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Kathleen M. Thomas; Elsie Merrill; Lewis J.
Merrill; Stephen J. Merrill; Alvin S. Merrill; George
A. Merrill; Margaret M. Durfee; and Annie M.
Dutson v. Jamis M. Johnson : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KATHLEEN M. THOMAS; ELSIE)
MERRILL; LEWIS J. MERRILL;)
STEPHEN J. MERRILL; ALVIN S.)
MERRILL; GEORGE A. MERRILL;)
MARGARET M. DURFEE; and)
ANNIE M. DUTSON,)

Plaintiffs-Respondents,)

vs.)

JAMIS M. JOHNSON,)

Defendant-Appellant.)

Civil No. C89-0385

14 b

BRIEF OF RESPONDENTS

APPEAL FROM JUDGMENT, JANUARY 4, 1989
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
HONORABLE J. DENNIS FREDERICK

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FILED

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COURT OF APPEALS

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JURISDICTION OF THE COURT

Jurisdiction of the Court of Appeals to hear this appeal is conferred by §§ 78-2-2(3)(j) and 78-2a-3(2)(j), Utah Code Annotated, 1953, as amended, and Rule 3 of the Rules of the Utah Supreme Court. The appeal is from a judgment in favor of the Respondents after a bench trial before the Honorable J. Dennis Frederick, Third Judicial District Court, on a claim pursuant to § 57-1-32, Utah Code Annotated, 1953, for judgment in the amount of the balance due after a trust deed foreclosure against real property.

STATEMENT OF THE ISSUES

The issues presented for review are as follows:

1. Was it error for the trial court to refuse as not relevant to the issue of fair market value, evidence of the prior fair market value of the property?
2. Was the trustee's sale under a trust deed given pursuant to Title 57, Chapter 1, Utah Code Annotated, 1953, invalid as a matter of law by virtue of the beneficiary stating that her bid was to purchase the property at its then fair market value rather than bidding a specific dollar amount?
3. Was the finding as to fair market value of the property at the time of trustee's sale supported by the weight of the evidence?

STATUTES TO BE INTERPRETED

Sections 57-1-27, 28 and 32, Utah Code Annotated, 1953, are to be interpreted.

STATEMENT OF THE CASE

Plaintiffs brought suit to recover the difference between the unpaid balance owing on a promissory note and the fair market value of real property against which they had foreclosed under a trust deed lien given as security. Defendant alleged that the trustee's sale was invalid and that the fair market value of the real property was in excess of the amount which Plaintiffs claimed under their promissory note. The court found an amount of \$29,622.62 owing under the promissory note, that attorney fees in an amount of \$4,980.00 had been incurred by Plaintiffs with regard to the action and that the fair market value of the real property at the time of trustee's sale was \$21,750.00. R. 159, 160; Appendix. The court awarded Plaintiffs damages of \$7,872.62 representing the amount owing to Plaintiffs at time of trustee's sale less the then fair market value of the real property and additionally awarded Plaintiffs their attorney fees incurred in the action. R. 155. Defendant brings this appeal seeking a determination that the trustee's sale was invalid, that the court's finding as to the fair market value of the real property was against the weight of the evidence and a reversal of the judgment.

STATEMENT OF FACTS

Defendant is an attorney licensed to practice in Utah since 1982. Tr. 171, 172. He purchased from Plaintiffs property located at 448 North Grant Street, Salt Lake City, Utah. Tr. 10, 11, 162. The purchase was in September, 1984. Tr. 11, 162. The property was a single family residence of some 60 years of age. Plaintiffs' Exh. 3 at 1; Defendant's Exh. 5 at 3. Defendant paid a down payment of \$8,000.00 and signed and delivered to Plaintiffs a \$25,000.00 promissory note and a trust deed granting to Plaintiffs a lien against the property for the purpose of securing payment of the promissory note. R. 3, 16; Tr. 13, 26. On September 5, 1985, Defendant resold the property to Robert B. Stonehocker. Tr. 156, 162. No payments were made under the promissory note from and after March 21, 1987. R. 3, 16. Defendant understood that he remained responsible to make such payments. Tr. 173-174.

On November 24, 1987, the property was sold at trustee's sale. Tr. 11, 12. The Defendant was aware that payments under the promissory note were in arrears and he had been served with the notice of default and the notice of sale, but had elected not to attend the trustee's sale. Tr. 167, 168. The sale was attended only by the tenant then occupying the property and by Plaintiff, Kathleen M. Thomas, who was there representing all Plaintiffs. Tr. 11, 25. Only the Plaintiffs bid at the

trustee's sale. Tr. 12. Mrs. Thomas did not know the fair market value of the property and so did not bid a dollar amount, but rather stated that her bid was for the then fair market value of the property. Tr. 12, 13, 25, 26. She testified she was prepared to bid as much as \$26,000.00 if Defendant or someone else had bid. Tr. 13. Plaintiffs received a trustee's deed to the property. R. 5, 16. The property was first inspected by Plaintiffs after the trustee's sale. Tr. 16, 17. The inspection determined the property to be in disrepair. Tr. 17, 32.

Plaintiffs listed the property for sale with a realtor, Ms. Joan Rushton Carlson, on December 7, 1987. Tr. 15, 16 and 43. Ms. Carlson arranged to have the property appraised to determine market value. Tr. 45, 46. The appraisal was undertaken by appraiser, Paul H. Maritsas, on December 10, 1987, and he completed the same on December 23, 1987. Tr. 66, 80. Mr. Maritsas determined the fair market value of the property to be \$21,750.00 as of the date of December 23, 1987. Tr. 79, 80; Plaintiffs' Exh. 3 at 2. Mr. Maritsas testified that in his opinion his valuation would have been the same for the November 24, 1987 date of the trustee's sale. Tr. 88, 89.

The initial price at which Plaintiffs listed the property for sale was \$32,000.00. Tr. 43. Mrs. Thomas testified the property was listed at that price not knowing its actual value, not having the benefit of an appraisal, but knowing that such was

the approximate price at which it had been sold to the Defendant in 1984. Tr. 36, 37. On February 1, 1988, the listing price of the property was reduced to the Maritsas appraised value of \$21,750.00. Tr. 46. From the time of the initial listing the property was continually advertised for a period of seven months in a bi-weekly trade magazine, was the subject of a realtors' open house, an office inspection, a realtors' bus tour and was continually over multiple listing. Tr. 44, 47.

In June of 1988 an offer was received for the purchase of the property for a price of \$20,500.00, with a down payment of \$500.00 and the balance payable in deferred payments. Tr. 48, 51; Plaintiffs' Exh. 2 at 1. One month later the property was sold to the offeror pursuant to the offered terms. Tr. 19, 51; Plaintiffs' Exh. 2 at 3-8. Ms. Carlson had showed the property to several prospective buyers during the seven months that it was listed, but had received only the one offer to purchase. Tr. 19, 48, 49.

On July 6, 1988, Defendant retained Mr. Richard Copeland to do a value appraisal of the property. The appraisal was completed one day later. Tr. 137. Mr. Copeland's written appraisal was received in evidence. Tr. 139; Defendant's Exhibit 5. He opined the property to have a value of \$31,800.00 as of November 27, 1987, said date being three days following the trustee's sale. The Defendant testified that in his opinion the

property had a value of between \$30,000.00 and \$35,000.00 at the time of the trustee's sale. Tr. 170. His attorney elicited testimony from Kathleen Thomas that when Plaintiffs sold the property to Defendant they received an \$8,000.00 down payment and a promissory note for \$25,000.00. Tr. 26. In response to Plaintiff's objection, the court refused as irrelevant, Defendant's proffered testimony as to the price which he had paid to purchase the property from Plaintiffs in September of 1984 and at which he had resold the property to Mr. Stonehocker in September of 1985. Tr. 162-164. Additionally, the court sustained Plaintiff's objection to Defendant's attempt to elicit the opinion of Kathleen Thomas as to the value of the property when sold to the Defendant in September, 1984, and as to whether she had at that time obtained a value appraisal of the property. Tr. 28, 29.

SUMMARY OF ARGUMENTS

The refusal of the court to permit testimony regarding the sales price of the property two and three years before the trustee's sale and opinion testimony regarding the value of the property four years before trustee's sale as not relevant to the issue of fair market value on date of the sale by the trustee was proper. In no event would it constitute prejudicial error. The court had permitted Defendant to testify as to his opinion of value at the date of the trustee's sale and to elicit testimony

from Plaintiff, Kathleen Thomas, reflecting Defendant's September, 1984, purchase price of \$33,000.00. The court accepted written appraisal reports separately commissioned by Plaintiffs and Defendant opining as to the fair market value of the property on the date of the trustee's sale. It accepted full and complete testimony from the parties regarding post-trustee's sale efforts to market the property and the terms and conditions of its eventual sale some seven months later. All was a sufficient and proper basis for the court's finding as to fair market value at the date of the trustee's sale.

Defendant with full legal notice of the trustee's sale elected not to attend or bid in accordance with his opinion of the then fair market value of the property. His attendance and his bid of the price which he testified as representing fair market value would have constituted his the successful bid, required his payment of the bid price, and would have been sufficient to retire his obligation to Plaintiffs and preclude Plaintiffs' action. The trustee's sale and Plaintiffs' credit of an amount equivalent to the then fair market value of the property against the Defendant's payment obligation was in accordance with Title 57, Chapter 1, Utah Code Annotated, 1953, and afforded Defendant the protection contemplated by law.

Judge J. Dennis Frederick identified in open court that evidence which he perceived to be persuasive with regard to a

determination of fair market value of the property. His finding is supported by the weight of the evidence.

ARGUMENT

POINT I.

THE TRIAL COURT PROPERLY REFUSED
EVIDENCE OF PRIOR FAIR MARKET
VALUE OF THE PROPERTY.

Defendant objects to the trial court's refusal to permit evidence of the value of the Grant Street property two, three and four years before the date for which the court was required to determine fair market value.

Section 57-1-32, Utah Code Annotated, 1953, outlines the findings to be made by the court in an action to recover the unpaid balance due upon an obligation secured by a trust deed lien against real property where the property has been foreclosed by power of sale and sold at trustee's sale. The text of the Section is hereto appended. It reads in pertinent part:

Before rendering judgment, the court shall find the fair market value at the date of sale of the property sold.

The trustee's sale of the property occurred November 24, 1987. Tr. 11, 12. Defendant contends that the court wrongfully refused to accept his proffer of evidence of (1) a November 26, 1983 appraisal report, (2) the price Defendant paid to Plaintiffs to purchase the property on September 21, 1984, (3) an appraisal report of fair market value on November 20, 1984, and (4) the

price at which Defendant resold the property on September 1, 1985 to Mr. Robert Stonehocker. The record will show that evidence of the price Defendant paid to purchase the property was already before the court at the time of his proffer and further, that he made no proffer of evidence as to either the November, 1983 appraisal or the November, 1984 appraisal.

Defendant sought to elicit testimony from Kathleen Thomas as to whether she had obtained an appraisal of the property prior to the September, 1984 sale to the Defendant. Tr. 29. Plaintiff's objection as to relevancy was sustained. Defendant made no proffer as to the evidence sought to be elicited. He now contends that he was seeking evidence of a written appraisal report setting fair market value at a date in 1983, some four years prior to the valuation date with which the court was concerned. Assuming that the court had required Mrs. Thomas to testify that she had obtained such an appraisal, it then would have been required to address the hearsay ramifications inherent in considering the opinion of value as represented by the report and in determining the weight to be accorded the report. Defendant did not represent to the court that he was prepared to introduce the report or call as a witness the appraiser whose work and opinion it represented. An appropriate proffer was not made.

Defendant testified that he had purchased the property from Plaintiffs in about September of 1984. The court thereupon sustained Plaintiff's objection on relevancy grounds to Defendant's testimony of the price which he had paid for the property. Tr. 162. However, Defendant had previously elicited testimony from Kathleen Thomas that in purchasing the property, he had paid Plaintiffs a down payment of \$8,000.00 and delivered to them his promissory note for \$25,000.00. Tr. 26. In other words, evidence of his \$33,000.00 purchase price for the property was already before the court.

There is no basis in the record for Defendant's contention that he was refused an opportunity to provide evidence as to an appraisal obtained from Paul J. Lund as of November 20, 1984. No such proffer was made and therefore none was rejected. At no time did the Defendant make any inquiry with regard to a November, 1984 appraisal or with regard to one prepared by Paul J. Lund or one prepared on behalf of Congressional Mortgage, Inc. Once again, the Defendant was asked by his attorney to testify as to the price which he paid to purchase the property in September, 1984, and the price for which he sold the property to Robert Stonehocker in September of 1985. Tr. 162, 163. It is impossible to find any attempt to introduce testimony with regard to a November, 1984 appraisal. There is neither Defendant's proffer nor the court's rejection.

The court precluded, as not relevant, Defendant's testimony of the price at which he resold the property to Robert Stonehocker in September of 1985. Tr. 163, 164. Mr. Stonehocker had previously testified that he took the property from Mr. Johnson as a trade in a real estate transaction. Tr. 156. Clearly, the price assigned by the Defendant and Mr. Stonehocker to the property for trade purposes could not alone be relevant. Further evidence would be required as to what extent the exchange of properties determined the value then assigned to the property and as to adjustments necessary to bring that value in line with a non-exchange price.

Irrespective of whether any or all of the evidence rejected by the court can stand the test of relevancy, the precluding of that evidence would not constitute reversible error. In State v. Verde, 770 P.2d 116, 120 (1989), the Utah Supreme Court determined:

Errors we label 'harmless' are errors which, although properly preserved below and presented on appeal, are sufficiently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings.

The evidence presented by the Defendant would lead one to conclude that the rejected testimony would not have affected the court's finding as to fair market value. Defendant's own appraiser, Richard Copeland, opined that the fair market value at the applicable valuation date was \$31,800.00. Such was more than

\$13,000.00 less than both the November, 1983 appraised value and the claimed sales price to Robert Stonehocker in September, 1985. It is \$7,000.00 less than what Defendant contends was the value determined by the November 20, 1984 appraisal and more than \$1,000.00 less than the price which he paid for the property in September of 1984. Finally, and perhaps most persuasive, is Defendant's own testimony over the objection of Plaintiffs' counsel that he believed the property to have a value of between \$30,000.00 and \$35,000.00 as of the valuation date. Tr. 169, 170. Such evidence as received by the court taken with that addressing the efforts undertaken by the Plaintiffs over a period of some seven months to market the property, which efforts resulted in only one offer having been received and the eventual sale of the property at that offering price, clearly establishes that in all events the trial court would have found the value of the property at \$21,750.00.

In open court, Judge Frederick analyzed the evidence which he had received as to the value of the property, addressed the condition of the property at the time of trustee's sale, efforts made to rehabilitate and market the same and compared the appraisals made by Mr. Paul Maritsas and Mr. Richard Copeland. Tr. 178, 179. It is clear that the additional evidence which Defendant contends he was entitled to submit would have been

neither helpful nor persuasive to the court, even if properly proffered and received.

POINT II.

THE TRUSTEE'S SALE WAS NOT
INVALID AS A MATTER OF LAW.

Plaintiffs' bid at the trustee's sale was not in a specified dollar amount. Tr. 26. Defendant contends that as a consequence the sale was invalid because (1) Plaintiffs' bid was not the highest bid received by the trustee, (2) the trustee was required to postpone the sale and the failure to do so invalidated the same, (3) the trustee failed to require payment of the purchase price in lawful money of the United States at the time of sale and (4) Defendant had insufficient time in which to obtain a separate appraisal more persuasive to the trial court in its determination of fair market value of the property.

1.

SALE WAS TO THE HIGHEST BIDDER.

Section 57-1-27, Utah Code Annotated, 1953, dictates the procedure to be followed by the trustee in conducting a foreclosure sale in accordance with the power of sale provisions of a trust deed against real property. The text of the statute is appended to this brief. In relevant part, the Section provides:

On the date and at the time and place designated in the notice of sale, the trustee or the attorney for the trustee shall sell the property at public auction

to the highest bidder. . . Any person, including the beneficiary or trustee, may bid at the sale. Every bid is considered an irrevocable offer,

Not only was Plaintiffs' the highest bid, it was the only bid. Tr. 12. Mrs. Kathleen Thomas, representing the Plaintiffs at the sale, did not know the fair market value of the property and so did not bid a specific dollar amount, but rather stated that her bid was for the then fair market value of the property. Tr. 12, 13, 25, 26.

Section 57-1-27 outlines the procedure to be followed by the trustee if there are competing bids. When only one bid is given, he has no alternative under the statute other than to sell to that bidder irrespective of the price bid. Such does not disadvantage the trustor for two reasons. First, the trustor has already received the statutory three-month notice of default as prescribed by § 57-1-24, Utah Code Annotated, 1953, and the notice of trustee's sale required by § 57-1-25, Utah Code Annotated, 1953. Both notices were received by this Defendant. Tr. 167. Secondly, § 57-1-32, Utah Code Annotated, 1953, requires that the fair market value of the property at the time of the sale or the price at which the property is sold by the trustee, whichever is the greater, shall be credited against the unpaid balance of the obligation for which the trust deed was given as security.

The text of the Section 57-1-32 is appended to this brief.

The pertinent part is as follows:

At any time within three months after any sale of property under a trust deed, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security. . . . Before rendering judgment, the court shall find the fair market value at the date of sale of the property sold. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale.

At the sale, Mrs. Thomas advised the trustee that she was bidding the fair market value of the property. By so doing, Plaintiffs assured Defendant that he would receive full credit for the then fair market value of the property. Such was in compliance with the safeguards which the statute extended to the Defendant. What then remained to be done was for the Plaintiffs to obtain an appraisal to determine fair market value of the property. They completed that process one month later. Tr. 80. This action was later commenced on February 22, 1988 with the filing of Plaintiffs' Complaint wherein the fair market value of the property was alleged to have been \$22,000.00. R. 2, 5.

Defendant claims that the failure to bid a sum certain violated safeguards extended to him by statute. He has the burden of proving his contention. Concepts, Inc. v. First Security Realty Services, Inc., 743 P.2d 1158, 1159 (1987). For the reasons above given, statutory safeguards were not violated,

and the sale was conducted within the spirit and purpose of the statute. On the other hand, if a technical violation did occur, still the Defendant cannot show, and in fact does not attempt to show, how he has been damaged or prejudiced. The Utah Supreme Court has held that a trustee's sale "will not be set aside unless the interests of the debtor were sacrificed or there was some attendant fraud or unfair dealing." Id. at 1160, quoting McHue v. Church, 583 P.2d 210 at 215, 216 (Alaska 1978).

The Defendant is an attorney licensed to practice in Utah. Tr. 171, 172. He received full legal notice of the sale and yet elected not to attend. Tr. 167, 168. He had some four months time before the scheduled sale date, in which to commission an appraisal to determine fair market value of the property. He did not do so. He testifies that he then believed the property to have had a value between \$30,000.00 and \$35,000.00. If he had availed himself of the safeguards afforded by the statute by both attending the sale and bidding what he then believed to be the value of the property, he would have been the successful purchaser. Kathleen Thomas testified that had the Defendant bid at the sale, she was prepared to bid as high as \$26,000.00. Tr. 13. Clearly, the Defendant would either have induced that higher bid by the Plaintiffs, thereby increasing the credit which he was to have received against his unpaid obligation or would have made a higher bid which would have resulted in his acquiring

title to the property. His failure to do so now precludes his right to claim "foul".

In American Falls Canal Securities Company v. American Savings & Loan Association, 109 Utah Adv. Rep. 21 (1989) the Utah Supreme Court determined as follows:

The principles of waiver and estoppel have application in determining the rights of parties to foreclosure sales. Hence, a party otherwise in position to object to a mortgage foreclosure sale may well be precluded from doing so based upon conduct sufficient to bring into operation the doctrines of waiver and estoppel.

The American Falls court went on to quote from 55 Am Jur 2d, Mortgages § 861:

(A) Mortgagor may by acquiescence and failure to assert his rights at the proper time be estopped to set up irregularities in the foreclosure proceedings to defeat rights of the purchaser. . .

If to any extent, the trustee's sale was not in compliance with statute, neither prejudice nor damage was thereby imposed upon Defendant, and any claim of irregularity otherwise available to the Defendant was waived by his failure to attend the trustee's sale and avail himself of available statutory safeguards.

2.

THE TRUSTEE WAS NOT REQUIRED TO
POSTPONE THE TRUSTEE'S SALE.

Defendant asserts that because Plaintiffs' bid was only for the fair market value then remaining to be determined, rather than a specific dollar amount, that the trustee did not actually

receive a designated price and therefore was required to either postpone or re-notice the sale. The obligation of the trustee to postpone or re-notice sale is found in § 57-1-27, Utah Code Annotated, 1953. The pertinent part is as follows:

The person conducting the sale may, for any cause he considers expedient, postpone the sale up to a period not to exceed 72 hours. Notice of such postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale. . . In the event of a longer postponement, the sale shall be cancelled and renoticed. . . .

Clearly, the statute places postponement and cancellation within the prerogative of the trustee. The only conditions imposed have to do with notice of postponement or cancellation. Plaintiffs' trustee received their bid, not in a specific dollar amount, but nevertheless in a sum certain, that being whatever amount then represented the fair market value of the property. It was then his obligation to sell the property to Plaintiffs who would thereupon be required as a condition of this action, to establish to the satisfaction of the trial court the fair market value of the property at the time of sale and to credit that amount against Defendant's unpaid obligation.

3.

PLAINTIFFS WERE NOT REQUIRED TO PAY
FOR THE PROPERTY IN LAWFUL MONEY
OF THE UNITED STATES AT TIME OF SALE

Defendant contends without any reference to the record that the Defendant, as trustor under the subject deed of trust, had

given instructions that the purchase price was "payable in lawful money of the United States at the time of sale". There is no evidence of such instruction having been given, and it has no statutory basis. The issue of payment at the time of trustee's sale was not raised below and therefore is not properly raised here.

Plaintiffs request this court take judicial notice that it is the standard practice in this jurisdiction for a foreclosing beneficiary under a deed of trust to place its bid with the trustee at the time of sale. Additionally, that if that bid is for an amount equal to or less than the then unpaid balance of the obligation for which the deed of trust is given as security and the bid is the highest bid received by the trustee, the trustee thereupon declares the beneficiary as the successful purchaser of the property and executes and delivers his trustee's deed to that purchasing beneficiary without requiring the beneficiary to make payment to the trustee.

Utah R. Evid. 201 provides for judicial notice of adjudicative facts. This court has recognized its power to take judicial notice pursuant to the rule although raised for the first time on appeal. Trimble Real Estate v. Monte Vista Ranch, 758 P.2d 451, 456 (Utah Ct. App. 1988). The matter of which the court is requested to take judicial notice is of common knowledge among members of the bar and bench of this jurisdiction.

The Plaintiffs' trustee acting in accordance with the custom in this jurisdiction did not require the Plaintiffs to make payment of the amount which they bid as beneficiaries under this trust deed. Clearly, the responsibility of the trustee did not thereby end with the conclusion of the sale and his execution and delivery of his deed. Rather, if it were subsequently determined that the fair market value of the property was in excess of the amount then owing by Defendant, the trustee would have been required to procure and pay over that excess amount to Defendant or deposit the same with the Clerk of the County of Salt Lake, State of Utah, all in accordance with § 57-1-29, Utah Code Annotated, 1953.

The failure of the trustee to require payment by the Plaintiffs in lawful money of the United States did not invalidate the sale.

4.

THE CONDUCT OF THE TRUSTEE'S SALE
DID NOT PREJUDICE DEFENDANT'S
OPPORTUNITY TO OBTAIN AN APPRAISAL OF
FAIR MARKET VALUE OF THE PROPERTY.

The Defendant contends that Plaintiffs by failing to bid a specific dollar amount and advise him of the same precluded him from timely obtaining an independent appraisal that would have been more persuasive to the trial court on the issue of fair market value. Plaintiffs were not aware of the fair market value of the property at the time of the sale and, therefore, did not

give a specific dollar bid. Approximately one month after the sale they obtained the Paul Maritsas appraisal indicating a fair market value of \$21,750.00. Approximately two months later, their Complaint was filed alleging a fair market value of \$22,000.00.

Defendant testified that he did not attend the sale because he believed the property had a fair market value in excess of the amount of his obligation to the Plaintiffs. Tr. 170, 171. Despite the fact that the action was filed in February of 1988, less than three months after the trustee's sale, the Defendant waited until July of 1988 to commission his own appraisal of the property. Tr. 137. Plaintiffs did not complete their resale of the property until July, 1988. Tr. 19, 51; Plaintiffs' Exh. 2 at 3-8. Between the filing of the Complaint on February 22, 1988 and the said resale of the property, Defendant had over four months time in which to commission an appraisal as exacting as Defendant and his appraiser desired. Notwithstanding the same, Defendant's appraiser testified that he went upon the property, entered the house, inspected the basement but did not go up into the attic because "I don't carry a ladder with me". Tr. 147, 148. He did testify as to the general appearance of the property and as to its structure as he observed it to be in July of 1988. Tr. 147.

The evidence indicates that the Defendant had every available opportunity to obtain within a reasonable time following the trustee's sale such appraisals of the property as he determined to be appropriate. There is nothing in the evidence to suggest that his voluntary election to do otherwise prejudiced his ability to raise a viable defense. In any event, responsibility for any such prejudice would rest with him.

POINT III.

THE FINDINGS OF THE COURT WITH REGARD
TO THE FAIR MARKET VALUE OF THE PROPERTY
ARE SUPPORTED BY THE EVIDENCE.

Defendant contends that the trial court's finding as to fair market value of the property as determined by Plaintiffs' appraiser, Paul H. Maritsas, is against the weight of the evidence. He therefore asserts that the evidence does not support the trial court's finding that the Maritsas appraised value of \$21,750.00 represented fair market value.

The court's findings were in accord with Rule 52(a), Utah Rules of Civil Procedure. The Rule reads in pertinent part as follows:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . .

The Utah Supreme Court in State v. Walker, 743 P.2d 191 (1987) has adopted the definition of "clearly erroneous" as given the Federal counterpart of the Rule in United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). It is defined as:

A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

743 P.2d at 193.

Findings are not disturbed as being clearly erroneous unless against the clear weight of the evidence or this court is firmly convinced that a mistake has been made. Adair v. Bracken, 745 P.2d 849, 851 (Utah Ct. of App. 1987). In reviewing the issue as to whether findings find support in the evidence, this court begins with the review of the trial court's findings and Defendant must first marshall all evidence in support of those findings and then proceed to establish that such evidence is insufficient. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (1985). Defendant fails to consider the abundant evidence as to Plaintiffs' efforts to sell the property. He avoids such by wrongfully declaring that "as soon as Mr. Maritsas' appraisal was concluded, Plaintiffs' realtor was ordered to immediately sell the property to the neighbor. . . ." He fails to recall that the offer upon which sale was effected was not received until six months after the appraisal was received.

The trial court heard the testimony of Plaintiffs' appraiser, Mr. Paul Maritsas, as well as that of Defendant's appraiser, Mr. Richard Copeland. The court had the benefit of the additional evidence as is reviewed under Point 1, above, and then identified in its ruling from the bench the evidence which it found persuasive in determining fair market value of the property. Tr. 178-180. Specific items were addressed in comparing the two appraisals and the court cited what it perceived as limitations in Mr. Copeland's appraisal.

On December 9, 1988, a copy of the Findings of Fact and Conclusions of Law prepared by Plaintiffs' attorney were mailed to Defendant's attorney. R. 150. On December 20, 1988, Defendant filed his objection to the same. R. 146. On January 4, 1989, said Findings of Fact and Conclusions of Law were entered by the court. R. 156, 162. A copy of the same is appended to this brief.

The trial court's finding that the property had a fair market value on the valuation date of \$21,750.00 as determined by the Paul H. Maritsas appraisal is clearly supported by the weight of the evidence. The Defendant is unable to demonstrate that the same is clearly erroneous.

REQUEST FOR ATTORNEY FEES

This action was commenced pursuant to § 57-1-32, Utah Code Annotated, 1953. The Section provides that ". . .the prevailing

party shall be entitled to collect its costs and reasonable attorney fees incurred in bringing an action under this section." By their Complaint filed in the action, Plaintiffs sought recovery under said Section of their reasonable attorney fees incurred in the action. R. 6. The trial court awarded them judgment for the same. R. 155. Plaintiffs now seek recovery of attorney fees incurred incident to this appeal.

The Utah Supreme Court has held ". . .that a provision for payment of attorney's fees in a contract includes attorney's fees incurred by the prevailing party on appeal as well as at trial, if the action is brought to enforce the contract. . . ." Management Services Corp. v. Development Associates, 617 P.2d 406, 409 (1980). Plaintiffs' claim lies not in contract but pursuant to statute. The same considerations which support an award of attorney fees on appeal for enforcement of contract apply for an action brought pursuant to statute whereby attorney fees are provided.

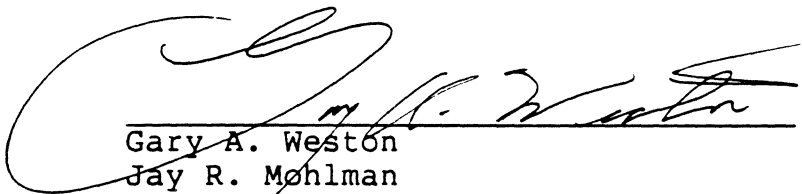
Plaintiffs respectfully request that the court determine that they are entitled to reasonable attorney fees incurred with regard to this appeal.

CONCLUSION

The evidence which the Defendant now contends was improperly refused by the trial court was either not proffered or was properly refused. In all events, the refusal did not constitute

reversible error. The fact that the Plaintiffs' bid at the trustee's sale was not in a specified dollar amount did not either invalidate the sale or deny Defendant his statutory safeguards. Disadvantages which he sustained, if any, are attributable to his voluntary election to neither attend the trustee's sale nor exercise the rights available to him by statute. The findings of fact entered by the trial court are not clearly erroneous but supported by the weight of the evidence. Plaintiffs are entitled to recover attorney fees which they incur with regard to this appeal.

RESPECTFULLY SUBMITTED this 23rd day of February, 1990.



Gary A. Weston
Jay R. Mohlman
Attorneys for Plaintiffs-
Respondents

CERTIFICATE OF SERVICE

CERTIFY that on this 23rd day of February, 1990, I did cause four true and correct copies of the foregoing Brief of Respondents to be personally delivered to the offices of A. Paul Schwenke, Esq. at 165 South West Temple, #300, Salt Lake City, Utah.

APPENDIX

Section 57-1-27, Utah Code Annotated, 1953.

Sale of trust property by trustee -- Public auction -- Conduct by attorney for trustee -- Trustor may direct order in which trust property sold -- Bids -- Postponement of sale.

On the date and at the time and place designated in the notice of sale, the trustee or the attorney for the trustee shall sell the property at public auction to the highest bidder. The trustee, or the attorney for the trustee may conduct the sale and act at such sale as the auctioneer. The trustor, or his successor in interest, if present at the sale, may direct the order in which the trust property shall be sold when such property consists of several known lots or parcels which can be sold to advantage separately, and the trustee, or the attorney for the trustee, shall follow such directions. Any person, including the beneficiary or trustee, may bid at the sale. Every bid is considered an irrevocable offer, and if the purchaser refuses to pay the amount bid by him for the property sold to him at the sale, the trustee, or the attorney for the trustee, may again sell the property at any time to the highest bidder. The party refusing to pay the bid price is liable for any loss occasioned thereby, including interest, costs, and trustee's and reasonable attorney's fees. The trustee or the attorney for the trustee may thereafter reject any other bid of such person.

The person conducting the sale may, for any cause he considers expedient, postpone the sale up to a period not to exceed 72 hours. Notice of such postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale. No other notice of the postponed sale need be given unless the sale is postponed for longer than 72 hours beyond the date designated in the notice of sale. In the event of a longer postponement, the sale shall be cancelled and renoticed as provided for herein in the same manner as the original notice of sale is required to be given.

Section 57-1-28, Utah Code Annotated, 1953.

Sale of trust property by trustee -- Payment of bid --Trustee's deed delivered to purchaser -- Recitals -- Effect.

(1) The purchaser at the sale shall pay the price bid as directed by the trustee and upon receipt of payment, the trustee shall execute and deliver his deed to such purchaser. The trustee's deed may contain recitals of compliance with the requirements of §§ 57-1-19 through 57-1-36 relating to the exercise of the power of sale and sale of the property described therein, including recitals concerning any mailing, personal delivery, and publication of the notice of default, any mailing and the publication and posting of the notice of sale, and the conduct of sale. These recitals constitute prima facie evidence of such compliance and are conclusive evidence in favor of bona fide purchasers and encumbrancers for value and without notice.

(2) The trustee's deed shall operate to convey to the purchaser, without right of redemption, the trustee's title and all right, title, interest, and claim of the trustor and his successors in interest and of all persons claiming by, through, or under them, in and to the property sold, including all such right, title, interest, and claim in and to such property acquired by the trustor or his successors in interest subsequent to the execution of the trust deed.

Section 57-1-32, Utah Code Annotated, 1953.

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

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

FILED DISTRICT COURT
Third Judicial District

JAN - 4 1989

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Telephone: (801) 532-1900

By  _____
SALT LAKE COUNTY
Deputy Clerk

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

KATHLEEN M. THOMAS, ELSIE)	
MERRILL, LEWIS J. MERRILL,)	
STEPHEN J. MERRILL, ALVIN S.)	FINDINGS OF FACT AND
MERRILL, GEORGE A. MERRILL,)	CONCLUSIONS OF LAW
MARGARET M. DURFEE and)	
ANNIE M. DUTSON,)	
)	
Plaintiffs,)	
)	
vs.)	Civil No. C88-01121
)	
JAMIS M. JOHNSON, also known as)	
JAMIS JOHNSON,)	Judge J. Dennis Frederick
)	
Defendant.)	

This matter having come on for trial on the 2nd day of December, 1988, before the Honorable J. Dennis Frederick, one of the judges of the Court, with Gary A. Weston of the firm of Nielsen & Senior appearing as attorney for the Plaintiffs, and A. Paul Schwenke appearing as attorney for the Defendant. At the commencement of trial and in response to Plaintiffs' Motion in

Limine, Defendant withdrew his request to call Philip Cook to testify as an expert witness. The Court then proceeded with trial and the taking of testimony and receipt of exhibits by way of evidence on the issues, and counsel having addressed the Court regarding application of law to the evidence presented, the Court now makes and enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On November 24, 1987, the property commonly known as 448 North Grant Street, Salt Lake City, Utah (hereinafter the "subject property"), was sold to Plaintiffs at trustee's sale.

2. The sale was undertaken and consummated in response to Defendant's failure to make payment to Plaintiffs of certain of the monthly payments provided to be paid pursuant to the terms of a trust deed note signed by Defendant incident to Defendant's purchase of the subject property from Plaintiffs and the payment of which promissory note Defendant collateralized by a trust deed which he signed and delivered to Plaintiffs therein describing the subject property.

3. Defendant knew of the payment delinquency under the promissory note and received notice from Plaintiffs of said delinquency and of the scheduled trustee's sale of the subject property.

4. Defendant had the opportunity to attend the trustee's sale of the subject property, but did not do so.

5. Plaintiffs made the only bid received by the trustee at the trustee's sale. Plaintiffs did not then know the fair market value of the subject property, but declared their bid to be for the amount of the fair market value of the property, whatever be that value.

6. Plaintiffs caused an appraisal to be performed of the subject property by Paul H. Maritsas for the purpose of determining fair market value of the property. The appraisal was completed on December 23, 1987 (Exhibit P-3). The appraisal estimated the fair market value as of December 23, 1987 to be \$21,750.00.

7. On December 7, 1987 Plaintiffs listed the subject property for sale with a licensed real estate salesperson. The property was then listed at a sales price of \$32,900.00. On or about January 27, 1988, the listing price was lowered to \$21,750.00.

8. Suitable efforts to find a purchaser for the subject property and to sell and market the property were made by Plaintiffs and the salesperson with whom Plaintiffs listed the property for sale.

9. In June, 1988, Plaintiffs received an offer from Larry D. Hyde and Kathleen J. Hyde to purchase the subject

property at a price of \$20,500.00. Plaintiffs determined reluctantly to accept said offer. The subject property was sold by Plaintiffs to Larry D. Hyde and Kathleen J. Hyde on or about July 13, 1988 for the price of \$20,500.00.

10. The offer received by Plaintiffs from Larry D. Hyde and Kathleen J. Hyde was the only offer received by Plaintiffs for the purchase of the subject property.

11. The subject property was in need of structural repair to roof rafters as of November 24, 1987, and the then condition of the property significantly impacted fair market value.

12. On July 6, 1988, Defendant requested Richard W. Koplin to conduct an appraisal of the subject property to determine the fair market value of the property. The appraisal was completed July 7, 1988 and estimated the fair market value of the property to be \$31,800.00 as of November 27, 1987 (Exhibit D-5). Mr. Koplin in performing his appraisal did not inspect the attic of the subject property nor make sufficient adjustment to his estimated value of the property to reflect the condition of the property.

13. As of November 24, 1987, the date of the trustee's sale of the subject property, Defendant was indebted to Plaintiffs under the promissory note and deed of trust in an amount of \$29,622.62, as more particularly itemized in Plaintiffs' Exhibit 1.

14. As of November 24, 1987, the date of the trustee's sale of the subject property, the fair market value of said property was \$21,750.00.

15. Plaintiffs incurred costs, expenses and trustee fees as a result and consequence of Defendant's delinquency under the promissory note and of Plaintiffs' foreclosure against the subject property of the trust deed received from Defendant to secure the payment of the promissory note. Plaintiffs made payment to Gary A. Weston, Attorney at Law, as substitute trustee thereunder said trust deed for his services relative to the foreclosure of the trust deed. Fees of \$1,059.00 and costs of \$354.70 were so paid. Said fees and costs are fair and reasonable with regard to the services rendered to Plaintiffs.

16. Plaintiffs have incurred attorney fees in an amount of \$4,980.00 with regard to the herein action. Said fees are fair and reasonable with regard to the services rendered to Plaintiffs by their attorneys.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court now makes and enters its Conclusions of Law as follows:

1. The trustee's sale of the subject property conducted on November 24, 1987 constituted a valid and proper exercise of

the rights and power of sale granted by Defendant to Plaintiffs under Defendant's trust deed given against the subject property and as granted by Title 57, Chapter 1, Utah Code Ann., 1953.

2. Pursuant to the bid made by Plaintiffs at trustee's sale and Plaintiffs' purchase of the subject property at sale as a consequence of that bid, Plaintiffs must credit Defendant with an amount of \$21,750.00 against the total amount owing by Defendant to Plaintiffs at time of trustee's sale, the amount of said credit being the fair market value of the subject property at the time of trustee's sale and which credit is required by § 57-1-32, Utah Code Ann.

3. Plaintiffs are entitled to recover from Defendant, pursuant to § 57-1-32, Utah Code Ann., Plaintiffs' attorney fees incurred in this action.

4. Plaintiffs are not barred by the doctrines of estoppel, waiver, release, laches, or either of the same, from recovery against the Defendant.

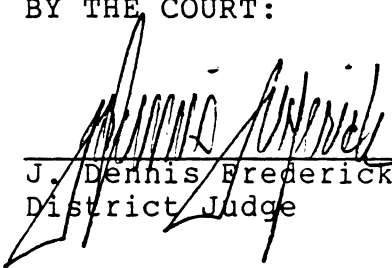
5. Judgment should be entered in favor of the Plaintiffs and against the Defendant pursuant to § 57-1-32, Utah Code Ann., as follows:

- (a) For an amount of \$7,872.62.
- (b) For attorney fees in an amount of \$4,980.00.

(c) For Plaintiffs' costs herein incurred.

DATED this 4th day of January, 1988.

BY THE COURT:



J. Dennis Frederick
District Judge

APPROVED AS TO FORM:

A. Paul Schwenke
Attorney for Defendant

58311