

1989

Leon Sprouse v. Arjen W. Jager, Nada H. Jager, Artie Edmunds, Lloyd Walters, and John Does I through V : Brief of Respondent

Utah Court of Appeals

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DOCKET NO. 89-642 CA IN THE COURT OF APPEALS

OF THE STATE OF UTAH

LEON SPROUSE,
Plaintiff,

vs.

ARJEN W. JAGER, NADA H. JAGER,
ARTIE EDMUNDS, LLOYD WALTERS,
and JOHN DOES I through V,

Defendants.

ROY N. LARSEN, ARTIE EDMUNDS,
and INTERWEST COMMERCIAL
PROPERTIES,

Third-Party Plaintiffs
and Respondents,

vs.

LEON SPROUSE,

Third-Party Defendant
and Appellant.

Case No. 890642-CA

Oral Argument
Category No. 14b

BRIEF OF RESPONDENTS

APPEAL FROM THE FINAL JUDGMENT OF THE
FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY,
UTAH, THE HON. J. PHILIP EVES, PRESIDING

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COURT OF APPEALS

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LEON SPROUSE,)	
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)	
vs.)	
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ARJEN W. JAGER, NADA H. JAGER,)	
ARTIE EDMUNDS, LLOYD WALTERS,)	
and JOHN DOES I through V,)	
)	Case No. 890642-CA
Defendants.)	
)	
ROY N. LARSEN, ARTIE EDMUNDS,)	
and INTERWEST COMMERCIAL)	
PROPERTIES,)	
)	
Third-Party Plaintiffs))	
and Respondents,)	
)	
vs.)	
)	
LEON SPROUSE,)	
)	
Third-Party Defendant))	
and Appellant.)	
)	

JURISDICTION

This is an appeal from the judgment of the Fifth Judicial District Court of Washington County, Utah in a civil case following a bench trial. The Utah Supreme Court had jurisdiction pursuant to Utah Code Ann. § 78-2-2(j), but transferred this case to the Court of Appeals. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j).

NATURE OF THE PROCEEDINGS

Leon Sprouse obtained a judgment and foreclosed on a motel he had sold to Arjen Jager under a Uniform Real Estate Contract.

Artie Edmunds, the real estate agent who brought the parties together, held an assignment of a \$25,000.00 interest in the Uniform Real Estate Contract (UREC) for the commission and counterclaimed for payment. Third-party plaintiffs (Edmunds, his broker, and broker company) sued Leon Sprouse for the real estate commission earned in connection with the sale. Trial was held July 1, 1988 and the Court entered judgment against Sprouse for \$33,239.46, finding liability for the commission and attorney's fees, and finding that the assignment of an interest in the UREC entitled the holder to share in the proceeds from the sheriff's sale, and that the holder, under the facts presented, was entitled to priority. After several unsuccessful post-judgment motions, Sprouse now appeals the Court's ruling.

STATEMENT OF THE ISSUES

Sprouse raises four issues in his appeal brief claiming that (1) a modification of a contract for a real estate commission does not need to be in writing and does not need to be signed by the real estate broker; (2) the great weight of the evidence showed that the real estate agent consented and agreed to a modification that relieved Sprouse of personal liability for the commission if Arjen Jager, the purchaser, defaulted; (3) the trial court erred in enforcing the "Note" and "Assignment" portions of the "NOTE/AGREEMENT/ASSIGNMENT" (hereinafter "NAA") document that only Sprouse signed, while refusing to enforce the "Agreement" portion that purported to relieve Sprouse of personal

liability for the commission; and (4) that the award of attorney's fees is not supported by the evidence.

Respondents contest these issues and present the following points:

1. Assuming, arguendo, that Sprouse is correct on his first three issues, the judgment should still be affirmed because:

A. Sprouse has acknowledged liability for the commission.

B. The judgment was also based upon Sprouse's assignment to Interwest Commercial Properties (hereinafter "ICP") of an undivided \$25,000.00 interest in the Uniform Real Estate Contract (UREC), entitling Artie Edmunds, the holder, to share in the proceeds.

C. The assignee (ICP/Edmunds) of a partial assignment of payments owed under the UREC is entitled to priority in payment over the assignor (Sprouse), especially where the documents manifest the parties' intent to pay the commission first.

2. The statute of frauds applies to the NAA insofar as it attempts to modify the broker's written commission agreement and the broker is the party to be charged when the landowner (Sprouse) alleges an oral agreement that reduces or eliminates the landowner's liability for a commission.

3. Marshalling of the disputed trial evidence shows an adequate basis to support the trial court's finding that the parties did not mutually agree to modify the written commission agreement so as to relieve Sprouse of liability if Jager

defaulted. Therefore, the trial court did not err by refusing to enforce a term of the NAA that, upon disputed evidence, the court found had not been mutually agreed upon.

4. The award of attorney's fees was adequately supported by the evidence. Alternatively, Sprouse cannot attack that part of the judgment on appeal because he and the court accepted a proffer as to reasonableness of the fees and did not challenge the fees at trial, and cannot do so for the first time on appeal.

DETERMINATIVE PROVISIONS

1. Utah Code Ann. § 25-5-4(5), as in effect at the times in issue, provided, in pertinent part, as follows:

In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

.
(5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.

2. Utah Rules of Evidence, Rule 103(a)(1) provides as follows:

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

STATEMENT OF THE CASE

A. Nature Of The Case.

This is a civil case to enforce a written agreement for a real estate commission and to enforce a note and an assignment of

an interest in a Uniform Real Estate Contract given to secure the commission on the sale of a motel in St. George, Utah.

B. Course Of Proceedings And Disposition Below.

Leon Sprouse filed a complaint against Arjen Jager September 10, 1986 after Jager defaulted under the Uniform Real Estate Contract on the motel purchased from Sprouse. (R. vol. I, pp. 1-7.) Sprouse's Second Amended Complaint filed December 9, 1986 sought a judicial foreclosure against Jager and named Artie Edmunds as a defendant because Edmunds claimed certain rights as the holder of the NAA, and requested an adjudication of Edmund's alleged interest. (R. vol. I, pp. 93-103.) Jager counterclaimed against Sprouse for rescission, alleging that Sprouse made fraudulent representations to induce him to purchase the motel, and requested \$85,000.00 refunded for the value of three properties given to Sprouse as the down payment and another \$100,000.00 for improvements he made to the motel property prior to his default. Jager also filed a cross-claim against Edmunds alleging misrepresentation as the sales agent in the transaction. (R. vol. I, pp. 107-120.) Edmunds filed a counterclaim against Sprouse claiming a \$25,000.00 interest in the UREC as the holder of the NAA and the right to participate in the foreclosure and asserted a priority right to payment. Edmunds also cross-claimed against Jager for foreclosure of his interest in the UREC. (R. vol. I, pp. 126-134.) Sprouse answered Edmunds counterclaim, admitting the assignment and Edmunds right to participate in the

foreclosure to protect his interest in the UREC. (R. vol. I, pp. 143-145.)

On September 29, 1987, a motion to intervene (R. vol. II, pp. 31-32) was made by Interwest Commercial Properties (ICP) and Roy Larsen, as the licensed real estate broker for ICP, in order to maintain an action for the commission. On October 14, 1987, during a summary judgment hearing, the court granted the motion (R. vol. I, pp. 290-291), and the third-party complaint was filed October 22, 1987 (R. vol. II, pp. 83-90), seeking a judgment against Sprouse for the commission. Sprouse eventually answered the third-party complaint and filed a counterclaim alleging that Edmunds had misrepresented Jager's financial ability to him. (R. vol. II, pp. 111-120.)

In the main action, the court granted partial summary judgment at the October 14, 1987 hearing, and on November 5, 1987, findings of fact and conclusions of law, along with a judgment and decree of foreclosure, were entered. Jager's claims, and claims between Sprouse and Edmunds, as well as the intervention claims of ICP, were all reserved for later adjudication. (R. vol. II, pp. 92-99.) The UREC was foreclosed at a sheriff's sale held December 10, 1987, and sold to Leon Sprouse for his bid of \$360,000.00. (R. vol. II, pp. 102-103.) Shortly before trial, the parties stipulated to reduce the attorney's fees portion of the judgment against Jager, and to dismiss the remaining claims made by or against Jager, and the court entered orders to carry out the stipulations. (R. vol. II, pp. 188-195.) Trial of the remaining claims was held July 1,

1988. The court found the issues in favor of third-party plaintiffs and against Sprouse. The court eventually entered Reinstated Findings of Fact and Conclusions of Law and Reinstated Judgment on July 12, 1989. (R. vol. III, pp. 147-155.) The delays were caused by the court's request for briefs before ruling, the withdrawal of Sprouse's trial counsel, time for new counsel to obtain a trial transcript, and the filing of post-trial motions such as objections to the findings, motion for new trial, and the like.

Sprouse has timely appealed from the final judgment entered on July 12, 1989.

C. Statement Of Facts.

This action arises out of a sale of the Oasis Motel in St. George, Utah by Leon Sprouse to Arjen Jager on a Uniform Real Estate Contract (UREC).

Artie Edmunds, a real estate sales agent for Interwest Commercial Properties (Tr. 77), knew that the motel had been listed for sale and that Sprouse would pay a commission (Tr. 78-79), so that when Arjen Jager contacted him (Tr. 81) about acquiring a motel, he showed Jager the outside of the Oasis Motel (Tr. 81-82). When Jager expressed an interest, Edmunds contacted Sprouse (Tr. 83), and Sprouse said he would look at an offer (Tr. 84). Jager made an offer of purchase involving trading several of Jager's interests in other properties as the down payment. Edmunds hand-delivered the offer to Sprouse at his home in Las

Vegas (Tr. 87). Sprouse would not accept the offer until he inspected the trade properties.

Edmunds and Sprouse met in Salt Lake City and together examined the trade properties (Tr. 88-89). Jager agreed to modify his offer to meet Sprouse's objections (Tr. 90, 197, 200-201), and on March 11, 1985, Edmunds travelled to Sprouse's home again to present Jager's second offer of \$475,000.00, which Sprouse accepted (Tr. 91-92, 167).

This Earnest Money Sales Agreement (EMSA) is Trial Exhibit No. 2. It was for \$475,000.00, with \$85,000.00 being allowed for Jager's equity in an assignment of contract (\$50,000.00), Salt Lake duplex (\$25,000.00), and Salt Lake home (\$10,000.00), and with the balance of \$390,000.00 to be paid on a contract (Tr. 47-49). It contains a section setting forth the agreement for payment of the real estate commission, which Sprouse would not sign until it was changed from a 6% commission (or \$28,500.00) to a \$25,000.00 commission (Tr. 92-93, 193). It also contains a provision for attorney's fees (paragraph B, page 3 and R. vol. II, p. 88).

Edmunds testified that it was understood that the commission would be paid on a deferred payment schedule because Sprouse would not receive any cash at closing to cover the commission (Tr. 93). Sprouse acknowledges this understanding, but testified that Edmunds also agreed, before he signed the EMSA, that if Jager subsequently defaulted, there would be no further payments on the commission (Tr. 193). Edmunds disputed that testimony (Tr. 118) and testified that he never agreed to forgo the

commission if Jager defaulted because his broker was adamantly against anything like that (Tr. 118). Roy Larsen, the broker, testified that he never agreed to forgo the commission if Jager defaulted and never authorized Edmunds to make any such agreement (Tr. 26, 42), that he has never, in any transaction, agreed to forgo a commission if the buyer defaulted (Tr. 42), and that he has never seen such a transaction (Tr. 36). Claudia Ashby, president of the Washington County Board of Realtors and a Director of the Utah Association of Realtors, was accepted by the court as an expert witness (Tr. 18), and testified that although about 10% of real estate closings involve some deferral of commission payments, usually with a note (Tr. 19), she had never seen an agreement where the obligation to pay a deferred commission was conditioned upon the buyer's payments (Tr. 20).

The transaction closed on Friday, March 29, 1985 in St. George. All the closing documents were prepared by James Ivins of Meridian Title Company at the request of Jager (Tr. 48, 211), since he had previously done work for Jager and was familiar with Jager's Salt Lake properties (Tr. 212). Among the many (Tr. 218) closing documents prepared by Ivins were Trial Exhibits 3 through 15. Exhibit 3 is a Uniform Real Estate Contract signed by Sprouse and Jager showing the price of \$475,000.00, with \$85,000.00 credit for exchange of properties, and a balance of \$390,000.00. Sprouse testified that he reduced the commission to \$25,000.00 on the EMSA (Tr. 193) because he wanted \$450,000.00 for the property and told Edmunds he'd have to put his commission on top of that (Tr. 196). Accordingly, Sprouse acknowledged that

the \$475,000.00 price and the \$390,000.00 contract balance both include the \$25,000.00 commission.

Ivins prepared a NOTE/AGREEMENT/ASSIGNMENT (NAA), Trial Exhibit No. 15, to cover this \$25,000.00 commission. The NAA is the primary focus of the controversy in this action. It is only signed by Sprouse.

Ivins, called as a witness by Sprouse, testified that Edmunds called him on March 14, 1985 and gave him information, some of which pertained to the commission, and that he prepared the NAA based on information obtained from Edmunds during the call and from a note he received from Edmunds after that call (Tr. 237). Ivins testified that in the note Edmunds "reiterated the basic terms of the payment of the real estate commission" (Tr. 220-221). During cross-examination Mr. Ivins produced the written note he received from Edmunds, and it was received as Trial Exhibit No. 24 (Tr. 235-236). Ivins then admitted that there was nothing in Exhibit No. 24 to support the second to last paragraph of the NAA (Exhibit No. 15), but that he included this paragraph based upon his recollection of the prior telephone conversation with Edmunds on March 14, 1985 (Tr. 238-239). Ivins admitted having telephone conversations with Mr. Jager (Tr. 211, 240) and Mr. Sprouse (Tr. 223, 241) prior to the time he prepared the NAA, and testified that in this complicated transaction, he was generally getting information from lots of different places and people, and that when he drafted the agreement, it was the culmination of all the facts that had been given to him (Tr. 240).

Edmunds testified that he called Mr. Ivins about March 13, 1985, and, regarding the commission, told Mr. Ivins that it would be a deferred commission over four years at the same interest rate as the contract on the motel, that it was to be secured by the property, and that ICP was to have the right to step in and take over the contract (Tr. 104-105), but testified he did not tell Mr. Ivins that Sprouse would not be liable if Jager defaulted (Tr. 105, 118-119). Edmunds testified that except for the second to last paragraph, the NAA pretty much followed the information he gave to Ivins, and that he did not learn of the language in that paragraph until after Jager defaulted more than a year later (Tr. 119).

The NAA is only signed by Sprouse. Sprouse (Tr. 176) and Ivins (Tr. 216) testified that the NAA was one of the closing documents signed on March 29, 1985, while Edmunds testified that he did not recall seeing the NAA at closing (Tr. 117, 145, 148-149). The NAA bears a date of April 1, 1985. Mr. Larsen, the broker, testified that the NAA was delivered to his office after the closing (Tr. 23). Ivins testified it may have been the last document handled at the closing (Tr. 216) and that he did not know if Edmunds had a complete set of documents at the closing (Tr. 220). All of the other closing documents were dated March 29, 1985 (Tr. 161 and Exhibits 3 through 14).

Sprouse testified that, at his request, Ivins made a hand-written change in the NAA before Sprouse signed it (Tr. 202). Ivins, an attorney (Tr. 211), testified that he did not intend to have anyone but Sprouse sign the NAA (Tr. 225), that he

did not have Edmunds or ICP sign the NAA because the form did not have a place for their signature (Tr. 233), that he did not remember why he did not have Edmunds initial the hand-written change to the NAA (Tr. 234-235), and that he did not know about the statute of frauds (Tr. 242). Ivins testified that generally only the maker of a note and the assignor of an assignment sign those documents (Tr. 233), but acknowledged that the NAA also purported to be an agreement between two parties, Sprouse and ICP (Tr. 219), and admitted that it should have been signed by both parties (Tr. 234).

If the \$25,000.00 commission had been paid at closing, it would have been distributed as follows: ten (10%) off the top, or \$2,500.00, to Joan Templeton, as the original listing agent; sixty (60%) percent of the \$22,500.00 balance, or \$13,500.00, to Artie Edmunds as the selling agent; and forty (40%) percent of \$22,500.00, or \$9,000.00, to ICP as the broker company (Tr. 27-28, 120). However, the commission was scheduled to be paid at \$640.00 a month over 4 years (Exhibits 15 and 20), so it was agreed that Edmunds would acquire the entire note. Edmunds did this by giving up his share of other commissions due him. Both Edmunds (Tr. 120-121) and his broker, Roy Larsen (Tr. 30), testified that Edmunds acquired ICP's share by payment of \$9,000.00 cash.

Shortly after the closing, ICP assigned the full note to Edmunds (Trial Exhibit 16). On April 24, 1985, before the first monthly payment was made, Edmunds assigned the note to Draper Bank for a loan he owed to the bank (Tr. 123, Exhibit No. 18).

After Jager defaulted, Draper Bank contacted Edmunds and wanted something done on their loan (Tr. 129), and assigned the NAA back to Edmunds (Tr. 124, Exhibit No. 19).

Jager made 13 monthly payments of \$3,687.50 before he defaulted on the June 1, 1986 payment (Tr. 50, Exhibit No. 5), and \$640.00 of each payment had been applied to the commission, reducing the unpaid commission to \$19,226.80 when Jager stopped making payments (Exhibit No. 21). With interest to the day of trial, the balance due on the commission note on July 1, 1988 was \$24,239.46 (Tr. 124-125, Exhibit No. 21).

Jager relinquished possession of the motel to Sprouse on June 28, 1987 (Tr. 50, 51, 61), ten months after Sprouse commenced this action. Sprouse pursued a judicial foreclosure and on November 5, 1987, the court entered Findings of Fact and Conclusions Of Law (see Appendix "A") and a Judgment and Decree of Foreclosure (see Appendix "B"). The judgment was originally for \$472,473.40, including \$15,000.00 for Sprouse's attorney's fees (R. vol. II, p. 97). Later, by the stipulation of all parties, those fees were reduced from \$15,000.00 to \$3,720.50 (R. vol. II, 188-189), and an order was entered in accordance therewith, thereby reducing the judgment to \$461,193.90.

The judgment ordered the property sold at sheriff's sale, which was held on December 10, 1987. Edmunds attended the sheriff's sale intending to bid (Tr. 134), but Sprouse made the first bid of \$360,000.00, and no higher bids were made (Tr. 135). The property was sold to Sprouse for his bid of \$360,000.00 (R. vol. II, pp. 102-103). The bid, by court order, reduced the

judgment by \$360,000.00, leaving a judgment of approximately 101,193.90 against Jager.

Jager's down payment, valued at \$85,000.00, consisted of one duplex, one single family home, and a note worth \$50,000.00 (Tr. 46-47, Exhibits 2 and 3). Jager testified that in the year prior to his default, he completely rebuilt 10 motel units at a cost of \$100,000.00, and increased business 40% (Tr. 49-50). Sprouse did not offer any evidence to challenge this testimony. Sprouse had regained possession of the motel a year before trial, and acknowledged at trial that he still had the benefits of the trade properties and was still receiving substantial monthly payments from them (Tr. 205-206).

SUMMARY OF ARGUMENT

Even if Sprouse is correct on the first three points raised in his brief, he is still liable because (1) he included the commission in his judgment against Jager; (2) he assigned an undivided \$25,000.00 interest in the UREC to secure the commission, and Edmunds, the holder, is entitled to share in the proceeds from the sheriff's sale; and (3) Edmunds, as an assignee of a partial assignment the balance of which is held by the assignor (Sprouse), is entitled to priority in payment over the assignor (Sprouse). Thus, even if the second to the last paragraph of the NAA were enforceable, third-party plaintiffs are still entitled to be paid because of the assignment of a \$25,000.00 interest in the UREC.

Sprouse cannot enforce the second to the last paragraph of

the NAA, however, because the NAA was not signed by Edmunds or ICP, the party Sprouse wants to charge with that term, and the statute of frauds requires such a modification of a commission agreement to be in writing. However, even if the statute of frauds did not apply, the court found no note, memorandum or even any oral agreement to support that term, and it never was mutually agreed upon.

The trial court heard conflicting testimony regarding whether or not Edmunds agreed to modify the written commission agreement (set forth in the EMSA, Exhibit No. 2) so as to relieve Sprouse of personal liability for the commission in the event Jager defaulted. The trial judge, with his advantaged position to assess the credibility of the witnesses, and based on substantial and credible evidence, concluded that the parties did not so agree (Findings, ¶¶ 7-9, R. vol. III, pp. 149-150). Further, marshalling of the disputed trial evidence shows an adequate basis to support the trial court's finding that the parties did not mutually agree to modify the written commission agreement so as to relieve Sprouse of liability if Jager defaulted.

The award of attorney's fees was adequately supported by the evidence because Sprouse's counsel stipulated to the reasonableness of the fee, based on 150 hours at \$60.00 an hour, for a total of \$9,000.00. Sprouse's counsel and the court accepted the proffer, which requested an award of \$9,000.00 attorney's fees, without objection or cross-examination, and Sprouse cannot object for the first time on appeal.

ARGUMENT

POINT I

THE JUDGMENT SHOULD BE AFFIRMED EVEN IF POINTS I, II,
AND III OF APPELLANT'S BRIEF ON APPEAL ARE CORRECT
BECAUSE OF THE ASSIGNMENT OF A \$25,000.00 INTEREST
IN THE UNIFORM REAL ESTATE CONTRACT.

The NAA (Exhibit No. 15) contains an assignment of a \$25,000.00 interest in the UREC. The first typed paragraph after the printed material provides:

The Undersigned hereby sells, assigns and sets over to INTERWEST COMMERCIAL PROPERTIES a \$25,000.00 interest as security for the payments set forth above in and to that certain Uniform Real Estate Contract dated March 29, 1985 by and between Leon Sprouse, Seller, and Arjen W. Jager, Buyer, covering the Oasis Motel, located at 231 West St. George Blvd, St. George, Utah.

Edmunds, as the present holder of that instrument, is entitled to share in the proceeds of any foreclosure sale because of his \$25,000.00 interest in the contract.

Sprouse has acknowledged, in several ways, that Edmunds' rights by virtue of this partial assignment are equal to his own rights. First, Sprouse's answer to Edmunds counterclaim alleging these rights essentially admitted them (R. vol. I, pp. 143-144). Second, at trial, Sprouse's counsel proffered the testimony of Mrs. Sprouse to the effect that there would be an assignment to secure the commission with "the right to stand in the shoes of Mr. Sprouse and foreclose" (Tr. 255). Third, on page 26 of Sprouse's brief on appeal, it states: "Sprouse argues that the NAA should be binding in all respects." Despite these admissions, Sprouse refuses to allow Edmunds to share in the proceeds of the sheriff's sale, at which Sprouse bid \$360,000.00.

The trial court has also recognized Edmunds rights. Edmunds filed a counterclaim against Sprouse asserting his rights under the assignment and a cross-claim against Jager asserting the right to join with Sprouse in foreclosure (R. vol. I, pp. 126-134). Edmunds claimed a \$25,000.00 interest in the UREC and rights equal to Sprouse. Subsequently, the court entered its Judgment and Decree of Foreclosure and made a finding of fact that Edmunds was entitled to attorney's fees of \$1,500.00 in the enforcement of his rights and the foreclosure of Jager's interest under the UREC (R. vol. II, pp. 99-99, ¶ 10, p. 94). The fees of \$1,500.00 awarded to Edmunds were included in the judgment of \$472,473.40 Sprouse obtained against Jager (R. vol. II, p. 97). Later, all parties stipulated to a reduction of Sprouse's fees (from \$15,000.00 to \$3,720.50), but Edmunds fees remained at \$1,500.00. Based on the stipulation, the court ordered the judgment reduced accordingly (R. vol. II, pp. 188-191).

The Judgment and Decree of Foreclosure (Appendix "B") ordered the property sold at a sheriff's sale. It then ordered "that the proceeds of said sale shall be paid over to the Clerk" to be distributed only by court order "following an adjudication of claims" in Jager's counterclaim and "claims existing between Plaintiff (Sprouse) and Defendant Artie Edmunds". The claims of ICP in intervention were also covered. It is clear that the court recognized Edmunds potential right to share in the proceeds of the sheriff's sale. The adjudication of these claims was part of the trial held July 1, 1988. Paragraph 14 of the Reinstated

Findings (R. vol. III, pp. 150-151) provides:

"14. The Court finds that defendant [Sprouse] gave plaintiffs [ICP] an assignment of a \$25,000.00 interest in the Uniform Real Estate Contract (Trial Exhibit P-3) when defendant signed Trial Exhibit P-15 [the NAA]. The Court further finds that plaintiffs are therefore entitled to share in the proceeds from the sheriff's sale of the Oasis Motel, which the Court finds was held on December 10, 1987, at which the Oasis Motel property was sold to defendant as the highest bidder for the bid of \$360,000.00."

The sale was noticed to be for "the highest and best bidder for cash, lawful money of the United States." (R. vol. II, pp. 100-101.) Sprouse did not pay cash, nor did he deposit with the Clerk any money as the court had ordered. Sprouse apparently felt that since most of the money was owed to him anyway, there was no need to comply. Sprouse's conduct has ignored the fact that he made a \$25,000.00 assignment of the contract.

A. Because Sprouse Included The Commission (NAA) In His Judgment Against Jager, He Has Acknowledged His Liability.

Sprouse has acknowledged an obligation to pay the commission by including the \$25,000.00 commission in his judgment against Jager. Sprouse testified at trial that he wanted \$450,000.00 for the Oasis Motel and that any commission would have to be added to that amount. He testified that before he agreed to sign the \$475,000.00 offer (Exhibit No. 2), he insisted on changing the six (6%) percent commission (which would have been \$28,500.00) to a \$25,000.00 commission, so that he would receive \$450,000.00 for the property. The price of \$475,000.00 therefore includes the commission. The \$85,000.00 agreed equity in the three properties Sprouse received from Jager at closing reduced the contract from

\$475,000.00 to \$390,000.00. Since Sprouse received those properties (and still has them), the commission was included in the unpaid balance of \$390,000.00, for which Jager signed notes and made payments until he defaulted.

The judgment Sprouse obtained against Jager was for \$472,473.40, and included \$386,275.13 as the principal balance owed on the \$390,000.00 notes. Thus, the Judgment and Decree of Foreclosure includes the full balance owed by Jager on the contract, and thereby includes the very commission which Sprouse is now attempting to avoid. Further, Sprouse included in his judgment \$59,542.42 accrued interest on the \$386,275.13. That means his judgment even includes interest on the commission.

Sprouse accuses Edmunds, on page 24 of his brief, of wanting to have his cake and eat it too. However, it is Sprouse who (A) took Jager's \$85,000.00 worth of traded properties (and is still receiving substantial payments on them); (B) took Jager's payments until he defaulted; (C) took the motel back along with \$100,000.00 worth of undisputed improvements; and (D) took a judgment against Jager that included the \$25,000.00 interest that he had assigned for the commission. Even after giving Jager credit for the \$360,000.00 he bid at the sheriff's sale, Sprouse still has a judgment of over \$100,000.00 against Jager which he can collect. That judgment even includes \$1,500.00 of Edmunds' attorney's fees, yet Sprouse has refused to allow Edmunds to share in the proceeds from the sheriff's sale. Sprouse cannot be allowed to obtain a judgment including the commission without having to account for it to his assignee.

- B. Edmunds, As The Holder Of The NAA, Is Entitled To Share In The Proceeds From The Sheriff's Sale, Because Assigned Rights Under A Real Estate Contract Are Treated Like A Mortgage.

The Uniform Real Estate Contract Sprouse and Jager signed is freely assignable (§ 18, Exhibit No. 3). By an assignment, the assignee takes the same rights his assignor had, and an assignment transfers the interest of one party in certain property to another. Tanner v. Lawler 6 Utah 2d 84, 305 P. 2d 882 (1957); Wiscombe v. Lockhart Co. 608 P. 2d 236 (Utah 1980).

In Butler v. Wilkinson 740 P. 2d 1244 (Utah 1987), at 1255-56, the court recognized that the vendor under an installment land contract has an interest that he can sell or mortgage that is measured by the amount the vendee owes under the contract, which is given the same special priority as purchase money mortgages in order to provide the critical security essential for an installment contract to be a commercially reasonable way of selling real estate. Sprouse sold, or mortgaged, \$25,000.00 of his interest in the UREC with Jager, and Edmunds, as the holder, is entitled to the same protection the law affords Sprouse.

A partial assignment, whether stated as an amount or fraction, ". . . is operative as to that part to the same extent and in the same manner as if the part had been a separate right." Restatement, Contracts 2d § 326(1). Since Sprouse retained title to the motel under the UREC for security, he is treated as a constructive trustee of the collateral for the assignee (Edmunds)

when he has made such an assignment and holds the collateral (see, Restatement, Contracts 2d, § 340(2)).

In Utah Farm Production Credit v. Wasatch Bank 734 P. 2d 904 (Utah 1987) the court said that:

" . . . when a borrower assigns an interest in a real estate contract as security for a loan, the assignee-lender acquires a lien on the borrower's interest in the real property which is treated like a mortgage."

Sprouse assigned the \$25,000.00 interest in the UREC as security for the commission he owed. Edmunds, the present holder and assignee, acquired a lien on Sprouse's interest in the motel that is treated like a mortgage.

In Campbell v. Warren 726 P. 2d 623 (Ariz. App. 1986) the court quoted from Batesville Institute v. Kauffman 85 U.S. (18 Wall.) 151, 153, 21 L.Ed. 775, 776 (1873), as follows:

"[N]o principle is better settled than this, that the assignment of a debt carries with it an assignment of a judgment or mortgage by which it is secured. If a part only of the debt is assigned, a pro tanto portion of the security follows it."

At the very least, Edmunds is entitled to a pro rata share of the proceeds from the sheriff's sale, which would be \$20,091.78. This is calculated by dividing the \$360,000.00 proceeds by \$461,193.90 (the total judgment as modified by the stipulated reduction of Sprouse's fees), and multiplying the resulting fraction by \$25,739.46 (the sum of the \$24,239.46 commission and the \$1,500.00 of Edmund's fees which were both included in Sprouse's judgment). Since Sprouse has refused to recognize Edmunds assignment rights and has forced Edmunds to assert his legal rights under the NAA (under both the note and

the assignment set forth in the NAA), Edmunds is also entitled to his attorney's fees in this action against Sprouse as provided in the NAA. Further, Edmunds is entitled to interest on these amounts because they were included in Sprouse's judgment and because Sprouse has refused to allow Edmunds to share in the sales proceeds or to pay the proceeds into court.

C. Edmunds Assigned Rights In The UREC Are Entitled To Priority In Payment Because The Portion Assigned Has Priority Over The Portion Retained And Because Of The Intent To Pay The Commission First.

The \$360,000.00 from the sheriff's sale must be applied in satisfaction of the judgment. The issue is how should the \$360,000.00 received at the sale be applied to the \$25,000.00 interest assigned and the \$365,000.00 (\$390,000.00 minus \$25,000.00) interest retained by Sprouse? Should it all go to Sprouse's interest first? To Edmund's interest first? To both interests in proportionate or pro rata amounts?

Since assignments of rights under land contracts are treated like mortgages (Utah Farm, supra), we look to the law of mortgages to determine priority. An assignment of a mortgage or contract debt operates as an assignment of the underlying mortgage or contract itself, and this rule extends to a partial assignment, which carries with it a proportional interest in the contract and vests the assignee with the powers and rights of the mortgagee as fully as if he had been made such in the original contract (55 Am. Jur. 2d Mortgages, §§1284 and 1301).

The question of priority of partial assignments which are secured by the same contract that secures the interest retained

by the assignor are said to involve ". . . an inquiry as to an implied agreement, and, if none, a consideration of the existence of an equity in favor of the assignee arising out of the assignment." (§ 1321 of 55 Am. Jur. 2d Mortgages). Here, there is such an equity, as the proof shows that the \$25,000.00 commission amortizes first, in four years, while Sprouse's retained interest amortizes in 25 years (Trial Exhibit No. 20). It is also clear that the parties intended that the commission should be fully paid by the time the amount owed by Jager was reduced to \$375,000.00 (Trial Exhibit No. 22). It is clear that the commission was to be retired and paid first.

The rule on this issue is found at 55 Am. Jur. 2d Mortgages § 1325, where it states:

" . . . that where several notes are secured by one mortgage and some of them are assigned, the assignees take precedence over the assignor with respect to the notes retained by the assignor. . . . Even in the courts that apply the prorata rule, there is some conflict as to its application between an assignor and assignee. By some, the equity arising out of the fact that the holder of some notes is the assignee of the holder of others is held to be strong enough to take the case out of the general rule, and the assignee is considered as entitled to a preference over the assignor."

The reason for the rule was explained in Lawson v. Warren 34 Okl. 94, 124 P. 2d 46 (1912), referring to Jones on Mortgages (6th Ed.) § 1701, as follows:

"Where a holder of a mortgage assigns a part of it, although he warrants only the existence of the debt at the time of the transfer, it would be contrary to good faith to permit him, after receiving the money for this part of the claim, to come into competition with his assignee, if the property prove insufficient to pay the claims of both. Unless the intention be plainly declared on the face of the assignment that the assignee is to share pro rata in the security with the

assignor, the equitable construction of it is that it must in the first place be applied for the payment of the part of the debt which was assigned."

The court then gave the following example:

"The reason the assignee is to be preferred is founded on the plainest principle of equity. When two notes are assigned to different persons, they are both presumed to have paid value, and they must share equally in the proceeds of the mortgaged property in order to preserve the equality which is equity. But to apply the same rule between the mortgagee and a person to whom he had transferred one of the notes would lead to inequality. For illustration, say that the mortgagee holds two notes for \$1,000 each. He assigns one of them for value. The property securing their payment only brings \$1,000, or enough to pay one note. If the mortgagee shares in the proceeds he will get out of the debt \$1,500, the \$1,000 he received for the first note and the \$500 he receives from the proceeds of the mortgaged property, while the assignee for half the debt only receives \$500. The mortgagee would thus receive more than if he had kept both notes. This is not right."

Sprouse received full value for the \$25,000.00 assignment, because he was obligated to pay a \$25,000.00 commission at the closing (Exhibit No. 2, bottom of page 2). Limiting Edmunds to a pro rata portion allows Sprouse to receive more than full value for the assignment because the \$25,000.00 commission debt is extinguished plus he recovers a percentage of what he had assigned to pay the commission. Therefore, Edmunds should be given priority and should be paid in full from the proceeds of the sheriff's sale and the balance belongs to Sprouse. Not only was it the intent to pay the commission first (in 4 years, while the UREC ran for 25 years), but the partial assignment is, by law, entitled to priority.

Nor can Sprouse argue that his bid was a so-called "credit bid" and that he is not obligated to actually pay the amount he

bid. While that theory may be appropriate when there are no other interested parties, in this case there was a court order that the amount bid be paid into the Clerk of the Court because of existing and unadjudicated claims, Edmunds' being one of them. Sprouse violated the court order by not paying to the Clerk the \$360,000.00 he bid, and is in contempt of court under Rule 69(e)(4), URCP. Utah mortgage foreclosure law makes no exceptions for sellers who bid, and Rule 69 must be strictly followed.

D. Even If The Paragraph Of The NAA Purporting To Relieve Sprouse Of Personal Liability Is Valid, Edmunds Must Be Paid In Full From The \$360,000.00 Proceeds From The Sheriff's Sale.

Sprouse's entire appeal rests on one paragraph of the NAA, the second to last paragraph, which says:

"The parties hereto understand and agree that this instrument does not obligate the undersigned to personally pay the amounts set forth herein. The obligation for payment hereunder arises only out of the payments received by Heritage under the Unifrom (sic) Real Estate Contract referred to above." (Emphasis Added.)

Although the NAA was not signed by Edmunds, ICP or anyone else but Sprouse, he claims that Edmunds agreed to this at the time Sprouse signed the offer (Exhibit No. 2) at his home in Las Vegas. Although Sprouse admits that he insisted on changing the six (6%) percent commission to \$25,000.00 at that time, he claims that there wasn't room to make the change. However, all that needed to be added was that the commission was only payable from Jager's payments, and Sprouse was not personally liable. There was room for that much.

But even if we assume that Sprouse's claims are correct, Edmunds is still entitled to full payment from the sheriff's sale proceeds because those proceeds are received by Heritage, or were agreed to be received through Heritage, and they must be treated as such.

Sprouse and Jager agreed, in paragraph 17 of the UREC (Exhibit No. 3) upon Heritage serving as the escrow agent and as trustee (see also Exhibit No. 6, the Escrow Agreement). Sprouse, in his second amended complaint, elected the remedy of paragraph 16C of the UREC (R. vol. I, pp. 93-103). This remedy provides that Heritage, as trustee, is to proceed with the foreclosure. Thus, any proceeds from the foreclosure must necessarily pass through Heritage, as Sprouse and Jager so agreed.

The parties are bound to strictly follow the foreclosure procedure set out in the Uniform Real Estate Contract. As stated in 55 Am. Jur. 2d, Mortgages, § 695, page 636:

"A sale made under the authority of a power of sale in a mortgage or deed of trust must be in strict compliance with that power. The power is limited and defined by the instrument in which it is contained . . . neither the trustee nor the court should disregard the terms of the power. Accordingly, the trustee or mortgagee must see that in all material matters he keeps within his powers, and must execute the trust in strict compliance therewith. . . . The power to sell is a matter of contract and the parties are bound to a strict observance of its terms."

The Utah Supreme Court has recently followed this rule in Concepts, Inc. v. First Security Realty Services 64 Utah Adv. Rep. 20 (09/01/87), when the court said:

"The maker of the deed of trust with power of sale may condition the exercise of the power upon such conditions as he may describe.
.

The grantor of the power is entitled to have his directions obeyed; to have the proper notice of sale given; to have it take place at the time and place, and by the person appointed by him. (Citations Omitted). The right of a grantor of a deed of trust to have its provisions strictly complied with to effect a valid foreclosure sale is absolute." (Emphasis Added.)

In this case, the parties have, by their contract, agreed that the escrow agent, Heritage, is to handle any foreclosure. It therefore follows that any amount bid at the sheriff's sale would be received by Heritage and therefore available for payment of the commission, no matter what interpretation the NAA is given.

POINT II

THE NAA IS WITHIN THE STATUTE OF FRAUDS AND THE BROKER IS THE PARTY TO BE CHARGED WHEN THE LANDOWNER ALLEGES A MODIFICATION AGREEMENT THAT ELIMINATES A COMMISSION. NONE OF THE EXCEPTIONS TO THE STATUTE CLAIMED BY SPROUSE APPLY UNDER THE FACTS OF THIS CASE.

Sprouse argues that the paragraph of the NAA, which purports to relieve him of liability if Jager defaults, is not within the statute of frauds, or even if it is, that the broker is not the "party to be charged", and need not sign it for it to be binding upon him. Even if Sprouse is right on both these points, he then must show that there actually was an agreement, or mutual assent, to that paragraph. Knowing this, Sprouse also contends in his brief that the trial court erred in finding that there was no such agreement. That issue will be addressed next, although it need not be reached because the statute of frauds does apply to that paragraph of the NAA.

A further problem, not addressed in Sprouse's brief, is that Sprouse only alleges that Edmunds, the real estate sales agent,

orally agreed to that paragraph. Sprouse makes no claim that the broker agreed to the same paragraph. General business havoc would result if brokers were suddenly confronted with determining the validity of various oral promises or agreements allegedly made by their selling agents.

Another obvious question Sprouse has not addressed or answered is this: What was the point of giving the broker a \$25,000.00 assignment of the contract, if it was true that if Jager defaulted, no further payments were required? Obviously, there is absolutely no point in making such an assignment if that was the understanding. If Jager defaults, the ball game is over, and the assignment for security is completely useless.

The Statute of Frauds, Section 25-5-4(5) of the Utah Code, provides that:

"In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

. . . .
(5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation." (Emphasis Added).

The Earnest Money Sales Agreement (Exhibit No. 2) contains a sufficient writing signed by Sprouse (bottom of page 2), who is the party to be charged under it (since it is his obligation to pay the commission) and therefore satisfies the statute of frauds. It establishes Sprouse's obligation to pay, and the broker's right to receive, the \$25,000.00 commission.

Sprouse claims that his obligation to pay the commission was modified by the NAA, which was signed by him but not by the broker or by Edmunds. Several Utah cases have held that if an

original agreement is within the statute of frauds (such as a commission agreement), a subsequent agreement which modifies the original written agreement must also satisfy the requirements of the statute of frauds to be enforceable. Coombs v. Ouzounian 24 Utah 2d 39, 465 P.2d 356; Bamberger Co. v. Certified Productions 88 Utah 194, 48 P.2d 489; Combined Metals, Inc. v. Bastian 71 Utah 535, 267 P. 1020.

In Zion's Properties, Inc. v. Holt (Utah 1975) 538 P.2d 1319, the Court said:

"It is elementary that when a contract is required to be in writing, the same requirement applies with equal force to any alteration or modification thereof."

The rule appears well settled in Utah. Since Sprouse is attempting to hold the broker and Edmunds to the NAA, it must be signed by them as the "party to be charged". It is not. Sprouse cannot unilaterally alter or modify the agreement by signing documents which have not been signed by the broker or Edmunds.

Sprouse contends that only the landowner is a party to be charged, and that the statute of frauds does not require the broker to sign a commission agreement or an agreement modifying a commission agreement. If that were the case, the statute should simply say "landowner" instead of "party to be charged". It is clear that the "party to be charged" under the original commission agreement (Exhibit No. 2) is Sprouse, since he has the obligation to pay \$25,000.00. But the broker is the "party to be charged" under any alleged agreement, like the second to last paragraph in the NAA, that would reduce or eliminate altogether

the obligation to pay. That is why it is important for the "party to be charged" to manifest his assent by a signed writing.

Sprouse claim that the statute operates in only one direction is wrong. Although Sprouse correctly refers to cases which say Section 25-5-4(5) is intended to protect landowners against fraudulent claims for commissions, that is not the only reason for the statute. In Ney v. Harrison 5 Utah 2d 217, 299 P. 2d 1114 (1956), the court found two policies implicit in the statute:

"The protection of the landowner from the imposition of spurious claims by real estate brokers, or the necessity of protecting the broker, who has rendered a bona fide service, from being refused just compensation for his work by the landowner."

According to the comment to Section 135 of Restatement, Contracts 2d, the words "party to be charged" refer to the party to be charged in the legal proceeding. Other authorities say the party to be charged is the party against whom the alleged contract or memorandum is sought to be enforced (72 Am. Jur. 2d Statute of Frauds § 364; 94 ALR2d 921). The statute operates, then, as needed, to protect both the landowner and the broker. In this case, it protects the broker from an alleged oral agreement that would wash away his compensation if Jager defaulted.

Strevell-Paterson Co., Inc. v. Francis 646 P.2d 741 (Utah, 1982) is a case dealing with exactly the same issue under subparagraph (2), instead of (5), of the same statute of frauds. It was an action against Francis, a guarantor, for amounts due on a written personal guarantee. On appeal, a summary judgment

against Francis was affirmed against his contention that whether or not plaintiff had orally released him from liability on the guarantee was a genuine issue of material fact. The Court held that even if an oral release were proved, it would be unenforceable as a matter of law under the statute of frauds. The Court noted that the personal guarantee was in writing, as required by §25-5-4(2) of the Utah Code, and was signed by Francis, the party to be charged by it. The Court then said:

"By the same token, the release or revocation of an agreement to answer for the debt of another must also be in writing. It is well settled that if an original agreement is within the Statute of Frauds, any subsequent agreement which alters or amends it must also satisfy the requirements of the Statute. (Citations omitted.) The alleged oral release obviously does not meet those requirements of enforceability."

The oral release must be signed by the plaintiff as the party to be charged with it. The same applies here--Sprouse must sign the original commission agreement, as he is charged with it (just as Francis was charged with the guarantee), and the broker must sign an agreement releasing the commission (just as the plaintiff above would have to sign such a release to be charged with it). In SCM Land Co. v. Watkins & Faber 732 P. 2d 105 (Utah 1986) it was said that an agreement to terminate or rescind a contract, such as the commission contract in issue here, must be done by a written contract if the contract that is extinguished falls within the Statute of Frauds. The NAA, not being signed by the broker, is not sufficient.

Sprouse's brief says that brokers owed a commission do not acquire an interest in land that merits the statute's protection.

This is a curious statement, because even a cursory reading of Section 25-5-4 shows that it has 6 subsections, none of which necessarily have anything to do with an interest in land, and all of which are subject to the "party to be charged" language. Sprouse is confusing Section 25-5-4 with 25-5-1.

Sprouse has failed to present any relevant authority for his claim that terms of the NAA which purport to modify the commission agreement do not have to be in writing signed by the broker as the party to be charged. There is no such authority, and the law is to the contrary.

In 12 Am. Jur. 2d Brokers, § 52, page 811, the general rule is stated as follows:

"If the original contract employing a broker is required to be in writing, any modification thereof which results in a new contract must itself be in writing to be effective to confer on the agent the right to compensation in accordance with the modified contract."

Also, in 72 Am. Jur. 2d Statute of Frauds § 274, page 789, it states:

"The broad general doctrine as announced by most authorities is that a contract required by the statute of frauds to be in writing cannot be validly changed or modified as to any material condition therein by subsequent oral agreement so as to make the original written agreement as modified by the oral one an enforceable obligation. To state the rule differently, where an original agreement comes within provisions of the statute of frauds requiring certain agreements to be in writing, the statute of frauds renders invalid and ineffectual a subsequent oral agreement changing the terms of the written contract."

Utah follows this general rule. In Golden Key Realty, Inc. v. Mantas 699 P.2d 730 (Utah, 1985), a case where a broker sued

for his commission, the Court said:

"The rule is well settled in Utah that if an original agreement is within the statute of frauds, a subsequent agreement which modifies the original written agreement must also satisfy the requirements of the statute of frauds to be enforceable."

Sprouse cites this case as similar because the statute of frauds was avoided in Golden Key by finding an accord and satisfaction, a different question than modification of a commission agreement. If Sprouse is attempting to assert that the NAA accomplished an accord and satisfaction, it must be pointed out that accord and satisfaction is an affirmative defense that must be pleaded or it is waived. See Staker v. Huntington Cleveland Irr. Co. 664 P. 2d 1188 (Utah 1983). Sprouse has failed to plead accord and satisfaction or raise it as a defense at any time prior to his brief.

Sprouse's claim that the NAA is not within the statute of frauds because it altered only terms of commission payment and not terms of employment is without merit. Price and terms are frequently the most important term in contracts. In this case, the parties made the terms of commission payment expressly material, since Exhibit No. 2 provides (in the section on the commission) that the terms cannot be changed without the broker's consent. It is difficult to conceive, at least from the broker's viewpoint, of any term more material to a commission agreement than the amount of the commission and the time of its payment.

Mr. Sprouse's attorney is misleading the court when he quotes C.J. Realty, Inc. v. Willey 758 P.2d 923 (Utah App. 1988) as standing for the proposition that only the matter or fact of

employment is within the statute of frauds, but that the terms of the commission, such as amount, time of payment etc. are not within the statute of frauds. Counsel fails to continue with the quoted material, which makes it clear that all the terms of the employment have to be made definite under the statute of frauds. The Utah court is quoting the California case dealing with whether or not the legal description of the land needs to be described specifically, which full quote, provides:

"the essential part of a contract to employ a real estate broker, so far as the statute of frauds is concerned, is the matter of the employment and consequently need not describe the land specifically, if the terms of the employment can be made definite without it." [i.e., without describing the land, an entirely different issue than the issue here].

Terms of employment include the amount of the commission to be paid, the date of its payment etc. Sprouse fails to cite any relevant authority for his argument that the terms of compensation are nothing more than a security agreement, are not material parts of the contract, and are not within the statute of frauds. On the contrary, these kind of terms have been held material and within the statute of frauds. Foster v. Mutual Savings Asso. 602 SW2d 98 (Texas 1980). According to Mr. Sprouse's position, only the fact of employment is required to comply with the statute of frauds and therefore be in writing signed by the party to be charged. This theory would eviscerate the intent and purpose of the statute of frauds, which is designed to protect both the landowner and the broker against fraudulent or fictitious claims. Nothing would stop an agent or broker, once the fact of employment is established, to maintain

that the owner agreed to a 20%, or 30% or even 50% commission. Likewise, nothing would stop the landowner from asserting, if the fact of employment is established, that the agent or broker agreed to accept 5%, 3% or even forgo the commission.

Sprouse also contends that because the NAA was assigned to Edmunds, then to Draper Bank, and then back to Edmunds, that these subsequent assignments are a sufficient writing to satisfy the statute. However, these subsequent assignments dealt with only the note portion of the NAA and made no specific reference to the agreement portion which purports, under only Mr. Sprouse's signature, to constitute an agreement that no further commissions would be payable if Jager defaults. These assignments do not relate to the transaction between Sprouse & Jager, or even between Sprouse and ICP, but relate to subsequent transactions in which the right to receive the commission was passed on to other parties.

The unrebutted evidence presented at trial showed that the assignment from ICP to Edmunds was made for full value, dollar for dollar, with Edmunds giving ICP cash of \$9,000.00 for its interest in the contract, and that it was done without knowledge of the language in the NAA's second to last paragraph. This is an obvious indication that the parties did not agree to the NAA term relieving Sprouse of liability if Jager defaulted, as Edmunds would certainly not be foolish enough to pay \$9,000.00 for a note that could evaporate into nothing if Jager defaulted, a situation far beyond his control. When Jager did default, Draper Bank sent the note back to Edmunds, contending that

Edmunds was still fully liable to Draper Bank. This conduct shows that Draper Bank had not agreed to the NAA paragraph limiting Sprouse's liability when it received the assignment (see Trial Exhibit No. 19).

There must also be something in the subsequent assignments that clearly show that Edmunds agreed to and accepted the term of the NAA that says Sprouse is not personally liable. This distinguishes this case from those cited by Sprouse. There is simply nothing in any of the subsequent assignments that even suggests a connection, let alone an agreement, to that term. The subsequent assignments, rather than showing an agreement to the disputed term of the NAA, are actually evidence that the term was never agreed upon, otherwise, it is highly doubtful that anyone would be willing to accept or pay value for such an assignment.

In order to satisfy the statute of frauds, the additional writings a party asserts must contain all the essential terms and provisions of the contract to which the parties have agreed, and must set out the conditions of the transaction with adequate certainty, which requirement is not met if the additional writings lack any acknowledgement or recognition that the parties have entered into the alleged agreement. See Machan Hampshire Properties v. Western Real Estate & Dev. 779 P. 2d 230 (Utah 1989).

Sprouse claims that because of the subsequent assignments and because 13 payments were received on the note, that Edmunds has manifested his consent to the NAA. That may be true for the "note" and "assignment" portions of the NAA, because all the

parties testified that it was agreed that Sprouse would sign a note with interest and secure it by an assignment of the UREC, but it is certainly not true of the "agreement" portion of the NAA, to which neither he nor his broker consented.

Sprouse has only indirectly mentioned the issue of part performance on appeal, so suffice it to say that this issue was fully briefed for the trial court (see R. vol. II, pp. 267-271). The acceptance by Draper Bank of 13 payments does not constitute part performance and take the NAA out of the statute of frauds because the payments are not "exclusively referable" to that alleged term, but are consistent with the "note" portion of the NAA, which is not disputed. See, for example, Downtown Athletic Club v. Horman 740 P. 2d 275 (Utah 1987).

The issues in this case are very similar to those in Bushnell Real Estate, Inc. v. Nielson 672 P. 2d 746 (Utah, 1983) because there was not enough cash available at the closing to meet the needs of the parties. The broker, who was entitled to a \$51,000.00 commission, took only \$15,000.00 of it at the closing and the seller signed a note for the balance of \$36,000.00. When the buyer filed for bankruptcy and failed to make further payments, the seller refused to pay the note, claiming, exactly as Sprouse has done here, that (1) payment of the balance of the commission was conditioned upon the buyer's payments; (2) that the escrow agreement, which provided for distribution of the commission from the buyer's payments, showed an agreement that the broker would not look beyond payments coming through the escrow agreement for payment of the commission; and (3) since the

buyer defaulted, the broker had not produced a buyer who was ready, willing and able, a condition to payment on the note. All three of these defenses failed. The district court granted the broker's motion for summary judgment. On appeal, the judgment was affirmed. The court said:

"Absent a contractual provision, which conditions the right to a commission on the performance of the buyer, the general rule accepted in Utah is that a broker has earned his commission upon the procuring of a buyer who is ready, willing and able and who is accepted by the seller. The broker is not an insurer of the subsequent performance of the contract and is not deprived of his right to a commission by the failure or refusal of the buyer to perform."

The court rejected the seller's claim that the escrow agreement, because it specifically provided for payment of the commission out of payments made by the buyer, constituted an agreement by the broker not to look beyond the escrow payments:

"Furthermore, the defendants' contention that the plaintiff look only to the buyer's payments into escrow for its commission would render the note meaningless and ignore the undisputed benefit received by the defendants from the plaintiff's agreement to defer part of the commission due at closing. On its face, the escrow agreement merely provides for a method of distribution of the payments made by the buyer."

The same reasoning applies in this case. Sprouse was obligated to pay the commission at closing. To hold that third-party plaintiffs must look only to Jager's payments for the commission would render the note and assignment portions of Exhibit No. 15, the NAA, meaningless and ignores the undisputed benefit Sprouse received from the broker's willingness to defer the payment of the commission over a four year period.

POINT III

THE EVIDENCE ADEQUATELY SUPPORTS THE TRIAL COURT'S FINDING THAT THERE WAS NO MUTUAL CONSENT TO THE DISPUTED TERM OF THE NAA. THEREFORE, THE COURT'S ENFORCEMENT OF THE NOTE AND ASSIGNMENT PORTIONS OF THE NAA WAS APPROPRIATE.

If a contract's interpretation is determined by extrinsic evidence of intent, then it is a question of fact. Seashores Inc. v. Hancey, 738 P.2d 645, 647 (Utah Ct. App. 1987). It follows that if a contract's very existence is determined by extrinsic evidence, it is also a question of fact. When a contract is ambiguous and the court finds facts regarding the parties' intent based on extrinsic evidence, the court's review is strictly limited. Copper State Leasing Co. v. Blackner Appliance & Furniture Co., 770 P.2d 88, 90 (Utah 1988). In these circumstances, the trial court's findings will not be disturbed or set aside on appeal unless they are "clearly erroneous", or against the clear weight of the evidence and the appellate court reaches a definite and firm conviction that a mistake has been made. State v. Walker, 743 P.2d 191, 193 (Utah 1987). When the evidence is controverted, the appellate court assumes that the trial judge believed those aspects of the evidence and the inferences reasonably drawn from them that support his decision. Redevelopment Agency of Salt Lake City v. Tanner, 740 P.2d 1296, 1302 (Utah 1987).

Sprouse's duty on appeal is to marshall all the evidence supporting the trial court's findings, and then demonstrate that the court's findings are clearly erroneous. Sprouse has failed to marshall the evidence supporting the court's findings, but even a brief review shows that the court's findings are amply

supported.

Sprouse claims that Edmunds agreed that he would not be personally liable for the commission at the time he signed the EMSA. Evidence showed that Sprouse is a seasoned and experienced businessman with several business interests, including other motels (Tr. 165, 196). He admitted that he knew such an agreement should have been in writing, but weakly claims there "wasn't room" on the EMSA (Tr. 178, 193). However, he found room to have the commission reduced from six (6%) percent to \$25,000.00, and this change was made at his insistence (Tr. 91-93, 193, 196). The fact is there was plenty of room, either in the commission section itself, or by an attached addendum, of which there were already two pages (Exhibit No. 2). A third would be no trouble. In the commission section itself, the last part of the last line could have been blacked out after the word "payable" and words added to reflect such an agreement. For example, it could easily have been changed to read: "Said commission shall be payable only from Jager's monthly payments and Sprouse is not personally liable for any part of the commission."

Edmunds testified there was no such agreement or even discussion (Tr. 105, 118, 148), and that his broker was adamantly opposed to anything like that and would never allow him to enter into such an agreement (Tr. 118). Roy Larsen, the broker, testified he had not agreed to such an arrangement, and never would authorize such an arrangement (Tr. 26-27). Claudia Ashby and Roy Larsen both testified that, in all their years of

experience, they had never encountered a situation where the seller's liability for the commission was excused if the buyer defaulted, although they both estimated that commission deferral occurs in about 10% of the closings (Tr. 19-20, 36, 42-43).

James Ivins simply made a mistake. Although he testified his recollection was that Edmunds had told him what he put in the second to last paragraph of Exhibit No. 15 (Tr. 241), he admitted that some parts of Exhibit No. 15 were his own creation, such as the assignment language (Tr. 229), and he acknowledged that he was getting information on this transaction from lots of different people and places (Tr. 240). The notes he had could have been from telephone conversations he had with Jager or Sprouse, as he admitted to having such calls (Tr. 211, 223).

The key evidence on determining whether the parties ever agreed to the second to last paragraph of the NAA is Exhibit No. 24, the handwritten note Ivins testified he received from Edmunds after the telephone call in which he thought Edmunds told him there would be no personal liability (Tr. 220, 237). Exhibit No. 24 supports every paragraph of the NAA except the critical second to last paragraph, thereby showing, by what is not said, that there was no agreement that Sprouse would not be personally liable. Ivins testified this was a source document for preparing the NAA (Tr. 221). Very conspicuous by its absence in Exhibit 24 is any mention or reference to the commission not being payable if Jager defaults. Thus, this term was added either at the sole instance of Sprouse or simply by Ivins, who admitted that parts of the NAA were of his own creation. In either case, however,

such added terms are not binding on third-party plaintiffs, who did not sign or assent to the added terms at any time.

Proof that there was no such oral agreement is demonstrated by Edmunds subsequent conduct in giving up his \$9,000.00 share of the commission on the Wyoming closing to obtain ICP's \$9,000.00 interest in the Sprouse-Jager commission (Tr. 29-30, 120-121). Although Edmunds was inexperienced, only a complete fool would give up \$9,000 in cash to acquire a \$9,000 interest in a note that could be wiped out if Jager defaulted. This is the clearest sort of contemporary evidence that Edmunds did not agree to such a term.

The Court heard evidence from all the principal players regarding this NAA. The preparer of the document, Mr. Ivins, testified. The signer of the document, Mr. Sprouse, testified. The payees of the document, Roy Larsen (for Interwest Commercial Properties) and Mr. Edmunds testified. The Court allowed parol evidence concerning that document because it was ambiguous. It was ambiguous because it gives an assignment for security in one paragraph, but then purports to make that assignment meaningless in another paragraph which says that if Jager defaults, Sprouse is not personally liable. The Court accepted all this parol evidence in order to find the true intention of the parties, and found that there had been no meeting of the minds, or mutual assent, to the one term of the NAA that allegedly excuses Sprouse from liability if Jager defaults.

The court appropriately found the agreement of the parties and enforced it. The "note" and "assignment" portions of the NAA

are enforceable against Sprouse because he signed it. Besides, those portions of the NAA were in fact agreed to by Edmunds and ICP (see Exhibit No. 24). But those portions of the NAA would be enforceable against Sprouse even if Edmunds and ICP didn't agree, because Sprouse's signature is the only signature required on a note or an assignment.

The "agreement" portion of the NAA, however, being an agreement, requires that both parties to the agreement manifest their consent by signature. Since neither Edmunds nor ICP signed it, the court received extrinsic evidence to determine whether or not they ever orally agreed to its terms. The court found that the parties never agreed to the disputed term, and that it never became part of their agreement. Sprouse contends that the NAA is an "entire" contract and not "several", but it does not matter, since Sprouse is incorrectly assuming that the disputed second to last paragraph became part of the agreement, but it never did.

In fact, the second to last paragraph of the NAA is contrary to and repugnant with the "assignment" paragraph two paragraphs above it in the same NAA. The first paragraph gives an assignment of the UREC to secure the note, while the second purports to be an agreement that Sprouse alleges relieves him of liability if Jager defaults, even of liability to account to the assignee for the proceeds from the sheriff's sale. If the second is valid, it eviscerates the first, and if the first is valid, it contradicts the second. When there is a repugnancy between two clauses, it is the province and duty of the court to reconcile them if possible, but if not, a subsequent clause that is

irreconcilable with a former clause and repugnant to the general purpose and intent may be disregarded. Mifflin v. Shiki 77 Utah 190, 293 P. 1.

Thus, it was proper for the court to enforce the undisputed "note" and "assignment" portions of the NAA, and to disregard the second to last paragraph, or "agreement" part, since it was never signed and there never was any mutual assent to it.

POINT IV

THE AWARD OF ATTORNEY'S FEES IS SUPPORTED BY THE EVIDENCE. IN ANY EVENT, SPROUSE STIPULATED TO THE REASONABLENESS OF THE FEES. NOT HAVING CHALLENGED THE FEES AT TRIAL, SPROUSE CANNOT DO SO FOR THE FIRST TIME ON APPEAL. RESPONDENTS ARE ENTITLED TO ADDITIONAL FEES ON APPEAL.

There should be no issue that Edmunds is entitled to an award of his attorney's fees. The court found (Reinstated Findings, R. vol. III, pp. 150, ¶¶ 12-13) that an award of attorney's fees to Edmunds was supported by (1) the Earnest Money Sales Agreement (Exhibit No. 2, see paragraph B, page 3; R. vol. II, p. 88); and (2) the attorney's fee provision of the "note" portion of the NAA (Exhibit No. 15). It might also be pointed out that Edmunds, as the holder of a \$25,000.00 interest in the UREC, is entitled to attorney's fees under paragraph 14 of the UREC (Exhibit No. 3) for enforcement of his rights thereunder.

Nevertheless, Sprouse attacks the trial court's award of \$9,000.00 attorney's fees as "unreasonable". At the trial, Sprouse's attorney, R. Clayton Huntsman, suggested, as Mr. Miles was preparing to take the stand to testify, that perhaps a stipulation could be reached as to the reasonableness of the

fees, and told Mr. Miles to make a proffer (Tr. 162). Mr. Miles then made the proffer that he had devoted at least 150 hours to the case, and that his hourly rate was \$60.00 an hour, and requested the court to award attorney's fees of \$9,000.00 (Tr. 162-163). Sprouse's attorney and the court accepted the proffer (Tr. 164; R. vol. II, p. 254).

Sprouse's attorney did not make any objection or even desire to cross-examine (Tr. 164), nor did Sprouse offer any evidence whatsoever regarding attorney's fees. At the conclusion of the trial, since it was already 5:45 p.m., no oral argument was presented (Tr. 259). Instead, the court took the matter under advisement and instructed both parties to file a written memorandum and written closing arguments (Tr. 258). Sprouse did not challenge the requested fees even in his written closing argument (R. vol. II, pp. 280-288). Sprouse should not be permitted to contest the fees for the first time on appeal. See Rule 103(a)(1) of the Utah Rules of Evidence; Hardy v. Hardy 776 P.2d 917 (Utah Ct. App. 1989); State v. Whittle 780 P.2d 819 (Utah 1989).

About a month after the trial, Mr. Huntsman withdrew as Sprouse's counsel (R. vol. III, pp. 1-4), and after Mr. Miles gave Sprouse the required notice to appoint new counsel or appear in person (R. vol. III, pp. 5-8), Sprouse's present counsel entered an appearance (R. vol. III, pp. 11-12).

When a proffer is made and accepted by opposing counsel and the court, the parties should be bound by the proffer. Proffers are useful in saving trial time, especially on those matters not

seriously disputed. If the parties are not bound by the proffers made and accepted, no attorney could safely make a proffer for fear that some opposing party, or some new attorney, will raise the matter on appeal, long after the opportunity is lost to meet any legitimate objection that might have readily been presented at trial.

If there had been any indication that the proffer was not fully accepted, Mr. Miles was prepared to take the stand and could have presented evidence establishing the legal work he had performed, and could have shown that his work was necessary to adequately prosecute the matter, that his hourly fee is reasonable compared to rates charged by other attorney's in the locality, that the case presented issues of considerable novelty and difficulty, and that it was absolute necessary to intervene in the action to vindicate Edmunds rights because Sprouse had proceeded against Jager in total disregard of Edmunds rights as the holder of a \$25,000.00 assignment under the UREC.

If the court on appeal does not hold Sprouse to the stipulation and proffer that his counsel accepted at trial, the matter should be remanded to the trial court for the opportunity to present the evidence that was foreclosed when Sprouse's counsel offered to stipulate to reasonableness and accepted the proffer made. But for the conduct of Sprouse's counsel, the detailed evidence would have been presented.

Sprouse also makes a contention that the \$9,000.00 award for fees should be reduced because Mr. Miles gave an approximate breakdown of his fees, and indicated that (1) about one-third of

his fees related to defense of counterclaims (both Jager's counterclaim and the counterclaim Sprouse pursued against third-party plaintiffs (R. vol. II, pp. 115-119); (2) about one-third of his fees related to the assertion of rights under the "assignment" portion of the NAA, including the right to foreclose (R. vol. I, pp. 126-134) and to share in the proceeds from the sheriff's sale; and (3) about one-third of his fees were related to enforcement of the "Note" portion of the NAA.

Edmunds prevailed on all three claims. He defeated the counterclaims of both Jager and Sprouse. Jager's counterclaim was dismissed by stipulation (R. vol. II, pp. 192-195) and Sprouse's counterclaims were tried and dismissed (see Reinstated Findings and Judgment). Edmunds successfully asserted his rights under the "assignment" portion of the NAA, as the court, in Finding 14 (R. vol. III, pp. 150-151) found that Edmunds held a \$25,000.00 interest in the UREC and was entitled to foreclose and share in the proceeds from the sheriff's sale. (Note: Sprouse cannot complain about the reasonableness of the \$3,000.00 fees for this part, since Sprouse's own fees for this part were allowed at \$3,720.50). Edmunds also prevailed on his claims under the "note" portion of the NAA, and the court entered judgment for the amount due on the note.

Having prevailed on all issues, Edmunds is entitled to his full attorney's fees. It was Sprouse's conduct that forced Edmunds and third-party plaintiffs to incur the fees. Had Sprouse acknowledged the assigned rights Edmunds held, including

the right to participate in the foreclosure and to be paid, the fees would likely not have been needed.

Edmunds and third-party plaintiffs are entitled to an additional award of their fees incurred since trial and on appeal. Management Services v. Development Associates 617 P.2d 406 (Utah 1980).

CONCLUSION

The trial court decision was supported by competent and credible evidence, and should be affirmed in all respects. This case should be remanded to the district court with instructions to take evidence on additional attorney's fees to be added to the judgment for fees necessarily and reasonably incurred since trial to defend the judgment, including reasonable attorney's fees for this appeal.

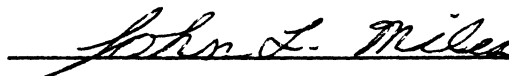
RESPECTFULLY SUBMITTED this 7th day of March, 1990.



JOHN L. MILES
Attorney For Respondents

MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the foregoing BRIEF OF RESPONDENTS to Fred D. Howard and Leslie W. Slaugh, at HOWARD, LEWIS & PETERSEN, Attorneys At Law, 120 East 300 North, Provo, Utah 84601 by first-class U.S. Mail, postage prepaid, on this 7th day of March, 1990.



APPENDIX "A"

Findings Of Fact And Conclusions Of Law
(Entered November 5, 1987)

'87 NOV 5 PM 4 14

GARY W. PENDLETON
Attorney for Plaintiff
50 East 100 South, Suite 101
St. George, Utah 84770
Ph: 628-4411

CLERK
DEPUTY Williamson

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

LEON SPROUSE,)	
)	
Plaintiff,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
vs.)	
)	
ARJEN W. JAGER, NADA H. JAGER,)		
ARTIE EDMUNDS, LLOYD WALTERS,)	Civil No. 86-0982
and JOHN DOES I through V,)	
)	
Defendants.)	

The above-entitled matter came on for hearing on October 14, 1987 on various motions of the parties. Plaintiff appeared by and through his attorney, Gary W. Pendleton, and Defendant Edmunds appeared by and through his attorney, John L. Miles and Defendants Arjen W. Jager and Nada H. Jager appeared by and through their attorney, Terry L. Wade. No appearances were made by any other named Defendant in person or through counsel.

The Court having reviewed the file and having heard arguments and having denied Defendant's Motion to Dismiss on the theory that judicial foreclosure was unavailable in these proceedings; and the Court having heard the statements of counsel and having taken testimony regarding the extent of the claim in foreclosure and reasonable attorney's fees associated with the foreclosure thereof and being fully advised in the premises now

makes the following:

FINDINGS OF FACT

1. By contract dated March 29, 1985 Defendant Arjen W. Jager contracted to purchased real property commonly known as the Oasis Motel from Plaintiff.

2. Defendant Arjen W. Jager did not make the monthly installment payment due June 1, 1986 under the terms of the subject Uniform Real Estate Contract nor has he made any subsequent monthly installment payment which have fallen due since June, 1986.

3. Defendants Jager have now vacated the subject property.

4. Defendant Nada H. Jager's interest in the subject real property arises out of a Quit-Claim Deed dated April 1, 1985, executed by Defendant Arjen W. Jager and recorded in the office of the Washington County Recorder on June 21, 1986.

5. Defendant Lloyd Walters has not filed an Answer to the Summons and Complaint served upon him in connection with the above-entitled proceedings and his default is appropriately entered.

6. The principal unpaid obligation amounts to \$386,275.13 and the interest accruing from the date of the last payment to this date is \$59,542.42 with late charges of

lm
JW 884.40
~~\$2,358.50.~~

7. Unpaid property taxes accruing through the term of Defendant's possession amount to \$9,164.95.

8. The underlying Uniform Real Estate Contract contains a provision allowing the Seller and assigns to recover attorney's fees in foreclosure proceedings.

9. Plaintiff is entitled to an award of attorney's fees in the amount of \$15,000.00 incurred in the enforcement of his rights and the foreclosure of Defendant Arjen W. Jager's rights in the subject property.

10. Defendant Artie Edmunds is entitled to attorney's fees in the amount of \$1,500.00 incurred in the enforcement of rights and the foreclosure of Defendant Arjen W. Jager's rights in the subject property.

From the foregoing Findings of Fact the Court now makes the following:

CONCLUSIONS OF LAW

1. Plaintiff and assigns, if any, are entitled to a Judgment and Decree foreclosing Defendant Arjen W. Jager's interest in the subject real property.

2. The interest of Nada H. Jager in the subject real property is inferior and subordinate to the lien which is hereby foreclosed.

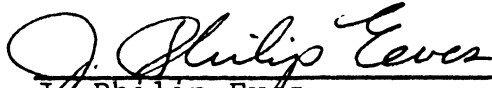
3. The interest of Defendant Lloyd Walters has been extinguished by his default.

4. Plaintiff and Defendant Edmunds are entitled to an award of attorney's

fees.

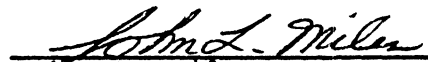
LET JUDGMENT BE RENDERED ACCORDINGLY.

DATED this 2nd day of ^{November}~~October~~, 1987.




J. Philip Eves
District Judge

Approved as to Form and Content:



John L. Miles
Attorney for Edmunds



Terry L. Wade
Attorney for Jagers

APPENDIX "B"

Judgment And Decree Of Foreclosure
(Entered November 5, 1987)

'87 NOV 5 PM 4 13

GARY W. PENDLETON
Attorney for Plaintiff
50 East 100 South, Suite 101
St. George, Utah 84770
Ph: 628-4411

CLERK
DEPUTY *S. Williams*

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

LEON SPROUSE,)	
)	
Plaintiff,)	JUDGMENT AND DECREE
)	OF FORECLOSURE
vs.)	
)	
ARJEN W. JAGER, NADA H. JAGER,)		
ARTIE EDMUNDS, LLOYD WALTERS,)	Civil No. 86-0982
and JOHN DOES I through V,)	
)	
Defendants.)	

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The Court having reviewed the file and having heard arguments and having denied Defendants' Motion to Dismiss on the theory that judicial foreclosure was unavailable in these proceedings; and the Court having heard the statements of counsel and having taken testimony regarding the extent of the claim in foreclosure and reasonable attorney's fees associated with the foreclosure thereof and being fully advised in the premises;

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NOW THEREFORE, IT IS HEREBY ORDERED that Plaintiff have Judgment against Defendant Arjen W. Jager in the principal amount of \$386,275.13, together with interest in the amount of \$59,542.42, late fees of \$884.40, attorney's fees in the amount of \$16,500.00, court costs in the amount of \$106.50, and unpaid property taxes in the amount of \$9,164.95 for a total Judgment of \$472,473.40, together with after-accruing costs, said Judgment to bear interest at the rate of 12% per annum from and after the date of the execution hereof, until paid in full.

IT IS FURTHER ORDERED that that certain Uniform Real Estate Contract dated March 29, 1985 by and between Plaintiff as Seller and Defendant Arjen W. Jager as purchaser is hereby ordered foreclosed, and the property described therein and hereinafter described shall be sold as provided by law at Sheriff's Sale, the proceeds of said sale shall be applied to the payment of the Judgment set forth above and described.

IT IS FURTHER ORDERED that the proceeds of said sale shall be paid over the Clerk of Washington County, State of Utah, to be held and deposited by said Court and to be distributed only by further order of this Court following an adjudication of claims asserted in Defendant Jager's Counterclaim and claims existing between Plaintiff and Defendant Artie Edmunds. It is further contemplated that additional claims may be asserted as a result of the intervention of Interwest Properties and others and it is the order of this Court that all funds remain on deposit with the Clerk pending adjudication of those claims as well as

any additional claims Plaintiff may assert against Defendant Artie Edmunds following the amendment of any pleadings on file herein. The Clerk of the Court is hereby authorized and directed to deposit said funds in an interest bearing account.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's vendor's lien is superior to and has priority over any interest of Defendant Nada H. Jager and Defendant Lloyd Walters.

The real property effected by this Judgment and Decree of Foreclosure is situated in Washington County, State of Utah, and is more particularly described as follows:


The East one-half (E1/2) of Lot 6, and all of Lot 7, in Block 23, Plat "A", St. George City Survey, less the following, to wit:

Beginning at the Southeast Corner of said Lot 7 and running thence West 198 feet, thence South 86 feet to the point of beginning.

Nothing in this Judgment or Decree of Foreclosure shall be construed to act as an adjudication upon the merits of any of the above-mentioned claims existing between the parties other than Plaintiff's claim against Defendant Arjen W. Jager for foreclosure of the Uniform Real Estate Contract as a note and mortgage and the claims of Defendant Nada H. Jager and Defendant Lloyd Walters whose interest in the subject property will necessarily be extinguished by the sale of the property upon foreclosure. The Court furthermore reserves the power to modify any award of attorney's fees at the time of the resolution and

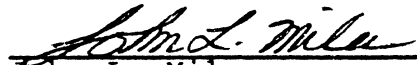
disposition of the claims remaining unadjudicated.

DATED this 2nd day of ~~October~~ ^{November}, 1987.

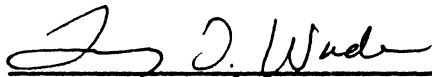


J. Philip Eves
District Judge

Approved as to Form and Content:



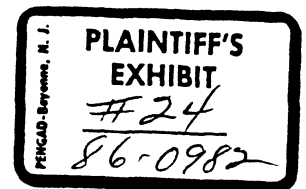
John L. Miles
Attorney for Edmunds



Terry L. Wade
Attorney for Jagers

APPENDIX "C"

Plaintiff's Exhibit No. 24



JUL 1 1988

Jim;

Leon Sprouse wants in his contract the following;

- ① 15 day grace
- ② 4% penalty of P+I component of monthly pymts

Contract to be made for sales commission;

- \$25,000 to be carried at 10.5% for 4 yrs amortization
- Secured by motel -
- We are to have the right in the event of default by buyer of motel to seller, that we can step in and take over the existing contract.