

1980

# Sugarhouse Finance Company v. Eugene L. Anderson And Colleen W. Anderson : Brief In Support of Petition For Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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SUGARHOUSE FINANCE COMPANY,	)	
Plaintiff-Appellant,	)	BRIEF IN SUPPORT OF
vs.	)	PETITION FOR REHEARING
EUGENE L. ANDERSON and	)	Case No. 16462
COLLEEN W. ANDERSON,	)	
Defendants-Respondents.	)	

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PRELIMINARY STATEMENT

Sugarhouse Finance Company, plaintiff-appellant, respectfully petitions this Court for a rehearing of the decision in the above referenced matter filed April 15, 1980.

The issue before this Court on appeal was the validity and enforceability of an alleged accord and satisfaction to a judgment entered in favor of appellant in 1976. In an opinion by Justice Hall, the Court held:

(a) Defendant's petition for judicial relief from plaintiff's judgment was procedurally proper and properly placed the issue before the trial court;

(b) the accord and satisfaction was supported by adequate consideration; and

(c) defendant's failure to state that he owned property located in Sevier County and failed to disclose the sale of a portion thereof did not render the accord and satisfaction voidable by reason of fraudulent inducement.

Plaintiff's Petition for Rehearing addresses the Court's holding with respect to (b) and (c) above only.

## STATEMENT OF FACTS

On July 7, 1976, plaintiff filed a complaint against defendant for non-payment of a promissory note. Judgment thereon was rendered in favor of plaintiff on December 17, 1976, in the amount of \$2,423.86, plus interest, costs, and attorney's fees. A copy of the judgment was docketed by plaintiff in Sevier County, defendants' county of residence.

On January 29, 1979, plaintiff served defendants with an Order in Supplemental Proceedings, ordering them to appear in court on February 29, 1979, and answer questions concerning their property. A few days after receiving this notice, defendant Eugene Anderson (hereafter "defendant") met with the President of Sugarhouse Finance Company to settle the judgment previously entered. Defendant Eugene Anderson informed plaintiff of the existence of numerous outstanding obligations against him, including medical expenses incurred pursuant to treatment for injuries sustained in an automobile accident in 1978. Defendant asserted that he was contemplating bankruptcy and such a measure would result in plaintiff's judgment being discharged (Supreme Court opinion, p. 1). After some discussion about defendants' ability to pay the amount due and owing on the judgment, Neuman C. Petty, acting for the plaintiff, agreed to accept the sum of \$2,200 in full settlement and satisfaction of the amount remaining to be paid on the judgment (Finding 4 of the Trial Court, R. 90). Defendant Eugene L. Anderson then made and delivered his check in the sum of \$2,200 to said Neuman C. Petty as full payment of the settlement amount. The

check was drawn on Zions First National Bank, Salina, Utah, and the purpose of payment was stated on the check in the following language: "Payment in full judgment civil #236207" (Finding 5 of the Trial Court, R. 90). Defendant issued a check for this amount, asking plaintiff, however, not to negotiate it immediately, there being some uncertainty as to the sufficiency of funds in the account to cover it (Supreme Court opinion, p. 1).

At the time the defendant Eugene Anderson was served with the Supplemental Order, he was anticipating the closing of a sale of real property in which he had a one-half interest and from which he was to receive \$2,000 after payment of the underlying indebtedness (Finding 6 of the Trial Court, R. 91). The sale was actually completed before Eugene Anderson met with plaintiff, and the title company had not disbursed any money to defendants because of plaintiff's judgment (Tr. 16, 17 and 18).

Defendant Eugene L. Anderson knew that plaintiff's judgment had been docketed as a judgment lien upon all real property belonging to defendants in which defendants had an interest in Sevier County (Finding 7 of the Trial Court, R. 91). Defendant Eugene L. Anderson did not disclose to Plaintiff of plaintiff the fact that he had an interest in property, that the property had been sold, and that he was anticipating the closing of the sale of property and was to receive the sum of \$2,000 from the sale (Finding 8 of the Trial Court, R. 91).

Subsequent to these negotiations, plaintiff received a telephone call from a title company indicating that defendant was in the process of selling a parcel of real property (R.

116). The title company requested a release from the Sugarhouse Finance Company judgment (R. 116). Plaintiff declined to provide the title company with the requested release (R. 116).

On the morning of February 2, 1979, Sugarhouse returned the check for \$2,200.00 to defendant by mail (R. 91, 116). Later that same date, defendant telephoned Sugarhouse (R. 91, 115-116). Plaintiff informed defendant that his check had been returned and that Sugarhouse would not accept the check as settlement of the judgment as defendant had not been candid with him regarding defendant's financial status during their settlement negotiations (R. 91, 100, 111, 117). Defendant received the check by mail on February 3, 1979 (R. 38).

Defendant thereafter filed a motion in the original action, asking that the court order plaintiff to comply with the terms of the agreement of settlement. Hearing on the motion was convened on March 13, 1979, at the conclusion of which the motion was granted and the plaintiff was ordered upon receipt of the \$2,200 payment, to file a satisfaction of judgment with the court. It is from this order that plaintiff appealed.

POINT I. THIS COURT HAS IMPROPERLY SUBSTITUTED ITS  
FINDINGS FOR THE FINDINGS OF THE TRIAL COURT.

A. The Trial Court Made No Finding Of A Loan.

The trial court made no finding that defendants had negotiated a loan and that such loan was the source of funds to be paid plaintiff. The trial court's findings regarding the check delivered to plaintiff were (1) that "defendant then requested that Mr. Petty retain the check for two days while he

made arrangements for the check to clear the bank," and (2) "two days later ... defendant notified Neuman C. Petty by telephone that arrangements had been made for the check to clear the bank" (Findings 10 and 11, R. 91). The trial court's findings did not include findings as to the "arrangements," whether from the defendants' own funds or from some other source.

This Court is required to defer to the findings of the fact finder rather than substitute its judgment. Carnesecca v. Carnesecca, 572 P.2d 708 (Utah 1977).

In contrast to the findings of the trial court, this Court stated:

Pursuant to the parties' conversation of January 31, 1979, defendant agreed that, for a release of the judgment upon payment of a lesser agreed amount, he would negotiate a loan with a third party to enable him to pay off the substitute obligation immediately. (Supreme Court opinion, p. 4., emphasis added.)

We note that, in the present case, defendant agreed to incur additional indebtedness pursuant to the terms of the accord, in reliance on plaintiff's promise to accept immediate payment of a lesser amount in full satisfaction of the underlying obligation. (Supreme Court opinion, p. 5., emphasis added.)

The foregoing findings are inconsistent with those of the trial court. As such, this Court has substituted its judgment for findings of the trial court, the finder of fact. This is error. Carnesecca v. Carnesecca, supra.

Rules of appellate review also require this Court to review the evidence in the light most favorable to the successful party at the trial court. There is evidence in the record to the effect that Eugene Anderson, after his conversation with

plaintiff, discussed with Zions First National Bank honoring defendant's check issued to plaintiff (Tr. 5, 13-14, 20; see Appendix A). This evidence was not reduced to any finding by the trial court. However, if this Court may consider this evidence, it clearly shows that no loan was made to the defendant. Thus the consideration relied upon by this Court in its opinion has failed. The evidence, viewed in the light most favorable to defendants, shows the arrangements made by defendant with Zions National Bank were that the bank would honor defendant's check when it was presented for payment. Had the check been presented for payment, the bank would have made a loan to defendants. However, the check was never presented to the bank for payment and therefore no loan was ever made to defendants. Thus the supposed consideration to support the accord and satisfaction failed.

B. The Trial Court Made No Finding That Defendants Agreed To Obtain A Loan.

The parties agreed that plaintiff would accept the sum of \$2,200 in full settlement and satisfaction of the judgment, whereupon defendant made and delivered his check in said sum (Findings 5 and 6, R. 90). The agreement was for defendants to pay what they were already legally obligated to pay plaintiff, which does not constitute new or adequate consideration. Corbin on Contracts, §§175 and 1281.

Notwithstanding the absence of any finding by the trial court of an agreement to obtain a loan, this Court in its opinion at least twice referred to such an agreement. See

point I.A, above. This Court should not now find what the trial court did not find.

By the findings of the trial court the defendants agreed only to do what they were already obligated to do. No new consideration was given. The agreement was not binding on plaintiff since not supported by new or adequate consideration.

Even if the agreement were that defendant would obtain a loan from the bank, defendant did not fulfill the promise or agreement because defendant, at most, arranged for the bank to honor his check when presented for payment. The check was never presented; thus, the loan was never made.

C. The Trial Court Made No Finding Of Detriment Or Injustice To The Defendants.

In its opinion, this Court relies on Section 90 of the Restatement of Contracts which is as follows:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

There is no evidence to support a finding of detriment or injustice to the defendants. Defendants suffered no legal detriment since no loan was ever made to them by the bank. Enforcement of the promise, however, under such circumstances, rather than avoiding injustice to the defendants, results in injustice to plaintiff. Illustration 4 of Section 90 of Restatement of Contracts is illustrative:



A promises B \$5,000, knowing that B desires that sum for the purchase of Blackacre. Induced thereby, B secures without any payment an option to buy Blackacre. A then tells B that he withdraws his promise. A's promise is not binding.

This illustration could be placed in the context of the present case as follows:

Plaintiff promises defendant to accept \$2,200 from defendant as full satisfaction for plaintiff's judgment against defendant which exceeds \$4,000 with interest, attorney's fees and costs. Induced thereby, defendant issues a check for \$2,200 which defendant informs plaintiff will not be honored upon presentment until defendant advises plaintiff otherwise. Defendant obtains an agreement from the bank upon which the check is drawn to honor the check. Plaintiff then tells defendant that the promise is withdrawn. Plaintiff's promise is not binding.

Defendant has suffered no detriment. Defendant is not indebted to the bank. Defendant remains in precisely the same position he was in before he met with plaintiff and before he obtained the bank's commitment to honor the check.

Since the trial court made no finding of detriment and since there is no evidence to support such a finding, the agreement was not supported by consideration. This Court should so hold.

POINT II. THE BURDEN OF PROVING AN ACCORD AND SATISFACTION WAS ON DEFENDANTS; THIS COURT PLACED THE BURDEN ON PLAINTIFF

Plaintiff submits that the burden of proving an accord and satisfaction is on the party claiming it. Rule 8, U.R.C.P. A sufficient defense thereto is a showing that it was not entered into fairly and honestly. 1 Am. Jur. 2d, Accord and Satisfaction, §24 at 322-23, citing Ralph A. Badger & Co. v.

Fidelity Building and Loan Association, 94 Utah 97, 75 P.2d 669 (1938). The burden of proof is stated:

Accord and satisfaction is properly an affirmative defense; it must be specifically pleaded and the burden of proof with respect to every element of it is on the party alleging it as a defense. (A. Corbin, Corbin on Contracts, §1280 at 134-5 (1962); footnote omitted.)

Plaintiff submits that the burden of establishing an accord and satisfaction was upon the defendant and that the Trial Court's findings, especially 4, 6, 7, 8 and 9, conclusively establish that the accord and satisfaction was not consummated fairly and honestly. Instead, this Court has placed upon plaintiff the burden of establishing fraud. Although that issue is discussed in Points III and IV, plaintiff submits that is an improper burden for plaintiff in this case and this Court's analysis, relieving defendants of the burden which is theirs, is erroneous.

POINT III. DEFENDANTS HAD A DUTY TO DISCLOSE  
THAT THE TITLE COMPANY WAS HOLDING MONEY PENDING  
THE RESOLUTION OF PLAINTIFF'S JUDGMENT.

A. The Particular Circumstances in this Case Imposed  
Upon Defendant a Duty to Speak.

Defendant Eugene L. Anderson was served with a motion and order in Supplemental Proceedings requiring him to personally appear before the Trial Court on February 20, 1979. As such, he was under court order to appear and testify regarding his property. Defendant Anderson was anticipating the closing of a sale of real property in which he had a one-half interest as a tenant in common, and from which he was to receive \$2,000

after payment of the underlying indebtedness (Finding 6, R. 90). Defendant knew that plaintiff's judgment had been docketed as a judgment lien upon all real property belonging to defendants or in which they had an interest in Sevier County (Finding 7, R. 90). The purchase price for the property had actually been received by the title company, and the amount required to obtain a conveyance of the property being sold from a larger parcel which defendant was purchasing had been paid. The \$2,000 that was to be the defendant's share from the sale was being held by the title company because of plaintiff's judgment (Tr. 17, 19). In that sense, the money being held actually belonged to plaintiff, or at least plaintiff had a claim upon it, as a result of its judgment lien.

To be valid, a contract of accord and satisfaction must have been consummated fairly and honestly. 1 Am.Jur.2d Accord and Satisfaction §24 at 322-323, citing Ralph A. Badger & Co. v. Fidelity Building & Loan Ass'n., 94 Utah 97, 75 P.2d 669 (Utah 1938). The agreement defendants seek to hold plaintiff to was not consummated fairly and honestly. Defendant was not only in a superior position to know, but actually knew, the facts which would have a direct bearing on plaintiff's agreement with defendants, and defendant did not disclose the facts.

Because defendant knew the title company was holding money because of plaintiff's judgment lien, defendant had a duty to disclose such fact to plaintiff, which defendant knew was without knowledge of such fact.

Where the particular circumstances impose on a person a duty to speak and he deliberately remains silent, his silence is equivalent to a false representation. 37 C.J.S. Fraud §16a.

The circumstances which impose on a person a duty to speak may arise in a business transaction, where parties are dealing at arms-length. For example, in Obde v. Schlemeyer, 353 P.2d 672 (Wash. 1960), plaintiffs initiated an action to recover damages for the alleged fraudulent concealment of termite infestation in an apartment house purchased by them from the defendants. The trial court found the building was infested at the time of purchase, that defendants were apprised of the termite condition but did not disclose the condition to plaintiffs. On appeal the defendants urged that they had no duty to inform the plaintiffs of the termite condition. The Washington Supreme Court acknowledged that the parties were dealing at arms-length, but nonetheless found, under the circumstances, a duty to disclose the condition. The Court reached this result even though the evidence showed that the purchasers asked no questions respecting the possibility of termites.

Similarly, in Sorrel v. Young, 491 P.2d 1312 (Wash. App. 1971), relying on a standard of "justice, equity and fair-dealing," attributed to Obde v. Schlemeyer, the Court held fraud by non-disclosure of the existence of a land fill where:

(1) A vendor, knowing that the land has been filled, fails to disclose that fact to a purchaser of the property, and (2) the purchaser is unaware of the existence of the fill because either he has had no oppor-

tunity to inspect the property, or the existence of the fill is not apparent or readily ascertainable, and (3) the value of the property is materially affected by the existence of the fill.

Of note is the fact that the buyer made no inquiry concerning the fill. See also Bethlahmy v. Bechtel, 415 P.2d 698 (Idaho 1966), (non-disclosure of known defects in the construction of a home).

Defendant's duty to disclose also arises because of the Order in Supplemental Proceedings. Defendant was under Court order to appear and testify under oath regarding this property. Defendant knew he would be required to testify regarding his property, including the fact of the sale. There can be no dispute that the disclosure of the property and the sale of a portion thereof would have had an effect on plaintiff's willingness to enter into an agreement to accept less than defendants owed. In effect, defendant withheld or concealed the facts to reach a settlement with plaintiff so he would not have to appear for the Order in Supplemental Proceedings. This is an affront on the power of the trial court, which should not be condoned.

B. Having Made Representations, Defendant Was Under a Duty to Reveal, Fully and Fairly, the Facts.

The trial court found:

After some discussion about defendants' ability to pay the amount due and owing on the judgment, the [plaintiff's president], acting for the plaintiff, agreed to accept the sum of \$2,200 in full settlement and satisfaction of the amount remaining to be paid on the judgment. (Finding 4, R. 90, emphasis added.)

However, defendant:

. . . did not disclose to president of plaintiff the fact that he had an interest in the property, that the property had been sold, and that he was anticipating the closing of the sale of property and that defendant Eugene L. Anderson was to receive the sum of \$2,000 from the sale thereof. (Finding 8, R. 91.)

In Russ v. Brown, 529 P.2d 765 (Idaho 1974), the court stated the widely accepted rule that in the sale of property, "although one may not be required to make representations regarding his property, once undertaking to do so, he must fully disclose." Having discussed water-rights with their prospective buyers, the sellers were obligated to reveal, fully and fairly, all facts to the prospective purchasers, including past and pending water disputes with an adjoining land owner and his predecessors. This rule is stated at 37 C.J.S. Fraud §16c:

Where one person seeks information from another, the latter may either refuse to give any information or he must make a full and truthful disclosure which shall have no tendency to deceive or mislead. One who conveys a false impression by the disclosure of some facts and the concealment of others is guilty of fraud, although his statement is true as far as it goes. (Emphasis added.)

There is little question that the plaintiff was seeking information from defendant. They discussed his financial situation for an hour-and-a-half. He indicated he was considering bankruptcy. He told plaintiff of his medical expenses. The trial court found plaintiff and defendant discussed "defendants' ability to pay the amount due and owing on the judgment ... " (Finding 4, R. 90). This alone required defendant to give a complete disclosure of his financial condition, includ-

ing the \$2,000 he was expecting. In view of defendants' interest in the property, which had ripened into money which was not being disbursed to defendants because of plaintiff's judgment, defendant was under an obligation to make a full and truthful disclosure, including the ownership of property, the sale thereof and the fact that money was being withheld from defendant because of plaintiff's judgment lien.

In Deardorf v. Rosenbuch, 206 P.2d 996 (Okla. 1949), plaintiff purchased a one-acre mineral interest which was undeveloped. She was subsequently approached for the conveyance of her interest for a nominal sum, without the disclosure that upon the premises there was one producing oil well and two others were being drilled. Although plaintiff was without knowledge of the producing oil wells upon the property, defendants contended they said nothing to mislead plaintiff and she made the sale of her own free will in an arms-length transaction. Although the negotiations were carried on by correspondence, the wells were clearly open to the view of anyone inspecting the premises. The Court stated:

In the opinion of this Court to confirm as true and others false impression concerning a material fact is no less a false representation of such fact as if made directly in order to create the false impression. The fact that there was production was the moving cause of defendant's seeking the conveyance. The absence of plaintiff's knowledge was relied on as an inducement to plaintiff's executing the conveyance for a nominal consideration. There is no need to weigh the value of each of the several statements in the letter when it is manifest that the letter as a whole is expressive of a scheme to capitalize on the ignorance of another.



C. Defendant Had a Duty to Speak Because the Facts Were Not Equally Knowable to Both Parties.

An arms-length transaction does not eliminate a party's duty, under certain circumstances, to disclose known facts to the other party:

Where the parties deal at arms-length, there is no duty of disclosure where the facts are equally within the means of knowledge of both parties. If a fact is peculiarly within the knowledge of one party and of such a nature that the other party is justified in assuming its non-existence, there is a duty of disclosure. Although there is authority to the effect that knowledge that another is acting under a misapprehension of fact does not impose a duty to speak, it is generally held that a deliberate failure to correct a delusion may constitute fraud. 37 C.J.S., Fraud §16b.

This Court cites the foregoing rule to the effect that where the facts are reasonably within the knowledge of both parties there is no duty of disclosure. The rule, accurately quoted, is slightly different:

Where the facts are equally within the means and knowledge of both parties, there is no duty of disclosure. (Emphasis added.)

In the present case, the facts were not equally within the means of knowledge of both parties, the plaintiff having no way of ascertaining the sale of plaintiff's property and the fact that the title company was withholding money from defendants because of plaintiff's lien.

In Elder v. Clausen, 384 P.2d 802 (Utah 1963), the defendant sold to plaintiffs a farm which had been quarantined for a noxious weed. Defendant showed the weed to plaintiffs, advising plaintiffs that the weed ought to be sprayed, but at no time did defendant advise plaintiffs of the quarantine.



This Court stated:

We conclude that here there was a suppression of the truth, which the party with superior knowledge had a duty to disclose, which amounted to fraud.<sup>1</sup>

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<sup>1</sup>The Court cited the following authority in support of this view:

"One of the fundamental tenets of the Anglo-American law of fraud is that fraud may be committed by the suppression of the truth \* \* \* as well as the suggestion of falsehood \* \* \*."

"Silence, in order to be an actionable fraud, must relate to a material matter known to the party and which it is his legal duty to communicate to the other contracting party, whether the duty arises from a relation of trust, from confidence, inequality of condition and knowledge, or other attendant circumstances \* \* \*."

"The principle is basic in the law of fraud as it relates to nondisclosure that a charge of fraud is maintainable where a party who knows material facts is under a duty, under the circumstances, to speak and disclose his information, but remains silent \* \* \*."

"Although the pertinent inquiry in any case where fraud on the basis of nondisclosure is asserted is whether, upon any particular occasion, it was the duty of the person to speak on pain of being guilty of a fraud by reason of his silence, except in broad terms the law does not attempt to define the occasions when a duty to speak arises. On the contrary, there has been adopted, as a leading principle, the proposition that whether a duty to speak exists is determinable by reference to all the circumstances of the case and by comparing the facts not disclosed with the object and end in view by the contracting parties. The difficulty is not so much in stating the general principles of law, which are pretty well understood, as in applying the law to particular groups of facts \* \* \*."

"Knowledge that the other party to a contemplated transaction is acting under a mistaken belief as to certain facts is a factor in determining that a duty of disclosure is owing. There is much authority to the effect that if one party to a contract or transaction has superior knowledge, or knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence, or means of knowledge which are not open to both parties alike, he is under a legal obligation to speak, and his silence constitutes fraud, especially when the other party relies upon him to communicate to him the true state of facts to enable him to judge of the expediency of the bargain." (Emphasis added. Footnotes and the Court's emphasis omitted.)

In summary of the foregoing Points A, B and C of Point III, there are circumstances in business or arms-length transactions where there is a duty of disclosure. In Warner Construction Corp. v. City of Los Angeles, 466 P.2d 996 (Cal. 1970), the Supreme Court of California stated:

In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff. (Footnotes omitted.)

Instances (1) and (2) clearly apply to the facts of this case.

This Court should have found that defendants had a duty to disclose to plaintiff, and having breached the duty, plaintiff was entitled to rescind the agreement.

POINT IV. DEFENDANTS STATEMENTS WERE MISLEADING  
AND MISREPRESENTED THE FACTS AND LAW;  
DEFENDANTS BANKRUPTCY WOULD NOT HAVE DISCHARGED  
PLAINTIFF'S JUDGMENT LIEN UPON THE REAL PROPERTY.

In the course of the conversation between plaintiff and defendant regarding settlement of the judgment against defendants, Eugene Anderson "asserted that he was contemplating bankruptcy, and that such a measure would result in plaintiff's judgment being discharged." Plaintiff's judgment had been docketed as a judgment lien upon all real property belonging to defendants or in which they had an interest in Sevier County. This was the only judgment lien docketed against defendant's real property. Defendants statement regarding the effect of

bankruptcy upon plaintiff's judgment was erroneous. In terms of the bankruptcy law, plaintiff was a secured creditor, its claim secured by a judgment lien on defendant's real property. Bankruptcy would not discharge the judgment lien. See 11 U.S.C. §§506 and 724.

This clearly brings the defendant's statements within the rule stated in Jardine v. Brunswick Corp., 423 P.2d 659 (Utah 1967):

Where one having a pecuniary interest in a transaction, is in a superior position to know material facts, and carelessly or negligently makes a false representation concerning them, expecting the other party to rely and act thereon, and the other party reasonably does so and suffers loss in that transaction, the representor can be held responsible if the other elements of fraud are also present.

There is no question but that Anderson was in a superior position to know the facts. He knew that plaintiff's judgment had been docketed as a judgment lien against his real property in Sevier County. His statement regarding the effect of bankruptcy was clearly made with the expectation that plaintiff would rely thereon and plaintiff did so rely. In making the statement, Anderson was either careless or negligent. Plaintiff does not challenge the Court's observation that "the plaintiff is obligated to take reasonable steps to inform himself." Plaintiff submits however that plaintiff did so under the circumstances. Defendant Anderson travelled from Salina, Utah to Salt Lake City to resolve the matter of plaintiff's judgment. He told plaintiff about his financial condition. He told plaintiff he was contemplating bankruptcy. Plaintiff and

defendant discussed the matter for an hour-and-a-half. As stated in Pace v. Parrish, 247 P.2d 273 (Utah 1952):

The full measure of the plaintiffs' duty was to use reasonable care and observation in connection with these representations. Having done so, it does not lie in defendant's mouth to say that they were too gullible and shouldn't have believed him.

plaintiff exercised reasonable care under the circumstances. Defendant's statement regarding the bankruptcy was false and misleading.

Even if defendant's misstatement were innocently made, the contract resulting therefrom is voidable by plaintiff. In Seeger v. Odell, 115 P.2d 977 (Cal. 1941), Justice Traynor for the California Supreme Court stated the following rules:

If . . . the opinion or legal conclusion misrepresents the facts upon which it is based or implies the existence of facts which are nonexistent, it constitutes an actionable misrepresentation . . . The fact that an investigation would have revealed the falsity of the misrepresentation will not alone bar his recovery . . . and it is well established that he is not held to constructive notice of a public record which would reveal the true facts. 115 P.2d at 980.

If plaintiff's president knew that a judgment lien on real property is not discharged by bankruptcy, defendant's statement would mean to plaintiff that defendant owned no real property subject to the judgment lien. If plaintiff did not know that a judgment lien on real property is not discharged by bankruptcy, defendant's statement would mean that all debts, including judgments and judgment liens would be discharged. In either event, the statement was misleading, even if innocently.

This Court should have held the defendant's statements were misleading and that plaintiff was entitled to rescind or void the agreement.

## CONCLUSION

The facts as found by the trial court and the evidence before the trial court and this Court require findings and judgment that:

(1) Defendant's agreement to pay \$2,200 in full satisfaction of plaintiff's judgment was not supported by new consideration to support an accord and satisfaction.

(2) Defendants had a duty to disclose to plaintiff their interest in real property, that a portion thereof had been sold, and that the proceeds which would otherwise be paid to defendants were being held by the title company because of plaintiff's judgment.

(3) The representations made by defendant were misleading; plaintiff was entitled to rescind the agreement entered into based on the misleading statements.

Based on the foregoing, Sugarhouse Finance Company prays for this Court to rehear this case and that this Court reverse the order of the trial court.

DATED this 6th day of May, 1980.

Respectfully submitted,

MOYLE & DRAPER

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Wayne G. Petty  
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600 Deseret Plaza  
Salt Lake City, Utah

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May, 1980, I served a copy of the attached Petition for Rehearing and Brief in Support of Petition for Rehearing by delivering a copy thereof to the following, or by mailing a copy thereof in a securely sealed, postage paid envelope to the following at the address indicated:

H. Ralph Klemm, Esq.  
Ten West Broadway  
Salt Lake City, Utah 84101

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## APPENDIX A

Testimony of Eugene L. Anderson at the hearing before Judge Durham, March 13, 1979:

- Q [By Mr. Petty] What did you tell him [plaintiff's president] with respect to the status of your bank account and the amount of this check?
- A I told him that I would have to see to it that it would clear.
- Q Did you tell him that?
- A I told him that the guy that is the bank president down there is a friend of mine, and that we go square dancing with him, and that there would be no problem on the check. In fact, I have written checks previously without the funds to cover them, and they have always cleared the checks, you know, whether I have the funds in there or not.
- Q You did tell him, though, that at the time this check was written there weren't sufficient funds to cover the check?
- A That's correct.
- (Tr. 5.)
- Q [By Mr. Klemm] Mr. Anderson, will you tell us specifically what arrangements were made with the bank with regard to the \$2200 check that was given to Mr. Petty?
- A I just told Rex that I may need some money and could he loan me some more money, and he said, "We will take care of it when you need it." And that's basically all it was.
- Q Did you have other arrangements as well with your friend at the bank in regards to checks that would come in that weren't covered by funds in the bank?
- A Never had an arrangement, but in three years--and I have written, I don't know, not too many, but several checks that the funds weren't in there--but the bank has cleared every check. I have never had a check come back unpaid.

Q Did you have an understanding with the bank in regards to that?

A We had never talked about it. They just did that for me.

(Tr. 13-14.)

Q [By Mr. Petty] Now, with respect to the bank, and the bank's honoring of this check, did you advise the bank that you had issued a check on your account?

A All I did was--like I said, all I did was tell Rex that I may need some more money, and would it be possible to get another loan. And he says, "When you need it, we will take care of it."

Q Did that mean you would have to go back in and talk to him again?

A No.

(Tr. 20.)