

1980

United American Life Insurance Company, A Corporation v. Zions First National Bank, A National Association, Franklin D. Johnson And Kathleen Johnson, His Wife; Glendon E. Johnson And Bobette Johnson, His Wife; Clifton I. Johnson; Johnson Land Company, A Partnership; And Bar 70 Ranches, Inc., A Nevada Corporation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

UNITED AMERICAN LIFE
INSURANCE COMPANY, a
corporation,

Plaintiff & Appellant,

vs.

ZIONS FIRST NATIONAL
BANK, a national
association,

Defendant & Third-Party
Respondent,

FRANKLIN D. JOHNSON and
KATHLEEN JOHNSON, his
wife; GLENDON E. JOHNSON
and BOBETTE JOHNSON, his
wife; CLIFTON I. JOHNSON;
JOHNSON LAND COMPANY, a
partnership; and BAR 70
RANCHES, INC., a Nevada
corporation,

Third-Party &
Additional Party
Defendants.

No. 17187

BRIEF OF APPELLANT

Appeal from the Judgment of the
Seventh District Court of Grand County

Honorable Boyd Bunnell, Judge

FILED

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

UNITED AMERICAN LIFE	:	
INSURANCE COMPANY, a	:	
corporation,	:	
	:	
Plaintiff & Appellant,	:	
	:	
vs.	:	
	:	
ZIONS FIRST NATIONAL	:	
BANK, a national	:	
association,	:	
	:	
Defendant & Third-Party:	:	
Respondent,	:	
	:	
FRANKLIN D. JOHNSON and	:	
KATHLEEN JOHNSON, his	:	
wife; GLENDON E. JOHNSON	:	
and BOBETTE JOHNSON, his	:	
wife; CLIFTON I. JOHNSON;	:	No. 17187
JOHNSON LAND COMPANY, a	:	
partnership; and BAR 70	:	
RANCHES, INC., a Nevada	:	
corporation,	:	
	:	
Third-Party &	:	
Additional Party	:	
Defendants.	:	

BRIEF OF APPELLANT

STATEMENT OF CASE

This is an action to compel Zions First National Bank to Reconvey a Trust Deed on unimproved land in Grand County, Utah, and to permanently enjoin the bank from proceeding with a Trustee's Sale under the terms of the aforesaid Trust Deed.

Title Insurance Agency of Utah, acting as agent for Plaintiff and Appellant, United American Life, paid to Zions First National Bank the sum of \$50,000, for a Reconveyance

of a Trust Deed on the above lands in Grand County, Utah. The payment was made by Title Insurance Agency's voucher-check which contained the following legend:

Payment in full of Trust Deed
dated November 19, 1968,
executed by Bar 70 Ranches,
Inc., recorded November 20,
1968, as Entry No. _____,
in Book 170, pages 190-200.

No prior contractual duty or privity had ever existed between Zions First National Bank and United American Life. The check was accepted and retained by the bank, however, it refused and now refuses to execute and record a proper Reconveyance.

Zions First National Bank, Respondent herein, denies that it, in any way, agreed to a Reconveyance and further denies that the facts and circumstances of the case give rise to any duty on its part to Reconvey.

DISPOSITION IN LOWER COURT

The case was tried to a court sitting without a jury. The court entered Findings of Fact and Conclusions of Law and Judgment against Plaintiff and Appellant and in favor of Defendant and Respondent. The court further found and adjudged, that in the event Plaintiff paid the amount of the lien, it was granted Judgment against the additional parties to the extent of the amount of the payment.

A Motion to Amend the Findings and Conclusions and to enter a new or different Judgment was, in most particulars, denied by the court.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the Judgment in favor of Zions First National Bank and asks that Judgment be entered in its favor ordering a Reconveyance of the real property described in the Trust Deed; for a permanent Injunction restraining the bank from further attempts to foreclose its Trust Deed; and for attorney's fees.

STATEMENT OF FACTS

The sequence of events giving rise to this litigation began November 18, 1968. Mr. Wayne Hintze, Vice-President and Manager of the Mortgage Loan Department of Zions First National Bank, made a loan to Johnson Land Company, a partnership composed of Clifton I. Johnson, Glendon E. Johnson and Franklin D. Johnson and Bar 70 Ranches, a Nevada corporation, and to Clifton I. Johnson, Franklin D. Johnson and Glendon E. Johnson, individually. A Trust Deed Note for \$150,000.00, with interest at ten (10%) percent per annum, was executed by the foregoing parties. (Ex. 3). To secure this Note, Bar 70 Ranches gave a Trust Deed (Ex. 4) on approximately 1100 acres of unimproved land on the Green River in Grand County, Utah, approximately six miles south of Green River, Utah. (See Plat Ex. 1).

Mr. Hintze was well acquainted with Franklin Johnson, having known him for many years, "since he was a tow-headed boy". (Tr. 149).

Almost from its inception, the loan was a problem loan. Payments were not made when due and demands for payment and collection efforts were continuous. There were never any principal payments made until 1974, when Appellant entered the picture. Interest payments, however, had been made, but not on a timely basis.

By 1973, Mr. Hintze and other bank personnel were writing letters to Mr. Johnson demanding payment. (Ex. 33-36-61). These demands and negotiations resulted in the preparation of

an Extension and Modification Agreement dated April 17, 1973. (Ex. 31). Evidently, that Agreement was not put into effect and a new Extension and Modification Agreement was entered into between the bank and the Johnson interests in August, 1973. (Ex. 35). The Extension Agreement called for the payment of \$75,000, on or before October 1, 1973. This payment was not made and on October 25, 1973, Mr. Hintze wrote to Franklin Johnson demanding the payment. (Ex. 36). On October 30, 1973, Mr. Franklin Johnson replied by letter stating he would need until December 7, 1973, to pay the \$75,000. (Ex. 37). This request was reluctantly agreed to by Mr. Hintze by letter dated November 24, 1973. (Ex. 39).

During the year 1973, Mr. Johnson was making a very determined effort either to sell property that he and his brothers owned or to refinance obligations owing on the property, including the indebtedness to Zions First National Bank, to put their financial situation in a more positive posture. To this end, he had arranged to undertake new and additional financing with Appellant United American Life. This involved restructuring a loan on properties in Ogden, Utah, in the amount of \$675,000, and an additional loan of \$185,000, on property involved in this lawsuit and property located in Sanpete County, Utah, and in the State of Colorado. The details of the transaction are set forth in Exhibit 45. This is a letter to Mr. Alton Lund, President of Title Insurance Agency of Utah, from United American Life containing instructions on how to handle the new financing package. The

Exhibit contains the following statement:

. . . your Title Insurance Binder Order No. 33743 which indicates, among other things, that there is a lien due the Zions First National Bank in the amount of one hundred and fifty thousand dollars. It is understood that this lien may be released upon payment of fifty thousand dollars to the Zions First National Bank.

Prior to the financing arrangement obtained by Franklin Johnson from Appellant, he had visited with Mr. Hintze and discussed his financial situation in detail. Mr. Hintze was well aware of his plight and was anxious to help if possible. (Tr. 149).

The understanding that Appellant relied upon relative to the payment of \$50,000 to obtain a release of the lien of Zions First National Bank, came from Franklin Johnson and his understanding came about as a result of discussions and negotiations he had with Mr. Wayne Hintze.

These negotiations are extremely important and will be discussed in detail at this point.

A meeting was held between Mr. Johnson and Mr. Hintze during the first part of December, 1973. Mr. Johnson testified as follows concerning that meeting:

- Q. Mr. Johnson, you filed an affidavit in this action, and I ask you to read paragraph 8 of that and then read it out loud if you will.
- A. Yes. I'll read the paragraph 8: "Over a period of some considerable time Affiant and Mr. Wayne Hintze had numerous discussions concerning the satisfaction of the promissory note. I informed Mr.

Hintze that it would not be possible to pay the note without securing new and additional financing, and that the party that we were negotiating with namely United American Life would require a first lien against the real property. After considerable discussion on the matter, Mr. Hintze on behalf of the bank in substance and effect stated that if we would pay \$50,000 on the principal of the obligation the bank would release its trust deed."

- Q. And when was that affidavit signed?
- A. 15th day of June, 1978.
- Q. And was that a true statement when it was made?
- A. Yes. I think there is one error. I think that the agreement was \$75,000 rather than \$50,000.
- Q. All right. Now, you were not asking Mr. Hintze to cancel the note for that amount of money, namely the \$75,000; is that correct?
- A. No. What we were trying to do was refinance the note and in effect make it a personal note.
- Q. All right. What you were asking for was a release of the lien that they had on the ranch property in Green River?
- A. Yes.
- Q. For their payment. And you indicate that you had an agreement with Mr. Hintze to that effect; is that right?
- A. Yes. I felt that we did. (Tr. 27).

The testimony of Mr. Hintze:

- Q. Can you recall any more of the specific details about this meeting with Frank Johnson on December 10th of '73?
- A. We were very anxious to assist Frank any way we could in getting this obligation taken care of. He

did indicate it was important to have this property released. And he then proposed that he could pay \$75,000 now and that he would arrange the other \$75,000 just as the memo said, through the commercial loan department. And when we got that money then we would be -- then we would release the mortgage, which would be a total payment of \$150,000.

- Q. Did you tell him that you would do anything to assist him in arranging for a loan of \$75,000 that was unsecured with the commercial loan department?
- A. No, I did not. I suggested that -- to Frank that he make that arrangement as soon as possible, because he knew Mr. Lang and Mr. Langdon and Mr. Bennett and after -- later that afternoon I did go down and talk to Mr. Bennett and request that he see Frank when he comes in, if there was any way that he could make the loan, it would be very helpful to Frank. (Tr. 134-135).

The testimony of Mr. Johnson says, in effect, that he had an agreement with the bank to release the lien for the payment of \$75,000 and to proceed with the remainder of the loan on an unsecured basis with Mr. Hintze and Mr. Hintze's department.

Mr. Hintze, on the other hand, says that no agreement was reached but he does acknowledge that it was necessary that Johnson have the lien released to secure the refinance package; that the promised payment of \$75,000 was discussed; and that, in fact, Mr. Hintze did talk to the Commercial Loan Department and told them that it would be very helpful to Mr. Johnson if the loan could be made.

The ambiguity or discrepancy in the testimony of both parties relates only to the manner in which the balance of the loan would be handled. Mr. Johnson was under the impression that Mr. Hintze would handle it in his department as an unsecured loan and Mr. Hintze was under the impression that Mr. Johnson would apply to the Commercial Loan Department of the bank for an unsecured loan. The \$75,000 payment was, in fact, made but a new unsecured Note was never signed. Of course, it would not have made sense to sign a new Note until the \$75,000 was actually paid and this was done at a later date.

The attention of the court is now directed to the activities of the third-parties in this transaction. As indicated, United American Life agreed to the refinancing package and forwarded to Title Insurance Agency of Utah the sum of \$155,931.81 with instructions for disbursement. (Ex. 45).

One of the instructions was to obtain a release of the lien to Zions First National Bank and record a new first lien in favor of Appellant. Mr. Reece Howell, an officer of Title Insurance Agency of Utah and an attorney, testified as to the mechanics of the closing with particular regard to the handling of the Zions' lien. Mr. Howell testified that his company had transacted a large amount of title business with Zions and that a custom existed between the two companies, whereby the Title Company would call the Loan Officer for a release figure on a particular secured loan; obtain the figure and then forward the payment check without immediately receiving the required

and expected Release of Mortgage or Reconveyance. After the bank had cleared their loan, and this would sometimes take several weeks or months, (Tr. 88), the Release or Reconveyance would be forwarded by the bank.

Mr. Howell testified that he called the Mortgage Department of Zions First National Bank to verify the figures of this loan as he did in the case of every transaction he had ever closed. On this point his testimony on cross-examination was clear and unequivocal. (Tr. 103).

Subsequent to obtaining verification of figures, Mr. Howell prepared a check and voucher for delivery to Zions First National Bank. The check and voucher are reproduced at this point in the Brief for ease of reference.

Escrow Account	PLAINTIFF'S EXHIBIT # 75	Title Insurance Agency Title Insurance — Abstracts — Escrows Salt Lake City, Utah January 25 1974		No. 28
	Pay to the Order of: ZIONS FIRST NATIONAL BANK, National Association			\$ 50,000.00
	EXACTLY 50,000 DOLLARS			
	To: BROADWAY — WEST TEMPLE OFFICE VALLEY BANK & TRUST CO. SALT LAKE CITY, UTAH			AUTHORIZED SIGNATURE <i>[Signature]</i> AUTHORIZED SIGNATURE <i>[Signature]</i>

TITLE INSURANCE AGENCY 80 WEST BROADWAY SALT LAKE CITY, UTAH		VOUCHER No. 28
ATTACHED CHECK IS IN SETTLEMENT OF ACCOUNTS LISTED HEREON. BEFORE DEPOSITING, DETACH THIS DUPLICATE OF VOUCHER AND RETAIN FOR YOUR RECORD. IF NOT CORRECT, RETURN.		
DATE	DESCRIPTION	AMOUNT
1/25/74	Payment in full of Trust Deed dated November 19, 1968, executed by Bar 70 Ranches, Inc. recorded November 20, 1968, as Entry No. _____, in Book 170, pages 198-200. Our Order No. 33773	\$50,000

Mr. George Robinson of Title Insurance Agency delivered the check and voucher directly to the office of Mr. Wayne Hintze at Zions First National Bank.

Mr. Hintze admitted receipt of the check and voucher, but his testimony concerning the handling of that item is vague and equivocal:

Q. All right. Let's follow it just one step further. You did actually have in your possession this check, Exhibit 75, before it was cashed?

A. Yes.

Q. And was the voucher attached?

A. I cannot swear to that. When I saw the check it was like this and I did not turn it over. I was not concerned what was on the voucher because in my mind it was the conversation with Frank that he could pay \$75,000, and that he would arrange for the other \$75,000 through the commercial loan department. Now, I assumed that's what he was doing. And so the check was -- my instructions to the office was to hold this check until Frank brought in the rest of the money.

Q. Where is a reference on that check to Frank Johnson?

A. There is no reference to it.

Q. Then how do you equate that with \$50,000 coming from Frank Johnson?

A. At the time it was given to me by a representative of the title insurance, either personally or given to my secretary in an envelope from Title Insurance Agency, one or the other, which indicated on it a Bar 70 Ranch -- I'm not denying -- Unfortunately I have to admit that voucher was attached to the check, presumably because it was in our loan file. It's

embarrassing to admit it was there. I've said I have no recollection of that because I specifically do not remember reading that voucher on the check until after this lawsuit started. (Emphasis added.) (Tr. 153-154).

How he knew the check from Title Insurance Agency referred to Bar 70 Ranches or Franklin Johnson is never satisfactorily explained. Mr. Hintze denies reading the voucher portion of the check until this litigation was commenced and yet knew at the time the check was received that it applied to the Bar 70 loan. It must be noted that only on the voucher is the name Bar 70 mentioned. This cannot be reconciled. Furthermore, Mr. Hintze testified that had he read the voucher at the time the check was received, he would have handed it back to the person who delivered it as unacceptable. (Tr. 156). What happened, however, is that Mr. Hintze gave the check to his office manager with instructions to hold it until Mr. Johnson brought in the balance of the money. (Tr. 156).

Shortly thereafter, the bank cashed the check, retained the proceeds and applied the amount to the Bar 70 Note.

Mr. Hintze was also aware that a severe problem had been created for Title Insurance Agency of Utah sometime between January 25, 1974, and the date that the bank received the additional \$25,000 from Mr. Johnson (June, 1974). Mr. Hintze had a conversation with Mr. Alton Lund the President of the Title Company. Mr. Hintze's testimony on this point follows:

Q. When Mr. Lund spoke to you

concerning a release or a reconveyance of this trust deed, wasn't it apparent to you that he was looking to get that from you?

A. Well, I'd have to say if I'd given it to him he would have been very happy; but I told him I couldn't give it to him because we had not received the money from Frank Johnson.

Q. But had the \$50,000 from his company just been a payment on account, there would have been no reason for him to question you about a release, would there?

A. No.

Q. So you knew -- you must have known there was a problem here by that time, did you not?

A. I did. I would say yes. (Tr. 164).

Nonetheless, the bank retained the \$50,000 from Title Insurance Agency. (Tr. 165).

Thereafter, Mr. Franklin Johnson paid the sum of \$25,000 to the bank in June, 1974, and this represented the full \$75,000 payment on the Note. There the matter remained until 1978, when the bank began foreclosure proceedings by private Trustee's Sale. This litigation resulted.

To briefly summarize, a loan made by Zions First National Bank to Bar 70 Ranches in 1968, secured by unimproved acreage in Grand County, Utah, became delinquent almost from its inception; by 1973, the collection problem was acute. Franklin Johnson and his brothers, who were the owners and principals in Bar 70 Ranches, were unable to pay the Note and the likelihood of collection by

the bank was doubtful. Mr. Wayne Hintze, the bank officer who made the loan, was well acquainted with Franklin Johnson and had known of his financial problems for some years. He was anxious to help if possible.

Mr. Johnson incurred and obtained new and additional financing and refinancing on various parcels of property in January, 1974. During that time, he had a meeting with Mr. Hintze and asked that Mr. Hintze accept \$75,000 on the principal of the Bar 70 Note, release the Trust Deed and handle the balance on an unsecured basis. He felt that he had an agreement with Mr. Hintze when he left the meeting. Mr. Hintze denied an agreement, but his Memo to the file (Ex. 41) does not indicate a denial, but only that Mr. Johnson would apply to the Commercial Loan Department at the bank for an unsecured loan on the balance. These two principals apparently differ only on the question as to which department of the bank would handle the balance of the loan on an unsecured basis.

Approximately 45 days after Mr. Johnson and Mr. Hintze met, a check representing the funds of United American Life, in the amount of \$50,000, was delivered to Mr. Hintze by Title Insurance Agency of Utah, as United American Life's agent; the voucher on the check clearly and unmistakably spelled out the terms for its acceptance; namely, that it paid in full the Trust Deed given by Bar 70 Ranches.¹ It

¹It should be clearly understood that no one contends that the \$50,000 check paid the loan in full; only that it bought a Reconveyance of the Trust Deed.

is impossible to believe that Mr. Hintze failed to note the contents of the voucher; that is the only way he could have identified the transaction. Admitting that he would have returned the check had he read the voucher, he nonetheless held it, the bank cashed it; knowing that it created a critical problem for Title Insurance Agency and retained the money, never offering to return it.

The evidence cited above is not unique in the field of commercial transactions involving financing arrangements and title insurance companies. The legal principles of accord and satisfaction; payment by a third-party; equitable estoppel; and conditional delivery of a check all have application to this factual situation and are interrelated.

For clarity, the points will be discussed separately. Because of the similarity of the applicable rules, some repetition is unavoidable.

POINT I THE LOWER COURT ERRED IN NOT FINDING "ACCORD AND SATISFACTION".

The acceptance by the bank of the \$50,000 check and the additional \$25,000 payment resulted in an accord and satisfaction, obligating the bank to Reconvey the Trust property.

The Supreme Court of Utah has described an accord and satisfaction as "a method of discharging a contract, or settling a claim arising from a contract, by substituting for such agreement or claim an agreement for the satisfaction thereof, and the execution of the substituted agreement." Cannon vs. Stevens School of Business, 560 P.2d 1383 (Utah, 1977).

This court has on several occasions stated that there are four essential requirements for a valid accord and satisfaction: (1) proper subject matter, (2) competent parties, (3) an assent or meeting of the minds, and (4) a consideration given for the accord. Sugarhouse Finance Co. vs. Anderson, 610 P.2d 1369 (Utah, 1980), and Ralph A. Badger and Co. vs. Fidelity Building and Loan Association, 75 P.2d 669 (Utah, 1938). It is obvious that the subject matter, in this case a Trust Deed, is a proper subject matter for an accord and it is also obvious that the parties, namely Franklin Johnson, Zions First National Bank, Title Insurance Agency of Utah, and United American Life, are competent. Only the last two requirements, namely assent and consideration, require in-depth analysis.

A. Zions Bank assented to the accord.

It is a traditional rule of law that in order for an accord and satisfaction to be enforceable, there must be an assent or meeting of the minds of the parties. 1 Am Jur 2d, Accord and Satisfaction, Sec. 11, p. 309. In determining whether there has been an assent, the Utah Court looks at the total circumstances of a case. See Tate, Inc. vs. Little America Refining Co., 535 P.2d 1228 (1977), and Hintze vs. Seach, 20 Ut.2d 275, 437 P.2d 202 (1968).

The circumstances of this case are easily stated. Franklin Johnson and his brothers, and the entities they controlled, owed the bank \$150,000 which they could not pay. The bank had a doubtful loan on its hands. Neither party desired to be in that position. For some as yet unexplained reason, Zions First National Bank chose to avoid and not to enforce, despite its availability as the most expedient and direct remedy, the power of sale available to it within the subject Deed of Trust. There is no evidence in the record that the security for the loan, namely the unimproved acreage in Grand County, Utah, was worth anywhere near the amount of the loan. A personal relationship existed between Mr. Hintze and Mr. Johnson going back many years. This would not only put a strain on that relationship, but it would also make it difficult to deal with the problem. This would explain why the parties had somewhat different views of the meeting in December, 1973. There is no question that Mr. Johnson was offering to pay \$75,000 on the obligation in order to

restructure the loan from a secured loan to an unsecured loan. This required a Reconveyance of the property so as to place United American Life in a first lien priority position. This is acknowledged by Mr. Hintze. Mr. Johnson thought the remaining balance of the loan would then be handled on an unsecured basis. Mr. Hintze denied such understanding but his Memo to the file did indicate that the balance of the loan could be handled by the Commercial Loan Department.

The negotiations between Mr. Hintze and Mr. Johnson created a mindset on the part of Mr. Hintze. Stated in traditional contract terms and given this background, the subsequent delivery of the \$50,000 check and voucher, with its clear terms and conditions, was in fact and law an offer to Zions First National Bank. The banks retention of the check and proceeds and acquiescence in the terms thereof constituted Zions First National Banks acceptance and assent thereto.

The \$50,000 check and voucher was delivered to Mr. Hintze, the bank official in charge of the Mortgage Loan Department. He knew the check had been funded by United American Life Insurance Company, a third-party, and that pursuant to its terms and his past business experience, United American Life required as a condition of the payment, Zions First National Bank's Reconveyance of its Deed of Trust. Mr. Hintze knew further that Title Insurance Agency of Utah, as agent for United American Life, expected and required a

Reconveyance and that the retention of the check and voucher without such a Reconveyance created a serious problem for Title Insurance Agency. Mr. Hintze, however, took no action, made no protest, did not offer to return the check and voucher nor even make inquiry or seek clarification, rather he accepted the check, acquiesced in its terms and retained the benefits to the detriment of United American Life and Title Insurance Agency of Utah.² The effect of Mr. Hintze's conduct as to the third-party, the Appellant, is clear. The bank cannot evade the binding effect of its assent in this case by claiming that it did not have knowledge of or would not be bound to the terms of the \$50,000 check and voucher.

In Minnesota and Ontario Paper Co. vs. Register and Tribune, 219 N.W. 321 (Iowa, 1928), the court held that if "through lack of attention or carelessness the creditor fails to understand the debtor's declaration that the check is sent in full discharge of an unliquidated claim, the

²It should be noted that Zions First National Bank was not without any alternative. The Uniform Commercial Code, adopted in Utah, provided the appropriate recourse for Zions. U.C.A. Sec.70A-1-207 provides that the recipient of a payment does not assent to the terms or conditions under which a payment is offered nor prejudices his rights by acceptance thereof so long as the acceptance or endorsement is expressly made "under protest" or "without prejudice". Thus, even though the Utah legislature has adequately proscribed the conduct Zions should have taken and to avoid a de facto assent or acceptance of the terms and conditions of the check and voucher and to prevent United American Life and Title Insurance Agency of Utah from incurring any detrimental reliance, Mr. Hintze chose to ignore this common legislatively endorsed business practice.

acceptance by the creditor will be binding, even though the creditor neglects to read the conditions as stated in the letter or check". (219 N.W. at 323). Although this case dealt with an unliquidated claim, the conclusion of the court is inescapable: When a creditor receives a "payment in full" check, he has constructive notice as to the conditions written in the check.

Legally charged with full notice and actual knowledge of the contents of the check and voucher, the bank cashed the check, retained the proceeds, and never offered any protest to the terms of the voucher nor offered to return the check. Such conduct on the part of the bank simply cannot be legally excused as being insignificant. The terms of the check and voucher have a compelling significance when viewed in the total circumstances of this case.

In Bennett vs. Robinson's Medical Mart, Inc. 417 P.2d 761 (Utah, 1966), this court held that if a creditor, upon receipt of a check, discusses and disputes the amount of the check with debtor, there will be no assent to the accord even if the creditor cashes the check.

Zions Bank remained silent on this matter, when a clear duty to protest arose if it did not accept the check according to its terms.

Consistent with its concept of accord and elemental requirement of assent, the Utah Supreme Court has discussed what terms are appropriate under facts similar to those of this case for purposes of finding such assent.

In a recent case, Cannon vs. Stevens School of Business, supra., the court noted the importance of words to the effect of "return if not correct" upon a voucher. This requisite language was on the voucher that was tendered to Zions.

In Reliable Furniture Company vs. American Assurance Co., 466 P.2d 368 (Utah), the court stated that one of the important "factors to be considered" in determining whether there is an assent to the accord when a creditor cashes a check is whether the notation "payment in full" appears on the check. Such a notation was specifically typed on the voucher in this case.

In the case of Hintze vs. Seach, 20 Ut.2d 275, 437 P.2d 202, this court adopted the following principle:

Two forms of accord and satisfaction of unliquidated claims are to be discovered in the books. One is where there is a true assent to the acceptance of a payment in compromise of a dispute, or in extinguishment of a liability uncertain in amount. [Citation omitted.] The other is where the tender of the payment has been coupled with a condition whereby the use of the money will be wrongful if the condition is ignored. (Emphasis added.)

This principle should apply with equal, if not more compelling, effect to this case where, although the amount of debt is not disputed, the proposal contained on the check-voucher, as it impacts on United American Life, was to secure a release of the security.

The bank received funds from United American Life amounting to \$50,000 funds that it would not have received

but for the reliance of United American Life upon Zions First National Banks acceptance of the terms of the check-voucher. The total circumstances of this case lead to the compelling conclusion that Zions Bank assented to, and agreed to, release its security pursuant to its acceptance of the terms of the check-voucher. Where a duty to speak was clearly present, the bank remained silent and by its silence gave its assent to, and acceptance of, the terms of the \$50,000 check and voucher.

B. The accord and satisfaction entered into by the parties was supported by adequate consideration.

The trial court held that no consideration was given to Zions to require it to release the Trust Deed. (Conclusion of Law #3, Tr. 142). However, the trial court's Findings of Fact do not support such conclusion. The evidence to the contrary is clear.

It is an elementary rule that for an accord and satisfaction of a liquidated debt to be enforceable, it must be supported by consideration. 1 Am Jur 2d, Accord and Satisfaction, Sec. 12. While the nature of the consideration necessary to support the accord is not capable of precise definition, our court, however, has laid down important guidelines in regard to adequacy of consideration in such cases. In the recent case of Sugarhouse Finance Co. vs. Anderson, 611 P.2d 1369, the court stated:

No completely satisfactory and comprehensive definition of "consideration" has ever been

devised. It is generally agreed, however, that where a promise is supported by the incurrence on the part of the promisee, of a legal detriment in order to confer a benefit on the promisor, such is sufficient to serve as consideration, thereby rendering the promise legally enforceable. This is particularly so when an accord and satisfaction is involved, the modern trend among the courts being to uphold such agreements wherever possible. In such cases, consideration is often found in the obligor's agreement to alter the means or method of payment of the obligation initially owed, or to surrender the assertion of a legally enforceable right. (Emphasis added.)

Applying the foregoing principles to the facts of that case, the court stated:

It is to be noted that, in the present case, plaintiff held a judgment which had been outstanding for more than two years. Pursuant to the parties' conversation of January 31, 1979, defendant agreed that, for a release of the judgment upon payment of a lesser agreed amount, he would negotiate a loan with a third party to enable him to pay off the substitute obligation immediately. A check was given for the agreed amount at the conclusion of that conversation, and authorization to cash it followed two days later. In effect, defendant had agreed to transfer the debt represented by plaintiff's judgment to a third party, thereby immediately satisfying the obligation owed to plaintiff. This was something defendant had no legal obligation to do; by law, plaintiff could only move by levy of execution against property already owned by the defendant - plaintiff could not legally require defendant to incur additional obligations to satisfy the judgment. By so

doing, defendant deliberately incurred the detriment of surrendering his right to limit plaintiff's ability to obtain satisfaction of the underlying judgment, and bestowed upon plaintiff the benefit of immediate payment by means of the incurrence of additional indebtedness. We hold such action to constitute sufficient consideration to support the accord negotiated by the parties.

The parallel between the Sugarhouse Finance case and the case now before the court for decision is striking.

Sugarhouse Finance had a judgment that had been outstanding for two years. Zions Bank had a loan which had been continuously delinquent for a number of years.

In the Sugarhouse case, the Defendant met with Mr. Neuman Petty to discuss an alternative to full payment of the judgment. Franklin Johnson met with Mr. Hintze of Zions Bank to discuss an alternative method of satisfying the Note.

In the Sugarhouse case, the financial difficulties of Anderson were known and discussed at the meeting. In this case, Mr. Hintze knew of the financial difficulties that Franklin Johnson was encountering.

In the Sugarhouse case, a settlement for a lesser amount than the total judgment was proposed and accepted. In this case, Franklin Johnson proposed an "agreement to alter the means or method of payment of the obligation initially owed". Although Mr. Hintze's assent to the proposal at that time may not have been clear, the later actions of the bank unequivocally supply the assent as discussed, *supra*.

In the Sugarhouse case, Anderson negotiated a loan with a third-party to fund payment of the substituted obligation. Franklin Johnson, in fact, incurred additional debt with United American Life.

Additional consideration on the part of Mr. Johnson comes from the fact that he assumed greater personal liability to the bank in giving up his right to have the bank foreclose against Bar 70 Ranches and, perhaps thereby, eliminate any personal liability. This, because the bank may have realized the full amount of its indebtedness on Trustee's or Sheriff's Sale.

The case of A. Ray Curtis Co., vs. Barnes, 554 P.2d 212 (Utah), adds two additional elements to the accord doctrine. In that case the court dealt with a situation where a surety on a corporate debt, after negotiations, delivered a check for an amount less than the liquidated amount which contained the following statement: "Endorsement of this check constitutes payment in full". The court held:

This was not an accord and satisfaction situation, involving a disputed amount, but one where the plaintiff pressured defendant; agreed to settle for a lesser amount; received a check from defendant, read the endorsement, but did not notify defendant of any unacceptability, and cashed it.

The court, in that case, did not require as an element of accord and satisfaction that there be new consideration for settlement of a lesser amount on a liquidated debt. The

financial difficulty of the debtor apparently supplied that missing element. Again, the financial difficulties of the Johnsons are in parallel with the holding in the Curtis Company case.

A second element introduced by the Curtis case is payment by a third-party.

The doctrine as set forth in 1 Am Jur 2d, Accord and Satisfaction, Sec. 46:

One of the recognized exceptions to the rule that part payment is not consideration for the discharge of an entire liquidated debt is where the part payment is made by or with the aid of a third person. Thus, an agreement between a debtor and his creditor whereby the latter undertakes to accept from a stranger a reduced amount of money in full satisfaction of his debt, and payment of such amount is made by the third person at the request of the debtor and received by the creditor, there is an accord and satisfaction as the creditor receives a benefit in securing the payment by such third person; otherwise, due to the financial condition of the debtor, he may not have been able to secure payment of any part of the debt.

This principle is acknowledged by the Utah case of Smoot vs. Checketts, 125 P. 412. It is also well articulated in the Restatement of Contracts, Sec. 421:

A payment or other performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered

it. But the debtor on learning of the payment or other performance has power by disclaimer within a reasonable time to make the payment or other performance inoperative as a discharge.

United American Life (the third-party) through its agent, Title Insurance Agency of Utah, paid \$50,000 to Zions Bank for a Reconveyance of a Trust Deed. This payment was made under no duty or privity to Zions First National Bank, in a commercially reasonable and customary manner, entitling United American Life and Title Insurance Agency to rely upon the conduct of Zions Bank.

The bank accepted, retained and cashed the check without protest or question.

The total facts and circumstances of this case show a proposal, an assent, consideration by Mr. Johnson and payment by a third-party.

. . . The modern trend among the court being to uphold such agreements wherever possible.

Sugarhouse Finance vs. Anderson,
supra.

POINT II THE DOCTRINE OF EQUITABLE ESTOPPEL PRECLUDES ZIONS BANK FROM DENYING ITS DUTY TO RECONVEY THE TRUST DEED AND THE LOWER COURT ERRED IN FAILING TO SO HOLD.

The doctrine of equitable or promissory estoppel has long been part of the jurisprudence of this state. In the early Utah case of Allen vs. Cannan, 28 P. 868 (1892), this court held that:

[t]he equitable rule is that if one maintains silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent.

The court affirmed the doctrine and restated its application in the case of J.P. Hoch, Inc. vs. J.C. Penney Co., 534 P.2d 903 (Utah):

to prevent one party from deluding or inducing another into a position where he will unjustly suffer loss. . . the test is whether there is conduct, by act or omission, by which one party knowingly leads another party, acting reasonably thereon, to take some course of action, which will result in his detriment or damage if the first party is permitted to repudiate or deny his conduct or representation.

The principle has specific application in the case of Sugarhouse Finance Co. vs Anderson, supra:

We note, in addition, that this jurisdiction recognizes the doctrine of promissory estoppel, whereby an individual who has made a promise which the individual should reasonably expect to induce action or forbearance is estoppel to deny or repudiate the promise should the promisee or some third person suffer detriment thereby. We note that, in the present case,

defendant agreed to incur additional indebtedness pursuant to the terms of the accord, in reliance on plaintiff's promise to accept immediate payment of a lesser amount in full satisfaction of the underlying obligation. As such, plaintiff should now be estopped to deny or reject the promise made.

United American Life, as a third-party, did rely upon Zions acceptance of its funds and acquiescence in the terms under which the \$50,000 check was delivered.

Incidentally, the Sugarhouse case ties together the principles of accord and satisfaction and equitable estoppel.

Again, it should be noted that Mr. Johnson was incurring additional indebtedness pursuant to the terms of the agreement between himself and the bank. Our facts are even stronger because Mr. Johnson was not seeking discharge of the obligation, but merely a restructuring of his loan. The bank suffers no detriment because, for this consideration, it was receiving a 50% payment on a doubtful, possibly undersecured and, perhaps, uncollectable loan.

It is of no excuse for the bank to contend that it did not know the terms of the check and voucher and is, therefore, not bound by it. This court, in the case of Garff Realty Co. vs. Better Buildings, Inc., 234 P.2d 842 (1951), adopted the common law view of a "duty to read". In that case, the court held that a party who signs or accepts a written contract without protest or question cannot later claim he did not read the contract.

The duty to read seems especially applicable in this case. The Defendant's business is handling money. A bank should be particularly aware of the legal implications of

conditions written on a voucher attached to a check. This was acknowledged by Mr. Hintze in his testimony. The bank acted negligently in not reading the voucher when it endorsed, cashed the same, and retained the funds. This is a breach of its duty to read the conditions and thus, Defendant by its omission is charged with knowledge of the conditions of the check.

Courts of other jurisdictions have applied the doctrine of equitable estoppel in cases where there has been a conditional payment or a conditional delivery of a check. The courts have imposed two duties upon the recipient of the check: (1) the recipient has the duty to read the conditions, and (2) the recipient has a duty to speak if he objects to the conditions of the delivery.

The duty of the recipient to read the conditions of the delivery is a fundamental common law principle. In a New Jersey case, Skillman vs. Titus, _____ N.J. _____ (1868), (Citation unknown), the court held that the presumption of the law is that the recipient of the check has read it and, if he has not read the conditions, it is his own fault. This view is repeated in a Maine case, Hix vs. Eastern S.S. Co., 107 Me. 357 (1910), where the court held that a party cannot escape the presumption of having read the conditions written on a delivery voucher.

Cases from other jurisdictions adhere to the principle that a recipient is bound by the terms stated on a check. In an Alabama case, McGarvin vs. Cobb, 32 S.2d 36 (1947),

Plaintiff tendered a check to Defendant for the purpose of extending Plaintiff's right to cut timber on Defendant's land for one year. The court held that since Defendant accepted and kept the check without expressing any dissent or alternative condition, he is bound by the conditions of the check.

The Kentucky court in an earlier case, Young vs. Venters, 18 S.W.2d (277) (1929), held the doctrine of equitable estoppel applies when a party accepts money paid upon condition, the acceptor cannot later deny the condition. This view is echoed in Richardson vs. Taylor, 60 A. 796 (1905), when the Maine court held that if money is offered upon certain terms and conditions, and the party to whom the money is offered takes the money, the conditions cannot later be denied.

The Maine court expanded upon its earlier holding in Appeal of Crockett, 154 A. 180 (1931), when it held:

If an offer of money is made to one, upon certain terms and conditions, and the party to whom it is offered takes the money, though without words of assent, the acceptance is an assent de facto and he is bound by it.

A Colorado case, Stanley-Thompson L. Co. vs Southern Colorado M. Co., 178 P. 577, rules very explicitly on these points stating:

The words "acknowledgment in full," when taken in connection, and considered, with the existing circumstances and all other recitals in the voucher and check, indicate that they mean the same as if the expression was "acknowledgment of payment in full of all accounts, or

some other phrase of like import. The creditor must have so understood the indorsement, and is presumed to have read it before signing its name beneath it and having the check cashed. The law charges the plaintiff creditor with knowledge of all the wording and contents of the voucher and check in question. Michigan Leather Co. v. Foyer, 104 Ill. App. 268. The plaintiff had notice from the words contained in the voucher and check, and from the attendant circumstances, that the check was being offered in full satisfaction of its claim.

The check was received, indorsed, and cashed, and the money obtained thereon was retained by the plaintiff. Neither the check nor the proceeds therefrom was ever returned or offered to be returned by plaintiff to defendant. It must be held, therefore, that the check was accepted on the conditions on which it was offered, and that its acceptance constituted an accord and satisfaction.

In this case, the law of this state and other jurisdictions is firm in holding that a party has a duty to read the terms of a check and is charged with knowledge of those terms if not read. Further, having accepted the check and retained the proceeds and remained silent, the bank is estopped to deny its duty to Reconvey the Trust property according to the terms of the check and voucher.

CONCLUSION

The loan made by Zions First National Bank to Franklin Johnson, his brothers and their entities was continuously delinquent. Unusual and unproductive collection efforts by the bank resulted in negotiations between Mr. Wayne Hintze and Mr. Franklin Johnson. Mr. Johnson thought he had an agreement with the bank where, for a payment of 50% of the principal of the loan, the bank would Reconvey the Trust Deed securing the Note and treat the balance as an unsecured loan. Mr. Hintze denied such agreement but the later actions of the bank estop the bank from denying its assent.

The bank accepted a \$50,000 check from United American Life, a third-person, through its agent Title Insurance Agency of Utah. The check was delivered in the usual and customary business manner between Title Insurance Agency and Zions First National Bank, whereby the title company would call the bank for a release figure on a particular secured loan; obtain the figures and then forward the payment check without immediately receiving the required and expected Release of Mortgage or Reconveyance. The check contained clear and unmistakable conditions. It was payment in full of the Trust Deed and the bank was instructed to return the check if the condition of its payment was not correct. The bank accepted the check, cashed the check, and retained the proceeds without protest.

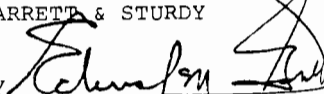
All of the elements of accord and satisfaction as set forth by a series of leading Utah cases were satisfied. In fact, the Sugarhouse Finance case, supra., is a mirror image of the case now before the court.

Zions First National Bank played a silent waiting game. The \$50,000 was accepted without comment, rejection or protest and with the knowledge or expectation that its conduct would be relied upon by United American Life and Title Insurance Agency. United American Life fully intended that it would have a first lien on the Green River property after release of Zions lien by the payment of \$50,000 and was never advised to the contrary by the bank. In fact, the bank did nothing on this matter until four years later when it filed a statutory Notice of Default. Under all of the circumstances of this case, the bank cannot in good conscience deny that this matter was settled between it and Plaintiff by an accord and satisfaction and the bank is estopped to deny its duty to Reconvey the Trust Deed.

Respectfully submitted,

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By


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CERTIFICATE OF MAILING

I hereby certify that I mailed a ² true and correct copy of
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