1980

W. M. Barnes Company, A Corporation v. Sohio Natural Resources Company, A Corporation, Formerly Sohio Petroleum Company, A Corporation :Appellant's Reply Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

W. M. BARNES COMPANY,
a Corporation,

Plaintiff-Appellant,

vs.

SOHIO NATURAL RESOURCES COMPANY, a Corporation, formerly SOHIO PETROLEUM COMPANY, a Corporation,

Defendant-Respondent.

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of
Fourth District Court for Utah
Honorable George E. [illegible]

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IN THE SUPREME COURT OF THE STATE OF UTAH

W. M. BARNES COMPANY, a Corporation,	:	
Plaintiff-Appellant,	:	
vs.	:	
SOHIO NATURAL RESOURCES COMPANY, a Corporation, formerly SOHIO PETROLEUM COMPANY, a Corporation,	:	
Defendant-Respondent.	:	Case No. 16454

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

INTRODUCTION

In its initial brief, plaintiff-appellant ("Barnes") argued that the district court erred in refusing to consider parol evidence on the question of whether the transaction taken as a whole involved a deed which was intended to create a security interest. Defendant-respondent ("Sohio"), although admitting that parol evidence may and should be considered on such a question as a general rule, countered by stating that such a question does "not require such a factual inquiry where, as in the present case, the deed is accompanied by contemporaneous writings exhibiting the intentions of the parties." (Sohio Brief, p. 23)

Sohio also argued that "even assuming the truth of Barnes' extrinsic factual assertions, there still is no genuine issue and the case was properly decided as a matter of law." (Sohio Brief, p. 27)

In reply, Barnes argues here that:

1) Contemporaneous writings accompanying a deed are not conclusive of the issue of the parties' intent in exchanging the deed and do not bar consideration of parol evidence on that issue;

2) The contemporaneous writings that accompanied the deed in this case are, in any event, ambiguous and the court must thus consider parol evidence in construing them;

3) The record evidence reveals numerous material issues of fact that need to be further discovered and tried on remand, including, inter alia, issues relating to outrageous and manipulative conduct designed to deprive the appellant of his property at a fraction of its worth.

ARGUMENT

I. Contemporaneous Writings Accompanying a Deed Are Not Conclusive on the Issue of Whether a Deed Was Intended to Create a Security Interest and Do Not Bar Consideration of Parol Evidence on that Issue.

By refusing to consider parol evidence in this case, the court below ignored the universally acknowledged exception

to the parol evidence rule that a party may show by "parol evidence" that "a deed absolute on its face . . . [was] given for security purposes only." Bybee v. Stuart, 189 P.2d 118, 122 (Utah 1948). Sohio seeks to rationalize the court's error by arguing that where a deed is "accompanied by contemporaneous writings exhibiting the intentions of the parties," the exception does not apply. (Sohio's Brief, p. 23) This is not the law in Utah, however.

In Utah a court charged with determining whether a deed was intended as a mortgage must examine all of the facts and circumstances surrounding the transaction. As this Court stated in Corey v. Roberts, 25 P.2d 940 (Utah 1933):

> "As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible."

Id. 15 946, quoting Peugh v. Davis, 96 U.S. 332 (1877). See also Duerden v. Solomon, 94 P. 978 (Utah 1908); Thomas v. Ogden State Bank, 13 P.2d 636 (Utah 1932).

Sohio's citation of Brown v. Skeen, 58 P.2d 24 (Utah 1936) and Gibbons v. Gibbons, 133 P.2d 105 (Utah 1943) to the contrary is unavailing. Both cases are inapposite. In neither of them was the trial court asked to consider any evidence besides the written instruments. Indeed, in Gibbons, supra at 106, the court expressly states that "[n]o evidence was taken

on the question except the written agreement pleaded a admitted and its construction was submitted to the court as matter of law."[1/]

Among the facts and circumstances which must be considered in determining whether a deed was intended as a mortgage are:

> Whether or not there was a continuing obligation on the part of the grantor to pay the debt or meet the obligation which it is claimed the deed was made to secure; the question of relative values; the contemporaneous and subsequent acts; the declarations and admissions of the parties; the form of the written evidences of the transactions; the nature and character of the testimony relied upon; the various business, social, or other relationship of the parties; and the apparent aims and purposes to be accomplished.

Corey v. Roberts, supra at 942. As Barnes will demonstrate in the succeeding sections of this memorandum, evidence on each of these facts and circumstances that tended to show the "real character" of the transaction was presented to the court below. Nonetheless, the court refused to consider it, relying instead solely on the writings accompanying the deed to determine the intent of the parties. This was reversible error. Bu

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[1/]One Utah case, Thomas v. Ogden State Bank, 13 P.2d 636 (Utah 1932), not cited by Sohio for the proposition, seems to suggest by way of dicta that writings accompanying a deed would be conclusive on the issue of intent. It is not clear, however, that any parol evidence was offered to the court in that case.

relying solely on the writings, the court denied Barnes its chance to show the "real character of the transaction," as is its right in this type of case. As the California Supreme Court stated in an en banc decision, Beeler v. American Trust Co., 147 P.2d 583, 595 (Cal. 1944), relying solely on the accompanying writings to determine the parties' intent is no better than relying on the deed itself:

> If by a separate writing the parties expressly agree, at the same time an absolute deed is executed, that it is what it purports to be, that is, an absolute sale, that would be no more than what the deed itself says. Therefore, if they could thus avoid its real effect as a mortgage, the true nature of such a transaction could never be shown. . . .

See also Larson v. Hinds, 394 P.2d 129 (Colo. 1964); Deardorff v. Nielson, 438 P.2d 981 (Or. 1968). Contra: see cases collected at 111 A.L.R. 448. Accordingly, this case should be remanded so the lower court can hear and consider all of the evidence relevant to the parties' intent.

II. The Contemporaneous Writings that Accompanied the Conveyance and Assignment Are Ambiguous and Parol Evidence Must Be Considered to Construe the Transaction.

Even if a court as a general rule may rely solely on the writings accompanying a deed to determine whether it was intended as a mortgage, it may not do so where the intent as expressed in the documents is ambiguous. As this Court stated

in Hansen v. Kohler, 550 P 2d 186, 188 (Utah 1976), wher "ambiguities are injected into the transaction" by the "subs quent agreements", a "more searching look into the evidence" i necessary.

The documents which accompanied the deed in this cas -- i.e., the Letter of Commitment (R:79), the Conveyance a Assignment (R:85), the Escrow Agreement (R:89) and t Promissory Note (R:93) -- are blatantly ambiguous and the cour below erred in not considering parol evidence to resolve th ambiguities.

A. The Letter of Commitment and the Escrow Agreement.

Chronologically, the first of the "contemporaneou writings" executed by the parties was the October 7, 197 "Letter of Commitment". This letter, on Sohio's letterhead was prepared by Sohio's lawyers during a meeting at Sohio' corporate offices in Cleveland at which Mr. Pfortzheime (Sohio's Vice President) and Mr. Barnes (who was withou counsel) were also present. The letter was signed by Barne and Sohio prior to the time, later in the same day, that th participants went to Sohio's Bank where Mr. Barnes was show for the first time the Promissory Note and the Escro Agreement. (R:42:69) The Letter of Commitment contains n mention of the Promissory Note, the Conveyance and Assignmen or the Escrow Agreement.

The Letter of Commitment first states that the "consideration" Sohio commits to pay for the "purchase" is $500,000, conditioned upon Barnes electing to sell at that price and giving Sohio not less than sixty days notice of such election. On page 2, however, Sohio agrees, upon the exercise of its "preferential right to purchase," to pay whatever a third party offeror shall offer to Barnes for the property at any time up to December 31, 1972. Sohio claims that under Paragragh 2 of the Escrow Agreement, Barnes made an "election" to effect a sale to Sohio on December 29, 1972 at the $500,000 price by failing to pay the Bank loan on that date. However, Sohio concedes it received notification from Barnes on December 29, 1972 (R:120-121) that Barnes had an offer from Prudential Drilling Funds, Inc. to purchase the property at a price of $2,500,000 plus a royalty of 1/6 or $.60 per barrel, whichever is greater, which Barnes had elected to accept subject to first offering Sohio the right to purchase at that price. The "election" Sohio claims Barnes impliedly made under Paragraph 2 of the Escrow Agreement is sharply at variance, by millions of dollars, with the express election Barnes actually made, on the same day, pursuant to the terms of the Letter of Commitment. The ambiguity in the two instruments sets up the trap which Sohio seized upon to claim that it could acquire the property at a ridiculously low price merely by refusing to tell Barnes

whether it would meet he Prudential offer until after December 29, 1972, note payment date would have passed. The Letter of Commitment gives Barnes until December 31, 1972 notify Sohio of any bonafide offer from a third party to purchase its property and Sohio then has thirty days to decide whether to match the offer and to exercise its preferential right to purchase. Under Paragraph 2 of the Escrow Agreement, however, as the Court below read it, Barnes, in direct contradiction of the Letter, only has, in effect, until November 29, 1972 to communicate a thirty-party offer to Sohio. If it waits any longer and Sohio takes a full thirty days to decide whether to exercise its preferential purchase right, Barnes will be deemed to have "elected" to sell Sohio, even while it is awaiting Sohio's reply to its notice of having elected to accept the third party offer, unless it can pay the bank by December 29.

The unfairness of this is augmented by the fact that the Letter of Commitment states nothing about a default or Barnes' loan from the Bank being deemed to be an "election" to sell and specifically provides that any sale by Barnes is to be at Barnes' election upon sixty days' written notice to Sohio. By its own terms, the Escrow Agreement, which was prepared by Sohio and the Bank and signed on October 7, 1971, several hours after the Letter of Commitment was signed was set up

> to provide for a deposit in escrow of the instrument of conveyance to be used in the event of the purchase by [Sohio] of the properties of [Barnes] pursuant to the Letter of Commitment. (Emphasis supplied)

In spite of the express language, the Escrow Agreement then sets forth in Paragraph 2 a method of purchase not even referred to in, and inconsistent with, the methods outlined in the Letter of Commitment.

Thus, without the Letter of Commitment, the Escrow Agreement is meaningless, since it purports to effect a sale "pursuant" to the Letter. Together, the two instruments are at best, ambiguous, and the more reasonable construction of the instruments is as explained by Mr. Barnes, viz.: that the $500,000 figure on page one was inserted to establish for the Bank that the property being mortgaged was worth at least the amount of the loan (since Sohio was willing to stand behind the loan in that amount with the property as security); that the consideration Sohio received for assisting Barnes to obtain the loan was the first refusal option to meet the price of a third-party offeror; that the Conveyance and Assignment was merely

security for the loan naming Sohio as the grantee[2/] in the event it paid the loan for Barnes' account; that the Escrow Agreement was merely the vehicle to accomplish the secured transaction and was to have no operative effect itself and that upon Barnes' failure to pay the Bank Sohio would wind up as Barnes' secured creditor. (R:42:30-43)

Besides being inconsistent with the Letter of Commitment, Paragraph 2 of the Escrow Agreement is inconsistent with other provisions in the Escrow Agreement itself. As noted above, the escrow was established as a deposit for the Conveyance and Assignment which was "to be used in the event of a purchase . . . pursuant to the Letter of Commitment." In addition, Paragraph 3 of the Escrow Agreement states that the bank shall release the Assignment and Conveyance only "in the event [Sohio] becomes obligated under the said Letter of Commitment." (Emphasis supplied.) The purchase that was

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[2/] In its Brief, Sohio points to the fact that the Conveyance and Assignment did not name the Bank, but rather Sohio, as grantee as evidence that it was not intended as a mortgage. (Sohio Brief, p. 19) This is entirely consistent with Mr. Barnes' explanation of the transaction. Although the Bank was the initial lender, it expected Sohio to purchase the loan if Barnes defaulted and to then assign the note to Sohio and deliver the note to it with its accompanying security instrument (the Conveyance and Assignment). It was therefore important that Sohio, as the party who might ultimately be required to foreclose the mortgage, be named as grantee.

allegedly made in accordance with Paragraph 2 was plainly not "pursuant" to the Letter of Commitment nor had Sohio become obligated "under" the Letter of Commitment as a result of Barnes' default on the loan. Thus, the subsequent delivery by the bank to Sohio of the Conveyance and Assignment appears to have been in violation of the express escrow instructions.

A further internal inconsistency in the Escrow Agreement is found in comparing Paragraph 4 with Paragraph 2. Under Paragraph 4, the Bank is empowered to accelerate the maturity of the note if Barnes at any time prior to December 29, 1972, should sell, assign or otherwise dispose of the property "in whole or in part". Paragraph 4 further provides that if Barnes fails to pay the note upon such acceleration, Sohio will pay it upon demand by the Bank. Thus, under Paragraph 4, Barnes could sell all or part of the property (after obtaining Sohio's waiver of its first refusal option) and default on its payment of the note but be deemed under Paragraph 2, by reason of such default, to have "sold" the property to Sohio.

B. The Promissory Note.

The Bank's handling of the Promissory Note made by Barnes is consistent with Barnes' explanation of the transaction and reveals that the parties intended a secured loan and not a sale. When Barnes defaulted on the note on December 29,

1972, the Bank demanded payment from Sohio, which it made. (R:43:0-8, 96-97) However, instead of marking the note paid in full, cancelling it and returning it to Barnes, as it would have done if payment had been intended as consummation of the purchase of the land, the bank assigned the note, without recourse, to Sohio (R:94), thus in legal effect making Barnes Sohio's debtor.

This act by the bank, as evidenced by the writing on the note itself, is plainly inconsistent with the interpretation given to the escrow documents by Sohio, which is predicated on the fact that there never has been and is not now any indebtedness between Sohio and Barnes. (Sohio Brief, p. 18) In fact, Sohio has been since January 1973, the holder of Barnes' negotiable note, with full power to further endorse it to a bona fide purchaser, during which time, it has never attempted to return the note to Barnes. Under the lower court's ruling, Barnes is in the position of having "sold" for $500,000, a property worth many millions and still having been, for the past seven years, at risk on the negotiable paper which allegedly constituted the "purchase price." The manner in which the Bank and Sohio have treated this note shows clearly that the transaction was intended to be as Barnes has always maitained, viz., that Sohio has purchased secured paper, not the property.

The court below, although aware of the assignment of the note to Sohio, nevertheless ruled that

> the escrow documents, and in particular the letter commitment to purchase would not as a matter of law permit an interpretation of the transaction as a security transaction contemplating foreclosure, rather than one of purchase as is expressly provided in the instrument. (R:152)

Faced with the blatant inconsistency between its interpretation of the Letter of Commitment and the Escrow Agreement and the Bank's act in assigning the note to Sohio, the court had no choice under the law but to consider parol evidence in an effort to resolve the inconsistency.[3/]

III. There Are Material Issues of Fact in This Case Which Will Require Further Discovery and Trial on Remand.

As its second argument in support of the lower court's decision, Sohio contends that "even assuming the truth of Barnes' extrinsic factual assertions, there is still no genuine issue of materal fact and the case was properly decided as a matter of law." (Sohio Brief, p. 26-27) Even the most cursory

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[3/] Sohio asserts that if the transaction was a mortgage with Sohio becoming the holder of the note by assignment, as Barnes claims, "Barnes could be expected to complete the sale to Prudential and pay off the note or redeem the property, as the case may be." (Sohio Brief, p. 16) This convenient speculation by Sohio ignores the fact, asserted by Mr. Barnes (Barnes Deposition, R:42:71) that Prudential refused to go forward with the purchase in face of Sohio's adverse claims against the property.

review of the record reveals, however, that the only way Sohio can make such an argument is by resolving every factual dispute raised by "Barnes' extrinsic factual assertions" in its own favor. On Summary Judgment, however, as Sohio admits elsewhere in its brief, just the opposite resolution of factual disputes is required. (Sohio Brief, p. 9) As this Court stated in Larsen v. Christensen, 443 P.2d 402, 403 (Utah 1968), on summary judgment "the evidence . . . and every reasonable inference that could be drawn therefrom [must be] considered in the light most favorable to 'the party against whom summary judgment is sought.'" When the evidence in this case is viewed "in the light most favorable" to Barnes, there can be no question that the case must be remanded for trial. Every major fact cited by Sohio as necessary to a judgment in its favor as a matter of law, as well as many others, is disputed by Barnes' record evidence.

A. The Issue of Indebtedness.

Probably the key issue in determining whether a transaction was intended as a mortgage is the question of whether there is any existing indebtedness between the parties to the transaction. Sohio asserts in its brief that "Barnes has never even claimed any indebtedness between it and Sohio." (Sohio Brief, p. 20) It can do so only be wilfully ignoring the evidence in the record.

Mr. Barnes testified at his deposition that Barnes considers itself in debt to Sohio for $500,000 plus interest (R:42:71) and that it has carried such a debt on its books since January, 1973. (R:42:74) Moreover, the note given originally by Barnes to the bank as evidence of the debt has not been cancelled. Instead, upon Sohio's payment of the note, the bank, consistent with Barnes' testimony about its indebtedness to Sohio, assigned the note to Sohio. (R:93-94) Although Sohio cites evidence that apparently contradicts Barnes' claim of indebtedness, that only serves to prove that the issue of indebtedness is one of fact which needs to be tried on remand.

B. The Issue of the Value of the Property.

One of the factors "often stated to be the single most important" one in determining whether a deed was intended as a mortgage, Kjar v. Brimley, 497 P.2d 23 (1972), quoting from Rizo v. Macbeth, 398 P.2d 209 (Alaska 1965), is the "smallness of the sum owed in comparison with the value of the land interest conveyed." 3 Powell on Real Property, 594-98 (1977). There is evidence in the record that the value of the land conveyed here was many times the $500,000 Barnes claims it owes Sohio. Sohio's evidence to the contrary only proves, as with the issue of indebtedness, that the value of the property is a material fact that needs to be tried.

At his deposition, Mr. Barnes testified:

> Of course, I had no intention of selling the property for five hundred thousand. If I was going to sell the property, I would sell it for much more than that. I had offers outstanding for much more.

(R:42:31) In addition, Barnes alleged in its complaint (R:2) and Mr. Barnes testified in his deposition (R:42:55) that Prudential Fund, Inc. offered to purchase Barnes' interest in the Asphalt Ridge Properties for $500,000 cash, a five year promissory note in the amount of $2,000,000.00 bearing interest at 6%, and a leaseback of the properties to one of Barnes' subsidiaries subject only to a one-sixth royalty or 60¢ per barrel of oil produced, whichever was greater.

By itself, this disparity between what the property is worth and what Barnes claims it owes justifies a remand of this case. Summary judgment is not appropriate where the result would be the forfeiture of property worth millions of dollars by reason of a default on a loan worth a fraction of that amount. Faced with such an apparently unjust result, a court of equity should consider every shred of evidence, parol or otherwise, before enforcing the transaction.

C. The Issue of Barnes' Understanding of the Transaction.

By taking it out of context, Sohio attempts to make much out of Mr. Barnes' statement in his deposition that he

"knew what [he was] signing. . . ." (Sohio Brief, p. 15) That statement, however, refers only to the Letter of Commitment. About the Escrow Agreement, which, as discussed above, is inconsistent with the Letter of Commitment and set up the trap in which Barnes was ultimately caught, Mr. Barnes had this to say:

> A. . . . The letter from Sohio, that was the agreement between the parties. [The Escrow Agreement] was merely, as I have signed many loans at banks, you have to sign whatever the fine print is whether you like it or not. . . .
>
> . . .
>
> Q. Now you are not making any claim here today that there is anything in the escrow agreement marked D-3 that was not in accordance with your agreement with all the parties at the time?
>
> A. At the time and the way they explained it and I quickly scanned it, I thought it was all in accordance with the first agreement. The only thing that I should have objected to that was a little out of line, and then again we were, we felt we were good friends with Sohio and had been working with them for, five or seven years or something. When the bank got through the fine print I didn't notice it until I read it here a year later carefully. There is one conflicting paragraph in it to a degree. Or the two documents. And as the first document says, I know we discussed it considerably. I think we changed the terminology to satisfy me in the first one. Was that the pledge of the collteral was only a pledge of the collateral. And not a sale of the asset. Only if I in writing demanded it. They slipped in this fine print on me that as of

a certain time they assume that I am asking them to do it, which was not my understanding.

Q. Now I am not sure. You made a couple of statements about fine print. As you look over Exhibit D-3 is there any fine print, or is that all a typed document?

A. It's typed, but I'll find the paragraph maybe that covers this that I have referred to.

Q. The print is all the same is it not?

A. Poor selection of terminology. In exact contradiction to the document signed in the mor[n]ing by the parties, this one reads as I did not catch is what I am referring to, that it shall be deemed that borrower has elected to sell to offerer. That was never my understanding. I didn't realize that when I executed the agreement.

(R:42:35-37)

At the very least, this testimony raises a factua question as to "the way [Sohio] explained" the Escrow Agreemer to Barnes and as to whether the parties ever discussed th contradiction between the Letter of Commitment and the Escro Agreement.

D. The Issue of the Parties' Subsequent Acts.

Sohio argues that Barnes' acts subsequent to th transaction at issue in this case tend to confirm that t transaction was a sale rather than a mortgage. (Sohio Brie p. 15-18) This would only be true if Mr. Barnes' testimo about what he did on behalf of his company subsequent to t

transaction and why he did it is disregarded completely. While Sohio claims that Barnes "ignored" the property, Mr. Barnes in fact testified that he had "tried to keep abreast" of the developments on the land, that he had "periodically" visited it, and that the only reason Barnes did not pay its share of the expenses of the land is that Sohio did not bill it for the expenses as it had promised to do under the October 6, 1971 operating agreement. (R:42:81-84) Furthermore, while Sohio claims that Barnes "made no objection or contrary claim for five years prior to this lawsuit" with respect to Sohio's ownership of the land, the record reveals that Barnes on advice of counsel believed that the letters exchanged with Sohio in January, 1973 had put Sohio on notice of its claim and that no further action was necessary until Sohio took steps to foreclose on the property. (R:42:62-64; 73) Consistent with its belief, as soon as Sohio contacted Barnes in 1977 to have Barnes acknowledge the Conveyance and Assignment, Barnes brought this suit.

Moreover, Sohio fails to mention in its brief that under the operating agreement (R:70), Barnes' lack of involvement in the day-to-day management of the property was to be expected. Under the agreement, Barnes had turned over to Sohio the "sole control, custody, supervision and management of the properties" and had given to Sohio authority to "conduct all

matters of a routine nature affecting the Properties, or the Parties, as such, in the ordinary course of business. . . ." Thus, it is plain that Sohio's assertion that Barnes "ignored" the property and failed to put Sohio on notice of its claim is directly disputed by the record evidence.

Also in dispute is the significance of Sohio's subsequent acts. Sohio claims that its acts were "fully consistent" with ownership. (Sohio Brief, p. 16) Many of those same acts, however, -- i.e., managing and developing the property and paying the taxes and other assessed expenses on it -- were also fully consistent with Sohio's trustee status as the record title holder and with its responsibility under the operating agreement to control, supervise and manage the property. Moreover, Sohio's failure to attempt to have the Conveyance and Assignment acknowledged until 1977 (Sohio Brief, p. 8) also suggests that it was acting pursuant to the operating agreement rather than an absolute conveyance. As Barnes is entitled to the inference that these acts were taken pursuant to the operating agreement, there is plainly a genuine issue of fact about their significance that precludes summary judgment at this point in the case.

E. The Issue of Fiduciary Duty.

"In determining whether a deed, absolute in its terms, is intended as a mortgage, [one] of the essential elements to

be considered" is the "various business, social, or other relationships of the parties. . . ." Corey v. Roberts, 25 P.2d 940, 942-943 (Utah 1933). There is evidence here that the relationship of Sohio to Barnes with respect to the Asphalt Ridge Properties was that of a trustee, thus giving rise to certain fiduciary duties on the part of Sohio. The operating agreement recites that Sohio is "holding" the property for Barnes (R:70). Sohio itself states in its Commitment Letter to Barnes that the property is "currently held in Sohio's name as trustee for Barnes" (R:79) and the Conveyance and Assignment drafted by Sohio states that "the record title to [the property] is now held in the name of [Sohio] for the use and benefit of [Barnes]." (R:85) Certainly, Barnes believed that Sohio owed it certain fiduciary duties. (R:42:84-85)

Although Sohio cites evidence to the contrary, that simply demonstrates, as noted above with respect to the other issues, that the issue of whether Sohio owed Barnes any fiduciary duties, what those duties were and how the trustee/beneficiary relationship may have affected the negotiations between Barnes, Sohio and the bank is disputed and needs to be tried on remand.

The lower court, in its Original Ruling, held that no breach of "any fiduciary responsibility" of Sohio to Barnes could be inferred from the transaction because the October 6,

1971 Operating Agreement "authorized the parties to increase or decrease their respective interest" in the property. (R:145) This conclusion does not follow from the premise. The fact that parties to a joint venture agree that they may "increase or decrease" their respective interests does not mean that they can do it in an unconscionable manner. Their conduct towards each other remains open to challenge, particularly where, as here, one (Sohio) stands in the relationship of trustee for the others (or at least, for Barnes). The lower court surely had no basis for concluding, as a matter of law, that no breach of fiduciary duty had occurred in this case. The record is replete with facts from which it can be inferred that such breach occurred in a most flagrant fashion. At the very least, Barnes is entitled to a full hearing on this issue.

F. The Issue of a Provision for Redemption.

Sohio claims that the "absence of any right of redemption by Barnes" on the face of the documents evidencing the transaction establishes "as a matter of law that the transaction between the parties was not a mortgage." (Sohio Brief, p. 20) This argument is beside the point. The issue here is not whether the Conveyance and Assignment has all the requisites of a formal mortgage,[5/] but whether it was intended as

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[5/] Even if this were the issue, Utah law does not require a mortgage to have an explicit provision for redemption. See U.C.A. §57-1-14.

a mortgage. If it was, then "equity will give effect to the intention of the parties," Bybee v. Stuart, 189 P.2d 118, 122 (Utah 1948), by implying the right of redemption inherent in all mortgages.

Gibbons v. Gibbons, 139 P.2d 105 (Utah 1943), which Sohio cites in support of its proposition, is distinguishable. There the court's task was simply to determine without reference to any parol evidence whether a deed and an accompanying writing contained on their face the requisites of a formal mortgage at law. Noting, among other things, that the documents contained no provision for redemption, the court quite properly held that they were not a mortgage.

Moreover, it appears from the record in this case that one reason why there is no provision for redemption on the face of the documents is because Sohio and the bank contrived to have Barnes waive the right at the time the loan was made.

Barnes came to Sohio needing money, explaining that it had not sought a loan from its regular bank because it needed to deal with someone who knew the true value of the property. (R:42:28) Sohio said that it was not in the business of lending money, but that it could probably arrange a loan to Barnes from its regular bank. (R:42:29-30) Rather than have Barnes pledge the property directly to the bank as security for the loan, which Barnes wanted to do (R:42:27-28), Sohio

negotiated with Barnes the agreement embodied in the Letter of Commitment. In that letter, Sohio promised to buy the property for $500,000 at Barnes' election in return for a grant by Barnes to Sohio of a first right of refusal on the property. With the letter in hand, Barnes and Sohio then went to the bank where the Escrow Agreement was signed. That Agreement, contrary to the Letter of Commitment, as discussed above, provided that Barnes would be deemed to have elected to sell to Sohio if it defaulted on the loan to the bank on or before December 29, 1972.

As a consequence of these agreements, the bank's loan to Barnes was secured, not by the property directly, but through the commitment of its good customer, Sohio, to purchase the property for the amount of the loan in the event of a default and to pay the proceeds to the bank. (Sohio Brief, p. 20) The bank thus had the advantages of a security interest in the property without the disadvantages of having to foreclose on that interest to realize its benefits. Sohio, on the other hand, with no risk to itself, stood to acquire the property in the event of a default for a fraction of its value, also without having to foreclose. Barnes, who needed the money and Sohio's assistance in getting it and so was willing to agree to the arrangement, was left without his right of redemption.

Had Barnes been dealing solely with the bank, such an arrangement would have been void as against public policy. See Kawauchi v. Tabata, 413 P.2d 221 (Haw. 1966); Coursey v. Fairchild, 436 P.2d 35 (Okla. 1967); 59 C.J.S. §818. Public policy is no less offended, however, when the same result is achieved by the involvement of a third party closely associated with the bank. The debtor is still forced to waive in advance his right of redemption in order to get a loan. Yet Sohio now has the temerity to argue that because the provision of redemption which it contrived to have Barnes waive is missing, there is no mortgage.

G. The Issue of Laches.

Sohio argues the applicability of the doctrine of laches. (Sohio Brief, p. 21) In so doing, Sohio relies upon Jacobson v. Jacobson, 557 P.2d 156 (Utah 1976), where an operative fact was that the plaintiffs in that case did not believe they owned the property in question. Barnes' testimony is to the contrary. In any event, the elements of laches -- i.e., whether Barnes sat on its rights and why, and the extent to which delay in bringing the suit may have prejudiced Sohio -- are inherently questions of fact not appropriate for resolution of summary judgment. In any event, as discussed above, those facts are disputed in the record.

CONCLUSION

The court erred in not considering parol evidence on the parties' intent. Had it considered the parol evidence, it would have determined that many material issues of fact are disputed in this case, thus making summary judgment inappropriate. Accordingly, the Court should vacate the judgment of the lower court and remand this case for a full trial of all issues.

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Certificate of Service

I hereby certify that I caused to be hand-delivered this 9th day of May, 1980, a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to the following:

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