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Von K. Stocking and Donna H. Stocking, husband and wife v. First Federal Savings & Loan Association of Logan, Fred Hunsaker and Bryan chadez, as officers and individuals; Brad H. Bearnson, trustee; Norma Barber and Helen Barber, successor beneficiaries; N. George Daines, and John does 1-8 : Brief of Appellants

Utah Court of Appeals

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BRIEF

DOCKET NO. **890345** IN THE UTAH COURT OF APPEALS

VON K. STOCKING and DONNA H.)
STOCKING, husband and wife,)
 Plaintiffs and Appellants,)
)
vs.)
)
FIRST FEDERAL SAVINGS & LOAN)
ASSOCIATION OF LOGAN, FRED)
HUNSAKER and BRYAN CHADEZ, as)
officers and as individuals;)
BRAD H. BEARNSON, Trustee;)
NORMAN BARBER and HELEN BARBER,)
successor beneficiaries; N.)
GEORGE DAINES, and JOHN DOES 1-8,)
 Defendants and Respondents.)

Case No. 890345-0

BRIEF OF THE APPELLANTS

APPEAL FROM AN ORDER OF THE FIRST DISTRICT COURT
FOR CACHE COUNTY, UTAH,
JUDGE VENOY CHRISTOFFERSEN

Priority No. 14(b)

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STOCKING, husband and wife,)	
Plaintiffs and Appellants,)	
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LIST OF ALL PARTIES

The caption on the cover names all the parties.

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal under U.C.A. §78-2a-3(2)(j), being a case transferred to the Court of Appeals from the Utah Supreme Court.

NATURE OF THE PROCEEDINGS

This is an appeal from the Order of the First District Court dismissing the Stockings' Complaint with prejudice under Rule 41(b), U.R.C.P. The Stockings believe the trial court abused its discretion. The trial court had earlier denied two Motions for Summary Disposition made by the Defendants. A related case on appeal before the Utah Supreme Court, Barber vs. Emporium, Supreme Court No. 880410, has been briefed. The relief requested in that case for Von Stocking, in part III, is similar to the relief requested for Mr. and Mrs. Stocking in this suit. The Stockings claim that the Defendants Barbers and Daines wrongfully interfered with a business arrangement they had with First Federal; that First Federal wrongfully breached an agreement to allow the Stockings to cure a Trust Deed Note default; and that Defendants Barbers and Daines failed to credit a judgment held against Von Stocking with the value of the property, taken in a Trust Deed Sale, in excess of the amount of the trust deed note owed to First Federal.

STATEMENT OF THE ISSUES

I.

Did the trial court do justice to the Stockings in dismissing the case under Rule 41(b)?

II.

Was the motion for a new trial proper after Summary Judgment was granted?

III.

Were Stockings denied due process by the trial court's failure to hold the required hearing?

DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, AND RULES

The following are determinative Constitutional provisions, statutes, and rules that support the relief Appellants seek:

1. U.S. Constitution Amendment V:

No person shall be. . .deprived of life, liberty, or property without due process of law. . .

2. U.S. Constitution Amendment XIV, Section 1:

. . .No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Utah Constitution Article I, Section 7:

No person shall be deprived of life, liberty, or property without due process of law.

4. Utah Constitution Article I, Section 11:

All Courts shall be open, and every person, for an injury done to him in his person, property, or reputation, shall have remedy by due course of law, which shall be ministered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party.

5. Rule 4-501(9), Code of Judicial Administration:

In cases where the granting of a motion would dispose of the action or any issues thereon on the merits with prejudice, the party resisting the motion may request a hearing and such request shall be granted.

STATEMENT OF THE CASE

The Stockings seek return of property and/or damages arising from the Defendants' conduct at a Trust Deed foreclosure in 1983. The Stockings filed suit November 3, 1983, against First Federal Savings and Loan Association, certain of its officers, the Trust Deed Trustee, the Barbers, and their attorney. Mr. and Mrs. Stocking, as Trustors, had been in default on a Trust Deed note. They believed they had an agreement allowing them to cure the default. The day before the Trust Deed sale, the Barbers bought First Federal Savings and Loan's beneficiary rights, and then proceeded themselves with the Trust Deed sale. The Barbers' interest in the property was wholly motivated by a previously attained judgment against Von Stocking, but not Mrs. Stocking, arising from Von Stocking's involvement in the Emporium Limited Partnership (Record Case No. 880410 pp 14-17). The Stocking's Trust Deed to First Federal preceded the Barber's judgment against Mr. Stocking by several years.

Four causes of action were stated in the Amended Complaint November 28, 1983 (Record pp. 16-35). The Stockings alleged: (1) that the Barbers caused First Federal to breach an agreement to allow the Stockings to cure the default in the Trust Deed on their residence; (2) that just before the sale, both First Federal and the Barbers fraudulently misrepresented their intentions to the Stockings; (3) that the Barbers wrongfully interfered with the Stockings' contractual relations with First Federal; and, (4) that

the Barbers wrongfully interfered with the Stockings advantageous economic relationship with First Federal.

First Federal Savings and Loan and Barbers are basically two groups of Defendants, each of which is separately represented. Both groups of Defendants unsuccessfully filed separate Motions for Summary Judgment. By Memorandum Decision entered March 19, 1984, and an Order entered April 3, 1984, (Record, 129-30; 135-6), the trial court found that there were genuine issues of fact regarding whether an accord was reached about curing the default. The Court said that other issues "must be tried to make these determinations" concerning First Federal (Record, 130).

The Barber group did not move for partial Summary Judgment until September 8, 1987. By its Memorandum Decision entered October 7, 1987, and Order filed October 26, 1987, (Record 215-17), the trial court also denied this motion. The court found there were questions of fact as to whether the Barbers and their attorney, N. George Daines, interfered with the rights of the Stockings by communicating with First Federal to interfere with Stockings' rights. The court's words included: "Where the facts are contested, Summary Judgment is not appropriate and the Motion for Partial Summary Judgment will be denied" (Record, 215).

Plaintiff's discovery proceeded intermittently after the Complaint was filed and after Summary Judgment was denied. Responses to the Stockings' last requests were filed January 6, 1988 (Record 238-40). In January 1986 and February 1987, the Court had brought its own Order to Show Cause inquiries as to whether the

case should be dismissed (Record 157; 160). In both instances, Plaintiffs said they had additional discovery to do and each Order to Show Cause was dismissed (158; 170). After the second was dismissed February 2, 1987 (Record 170), Plaintiffs filed an Objection to the Orders to Show Cause (February 6, 1987; Record 170), in which they anticipated requesting a trial date within the year (Record 161). Discovery was proceeding for eleven months, until January 6, 1988. Thereafter, none of the parties filed anything on this case until First Federal moved for dismissal with prejudice under Rule 41(b) November 28, 1988 (Record 240). Their sole argument was that the Complaint had not been prosecuted fast enough. The Barbers and their attorney joined in the motion December 2, 1988 (Record 255). Nothing had happened in this case between January 6, 1988, and November 28, 1988, but Stockings and Barbers had been in litigation in two other cases in Cache County with the Barbers, case nos. 17630 and 25616. Both of these cases involved appeals. The first of these was Barber vs. Emporium, Cache County No. 17630, Court of Appeals No. 870128-CA. The second is Barber vs. Emporium, Cache County No. 25616, Supreme Court No. 880410. The latter case attempted to renew the judgment against the Emporium. Its appeal is pending before the Supreme Court.

December 6, 1988, Stockings gave notice of their objections to the dismissal. On December 9, 1988, they requested a hearing on the matter, and filed a Notice of Readiness for Trial (Record, 257-64). At the same time, Stockings also paid the \$50 jury fee (Record, 280), and requested that the matter be tried before a jury

(Record, 278). December 21, 1988, the Court sent a Notice of Trial Setting, for three days of jury trial, to all counsel (Record, 268-69). January 3, 1989, the Barbers and their attorney filed a Reply Memorandum, setting forth their only written comments on dismissal as a Reply to the Plaintiff's objection, but failed to send a copy of this Reply to the Plaintiffs (Record, 270-72). Plaintiffs were not aware it had been filed. The Court issued its Memorandum Decision January 19, 1989, granting Defendants' Motion to Dismiss with Prejudice (Record, 273). The Court did not allow Plaintiffs their requested hearing under Rule of Practice 2.8(g), (as it then existed), or Code of Judicial Administration Rule 4-501(9).

Stockings filed their Notice of Objections to Proposed Findings in Order of Dismissal on January 25, 1989 (Record 274). The Stockings pointed out that the Court had denied them the hearing to which they were entitled by Rule 4-501(9), Code of Judicial Administration. Stockings also argued that the Defendants had not shown that having a trial would be prejudicial to the Defendants. The Stockings finally noted that the Court had set a trial date (Record 273-82), and had believed that all the parties relied on that setting because no one objected when it was made. Nevertheless, the Court signed a Dismissal with Prejudice January 27, 1989 (Record, 289), and this appeal followed.

Plaintiffs' Motion for a New Trial was filed February 6, 1989 (Record, 291). An order denying the same was filed March 14, 1989 (Record, 305). The Notice of Appeal was filed with the trial court April 11, 1989 (Record, 307).

SUMMARY OF THE ARGUMENT

Failure of the trial court to grant the Stockings a hearing before dismissing under Rule 41(b), U.R.C.P., ought to be considered reversible error and an abuse of discretion. This court should also rule on the merits, as shown in the pleadings, that the trial court did not give Plaintiffs an opportunity to be heard and to do justice, and order that the case be set for trial.

Prior rulings by the trial court and affidavits submitted by the Stockings adequately show there are issues which need to be tried. The Court actually allowed the matter to be set on the trial calendar during the pendency of the Motion to Dismiss, and no objections were raised to the trial settings. During the proceedings on this case, somewhat related issues were being litigated between Mr. Stocking and the Barbers in other cases involving the same court and the same judge. The judge's decision is on appeal in a related case before the Utah Supreme Court.

Although the appeals court has upheld dismissing cases under Rule 41(b), the other cases were situations where the parties failed to show up for trial or there had been no activity for more than the one year Plaintiffs were not directly active in this case.

The Stockings Motion for a "New Trial," after the court dismissed on a motion, was procedurally correct. It is consistent with the Utah Court of Appeals decision in Moon Lake Electric Assoc., Inc. v. Ultra Systems Western Const., 767 P.2d. 125 (Utah App. 1988).

ARGUMENT

I.

THE TRIAL COURT DID NOT DO JUSTICE TO THE STOCKINGS IN DISMISSING THE CASE UNDER RULE 41(b).

If the trial court's decision to dismiss does not do justice to the parties, the trial court abused its discretion. Unless substantial prejudice or injustice will result to the adverse party, the opportunity to be heard should be considered more important than moving calendars along. Westinghouse Electric Supply v. Paul W. Larsen Contractor, Inc., 544 P.2d. 876 (Utah 1975). While trial courts have broad discretion to decide whether a claim has been pursued with due diligence, if it appears the trial court abused its discretion and there is a likelihood an injustice has been done, an appeals court should review the dismissal. Department of Social Services v. Romero, 609 P.2d. 1323, 1324 (Utah 1980). The appeals court should review the history of this case to see whether dismissing it would result in an injustice. A review of the facts shows Stockings have not had an opportunity to be heard equivalent to the opportunities to be heard in cases where 41(b) motions have been upheld.

In Utah Oil Co. v. Harris 565 P.2d. 1135 (Utah 1987), a sixteen-month lapse after a pre-trial conference had been suspended for settlement negotiations was held not to be too long. The court said that during that time either party could have requested an earlier trial setting. When neither party had obtained a trial setting, the court found that such a lapse was acceptable, and the

trial court's dismissal under Rule 41 was reversed. Utah Oil Co. applies the standard for review, and this case, like that one, should be remanded for trial.

Defendants convinced the trial court to decide the five years between November 1983 and December 1988 was enough to order a dismissal. They have referred to Brasher Motor and Finance Company v. Richard A. Brown, 23 Utah 2d. 247, 461 P.2d. 464 (1969). The trial court in Brasher waited five and one-half years before dismissing the action. The time period is the only similarity with the present case, however. In Brasher there had been no activity for that 5½ years: no discovery, no motions, and no rulings that there were questions of fact. The decision by Justice Henriod acknowledges that after a Complaint for Replevin was filed by a car company, the sheriff could not find the property, and that a Counterclaim was filed a month later "as long as a hippie's hairdo." The Plaintiffs then moved to dismiss, and the case sat dormant:

Thereafter everyone treated the litigation with a silent reverence accorded to that which is interred, until, lo and behold, 5½ years later the Browns, like Abou Ben Adhem, awoke from a deep dream of peace and attempted to exhume and reactive what for all intents and purposes appeared to have been a litigious corpse.

The matter was brought to the attention of the trial judge, who on his own motion dismissed the whole works, Brasher's Complaint and Brown's Counterclaim. Id. at 464.

The present case should not be equated with Brasher. There has not been a five year period of total silence and inactivity. The trial

court here had already ruled that Stockings have a right to have the facts heard.

Another case the trial court could have been persuaded by, but which is distinguishable, is Maxfield v. Fishler, 538 P.2d. 1323 (Utah 1975). Maxfield had been set for trial before the dismissal was granted. The action was filed in October 1972, and a trial setting made for October 1974. The court set the trial date months in advance, and Plaintiff had objected. However, the objection had not been heard and the trial date remained on the calendar. When the parties appeared for trial, the Plaintiff did not have an expert witness for this malpractice action and moved to continue the matter. The trial court dismissed the case. The dismissal was upheld on appeal. However, a dissent was filed in which Justices Ellet and Maughan said the Plaintiff should have been allowed to produce what evidence he had, and used the trial date, even if his motion to continue had not been granted. Because a trial date had already been set, the opportunity to do justice to the parties was far more established than it has been in the instant case, where the parties have never backed away from an actual trial date.

The Defendants' here mostly relied upon a decision from the Utah Appeals Court entitled Charlie Brown Construction Company v. Leisure Sports Incorporated, 470 P.2d. 1368 (Utah App. 1987). However, this case should also not be controlling here. A trial date had also been set in that case. On the eve of trial, a settlement appeared imminent. No one appeared for the June 18, 1984, trial, so the trial court dismissed the matter. Apparently

settlement did not result, and the dismissal did not come to the parties' attention for another seven months. March 18, 1985, a hearing was held on the Plaintiff's Motion to Set Aside the Dismissal. After reviewing the entire file, which included the history of the case and the history of the discovery and the protective orders, the trial court stuck with the dismissal. Nowhere does it appear in the opinion that the trial court made any ruling on the merits of the case, such as it would have done had there been Motions for Summary Judgment. The facts in Charlie Brown are not close enough to the instant case to justify using it as a precedent. Stockings did not miss a court date. There were questions of fact.

Similarly, the citation in Charlie Brown to Lake Meredith Reservoir Company v. Amity Mutual Irrigation Company, 698 P.2d. 1340 (Colo. 1985) does not suggest facts sufficiently related to the present case sufficient to justify dismissing the action. The value of the Lake Meredith decision is to show that the present action, pending for five years, and during which Defendants' Summary Judgment motions were denied, should go to trial. The Stockings may have been slow, but they were not inactive. Lake Meredith is the classic example of what inactive lawsuits can be like. The complaint was filed in 1931 and finally resolved by dismissal in 1983. That is 52 years. After 1931, the Defendants moved the case into the Federal Court for diversity reasons, where it sat for eight years. After Defendants' identities changed because of assignments of various irrigation rights, the case

returned to Colorado State courts until 1944, when it was dismissed without prejudice. Plaintiffs refiled the case and an Answer was filed in 1944. In 1945, a Stipulation was entered, by which the parties (but not the Court) agreed the case would not be set for trial, but held on the Court's docket. In 1947, Defendants moved to dismiss; the Motion was denied. In 1949, the case was retired from the Court's docket on the judge's motion, but not dismissed. In 1982, Plaintiff moved the case to the Colorado water court, and in 1983, moved for Summary Judgment on some of the issues. In 1983, additional Defendants moved to intervene and to dismiss for lack of prosecution. The case was dismissed, but it had been 52 years since it was filed, and 37 since it was refiled. The Colorado court considered this "an unusual delay" and approved the dismissal, saying the trial court had that much discretion. The Court agreed that 37 years was an unusual period for no activity. In the appeal, the trial court considered not only the Plaintiff's efforts in 1983 to resume prosecution, but the length of the delay, the reasons for the delay, the prejudice to the Defendants, the difficulties of trying the case at such a late date, and held it appropriate for the trial court to consider all these things and inquire into the totality of the circumstances surrounding the delay.

In the instant case, the trial court failed to make an adequate inquiry into the totality of the circumstances outlined in Lake Meredith, and in so failing, abused its discretion. One factual issue in Lake Meredith was the effect a water storage

reservoir would have on irrigation in the area. The appeals court thought that between 1945 and 1983 the parties could have developed some opinions. That is the closest the Colorado court came to the merits of the action. In the present case, the court actually reviewed the merits, and found the Plaintiffs should be able to go to Court. It did not justify dismissing the case, using the same or similar review standards approved from Lake Meredith in the Charlie Brown decision. Stockings did not nearly approach the failures to prosecute shown in the Charlie Brown and Lake Meredith examples. Those cases support Stockings' claim that the trial court abused its discretion.

The following elements demonstrate the court's abuse of discretion in the present action:

1. The Court has already denied motions by both groups of Defendants for summary judgment, holding there were issues of fact which should be tried.
2. Defendants could have requested trial in 1988, during which time neither party filed pleadings with the Court, but did not.
3. The Plaintiffs were busy with the Barber group of Defendants before the same Judge in the same Court. One action involved writs and the Court of Appeals' decision on the original judgment; the other involved the effort to renew the judgment, and is now briefed before this Court.
4. There was no pretrial conference and no trial set, so Plaintiffs were not ignoring an opportunity to be heard.
5. When Defendants' Motion was made, Plaintiffs immediately requested trial and paid the jury fee. Before the Court ruled on the Motion, the Court actually accepted the fee and set the matter for trial.

6. Plaintiffs also requested a hearing on Defendants' Motion, which was not granted.
7. During the first four years of the action, there was considerable activity, before the same Judge, involving the Plaintiffs and the Barber group of Defendants, plus discovery requests by Plaintiffs, and the denial of summary judgment, against the Defendants.

II.

THE MOTION FOR A NEW TRIAL WAS PROPER AFTER SUMMARY JUDGMENT WAS GRANTED.

Rule 59(a) U.R.C.P. has been interpreted by the Utah Court of Appeals to allow a motion for a new trial even when there has not, in fact, been a "trial." Moon Lake Electric Assoc., Inc. v. Ultra Systems Western Constr., Inc., 767 P.2d. 125 (Utah App. 1988). The Court of Appeals held that while Rules 59 and 56 do not address the availability of a motion for a "new" trial following Summary Judgment, that such a motion was nevertheless procedurally correct. The Court said:

Neither Utah R. of Civ. P. 59 (new trial) nor Utah R. of Civ. P. 56 (summary judgment) directly addresses the availability of the motion for a "new" trial following summary judgment. Our analysis of Rule 59(a) and the rationale behind it leads us to conclude that such a motion is, nonetheless, procedurally correct.

Thereafter, the Court's analysis followed, including the holding that:

The concept of a new trial under Rule 59 is broad enough to include a rehearing of any matter decided by the Court without a jury. . . . While there may be some logic in concluding that there can be no new trial where no trial has yet occurred, we should be less concerned with what this "reconsideration"

procedure may be called, so long as the procedure is available to litigants.

One of Defendants' arguments to the trial court was there had been no trial, so the Motion was not properly taken. This argument seems to have been accepted by Judge Christoffersen, but it is contrary to the holding of the Utah Appeals Court in Moon Lake. The Moon Lake opinion, made December 29, 1988, was relied on by the Stockings in requesting the trial court to review the case under Rules 59(a)(1), and (7) (Record, 291-93). In the motion for a new trial, the Stockings asserted the court had abused its discretion and made errors in law. This argument is amply supported by the facts and law recited herein. There is not a legal precedent for dismissing a case which has been inactive for only a year, which was never set for trial, and in which the delay was not unusual. The interests of justice, moreover, require that the parties have an opportunity to be heard. The only trial setting the Court ever made in this matter was scrapped by the Court before the date arrived.

Defendants' argument to the trial court which relied on Christenson v. Jewkes, 761 P.2d. 1375 (Utah 1988), is also misplaced. That case discusses the trial court's discretion in considering motions for a new trial. In Christenson, trial had previously been set, and a jury trial held. The court refused to grant a new trial because the court had previously set the trial date. It said trial would go forward even if the discovery had not been completed. Plaintiffs there had asked for a new trial

because the jury voted with the Defendant. The Christenson appeal decision said that the jury's verdict was supportable even without contested expert testimony. Thus, Christenson deals with whether a new trial should have been granted where trial before a jury had already taken place, and the court found the jury verdict to have been adequately supported. It demonstrates the intent to allow parties the chance to be heard and to have justice done. That intention has not been manifested by the trial court in this case.

III.

STOCKINGS WERE DENIED DUE PROCESS BY THE TRIAL COURT'S DISMISSAL WITH PREJUDICE AND/OR FAILURE TO HOLD THE REQUIRED HEARING.

Where a motion would resolve the case against the party opposing it, the party opposing the motion is entitled to a hearing. Under prior Rule of Practice 2.8(g), which is now Rule 4-501(9) in the Code of Judicial Administration, the Stockings were entitled to the hearing they requested, but did not get:

In cases where the granting of a motion would dispose of the action or any issues thereon on the merits with prejudice, the party resisting the motion may request a hearing and such request shall be granted . . . (emphasis supplied).

It was not necessary for Stockings to submit affidavits concerning why they had not requested a trial setting earlier or done additional discovery. The court had already ruled, against both groups of Defendants, that there were facts which had to be tried. Affidavits supporting those facts were already in the record. Moreover, Rule 4-501(9), Code of Judicial Administration,

says that in the motion such as Defendants' Rule 41(b) motion, the party resisting the motion may request a hearing and the request shall be granted. In Stroud v. Stroud, 738 P.2d. 649 (Utah App. 1987) the Court held:

According to the Utah Supreme Court, the meaning of the word "shall" is usually or ordinarily presumed to be mandatory. Herr v. Salt Lake County, 525 P.2d. 728 (Utah 1974); State v. Zeimer, 10 Utah 2d. 45, 347 P.2d. 1111 (1960).

When Stockings asked for a hearing December 9, 1988, they expected to get one. They did not expect the case would be ruled on without a hearing. In fact, they thought the Defendants' motion had been denied because they next received a Notice of Trial Setting from the Court. One reason for a hearing is that the trial court, in exercising its discretion, has to face the parties. It is possible all the matters could have been presented to the Court in writing, but that is not the point. The Court had the obligation to grant a hearing to hear whatever may have been said, again or in addition, before granting such a motion. This trial court abused its discretion in not doing this. Whatever analysis the Defendants give to Plaintiffs' reasons for not having moved ahead sooner, the duty of the trial court was to allow the Plaintiffs to justify what they were doing at a hearing. The court did not perform its duty.

CONCLUSION

The Defendants have acknowledged there may have been reversible procedural error in the trial court's failure to not have the

hearing Stockings requested. Now that the case is on appeal, the hearing phase could be eliminated and the case directly remanded for trial on the merits. The Plaintiffs are entitled to have an opportunity to be heard and to do justice. In cases where Rule 41(b) dismissals have been sustained, trial has been set or there has been no activity for far more than the one year period Plaintiffs were not very active in this particular case. Plaintiffs had no duty to submit additional data to the trial court justifying their delay, where affidavits in the file and prior rulings by the court had previously held there were issues which must be tried. The court certainly knew about the related actions between the Stockings and the Barbers. It appeared ready to get rid of the Stockings and everyone associated with them, quickly if possible. The Barber v. Emporium matter is on appeal to the Utah Supreme Court (No. 880410) as a result of the same attitude by the same judge. In this case, Stockings seek the value of their property in excess of what was owed on the Trust Deed Note because they had relied, to their detriment, on the actions of First Federal, the Trustee, the Barbers, and Mr. Daines about the Trust Deed Foreclosure.

In the related appeal Barber v. Emporium, Mr. Stocking challenges Barbers' and the trial court's improvements to a prior judgment in connection with renewing it, and appeal the court's refusal to allow offsets required by law and by equity. Trial of this present case would allow a measurement of the damages to Stockings for the value of their property in excess of the Trust

Deed Note. The two appeals are closely related. Barbers had admitted they were only interested in the Stockings' house at First Federal's Trust Deed Sale because of their prior judgment (Record, Supreme Court Appeal No. 880410, pp. 14-17, set out in Addendum Item 4 of Appellant's Brief in the same case). Mrs. Stocking is a party to this suit, but is not a party in the other suit.

The Stockings believe they are victims of judicial prejudice or abuse of discretion by Judge Christoffersen's rulings in both this case and Case No. 880410 that is also on appeal. They ask this court to remand the case for trial, and grant the Appellants attorney's fees and costs on appeal as allowed by Rule 33 and 34 of the Rules of Appellate Procedure.

Respectfully submitted this ____ day of July, 1989.

Raymond N. Malouf

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of July, 1989, four true and correct copy of the foregoing BRIEF OF APPELLANTS, Case No. 890345-CA, was mailed postage prepaid to each of the following:

L. Brent Hoggan, Esq.
OLSON & HOGGAN
Attorneys for
Defendants/Respondents
56 West Center
Logan, Utah 84321

N. George Daines, Esq.
DAINES & KANE
Attorneys for
Defendants/Respondents
108 North Main, Suite 201
Logan, UT 84321

Raymond N. Malouf

ADDENDUM

Item

1. Findings of Fact and Order of Dismissal with Prejudice, Record 286-290.
2. Notice of Objections to Proposed Findings and Order of Dismissal, Record 274-282.
3. Motion for New Trial and Memorandum, Record 291-296.
4. Responses to Motion, Record 297-300.
5. Reply by Plaintiffs in Support of Motion for New Trial, Record 301-303.
6. Memorandum Decision, March 19, 1984, denying Summary Judgment, Record 129-130.
7. Memorandum Decision, October 7, 1987, denying Summary Judgment, Record 215.
8. Memorandum Decision and Order, Record 304-306.
9. Notice of Appeal, Record 307-308.
10. Appellants also request the Court take judicial notice of Appeal No. 881410, currently before the Utah Supreme Court, including pages 14-17 thereof which are included here.

L. Brent Hoggan (#1512)
OLSON & HOGGAN
Attorneys at Law
56 West Center
P.O. Box 525
Logan, Utah 84321-0525
Telephone: 752-1551

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

VON K. STOCKING and DONNA H.
STOCKING, husband and wife,

Plaintiffs,

vs.

FIRST FEDERAL SAVINGS & LOAN
ASSOCIATION OF LOGAN, FRED
HUNSAKER and BRIAN CHADAZ as
officers and as individuals;
BRAD H. BEARNSON, Trustee;
NORMAN BARBER and HELEN BARBER,
successor beneficiaries;
N. GEORGE DAINES, and JOHN
DOES 1-8,

Defendants.

FINDINGS OF FACT
AND ORDER OF DISMISSAL
WITH PREJUDICE

Civil No. 22183

In this matter Defendants First Federal Savings & Loan Association of Logan, Fred Hunsaker, Brian Chadaz and Brad H. Bearnson, filed a Motion pursuant to Rule 41(b) to dismiss Plaintiffs' Complaint with prejudice for failure to prosecute the same and therewith filed a Memorandum of Points and Authorities in Support of said Motion, and Defendants Norman Barber, Helen Barber, and N. George Daines joined in said Motion in writing. Plaintiffs objected to said Motion and filed their objection with a Memorandum in support thereof in writing. The Court having read

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and considered said Motions and the Memoranda in support and opposition thereto, having examined the file, and on January 19, 1989 having made its Memorandum Decision in writing, now makes the following:

FINDINGS OF FACT

From the record in the file on this matter, the Court finds:

1. Plaintiffs' Complaint was filed November 3, 1982 and a Temporary Restraining Order was issued the same day to restrain Defendants First Federal Savings & Loan Association of Logan, Fred Hunsaker, Brian Chadaz and Brad H. Bearnson from proceeding with a Trustee's sale of Plaintiffs' property.
2. The Trustee's sale scheduled November 3, 1983 was postponed one (1) day to November 4, 1983, and on November 4, 1983, a hearing was held before the Honorable VeNoy Christoffersen on Plaintiffs' Temporary Restraining Order. As a result of the hearing, Plaintiffs' Temporary Restraining Order was dismissed on November 4, 1983, and the Trustee's sale as rescheduled was conducted the same day.
3. On November 7, 1983, Defendants First Federal, Hunsaker, Chadaz and Bearnson filed an Answer to Plaintiffs' Complaint.
4. On November 28, 1983, Plaintiffs filed an Amended Complaint.
5. On December 8, 1983, Defendants First Federal, Hunsaker, Chadaz and Bearnson filed an Answer to Plaintiffs' Amended Complaint.
6. On February 3, 1984, Defendants First Federal, Hunsaker, Chadaz and Bearnson filed a Motion For Partial Summary Judgment, which was denied by the Court in a Memorandum Decision dated March 19, 1984.
7. On March 21, 1984, Defendants First Federal, Hunsaker, Chadaz and Bearnson filed a Notice of Readiness for Trial.

Plaintiffs objected to the Notice on April 2, 1984, stating in their objection, "Plaintiffs intend to prepare and complete discovery both with interrogatories and depositions."

8. On July 6, 1984, Defendants First Federal, Hunsaker, Chadaz and Bearnson filed a Second Notice of Readiness for Trial, to which Plaintiffs objected stating, "... plaintiffs are proceeding with discovery."

9. On July 11, 1984, Plaintiffs served Interrogatories and a Request For Admission on Defendants Chadaz and Bearnson, to which Bearnson filed Answers on July 18, 1984 and Chadaz filed Answers on August 10, 1984.

10. On January 13, 1986, the Court, on its own motion, issued an Order returnable January 27, 1986 for Plaintiffs to show cause why their Complaint should not be dismissed for failure to prosecute the same.

11. On January 23, 1986, Plaintiffs moved to dismiss the Court's Order to Show Cause and in their Motion stated, "Plaintiffs intend to bring this matter to trial after their evidence has been completed. The appraiser has not completed the work he indicated would be done sometime ago and Plaintiffs are reminding him of the commitment to complete the work."

12. On January 27, 1987, the Court, on its own motion, issued an Order, returnable February 9, 1987, for Plaintiffs to show cause why their Complaint should not be dismissed for failure to prosecute the same.

13. On February 5, 1987, Plaintiffs moved to dismiss the Court's Order to Show Cause, and in their motion stated, "Plaintiffs have not left this case unpursued, but have been preparing to go forward with it. ... They desire that this matter eventually be set for trial, and anticipate being ready to file a request within the year."

HOGGAN
15 AT LAW
CENTER
BX 525
AH 84321
12-1551

2N OFFICE
BT MAIN
BX 115
UTAH 84302
17-3885

14. On February 6, 1987, Plaintiffs served a "First Set of Request For Admissions, First Set of Interrogatories and For Production of Documents" on Defendants Barber. These discovery requests were answered by Defendants Barber on March 11, 1987.

15. On September 4, 1987, Defendants Barber moved the Court for partial summary judgment, which motion was denied by the Court's Memorandum Decision dated October 6, 1987.

16. On November 25, 1987, Plaintiffs served a "First Set of Interrogatories" on Defendants First Federal, Hunsaker, Chadaz and Bearnson. Defendants First Federal and Hunsaker answered the Interrogatories on December 23, 1987; Defendant Bearnson answered the Interrogatories on December 22, 1987, and Defendant Chadaz answered the Interrogatories on December 23, 1987.

17. No action has been taken by Plaintiffs on their claim since December 23, 1987.

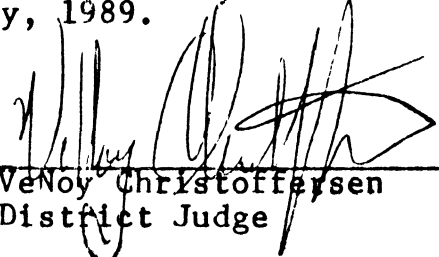
18. Based upon the foregoing Findings from the record in the file, the Court finds that Plaintiffs have failed to prosecute their claims in this case in due course and without unreasonable delay.

Based upon the foregoing Findings of Fact, the Court concludes that Plaintiffs' Complaint and all claims therein should be dismissed with prejudice.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that Plaintiffs' Complaint and all claims therein as against all Defendants be and the same is hereby dismissed with prejudice.

It is further ORDERED that the trial date for this case of April 11, 1989 as a second setting and May 23, 1989 as a first setting be and are stricken.

DATED this 27 day of January, 1989.


Venoy Christoffersen
District Judge

N & HOGGAN
RNEYS AT LAW
WEST CENTER
O BOX 525
N. UTAH 84321
(1) 752-1551

ANTON OFFICE:
3 EAST MAIN
O BOX 115
TON. UTAH 84302
(1) 257-3885

CERTIFICATE OF SERVICE

I certify that an exact copy of the foregoing Findings of Fact and Order of Dismissal With Prejudice was served upon Plaintiffs' counsel, Raymond N. Malouf, personally by delivering a copy to his office at 150 East 200 North in Logan, Utah this 20th day of January, 1989, and that an exact copy of the foregoing Findings of Fact and Order of Dismissal With Prejudice was served upon N. George Daines, III, Attorney for Defendants Barber, personally by delivering a copy to his office at 108 North Main, Suite 200, Logan, Utah, this 20th day of January, 1989.

Tiffany Parker
Tiffany Parker
Secretary to L. Brent Hoggan

LBH/20

L. BRENT HOGGAN
ATTORNEY AT LAW
COURT CENTER
BOX 525
LOGAN, UTAH 84302
752-1551

LOGAN OFFICE:
AST MAIN
BOX 115
N. UTAH 84302
257-3885

Raymond N. Malouf/md (#2067)
MALOUF LAW OFFICES
Attorneys for Plaintiffs
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Logan, Utah 84321
Telephone (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

VON K. STOCKING and DONNA H.
STOCKING, husband and wife,
Plaintiffs,

vs.

FIRST FEDERAL SAVINGS & LOAN
ASSOCIATION OF LOGAN, et. al.
Defendants.

NOTICE OF OBJECTIONS TO
PROPOSED FINDINGS AND
ORDER OF DISMISSAL

Civil No. 22183

Come now the Plaintiffs and serve Notice of their Objections to the proposed Findings of Fact and Order of Dismissal. Notice is also given of objections to the entry of the Memorandum Decision. The objections are as follows:

ABSENCE OF HEARING VIOLATED PLAINTIFFS' RIGHTS

1. Entry of the Memorandum Decision and the proposed Findings and Dismissal violate Rule 4-501(9), Code of Judicial Administration (C.J.A.) which provides as follows:

In cases where the granting of a motion would dispose of the action or any issues thereon on the merits with prejudice, the party resisting the motion may request a hearing and such request shall be granted . . .

December 8, 1988, the Plaintiffs requested this matter be set for hearing under Rule of Practice 2.8(g), Rules of Practice. Rule 2.8(g) was replaced by C.J.A. Rule 4-501(9). The language in both rules is identical. It is not optional whether a hearing will be granted. A hearing was timely requested but was not granted. This denied the Plaintiffs the due process they are entitled to. The court has no authority, under these Rules, to issue a Memorandum

Decision dismissing the Plaintiffs' cause of action with prejudice, without a hearing. Entry of such an Order, and entry of the Memorandum Decision, may also show prejudice on the part of the court, and violate Cannons 2 & 3 of the Code of Judicial Conduct.

A TRIAL DATE WAS ALREADY SET

2. This case was already set for trial before the Memorandum Decision. December 8, 1988 the Plaintiffs filed a Notice of Readiness for Trial, requesting the matter be set for a jury trial, and tendered the jury fee. The jury fee was accepted by the court December 9, 1988, and had the name of the Judge imprinted on the receipt. Within the Notice of Readiness for Trial was a Notice that opposing counsel had 10 days to object to the Request for Trial Setting. There was no objection filed by either opposing counsel.

On December 21, 1988, the court sent notice that trial was set for April 11-13 (or May 23-25) to all counsel. None of the parties objected to those settings. To dismiss with prejudice denies to the Plaintiffs their right to go to court. On December 20, 1988, the moving Defendants' Reply Memorandum acknowledged that the Request for a Trial Setting had been filed. Notice of the trial dates was given December 21, 1988. Plaintiffs, and apparently all the parties, considered this a response denying the Defendants' Motion for dismissal.

Copies of the Request for Trial Setting, Receipt, and Notice of Setting are attached to this Notice of Objections.

TRIAL REQUEST WAS NOT PREJUDICIAL TO DEFENDANTS


3. Between the November 25, 1988 Motion to Dismiss, and the filing of Barbers' and their attorney's Response to Request for Production of Documents in January, 1988, there is approximately 11 months. While it is true that the Plaintiffs could have requested a trial setting during that 11 month period of time, it is also true that the Defendants could have requested one too. Granting the Motion to Dismiss prejudices Plaintiffs, who were also

busy with cases related to some of these Defendants. The court already denied separate motions by both groups of Defendants for Summary Judgment because there are genuine issues of material fact. Unlike Charlie Brown, an actual trial setting was not ignored. Only 14 months have lapsed since the court denied Summary Judgment for the Barbers, and 11 months since Barbers answered Plaintiffs' last discovery request. In Utah Oil, a 16 month lapse was not too long for nothing to happen. Lots happened between Plaintiffs and Defendants Barbers during the 11 months. In Case No.25616, numerous pleadings were filed between the Plaintiffs and the Barber group of Defendants. One of the issues there was whether the court should allow Summary Judgment to the Barbers to renew a prior judgment. The court allowed it, and Stocking is appealing. In No. 25616 the court was reminded it allowed the Stockings to pursue their claim for equitable offsets, against the Renewal Judgment and against Barbers, by this lawsuit (No. 22183) which addresses the wrongful taking of Stockings' property. To grant Defendants' Motion here, without a hearing, is unfair and shows judicial prejudice.

CONCLUSION

Granting the Motion to Dismiss with Prejudice is an abuse of the court's discretion because it violates Rule of Practice 2.8(g), it violates Rule 4-501(9) of the Code of Judicial Administration; it overlooks the fact that a trial setting was already made, with jury fee and Notice of Readiness accepted by the court, before a ruling was made on this Motion; and ignores the merits of Plaintiffs' case conflicting with prior orders. The 11 month lapse before granting Defendants' Motions was not idle time. The court should use its discretion to allow Plaintiffs the opportunity to be heard, and not sign the proposed Findings and Order.

Dated this 25th day of January, 1989.


Raymond N. Malouf
Attorney for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that on the ^{25th 11th} 24th day of January, 1989
a true and correct copy of the foregoing NOTICE OF OBJECTIONS TO
PROPOSED FINDINGS AND ORDER OF DISMISSAL, Civil No. 22183, mailed
postage prepaid to the following:

L. Brent Hoggan, Esq.
Post Office Box 525
Logan, Utah 84321

N. George Daines, Esq.
108 North Main #201
Logan, Utah 84321

M. L. Daines
Secretary

Raymond N. Malouf/md (#2067)
MALOUF LAW OFFICES
Attorneys for Plaintiffs
150 East 200 North, Suite D
Logan, Utah 84321
Telephone (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

VON K. STOCKING and DONNA H.
STOCKING, husband and wife,

NOTICE OF READINESS FOR TRIAL

Plaintiffs,

vs.

FIRST FEDERAL SAVINGS & LOAN,
et al.,

Civil No. 22183

Defendants.

TO THE JUDGE OF THE ABOVE ENTITLED COURT:

You will please take notice that the undersigned attorney for the Plaintiffs herewith certifies:

1. He has interviewed all known witnesses who might be called upon in the trial of the case.

2. That such drawings, documents, physical evidence and/or other exhibits as they may choose to offer are prepared or will be prepared and ready by any expected trial date.

3. That such use of the rules of discovery as counsel feels necessary for the trial of this cause have been completed and the case is at issue.

4. That all the examinations and depositions which counsel feels necessary have been concluded.

5. That the parties hereto have attempted settlement, but settlement at this time cannot be made.

6. Counsel does desire pretrial.

7. Counsel requests a jury trial.

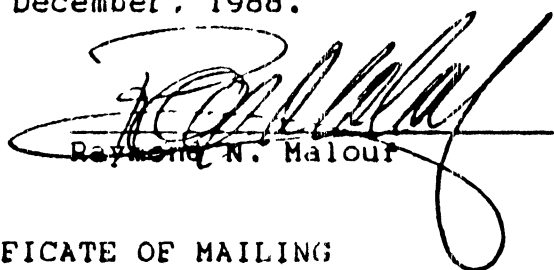
8. Expected time for trial is three (3) days.

9. The below signed attorney represents the statements made herein are true and correct and requests the court to act in reliance thereon.

10. A copy hereof was mailed this date to L. Brent Hoggan, Esq., at Post Office Box 525, Logan, Utah, and N. George Daines, Esq. at 108 North Main, Suite 201, Logan, Utah.

OPPOSING COUNSEL HAS TEN (10) DAYS TO OBJECT TO ANY OF THE ABOVE. FAILURE TO DO SO WILL BE DEEMED AS AN ACCEPTANCE.

Dated this 8th day of December, 1988.

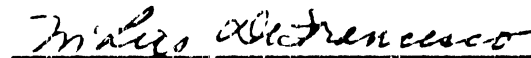

Raymond N. Malour

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of December, 1988, a true and correct copy of the foregoing Notice of Readiness for Trial, Civil No. 22183 was mailed postage prepaid to the following:

L. Brent Hoggan, Esq.
Post Office Box 525
Logan, Utah 84321

N. George Daines, Esq.
108 North Main, Suite 201
Logan, Utah 84321


Secretary

FIRST DISTRICT - CACHE

12/09/88 TIME: 13:35 CLERK: LRD
CASE: 8809221830K
CLIFF/PET: STOCKING, WENDY
DPNIT/RES: FIRST FEDERAL SAVINGS & LOAN
JUDGE: McNoy Christoffersen

PAYOR: MALOUF LAW OFFICE
AMT. Received: 50.00
Other FeesNO: 8492 Check: 50.00

JURY FEE

Receipt No: 881426619

SAVE THIS RECEIPT *** SAVE THIS RECEIPT

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

IN AND FOR THE

COUNTY OF CACHE, STATE OF UTAH

STOCKING, VON K.
STOCKING, DONNA H.

Plaintiff,

-VS-

FIRST FEDERAL SAVINGS & LOAN
HUNSAKER, FRED

Defendant.

NOTICE OF SETTING NO. 1

Case No. 830022183 CN

TO:

S E E A T T A C H M E N T

YOU WILL PLEASE TAKE NOTICE THAT THE ABOVE ENTITLED ACTION
IS SET FOR JURY TRIAL IN THE FIRST JUDICIAL DISTRICT,
CACHE COUNTY COURTHOUSE, 140 NORTH 100 WEST,
LOGAN, UTAH.

DATE: 04/11/89 to 04/13/89 TIME: 10:00 AM, AS A SECOND SETTING
05/23/89 to 05/25/89 10:00 AM, AS A FIRST SETTING

- * **NOTICE:** The Clerk will notify counsel on cases of second settings as soon as possible up to 1 day before trial as to whether the matter will be tried. If no objections to the above dates are received within 10 days hereof, it will be presumed said dates are satisfactory and not in conflict with any other matters.

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing NOTICE OF SETTING, postage prepaid, to the attached list of attorneys at the addresses set forth, this 21 day of December, 19 88, at LOGAN, UTAH.

Seth S. Allen
CACHE County Clerk

By: Liz Whitbrook

Deputy Clerk



A T T A C H M E N T

MALOUF, RAYMOND
Attorney for Plaintiff
150 EAST 200 NORTH
LOGAN UT 84321

HOGGAN, L. BRENT
Attorney for Defendant
P.O. BOX 525
LOGAN UT 84321

DAINES, N. GEORGE
Attorney for Defendant
108 NORTH MAIN
LOGAN UT 84321

Raymond N. Malouf/md (#2067)
MALOUF LAW OFFICES
Attorneys for Plaintiffs
150 East 200 North, Suite D
Logan, Utah 84321
Telephone (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

VON K. STOCKING and DONNA H.
STOCKING, husband and wife,
Plaintiffs,
vs.


MOTION FOR NEW TRIAL

FIRST FEDERAL SAVINGS & LOAN,
et al.,
Defendants.

Civil No. 22183

Come now the Plaintiffs in this matter, and move for a new trial in this matter. The Motion is allowed by Utah Rule of Civil Procedure 59(a)(1) and (7). This Motion is made within 10 days after entry of the Order of Dismissal with Prejudice. It is supported by the Affidavit of the undersigned counsel, the file, and the Memorandum.

Dated this 6th day of February, 1989.

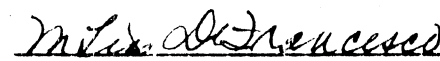

Raymond N. Malouf
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 1989, a true and correct copy of the foregoing MOTION FOR NEW TRIAL Civil No. 22183, was mailed postage prepaid to the following:

L. Brent Hoggan, Esq.
56 West Center
Post Office Box 525
Logan, Utah 84321-0525

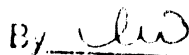
N. George Daines, Esq.
108 North Main, Suite 201
Logan, Utah 84321


Secretary

FEB 06 1989

Number 75
FILED

FEB 6 1989

By 

Raymond N. Malouf and (#2067)
MALOUF LAW OFFICES
Attorneys for Plaintiffs
150 East 200 North, Suite D
Logan, Utah 84321
Telephone (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

VON K. STOCKING and DONNA H.
STOCKING, husband and wife,
Plaintiffs,
vs.

MEMORANDUM IN SUPPORT OF
MOTION FOR NEW TRIAL

FIRST FEDERAL SAVINGS & LOAN,
et al.,
Defendants.

Civil No. 22183

Plaintiffs submit this Memorandum in support of the Motion for New Trial under Rule 59(a)(1) and (7), Utah Rules of Civil Procedure.

The Rule provides for a motion for a new trial, even if there has in fact not been a trial. See Moon Lake Electric Association, Inc. v. Ultrasystems Western Constructors, Inc., 870212-CA, 99 Utah Adv. Rep. 25, December, 1988. This case involved a motion for a new trial after summary judgment was granted. The court said:

Neither Utah Rule of Civil Procedure 59 (new trial) nor Utah Rule of Civil Procedure 56 (summary judgment) directly address the availability of a motion for "new" trial following summary judgment. Our analysis of Rule 59(a) and the rationale behind it leads us to conclude that such a motion is, nonetheless, procedurally correct.

An Order of Dismissal with Prejudice entered on this case January 27, 1989. This Motion is filed within 10 days after said Order.

This Motion is supported by the totality of the file and particularly the points raised by the Notice of Objections to Proposed Findings and Order of Dismissal dated January 25, 1989. These include the following:

1. The absence of a hearing on Dismissal violated the Plaintiffs' rights to a hearing on the question of

dismissal under the Code of Judicial Administration Rule 4-501(9).

2. A trial date was set before the court entered its Order Dismissing with Prejudice. Plaintiffs should be entitled to have a trial.

3. It is not prejudicial to the Defendants, under the circumstances, to be forced to go to trial on the questions raised by the Plaintiffs' Complaint.

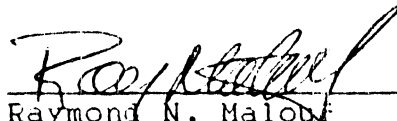
The court had already ruled on two previous occasions that material disputed questions of fact are present, sufficient to require trial, and denied two motions for summary judgment.

Regarding the merits of the action, besides the question of whether Plaintiffs did or did not have an agreement which Defendants were obligated to perform in connection with a trust deed sale, this case involves the question of whether Defendants were equitably estopped from selling the property to Barbers. Equitable estoppel is claimed against all the Defendants.

Equitable estoppel is "conduct by one party which leads another party, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct." Blackhurst v. Transamerica Insurance Company, 699 P.2d 688, 691 (Utah 1985). Such a finding is believed by the Plaintiff to be expected because of the facts in this case. Affidavits by Von Stocking, which are part of the cased file, attest to the fact that the Plaintiff did rely to his detriment on representations made by each of the groups of Defendants herein.

Motion for a new trial should be granted and the prior Order set aside.

Dated this 6th day of February, 1989.



Raymond N. Malouf
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 1989, a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL Civil No. 22183, was mailed postage prepaid to the following:

L. Brent Hoggan, Esq.
56 West Center
Post Office Box 525
Logan, Utah 84321-0525

N. George Daines, Esq.
108 North Main, Suite 201
Logan, Utah 84321

M. L. DeLoe
Secretary

Raymond N. Malouf/md (#2067)
MALOUF LAW OFFICES
Attorneys for Plaintiffs
150 East 200 North, Suite D
Logan, Utah 84321
Telephone (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

VON K. STOCKING and DONNA H.
STOCKING, husband and wife,
Plaintiffs,
vs.

AFFIDAVIT OF RAYMOND N. MALOUF

FIRST FEDERAL SAVINGS & LOAN,
et al.,
Defendants.

Civil No. 22183

STATE OF UTAH)
) ss.
COUNTY OF CACHE)

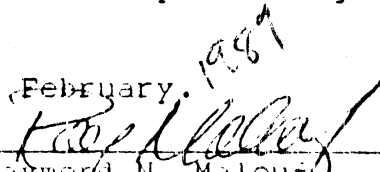
The undersigned, Raymond N. Malouf, being first duly sworn,
states the following of his own personal knowledge and belief:

1. I am the attorney representing the Plaintiffs herein.
2. Plaintiffs' case was brought and is maintained in good faith, and the Plaintiffs desire to resolve the disputes with the Defendants.
3. Plaintiffs have moved forward with the case as quickly as their schedule and counsel's schedule would allow, in view of the limited discovery responses and the totality of events needing their attention.
4. The undersigned knows the Plaintiffs desire to go to trial on this matter, and that a trial date has been set and not vacated.
5. The undersigned believes the law entitles his clients to go to court for the reasons set forth in the pleadings heretofor filed, and that failure to allow this matter to go to trial would constitute an irregularity in the proceedings of the court and an error in law.

Dated this 6th day of February, 1989

Number 77

FILED


Raymond N. Malouf
Attorney for Plaintiffs

FEB 9 1989

STATE OF UTAH)
) ss.
COUNTY OF CACHE)

The foregoing instrument was acknowledged before me this
6th day of February, 1989, by Raymond N. Malouf, attorney for
Plaintiffs herein.

M. Luis DeHancesco

NOTARY PUBLIC

Residing At: Logan, Utah

Commission Expires:

10/31/90

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 1989, a true
and correct copy of the foregoing AFFIDAVIT OF RAYMOND N. MALOUF,
Civil No. 22183, was mailed postage prepaid to the following:

L. Brent Hoggan, Esq.
56 West Center
Post Office Box 525
Logan, Utah 84321-0525

N. George Daines, Esq.
108 North Main, Suite 201
Logan, Utah 84321

M. Luis DeHancesco
Secretary

L. Brent Hoggan (#1512)
OLSON & HOGGAN
Attorneys at Law
56 West Center
P.O. Box 525
Logan, Utah 84321-0525
Telephone: 752-1551

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

VON K. STOCKING and DONNA H.
STOCKING, husband and wife,

Plaintiffs,

vs.

FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION OF LOGAN, FRED
HUNSAKER AND BRIAN CHADAZ, as
officers and as individuals,
BRAD H. BEARNSON, Trustee;
NORMAN BARBER and HELEN BARBER,
successor beneficiaries; N.
GEORGE DAINES, and JOHN DOES 1-8,

Defendants.

RESPONSE OF DEFENDANTS
FIRST FEDERAL SAVINGS AND
LOAN ASSOCIATION OF LOGAN,
FRED HUNSAKER, BRIAN CHADAZ
AND BRAD H. BEARNSON TO
PLAINTIFFS' MOTION FOR A
NEW TRIAL

Civil No. 22183

For their response to Plaintiffs' Motion For A New Trial, the
Defendants First Federal Savings And Loan Association Of Logan,
Fred Hunsaker, Brian Chadaz and Brad H. Bearnson, state:

1. That there has been no trial of this case. This issue
was put to the Court on a Motion To Dismiss for failure to
prosecute and decided by the Court from the record in the file on
said Motion. It is therefore inappropriate to consider a Motion
For A New Trial when no prior trial has been held.

2. The argument set forth by Plaintiffs for a new trial is
the same argument submitted by Plaintiffs in opposition to the

FEB 08 1989

Number 78
FILED

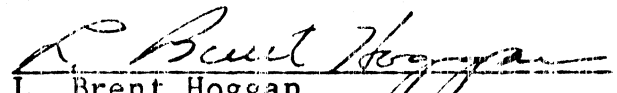
FEB 8 1989

Motion of these Defendants to dismiss and was considered by the Court prior to signing the Findings and Decree. The Court having already considered and rejected said argument, the same should be overruled by the Court.

WHEREFORE, having replied to Plaintiffs' Motion For A New Trial, these Defendants pray said Motion be denied.

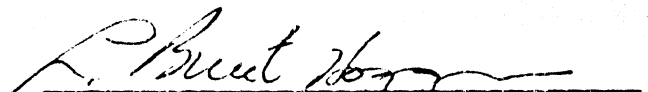
DATED this 8th day of February, 1989.

OLSON & HOGGAN


L. Brent Hoggan
Attorney for Defendants

MAILING CERTIFICATE

I hereby certify that I mailed an exact copy of the foregoing Response Of Defendants First Federal Savings And Loan Association Of Logan, Fred Hunsaker, Brian Chadaz And Brad Bearnson To Plaintiffs' Motion For A New Trial, to Plaintiffs' Attorney, Raymond N. Malouf, at 150 East 200 North, Suite D, Logan, Utah 84321; and to N. George Daines, Attorney for himself and Defendants Barber, at 108 North Main, Suite 200, Logan, Utah 84321, postage prepaid in Logan, Utah, this 8th day of February, 1989.


L. Brent Hoggan

LBH/8

N. George Daines - 0303
DAINES & KANE
108 North Main, Suite 200
Logan, UT 84321
Telephone: (801) 753-4403

IN THE FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

VON K. STOCKING and DONNA H.
STOCKING, husband and wife,

Plaintiffs,

vs.

FIRST FEDERAL SAVINGS & LOAN,
et al.,

Defendants.

*
*
*
*
*

RESPONSE TO MOTION
FOR NEW TRIAL

Civil No. 22183

COME NOW the Defendants DAINES & KANE and Norman and Helen Barber and respond to Plaintiff's Motion for a New Trial as follows:

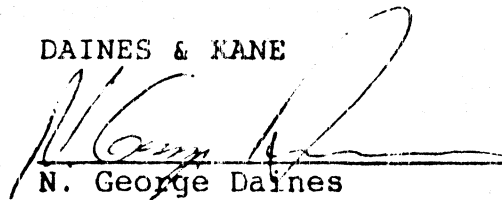
1. The Affidavit of Raymond N. Malouf and the attached Memorandum in support of motion add no further information to the court that was not available at the time that the court previously ruled in this matter. It is obvious from the records that Plaintiffs have not moved this matter forward and have objected to the Defendants efforts to do so. These objections have gone on long enough that a dismissal as ordered by the court is entirely appropriate and regular.

WHEREFORE Defendants pray that the court denies Plaintiffs Motion for a new trial.

number 79 DATED this 8 day of February, 1989.

FEB 09 1989

DAINES & KANE

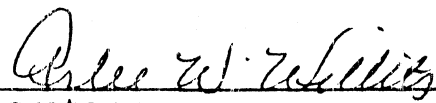

N. George Daines

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Response to Motion for New Trial was mailed this 8 day of February, 1989 to the following:

L. Brent Hoggan
56 West Center
P.O. Box 525
Logan, UT 84321

Raymond N. Malouf
150 East 200 North, Suite D
Logan, UT 84321


Secretary

D891/4108

Raymond N. Malouf/md (#2067)
MALOUF LAW OFFICES
Attorneys for Plaintiffs
150 East 200 North, Suite D
Logan, Utah 84321
Telephone (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

VON K. STOCKING and DONNA H.
STOCKING, husband and wife,
Plaintiffs,
vs.

REPLY BY THE PLAINTIFFS IN
SUPPORT OF MOTION FOR NEW
TRIAL

FIRST FEDERAL SAVINGS & LOAN,
et al.,
Defendants.

Civil No. 22163

In support of its Motion for New Trial, Plaintiffs Reply, and show the Court:

1. The Motion by Von K. Stocking and Donna H. Stocking for a New Trial is a legitimate request. In Plaintiffs' Memorandum, reference was made to Moon Lake Electric Association, 99 U.A.R. 25, December, 1988. Defendants have not attempted to distinguish that case. Clearly, there does not need to be a "trial" before this Motion is made.

2. Plaintiffs remind the Court that it never granted the Plaintiffs a hearing, contrary to Rule 4-501(9) of the Code of Judicial Administration. Plaintiffs are entitled to a hearing. Just because the Court did not grant it does not mean that the Court intentionally failed to grant it. Defendants have failed to show why a hearing is not required. In asking the Court to deny the Motion, the Court is being asked to compound its failure to follow Rules Plaintiffs are entitled to expect the Court to follow.

3. Defendants have failed to justify the fact that this case was set for a jury trial prior to the time the Court granted the Defendants' Motion to Dismiss under Rule 41(b).

4. It was not until October 6, 1987 that the Defendants Barbers' Motion for Summary Judgment was denied by this Court saying there were issues of fact. The action was initially filed

by the Plaintiffs November 3, 1982. The Defendants were obviously willing to allow the matter to sit for five years. The additional delay between October 1987 and when trial was actually set is not inconsistent with the case. The Utah Supreme Court has previously reversed Rule 41(b) dismissals for lesser reasons. See Utah Oil Company v. Harris, 565 P.2d 1135 (Utah 1977) and Westinghouse Electric Supply v. Paul Larsen, 544 P.2d 876 (Utah 1975). In Westinghouse, the Court said it is commendable to get matters on the trial calendar, but said it was even more important to keep in mind that the reason for courts was to afford people the opportunity to have justice finally done.

5. Where the Court has denied Motions for Summary Judgment made by each of the Defendants in the past, equity requires that this matter go to trial. For whatever reason the delay, the matter is on the trial calendar and the Plaintiffs have expressed a willingness to move the case forward now. Defendants have failed to show how the delay has been prejudicial, and have themselves acquiesced in most of the delay.

CONCLUSION

Plaintiffs have adequately shown that the facts justify presentation at trial. A jury trial has been set. The Plaintiffs moved for a New Trial on the issue of whether any delay has been prejudicial. The Defendants have failed to show how the delay has been prejudicial. Dismissal of the action under Rule 41(b) is not rational, but is prejudicial against the Plaintiffs' legal rights. The Defendants have each failed to show any good reason why trial cannot go forward now. The Motion for a New Trial, even though the matter has only been resolved so far by motion, is clearly a legal one, upheld in December, 1988, by the Utah Supreme Court.

Dated this 10 day of February, 1989.


Raymond N. Malour
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 1989, a true and correct copy of the foregoing MOTION FOR NEW TRIAL Civil No. 22183, was mailed postage prepaid to the following:

L. Brent Hoggan, Esq.
56 West Center
Post Office Box 525
Logan, Utah 84321-0525

N. George Daines, Esq.
108 North Main, Suite 201
Logan, Utah 84321

James D. McLeod
Secretary

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

VON K. STOCKING and DONNA H.
STOCKING, Husband and Wife

Plaintiffs

vs.

FIRST FEDERAL SAVINGS & LOAN
ASSOCIATION OF LOGAN, FRED
HUNSAKER, and BRIAN CHADAZ as
officers and as individuals;
BRAD H. BEARNSON, Trustee;
NORMAN BARBER AND HELEN BARBER
successor beneficiaries; N.
GEORGE DAINES and JOHN DOES
1-8,

Defendants

MEMORANDUM DECISION

Case No. 22183

Defendant, First Federal Savings and Loan Association of Logan, Fred Hunsaker, and Brian Chadaz, Brad Bearnson, have filed a motion for partial summary judgment alleging there are no genuine issue of facts in regard to a breach of contract by the plaintiff in failing to make payments when due pursuant to written contract.

The defendants do agree there was some conversation as to how plaintiffs may cure their default. It is the defendants position they reached no accord. It is the plaintiff's position that they were in fact in default but there were conversations where there was an offer made by the defendants and an accord was reached. The affidavits supporting both memorandums are contradictory in this regard and also on other issues raised by the memorandum and affidavits. Since they

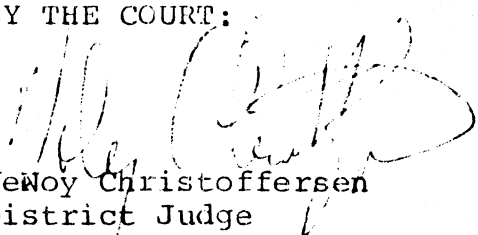
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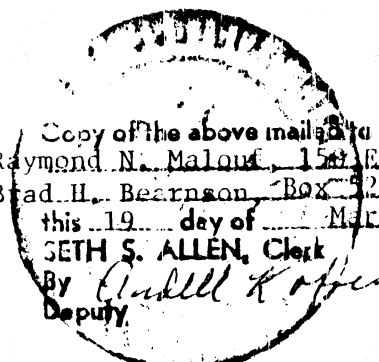

are in conflict as to these facts, there remains issues that must be tried to make this determination.

Therefore, the motion for partial summary judgment by the above named defendants is denied. Counsel for plaintiff to prepare the appropriate order.

Dated this 19 day of March, 1984.

BY THE COURT:


VeNoy Christoffersen
District Judge


Copy of the above mailed to
Raymond N. Malouf, 154 E. 200 No. #D, Logan, Utah 84321
Brad H. Bearnson, Box 925, Logan, Utah 84321
this 19 day of March 19 84.
SETH S. ALLEN, Clerk
By 
Deputy

N. George Daines
128 No. Main
Logan, Utah 84321

VON K. STOCKING and DONNA)
H. SOTCKING, husband and)
wife,)

Plaitniff
v.

FIRST FEDERAL SAVINGS and
LOAN ASSOCIATION, et al

Defendants Norman Barber, Helen Barber, and N. George Daines have filed their motion for partial summary judgment on the basis that the affidavits of Brian Chadaz, Mr. Brad Bearnson and Mr. Fred Hunsaker, who were the representatives of the defendant First Federal Savings and Loan Association of Logan, stated under oath there has been no contact between First Federal and the three defendants that would support any effort on the part of the defendants Barber and Daines that would interfere with the rights of the plaintiff.

This is, however, disputed by affidavits attached to plaintiff's response that would contest the facts in the affidavits of Chadaz Bearnson , and Hunsaker. Where the facts are contested, summary judgment is not appropriate and the motion for partial summary judgment will be denied.

Counsel for plaintiffs to prepare the appropriate order.

Dated this 10TH day of October, 1987.

BY THE COURT :

COPY OF THE ABOVE MAIL ON TO

0617 1987

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

VON K. STOCKING and
DONNA H. STOCKING, husband
and wife,

Plaintiff

v.

FIRST FEDERAL SAVINGS and
LOAN ASSOCIATION, et al

Defendants

MEMORANDUM DECISION

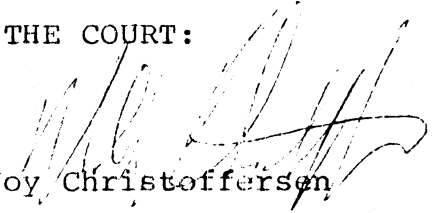
Civil No. 22183

Plaintiffs have filed a Motion for a New Trial. There was no trial in this case, the issue was put to the Court on a Motion to Dismiss for failure to prosecute and decided by the Court from the record on that basis. Plaintiffs have, in their motion, used the same arguments that were used on the prior motion.

Therefore, the Motion for a New Trial is denied and counsel for defendants to prepare the appropriate order.

Dated this 27 day of February, 1989.

BY THE COURT:


VeNoy Christoffersen
District Judge

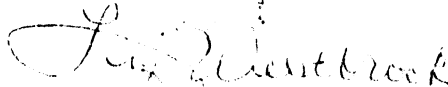
Number 81
FILED

FEB 27 1989

By Qu

George Daines, 108 W. Main, Logan
COPY OF THE ABOVE MAILED TO

L. Brent Hoggan, P.O. Box 575, Logan..... AND
Ray D. Daines, P.O. Box 100, W. Logan.....
THIS 27 DAY OF February, 1989



L. Brent Hoggan (#1512)
OLSON & HOGGAN
Attorneys at Law
56 West Center
P.O. Box 525
Logan, Utah 84321
Telephone: 752-1551

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE

VON K. STOCKING and DONNA H.
STOCKING, husband and wife,

Plaintiffs,

vs.

FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION OF LOGAN, FRED
HUNSAKER AND BRIAN CHADAZ, as
officers and as individuals,
BRAD H. BEARNSON, Trustee;
NORMAN BARBER and HELEN BARBER,
successor beneficiaries; N.
GEORGE DAINES, and JOHN DOES 1-8,

Defendants.

ORDER DENYING NEW TRIAL

8300
Civil No. 22183

In this matter the Court having made and entered its Findings of Fact and Conclusions of Law and Judgment and Decree on January 27, 1989 dismissing Plaintiffs' Complaint and all claims therein with prejudice and Plaintiffs having thereafter filed with this Court a Motion For New Trial and in support thereof having filed a Memorandum of Points and Authorities and Defendants having filed responsive Memorandum to said Motion For New Trial and the Plaintiff a rebuttal to Defendants' response, and the Court having examined the Motion of Plaintiffs and the Memoranda of the parties for and against the same, now finds that the arguments of Plaintiffs in support of their Motion For New Trial were the same

L. HOGGAN
ATTORNEYS AT LAW
56 WEST CENTER
PO BOX 525
LOGAN UTAH 84321
752-1551

ON OFFICE:
1ST MAIN
BOX 115
UTAH 84337
57-3885

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FILED

March 8 1989

MAR 14 1989

arguments submitted by Plaintiffs in their opposition to Defendants' Motion to Dismiss Plaintiffs' Complaint and that there are no new matters or arguments raised by Plaintiffs in said Motion For New Trial and the Court on February 27, 1989 having made and entered its Memorandum Decision, and the Court being fully advised in the premises, it is now

ORDERED, ADJUDGED and DECREED that Plaintiffs' Motion For New Trial be and the same is hereby denied.

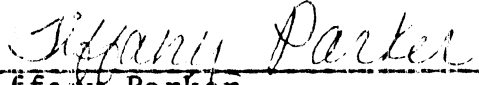
DATED this 14 day of March, 1989.



District Court Judge

CERTIFICATE OF PERSONAL SERVICE

I hereby certify that I personally served an exact copy of the foregoing Order Denying New Trial upon N. George Daines, Attorney for himself and Defendants Barber, and upon Raymond N. Malouf, Attorney for Plaintiffs, by delivering a copy to each at their law offices in Logan, Utah, this 1st day of March, 1989.



Tiffany Parker
Secretary to L. Brent Hoggan

LBH/38

L. BRENT HOGGAN
ATTORNEY AT LAW
FIDELITY CENTER
BOX 525
TAN 84321
52-1851

LOGAN OFFICE:
ST MAIN
BOX 115
UTAH 84337
57-3885

Raymond N. Malouf/bh (#2067)
MALOUF LAW OFFICES
Attorneys for Plaintiffs
150 East 200 North, Suite D
Logan, Utah 84321
Telephone (801) 752-9380

IN THE FIRST JUDICIAL DISTRICT COURT
COUNTY OF CACHE, STATE OF UTAH

VON K. STOCKING and DONNA H.
STOCKING, husband and wife,

NOTICE OF APPEAL

Plaintiffs,

vs.

FIRST FEDERAL SAVINGS & LOAN
ASSOCIATION OF LOGAN, FRED
HUNSAKER and BRYAN CHADAZ, as
officers and as individuals;
BRAD H. BEARNSON, Trustee;
NORMAN BARBER and HELEN BARBER,
successor beneficiaries; N.
GEORGE DAINES, and JOHN DOES 1-8,

Civil No. 830022183

Defendants.

NOTICE IS HEREBY GIVEN that Plaintiffs, Von K. Stocking and Donna H. Stocking, through counsel, Raymond N. Malouf, appeal to the Utah Supreme Court the final Order of the Honorable Venoy Christoffersen, District Judge, entered in this matter on January 27, 1989. Further, Plaintiffs appeal from the Court's denial of Plaintiffs' Motion For a New Trial under Rule 59(a) made February 6, 1989, which Order denying the new trial was made March 14, 1989. The effect of the Orders appealed from was to dismiss Plaintiffs' action under Rule 41(b) with prejudice.

FILED Number 830022183-13

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The appeal is taken from the entire Order.

Dated this 12th day of April, 1969.

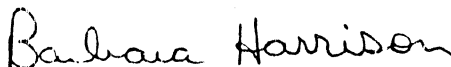

Raymond H. Malouf

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 1969, a true and correct copy of the foregoing Notice of Appeal was mailed postage prepaid to the following:

L. Brent Hoggan, Esq.
56 West Center
Post Office Box 525
Logan, Utah 84321-0525

N. George Daines, Esq.
108 North Main, Suite 201
Logan, Utah 84321

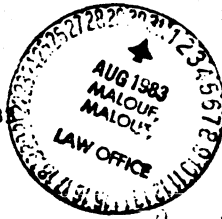

Secretary

I CERTIFY THAT THE FOREGOING
IS A TRUE AND CORRECT COPY
OF THE ORIGINAL FILED IN THE
DISTRICT OF
DATE 4-12-89
LOU PARKER
DEPUTY CLERK

LAW OFFICES
DAINES & KANE
128 NORTH MAIN
LOGAN, UTAH 84321
(801) 753-4463

N. GEORGE DAINES
KEVIN E KANE

29 August 1983



Mr. Raymond Malouf
150 East 200 North #D
Logan, Utah 84321

Re: Barber v. Emporium

Dear Ray:

Norm Barber and I have examined the Von Stocking home and believe that its worth would probably be somewhere in the range of \$45-60,000.00. We believe to determine its value accurately, a professional appraisal should be done. In discussing various appraisers, Norm Barber and I felt that the best appraiser would probably be Tom Singleton, but perhaps, if you have someone else in mind, we would accept an appraisal upon advance clearance of the individual involved.

It would be my suggestion that you prepare that appraisal at your expense and submit it to us for our review. Upon reviewing that we may well be able to consummate some kind of an arrangement regarding your liability to Norm Barber.

Anticipating that this is going to take several weeks to determine what the appraisal of that home is and the likelihood that the home is insufficient to pay the full amount of the judgment, I think it is advisable that we continue with the Supplemental Order that was started this week. Please consider this formal notice, pursuant to our arrangement, that you should be prepared and at court the next motion and order day to continue answering questions regarding this supplemental proceedings. You should also be advised that we have served a notice to appear on your wife, your father and also Carl Malouf, to determine more concerning the arrangements between yourself and these individuals. I also anticipate preparation and perhaps filing of a lawsuit involving fraudulent conveyance against some of these parties. I feel strongly that you should come forward now and make some

Mr. Raymond Malouf
25 August 1983
Page Two

definitive arrangements to take care of your obligation in this situation. Mr. Barber is insistent that you do so.

Sincerely,

DAINES & KANE

N. George Daines
Attorney at Law

1c
cc Norm Barber

Raymond N. Malouf/dh (68:EMBAAFV.RDP)
MALOUF LAW OFFICES
Attorney for Defendants
150 East 200 North #D
Logan, UT 84321
Telephone: 752-9380

DISTRICT COURT, STATE OF UTAH, COUNTY OF CACHE

NORMAN BARBER and HELEN BARBER,
husband and wife,
Plaintiff,

AFFIDAVIT OF VON STOCKING

vs.

THE EMPORIUM PARTNERSHIP,
and VON K. STOCKING, DON A. WHITE,
JR., and RAYMOND N. MALOUF, JR.,
Defendants.

Civil No. 25616

STATE OF UTAH)
) ss
COUNTY OF CACHE)

Comes now Von K. Stocking and being first duly sworn deposes and states the following of his own personal knowledge:

1. That he is a Defendant in the above named action. *Not Party*
2. That he was a Defendant in Civil No. 17630.
3. That he owned the property described in book 189 page 458 in a Trust Deed given to First Federal Savings & Loan on March 18, 1976.
4. That the afore-described property was a home with a basement apartment worth far in excess of \$33,191.94 that Plaintiffs Norman and Helen Barber paid First Federal for in their purchase of the beneficial rights on or about November 3, 1983.
5. That he knows Norman and Helen Barber bid \$33,191.94 at the trust deed sale on this property on November 4, 1983.

Filed 4-20-87

6. That he is familiar with the representations from Plaintiffs made by letter dated August 29, 1983 where Barbers alleged that the property was worth between \$45,000 and \$60,000, and knows that, for the date of the sale, such values were conservative.

7. On November 2nd and 3rd, 1983 he was involved in several conversations initiated by George Daines, attorney for Plaintiffs who asked him to agree to let the Barbers take over this property aforementioned by paying First Federal, and applying between \$12,000 and \$15,000 against the prior judgment to his credit, plus giving Von Stocking an additional \$3,000.

8. That Mr. Daines continued these conversations while the undersigned was trying to cure the default with First Federal and until the morning of the trust deed sale on November 4, 1983.

9. That there was no doubt that the Barbers wanted to take over this property in order to collect from me on the judgment they had against the Emporium, the undersigned, Don and Ray.

10. That he relied on the representations by Mr. Daines on behalf of Plaintiffs that he would credit the prior judgment, and believed he had kept his word, which the undersigned has very good notes on, because Plaintiffs took no further action to collect from the undersigned until the prior judgment almost expired.

11. That Mr. Daines represented that he wanted each of the individual Defendants in the prior judgment to pay only the percentage of the prior judgment equal to their percentage of the Emporium Partnership.

12. That if Mr. Daines did not intend to go through with what he promised on behalf of his clients, the Plaintiffs should be required to honor his promises since Plaintiffs in fact proceeded to take over the property, and the undersigned relied on these representations by their attorney. In fact, Mr. Daines was fraudulent in his representations, but this fraud, of not crediting the prior Barber judgment, did not become apparent until

February 7, 1987 when Mr. Daines again served Mr. Stocking's wife with a Motion and Order for Mr. Stocking to appear in Supplemental proceedings on the prior judgment.

DATED this 13th day of April, 1987.

Von K. Stocking
Von K. Stocking

Von K. Stocking having been duly sworn on oath deposes and states that he is the affiant and that he has read the foregoing Affidavit, knows the contents thereof and believes the same to be true and as to items stated on information and belief, the same are believed to be true.

Von K. Stocking
Von K. Stocking

SUBSCRIBED and SWORN to before me this 13th day of April, 1987.

Christine Goff
NOTARY PUBLIC

Residing at:

Commission Expires: 9-24-88

SLC, Utah

CERTIFICATE OF MAILING

I hereby certify that on the 20th day of April, 1987, a true and correct copy of the foregoing Affidavit of Von Stocking was mailed postage prepaid to the following:

N. George Daines, Esq.
108 North Main
Logan, UT 84321

Maria DeFrancisco
Secretary