

1989

Vail J. Phillips v. Utah State Credit Union : Brief of Appellant

Utah Court of Appeals

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Byron L. Stubbs; attorney for respondent.

Dale R. Kent; McKay, Burton and Thurman; attorney for appellant.

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UTAH COURT OF APPEALS

UTAH

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A.O.

DOCKET NO.

890300-CA

IN THE SUPREME COURT, STATE OF UTAH

VAIL J. PHILLIPS,	:	APPELLANT'S BRIEF
Plaintiff/Respondent,	:	
vs.	:	Priority #14(b)
UTAH STATE CREDIT UNION,	:	
Defendant/Appellant.	:	Appellate No. 89-0300

BYRON L. STUBBS - 3145
530 East 500 South
Salt Lake City, UT 84102
Telephone: (801) 328-4207

Attorney for Respondent

DALE R. KENT - 1800
McKAY, BURTON & THURMAN
1200 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133
Telephone: (801) 521-4135

Attorney for Appellant

FILED
JAN 22 1990

Clerk, Supreme Court, Utah

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530 East 500 South
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Telephone: (801) 328-4207

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DALE R. KENT - 1800
McKAY, BURTON & THURMAN
1200 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133
Telephone: (801) 521-4135

Attorney for Appellant

LIST OF PARTIES

The caption of the case contains the names of all parties.

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STATUTES

§57-1-32, <u>Utah Code Ann.</u> , as amended, 1953	3, 7, 8, 9, 10, 12, 14, 15
§78-2-2(j), <u>Utah Code Ann.</u> , as amended, 1953	1
§78-37-1, <u>Utah Code Ann.</u> , as amended, 1953	7, 12, 14

DETERMINATIVE CONSTITUTIONAL
PROVISIONS, STATUTES AND RULES

§57-1-32, Utah Code Ann., as amended, 1953.

57-1-32. Sale of trust property by trustee -- Action to recover balance due upon obligation for which trust deed was given as security -- Collection of costs and attorney's fees.

At any time within three months after any sale of property under a trust deed, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in such action the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed, the amount for which such property was sold, and the fair market value thereof at the date of sale. Before rendering judgment, the court shall find the fair market value at the date of sale of the property sold. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale. In any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred in bringing an action under this section.

§78-37-1, Utah Code Ann., as amended, 1953.

78-37-1. Form of action -- Judgment -- Special execution.

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 the provisions of this chapter. Judgments shall be given adjudging the amount due, with costs and disbursements, and the sale of mortgaged property, or some part thereof, to satisfy said amount and accruing costs, and directing the sheriff to proceed and sell the same according to the provisions of law relating to sales on execution, and a special execution or order of sale shall be issued for that purpose.

STATEMENT OF THE CASE

On the 18th of November, 1980, Phillips secured a loan from USCU (together with Jack R. Neese) for \$150,000.00 from the Utah State Credit Union (USCU), Defendant in this action and executed a Promissory Note therefore. Neese had previously filed Bankruptcy and therefore was not a party in the action. The loan was secured by two forms of collateral: 1) A lien in the form of a Trust Deed on real property owned by Plaintiff and Jack R. Neese; and 2) the assignment of a real estate note and mortgage held by Plaintiff and Neese as mortgagees, and Central Ranches, Inc., aka Desert Springs, Inc., as mortgagors. This assigned note only provided for annual payments to Neese and Phillips. (Exhibit B #1).

Phillips failed to make payments on the note, and on October 25, 1985, USCU served Phillips and Neese with a written declaration of default. This document was recorded November 21, 1985. (Exhibit B #2). At this time, however, the annual payments on the assigned mortgage were not delinquent.

In November, 1985, Phillips was issued a check from Guardian Title in the amount of \$27,850.00 made payable jointly to USCU and Vail J. Phillips. Said check was issued pursuant to and in conformity with the assigned mortgage. (Exhibit C #2, #3)

Phillips failed to disclose to USCU that he had received this check during the entire default period under the Deed of Trust although it was more than sufficient to cure the default.

(Trial Court Record (hereinafter "R") p. 45) (Exhibit C #4). He apparently kept this check, unnegotiated, for approximately one year.

USCU exercised the power of sale provided for in the Trust Deed and conducted a Trustee's Sale on April 29, 1986. The property described in Exhibit A was at that time purchased by USCU for \$90,000.00. The balance due on the note at the time of the sale was \$112,566.30 leaving a balance still due after application of the sale proceeds. (Exhibit B #3).

USCU first became aware of the issuance of the \$27,850.00 check from Guardian Title in November of 1986, when it received a letter from Guardian Title Company requesting the help of the Credit Union to determine why the check had not been negotiated. (R. p. 45) (Exhibit C #5).

USCU met with Vail Phillips later in November of 1986, at which time the issuance of the check was discussed by the parties. At that time, they discussed the possibility of depositing the money into an escrow account with USCU, but Plaintiff refused to so deposit the money. (R. p. 21).

This check was then cancelled by Guardian Title and a new check was reissued by Guardian Title Company on December 11, 1986, for the same amount. This second check was also concealed from USCU and was neither negotiated nor deposited by the Plaintiff. (R. pp. 8-10) (Exhibit C #7, #8).

The amount requested by said check was ultimately collected by the Plaintiff on May 12, 1987, by way of execution

against Guardian Title Company. (Exhibit C #9)

On January 17, 1987, Plaintiff filed this action. On April 29, 1987, the Honorable Leonard H. Russon granted Plaintiff's Motion for Partial Summary Judgment.

USCU filed a request for interlocutory review to the Utah Supreme Court which request was denied on August 20, 1987. On May 12, 1989, trial was held before the Honorable Leonard H. Russon to determine the issue of damages. Final judgment was entered on June 9, 1989, denying any damages to either party.

SUMMARY OF ARGUMENT

Vail Phillips and his partner borrowed money from USCU. That money was secured by both a Trust Deed and an Assignment of Mortgage on separate parcels of property. Phillips and his partner failed to make the payments due under the note as required, and the property covered by the Trust Deed was nonjudicially foreclosed.

Prior to the foreclosure, Phillips had received a check for \$27,850.00 made payable jointly to USCU and Phillips. The check was issued pursuant to and in conformity with the assignment of mortgage which was the additional collateral pledged by Phillips on his loan with USCU. The assignment was legal and absolute.

Phillips withheld knowledge of the receipt of these funds from USCU for over a year. These funds which had been assigned to USCU were more than sufficient to cure the default.

Furthermore, these funds were in excess of the balance still due after the foreclosure of the Trust Deed.

USCU was precluded from filing for a deficiency for the following reasons. First, there was no deficiency. The money from the assigned mortgage was more than sufficient to pay off the remaining debt owed by Phillips to USCU.

In this case, the security could not be liquidated because the mortgage which had been assigned to USCU was not in default. USCU could take no action on that mortgage unless it became delinquent. The funds were tendered properly by the title company, but improperly held and concealed by Phillips.

Second, the One Action Rule as set forth by §78-37-1 precluded USCU from filing for a deficiency. In order to file for a deficiency, USCU was required to first liquidate all its collateral. As set forth above, the additional collateral could not be liquidated.

§57-1-32, does not preclude USCU from receiving the additional amounts owed from the further pledged security. This statute, as interpreted by the Utah Supreme Court, only prevents additional judicial remedies. Receipt of the additional monies coming to USCU under the note was not judicial remedy covered by the statute. Furthermore, had USCU sought judicial relief for deficiency against Phillips at this point it would have waived its right to the additional collateral.

Thus it was impossible for USCU to comply with both §57-1-32 and §78-37-1. Rules of Statutory Interpretation therefore

preclude the interpretation of §57-1-32 expressed by the Trial Court as it would defeat the intent of the statutes and make their application an absurdity.

Additionally, Phillips should be equitably estopped from working a fraud on USCU. Such will be the result if USCU is precluded from receiving the balance owed on its note from the security, namely the unnegotiated check which had been in the possession of Phillips for over a year. Clearly an individual should not be allowed to abuse the law by using it to perpetrate a fraud on his creditors.

Finally, §57-1-32 does not bar a tort claim for conversion. The necessary elements for conversion having been found by the Trial Court, USCU is entitled, as a matter of law, to its claim for damages against Phillips.

ARGUMENT

POINT I. UTAH CODE ANNOTATED, §57-1-32 IS INAPPLICABLE TO THE INSTANT CASE.

A. Utah Law Required USCU to Satisfy The Balance Due On The Debt By First Exhausting All Security Pledged.

Utah State Credit Union was obligated under Utah Law to satisfy the balance due on the debt owed from Phillips by first exhausting all security before it could proceed against Phillips personally. This rule was set forth by the Utah Supreme Court in Bank of Ephraim v Davis, 581 P.2d 1001 (Utah 1978). Security must be exhausted as to both quantity and quality. Salt Lake

Valley Loan & Trust Co. v Millspaugh, 54 P. 893 (Utah 1889);

Bawden & Associates v Smith, 646 P.2d 711 (Utah 1982).

Furthermore, no personal liability exists until all security pledged is exhausted. Hammond v Wall, 171 P. 148 (Utah 1917); Utah Mortgage & Loan Co. v Black, 618 P.2d 43 (Utah 1980). Once all security has been exhausted then a mortgagee can proceed against the mortgager personally, and then only through judicially available remedies, that is by means of a deficiency judgment for any deficiency. Cox v Green, 696 P.2d 1207 (Utah 1985).

The courts can impose personal liability on the mortgagor only after having ordered sale of the property; and, if after sale, a deficiency appears . . . The status of a mortgage debt under 78-37-1 is somewhat analogous to one not yet due or one which lacks mutuality. Although the debt is past due, the creditor is not yet in a position to obtain personal judgment against the debtor, or to proceed to satisfy the debt out of the debtor's assets other than the mortgaged property. Davis at 1003.

USCU was in the process of satisfying the balance due on Plaintiff's note by liquidating its collateral. Defendant could not maintain a deficiency action against Phillips while remaining security had still not been liquidated. Therefore, §57-1-32 cannot have a meaningful application to this case.

B. §57-1-32 Is Inapplicable Because
There Was No Deficiency

The amount credited by USCU from the Trustee's Sale was \$90,000.00. This left a balance due of \$22,566.30. The amount of the check from the title company which was intentionally

concealed from USCU by Phillips was for \$27,850.00. These funds had been legally assigned to the Credit Union. The amount was more than enough to pay the balance still due by USCU. There being sufficient collateral remaining, in the form of the note and mortgage to meet the balance due on the loan from USCU to Phillips, there was no deficiency to sue upon. It was only upon the release of the assignment by the Trial Court that a deficiency occurred.

In Utah Mortgage & Loan Co. v Black, 618 P.2d 43, 45 (Utah 1980), the Utah Supreme Court found that §78-37-1, known as the "One-Action Rule" limits a creditor to one remedy in exhausting his security before having recourse to the debtor for a deficiency. The Court found:

Consequently, if the creditor (Plaintiff) here fails to comply with the statute in not applying the security to the Defendant's obligation in accordance with their agreement, that would preclude its recovery of any deficiency against them. Utah Mortgage & Loan Co. at 45.

Since no deficiency arises until all security is exhausted, and since the security could not all be exhausted at that time as there had been no default upon the assigned mortgage and note, no action could be taken to recover any deficiency pursuant to Utah Code Ann. §57-1-32.

In a case somewhat analogous to the present, the Utah Supreme Court in Bawden & Associates v Smith, 646 P.2d 711 (Utah 1982) found:

Where two mortgages were foreclosed in one suit but only one was sold, a deficiency judgment could be entered against the mortgager only if

the unsatisfied mortgage with respect to the parcel sold, plus costs and attorney's fees were more than the sale price, and deficiency could not be entered with respect to the second parcel until it also was sold and proceeds applied against the indebtedness and costs secured thereby." Bawden & Associates at 714.

Applying the Court's reasoning to the current case, where only one of the two items of security was foreclosed and sold, USCU could not obtain a deficiency judgment against Phillips unless the unforeclosed security, the mortgage and note, was worth less than the remaining unpaid balance of the loan. Clearly, in this case, that was not so. The check concealed by Phillips was more than sufficient to pay the remaining balance of the loan. Therefore, there was no deficiency and §57-1-32 is inapplicable. See also First Security Bank v Felger, 658 F. Supp 175 (D. Utah 1987).

In its Order Granting Partial Summary Judgment the Trial Court apparently relied upon Cox v. Green, Supra. and Concepts, Inc. v First Security Reality Services, 743 P.2d 1158 (Utah 1987). These two cases, however, are clearly distinguished from the instant case. In those two cases the only security was a Trust Deed upon a single parcel of property. Therefore upon foreclosure, all security was exhausted. The instant case can be further distinguished from Cox and Concepts, Inc. in that, in both Cox and Concepts, Inc. the creditor was attempting to recover damages against the debtor personally. In the instant case, USCU was only seeking to retain its valid interest in the additional security. Therefore, the Court's holding in Cox and

Concepts, Inc. is inapplicable to the instant case.

C. Plaintiff Should Be Estopped From
Perverting The Intent of §57-1-32.

§57-1-32 and §78-37-1 were both created to prevent double recovery by creditors and to prevent creditors from any over-reaching. See First Security Bank v Felger, 658 F. Supp. 175 (D. Utah 1987). The statutes were not created to allow a debtor to defraud his creditors. In the current case, the debtor, Phillips, had in his possession monies to which USCU was legally entitled. He willfully concealed those funds from USCU. (R. p. 12-14).

Those funds were sufficient to clear any default on the loan prior to the Trust Deed foreclosure and were more than sufficient to meet the balance owed after the foreclosure sale. (R. p. 13).

A finding therefore, that Phillips is entitled to a reassignment of the note and mortgage and its proceeds, is an endorsement of Phillips' devious efforts to avoid payment of his just debt to USCU.

POINT II. USCU'S COUNTERCLAIM AGAINST PHILLIPS
SHOULD BE GRANTED AS A MATTER OF LAW

A. Plaintiff's Conduct Constitutes
Conversion Of USCU's Property

Utah follows orthodox criteria in applying the doctrine of conversion. Benton v. Division of State Lands & Forestry, 709

P.2d 362,365 (Utah 1985).

A conversion is an act of willful interference with a chattel, done without lawful justification, by which the person entitled thereto is deprived of its use and possession . . .

Although conversion results only from intentional conduct, but it does not require a conscious wrong doing, and an intent to exercise dominion or control over goods inconsistent with [their] owner's right of suffices. Allred v Hinkley, 328 P.2d 726 at 728 (Utah 1958).

The Record of the Trial Court shows that Phillips knew the check he received from the title company was part of the security pledged to USCU. (R. p. 11) The Record further shows that Phillips knew his note to USCU was in default. (R. p. 12).

After default a debtor has lost his right of possession in property subject to a security interest and retains only a contingent right in the surplus, if any, after the sale. Murdock v Blake, 26 Utah 2d 22, 484 P.2d 164 (1971).

Phillips' counsel admitted that the assignment was a valid one. (R. p. 38). Furthermore, the Trial Court found that the Credit Union was entitled to the payment. (R. p. 36). In spite of USCU's meeting all the criteria necessary for a claim of conversion, the Trial Court held no claim existed because of the bar against collections of deficiencies more than ninety (90) days following foreclosure. (R. p. 41). Such a reading of the statute is clearly overbroad.

The tort action for conversion is completely separate from any action that could have been brought for a deficiency,

had one existed. This is simply a matter of one party, Phillips, exercising unlawful control over the property of another, USCU.

Surely the statute could not be read so as to preclude the eviction of a person whom has been foreclosed on, if the eviction action is taken over 90 days after a foreclosure. Yet, using the Trial Court's reasoning this would be the application of the statute. Independent causes of action cannot be barred by §57-1-32 where they do not comprise an attempt to obtain a deficiency against a debtor. Therefore, USCU's claim for conversion, having been established as a matter of law, should be granted.

CONCLUSION

It is respectfully submitted that the Trial Court erred in awarding Judgment against USCU for the following reasons:

(1) USCU was prevented from bringing a deficiency action against Phillips pursuant to the One-Action Rule until all its collateral had been exhausted.

(2) There was no deficiency, and therefore no cause of action under §57-1-32, until the Trial Court's release of the assignment of mortgage and note to Phillips.

(3) The Trial Court's interpretation of §57-1-32 is erroneous as it conflicts with §78-37-1.

(4) Phillips should be equitably estopped from pleading §57-1-32 as a defense, because to allow him to do so is to put a judicial stamp of approval on Phillips' devious attempts to avoid payment of his just debt to USCU.

(5) U.C.A. §57-1-32 is inapplicable as a defense to USCUs Counterclaim.

(6) Phillips' conduct constitutes conversion of property of USCUs.

Appellant, therefore, respectfully requests that the Judgment of the District Court be reversed with respect to its Motion for Summary Judgment and denial of USCUs Counterclaim against Plaintiff, and that this Court award Judgment to Defendant as a matter of law in the amount of \$22,560.30, together with interest, costs and such other relief as is appropriate.

Respectfully Submitted this ____ day of January, 1990.

DALE R. KENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ____ day of January, 1990, four true and correct copies of the foregoing document were mailed to Byron L. Stubbs, 530 East 500 South, Salt Lake City, Utah, 84102.

EXHIBIT A

1 Exhibit 1-P and this is the check which you previously
2 identified. Tell me when that check was issued?

3 A Well, I think that check was originally issued
4 in 1985.

5 Q No, that particular check.

6 A This particular check?

7 Q Sir, what is the date on the check?

8 A It shows December 11, 1986.

9 Q So then, this isn't the check that you
10 testified you talked to Terry Rawlings about?

11 A Well, I had a check prior to this time that I
12 talked with Terry about.

13 Q Let me show you what your counsel has marked as
14 Exhibit 2-P. Is this the check then that you say you had
15 in your possession at the time you talked to the credit
16 union?

17 A I would think so.

18 Q What is the date of that check?

19 A That one is November 13, 1985.

20 Q Now, do you recall why there are two checks for
21 the same amount?

22 A I am not sure.

23 MR. STUBBS: For the record, I have no
24 objection to 2-P, assuming it is offered.

25 MR. KENT: No objection.

1 THE COURT: 2-P is received.

2 Q (By Mr. Kent) Isn't it true that Exhibit 1 was
3 simply a re-issue of Exhibit 2?

4 A One check was a re-issue of the former check.

5 Q So represented the same thing?

6 A Same thing.

7 Q So, Exhibit 2, the earlier check, was never
8 negotiated, cashed or anything else done with it?

9 A No.

10 Q Did you just tear it up? What happened to it?

11 A It was returned to the title company.

12 Q Now, I think you told me you are certain that
13 this conversation with the credit union took place after
14 the foreclosure; is that right?

15 A Yes.

16 Q And you talked to Terry Rawlings?

17 A Right.

18 Q Now, is it not true, that the reason you were
19 there to talk to Terry Rawlings was because he called you
20 to ask you where is the check?

21 A No, that isn't true. I had a number of
22 conversations with Verl Wright and Verl Wright set up an
23 appointment for me to go up and talk to Terry Rawlings.
24 It was my instigation and not Terry's.

25 MR. KENT: I see. That is all the questions I

1 have.

2 THE COURT: Mr. Stubbs.

3 REDIRECT EXAMINATION

4 BY MR. STUBBS:

5 Q Mr. Phillips, you have indicated. I want to pin
6 down again exactly when you had the conversation, as near
7 as possible. The Notice of Default which Mr. Kent sent
8 out was sent in November of 1985?

9 A Yes.

10 Q Do you have a recollection of receiving that?

11 A Yes.

12 Q Now then, the foreclosure sale was held in
13 April of 1986?

14 A Right.

15 Q When did your conversation, did it take place
16 after the Notice of Default and before this sale, or
17 Mr. Kent's question was: After the foreclosure, which
18 would not have been completed until after April?

19 A Well, I would think it was after the
20 foreclosure.

21 Q And you had no conversations with the credit
22 union from the time you received the Notice of Default
23 until after the sale in April?

24 A Yes. I had several with the fellow downstairs
25 mostly about my ability to take care of the payments, but

1 I was not in a position that I could continue payments.

2 Q Prior to the foreclosure sale, did you have any
3 conversation with anyone at the credit union with regard
4 to the check that you had in your possession?

5 A I can't remember.

6 MR. STUBBS: I have no further questions.

7 RECROSS EXAMINATION

8 BY MR. KENT:

9 Q What was the purpose of this check we are
10 talking about? Why did you have this check?

11 A Well, that was a payment on the mortgage that
12 we had assigned to the credit union.

13 Q And there had been payments prior to this one,
14 had there not, made to you pursuant to that assignment of
15 mortgage?

16 A You say there had been payments on this
17 mortgage prior?

18 Q Yes.

19 A Yes, there had.

20 Q And, in fact, in past years isn't it true that
21 from the time you executed the note with the credit
22 union, you would have received a waiver from the credit
23 union in order to negotiate the checks or so the check
24 would be made directly payable to you without the credit
25 union's name on it also?

1 A Yes, we had done that.

2 Q You had done that in the past. Now, you
3 received this check, Exhibit 2, in November of 1985;
4 isn't that correct?

5 A Yes.

6 Q And it is \$27,000?

7 A Yes.

8 Q And that represented a payment on a mortgage
9 which had been assigned to the credit union, did it not?

10 A That was representative. Yes, it was a payment
11 on a mortgage. It had been assigned to the credit union.

12 Q And your loan with the credit union about this
13 time was in default, was it not, was delinquent?

14 A I think it was in default from something like
15 September to November when they -- when the Notice of
16 Default was served.

17 Q And you never brought that check into the
18 credit union, though, did you, to cure the default?

19 A No.

20 Q Even though that check had been made payable
21 jointly to yourself and the credit union; is that not
22 true?

23 A That is true.

24 Q Even though you were aware that that money
25 coming in on that mortgage had been assigned to the

1 credit union for security for payment of your note; is
2 that not true?

3 A That had my note been current, that would have
4 been reassigned to me anyway.

5 Q So, the question was, you knew when you kept
6 the money that rightfully that money belonged to the
7 credit union because you had assigned that money to the
8 credit union?

9 A No, I don't believe it belonged to the credit
10 union.

11 Q You have testified you were aware and knew the
12 effect of the assignment of the mortgage; isn't that
13 right?

14 A After the mortgage --

15 Q Excuse me. The question was, is it not right
16 that you are aware at the time you received that check
17 that that money had been assigned by you to the credit
18 union to pay your note? Is that not true?

19 A It was assigned for additional collateral for
20 that note, yes.

21 Q Now, so you could have cured the delinquency at
22 any time, at any time, if you had simply tendered that
23 check to the credit union, couldn't you?

24 A I could have brought it current, I guess, with
25 that check.

1 Q And you refused to do that, didn't you?

2 A I didn't do it.

3 Q And is it not true that you didn't even tell

4 the credit union that you had the check?

5 A I don't remember when the credit union became

6 aware that I had the check.

7 Q Well, let me refresh your recollection. Is it

8 not true that the credit union didn't become aware that

9 you had the check until November of 1986; is that not

10 true?

11 A No. I am sure it was before November of 1986.

12 Q Was it then, by your recollection, during this

13 conversation you had with the credit union about

14 depositing that check which was some time after April of

15 '86?

16 A I would say it was some time between April and

17 it was prior to the time that we filed suit.

18 Q It is your testimony also, is it not, that you

19 did not tell the credit union you had this check until

20 after the foreclosure had been completed? That is true,

21 isn't it?

22 A That is true.

23 MR. GENT: That is all the questions I have.

24 Your Honor.

25

1 to clarify the matter. Then I called Mr. Phillips on the
2 phone and asked him about the check.

3 Q Was anyone else present during that
4 conversation that you recall?

5 A No, I don't believe so.

6 Q Will you relate to me what that conversation
7 was?

8 A I just asked him why he had not approached us
9 with the check to have it endorsed so we could have
10 applied towards the proceeds of his loan.

11 Q And what was his response?

12 A He wanted to come in and try and talk about it.
13 So subsequently we set up an appointment and he came in
14 and to talk about the check, and I asked him if he would
15 like to put it on deposit in the credit union until the
16 matter could be resolved and apparently he wasn't
17 agreeable to that because the check was never deposited
18 at the credit union.

19 Q You say, though, you did offer to allow this
20 check to be deposited and held in escrow pending the
21 resolution of who was entitled to the money?

22 A Yes.

23 Q And he refused to do that?

24 A He was not agreeable to putting it on deposit
25 at the credit union, correct.

1 MR. STUBBS: Forged it?

2 THE COURT: He forged it and put it in his own
3 account someplace else. Do you think you could stand
4 here today and say they can't go after us on a
5 deficiency, so they are out the money on that?

6 MR. STUBBS: But that didn't happen.

7 THE COURT: But we all agree if it had
8 happened, it doesn't matter that the credit union can't
9 go after him on the deficiency. They would still be
10 entitled to that check that had been wrongly forged. We
11 all agree on that.

12 MR. STUBBS: On a different theory, on a
13 different theory entirely.

14 THE COURT: Now, we come down to where there
15 was a legal assignment, an assignment of the payments I
16 suppose that the credit union was entitled to.

17 MR. STUBBS: And I think --

18 THE COURT: And he has withheld that from them
19 and now your argument is the same: "But it is too late
20 because, after all, they can't come after us on a
21 deficiency.

22 MR. STUBBS: They knew they had the assignment
23 and they knew the check was to be made. They could have
24 sued and foreclosed, which they did, and sued on a
25 deficiency and executed on the check just like we did

1 around for a year?

2 MR. KENT: I don't think we are. No. 1. that
3 is not the case where he has money that he owes us and he
4 doesn't have the money. That is not this case. This
5 case, he has got money that belongs to -- that is in the
6 hands of a third party. All he has is evidence of it.
7 The third party has got the money. He knows that money
8 was pledged. He knows that payment is due to the credit
9 union and he intentionally hides that from them. It is
10 not his money, but it is someone else's money that is due
11 to the credit union.

12 THE COURT: Let me ask you this. Was this a
13 legal assignment? Was this an actual assignment of his
14 rights to that real estate contract to the credit union?

15 MR. STUBBS: Yes, it was assigned, Your Honor.

16 MR. KENT: Yes.

17 THE COURT: Then, why isn't that money there?

18 MR. STUBBS: It was assigned to them and it
19 would have been theirs and they would have been entitled
20 to it had they not accepted the property that they took
21 as primary security as full payment of the debt. They
22 accepted the property.

23 THE COURT: Now, we come back to that argument.
24 Once you take the property on the foreclosure, then you
25 forego that right?

1 clarified from the testimony I have heard today and I am
2 going to let my prior ruling stand, but I can understand
3 the argument and it isn't -- it certainly isn't an open
4 and shut case. It certainly isn't a case of bad faith
5 and it certainly isn't a case that they don't have an
6 argument and the chances are good you will both go
7 through the cost of an appeal. I could well be reversed
8 and you are back here again. But I can understand your
9 argument, and it is a technical, legal one and I
10 understand your argument. It is more an equitable one,
11 but I think you have got a legal argument too. And the
12 question comes down -- There is no question in my mind,
13 if he had forged the instrument, there is no question
14 that that had nothing to do with the deficiency. He had
15 to give them back the money.

16 Now, we step back one step and say: In this
17 case, there was an assignment and he carried that check
18 around. Is that the credit union's regardless of this
19 deficiency or not? That is really the issue. That is
20 what we really come down to. And Mr. Stubbs is arguing,
21 "It really isn't because when they foreclosed they took
22 it in lieu of, and if there is a deficiency, they can
23 file an answer. Your argument was, No, we didn't take
24 it. We were entitled to it to begin with and it has
25 nothing to do with the deficiency." That is it for an

1 appeal, and I can see that coming. Okay, go ahead with
2 your argument on interest and attorney fees.

3 MR. KENT: I am through with the interest.
4 Just the attorney fees that the parties indicated under
5 Katie vs. Johnson. You get attorney fees under that.

6 The faith statute, you have got to show bad
7 faith, or that the defense is not asserting in good
8 faith, and it is done with the intent to defraud, hinder,
9 those kind of things. And it is clear that was not done
10 in this case. The statute is inapplicable. Just because
11 we are ruled against, does not mean the defense was not
12 meritorious or without merit. Certainly, as the Court
13 has indicated, we have strong legal principles that we
14 are standing on. The attorney fees aren't proper under
15 that statute.

16 The other statute that talks about if attorney
17 fees are provided for in a contract, the one side or the
18 other side gets them. That is inapplicable because that
19 statute on its face says for contracts or notes entered
20 into after April 28, 1986, then that rule applies. These
21 were entered into years before that. So, that doesn't
22 apply either.

23 The third ground upon which Mr. Stubbs asserts
24 they might be applied and entitled to some attorney fees
25 has to do with this case, that he cited and talks about

1 know about this check is six or eight months down the
2 road, and a year later the check is issued. And on that
3 basis I will submit they are not entitled to any further
4 relief.

5 THE COURT: Mr. Stubbs, anything further?

6 MR. STUBBS: Yes, the one point on the interest
7 that he talked about in the beginning of his argument,
8 Your Honor. I don't think it is that difficult to
9 determine a date when the interest starts in this case.
10 They have the foreclosure sale. They have got 90 days
11 from the date of that foreclosure sale to file for a
12 deficiency. They don't file for a deficiency, therefore
13 the interest starts on the date of the foreclosure sale,
14 not 90 days after that. That is when they started it.
15 It is not that difficult. We didn't speculate on the 18
16 percent or the 20 percent of what he was paying. I
17 wouldn't let him do that if he wanted to. I'd say, "You
18 have got to stick to the legal rate of interest, which is
19 10 percent." We have no ambiguity as to the time or
20 ambiguity as to the amount because we stuck with the
21 legal figure.

22 Other than that, Your Honor, I submit it. I
23 think the Court pretty well understands.

24 THE COURT: The Court makes the following
25 findings in regards to the evidence given, that the

1 credit union was unaware of this check, the check of
2 November, 1985. They became unaware of it until November
3 of 1986, and that the inquiry was made by a
4 representative of the credit union of Mr. Phillips, when
5 the credit union was contacted by the title company
6 concerning the check that was still outstanding.

7 The Court is going to find that there was a
8 failure on Mr. Phillips to mitigate in this matter, and
9 the Court has already expressed its grave concern I think
10 concerning that check and the entitlements in regards to
11 that. But understands the arguments made of counsel and,
12 on balance all things considered, is going to allow its
13 prior ruling to stand in regards to that.

14 As to prejudgment interest, the Court is going
15 to deny the same on the grounds that it is not really
16 fixed and unliquidated and cannot be really determined,
17 and the Court is also going to deny the attorney fees.
18 It certainly is not a frivolous or bad faith effort on
19 the part of the defendants in this matter, and the Court
20 will deny the motion for attorney fees. Deny the
21 attorney fees, as well as the interest for the reasons
22 stated in the defendant's memorandum in this regard.

23 Now I suppose that ties it all back up so that
24 it can now be appealed and they will accept it on appeal,
25 and we will see what they do with this matter.

EXHIBIT B

Hand Delivered
- copy -
- -

BYRON L. STUBBS (3145)
Attorney for Plaintiff
530 East Fifth South
Salt Lake City, Utah 84102
(801) 328-4207

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

VAIL J. PHILLIPS,

Plaintiff,

vs.

UTAH STATE CREDIT UNION,
a Utah corporation,

Defendant.

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Civil No. C-87-311

Judge Leonard H. Russon

The plaintiff filed a motion for summary judgment and in response thereto the defendant also filed such a motion; oral argument on both motions was heard by the court on the 13th day of April, 1987; counsel for the parties filed written memorandums of points & authorities and the court having reviewed said memorandums as well as the pleadings of the respective parties on file in this case, and being fully advised in the premises, now enters the following:

FINDINGS OF FACT

1. Plaintiff, on or about the 18th day of November 1980, borrowed from defendant \$150,000.00 and gave said defendant as security for said loan a Trust Deed. As part of said original

transaction the plaintiff, as additional security, assigned to defendant a real estate mortgage and note owned by plaintiff.

2. Plaintiff failed to make payment to defendant on the \$150,000 note secured by the trust deed, and on the 29th day of October 1985, defendant served plaintiff with a written declaration of default which was recorded November 21, 1985.

3. Subsequent thereto and pursuant to said notice of default, a trustee sale was held on April 29, 1986, and the property covered by said trust deed securing the \$150,000.00 note was purchased by the defendant at the trustee's sale for the sum of \$90,000.00.

4. Plaintiff filed this action demanding reassignment of the mortgage and note given as additional security together with any and all proceeds now due or to become due thereon based upon the fact that more than three months had passed since the date of the sale of the real property and the defendant failed to commence an action for any deficiency pursuant to §57-1-32, Utah Code Annotated.

5. Defendant claimed that it was not estopped from continuing to collect monies due on the debt until the balance was paid in full after the trustee's sale.

CONCLUSIONS OF LAW

1. The court concludes that §57-1-32, supra, as interpreted by the Supreme Court of the State of Utah in Cox v Green 696 P2d

1207 (Utah 1985), provides the exclusive procedure for securing a deficiency judgment following a sale of real property under a trust deed, and plaintiffs' election to sell the property to satisfy the debt and failure to comply with said section precludes them from seeking any other remedy.

2. The defendant in this matter elected its remedy of non-judicial trust sale and in doing so was required to comply with §57-1-32, Utah Code Annotated, which requires that the action be filed within three months of the date of sale. Defendant, having failed to comply, is now precluded from seeking any other remedy including a deficiency against the plaintiff.

3. Plaintiff's motion for summary judgment should by reason of the foregoing be granted, and the mortgage and note in question should be re-assigned to him together with any and all proceeds now due or to become due thereon.

4. Defendant's motion for summary judgment should be denied.

DATED this 22 day of April, 1987

BY THE COURT:

JUDGE

Approved as to form:

DALE R. KENT
Attorney for Defendant

CERTIFICATE OF DELIVERY

I hereby certify that I delivered a copy of the foregoing Findings of Fact and Conclusions of Law this 22 day of April, 1987, to:

Dale R. Kent
Attorney for Defendant
660 South 200 East, Suite 100
Salt Lake City, Ut 84111

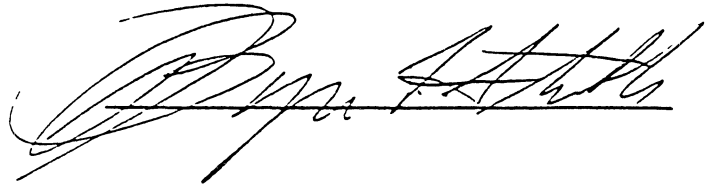
A handwritten signature in dark ink, appearing to read "Dale R. Kent", is written over a horizontal line.

EXHIBIT C

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

VAIL J. PHILLIPS,	:	MEMORANDUM DECISION
Plaintiff,	:	CIVIL NO. C-87-311
vs.	:	
UTAH STATE CREDIT UNION,	:	
A Utah corporation,	:	
Defendant.	:	

Motions for Summary Judgment filed by both parties came on for hearing on April 13, 1987. Following argument of counsel, the Court took the matter under advisement. The Court has now reviewed the file, the Memoranda of Points and Authorities filed by both parties, and the authorities cited, and herein renders its decision.

The plaintiff made a loan from the defendant in the amount of \$150,000.00. Plaintiff gave defendant a trust deed note, and trust deed in regards to the said loan. As "additional security" plaintiff assigned a real estate mortgage and note to the defendant.

Plaintiff failed to make payments on the note, and on October 29, 1985 defendant served plaintiff with a written declaration of default. This document was recorded November 21, 1985.

After notice, a trust deed sale was held on April 29, 1986, where the property was purchased for \$90,000.00.

Plaintiff filed this action, demanding reassignment of the mortgage note, and certain proceeds in regards thereto, upon the grounds that more than three months had passed after the sale of property without the defendant commencing an action for any deficiency amounts pursuant to Section 57-1-32, Utah Code Ann.

Defendant counterclaimed, claiming that it was not estopped from continuing to collect monies pursuant to the assignment of mortgage, until the deficiency amount of \$22,566.30 was received.

Both parties filed Motions for Summary Judgment, plaintiff claiming that defendant was bound strictly to the requirements of Section 57-1-32, and upon failure to file the action within three months after the sale of the property is foreclosed from claiming any deficiency amount against the plaintiff, and the defendant claiming that the additional security represented by assignment of the mortgage was subject to the one action rule, and that a deficiency could not be sought against the plaintiff until the secured interest was exhausted.

Section 57-1-32 states:

At any time within three months after any sale of property under a trust deed, as hereinbefore provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in such action the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed, the amount for which such property was sold, and the fair market value at the date of sale. . . .

;

The trial court ruled, and we agree, that section 57-1-32 provides the exclusive procedure for obtaining a deficiency judgment. The trial court's ruling in this regard was based on the trust used. Plaintiffs' election to sell the property to satisfy the debt precludes them from seeking any other remedy, including damages for breach of contract, which might have been available to them. Since plaintiffs' action was not filed within the time limits of the date of the trustee's sale of the real property, the trial court did not

The defendant in this matter elected its remedy of a non-judicial trustee sale, and in doing so were required to comply with section 57 of the California Code of Civil Procedure. Any rights to a deficiency, an action for the same had to be filed within the time required by that statute. This requirement, as well as the fair market value requirement, ⁶⁴ are necessary for the protection of the debtor and the lender seeks the remedy of a non-judicial trustee sale. Such was not done in this case, therefore, defendant is precluded from any claims of deficiency against the plaintiff.

Since defendant has no right as to a deficiency against the plaintiff, the plaintiff is entitled to have restored to him the mortgage and proceeds in regards thereto.

Plaintiff's Motion for Summary Judgment is granted. Defendant's Motion for Summary Judgment is denied.

Plaintiff will prepare the Order and Summary Judgment.

Dated this 10 day of April, 1987.

1st Leonard H. Russon

LEONARD H. RUSSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this _____ day of April, 1987:

Byron L. Stubbs
Attorney for Plaintiff
530 East 500 South
Salt Lake City, Utah 84102

Dale R. Kent
Attorney for Defendant
660 South 200 East, Suite 100
Salt Lake City, Utah 84111

EXHIBIT D

FILED IN CLERK'S OFFICE
Salt Lake County Utah

APR 20 1987

H. Dixon Hindley, Utah Dist. Court
By L. L. Lundberg

BYRON L. STUBBS (3145)
Attorney for Plaintiff
530 East Fifth South
Salt Lake City, Utah 84102
(801) 328-4207

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

VAIL J. PHILLIPS,

Plaintiff,

vs.

UTAH STATE CREDIT UNION,
a Utah corporation,

Defendant.

ORDER ON SUMMARY JUDGMENT

Civil No. C-87-311

Judge Leonard H. Russon

Plaintiff's motion for summary judgment, together with defendant's motion for summary judgment came on before the above-entitled court on the 13th day of April, 1987, and after oral argument being made by the parties respective counsel,

IT IS HEREBY ORDERED that plaintiff's motion for summary judgment be and the same is hereby granted, and the mortgage and note in question should be forthwith reassigned to plaintiff together with all proceeds now due or to become due thereon.

IT IS FURTHER ORDERED that defendant's motion for summary judgment be and the same is hereby denied with prejudice.

DATED this 20th day of April, 1987.

BY THE COURT:

ATTEST
H. DIXON HINDLEY
Clerk

Leonard H. Russon
JUDGE

BYRON L. STUBBS (3145)
Attorney for Plaintiff
530 East Fifth South
Salt Lake City, Utah 84102
(801) 328-4207

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

VAIL J. PHILLIPS,

Plaintiff,

vs.

UTAH STATE CREDIT UNION,
a Utah corporation,

Defendant.

JUDGMENT

Civil No. C-87-311

Judge Leonard H. Russon

On the 13th day of April, 1987, plaintiff's motion for summary judgment, together with defendant's motion for summary judgment were heard by the above-entitled court; counsel for both parties presented oral argument to the court and filed written memorandums of points and authorities therewith; the court having heard said arguments, reviewed said memorandums and the pleadings on file in this case, and having fully advised itself in the premises, and having made its Findings of Fact and Conclusions of Law, now

ORDERS, ADJUDGES AND DECREES that plaintiff's motion for summary judgment be and the same is hereby granted, and defendant is ordered to restore and assign to plaintiff the mortgage and note in question herein together with all the proceeds now due and or to become due on said note and mortgage. Said note and mortgage which

is to be restored and assigned to plaintiff is attached to this Judgment, marked as Exhibits I and II, and by this reference made a part hereof as if fully set forth herein.

Defendant's motion for summary judgment be and the same is hereby denied with prejudice.

DATED this _____ day of April, 1987.

BY THE COURT:

JUDGE

Approved as to form

DALE R. KENT
Attorney for Defendant

CERTIFICATE OF DELIVERY

I hereby certify that I delivered a copy of the foregoing Judgment 22nd day of April, 1987, to:

Dale R. Kent
Attorney for Defendant
660 South 200 East, Suite 100
Salt Lake City, Ut 84111

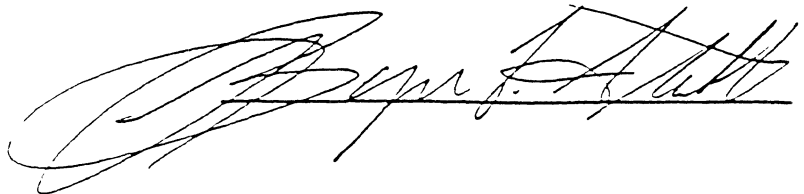


EXHIBIT E

DALE R. KENT (1800)
1200 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133
Telephone: (801) 521-4135

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

VAIL J. PHILLIPS,	:	SUPPLEMENTAL
	:	FINDINGS OF FACT AND
Plaintiff,	:	CONCLUSIONS OF LAW
vs.	:	
	:	Judge Leonard H. Russon
UTAH STATE CREDIT UNION,	:	
a Utah corporation,	:	
Defendant.	:	Civil No. C-87-311

The above-entitled matter came on regularly for trial before the above-entitled Court on the 12th day of May, 1989, the Honorable Leonard H. Russon presiding; and the Plaintiff being present and represented by his attorney, Byron L. Stubbs; and Defendant being present through its officers and represented by its attorney, Dale R. Kent; and the Court having heard the testimony of the parties, and having heard the Stipulation of the parties with regard to the narrowing of issues presented; and being fully advised in the premises; and the Court having previously made its Findings of Fact and Conclusions of Law with regard to the Order Granting Partial Summary Judgment, which Order was entered in April, 1987; and being fully advised in the

premises, the Court, therefore, renders the following:

FINDINGS OF FACT

(1) The Findings of Fact previously entered by the Court are hereby adopted and incorporated as though fully set forth herein.

(2) In November 1985, the Plaintiff was issued a check from Guardian Title in the amount of \$27,850.00 made payable jointly to Utah State Credit Union and Vail J. Phillips.

(3) Said check was issued pursuant to and in conformity with the Assignment of Mortgage which was the additional collateral pledged on the Plaintiff's loan with the Defendant.

(4) The Plaintiff failed to disclose to the Defendant that he had received said check during the entire default period under the Deed of Trust.

(5) The Defendant first became aware of the issuance of the check in November of 1986 when it received a letter from Guardian Title Company requesting Mountain America Credit Union's help in determining why the check had not been negotiated.

(6) The parties met later in November of 1986, at which time the issuance of the said check was discussed by the parties. At that time, they discussed the possibility of depositing the money into an escrow account with the Defendant, but the Plaintiff refused to so deposit the money.

(7) This check was subsequently cancelled and a new check was reissued by Guardian Title Company on December 11, 1986, for the same amount.

(8) The second check was also never negotiated or deposited by the Plaintiff.

(9) The amount referenced by said check was collected by the Plaintiff on May 12, 1987, by way of execution against Guardian Title Company.

(10) This Court can make no finding as to the time upon which the Plaintiff's cause of action against the Defendant arose.

(11) Mountain America Credit Union, in refusing to endorse the check over to the Plaintiff, did not in any manner intend to hinder, delay, defraud, or take advantage of the Plaintiff.

From the foregoing Findings of Fact, the Court now enters the following:

CONCLUSIONS OF LAW

(1) The Plaintiff has failed to mitigate his damages, if any, in this matter.

(2) The damages, if any, claimed by the Plaintiff were unliquidated.

(3) The defense of the Defendant was asserted in good faith.

(4) The Defendant was not negligent in its handling of this matter.

(5) The Plaintiff should not be awarded prejudgment interest, nor attorney's fees in this matter.

DATED this 9th day of June, 1989.

BY THE COURT:

S/ 5-2-79
Judge Leonard H. Russon

Approval as to form:

Byron L. Stubbs

MAILING CERTIFICATE

The undersigned hereby certifies that on the _____ day of May, 1989, a true and correct copy of the foregoing document was mailed, postage prepaid, to the following:

Byron L. Stubbs
530 East Fifth South, Suite 10
Salt Lake City, UT 84102

DRK03

EXHIBIT F

DALE R. KENT (1800)
McKay, Burton & Thurman
1200 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133
Telephone: (801) 521-4135

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

VAIL J. PHILLIPS,	:	JUDGMENT
Plaintiff,	:	
vs.	:	
UTAH STATE CREDIT UNION,	:	Judge Leonard H. Russon
a Utah corporation,	:	
Defendant.	:	Civil No. C-87-311

The above-entitled case came on regularly for trial before the above-entitled Court on the 12th day of May, 1989, the Honorable Leonard H. Russon presiding; and the Plaintiff being present and represented by his attorney, Byron L. Stubbs; and Defendant being present through its officers and represented by its attorney, Dale R. Kent; and the Court having heard the evidence introduced at the trial, and the stipulation of the parties regarding narrowing of the issues to be tried; and the Court having previously entered its Findings of Fact and Conclusions of Law and Judgment with regard to the Order Granting Partial Summary Judgment; and the Court having previously entered its Supplemental Findings of Fact and Conclusions of

Law; now, therefore, it is hereby,

ORDERED, ADJUDGED, AND DECREED as follows:

(1) The prior ruling of the Court shall be and the same shall remain in full force and effect.

(2) The Plaintiff's claim for monetary damages and prejudgment interest shall be and the same is hereby denied.

(3) Both parties shall assume and pay their own attorney's fees incurred in the prosecution of this action.

DATED this 9th day of June, 1989.

BY THE COURT:

S/
Honorable Leonard H. Russon

Approval as to form:

Byron L. Stubbs

MAILING CERTIFICATE

The undersigned hereby certifies that on the _____ day of May, 1989, a true and correct copy of the foregoing document was mailed, postage prepaid, to the following:

Byron L. Stubbs
530 East Fifth South, Suite 10
Salt Lake City, UT 84102

DRK03