

1988

Lawrence C. Kay, Joy Kay, Robert L. Kay, and Teresa Kay v. Summit Systems : Brief of Appellant

Utah Supreme Court

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BRIEF

UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

110

DOCKET

LAWRENCE C. KAY, JOY

KAY, ROBERT L. KAY,

and TERESA KAY,

880234-CA

Plaintiffs-
Appellants,

vs.

SUMMIT SYSTEMS, INC.,
a corporation; VAL E.
SOUTHWICK; et al.,

Defendants-
Respondents.

Case No. 870121

Category 14b

APPELLANTS' BRIEF

APPEAL FROM THE JUDGMENT OF THE
SEVENTH JUDICIAL DISTRICT COURT OF
UINTAH COUNTY, STATE OF UTAH, THE HONORABLE
RICHARD C. DAVIDSON, PRESIDING.

JACKSON HOWARD and
LILLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
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APPELLANTS

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500 Kearns Building
Salt Lake City, Utah 84101
ATTORNEYS FOR DEFENDANTS-RESPONDENTS

IN THE SUPREME COURT OF THE STATE OF UTAH

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ATTORNEYS FOR DEFENDANTS-RESPONDENTS

LIST OF PARTIES

A complete heading in the District Court appears below. All of the defendants, except J. Scott Beuhler, were represented by Richard W. Giaugue and Stephen T. Hard of Giaugue, Williams, Wilcox & Bendinger, Salt Lake City, Utah. The damage claims against J. Scott Beuhler were dismissed by stipulation, but he was represented below by Robert M. Anderson of Hansen & Anderson, Salt Lake City, Utah.

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR UINTAH COUNTY

STATE OF UTAH

LAWRENCE C. KAY, JOY KAY,
ROBERT L. KAY and TERESA
KAY,

Plaintiffs,

vs.

SUMMIT SYSTEMS, INC., a
corporation; VAL E. SOUTHWICK;
J. SCOTT BUEHLER; JACK M.
STEVENS and DEVON JOHNSON,
Trustees of BENNETT'S EMPLOYEES
PENSION PLAN TRUST; DEAN F.
HAMMOND, M.D., Trustee of
ASSOCIATES OF PATHOLOGY PROFIT
SHARING TRUST; DONNA J. NOLL;
JOHN DOE I, Trustee of LINFORD
BROTHERS EMPLOYEES PROFIT
SHARING TRUST; KATIE LOGAN;

Civil No. 27,379

SIMPLOT PARTNERSHIP, a	:
partnership; MYRTLE HUTCHISON;	
MARY C. YOUNG; CHARLES SMITH;	:
KARMA SMITH; ROSS HYLAND;	
RITA HYLAND; JOHN DOE II,	:
Trustee of STEVEN R. POPE	
PENSION PROFIT SHARING PLAN;	:
JOHN DOE III, Trustee of	
STEVEN R. POPE KEOGH;	:
JOHN DOE IV, Trustee of	
STEVEN R. POPE IRA;	:
FREDERICK MONTMORENCY,	
Trustee of FREDERICK	:
MONTMORENCY P.C. EMPLOYEES	
RETIREMENT TRUST; JOHN DOE	:
V, Trustee of FREDERICK	
MONTMORENCY P.C. PROFIT	:
SHARING PLAN; BRANDON	
BOSWORTH; BRIAN BOSWORTH;	:
GARY BOSWORTH, Guardian;	
DARIN G. BOSWORTH; RICHARD	:
C. BOSWORTH, Guardian; RICHARD	
D. BOSWORTH; R. LAMONT STEVENS,	:
Trustee of A & B PLUMBING	
PENSION; FRANCIS M. HAMMOND;	:
W. ANDREW LYLE, M.D., Trustee	
of W. ANDREW LYLE, M.D. P.C.	:
DEFINED BENEFIT PENSION PLAN;	
JOHN R. REAM, JR., M.D.,	:
Trustee of JOHN R. REAM, JR.,	
M.D. P.C. REAM DEFINED	:
BENEFIT PENSION PLAN;	
GORDON D. BIRD; MAJORIE	:
BIRD; DEAN A. BEAL; JOANNE	
BEAL; ZION'S FIRST NATIONAL	:
BANK, Custodian for L.	
LAMONT STEVENS INDIVIDUAL	:
RETIREMENT ACCOUNT; JAY R.	
YEATS, M.D., aka J. R.	:
YEATS, Trustee of TANNER	
MEMORIAL CLINIC PROFIT	:
SHARING PLAN FBO; PAUL R.	
TAYLOR, M.D.; JOHN DOE VI,	:
Trustee of TANNER MEMORIAL	

CLINIC PROFIT SHARING PLAN	:
FBO; JOHN DOE VII, Trustee of	:
R. THANE HALES, D.D.S. PROF.	:
CORP. DEFINED BENEFIT PLAN;	:
JOHN DOE VIII, Trustee of R.	:
THANE HALES, D.D.S. PROFIT	:
SHARING ACCOUNT; QUINN H.	:
CHILD, Trustee of PEERLESS	:
PRODUCTS AND CO PENSION	:
PLAN AND TRUST; RUTH ANN	:
TRIGGS; F. CLYDE NULL, M.D.;	:
ROY E. McDONALD, M.D.; JOHN	:
DOE IX, Trustee of DEVON AND	:
RUTH JOHNSON IRA,	:

Defendants.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Case No. 870121

Category 14b

APPELLANTS' BRIEF

JURISDICTION AND NATURE OF PROCEEDINGS

The trial court dismissed plaintiffs' Complaint on defendants' Motion for Summary Judgment. This is an appeal as of right from that ruling. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(i) (1987).

ISSUES PRESENTED

1. Where a note secured by a trust deed and by certain letters of credit provides for partial reconveyances upon payment of specified portions of principal, and where the letters of credit are called and applied to the principal by reason of the

promissors' failure to make other payments, are the promissors entitled to the corresponding partial reconveyances?

2. Does an accord and satisfaction exist as a matter of law where one party to a real estate transaction claims an entitlement to a reconveyance of a certain number of lots, and the trustee and beneficiaries repeatedly refuse to reconvey those lots but finally agree to reconvey a portion of the lots?

3. Are the covenants of good faith and fair dealing breached where the trustors make an oral demand for release of certain lots to which they are entitled, and where the beneficiaries know of circumstances which make the release of those lots by a certain date necessary in order to prevent severe economic injury to the trustors, but nonetheless fail to secure a reconveyance of the lots by the required date?

4. Did a genuine issue of fact exist precluding summary judgment on plaintiffs' claim that the contract was unconscionable where the lender failed to disclose material terms in advance of closing and by reason of the lender's delay in closing the borrower had no viable alternative but to execute the contract, and where the terms of the contract are unfair and oppressive?

STATEMENT OF THE CASE

A. Nature of the Case. This is an action by the trustors under a trust deed and note for breach of contract by the benefi-

ciaries. The trustors, in addition, sought reformation of the contract, to quiet title to the underlying real property, and recover damages for breach of fiduciary duties and for filing a wrongful notice of default.

B. Course of Proceedings. Plaintiffs commenced this action by filing their Complaint on February 12, 1986. (R. 1.) Defendant J. Scott Beuhler filed a Motion for Summary Judgment on November 3, 1986 (R. 614), and the damage claims against him were dismissed pursuant to stipulation. (R. 697-98, 699-700.) All of the defendants, except Beuhler, (hereinafter "defendants") had previously filed a Motion for Summary Judgment on October 17, 1986. (R. 390-92.) The Hon. Richard C. Davidson, District Judge, considered the matter on the briefs and entered a ruling dismissing plaintiffs' Complaint in its entirety on January 27, 1987. (R. 945.)

Plaintiffs filed a Motion under Utah R. Civ. P. 60(b) to vacate the judgment (R. 977) and obtained an extension of time to appeal pending ruling on the motion for relief from the judgment. (R. 986.) The matter was heard by the Hon. Boyd Bunnell, District Judge, who entered a ruling denying the motion for relief from the judgment on March 18, 1987. (R. 1097.) Plaintiffs thereafter perfected this appeal. (R. 1101.)

C. Statement of Facts. This action involves certain agreements plaintiffs entered into with Summit Systems, Inc. (hereinafter "Summit") in order to finance the development of a 75-acre subdivision known as Yellow Hills located near Vernal, Utah. Robert Kay, as nominee, purchased the land¹ on January 20, 1983, from Clive Sprouse for \$350,000.00. (Clive Sprouse deposition at Exhibit 1.) Plaintiffs thereafter spent approximately \$110,000.00 in engineering and surveying work and road construction. (L. Kay depo at p. 43.)

In October or November of 1983, plaintiffs sought to obtain financing for the project from Summit. (L. Kay depo at p. 56.) The Yellow Hills property, at that time, had an appraised value of approximately \$1,518,000.00 (L. Kay depo at Ex. 9 (appraisal dated November 3, 1983)), and it appeared that lots would be readily marketable. (L. Kay depo at Ex. 2.) Summit agreed to extend a loan for approximately \$800,000.00 if certain requirements were met. (L. Kay depo at p. 56.)

At the time plaintiffs applied for a loan from Summit, they already had existing obligations of \$250,000.00 to Clive Sprouse for the balance of the purchase price of the land, \$110,000.00 to

¹Robert Kay purchased approximately 175 acres but only approximately 75 acres were developable. (Deposition of Lawrence Kay, June 12, 1986, (hereinafter "L. Kay depo") at p. 20, l. 22 through p. 21, l. 4.)

First Security Bank for a development loan on the project, and \$135,000.00 for another development loan. (L. Kay depo at pp. 60-62, 66, Ex. 1.) Summit delayed the closing of the loan for a couple of months (L. Kay depo at p. 56), and by the time the closing occurred, the Sprouse and First Security Bank obligations were past due. (L. Kay depo at pp. 61, 84.)

Although plaintiffs had been previously advised that there would be a "discount" (i.e., the face amount of the loan would be greater than the amount actually disbursed), plaintiffs had understood the discount would be approximately 10% and that the interest rate would be approximately 10%. (R. 499, 524.) The plaintiffs were not informed until closing that the discount would be \$123,000.00, or approximately 17%, and in addition that the interest rate would be 17%. (R. 500, 525.) Plaintiffs objected to the discount rate and interest rate, but upon discovering that Summit would not negotiate the terms, the plaintiffs signed the documents because they had no reasonable alternative at that time due to the delay in closing the loan and the resulting delinquency of the obligations to Clive Sprouse and to First Security Bank. (L. Kay depo at pp. 93-94.) Plaintiffs received the sum of \$667,000.00, but under the trust deed and note were required to pay \$806,000.00 plus interest at 17%. (R. 19-23.) (Copies of the

trust deed and trust deed note are attached hereto as Appendices "B" and "C" respectively.

In connection with obtaining the loan, plaintiffs were required to execute a trust deed for the Yellow Hills property in favor of Summit as beneficiary, and in addition to post three letters of credit with a total value of \$280,000.00. Plaintiffs were concerned about the effect of calling the letters of credit, particularly with respect to reconveyances of lots. Plaintiffs were assured by Val Southwick, president of Summit, that the appropriate number of lots would be reconveyed upon the calling of a letter of credit, the same as with other payments of principal. (R. 500-01, 525-26; L. Kay depo at pp. 91, 93, 95, 117; Robert Kay depo dated June 12, 1986 (hereinafter "R. Kay depo"), at pp. 32-33, 35; Marva Joy Kay depo at p. 13; Teresa Kay depo at pp. 9-10.)

The beneficial interest under the trust deed was subsequently assigned by Summit to various investors, each of which are named as parties defendant in this action. Plaintiffs were not informed of the assignments and did not discover that they had occurred until after the trustee had recorded a notice of default with respect to the loan. (R. 502, 527.)

The trust deed stated that the first payment was due on June 1, 1986. Because of the uneven number of days for which interest

was due, however, Summit had agreed to compute the exact amount of the payment due and to advise plaintiffs. (R. 503, 528.) Plaintiffs paid the amount due on or about June 19, 1986, which was within ten days of receiving notice from Summit of the amount due. (L. Kay depo at Ex. 8; R. 473 at para. 13.) Plaintiffs did not make the payment which was due September 1, 1984, and Summit accordingly called one of the letters of credit from First Security Bank for \$110,000.00. (R. 473 at para. 13.) Plaintiffs also did not make the payment due December 1, 1984, and Summit called and drew upon the two remaining letters of credit, from First Interstate Bank in the total amount of \$170,000.00. (Id.)

As a result of the calling of the letters of credit, approximately \$200,000.00 was paid against the principal amount of the loan. Plaintiffs accordingly, on January 10, 1986, sent a written request to Summit for release of 12 lots.² (L. Kay depo at p. 118, Ex. 13; R. Kay depo at p. 46.) Summit received the letter (id.), but failed to release any lots. Plaintiffs had disclosed, while negotiating for the loan and at closing, that they were dependent upon timely releases and sales of lots in order to make the payments due under the trust deed and trust deed

²The trust deed provided in paragraph 22(a) for the release of one of each of the specified lots upon receipt of \$15,000.00 for each lot to be reconveyed. A payment of \$180,000.00 in principal would have entitled plaintiffs under this provision to a release of 12 lots.

note. (L. Kay depo at 69.) Plaintiffs had several parties who has expressed a genuine interest in purchase of lots, but plaintiffs were never able to solicit any written offers because they did not have any lots to sell. (L. Kay depo at 72-73.) Plaintiffs were able to make the payment due March 1, 1986, but were not able to make the payment due June 1, 1986.

Subsequent to the January 10, 1985, written demand for release of lots, plaintiffs made numerous oral demands for lot releases. (R. 503-04, 528-29.) Plaintiffs also explored several alternatives for arranging a purchase of the entire subdivision by other parties in order that plaintiffs could satisfy the obligation to Summit. About May 1, 1985, Southwick finally acknowledged that Summit was obligated to reconvey some lots to plaintiffs and in the middle of May agreed to reconvey 7 specified lots. (R. 504, 529.) Plaintiffs confirmed that agreement by a letter dated June 2, 1985. (R. Kay depo at p. 47.)

At about the same time, plaintiffs had negotiated a sale of the entire subdivision back to Clive Sprouse. The sale was contingent, however, on the release of 7 lots by June 24, 1985. (R. 504, 529.) Plaintiffs informed Southwick of the need to have the lots released by June 24. (Id.) The 7 lots were not, however, released until after July 1, 1985. (R. 489.) Plaintiffs immediately contacted Mr. Sprouse to determine if he would still

purchase the subdivision, but he had lost interest in the project and would not extend the deadline in his prior offer. (L. Kay depo at p. 142.) Plaintiffs thereafter commenced this litigation to recover the damages they had incurred and for a declaration of their rights.

SUMMARY OF ARGUMENT

The trust deed provided for partial reconveyances of one lot for each \$15,000.00 of principal paid. By reason of the calling of certain letters of credit, plaintiffs paid over \$200,000.00 in principal and were entitled to an appropriate release of lots. Even though the letters of credit were called and applied to the principal by reason of a claimed default by plaintiffs, case law establishes that plaintiffs were still entitled to the reconveyances where the trust deed did not make the reconveyances contingent on the absence of default.

The primary basis for the trial court's dismissal of plaintiffs' Complaint was its determination that an accord and satisfaction had been reached. The only evidence to support this determination was the fact that a demand for release of a reduced number of lots had been made and complied with. There was no evidence, however, of any intent to waive the balance of the initial demand, and in fact there was substantial evidence that

there was no such intent. The resolution of this factual dispute by summary judgment was improper.

Even if an executory accord or an accord and satisfaction were reached, defendants breached the agreement and breached their covenant of good faith and fair dealing by failing to reconvey the lots by a critical deadline of which defendants were aware.

Finally, the entire transaction was unconscionable. The interest rate and discount were grossly unreasonable and unfair in view of the value of the security. Plaintiffs had no meaningful alternative to entering the contract because they had foregone pursuit of other financing in reliance upon the representation that Summit would extend financing on certain terms, but they were not informed until closing that the terms were much more oppressive than initially represented, and because the underlying obligations were in default as a result of delays in closing. The court erred in dismissing the claim without a full hearing on the merits.

ARGUMENT

POINT I

DEFENDANTS BREACHED THE CONTRACT BY FAILING TO RECONVEY LOTS IN RESPONSE TO THE JANUARY 10, 1985 DEMAND.

The trust deed which is the subject of this action provided, in paragraph 22, that plaintiffs were entitled to a reconveyance

of specified lots upon receipt of \$15,000.00 for each lot reconveyed. (A complete copy of the trust deed is attached hereto as Appendix B.) As of January 4, 1985, the principal obligation secured by the trust deed had been reduced to \$605,972.17, a reduction of \$200,027.83 from the initial principal balance of \$806,000.00. (R. 479.) Although the large reduction in principal had resulted mainly from the proceeds of three letters of credit in the total amount of \$280,000.00 which had been called by defendants, plaintiffs nonetheless were entitled, by reason of representations made by Summit at the time the loan was closed and by the terms of the trust deed itself, to a reconveyance of an appropriate number of lots. On January 10, 1985, plaintiffs accordingly made a written demand on Summit for a release of 12 specified lots. Pursuant to the terms of the trust deed, plaintiffs would have been entitled to the release of those lots upon payment of \$180,000.00 in principal; plaintiffs had paid over \$200,000.00 in principal and should have been entitled to a release of 13 lots. Summit, however, refused to release any lots.

Summit's wrongful refusal to release the lots was the specific subject of Count II of plaintiffs' Complaint herein and was implicitly the subject of most of the other claims raised in plaintiffs' Complaint, including specifically Counts V, VI, and VII. The trial court dismissed Counts II, V, VI, and VII of the

Complaint based upon a claimed accord and satisfaction, and accordingly did not decide the issue of whether defendants had breached the contract by failing to reconvey the lots. Point II below establishes that the trial court erred in dismissing the Complaint based on the claim of accord and satisfaction.

The subject of lot releases was of critical importance to plaintiffs. The plaintiffs' ability to make the required payments under the trust deed note were dependent to a large extent on plaintiffs obtaining money from the sales of released lots. (L. Kay depo at p. 69.) Because obtaining timely releases of lots was of such critical importance to the entire operation, plaintiffs discussed the question of lot releases in some detail with Southwick at the closing of the transaction. Each of the plaintiffs testified that the subject of lot releases was discussed at the closing prior to the signing of the trust deed, and that Southwick had represented to plaintiffs that lots would be released if the letters of credit were called, the same as for any other payments of principal. Plaintiffs further testified that they were familiar with contracts in which lot release provisions were enforceable only when the trustors were not in default. In fact, the contract under which plaintiffs had purchased the property from Clive Sprouse contained such a provision. (L. Kay depo at pp. 53-54.)

The trust deed and trust deed note in this case were prepared by or at the direction of Summit, and accordingly, must be construed in favor of plaintiffs. In addition, contracts which provide for the partial release of a mortgage on specific lots or parcels are generally interpreted more strongly against the party required to give the release. Sears v. Riemersma, 655 P.2d 1105, 1107 (Utah 1982). To the extent that the partial release provision is ambiguous or uncertain, the Court should consider the testimony of the parties as to what the contract meant. Oberhansly v. Earle, 572 P.2d 1384, 1386 (Utah 1977).

Application of these principles to the instant case compels the conclusion that plaintiffs were entitled to a release of the lots claimed. Although Summit could have easily inserted a provision in the trust deed to provide that plaintiffs would not be entitled to reconveyances if they were otherwise in default, Summit failed to do so. Summit, in addition, represented to plaintiffs that they would be entitled to reconveyances if payments were made through calling of the letters of credit.

Courts that have considered the issue have generally held that a party is entitled to lot releases under a mortgage notwithstanding that he may be in default of other provisions unless the mortgage specifically provides otherwise. E.g., Harada v. Burns, 50 Hawaii 528, 588, 445 P.2d 376, 379 (1968); see also

Annot., Construction of provision in real-estate mortgage, land contract or other security instrument for release of separate parcels of land as payments are made, 41 A.L.R. 3d 7, 67 (1972).

This Court should hold, as a matter of law, that plaintiffs were entitled to a reconveyance of at least 12 lots on January 10, 1985, and are entitled to an appropriate award of damages by reason of defendants' failure to release those lots. In the alternative, this case should be remanded for the taking of evidence to determine what was the parties' intention with respect to release of lots at the time the trust deed was executed.

POINT II

THE JUNE 2, 1985 DEMAND FOR RELEASE OF 7 LOTS
DID NOT CONSTITUTE AN ACCORD AND SATISFACTION
AS A MATTER OF LAW.

Defendants claimed before the District Court that the June 2, 1985 demand for release of 7 lots constituted a compromise and settlement of the prior demand for release of 12 lots. The District Court accepted defendants' argument and entered summary judgment dismissing plaintiffs' breach of contract and other claims related to the failure to timely release lots (Counts II, V, VI and VII). The District Court's ruling was clearly erroneous. First, defendants failed to plead accord and satisfaction as an affirmative defense. Second, the record in this case clearly establishes material factual disputes as to whether there

was an accord and satisfaction. Third, even ignoring the evidence offered by plaintiffs, the evidence offered by defendants in support of their Motion for Summary Judgment was insufficient as a matter of law to establish an accord and satisfaction. Fourth, any agreement which was reached was executory only, and defendants failed to release the lots within the time required by any such executory accord. These arguments will be addressed in order.

A. Defendants Failed To Plead Accord And Satisfaction As An Affirmative Defense.

Accord and satisfaction is an affirmative defense which must be specifically pleaded. Utah R. Civ. P. 8(c); Hintze v. Seach, 20 Utah 2d 275, 437 P.2d 202, 207-08 (1968). No claim of accord and satisfaction appeared in defendant's Answer. The claim appeared for the first time in defendant's Reply Memorandum in Support of Motion for Summary Judgment. (R. 563-66.)

Defendants have claimed in response to plaintiffs' post-judgment motions that the claim of accord and satisfaction was pleaded in that it was embraced within the defendants' Second and Fifth Affirmative Defenses. Those defenses provide as follows:

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrine of waiver.

FIFTH AFFIRMATIVE DEFENSE

All of defendants' obligations under the agreements and understandings of the parties have been met.

(R. 267.)

Defendants claim that accord and satisfaction is embraced within these affirmative defenses because an accord and satisfaction is similar to a waiver and because a reference to defendants having met their obligations under the agreements and understandings of the parties includes having met their obligations under any settlement agreements. These arguments are simply without merit. No reasonable person would understand from a reading of these defenses that defendants would rely on a claim of accord and satisfaction. It is clear that even defendants did not believe these defenses to include accord and satisfaction because the claim was never raised until their Reply Memorandum in Support of Motion for Summary Judgment.

Where defendants had failed to properly plead accord and satisfaction, it was error for the Court to grant summary judgment on that ground.

B. Material Issues Of Fact Exist With Respect To The Claim of Accord And Satisfaction.

Because the claim of accord and satisfaction was not raised until after most of the discovery had been completed, no discovery was addressed specifically to that issue. All the evidence in the

record establishes, nevertheless, that plaintiffs' demands for lot releases were consistent. Plaintiffs demanded the full number of lots to which they were entitled by reason of the principal paid both before and after the July 1, 1986 release of 7 lots. The evidence clearly supports the inference that defendants released those 7 lots because defendants finally acknowledged that plaintiffs were entitled to the release of at least that many lots. There is no evidence that plaintiffs agreed to withdraw their claim for the remaining lots. Plaintiffs continued to demand the release of the remaining lots to which they are entitled, and at no time did defendants ever object to or respond to those demands by claiming that an accord and satisfaction had been reached.

Lawrence Kay and Robert Kay each testified with respect to the release of lots as follows:

On or about January 10, 1985 Affiant sent the letter marked as Exhibit 13 to L. Kay's deposition herein to Summit. Affiant has personal knowledge that Summit received the aforementioned letter within a matter of days following January 10, 1985 because Southwick so advised Affiant in conversations which Affiant had with Southwick at that time and subsequently. During and throughout the period commencing approximately January 1, 1985 and ending June 30, 1985, Affiant had numerous telephone conversations with Southwick in which Affiant demanded the release of lots. Southwick denied Summit had any obligation to provide plaintiffs with releases of lots until approximately May 1, 1985, but he thereafter repeatedly acknowledged Summit's obligation to provide

plaintiffs with such releases and repeatedly promised Affiant that Summit would promptly provide such releases. However, plaintiffs were never provided with any such release until after July 1, 1985. In early May, 1985 Affiant advised Southwick that plaintiffs had a sale for the Yellow Hills Project and that plaintiffs would have to have lots released to effectuate such sale. In late May and early June, 1985, Affiant advised Southwick that plaintiffs would have to have the lots released in time to meet a closing date of not later than June 24, 1985.

Affidavit of Lawrence C. Kay, para. 17 (R. 503-04); Affidavit of Robert L. Kay, para. 17 (R. 528-29) (emphasis added).

A reasonable inference from these statements, which were made before defendants first raised the claim of accord and satisfaction, is that Summit released the 7 lots because Summit had determined that the plaintiffs were entitled to the release of those lots, and not as a compromise of a greater claim. The statements are further supported by the testimony of Robert Kay given in his deposition on June 11, 1986, which again was before the claim of accord and satisfaction had been raised. In connection with questioning concerning the June 2, 1985 demand for release of 7 lots, Mr. Kay testified as follows:

Q What did you do with that letter?
Did you prepare it on or about the date, June 2?

A Yeah. Well, he had already agreed to release those lots by the time this letter
--

Q Who is "he"?

A Southwick. We flipped over the phone for the release of those lots. He said his lawyer said I wasn't -- after great research, they figured I was entitled to six and a half lots. But I will flip you for the seven. So he had a coin on his end of the phone, and flipped it, and I won, I got the seventh. I told him then what lots I wanted. This was in the middle of May. I called him back, wanting to know where they were. And he said something that it got one wrong or something, so I just typed that to make sure he knew which ones I wanted, and mailed it to him.

Robert Kay deposition, June 11, 1986, at p. 47, l. 10-24.³

Further evidence which supports the inference that the parties did not understand themselves to have reached an accord and satisfaction by the July 1, 1985 release of lots, is the fact that they continued to negotiate for the release of the remaining

³This is further supported by the testimony of Robert Kay in his deposition on December 12, 1986. After again describing the telephone conversation referred to in the quotation in the main text, Robert Kay testified as follows:

Q Did you agree to accept the six lots?

A No, but it was -- well, I agreed to get the seven lots to me. I wanted seven. But he still had the others that he owed to us. But for the meantime it was better than nothing.

Robert Kay deposition, December 12, 1986, at p. 53, l. 11-15. Due to an error of the court reporter, this deposition was not filed with the District Court until after plaintiffs filed their Notice of Appeal. Plaintiffs have filed a motion to have the deposition made a part of the record in this matter.

lots. On July 29, 1985, plaintiffs' then counsel sent a letter to J. Scott Beuhler, counsel for Summit Systems, demanding the release of an additional 7 lots. (L. Kay depo at p. 162, Ex. 19.) Lawrence Kay also sent a personal letter to Val Southwick which also demanded the release of lots. (L. Kay depo at p. 165, Ex. 20.) There is no evidence that any of these demands were met with the response that the matter had already been settled, and in fact, as a result of these demands, the parties later reached a tentative settlement agreement involving the release of the lots. (L. Kay depo at p. 165, l. 15-24.)

The evidence before the District Court, viewed as required in the light most favorable to plaintiffs, clearly supports the inference, and in fact establishes without dispute, that the parties never intended to reach an accord and satisfaction. The 7 lots were released on July 1, 1985, because defendants acknowledged an obligation to release those lots, not as a compromise of a greater claim. The District Court erred in granting summary judgment on the claim of accord and satisfaction.

C. Defendants' Evidence Is Insufficient As A Matter Of Law To Establish An Accord And Satisfaction.

The preceding subpoints establish that defendants did not properly plead accord and satisfaction as an affirmative defense, and in any event, there were material issues of fact precluding a

ruling by summary judgment on the existence of an accord and satisfaction. Even ignoring the pleading defects and the substantial evidence in plaintiffs' favor cited above, however, the evidence before the District Court was insufficient as a matter of law to establish an accord and satisfaction. The high level of proof required to establish an accord and satisfaction was recently reaffirmed by this Court as follows:

A party seeking to establish an accord and satisfaction bears the burden of proof and must demonstrate the existence of declarations "of such a clear nature as to assure that the parties are aware of the extent and scope of such agreement."

Security State Bank v. Broadhead, 734 P.2d 469, 472 (Utah 1987), quoting Messick v. PHD Trucking Service, Inc., 615 P.2d 1276, 1277 (Utah 1980).

An illustration of the degree of proof required is found in Tates, Inc. v. Little America Refining Co., 535 P.2d 1228 (Utah 1975). The Court stated as follows:

The authorities dealing with this problem . . . uniformly affirm that it must clearly appear that the parties so understood and entered into a new and substitute contract. To state the matter in traditional contract language: that there was a definite meeting of the minds on such an agreement. Further; when a party asserts that his debt has been discharged by paying a lesser amount in accord and satisfaction of the entire debt, that is an affirmative defense upon which he has the burden of proof.

535 P.2d at 1230 (emphasis added).

In Tates, the defendant had agreed to purchase a bus from the plaintiff, but the bus was not delivered when promised. The defendant made an oral claim for an adjustment by reason of expenses incurred by the defendant as a result of the delay, and later followed up that oral claim with a letter and a check for payment of the amount due less the amount of the expenses. The plaintiff subsequently sued for the balance of the amount due, and the defendant claimed the suit was barred by an accord and satisfaction. The trial court held that there was an accord and satisfaction, but the Supreme Court reversed, noting as follows:

[I]t cannot fairly and justly be concluded that there was any point at which it was clearly brought home to the plaintiff that it was agreeing to accept the check, less the claimed expenses listed by the defendant, as a full settlement for the purchase price of the bus. Accordingly, the finding of an accord and satisfaction and the judgment based thereon are in error.

535 P.2d at 1231-32.

The evidence in this case offered by defendants was similarly insufficient as a matter of law. The only "evidence" referred to in the portion of defendants' Reply Memorandum which raised the accord and satisfaction claim was the statements of Lawrence Kay and Robert Kay quoted above in subpoint B of this Point. The testimony was offered only for the proposition that Summit ini-

tially denied any obligation to reconvey any lots. Defendants cite to no other evidence in support of their claim of accord and satisfaction, but apparently rely solely on the fact that plaintiffs subsequently requested, and defendants reconveyed, a lesser number of lots.

Specifically lacking was any evidence that it was "clearly brought home" to the plaintiffs that they were agreeing to accept the 7 lots as a compromise of their prior claim for 12 lots. Even if viewed in the light most favorable to defendants, which is the opposite of what should have been done on this motion for summary judgment, the evidence in this case was weaker than that rejected by this Court in Tates. The judgment of the District Court "finding" that an accord and satisfaction had been reached is clearly in error and should be reversed.

D. If An Agreement Was Reached It Was An Executory Accord, The Terms Of Which Were Breached By Defendants.

An accord and satisfaction should be contrasted with an executory accord, which "is an agreement that an existing claim shall be discharged in the future by the rendition of a substituted performance." 6 Corbin Contracts § 1269 at 75 (1962), quoted in Bradshaw v. Burningham, 671 P.2d 196, 198 (Utah 1983). Under an executory accord, the existing claim is not discharged until the new agreement is fully and properly performed. Id.

The question of whether a given set of facts constitutes an accord and satisfaction or an executory accord is a question of fact for the jury. Golden Key Realty, Inc. v. Mantas, 699 P.2d 730, 733 n.4 (Utah 1985).

The Court in this matter found that the parties had reached an accord and satisfaction. The evidence, viewed in the light most favorable to the plaintiffs, just as readily supports the inference that the parties reached an executory accord, under which the plaintiffs agreed to accept seven lots in satisfaction of their existing claim for more lots, but only if those seven lots were released within the time constraints imposed by the Clive Sprouse contract. Defendants failed to release the lots within the time required under the terms of the executory accord. Plaintiffs were then entitled to elect to proceed either upon their original claim or the accord. L & A Drywall, Inc. v. Whitmore Construction Co., 608 P.2d 626, 629 (Utah 1980). Whether such an executory accord existed, and whether it was breached were, as stated above, questions of fact not appropriate for resolution by summary judgment.

POINT III

DEFENDANTS' FAILURE TO RELEASE LOTS UNTIL AFTER JUNE 24, 1985, WAS A BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING.

Plaintiffs have established in Point I of this brief that they were entitled to a reconveyance of 12 lots in January, 1985. Although defendants dispute that contention, defendants did acknowledge on approximately May 1, 1985, that plaintiffs were entitled to the release of some lots and accordingly agreed to reconvey 7 lots. Plaintiffs soon thereafter advised defendants that they had a firm offer to purchase the entire subdivision, but the offer was contingent upon the release of 7 lots by June 24, 1985. Plaintiffs confirmed defendants' agreement to release the 7 lots by sending a written request for the release of those lots to Summit on June 2, 1985.

Notwithstanding their knowledge that plaintiffs needed to have the lots released by June 24, 1985 in order to effectuate a sale of the entire subdivision, defendants failed to release those lots until approximately July 1, 1985. As a result of the delay, the offer to purchase the subdivision expired by its own terms, and the offeror declined to renew the offer.

Defendants attempted to justify the failure to timely release lots by demonstrating that Summit made a request for reconveyance

within the thirty-day period prescribed by Utah Code Ann. § 57-1-

33. That statute states, in pertinent part, as follows:

Any beneficiary under such trust deed who refuses to request a reconveyance from the trustee for a period of thirty days after written demand therefor is made by the trustor or his successor in interest shall be liable to the trustor or his successor in interest, as the case may be, for double damages resulting from such refusal

This statute does not apply for at least two reasons. First, although defendants did make a request for reconveyance within thirty days of the June 2, 1985 letter, there had already been a prior written request for reconveyance of the lots, made January 10, 1985. The request for reconveyance clearly was not timely with respect to the January 10, 1985 letter.

More importantly, however, the statute only prescribes certain minimum standards which must be met by the beneficiaries. There is implied in every contract a covenant of good faith and fair dealing. Beck v. Farmers Insurance Exchange, 701 P.2d 795, 801 (Utah 1985); Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 306 (Utah 1982). Even though the statute may have imposed an outside limit of thirty days for making a request for reconveyance, defendants had an obligation under the unique facts and circumstances of this case to reconvey the lots by the June 24, 1985 deadline. Defendants had acknowledged approximately May 1, 1985, that they had an obligation to reconvey the lots. In the

middle of May, 1985, Southwick, acting on behalf of defendants, specifically agreed to reconvey 7 lots, and Robert Kay specified which lots were requested. The June 2, 1985 letter was merely a formality to confirm the agreement made in mid-May. (Robert Kay deposition, June 11, 1986, at p. 47, l. 15-24.)

In addition Summit was aware of the critical importance to plaintiffs of having the lots released by June 24, 1985. Under these circumstances, Summit had a duty which was greater than the minimum duties imposed by the written contract and the statute. Summit breached that duty by failing to arrange for a reconveyance of lots prior to June 24, 1985. This case should be remanded for a determination of the damages suffered by plaintiffs by reason of that breach of the covenant of good faith and fair dealing.

POINT IV

THE COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT I OF PLAINTIFFS' COMPLAINT, WHICH SOUGHT REFORMATION ON THE GROUNDS OF UNCONSCIONABILITY.

The District Court dismissed Count I of plaintiffs' Complaint, which alleged that the trust deed and trust deed note were unconscionable and sought reformation in order to make them conscionable. As grounds for the dismissal, the District Court stated as follows:

The parties willingly entered into negotiations over the loan. The final terms were well understood by all and were specifically

agreed to by plaintiffs. Count I is hereby dismissed with prejudice.

(R. 945.)

Plaintiffs respectfully submit that the District Court misapprehended the elements of unconscionability, and that plaintiffs' claim of unconscionability was not susceptible of disposition by summary judgment.

Two recent Utah cases considered the issue of unconscionability. Resource Management Co. v. Weston Ranch and Livestock Company Inc., 706 P.2d 1028 (Utah 1985); Bekins Bar V Ranch v. Huth, 664 P.2d 455 (Utah 1983). In both cases, this Court reversed a trial court finding of unconscionability; however, each decision was based upon the unique facts and circumstances of the case, which are materially different from the facts and circumstances of the case at bar.

These cases describe unconscionability as having two component parts, procedural and substantive, each of which must be assessed in the light of the circumstances of the particular case:

"Unconscionable" is a term that defies precise definition. Rather, a court must assess the circumstances of each particular case in light of the two-fold purpose of the doctrine, prevention of oppression and of unfair surprise. [Citation] Recognition of these purposes has led to an analysis of unconscionability in terms of "substantive" and "procedural" unconscionability. "Substantive unconscionability" examines the relative fairness of the obligations assumed. "Proce-

dural unconscionability" focuses on the manner in which the contract was negotiated and the circumstances of the parties.

Resource Management, 706 P.2d at 1041.

Procedural unconscionability exists where there has been an absence of meaningful choice. Among the factors considered by the courts in determining whether a party has had a meaningful choice are the relative expertise of the party, excessive price or interest, an overall imbalance in the obligations and rights imposed by the bargain, and a lack of opportunity for meaningful negotiation. Bekins, 664 P.2d at 462. See also Resource Management, 706 P.2d at 1042.

There is ample evidence in this case which would support a finding of procedural unconscionability. Plaintiffs are relatively inexperienced in real estate developments and had never previously entered into a transaction of this magnitude. Plaintiffs had been assured that financing would be readily available from Summit and had been advised that the interest rate would be approximately 10%, together with an approximately 10% discount. In reliance on these representations, plaintiffs had terminated their efforts to obtain alternative financing. Summit delayed the closing for several months, with the result that the underlying obligations went into default, and plaintiffs were in a position of having to either refinance or face foreclosure. It was not

until the closing, however, that plaintiffs first learned that the interest rate would be 17%, together with a discount of approximately 17%. Although plaintiffs may have understood the terms of the contract, they nevertheless had no meaningful opportunity for negotiation because the precise proposed terms had not been disclosed until closing, and plaintiffs further had no meaningful choice because they had abandoned efforts to obtain alternative financing in reliance upon the promise and expectation of financing from Summit at the 10% terms initially discussed.

Plaintiffs acknowledge that there exists evidence which was cited to the District Court by defendants which would tend to refute each of the above statements. The resolution of those factual disputes is clearly not appropriate on a Motion for Summary Judgment.

Substantive unconscionability is also present in this case. The relevant factors are as follows:

Substantive unconscionability is indicated by contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, excessive price, or significant cost-price disparity. . . . [T]he terms are to be evaluated in the light of a general commercial background and the commercial needs of the particular trade or case. . . . [T]he test is whether the terms are so extreme as to appear unconscionable according to the mores and business practices of the time and place.

Resource Management, 706 P.2d at 1041-42 (citations and quotation marks omitted).

The record contains testimony from individuals knowledgeable concerning the real estate and financial circumstances in the Vernal area that the interest rate charged by Summit was unreasonably high (deposition of Clive Sprouse at pp. 4, 27), and the overall terms of the transaction were unfair. (Deposition of Bob Dearman at pp. 26, 33.) Although high interest rates may be appropriate under some circumstances, the appraised value of the subdivision, \$1,518,000.00, was more than double the amount actually loaned, \$667,000.00, plus plaintiffs had posted additional security in the form of letters of credit totalling \$280,000.00.

Plaintiffs again acknowledge that contrary inferences may be drawn from the evidence in the record. The resolution of those conflicts should have been made only after a full trial on the merits.

In Bekins, this Court reversed a trial court finding of unconscionability where the interest rate was 36.3%. In that case, however, the loans were clearly high risk. The borrower was struggling through a bankruptcy, and there was already a first mortgage against the property for 1.1 million dollars. In the instant case, in contrast, there is evidence which supports the

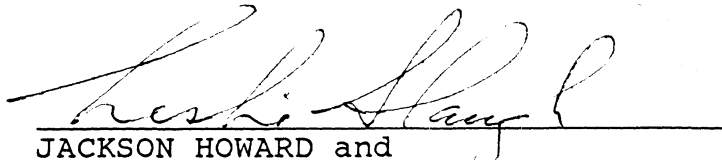
inference that the loan was more than adequately secured and could not be considered high risk.

The equitable determination of whether a contract is unconscionable depends on the unique facts and circumstances of each case, and should be made only after a full hearing on the merits. The evidence in this case, viewed in the light most favorable to plaintiffs, would support a finding of unconscionability, and the District Court erred in granting defendants' Motion for Summary Judgment.

CONCLUSION

The summary judgment of the District Court should be reversed and the matter remanded for trial on the merits.

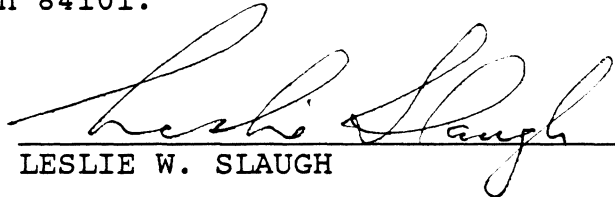
DATED this 16th day of September, 1987.


JACKSON HOWARD and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS FOR PLAINTIFFS-
APPELLANTS

MAILING CERTIFICATE

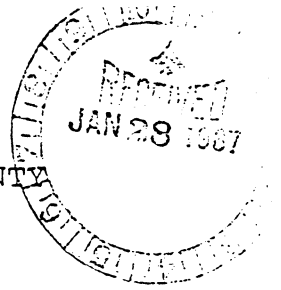
I hereby certify that four true and correct copies of the foregoing was mailed to the following, postage prepaid, this 16th day of September, 1987, to:

Richard W. Giauque, Esq. and
Stephen T. Hard, for:
GIAUQUE, WILLIAMS, WILCOX & BENDINGER
500 Kearns Building
Salt Lake City, Utah 84101.



LESLIE W. SLAUGH

IN THE SEVENTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH



LAWRENCE C. KAY, JOY KAY,)	
ROBERT L. KAY, and TERESA KAY,)	
)	
Plaintiffs,)	R U L I N G
)	
vs.)	
)	
SUMMIT SYSTEMS, INC., a)	
corporation, et al.,)	
)	
Defendants.)	Civil No. 86-CV-48U

The parties willingly entered into negotiations over the loan. The final terms were well understood by all and were specifically agreed to by Plaintiffs. Count I is hereby dismissed with prejudice.

The Court is not persuaded that a beneficiary of an agreement owes any fiduciary duty to the Trustor. Plaintiff has cited no authority to the contrary. Count III is hereby dismissed with prejudice.

This Court will not recognize a cause of action for tortious breach of implied covenant and fair dealing. Court IV is dismissed with prejudice.

The Court having dismissed Counts III and IV finds nothing to sustain Plaintiffs' Claim for punitive damages. Count VIII is dismissed with prejudice.

The remaining Counts, II, V, VI and VII, are dependant upon Plaintiffs' claim of wrongful refusal to release lots. Plaintiffs' claim this is based upon a letter dated January 10, 1985. Defendants claim the matter was compromised and a new letter was sent on June 2, 1985 demanding the release of seven (7) lots. There is no dispute that the seven (7) lots were released within thirty (30) days of that demand.

The facts as admitted by both sides show the Plaintiffs making payments late or failing to make payments with the result that the "additional security" was utilized. There was a dispute whether lots could be released. The June 2, 1985 letter is an abandonment of the earlier and greater claim for releases and does constitute a compromise and the subsequent release constitutes an accord and satisfaction. The Court does not find a failure on the part of the Defendants. Counts II, V, VI and VII are also dismissed with prejudice.

DATED this 26 day of January, 1987.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Richard W. Giaugue", written over a horizontal line.

cc: Richard W. Giaugue
Ray G. Martineau
Robert M. Anderson

WHEN RECORDED, MAIL TO

Summit Systems Inc. No. 528-84 Recorded at request of Verne District on 24 day of Jan at 9:00 AM. 349 Utah County 380
4590 Harrison Blvd. Verne District Deputy Book 349 Page 380
Ogden, Utah 84403 Space Above This Line For Recorder's Use

TRUST DEED

With Assignment of Rents

THIS TRUST DEED, made this 23rd day of January, 1984,
between Lawrence C. Kay and Joy Kay
Robert L. Kay and Teresa Kay, as TRUSTOR,
whose address is 1940 East 2500 South Naples Utah 84078
(Street and number) (City) (State)
J. Scott Buehler, as TRUSTEE,* and
Summit Systems Inc., as BENEFICIARY,

WITNESSETH: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST,
WITH POWER OF SALE, the following described property, situated in Uintah
County, State of Utah:

✓ Lots 1 through 95 inclusive of Plat "A" YELLOW HILL ESTATES
SUBDIVISION, excluding Lots 10, 20 & 28-34. Lots 1 through
51 inclusive of Plat "B" YELLOW HILL ESTATES SUBDIVISION,
being located in the West half of Section 18, Township 4 South,
Range 21 East, Salt Lake meridian.

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits;

FOR THE PURPOSE OF SECURING (1) payment of the indebtedness evidenced by a promissory note of even date herewith, in the principal sum of \$ 806,000.00, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or renewals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Trust Deed; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

*NOTE: Trustee must be a member of the Utah State Bar; a bank, building and loan association or savings and loan association authorized to do such business in Utah; a corporation authorized to do a trust business in Utah; or a title insurance or abstract company authorized to do such business in Utah.

TO PROTECT THE SECURITY OF THIS TRUST DEED, TRUSTOR HEREBY:

1. To keep said property in good condition and repair; not to remove or destroy any building thereon, to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon; to comply with all laws, covenants and restrictions affecting said property; not to commit or permit waste thereof; not to commit, suffer or permit any act upon said property in violation of law, to do all other acts which from the character or use of said property may be reasonably necessary; the specific enumerations herein not excluding the general, and, if the loan secured hereby or any part thereof is being obtained for the purpose of financing construction of improvements on said property, Trustor further agrees:

(a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary, and

(b) To allow Beneficiary to inspect said property at all times during construction.

Trustee, upon presentation to it of an affidavit signed by Beneficiary, setting forth facts showing a default by Trustor under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein, and to act thereon hereunder.

2. To provide and maintain insurance, of such type or types and amounts as Beneficiary may require, on the improvements now existing or hereafter erected or placed on said property. Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form acceptable to Beneficiary. In event of loss, Trustor shall give immediate notice to Beneficiary, who may make proof of loss, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary instead of to Trustor and Beneficiary jointly, and the insurance proceeds, or any part thereof, may be applied by Beneficiary, at its option, to reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged.

3. To deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements thereto.

4. To appear in and defend any action or proceeding purporting to affect the security hereof, the title to said property, or the rights or powers of Beneficiary or Trustee; and should Beneficiary or Trustee elect to also appear in or defend any such action or proceeding, to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee.

5. To pay at least 10 days before delinquency all taxes and assessments affecting said property, including all assessments upon water company stock and all rents, assessments and charges for water, appurtenant to or used in connection with said property, to pay, when due, all encumbrances, charges, and liens with interest, on said property or any part thereof, which at any time appear to be prior or superior hereto; to pay all costs, fees, and expenses of this Trust.

6. Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto, and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

7. To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of ten per cent (10%) per annum until paid, and the repayment thereof shall be secured hereby.

IT IS MUTUALLY AGREED THAT:

8. Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement, in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary, who may, after deducting therefrom all its expenses, including attorney's fees, apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Beneficiary or Trustee may require.

9. At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Trust Deed and the note for endorsement (in case of full reconveyance, for cancellation and retention), without affecting the liability of any person for the payment of the indebtedness secured hereby, Trustee may (a) consent to the making of any map or plat of said property; (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement affecting this Trust Deed or the lien or charge thereof; (d) reconvey, without warranty, all or any part of said property. The grantee in any reconveyance may be described as "the person or persons entitled thereto", and the recitals therein of any matters or facts shall be conclusive proof of truthfulness thereof. Trustor agrees to pay reasonable Trustee's fees for any of the services mentioned in this paragraph.

10. As additional security, Trustor hereby assigns Beneficiary, during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Trust Deed and of any personal property located thereon. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable. If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property affected hereby, to collect all rents, royalties, issues, and profits. Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right, power, and authority to collect the same. Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Trust Deed to any such tenancy, lease or option.

11. Upon any default by Trustor hereunder, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver), and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect said rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

12. The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies, or compensation or awards for any taking or damage of said property, and the application or release thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

13. The failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default shall not constitute a waiver of any other or subsequent default.

14. Time is of the essence hereof. Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of Beneficiary. In the event of such default, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause said property to be sold to satisfy the obligations hereof and Trustee shall file such notice for record in each county wherein said property or some part or parcel thereof is situated. Beneficiary also shall deposit with Trustee, the note and all documents evidencing expenditures secured hereby.

14a Due on Sale. The loan evidenced by the note secured hereby was made in reliance upon Trustor's credit and financial capacity and property management expertise. Accordingly, in the event the Trustor or its successors in interest shall either sell, convey or alienate the herein described property or any part thereof, any interest therein without the written permission of lender or be divested of title in any manner, whether voluntarily or involuntarily, then the full principal of the Note secured hereby together with full and all other amounts due

15. After the lapse of such time as may then be required by law following the execution of said notice of default, and notice of default and no sale having been given as then required by law, Trustee, without demand on Trustor, shall sell said property on the date and at the time and place designated in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels, shall be sold), at public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale; provided, if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale. Trustee shall execute and deliver to the purchaser its Deed conveying said property so sold, but without any covenant or warranty, express or implied. The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustee's and attorney's fees; (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deed; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at 10% per annum from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in its discretion, may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place.

16. Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court.

17. Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority and title of the trustee named herein or of any successor trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made, in the manner provided by law.

18. This Trust Deed shall apply to, inure to the benefit of, and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder are joint and several. The term "Beneficiary" shall mean the owner and holder, including any pledgee, of the note secured hereby. In this Trust Deed, whenever the context requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

19. Trustee accepts this Trust when this Trust Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Trust Deed or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

20. This Trust Deed shall be construed according to the laws of the State of Utah.

21. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

21a. Personal Liability Trustor and its constituent partners shall personally liable for all amounts due under the loan secured hereby. In the event of a default under the Note or related Security Instruments, Beneficiary shall have the right to proceed directly and immediately against Trustor and/or its constituent partners without first proceeding against the property through foreclosure or otherwise and such proceeding is not to be deemed an irrevocable election of remedies.

21b. Due on Incumbrance. Trustor covenants during the term hereof not to encumber, mortgage, pledge or hypothecate the property as security for additional junior debt without written consent of the beneficiary and a breach of this covenant shall entitle lender, at its sole option, to declare the entire outstanding principal and interest due and payable in full without demand or notice.

22 & 23 (See Schedule A) SIGNATURE OF TRUSTOR

x Lawrence C. Kay
Lawrence C. Kay
x Joy Kay
Joy Kay

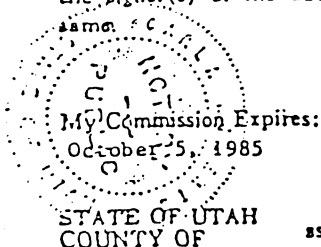
x Robert L. Kay
Robert L. Kay
x Teresa Kay
Teresa Kay

(If Trustor an Individual)

STATE OF UTAH ss.
COUNTY OF UTAH

On the 23rd day of January, A.D. 1984, personally

appeared before me Lawrence C. Kay, Joy Kay, Robert L. Kay, and Teresa Kay, the signer(s) of the above instrument, who duly acknowledged to me that they executed the



Karen Roberto
Notary Public residing at:

Vernal, Utah

(If Trustor a Corporation)

STATE OF UTAH ss.
COUNTY OF

On the day of , A.D. 19, personally

appeared before me , who being by me duly sworn,

says that he is the of the corporation that executed the above and foregoing instrument and that said instrument was signed in behalf of said corporation by authority of its by-laws (or by authority of a resolution

of its board of directors) and said acknowledged to me that said corporation executed the same.

Notary Public residing at:

My Commission Expires:

22. Partial Releases. Upon receipt of the written request of the Trustor, and upon receipt of the principal payments hereinafter set forth, the beneficiary shall instruct the Trustee to deliver to the Trustor Deeds of Partial Reconveyance as follows:

(a) Plat "A": Lots 1 through 27 excluding Lots 10, 20, 28, 29, 30, 31, 32, 33, and 34 upon receipt of \$15,000.00 for each lot to be so reconveyed.

(b) Plat "A": Lots 35 through 95 upon receipt of \$13,000.00 principal for each lot to be so reconveyed.

(c) Plat "B": Lots 1 through 51 upon receipt of \$5,000.00 principal for each lot to be so reconveyed.

23. Letter (s) of Credit. As additional security for the indebtedness the Trustor has delivered or shall deliver to the beneficiary the following irrevocable and unconditional letter(s) of credit drawn for the Trustor's account:

Bank: First Security Bank of Utah N.A.
 ("The first bank")

Letter of Credit Number: 062-060-8980-50005

Amount: \$110,000.00

Expiration Date: July 10th 1985

Bank: First Interstate Bank

("The second bank")

Letter of Credit Number: 2003 and 2004

Amount: \$130,000.00 (#2003) & \$40,000.00 (#2004)

Expiration Date: Both July 10th 1985

The beneficiary shall have the right to draw upon the letter(s) of credit or any renewal or extension thereof, in whole or in part, upon the occurrence of any one or more of the following events:

(A)

1. the occurrence of any event of default under this mortgage; or

2. The Trustor's failure to deliver to the beneficiary, no less than thirty (30) days prior to the expiration date of the letter(s) of credit or any renewal or extension thereof, a renewal or extension of the letter(s) of credit for a term of not less than one year; or

3. Any action by the Trustor or the first or second bank which, in the beneficiary's discretion, reasonably exercised, may jeopardize its rights to draw on the letter(s) of credit;

(B) Proceeds of any draw upon the letter(s) of credit may be applied by the beneficiary to be a payment of accrued interest (including any accrued interest the payment of which was otherwise deferred), late charges, principal (including any pre-payment charge occasioned by a principal payment), or any other obligation arising out of the Trustor's obligation to the beneficiary under this Deed of Trust or the Trust Deed Note, in such manner as the beneficiary, in its sole discretion, deems appropriate.

(C) Provided there is no default or condition which but for the furnishing of notice or the passage of time would constitute an event of default under this Trust Deed, the beneficiary shall release its rights in the letter(s) of credit and surrender the letter(s) of credit to the first and second bank upon the principal reduction of the Trust Deed Note as secured by this Deed of Trust in the amount of Two Hundred Eighty Thousand (\$280,000.00) Dollars.

an January 23rd, 1984

For value received, we, or any of us, promise to pay to SUMMIT SYSTEMS, INC. or order, at its above office in Utah, the principal of Eight Hundred Six Thousand Dollars (\$806,000.00) with interest thereon from January 23rd, 1984 until paid at the rate of SEVENTEEN (17%) percent per annum, both principal and interest payable only in lawful money of the United States of America.

This Note evidences a loan made or to be made by SUMMIT SYSTEMS, INC. to Borrower in the principal amount hereof and is secured by a Trust Deed or even date herewith. This note is calculated on a daily interest basis.

It is understood and agreed, that the first installment of all accrued interest shall be due on the 1st day of June, 1984. Then, subsequent installments in the amount of (\$42,659.37) Forty Two Thousand Six Hundred Fifty Nine and 37/100's dollars, including interest, shall be due on the 1st day of September 1984, and one of said installments to be paid on the 1st day of each and every quarter thereafter until the 1st day of December, 1987, at which time the whole of the unpaid principal, together with accrued interest, shall be due; each of said quarterly installments to be applied first to the payment of accrued interest on the unpaid balance, and the balance thereof to be credited on said principal.

And in case default be made in the payment of any of said installments of principal or interest at the times and in the manner aforesaid, then such installment or payment, installments, or payments, so in default, shall be added to and become a part of the principal sum, and from the date when each installment should have been paid until it is paid it shall bear twenty one percent rate of interest as the principal debt, or in the performance of any agreement, covenant or condition in the Trust Deed securing this note, the holder thereof, at its option, and without notice or demand, may declare the entire principal balance and accrued interest due and payable.

In the event any installment of principal and interest shall remain unpaid for a period of 15 days after due, the undersigned, at the option of the holder hereof and upon demand, agree to pay as a late charge a sum equivalent to FIVE (5%) percent of the principal amount of such installment. Default is defined as 15 days late on any payment.

If this note be placed for collection, either with or without suit, the undersigned jointly and severally agree to pay all costs and expenses thereof, including a reasonable attorney's fee.

The makers, guarantors and endorsers hereby severally waive presentment for payment, demand, notice of dishonor, protest and of non-payment of this note, and all defenses on the ground of any extension of time of payment that may be given by the holder to them or any of them; and also agree that further payments of principal or interest in renewal thereof shall not release them as makers, guarantors or endorsers.

In the event the undersigned is unable to pay off the outstanding principal and interest due on 12-1-87 due solely to external financial conditions affecting this and like property generally, then and only then will the lender extend the term for two more years with the following conditions strictly met; (1) A 4% modification fee of the outstanding balance paid at the time of modification; (2) The quarterly payment will increase so as to amortize fully the outstanding balance due on 12-1-87 over the two year period ending 12-1-89 at the same rate of interest set forth in the note secured hereby; (3) To verify the existence of the above mentioned external financial conditions and market conditions the Borrower will submit to the Lender written verification that the Borrower has been denied re-financing by three commercial banks solely because of adverse financial conditions and market conditions generally affecting this and like other property.

X Lawrence L. Kay
Lawrence Kay

X Joy Kay
Joy Kay

X Robert L. Kay
Robert L. Kay

X Teresa Kay
Teresa Kay