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Sam L. Kiniry v. Larry Sorenson and American Heritage Builders, Inc : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT

OF THE

STATE OF UTAH

SAM L. KINIRY, Plaintiff-Respondent, vs. LARRY SORENSON and AMERICAN HERITAGE BUILDERS, INC., Defendant-Appellant.	:	Case No. 16665

BRIEF OF RESPONDENT

APPEAL TAKEN FROM THE
THIRD JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF SALT LAKE,
JUDGE DEAN E. CONDOR

C. GLENN ROBERTSON
9455 Peruvian Drive
Sandy, Utah 84070
Attorney for Defendant-
Appellant, Larry Sorenson

BRIAN M. BARNARD
214 East Fifth South
Salt Lake City, Utah 84111
Attorney for Plaintiff-
Respondent

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vs.

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Attorney for Defendant-
Appellant, Larry Sorenson

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214 East Fifth South
Salt Lake City, Utah 84111
Attorney for Plaintiff-
Respondent

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I

NATURE OF THE CASE

This action sought foreclosure of a chattel mortgage, a determination of the amount due on a promissory note, and a judgment against the corporate defendant, American Heritage Builders, Inc., and the individual defendant, the Appellant Larry Sorenson, in his individual capacity, in the amount so determined, together with interest, costs and a reasonable attorney fee.

II

DISPOSITION IN LOWER COURT

The Court below granted Plaintiff-Respondent a foreclosure of the chattel mortgage, a judgment jointly and severally against the corporate defendant and against the individual defendant in his personal capacity for the deficiency in the amount of ELEVEN THOUSAND SEVEN HUNDRED AND FORTY-EIGHT DOLLARS and 64/100 ($11,648.64), and a reasonable attorney fee in the amount of THREE THOUSAND DOLLARS and NO/100 ($3,000.00), together with costs and the statutory rate of interest from the date of judgment.

III

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent seeks affirmance of the lower court's decision.

IV

STATEMENT OF FACTS

In December of 1973, the Plaintiff and his former spouse purchased a house from the Defendants. (t.r. pg. 16, L. 22-24) At the time the terms of said purchase were negotiated, the Plaintiff and his wife were living in a trailer home which they owned subject

to a lien in favor of Cyprus Credit Union. (t.r. pg. 54, L. 13-22) They desired to trade their interest in the trailer home as a down payment toward the house, and the parties agreed to an arrangement whereby the Defendants would sell Plaintiff and his wife the house, and Plaintiff and his wife would convey to Defendants their interest in the trailer home. (t.r. pg. 12, L. 3-13) Plaintiff's trailer home was then subject to a mortgage at what the parties considered to be a favorable rate of interest. Rather than pay off the mortgage, they agreed that Plaintiff would continue to make payments on the mortgage to Cyprus Credit Union in the amount of ONE HUNDRED EIGHTY-NINE DOLLARS and NO/100 ($189.00) per month, and that Defendants would re-imburse Plaintiff monthly for that amount. (t.r. pg. 12, L. 29, 30 and pg. 13, L. 1-19) The Defendants executed a promissory note to Plaintiff and his wife in the amount of the outstanding indebtedness on the trailer home, THIRTEEN THOUSAND DOLLARS and NO/100, ($13,000.00), payable in the amount of ONE HUNDRED EIGHTY-NINE DOLLARS and NO/100 ($189.00) per month. (t.r., pg. 14, L. 5-30, and Plaintiff's Exhibit 1) To secure payment of the note in question, the corporate Defendant, American Heritage Builders, Inc., granted Plaintiff and his wife a chattel mortgage in the trailer home. (Defendant's Exhibit 6)

Subsequent to the above-described transactions, the Plaintiff and his wife were divorced. In an Order entered by the Third Judicial District Court in Salt Lake County on August 31, 1976, the Plaintiff was awarded all right, title and interest in the promissory note and chattel mortgage in question. (Plaintiff's Exhibit 2)

By September of 1975, the Defendants had defaulted on the promissory note in issue. (t.r. pg. 38, L. 14-18) The corporate defendant, though neither dissolved nor discharged in bankruptcy, had become financially defunct. (t.r. pg. 6, L. 17-30, pg. 7, L. 1-30, pg. 8, L. 1-2) The Plaintiff demanded repeatedly that the Defendants pay the amount owed on the note, and they refused to do so. (t.r. pg. 40, L. 11-18, L. 27-30, pg. 41, L. 1-10) Finally, on or about September 14, 1976, the Plaintiff declared the full amount of the note to be due and owing, as per the terms of the note, and brought the present action to obtain judgment on the note and foreclose the chattel mortgage. (r., pg. 2) The corporate defendant, American Heritage Builders, Inc., defaulted in that action, and a Judgment by Default was entered against it.

The Court below granted foreclosure of the chattel mortgage. A sheriff's sale of the trailer home was held on or about January 28, 1977, subsequent to the default of the corporate defendant, the mortgagor of the chattel mortgage. (r., pg. 107, Finding of Fact #9) At said sale, the Plaintiff bid ONE THOUSAND DOLLARS and NO/100 ($1,000.00) of his judgment against the corporate defendant, and purchased the trailer home. The Defendants have been granted a credit against their indebtedness for this ONE THOUSAND DOLLARS and NO/100 ($1,000.00). (r., pg. 107, Finding of Fact #9, and Conclusion of Law #3)

The Plaintiff proceeded to trial against the individual Defendant in the lower court. After a trial held July 17, 1979, the court below awarded Plaintiff a judgment jointly and severally against the Defendant corporation and against the individual Defendant in his personal capacity in the amount of the unpaid indebtedness on the promissory note, less the above described credit of ONE THOUSAND DOLLARS and NO/100 ($1,000.00) or ELEVEN THOUSAND SEVEN HUNDRED AND FORTY-EIGHT DOLLARS and 64/100 ($11,748.64), together with a reasonable attorney fee of THREE THOUSAND DOLLARS and NO/100 ($3,000.00) plus costs and interest from the date of judgment.

From this adverse decision the individual defendant has appealed.

ARGUMENT

Point I

THE TRIAL COURT'S FINDINGS SHOULD NOT BE DISTURBED UNLESS CLEARLY ERRONEOUS WHEN VIEWED IN THE EVIDENCE

The court below held that the individual defendant in the instant case. Upon the conclusion of that trial the lower court found as a factual matter that the individual defendant Larry Sorensen executed the promissory note in question. Finding of Fact #[illegible] and that as a matter of law the individual defendant is personally liable jointly and severally along with the corporate defendant on the note in question. Conclusion of Law #[illegible]

It is settled law in the State of Utah that an appellate court should grant great deference to the findings of a trial court. The appellate court will not disturb a trial court's findings unless they are clearly against the weight of the evidence or unless it is manifest the trial court has misapplied the law to the

established facts. *Nixon v. Utah State Retirement Board*, [illegible] P.2d [illegible] (Utah [illegible]). The Court in *Wasatch-Aetna v. Bunn*, [illegible] P.2d [illegible] (Utah [illegible]) noted that this is true even where the appellate court may disagree with the trial court:

> The evidence was sufficient to support the judgment made and we should support the trial court even if we might have come to a different decision had we been trying the matter. At page [illegible].

In the present case, appellant has failed to clearly in any manner that the decision of the lower court was clearly against the weight of the evidence. He has failed to demonstrate in any way whereby the decision of the court below was not supported by the evidence. The appellant is now estopped to allege that the trial court committed error in its findings, and the decision below must be sustained.

The evidence presented to the trial court supports the Lower Court's findings. The trial court was presented with a promissory note, Plaintiff's Exhibit 1, bearing two signature spaces. In one space appears the typewritten words "American Heritage Builders, Inc." In the other appears the unqualified signature of the

individual Defendant, Larry Sorenson. Parol evidence in the form of testimony adduced at trial demonstrates that at the time the promissory note in question was executed, neither party discussed with the other in what capacity the Defendant Sorenson was signing the note. (t.r. qg. 29, L. 29-30, pg. 30, L. 1-3 and t.r. pg. 34, L. 3-6, 27-30, pg. 35 L. 1-3) Other documents signed by the parties on the same day as the promissory note in question, a Uniform Real Estate Contract, (Defendant's Exhibit 3), a Bill of Sale (Defendant's Exhibit 5), and a Chattel Mortgage (Defendant's Exhibit 6), bear varying signatures in that the Defendant Sorenson's signatures on the Bill of Sale and Chattel Mortgage are unqualified while his signature on the Uniform Real Estate Contract is qualified as "Larry Sorenson, Pres." (emphasis added) The Appellant testified at trial that some payments made on the note in issue were made from his personal funds. (t.r. pg. 21, L. 12-19, pg. 23, L. 9-19)

From all this evidence, the lower Court could and did conclude that the promissory note at issue was signed by the Defendant-Appellant in his personal capacity and that he is, therefore, personally liable on the note.

This finding is supported by the evidence. It is not a finding which is clearly against the weight of the evidence. It is not a finding where the law has been misapplied to established facts. For this reason the Court must affirm the judgment below.

Point II

AS A MATTER OF LAW, THE DEFENDANT-APPELLANT SIGNED THE PROMISSORY NOTE IN QUESTION IN HIS PERSONAL CAPACITY, AND HE IS PERSONALLY LIABLE THEREON.

A.

THE NOTE IN QUESTION ITSELF MANDATES THAT DEFENDANT-APPELLANT BE HELD LIABLE.

The promissory note in question (hereinafter, the note) appears in the record as Plaintiff's Exhibit 1. It bears two signature spaces. On one space appear the typewritten words "American Heritage Builders, Inc." On the other space directly below appears the signature of the Defendant-Appellant, Larry Sorenson. Neither signature is qualified in any way. The issue before the Court is whether the Appellant signed the note in his personal capacity, and is therefore personally liable on the note, or whether he signed it merely as an agent or officer of the Defendant signatory corporation, and is therefore not personally liable on the note.

The applicable Utah statute in this case is U.C.A., §70A-3-403 (1953), which reads as follows:

> Signature by authorized representative.--
> (1) A signature may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation. No particular form of appointment is necessary to establish such authority.
>
> (2) An authorized representative who signs his own name to an instrument
>
> (a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;
>
> (b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.
>
> (3) Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity.

This statute requires that the Appellant be personally bound on the note. Subsection (2)(a) mandates that an authorized representative be personally liable

on an instrument unless the instrument itself clearly indicates he has signed in a representative capacity. In the instant case, the Appellant did not qualify his signature in any way. The note does not show that the Appellant signed in his capacity as representative of the defendant corporation. Appellant is, therefore, personally liable on the note.

Subsection (2)(b) further requires that a person be obligated on an instrument unless he shows on the instrument that he signed in a representative capacity, or unless the parties otherwise agree. Again the Appellant must be found personally obligated. The note does not show that he signed in a representative capacity, and the evidence adduced at trial does not show that the parties agreed otherwise. The parties simply did not discuss the issue of Appellant's obligation at all. (t.r. pg. 29, L. 29-30, pg. 30, L. 1-3 and t.r. pg. 34, L. 3-6, 27-30, pg. 35, L. 1-3)

Subsection (3) provides an easy out for officers of a corporation who wish not to be bound personally on an instrument. They may sign the instrument with the name of the corporation followed by their name and <u>office</u>.

In the present case, the Appellant chose not to sign the note with his name and office. He chose merely to sign with his name. From this the Court should infer that the Appellant intended to be personally obligated on the note.

The Court should construe U.C.A., 70A-3-403, (1953) strictly against the Defendant-Appellant. The statute provides means by which a representative may sign an instrument without becoming personally obligated, and provides that a signer who does not show he is signing in a representative capacity will be personally abligated on the instrument. The Appellant should not now be heard to argue that when he signed the note, however he may have signed it, he did not mean to be bound. His own self-serving testimony of his intent is not sufficient to overcome the dictates of the statute. He has failed to heed the provisions of the statute, and it should be strictly construed against him.

Courts in numerous jurisdictions have so construed this provision of the Uniform Commercial Code. They have held that where an instrument is endorsed as is the note in question, where the name of a corporation is followed by the unqualified signature of the corporation's

authorized representative, both the corporation and the representative personally are liable on the instrument. Lumberman Associates, Inc. v. Palmer, 344 F. Supp. 1129 (E.D. Penn., 1972), affd. 485 F.2d 680; Fanning v. Hembree Oil Co., 434S.W.2d 822 (Ark., 1968); Norfolk County Trust Co. v. Vichensky, 359N.E. 2d 59 (Mass. App., 1977); Lanier v. Bank of Virginia, 387 A.2d 614 (Md. App., 1977); Rotuba Extruders v. Ceppos, 385 N.E. 2d 1068 (N.Y. App., 1978); Kroh v. Pronto Petroleum Co., 536 P. 2d 860 (Colo. App., 1975); Perez v. Janota, 246 N.E. 2d 42 (Ill. App., 1969); Seamon v. Acree, 236 S.E. 2d 688 (Ga. App., 1977).

Such a strict construction of U.C.A., §70A-3-403, (1953), would also be in keeping with the underlying theories of the law of negotiable instruments. The purpose of a negotiable instrument is that it may be freely negotiated in commerce. The theory is that persons ought to be able to trade freely in commercial paper, and that such free negotiability of commercial paper is essential to our economy. To enhance the unhampered exchange of negotiable instruments, a cardinal rule has developed that all terms of a negotiable instrument must appear clearly on the document. In the words of Learned Hand, a negotiable instrument must be "a courier without baggage." Specifically, U.C.A., §70A-3-104, (1953),

requires that, to be negotiable, a promissory note such as the note here in question must be signed by the maker. It must show who is bound by the note.

In the instant case, the Defendants purported to make a negotiable instrument payable to the Plaintiff, and the Defendant-Appellant personally signed the note without indicating on the note that he would not be personally bound. It would be incongruous with the above-described law of negotiable instruments to hold that the Defendant-Appellant should not be bound on the note when he signed it in an unqualified manner. As noted above, all terms of a negotiable instrument must appear on the instrument itself, including the name of the person to be bound. Holders of negotiable instruments should not be made to guess exactly who is liable to them on the instrument. This information should be derived from the document itself. Where an unqualified signature appears on a negotiable instrument, it must be presumed that the signer is liable on that instrument. U.C.A., §70A-3-403, (1953), must be strictly construed in keeping with this policy. The statute must be construed so that where an unqualified signature appears on an instrument, the signer is personally bound. The Defendant-Appellant herein is bound on the note pursuant to a strict construction of U.C.A., §70A-3-403, (1953).

Finally, the language contained in the body of the note supports a finding that both the Appellant and the Defendant corporation are bound on the note. The note is worded in the plural. It begins, "For value received We (sic), the undersigned after date, without grace I (or we) promise to pay . . ." The fact that the note is written in the plural indicates that at least two seperate persons are liable for payment of the note. The only two persons indicated as makers and signers of the note are the two Defendants. The Defendant-Appellant is thus liable on the note, or the note is gramatically incorrect and makes no sense.

More significantly, the first "we" of the above-quoted passage is type-written, and was inserted into the language of the note by the note's maker. It is not a mere formality of a printed form. The Appellant testified at trial that the note was prepared by his secretary at his direction and to his specifications. (t.r. pg. 4, L. 8-23) The fact that the Appellant himself prepared the note and worded it in the plural is strong evidence that the Appellant is bound on the note along with the Defendant corporation.

This Court has recognized that the fact that a negotiable instrument is worded in the plural is proof that both the corporate maker and the individual maker of the instrument are bound. Stanley v. Deseret Foods Corp., 74 P.2d 1221 (Utah, 1938). There, the Court found, at page 1223, that the phrase "we promise to pay" unambiguously indicates that both the corporation and the unqualified endorser of a note intended to be bound thereon. The wording of the note here in question clearly indicates that the Appellant is liable on the note.

B.

PAROL EVIDENCE ADDUCED AT TRIAL FURTHER MANDATES THAT DEFENDANT-APPELLANT BE HELD PERSONALLY LIABLE ON THE NOTE.

The Court below permitted parol evidence of the circumstances surrounding the making of the note to be presented at trial. It permitted testimony of all parties to this action and of third persons present at the time the note was signed. This testimony encompassed all aspects of the negotiations surrounding the note and the subjective intent of the parties. This parol evidence supports the lower court's decision that Appellant is liable on the note.

Plaintiff's testimony indicates that at the time the note was signed he believed the Defendant-Appellant would be liable on the note. His understanding of the whole transaction was simply that Appellant was selling his home to Plaintiff and was giving Plaintiff his note back as part of the deal. (t.r. pg. 34, L. 27-30, pg. 35, L. 1-3, pg. 36, L. 4-30, pg. 45, L. 8-11) Further, the Appellant himself testified at trial that at no time did the parties discuss the personal liability of Appellant on the note. They did not explicitly discuss this matter at all. (t.r. pg. 29, L. 29-30, pg. 30, L. 1-3) However, Appellant did testify that he told Plaintiff all along that he was simply selling his home to Plaintiff. (t.r. pg. 18, L. 23-30, pg. 19, L. 1-3) In short, the parol evidence adduced at trial establishes that the parties did not have an oral understanding that Appellant would not be liable on the note. The evidence further establishes that both parties regarded the transaction as Appellant's selling of his home to Plaintiff. This understanding of the parties supports the lower court's judgment against Appellant.

The Appellant testified at trial that he made at least one cash payment to Plaintiff on the note, that he received a receipt on the cash payment and that the funds for some of the payments to Plaintiff on the note came from Appellant's personal funds. (t.r. pg. 20, L. 18-30, pg. 21, L. 1-19, pg. 23, L. 9-30, pg. 24, L. 1-4) All this conduct on Appellant's part is inconsistent with his claim that he did not intend to be personally liable on the note. It is unusual business practice for a corporation to make cash payments to its creditors. It is even more unusual for a corporation to accept a receipt for a cash payment where the receipt is made to an individual person. And it is totally inconsistent with Appellant's claim of no personal liability on the note that he made payments on the note out of his own personal funds. All this conduct of Appellant, the cash payments, personal receipts, and use of personal funds, is more consistent with the payment of a personal debt than with the payment of a corporate debt, and supports the lower court's finding of personal liability in Appellant.

The documentary evidence presented below indicates that Appellant knew very well how to sign a document in his capacity as a corporate agent. The Uniform Real Estate Contract signed by the parties (Defendant's Exhibit 3) bears Appellant's signature as "Larry Sorenson, Pres." If Appellant had wanted to sign the note as an agent only, he could have signed as he did on the Uniform Real Estate Contract.

Appellant has argued that the Uniform Real Estate Contract and the note should be construed together, inasmuch as they were executed together, and that the qualified signature on the contract limits Appellant's liability on the note. It would be inappropriate to construe these documents together, however. The contract is a document conveying title in land. The title to the land in question was exlusively in a corporation at the time of the sale. (t.r. pg. 15, L. 7-24) Hence, Appellant could not have signed the contract in his personal capacity. His personal signature on the document would simply have had no effect. The note, on the other hand, represents a debt. The corporate debtor in question was a small, family owned entity. (t.r. pg.

6, L. 3-16) Unlike a signature on the contract, Appellant's personal signature on the note could have an effect beyond merely binding the corporate defendant. A personal signature there could have the effect of obligating Appellant personally on the note. And it is likely that an officer of a small, closely held corporation will sign for corporate debts in both a personal and in an agency capacity in order to encourage others to conduct business with the corporation. Hence, it is logical to construe the Uniform Real Estate Contract and the note separately, and to find that the Appellant signed one in a representative capacity and the other in both representative and personal capacities. The manner in which Appellant signed the Uniform Real Estate Contract indicates he knew how to sign purely as an agent. It is not illogical to construe the contract and the note separately. The documentary evidence admitted at trial support the findings of the Court below.

Finally, testimony adduced in the lower Court indicates that the Appellant was in a much better bargaining position than the Plaintiff with regard to land transactions. The Plaintiff testified to having a high school education, (t.r. pg. 54, L. 25-27) and to being very ignorant of

real estate matters. (t.r. pg. 36, L. 9-15) The Appellant, on the other hand, is currently employed as a real estate agent. (t.r. pg. 3, L. 25-30, pg. 4, L. 1-7) At the time of the land transaction in question he was an officer in several corporations conducting business in real estate and home contruction. (t.r. pg. 5, L. 20-29) All the documents prepared in the course of the transaction in question were prepared by Appellant. (t.r. pg. 4, L. 8-23, pg. 34, L. 11-21) In view of the divergent situations of the parties, it would be inequitable now to construe the documents in question against Plaintiff. The Appellant knew very well what he was doing in the course of the land sale at issue while Plaintiff never had a clear understanding of the process. Appellant drew up the note and its accompanying documents and created the ambiguity as to whom is liable on the note. Equity requires that that ambiguity now be resolved against him.

C.

THE CASES CITED IN APPELLANT'S BRIEF ARE DISTINGUISHABLE FROM THE INSTANT CASE AND DO NOT SUPPORT A CONCLUSION THAT APPELLANT IS NOT LIABLE ON THE NOTE.

The Appellant has cited the case of First Bank and Trust Company v. Post, 12 U.C.C. Reporting Service 512, 192 N.E.2d 907 (Ill.1973)in support of his claim that he

is not liable on the note. That case is easily distinquishable from the instant case. First, the promissory note in Post was given for purchase of an industrial lathe by a corporation from another business entity. There could be no mistake there that the transaction involved corporate property purchased for corporate use. Here, however, the transaction in question involves the sale and purchase of a residence. It would be easy and logical for Plaintiff here to assume the transaction was a personal one. And crucially, in Post all parties to the note there in issue testified that they did not intend to bind the corporate officers in their personal capacity. Here, the Plaintiff has testified that he assumed he was dealing personally with the Appellant, and both parties have testified they did not discuss the matter of Appellant's personal liability.

The Appellant has also cited Speer v. Friedland, 12 U.C.C. Reporting Service 509, 276 So.2d 84 (Fla. App., 1973 in his behalf. In that case, the corporate officer's signature was affixed to the check there in question by a check signing machine, whereas in the instant case, Appellant personally signed the note. (t.r. pg. 4, L. 22-23) Moreover, in Speer the corporate officer testified that she did not intend to be personally bound on the

check, and the Plaintiff there produced no evidence to rebutt this testimony. Here, there is substantial evidence to rebutt Appellant's claim that he did not intend to be bound on the note. Finally, in Speer as in Post, the holder of the instrument in question was clearly dealing with an automobile auctioning concern. As noted above, in the present case it was not at all clear whether Plaintiff was dealing with a corporation or an individual.

The Appellant also cites J.P. Sivertson & Co. v. Lolmaugh, 24 U.C.C. Reporting Service 1212, 380 N.E. 2d 520 (Ill. App. 1978), for the proposition that parol evidence was properly admitted below. The admissability of parol evidence below has never been raised by Plaintiff. In fact, the parol evidence lends support to Plaintiff's claim against Appellant, an noted in Point II B above. In addition, Lolmaugh is distinquishable from the present case. There, the Court found a prior course of dealings between the parties to support the conclusion that the corporate officer signed the instrument soley in a representative capacity. Here, there is no prior course of dealing between the parties to support Appellant's theory.

The cases cited by Appellant are distinquishable from the instant case and do not support Appellant's claim that he is not personally liable on the note.

POINT III

THE FACT THAT THE MOBILE HOME IN QUESTION WAS SOLD AT A SHERIFF'S SALE DOES NOT RELIEVE THE DEFENDANT-APPELLANT'S UNDERLYING OBLIGATION ON THE NOTE.

The Appellant argues in Point II of his brief that he is no longer liable on the note because the chattel mortgage on the mobile home in question, which secured the note, has been foreclosed. He claims that the Plaintiff bid ONE THOUSAND DOLLARS and NO/100 ($1,000.00) of his judgment against the corporate defendant at the sheriff's sale and recovered the mobile home. He further claims that the Plaintiff resold the mobile home for THREE THOUSAND DOLLARS and NO/100 ($3,000.00) profit above what was owed to the Cypres Credit Union on the mobile home, and that therefore the note should be deemed satisfied and the Appellant should be relieved of his obligation on the note. Appellant cites in support of this claim the case of Dulio v. Senechal, 7 U.C.C. Reporting Service 222, (Mass. App. 1969).

The Dulio case is not applicable in the instant situation. The facts of that case are wholly different from the facts now before the Court. In Dulio, X sold Y a used car and Y gave X his personal check for $500.00 as payment for the car. The check did not clear the bank. Y returned the used car to X. The Court in Dulio held that X was not entitled to collect on the check in addition to recovering the car. There was no promissory note or security interest involved in Dulio and the whole transaction took place in a matter of days.

Here, Appellant did not merely give a check to Plaintiff and take Plaintiff's mobile home in exchange. There was a complex transaction involved in which Appellant sold Plaintiff his house on contract, took Plaintiff's trailer home and gave Plaintiff his promissory note for $13,000 and a chattel mortgage on the mobile home. A third party held a mortgage on the mobile home and Plaintiff was to continue paying that third party for a period of years while receiving payments on the note for a period of years from Appellant and paying Appellant on the Uniform Real Estate Contract for a period of years. To compare the foreclosure of the chattel mortgage here in issue with the simple purchase and return of goods in Dulio is absurd.

Appellant cites the Restatement of Restitution in support of his claim. However, Plaintiff here has not sued in equity for restitution. He has sued in law on a note and for enforcement of a contract. The Restatement of Restitution is simply not applicable.

Appellant would have the Court believe that Plaintiff is estopped from pursuing his remedy on the note merely because he foreclosed a mortgage securing the note and obtained a ONE THOUSAND DOLLAR ($1,000.00) recovery at the foreclosure sale. Appellant has not ever contended that ONE THOUSAND DOLLARS and NO/100 ($1,000.00) was an unjust or unreasonable price to bid at the sheriff's sale of the mobile home. He has offered no proof that this amount was unreasonable. And unless that price itself was unreasonable, it is the only amount which should be considered in determining how much credit Appellant is entitled to toward the judgment against him. The Court should not look at events which occurred after the sheriff's sale to see if Plaintiff later managed to make a good bargain on the mobile home. In the absence of pleading and proof that the price bid was unreasonable, the Court should treat this case as though a stranger had bought the mobile home

for $1,000.00 at the sheriff's sale. The Plaintiff would be entitled to the $1,000.00 bid, the Appellant would be entitled to a credit for that amount, and what the stranger did with the mobile home later would have no effect on the present case. What Plaintiff did here with the mobile home after the sheriff's sale has no effect on the present case involving liability on the note.

Appellant further seems to argue that after Plaintiff bought the mobile home at the sheriff's sale, he was put in as good a condition as he would have been had Appellant paid on the note, and that this should bar Plaintiff from further recovery. However, Plaintiff is not now in as good a position as he would have been had Appellant honored his obligation on the note. Testimony presented at trial by both parties indicates Appellant defaulted on the note as early as September of 1975, (t.r. pg. 38, L. 14-18) and certainly by June of 1976. (t.r. pg. 23, L. 1-11) Yet Plaintiff did not buy the trailer home at the auction sale until January of 1977. As noted in the Statement of Facts above, each month the Appellant failed to pay the Plaintiff on the note, the Plaintiff nevertheless had to pay his credit union $189.00 as payment on the mobile home. From September, 1975 until

January, 1977 the Plaintiff paid his creditor for a mobile home he no longer owned and built equity in that mobile home for Appellant. It is true the Plaintiff recovered the mobile home at auction sale in January, 1977, and it is true he later sold the home for enough to pay off Cyprus Credit Union's mortgage on the trailer home. However, the amount he had to pay to clear the mortgage to Cyprus Credit Union had already been greatly reduced by payments he had made (payments the Appellant should have made) from September, 1975 to January, 1977. If Appellant had performed on his note as he should have, Plaintiff would never have had to make those out-of-pocket payments. Moreover, Plaintiff is entitled to interest for the payments on which Appellant defaulted. And the Plaintiff has suffered much expense and aggrivation in being forced to take Appellant to court to recover on the note and the chattel mortgage in question. Clearly, the sheriff's sale of the trailer home has not put Plaintiff in as good a position as he would have been in had Appellant performed on the note.

The mere fact that Plaintiff was able to recover his interest in the mobile home for ONE THOUSAND DOLLARS and NO/100 ($1,000.00) after a suit and foreclosure does not relieve Appellant of his liability on the note. The chattel

mortgage provides that Plaintiff may recover a deficiency judgment on the note for any amount not recovered at the sale of the collateral, and the lower Court's judgment should stand.

V

CONCLUSION

The Court should not reverse the decision of the lower Court unless that decision is clearly against the weight of the evidence. Appellant has neither pleaded nor proved that the decision below was against the weight of the evidence, and the evidence below supports the lower Court's findings. The judgment below must be affirmed.

A review of the evidence adduced at trial demonstrates that Appellant is personally liable on the note. First, an analysis of the note itself shows that Appellant is personally liable. It bears the Appellant's unqualified signature. U.C.A., §70-3-403, (1953), establishes that where an authorized representative of a corporation signs an instrument without indicating he is signing in a representative capacity, he is personally bound on the instrument. The weight of case law and the

underlying policy of negotiable instruments demand that this statute be strictly construed against Appellant. Also, the plural wording of the note requires a finding that Appellant is obligated on the note along with the defendant corporation.

Parol evidence admitted below supports the lower Court's judgment that Appellant is liable. The evidence shows no agreement to the contrary between the parties and shows that Plaintiff believed Appellant would be personally liable. Appellant's conduct in making cash payments on the note out of his personal funds and in accepting personal receipts back for these payments supports a finding of Appellant's personal liability.

The documentary evidence presented below also supports the lower Court's ruling. It indicates that Appellant knew how to sign the note in a representative capacity if he wanted to. Appellant's argument that the documents should be construed together is erroneous, due to the differing nature of the documents.

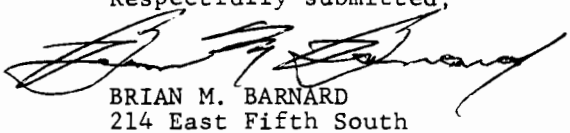
Testimony below demonstrates the unequal bargaining position of the parties and Appellant's responsibility for preparing the documents in issue. Any ambiguity in those documents should be resolved against Appellant.

Appellant cites several cases in support of his claim that he is not personally liable on the note. All these cases can be distinguished from the instant case. None of them requires the reversal of the Court below.

The Appellant claims that Plaintiff should not recover on the note because he already recovered his interest in the mobile home by bidding on his judgment at the sheriff's sale. Appellant is entitled only to $1,000.00 credit toward his debts for the amount bid at the sale. He has not demonstrated that $1,000.00 was an unreasonable amount to bid at the sale, and in the absence of unreasonableness the Court should not consider whether Plaintiff ultimately made a good bargain on the mobile home. The Court should treat the auction as though a stranger bid $1,000.00 on the collateral. Moreover, Plaintiff has not yet been put in as good a position as he would have been in had Appellant not defaulted on the note. The chattel mortgage in issue permits recovery of any dificiency on the note after the mortgage is foreclosed.

The decision of the Court below that Appellant is personally liable to Plaintiff for the deficiency on the note should be affirmed.

Respectfully submitted,



BRIAN M. BARNARD
214 East Fifth South
Salt Lake City, Utah 84111

Attorney for Plaintiff-
Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Respondent to C. Glenn Robertson, Attorney for Defendant-Appellant, Larry Sorenson, 9455 Peruvian Drive, Sandy, Utah 84070, postage prepaid in the United States Postal Serivice the 29th day of February, 1980.

BRIAN M. BARNARD
Attorney for Plaintiff-
Respondent