

1989

# Gunda M. Galloway and Laurence Galloway v. Rowland H. Merrill, Jr. : Reply Brief of Appellant

Utah Court of Appeals

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Jax H. Pettey; Attorney for Respondent

Vincent C. Rampton; Watkiss & Saperstein; Attorney for Defendant.

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## Recommended Citation

Reply Brief, *Galloway v. Merrill*, No. 890644 (Utah Court of Appeals, 1989).  
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DOCKET NO. 89-644 CA IN THE UTAH COURT OF APPEALS

GUNDA M. GALLOWAY and  
LAURENCE GALLOWAY,

Plaintiffs,

vs.

ROWLAND H. MERRILL, JR.;  
GUARDIAN TITLE COMPANY OF UTAH,  
Trustee, BRIAN STEFFENSEN,  
Attorney at Law; LAND  
ACQUISITION AND DEVELOPMENT  
COMPANY; JOSEPH R. BRUNETTI;  
ROBERT L. LORD, Attorney at  
Law; ROBERT B. BROWN, Attorney  
at Law; APOSHIAN, SNIDEMAN &  
ASSOCIATES, INC.; NORTH TEMPLE  
LTD.; PLASTER DE'COR, INC.;  
MARCIA S. MERRILL; THE STATE  
TAX COMMISSION OF THE STATE OF  
UTAH; ROBERT B. BROWN; AND JOHN  
DOES 1-10,

Defendants and  
Appellant.

Court of Appeals  
No. 890644-CA

Priority Classification  
14b

REPLY BRIEF OF APPELLANT

Appeal from the Third Judicial District Court  
of Salt Lake City, State of Utah  
The Honorable Scott Daniels

(Increase In Redemption Amount of Real Property  
Pursuant to Rule 69(f), URCP)

JAX H. PETTEY  
180 South 300 West, #313  
Salt Lake City, Utah  
Telephone: (801) 532-6721

Attorney for Respondent  
Gloria Ruiz dba CVF  
Land Investment

VINCENT C. RAMPTON (2684)  
WATKISS & SAPERSTEIN  
310 South Main, Suite 1200  
Salt Lake City, Utah 84101  
Telephone: (801) 363-3300

Attorney for Defendant/  
Appellant Marcia S. Merrill

1-10-1989

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Pursuant to Rule 24(c), Rules of the Utah Court of Appeals, defendant/appellant Marcia S. Merrill submits the following Reply Brief in the above-entitled matter.

SUMMARY OF THE ARGUMENT

POINT I.

CVF Land Investments claims that it is entitled to reimbursement of \$13,000.00 in development costs expended on the Galloway property prior to redemption, since all procedures undertaken were mandated by Salt Lake City incident to a March 1, 1989 demolition order. CVF Land Investment bore the burden of proof of this claim, and failed to produce any evidence whatever to substantiate it. Neither the "Notice and Order" which CVF Land Investment attempted to introduce into evidence, nor the testimony of any witnesses, established or suggested that Salt Lake City Corporation ordered CVF Land Investment to pour 1,400 tons of fill material onto the property, level and grade the same, as part of a simple demolition project of one 800-square-foot clapboard house.

POINT II

CVF Land Investment improperly argues that defendant/appellant Merrill is attempting raise theories and issues for the first time on appeal. All arguments made pursuant to this appeal were either explicitly or implicitly

before the trial court, and no new matter has been introduced.

POINT III

CVF Land Investment is in error in claiming that it is entitled to the value of improvements placed on the Galloway property, as it did not have notice of defendant/appellant Merrill's redemption rights. This claim is not only contrary to law, but to Gloria Ruiz' own testimony during the hearing.

ARGUMENT

POINT I

NO EVIDENCE WAS SUBMITTED BEFORE THE TRIAL  
COURT TO SUPPORT CVF LAND INVESTMENT'S CLAIM  
THAT IT WAS REQUIRED TO RE-GRADE AND RAISE  
THE GALLOWAY PROPERTY

CVF Land Investment concedes in its responsive brief that the expenditure of \$13,000 for re-grading and raising the entire Galloway property with prime-quality fill material would not ordinarily fall within the scope of Rule 69(f)(3) as a "reasonable sum" for "necessary maintenance, upkeep, or repair of any improvements upon the property". It argues, though, that the lower court properly awarded this sum as an addition to the redemption amount, as CVF Land Investment was acting pursuant to a direct "order" from Salt Lake City.

There was no evidence whatever presented to the trial court to support this claim.<sup>1</sup> Neither the "Notice and Order" produced and offered by CVF Land Investment (Attachment 5 to Respondent's Brief) nor any other evidence offered during the hearing established, or even suggested, that in the case of CVF Land Investment, Salt Lake City made any departure from the demolition requirements spelled out in its own ordinances, much less demanded the sort of large-scale, extensive reconfiguration of the Galloway property which CVF performed.

A. The March 2, 1989, Notice And Order Did Not Require The Re-Grading And Fill Work Performed by CVF Land Investment.

CVF Land Investment relies wholly on a document entitled "Notice and Order", which it claimed justified the extensive grading, levelling and preparation work performed on the Galloway property.

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<sup>1</sup>CVF Land Investment's claim that its reconfiguration of the Galloway property was pursuant to order of Salt Lake City constituted an affirmative matter, raised in defense to defendant Merrill's claim that amounts expended were neither reasonable nor necessary. Accordingly, CVF Land Investment bore the burden of producing proof that its conduct was pursuant to City order--see In re Swan's Estate, 4 U.2d 277, 293 P.2d 682 (1956); Jay Silversmith, Inc. v. Marchindo, 75 N.M. 290, 404 P.2d 122 (1965); Morrison v. Reilly, 511 P.2d 970 (Wyo. 1973).

To begin with, the document was never properly authenticated or received into evidence for the purpose of establishing the truth of its content. CVF Land Investment's attempt to introduce the document into evidence generated the following exchange:

"Q. Okay. I show you a document and I'd like you to tell me if you are familiar with that document and exactly what it is?

A. It is a notice from the Sheriff's office, I guess, for Salt Lake to do that.

Q. Have you seen that before; that document?

A. I must have. I didn't bring my glasses and I can't really tell what I am reading. Very embarrassing.

Q. Would you read what it says on the notice, at least the first --what the heading is on that document.

MR. RAMPTON: Your Honor, I am going to object before the document comes into evidence or its contents. It needs to be offered. I believe this is a document that hasn't been authenticated.

THE COURT: Well, sustained at this point. I don't think you should have her read from it until it's been admitted.

MR. PETTEY: Your Honor, I'd like to submit for --

THE COURT: Any objection?



MR. RAMPTON: This appears to be a document supposedly issued by Salt Lake City Corporation. It is not a certified document. There is no certification on it. There is no authenticating witnesses to state that it is what it purports to be, so we object to its being received.

MR. PETTEY: Mrs. Ruiz, I think you received it --

THE COURT: Right. It will be admitted; not necessarily for the truthfulness of its content, but to explain why she did what she did. (Transcript pp. 6-7)

CVF Land Investment's "Notice and Order" was never properly authenticated, either by a subscribing witness or by any other means established by Rule 901, Utah Rules of Evidence; accordingly, it was not properly before the Court, and should not have been considered as an official document from the City at all.

Even disregarding this lack of authentication, however, the "Notice and Order" nowhere requires, or even implies, that compliance therewith would entail the kind of massive re-contour of the Galloway property undertaken by CVF Land Investment. It observes that the Galloway property is "found to be in violation of the Salt Lake City Building/Housing Ordinances", pursuant to an inspection on March 1, 1989. The order then states that CVF Land Investment's option are (1) demolition; or (2) appeal. The

appeal process is briefly explained. Attached is a list of particulars in which the buildings on the Galloway property did not meet the Uniform Housing Code, which concludes by observing that "because of the above deficiencies, the buildings are determined to be sub-standard and dangerous and are hereby declared to be a public nuisance which must be abated by repair, rehabilitation, demolition or removal."

Nowhere in the notice is a word said about regrading the property, or any portion thereof; about raising the level of the property, or any portion of it; or about performing any operation outside the scope of "demolition", the parameters of which are established by ordinances referenced and discussed in appellant's opening brief.

Yet on the basis of this document (even assuming it were properly received in evidence), CVF Land Investment maintains that it was justified--in fact required--to expend seven times the necessary amount in the demolition and removal of structures on the property. The document simply fails to sustain the allegation, and is no evidence at all thereof.

B. CVF Land Investment Presented No Other Evidence  
Whatever To Establish That Salt Lake City Required The Re-  
Grading, Re-Contouring and Re-surfacing Of The Galloway  
Property.

Other than the "Notice and Order", no evidence appears anywhere of record addressing demands or claims by Salt Lake City at all. Mr. Jay Hansen attempted to refer to a conversation with a Salt Lake City representative; the representative, however, was notably absent from the hearing, and the Court properly excluded any representations attributed to him as inadmissible hearsay.

CVF Land Investment claims that, this lack of evidence notwithstanding, the dumping and spreading of 1,400 tons of fill material on the Galloway property was both "reasonable" and "necessary", since Mr. Hansen allegedly understood this to be the City's demand. What Mr. Hansen did or did not "understand" the case to be is not evidence establishing what the City in fact required, and is therefore irrelevant to the necessity or reasonableness of the expenditures in question. Indeed, given the absence of any direct evidence to the contrary, the requirements set out in Salt Lake City's ordinances must be presumed to govern, and Mr. Hansen's "understanding" can be treated as nothing more than a misapprehension thereof. Indeed, the glaring contrast between the minimal demolition expenditure required by City ordinance and the extensive re-grading and fill work performed by CVF Land Investment makes Mr. Hansen's "understanding" flatly

implausible, particularly given CVF Land Investment's failure to produce the alleged declarant of this critical piece of evidence to testify in his own behalf.<sup>2</sup>

Yet the lower court, without considering corroborating evidence from the City itself and in the face of direct evidence to the contrary, assumed Mr. Hansen's "understanding" to reflect City requirements accurately, and concluded that

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<sup>2</sup>Due to the summary nature of a hearing to determine the proper redemption amount under the Utah Rules of Civil Procedure, defendant Merrill was not able to conduct any meaningful discovery of CVF Land Investment's theories prior to hearing. For this reason, defendant Merrill was unaware that CVF Land Investments was intending to allege representations by a City representative. Had advance notice been given, defendant Merrill herself would have produced the representative, for the purpose of denying the allegation which Mr. Hansen attempted to attribute to him.

Defendant Merrill, did, however, produce an expert witness with extensive experience in City demolition projects, who testified that Mr. Hansen's "understanding" of City requirements was plainly in error:

Q. Is there any requirement in the City that after a house is demolished, the entire lot must be changed in grade to that of the surrounding sites?

A. No.

Q. So if a house sits lower than a surrounding site, you don't have to fill that in as part of the demolition project?

A. No. (Transcript at pp. 32-33).

the consequent expenditures were reasonable and necessary in light thereof. The conclusion was not only against the weight of the evidence, but unsupported by any admissible evidence whatever.

## POINT II

### DEFENDANT MERRILL HAS RAISED NO ISSUES ON APPEAL WHICH WERE NOT BEFORE THE LOWER COURT

CVF Land Investment argues, at Page 15 of its brief, that appellant's opening brief raised issues not presented to the trial court. The opposing brief is not clear on just what these new issues are, or why they were not implicit in the issues before the lower court.

The proceeding before the trial court began with opening statements from counsel. Counsel for defendant Marcia Merrill cited the applicable provision of Utah's Rules of Civil Procedure, outlined the improvements and development work done by CVF Land Investment prior to redemption, and stated that the evidence would establish that such work was not "reasonable" or "necessary" within the meaning of Rule 16(f)(3) Utah Rules of Civil Procedure. Evidence was then presented to the Court, at the conclusion of which, the Court issued its ruling without giving either counsel the opportunity of closing argument.

Under the circumstances, all issues raised in defendant/appellant Merrill's opening brief must be deemed to have been expressly or implicitly before the lower court. The only possible exception would be Point III of the appellant brief, which addressed the "benefit" theory voiced by the trial court. Needless to say, this theory was not addressed or argued before the lower court, since it was first raised by the Court itself in the course of its final ruling.

#### POINT III

#### CVF LAND INVESTMENT IS NOT ENTITLED TO THE VALUE OF PRE-REDEMPTION IMPROVEMENTS BASED ON LACK OF NOTICE

CVF Land Investment argues, at Pages 15-18 of its brief, that pre-redemption improvements to the Galloway property are ipso facto rendered "necessary" and "reasonable" (and therefore compensable pursuant to redemption) because CVF Land Investment had proceeded in good faith, without notice of defendant Merrill's intent to redeem.

This argument directly contradicts Gloria Ruiz' own testimony:

- Q. Okay. Fine. Were there other items that you had anticipated doing to improve that property, besides the demolition work?
- A. I had thought that I would want to build onto it. That was my idea of purchasing

it to begin with, because I wanted to build.

Q. You have not started construction on the premises?

A. No, absolutely not.

Q. Why have you not started construction?

A. I was waiting to see what was resolved. It wasn't mine until --

Q. You understood this property would not be yours until the six months redemption period was over?

A. Yes. (Transcript pp. 9-10; emphasis added)

In other words, CVF Land Investment had actual notice that, pending expiration of the six-month redemption period, its purchase was subject to the redemption rights of other parties to the lawsuit. That Marcia Merrill was one of these parties was a matter of public record, and well known to CVF Land Investment as such (defendant Merrill, in fact, was the only other bidder at the judgment sale on February 28, 1989, other than Mrs. Ruiz and the plaintiffs).

The rule in such cases is stated in the very section of Corpus Juris Secundum cited at Page 16 of Respondent's Brief:

One who purchases at a sale to satisfy a senior encumbrance, without notice of the existence of a person holding a prior encumbrance entitling him to redeem from the

sale, is entitled to compensation for improvements, but it has been held that he is not entitled to improvements in such a case where he had notice of the right of such person to redeem.

15 C.J.S. §37(e)(2), page 645.

It is for this reason that CVF Land Investment's attempted analogy to the Occupying Claimant's Statute, 57-6-1, et seq., Utah Code Ann. (1953, as amended) is inapplicable. That statute deals with the rights of a person who makes valuable improvements to real property under color of title, with no notice of outstanding claims of paramount title in any other person.

Contrary to respondent's argument, Rule 69(f)(3) is not intended to protect those who construct valuable improvements on property subject to redemption. By its wording, the rule is intended to permit a purchaser to maintain property during the redemption period--of which he is chargeable by law with actual notice--until redemptive rights have either been exercised or have lapsed.

#### CONCLUSION

The issue before the Court in this appeal is a simple one. The facts in evidence before the lower court establish that CVF Land Investment, between the February 28, 1989 Sheriff's Sale and the end of the subsequent redemption

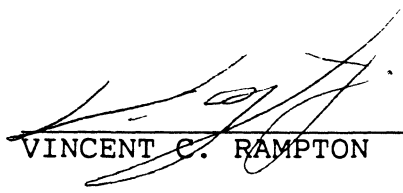


period, performed extensive grading and preparation work on the Galloway property which were not required, by ordinance or order of Salt Lake City or by any other reason, for the maintenance or upkeep of the property pending expiration of the redemption period. Nevertheless, the lower court ruled that, based on its misapprehension of Salt Lake City's requirements and upon defendant Merrill's presumed receipt of "benefits" from the work performed, CVF Land Investment was entitled to dollar-for-dollar reimbursement for all construction costs expended.

It is submitted the Rule 69(f)(3) does not cast the aspiring redemptioner in the role of guarantor of all development costs incurred by the purchaser at a sheriff's sale. Accordingly, the lower court's ruling must be reversed, and the matter remanded for recalculation of the redemption amount in accordance with the uncontested evidence before the lower court.

DATED this 21<sup>st</sup> day of February, 1990.

WATKISS & SAPERSTEIN



VINCENT C. RAMPTON

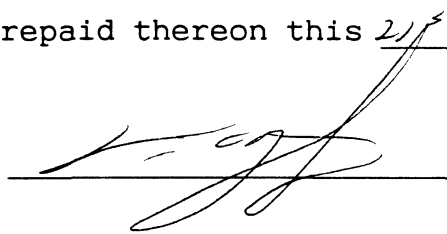
Attorneys for Defendant Marcia  
S. Merrill

CERTIFICATE OF SERVICE

I herewith certify that I am a member of and/or employed by the law firm of WATKISS & SAPERSTEIN, 310 South Main Street, Suite 1200, Salt Lake City, Utah, and that in said capacity and pursuant to Rule 21(d) Rules of the Utah Court of Appeals, a true copy of the attached Appellant's Reply Brief was caused to be served upon:

Jax H. Pettey  
180 South 300 West, #313  
Salt Lake City, Utah 84101

by depositing a properly addressed envelope containing the same in the U. S. Mails, postage prepaid thereon this 21<sup>st</sup> day of February, 1990.

A handwritten signature in black ink, appearing to read "Jax H. Pettey", is written over a horizontal line.