Supp. at 390, was found to be an unequivocal waiver of rights against collateral.

The undersigned hereby waive notice of the following events or occurrences: ... the holder's obtaining, amending, substituting or releasing, waiving, or modifying any ... security interests, liens, or encumbrances; [or] ... the holder's ... hereafter accepting ... any collateral securing the payment ... or said holder's settling, subordina-

ting, compromising, discharging, or releasing the same. The undersigned agree that the holder of the Note may ... do any or all of the foregoing events or occurrences in such manner, upon such terms and at such times as said holder, in its sole and absolute discretion, deems advisable, without in any way or respect impairing, affecting, reducing, or releasing the undersigned from their obligations hereunder

Id. See also *Schauss v. Garner*, 590 P.2d 1316 (Wyo. 1979).

In contrast, the court in *Behlen Mfg. Co.* found that language in the guaranty agreement² did not meet this test because "the only waiver in the guaranty agreement [had] to do with notice of nonpayment, protest, extension of the note and partial payment. *There [was] no waiver relating to the collateral.* The indemnity agreement is limited to expense, loss or damage incurred in accepting the collateral or incurred in enforcing collection." *Id.* at 708, (emphasis added). See also *Mack Fin. Corp. v. Scott*, 100 Idaho 889, 606 P.2d 993, 1000 (1980).

Similarly, the Arizona court, in *Jaquays*, found that guarantors' subrogation rights were not impaired because consent to impair the collateral was not explicitly given, stating that the following language was insufficient to constitute an unequivocal waiver of rights against the collateral: "and in connection therewith consents without notice to any extensions or forbearance by assignee, and waives any demand or notice of default." *Jaquays*, 419 P.2d at 88.

In the present case, there are no explicit waivers of rights against collateral in the Lowes' guaranty agreements. The only language which could be remotely construed to be a waiver of rights against collateral states that the Lowes "jointly and severally guarantee payment when due of any and all obligations of Borrower to Bank now existing or which may hereafter arise of whatsoever nature and however represented, whether secured or unsecured."

In interpreting this language, we recognize that an instrument purporting to establish liability against a guarantor must be construed strictly, and any ambiguities must be resolved against the drafter of the instrument. *National Acceptance Co. of America v. Demes*, 446 F. Supp. at 391. This present language deals with the guarantors' liability for any loans made to the debtor, whether secured or unsecured, not with any waiver relating to collateral. Construed strictly against the Bank, it does not explicitly waive any subrogation rights to collateral.

Therefore, assuming the Bank had control over the collateral, as the Lowes contend, we

conclude that it had a duty to preserve the Lowes' interest in the property held as security and that performance of this duty was not waived by the Lowes' unconditional guaranties because the Lowes did not expressly consent to impairment of the collateral. See *Jaquays*, 419 P.2d at 89.

Whether the Lowes can prevail, however, depends upon two factors: If the forms which the Lowes found were the actual collateral and, if so, whether the Bank had control over them.³ Further, a guarantor is released from his liability only to the extent of the injury caused by the failure of the creditor to protect his security interest, if the creditor was in control of the property held as security. Utah Code Ann. §70A-3-606(1)(1980); see *Jaquays*, 419 P.2d at 89; *Mack Fin. Corp. v. Scott*, 606 P.2d at 998.

Since there are genuine issues of material fact as to whether the Bank had control over the collateral and whether the forms released by the Bank were, in fact, the collateral securing the note guaranteed by the Lowes, the summary judgment must be set aside. *Atlas*, 737 P.2d at 229. This conclusion renders any discussion concerning disposition of the collateral in a commercially reasonable manner unnecessary.

II.

The second issue raised by appellants was whether the award of \$2,800 in attorney fees was proper. It is undisputed that the Lowes were liable for attorney fees.⁴ What is at issue is the amount of the fee.

On February 24, 1984, Veasy, the Bank's counsel, filed an affidavit in support of attorney fees with the court, but failed to serve a copy on McIff, counsel for the Lowes. McIff received, on Feb. 27, 1984, a copy of the proposed judgment from Veasy which indicated that the Lowes were liable for \$2,800 in attorney fees. He called Veasy that day to inform him of the lack of affidavits or documentation supporting the award of attorney fees and, on Feb. 28, 1984, filed an affidavit alleging that the attorney fee award was excessive and the supporting affidavit was not timely filed.

The trial court entered judgment on March 5, 1984, for \$4,494.71 principal, \$1,884.78 interest, \$2,800 attorney fees, and \$51.50 court costs. McIff stated that he finally received a copy of the affidavit in support of attorney fees on March 7, 1984, and, on the same day, filed a motion in opposition to plaintiff's affidavit in support of attorney fees. On April 4, 1984, McIff filed an affidavit in which he brought these facts again to the court's attention.

The Utah Supreme Court has stated that "[e]ven if there were no disputed issue of material fact, the summary judgment cannot award an attorney's fee without a stipulation

as to the amount, an un rebutted affidavit, or evidence given as to the value thereof." *Freeport Fin. Co. v. Stoker Motor Co.*, 537 P.2d 1039 1040 (Utah 1975). In the instant case, there was not only a lapse of due process in that judgment was entered before appellant had an opportunity to see and respond to respondent's affidavit on attorney fees, but appellants rebutted respondent's affidavit. Accordingly, the award of attorney fees was improper. Since the judgment appealed from is reversed, the award of attorney fees falls as well, and fresh consideration of the attorney fee question will, of course, be appropriate.

Reversed and remanded for trial consistent with this opinion.

R. W. Garff, Judge

WE CONCUR:

Richard C. Davidson, Judge

Gregory K. Orme, Judge

1. The Bank's release stated that "[b]y disclaiming any interest in and to the forms set forth as described herein, Valley Bank and Trust Company does not release or waive any right under its Security Interest and Financing Statement with Rite-Way Concrete Forming, Inc., Debtor, ..."

2. The specific provisions in the guaranty agreement were as follows: Behlen agreed "to fully indemnify and save the Bank harmless against all expense, loss damage or injury arising in connection with the above note, or in the acceptance of any collateral therefor, or which may be incurred in enforcing collection of the same" *Behlen Mfg. Co.*, 472 P.2d at 706.

3. The Bank conceded, for purposes of this appeal only, that it had such control. Our decision in no way precludes the Bank from proving at trial that it in fact, had no such control.

4. The relevant portion of the loan contract states "[a]ll costs and expenses of Bank, in retaking holding, preparing for sale and selling or otherwise realizing upon the collateral in the event of default by Borrower, including court costs and reasonable attorney's fees and legal expenses, shall constitute additional indebtedness of the Borrower secured hereby which the borrower promises to pay on demand." The Guaranty agreement is in accord "Each Guarantor agrees to pay all costs and expenses, including reasonable attorney's fees incurred in enforcing this agreement."

(FILED)

FILED IN CLERK'S OFFICE
Salt Lake County, Utah

W. JEFFERY FILLMORE and
PAUL D. VEASY of
BIELE, HASLAM & HATCH
Attorneys for Plaintiff
50 West Broadway, Fourth Floor
Salt Lake City, Utah 84101
Telephone: (801) 328-1666

MAR 5 1984

H. D. Connelley, Clerk of District Court
By: [Signature]
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

VALLEY BANK AND TRUST COMPANY,
a Utah corporation,

Plaintiff,

vs.

RITE WAY CONCRETE FORMING,
INC., a Utah corporation,
PETER LOWE JR., J. RANDALL
OUTSEN, TRACY M. JONES,
RICHARD H. LOWE and DON
BAILEY CONSTRUCTION, INC.,
a Utah corporation,

Defendants.

Br 185 No. 3628
3-8-84-801am

PETER LOWE, JR., and
RICHARD H. LOWE,

Cross-complainants and
Third-party Plaintiffs,

vs.

J. RANDALL OUTSEN, TRACY M. JONES,
DON BAILEY CONSTRUCTION, INC.,
a Utah corporation,

Cross-defendants,

and

DON BAILEY, DRAPER BANK, a
Utah corporation, and

JUDGMENT

Civil No. C-81-487

EXHIBIT NO. "B"

JACOBSEN-ROBBINS CONSTRUCTION :
COMPANY, INC., a Utah corporation, :
:
Third-party Defendants. :

The above-entitled matter came on regularly for hearing on Plaintiff's Motion for Summary Judgment against Defendants, Rite Way Concrete Forming, Inc., Peter Lowe, Jr., and Richard H. Lowe, before the Honorable Dean E. Conder, Judge of the above-entitled Court on the 14th day of February, 1984, at the hour of 1:00 p.m.

Plaintiff appeared by and through its counsel, Paul D. Veasy of Biele, Haslam & Hatch. The Defendants, Rite Way Concrete Forming, Inc., Peter Lowe, Jr., and Richard H. Lowe, appeared by and through their counsel, K. L. McIff of Jackson, McIff & Mower. The Court having considered the evidence presented by counsel, being fully advised in the premises, and having rendered its Memorandum Decision on file herein:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

Plaintiff is awarded Judgment jointly and severally against the Defendants, Rite Way Concrete Forming, Inc., Peter Lowe, Jr., and Richard H. Lowe, for the principal sum of \$4,494.71, accrued interest in the sum of \$1,884.78 calculated to February 14, 1984, together with interest on said Judgment at the rate of 12.75% per annum until paid, reasonable attorney's fee in the amount of \$2,800, and costs of Court incurred herein in the sum of \$51.50.

DATED this 5 day of ^{March}~~February~~, 1984.

BY THE COURT:



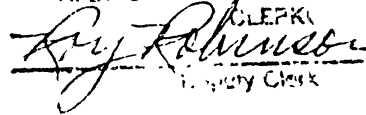
DEAN E. CONDER
District Court Judge

ATTEST

H. DIXON HEDLEY

CLERK

BY


Deputy Clerk

FEB 23 1964

H. District Court
By *[Signature]*
Clerk



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

VALLEY BANK AND TRUST COMPANY, :
a Utah corporation, :

Plaintiff, :

vs. :

RITE WAY CONCRETE FORMING, :
INC., a Utah corporation, :
OUTSEN, TRACY M. JONES, :
RICHARD H. LOWE, and DON :
BAILEY CONSTRUCTION, INC., :
a Utah corporation, :

Defendants. :

and :

PETER LOWE, JR. and :
RICHARD H. LOWE, :

Cross-complainants :
and Third-party :
Plaintiffs, :

vs. :

DON BAILEY CONSTRUCTION, :
INC., a Utah corporation, :

Cross-defendants, :

and :

DON BAILEY, DRAPER BANK, a :
Utah corporation, and :
JACOBSEN-ROBBINS CONSTRUCTION :
COMPANY, INC., a Utah :
corporation, :

Third-party :
Defendants. :

MEMORANDUM DECISION

CIVIL NO. C 81-487

EXHIBIT NO. "C" _____

Plaintiff's Motion for Summary Judgment against defendants and guarantors Peter M. Lowe, Jr. and Richard H. Lowe is hereby granted. The "Guaranty" executed by each of the parties is an absolute and unconditioned guarantee in that it provides that the Guarantors "...severally guarantee payment when due of any and all obligations of Borrowers to Bank now existing or which may hereafter arise of whatsoever nature and however represented, and whether secured or unsecured". (Emphasis added) 70A-3-416(1) UCA 1953 provides, "'Payment guaranteed' or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party". Using this analogy of the UCA to the guaranty, the court finds that the plaintiff has a cause of action against these defendants without first exhausting any remedies it has against the primary obligor. Furthermore, the Guaranty was effective whether or not the obligation was secured or unsecured.

Defendants Lowe argue that they located the security for the benefit of the plaintiff and by reason of plaintiff's "release" and failure to take possession of the security the plaintiff cannot pursue its action against these defendants. Two things are against this: (1) The guaranty signed by these defendants provides that they are obligated on the loan "whether secured or unsecured"; also (2) The case of Dunser v. Southeast First National Bank of Miami, 367 So.2d 1094 (1979) states the law as follows:

"Finally, a most persuasive argument against reversal in the instant cause is the well-established principle that under an absolute and unconditional contract of guaranty, as is the subject matter of this appeal, it is no defense that the creditor has lost security or has been negligent in regard to protection of the collateral. Fegley v. Jennings, 44 Fla. 203, 32 So. 873 (1902) and A & T Motors, Inc. v. Roemelmeyer, 158 So.2d 567 (Fla. 3d DCA 1964)."

The third-party defendant, Jacobsen-Robbins, has also filed a motion for summary judgment against the third party plaintiffs, Lowe. At the hearing on this matter the third-party plaintiffs, Lowe, moved to dismiss its third-party complaint. Motion is granted without prejudice.

Dated this 15 day of February, 1984.

/s/ Dean E Conder
DEAN E. CONDER, DISTRICT JUDGE

GUARANTY

VALLEY BANK AND TRUST COMPANY, a corporation, hereinafter referred to as "Bank", has extended credit and agreed to extend credit and/or furnished or agreed to furnish other accommodations to the person hereinafter identified "Borrower", and the undersigned Guarantors, in consideration of such credit and/or accommodations by Bank to Borrower jointly and severally guarantee payment when due of any and all obligations of Borrower to Bank now existing or which may hereafter arise of whatsoever nature and however represented, and whether secured or unsecured.

This agreement is continuing in nature, it being specifically understood that unless indicated to the contrary at the end hereof, the agreement is to encompass future accommodations and indebtednesses of Borrower as well as existing indebtednesses of Borrower, and that any obligations or indebtednesses may be changed, modified, increased, renewed, paid, reinstated, all without notice to the Guarantors or any of them. The liability of any Guarantor for future advances, credits or accommodations granted by Bank to Borrower may be terminated by such Guarantor by furnishing written notice of such termination and, although this agreement remains in full force and effect as to then extant obligations of Borrower thereby allowing Bank to extend, modify or renew such extant obligations, Guarantor shall not be liable for new advances or additional credits furnished to Borrower subsequent to the date the notice is received by the Bank. This Guaranty shall remain in full force and effect until terminated in writing even though from time to time there may be no obligation between the Borrower and the Bank.

This agreement is severable as to each Guarantor, it being specifically understood that no one Guarantor is relying upon the obligations of any other Guarantor, and Bank may release or modify this agreement in relation to the obligation of one or more Guarantors without affecting the liability of any other Guarantor.

Each Guarantor agrees that his Guaranty is binding upon him without the signature of any other person or the existence of any other Guaranty and that a termination notice served by any other Guarantor shall not affect the liability of any other Guarantor.

Each Guarantor agrees to pay all costs and expenses, including reasonable attorney's fees incurred in enforcing this agreement.

Each Guarantor waives notice of any matter, default, presentment, demand, protest or dishonor between the Borrower and Bank and agrees that any notice furnished to Borrower shall be deemed as being furnished to each Guarantor. Notice is waived of acceptance hereof by Bank.

This instrument shall be binding upon the heirs, personal representatives, successors and assigns of the Guarantor and shall inure to the benefit of the Bank, its successors and assigns. This contract is assignable in whole or in part without notice to Guarantors. This writing contains the entire agreement of the parties. The undersigned specifically submits himself to the jurisdiction of the District Court of Salt Lake County, State of Utah, and agrees that the laws of the State of Utah shall govern this contract. If the undersigned is without the territorial jurisdiction of such Court at the time Bank institutes an action thereon, then service of process from such Court served on the undersigned, regardless of where undersigned is located, allowing sixty (60) days to answer such process shall be the only condition to the exercise of such jurisdiction by said Court, the undersigned consenting to and submitting to such jurisdiction.

A notice to a Guarantor will be deemed complete two (2) days after being placed in the United States Mail, postage prepaid, addressed to the Guarantor at the address indicated after the Guarantor's signature.

The liability of each Guarantor is unlimited as to amount unless a limitation is indicated immediately in advance of Guarantor's signature, whereupon the guarantee as to that Guarantor is limited to the indicated amount.

The Borrower hereinafter referred to is RITE-WAY CONCRETE FORMING, INC. and if more than one Borrower is indicated, the reference "Borrower" in this agreement is joint and several.

IN WITNESS WHEREOF and by authority duly vested, the undersigned have caused this agreement to be executed of this 1 day of JUNE, 1977.

GUARANTORS:

Limit: UNLIMITED
Peter M. Lane SEC
Guarantor

Limit: _____

Guarantor

Address: _____

Address: _____

GUARANTY

VALLEY BANK AND TRUST COMPANY, a corporation, hereinafter referred to as "Bank", has extended credit and agreed to extend credit and/or furnished or agreed to furnish other accommodations to the person hereinafter identified "Borrower", and the undersigned Guarantors, in consideration of such credit and/or accommodations by Bank to Borrower jointly and severally guarantee payment when due of any and all obligations of Borrower to Bank now existing or which may hereafter arise of whatsoever nature and however represented, and whether secured or unsecured.

This agreement is continuing in nature, it being specifically understood that unless indicated to the contrary at the end hereof, the agreement is to encompass future accommodations and indebtednesses of Borrower as well as existing indebtednesses of Borrower, and that any obligations or indebtednesses may be changed, modified, increased, renewed, paid or reinstated, all without notice to the Guarantors or any of them. The liability of any Guarantor for future advances, credits or accommodations granted by Bank to Borrower may be terminated by such Guarantor by furnishing written notice of such termination and, although this agreement remains in full force and effect as to then extant obligations of Borrower thereby allowing Bank to extend, modify or renew such extant obligations, Guarantor shall not be liable for new advances or additional credits furnished to Borrower subsequent to the date the notice is received by the Bank. This Guaranty shall remain in full force and effect until terminated in writing even though from time to time there may be no obligation between the Borrower and the Bank.

This agreement is severable as to each Guarantor, it being specifically understood that no one Guarantor is relying upon the obligations of any other Guarantor, and Bank may release or modify this agreement in relation to the obligation of one or more Guarantors without affecting the liability of any other Guarantor.

Each Guarantor agrees that his Guaranty is binding upon him without the signature of any other person or the existence of any other Guaranty and that a termination notice served by any other Guarantor shall not affect the liability of any other Guarantor.

Each Guarantor agrees to pay all costs and expenses, including reasonable attorney's fees incurred in enforcing this agreement.

Each Guarantor waives notice of any matter, default, presentment, demand, protest or dishonor between the Borrower and Bank and agrees that any notice furnished to Borrower shall be deemed as being furnished to each Guarantor. Notice is waived of acceptance hereof by Bank.

This instrument shall be binding upon the heirs, personal representatives, successors and assigns of the Guarantor and shall inure to the benefit of the Bank, its successors and assigns. This contract is assignable in whole or in part without notice to Guarantors. This writing contains the entire agreement of the parties. The undersigned specifically submits himself to the jurisdiction of the District Court of Salt Lake County, State of Utah, and agrees that the laws of the State of Utah shall govern this contract. If the undersigned is without the territorial jurisdiction of such Court at the time Bank institutes an action thereon, then service of process from such Court served on the undersigned, regardless of where undersigned is located, allowing sixty (60) days to answer such process shall be the only condition to the exercise of such jurisdiction by said Court, the undersigned consenting to and submitting to such jurisdiction.

A notice to a Guarantor will be deemed complete two (2) days after being placed in the United States Mail, postage prepaid, addressed to the Guarantor at the address indicated after the Guarantor's signature.

The liability of each Guarantor is unlimited as to amount unless a limitation is indicated immediately in advance of Guarantor's signature, whereupon the guarantee as to that Guarantor is limited to the indicated amount.

The Borrower hereinafter referred to is RITE-WAY CONCRETE FORMING INC., and if more than one Borrower is indicated, the reference "Borrower" in this agreement is joint and several.

IN WITNESS WHEREOF and by authority duly vested, the undersigned have caused this agreement to be executed on this 1 day of JUNE, 1977.

GUARANTORS:

Limit:

Richard H. Howe

Guarantor

Limit:

Unlimited

Guarantor

Address: 5686 SOUTH 4540 WEST

Address: _____

AFFIDAVIT OF MAILING

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

PAUL D. VEASY, being duly sworn, says:

That he is employed in the office of Biele, Haslam & Hatch, P.C. attorneys for Peititioner, Valley Bank and Trust Company.

That he mailed four (4) true and accurate copies of the Brief of Petitioner upon the parties to the within described action by placing a true and correct copy thereof in an envelope addressed to:

K.K. McIff, Esq.
JACKSON, McIFF & MOWER
Attorneys for Respondents
151 North Main Street
Richfield, Utah 84701

Dwight L. King, Esq.
Attorney for Draper Bank
and Trust
2121 South State Street
Salt Lake City, Utah 84115

Arthur H. Nielsen, Esq.
Richard Hincks, Esq.
NIELSEN & SENIOR
Attorneys for Jacobsen-Robbins
Construction Company
Beneficial Life Tower
36 South State
Salt Lake City, Utah 84111

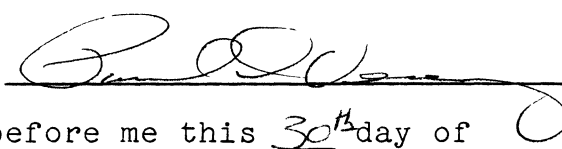
Arthur F. Sandack
Attorney for Tracy Jones
370 East Fifth South
Salt Lake City, Utah 84111

and by mailing the same with the United States Post Office, first class, postage prepaid, on the 30 day of September, 1987.

SUBSCRIBED AND SWORN to before me this 30th day of September, 1987.

My Commission Expires:

6-1-89


NOTARY PUBLIC
Residing at: Salt Lake County, UT