

1979

# Utah Mortgage Loan Corporation v. Betty J. Black, Individually And As Personal Representative of The Estate of Don J. Black, And Don J. Black Realty, Inc : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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UTAH MORTGAGE LOAN )  
CORPORATION, )

Plaintiff-Appellant )

vs. )

CASE NO.  
16610

BETTY J. BLACK, individually )  
and as personal representative )  
of the estate of DON J. BLACK, )  
and DON J. BLACK REALTY, INC., )  
Defendants-Respondents)

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APPEAL FROM A SUMMARY JUDGMENT  
OF THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, UTAH  
HONORABLE CHRISTINE M. DURHAM, JUDGE

BRIEF OF APPELLANT

STEVEN H. GUNN  
RAY, QUINNEY & NEBEKER  
Suite 400, Deseret Building  
79 South Main  
Salt Lake City, Utah 84111

RICHARD B. FERRARI  
L. S. McCULLOUGH, JR.  
1200 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111

FILED

DEC 24 1979

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Defendants-Respondents )

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CASE NO 16610

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the Summary Judgment granted by the Honorable Christine M. Durham, Judge of the Third Judicial District Court, in and for Salt Lake County, State of Utah, and entered in the above entitled matter on July 2, 1979.

RELIEF SOUGHT ON APPEAL

Appellant Utah Mortgage Loan Corporation, a Utah corporation ("Utah Mortgage"), seeks a reversal of the Judgment entered by the lower court pursuant to defendant's Motion for Summary Judgment and reversal of the lower court's denial of

Plaintiff's Motion for Partial Summary Judgment. Appellant further seeks remand of this case to the Third Judicial District Court for a full trial on the merits as to all unresolved issues.

#### STATEMENT OF FACTS

On June 26, 1975, Betty J. Black, Don J. Black and Don J. Black Realty, Inc. ("Black Realty") executed and delivered to Utah Mortgage their Trust Deed Note in the principal sum of \$675,715.00 evidencing a loan by appellant to the makers in that amount. (R. 2(¶4), 9(¶4).) Payment of the promissory note was secured by a Trust Deed on certain real property located in Salt Lake County, Utah, which Mr. and Mrs. Black and Black Realty were subdividing and developing. (R. 16.)

The parties agreed that Utah Mortgage would release individual lots within the proposed subdivision upon its receipt of a pre-determined amount. Initially, this amount was set at \$5,200.00 but was subsequently raised to \$5,500.00. (R. 26(¶26), 29, 30.) Typically, a buyer wishing to purchase one of the subdivision lots would pay the lot release price into escrow with the title insurance company at closing. The title insurance company would then forward the release price to Utah Mortgage. Upon receipt of the release price, Utah Mortgage instructed the Trustee under the Trust Deed to execute a



partial release as to the particular lot. All of the sub-division lots were released in this manner. (R. 30.) Once all of the individual lots were released, a general Deed of Reconveyance was recorded describing the entire tract. (R.19.)

Because of various cost overruns, delays, and unforeseen expenses, the amount required to complete the project, and the corresponding funds disbursed from the loan account exceeded the fair market value of the lots comprising the project. (R. 26 (¶7).)

According to the uncontradicted affidavit of Craig D. Anderson, one of Utah Mortgage's loan officers, the unpaid principal balance of the loan is \$36,760.01. (R. 25(¶2).)

By a Complaint dated April 3, 1979, Utah Mortgage instituted the present action against Betty J. Black, Black Realty, and Betty J. Black as the personal representative of the estate of Don J. Black who died prior to the filing of the Complaint. (R. 2-3.)

Defendants answered the complaint by alleging, inter alia, that plaintiff's action was barred by the "one-action" rule, § 78-37-1, Utah Code Annotated, and by the doctrines of estoppel, accord and satisfaction, and waiver. (R. 10.)

By a Motion for Summary Judgment dated June 19, 1979, defendants moved the District Court for summary judgment based upon the aforesaid one-action rule. (R. 14-19.) Correspondingly, by Plaintiff's Motion for Partial Summary Judgment dated June 21, 1979, plaintiff sought partial summary judgment as to the defenses raised in the Third, Fourth, Fifth and Sixth Defenses of Defendants' Answer. (R. 20.) By a Judgment dated July 2, 1979, District Court Judge Christine M. Durham granted defendants' Motion and denied that of plaintiff. (R. 68-69.) At the time of the hearing on the parties' Motions, counsel for both plaintiff and defendants orally stipulated that notwithstanding any language to the contrary in their respective motions, both motions were to apply to all defendants. (Id.)

## ARGUMENT

### POINT I

#### THE LOWER COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Although the lower court's Judgment does not specify the reasons why it granted defendants' Motion for Summary

Judgment, the Motion itself, along with its accompanying Memorandum, makes it clear that the basis of the court's ruling was its finding that the "one-action rule", §78-37-1, Utah Code Ann. (1953), barred plaintiff's action. In pertinent part that statute provides:

There can be one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate which action must be in accordance with provisions of this chapter. . . .

In ruling that the above statute prevented plaintiff from seeking a judgment against the defendants on their promissory note, the court appears to have held that the fact that Black Realty and Mr. and Mrs. Black had agreed to release of the mortgaged property was irrelevant. The court also appears to have rejected Utah Mortgage's argument that its recovery on the promissory note could only be barred by the one-action rule if it were negligent in releasing the collateral. As more fully discussed below, the court's apparent adverse ruling as to these two issues was in error.

A. THE ONE-ACTION RULE DOES NOT PRECLUDE JUDGMENT AGAINST DEFENDANTS BECAUSE THEY AGREED TO RELEASE OF THE COLLATERAL

As stated, the uncontradicted affidavit of Craig D. Anderson makes it clear that all three defendants agreed to the lot release program under which Utah Mortgage released

piecemeal-fashion all of the property described in the Trust Deed. Furthermore, the Trust Deed itself which was signed only by Black Realty provides, in part:

4. At any time and from time to time upon written request of Beneficiary [Utah Mortgage], payment of its fees and presentation of the Trust Deed and the note for endorsement (in case of full reconveyance, for cancellation and retention), without affecting the liability of any person for the payment of the indebtedness secured hereby, Trustee may . . . (d) reconvey without warranty, all or any part of said property. (R. 17.)

The effect of a debtor's consent to release of collateral on the operation of the one-action rule has not been clearly defined by this court. Indeed, in the five western states which have adopted the one-action rule, Utah, California, Idaho, Nevada and Montana, only the courts of California appear to have considered this issue. Thus, in Cooper v. Burch, 3 Cal. 470, 86 P. 719 (1906), the California Supreme Court held that where a co-signer on a promissory note secured by a mortgage on real property was neither informed of nor had consented to partial releases of the mortgaged property, the holder of the note could not obtain personal judgment against him on the note.

Conversely, in Mono Irrigation Company v. State, 32 Cal. 194, 162 P. 647 (1916) the court held that a creditor's sale of personal property described in a chattel mortgage prior

to foreclosure as permitted in the mortgage instrument did not bar the creditor from seeking personal judgment on the note for any deficiency after the sale. The court there said:

Thus, perhaps, if one having a debt secured by a mortgage should cancel it of record, without the consent of the mortgagor, it might be held he could not bring a personal action. On the other hand, if such mortgage were cancelled with the consent or at the request of the mortgagor without any intention of cancelling the indebtedness . . . the holder of the indebtedness would not be at all prevented by [the one-action rule] from bringing and maintaining a personal action for the amount due. Id. at 648-649.

The rule in Utah appears to be consistent with that of California. Thus, in Donaldson v. Grant, 15 Utah 231, 49 P. 779 (1897), this court said:

[W]hen the mortgagee by his own act or neglect deprives himself of the rights to foreclose the mortgage, he at the same time deprives himself of the right to an action on the note. He is not permitted, without the consent of the mortgagor, to release the mortgage for the purpose of bringing an action upon the note. 15 Utah at 241, 49 P. at 781. (Emphasis added).

In view of the fact that prior to the advent of the Uniform Commercial Code the one-action rule applied both to real and personal property, perhaps the clearest statement of Utah law as to the effect of a consent to release of collateral securing payment of the note is found in §70A-3-606(1), Utah Code Ann. (1953), which provides:

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. (Emphasis added.)

Similarly, analogous common-law doctrines in guaranty and surety law also point to the conclusion that in agreeing to release of the mortgage property, the makers of a promissory note lose the protection of the one-action rule in the event of a subsequent action on the note. Thus, concerning the effect of release of security as to a guarantor, it has been stated:

Where the creditor, having had other security for payment of the debtor's obligation, releases or diverts that security, the guarantor is generally discharged to the extent of the value of the collateral released or diverted. . . . There are, however, exceptions to the general rule stated above. If the guarantor consented to the discharge of the security, he is not released. 38 Am. Jur.2d Guaranty §84.

Similarly, it is well-established that release of security by a secured creditor acts as a prorata discharge of surety unless he consented to the release. Chicago Bridge and Iron Co. v. Reliance Insurance Co., 46 Ill.2d 522, 264 N.E.2d 134, 136 (1970); Walin v. Young, 181 Ore. 185, 180 P.2d 535, 537 (1947).

Finally, defendants' consent to release of the collateral acts as a waiver of their defense under the one-action rule. As to the doctrine of waiver this court has said

A waiver is the intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it. It must be distinctly made, although it may be expressed or implied. Phoenix Insurance Co. v. Heath, 90 Utah 187, 194, 61 P.2d 308, 311-312 (1936); American Savings & Loan Association v. Blomquist, 21 Utah 2d 289, 292, 445 P.2d 1, 3 (1968).

It will be seen that the elements of waiver described in the above decision are present here. The Blacks and Black Realty intentionally relinquished their right to prevent release of the collateral. Their relinquishment of this right was distinctly made. Thus they cannot now be heard to disclaim the negative effects of their agreement.

It should be remembered that all of the loan proceeds were used for the benefit of the defendants. Similarly, the proceeds from the sale of the individual lots were used to reduce the indebtedness owed to Utah Mortgage. Mr. and Mrs. Black and Black Realty agreed to the lot release program which ultimately resulted in release of the security. Under such circumstances it would be both inequitable and contrary to

well-established principles of law to prevent Utah Mortgage from recovering the unpaid balance of the loan from the defendants.

B. THE ONE-ACTION RULE DOES NOT PRECLUDE JUDGMENT AGAINST DEFENDANTS SINCE RELEASE OF THE COLLATERAL WAS NOT ATTRIBUTABLE TO PLAINTIFF'S NEGLIGENCE OR FAULT

Quite apart from the fact that in consenting to the release of the collateral defendants have waived any objection they might otherwise have had to the lot release program, it must also be recognized that Utah Mortgage's behavior was free of the neglect or fault which has led courts to prevent recovery by a secured creditor where the collateral has been lost.

Judicial interpretation of the one-action rule has made it clear that the rule requires exhaustion of the collateral before resort can be had against the maker of a secured note. Cache Valley Banking Co. v. Logan Lodge No. 1453, B.P.O.E., 88 Utah 577, 56 P.2d 1046, 1049 (1936). However, the courts do not require a meaningless foreclosure action where the collateral has been previously lost or exhausted. Id. By contrast, if loss of the collateral is attributable to the culpable act of the secured party, the courts have refused to permit the creditor to recover any deficiency from the debtor.



The type of culpability necessary to bar a creditor's recovery has not been clearly defined by the courts. In Donaldson v. Grant, supra, the court found that the failure of the assignee of the secured creditor to file timely notice of the assignment of a mortgage, thereby losing the priority of his lien, barred him from recovering a personal judgment against a co-maker. In ruling against the secured party, the court quoted with approval the following language from the California case of Merced Security Savings Bank v. Casaccia, 103 Cal. 641, 37 P. 648 (1894):

[T]he obvious purpose of the statute [i.e., the California one-action rule] is to compel one who has taken a specific lien to secure his debt to exhaust his security before having recourse to the general assets of the debtor. When he has done this, or when, without his fault, the security has been lost, the policy of the law does not prohibit a personal action. 15 Utah at 241, 49 P. at 781. (Emphasis added.)

The court also quotes with approval a second California case, Hibernia Savings and Loan Society v. Thornton, 109 Cal. 427, 42 P. 447, 448 (1895) wherein the court stated:

But, when the mortgagee by his own act or neglect deprives himself of the right to foreclose the mortgage, he at the same time deprives himself of the right to an action on the note. Id.

Whatever confusion may have been created by the "act or neglect" test of Donaldson v. Grant, supra, was eliminated

in Cache Valley Banking v. Logan Lodge, supra, where the Court characterized Donaldson v. Grant as requiring fault.

But it has also been held that, where the security has been lost through no fault of the mortgagee, an action may be maintained directly upon the personal obligation evidenced by the note without going through the idle and fruitless procedure of foreclosure. Id. at 1049. (Emphasis added).

As if to further emphasize the requirement of neglect or fault, the court in Cache Valley Banking further stated:

He [the secured party] has not waived nor lost . . . [the security] by his negligence. It was lost by the fault of the mortgagor in not paying the first mortgage. Id. (Emphasis added.)

Thus, this court has described the type of behavior of a secured creditor sufficient to bar his recovery of a personal judgment in terms of "fault" (Cache Valley Banking v. Logan Lodge, Donaldson v. Grant) and "act or neglect" (Donaldson v. Grant). The question posed by the case at bar is whether the act of Utah Mortgage in instructing the Trustee under the Trust Deed to reconvey individual lots in accordance with its agreement with the defendants was the type of "fault" or "act or neglect" which should bar it from obtaining a personal judgment against the defendants.

At the outset it must be recognized that the word "act" in the Donaldson v. Grant test of "act or neglect" does

not refer to every conceivable affirmative act of the creditor in releasing the collateral, but rather incorporates the concepts of neglect and fault.

That not every act contributing to the release of collateral is subsumed within the expression "act" as used by the court in Donaldson v. Grant becomes clear when one examines the factual circumstances involved in the relevant Utah cases. Thus, in Donaldson v. Grant, the creditor was barred from recovery where he lost the priority of his lien by virtue of having neglected to record the notice of the assignment of the mortgage to himself. By contrast, in Cache Valley Banking Co. v. Logan Lodge, supra, the creditor was not barred from recovery where the earlier foreclosure of a prior mortgage had resulted in exhaustion of the collateral, notwithstanding the fact that the creditor could have commenced his own foreclosure action prior to that of the first mortgage holder.

The two cases illustrate the positive and negative aspects of the rule that the "act" of the creditor must contain the element of fault or neglect. Both involve an act (actually an omission) which resulted in loss of collateral. But only the "act" which was of a negligent character barred recovery on the note. Thus the court in Cache Valley Banking v. Logan Lodge explained that the creditor's lack of negligence, rather

than its failure to act, was the factor upon which the court relied in ruling in his favor.

As noted above, the "act or neglect" test adopted in Donaldson v. Grant was actually taken from a California decision of Hibernia Savings and Loan Society v. Thornton, supra. California is also the state from whom Utah adopted its one-action statute. It is therefore interesting to note that the California rule requires the element of fault.

If a mortgagee cancels a mortgage of record without the mortgagor's consent he cannot then sue on the note on the loan as he would be permitted to do had the security become lost or valueless. On the other hand, a simple action on the note or debt is permissible where it appears that the security has, without fault of the mortgagee, been lost to him . . . 34 Cal. Jur.2d Mortgages §437, at 109.

This formulation is virtually identical to that adopted in Idaho, Montana and Nevada. See Rein v. Callaway, 7 Idaho 634, 65 P. 63, 64 (1901); Vande Veegaete v. Vande Veegaete, 75 Mont. 52, 243 P. 1082, 1084 (1928); McMillan v. United Mortgage Co., 82 Nev. 117, 412 P.2d 604, 606 (1966).

It should be further noted that the rule barring recovery by a secured creditor whose own negligence or fault has resulted in loss of the collateral is nothing more than a negative formulation of the Uniform Commercial Code's requirement that a secured creditor exercise "reasonable care" as to

collateral. §70A-9-207(1), Utah Code Ann. (1953). It is also closely analogous to the common law's imposition of a duty of "ordinary care" in cases not coming within the Code. First National Bank Giddings v. Helwig, 464 S.W.2d 953, 955 (Tex. App. 1971).

In the instant case, it is clear that Utah Mortgage's actions in releasing the collateral were free of fault and neglect and that Utah Mortgage acted with reasonable care. These actions may be summarized as follows: (1) Utah Mortgage agreed with the defendants that it would release individual lots upon payment of a pre-determined amount (R. 26, 29); and (2) upon receipt of the release price, Utah Mortgage instructed the Trustee to execute a Deed of Reconveyance as to the particular lot. (R. 30.)

To say that Utah Mortgage acted unreasonably or in a negligent manner in entering into the agreement with the defendants for partial releases of the collateral, is to admit at the same time that the defendants were themselves negligent in so agreeing. The more logical conclusion, however, is that plaintiff and defendants were acting in a reasonable manner at the time they entered into the agreement and that only in light of subsequent events can it be seen that the lot release price should have been set at a slightly higher level. In any case,

it is clear that the defendants were not precluded by the agreement from reducing the principal amount of the note by means of payments from their share of the purchase price of the lots or from other sources.

As to the reasonableness of Utah Mortgage's release of the individual lots upon receipt of the release price, it need only be observed that had Utah Mortgage refused to make such releases it would have thereby breached its agreement with defendants. Thus, if Utah Mortgage were negligent or acted unreasonably, it must be concluded that it is negligent or unreasonable to perform one's covenants under a contract. Furthermore, the fact that the total indebtedness of over \$675,000 was reduced to less than \$40,000 through the lot release program would appear to refute any allegation that lots were negligently released.

In conclusion, it should be observed that permitting Utah Mortgage's recovery would not violate the policy underlying the one action rule. The policy of the rule has been expressed as follows:

The purpose of the statute is dual. One is to protect the mortgagor against multiplicity of actions when the separate actions, though theoretically distinct, are closely connected that normally they can and should be decided in one suit. The other is to compel a creditor who has taken a mortgage on land to exhaust his security

before attempting to reach any unmortgaged property to satisfy his claim. G. Osborne, Mortgages §334, at 700-701 (2d ed. 1970).

In this case the policy against multiplicity of actions is not violated by this action since the release of the collateral precludes any possibility of a separate foreclosure action. Correspondingly, the policy requiring resort to the collateral before any personal judgment can be sought would not be violated since the property has already been sold and the proceeds therefrom either distributed to the defendants or applied against the defendants indebtedness. It follows that the one-action rule does not bar this action.

## POINT II

THE ONE-ACTION RULE DOES NOT BAR PLAINTIFF'S CLAIM AGAINST MR. AND MRS. BLACK BECAUSE THEY WERE SURETIES

As noted above, the practical effect of the one-action rule is to require the creditor to exhaust the collateral as a prerequisite to any recovery directly from the debtor. However, the rule has no application to those who sign or indorse a note as sureties. Thus it has been stated:

The Code requirement that there be but one form of action for recovery of any debt or enforcement of any rights secured by a mortgage applies to the primary debtor and was enacted for his benefit. The law never contemplated that because one has taken a mortgage he cannot take other independent

security for his debt and, if the contract for such security permits it, enforce such contract without reference to the mortgage debt. 34 Cal. Jur.2d Mortgages §429, at 98-99.

Where, as here, some of the co-makers on a note are nothing more than sureties, the one-action rule does not require foreclosure on the mortgage securing payment of the note as a prerequisite to a personal action against the accommodation makers.

[U]less there is some agreement or special circumstance imposing deligence on the creditor as a duty, he does not by mere failure to pursue the original debtor discharge a guarantor, surety, or indorser, though his passivity in this regard may result in barring his remedy against the original debtor. Accordingly, a creditor loses no rights against an indorser, whose liability has become fixed by a simple failure to enforce his lien against property mortgaged to secure the debt. Id. at 100.

The reason for the above rule is clear: one who has given security for the payment of a debt may reasonably expect that the creditor will look first to the security for satisfaction of the indebtedness. By contrast, one whose obligation is secured by collateral belonging to a co-debtor is not injured if the creditor chooses to proceed against him directly instead of resorting first to the collateral.

In addition, the undertaking of the surety is in the nature of additional collateral to the obligation of the



primary maker. If he defaults, the creditor may choose to waive the collateral and proceed directly against the surety on his separate contract of suretyship. Thus as to a suretyship in the form of a guaranty it has been held that a creditor may proceed directly against an absolute guarantor without first resorting to foreclosure of a mortgage or trust deed, even where the one action rule is in effect. First National Bank of Nevada v. Barengo, 91 Nev. 396, 536 P.2d 487 (1975); Coombs v. Heers, 366 F. Supp. 851 (D. C. Nev. 1973).

"Suretyship" is defined by the Restatement as follows:

Suretyship is the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other should perform.  
Restatement of Security §82 (1941)

The co-maker of a note may be a surety. Miller v. Zeigler, 3 Utah 17, 5 P. 518 (1881).

In the case at bar it is undisputed that Mr. and Mrs. Black and Black Realty signed the note. It is also apparent from the Trust Deed (R. 16) and the Deed of Reconveyance (R. 19) that Black Realty was the fee owner of the mortgaged property. Thus Mr. and Mrs. Black appear to have signed the note as sureties for the obligation of Black Realty.

Correspondingly under the California rule described above, Mrs. Black, both individually and as executrix for her husband's estate has no standing to complain that the collateral which was supplied by her co-defendant, Black Realty, was negligently disposed of. It follows that the one-action rule should not be so construed as to bar Utah Mortgage's action against the Blacks, even if this Court were to decide that the action against Black Realty is precluded.

### POINT III

#### THE LOWER COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Consistent with its grant of summary judgment to defendants, the lower court denied Utah Mortgage's Motion for Partial Summary Judgment as to the defenses of the one-action rule (Third Defense), estoppel (Fourth Defense), accord and satisfaction (Fifth Defense) and waiver (Sixth Defense). Since, as discussed above, the court ruled incorrectly when it granted Defendant's Motion for Summary Judgment based upon the one-action rule, it follows that this court should reverse not only the lower court's granting of Defendant's Motion for Summary Judgment, but also its denial of Plaintiff's Motion for Partial Summary Judgment on the same issue. In addition, since

the facts as set forth in the various affidavits are uncontradicted as to the doctrines of estoppel, accord and satisfaction and waiver, Plaintiff's Motion for Partial Summary Judgment as to these issues should have been granted and failure to do so rule was reversible error on the part of the lower court.

A. PLAINTIFF IS NOT ESTOPPED FROM ASSERTING ITS CLAIM.

Defendants assert in their Fourth Defense that plaintiff is "barred, precluded, and estopped by the terms of its Deed of Reconveyance . . . from asserting the claims and demands set forth herein." An examination of the facts in this case in light of the elements of estoppel as enunciated by the Utah Supreme Court shows clearly that defendants' assertion is without merit.

The Utah Supreme Court has described equitable estoppel in the following terms:

It is a doctrine of equity to prevent one party from deluding or inducing another into a position where he will unjustly suffer loss. As applicable here, the test is whether there is conduct, by act or omission, by which one party knowingly leads another party, reasonably acting thereon, to take such course of action, which will result in his detriment or damage if the first party is permitted to repudiate or deny his conduct or representation. Harvey v. Sanders, 534 P.2d 903, 905 (Utah 1975).

See also, 28 Am.Jur. 2d Estoppel and Waiver § 35.

In the case at bar the only conduct which defendants point to as giving rise to estoppel is plaintiff's reconveyance of the real property described in the Trust Deed which originally secured the promissory note sued upon. There has been no allegation made by defendants that plaintiff is attempting to "repudiate or deny his conduct or representation." Id. Similarly, defendants have not alleged that as a result of plaintiff's releasing of its lien they have taken some course of action resulting in detriment or damage to them. Indeed, the only evidence before this court is that defendants specifically agreed to release of the collateral. Thus, there could not have been any detrimental reliance on the part of defendants giving rise to estoppel. Defendants' invocation of the doctrine of estoppel must therefore be rejected.

**B. PLAINTIFF'S CLAIM IS NOT BARRED BY ACCORD AND SATISFACTION.**

Defendants claim in their Fifth Defense that Utah Mortgage's claim is barred by the doctrine of accord and satisfaction. An examination of the authorities belies this assertion. The doctrine of accord and satisfaction has been described by the Utah Supreme Court in the following terminology:

An accord and satisfaction is a method of discharging a contract, or settling a claim arising from a contract, by substituting for such contract or claim an agreement for the satisfaction thereof, and the execution of the substituted agreement. "To constitute an accord and satisfaction there must be an offer in full satisfaction of the obligation, accompanied by such acts and declarations as amount to a condition that if it is accepted, it is to be in full satisfaction, and the condition must be such that the party to whom the offer is made is bound to understand that if he accepts it, he does so subject to the conditions imposed. . . . The accord is the agreement and the satisfaction is the execution or performance of such agreement. . . ." Cannon v. Stevens School of Business, Inc., 560 P.2d 1383, 1386 (Utah 1977) (Quoting 1 Am. Jur.2d Accord and Satisfaction §1.)

As shown by the affidavit of Craig D. Anderson, (R.26 (¶8).) Utah Mortgage has never agreed to substitution of the promissory note sued upon for any other obligation. Similarly, defendants have adduced no evidence to show that they ever made an offer "in full satisfaction of the obligation". Cannon v. Stevens School, supra. It is true that the Affidavit of Craig D. Anderson shows that there was a partial reduction of the indebtedness each time a subdivision lot was sold. (R.26 (¶9).) However, as Mr. Anderson's Affidavit also shows, the proceeds from the sale of the lots never completely paid off the underlying indebtedness. Thus, there was only an "accord and satisfaction" to the extent of the proceeds from the sales

of the lots. Correspondingly, defendants' theory is without merit.

C. PLAINTIFF'S CLAIM IS NOT BARRED BY WAIVER.

Defendants assert in their Sixth Defense that "plaintiff is barred and precluded by waiver from asserting the claims and demands set forth herein." As is the case with the other theories discussed above, defendants' theory of waiver is not consistent with the law of this state.

As noted above, this Court has defined waiver as an intentional relinquishment of a known right.

A waiver is the intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it. It must be distinctly made, although it may be expressed or implied. Phoenix Insurance Co. v. Heath, 90 Utah 187, 194, 61 P.2d 308, 311-312 (1936); American Savings & Loan Association v. Blomquist, 21 Utah 2d 289 292, 445 P.2d 1, 3 (1968).

As the affidavit of Craig D. Anderson makes clear, Utah Mortgage has never agreed to relinquish or dispense with its rights under the promissory note. (R. 26-27 (¶11).) Thus there is no factual support for defendants' waiver theory.

The defenses of estoppel, accord and satisfaction, and waiver are all affirmative defenses the burden of proof of which rests upon defendants. Utah R. Civ. P. 8(c); 29 Am. Jur.2d Evidence §129. In the case at bar defendants have

failed to produce any evidence in support of the aforesaid theories; on the contrary plaintiff has produced affidavits in support of its Summary Judgment negating those defenses. It follows that plaintiff's Motion for Partial Summary Judgment as to the issues of estoppel, accord and satisfaction, and waiver should have been granted.

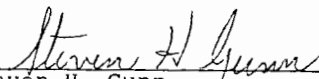
### CONCLUSION

Although the defenses relied upon by defendants may be described variously in legal terminology as the "one-action rule", "estoppel and waiver" and "accord and satisfaction" they are all essentially variations on a central theme: namely, that plaintiff should not be entitled to recover against defendants since the loan collateral was insufficient to pay off the indebtedness. As demonstrated above, the legal authorities do not support defendants in this argument. In essence, what defendants are saying is that any loss on the project should be absorbed by Utah Mortgage, but that any profit should inure to them. While such an arrangement may be typical of a partnership or joint venture, it is certainly anomalous to the relationship of a lender to a borrower. Defendants gambled on

the real estate market and lost. Now they should be required to reimburse the lender who made their venture possible.

DATED this 24<sup>th</sup> day of October, 1979.

RAY, QUINNEY & NEBEKER

  
Steven H. Gunn  
Attorneys for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed copies of the foregoing Brief of Appellant to Richard B. Ferrari and L. S. McCullough, Jr. Attorneys for Respondents, 1200 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah, on this the 24<sup>th</sup> day of October, 1979.

