1980

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 : Appellant's Reply Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

UTAH MORTGAGE LOAN CORPORATION, Plaintiff-Appellant, vs. BETTY J. BLACK, individually and as personal representative of the estate of DON J. BLACK, and DON J. BLACK REALTY, INC., Defendants-Respondents.	CASE NO. ~~11610~~ 16610

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

APPELLANT'S REPLY BRIEF

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

PETER W. BILLINGS
GLEN E. CLARK
FABIAN & CLENDENIN
800 Continental Bank Building
Salt Lake City, Utah 84101

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

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Salt Lake City, Utah 84111

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APPELLANT'S REPLY BRIEF

STATEMENT OF FACTS

Many of the statements contained in the Brief of Appellant and the Brief of Defendants-Respondent as to the facts in this case are undisputed; however, a careful examination of the affidavits which are the source of the facts in this case reveals that in several respects defendant's Statement of the Facts is inaccurate.

The most serious misstatement of the facts contained in defendants' Brief arises in the context of defendants' insistence that the only agreement between the parties relating to partial

that Utah Mortgage was free to release or to not release, as it saw fit. (See Brief of Defendants-Respondent, pp. 3-5, 17-18.)

There are four references to partial releases in the Record. The first of these is contained in the Trust Deed itself in paragraph B.4. which states that upon request of Utah Mortgage the trustee may "reconvey without warranty all or any part of said property." (R. 17.)

The remaining references to the agreement are found in the Anderson, Fry and Newman affidavits (R. 25, 29 and 30.) Mr. Anderson's affidavit sets forth the following information as to the loan agreement:

> 6. At the time it made the loan Utah Mortgage agreed with the Blacks and Black Realty that it would give a partial release as to individual lots in the proposed subdivision upon payment of $5,200.00 per lot. This release price represented approximately 115% of the prorata value of each lot based upon the loan amount. The release price was later raised to $5,500.00. (R. 26.)

Correspondingly, the affidavit of John D. Fry states:

> 2. As part of the loan, Mr. and Mrs. Black requested that Utah Mortgage agree to release single lots from the Trust Deed upon payment of the sum of $5,200.00. This, Utah Mortgage agreed to do. (R. 29.)

Finally, the affidavit of Robert A. Newman provides the following information as to the lot release agreement:

> 2. Although the facts surrounding the release of lots varied with each sale, typically a buyer

> wishing to purchase one of the Brook Hollow lots would pay the lot release price into escrow with a title insurance company as part of his closing. His title insurance company would then forward the $5,200.00 or $5,500.00 release price to us. Upon receipt of the release price, we instructed the trustee under the Trust Deed to execute a partial reconveyance as to the particular lot. All of the Black lots were released in this manner. (R. 30.)

It is clear from the above statements from the affidavits of Messrs. Anderson, Fry and Newman that quite apart from the language in the Trust Deed which permitted Utah Mortgage to make partial reconveyances of the property, there existed a separate agreement between the parties which required Utah Mortgage to release individual lots in the subdivision upon payment of $5,200.00 and that this lot release price was subsequently raised by agreement of the parties to $5,500.00. Thus, Mr. Anderson's Affidavit makes reference to the fact that "Utah Mortgage agreed with the Blacks and Black Realty that it would give a partial release as to individual lots in the proposed subdivision upon payment of $5,200.00 per lot." (R. 26.) And Mr. Fry states that the Blacks "requested that Utah Mortgage agree to release single lots from the Trust Deed upon payment of the sum of $5,200.00 . . . " and that Utah Mortgage agreed to do so. (R.29.)

Notwithstanding the clear language of the affidavits as set forth above, defendants characterize Utah Mortgage as being "free to set any release price it chose", and to "have withheld

even higher release price, had it so desired". (Brief of Defendants-Respondent, p. 4.) Similarly, defendants state that "Utah Mortgage's right to demand any payment it chose as a condition of releasing lots was unrestricted . . ." and that "[i]t could and did vary the release price to suit its perception of necessary cash flow." (Brief of Defendants-Respondent, p. 5.)

A more accurate statement of the facts as set forth in the affidavits would appear to be that an agreement of some type existed between the parties as to partial releases of the lots, that the agreement, although not set forth in detail in the record, required that Utah Mortgage release lots to the defendants upon their tender of an agreed-upon sum, and that at some point in time, for unknown reasons, the release price was increased from $5,200.00 to $5,500.00.

A second misstatement of the facts occurs in defendants' Statement as to the sufficiency of the release price to pay off the outstanding indebtedness under the note. Thus, defendants state that "[a] release price of even $5,200.00 per lot would have been more than sufficient to retire the loan, had it been collected." (Brief of Defendants-Respondent, p. 5.) It should be noted that this statement is not taken from the facts as set forth in any of the affidavits, but rather is an interpolation of certain figures found in the affidavit of Craig D. Anderson.

Mr. Anderson states in his Affidavit that Utah Mortgage loaned defendants the sum of $675,715.00, or 75% of the appraised val of the land and that the release price of $5,200.00 represente "approximately 115% of the prorata value of each lot". (R. 25, 26.) Defendants apparently conclude from these figures that h each lot been released for the $5,200.00 or $5,500.00 release price, the loan would have been paid well before all of the lot had been released. Such a conclusion overlooks the fact that t loan balance could have been increased by subsequent advances, payment of which would still be secured by the Trust Deed. (See the third paragraph of the Trust Deed which states that the instrument is given to secure not only payment of the principa and interest due on to the note, but to secure payment of all s expended by the beneficiary or trustee pursuant to their rights under the Trust Deed. (R. 16.)) That such advances were made apparent from the following statement by Mr. Anderson in his affidavit:

> 7. Because of various cost overruns, delays, and unforseen expenses, the amount required to complete the project and the corresponding funds dispursed from loan account, exceeded the fair market value of the lots comprising the project. As a result, the proceeds from the sale of the property described in the Trust Deed were not sufficient to pay off the loan. (R. 26.)

While admittedly the affidavits contain little information as to the reason why the sums paid for the lot

releases were insufficient to pay off the loan balance,[1] it is inaccurate to say, as defendants do, that "a release price of even $5,200.00 per lot would have been more than sufficient to retire the loan. . . ." The more accurate statement would appear to be that if no further advances were made to the defendants, the cumulative lot release price would have been sufficient.

Defendants' misapprehension of the above facts leads to a third misstatement: namely, that "Utah Mortgage apparently claims that it somehow lost track of the loan balance and released all the mortgaged lots before the loan had been paid off." (Brief of Defendants-Respondent, p. 6.) The facts as set forth in the affidavits are quite the contrary. Far from alleging that they lost track of the loan balance and inadvertantly released all of the remaining lots, the representatives of Utah Mortgage stated

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[1]These and other gaps in the facts set forth in the affidavits are understandable when one considers that the action was commenced only a few weeks prior to defendants' motion. Furthermore, neither defendants' Motion nor their Answer sets forth their subsequently advanced theory that they had not agreed to the release of the lots. Thus, in gathering its affidavits Utah Mortgage was left to guess as to the basis for the Summary Judgment. Since the only "evidence" filed by defendants consisted of certified copies of the Trust Deed and Deed of Reconveyance, plaintiff's counsel was led to believe that defendants contended that <u>any</u> release of the collateral (whether consented to or not) was in violation of the one-action rule.

that "all" of the Black lots were released according to the lo release agreement (R. 30) and that "the proceeds from the sale the property . . . were not sufficient to pay off the loan." 26.) Unless one applies a rather unique interpretation to the word "all" one must conclude that every single lot contained i the Black subdivision was released upon payment by the defenda of the prearranged release price. It follows that defendants' characterization of the reason given by Utah Mortgage for releasing the lots is totally inaccurate and misleading.

While it is understandable that defendants are not hap with the facts as set forth in the affidavits, for purposes of their Summary Judgment defendants must live with them. The pertinent facts are these:

1. Utah Mortgage loaned defendants the sum of $675,715.00. (R. 25.)

2. To secure payment of the loan, Utah Mortgage took trust deed on the subdivision which defendants were developing. (R. 16.)

3. At or about the time of the execution of the note trust deed, defendants agreed with Utah Mortgage that upon the payment of an agreed price, Utah Mortgage would direct the trus to execute partial reconveyances from the Trust Deed so that th sale of the particular lot could be completed. (R. 26, 29, 30.

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

5. The unpaid principal balance of the loan is $36,760.01. (R. 25.)[2]

6. All of the lots in the subdivision were released pursuant to the lot release agreement between defendants and Utah Mortgage. (R. 30.)

ARGUMENT

POINT I

RESPONDENTS' BRIEF REVEALS THE EXISTENCE OF MATERIAL ISSUES OF FACT

It is universally acknowledged that summary judgment is in appropriate where there exists an unresolved issue at to a material fact. Thus, this Court has said:

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[2]Although the evidence as to the loan balance is uncontradicted, defendants make much of the discrepancy between the prayer of the Complaint ($38,467.43) and Mr. Anderson's Affidavit ($36.760.01). (See Brief of Defendants-Respondent at pp. 1, 3.) While the discrepancy is irrelevant to these proceedings, the Court may wish to know that the difference represents accrued interest on the loan.

> A summary judgment must be supported by evidence, admissions and inferences which when viewed in the light most favorable to the loser shows that, "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor. Bullock v. Desert Dodge Truck Center, Inc., 11 U.2d 1, 4-5, 354 P.2d 559, 561 (1960).

As alluded to in the Statement Facts in this Brief, there are significant disputes as to the facts in this case. Thus, under the rule stated above, summary judgment is inappropriate.

Utah Mortgage's opposition to entry of summary judgment below is based upon the fact that the release of the collateral (the lots in the subdivision) was agreed to by the defendants and therefore does not constitute the type of "act or neglect" which will bar it from suing the borrowers directly. Defendants' response to this argument is primarily in the form of an interpretation of the facts as set forth in the Affidavits of Messrs. Anderson, Fry and Newman. Thus, as to Utah Mortgage's argument that defendants agreed to release of the lots, defendants respond by asserting that (1) such an agreement does not exist outside of the Trust Deed (Brief of Defendants-Respondent, p. and (2) Utah Mortgage lost track of the number of lots which it had released and inadvertently released the remaining lots without obtaining consideration. (Id. at pp. 15, 16, 19.)

It should be noted at the outset that defendants' arguments are essentially factual rather than legal. To reiterate, the so called "facts" upon which defendants rely are (1) that there was no release agreement other than that found in the Trust Deed and (2) that Utah Mortgage "lost track" of the property. As discussed in the Statement of Facts, at best defendants' "facts" are disputed by the affidavits; at worst, they find no support in the Record. This fact is shown clearly by the affidavits of Craig D. Anderson (R. 25), John D. Fry (R. 29), and Robert A. Newman (R. 30) each of which speaks of an agreement by which lots in the subdivision were to be released upon payment of a specific lot release price. Similarly, Mr. Newman's Affidavit clearly states that "all of the Black lots were released in this manner." (Id.) There is absolutely nothing in the record to indicate that the lots were released by virtue of Utah Mortgage's having "lost track" of the number of lots which had been released or the amount which had been released from the lot release program. It follows that defendants' case for summary judgment is based upon disputed or nonexistent facts. Summary Judgment was therefore inappropriate.

POINT II

THE PROPERTY WAS NOT "LOST" BY VIRTUE OF ANY "ACT OR NEGLECT" OF UTAH MORTGAGE

The parties are in agreement that the law applicable to

this case is set forth in Donaldson v. Grant, 15 U. 231, 49 P. (1897) and Cache Valley Banking Co. v. Logan Lodge No. 1453, B.P.O.E., 88 U. 577, 56 P.2d 1046 (1936), wherein it is stated that where collateral is lost without the fault of the secured party or where it is not lost because of "act or neglect" of th secured party, the creditor is not barred by the one-action ru from proceeding on the note. 15 U. at 241, 49 P. at 781; 88 Ut at 583, 56 P.2d at 1049.[3] The parties diverge, however, in their views as to whether or not in directing the trustee to release the lots Utah Mortgage was free of fault or of neglect.

Defendants take the position that the release of the was a voluntary act by Utah Mortgage and that such a voluntary

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[3]Defendants suggest the following formulation for the rule:

> [T]he mortgagee is relieved from its duty to proceed by forclosure only if the property is lost through circumstances beyond its control. (Brief of Defendants-Respondent, p. 17.)

This proposed formulation does not appear to contradict the ru set forth in Donaldson and Cache Valley Banking except insofar the reference to "circumstances beyond its control" may imply higher duty on the part of the creditor than freedom from faul negligence.

by its very nature shows neglect and inadvertence.[4]

There are two weaknesses in this agrument -- one factual, one legal. First, it is misleading to speak of the partial releases of the collateral as a "voluntary act". In point of fact Utah Mortgage was contractually bound to release the lots upon request by defendants and receipt of payment of the lot release price. Whether performance of a contractual obligation is a "voluntary act" is simply a semantical game having no relevance to the issue at hand.

Rather than asking whether plaintiff's performance of its contractual obligation was "voluntary", this Court should ask whether Utah Mortgage's actions were free of negligence or fault, i.e., whether it acted reasonably under the circumstances. Clearly such a determination is one for the trier of fact and is inappropriate for summary judgment.

Second, the rule of law is that where collateral has been released with the consent of the mortgagor, a personal action on

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[4] "If Utah Mortgage lost the security for its loan before that loan was paid off, it did so through a voluntary reconveyance of the property, not through destruction or prior forclosure. At best, Utah Mortgage can claim only that its security was lost through its neglect and inadvertence. Such a loss can not excuse a mortgagee from the One-Action Rules requirements." (Brief of Defendants-Respondent, p. 12.)

the note is not barred by the one-action rule. Mono Irrigatic Company v. State, 32 Cal 194, 162 P. 647, 648-49 (1916) (For a more complete discussion of this rule, see Brief of Appellant, 6-9.)

But even if one assumes that release of the lots was "voluntary", and that the lots were released through the "act neglect" of Utah Mortgage, it does not follow that Utah Mortga claim against the defendants is barred by the one-action rule. The underlying supposition of defendants' Motion for Summary Judgment is that the release of the lots constituted a "loss" within the meaning of Donaldson and Cache Valley Banking. Thu defendants state, "In this case, the security obviously was lo through the act and neglect of Utah Mortgage." (Brief of Defendants-Respondent, p. 8.). But such a theory is inconsist with the policy underlying the one-action rule. The rule was adopted for the purpose of protecting the debtor from a multiplicity of suits. G. Osborne, Mortgages, § 334 at 701 (2 ed. 1970). Since the statute is designed to protect the debto it follows that the question of whether the collateral has bee "lost" must be approached from the debtor's standpoint. If th collateral has not by the creditor's actions become valueless the debtor, it cannot be said that he has suffered a "loss" wh would bar the creditor's action on the note.

Furthermore, in order to bar the creditor's recovery the alleged negligent action must be the logical cause of the collateral's having become valueless. Thus this Court's decision in Donaldson v. Grant, supra., speaks of loss of the collateral "through no fault of the mortgagee". 88 Utah at 583, 56 P.2d at 1049.

In the case at bar these elements are not present. Utah Mortgage's partial releases did not render the collateral valueless to defendants. On the contrary, in releasing its lien on a particular lot Utah Mortgage bestowed value upon it -- value which could be immediately realized by defendants by sale of the lot.

Similarly, it is defendants, not Utah Mortgage, which have now rendered the property valueless to themselves (and to Utah Mortgage) by conveying the property to third parties. It follows that the acts attributed to Utah Mortgage by defendants did not result in any loss within the meaning of Donaldson and Cache Valley Banking. Therefore Utah Mortgage's release of the collateral does not bar its recovery from defendants.

CONCLUSION

Defendants motion for summary judgment is based upon the facts which are either disputed or unsupported by the Record. These include the allegations that no lot release agreement

existed between the parties and that Utah Mortgage inadvertent released a portion of the subdivision lots from the Trust Deed without having obtained adequate consideration for the release. Since the Record is devoid of any facts which substantiate the allegations, the court below erred in granting defendants' Motion. Furthermore, even if the facts were as defendants have portrayed them, their Motion should still have been denied since they have suffered no loss as a result of the release of the collateral. It follows that the lower court's decision should be reversed and remanded.

DATED this 9th day of May, 19

RAY, QUINNEY & NEBEKER

Steven H. Gunn

Steven H. Gunn

Attorneys for Plaintiff-Appellant
400 Deseret Building
Salt Lake City, Utah 84111
Telephone: 532-1500

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of May, 1980, a true and correct copy of the foregoing Appellant's Reply Brief was mailed, postage prepaid, to the following:

Ricardo B. Ferrari
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

L. S. McCullough
600 Deseret Plaza
Salt Lake City, Utah 84111

Steven H Gunn