

2001

Louis L. Timm, John Neiuwland, and Floyd M. Childs v. T. Lamar Dewsnap, Aletha Dewsnap : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

LOUIS L. TIMM, JOHN	:	
NEIUWLAND, and FLOYD M.	:	
CHILDS, et al.,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	No. 20010818
	:	
T. LAMAR DEWSNUP and ALETHA	:	Priority No. 15
DEWSNUP, et al.,	:	
	:	
Defendants.	:	
	:	

APPELLANT'S REPLY BRIEF

APPEAL FROM AN ORDER OF
THE FOURTH JUDICIAL DISTRICT COURT
OF MILLARD COUNTY, UTAH
HONORABLE Judge Donald J. Eyre, Jr.
DATE OF ORDER: September 24, 2001
Case No. 800407191

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UTAH SUPREME COURT

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PAT BARTHOLOMEW
CLERK OF THE COURT

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I. THE TRIAL COURT'S AWARD OF \$88,911.67 IN
COSTS AND ATTORNEY FEES SHOULD BE REVERSED.

Prior to December 5, 1980 (the date the principal and interest on the Promissory Notes was paid in full) plaintiffs were attempting to recover two debts, the \$119,000 due on the Promissory Notes (for which attorney fees were recoverable) and the \$49,966.21 due on the Assignment of Contract (for which attorney fees were not recoverable.) As to attorney fees incurred by plaintiffs prior to December 5, 1980, plaintiffs failed to allocate between attorney fees attributable to collection of each debt. Only those allocable to collection of the Promissory Notes were recoverable. In their analysis, plaintiffs failed to recognize this distinction.

As to attorney fees incurred after December 5, 1980, the primary debt that plaintiffs were then trying to collect was the \$49,966.21 due on the Assignment of Contract since all principal and interest on the Promissory Notes had been paid. Attorney fees were not recoverable for that debt since the Assignment of Contract did not include an attorney fees clause.

There were some unpaid attorney fees that had been incurred in collection of the Promissory Notes prior to December 5, 1980 that were still owed. However, those fees were relatively minor

(less than \$5,000.) Furthermore, the Promissory Notes did not allow for recovery of attorney fees incurred in the collection of those attorney fees. The Promissory Notes only allow for recovery of costs and attorney fees for the recovery of the unpaid principal and interest due under the Promissory Notes.¹ As of December 5, 1980, there was no principal and interest due under the Promissory Notes since all principal and interest had been paid in full. Accordingly, after December 5, 1980 no costs and attorney fees could have been incurred for recovery of unpaid principal and interest.

Once all principal and interest on the Promissory Notes was paid in full on December 5, 1980, there was no further basis for plaintiffs to recover any costs and attorney fees thereafter incurred by plaintiffs for any reason, except costs and attorney fees "incident to" the April 29, 1994 nonjudicial trustee's sale

¹The Promissory Notes provide:

In the case of default in the payment of any installment of principal or interest as herein stipulated, then it shall be optional with the legal holder of the note to declare the entire principal sum hereof due and payable; and proceedings may at once be instituted for recovery of the same [i.e., recovery of principal and interest] by law, with accrued interest and costs, including reasonable attorney's fees.

(R. at 469) (emphasis added).

(to the extent that sale was valid.)²

Plaintiffs cite Section 506 of the Bankruptcy Code as an alternate basis for recovery of attorney fees, but that section only allows recover of attorney fees if "provided for under the agreement under which such claim arose:"

[T]here shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs or charges provided for under the agreement under which such claim arose.

11 U.S.C. Section 506(b).

As discussed above, recovery of attorney fees is not provided for at all under the Assignment of Contract (for recovery of the \$49,966.21 advance) and is only provided for under the Promissory Notes for recovery of principal and interest.

Plaintiffs emphasize that "all amounts expended in the bankruptcy proceedings were necessary to protect Timm's security interest." (Appellee's Brief at page 19.) That may be true, however, there must still be a legal basis to recover attorney fees incurred in "protecting Timm's security interest." Furthermore, the reason plaintiffs were trying to "protect" their "security interest" in the Dewsnap property in the bankruptcy proceeding was to use that property to collect on the \$49,996.21

²As discussed in Appellant's Brief, under paragraph 16 of the Trust Deed plaintiffs would have been able to recover all "costs and expenses incident to" the April 29, 1994 foreclosure, including attorneys fees. See Appellant's Brief, page 23-24.

debt due under the Assignment of Contract. There was no attorney fees provision in the Assignment of Contract. There was no legal basis to award plaintiffs attorney fees for "protecting" their "security interest" in the Dewsnup property.

Plaintiffs next argue that "Dewsnup's interpretation would completely eviscerate the value of a contract provision for attorney fees." (Appellee's Brief, page 19.) This is not true. The Assignment of Contract contains no contractual provision providing for recovery of attorney fees. The Promissory Notes only allow for recovery of attorney fees incurred in the recovery of principal and interest on the Promissory Notes. Mrs. Dewsnup is only asking the Court to interpret the contracts as they were drafted.

In any event, Plaintiffs are estopped from claiming more than \$50,530.76 in costs and attorney fees. At the time of the foreclosure sale, Mrs. Dewsnup requested from plaintiffs "the entire amount" of attorney fees and costs that plaintiff claimed were due and owing. The figure provided by plaintiffs was \$50,530.76. At the hearing held six years later (November 13, 2000), that figure jumped to \$88,911.67.

At the end of plaintiffs answers to interrogatories plaintiffs did state that "[t]his figure does not include attorneys fees and costs incurred after April 1, 1994, nor does

it include attorneys fees expended by Plaintiffs between April 29, 1981, and March of 1987." However, the figure given by plaintiff as the "entire amount" of attorney fees due and owing was \$50,530.76. Plaintiffs have waived and/or are estopped from claiming any fees in addition to the \$50,530.76 figure given. If plaintiffs claimed additional attorney fees, they should have stated what they were at the time of the foreclosure sale. Mrs. Dewsnap had a statutory right to rely on the figure provided by plaintiffs in exercising her right to cure under Sections 57-1-31 and 57-1-40. Plaintiffs cannot give Mrs. Dewsnap one figure at the time of the sale, and then six years later, when it suits their purpose, provide a different (and much higher) figure.

Finally, on April 24, 1992, the Dewsnums paid \$3,362.37 to plaintiffs. In Appellees' Brief, plaintiffs do not dispute that Mrs. Dewsnap was not given credit for this payment against any costs and attorney fees that may have been due and owing.

II. THE TRIAL COURT ERRED IN DENYING THE DEWSNUPS' MOTION FOR PARTIAL SUMMARY JUDGMENT

A. Mrs. Dewsnap is Entitled to Summary Judgment Because the Nonjudicial Foreclosure Sale Violated the "One-Action" Rule

Plaintiffs argue that the nonjudicial foreclosure sale does not violate the one-action rule since that rule applies to debts secured "solely by mortgage upon real estate" and in this case

the "Dewsnup's debt on the Promissory Notes was secured by a Trust Deed, water rights and Dewsnup's assigned interest in the Arrow Contract." (Appellees' Brief, page 35). The "Arrow Contract" (an installment sales contract) has been treated as a mortgage upon real property in other jurisdictions. See Quintana v. Anthony, 712 P.2d 678 (Idaho 1985). Furthermore, water rights are "real property." Therefore, all three instruments (the Trust Deed, Assignment of Contract and security interest in water rights) constitute a "mortgage" upon "real property." Even if those assets were construed as "mixed collateral," the one-action rule should still apply. See Real Property Collateral: The One-Action Rule in Action, 1991 Utah Law Review, 557, 576-77, David Millner. ("Both the language of UCC Section 9-501(4) as adopted in Utah and understanding of the Utah State Bar Committee, however, indicate that the rule continues to apply to any foreclosure involving real property.") (Emphasis in original.)

Plaintiffs argue that the Dewsnup bankruptcy "bars application" of the one-action rule. Plaintiffs offer no authority to support this position and counsel for Mrs. Dewsnup is unaware of any such authority.

Finally, plaintiffs argue that Mrs. Dewsnup has waived the right to raise the one-action rule as a defense. Plaintiffs now claim that the issue should have been raised as early as 1980. After the April 29, 1994 nonjudicial trustee's sale was held,

Mrs. Dewsnap promptly raised this issue before the trial court. The trial court addressed the issue on the merits and did not find the issue to have been untimely raised. The issue was timely raised and considered below and is properly before this Court on appeal.

Plaintiffs elected to proceed by filing a Complaint to recover the \$119,000 due under the Promissory Notes, the corresponding costs and attorney fees and the \$49,966.21 due under the Assignment of Contract. The principal and interest due on the Promissory Notes was paid in full and plaintiffs obtained a Judgment for the \$49,966.21 due under the Assignment of Contract and \$6,985.00 in costs and attorney fees. Having done so, plaintiffs must foreclose through judicial (pursuant to Rule 69 of the Utah Rules of Civil Procedure) and cannot thereafter commence a nonjudicial foreclosure for the same debt for which a Judgment has been obtained.

B. The Dewsnums Are Entitled to Summary Judgment Because the Nonjudicial Foreclosure Sale was Barred by the Statute of Limitations

As discussed in Appellant's Brief, plaintiffs are estopped from claiming that the statute of limitations for commencing a nonjudicial foreclosure was "tolled" as of 1988 inasmuch as plaintiffs filed a Notice of Default to commence their nonjudicial foreclosure on August 29, 1988. In response to this,

plaintiffs attempt to switch theories, now arguing for the first time that it was Mrs. Dewsnums' Motion to Stay (filed in 1989) that tolled the statute of limitation. Plaintiffs offer no case law or other authority to support this theory. The Order to Stay was issued by Judge Thomas Green, United States District Court, and did not stay the statute of limitation, either expressly or implicitly. Mrs. Dewsnum posted a \$10,000 bond which the Court held would compensate plaintiffs for any damages as a result of the stay. That bond was subsequently released to pay unpaid property taxes on the property and to plaintiffs.

Contrary to plaintiffs' claim, this issue was before the trial court and the trial court addressed this issue on the merits on pages 3-4 of its Memorandum Decision (R. 916-17.) At a minimum this defense gave rise to issues of fact that required an evidentiary hearing on whether the statute of limitations had been tolled. The trial court erred in dismissing this defense without a hearing and holding that, as a matter of law, Mrs. Dewsnum had no statute of limitations defense.

C. The Dewsnums Are Entitled to Summary Judgment Because the Foreclosed Debt was Not Secured by the Trust Deed

At the time of the foreclosure sale, plaintiffs claimed in answers to interrogatories that \$222,814.62 in debt was secured by the Trust Deed. In the Trustee's Deed, plaintiffs recited

that the property was sold to plaintiffs at the foreclosure sale for \$115,000.00 in "partial satisfaction" of that debt.

Plaintiffs now claim that under Section 57-1-29 they paid "excess proceeds" from the foreclosure sale to themselves as a "person legally entitled to the proceeds." Plaintiffs claim that because they had a "judgment lien" for \$49,966.21, plaintiff's could (and did) pay the "balance" from the foreclosure sale to themselves as the "person entitled thereto."

First, under Section 57-1-31 and 57-1-40 Mrs. Dewsnap had a statutory right to cure the default and prevent the foreclosure sale by paying the amount that was unpaid and secured by the trust deed. At most this would have been the portion of \$5,000 representing unpaid attorneys fees at the time that the principal and interest was paid in full on December 5, 1980, not \$222,814.62 as plaintiffs claimed at the time of the foreclosure sale. In particular, Mrs. Dewsnap had a statutory right to cure the debt secured by the Trust Deed and avoid the foreclosure sale without paying the \$49,966.21 "judgement lien." This right was denied her.

Second, at the foreclosure sale plaintiff did not pay to themselves "excess proceeds" from the nonjudicial trustee's sale in accordance with Section 57-1-29, as they now claim. In response to interrogatories, plaintiffs claimed that \$222,814.62

was secured by the Trust Deed. The Trustee's Deed states that the Property was sold at the foreclosure sale to plaintiffs for "\$115,000.00 . . . in partial satisfaction of the indebtedness then secured by the Deed of Trust." (R. at 440.)³ Based on the plain language in Trustee's Deed and the plaintiffs answers to interrogatories, plaintiffs foreclosed on the Property for debt that was not secured by the Trust Deed. This Court has already determined that the \$49,966.21 debt, plus interest (which constituted 166,835.56 of the \$222,814.62) was not secured by the Trust Deed. See Timm II, 921 P.2d at 1388 (stating that "the \$49,966.21 . . . debt was not secured by the trust deed"). Plaintiffs claim that they paid themselves the balance pursuant to Section 57-1-29 is not what actually happened.

Even assuming that plaintiffs had paid themselves the "excess proceeds," they were not the "party entitled thereto." The legal effect of plaintiffs' "judgment lien" had long since

³The Trustee's Deed states:

The Trustee did, on April 29, 1994, at 4:30 p.m. at the Millard County Courthouse, sell, at public auction, to the Grantees, the United Precision Machine and Engineering Company Profit Sharing Trust, ABCO Insurance Agency, Inc. and Joseph L. Henriod, as Trustee for the Annette Jacobs Trust, the highest bidders therefore, the property described below for the total sum of One Hundred Fifteen Thousand Dollars (\$115,000.00), in partial satisfaction of the indebtedness then secured by the Deed of Trust.

(R. 440.)

expired under the eight year statute of limitations for enforcing judgments. See Utah Code Ann. Section 78-12-22. Plaintiffs "judgment lien" was created on April 24, 1981 and expired on April 24, 1989, five years before the trustee's sale.

Finally, plaintiffs argue that because they were acting in "good faith and reliance on a valid judgment" the foreclosure sale was legitimate. However, where the issue of whether a debt is secured by a trust deed is being litigated, the creditor holds a foreclosure sale on that debt at its own risk. Timm III, 1999 UT 105, ¶¶14-15.

D. The Dewsnums Are Entitled to Summary Judgment Because Plaintiffs Failed to Mail the Dewsnums a Notice of Default or a Notice of Sale

Plaintiffs' sole argument against voiding the trustee's sale because of statutory noncompliance is that Mrs. Dewsnum "had actual notice and attempted to block the sale." The only reason Mrs. Dewsnum had actual notice of the nonjudicial trustee's sale is because she happened to read about it in the newspaper. For the reasons discussed in Appellant's Brief, a nonjudicial trustee's sale that ignores all of the debtors statutory rights is not valid. At a minimum, Mrs. Dewsnum was prejudiced by not having notice of the sale three months prior to sale to allow time to contest the amount alleged to be secured by the Trust Deed and to raise the funds necessary to cure any legitimate

default under the Trust Deed.

III. TRIAL COURT ERRED IN GRANTING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT

This is the second time that Mrs. Dewsnap has appealed the trial court's dismissal of her counterclaims on plaintiffs' Motion for Summary Judgment. In Timm III, this Court reversed the trial court's dismissal of Mrs. Dewsnap's counterclaims:

We therefore reverse the summary judgment in favor of the lenders and the dismissal of Dewsnap's counterclaim and remand the case to the trial court to address the merits of the Dewsnap's claim for the wrongful foreclosure of the trust deed property and the other claims and defenses alleged in the counterclaim.

Timm v. Dewsnap, 921 P.2d 1381 (Utah 1996.)

The facts and issues in plaintiffs' first Motion for Summary Judgment are the same facts and issues raised in plaintiffs' second Motion for Summary Judgment. (See R. at 448-49.) The fact that Mrs. Dewsnap did not specifically state again all issues and facts that were already on file in responding to plaintiffs second Motion for Summary Judgment does not mean that these facts and issues were not before the trial court -- they were. The trial court is presumed to have notice of the entire file and the trial court was advised on at least one occasion by counsel that the second Motion for Summary Judgment was basically a renewal of the first.

Plaintiffs acknowledge in their brief that the trial court

ruled on these issues prior to Timm III -- "[t]he trial court in this matter has already considered these matters and previously made specific findings regarding her allegation before Timm III." (See Appellee's Brief, page 42.) The previous trial court ruling dismissing Mrs. Dewsnap's Counterclaims was reversed in Timm III, and for the same reasons the trial court's ruling dismissing Mrs. Dewsnap's counterclaims should be reversed again.

IV. CONCLUSION

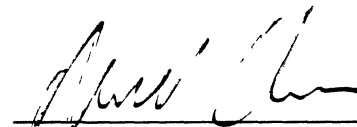
Attorney fees incurred by plaintiffs prior to December 5, 1980 must be allocated between collection of the principal and interest due on Promissory Notes and the collection of \$49,996.21 advance. Only attorney fees incurred in collection of the principal and interest due on the Promissory Notes are recoverable. After December 5, 1980 (the date all principal and interest on the Promissory Notes was paid in full), there was no legal basis to recover attorney fees except for attorney fees that were "incident to" the April 29, 1994 foreclosure sale.

Mrs. Dewsnap is entitled to summary judgment on her claim for wrongful foreclosure because the sale violated the "one action" rule and was barred by the statute of limitations. Plaintiffs also foreclosed on Trust Deed for debt not secured by the Trust Deed. Furthermore, plaintiffs failed to mail Mrs. Dewsnap a notice of default and notice of sale as required by

law.

In addition, the trial court erred in granting Plaintiffs' Motion for Summary Judgment because a dispute of material fact exists regarding Mrs. Dewsnums' counterclaims. All of those issues were before the trial court prior to Timm III. This Court held in Timm III that those counterclaims should not have been dismissed and the Timm III ruling in connection with those counterclaims should be reinstated.

DATED this 6th day of May, 2002.



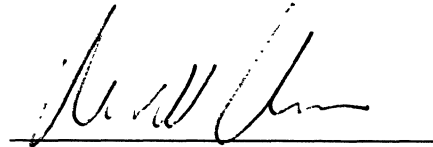
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MAILING CERTIFICATE

This is to certify that on this 6th day of May, 2002, two (2) true and correct copies of the foregoing Appellant's Brief were mailed first class postage prepaid to:

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