

2001

Louis L. Timm, John Neiuwland, and Floyd M.
Childs, et al., v. T. Lamar Dewsnap and Aletha
Dewsnap, et al., : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LOUIS L. TIMM, JOHN NEIUWLAND, and FLOYD M. CHILDS, et al., Plaintiffs/Appellees, vs. T. LAMAR DEWSNUP and ALETHA DEWSNUP, et al., Defendants/Appellants.	Case No. 20010818 Priority No. 15
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BRIEF OF APPELLEE

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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FILED
UTAH SUPREME COURT

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PAT BARTHOLOMEW
CLERK OF THE COURT

IN THE SUPREME COURT OF THE STATE OF UTAH

<p>LOUIS L. TIMM, JOHN NEIUWLAND, and FLOYD M. CHILDS, et al.,</p> <p style="text-align: center;">Plaintiffs/Appellees,</p> <p style="text-align: center;">vs.</p> <p>T. LAMAR DEWSNUP and ALETHA DEWSNUP, et al.,</p> <p style="text-align: center;">Defendants/Appellants.</p>	<p style="text-align: center;">Case No. 20010818</p> <p style="text-align: center;">Priority No. 15</p>
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STATEMENT OF JURISDICTION

The Supreme Court of Utah has jurisdiction over this appeal pursuant to Article VIII, Section 3, *Utah Constitution*, and *Utah Code Ann.* § 78-2-2(3)(j) (1953, as amended).

STATEMENT OF ISSUES PRESENTED

1. Was the trial court's determination that \$88,911.67 in costs and attorneys fees was due and owing by Dewsnup on April 29, 1994, correct?

This question presents a mixed question of law and fact. Whether attorneys fees are recoverable is a question of law reviewed for correctness. *R.T. Nielsen v. Cook*, 40 P.3d 1119 (Utah 2002). The amount of attorneys fees awarded is reviewed for abuse of discretion. *Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998).

2. Did the trial court properly determine that \$5,000 in attorneys fees and costs were unpaid, due and owing by Dewsnup on December 5, 1980?

This question presents a mixed question of law and fact. Whether attorneys fees are recoverable is a question of law reviewed for correctness. *R.T. Nielsen v. Cook*, 40 P.3d 1119 (Utah 2002). The amount of attorneys fees awarded is reviewed for abuse of discretion. *Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998).

3. In granting Timm's Motion for Summary Judgment and in denying Dewsnup's Motion for Partial Summary Judgment, did the trial court properly determine that:

a. The non-judicial sale was not barred by the statute of limitations;

- b. Dewsnap was not entitled to relief on her claim alleging that unsecured debt was included in the foreclosure action;
- c. The one-action rule does not apply;
- d. The sale was not defective for lack of notice; and
- e. There were no genuine issues of material fact preventing an award of summary judgment to Timm.

In reviewing a grant of summary judgment, an appellate court views the facts in a light most favorable to the losing party below and gives no deference to the trial court's conclusions of law; those conclusions are reviewed for correctness. *Bearden v. Croft*, 31 P.3d 537 (Utah 2001).

DETERMINATIVE STATUTES AND RULES

The following statutory provisions of the *United States Bankruptcy Code* are determinative of Dewsnap's claims:

- 1. 11 U.S.C. § 108(c);
- 2. 11 U.S.C. § 362(a); and
- 3. 11 U.S.C. § 506.

The full text of these statutes is set forth in the Addendum.

The following provisions of the *Utah Code Annotated* and the *Utah Rules of Judicial Administration* regarding trustee's sales are determinative of Dewsnap's claims:

1. *Utah Code Ann.* § 57-1-26;
2. *Utah Code Ann.* § 57-1-29;
3. *Utah Code Ann.* § 78-12-41;
4. *Utah Code Ann.* § 78-37-1; and
5. Rule 4-501, *Utah Rules of Judicial Administration*, subparagraph (2).

The full text of these statutes is set forth in the Addendum.

STATEMENT OF THE CASE

Nature of the Case

This is an action by secured creditors to recover amounts due, including interest and attorneys fees incurred to collect the Notes and protect the Plaintiff's security.

Course of Proceedings and Disposition Below

This case comes before this Court for the fourth time. *Timm v. Dewsnup*, 851 P.2d 1178 (Utah 1993) (*Timm I*); *Timm v. Dewsnup*, 921 P.2d 1381 (Utah 1996) (*Timm II*); *Timm v. Dewsnup*, 990 P.2d 942 (Utah 1999) (*Timm III*).

In 1978, Defendants Aletha Dewsnup and her now-deceased husband, T. LaMar Dewsnup ("Dewsnup") borrowed \$119,000 from the Plaintiffs (collectively referred to hereinafter as "Timm"). Dewsnup executed three Promissory Notes totaling \$119,000. The Promissory Notes were secured by a Trust Deed, certain water rights, and a security interest in a real estate contract entered into by Dewsnup on property known as the "Arrow

Property.” The Promissory Notes and Trust Deed are attached hereto in the Addendum. The property included in the Trust Deed is referred to in the record as the “Oak City Property” and the “Deseret Property.”

Dewsnup failed to pay the Promissory Notes when due in June 1980. Additionally, Dewsnup failed to make an installment payment on the Arrow Contract due in June 1980 and to pay the property tax payment due November 30, 1980. In order to protect Timm’s security interest on the Arrow Property, Timm was required to make the necessary tax payment and the required installment payment on that contract. Dewsnup failed to pay amounts due to Timm on demand and Timm therefore brought suit in the Fourth District Court of Millard County, State of Utah.

The trial court granted Timm summary judgment in April of 1981. Shortly thereafter, Dewsnup filed a Chapter 11 bankruptcy petition. The initial Chapter 11 bankruptcy petition was dismissed, and a subsequent Chapter 11 petition was dismissed with prejudice by the Bankruptcy Court. Dewsnup then filed a Chapter 7 petition for discharge. In conjunction with her Chapter 7 bankruptcy petition, Dewsnup also filed an adversary proceeding in the Bankruptcy Court seeking to strip Timm’s liens from Dewsnup’s property included in the Trust Deed and the judgment of the state trial court.

Following adverse decisions from the Bankruptcy Court, the United States District Court, the 10th Circuit Court of Appeals, and finally the United States Supreme Court,

Dewsnup v. Timm, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992), Dewsnup filed a motion with the Fourth Judicial District Court to amend her counterclaim. The court denied her motion to amend and Dewsnup appealed. This Court reversed and remanded to consider the amended counterclaim and reconsider Timm's summary judgment. *Timm v. Dewsnup*, 851 P.2d 1178 (Utah 1993) (*Timm I*). On remand, the District Court allowed Dewsnup to amend her counterclaim but denied her motion to reconsider the 1981 summary judgment. Dewsnup appealed that decision and this Court affirmed in part and reversed in part in *Timm v. Dewsnup*, 921 P.2d 1381 (Utah 1996) (*Timm II*).

On remand after *Timm II*, the trial court again granted summary judgment to Timm, dismissing Dewsnup's counterclaim. Upon Dewsnup's appeal, this Court issued its opinion in *Timm v. Dewsnup*, 990 P.2d 942 (Utah 1999) (*Timm III*) and remanded to determine the amount of attorneys fees and costs owed by Dewsnup on the Notes and to determine Dewsnup's summary judgment issues.

On remand from *Timm III*, the trial court conducted an evidentiary hearing and found that, at the time of the non-judicial sale on the property in 1994, there was \$88,911.67 in costs and attorneys fees that were due and owing from Dewsnup to Timm (*See Findings of Fact and Conclusions of Law*, attached hereto in the Addendum). Subsequent to its findings and conclusions on the fees, the trial court considered the parties' cross motions for summary judgment. The court granted Timm's Motion for Summary Judgment, dismissed Dewsnup's

counterclaim in its entirety, and denied Dewsnup's Motion for Partial Summary Judgment. The court's Memorandum Decision explaining its ruling and the final Judgment are attached hereto in the Addendum.

Statement of Facts

On June 1, 1978, LaMar and Aletha Dewsnup borrowed \$119,00 from Timm and executed three promissory notes (the "Promissory Notes") in favor of Timm. *Timm I*, 851 P.2d at 1179.

At the same time, Dewsnup executed a Trust Deed and an Amended Trust Deed (collectively, the "Trust Deed") to secure the Promissory Notes. *Id.*

As additional security for the Promissory Notes, Dewsnup also signed an Assignment of Contract (the "Assignment of Contract"). The Assignment of Contract gave Timm a security interest in a purchase contract whereby Dewsnup was purchasing additional farm land (the "Arrow Property") from Arrow Investment Company (the "Arrow Contract"). *Id.*

On June 1, 1980, the Promissory Notes came due, but Dewsnup failed to make any payment on the loan. *Id.* Dewsnup had also failed to make the January 2, 1980, annual installment payment on the Arrow Contract when due and failed to pay the 1979 property taxes on the Arrow Property as required by the Arrow Contract. *Id.*

The Assignment of Contract allowed Timm to make Dewsnup's missed payments under the Arrow Contract, and required Dewsnup to reimburse Timm for those payments:

[Dewsnups] agree that in the event they are in default [under the Arrow Contract] that [Timm] may make payments due under and pursuant to [the Arrow Contract] and will be reimbursed for the same by [Dewsnup].

R. at 836.

To preserve their security interest in the Arrow Contract, on June 2, 1980, Timm made the January 2, 1980, Arrow Contract payment in the amount of \$47,880.50, and paid the delinquent 1979 property taxes on the Arrow Property in the amount of \$2,085.71. *Timm I*, 851 P.2d at 1179; *Timm II*, 921 P.2d at 1387.

On September 16, 1980, Timm filed the Complaint herein against Dewsnup seeking judgment for the unrecovered principal and interest on the \$119,000 loan, plus \$49,966.21 which Timm paid for the 1979 property taxes and the 1980 Arrow Contract payment, and for Timm's attorneys fees and costs to collect the Notes. Dewsnup counterclaimed against Timm. *Timm I*, 851 P.2d at 1180.

In December of 1980, Dewsnup paid Timm only the principal and interest due on the \$119,000 loan. Dewsnup failed and refused to pay any costs and attorneys fees. Dewsnup also refused to reimburse Timm for the 1979 property taxes on the Arrow Property (\$2,085.71) and the \$47,880.50 installment payment on the Arrow Contract. *Id.*

Because of Dewsnup's refusal to make any further payments, Timm then moved for summary judgment, seeking a judgment for the unpaid attorneys fees and costs incurred, as well as the \$49,966 advanced on the Arrow Contract. *Id.*

On April 24, 1981, the trial court entered a Summary Judgment and Decree of Foreclosure (the “Judgment”), granting Timm’s Motion for Summary Judgment. The court awarded Timm judgment against Dewsnup for \$49,966.21 (consisting of the Arrow Property taxes of \$2,085.71 and the January 2, 1980, Arrow Contract installment of \$47,880.50) and awarded judgment on the Notes for the unpaid \$6,985.00 “costs of collection, including attorney’s fees.” *Id.*

The Judgment also held that the \$49,966.21 and the \$6,985.00 were secured by the Trust Deed. Later, in *Timm II*, this Court determined that the Arrow Contract payments were not secured by the Trust Deed. However, the \$49,966.21 judgment itself was not altered by that determination and remained a judgment against Dewsnup. *Timm II*, 921 P.2d 1381, 1388.

In late April 1981, shortly following the trial court’s grant of summary judgment to Timm, Dewsnup filed her first Chapter 11 bankruptcy petition. *Timm I*, 851 P.2d 1178, 1180; *Dewsnup v. Timm*, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992).

Dewsnup’s first bankruptcy petition was dismissed, as was her second petition. In 1984, Dewsnup filed a Chapter 7 bankruptcy petition. In conjunction with that Chapter 7 proceeding, Dewsnup filed an adversary proceeding in the Bankruptcy Court, seeking to strip Timm’s liens off the property described in the Trust Deed. *Id.*

Between 1984 and 1992, Dewsnap's adversary proceeding remained pending in the Bankruptcy Court and was ultimately decided by the United States Supreme Court in 1992 with a final dismissal of Dewsnap's adversary claims and a preservation of Timm's security. *Dewsnap v. Timm*, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992).

On January 7, 1991, the Chapter 7 bankruptcy trustee abandoned Dewsnap's counterclaim. Two weeks later, in the instant action, Dewsnap filed a motion to amend her counterclaim and a motion to reconsider and set aside the trial court's 1981 summary judgment award. The trial court denied both motions. *See Timm I*, 851 P.2d at 1180.

Dewsnap appealed, and in *Timm I* (issued April 1993) this Court reversed the trial court's order and remanded the case with direction that Dewsnap be allowed to file an amended counterclaim and that the court reconsider the summary judgment order of 1981. *Id.*

In late March 1994, Timm scheduled a trustee's sale of the property for April 29, 1994. R. at 839. At the trustee's sale on April 29, 1994, Timm bid on the Trust Deed Property for \$115,000.00 in debt that Timm claimed was secured by the Trust Deed and due and owing. R. at 841.

On remand after *Timm I*, the District Court allowed Dewsnap to amend her counterclaim but refused to disturb or set aside its 1981 order granting summary judgment to Timm. Dewsnap appealed that decision. *See Timm II*, 921 P.2d 1381 (Utah 1996).

On appeal, this Court affirmed in part and reversed in part. The Court affirmed the summary judgment in favor of Timm but held that the \$49,966.21 payment on the Arrow Contract was not secured by the Trust Deed. This Court stated:

An examination of the “Assignment of Contract” reveals that the Dewsnups were obligated to repay the lenders the \$49,966.21 paid under the Arrow Contract. However, this debt was not secured by the trust deed, the Arrow property, or the water rights specified in the security agreement. Such properties secured only the \$119,000 debt on the promissory notes. Therefore the trial court’s legal conclusion that the \$49,966.21 was secured by the “mortgage and security agreement . . . as well as the trust deed property was error.”

Timm II, 921 P.2d at 1387-1388. This Court reversed and remanded “to determine whether costs and fees were outstanding on the promissory notes at the time of the Judgment.” *Id.*

On remand, Timm presented sworn evidence that costs and fees were outstanding on the Notes at the time of judgment. Again, the trial court granted Timm’s Motion for Summary Judgment and Dewsnup appealed again. On appeal, this Court recognized that Dewsnup owed fees but that there was no finding of fact as to the amount of fees properly owed. This Court again remanded the case with specific instruction to determine the amount of costs and attorneys fees which remained unpaid on the Note at the time of the Trust Deed sale in 1994. *See Timm III*, 1999 Ut. 105, 990 P.2d at 945 (Utah 1999).

On November 13, 2000, following an evidentiary hearing, the trial court found and determined that \$88,911.67 in costs and attorneys fees were due and owing on the Trust Deed on April 29, 1994, the date of the sale. *See R. at 783; Findings, Addendum; Tr. 937: p. 56.*

Following the trial court's findings and conclusions regarding the amount of costs and attorneys fees owing on the Note at the time of sale, the parties again filed cross motions for summary judgment. In a Memorandum Decision dated August 29, 2001, the trial court granted Timm's Motion for Summary Judgment dismissing Dewsnup's counterclaim in its entirety and denied Dewsnup's Motion for Partial Summary Judgment. *See* Memorandum Decision and the Judgment, Addendum.

SUMMARY OF ARGUMENT

The trial court's findings and determination that \$88,911.67 in costs and attorneys fees was due and owing on April 29, 1994, should be affirmed. Two separate and independent bases support the award of costs and attorneys fees to Timm. The Promissory Notes underlying the debt at issue contain an attorney fee clause. The costs and attorneys fees were reasonably incurred to preserve the Trust Deed security and to collect the Notes. Additionally, Timm is entitled to all costs and fees incurred in Dewsnup's bankruptcy proceedings under the specific language of the *United States Bankruptcy Code* and the attorneys fee clause in the Notes.

Dewsnup argues that Timm and the trial court committed error in failing to "allocate" attorneys fees among the differing causes of action. Utah law does require allocation. However, the trial court's separation of recoverable fees from nonrecoverable fees is sufficient to meet this burden. The court's findings are also clearly sufficient to support the

determination that the fees awarded were recoverable and were owing and unpaid on the date of the non-judicial sale. The testimony of counsel, the sworn attorneys fee affidavits and the billing detail introduced below at the evidentiary hearing on costs and attorneys fees clearly support the court's findings that all of the fees and costs presented were incurred to protect the security and collect the Note.

Timm's non-judicial sale of the Trust Deed Property did not violate Utah's one-action rule. The one-action rule is simply not applicable to this case. Because Timm was the junior lienholder on the Trust Deed Property, any excess proceeds from the sale were to be paid over to Timm and the one-action rule has no application. Additionally, the one-action rule, by its terms, applies only when the debt is secured solely by a mortgage. In this case, the debt evidenced by the Promissory Notes was secured by both real property and personal property. Moreover, Dewsnap's intervening bankruptcies bar application of the one-action rule. Where a bankruptcy eliminates a judgment creditor's right to collect an unsecured debt from the judgment debtor, the one-action rule should not act as a bar to collection of the debt through non-judicial sale when the debt is secured by a trust deed lien on the real property.

Timm's non-judicial sale of the property was not barred by the statute of limitations. Dewsnap's intervening bankruptcies tolled the running of the statute. The 1994 sale was conducted well within any statutory time frame.

Dewsnup's claim that the non-judicial sale was conducted for debt which was not secured by the Trust Deed does not entitle her to damages. Utah statutes do not require a recitation of the amount of the debt at the time of a non-judicial sale. Additionally, Dewsnup has failed to show any damages resulting from any alleged inclusion of unsecured debt.

Dewsnup's claims regarding failure of notice of the non-judicial sale lack merit because Dewsnup had actual notice of the non-judicial sale. The trial court correctly determined that Timm substantially complied with the statutory notice provisions. Additionally, she has failed to demonstrate any prejudice as a result of the alleged lack of statutory notice.

Dewsnup has argued, for the first time on appeal, that there are now genuine issues of material fact preventing the trial court's award of summary judgment in favor of Timm. This Court should not consider this issue because the claim was not raised in the trial court. Additionally, even if the Court were to consider this argument, it is apparent that there is no competent evidence proffered below that creates any disputed issue of material fact and that there was no tender by Dewsnup of the payment of costs and attorneys fees. Therefore, this argument fails.

The findings and judgment of the District Court should be affirmed.

ARGUMENT

POINT I

THE TRIAL COURT’S DETERMINATION THAT \$88,911.67 IN COSTS AND FEES WAS DUE AND OWING ON APRIL 29, 1994, IS SUPPORTED BY FINDINGS OF FACT AND BY THE EVIDENCE BELOW.

In *Timm v. Dewsnap*, 921 P.2d 1381 (Utah 1996) (*Timm II*), this Court remanded this matter to the trial court with instructions “to grant Mrs. Dewsnap’s motion to reconsider and determine what amount, if any, remained outstanding on the promissory notes.” *Timm II*, 921 P.2d at 1394. In *Timm v. Dewsnap*, 990 P.2d 942 (Utah 1999) (*Timm III*), this Court explained:

We directed that determination to be made because it was only for that amount that the non-judicial foreclosure sale could be held. The trust deed property secured only payment of the three Promissory Notes totaling \$119,000. It is undisputed that the principal and interest of the notes were paid in full in December, 1980. Only the amount, if any, owing for attorneys fees incurred in the collection of the notes would continue to be owing and would constitute a legal basis for holding a foreclosure sale on the trust deed property We must therefore again remand this case to the trial court to determine what amount, if any, of attorneys fees remained unpaid on the promissory notes when the sale was held.

Timm III, 990 P.2d at 945 (emphasis added). The determination to be made by the trial court was the amount of costs and fees due and owing at the time of the foreclosure sale.

The trial court in this matter concluded that:

1. On December 5, 1980, there were Five Thousand Dollars (\$5,000) in costs and attorneys fees due and owing on the Promissory Notes which amounts were secured by Plaintiff's Trust Deed on the property.

2. On April 29, 1994, there were Eighty-Eight Thousand Nine Hundred Eleven Dollars and 67/100 (\$88,911.67) in costs and attorneys fees due and owing on the Promissory Notes which amounts were secured by Plaintiff's Trust Deed on the property.

R. at 783. The fees incurred from December 1980 to April 1994 were a result of Dewsnap's attempts to invalidate the security in Timm's Trust Deed. The court correctly found that the fees and costs were reasonably incurred to collect the Promissory Note and defend Timm's security. Additionally, the trial court's findings are sufficient to support the conclusions noted above.

A. The Trial Court's Determination that \$88,911.67 in Costs and Fees was Recoverable was Correct.

Attorneys fees are awarded in this case as a matter of right under both contract and statute. *Cabrera v. Cottrell*, 694 P.2d 622, 625 (Utah 1985).

The debt in this case arises from three Promissory Notes, each for varying amounts, totaling \$119,000.00, and each bearing the same attorneys fees provision:

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

R. at 469-471.

From the plain language of the Notes, it is apparent that fees incurred based upon Dewsnap's default were recoverable.

The fees are also recoverable under the *United States Bankruptcy Code* § 506(b), which allows for the recovery of Timm's fees incurred to protect the Trust Deed Property during Dewsnap's bankruptcies.

Section 506 of the *Bankruptcy Code* (11 U.S.C. §506) relates to the status of secured creditor claims, and provides:

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there 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.

* * *

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless—

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

(Emphasis added). In this matter, final judgment in Dewsnap's adversary proceeding was finally rendered by the United States Supreme Court in 1992. The Court stated:

Therefore, we hold that §506(d) does not allow petitioner to strip down respondent's lien because respondent's claim is secured by a lien and has been fully allowed pursuant to §502.

Dewsnap v. Timm, 112 S. Ct. 773, 776, 116 L. Ed. 903, 906 (1992) (emphasis added). Thus, it is apparent that the *Bankruptcy Code* provides for recovery of Timm's attorneys fees incurred in defending their entitlement to the proceeds from the Trust Deed Property.

Common law is in accord. In *Coastal Production Credit Ass'n. v. Goodson Farms, Inc.*, 319 S.E.2d 650 (N.C. App. 1984), the court determined that a creditor under a promissory note was entitled to collect attorneys fees incurred in bankruptcy proceedings which were instituted by the debtor to avoid the promissory note debt. That court noted:

The court found as fact that plaintiff's attorney undertook various duties, including participating in bankruptcy and foreclosure actions regarding this estate and acting as commissioner for sale of the collateral. Plaintiff argues that such time was properly chargeable to the collection of the note since it was spent preserving for collection the assets of the estate and expediting ancillary proceedings used by defendants to delay eventual recovery. Defendants argue that the court abused its discretion in allowing such fees. . . . [W]e believe that when other actions are reasonably related to the collection of the underlying note sued upon, attorneys fees incurred therein may properly be awarded Reasonableness, not arbitrary classification of attorney activity, is the key factor under all our attorneys fees statutes. . . . [O]ur result, that participation in other proceedings may be allowed as costs, is consistent with the position of the United States Supreme Court. That Court has approved disallowance of an award of fees in other litigation where such proceedings could neither disturb the prosecution of the present suit nor affect its outcome. *United States v. Equitable Trust Co.*, 283 U.S. 738, 51 S.Ct. 639,

75 L.Ed. 1379 (1931). By extension, allowance of fees for participation in other proceedings to expedite collection or preserve assets would not constitute abuse of discretion.

Coastal Production, 319 S.E.2d at 655.

The trial court here found that the fees and costs incurred by Timm both in this action and in the corollary bankruptcy proceeding were reasonably incurred to collect sums due under the Promissory Notes. R. at 780-781. Such sums were recoverable under the attorneys fees clause in the Promissory Notes and under the *Bankruptcy Code*.

In the face of protracted litigation by Dewsnup in the Bankruptcy Court, the attorneys fees incurred by Timm in these proceedings were absolutely necessary to protect Timm's security interest in the debt owed by Dewsnup. Dewsnup's Amended Complaint in the adversary bankruptcy proceeding sought the following relief:

1. The Court enter an order removing the June 1, 1978 Trust Deed, with Defendants as beneficiary, from the property of the debtors because the underlying note has been satisfied and the Trust Deed is invalid.
2. The Court enter an order avoiding Defendants' security interest on the real property of the Plaintiffs to the extent that the security interest exceeds the value of the real property under 11 U.S.C. §506(d).
3. The Court enter an order voiding the April 24, 1981 judgment in favor of Defendants under 11 U.S.C. §362.

R. at 718. The Trust Deed Property, the same parcels encumbered by the judgment lien resulting from the 1981 summary judgment, was the only security remaining upon which Timm could execute to collect the debt owed by Dewsnup. It is also critical to note that the Dewsnup's bankruptcy issue before the United States Supreme Court sought to force Timm

to accept Dewsnup's determined value of the property, \$39,000.00, and to release the security interest. *See Dewsnup v. Timm*, 112 S.Ct. 773; 116 L.Ed. 903 (1992). It was necessary for Timm to defend against this claim to prevent its security interest from being significantly compromised. Therefore, all amounts expended in the bankruptcy proceedings were necessary to protect Timm's security interest. The trial court so found and that finding is supported by the substantial evidence offered at the hearing on costs and attorneys fees. R. at 781; Tr. 937: p. 56.

In her Brief, Dewsnup erroneously asserts that "[o]nce all principal and interest on the Promissory Notes was paid in full on December 5, 1980, there was no contractual basis under the Promissory Notes for Plaintiffs to recover any costs and attorney fees thereafter incurred by the Plaintiffs for any reason." Brief of Appellant at p. 23. This argument does violence to settled principles of contract interpretation.

The basic purpose in interpreting a contract is to determine the intention of the parties, which is controlling. *Winegar v. Froerner Corp.*, 813 P.2d 104, 108 (Utah 1991). Dewsnup's interpretation would completely eviscerate the value of a contract provision for attorneys fees. No party could ever be held responsible for the payment of such fees without the other party losing the benefit of its bargain.

The Utah Court of Appeals apparently recognized this when it held that the prevailing party in a dispute over contractual attorneys fee provisions is entitled not only to attorneys

fees on appeal, but also to fees reasonably incurred in establishing the reasonableness of the fees to which it was entitled. *Brown v. David K. Richards & Co.*, 978 P.2d 470, 476 (Utah App. 1999); citing *James Constructors, Inc. v. Salt Lake City*, 888 P.2d 665, 674 (Utah App. 1994). Dewsnap's construction is obviously contrary to the intent of attorneys fee provisions and is contrary to established Utah law.

B. The Trial Court's Findings Sufficiently Support the Trial Court's Determination That Timm's \$88,911.67 in Costs and Fees are Recoverable.

The trial court's award of attorneys fees must be based on the evidence below and supported by findings of fact. *Cottonwood Mall Co. v. Sine*, 830 P.2d 266, 268 (Utah 1992).

In the instant case, the trial court conducted an evidentiary hearing to receive the parties' evidence, hear any witnesses, and determine the amount of costs and fees that were due and owing on the date of the non-judicial sale. Prior to the hearing, and in support of the evidence to be presented at the hearing, Timm filed and proffered the Affidavits of Wendell E. Bennett and Michael Z. Hayes, legal counsel for Timm in these proceedings. R. at 702, 706.

At the hearing, Timm's attorneys, Michael Z. Hayes and Wendell E. Bennett, testified on behalf of Timm. The court also received Plaintiff's Exhibit 6, which are the actual billing statements of legal counsel representing Timm through the course of this and the bankruptcy litigation. Plaintiff's Exhibit 6 included a detailed recitation of the work performed and the actual time spent for each entry. R. at 937: p. 25-26; R. at 777. All of these entries relate to

the time spent and fees incurred to collect on the Note and protect Timm's security in the Trust Deed Property.

Dewsnup did not present any evidence at the hearing and failed to object in any way to either the reasonableness or amount of the fees. At the conclusion of the hearing, the trial court made findings of fact and conclusions of law as to the amount, reasonableness and necessity of attorneys fees and costs. Included within its findings, the court found that:

4. From December 5, 1980, to April 29, 1994, Plaintiffs were required to expend Eighty-three Thousand Nine Hundred Eleven Dollars and 67/100 (\$83,911.67) in costs and attorneys fees in an attempt to collect amounts due under the Promissory Notes executed by Defendants, and to protect Plaintiff's security for the payment of said notes.

5. The Eighty-three Thousand Nine Hundred Eleven Dollars and 67/100 (\$83,911.67) was paid for costs actually incurred and for legal work actually performed and the expenditures and the legal work performed were reasonably necessary to adequately prosecute the matter and to preserve Plaintiffs' interest in the property which secured payment of all sums due under the Promissory Notes.

6. Of the Eighty-eight Thousand Nine Hundred Eleven Dollars and 67/100 (\$88,911.67) paid by Plaintiffs between the inception of this case and April 29, 1994, Eleven Thousand Eight Hundred Ninety-six Dollars and 07/100 (\$11,896.07) were taxes on the property which served as security for payment of the Promissory Notes. The taxes were paid to avoid a tax sale of the property and in order to preserve the Plaintiffs' security interest.

7. The Court finds that between December 5, 1980, and the award of Summary Judgment by the District Court on April 14, 1981, work was performed to collect sums due under the Promissory Notes and to collect sums due for an advance paid by Plaintiffs under an Assignment of Contract, which Assignment of Contract also served as security for the payment of sums due under the Promissory Notes.

8. The Court finds that the attorneys fees expended for legal work during the time between December 5, 1980 and April 14, 1981 are not segregable and not allocable to separate causes of action, as pursuit of both

causes of action was necessary to collect amounts due under the Promissory Notes and to preserve Plaintiff's security interest in the property.

9. The Court finds that all fees and costs were reasonable under the circumstances of this case. The Court further finds that Defendant's repeated bankruptcy filings and efforts to prevent non-judicial sales of the property securing payment of sums due under the Promissory Notes created significant cost and legal expense for the Plaintiffs.

10. The Court finds that all costs and fees incurred in bankruptcy proceedings between 1981 and 1994 were necessary to preserve Plaintiff's security interest in the property and were incurred in an effort to recover amounts due for costs and attorneys fees under the Promissory Notes and Trust Deed.

11. Section 506 of the Bankruptcy Code (11 U.S.C. § 506) authorizes Plaintiffs to recover costs and attorneys fees expended in protecting their security interest in the property of Defendant Aletha Dewsnup.

12. The Trust Deed which gave Plaintiffs a security interest in Aletha Dewsnup's property authorizes recover of costs and attorneys fees expended by Plaintiffs in conducting the non-judicial sale of the property.

R. at 781-782.

Based upon the uncontraverted evidence submitted and the court's findings and conclusions, Timm's evidence was overwhelmingly sufficient to satisfy its legal burden to demonstrate that its attorneys fees were recoverable.

C. The Trial Court Correctly Rejected Dewsnup's Attempt to "Allocate" the Costs and Fees to the Arrow Contract.

In her Brief, Dewsnup argues that both the trial court and Timm failed to allocate the costs and attorneys fees incurred to the Arrow Contract. This argument misinterprets the applicable legal authority and the evidence submitted in this matter.

Paragraph 8 of the court's Findings of Fact and Conclusions of Law states:

The Court finds that the attorneys fees expended for legal work during the time between December 5, 1980 and April 14, 1981 are not segregable and not allocable to separate causes of action, as pursuit of both causes of action was necessary to collect amounts due under the Promissory Notes and to preserve Plaintiff's security interest in the property.

R. at 782.

The Utah Court of Appeals has opined that “an allocation [of fees] is sufficient if the substance of the process results in separating recoverable from non-recoverable fees.” *Brown v. David K. Richards & Co.*, 978 P.2d at 474 (Utah App. 1999). The evidence in this matter presented at the hearing on attorneys fees and costs demonstrates that this burden was met – only recoverable fees were submitted to the trial court. Nonrecoverable fees were not.

According to the Affidavit of Wendell Bennett, on December 5, 1980, Dewsnup paid only the outstanding principal and interest owed to Timm on the three Promissory Notes. R. at 695. At that time, the costs and attorneys fees owing from Dewsnup to Timm were \$5,000. *Id.* Between December 5, 1980, and April 29, 1981, the date the trial court entered its award of summary judgment to Timm, the costs and fees had increased to \$6,985. R. at 694.

Within a day or two of the court's summary judgment, Dewsnup filed a Chapter 11 bankruptcy proceeding. R. at 937: p. 11, ¶¶ 3-5. Mr. Bennett testified that, over the next several years, from 1981 through 1987, he tried, on different occasions, to schedule a non-

judicial sale of the property, but each time was prevented from proceeding with the non-judicial sale by Dewsnup's bankruptcy proceedings. R. at 937: p. 11-12.

Mr. Bennett further testified that, from the time the trial court awarded summary judgment to Timm in 1981 until the time he turned the case over to Mr. Hayes to represent Timm, all of Bennett's efforts were expended to protect Timm's interest in the Trust Deed Property, which, by virtue of Dewsnup's bankruptcies, was the only security left from which Timm could collect the debt owed. R. at 937: p. 12, ¶¶ 6-9.

For purposes of allocating attorneys fees, Mr. Bennett's representation of Timm can be broken out into three distinct periods. From the beginning of Mr. Bennett's representation of Timm to December 5, 1980, when Dewsnup paid the principal and interest due on the Promissory Notes, all of Mr. Bennett's efforts were necessary to collect amounts due and owing under the Promissory Notes. R. at 937: p. 8, 19-20. Mr. Bennett's testimony indicated that Timm's advance on the Arrow Contract was necessary to preserve that contract as security for payment of the Promissory Notes. Therefore, the Timm advance on the Arrow Contract was made in an effort to collect sums due under the Promissory Notes and any attorneys fees incurred thereby were chargeable to the Promissory Notes as costs of collection.

Between December 5, 1980, and the trial court's award of summary judgment on April 29, 1981, an additional \$1,985 in costs and fees were incurred by Timm. Mr. Bennett

did testify that approximately one-fifth of his time during that period was spent to recover the costs and attorneys fees under the Promissory Note and four-fifths of his time was spent to recover the money advanced on the Arrow Contract. R. at 937: p. 21, ¶¶ 18-25. However, Mr. Bennett further testified that he did not believe the fees should be “allocated” because all of his efforts were to protect the Trust Deed security or to collect on the Note. He viewed it all as one debt that had not been paid off. R. at 937: p. 19-21.

Finally, Mr. Bennett testified that from the time of the 1981 award of summary judgment until he was replaced by Mr. Hayes, all of Bennett’s efforts were expended in the bankruptcy court to protect Timm’s interest in the Trust Deed Property, which then was Timm’s only means of collecting the debt owed on the Notes. All of these costs are recoverable under 11 U.S.C. § 506(b) and under the unambiguous terms of the Notes.

Timm’s attorney, Michael Z. Hayes, also testified at both the September 8 and November 13, 2000, attorneys fee hearings. He testified that he made no allocation of fees paid to his firm because all of his fees were recoverable.¹ His firm’s fees were all expended to protect Timm’s security interest in the Trust Deed Property. R. at 937: p. 26, 27. Further, those fees were recoverable under applicable bankruptcy law.

¹ Mr. Hayes did not make any claims for or present evidence on the thousands of dollars of legal fees expended by his clients after the Trust Deed sale in 1994. R. at 937: p. 30.

From the foregoing, it is apparent that Timm allocated fees by separating recoverable fees from non-recoverable fees. While not specifically referred to as an “allocation” by Mr. Bennett and Mr. Hayes, the recoverable fees were allocated by excluding from the evidence all fees that were not recoverable. Dewsnup’s complaint is only that the trial court did not allocate the fees in the way Dewsnup argued – without presenting any evidence to contradict Timm’s evidence.

After considering Dewsnup’s argument for allocation, the trial court appropriately allocated between recoverable and non-recoverable fees and found that Timm’s evidence as to the fees claimed demonstrated that all the fees claimed were recoverable. Dewsnup presented no evidence to the trial court to dispute Timm’s evidence.

The trial court’s finding and ruling that the fees requested were not allocable should be affirmed.

D. Timm is Not Estopped from Demonstrating that \$88,911.67 in Costs and Attorneys Fees was Recoverable.

Dewsnup argues that the amount of costs and attorneys fees owing should be limited to \$50,530.76, relying on Timm’s April 1994 interrogatory response furnished below. R. at 425, Addendum; Appellant’s Brief. However, Dewsnup seeks to mislead this Court by failing to quote the full text of that answer, which specifically states 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, which is the date

that the Plaintiffs hired Michael Z. Hayes to represent them in this case.” The trial court made a specific finding that \$88,911.67 was the amount of costs and attorneys fees incurred and was due and owing under the Promissory Notes secured by the Trust Deed at the time of the non-judicial sale. Finding No. 6, R. at 781. Timm was not estopped from showing by its evidence that all of the costs and fees presented protected the Trust Deed Property or were to collect the Note. That total was \$88,911.67. The trial court’s finding is supported by the evidence.

POINT II

THE NON-JUDICIAL SALE OF DEWSNUP’S PROPERTY WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

Dewsnup argues that the trustee’s sale was barred by the statute of limitations as to the entire “debt.” (Brief of Appellant at p. 32). However, Dewsnup fails to acknowledge that her intervening bankruptcies stayed Timm’s action and tolled the statute of limitations while escalating the attorneys fee obligation.

Under *Utah Code Ann.* § 78-12-41 (1996), “[w]hen the commencement of an action is stayed by injunction or a statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.” The *United States Bankruptcy Code*, 11 U.S.C. § 362(a) states, in part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title, or an application filed under

section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of —

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate

By virtue of 11 U.S.C. § 362(a) and *Utah Code Ann.* § 78-12-41, the statute of limitations for Timm to pursue any foreclosure proceedings was tolled by Dewsnap's bankruptcy. *See City Corp. Mortgage, Inc. v. Hardy*, 834 P.2d 554 (Utah 1992). Therefore, as a matter of law, Dewsnap's claim on this point fails.

Dewsnap now argues, for the first time on appeal, that Timm's 1988 Notice of Default indicates that Timm was not stayed, but if there was a stay then the Notice violated the stay. Brief of Appellant at p. 34. Dewsnap correctly notes that Timm received an abandonment of the Trust Deed Property from the bankruptcy trustee in 1988. Immediately after receiving that abandonment, Timm filed a Notice of Default on the Trust Deed Property. Dewsnap argues that this Notice of Default was either void as a violation of the automatic stay or that the abandonment of the Trust Deed Property ended the tolling of the statute of limitations.

In a remarkable attempt to mislead this Court, Dewsnup fails to acknowledge her January 1989 motion for stay pending appeal, brought by her for the specific and express purpose of preventing Timm from going forward with the foreclosure sale. R. at 807, Addendum. Obviously, the Bankruptcy Court's order granting that intervening stay pending appeal prevented Timm from going forward with the foreclosure sale, further tolling the statute of limitations until 1992. R. at 811, Addendum. Therefore, Dewsnup's arguments on this point fail.

The trial court properly rejected this argument.

POINT III

DEWSNUP IS NOT ENTITLED TO RELIEF ON HER CLAIM ALLEGING THAT UNSECURED DEBT WAS INCLUDED IN THE FORECLOSURE ACTION.

Dewsnup argues that she is entitled to damages based on Timm's assertion that the 1994 non-judicial sale included debt arising from the Arrow Contract advance. Dewsnup argues that she is entitled to any excess proceeds to be realized from the sale after payment to Timm of obligations arising under the Promissory Notes which were secured by the Trust Deed Property. Dewsnup acknowledges in this argument that Timm's attorneys fees and costs were part of the secured debt and that she didn't pay them. However, Dewsnup conveniently ignores that what was a \$5,000 obligation in 1980 has escalated only because

of her refusal to pay and unrelenting attempts to void Timm's Trust Deed security for the Notes.

Under *Utah Code Ann.* § 57-1-29, Dewsnup clearly cannot recover damages based on her allegation that an "unsecured debt" was included in the non-judicial sale. This section governs the disposition of proceeds after a Trustee's sale and provides, in part:

The Trustee shall apply the proceeds of the trustee's sale, first, to the costs and expenses of exercising the power of sale and of the sale, including the payment of the trustee's and attorney's fees actually incurred not to exceed the amount which may be provided for the in the trust deed, second, to payment of the obligation secured by the trust deed, and the balance, if any, to the person or persons legally entitled to the proceeds, or the trustee, in his discretion, may deposit the balance of the proceeds with the Clerk of the District Court of the County in which the sale took place

(Emphasis added.)

Interpreting this statutory provision, Utah appellate courts have held that after a non-judicial sale, any excess proceeds replace the property as security, and any remaining liens attach to the excess proceeds. *Randall v. Valley Title*, 681 P.2d 219 (Utah 1984); *In re Property in West Valley City v. Munford*, 2000 Ut. 116, 1 P.3d 1116 (Utah App. 2000). These cases clearly indicate that, under § 57-1-29, the excess proceeds, if any, arising from the non-judicial sale are to be paid to junior lienholders.

In this case, there are two distinct debts at issue: the debt on the Promissory Notes, secured by the Trust Deed Property; and the Arrow Contract advance, which this Court has determined not to be secured by the Trust Deed.

However, the District Court's summary judgment award of \$49,966.21 to Timm for the advance paid on the Arrow Contract assignment was affirmed by this Court in *Timm II*, 921 P.2d at 1387. That judgment, as a valid judgment against Dewsnup, attached as a lien to her real property, including the Trust Deed Property. The \$49,966.21 judgment arising out of the Arrow Contract advance became a junior lien (junior to the Trust Deed) on the Trust Deed Property.

Upon the non-judicial sale, Timm was entitled to the excess sale proceeds to satisfy their judgment lien. As noted in Dewsnup's Brief, Timm bid \$115,000.00 at the non-judicial sale. The trial court has found that upon the date of the non-judicial sale, \$88,911.67 was due and owing in Timm's costs and attorneys fees on the Promissory Notes. Any difference between the \$115,000.00 bid for the property, and the \$88,911.67 debt on the Notes cannot satisfy Timm's judgment lien of \$49,996 for the Arrow Contract advance. Therefore, there are no excess proceeds to be paid to Dewsnup. Dewsnup suffered no damages arising from this alleged foreclosure for an "unsecured debt." There were never any excess proceeds to be paid over to Dewsnup because of Dewsnup's own conduct and failure to pay the entire debt, thereby increasing the debt. Additionally, Dewsnup argues without any authority whatsoever that the notice of sale should have recited the amount of debt for which the non-judicial sale was to be held. In fact, Utah law contains no such requirement. *See Utah Code Ann. § 57-1-25 (1953).*

In *Southeast Timberlands v. Security National*, 469 S.E.2d 454 (Ga. App. 1996), the debtor sought to set aside a foreclosure sale. The debtor claimed that the sale should be set aside because the notice referenced a debt of \$400,000.00 when the actual debt owed was only \$362,000.00. The court refused to set aside the sale, noting that Georgia's foreclosure notice requirements did not require a listing of the amount of the debt. Therefore, a misstatement or overstatement of the debt did not render the advertisement legally defective or the sale unlawful.

In this case, Dewsnup has made no claim or showing that inclusion of the "unsecured debt" chilled bidding at the sale. In fact, such a claim cannot be made as the only party, other than Timm, who was aware of Timm's claims was Dewsnup.

Finally, we suggest that while this Court has determined that the Arrow Contract advance was not secured by the Trust Deed Property, at the time of the 1994 non-judicial sale, Timm acted in good faith and reliance on a valid judgment of the District Court in this matter. Although Dewsnup filed a motion to stay the non-judicial sale, she failed to properly bring that motion to the trial court's attention in a timely manner. To allow Dewsnup to recover damages under these circumstances would be inequitable considering Timm's good faith and its judgment lien.

POINT IV

PLAINTIFF'S NON-JUDICIAL SALE OF DEWSNUP'S PROPERTY DID NOT VIOLATE THE ONE-ACTION RULE.

Dewsnup argues that Timm's 1994 non-judicial sale violated the one-action rule because "where Plaintiff had a judgment for costs and attorneys fees, Plaintiff could not hold a non-judicial Trustee's sale on the Trust Deed Property for the same debt." However, Utah law and the one-action rule itself preclude its application to the facts of this case.

A. The One-Action Rule Does Not Apply to *Utah Code Ann. § 57-1-29*.

Dewsnup argues that because Timm's non-judicial sale violated the one-action rule, it was unlawful. However, the Utah Court of Appeals has determined that, in a case such as this one, the application of other relevant law determines the question.

In *Munford*, 1 P.3d 1116 (Utah App. 2000), the Utah appeals court reviewed a claim strikingly similar to this case. The appellant, Munford, owned property secured by a trust deed and by another junior lien. Munford defaulted on this senior loan. The trustee of the senior trust deed initiated non-judicial foreclosure proceedings. At the trustee's sale, the junior lienholder, Alliance, purchased the property. Because the amount realized from the sale left a surplus after the senior lienholder's debt was satisfied, the trustee deposited the funds into the trial court. Alliance, as a junior lienholder, applied for a release of the funds, but Munford objected. Munford claimed that she was entitled to the funds and that, because

Alliance had failed first to exhaust its security, it was precluded by the one-action rule from claiming the funds.

The Court of Appeals determined:

We need not reach the issues of whether the one-action rule applies or whether Alliance is a sold-out junior lienholder, because we agree with the trial court that this situation is governed by section 57-1-29 and by *Randall*.

* * *

In our case, the trial court correctly concluded that Alliance was legally entitled to the excess proceeds. When the Property was sold at the foreclosure sale, the res securing Alliance's lien was converted from realty to personal property--specifically, the excess proceeds. It makes no difference that Alliance bought the Property; the sale of the Property did not extinguish Alliance's lien. Rather, the proceeds replaced the Property as security for Alliance's lien. (Cite omitted.) Accordingly, we conclude the trial court correctly ruled that Alliance was "legally entitled to the proceeds," Utah Code Ann. § 57-1-29 (Supp.1999), and the trial court correctly granted Alliance's Motion for Release of Funds.

Munford, 1 P.3d at 1118-1119.

The disposition of this matter is governed by *Utah Code Ann.* § 57-1-29. Simply, Utah's one-action rule does not apply.

B. The Language of the One-Action Rule Precludes its Application.

Utah's one-action rule does not preclude collateral proceedings where a debt is secured by both a mortgage (or trust deed) on real property and personal property. *Utah Code Ann.* § 78-37-1 provides:

There can be but 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.

(Emphasis added.)

Dewsnup's debt on the Promissory Notes was secured by a Trust Deed, water rights and Dewsnup's assigned interest in the Arrow Contract. Additionally, there are two separate and distinct debts at issue: one on the Promissory Notes, and one arising from Timm's advance of the Arrow Contract payment. By the very terms of the statute itself, the one-action rule does not apply in this case because the Notes were not secured solely by "mortgage on real estate."

We also note that Dewsnup's arguments on this point are inconsistent with her arguments before the trial court below. R. at 919. With reference to the one-action rule, Dewsnup essentially argues that the entire transaction between Timm and Dewsnup constituted one "mortgage" on real property. However, throughout the course of this case, and now specifically in her argument relating to foreclosure for "unsecured debt," Dewsnup has successfully argued that the Arrow Contract assignment and the Trust Deed were completely separate and distinct transactions and that the advance on the Arrow Contract was not secured by the Trust Deed Property. With this in mind, Dewsnup cannot now argue that the entire transaction between Timm and Dewsnup constituted one "mortgage" on real property in order to apply the one-action rule.

C. Dewsnup's Bankruptcy Bars Application of the One-Action Rule.

The one-action rule is intended to limit a creditor's means of enforcing its debt, but not the right to recover. *City Consumer Services, Inc. v. Peters*, 815 P.2d 234, 237 (Utah 1991). Dewsnup argues that the District Court's award of summary judgment in this matter precludes Timm's non-judicial sale. However, where a bankruptcy eliminates a judgment creditor's right to collect that debt from a judgment debtor, but the debt is still secured by a lien on real property, the one-action rule should not act as a bar to collection of that debt through non-judicial sale.

In *Peters*, this Court held that the one-action rule did not bar an action by a junior lienholder where the real property securing the debt had been lost through foreclosure sale by a senior lienholder. By analogy, where a party has obtained a judgment against an individual debtor, and bankruptcy eliminates the ability to collect that judgment, the one-action rule should not bar collection of the debt by a non-judicial sale of property which secures the original debt. To hold otherwise would be contrary to the general intent of the law, which is to give the parties the benefit of their bargain. The contrary result argued for by Dewsnup would also contravene longstanding bankruptcy law which holds that while the personal debt may be discharged, judgment liens are not discharged through bankruptcy. *Dewsnup v. Timm*, 112 S.Ct. at 776.

D. Dewsnup Waived the One-Action Rule as a Cause of Action.

The original Complaint in this case alleged Timm's efforts to conduct a non-judicial sale of the Trust Deed Property beginning in 1980. Therefore, from the very outset of this case, Dewsnup has been aware that Timm was proceeding judicially to collect the debt arising from the Arrow Contract assignment and through a non-judicial sale to collect the debt on the Promissory Notes. Any claims or defenses relating to the one-action rule have been available to Dewsnup since 1980. The issue of the one-action rule raises matters outside of Timm's *prima facie* case. Therefore, under Utah law, the one-action rule was an affirmative defense to Timm's efforts. There is no evidence in the record that the one-action rule was ever timely raised as an affirmative defense to the trustee's sale or to the action. Failure to raise that defense results in a waiver of the right to do so. *Mabey v. Kay Peterson Const. Co., Inc.*, 682 P.2d 289 (Utah 1984).

POINT V

DEWSNUP HAD ACTUAL NOTICE OF THE TRUSTEE'S SALE.

Dewsnup has disingenuously argued that the trustee's sale should be set aside because she did not receive notice via certified and registered mail as the statute provides. *See Utah Code Ann. § 57-1-26(2)*. Dewsnup still makes her argument despite having received actual notice of the sale. Her actual notice is evidenced by Dewsnup's motion to stay the sale, filed a month in advance of the date of the sale. R. at 171. Indeed, she was even at the sale.

Section 57-1-26(2) expressly requires that certified, registered mail be given only when a proper request for notice has been recorded or is included in the trust deed. While Dewsnup's Trust Deed did include a request for notice, the only address given was "Deseret, Utah" with no delivery address included. Such a "general delivery" address precluded certified or registered mail. Timm's notice of the sale, including posting the properties with the sale notice and the statutorily required publication, provided actual notice and substantially complied with the statute.

This Court has upheld the validity of a trustee's sale despite minor defects in the notice of sale. *Progressive Concepts, Inc. v. First Sec. Realty Services, Inc.*, 743 P.2d 1158 (Utah 1987). The Washington appellate court has also held that defects in the notice of sale which do not affect a debtor's knowledge or ability to attend and participate are not grounds to set aside the sale. *Stewart v. Good*, 754 P.2d 150 (Wash. App. 1988).

In this case, not only did Dewsnup have actual notice of the sale well in advance, but she has completely failed to demonstrate any prejudice to her by her failure to receive notice by registered or certified mail. Therefore, while there may have been some dispute as to whether or not notices were sent, that dispute was not material. What was material and undisputed was that Dewsnup had actual notice and attempted to block the sale. The trial court's rejection of Dewsnup's argument should be affirmed.

POINT VI

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO TIMM.

On appeal, Dewsnup now argues that there are genuine issues of material fact preventing an award of summary judgment in this matter. However, Dewsnup failed to ever make this claim and argument to the trial court. This Court should not consider this argument.

Even if this Court considered such an argument for the first time on appeal, it is apparent that there were no genuine disputes as to any material fact preventing the summary adjudication.

A. This Court Should Not Consider Dewsnup's Improper Argument for the First Time on Appeal.

On appeal, the Court will not consider an issue not raised in the trial court except upon exceptional circumstances or plain error. *Coleman v. Stevens*, 17 P.3d 1122 (Utah 2000); *Salt Lake City v. Ohms*, 881 P.2d 844, 847 (Utah 1994). In this case, Dewsnup raised no argument of any genuine issues of material fact in the trial court. There is no showing of “plain error” or “exceptional circumstance” here. Her arguments on this point should not be considered by this Court.

In the trial court, the parties filed cross motions for summary judgment. Timm's motion sought dismissal of Dewsnup's counterclaim. Dewsnup's motion sought partial summary judgment on her unlawful foreclosure claim.

Rule 4-501(2) of the *Utah Rules of Judicial Administration*, governing motions for summary judgment, reads in pertinent part:

(2) *Motions for summary judgment.*

(A) *Memorandum in support of a motion.* The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. . . .

(B) *Memorandum in opposition to a motion.* The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. . . . All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(Emphasis added.)

Dewsnup's memorandum in opposition to Timm's Motion for Summary Judgment did not set forth any facts she disputed and Dewsnup did not argue any. R. at 875. Nowhere in any of her briefing on the summary judgment motions does Dewsnup argue that there were genuine issues of material fact that prevented summary judgment. *Id.*; R. at 898. Moreover, the alleged facts argued in Dewsnup's Brief at page 46 do not appear anywhere in her briefing on the parties' cross summary judgment motions in the lower court. Accordingly, her issues should not be considered on appeal.

B. There Are No Genuine Disputes as to Any Material Fact Preventing an Award of Summary Judgment.

Dewsnup contends that in the time between the court's order of summary judgment in April 1981 and the non-judicial sale in April 1994 (and during her several pending bankruptcies), she made several tenders of payment to Timm sufficient to have the Trust Deed released. Dewsnup argues that this fact should have prevented the trial court from granting Timm's Motion for Summary Judgment.

A tender requires that there be a *bona fide*, unconditional offer of payment of the amount of money due, coupled with an actual production of the money or its equivalent. *Zions Properties, Inc. v. Holt*, 538 P.2d 1319, 1322 (Utah 1975). Even if this Court were to consider Dewsnup's alleged tenders in a light most favorable to her, it is clear that no valid, legal tender was ever made.

In her Brief (at page 46), Dewsnup suggests that she made separate "tenders" of \$40,000.00 and \$10,000.00 to Timm. The only evidence of the first alleged "tender" consists of a third-party letter to Dewsnup indicating that a loan may yet be approved on the property subject to further qualification. R. at 433. Evidence of the second alleged tender is another letter, unsigned, to Dewsnup indicating that a loan may be approved, conditioned on Dewsnup providing necessary security. R. at 432. A copy of each letter is included in the Addendum to this Brief. The third alleged tender was a supersedeas bond filed in the Federal District Court to cover Timm's appeal costs incurred in her bankruptcy appeals. R. at 431.

None of these factual allegations amount to evidence of a valid, legal tender of the costs and attorneys fees owing to Timm. Moreover, at the time the supposed tenders were made, Dewsnup was in bankruptcy.

Dewsnup fails to acknowledge to this Court that the trial court in this matter has already considered these matters and previously made specific findings regarding her allegation before *Timm III*. In the trial court's summary judgment on February 18, 1998,² the court determined that:

(1) Based on the evidence presented to this Court, and the legal arguments raised in Plaintiffs' Memoranda, there is no genuine dispute of material fact with regard to Plaintiffs' contention that Defendants failed to pay the costs and attorneys fees under the Note secured by the Trust Deed . . . either prior to or after the principal and interest was paid on the notes and there is no competent evidence before the Court to show that any valid tender of payment of the costs and attorneys fees was ever made.

R. at 613 (emphasis added).

Finally, any evidence of a tender would be irrelevant to whether or not Timm had a duty to reconvey the Trust Deed. The trial court made specific findings, supported by the evidence, that \$88,911.67 in costs and attorneys fees were due and owing on the date of the

² Timm acknowledges that this summary judgment was reversed in part and remanded. However, the remand was only "to address the merits of Dewsnup's claim for the wrongful foreclosure of the trust deed property and other claims and defenses alleged in the counterclaim." *Timm III*, 990 P.2d at 945. Dewsnup's failure to reargue these tenders in the trial court and her reliance on the same defective evidence, leads to the same result.

non-judicial sale. Dewsnup has completely failed to demonstrate that at any point any alleged tender would have been sufficient to satisfy the costs and attorneys fees owed. Accordingly, Dewsnup has failed to demonstrate that there were any genuine issues of material fact preventing an award of summary judgment to Timm.

CONCLUSION

Timm requests that this Court affirm the decision of the trial court on the following bases:

1. The trial court's determination that \$88,911.67 in costs and attorneys fees was recoverable was correct and was supported by substantial evidence. The testimony of the witnesses and the proffered affidavits and exhibits demonstrated that the fees were necessary and reasonably incurred. Further, the evidence demonstrated that Timm's allocation was sufficient in that only recoverable fees were submitted.

2. The trial court's decision on the summary judgment motions was correct because the sale of the Trust Deed Property was accomplished within the statute of limitations; Dewsnup is not entitled to relief on her claim that the sale included unsecured debt; the one-action rule is not applicable to the facts of this case; Dewsnup had actual notice of the sale; and there were no genuine issues of material fact preventing an award of summary judgment to Timm.

Based on the foregoing, Timm requests that this Court award Timm its costs and fees incurred in defending this appeal.

DATED this 1st day of ^{April}~~March~~, 2002.

MAZURAN & HAYES, P.C.

By: 
Todd J. Godfrey
Attorneys for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of ^{April}~~March~~, 2002, I caused to be mailed, first-class United States mail, postage pre-paid, a true and correct copy of the foregoing **BRIEF OF APPELLEE** to the following:

Russell A. Cline
Crippen & Cline
10 West 100 South, Suite 425
Salt Lake City, UT 84101

A handwritten signature in black ink, appearing to read "Russell A. Cline", written over a horizontal line.

ADDENDUM

11 U.S.C. § 108

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UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 1--GENERAL PROVISIONS

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Current through P.L. 107-89, approved 12-18-01

§ 108. Extension of time

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of--

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) two years after the order for relief.

(b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of--

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 60 days after the order for relief.

(c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of--

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

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(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2556; Pub.L. 98-353, Title III, § 424, July 10, 1984, 98 Stat. 369; Pub.L. 99-554, Title II, § 257(b), Oct. 27, 1986, 100 Stat. 3114.)

11 U.S.C. § 362

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UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 3--CASE ADMINISTRATION
SUBCHAPTER IV--ADMINISTRATIVE POWERS

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Current through P.L. 107-89, approved 12-18-01

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay--

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section--

(A) of the commencement or continuation of an action or proceeding for--

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[**(5) Repealed.** Pub.L. 105-277, Div. I, Title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681-886]

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of--

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section--

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of--

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided

under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period)--

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section--

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

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11 U.S.C. § 506

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UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 5--CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER I--CREDITORS AND CLAIMS

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Current through P.L. 107-89, approved 12-18-01

§ 506. Determination of secured status

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there 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.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless--

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

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1993 Main Volume

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2583; Pub.L. 98-353, Title III, § 448, July 10, 1984, 98 Stat. 374.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

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Utah Code Ann. § 57-1-26

UTAH CODE, 1953
TITLE 57. REAL ESTATE
CHAPTER 1. CONVEYANCES

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Current through the 2001 Supplement (2001 First Special Session)

57-1-26 Requests for copies of notice of default and notice of sale -- Mailing by trustee or beneficiary --Publication of notice of default.

(1) (a) Any person desiring a copy of any notice of default and of any notice of sale under any trust deed shall, at any time subsequent to the filing for record of the trust deed and prior to the filing for record of a notice of default of the trust deed, file for record in the office of the county recorder of any county in which the trust property, or any part of the trust property, is situated, a duly acknowledged request for a copy of any notice of default and notice of sale. Except as provided in Subsection (3), the request may not be included in any other recorded instrument. The request shall set forth the name and address of the persons requesting copies of those notices and shall identify the trust deed by stating the names of the original parties to the trust deed, the date of filing for record of the trust deed, the book and page where the trust deed is recorded or the recorder's entry number, and the legal description of the trust property. The request shall be in substantially the following form:

REQUEST FOR NOTICE

The undersigned requests that a copy of any notice of default and a copy of notice of sale under the trust deed filed for record _____ (month/day/year), and recorded in Book _____, Page _____, Records of _____ County, (or filed for record _____ (month/day/year), with recorder's entry number _____, _____ County), Utah, executed by _____ and _____ as trustors, in which _____ is named as beneficiary and _____ as trustee, be mailed to _____ (insert name) _____ at _____ (insert address) _____.

(Insert legal description)

Signature _____

(Certificate of Acknowledgement)

(b) Upon filing for record of a request for notice, the recorder shall index

the request in the mortgagor's index, mortgagee's index, and abstract record. Except as provided in Subsection (3), the trustee under any deed of trust is not required to send notice of default or notice of sale to any person not filing a request for notice as described in Subsection (1)(a).

(2) Not later than ten days after recordation of a notice of default, the trustee or beneficiary shall mail, by certified or registered mail, with postage prepaid, a copy of the notice of default with the recording date shown, addressed to each person whose name and address are set forth in a request that has been recorded prior to the filing for record of the notice of default, directed to the address designated in the request. At least 20 days before the date of sale, the trustee shall mail, by certified or registered mail, return receipt requested with postage prepaid, a copy of the notice of the time and place of sale, addressed to each person whose name and address are set forth in a request that has been recorded prior to the filing for record of the notice of default, directed to the address designated in the request.

(3) Any trust deed may contain a request that a copy of any notice of default and a copy of any notice of sale under the trust deed be mailed to any person who is a party to the trust deed at the address of the person set forth in the trust deed. A copy of any notice of default and of any notice of sale shall be mailed to any person requesting the notice who is a party to the trust deed at the same time and in the same manner required in Subsection (2) as though a separate request had been filed by each person as provided in Subsection (1)(a).

(4) If no address of the trustor is set forth in the trust deed and if no request for notice by the trustor has been recorded as provided in this section, a copy of the notice of default shall, no later than 15 days after the filing for record of the notice of default, either be:

(a) mailed to the address of the property described in the notice of default;
or

(b) posted on the property.

(5) No request for a copy of any notice filed for record under Subsections (1) and (3), nor any statement or allegation in any of those requests, nor any record of those requests, shall affect the title to trust property or be considered notice to any person that any person requesting copies of notice of default or of notice of sale has or claims any right, title or interest in, or lien or claim upon, the trust property.

History: L. 1961, ch. 181, § 8; 1980, ch. 57, § 1; 1981, ch. 100, § 3; 1989, ch. 88, § 4; 2000, ch. 75, § 25; 2001, ch. 236, § 8.

NOTES, REFERENCES, AND ANNOTATIONS

Amendment Notes. --The 2000 amendment, effective May 1, 2000, updated the date

Utah Code Ann. § 57-1-29

UTAH CODE, 1953
TITLE 57. REAL ESTATE
CHAPTER 1. CONVEYANCES

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Current through the 2001 Supplement (2001 First Special Session)

57-1-29 Proceeds of trustee's sale --Disposition.

(1) The trustee shall apply the proceeds of the trustee's sale, first, to the costs and expenses of exercising the power of sale and of the sale, including the payment of the trustee's and attorney's fees actually incurred not to exceed the amount which may be provided for in the trust deed, second, to payment of the obligation secured by the trust deed, and the balance, if any, to the person or persons legally entitled to the proceeds, or the trustee, in the trustee's discretion, may deposit the balance of the proceeds with the clerk of the district court of the county in which the sale took place. If the proceeds are deposited with the clerk of the district court, the trustee shall file an affidavit with the clerk setting forth the facts of the deposit and a list of all known claimants, including known addresses. Upon depositing the balance and filing the affidavit, the trustee shall be discharged from all further responsibility and the clerk shall deposit the proceeds with the state treasurer subject to the order of the district court.

(2) The clerk shall give notice of the deposited funds to all claimants listed in the trustee's affidavits within 15 days of receiving the affidavit of deposit from the trustee.

(3) Any claimant may file a petition for adjudication of priority to the funds. The petitioner requesting the funds shall give notice of the petition to all claimants listed in the trustee's affidavit and to any other claimants known to the petitioner. The petitioner's notice must specify that all claimants have 20 days to contest the petition by affidavit or counter-petition. If no affidavit or counter-petition is filed within 20 days, the court shall, without a hearing, enter an order directing the clerk of the court or the county treasurer to disburse the funds to the petitioner according to the petition.

(4) If a petition for adjudication is contested by affidavit or counter-petition, the district court shall, within 20 days, conduct a hearing to establish the priorities of the parties to the deposited funds and give notice to all known claimants of the date and time of the hearing. At the hearing, the court will establish the priorities of the parties to the deposited funds and enter an order directing the clerk of the court or county treasurer to disburse the funds according to the court's determination.

(5) All persons having or claiming to have an interest in the disposition of funds deposited with the court under Subsection (1) who fail to appear and assert

their claims are barred from any claim to the funds after the entry of the court's order under Subsection (4).

History: L. 1961, ch. 181, § 11; 1997, ch. 215, § 7; 2001, ch. 236, § 11.

NOTES, REFERENCES, AND ANNOTATIONS

Amendment Notes. --The 1997 amendment, effective July 1, 1997, deleted "county" before "clerk" and inserted "district court of the" near the end of the first sentence; substituted "state" for "county" in the second sentence; and made stylistic changes throughout.

The 2001 amendment, effective April 30, 2001, added the sentence beginning "If the proceeds are deposited" and the phrase "and filing the affidavit" in Subsection (1), added Subsections (2) through (5), and made a stylistic change.

NOTES TO DECISIONS

Application.

Because the construction agreement between the parties did not provide for payment to defendant before plaintiffs in the event of foreclosure, the surplus proceeds of a nonjudicial foreclosure sale belonged to plaintiffs where plaintiffs held second priority interest by virtue of their trust deed before foreclosure and that interest survived foreclosure. *Jones v. ERA Brokers Consol.*, 2000 UT 61, 6 P.3d 1129.

Duties of trustee.

A trustee under trust deed has an affirmative duty to uphold his statutory responsibilities, and may not ignore those responsibilities in order to assist certain interest holders at the expense of others. *Randall v. Valley Title*, 681 P.2d 219 (Utah 1984).

Excess proceeds.

Junior lienholder was legally entitled to the excess proceeds under this section, because when the property was sold at the foreclosure sale, the res securing junior lienholder's lien was converted from realty to personal property. It made no difference that the junior lienholder bought the property; the sale of the property did not extinguish the lien; rather, the proceeds replaced the property as security for the junior lienholder's lien. *2793 S. 3095 W. v. Munford*, 2000 UT App 116, 1 P.3d 1116.

Utah Code Ann. § 78-12-41

UTAH CODE, 1953
TITLE 78. JUDICIAL CODE
PART II. Actions, Venue, Limitation of Actions
CHAPTER 12. LIMITATION OF ACTIONS
ARTICLE 3. MISCELLANEOUS PROVISIONS

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Current through the 2001 Supplement (2001 First Special Session)

78-12-41 Effect of injunction or prohibition.

When the commencement of an action is stayed by injunction or a statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-41.

NOTES, REFERENCES, AND ANNOTATIONS

Cross-References. --Injunctions, Rule 65A, U.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Bankruptcy proceeding.
Tolling.
Cited.

Bankruptcy proceeding.

The limitation period for a deficiency action that arose during the pendency of a bankruptcy proceeding was the three-month period provided under § 57-1-32 and began running when the bankruptcy proceeding was terminated. Citicorp Mtg., Inc. v. Hardy, 834 P.2d 554 (Utah 1992).

Tolling.

Utah Code Ann. § 78-37-1

UTAH CODE, 1953
TITLE 78. JUDICIAL CODE
PART IV. Particular Proceedings
CHAPTER 37. MORTGAGE FORECLOSURE

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Current through the 2001 Supplement (2001 First Special Session)

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

There can be but 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. Judgment 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.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-37-1; L. 1965, ch. 172, § 1.

NOTES, REFERENCES, AND ANNOTATIONS

Cross-References. --Execution and proceedings supplemental thereto, Rule 69, U.R.C.P.

Procedure for foreclosure of service member in military service or dependent, § 39-7-115.

Trust deeds, § 57-1-19 et seq.

NOTES TO DECISIONS

ANALYSIS

Action for deficiency.
Additional security.
Applicability of section.
Defenses.

Rule 4-501, *Utah Rules of Judicial Administration*

***1053 Judicial Administration Rule 4-501**

**WEST'S UTAH RULES OF COURT
UTAH CODE OF JUDICIAL
ADMINISTRATION
PART I. JUDICIAL COUNCIL
RULES OF JUDICIAL
ADMINISTRATION
CHAPTER 4. OPERATION OF THE
COURTS
ARTICLE 5. CIVIL PRACTICE**

*Current with amendments received through
9-1-2001.*

RULE 4-501. MOTIONS

Intent:

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for requesting and scheduling hearings on dispositive motions.

To establish a procedure for expedited dispositions.

Applicability:

This rule shall apply to motion practice in all trial courts of record except proceedings before the court commissioners and small claims cases. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

Statement of the Rule:

(1) Filing and service of motions and memoranda.

(A) Motion and supporting memoranda. All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions

of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(B) Memorandum in opposition to motion. The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(D) of this rule.

***1054** (C) Reply memorandum. The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(D) Notice to submit for decision. Upon the expiration of the five-day period to file a reply memorandum, either party may notify the clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The Notice to Submit for Decision shall state the date on which the motion was served, the date the memorandum in opposition, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

(2) Motions for summary judgment.

(A) Memorandum in support of a motion. The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(B) Memorandum in opposition to a motion. The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a verbatim restatement of each of the movant's statement of facts as to which the party contends a genuine issue exists followed by a concise statement of material facts which support the party's contention. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(3) Hearings.

(A) A decision on a motion shall be rendered without a hearing unless ordered by the court, or requested by the parties as provided in paragraphs (3)(B) or (4) below.

(B) In cases where the granting of a motion would dispose of the action or any claim in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

***1055** (C) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(D) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(E) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(F) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(G) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the court.

(H) If a hearing has been requested and the non-moving party fails to file a memorandum in opposition, the moving party may withdraw the request or the court on its own motion may strike the request and decide the motion without oral argument.

(4) Expedited dispositions. Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) Telephone conference. The court on its own motion or at a party's request may direct

arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

[Amended effective November 1, 1996; November 1, 1998; April 1, 1999; April 1, 2001; November 1, 2001.]

Promissory Notes

-30,000.00--

June 1, 1978

FOR VALUE RECEIVED, the undersigned promise(s) to pay to United Precision Machine and Engineering Company, Profit Sharing Trust
order, -----Thirty thousand and no/100----- DOLLARS, (\$-30,000.00-),

either with interest from date at the rate of eighteen per cent, (-18-%) per annum on the unpaid balance payable as follows, viz:

All accrued interest shall be paid on June 1, 1979; the entire balance of interest and principal shall be paid on or before June 1, 1980, provided, however, that no prepayment shall be permitted prior to June 1, 1979

lawful money of the United States of America, negotiable and payable at the office of 410 Newhouse Building, Salt Lake City, Utah, 84111

without defalcation or discount. All payments hereinabove provided for shall be applied first on accrued interest and balance to reduction of principal. Any installments of principal and interest not paid when due shall, at the option of the legal holder thereof, bear interest thereafter at the rate of -10%- per annum until paid.

In 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 this note to declare the entire principal sum hereof due and payable; and proceedings may at once be instituted for the recovery of the same by law, with accrued interest and costs, including reasonable attorney's fees.

The makers and endorsers severally waive presentment, protest and demand; and waive notice of protest, demand and of honor and non-payment of this note, and expressly agree that this note, or any payment thereunder, may be extended from time to time without in any way effecting the liability of the makers and endorsers thereof.

This note and the interest thereon is secured by a first ~~mortgage~~ Trust Deed dated June 1, 1978, covering real property in Millard County, Utah.

T. LaMar Dewsnap
T. LaMar Dewsnap
Aletha Dewsnap
Aletha Dewsnap

33,000.00--

June 1, 1978

FOR VALUE RECEIVED, the undersigned promise(s) to pay to Joseph L. Harrod, Trustee for the
ette Jacob Trust
der, Thirty-three thousand and no/100-----DOLLARS, (\$ -33,000.00-),
er with interest from date at the rate of eighteen per cent, (-18- %) per annum on the unpaid balance payable as
s, viz:

All accrued interest shall be paid on June 1, 1979; the entire
balance of interest and principal shall be paid on or before June 1,
1980, provided, however, that no prepayment shall be permitted prior
to June 1, 1979

valuable money of the United States of America, negotiable and payable at the office of 410 Newhouse Building,
: Lake City, Utah, 84111

ut defalcation or discount. All payments hereinabove provided for shall be applied first on accrued interest and balance to
tion of principal. Any installments of principal and interest not paid when due shall, at the option of the legal holder
f, bear interest thereafter at the rate of -10%- per annum until paid.

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

he makers and endorsers severally waive presentment, protest and demand; and waive notice of protest, demand and of
ior and non-payment of this note, and expressly agree that this note, or any payment thereunder, may be extended from
o time without in any way effecting the liability of the makers and endorsers thereof.

his note and the interest thereon is secured by a first ~~XXXXXX~~ Trust Deed dated June 1, 1978,
ring real property in Millard County, Utah.

T. Lamar Dewsnup
T. Lamar Dewsnup
Aletha Dewsnup
Aletha Dewsnup

56,000.00--

June 1, 1978

FOR VALUE RECEIVED, the undersigned promise(s) to pay to Abco Insurance Agency, Inc.

order, Fifty-six thousand and no/100 DOLLARS, (\$56,000.00-),
ther with interest from date at the rate of eighteen per cent, (-18-%) per annum on the unpaid balance payable as
ws, viz:

All accrued interest shall be paid on June 1, 1979; the entire
balance of interest and principal shall be paid on or before June 1,
1980, provided, however, that no payment shall be permitted prior
to June 1, 1979

awful money of the United States of America, negotiable and payable at the office of 410 Newhouse Building,
lt Lake City, Utah, 84111

out defalcation or discount. All payments hereinabove provided for shall be applied first on accrued interest and balance to
ction of principal. Any installments of principal and interest not paid when due shall, at the option of the legal holder
of, bear interest thereafter at the rate of -10% per annum until paid.

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

The makers and endorsers severally waive presentment, protest and demand; and waive notice of protest, demand and of
onor and non-payment of this note, and expressly agree that this note, or any payment thereunder, may be extended from
e to time without in any way effecting the liability of the makers and endorsers thereof.

This note and the interest thereon is secured by a first ~~trust deed~~ Trust Deed dated June 1, 1978,
vering real property in Millard County, Utah.

T. LaMar Dewsnap
T. LaMar Dewsnap
Aletha Dewsnap
Aletha Dewsnap

Amended Trust Deed

316 Salt Lake City, Utah 84111

521-3350

Space Above This Line For Recorder's Use

A M E N D E D
TRUST DEED

With Assignment of Rents

THIS TRUST DEED, made this 1st day of June, 1978
between T. LaMAR DEWSNUP and ALETHA DEWSNUP

....., as TRUSTOR,

whose address is DESERET UTAH
(Street and number) (City) (State)

..... EARL JAY PECK as TRUSTEE,* and
UNITED PRECISION MACHINE & ENGINEERING COMPANY PROFIT SHARING TRUST,
ABCO INSURANCE AGENCY, INC. and JOSEPH L. HENRIOD, as trustee for
the Annette Jacob Trust
..... as BENEFICIARY,

WITNESSETH: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST,
WITH POWER OF SALE, the following described property, situated in Millard
County, State of Utah:

PARCEL ONE: See Exhibit 'A' hereto

PARCEL TWO: See Exhibit 'B' hereto

25008
RECORDED AT REQUEST OF
DeLoren, Henrich, Ditt, Johnson & Peck
DATE June 9, 1978 TIME 8:30 P.M.
BOOK 128 OF REC. PAGE 181 FOR \$ 10.00
Gilby Martin
RECORDER OF MILLARD COUNTY, UTAH
By DeLoren, Henrich, Ditt, Johnson & Peck Deputy

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits;

FOR THE PURPOSE OF SECURING (1) payment of the indebtedness evidenced by a promissory notes of even date herewith, in the principal sum of \$33,000.00; \$56,000.00 & \$30,000.00, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or renewals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Trust Deed; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

*NOTE: Trustee must be a member of the Utah State Bar; a bank, building and loan association or savings and loan association authorized to do such business in Utah; a corporation authorized to do a trust business in Utah; or a title insurance or abstract company authorized to do such business in Utah.

1. To keep said property in good condition and repair; not to remove or demolish any building thereon, to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon; to comply with all laws, covenants and restrictions affecting said property; not to commit or permit waste thereof; not to commit, suffer or permit any act upon said property in violation of law; to do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general; and, if the loan secured hereby or any part thereof is being obtained for the purpose of financing construction of improvements on said property, Trustor further agrees:

(a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary, and

(b) To allow Beneficiary to inspect said property at all times during construction.

Trustee, upon presentation to it of an affidavit signed by Beneficiary, setting forth facts showing a default by Trustor under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein, and to act thereon hereunder.

2. To provide and maintain insurance, of such type or types and amounts as Beneficiary may require, on the improvements now existing or hereafter erected or placed on said property. Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form acceptable to Beneficiary. In event of loss, Trustor shall give immediate notice to Beneficiary, who may make proof of loss, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary instead of to Trustor and Beneficiary jointly, and the insurance proceeds, or any part thereof, may be applied by Beneficiary, at its option, to reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged.

3. To deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements thereto.

4. To appear in and defend any action or proceeding purporting to affect the security hereof, the title to said property, or the rights or powers of Beneficiary or Trustee; and should Beneficiary or Trustee elect to also appear in or defend any such action or proceeding, to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee.

5. To pay at least 10 days before delinquency all taxes and assessments affecting said property, including all assessments upon water company stock and all rents, assessments and charges for water, appurtenant to or used in connection with said property; to pay, when due, all encumbrances, charges, and liens with interest, on said property or any part thereof, which at any time appear to be prior or superior hereto; to pay all costs, fees, and expenses of this Trust.

6. Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

7. To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of ten per cent (10%) per annum until paid, and the repayment thereof shall be secured hereby.

IT IS MUTUALLY AGREED THAT:

8. Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement, in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary, who may, after deducting therefrom all its expenses, including attorney's fees, apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Beneficiary or Trustee may require.

9. At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Trust Deed and the note for endorsement (in case of full reconveyance, for cancellation and retention), without affecting the liability of any person for the payment of the indebtedness secured hereby, Trustee may (a) consent to the making of any map or plat of said property; (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement affecting this Trust Deed or the lien or charge thereof; (d) reconvey, without warranty, all or any part of said property. The grantee in any reconveyance may be described as "the person or persons entitled thereto", and the recitals therein of any matters or facts shall be conclusive proof of truthfulness thereof. Trustor agrees to pay reasonable Trustee's fees for any of the services mentioned in this paragraph.

10. As additional security, Trustor hereby assigns Beneficiary, during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Trust Deed and of any personal property located thereon. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable. If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property affected hereby, to collect all rents, royalties, issues, and profits. Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right, power, and authority to collect the same. Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Trust Deed to any such tenancy, lease or option.

11. Upon any default by Trustor hereunder, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver), and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect said rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

12. The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies, or compensation or awards for any taking or damage of said property, and the application or release thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

13. The failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default shall not constitute a waiver of any other or subsequent default.

14. Time is of the essence hereof. Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of Beneficiary. In the event of such default, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause said property to be sold to satisfy the obligations hereof, and Trustee shall file such notice for record in each county wherein said property or some part or parcel thereof is situated. Beneficiary also shall deposit with Trustee, the note and all documents evidencing expenditures secured hereby.

direct the order in which such property, it consisting of several known lots of land in the County of Utah, to be sold at public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale; provided, if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale. Trustee shall execute and deliver to the purchaser its Deed conveying said property so sold, but without any covenant or warranty, express or implied. The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustee's and attorney's fees; (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deed; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at 10% per annum from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in its discretion, may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place.

16. Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court.

17. Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority and title of the trustee named herein or of any successor trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made, in the manner provided by law.

18. This Trust Deed shall apply to, inure to the benefit of, and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder are joint and several. The term "Beneficiary" shall mean the owner and holder, including any pledgee, of the note secured hereby. In this Trust Deed, whenever the context requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

19. Trustee accepts this Trust when this Trust Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Trust Deed or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

20. This Trust Deed shall be construed according to the laws of the State of Utah

21. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

Signature of Trustor

L. L. M. Dawson
Altha Dawson

(If Trustor an Individual)

STATE OF UTAH
COUNTY OF

ss.

On the 1st day of June, A.D. 1978, personally appeared before me L. L. M. Dawson & Altha Dawson, the signer(s) of the above instrument, who duly acknowledged to me that they executed the same.

My Commission Expires:

Nov. 4, 1980

Notary Public residing at:

Butterfield, Utah

(If Trustor a Corporation)

STATE OF UTAH
COUNTY OF

ss.

On the day of, A.D. 19....., personally appeared before me, who being by me duly sworn, says that he is the of, the corporation that executed the above and foregoing instrument and that said instrument was signed in behalf of said corporation by authority of its by-laws (or by authority of a resolution of its board of directors) and said acknowledged to me that said corporation executed the same.

Notary Public residing at:

My Commission Expires:

REQUEST FOR FULL RECONVEYANCE

(To be used only when indebtedness secured hereby has been paid in full)

TO: TRUSTEE.

The undersigned is the legal owner and holder of the note and all other indebtedness secured by the within Trust Deed. Said note, together with all other indebtedness secured by said Trust Deed has been fully paid and satisfied; and you are hereby requested and directed, on payment to you of any sums owing to you under the terms of said Trust Deed, to cancel said note above mentioned, and all other evidences of indebtedness secured by said Trust Deed delivered to you herewith, together with the said Trust Deed, and to reconvey, without warranty, to the parties designated by the terms of said Trust Deed, all the estate now held by you thereunder.

Dated....., 19.....

.....
.....

Mail reconveyance to

TRUST DEED

With Assignment of Rents

.....
.....
.....
.....
.....

TO

AS TRUSTEE FOR

.....
.....
.....

Dated, 19.....

FORM 142—TRUST DEED, LONG FORM—KELLY CO., 95 W. NINTH SOUTH, S.L.C., UTAH

25008

BEGINNING 980 feet West of the Southeast Corner of the Southwest 1/4 of Section 4, Township 17 South, Range 4 West, Salt Lake Base & Meridian; thence North 1320 feet; thence West 1264 feet; thence South 625 feet; thence Southeasterly along the roadway 541 feet; thence South 470 feet; thence East 840 feet to beginning. More or less 35 Acres

BEGINNING 980 feet West of the Northeast Corner of the Northwest 1/4 of Section 9, Township 17 South, Range 4 West, Salt Lake Base & Meridian; thence South 1320 feet; thence West 840 feet; thence North 1320 feet; thence East 840 feet to beginning. More or less 25 Acres.

EXHIBIT 'A'

25008

The Southwest quarter of the Northeast quarter; of the Northwest quarter of the Southeast quarter; the Southeast quarter of the Northwest quarter; and the Northeast quarter of the Southwest quarter of Section 13, Township 18 South, Range 8 West, Salt Lake Base and Meridian.

EXCEPTIN THEREFROM that portion which lies within the boundaries of the DELTA CANAL COMPANY, MELVILLE IRRIGATION COMPANY, ABRAHAM IRRIGATION COMPANY and the DESERET IRRIGATION COMPANY distribution systems.

EXCEPTING THEREFROM all rights of way, stock trails, ditches and canals, gravel pits and gravel beds.

Findings of Fact and Conclusions of Law as to Attorney's Fees and Costs

FILED
Fourth Judicial District Court
of Utah County, State of Utah

Michael Z. Hayes (#1432)
Todd J. Godfrey (#6094)
MAZURAN & HAYES, P.C.
2118 East 3900 South, Suite 300
Salt Lake City, UT 84124-1725
Telephone: (801) 272-8998
Fax: (801) 272-1551

12/13/00 not Deputy

Attorneys for Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR MILLARD COUNTY, STATE OF UTAH

---ooo0ooo---

LOUIS L. TIMM, JOHN NEIUWLAND,
and FLOYD M. CHILDS, Trustees of the
UNITED PRECISION MACHINE AND
ENGINEERING COMPANY PROFIT
SHARING TRUST; ABCO
INSURANCE AGENCY, INC., a Utah
corporation; and JOSEPH L. HENRIOD,
Trustee for the ANNETTE JACOB
TRUST,

Plaintiffs,

vs.

T. LAMAR DEWSNUP and ALETHA
DEWSNUP ARROW INVESTMENT
CO., a limited partnership, THE
FEDERAL LAND BANK OF
BERKELEY; IMPERIAL LAND TITLE,
INC., as Trustee and EUGENE L.
CARSON and ELAINE CARSON as
Beneficiaries; STRINGHAM,
MAZURAN, LARSEN & SABIN, a
Professional Corporation; MINERAL
FERTILIZER CO., INC., and HARRY
V. KAPS,

Defendants.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW AS TO
ATTORNEY'S FEES AND COSTS**

80040
Civil No. 7191

Judge Fred D. Howard

---ooo0ooo---

This matter came before the Court for hearing initially on September 8, 2000, at 9:00 a.m., and was concluded on November 13, 2000, the Honorable Fred D. Howard presiding. Plaintiffs were represented by Michael Z. Hayes and Todd J. Godfrey. Defendant, Aletha Dewsnup, was represented by Russell A. Cline. The Court took evidence presented by Plaintiffs and also heard argument from the parties. The hearing was called for the purpose of determining the amount of costs and attorneys fees owing at the time the sale of the property at issue in this matter was conducted.

FINDINGS OF FACT

The Court, having considered all the evidence submitted and the arguments of the parties, and being duly advised in the premises, hereby finds as follows:

1. Defendants T. Lamar Dewsnup and Aletha Dewsnup originally executed 3 Promissory Note in favor of the Plaintiffs. These Notes, state, in part:

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

2. From the inception of this matter to December 5, 1980, Plaintiffs were required to expend Five Thousand Dollars (\$5,000) in costs and attorneys fees in an attempt to collect amounts due under the Promissory Notes executed by Defendants.

3. The Five Thousand Dollars (\$5,000) in costs and attorneys fees expended by the Plaintiffs were expended in an effort to collect the sums due under the Promissory Notes. The Five Thousand Dollars (\$5,000) was paid for costs actually incurred and for legal work actually

performed and the expenditures and the legal work performed were reasonably necessary to adequately prosecute the matter.

4. From December 5, 1980, to April 29, 1994, Plaintiffs were required to expend Eighty-three Thousand Nine Hundred Eleven Dollars and 67/100 (\$83,911.67) in costs and attorneys fees in an attempt to collect amounts due under the Promissory Notes executed by Defendants, and to protect Plaintiff's security for the payment of said notes.

5. The Eighty-three Thousand Nine Hundred Eleven Dollars and 67/100 (\$83,911.67) was paid for costs actually incurred and for legal work actually performed and the expenditures and the legal work performed were reasonably necessary to adequately prosecute the matter and to preserve Plaintiffs' interest in the property which secured payment of all sums due under the Promissory Notes.

6. Of the Eighty-eight Thousand Nine Hundred Eleven Dollars and 67/100 (\$88,911.67) paid by Plaintiffs between the inception of this case and April 29, 1994, Eleven Thousand Eight Hundred Ninety-six Dollars and 07/100 (\$11,896.07) were taxes on the property which served as security for payment of the Promissory Notes. The taxes were paid to avoid a tax sale of the property and in order to preserve the Plaintiffs' security interest.

7. The Court finds that between December 5, 1980, and the award of Summary Judgment by the District Court on April 14, 1981, work was performed to collect sums due under the Promissory Notes and to collect sums due for an advance paid by Plaintiffs under an Assignment of Contract, which Assignment of Contract also served as security for the payment of sums due under the Promissory Notes.

8. The Court finds that the attorneys fees expended for legal work during the time between December 5, 1980 and April 14, 1981 are not segregable and not allocable to separate causes of action, as pursuit of both causes of action was necessary to collect amounts due under the Promissory Notes and to preserve Plaintiff's security interest in the property.

9. The Court finds that all fees and costs were reasonable under the circumstances of this case. The Court further finds that Defendant's repeated bankruptcy filings and efforts to prevent non-judicial sales of the property securing payment of sums due under the Promissory Notes created significant cost and legal expense for the Plaintiffs.

10. The Court finds that all costs and fees incurred in bankruptcy proceedings between 1981 and 1994 were necessary to preserve Plaintiff's security interest in the property and were incurred in an effort to recover amounts due for costs and attorneys fees under the Promissory Notes and Trust Deed.

11. Section 506 of the Bankruptcy Code (11 U.S.C. § 506) authorizes Plaintiffs to recover costs and attorneys fees expended in protecting their security interest in the property of Defendant Aletha Dewsnup.

12. The Trust Deed which gave Plaintiffs a security interest in Aletha Dewsnup's property authorizes recover of costs and attorneys fees expended by Plaintiffs in conducting the non-judicial sale of the property.

CONCLUSIONS OF LAW

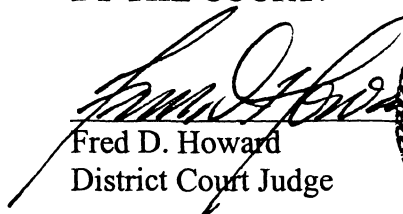
Based upon the foregoing FINDINGS OF FACT, and in consideration of the relevant law, the Court concludes as follows:

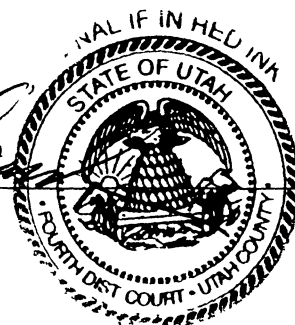
1. On December 5, 1980, there were Five Thousand Dollars (\$5,000) in costs and attorneys fees due and owing on the Promissory Notes which amounts were secured by Plaintiffs Trust Deed on the property..

2. On April 29, 1994, there were Eighty-eight Thousand Nine Hundred Eleven Dollars and 67/100 (\$88,911.67) in costs and attorneys fees due and owing on the Promissory Notes which amounts were secured by Plaintiff's Trust Deed on the property.

DATED this 13th ^{December} day of November, 2000.

BY THE COURT:


Fred D. Howard
District Court Judge



APPROVED AS TO FORM:

CRIPPEN & CLINE


Russell A. Cline
Attorneys for Defendant

783

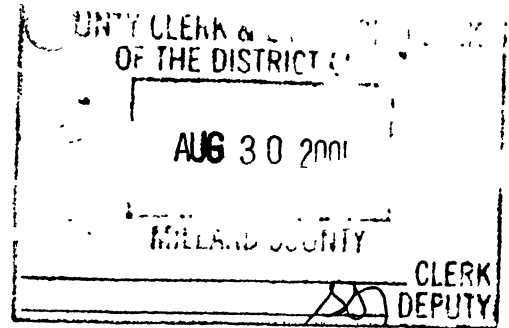
CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2000, I caused to be served a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO ATTORNEY'S FEES AND COSTS** by mailing, postage prepaid, first class United States mail, to the following:

Russell A. Cline
CRIPPEN & CLINE, L.C.
10 West 100 South, Suite 425
Salt Lake City, UT 84101

A handwritten signature in black ink, appearing to read "Todd J. Cline", written over a horizontal line.

Memorandum Decision



**IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH**

LOUIS L. TIMM, JOHN NEIUWLAND,
and FLOYD M. CHILDS, Trustees of
United Preceision Machine and
Engineering Company Profit Sharing
Trust; ABCO Insurance Agency, Inc., a
Utah Corporation; and JOSEPH L.
HENRIOD, Trustee for the ANNETTE
JACOB TRUST,

Plaintiffs,

vs.

T. LAMAR DEWSNUP and ALETHA
DEWSNUP, ARROW INVESTMENT
CO. A Limited Partnership, THE
FEDERAL LAND BANK OF
BERKELEY, IMPERIAL LAND TITLE
INC., as Trustee and EUGENE L.
CARSON and ELAINE STRINGHAM,
MAZURAN, LARSEN & SABIN, a
Professional Corporation, MINERAL
FERTILIZER CO., INC., and HARRY V.
KAPS,

Defendants.

MEMORANDUM DECISION

Civil No. 800407191

Hon. Donald J. Eyre

The above-entitled matter came before the court pursuant to Defendants' Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment. The court having considered the relevant documents and the parties' respective arguments, being fully advised in the premises, for good cause appearing, makes the following ruling.

FACTUAL SETTING

The facts set forth in Defendants' Memorandum in Support of Defendants' Motion for Partial Summary Judgment are undisputed except as to the notice requirements for a trustee's sale under U.C.A. §57-1-26. As described below, although Plaintiffs dispute whether notice was sent, this court finds that this disputed fact is not material to its decision.

ANALYSIS AND RULING

This case is once again before this court upon the Supreme Court's remand in Timm v. Dewsnup III. The Supreme Court directed the trial court to "determine what amount, if any, of attorney fees remained unpaid on the promissory notes when the sale was held." The Court also directed this court to "address the merits of Dewsnup's claim for the wrongful foreclosure of the trust deed property and the other claims and defenses alleged in the counterclaim. Timm v. Dewsnup, 990 P.2d 942, 945 (Utah 1999). After an evidentiary hearing on November 13, 2000, this court determined that \$88,911.67 in costs and attorney's fees were secured by the Trust Deed on April 29, 1994, the date of the non-judicial foreclosure sale.

Defendants raise four issues in support of their claim that Plaintiffs wrongfully foreclosed on the debt that is the subject of this action: 1) the trust deed sale was barred by the statute of limitations, 2) Plaintiffs foreclosed on the trust deed for unsecured debt, 3) the foreclosure sale violated the "one-action" rule, and 4) Plaintiffs failed to give the required statutory notice of default and notice of sale. For the following reasons, the Defendants' Motion for Partial Summary Judgment

is denied and the Plaintiffs' Cross Motion for Summary Judgment is granted.

I. Standard of Review

Utah Rule of Civil Procedure 56(c) allows entry of summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." At the summary judgment stage, "a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exists." Draper City v. Estate of Bernardo, 888 P.2d 1097, 1100 (Utah 1995). "A genuine issue of material fact exists, where, on the basis of the facts in the record, reasonable minds could differ on any material issue." Ron Shepherd Ins. Inc. v. Shields, 882 P.2d 650, 655 (Utah 1994). The court will review the evidence "in the light most favorable to the non-moving party." Walker Drug Co. v. La Sal Oil Co., 902 P.2d 1229, 1230 (Utah 1995).

II. Statute of Limitations

Defendants' claim that Plaintiffs' trustee sale was barred by the statute of limitations under U.C.A. §57-1-34 and §78-12-23. Under 57-1-34, a trustee's sale must be made within the time allowed by law. Section 78-12-23 sets forth the statute of limitations for this action--six years. Defendants claim that the foreclosure sale should have commenced before June 1, 1986 because the debt secured by the trust deed came due on June 1, 1980.

While there is a certain simplicity in Defendants' argument, it completely ignores the effect

of the intervening bankruptcy action. 7 U.S.C. §362(a) states that “a petition filed...operates as a stay applicable to all entities, of...the commencement or continuation...a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title (Bankruptcy law).” U.C.A. §78-12-41 provides that “When the commencement of an action is stayed by injunction or a statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.”

Defendants’ cite no statutory or case law to explain why the plain language of these two statutes should not operate to toll the statute of limitations. In fact, Utah case law dictates that the statute of limitations to commence foreclosure proceedings is tolled by the effect of the two statutory provisions cited above. See City Corp. Mortgage, Inc. v. Hardy, 834 P.2d 554 (Utah 1992).

III. Foreclosure on Unsecured Debt

Defendants next claim that because Plaintiffs attempted to foreclose on \$222,814.62 worth of debt, some of which was not secured by the Trust Deed (See Timm v. Dewsnap, 921 P.2d 1381 (Utah 1996)), the foreclosure sale was defective and Defendants are entitled to damages.

At the time the non-judicial trustee’s sale was held, Plaintiffs were acting under a valid summary judgment entered in their favor by the trial court that the full amount of the debt was secured by the Trust Deed. It wasn’t until 1996 that the Supreme Court’s ruled that the Arrow Contract debt (\$49,966.21) was not secured by the Trust Deed. Defendants assert that because

Plaintiffs included the “unsecured” debt in the payoff amount, they never had the opportunity to satisfy the debt and obtain a reconveyance. However, in this court’s Order Granting Summary Judgment on February 18, 1998, Defendants were not entitled to a reconveyance of the Trust Deed property because “there is no competent evidence before the Court to show that any valid tender of payment of the costs and attorneys fees was ever made.”

Further, in the Supreme Court’s Timm III decision, they stated that “We must therefore again remand this case to the trial court to determine what amount, if any, of attorney fees remained unpaid on the promissory notes when the sale was held. It was only for that amount that the foreclosure sale could have legally been held.” Timm v. Dewsnup, 990 P.2d 942, 945 (Utah 1999). After an evidentiary hearing, the amount of attorney’s fees found owing at the time of the sale was \$88,911.67. Plaintiffs are not estopped from using this figure.

Finally, this court finds Defendants argument that they are entitled to the difference between the bid price (\$115,000) and the amount of fees owing (\$88,911.67) unpersuasive. Plaintiffs had a valid judgment lien. Under U.C.A. §57-1-29, the trustee has the authority after applying the proceeds of the sale “first, to the costs and expenses of exercising the power of sale and of the sale, including the payment of the trustee’s and attorney’s fees actually incurred not to exceed the amount which may be provided for in the trust deed” to pay the balance of the proceeds “to the person or persons legally entitled to the proceeds.” The statute gives the trustee discretion, but does not require, the trustee to deposit those proceeds with the court. Defendants do not challenge the validity of

Plaintiffs' judgment lien.

The non-judicial foreclosure sale was not defective because the Plaintiffs included "unsecured" debt. Defendants offer no support for this proposition. Utah Code allows a trustee to apply the proceeds of a sale to those persons legally entitled to the proceeds. Defendants owed \$88,911.67 in attorneys fees. The Plaintiffs bid in \$115,00 of the debt. After applying this to the \$88,911.67 the excess proceeds were applied to the \$49,966.21 judgment lien on the Arrow Contract.

IV. The One-Action Rule

Defendants third claim is that the trustee's sale violated the one-action rule. They argue that because Plaintiffs were awarded a judgment and had elected to proceed "judicially," the subsequent non-judicial sale violated the one-action rule. Interpreting the one action rule to limit a creditor's recovery to a single remedy, Defendants claim that Plaintiffs could not proceed non-judicially on "the same debt" that was covered by the judgment. Defendants claim fails on a number of grounds.

First, Defendants attempt to define "the debt" in this case as the entire amount covered by the trust deed, the promissory notes, and the Arrow Contract assignment. However, Defendants fail to recognize what they successfully argued for nearly 16 years, that this "debt" is in reality two debts, one secured by the trust deed and one not secured by the trust deed. It is disingenuous for Defendants to now attempt to argue contrary to the position they have held all along, that these were two distinct transactions.

Even if these two debts are considered one debt, Defendants misconstrue the very purpose

of the one-action rule. It does not bar a creditor from electing to proceed with a non-judicial trustee sale even if judicial proceedings have commenced. The purpose of the one-action rule is to force creditors to proceed first against the *security*, and then against the debtor personally. Utah case law makes this very clear. Discussing U.C.A. §78-37-1, the Utah Supreme Court held that “there is no personal liability on the part of the mortgagor until after foreclosure or sale of the security and then only for the deficiency then remaining unpaid; a mortgagee may not have a personal judgment against the mortgagor until the security has first been exhausted.” Lockhard Co. v. Equitable Realty Co., 657 P.2d 1333, 1334 (Utah 1983). “The underlying purpose of the single-action statute is to preclude the creditor from waiving the security and suing directly on the contract to pay money and hold the debtor rather than the security primarily liable.” National Loan Investors, L.P., v. Givens, 952 P.2d 1067, 1071 (Utah 1998) (quoting Bank of Ephraim v. Davis, 581 P.2d 1001, 1003 (Utah 1978)).

The one-action rule does not bar a party who proceeds judicially from holding a non-judicial trustee’s sale. In either action, the security is exhausted before the debtor is sued personally. In fact, this was exactly what this court ordered. “The trial court ordered that the Arrow property and the water rights described in the assignment of contract and security agreement respectively *be sold at public auction.*” Timm v. Dewsnap, 921 P.2d 1381, 1385 (Utah 1996) (emphasis added). The one-action rule only bars a creditor from proceeding both on the security and directly on the contract *at the same time*. Defendants have raised no claim that Plaintiffs attempted to hold them personally liable before exhausting the security.

V. Statutory Notice of Default and Notice of Trustee's Sale

Defendants' final claim is that Plaintiffs failed to provide them with statutory notice of default and sale. While in their Memorandum in Opposition to Defendants Motion for Partial Summary Judgment Plaintiffs dispute the allegations that Defendants never received the required notice, because of the decision set forth below, this court finds that this fact, while disputed, is not material to its ruling. Section 57-1-26(3) (not 57-1-27(2) as cited in Defendants' Memorandum) contains the applicable language:

When a proper request has been made in a trust deed, a copy of any notice of default and of any notice of sale shall be mailed to each such person at the same time (no later than ten days after recordation of default for notice of default and at least 20 days before the sale for a notice of sale) as though a separate request therefor had been filed.

Plaintiffs had a statutory duty to send written notice of default and written notice of sale. Even if the address listed on the trust deed was somehow defective, Plaintiffs should have followed the back-up procedures described in subparagraph (4), which require publication at least three times, etc. or personal delivery to the trustor. However, Defendants must show more than simply the failure to receive the required statutory notice. In the case of Progressive Concepts, Inc. v. First Sec. Realty Services, 743 P.2d 1158, cited by Plaintiffs and un rebutted by Defendants, the Utah Supreme Court stated that:

The purpose of strict notice requirements in a non-judicial sale of property secured by trust deed is to inform persons with an interest in the property of the pending sale of that property, so that they may act to protect those interests. Morrell v. Arctic Trading Co., Inc., 21 Wash. App. 302, 584 P.2d 983 (1978). The objective of the

notice is to prevent a sacrifice of the property. If that objective is attained, immaterial errors and mistakes will not affect the sufficiency of the notice or the sale made pursuant thereto. Russell v. Webster Springs National Bank, 164 W. Va. 708, 265 S.E.2d 762 (1980). A party who seeks to have a trustee sale set aside for irregularity, want of notice, or fraud has the burden of proving his contention, it being presumed, in the absence of evidence to the contrary, that the sale was regular. *Id.* Defects in the notice of foreclosure sale that will authorize the setting aside of the sale must be those that would have the effect of chilling the bidding and causing an inadequacy of price. Boyce v. Hughes, 241 Ga. 357, 245 S.E.2d 308 (1978). The remedy of setting aside the sale will be applied only in cases which reach unjust extremes. McHugh v. Church, 583 P.2d 210 (Alaska 1978).

The Defendants have failed to meet their burden to show why this sale should be overturned. They offer no factual evidence that the lack of statutory notice had the “effect of chilling the bidding and causing an inadequacy of price.” This court finds that actual notice was received by Defendants as they could not have filed a Motion to Stay the sale a month in advance of the sale without actual notice. Defendants have offered no substantive reason nor support in law as to why this sale should be set aside for lack of notice.

Because there are no disputed material issues of fact, as a matter of law Defendants’ Motion for Partial Summary Judgment on this issue is denied and Plaintiffs’ Cross Motion for Summary Judgment is granted.

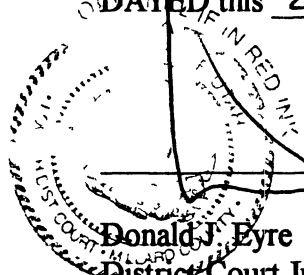
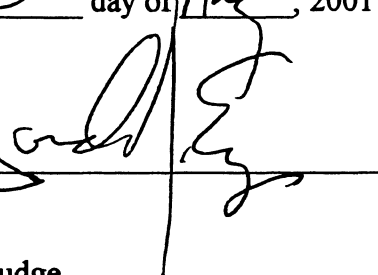
CONCLUSION

This court finds that there are no material issues of fact in dispute. Therefore as a matter of law: 1) Plaintiffs non-judicial trustee sale was not barred by the statute of limitations, 2) Plaintiffs were entitled to apply the proceeds of the sale to satisfy their valid judgment lien, 3) the non-judicial

trustee sale was not barred by the one-action rule, and 4) Defendants received actual notice of default and sale and failed to meet their burden of proof as to any harmful effects the lack of statutory notice caused. As a result of the above, Plaintiffs' Cross Motion for Summary Judgment is granted and Defendants' Motion for Partial Summary Judgment is dismissed.

Counsel for Plaintiffs is directed to prepare a Judgment and Order consistent with this decision and submit it to counsel for Defendants for review and then to the court for execution.

DATED this 29th day of Aug, 2001



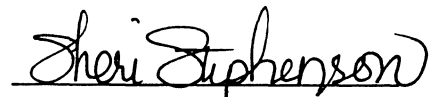
Donald J. Eyre
District Court Judge

MAILING CERTIFICATE

I certify that true copies of the foregoing order were mailed, postage prepaid, on the 31st day of August 2001 to the following at the addresses indicated, to wit:

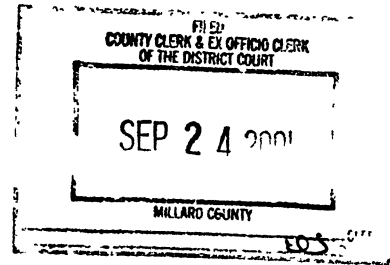
Russell A. Cline (#4298)
CRIPPEN & CLINE L.C.
10 West 100 South, Suite 425
Salt Lake City, UT 84101

Michael Z. Hayes (#1432)
Todd J. Godfrey (#6094)
MAZURAN & HAYES, P.C.
2118 East 3900 South , Suite 300
Salt Lake City, UT 84124-1725



Deputy Clerk

Order (“Judgment”)



Michael Z. Hayes (#1432)
Todd J. Godfrey (#6094)
MAZURAN & HAYES, P.C.
2118 East 3900 South, Suite 300
Salt Lake City, UT 84124-1725
Telephone: (801) 272-8998
Fax: (801) 272-1551

Attorneys for Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR MILLARD COUNTY, STATE OF UTAH

---0000000---

LOUIS L. TIMM, JOHN NEIUWLAND,
and FLOYD M. CHILDS, Trustees of the
UNITED PRECISION MACHINE AND
ENGINEERING COMPANY PROFIT
SHARING TRUST; ABCO
INSURANCE AGENCY, INC., a Utah
corporation; and JOSEPH L. HENRIOD,
Trustee for the ANNETTE JACOB
TRUST,

Plaintiffs,

vs.

T. LAMAR DEWSNUP and ALETHA
DEWSNUP ARROW INVESTMENT
CO., a limited partnership, THE
FEDERAL LAND BANK OF
BERKELEY; IMPERIAL LAND TITLE,
INC., as Trustee and EUGENE L.
CARSON and ELAINE CARSON as
Beneficiaries; STRINGHAM,
MAZURAN, LARSEN & SABIN, a
Professional Corporation; MINERAL
FERTILIZER CO., INC., and HARRY
V. KAPS,

Defendants.

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ORDER

Civil No. 7191

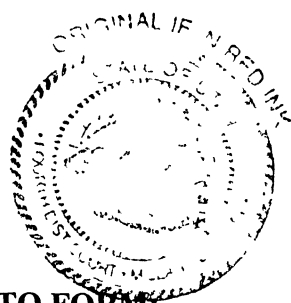
800407191

Judge Donald J. Eyre, Jr.


This matter came before the Court on the parties' cross Motions for Summary Judgment. The Court, having considered the respective Briefs of the parties, on August 29, 2001, issued a Memorandum Decision on the parties' cross Motions, denying Defendant's Motion for Partial Summary Judgment, granting Plaintiffs' Motion for Summary Judgment, and dismissing Defendant's Counterclaim, in its entirety, with prejudice. In consideration of the above-referenced Memorandum Decision of the Court, it is hereby

ORDERED, ADJUDGED AND DECREED that the Memorandum Decision on the parties' cross Motions for Summary Judgment is hereby adopted as the Order of the Court and Plaintiffs' Motion for Summary Judgment is hereby granted and Defendant's Counterclaim is dismissed, in its entirety, with prejudice.

DATED this 24th day of September, 2001.



BY THE COURT:



Donald J. Eyre, Jr.
District Court Judge

APPROVED AS TO FORM:

CRIPPEN & CLINE

Russell A. Cline
Attorney for Defendant Aletha Dewsnup

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2001, I caused to be served a true and correct copy of the foregoing **ORDER** by mailing, postage prepaid, first class United States mail, to the following:

Russell A. Cline
CRIPPEN & CLINE, L.C.
10 West 100 South, Suite 425
Salt Lake City, UT 84101

_____

Motion for Stay Pending Appeal

Scott C. Pierce
McKAY, BURTON & THURMAN
Attorneys for Debtor
Suite 1200, Kennecott Building
10 East South Temple Street
Salt Lake City, UT 84133
Telephone: 801-521-4135

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

LAMAR DEWSNUP	:	Bankruptcy No. 84C-01746
ALETHA DEWSNUP,	:	(Chapter 7)
	:	
Appellants,	:	Adversary No. 87PC-0116
	:	
vs.	:	District No. 88C-08416
	:	
LOUIS L. TIMM, et al.	:	
	:	MOTION FOR STAY PENDING
Respondents.	:	APPEAL

Plaintiff/Appellant, Aletha Dewsnap, hereby moves the Court for an Order staying the Defendants/Respondent's efforts to foreclose the real property which is at issue in the Appeal of this matter. The Appeal of this Court's decision involves issues of whether or not Plaintiff's may avoid the lien of the Defendants to the extent that it exceeds the value in the real property and effectively redeem the property under 11 U.S.C. §506. In support of this motion the Appellant states the following:

1. Appellant will be extremely prejudiced if the Defendant is allowed to foreclose on the real property. This

will render the Appeal moot and effectively destroy the Appellant's right of Appeal in this matter. The only way Appellant's right to redeem the property can be preserved, while the issue is being decided on Appeal, is to stay any foreclosure sale scheduled by Defendants.

2. Defendants/Respondents will not be prejudiced in that the property upon which they have a lien is not declining in value nor is any substantial harm going to occur to the property during the short time the Appeal is pending. Defendants' position is fully secure should the District Court affirm the Bankruptcy Court's judgment. The only possible prejudice Defendants' may receive is a slight delay in foreclosing on the property.

3. The issue which has been appealed by Appellant is very unsettled at the current time. There are a number of Courts that have ruled on both sides of the issue. The majority of the Courts who have faced the issue have ruled in favor of the Appellant's position. Therefore, Appellant does have a likelihood of success on the merits substantial enough to justify this Court granting a stay pending appeal.

4. No public policy would be offended by the granting of a stay pending Appeal in this matter.

BOND ON APPEAL

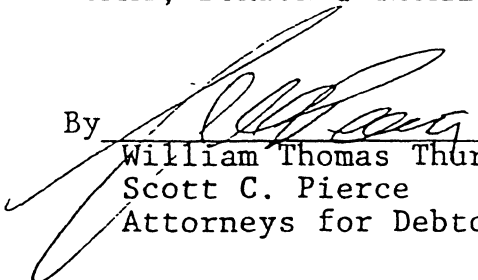
Plaintiff/Appellant would move that the Court grant the stay pending Appeal with no bond required. The Defendant/Respondents, have a perfected security interest in the real property which is the subject matter of the Appeal. Their interest is fully secured and protected by the value of the property. The only interest to which they are entitled is the fair market value of the property. If the Court requires that a bond should be posted, the bond should only be in the form of a cost bond to possibly cover and costs incurred by the Defendants/Respondents in this Appeal.

WHEREFORE the Plaintiff/Appellant hereby moves the Court for an Order granting a stay pending the Appeal of this action, preventing Defendants/Respondents from foreclosing their interest in the real property until the Appeal has been decided. Furthermore, Plaintiff/Appellant requests that the stay be granted without the posting of a bond.

DATED this 15th day of January, 1989

McKAY, BURTON & THURMAN

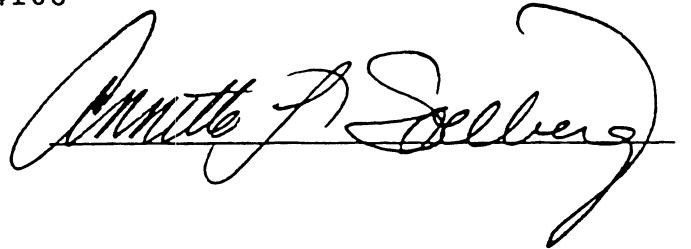
By


William Thomas Thurman
Scott C. Pierce
Attorneys for Debtor

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 17th
day of January, 1989, a true and correct copy of the foregoing
MOTION FOR STAY PENDING APPEAL was mailed, postage prepaid, to
the following:

Michael Z. Hayes, Esq.
MAZURAN, VERHAAREN & HAYES
2180 South 3100 East, #260
Salt Lake City, UT 84106

A handwritten signature in cursive script, reading "Matthew J. Solberg", written over a horizontal line.

Order Granting Stay Pending Appeal

Scott C. Pierce
McKAY, BURTON & THURMAN
Attorneys for Debtor
Suite 1200, Kennecott Building
10 East South Temple Street
Salt Lake City, UT 84133
Telephone: (801) 521-4135

FILED IN TIME
UNITED STATES
FEB 7 11 58 AM '89
BY
DEPUTY CLERK

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

LAMAR DEWSNUP and	:	Bankruptcy No. 84C-01746
ALETHA DEWSNUP,	:	(Chapter 7)
	:	
Appellants,	:	Adversary No. 87PC-0116
	:	
vs.	:	District No. 88C-08416
	:	
LOUIS L. TIMM, et al.,	:	
	:	ORDER GRANTING STAY PENDING
Respondents.	:	APPEAL

The Debtor's Motion for a Stay Pending Appeal came on for hearing before the Honorable Judge Glen E. Clark on February 1, 1989. Scott C. Pierce of McKay, Burton & Thurman appeared on behalf of the Appellants. Michael Z. Hayes of Mazuran, Verhaaren and Hayes appeared on behalf of the Defendants/Respondents to the Appeal. Notice appeared proper in all respects.

Based upon the arguments of counsel at the hearing and the pleadings on file with the Court, the Court made Findings of Fact and Conclusions of Law on the record. Based upon the Findings and Conclusions,

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IT IS HEREBY ORDERED that the Appellants Motion for Stay Pending Appeal is hereby granted. The Stay will become effective upon the posting of a \$9,900.00 bond with the Court. The \$9,900.00 bond is for protection of the Defendants/Respondents during the pendency of the Appeal. The Bond amount is calculated as follows: \$1,000.00 for taxes accruing; \$5,000.00 for costs; and \$3,900.00 for interest.

DATED this 13 day of February, 1989.

BY THE COURT:

By CS
Judge Glen E. Clark
Bankruptcy Judge

1989
U.S. BANKRUPTCY COURT

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 6th day of February, 1989, a true and correct copy of the foregoing was mailed, postage prepaid, to the following:

Michael A. Hayes, Esq.
MAZURAN, VERHAAREN & HAYES
2180 South 1300 East, #260
Salt Lake City, UT 84106

Matthew J. Edberg
Secretary

CERTIFICATE OF SERVICE

CLERK OF THE COURT

I, the undersigned Clerk of the Court, do hereby certify that on the _____ day of February, 1989, a true and correct copy of the foregoing was mailed, postage prepaid, to the following:

Scott C. Pierce, Esq.
McKAY, BURTON & THURMAN
Suite 1200, Kennecott Building
10 East South Temple Street
Salt Lake City, UT 84133

Michael A. Hayes. Esq.
MAZURAN, VERHAAREN & HAYES
2180 South 1300 East, #260
Salt Lake City, UT 84106

Clerk of the Court

Alleged “Tender” Letters

STATE OF UTAH

DEPARTMENT OF AGRICULTURE

350 North Redwood Road • Salt Lake City, Utah 84116 • (801) 533-5421



SCOTT M. MATHESON
GOVERNOR

STEPHEN T. GILLMOR
COMMISSIONER

November 28, 1984

LaMar Dewsnap
Deseret Rt. Box 42
Delta, Utah 84624

Dear La Mar:

On November 19, 1984, your Rural Rehabilitation loan request of \$40,000 was presented and approved by the Agriculture Advisory Board.

You will need to contact our office as soon as possible to determine the security needed and necessary information to draw up your loan papers.

I look forward to hearing from you soon.

Sincerely,


Kyle R. Stephens
Loan Program Supervisor

KSR/cg

Associated Credit Union
1812 South Empire Road
P. O. Box 30430
Salt Lake City, Utah

TO WHOM IT MAY CONCERN;

We have this 26th day of August, 1988, approved a loan in the amount of TEN THOUSAND DOLLARS (\$10,000.00) for and in behalf of Aletha Dewsnap, Alan Dewsnap and Darwin Dewsnap for the purchase of property.

Consideration for the said loan will be a Promissory Note and pledged collateral other than the property to be purchased with the proceeds of this loan.

Funds in the amount of TEN THOUSAND DOLLARS (\$10,000.00) will be made available upon the completion of appropriate documentation but in no case later than September 1, 1988 provided that the borrowers furnish appropriate documents and complete closing of the loan as required, and that their offer for the property is accepted.

WITNESS OUR HAND this 26th day of August, 1988.

Associated Credit Union

Subscribed and sworn before me this 26th day of August, 1988.

Notary Public for State of Ut

Residing in Bountiful, Utah
My commission expires 6-8-91