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Utah Court of Appeals

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DOCKET NO. 89-498 CA

IN THE UTAH COURT OF APPEALS

GATE CITY FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff-Appellant, v. EDWARD A. DALTON, JR., JOHN C. FORRESTER, JR., MICHAEL C. JOHNSEN, and DANIEL W. MARCUM, et al., Defendants-Respondents.	APPELLANT'S BRIEF Docket No. 89-498-CA PRIORITY CLASSIFICATION NO. 14(b)

Appeal of an Order of the Third District Court of Summit County, Judge J. Dennis Frederick.

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FILED
OCT 24 1989
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

GATE CITY FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff-Appellant, v. EDWARD A. DALTON, JR., JOHN C. FORRESTER, JR., MICHAEL C. JOHNSEN, and DANIEL W. MARCUM, et al., Defendants-Respondents.	:	APPELLANT'S BRIEF Docket No. 89-498-CA PRIORITY CLASSIFICATION NO. 14(b)

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LIST OF ALL PARTIES TO THE PROCEEDING

The following is a complete list of all persons and entities which are currently parties to the proceeding before the Court. Plaintiff, Gate City Federal Savings and Loan Association, is a National Association with its principal place of business in Fargo, North Dakota. Defendants are Daniel W. Marcum, Dr. Edward A. Dalton, Jr., Michael C. Johnsen, John C. Forrester, Jr., Graham Dodd, Dwight H. Eagan, Christian E. Hansen, David E. Jones, Matthew R. White, R. John Eyre, Kelvyn H. Cullimore, Thomas G. Osborne, W. Truman Rigby, Donald L. Smith, Jedd P. Jones, Clive A. Pusey, Dennis L. Crockett, Steven L. Blazer, O. Jay Call, Marden Spencer, Kenneth P. Colledge, J. Ray Fisher, John C. Forrester, Marvin L. Mills. In addition to the parties above named there were in the lower Court additional parties named as defendants in each of the original eleven foreclosure actions. These parties were owners of time share interests in the properties and have either stipulated to judgment or had a default judgment entered against them, which judgments are not before the Court on this appeal. A complete list of these parties is contained in the original eleven case headings included in the Appendix as Exhibit "A."

Dear Ms. Noonan:

As counsel for Respondents in the appeal named above, we wish to supplement our brief filed December 22, 1989, with the following case citation which just came to our attention. The case is Parrish v. Richards, 8 Utah 2d 419, 336 P.2d 122 (1959). This supplemental authority addresses the issue of ejusdem generis addressed in Point VII(E), found at pages 45-46 of the brief of respondents.

Sincerely,

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John K. Mangum

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cc: Clark W. Sessions, Esq.

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RE: Citation of supplemental authority for Gate City Federal Savings & Loan Association v. Edward A. Dalton, Jr. et al., Docket No. 89-498-CA, Priority No. 14b

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STATEMENT OF JURISDICTION

Jurisdiction of this appeal lies with the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1987), this case having been transferred to the Court of Appeals on August 21, 1989, at the direction of the Utah Supreme Court.

NATURE OF THE PROCEEDINGS

This is an appeal of the Summary Judgment granted to Defendants by the Third Judicial District Court, Judge J. Dennis Frederick presiding.

ISSUES ON APPEAL

1. Did the Trial Court err in determining, as a matter of law, that documents entitled "Indemnity Agreement," each of which, on its face, stated that its purpose was to indemnify the lender from mechanics' liens filed against the properties securing the Promissory Notes, constituted a written promise by a third person to assume liability for each of the loans in question?

2. Did the Trial Court err in ruling as a matter of law that the Indemnity Agreements constituted unambiguous assumption agreements, accepted in writing by Plaintiff, which, under the terms of the Promissory Notes, would serve to release the Defendants from all liability for repayment of the Promissory Notes?

3. Did the Trial Court err in ruling that the conflicting Affidavits, Depositions and pleadings filed with the Trial Court

did not raise or reveal genuine issues of material fact regarding the intent of the parties to the Indemnity Agreements?

4. Did the Trial Court err in construing the Indemnity Agreements to have an effect that was not apparent from the language of the agreements and was in direct conflict with the expressed intent of the parties to the agreements, and the actions of Defendants?

5. Did the Trial Court err in finding a novation?

6. Did the Trial Court err in ruling as a matter of law that there were no genuine issues of material fact in dispute and that Defendants were thereby entitled to Judgment as a matter of law?

7. Did the Trial Court err in finding that the Indemnity Agreements satisfied all the requirements of a release?

DETERMINATIVE PROVISIONS

The determinative provisions are Utah Code Ann. § 57-15-8 and Rule 56 of the Utah Rules of Civil Procedure. See Appendix I.

STATEMENT OF THE CASE

Plaintiff filed eleven separate civil actions seeking judicial foreclosure of trust deeds executed by Defendants. The properties were sold pursuant to stipulation and Plaintiff is pursuing the resulting deficiencies from Defendants. On motion of Defendants, strongly opposed by Plaintiff, the Trial Court granted an order consolidating the eleven individual actions. Twenty of the twenty-

three Defendants moved for Summary Judgment against Plaintiff alleging that there had been an assumption of liability by C.C. International and a release of Defendants by Plaintiff. By Minute Entry dated February 15, 1989 (See Appendix "B") Judge J. Dennis Frederick granted said Defendants' Motion for Summary Judgment. Defendants Jedd P. Jones, O. Jay Call and Kenneth B. Colledge did not join in the Motion and were not included in the Judgment. Plaintiff brought a motion for reconsideration which was heard on April 18, 1989. On reconsideration the Trial Court affirmed its Order granting Summary Judgment. In its Judgment entered April 28, 1989 (See Appendix "C") the Trial Court certified its ruling as final pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. Plaintiff filed a Notice of Appeal with the Utah Supreme Court on May 22, 1989. Pursuant to notice dated August 21, 1989, the Utah Supreme Court assigned the case to the Utah Court of Appeals for determination.

STATEMENT OF FACTS

In December of 1981 Plaintiff, Gate City Federal Savings and Loan Association, made eleven separate loans to groups of one or more of the Defendants for the purchase of newly constructed residential properties located at Jeremy Ranch in Summit County, Utah. At the time the loans were made the time for filing mechanics' and materialmen's liens had not expired. Record at

1340. Some of the Defendants qualified for the loans based on their individual financial strength; others combined in groups of two or more. Record at 593. Upon closing, Defendants received deeds to their respective properties from C.C. International, a company owned and operated by the builder and developer of the subject Jeremy Ranch properties, Vaughn Cook. Record at 1339. Defendants resold their properties to C.C. International pursuant to Uniform Real Estate Contracts. Deposition of Vaughn Cook 12-6-88 at p. 301.

C.C. International resold the properties to Kilburn Vacation Homeshares Inc., for the development of "homeshare" timeshare condominiums. Deposition of Vaughn Cook 11-21-88 at p. 99 and Deposition of 12-6-88 at p. 387-388. The homes were sold to C.C. International rather than directly to Kilburn to allow C.C. International to recover money it had coming from Kilburn. Cook Deposition of 12-6-88 at p. 387.

It was the understanding of Defendants that Kilburn would assume responsibility for payment of the Promissory Notes in a two-step process. Deposition of Vaughn Cook of 11-21-88 at p. 84. The first step would be a simple assumption which would not release Defendants on their obligations on the Notes. Deposition of Vaughn Cook of 12-6-88 at p. 274. This assumption is evidenced by the assumption agreements executed by each of the Defendants which

clearly state that the Defendants were not released from liability. Appendix "G". The second step was to be a formal application by Kilburn to assume Defendants' loans and have them released from liability. Cook Deposition of 12-6-88 page 275. This second step never occurred. Cook Deposition 12-6-88 at page 283. Timeshare condominium units were sold and payments were made on the loans for approximately two years. Record at 831. During that time, no application was received by Gate City for an assumption of the loans whereby Gate City would accept the credit and financial strength of the assuming party and release Defendants from liability. Record at 851.

When the Notes went into default in the spring of 1984, Notices of Default were sent to the Defendants. Record at 831. The defaults were not cured, and Plaintiff filed eleven separate actions seeking judicial foreclosure of the Trust Deeds securing the Promissory Notes. Record at 991. The properties were sold pursuant to stipulation. Record at 300. Each of the sales resulted in a substantial deficiency which was pursued by Plaintiff in the eleven separate foreclosure actions. Record at 309. Defendants brought a motion to consolidate the eleven individual actions. Record at 245. Defendants' motion was granted over Plaintiff's objections that it would be prejudiced by allowing consolidation. Record at 498. Following consolidation and prior

to the scheduled trial date, twenty of the twenty-three Defendants, representing nine of the eleven individual actions, filed a Motion for Summary Judgment. Record at 709. After hearing and argument the Trial Court, by Minute Entry dated February 15, 1989, ruled that a document entitled "Indemnity Agreement" executed by Plaintiff and C.C. International, which stated that C.C. International would indemnify Gate City from mechanics' liens filed against the properties, was "an unambiguous assumption agreement." Record at 935. The Trial Court also determined that Gate City had waived its right to accelerate under each of the Promissory Notes and that the waiver, coupled with the Indemnity Agreement, released Defendants' from liability pursuant to the terms of the Promissory Notes and Trust Deeds. Record at 935.

Plaintiff's motion to have the Trial Court reconsider its decision was granted. Record at 1417. On reconsideration, the Trial Court affirmed its earlier ruling and certified its judgment as final pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. Record at 1513. Gate City appeals from that final judgment.

SUMMARY OF ARGUMENT

The Trial Court attempted, by ruling "as a matter of law," to avoid the myriad of factual issues raised by the pleadings, affidavits and depositions of the parties. In so doing, the Trial

Court erred in several fundamental respects. First, the Trial Court's interpretation of the document entitled "Indemnity Agreement" as an assumption agreement is wrong. This Court may interpret that document without any deference to the construction placed on it by the Trial Court.

Second, the Trial Court erred in ruling that the document is unambiguous. An unambiguous document is subject to only one interpretation. Without reading any further, Appellant invites this Court to simply refer to the Indemnity Agreement included in the Appendix as Exhibit "D" and, upon reading that document, determine if it is unequivocally clear that C.C. International therein agrees to assume Defendants' obligations to repay Promissory Notes to the Plaintiff in excess of $2,000,000. Plaintiff submits that not only is this meaning not clear from the language of the Indemnity Agreement, but that the language itself does not even imply such a result.

Third, in basing its ruling solely on the four corners of the document, the Trial Court erred by ignoring the numerous facts, circumstances, actions and statements which evidence that the understanding and intent of all the parties in entering into the Indemnity Agreement was inconsistent with the Trial Court's interpretation.

Fourth, reference to other relevant documents executed contemporaneously is necessary and proper in determining whether a release had occurred. These documents are inconsistent with the Trial Court's ruling and raise factual questions which preclude summary judgment.

Fifth, there exist genuine issues of material fact which preclude the interpretation of the Indemnity Agreement in the manner interpreted by the Trial Court and preclude summary judgment as a matter of law.

Finally, even if the Indemnity Agreements are unambiguous assumption agreements, all the requirements for a release have not been met.

ARGUMENT

I.

THE COURT ERRED IN ITS INTERPRETATION OF THE INDEMNITY AGREEMENTS.

In order to find Defendants had been released under the terms of the Promissory Notes and Trust Deeds the Court had to find that Defendants' successor in interest had executed a written assumption agreement, accepted in writing by Plaintiff. The clear language of the Indemnity Agreements does not support this interpretation.

The Defendants' arguments interpreting the language of the Indemnity Agreements to be an "Assumption Agreement" are like a

magician's sleight-of-hand designed to distract his audience while making them believe they see something that does not exist. On Page 26 and 27 of the transcript of Defendants' Motion for Summary Judgment (Record at 1476) Defendants present the following argument:

> How did C.C. International get involved in this? It says that, "Whereas party of the first part," that's C.C. International, "has obtained from party of the second part," that's Gate City, "a first mortgage loan, has obtained a first mortgage loan for the principal balance of $200,000 on the following described property," how did C.C. International obtain this mortgage?
>
> The language, your Honor, that answers that question is contained at the bottom of the agreement. I've marked it. It says, "The obligation of the party of the first part," that's C.C. International, "in this agreement . . . ." Now, I've got to stop there and say, what is the obligation of the party of the first part? Well, it's contained right in that same paragraph and I've marked that in yellow. "Party of the first part," that's C.C., "agrees upon demand to indemnify party of the second part for any loss," and then skipping the irrelevant language, "it may sustain by reason of admitting to set out such liens," so that part of the language is talking about indemnity for the liens, but this next language then, the obligation. What obligation? The obligation to indemnify of C.C. International in this agreement shall extend to the mortgage, not such the liens. "It shall extend to the mortgage which has been executed by," by whom? "By C.C. International through," through whom? "Through C.C. International or for," for whom? "C.C. International, for the party of the first part," which is C.C. International, "of assigns," and I submit that might be a misprint, the assigns there, "on the above premises."
>
> The language is clear.

Defendants' argument is that C.C. International agrees to assume full and complete responsibility for repayment of each Defendant's personal obligation on each $200,000 Promissory Note.

Slowed down and analyzed, we can see that what the Defendants would have us believe, like the magician's illusion, is not reality. Defendants would have us believe that the "obligation" C.C. International undertakes in the Indemnity Agreement is to pay --period; and, that the obligation extends to the mortgage.

Defendants explain that the "obligation of the party of the first part" is to " 'indemnify the party of the second part for any loss,' then skipping the irrelevant language . . . ." The "irrelevant language" that Defendants would have us ignore is the heart of the agreement. It states:

> 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," C.C. International, is set forth more fully in the fourth paragraph of the Indemnity Agreement as follows:

> that if the Party of the Second Part shall omit from such mortgage an exception concerning one or more of such liens, filed or unfiled, 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, <u>the Party of the First Part agrees to promptly secure the discharge of all such liens</u>.

Simply stated, the Indemnity Agreement provides that Gate City will exclude exceptions for mechanics' liens and that C.C. International "agrees to promptly secure the discharge of all such liens", and to indemnify Gate City for any loss it may sustain "by reason of omitting to set out such lien(s) as an exception in the mortgage . . . ." <u>That</u> is the obligation of the Party of the First Part, nothing less, nothing more.

Defendants' argument, like the magician's trick, requires reliance on the obscure out of the context of the document as a whole, rather than reliance on the clear language and intent expressed by the Indemnity Agreement. Defendants would have the Court interpret one obscure provision by reference solely to another, creating a hall of mirrors in which reality is lost among the reflections. The Trial Court accepted Defendants' explanation of what are the only obscure passages in the document rather than read the document line by line to determine its meaning and the intent of the parties.

Plaintiffs ask this Court to read the Indemnity Agreement attached as Appendix "D" line by line and to interpret that agreement as a matter of law. In so doing this Court owes no deference

to the Trial Court's determination. Mountain Fuel Supply Co. v. Salt Lake City, 752 P.2d 884 (Utah 1988). The question to be determined is whether the Trial Court's interpretation of the Indemnity Agreement as an unambiguous assumption agreement, accepted in writing by Plaintiffs, was correct. Scharf v. BMG Corp., 700 P.2d 1068 (Utah 1985); Olwell v. Clark, 658 P.2d 585 (Utah 1982). If this Court determines that the Trial Court's determination was in error the Trial Court's award of summary judgment must be reversed.

II.

THE TERMS OF THE INDEMNITY AGREEMENTS ARE AMBIGUOUS

Although Plaintiff argues that the lower court's interpretation of the Indemnity Agreement finds no support in the language thereof, this Court need merely find that the language is subject to differing interpretations in order to reverse the lower court's ruling on summary judgment. See Macaruso v. Republic National Bank, 543 S.W.2d 211 (Tex. Civ. App. 1976); R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc., 596 S.W.2d 517 (Tex. 1980).

Had this been a bench trial, the Trial Court would have been free to accept one conflicting interpretation over another. However, this matter came before the Trial Court on Defendants' Motion for Summary Judgment. Ambiguity in a written instrument is sufficient in and of itself to make summary judgment inappropriate.

Frisbee v. K & K Construction Co., 676 P.2d 387, 390 (Utah 1984); AMJACS Interwest, Inc. v. Design Associates, 635 P.2d 53 (Utah 1981). The Trial Court sought to avoid the problems created by ambiguity in the document by ruling that the document itself is unambiguous. However, if a contractual provision is reasonably subject to differing interpretations, its meaning is a question of fact which precludes summary judgment. Kerr Land & Livestock, Inc. v. Glaus, 107 Idaho 767, 692 P.2d 1199 (Ct. App. 1984); Dennis v. Searle, 457 So.2d 941 (Miss. 1984). In any case where there is any doubt about the meaning of a written instrument there arise issues of fact to be litigated and summary judgment is inappropriate. Weaver v. Blue Cross-Blue Shield of Wyoming, 609 P.2d 984 (Wyo. 1980).

In the instant case, it is clear that the relevant provisions of the Indemnity Agreements are subject to conflicting interpretations.

The next-to-last sentence of the Indemnity Agreements states:

> 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.

This language is the lynch pin of Defendants' argument. It is not an exemplary model of clarity of expression. To say that it is

intelligible is generous. To say that it is an expression of the parties' intent which is clear and unambiguous is error.

Courts have used various tests in determining the existence of an ambiguity within a document. While expressed differently, the central element is the possibility that the document is susceptible to conflicting interpretations. See DeLancey v. DeLancey, 110 Idaho 63, 714 P.2d 32 (1986); Newman v. Associated Systems, 107 Idaho 922, 693 P.2d 1124 (Ct. App. 1985); Ramsey v. Sedlar, 75 Wash. 2d 901, 454 P.2d 416 (1969). The Oregon Court of Appeals has stated that a "contract term is ambiguous if it has no definite significance, or if it is capable of more than one sensible and reasonable interpretation." Oakridge Cable Vision Inc. v. First Interstate Bank, 65 Or. App. 640, 673 P.2d 532 (1983). Stated positively, a term is unambiguous if it is so clear as to preclude doubt by a reasonable man of its meaning. Western Alliance Corp. v. Western Reliance Corp., 57 Or. App. 263, 643 P.2d 1382 (1982). The Wyoming Supreme Court has held that an ambiguous contract is an agreement which is obscure in its meaning because of indefiniteness of its expression or because of the presence of a double meaning. Farr v. Link, 746 P.2d 431 (Wyo. 1987). Measured by any standard, the language relied upon by the Trial Court is ambiguous.

The language is capable of several reasonable interpretations different from the one imposed on it by the Trial Court. A fair reading of the above-quoted language would be that the obligation of C.C. International (to indemnify Gate City from any mechanics' liens as stated in Point I, Supra) shall extend to the above-mentioned mortgage, meaning that C.C. International's duty to indemnify runs not to the owner of the property, but rather to the holder of the security interest. This reading of the language draws nothing from outside the four corners of the document and is in perfect harmony with the language and expressed intent of all of the pre-printed sections which precede it. A third interpretation of this language would be that the obligation of C.C. International contained in this agreement, the "Indemnity Agreement", shall run with the land, thus the reference to "of assigns on the above premises." Another possible meaning is that C.C. International's duty to indemnify from mechanics' liens extends to the mortgage executed by Defendants as assigns of C.C. International. These interpretations do not exclude the possibility of still different and conflicting interpretations of the language. Any of the above readings and interpretations of the critical language is as reasonable as the one given by the Trial Court.

The term "of assigns of the above premises" appears to have no definite significance, or is, at best, unclear in its expres-

sion. One may speculate that the language contained a typographical error, and attempt to replace one or more of the words with a word which fits one's own particular interpretation, as Defendants do. Record at 1476 at 27. Or, one may choose to simply ignore certain words, phrases, or clauses. However, if one must resort to changing or ignoring the language of the Agreement, that is a clear indication that the words as written are not clear, unambiguous expressions of the parties' intent. Words cannot be read into an agreement which impart meaning wholly unexpressed when the agreement was executed. Cline v. Angle, 216 Kan. 328, 532 P.2d 1093 (1975).

The language used at the beginning of the Indemnity Agreement reads as follows:

> Whereas the 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 on the following described property. . . .

While this particular language may appear unambiguous on its face, significant latent ambiguities exist. It is an undisputed fact that C.C. International did not obtain loans from Gate City for $200,000 on the properties described.

A statement of fact in the recitals of an agreement which is clearly inaccurate gives rise to questions regarding the intent and understanding of the parties at the time they entered into the

agreement. See Ebert v. Dr. Scholl's Foot Comfort Shops, Inc., 92 Ill. Dec. 323, 484 N.E.2d 1178 (1985); Chargois v. Trip-L-Quik, 441 So.2d 45 (La. Ct. App. 1983); Griffin Builders Supply, Inc. v. Jones, 384 So.2d 265 (Fla. Ct. App. 1980).

The use of the term "mortgage" in the document also creates ambiguity. Mortgage is a term of art describing a method of securing an indebtedness. It has particular characteristics set forth by statute. Utah Code Ann. § 78-40-8 (1987). It is undisputed that there were no mortgages granted by C.C. International, for C.C. International, or on behalf of C.C. International with regard to any of the eleven properties which are the subjects of this action. The only security devices used on the loans made were the Promissory Notes and Trust Deeds executed by Defendants. Therefore any references to "mortgages" is inaccurate and creates uncertainty in meaning.

When latent ambiguities exist the Court, of necessity, must resort to extrinsic evidence of the parties' intent. See Macaruso v. Republic National Bank, 543 S.W.2d 211 (Tex. Civ. App. 1976). Since the language as written clearly, unequivocally, and undeniably contains inaccurate statements of fact, the Court must look outside the document to ascertain the true facts and determine from those facts, and the circumstances surrounding the transaction, the true intent of the parties.

III.

THE INTENT OF THE PARTIES CREATES AMBIGUITY.

Defendants argued at the hearing on their Motion for Summary Judgment that the Court could rely on the four corners of the document without reference to any expressions of the parties' intent. Record at 1476 transcript pages 27 and 28. This argument is clearly in error. The Court's purpose in reviewing a document is to determine the parties' intent. Bennett v. Robinson's Medical Mart, Inc. 18 Utah 2d 186, 417 P.2d 761 (Utah 1966). In the instant case, Defendants seek to impose their own strained construction on an agreement to which they were not parties in an effort to avoid an obligation they voluntarily entered into for profit.

The Trial Court in reviewing a document errs when it ignores clear evidence of the parties' intent, even when the language of the document seems clear. It is a universally recognized principle of law that, where an instrument, such as deed, absolute on its face and unambiguous in its terms, was intended by the parties to provide security rather than to transfer title, the Court will allow parole evidence of the parties' intent and construe the instrument accordingly. The Utah Supreme Court has repeatedly held that when all parties to a writing understood, intended and treated it as something inconsistent with its express terms, that creates

an ambiguity that must be resolved by parol evidence of the parties' intent. Jacobsen v. Jacobsen, 558 P.2d 156 (Utah 1976); Hansen v. Kohler, 550 P.2d 186 (Utah 1976); Taylor v. Turner, 27 Utah 2d 39, 492 P.2d 1343 (1972); Gibbons v. Gibbons, 103 Utah 266, 135 P.2d 105 (1943); Thornley Land and Livestock Company v. Gailey, 105 Utah 519, 143 P.2d 283 (1943).

In such cases, where the Trial Court has refused to consider extrinsic evidence of the parties' intent, but determined intent solely on the basis of the express language of the documents, the Supreme Court has reversed stating: "Documentary evidence is not dispositive if the intent and purpose underlying the documents are at issue." W.M. Barnes Company v. Sohio Natural Resources Co., 627 P.2d 56 (Utah 1981). In Sohio, the Trial Court awarded summary judgment based on documents that were admittedly absolute and unambiguous in their terms. The Supreme Court reversed stating that a question of material fact remained regarding the parties' intent, because the parties' purpose, intent and understanding in executing the documents was contrary to their express language.

In Colonial Leasing Company v. Larsen Brothers Construction, 731 P.2d 483 (Utah 1986), the Utah Supreme Court extended and affirmed this rule of construction, recognizing that "ambiguity" requiring parol evidence of intent may arise despite the otherwise unambiguous language of an agreement.

> It is the general rule that if an agreement is ambiguous because of lack of clarity in the meaning of particular terms, it is subject to parole evidence as to what the parties intended with respect to those terms. We hold that the rule also applies where the character of the written agreement itself is ambiguous even though its specific terms are not ambiguous.

Id. (Citations omitted) (Emphasis added).

An ambiguity or dispute regarding the "character" of an agreement, turns on the intent, understanding and expectations of the parties concerning the nature, purpose and effect of the agreement as opposed to the interpretation or clarity of a specific term or clause thereof. Whether this ambiguity of "character" involves a deed/mortgage as in Barnes v. Sohio, supra, a sale/lease agreement as in Colonial, or an indemnity agreement/assumption as in the instant case, the relevant issue is not the clarity of the language of the agreement per se, but the underlying understanding of the parties concerning its nature, purpose and effect on the parties' rights and obligations. Resort simply to the express language of the document cannot resolve that ambiguity, since it arises from the intentions, understanding and expectations of the parties inconsistent with the document's language.

This rule of law was also recognized in Bullough v. Sims, 16 Utah 2d 304, 400 P.2d 20 (1965). The Bullough Court explained that even if the express language of a contract, standing alone, would

mean one thing to the Court, where the parties demonstrated that they understood it to mean something else, the meaning and the intent of the parties should be enforced.

> Here the contracting parties demonstrated by their actions that they knew what the words meant and were intended to mean. Thus, even if it be assumed that the words standing alone might mean one thing to the members of this Court, where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent of the parties should be enforced. In such a situation the parties, by their actions, have created the 'ambiguity' required to bring the rule into operation. If this were not the rule, the Courts would be enforcing one contract when both parties have demonstrated that they meant and intended the contract to be quite different. [Emphasis added].

The rationale for this rule is very basic. The Court's primary objective in viewing a document purported to be an agreement between two parties is to ascertain the intent of the parties in entering the agreement. Verhoef v. Aston, 740 P.2d 1342 (Utah Ct. App. 1987). The Court must do more than simply determine the language of the agreement and its legal implications; it must also determine the mutual understanding of the parties, for there can be no agreement absent mutual understanding and assent. Cargill v. Sherrod, 96 N.M. 431, 631 P.2d 726 (1981).

The intent, understanding and expectation of the parties to the Indemnity Agreement is demonstrated by the numerous statements

and actions of C.C. International, and its owner and president, Vaughn Cook, and Gate City Mortgage Company. Certain of those statements and actions include:

1. Vaughn Cook stated in his affidavit, filed in opposition to the Defendants' Motion for Summary Judgment, that neither he nor C.C. International intended to assume the loan obligations of the Defendants; applied or otherwise requested to assume those loan obligations; nor understood or considered that they had assumed those loan obligations. Record at 851.

2. At the time of closing on each of the subject loans, Mr. Cook advised the Defendants that they would remain liable on the obligations until they were assumed by Kilburn Vacation Homeshare, Inc., a corporation owned by James Clark, and that such assumption would occur sometime <u>after</u> the closing on the loan obligations. (Deposition of Vaughn Cook of 11-21-88 at pp. 83, 165).

3. At the time of the closings on the subject loans, Mr. Cook presented to the Defendants an agreement entitled "Assumption Agreement" to be executed by the Defendants, and to be executed subsequently by Kilburn Vacation Homeshares, Inc., whereby Kilburn Vacation Homeshares, Inc. would agree to assume the loan obligations of the Defendants. Those Assumption Agreements, executed by each of the Defendants, specifically provide that the Defendants

would not be released from ongoing liability to Plaintiff on the subject loan obligations. Record at 855.

4. In August of 1982, nearly nine months after execution of the Indemnity Agreements, Vaughn Cook sent a letter to Defendant Michael Johnson, a copy of which is attached to the Second Affidavit of Vaughn Cook Record at 1003 (Appendix "E"), requesting that Mr. Johnson execute the aforesaid "Assumption Agreement."

5. In June of 1984, Vaughn Cook sent a letter to Gate City Mortgage Company, a copy of which is attached to the Second Affidavit of Vaughn Cook Record at 1003 (Appendix "E"), stating that the loan obligations of the Defendants were to be assumed by Kilburn Vacation Homeshares, Inc., but that the assumption had never occurred.

6. Several of the Defendants received letters from Vaughn Cook advising them that Kilburn was the party responsible for assuming the loan obligations and/or providing Defendants with guarantees of that fact. Record at 1395, (And are also identified by the Defendants in certain of their depositions. John Eyre Deposition at 51-53; Ray Fisher Deposition at 25-27; John C. Forrester, III Deposition at 33-36; Christian E. Hansen Deposition at 96-98; David E. Jones Deposition at 50-51; Daniel W. Marcum Deposition at 27; Marvin LeRoy Mills Deposition at 59-60; and

Thomas G. Osborne Deposition at 39.) Those letters and guarantees are attached hereto as Appendix "H."

7. In his deposition, Vaughn Cook stated that his understanding of the nature, purpose, and effect of the Indemnity Agreements was that they would indemnify Gate City Mortgage Company from mechanics' liens on the properties securing the loan obligations. (Deposition of Vaughn Cook of 12-6-88 at 305).

8. Stephen Blazer, the Defendant whose Indemnity Agreement was attached to the Defendants' Motion for Summary Judgment, and on which the Court based its Ruling, testified that Vaughn Cook told him that the subject Indemnity Agreement covering his lot in Jeremy Ranch did not act as an assumption of his loan obligation to Gate City, or release him from his liability to Gate City. Kilburn Vacation Homeshares, Inc. was to assume the obligation. (Deposition of Stephen Blazer at Page 117 - 129).

9. Gate City Mortgage Company, through the Affidavit of Blaise Johnson, its officer, stated that it never agreed, nor intended to agree to permit Vaughn Cook or his company C.C. International, to assume the subject loan obligations, nor did Vaughn Cook or C.C. International ever apply to assume such loan obligations. Gate City's intent and understanding in executing the Indemnity Agreement was that C.C. International, would indemnify

Gate City from any mechanics' liens filed on the properties securing the subject loans. Record at 958.

10. When the loans went into default in the spring of 1984, Gate City recorded Notices of Default reflecting that the Defendants were in default on the loans and demanding that they cure any default. Copies of those notices to the Defendants were sent to them at the addresses specified in the subject Trust Deeds. Record at 577.

11. Gate City never prepared, recorded or mailed notices of default reflecting that C.C. International had defaulted on any obligation it had with respect to the subject loans, or demanding that it cure such defaults. Record at 577.

12. Gate City commenced the eleven actions consolidated in the above-captioned matter against each of the Defendants on their subject loan obligations. Vaughn Cook and C.C. International were not named as Defendants in those actions, nor has any deficiency action been brought against them by Gate City on those loan obligations. Record at 550.

The actions and statements of the parties to the Indemnity Agreement, C.C. International, and Gate City, clearly demonstrate that neither party intended the Indemnity Agreement to do anything more than to indemnify Gate City for mechanics liens. Nothing in the conduct of the parties can be construed to support the trial

court's reading of the Indemnity Agreement as an assumption agreement. The Court cannot ignore the express intent of the parties in entering into the Assumption Agreement, even if it finds that the language of that document is clear. W. M. Barnes v. Sohio, supra, Bullough, supra. The express intent of the parties in entering into the Indemnity Agreement is in direct conflict with the interpretation the Court has placed on that document. This creates an ambiguity which precludes summary judgment as a matter of law.

IV.

DEFENDANTS' ACTIONS ARE INCONSISTENT WITH THEIR ARGUMENT.

The actions of the Defendants are inconsistent with their argument that the Indemnity Agreement constituted "assumptions", and unequivocally support the position of Gate City that the Indemnity Agreements were not agreements of assumption.

A. Following Execution of the Indemnity Agreements, the Defendants Executed Uniform Real Estate Contracts.

The Real Estate Contracts each provide in paragraph 3 thereof, that "buyer [C. C. International] agrees to take property subject to the first mortgage to Gate City mortgage . . . and to assume [future tense] or cause the same to be assumed by any subsequent buyer." (Emphasis added). Just below the signature line on each

Real Estate Contract, a separate hand-typed paragraph is inserted which states:

> It is understood that at such time as the underlying mortgage is assumed [future tense] by buyer or its assigns then this contract shall be deemed fully executed and paid.

(Emphasis added).

The Real Estate Contracts expressly state that C. C. International thereby purchases the properties from the Defendants subject to the mortgage loan obligations.

"Subject to" is a term of art that means that an existing mortgage obligation is not assumed by the purchaser of the encumbered property. See, e.g., Snidow v. Hill, 197 P.2d 801 (Cal. Ct. App. 1948), in which the Court stated:

> On the contrary [appellants] agreed to buy the land "subject to" the deed of trust. Even assuming that the transfer of the property pursuant to the agreement was subject to the trust deed, it does not follow that appellants by the agreement thereby assumed to perform all the obligations of the trust deed. A mere grant of the property subject to a mortgage debt is not sufficient to impose any personal liability on the grantee to pay the debt or perform any of the obligations thereof. To effect such obligation, there must be a distinct assumption of the debt or of the contractual obligations thereunder.

Id. at 803 (citations omitted). See also Fluke Capital & Management Services Co. v. Richmond, 106 Wash. 2d 614, 724 P.2d 356 (1986).

In this case, the purchaser C. C. International expressly was not assuming the loan obligations when it purchased the Defendants' properties. It purchased them "subject to" the obligations. If C. C. International had assumed the Defendants' loan obligations through the Indemnity Agreements prior to entering into the Real Estate Contracts, the contracts would not provide that the properties were purchased "subject to" those obligations. Likewise, the contracts themselves would be unnecessary, since the contracts were to be deemed "paid" at the time that the purchaser assumed Defendants' liability to repay the Promissory Note.

Moreover, the hand-typed paragraph below the signature lines reflects that an assumption had not yet occurred: ". . . at such time as the underlying mortgage is assumed . . . ." That paragraph is absolutely unnecessary if an assumption had previously occurred, but was carefully added by hand to each Real Estate Contract. This is compelling evidence that the prior execution of the Indemnity Agreement did not constitute an assumption, and should be viewed as evidence of C.C. International's intent in interpreting the Indemnity Agreement.

B. Defendants Never Expected or Intended C.C. International to Assume Their Obligations.

Virtually every Defendant testified that he understood that Kilburn was the party that would assume the loan obligations, and

that the Defendants remained liable until that assumption occurred. See, e.g., Oral Jay Call Deposition at 40-41; Kenneth P. Colledge Deposition at 66-67; Edward A. Dalton Deposition at 62-63; R. John Eyre Deposition at 49-51, 54, 56; Ray Fisher Deposition at 81; John C. Forrester, III Deposition at 28-29; Christian E. Hansen Deposition at 20-22; David E. Jones Deposition at 46-48; Jedd P. Jones Deposition at 16-18; Daniel W. Marcum Deposition at 22; Marvin LeRoy Mills Deposition at 32; Clive A. Pusey Deposition at 31-32, 52-53; W. Truman Rigby Deposition at 35; Donald L. Smith Deposition at 121-122; Charles Marden Spencer Deposition at 26.

Moreover, the Defendants executed, concurrent with the execution of the Uniform Real Estate Contracts and subsequent to execution of the Indemnity Agreements, formal written Assumption Agreements providing that Kilburn Vacation Homeshares, Inc., not C.C. International, was to assume the loan obligations, and acknowledging that they were not released from ongoing liability to Gate City. (See Appendix "G"). Pertinent portions of the Assumption Agreements state as follows:

ASSUMPTION AGREEMENT

> THIS AGREEMENT made on the date hereinafter set forth opposite the signatures of vendor and purchaser, by and between [names of applicable Defendants] hereinafter called Vendors, and Kilburn Vacation Homeshares, Inc. hereinafter called Purchasers, of property located at [description of the applicable property in the Jeremy Ranch subdivision] . . .

Purchasers [Kilburn Vacation Homeshares, Inc.] 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 [Gate City] does not release Vendor or Vendors [the Defendants] from further liability under or on account of the said Note and Mortgage. . . .

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

DATED _____ /s/ [Defendants]
VENDOR

/s/ [Defendants]
VENDOR

DATED _____ KILBURN VACATION HOMESHARES, INC.
PURCHASER

By: /s/
JAMES M. CLARK

(Emphasis added).

By executing those Assumption Agreements each Defendant agreed that Kilburn Vacation Homeshares, Inc. was the party that was to assume the loan obligations, and further agreed that he was not released from liability to Gate City on the loans pursuant to the assumption.

The formal written assumption agreements are consistent with Defendants' statements that the loan obligations were to be assumed by Kilburn Vacation Homeshares, Inc., not C.C. International or Vaughn Cook, and are directly inconsistent with every argument and assertion advanced by the Defendants in their Motion for Summary Judgment.

V.

NOVATION MUST BE INTENDED BY THE PARTIES.

The effect of the Court's ruling was that the Indemnity Agreement was an assumption and release which constitutes a novation. It is well-settled contract law that "[t]he essential element of a novation is the discharge of one of the parties to a contract and the acceptance of a new performer by the other party as a substitute for the first original party." First American Commerce Co. v. Washington Mutual Savings Bank, 743 P.2d 1193, 1195 (Utah 1987); Kennedy v. Griffith, 98 Utah 183, 187, 95 P2.d 752 (1939).

Significantly, a novation must be intended by the original contracting parties, and whether an agreement is a novation is a matter of intent to be determined by a trier of fact and not a question of law. First American, 743 P.2d at 1195. See also Horman v. Gordon, 740 P.2d 1346 (Utah App. 1987) ("intent of the parties to cause a novation cannot be presumed but must be clear.")

This rule and its rationale are especially applicable to

agreements of assumption because such agreements are not favored or presumed in the law. An agreement to assume the obligations of another can arise only when the party so charged affirmatively undertakes that obligation. A. Stearns, Suretyship § 3.6 (5th ed. 1981). Such a relationship is consensual and contractual and requires mutual assent to its terms. National Bank of Washington v. Equity Investors, 86 Wash. 2d 545, 546 P.2d 440 (1976). Indeed, the construction against assumption agreements is so compelling that the transferee of land subject to a mortgage will not be held to have assumed the mortgage obligation absent clear and convincing proof of assumption. Fluke Capital & Management Services Co. v. Richmond, 106 Wash. 2d 614, 724 P.2d 356, 362 (1986).

The finding of a novation by the Trial Court required a finding of intent on the part of C.C. International to assume over $2,000,000 in liabilities. The clearest statement of intent is the affidavit of Vaughn Cook, President of C.C. International, which states he never assumed or even applied to assume the obligation.

Defendants argue this "intent" to assume is evidenced by the ambiguous language of the Indemnity Agreements. However, conspicuously absent from any language contained in the Indemnity Agreements, is:

1. The word assume, assumption, or any derivative thereof, either in the title of the document or in its substantive provisions;

2. A reference that C.C. International will pay or cause to be paid the loan obligations of the Defendants;

3. A reference that C.C. International is liable, responsible, or answerable for the loan obligations;

4. A reference that C.C. International will indemnify the Defendants from any liability arising from a default in connection with the loan obligations; or,

5. Any other words or phrases reflecting an assumption of the loan obligations.

Likewise, the clearest expression of Gate City's intent in entering into the Indemnity Agreement is the affidavit of Blaise Johnson, on behalf of Gate City, that Gate City never intended by the Indemnity Agreement to accept C.C. International as the obligor on the loans nor did it intend to release the Defendants from liability. Record at 576.

Defendants argued on Summary Judgment that the acceptance of payments by Gate City from third parties was evidence of their intent to release borrower from liability. However: "[A] creditor's mere acceptance of the obligation of a third person without an agreement or intention to release the original debtor or

extinguish the original debt does not amount to a novation." D.A. Taylor Co. v. Paulson, 552 P.2d 1274, (Utah 1976); Kennedy v. Griffith, 98 Utah 183, 95 P.2d 752 (1939).

The primary purpose in construction of a contract is to determine the parties' intent. Dubois v. Nye, 584 P.2d 823 (Utah 1978). In the instant case, both parties to the Indemnity Agreement state that they never intended or understood the agreement to be an assumption agreement, and never considered or treated it as such. (Affidavits of Vaughn Cook and Blaise Johnson filed in opposition to Defendants' Motion for Summary Judgment Record at 850, 958.)

The clear expression of intent by the parties to the Indemnity Agreement, Gate City and C.C. International, was that it was not intended as an assumption. The finding by the Trial Court to the contrary required a determination of a disputed material fact which was not appropriate on Summary Judgment.

VI.

THE TRIAL COURT IMPROPERLY MADE FACTUAL DETERMINATIONS.

It is impossible to accept the Indemnity Agreement as an "assumption agreement," or to even consider the possibility that it might be construed as such without giving Defendants the full advantage of every assertion of fact in their Memorandum. In reviewing the Motion for Summary Judgment the opposite standard

must be applied. All facts, and inferences to be drawn from those facts, must be viewed in the light most favorable to the parties resisting the motion. Geneva Pipe Co. v. S & H Insurance Co., 714 P.2d 648 (Utah 1986); Brandt v. Springville Banking Co., 10 Utah 2d 350, 353 P.2d 460 (1960). Any doubt should be resolved in favor of denying the motion to allow the parties to fully present their arguments at trial. See Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636 (Utah Ct. App. 1988); Atlas Corp. v. Clovis National Bank, 737 P.2d 225, 229 (Utah 1987).

The Trial Court could not have applied this standard in reaching a decision in this case. The following facts and inferences, viewed in the light most favorable to the Plaintiff, would present factual issues which would have precluded summary judgment.

In order to rule as it did the Trial Court had to make factual findings that executed Indemnity Agreements existed for each of the eleven transactions. Defendants have failed to produce the critical documents for two of the eleven transactions. Without such Indemnity Agreements, Defendants' arguments must fail. A determination that an executed Indemnity Agreement existed in cases where none were produced by Defendants is a determination of fact. This determination was made based upon circumstantial evidence presented to the Trial Court. While the Court may rely on cir-

cumstantial evidence to determine a fact at trial, to do so on a motion for summary judgment is clearly error.

In order to find a release of liability under section 17 of the Trust Deed it is necessary to determine that Plaintiff had waived the right to accelerate. This determination is a factual one. Becovic v. Harris Trust & Savings Bank, 128 Ill. App. 3d 107, 469 N.E.2d 1379 (1984); See also The Bowery Savings Bank v. Jenkins, 30 Utah 2d 232, 516 P.2d 178 (1973). Therefore, the Trial Court could not have ruled as it did without, of necessity, making determinations of fact. Such factual determinations are improper on summary judgment.

VII.

THE OPERATIVE DOCUMENTS DO NOT SATISFY THE REQUIREMENTS OF A RELEASE

Even if the subject Indemnity Agreements are unambiguous assumptions of the Defendants' loan obligations, which Plaintiff vigorously denies, the Defendants still are not released from liability.

The clear and unambiguous language of the subject Trust Deeds and Trust Deed Notes expressly provides that the Defendants are not released from liability unless two requirements are satisfied in writing:

1. There must be a written assumption of the subject mortgage loan obligations, and

2. There must be a written agreement whereby Gate City accepts the credit of the assuming party, and fixes the interest rate for which that party will be responsible.

These requirements are set forth in paragraph 17 of the subject Trust Deeds, and paragraph 10 of the subject Trust Deed Notes (which quotes paragraph 17 of the Trust Deed verbatim):

> 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, excluding (a) creation of a lien or encumbrance subordinate to this Deed of Trust, (b) the creation of a purchase money security interest for household appliances, (c) a transfer by devise, descent or by operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, 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.

(Emphasis added)

Under the express language of paragraph 17, the execution of an assumption agreement does not release the Defendants from liability unless there is also a waiver of the option to accelerate. The aforesaid provision carefully states that a waiver does not occur unless "prior to the sale or transfer [of the property], Lender, and the person to whom the property is to be sold or transferred reach an 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." This written waiver agreement must be reached prior to any transfer of the property securing the obligation.

The subject Indemnity Agreements do not, and cannot, satisfy those written waiver requirements. Nowhere do those agreements state, provide or reflect that Gate City has accepted the credit of C.C. International. Nowhere do they fix the interest rate to be charged.

The Defendants have not identified or referred to any document that satisfies the specific written waiver requirements. They merely argue that the Plaintiff's forbearance constituted a waiver. That argument fails as a matter of law for three reasons. First, any such waiver by forbearance did not occur prior to the transfer of the subject properties, which were transferred immediately after

the closing on the subject mortgage loans. It could not have occurred after the transfer and the subsequent failure to accelerate the obligation, because prior to the property transfer Plaintiff had no right to accelerate.

Second, the express, unambiguous language of the subject Trust Deeds specifically states that forbearance does not constitute a waiver of the right to accelerate.

> 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.

Hence, there could not be a waiver except by written agreement as set forth in paragraph 17 of the subject Trust Deeds and paragraph 10 of the subject Trust Deed Notes.

Third, even if forbearance could constitute a waiver under the express language of the operative documents, whether a waiver occurred is a factual question reserved for the jury. Becovic v. Harris Trust & Savings Bank, 128 Ill. App. 3d 107, 469 N.E.2d 1379 (1984), See The Bowery Savings Bank v. Jenkins, 30 Utah 2d 232, 516 P.2d 178 (1973). That alone precludes summary judgment.

As provided by the express language of the subject Trust Deed Notes and Trust deeds, waiver occurs only through the execution of a written agreement accepting the credit of the assuming party and fixing the interest rate the lender requires. That never occurred.

Absent such a written waiver, the Defendants are not released from liability. Therefore, under the clear, unambiguous language of those operative documents, even if an assumption occurred, the Defendants remain liable on their loan obligations.

Utah Code Ann. § 57-15-8 (1986) outlines the procedure that must be followed in order to affect an assumption. That section requires the borrower to provide a written notice and request for assumption to the lender. The lender at its option may approve or deny the assumption, and may refuse to release the original borrower from liability.

In the instant case this procedure was not followed. No written application was made by the borrowers to have C.C. International assume their liability. The Indemnity Agreements do not constitute such. Defendants have failed to effect an assumption as required by statute and failed to obtain a written waiver of the right to accelerate pursuant to Section 17 of the Trust Deed. Therefore, the Trial Court erred in finding that the requirements for a release had been met.

CONCLUSION

Defendants' argument hinges on an interpretation of obscure language contained in agreements which they were not parties to. Defendants' interpretation of that language is inconsistent with the remaining clear and unambiguous language of those agreements.

It is inconsistent with the intent of the parties to the agreements as expressed by the language of the agreements, the actions of the parties and their affidavits concerning their intent.

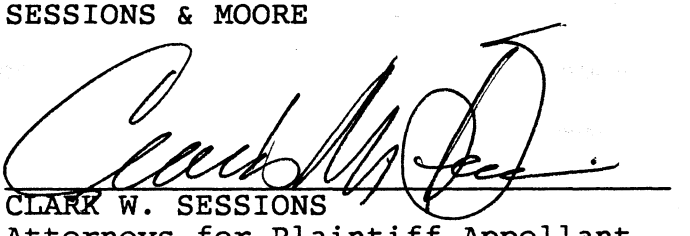
The Trial Court erred in adopting Defendants' interpretation of this language and by ruling that such language was clear and unambiguous when there are both patent and latent ambiguities in the language of the documents. The Court also improperly ignored all other evidence of the parties' intent. Even if the language were unambiguous, the Court was not asked simply to interpret that document, but to determine whether, given all relevant evidence, there were any material issues of fact regarding whether all of the elements necessary for a release had occurred.

There were questions of fact regarding the intent of the parties, not just their intent in entering into the Indemnity Agreements, but their intent in executing the other relevant documents. Whether Plaintiff waived its right to accelerate is a question of fact completely independent of the Court's interpretation of the Indemnity Agreements. Wherefore, not only is the Trial Court's interpretation of the Indemnity Agreements wrong, as a matter of law, but the Trial Court's ruling granting summary judgment is improper since there exist questions of fact which cannot be resolved by interpretation of the Indemnity Agreements.

In reviewing summary judgment this Court must view all facts and inferences drawn therefrom in the light most favorable to the Plaintiff's claims; in so doing, this Court need not give deference to the ruling of the Trial Court, but must simply determine if summary judgment was appropriate as a matter of law. Plaintiff asserts that summary judgment was inappropriate and respectfully requests that the ruling of the Trial Court be reversed.

RESPECTFULLY SUBMITTED this 24 day of October, 1989.

SESSIONS & MOORE



CLARK W. SESSIONS
Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of October, 1989, I hand-delivered four true and correct copies of the foregoing APPELLANT'S BRIEF 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
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Salt Lake City, Utah 84111

APPENDICES

A. List of Parties to the Proceeding

B. Court's Minute Entry, February 15, 1989

C. Judgment of April 28, 1989

D. Indemnity Agreement

E. Second Affidavit of Vaughn Cook

F. Uniform Real Estate Contract

G. Assumption Agreements

H. Letters from Cook, Reply Memo, Exhibit 5

I. Determinative Provisions

APPENDIX A

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

GATE CITY FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

vs.

DANIEL W. MARCUM; DR. EDWARD A. DALTON, JR.; MICHAEL C. JOHNSON; JOHN C. FORRESTER, JR.; MCB CO.; GOOD TIMESHARE; LARRY J. HERCULES and AMIR VITRANI d/b/a GALLERIA TIME-SHARE; JACK T. BROOKSHIRE and LINDA A. BROOKSHIRE d/b/a JT & LA HOMESHARE; STEPHEN C. PECORARO and JUDY DUPRE PECORARO d/b/a DUPEC ENTERPRISES; L.O. DENNY and ELIZABETH A. DENNY d/b/a DENNY'S TIMESHARE; JERRY T. PAUL and MARGARET E. PAUL d/b/a PAUL AND PAUL INVESTMENTS; ROBERT H. OLIVER and NORA R. OLIVER d/b/a OLIVER TIMESHARE; MORRIS J. DUPRE and BILLYE LOUISE DUPRE d/b/a N.J. DUPRE ENTERPRISES; RONALD L. LEE and ARDIS F. LEE d/b/a LEES SKI; FRED KEATON and GLORIA KEATON d/b/a KEATON AND KEATON; THOMAS BAUER and DONNA M. BAUER d/b/a THE BAUER PARTNERSHIP; ROBERT D. RAFFERTY and DORALIE A. RAFFERTY d/b/a ROKENKAR ENTERPRISES; TOMMY F. KEATON and PATRICIA L. KEATON d/b/a ROE LAND TIMESHARE; VICTOR F. PETRUZZELLI and MURIEL B. PETRUZZELLI d/b/a CASA PETRUZZELLI TIMESHARE; AUSSIE PARTNERSHIP; NOLAND & SONS; PAUL D. WILSON and BEVERLY WILSON d/b/a DOUBLE ODDS TIMESHARE; KELLY B. DEINES and DONNA N. DEINES d/b/a WILSON TIMESHARE; JOHN A. MCFARLANE and JANET L. MCFARLANE d/b/a MCFARLANE TIMESHARE; CHARLES W. CALHOUN and SHIRLEY S. CALHOUN d/b/a CHA-SHIR; TED M. CADMAN and BRYCE K. HOMER d/b/a CADMAN & ASSOCIATES; WALTER J. PETERS and JEANNETE E. PETERS d/b/a WJJP TIMESHARE; JANICE C. WILLIAMSON and KEITH N. SHELLHAMMER d/b/a KE-JAN HOMESHARE; DARREL R. NAUSASCHASER and CAROL J. NAUSASCHASER d/b/a STORK INVESTMENTS; E. KEITH COFFIN and FRANK H. RODKEY d/b/a COFFIN AND RODKEY HOMESHARE; ROBERT C. GORDON and JOSEPHINE PICKARD d/b/a GOODIE TWO SHOES TIMESHARE; W. R. HEARSHMAN and GLORIA M. HEARSHMAN d/b/a B & G GETAWAYS; JAMES B. PHILLIPS and JOAN K. PHILLIPS d/b/a J & J PHILLIPS ENTERPISES; HAROLD E. WHITELEY and JOAN C. WHITELEY d/b/a JOHAL TIMESHARE; EDISON P. JANNEY and MAUREEN A. JANNEY d/b/a WINGMAN CORPORATION; DENTON LYNN DUNN, DENTON LEE DUNN, DALE O. CHRISTENSEN, GLEN R. PENROSE and HOWARD RONALD STONE d/b/a DUNN PETROLEUM HOMESHARE; HOMESHARE GENERAL OWNERS ASSOCIATION; JOHN DOES 1-50 and JOHN DOES 51-75,

Defendants.

Civil No. 8074

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

GATE CITY FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, vs. GRAHAM DODD; DWIGHT H. EGAN; MCB CO.; BILLY R. BRAZIL and BILLIE J. BRAZIL d/b/a BRAZIL INVESTMENTS; DIVERSIFIED INVESTORS; GUY H. LANEY and BETTY J. LANEY d/b/a LANEY PROPERTIES; JOSEPH P. SMITH and LYNN E. SMITH d/b/a JOSEPH & LYNN SMITH CO.; LARRY STRICKER and NEMA STRICKER d/b/a WALDO'S LADY; DAVID B. MCKINNON and R. D. HALL d/b/a MHK ASSOCIATES; DENNIS V. KIDA and KELLEY ANN KIDA d/b/a KIDA & ASSOCIATES; LAWRENCE J. BIDERMAN and SHARON M. BIDERMAN d/b/a BTW LIMITED; JOHN E. BUCHER and CHARLOTTE BUCHER d/b/a NOSAM AND REHCUB; DENTON LYNN DUNN, DENTON LEE DUNN, DALE O. CHRISTENSEN, GLEN R. PENROSE and HOWARD RONALD STONE d/b/a DUNN PETROLEUM HOMESHARES; HOMESHARE GENERAL OWNERS ASSOCIATION; CAPITOL THRIFT & LOAN; JOHN DOES 1-50 and JOHN DOES 51-75, Defendants.	Civil No. 8075

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

GATE CITY FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, vs. CHRISTIAN E. HANSON; DAVID E. JONES; MCB CO.; FOREVER LIVING PRODUCTS, INC. d/b/a FOREVER LIVING PRODUCTS; R. JOHN EYRE, STEVEN JOHN EYRE and SIDNEY R. HARMON d/b/a CAREFREE; EDWARD B. HALDEMAN and KENNETH A. MILLER d/b/a KILLARNEY; EUGENE ISAAK and M. J. SEBY d/b/a BLUE SPRUCE PROPERTIES; ROBERT A. DOWER and KATHLEEN K. KOWER d/b/a R. & K. DOWER ENTERPRISES; C & L DEVELOPMENT, INC. and CARYL M. LIBHART d/b/a BILCO PROPERTIES; WINSTON L.E. EDMONDSON and LOUISE A. EDMONDSON d/b/a EDMONDSON & EDMONDSON INVESTMENT COMPANY; ORVIN F. BAKER and VIRGINIA A. BAKER d/b/a V & O PARTNERSHIP; CARLISLE F. GRIFFIN and WILLIAM O. FOSTER d/b/a GRIFFIN UTAH PROPERTIES; DENTON LYNN DUNN, DENTON LEE DUNN, DALE O. CHRISTENSEN, GLEN R. PENROSE and HOWARD RONALD STONE d/b/a DUNN PETROLEUM HOMESHARE; HOMESHARE GENERAL OWNERS ASSOCIATION; ZIONS FIRST NATIONAL BANK; JOHN DOES 1-50 and JOHN DOES 51-75, Defendants.	Civil No. 8076

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

GATE CITY FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, vs. MATHEW R. WHITE; MCB CO.; DENTON LYNN DUNN, DENTON LEE DUNN, DALE O. CHRISTENSEN, GLEN R. PENROSE and HOWARD RONALD STONE d/b/a DUNN PETROLEUM HOMESHARE; HOMESHARE GENERAL OWNERS ASSOCIATION; JOHN DOES 1-50 and JOHN DOES 51-75, Defendants.	:	Civil No. 8077

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

GATE CITY FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, vs. R. JOHN EYRE; MCB CO.; THE JEREMY LTD., a Utah limited partnership; CHRISTINE E. HYNES and K. M. HYNES d/b/a CEH & KMH PARTNERSHIP; LARRY M. BRUNER and KAREN R. BRUNER d/b/a BRUNER ENTERPRISES; HOWARD R. BOOK and LEE ANN BOOK d/b/a SONG BIRD VACATIONS; JAMES R. SIMMONS and LORNA M. SIMMONS d/b/a WASCLO; KERMIT K. TAYLOR and FLORA B. TAYLOR d/b/a KKT/FBT PARTNERSHIP; DANIEL J. REDECKI and CLARE G. REDECKI d/b/a RADECKI INVESTMENT COMPANY; MILES D. HOBBS and LENORA R. HOBBS d/b/a MAH/LRH PARTNERSHIP; CHARLES M. BERGSCHNEIDER and RICHARD J. ALTHOFF d/b/a WAVERLY TIMESHARE; CARMINE J. COLADONATO and BETTY J. COLADONATO d/b/a C. J. & BETTY COLADONATO; H. E. CHAMBERS and MAXINE T. CHAMBERS d/b/a H. E. & MAXINE T. CHAMBERS; DENTON LYNN DUNN, DENTON LEE DUNN, DALE O. CHRISTENSEN, GLEN R. PENROSE and HOWARD RONALD STONE d/b/a DUNN PETROLEUM HOMESHARE; HOMESHARE GENERAL OWNERS ASSOCIATION; RICHARD L. SORENSEN; JOHN DOES 1-50 and JOHN DOES 51-75, Defendants.	Civil No. 8078

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

GATE CITY FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

vs.

KELVYN H. CULLIMORE; THOMAS G. OSBORNE; W. TRUMAN RIGBY; MCB CO.; AUSSIE PARTNERSHIP; DAVID M. SIBLEY, PAM S. SIBLEY and JOSEPH B. BERKE d/b/a TEXIAN INVESTMENTS; ROBERT J. SHOFER and CYNTHIA ROYCE SHOFER d/b/a CYN-BOB PROPERTIES; GEORGE N. MILLS; JACK A.FRYDRYCH and J. MICHAEL WEBSTER d/b/a FRYDRYCH & WEBSTER PARTNERSHIP DEVELOPMENT; GEORGE I.ADLER and TRANSAMERICAN AUTO PARTS d/b/a ADLER-TRANS INVESTMENTS; FRANKLIN M. CHILDS and JENNIE R. CHILDS d/b/a JEFRA HOMESHARES; BILLY J. HORN and SHARON P. HORN d/b/a HORN INVESTMENTS; LINN G. MELZER and MARGARET D. MELZER d/b/a MAR-LIN; IRA CASOFF and CHARLES O. GRIFFITH d/b/a CASOFF INVESTMENTS; JOHN M. COUSINS and BEVERLY J. COUSINS d/b/a COUSINS & COUSINS INVESTMENTS; DELBERT V. THOMAS and PHYLLIS B. THOMAS d/b/a PHILADELPHIA PROPERTIES; MIKE FRIZZELL and SUZANNE L. FRIZZELL d/b/a PEANUT, LTD.; ROY LEE JOHNSON and JANICE JOHNSON d/b/a R. J. JOHNSON PARTNERS; DENTON LYNN DUNN, DENTON LEE DUNN, DALE O. CHRISTENSEN, GLEN R. PENROSE and HOWARD RONALD STONE d/b/a DUNN PETROLEUM HOMESHARE; HOMESHARE GENERAL OWNERS partnership; FIRST SECURITY BANK OF UTAH; NOLAND & SONS; JOHN DOES 1-50 and JOHN DOES 51-75,

Defendants.

Civil No. 8079

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

GATE CITY FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

vs.

DONALD L. SMITH; JEDD P. JONES; MCB CO.; SHARAD MULTANI and MALATI MULTANI d/b/a MULATI AND SHARAD INVESTMENT CO.; RUDOLPH R. HANSEN and DOUGLAS E. McNEAL d/b/a McHANSEN PROPERTIES; THOMAS K. WATTS and LAURA B. WATTS d/b/a KARBELL; LAWRENCE R. JOHNSON and SAREDA BAYLE JOHNSON d/b/a SAREDA; NOLAND & SONS; ELVIS D. BURROW and DEBRA A. BURROW d/b/a F.D. & D.A. BURROW PARTNERSHIP; RAYMOND J. GASCON and RUTH H. GASCON d/b/a THE R. GASCON COMPANY; RICHARD E. BROWN and DOROTHY F. BROWN d/b/a FAN-BRO INVESTMENTS; DARYL B. JONES and IRENE R. JONES d/b/a JONES & JONES PARTNERSHIP; DANIEL J. AHEARN and ANDREA AHEARN d/b/a DANIEL J. AHEARN AND CASSER PARTNERSHIP; GLENN T. HYDE and CYNTHIA L. CRAWFORD d/b/a COMPANY 65; JAMES D. SHADOAN, GEORGE SCHAUB and CHARLES M. KAMINSKY d/b/a WOLVERINE INVESTMENT COMPANY; MYUNG K. YOON and SUN S. YOON d/b/a MYUNG AND SUN YOON INVESTMENTS; JOE L. SCHRIMSCHER and JAY STEVEN SCHRIMSHER d/b/a REALM REALTY; BRAD LARSEN and VAL LARSEN d/b/a PETRO ALLIANCE; WILLIAM S. MACADAM, JR. and JUDITH A. MACADAM d/b/a LUROY INDUSTRIES; DENTON LYNN DIEM and HOWARD RONALD STONE d/b/a DUNN PETROLEUM HOMESHARE; HOMESHARE GENERAL OWNERS ASSOCIATION; JOHN DOES 1-50 and JOHN DOES 51-75,

Defendants.

Civil No. 8080

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

GATE CITY FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, vs. CLIVE A. PUSEY; DENNIS L. CROCKETT; MCB CO.; HAROLD E. BOLING; VIRGINIA L. BOLING; ALEX HALE and JEANNE HALE d/b/a ALEX HALE INVESTMENTS; JAMES SCHUESSLER and JOHN CARBERRY d/b/a J & J RENTAL PROPERTIES; R. EDWARD NOBLE, ANDREW E. KIDD and JAMES B. ZACHARIAS d/b/a NKZ PROPERTIES; ROBERT MICHAEL MOORE and JANICE KAY MOORE d/b/a MIKE AND JAN PROPERTIES; KEVIN T. FITZWATER d/b/a FITZWATER INVESTMENT GROUP; ROBERT L. KUTCHERA and SANDRA J. KUTCHERA d/b/a KUTCHERA INVESTMENTS; PAUL WIEGMAN and KENNETH T. WIEGMAN d/b/a CINDY PROPERTIES; JOSEPH H. BECKER and DIANE M. BECKER d/b/a JO AND DI RENTAL PROPERTIES COMPANY; PETER JAMES JACKSON and JOHN GERARD JACKSON d/b/a JACKSON PROPERTIES COMPANY; JOHN A.KIVLEHAN and CAROL A. KIVLEHAN d/b/a KIVLEHAN RENTAL PROPERTIES; DENTON LYNN DUNN, DENTON LEE DUNN, DALE O. CHRISTENSEN, GLEN R. PENROSE and HOWARD RONALD STONE d/b/a DUNN PETROLEUM HOMESHARE; HOMESHARE GENERAL OWNERS ASSOCIATION; JOHN DOES 1-50 and JOHN DOES 51-75, Defendants.	Civil No. 8081

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

GATE CITY FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

vs.

STEPHEN L. BLASER; MCB CO.; PRESTON LTD.; PAUL N. NETTLAND and VENNA N. NETTLAND d/b/a NETTLAND VACATION RENTALS; WAYNE C. DESSELLE and LEON HUGGINS, JR. d/b/a L & W INVESTMENTS; FRED W. STEINFORT and CHARLES P. CORKINS d/b/a STEINFORT ENTERPRISES; MICHAEL K. SCHUTTE and KAREN L. SCHUTTE d/b/a SCH-OFF ENTERPRISES; MARVIN L. MILLS and VIKKI MILLS d/b/a SPRINGHAUS ENTERPRISES; PETER HANNA and LIDIA HANNA d/b/a P & LH INVESTORS; JAMES L. BEGGS and BEVERLY H. BEGGS d/b/a BEGGS-INVESTMENT RENTALS; RICHARD DAVID PRESTON and MARY ANN PRESTON d/b/a P & P and G & P, LTD.; BARRY D. BLONDER and JACQUELYN BLONDER d/b/a TIERRA VERDE PROPERTIES; CHARLES H. SMITH and NANCY M. SMITH d/b/a S & S SMITH ENTERPRISES; ROBERT E. DAVID and KATHRYN S. DAVID d/b/a CRESCENTA, LTD.; JOHN M. SARTINSKY and HARRIETTE A. SARTINSKY d/b/a MICHAEL'S JOY; KENNETH L. HEIT and JOYCE ELAINE HEIT d/b/a KENJO PROPERTIES; ROBERT T. JONES and CHRIS JONES d/b/a BOB JONES INVESTMENTS; DENTON LYNN DUNN, DENTON LEE DUNN, DALE O. CHRISTENSEN, GLEN R. PENROSE

HOMESHARE GENERAL OWNERS ASSOCIATION; BRUCE and JEAN McMULLIN; JOHN DOES 1-50 and JOHN DOES 51-75,

Defendants.

Civil No. 8082

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

GATE CITY FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

vs.

O. JAY CALL; MARDEN SPENCER; KENNETH P. COLLEDGE; J. RAY FISHER; MCB CO.; WILLIAM S. BRUCE, PHIL C. SCHAFFER, TIMOTHY O. CORNELL and MELVIN C. BREWER d/b/a ENGLEWOOD PARTNERS, LTD.; BENJAMIN M. DOBBINS and SHIRLEY FRED HARTLEY d/b/a DOBBINS & HARTLEY INVESTMENTS; KERMIT LESLIE TAYLOR and JULIA L. TAYLOR d/b/a TAYLOR/TAYLOR LTD.; QUEST ENTERPRISES; NOLAND & SONS; JACK KECHICHIAN and BEVERLY KECHICHIAN d/b/a JACK AND BEV KECHICHIAN; ROBERT W. SMITH and SALLIE T. SMITH d/b/a S & T RENTALS; THOMAS A. OTTER, M.D. and BARBARA OTTER d/b/a THOMAS AND BARBARA OTTER RENTAL; RICHARD L. DIAMOND and ELAINE DIAMOND d/b/a R. L. & E. DIAMOND INVESTORS; STANLEY SHERMAN and RUBY SHERMAN d/b/a SHERMAN & SHERMAN; EDMUND L. GRADY and BETTYE B. GRADY d/b/a B & G INVESTMENTS; ROWLAND D. BAUMANN and MICHAELENE BAUMANN d/b/a STIRS-ALPHA PARTNERSHIP; RUBIN CARTER and DIANA H. CARTER d/b/a ALPHA-DELTA ENTERPRISES; ALTON M. BUJARD and STANTON BUJARD d/b/a VERMILION ENTERPISES; DAVID M. FIGLEY and DORIS M. FIGLEY d/b/a JAMES AND RANDALL PROPERTIES; JOEL M. BORISKIN and JUDY R. BORISKIN d/b/a JOEL AND JUDY BORISKIN RENTALS; DANNY O. BLACK and JANET RALSTON d/b/a DANNY O. BLACK PROPERTIES; MICHAEL J. BARKIN d/b/a HELENE AND MICHAEL BARKIN RENTAL; ROBERT A. VEDER and CAROL VEDER d/b/a ROBERT AND CAROL VEDER RENTAL; GERALD HING and PATRICIA Q. HING d/b/a GERALD AND PATRICIA PROPERTIES; ROGER L. HUNTER and PATRICIA Q. HING d/b/a R. L. HUNTER, DVM PROPERTIES; EFREM EYVAZOV and NINA EYVAZOV d/b/a EFREM AND NINA PROPERTIES; EDWARD A. HUME and JANET E. HUME d/b/a EDWARD AND JANET HUME PROPERTIES; ROBERT A. BLACKBURN and JOANN M. BLACKBURN d/b/a ROBERT AND JOANN BLACKBURN PROPERTIES; ALAN STRAUB and LYNDA STRAUB d/b/a ALAN AND LYNDA STRAUB PROPERTIES; ROBERT L. SHRADER and LOLA M. SHRADER d/b/a ROBERT AND LOLA SHRADER PROPERTIES; ROBERT E. MATLACK and JOYCE I. MATLACK d/b/a MATLACK INVESTORS; HENRY J. ORSI and ESTHER S. ORSI d/b/a HENRY AND ESTHER ORSI RENTALS; ROGER K. WEDEL and LYNN WEDEL d/b/a ROGER AND LYNN WEDEL RENTAL PROPERTIES; HOMESHARE GENERAL OWNERS ASSOCIATION; JOHN DOES 1-50 and JOHN DOES 51-75,

Defendants.

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

GATE CITY FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

vs.

JOHN C. FORRESTER, III; MARVIN L. MILLS; MCB CO.; BRUCE BUMGARDNER and TERRY W. MOORE d/b/a BLACKTOP PROPERTIES; THOMAS A. SCOTT, JR., WILTS C. ALEXANDER and RUTHIE A. WATSON d/b/a BIMMER ASSOCIATES; DR. K. MIKE DOSSETT and BEVERLY JEAN DOSSETT d/b/a DOSSETT INVESTMENTS; AIDEN J. DOYLE and MARLENE L. DOYLE d/b/a DOYLE-AIDEN INVESTMENTS; NORMAN GINSBURG and LYNN KIKAWA d/b/a MDL PARTNERSHIP; JAMES G. WHYBURN and LOUISE WHYBURN d/b/a JIMLOU WHYBURN; SUSAN P. SMITH and WALTER H. SMITH, JR. d/b/a SUWALT PROPERTIES; RONALD A. WALLER and J. VERNON WADE d/b/a WILLIN PROPERTIES; AUSSIE PARTNERSHIP; BILLY GENE CUTRER and GLORIA CUTRER d/b/a BILL AND GLORIA CUTRER PROPERTIES; FREDERICK E. MEYER and DOROTHY B. MEYER d/b/a SKY HEIGHTS UNLIMITED PARTNERSHIP; LOUIS ODELL-SMITH and ROSEMARIE ODELL-SMITH d/b/a ODELL-SMITH ENTERPRISES; HARVEY MARCUS GATTIS, JR. and CAROL SCHROEDER GATTIS d/b/a MAR-CAR; RICHARD A. CASTRO and ERNESTINE D. CASTRO d/b/a RDC TIMESHARE; GEORGE R. CARLTON, JR. and CHERYL ANN BOYD d/b/a CARLTON BOYD RENTALS; KENNETH E. VROCKE and CAROLE VROCKE d/b/a [illegible] CHRISTENSEN, GLEN R. PENROSE and HOWARD RONALD STONE d/b/a DUNN PETROLEUM HOMESHARE; HOMESHARE GENERAL OWNERS ASSOCIATION; JOHN DOES 1-50 and JOHN DOES 51-75,

Defendants.

Civil No. 8120

APPENDIX B

FILE NO. 8074, ETC.

TITLE: (✓ PARTIES PRESENT)		COUNSEL: (✓ COUNSEL PRESENT)
GATE CITY FEDERAL SAVINGS & LOAN ASSN.	:	ROY B. MOORE & KEVIN ANDERSON
V	:	
DANIEL W. MARCUM, ET AL	:	JOHN K. MANGUM & EARL JAY PECK
	:	
	:	

Joye D. Ovard
CLERK

REPORTER

BAILIFF

HON. J. Dennis Frederick
JUDGE

DATE: February 15, 1989

COURT'S RULING:

After review of the Memoranda and after hearing oral argument in support of respective MOTIONS TO STRIKE, DISMISS and FOR SUMMARY JUDGMENT, Court rules as follows:

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT is granted for the reasons that the operative documents are clear and unambiguous on their face and reflect an assumption and release as more particularly set forth in the Memorandum in Support thereof.

Counsel for Defendants is to prepare an appropriate Order.

Copies are mailed to: Clark W. Sessions, Roy B. Moore & Kevin E. Anderson, 400 First Federal Plaza, 505 East 200 South, Salt Lake City, UT 84102
Earl Jay Peck, John K. Mangum & Jay R. Mohlman, 1100 Beneficial Life Tower, 36 South State, Salt Lake City, UT 84111. 2-15-89 J.O.

APPENDIX C

Earl Jay Peck (A2562)
John K. Mangum (2072)
Jay R. Mohlman (5113)
NIELSEN & SENIOR
Attorneys for Moving Defendants
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-1900

NO.....
FILED
APR 28 1989
Clerk of Summit County
BY.....
Deputy Clerk

E-2384
231

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

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.	JUDGMENT Consolidated Cases Civil Nos. 8074 8075 8076 8077 8078 8079 8080 8081 8082 8119 8120
EDWARD A. DALTON, JR., JOHN C. FORRESTER, JR., MICHAEL C. JOHNSEN and DANIEL W. MARCUM, Counterclaimants, vs. GATE CITY FEDERAL SAVINGS AND LOAN ASSOCIATION, Counterclaim Defendant.	

The following Motions filed by Plaintiff Gate City Federal Savings & Loan Association, presently doing business as Gate City Federal Savings Bank (hereinafter "Gate City") and Defendants Edward A. Dalton, Jr., John C. Forrester, Jr., Michael C. Johnsen, Daniel W. Marcum, Graham Dodd, Dwight H. Egan, Christian E. Hansen, David E. Jones, Matthew R. White, R. John Eyre, Kelvyn H. Cullimore, Thomas G. Osborne, W. Truman Rigby, Donald L. Smith, Clive A. Pusey, Dennis L. Crockett, Stephen Blaser, Marden Spencer, J. Ray Fisher, John C. Forrester, III, and Marvin L. Mills (hereinafter sometimes referred to as "Moving Defendants") in these consolidated actions came on regularly for hearing on February 6, 1989, at the Summit County Courthouse in Coalville, Utah, before the Honorable J. Dennis Frederick:

a. Plaintiff's Motion to Strike or Dismiss certain Defenses and Counterclaims or in the Alternative Motion for Partial Summary Judgment, dated January 25, 1989, (hereinafter "Motion to Dismiss");
b. Defendants' Motion for Summary Judgment, dated January 26, 1989;
c. Defendants' Motion to Strike Portions of Affidavit of Vaughn Cook dated February 2, 1989;
d. Plaintiff's Motion (made verbally in open court on February 6, 1989) to strike affidavit of Stephen L. Blaser dated January 26, 1989;

Plaintiff Gate City was represented by Kevin E. Anderson of Sessions & Moore. Moving Defendants were represented by Earl Jay Peck and John K. Mangum of Nielsen & Senior.

The Court considered the Motions and the respective memoranda, submissions and arguments of counsel relating thereto, and after taking these matters under advisement, addressed these matters by its minute entry ruling dated February 15, 1989.

Thereafter, by motion dated March 2, 1989, Plaintiff Gate City filed a Motion to Reconsider said ruling, which came on for hearing on April 18, 1989, at the hour of 3:00 p.m., at the Summit County Courthouse in Coalville, Utah, again before the Honorable J. Dennis Frederick. Plaintiff was represented by Clark W. Sessions of Sessions & Moore and the original Moving Defendants were represented by Earl Jay Peck of Nielsen & Senior.

The Court, having reviewed Plaintiff's Motion to Reconsider, and all of the respective memoranda, exhibits, affidavits and other submissions, and having heard argument again from counsel relating thereto,

Now Orders and Adjudges:

1. The Motion of the Moving Defendants for Summary Judgment, dated the 26th day of January, 1989, is granted. The Moving Defendants named hereinafter in this paragraph are released from any and all obligations they may have had to Plaintiff Gate City Federal Savings and Loan Association or its predecessor-in-interest, Gate City Mortgage Company, under the

following Promissory Notes, each in the original principal amount of $200,000.00, executed by the Moving Defendants in favor of Gate City Mortgage Company, and bearing the dates shown below, all pursuant to Paragraph 10 of said Notes, the Court having found that the conditions for such release have been met. Copies of said respective Promissory Notes have previously been filed as exhibits to Plaintiff's Complaints in the respective civil actions noted below.

CIVIL #	DATE OF NOTE	MOVING DEFENDANTS WHO SIGNED NOTES AS BORROWERS AND ARE RELEASED	
8074	Dec. 14, 1981	Edward A. Dalton, Jr. John C. Forrester, Jr. Michael C. Johnsen Daniel W. Marcum	E-230
8075	Dec. 21, 1981	Graham Dodd Dwight H. Egan	E-230
8076	Dec. 30, 1981	Christian E. Hansen David E. Jones	E-231
8077	Nov. 27, 1981	Matthew R. White	E-231
8078	Nov. 27, 1981	R. John Eyre	E-231
8079	Dec. 9, 1981	Kelvyn H. Cullimore Thomas G. Osborne W. Truman Rigby	E-231
8080	Dec. 9, 1981	Donald L. Smith	E-231
8081	Dec. 21, 1981	Clive A. Pusey Dennis L. Crockett	E-231
8082	Dec. 30, 1981	Stephen Blaser	E-231
8119	Dec. 14, 1981	Marden Spencer J. Ray Fisher	E-231

BOOK 6 6 PAGE 0 1 2

CIVIL #	DATE OF NOTE	MOVING DEFENDANTS WHO SIGNED NOTES AS BORROWERS AND ARE RELEASED
8120	Dec. 14, 1981	John C. Forrester, III Marvin L. Mills

E-231

2. Plaintiff's Complaints in each of these consolidated actions against the Moving Defendants named above are hereby dismissed, with prejudice, there being no cause of action against such Defendants in favor of Plaintiff Gate City. This ruling does not affect Plaintiff's Complaints against the non-moving Principal Defendants, Jedd P. Jones (Civil No. 8080) and O. Jay Call and Kenneth P. Colledge (Civil No. 8019).

3. The Motion of Plaintiff Gate City to Dismiss is denied to the extent that it seeks relief inconsistent with this Judgment, and the balance of said motion is rendered moot hereby.

4. The motions of the moving Defendants and Plaintiff to strike all or portions of affidavits, as identified above, are denied.

5. This Judgment renders the Counterclaims of the Moving Defendants moot.

6. The Moving Defendants are awarded their costs, which shall be determined pursuant to the provisions of Rule 54(d) and (e) of the Utah Rules of Civil Procedure, and the amount so determined of $_____ shall accrue interest

BOOK GG PAGE 913

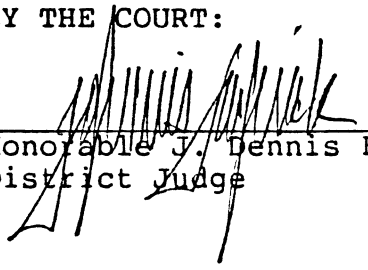
at the rate of twelve percent (12%) per annum from and after the date of entry of this Judgment, until paid by Plaintiff Gate City.

7. Pursuant to the provisions of Rule 54(b) of the Utah Rules of Civil Procedure, the Court expressly determines that this Judgment effectively disposes of all remaining claims between Plaintiff and the Moving Defendants named above and that there is no just reason to delay entry of final judgment insofar as said parties are affected by this Judgment, the properties securing the subject Promissory Notes having previously been sold at foreclosure sales, and the Court hereby expressly directs and orders that this Judgment be entered forthwith.

8. The original of this Judgment shall be filed in Civil No. 8074. The Clerk of the Court is hereby directed to file a certified copy hereof in each of the other civil actions addressed by this Judgment, at no cost to the parties.

DATED this 26th day of April, 1989.

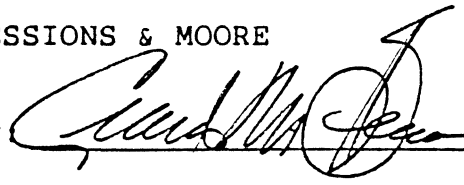
BY THE COURT:



Honorable J. Dennis Frederick
District Judge

Approved as to Form:

SESSIONS & MOORE

By 

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 1989, I caused a true and correct copy of the foregoing proposed JUDGMENT to be placed in the United States Mail, first-class, postage prepaid, addressed to the following:

Jedd P. Jones
11756 Briarglen Drive
Sandy, Utah 84092

O. Jay Call
4755 Rainbow Drive
Murray, Utah 84107

Kenneth P. Colledge
3276 North 10th East
Ogden, Utah 84404

A COPY OF THE FOREGOING JUDGMENT was hand-delivered this 19th day of April, 1989, to the following:

Clark W. Sessions
Roy B. Moore
Kevin E. Anderson
Sessions & Moore
400 First Federal Plaza
505 East 200 South
Salt Lake City, Utah 84102

John K Mangum

04840

APPENDIX D

INDEMNITY AGREEMENT

THIS AGREEMENT, made and entered into this 30th day of December, 19 81 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 Recorders office, as Entry No. 157211.

Situate in Summit County, State of Utah.

DEPOSITION EXHIBIT 18 4-26-88 Black

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 one more of such liens, filed or unfiled, 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 _____
Party of the Second Part
Stanley F. Jenkins

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

_____
Party of the First Part

APPENDIX E

CLARK W. SESSIONS (2914)
ROY B. MOORE (2308)
KEVIN EGAN ANDERSON (0099)
SESSIONS & MOORE
Attorneys for Plaintiff
400 First Federal Plaza
505 East 200 South
Salt Lake City, Utah 84102
Telephone: (801) 359-4100

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

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.	SECOND AFFIDAVIT OF VAUGHN COOK Consolidated Case No. 8074 (8075) (8076) (8077) (8078) (8079) (8080) (8081) (8082) (8119) (8120)
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.	

PLAINTIFF'S EXHIBIT "B"

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Vaughn Cook, being first duly sworn deposes and states as follows:

1. I testify to all matters herein from personal knowledge.

2. The letter attached hereto as Exhibit "A", and incorporated herein by this reference, is a letter that I caused to be prepared by my secretary and sent to Michael C. Johnsen on or about August 26, 1982.

3. I had enclosed with the letter a document entitled "Assumption Agreement", a representative copy of which is attached hereto as Exhibit "B", requesting that he execute the enclosed Assumption Agreement and return it to me to be forwarded to Kilburn Vacation Homeshares, Inc., a company owned by James Clark, which was to execute the Assumption Agreement as the party assuming the subject Jeremy Ranch mortgage loan obligation of Michael Johnsen.

4. I presented or caused to be presented to most, if not all of the subject borrowers (the Defendants in the above-captioned matter) Assumption Agreements conforming to the Assumption Agreements attached hereto as Exhibit "C", when they closed on the subject mortgage loan transactions.

5. I don't recall if Michael C. Johnsen failed to sign an agreement at closing, or if the agreement he signed was lost, necessitating the execution of another copy thereof.

6. The Assumption Agreements attached hereto as Exhibit "C" were executed by all of the subject borrowers (the Defendants) at the time of closing or shortly thereafter.

7. Attached hereto as Exhibit "D" is a letter I wrote and mailed Gate City Mortgage Company on or about June 29, 1984, explaining that Kilburn Vacation Homeshares, Inc., was to have assumed the subject mortgage loan obligations from the subject borrowers after the closing on the subject mortgage loan transactions, and explaining my surprise at learning that it had not completed the assumption process by requesting that Gate City Mortgage Company approve the assumption of the subject mortgage loan obligations by Kilburn Vacation Homeshares, Inc., approve its credit, and fix the appropriate interest rate.

8. Neither I, nor my company, C.C. 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.

DATED this 2 day of March, 1989.

Vaughn Cook
VAUGHN COOK

SUBSCRIBED AND SWORN to before me this 2 day of March, 1989.

NOTARY PUBLIC
Residing in Salt Lake County, UT

My Commission Expires:

12-3-89

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of March, 1989, the foregoing SECOND AFFIDAVIT OF VAUGHN COOK was served on the Defendants by hand delivering a true and correct copy thereof to:

Earl Jay Peck, Esq.
John K. Mangum, Esq.
Jay R. Mohlman, Esq.
NIELSEN & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, UT 84111

by first-class U.S. mail, postage prepaid to:

Jedd P. Jones, pro se
11765 Briarglen Drive
Sandy, Utah 84092

Donald L. Smith, pro se
4266 Park Street
Salt Lake City, UT 84107

Kenneth P. Colledge, pro se
3276 North 1000 East
Ogden, Utah 84401

Marilyn Christ

VAUGHN COOK & ASSOCIATES
450 East 1000 North - North Salt Lake City, Utah 84054 - (801) 295-1507

August 26, 1982

Michael C. Johnson
223 Millcreek Way
Tooele, Utah 84074

Dear Mike;

Enclosed is an Assumption Agreement from Gate City for the loan that you signed on the 14th of December, 1982. This loan was to stay in you name for six months and then Kilburn Vacation Homeshare was to come in and assume the loan. The Assumption Agreement needs to be signed by you before this process can begin. Please sign on the line above your name and return in the self-addressed envelope.

If you have any questions please feel free to contact me at the number and/or address list on the letterhead. Your prompt attention would be very much appreciated. Thank you so much for you help.

Sincerely Yours,
VAUGHN COOK & ASSOCIATES INC.

Jill Christensen

JILL CHRISTENSEN

enclosures

1008
EXHIBIT "A"

C 013008

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: Daniel W. Marcum, an unmarried man, John C. Forrester Jr. a married man, Edward A. Dalton Jr., a married man, & Michael C. Johnson, a married man hereinafter called Vendors,

and Kilburn Vacation Home Shares Inc. hereinafter called

Purchasers, of property located at 8835 West Silver Spur Road

WHEREAS Gate City Mortgage Company is the owner and holder of a certain note dated 12-14-81 executed and delivered by Vendors or their predecessors in interest to Gate City Mortgage Company

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 M205 of at Page 721-25 in the Summit County Recorder's office, State of Utah, as Document No. 186655

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 endors 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

Daniel W. Marcum

John C. Forrester Jr. Vendor

Edward A. Dalton Jr. Vendor

Michael C. Johnson

Dated

Kilburn Vacation Home Shares Inc.

by James M. Clark

Agent

Purchaser

(over)

EXHIBIT "B"

1009

JC 300087

GCM 35

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: Dennis Lee Crockett, a married man & Clive A. Pusey, a married man hereinafter called Vendors,

and Kilburn Vacation Home Share Inc. hereinafter called

Purchasers, of property located at 3397 West Saddleback Road

WHEREAS Gate City Mortgage Co. is the owner and holder of a certain note dated 12-21-81 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 M 206 of at Page 689-94 in the Summit County Recorder's office, State of Utah, as Document No. 189635

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

Dennis Lee Crockett Vendor

Clive A. Pusey Vendor

Dated

Kilburn Vacation-Homeshare

Purchaser

by James M. Clark

Agent Purchaser

(over)

EXHIBIT "C"

1010

JC 300051

GCM 35

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:

Stephen L. Blaser, A married man hereinafter called Vendors,

and Kilburn Vacation Home Share Inc. hereinafter called

Purchasers, of property located at 3493 West Saddle back Road

WHEREAS Gate City Mortgage Co. is the owner and holder of a certain note dated 12-30-81 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 M207 of ..... at Page 310 in the Summit County Recorder's office, State of Utah, as Document No. 187140

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 .....

Stephen L. Blaser Vendor

Vendor

Dated .....

Kilburn Vacation-Homeshare

Purchaser

by James M. Clark

Agent Purchaser

(over)

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:

Matthew R. White, a married man hereinafter called Vendors,

and Kilburn Vacation Home Share Inc. hereinafter called

Purchasers, of property located at 3780 West Saddleback Road

WHEREAS Gate City Mortgage Co. is the owner and holder of a certain note dated 11-27-81 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 M204 of at Page 160 in the Summit County Recorder's office, State of Utah, as Document No. 186118

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

Matthew R. White Vendor

Vendor

Dated

Kilburn Vacation-Homeshare by

James M. Clark Purchaser

Purchaser

Agent

(over)

1012

JC 350067

GCM 35

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: Graham Dodd, a married man, and Dwight Howard Egan, A married man hereinafter called Vendors, and Kilburn Vacation Home Share Inc. hereinafter called Purchasers, of property located at 8765 West Silver Spur Road

WHEREAS Gate City Mortgage Co is the owner and holder of a certain note dated 12-21-81 executed and delivered by Vendors or their predecessors in interest to Gate City Mortgage

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 M206 of at Page 680 in the Summit County Recorder's office, State of Utah, as Document No. 186931

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

Graham Dodd Vendor

Dwight Howard Egan Vendor

Dated

Kilburn Vacation-Homeshare

Purchaser

by James M. Clark

Purchaser

Agent

(over)

1013

JC 300063

GCM 35

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: Christian E. Hansen, A married man, and David E. Jones, a married man hereinafter called Vendors,

and Kilburn Vacation Home Share Inc. hereinafter called

Purchasers, of property located at 3493 West Wrangler Way

WHEREAS Gate City Mortgage is the owner and holder of a certain note dated 12-30-81 executed and delivered by Vendors or their predecessors in interest to Gate City Mortgage

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 M207 of at Page 639 in the Summit County Recorder's office, State of Utah, as Document No.

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 Aug 23, 1982

Christian E. Hansen Vendor

David E. Jones Vendor

Dated

Kilburn Vacation-Homeshare

by James M. Clark Purchaser

Purchaser

Agent

(over)

JC 300059

1014

GCM 35

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: Kelvyn H Cullimore, a married man, Thomas G. Osborne, a married man, and W. Truman Rigby, a married man hereinafter called Vendors, and Kilburn Vacation Home Shares Inc. hereinafter called Purchasers, of property located at 8775 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 M205 of at Page 386-90 in the Summit County Recorder's office, State of Utah, as Document No. 186503

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.

Kelvyn H. Cullimore

Dated

Thomas G. Osborne Vendor

W. Truman Rigby Vendor

Dated

Kilburn Vacation-Homeshare Purchaser

by James M. Clark

Agent Purchaser

(over)

JC 350071

1015

GCM 35

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: Marden Spencer, a married man, Kenneth Paul College, a married man, J. Ray Fisher, a married man, and O. Jay Call, a married man, hereinafter called Vendors,

and Kilburn Vacation Homeshare Inc. hereinafter called

Purchasers, of property located at 8805 West Silver Spur Road

WHEREAS Gate City Mortgage Co. is the owner and holder of a certain note dated 12-14-81 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 M205 of at Page 713-17 in the Summit County Recorder's office, State of Utah, as Document No. 186651.

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.

Marden Spencer

Dated

Kenneth Paul College Vendor

J. Ray Fisher Vendor

Dated

O. Jay Call

Purchaser

~~Purchaser~~

Kilburn Vacation-Homeshare

by James M. Clark

Agent

(over)

JC 300075

1016

GCM 35

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: Marvin L. Mills, a married man, and John C. Forrester III, a married man hereinafter called Vendors,

and Kilburn Vacation Home Shares Inc. hereinafter called

Purchasers, of property located at 8815 West Silver Spur Road

WHEREAS Gate City Mortgage Co. is the owner and holder of a certain note dated 12-14-81 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 M205 of at Page 318-22 in the Summit County Recorder's office, State of Utah, as Document No. 186692

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

Marvin L. Mills
Marvin L. Mills Vendor

John C. Forrester III
John C. Forrester III Vendor

Dated

Kilburn Vacation-Homeshare
James M. Clark Purchaser
by James M. Clark
Agent Purchaser

(over)

JC 300079

1017

GCM 35

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

Donald Lewis Smith Vendor

Jedd P. Jones Vendor

Dated

Kilburn Vacation-Homeshare Purchaser

by James M. Clark

Agent Purchaser

(over)

00083

GCM 35

1012

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: Daniel W. Marcum, an unmarried man, John C. Forrester Jr. a married man, Edward A. Dalton Jr., a married man, & Michael C. Johnson, a married man hereinafter called Vendors,

and Kilburn Vacation Home Shares Inc. hereinafter called

Purchasers, of property located at 8835 West Silver Spur Road

WHEREAS Gate City Mortgage Company is the owner and holder of a certain note dated 12-14-81 executed and delivered by Vendors or their predecessors in interest to Gate City Mortgage Company

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 M205 of at Page 721-25 in the Summit County Recorder's office, State of Utah, as Document No. 186655

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

Daniel W. Marcum

John C. Forrester Jr. Vendor

Edward A. Dalton Jr. Vendor

Michael C. Johnson

Dated

Kilburn Vacation-Home Purchaser

by James M. Clark

Agent

Purchaser

(over)

1019

JC 300087

GCM 35

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:

R. John Eyre, a married man hereinafter called Vendors,

and Kilburn Vacation Home Share Inc. hereinafter called

Purchasers, of property located at 8845 West Silver Spur Road

WHEREAS Gate City Mortgage Co. is the owner and holder of a certain note dated 11-27-81 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 M204 of at Page 167 in the Summit County Recorder's office, State of Utah, as Document No. 186121

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

R. John Eyre Vendor

Vendor

Dated

Kilburn Vacation-Homeshare

Purchaser

by James M. Clark

Purchaser

Agent

(over)

1020

JC 380091

GCM 35

June 29. 1994

Carl Cooper
Gate City Mortgage
1225 South 800 East Suite 210
Orem. Utah
84057

Dear Carl:

On behalf of those individuals listed on the attached page. I am writing a formal response to your delinquency letter mailed.

As you know. the homes in questioon have been owned and payments have been made by Kilburn Vacation Homeshare. Inc. for the last 2.5+/- years. It was a condition of sale from the prior owness that these mortgages be assumed by Kilburn. I think you are aware of this inasmuch as you have worked with Kilburn during that period on the assumption process. It was my assumption (no pun intended) that this process had been completed based on my conversations with Kilburn during the last year and due to the fact no payment information or correspondence to my knowledge had been sent to the prior owners.

Upon hearing of Kilburn's current financial stresses. and upon confirmation of the fact that no assumption had been made. I negotiated a purchase of the homes from Kilbuirn. They are presently owned by MCB Co.

My main interest in this unfortunate situation is to see that protracted foreclosure proceedings and unnecessary hassles to prior owners are avoided. To accomplish this I am proposing (as I have previously over the phone) that Gate City Mortgage accept deeds in lieu of foreclosure immediately - thereby putting the property into your ownership, and absolute control.

I am not interested in any negative counter-productive proceedings with any party involved. but am not in a position to incur a loss in this matter. If it becomes necessary to protect MCB and it's other asets with more dramatic measures, I will not hesitate to take them. Let me reassure you, my first choice is to see that deeds are transferred and am prepared to follow through for you in this way at the present time.

Sincerely,

Vaughn Cook

PS. I am expecting to talk with Bill Lively the first of next week as a continuation of our conversation of yesterday. I am optomistic things can work out satisfactorily for all of us.

EXHIBIT "D"

APPENDIX F

DEPOSITION EXHIBIT
21
4-26-83

UNIFORM REAL ESTATE CONTRACT

1. THIS AGREEMENT, made in duplicate this 1st day of January, A. D., 1982, by and between Stephen L. Blaser, a married man hereinafter designated as the Seller, and CC International, a Utah Corporation hereinafter designated as the Buyer, of c/o Vaughn Cook and Associates, Inc. 450 East 1000 North North Salt Lake City, Utah 84054

2. WITNESSETH: That the Seller, for the consideration herein mentioned agrees to sell and convey to the Buyer, and the buyer for the consideration herein mentioned agrees to purchase the following described real property, situate in the county of Summit, State of Utah, to-wit: 3780 West Saddleback Road Park West (ADDRESS)

More particularly described as follows: 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 Recorders Office, as Entry No. 157211.

Situated in Summit County, State of Utah.

3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of two hundred ninety five thousand, four hundred seventy one &48/100 Dollars ($295,471.48) payable at the office of Seller, his assigns or order see below strictly within the following times, to-wit: ninetyfive thousand four hundredseventyone 48/100(95,471.48 cash, the receipt of which is hereby acknowledged, and the balance of $200,000 shall be paid as follows:

Buyer agrees to take property subject to first mortgage to Gate City Mortgage dated December 30, 1981, and to assume, or cause the same to be assumed by any subsequent buyer.

Possession of said premises shall be delivered to buyer on the 1st day of January, 19 82

4. Said monthly payments are to be applied first to the payment of interest and second to the reduction of the principal. Interest shall be charged from see above on all unpaid portions of the purchase price at the rate of see above per cent (see above %) per annum. The Buyer, at his option at anytime, may pay amounts in excess of the monthly payments upon the unpaid balance subject to the limitations of any mortgage or contract by the Buyer herein assumed, such excess to be applied either to unpaid principal or in prepayment of future installments at the election of the buyer, which election must be made at the time the excess payment is made.

5. It is understood and agreed that if the Seller accepts payment from the Buyer on this contract less than according to the terms herein mentioned, then by so doing, it will in no way alter the terms of the contract as to the forfeiture hereinafter stipulated, or as to any other remedies of the seller.

6. It is understood that there presently exists an obligation against said property in favor of Gate City Mortgage (which buyer agrees to be responsible for) with an unpaid balance of $200,000.00, as of December 30, 1981

7. Seller represents that there are no unpaid special improvement district taxes covering improvements to said premises now in the process of being installed, or which have been completed and not paid for, outstanding against said property, except the following none

8. The Seller is given the option to secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder, bearing interest at the rate of not to exceed NA percent (NA %) per annum and payable in regular monthly installments; provided that the aggregate monthly installment payments required to be made by Seller on said loans shall not be greater than each installment payment required to be made by the Buyer under this contract. When the principal due hereunder has been reduced to the amount of any such loans and mortgages the Seller agrees to convey and the Buyer agrees to accept title to the above described property subject to said loans and mortgages.

9. If the Buyer desires to exercise his right through accelerated payments under this agreement to pay off any obligations outstanding at date of this agreement against said property, it shall be the Buyer's obligation to assume and pay any penalty which may be required on prepayment of said prior obligations. Prepayment penalties in respect to obligations against said property incurred by seller, after date of this agreement, shall be paid by seller unless said obligations are assumed or approved by buyer.

10. The Buyer agrees upon written request of the Seller to make application to a reliable lender for a loan of such amount as can be secured under the regulations of said lender and hereby agrees to apply any amount so received upon the purchase price above mentioned, and to execute the papers required and pay one-half the expenses necessary in obtaining said loan, the Seller agreeing to pay the other one-half, provided however, that the monthly payments and interest rate required, shall not exceed the monthly payments and interest rate as outlined above.

11. The Buyer agrees to pay all taxes and assessments of every kind and nature which are or which may be assessed and which may become due on these premises during the life of this agreement. The Seller hereby covenants and agrees that there are no assessments against said premises except the following:

It is agreed that any assessments that may be against the property which are not known of this time shall be the responsibility of buyer and Alta Title.

The Seller further covenants and agrees that he will not default in the payment of his obligations against said property.

12. The Buyer agrees to pay the general taxes after December 3 1981

13. The Buyer further agrees to keep all insurable buildings and improvements on said premises insured in a company acceptable to the Seller in the amount of not less than the unpaid balance on this contract, or $_____ and to assign said insurance to the Seller as his interests may appear and to deliver the insurance policy to him.

14. In the event the Buyer shall default in the payment of any special or general taxes, assessments or insurance premiums as herein provided, the Seller may, at his option, pay said taxes, assessments and insurance premiums or either of them, and if Seller elects so to do, then the Buyer agrees to repay the Seller upon demand, all such sums so advanced and paid by him, together with interest thereon from date of payment of said sums at the rate of ¾ of one percent per month until paid.

15. Buyer agrees that he will not commit or suffer to be committed any waste, spoil, or destruction in or upon said premises, and that he will maintain said premises in good condition.

16. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within fifteen days thereafter, the Seller, at his option shall have the following alternative remedies:

A. Seller shall have the right, upon failure of the Buyer to remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may at his option re-enter and take possession of said premises without legal processes as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller; or

B. The Seller may bring suit and recover judgment for all delinquent installments, including costs and attorneys fees. (The use of this remedy on one or more occasions shall not prevent the Seller, at his option, from resorting to one of the other remedies hereunder in the event of a subsequent default): or

C. The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah, and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorney's fees; and the Seller may have a judgment for any deficiency which may remain. In the case of foreclosure, the Seller hereunder, upon the filing of a complaint, shall be immediately entitled to the appointment of a receiver to take possession of said mortgaged property and collect the rents, issues and profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to order of the court; and the Seller, upon entry of judgment of foreclosure, shall be entitled to the possession of the said premises during the period of redemption.

17. It is agreed that time is the essence of this agreement.

18. In the event there are any liens or encumbrances against said premises other than those herein provided for or referred to, or in the event any liens or encumbrances other than herein provided for shall hereafter accrue against the same by acts or neglect of the Seller, then the Buyer may, at his option, pay and discharge the same and receive credit on the amount then remaining due hereunder in the amount of any such payment or payments and thereafter the payments herein provided to be made, may, at the option of the Buyer, be suspended until such time as such suspended payments shall equal any sums advanced as aforesaid.

19. The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned and except as may have accrued by or through the acts or neglect of the Buyer, and to furnish at his expense, a policy of title insurance in the amount of the purchase price or at the option of the Seller, an abstract brought to date at time of sale or at any time during the term of this agreement, or at time of delivery of deed, at the option of Buyer.

20. It is hereby expressly understood and agreed by the parties hereto that the Buyer accepts the said property in its present condition and that there are no representations, covenants, or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached hereto _____

21. The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

22. It is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the said parties to this agreement have hereunto signed their names, the day and year first above written.

Signed in the presence of

It is understood that at such time as the underlying mortgage is assumed by buyer or its assigns, then this contract shall be deemed fully executed and paid

Seller

CC International, a Utah Corp.
by Vaughn Cooke, Sec/Treas
& Vaughn Cooke individually
Buyer

Uniform Real Estate Contract

No.

To

Approved Form: Utah State Securities Commission and Utah State Realty Association.

APPENDIX G

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: Dennis Lee Crockett, a married man & Clive A. Pusey, a married man hereinafter called Vendors,

and Kilburn Vacation Home Share Inc. hereinafter called Purchasers, of property located at 3397 West Saddleback Road

WHEREAS Gate City Mortgage Co. is the owner and holder of a certain note dated 12-21-81 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 M 206 of at Page 689-94 in the Summit County Recorder's office, State of Utah, as Document No. 189635

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

Dennis Lee Crockett Vendor

Clive A. Pusey Vendor

Dated

Kilburn Vacation-Homeshare Purchaser

by James M. Clark

Agent Purchaser

(over)

EXHIBIT "C"

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JC 300051

GCM 35

APPENDIX H

VAUGHN COOK & ASSOCIATES
450 East 1000 North - North Salt Lake City, Utah 84054 - (801) 295-1507

PENGAD-Bayonne, N. J.
DEPOSITION EXHIBIT
1
-5-85

October 8, 1981

Marv Mills
4527 South 2300 East
Holladay, Utah 84117

Dear Marv,

This letter is just a follow-up on our Park City financing program that you are participating in. I want to be sure that you have a written description of what we are doing as well as have a follow-up on any legal documents involved so that we all know that the bases have been properly covered right from the start. As I have explained, I am building 26 homes for a man named Jim Clark in the Jeremy Ranch subdivision in Summit County. Jim is in the business of timesharing these homes out and because of the tax shelter aspects involved, his timeshare program has been, and is for 1981, very successful.

At the beginning of this year when I entered into the contract with Jim, we pursued financing on the basis of one loan for the entire package with Jim as the mortgagor. We soon found that there was no money available in the secondary market for such a loan which is to say the lending institutions were interested in the loan, but found that they had no buyer for that type of mortgage in today's market. As a result of this problem we arranged with the bank to finance each home on an individual basis. What this required was to have between one and three individuals who would qualify and take out the mortgage, or effectively, buy the home. We further agreed with the banks that all mortgages would be assumable and that after the mortgage is placed, Jim Clark would be able to assume those mortgages. This program accomplished my purpose in providing me with the funding needed to deliver the homes to Jim. It also satisfied the needs of the banks because it gives them a mortgage that they can sell on the secondary market.

In developing this program I allocated proceeds from each home to be paid to those individuals willing to help finance the homes. This money is to be split by the individuals qualifying for that home. Presently we have committments on homes under construction and where possible we'll process you with the lending institutions in such a way as to qualify you for more than one home. Inasmuch as I am successful in doing this you will receive additional fees. Enclosed you will find two documents. The first is a guarantee from Jim that he will assume any mortgage we place on "your" home. Although I have a firm contract

with Jim that gives me his guarantee, I felt that it would be useful to have him extend his guarantee to you in writing, so that you are assured of his further performance. The second item is an assignment of interest on any property we presently have you committed to finance. This assignment of interest serves as a guarantee to Jim that the property will be transferred to him at closing without question or delay.

I appreciate your help in this matter and am looking forward to a smooth closing prior to the end of the year.

Sincerely,

Vaughn

VAUGHN R COOK

VRC:ko

Enclosures

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You'll notice that the assignments and guarantee letter have not been signed. These items will be signed on the specific homes as we make those assignments. I wanted you to have a copy to see what they would look like.

Kilburn Vacation-Homeshare, Inc. does hereby guarantee to assume or cause to be assumed by this corporation, or its subsidiaries or assigns, the mortgage to be placed on the property known as Lot # _____, Jeremy Ranch Subdivision, Summit County, Utah. It is understood that following your closing of said mortgage on subject property this corporation, or its subsidiaries, or assigns shall take title to said property and as part of the title transfer, assume that mortgage from you.

KILBURN VACATION-HOMESHARE, INC.

By: _____
Its Agent

VAUGHN COOK & ASSOCIATES
450 East 1000 North - North Salt Lake City, Utah 84054 - (801) 295-1507

PENGAD-Bayonne, N. J.
DEPOSITION EXHIBIT
19

October 6, 1981

John C. Forrester, III
3409 East Magic View Drive
Salt Lake City, Utah 84121

Dear Jack,

This letter is just a follow-up on our Park City financing program that you are participating in. I want to be sure that you have a written description of what we are doing as well as have a follow-up on any legal documents involved so that we all know that the bases have been properly covered right from the start. As I have explained, I am building 26 homes for a man named Jim Clark in the Jeremy Ranch subdivision in Summit County. Jim is in the business of timesharing these homes out and because of the tax shelter aspects involved, his timeshare program has been, and is for 1981, very successful.

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I appreciate your help in this matter and am looking forward to a smooth closing prior to the end of the year.

Sincerely,

Vaughn

VAUGHN R COOK

VRC:ko

Enclosures

PENGAD-Bayonne, N. J.
DEPOSITION EXHIBIT
19-2

VAUGHN COOK & ASSOCIATES
450 East 1000 North - North Salt Lake City, Utah 84054 - (801) 295-1507

PENGAD-Bayonne, N.J.
DEPOSITION EXHIBIT
1
Fisher

October 6, 1981

J. Ray Fisher
606 East 3550 South
Bountiful, Utah 84010

Dear Ray,

This letter is just a follow-up on our Park City financing program that you are participating in. I want to be sure that you have a written description of what we are doing as well as have a follow-up on any legal documents involved so that we all know that the bases have been properly covered right from the start. As I have explained, I am building 26 homes for a man named Jim Clark in the Jeremy Ranch subdivision in Summit County. Jim is in the business of timesharing these homes out and because of the tax shelter aspects involved, his timeshare program has been, and is for 1981, very successful.

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Sincerely,

Vaughn

VAUGHN R COOK

VRC:ko

Enclosures

VAUGHN COOK & ASSOCIATES
450 East 1000 North - North Salt Lake City, Utah 84054 - (801) 295-1507

October 6, 1981

R. John Eyre
2464 Murray Holladay Road
Salt Lake City, Utah 84117

Dear John,

This letter is just a follow-up on our Park City financing program that you are participating in. I want to be sure that you have a written description of what we are doing as well as have a follow-up on any legal documents involved so that we all know that the bases have been properly covered right from the start. As I have explained, I am building 26 homes for a man named Jim Clark in the Jeremy Ranch subdivision in Summit County. Jim is in the business of timesharing these homes out and because of the tax shelter aspects involved, his timeshare program has been, and is for 1981, very successful.

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DEPOSITION EXHIBIT 1

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I appreciate your help in this matter and am looking forward to a smooth closing prior to the end of the year.

Sincerely,

Vaughn

VAUGHN R COOK

VRC:ko

Enclosures

VAUGHN COOK & ASSOCIATES
450 East 1000 North - North Salt Lake City, Utah 84054 - (801) 295-1507

DEPOSITION EXHIBIT
3
Dalton
PENGAD-Bayonne, N. J.

October 8, 1981

Ed Dalton
Erda, Utah 84074

Dear Ed,

This letter is just a follow-up on our Park City financing program that you are participating in. I want to be sure that you have a written description of what we are doing as well as have a follow-up on any legal documents involved so that we all know that the bases have been properly covered right from the start. As I have explained, I am building 26 homes for a man named Jim Clark in the Jeremy Ranch subdivision in Summit County. Jim is in the business of timesharing these homes out and because of the tax shelter aspects involved, his timeshare program has been, and is for 1981, very successful.

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I appreciate your help in this matter and am looking forward to a smooth closing prior to the end of the year.

Sincerely,

Vaughn

VAUGHN R COOK

VRC:ko

Enclosures

VAUGHN COOK & ASSOCIATES
450 East 1000 North · North Salt Lake City, Utah 84054 · (801) 295-1507

New file "Vaughn Cook" -- Park City deal CO 627

October 6, 1981

Daniel W. Marcum
65 Apricot Avenue
Salt Lake City, Utah 84103

Dear Dan,

This letter is just a follow-up on our Park City financing program that you are participating in. I want to be sure that you have a written description of what we are doing as well as have a follow-up on any legal documents involved so that we all know that the bases have been properly covered right from the start. As I have explained, I am building 26 homes for a man named Jim Clark in the Jeremy Ranch subdivision in Summit County. Jim is in the business of timesharing these homes out and because of the tax shelter aspects involved, his timeshare program has been, and is for 1981, very successful.

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DEPOSITION EXHIBIT
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9-21-87
NGAD-Bayonne, N.J.

APPENDIX I

57-15-8. Procedure for assumption — Request to lender — Effect of failure to request — Approval or refusal by lender — Information furnished by lender.

(1) In order to effect an assumption under this chapter the original borrower, or, if the secured party has previously approved, and pursuant to that approval there has been effected, an assumption of the indebtedness secured by an instrument representing a security interest in real estate, the person last approved as an assumer and who has assumed the indebtedness shall give to the lender a written notice and request for assumption. The lender shall either approve or reject a prospective assumer within 30 days after the written notice and request for assumption is received from the original borrower or the party last approved as an assumer. The lender may refuse to release the original borrower or the party last approved as an assumer and who has assumed if the secured party has previously approved the assumption of the indebtedness, from liability for the payment of the indebtedness to be assumed. With respect to any transfer involving an assumption effected after the effective date of this act, if the written notice and request for an assumption is not timely made before a transfer or within 90 days after transfer, the lender may call the entire loan balance due without a determination that the security interest is substantially impaired, if that option is provided for in the original loan agreement.

(2) The lender shall provide the original borrower or, if the indebtedness has been assumed with the previous approval of the lender, the person last approved with a statement of loan condition within 14 days after receipt of written notice and request. The statement shall include the following information: (a) the amount of the unpaid balance on the secured loan; (b) the interest rate; (c) the amount of the monthly loan installment; (d) the date or dates any real estate taxes and special assessments were last paid; (e) the amount of hazard insurance in effect if that information is contained in the records of the lender; and (f) the amount of any impound balance reserve for payments of taxes, special assessments, and insurance.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.