

1989

Gate City Federal Savings and Loan Association v.  
Edward A. Dalton, Jr., John C. Forrester, Jr., Michael  
C. Johnson, and Daniel W. Marcum, et al. : Reply  
Brief

Utah Court of Appeals

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**BRIEF**

DOCKET NO.

**89-498 CA**

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IN THE UTAH COURT OF APPEALS

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GATE CITY FEDERAL SAVINGS AND  
LOAN ASSOCIATION,

Plaintiff-Appellant,

v.

EDWARD A. DALTON, JR., JOHN C.  
FORRESTER, JR., MICHAEL C. JOHNSON,  
and DANIEL W. MARCUM, et al.,

Defendants-Respondents.

**REPLY BRIEF  
OF APPELLANT**

Docket No. 89-498-CA

PRIORITY CLASSIFICATION NO. 14(b)

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Appeal of an Order of the Third District Court of Summit County,

Judge J. Dennis Frederick,

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COURT OF APPEALS

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### FACTS

Respondents' ten page statement of facts indicates the extent to which the parties differ in their view of the transactions and underscores genuine issues of material fact remaining in dispute. In paragraph 4, Respondents state "Gate City suggested a scheme" involving individual borrowers. In truth, Gate City merely informed Vaughn Cook that it could not lend money to a corporation for permanent home financing and that the only financing money available was to Fannie Mae qualified individual borrowers. (Deposition of Stan Jenkins, p. 22, Appendix 6 Respondents' Brief.)

In that same paragraph at page 3, Respondents assert there was a "prearrangement" among Gate City, Kilburn and Cook and the individual borrowers for assumption of the loans. Gate City denies any prearrangement or preapproval of assumption. Gate City's loan officer, Stan Jenkins, clearly explained that if assumption was desired, the assuming party would simply submit applications subject to approval by Gate City. (Deposition of Stan Jenkins, p. 26.)

At page 10, paragraph 17, Respondents claim "each defendant continued to believe and understand that he had been released from any and all obligations under the loan documents". Gate City disputes whether Respondents held such a belief and whether such a belief is reasonable, given the fact that the assumption documents were never executed by Kilburn as Respondents anticipated (Record at 1009-1020 Appendix E Appellant's Brief). This is especially true regarding two of the Borrowers who were attorneys and who understood the requirements for release. Gate City asserts that such a subjective belief is not a "fact" which could support summary judgment, but rather a "fact" which is in dispute.

### SUMMARY OF ARGUMENT

Neither of the requirements necessary to find that Respondents had been released from their obligations under the promissory notes have been met. The ambiguous language of the assumption agreements relied by Respondents does not meet the requirements of

either a waiver or an assumption. Certainly, the documents cannot be construed to meet both requirements. The language of the documents contain both patent and latent ambiguities which preclude the court from interpreting them as a matter of law. Even if the documents could be construed to be unambiguous, the intent of the parties, as manifest by their actions and the other relevant documents executed contemporaneously with the indemnity agreements raise issues of material fact which preclude summary judgment. Therefore, the trial court's award of summary judgment must be reversed.

### ARGUMENT

#### **I. THE TRIAL COURT ERRED IN FINDING THAT THE BORROWERS HAD BEEN RELEASED.**

##### **A. The Requirements Of Release Have Not Been Met.**

Respondents (hereinafter "Borrowers") argue that the indemnity agreements satisfy all of the requirements necessary to release them from their obligation to repay their promissory notes. One need only review the requirements that must be satisfied to effect a release to see that this argument must fail. In order for the Borrowers to be released from their obligations under the promissory notes secured by the trust deeds which they signed, the terms and conditions of paragraph 17 of such trust deeds (which terms are the same as paragraph 10 of the promissory notes) must be fully complied with. That section provides:

17. Transfer of the property; Assumption. If all or any part of the property or an interest therein is sold or transferred by Borrower without Lender's prior written consent . . . Lender may, at Lender's option, declare all the sums secured by this Deed of Trust to be immediately due and payable. Lender shall have waived such option to accelerate if, prior to the sale or transfer, Lender and the person to whom the Property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to Lender and that the interest payable on the sums secured by this Deed of Trust shall be at such rate as Lender shall request. If Lender has waived the option to accelerate provided in this paragraph 17, and if Borrower's successor in interest has executed a written assumption agreement accepted in writing by Lender, Lender shall release borrower from all obligations under this Deed of Trust and the Note.

In short, two conditions for release are imposed, first that there is a prior written waiver of the right to accelerate, and second, that there be a written assumption agreement accepted in writing by Gate City. The first condition imposed by that section is that the lender waive the option to accelerate. The trust deed clearly sets out the steps to be taken for a waiver to occur: 1) Lender and the person to whom the property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to Lender; and 2) that the interest payable on the sums secured by the deed of trust shall be at such rate as Lender shall request. Therefore, in order to find a waiver there must be a written agreement entered into prior to the transfer which recites that the credit of the transferee is satisfactory to the Lender and establishes the agreed interest rate payable on the note as requested by the Lender.

The Borrowers allege that the indemnity agreements satisfy these conditions. (Respondents' Brief at p. 38.) The deficiencies in this argument are obvious. The indemnity agreements do not state that the credit of CC International is acceptable. Vaughn Cook admits that neither he nor CC International applied to have their credit approved (Second Affidavit of Vaughn Cook, R. 1005). He further states that he never executed a document which meets the requirements of Section 17. Id.

As for the second requirement of a waiver, the indemnity agreements themselves make no mention of the interest rate nor any reference to any document which would set the interest rate or any other terms. The requirements of a prior written waiver preclude Respondents' argument that the waiver and the assumption were accomplished by the same ambiguous language of the indemnity agreements. The Borrowers' assertion that the indemnity agreements meet the specific requirements set forth for a written waiver of the right to accelerate simply has no support in fact or logic.

The Borrowers claim that these deficiencies are "irrelevant" because Gate City "demonstrated an intent to rely on the credit of Kilburn." (Respondents' Brief p. 41.) How this supports the argument that there was a prior written approval of the credit of

CC International is not clear. What is clear is that Gate City merely informed Cook that Kilburn would have to apply for assumption and that assumption was dependant upon approval of the assuming party's credit. (Deposition of Stan Jenkins, p. 25; Appendix 6 Respondents' Brief.)

The loan commitment made to Cook does nothing to bolster the Borrowers' argument that Gate City approved the credit of CC International. The loan commitment was based on the loan of funds to individual Fannie Mae qualified buyers. Id. No "intent", let alone written consent, was shown to indicate that Gate City was relying on the credit of any one but the individual Borrowers. Each Borrower went through the loan application, loan underwriting and loan approval process. This included submitting verifications of employment, deposit, income, credit, etc. Each Borrower was approved based on the information submitted. Each Borrower signed a promissory note and executed a trust deed. Nothing in the loan commitment can be construed to be prior written approval of the credit of CC International.

**B. There Was No Waiver By Forbearance.**

Recognizing the weakness of relying on the indemnity agreement as a "prior written waiver", Borrowers attempt to argue that waiver was made by Gate City's forbearance in exercising its right to accelerate. In support, Borrowers cite two cases. The first PLC Landscape Const. v. Piccadilly Fish "N" Chips, Inc., 28 Utah 2d 350, 502 P.2d 562, 563 (Utah 1972), does not deal with waiver but merely states that a party may vary a written contract by a subsequent agreement so long as the subsequent agreement does not violate the rule against parol evidence. Id. This case has no application since prior approval is specifically required by the express language of paragraph 14. Furthermore, there is no assertion of any "subsequent agreement" which waived the specific requirements for release set forth in Paragraph 17 of the trust deeds.

The second case cited by Borrowers, Cooper v. Deseret Federal Sav. & Loan Ass'n, 757 P.2d 483 (Utah App. 1988), also does not deal with waiver, but rather the



doctrine of laches. That case states that in the absence of a contractual provision setting the time to exercise the option, the option to accelerate must be exercised in a "reasonable time". The court stated that an election to accelerate a year or years in the future could be considered reasonable under ordinary circumstances. Id. at 485. What comprises a "reasonable time" depends upon the individual facts and circumstances of each case and is therefore a question of fact which precludes granting summary judgment. Id. Cooper holds that a party who does not exercise the right to accelerate in a "reasonable time" is simply barred by the doctrine of laches from exercising it. Cooper, 757 P.2d 485.

There are significant differences in the doctrines of waiver and laches that make Cooper inapplicable to the instant case. Waiver is a conscious relinquishment of a known right. Martin v. Hickenlooper, 90 Utah 185, 61 P.2d 307 (1936). Whether or not there has been a waiver is a question of fact. Bowery Sav. Bank v. Jenkins, 30 Utah 2d 232, 516 P.2d 178 (1973). Laches on the other hand is an equitable bar to the assertion of a right. Olansen v. Texaco Inc., 587 P.2d 976, 985 (Okla. 1978). In Cooper, equity demanded granting such a remedy. The borrower, in reliance on the lender's forbearance in exercising its right to accelerate, reacquired the property and brought the note current. Under such circumstances it would be inequitable to allow the lender to go back and accelerate the full amount of the debt based on the prior transfer. In the instant case, the question is not whether equity would prevent Gate City from exercising its right to accelerate, but whether Gate City voluntarily relinquished that right. Gate City specifically agreed in the trust deed that in order to relinquish its rights, a prior written agreement was required. The doctrine of laches should not be confused with waiver especially where waiver is defined by contract and carries with it legal consequences.

**C. The Doctrine Of Eiusdem Generis Has No Application.**

The Borrowers misapply the doctrine of *eiusdem generis* in an attempt to support the argument that paragraph 11 of the trust deed does not apply to the right to accelerate. Paragraph 11 specifically states that forbearance by the lender in exercising its rights does not constitute a waiver of those rights.

11. Forbearance by lender not a waiver. Any forbearance by lender in exercising any right or remedy hereunder, or otherwise, afforded by applicable law, shall not be a waiver of or preclude the exercise of any such right or remedy.

Borrowers cite as supplemental authority Parrish v. Richards, 8 Utah 2d 419, 336 P.2d 122 (1959). That case states the doctrine of *eiusdem generis* as follows:

In those instances where a particular enumeration is followed by general terms, the latter will be understood as limited in their scope to matters and things of the same general kind or character as those specified in the particular enumeration, unless there is something to show a contrary intent.

Parrish, 335 P.2d at 123 (emphasis added). In paragraph 11 of the trust deed, the general provision quoted above precedes a sentence containing more specific provisions. Where, as here, the general provisions precede the specific provisions, rather than vice versa, the doctrine cited to by the Borrowers simply has no application.

There is no "prior written waiver" of the right to accelerate as specifically required by paragraph 17 of the trust deed. The doctrine of laches should not be confused with waiver especially here where waiver is defined by the contract and carries with it legal consequences. The terms of the trust deed specifically prohibit a waiver of the right to accelerate by forbearance. Given these facts, the trial court erred in determining that the first requirement of paragraph 17 had been met. In the absence of a waiver of the right to accelerate, the court need not reach the issue of whether the indemnity agreements meet the second requirement necessary to find a release under paragraph 17, i.e., a "written assumption agreement accepted in writing by Gate City."

## II. THE TRIAL COURT ERRED IN ITS INTERPRETATION OF THE INDEMNITY AGREEMENTS.

The trial court erred in holding that the indemnity agreements were, "as a matter of law, unambiguous assumption agreements. In reviewing the trial court's determination of a matter of law, this Court reviews for correctness and shows no deference to the trial court's findings. Allstate Enterprises, Inc. v. Heriford, 772 P.2d 466 (Utah App. 1989).

A document is ambiguous if it is capable of more than one reasonable interpretation. Kerr Land & Livestock, Inc. v. Glaus, 107 Idaho 757, 692 P.2d 1199 (Ct. App. 1984). Defendants cite Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382 (Utah 1989) in support of their argument that the language of the indemnity agreements is unambiguous. The language the court was called upon to interpret in Ron Case reads as follows:

Panos, Bloomquist and Vesper, jointly and severally, agree to pay all indebtedness which is presently outstanding or in the future may arise which claims relate to the furnishing of labor, materials, equipment, tools, fuel, supplies and other items furnished to or incorporated into the Vesper Projects.

Id. at 1385. That language clearly identifies the parties and the nature and extent of the obligation. After a single reading, it is possible to clearly understand the obligations created by the above language. That passage provides answers to all critical questions.

Contrast that language with the convoluted language at issue in this case.

Party of the First Part agrees upon demand to indemnify Party of the Second Part for any loss (including but not limited to amounts paid in discharge of the lien, expenses of investigation, preparation for litigation, judgment, court costs, and attorney's fees) it may sustain by reason of omitting to set out such lien(s) as an exception in the mortgage executed hereunder or by reason of enforcement of this agreement. The obligation of the Party of the first part in this agreement shall extend to the mortgage executed by, through, or for the Party of the First Part of assigns on the above premises.

The trial court found that the clear and unambiguous meaning of the above quoted language was that CC International agreed to take full, complete and sole responsibility not for payment of mechanic's liens but for the repayment of 1.8 million dollars in loans made to 21 different Borrowers.<sup>1</sup> Appellant respectfully submits that the trial court's construction of the indemnity agreements is so far removed from their clear language that no one, layman, lawyer or judge, upon reading those documents without any further explanation would reach the same interpretation as the trial court. Not only is the meaning forced upon the indemnity agreements by the trial court not "clear and unambiguous", the trial court's interpretation is not even suggested by the language of the agreements themselves. The more reasonable interpretation of the indemnity agreements are to indemnify the lender, Gate City, for any mechanic's or materialmen's liens which are omitted from the mortgage. Had the trial court found that such was the meaning of the documents that conclusion would be understandable. At best, the above language is subject to more than one reasonable interpretation, therefore the language is not "clear and unambiguous". DeLancey v. DeLancey, 110 Idaho 63, 714 P.2d 32 (1986). The trial court erred in so ruling and erred in granting summary judgment based on that ruling.

**III. EVEN IF THE LANGUAGE OF THE DOCUMENT WAS CLEAR  
AND UNAMBIGUOUS, SUMMARY JUDGMENT IS NOT APPROPRIATE  
WHERE THERE ARE QUESTIONS OF FACT REGARDING THE  
PARTIES' INTENT IN ENTERING INTO THE AGREEMENT.**

**A. Documentary Evidence Is Not Dispositive If The Intent And Purpose Underlying The Documents Are At Issue.**

It is strange that the parties claiming that the indemnity agreements are "clear and unambiguous" are not parties to the agreement. The parties to the indemnity agreements, CC International and Gate City, clearly expressed, through affidavits submitted to the trial court, that they did not understand or intend the indemnity

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<sup>1</sup>The entire amount of the transaction was 2.2 million dollars, however, two of the Borrowers did not join in the motion.

agreements to be construed as assumptions. (Second Affidavit of Vaughn Cook, ¶ 8; Appendix E Appellant's Brief; Affidavit of Blaze Johnson; Record at 575, 829, 958.)

The trial court erred in ignoring evidence of the parties' intent, even if the indemnity agreements seemed clear and unambiguous. W.M. Barnes Co. v. Sohio Natural Resources Co., 627 P.2d 56 (Utah 1981). (See, Appellant's Brief, Point III.) In the instant case, the central issue facing the trial court was the intent of the parties in executing the indemnity agreements. The affidavits of Vaughn Cook submitted to the trial court create questions of fact regarding the intent of CC International. The second affidavit of Vaughn Cook states that

... neither I, nor my company, CC International, Inc., ever applied to Gate City Mortgage Company to have our credit approved in connection with assuming the subject mortgage loan obligations, nor did we execute a writing whereby Gate City Mortgage Company approved our credit as an assuming party or fixed the interest rate to be charged, nor did we ever execute a writing to assume such obligations or otherwise agree or consent thereto, nor did we intend or understand that the defendants would be released from liability thereby.

(Second Affidavit of Vaughn Cook, ¶ 8; Record at 1005; Appendix E Appellant's Brief.)

The third affidavit of Vaughn Cook states:

It is true that at the time I signed those indemnity agreements, I did not realize that those instruments, by themselves, manifested an agreement by CC International to assume the obligations of the mortgage loans.

(Third Affidavit of Vaughn Cook, ¶ 15; Appendix No. 1 Respondents' Brief.) A party's intent must be determined as of the time of the transaction. Hefley Ranch, Inc. v. Stewart, 764 P.2d 415 (Colo. App. 1988). The statement in Cook's third affidavit that he would have "intended to assume . . . if only for a interim period" was not a statement of his intent at the time the transaction was entered into. He clearly stated that at the time that the transaction was entered into, he did not have the understanding that he was assuming the Borrowers' liability. (Third Affidavit of Vaughn Cook, ¶ 16.) Cook admits that he never applied for assumption of the loans and never signed any documents

to effect an assumption. The statement in Cook's third affidavit stating in retrospect what he "would have done" demonstrates not only that he did not have the intention of assuming the loans when signing the documents but also demonstrates that the indemnity agreements were so ambiguous that he did not understand them to have had that effect. If the tables were turned and Gate City was suing Cook claiming that he assumed 1.8 million dollars in loans by signing the indemnity agreements, clearly his affidavit would raise a question of fact regarding his intent which would preclude summary judgment against him. The result should be consistent where, as here, Gate City raised the question of fact regarding his intent in entering into the indemnity agreements.

**B. Respondent's Argument That All Parties Knew That Assumptions Were Intended Is Misplaced.**

Respondents' argument that they anticipated an assumption cuts against their position. It is clear from the facts presented to the trial court that they understood that Kilburn Vacation Home Share not CC International was to make application to assume the loans. The Borrowers all expected Kilburn to assume the loans and executed assumption agreements for it to do so. (Appendix E Appellant's Brief; see also, Point IV.B., page 29 Appellant's Brief.) Cook stated that Kilburn was to assume the loans. (Deposition of Vaughn Cook, p. 300; Record at 1087.) Jenkins was told that Kilburn was going to apply for assumption. (Deposition of Stan Jenkins at p. 24; Appendix 6 Respondents' Brief.) Jim Clark, on behalf of Kilburn Vacation Home Share, stated that Kilburn would attempt to assume the loans. (Affidavit of Jim Clark, ¶ 3; Appendix No. 5 Respondents' Brief.) The undisputed fact is that despite any expectations, promises or commitments to the contrary, Kilburn never assumed the loans. (Respondents' Brief at 32.) The court did not find that Kilburn assumed the loans, therefore, Respondents' "understanding" of how the loans were to be assumed is contrary to the position now taken by Respondents that CC International assumed the loans.

**C. The Affidavit Of Blaze Johnson Contains Competent Evidence.**

The affidavit of Blaze Johnson<sup>2</sup> is more than "unsubstantiated opinion" as asserted by Respondents. In Williams v. Melby, 699 P.2d 723 (Utah 1985), cited by the respondents, the court reversed summary judgment and found that an affidavit of plaintiff's architect created issues of material fact which precluded summary judgment. The court so found despite the fact that the architect did not design the house in question, but merely made observations and offered opinions based on those observations. The affidavit of Mr. Johnson established that to accomplish an assumption Gate City would use proper forms and follow the requirements of its trust deed. Mr. Johnson has personal knowledge of those facts which were material to the determination of the question before the court. Based on those facts, Mr. Johnson makes comparison of the transaction in question with the accepted procedures and practices of Gate City. Adequate foundation is laid for each of the facts and observations drawn. Therefore, the affidavit is competent evidence and creates a question of fact regarding the meaning of Gate City's forms and its intent in executing the indemnity agreements in question.

**D. Questions Of Fact Are Raised By The Other Relevant Documents.**

In section IV of their brief, the Borrowers admit that the uniform real estate contracts executed by Vaughn Cook state that the properties were taken "subject to" the mortgage. Those real estate contracts were to be "fully paid" when a complete assumption of Respondents' liability was made. (Deposition of Vaughn Cook, p. 300; Record at 1037.) Respondents at page 33 of their brief assert that the indemnity agreements "fulfill this contractual obligation of CC International to defendants." This conclusion cannot be true for several reasons. First, the indemnity agreements were entered prior to the real estate contracts and therefore could not be in satisfaction of the conditions stated therein. Second, Cook did not do any act necessary to satisfy the

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<sup>2</sup>A copy of the affidavit is attached hereto as Appendix "A".

requirements of a release under paragraph 17 of the trust deed. (Second Affidavit of Vaughn Cook, ¶ 8.) Third, the contracts were not treated as satisfied but remained in escrow at Alta Title. (Deposition of Vaughn Cook, p. 300; Record at 1087.) Fourth, any assumption by Cook would have at most been a simple or "interim assumption". (Third Affidavit of Vaughn Cook, ¶ 15.) Fifth, Kilburn was to apply for and obtain a complete formal assumption and release. (Affidavit of Jim Clark, ¶ 3; Record at 1432.)

The intent of the parties to the transactions is placed squarely at issue in this case. Their conduct and the other relevant documents clearly create questions of fact regarding their intent. Therefore, even if the documents were deemed "unambiguous", the questions of fact surrounding the intent of Gate City and CC International in entering into the indemnity agreements preclude summary judgment as a matter of law.

#### **IV. APPELLANT DOES NOT HAVE THE BURDEN OF CONVINCING THE COURT OF ANY ALTERNATIVE INTERPRETATION OF THE INDEMNITY AGREEMENTS.**

At page 18 of their Brief, Borrowers inaccurately state that Appellant had not discussed the language in the beginning of each indemnity agreement which states that CC International had obtained a mortgage. Appellant refers the Court to pages 16 and 17 of its Brief which points out that this language created a latent ambiguity in the document since it is undisputed that no mortgage loans were made to CC International.

The Borrowers would have the Court draw an inference from this obviously inaccurate language to support their construction of the indemnity agreements. However, on viewing a motion for summary judgment, the court must view all facts and all inferences drawn from those facts in the light most favorable to the party resisting the motion. Allstate Enterprises, Inc. v. Heriford, 772 P.2d 466 (Utah App. 1989). Viewing the inaccurate language in the indemnity agreements in the light most favorable to Gate City, the language creates ambiguity in the documents which would preclude summary judgment. See, Frisbee v. K&K Construction Co., 676 P.2d 387, 390 (Utah 1980).



The "questions" posed by Borrowers on pages 19 and 20 of their brief are typical of the genuine issues of material fact which preclude summary judgment. Respondents seem to suggest that Appellant must prove some alternative interpretation of the indemnity agreements in order to prevail. In order to avoid summary judgment, Appellant need only demonstrate that an ambiguity exists. Kerr Land and Livestock v. Glaus, 692 P.2d 1199 (Idaho Ct. App. 1984).

There are numerous "reasonable explanations" which address the questions listed by Borrowers at pages 19 and 20 of their brief. It is not Appellant's burden in avoiding summary judgment to prove any of the "reasonable explanations" of the language of the indemnity agreements. It was and is Borrowers' burden to show there is only one "clear and unambiguous" interpretation of the indemnity agreements and to establish that there were no questions of fact regarding that interpretation.

The question posed by the Borrowers at pages 19 and 20 of their Brief can be easily answered consistent with other "reasonable interpretations" of the indemnity agreements.

1. CC International signed the indemnity agreements at Gate City's request. (Third Affidavit of Vaughn Cook, ¶ 12 R. 1052.) It was willing to accommodate Gate City's desire to be protected from mechanic's liens to protect its own interest in making sure this deal went through. If the loans were not made Vaughn Cook, principal of CC International, stood to lose a great deal of money.

2. CC International was not the obligor on the notes and may have been described as having "obtained" a mortgage from Gate City in a misguided attempt to show consideration for its promise to indemnify against mechanic's liens. This is consistent with the language used later in the document which states the mortgages were executed "by, for or on behalf of CC International." This language reflects not that CC International was liable on the loans, but that CC

International has an interest in the transaction which could serve as consideration for its promise to indemnify.

3. Either party, Gate City or CC International may have wished to omit the liens from the recorded security interest to make the loans and the properties easier to transfer.

4. CC International was willing to indemnify against materialmen's liens because as the builder it was already obligated to pay those who provided material and labor. It neither increased its obligation or risk by agreeing to indemnify Gate City against such liens. It also anticipated immediate income from the sale of the homes which would allow it to pay the material providers and release any liens.

5. CC International stood to "benefit in the conduct of its business" by selling the homes to the Borrowers and then repurchasing the homes, with permanent financing in place and reselling them to Kilburn Vacation Home Share.

6. The language that CC International's obligation to indemnify extends to this mortgage should at best be interpreted as making it a surety not a principal obligor.

7. The language that the mortgages were executed by, for or on behalf of CC International, while not technically correct, accurately reflects Cook's view of the transaction since each of the Borrowers entered into the transaction on Cook's inducement and request.

While Appellant does not bear the burden of proving any "reasonable interpretation" of the indemnity agreement, the fact that the questions posed by Borrowers can be answered based on Appellant's view of the facts clearly shows that the indemnity agreements are subject to reasonable interpretations which conflict with the trial court's reading of the indemnity agreements. Therefore, the documents are ambiguous and

summary judgment is inappropriate as a matter of law. W.M. Barnes v. Sohio Natural Resources Co., 627 P.2d 56 (Utah 1981).

#### V. RESPONDENTS BEAR THE BURDEN OF PROOF ON SUMMARY JUDGMENT.

Respondents argue in Section VI of their brief that Gate City had the obligation to come forward with a submission to place in issue the fact that the indemnity agreements were not submitted for each of the moving parties. In support they cite Schaer v. State of Utah, 657 P.2d 1337 (Utah 1983). That case states "where the moving party's evidentiary material is itself sufficient, and the opposing party fails to offer any evidentiary matters when it is in a position to do so. . . ." In the instant case, the moving party's evidentiary material is not sufficient. Borrowers claim that the indemnity agreement is a complete assumption and claimed that all movants are released even though they cannot produce the critical documents for two of the transactions. On a motion for summary judgment, the moving parties have the burden of establishing the facts which entitle them to relief. See, FMA Acceptance Co. v. Leatherby Ins. Co., 594 P.2d 1332 (Utah 1979). Here, Borrowers have failed to meet that burden. Gate City is not in a position to submit an affidavit as to the non-existence of a fact. Appellant simply argued to the trial court as it does here that appellant does not have those documents in its files. The non-existence of the documents in the files of Gate City where they would normally be found creates a reasonable inference that the documents do not exist. It is incumbent upon the Borrowers as moving parties to produce such documents. Borrowers simply could not produce the documents. The affidavit of Vaughn Cook may create an inference that the documents exist, however, to make a determination between two conflicting inferences is not proper on a motion for summary judgment. See, Jackson v. Dabney, 645 P.2d 613 (Utah 1982).

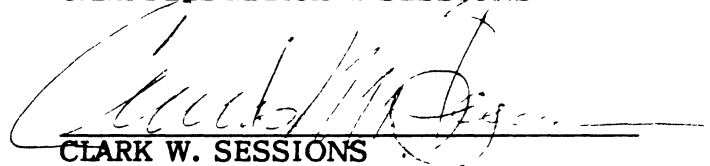
### CONCLUSION

In order to rule as it did, the trial court had to determine that the requirements of paragraph 17 of the trust deed had been met. The first requirement, a written waiver of the right to accelerate, has never been met. Unless this Court finds that this condition is met, it need not determine whether the trial court was correct in ruling that the indemnity agreements constituted clear and unambiguous agreements by CC International to assume complete and full responsibility for payment of promissory notes signed by the Borrowers.

With regard to this second requirement, the language of the indemnity agreement contain patent and latent ambiguities. The intent of the parties in signing the indemnity agreements was clearly placed at issue. The conflicting affidavits of the parties and the other relevant documents submitted to the trial court all create questions of fact regarding Gate City and CC International's intent in entering into the indemnity agreements. These questions of fact may not be determined on a motion for summary judgment, therefore the judgment of the trial court must be reversed.

Respectfully submitted this 26th day of February, 1990.

CAMPBELL MAACK & SESSIONS



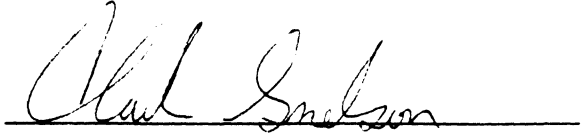
CLARK W. SESSIONS

Attorneys for Plaintiff-Appellant

**CERTIFICATE OF SERVICE**

I hereby certify on the 26th day of February, 1990, I caused to be hand delivered four true and correct copies of the foregoing Reply Brief of Appellant to the following:

Earl J. Peck, Esq.  
John K. Mangum, Esq.  
Douglas K. Pehrson, Esq.  
Jay R. Mohlman, Esq.  
NIELSEN & SENIOR  
Attorneys for Defendants-Respondents  
1100 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "Earl J. Peck", is written over a horizontal line.

## **APPENDIX**

CLARK W. SESSIONS (2914)  
ROY B. MOORE (2308)  
KEVIN EGAN ANDERSON (099)  
SESSIONS & MOORE  
Attorneys for Plaintiff  
400 First Federal Plaza  
505 East 200 South  
Salt Lake City, Utah 84102  
Telephone: (801) 359-4100

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY  
STATE OF UTAH

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GATE CITY FEDERAL SAVINGS  
AND LOAN ASSOCIATION,

Plaintiff,

vs.

EDWARD A. DALTON, JR., JOHN C.  
FORRESTER, JR., MICHAEL C.  
JOHNSEN, and DANIEL W. MARCUM,  
et al.,

Defendants.

AFFIDAVIT OF  
BLAISE P. JOHNSON

Consolidated Case No. 8074

EDWARD A. DALTON, JR., JOHN C.  
FORRESTER, JR., MICHAEL C.  
JOHNSEN, and DANIEL W. MARCUM,  
et al.,

Counterclaimants,

v.

GATE CITY FEDERAL SAVINGS AND  
LOAN ASSOCIATION,

Counterclaim Defendant.

(8075)

(8076)

(8077)

(8078)

(8079)

(8080)

(8081)

(8082)

(8119)

(8120)

STATE OF NORTH DAKOTA)  
COUNTY OF CASS                   : ss.  
  )

I, Blaise P. Johnson, being first duly sworn state as follows:

1. I am an officer of Gate City Mortgage Company.
2. The Indemnity Agreement form attached is a standard, pre-printed form, used by Gate City Mortgage Company to obtain indemnification on mechanics and/or materialmens liens.
3. As of the date of each of the Indemnity Agreements involving the subject Jeremy Ranch properties, no mortgage loans had been made to C.C. International or Vaughn Cook by Gate City Mortgage Company.
4. The Indemnity Agreements covering the subject Jeremy Ranch properties do not reflect that C.C. International or Vaughn Cook had, or was thereby, assuming the obligation on the Jeremy Ranch mortgage loans made to the Defendants in the above-captioned matter, secured by the subject Jeremy Ranch property.
5. As of the date of the execution of each of the Indemnity Agreements covering the subject Jeremy Ranch properties, neither C.C. International nor Vaughn Cook had <sup>By</sup> ~~not~~ applied for assumption of the subject Jeremy Ranch mortgage loans.
6. Standard forms are used to accomplish an assumption. These forms clearly state whether or not the original borrower is released from liability on the loan. (see Exhibit "B" attached).



7. The Indemnity Agreement form is not used to evidence an assumption. It is used simply to insure that the indemnitor, here C.C. International, would indemnify Gate City for mechanics or materialmens liens on the properties.

DATED 3rd day of February, 1989.

Blaise P. Johnson  
BLAISE P. JOHNSON

SUBSCRIBED AND SWORN to before me this 3rd day of February, 1989.

Sandra H. Bergquist  
NOTARY PUBLIC  
Residing at: West Fargo, North Dakota

My Commission Expires:

SANDRA H. BERGQUIST  
Notary Public, STATE OF NORTH DAKOTA  
My Commission Expires JUNE 2, 1994

INDEMNITY AGREEMENT

THIS AGREEMENT made and entered into this 30th day of December 1981 by and between C. C. International hereinafter referred to as Party of the First Part and Gate City Mortgage Company, hereinafter referred to as Party of the Second Part.

WITNESSETH

WHEREAS, Party of the First Part has obtained from the Party of the Second Part a first mortgage loan for the principal balance of \$200,000.00 on the following described property:

All of Lot 48, The Jeremy Ranch Plat No. 1, according to the official plat thereof, recorded in the office of the Summit County Recorder.

Subject to and together with a right of way for the purpose of ingress and egress over those roadways as designated on the official plat of Jeremy Ranch Plat No. 1, as recorded in the Summit County Recorder's office, as Entry No. 157211.

Situate in Summit County, State of Utah.

and such property is now subject to mechanics' and/or materialmen's liens insofar as the time for filing the same is concerned and it is the desire of the Party of the First Part that such mortgage shall be executed without showing therein an exception for such possible liens, and the Party of the Second Part is not agreeable thereto unless the Party of the First Part shall guarantee the discharge of such liens.

NOW, THEREFORE, in consideration of the premises and the additional liability Party of the Second Part will sustain by reason of omitting to state, as an exception in such mortgage the interest of mechanics' and/or materialmen's lien holders (or possible lien holders), and in consideration of the benefit of the Party of the First Part in the conduct of its business by reason thereof, Party of the First Part guarantees and agrees as follows:

That if the Party of the Second Part shall omit from such mortgage an exception concerning more of such liens, filed or unfilled, and one or more such mechanics' and/or materialmen's liens, is, has been or may thereafter be filed or secured on the insured premises effective or relating back to a date prior to the date of the policy, then, upon written demand of the Party of the Second Part, the Party of the First Part agrees to promptly secure the discharge of all such liens.

In the event Party of the First Part fails to promptly discharge all such liens, then Party of the Second Part may pay, compromise, settle or discharge such liens and recover from the Party of the First Part such amounts so paid.

Party of the First Part agrees upon demand to indemnify Party of the Second Part for any loss (including but not limited to amounts paid in discharge of the lien, expenses of investigation, preparation for litigation, judgment, court costs, and attorney's fees) it may sustain by reason of omitting to set out such lien(s) as an exception in the mortgage executed hereunder or by reason of enforcement of this agreement. The obligation of the Party of the First Part in this agreement shall extend to the mortgage executed by, through, or for the Party of the First Part of assigns on the above premises.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

Gate City Mortgage Company

By Stanley F. Jenkins  
Party of the Second Part

C. C. INTERNATIONAL  
Vaughn Cook  
Party of the First Part

Party of the First Part

EXHIBIT

# Gate City Mortgage Co.

## ASSUMPTION AGREEMENT

THIS AGREEMENT made on the date hereinafter set forth opposite the signatures of Vendor and Purchaser, by and between: Donald Lewis Smith, a married man and Jedd P. Jones, a married man ..... hereinafter called Vendors, and Kilburn Vacation Home Share Inc. .... hereinafter called Purchasers, of property located at 8825 West Silver Spur Road

WHEREAS Gate City Mortgage Co. .... is the owner and holder of a certain note dated 12-09-81 ..... executed and delivered by Vendors or their predecessors in interest to Gate City Mortgage Co. ....

in the principal amount of \$ 200,000.00 ..... secured by a mortgage executed and delivered by Vendors or their predecessors in interest and recorded in Book M209... of ..... at Page 29-33 in the Summit, ..... County Recorder's office, State of Utah ..... as Document No. 187721

WHEREAS, Vendors represent that all regular required monthly installment payments heretofore due and owing under the note and mortgage have been paid and that all other obligations to be performed prior to the date hereof under the terms of the note and mortgage have been performed, and that the unpaid balance of the loan as of ..... is \$ ..... with interest paid to .....

WHEREAS, Purchasers have purchased or are now purchasing from Vendors the property covered by said Mortgage:

NOW, THEREFORE, the said parties, in consideration of the premises and of their mutual promises as herein set forth, do agree as follows:

Purchasers assume and agree to pay said note as therein provided, and further to assume all the obligations of said mortgage as therein provided, and to perform in accordance with the covenants and conditions thereof.

It is understood that Mortgagee does not release Vendor or Vendors from further liability under or on account of the said note and mortgage.

Vendors hereby transfer to Purchasers, subject to the conditions of the mortgage pertaining to same, all their right, title and interest in the policy of hazard insurance and in the funds on deposit in escrow as payment for taxes and hazard insurance premium, and mortgage insurance premium, in connection with said mortgage.

The word "note" as used herein shall be construed to mean note, bond or other instrument evidencing the indebtedness herein referred to. The word "mortgage" as used herein shall be construed to mean mortgage, deed of trust, or other instrument securing the indebtedness herein referred to. The word "Mortgagor" shall include Trustor, and word "Mortgagee" shall include Beneficiary under a deed of trust.

IN WITNESS WHEREOF, this instrument has been executed by the parties hereto on the dates set forth opposite their names.

Dated .....

 5/8/12/82  
Donald Lewis Smith Vendor

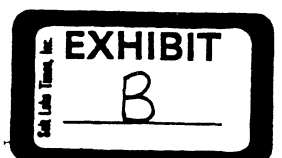
  
Jedd P. Jones Vendor

Dated .....

.....  
Purchaser

.....  
Purchaser

(over)



021013