1981

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 Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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UNITED AMERICAN LIFE INSURANCE COMPANY, a corporation,	:	
Plaintiff and Appellant,	:	
vs.	:	
ZIONS FIRST NATIONAL BANK, a National Association,	:	
Defendant and 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,	:	No. 17187
Third Party and Additional Party Defendants.	:	

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BRIEF OF RESPONDENT

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Appeal from the Judgment of the
Seventh District Court of Grand County
Honorable Boyd Bunnell, Judge

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Edward M. Garrett
GARRETT & STURDY
144 South 500 East
Salt Lake City, Utah 84102
Attorney for Plaintiff and Appellant

Richard H. Nebeker
GREENE, CALLISTER & NEBEKER
800 Kennecott Building
Salt Lake City, Utah 84133
Attorney for Defendant and Respondent

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Edward M. Garrett
GARRETT & STURDY
144 South 500 East
Salt Lake City, Utah 84102
Attorney for Plaintiff and Appellant

Richard H. Nebeker
GREENE, CALLISTER & NEBEKER
800 Kennecott Building
Salt Lake City, Utah 84133
Attorney for Defendant and Respondent

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES CITED

Cases

Authorities

Statutes

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* * * * * * * * * * * * * * * * *

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BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Plaintiff-appellant United American Life has reargued all of the facts as though the trial court found in its favor, to-wit: that there was an agreement made by Wayne Hintze for and on behalf of Zions First National Bank (herein

"Bank") that it would agree to release its Trust Deed lien on the Bar-70 Ranch fo $50,000.00 when the unpaid balance on the loan was $150,000.00. The Court, after submission of Findings of Fact in May (R.132), Objections to Findings of Fact filed by appellant (R.148), then final Amended Findings of Fact, signed ove plaintiff's objections on June 17, 1980 (R.142-147), found that there was no agreement, no meeting of the minds; that the only agreement was that the Bank would release its Trust Deed lien only in the event it received payment in full.

FINDINGS OF FACT

1. On November 13, 1968, Bar 70 Ranches, Inc., a Nevada corporat and Franklin D. Johnson, Glendon E. Johnson and Clifton I. Johnson borrowed th sum of $150,000.00 from Zions First National Bank, which loan was secured by a Trust Deed constituting a first lien on real estate in Grand County, Utah (herein called the "Bar 70 Ranches" and more particularly described in the Trust Deed, Exhibit 4), together with all water rights, including the certificates and applicat of appropriation as described in the Trust Deed.

2. The loan was also made upon the parties executing a Purchase and Sale Agreement dated November 18, 1968, whereby United American Life Insuran Company of Denver, Colorado (herein called "United American Life"), agreed to purchase the loan from the Bank on November 1, 1970. The commitment of Unite American Life was extended for another 12 months by letter dated March 9, 1971.

3. On November 24, 1971, the Purchase and Sale Agreement where United American Life agreed to purchase the loan was substituted by a Purchase

and Sale Agreement executed by Howard Life Insurance Company, a Colorado corporation. The balance on the loan still remained at $150,000.00.

4. In April, 1973, and August, 1973, the borrower executed Extension and Modification Agreements which changed the rate of interest and extended the time of payment until July 1, 1978, when the entire balance was to become due and payable.

5. Commencing August 6, 1973, and continuing through December 10, 1973, Franklin D. Johnson, the principal borrower, and Wayne S. Hintze, Senior Vice President of Zions First National Bank, exchanged correspondence regarding payment of $75,000.00 on the loan and amortizing the balance of $75,000.00 over a five-year period. On December 10, 1973, Franklin D. Johnson visited Wayne S. Hintze in his office, and Mr. Hintze made a memorandum of their discussions, which reads as follows:

> Today Mr. Franklin Johnson indicated that he would be able to pay $75,000 on the principal of the subject loan reducing it to $75,000, that then he would ask that the balance of the $75,000 be taken over by our Commercial Loan Department with the understanding that they would pay $25,000 within 30 days and the balance of $50,000 within a 90-day period on a personal loan to he and Glendon Johnson.
>
> /s/ Wayne S. Hintze, Vice President
> (Exhibit 41)

Mr. Hintze agreed that Zions First National Bank would release its Trust Deed lien on the Bar 70 Ranches property when and if the Bank received full payment.

6. Sometime in December, 1973, Mr. Franklin D. Johnson and United American Life agreed to a refinancing package wherein United American Life agreed

to advance an additional $185,000.00 in addition to a prior loan of $675,000.00 w
it had with Johnson Land Company on property known as the East Oaks Company
Weber County, Utah, provided it be given additional collateral on three parcels
property, including a first lien on the Bar 70 Ranches property. In January, 19
United American Life mailed a check of $152,816.98 to Title Insurance Agency of
Lake City, Utah, with instructions to pay $50,000.00 to Zions First National Bank.
By letter dated January 2, 1974, United American Life advised Title Insurance
Agency that " . . . there is a lien due to Zions First National Bank in the amount of
$150,000.00. It is understood that this lien may be released upon payment of
$50,000.00 to the Zions First National Bank." On January 23, 1974, a Trust Deed
executed by Glendon E. Johnson, Franklin D. Johnson and their wives to United
American Life covering the Bar 70 Ranches property in Grand County, Utah, was
recorded by Title Insurance Agency acting for and on behalf of United American
Life. The Trust Deed was dated December 28, 1973. Title Insurance Agency wrote
a title insurance policy insuring that the Trust Deed lien of United American Life
was a first lien upon said property, which title policy was effective January 23,
1974.

7. On January 25, 1974, Title Insurance Agency drew a check in the
sum of $50,000.00 payable to Zions First National Bank, which contained the
following language on the voucher portion of the check:

> Printed: Attached check is in settlement of accounts listed hereon, before depositing detach this DUPLICATE VOUCHER and retain for your records. If not correct, return.

Typewritten: 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.

At an unknown date subsequent to January 25, 1974, Mr. George Robinson of Title Insurance Agency went to the office of Wayne S. Hintze at Zions First National Bank, Head Office, One South Main Street, Salt Lake City, Utah, and delivered said check either to Mr. Hintze or his secretary stating that this was for the Johnson deal. There was no accompanying letter with the check, nor any request made to Mr. Wayne Hintze to deliver a reconveyance of the Trust Deed of Zions First National Bank against the property.

8. Wayne S. Hintze examined the check but neglected to note at that time the language contained in the voucher portion of the check. He was surprised the check was for $50,000.00 instead of $75,000.00 which was discussed with Franklin D. Johnson on December 10, 1973. Mr. Hintze instructed his subordinates to hold the check and wait and see if Franklin D. Johnson brought in additional funds.

9. The check for $50,000.00 was deposited by mistake by some person other than Wayne S. Hintze, acting for the Bank on March 1, 1974, with a stamped endorsement and no personal endorsement on the back.

10. On June 12, 1974, an additional $25,000.00 was paid by Franklin D. Johnson, which payment was applied on the loan.

11. The Court finds that there was no meeting of the minds between Franklin D. Johnson and Wayne S. Hintze that the Trust Deed would be reconveyed

for the sum of $50,000.00 or for the sum of $75,000.00; that Mr. Hintze at all times was only willing to reconvey the Trust Deed lien with the understanding that the real estate loan of $150,000.00 would be paid in full.

12. On December 21, 1976, Johnson Land Company by Franklin D. Johnson conveyed the Bar 70 Ranches property to United American Life, which Warranty Deed was recorded January 4, 1977. On said date the principal balance owing by Johnson to Zions First National Bank was the sum of $83,906.23. The Warranty Deed did not refer to or except the prior Trust Deed lien of Zions First National Bank. On or about January 4, 1977, Title Insurance Agency wrote an owner's policy of title insurance insuring that United American Life owned the premises without reference to the existing Trust Deed lien of Zions First National Bank.

13. On or about January 4, 1977, the officers and agents of Title Insurance Agency knew that the Trust Deed lien of Zions First National Bank was still of record but no written demand or request was made for the reconveyance of said Trust Deed lien.

14. The loan became delinquent and on March 31, 1978, Zions First National Bank recorded its Notice of Default against the Bar 70 Ranches property which foreclosure was halted by the Temporary Restraining Order applied for by United American Life and granted by this Court upon oral argument heard June 15, 1978. The balance of $83,906.23 with accrued interest of $31,850.00 and late charges of $12,515.63 to the date of trial and the attorney's fees incurred to date in

the sum of $8,200.00 have not been paid. The Court finds that the amount of attorney's fees incurred to date are reasonable (R.142-146).

The plaintiff states in its Brief that the loan was a problem loan, and argues that there should be some kind of an estoppel enforced in favor of the plaintiff and against the Bank. Contrary to plaintiff's assertions, the loan by the Bank was well-secured by 1,000 acres of land (Bar-70 Ranches on the Green River), plus 22 second feet of water (Certificate for 10 c.f.s.; Application of Appropriation for 12 c.f.s.). (See Exhibit 4 and Tr.31,35.) The Bank had a first Trust Deed lien on collateral worth a great deal more in value than $150,000.00. The Bank did not want to foreclose, and Wayne Hintze testified that he was anxious if possible to help Mr. Johnson (Tr.149). The agreement between the Bank and Frank Johnson was clearly set forth in five written exhibits, Nos. 34, 36, 37, 39 and 41. The background to these letters and the memorandum written by Hintze on December 10, 1973, is that the loan for $150,000.00 had been a two-year loan with no provisions for monthly amortization (Exhibit 3). From November, 1968, to March 1, 1974 (5-1/2 years), no principal reduction had been made on the loan (Tr.132). All that Frank Johnson had been able to do was to pay the interest on the loan. The loan by the Bank was originally based upon a Purchase and Sale Agreement by plaintiff to buy the loan from the Bank (Exhibit No. 5). Plaintiff reneged on this commitment (Exhibit 18,20) -- "they had made so many commitments all over the western part of the United States that they were broke" (Tr.25). Then Frank Johnson bought a project known as the East Oaks building in the mouth of Ogden

Canyon from plaintiff (Tr.48) because he was told that this would help him get some money to finance the Terracor development of Bloomington. Johnson could not make the payments to plaintiff on the East Oaks property, because the property later purchased by Terracor in Stansbury (Tooele County) had turned out to be a very tough property, and United American had over-committed itself and couldn't live up to any of its commitments (Tr.50).

Frank Johnson testified as follows:

> Q. Now, I am aware -- isn't it a fact that there are mortgages finally on the Stansbury project that total $28 million?
>
> A. Oh, I'm sure there is. Yes. Well, I'm not positive. When I left Terracor -- when we reached a settlement in Terracor in 1972, at the end of '72, there was approximately $11 million that had been put into Stansbury.
>
> Q. And while Bloomington was a success, Stansbury turned out to be quite a disaster?
>
> A. Yes. People did not want to live there.
>
> Q. All right. Then wasn't it a fact that you also had some discussions with Wayne Hintze about how you were doing overall on these other projects?
>
> A. Yes, we did.
>
> Q. That Wayne Hintze knew that you were heavily involved in real estate development and had loans at many banks in many different insurance companies that you obtained through your brother, Glendon?
>
> A. That's right. I think Wayne was -- Yes. I think that's right. (Tr. 42; emphasis added)

It is clear from the evidence that Hintze knew that Frank Johnson was

very very heavily indebted on many loans at other banks and insurance companies. And Frank Johnson knew that Hintze knew of his financial predicament. Frank Johnson's financial difficulty and the Bank's knowledge of Frank's predicament is the reason that Frank did not ask for a reconveyance, without full payment on his Trust Deed Note, and why he never applied at the Commercial Loan Department of the Bank to obtain an unsecured loan. It is the reason why Wayne Hintze testified: "Q. But he needed the release then, did he not? A. Well, he couldn't get that because he hadn't paid the money. No way do we release when we've still got a loan outstanding" (Tr.162).

Thus, in August, 1973, Johnson wrote to Hintze that he was selling a piece of property in September so "we could reduce the amount owed on the Green River ranch by $75,000.00. We would then be able to make a pay-out on the ranch over a five year period" (Exhibit 34). No mention was made of any release of the Bank's Trust Deed lien on the Green River ranch. On the basis of this request Hintze agreed to release the commitment of Howard Life Insurance Company (Exhibit 36). This was a successive replacement agreement to buy the loan from the Bank (Exhibit 24). Johnson had procured the Howard Life commitment to buy the $150,000.00 loan at the Bank, after United American Life reneged and failed to perform on its original commitment (Exhibit 5). Johnson replied to Hintze on October 30, 1973, that the sale of our Ogden property was not yet concluded (meaning East Oaks -- purchased from plaintiff) and asked for "an extension of the period of the time until December 7 to pay the remaining $75,000.00" (Exhibit 37). Hintze replied on November 14, 1973, that the Bank would agree to a

$75,000.00 principal reduction and then Frank "would start a regular monthly payment of $1,594.00 . . . This would then pay the loan in full within a five-y period after the $75,000 has been applied." Thus, there were to letters writte Johnson (Exhibits 34 and 37) and two letters written by Hintze (Exhibits 36 an none of which mentioned any release of the Bank's Trust Deed lien for partial pa ment only. All of the letters led up to the critical conference between Frank Jo and Wayne Hintze on December 10, 1973.

Wayne Hintze made a memorandum of that conversation which is as follows (Exhibit 41):

MEMORANDUM

December 10, 1973

TO: FILE
FROM: Wayne S. Hintze, Vice President
SUBJECT: Bar 70 Ranches

Today Mr. Franklin Johnson indicated that he would be able to pay $75,000 on the principle [sic] of the subject loan reducing it to $75,000, that then he would ask that the balance of the $75,000 be taken over by our Commercial Loan Department with the understanding that they would pay $25,000 within 30 days and the balance of $50,000 within a 90 day period on a personal loan to he and Glendon Johnson.

/s/ Wayne S. Hintze, Vice President

The loan balance at that time was still $150,000.00. It is clear tha Frank Johnson, by asking that the balance of $75,000.00 be taken over by our Bank's) Commercial Loan Department was not requesting a release of the Trus lien from the Real Estate Doan department for less than full payment. The trial found:

> Mr. Hintze agreed that Zions First National Bank would release its Trust Deed lien on the Bar 70 Ranches property when and if the Bank received full payment. (Finding of Fact No. 5, R.144)

Trial was seven years later in July, 1980. Memories had dimmed but not the content of letters and memos. Frank Johnson testified that plaintiff was becoming very edgy because they could see we had financial difficulties and were having a hard time paying (for the East Oaks property) (Tr.51), so Johnson and plaintiff worked out a deal to refinance the East Oaks project at the mouth of Ogden Canyon and give plaintiff additional collateral in a Sanpete County property, and in property called LaRue in Colorado, and they wanted a first mortgage on the property at Green River, Utah (Tr.51). Plaintiff wanted a first lien on the Bar 70 Ranches . . . and we agreed to try and get it for them (Tr.52). See the details of this Loan Modification Agreement in Exhibit 44. Johnson stated on his direct examination that " . . . the conversation (with Wayne Hintze) I think was ambiguous. That was what I stated and I cannot recall totally what Mr. Hintze stated" (Tr.26).

Frank Johnson did not testify that he told anyone at the Title Insurance Agency that he had an agreement with the Bank that they would release the lien upon payment of $75,000.00 or $50,000.00, or any conversation at all. The title company did not offer testimony that Johnson told them the Bank would release its lien. The title company got their information from plaintiff in a letter dated January 2, 1974 (Exhibit 45), which states cryptically:

> . . . there is a lien due the Zions First National Bank in the amount of $150,000. It is understood that this lien may be released upon payment of $50,000 to the Zions First National Bank.

No one called or wrote to Wayne Hintze to confirm whether this was true or not.

The Trust Deed by Frank and Glendon Johnson to plaintiff to secure a new adv[illegible] of $185,000.00 had already been executed on December 28, 1973 (Exhibit 43).

The title company had letters confirming in writing their payments [illegible] the Speicker property in Colorado (Exhibit 38) and wherein Richard Christenso[illegible] agreed to release the LaRue Colorado property upon receipt of $50,000.00 (Exhibit 40). Yet, Reese Howell, an attorney and title examiner for Title Insurance Agency testified that he thought he had called someone at the Bank; that "I would have said I have a letter from United American Life saying that the payoff to Zions First National Bank for reconveyance would be $50,000. Could you verify that figure for me please? That's what I would have requested" (Tr.98). He couldn't remember who he talked to, whether it was a man or a woman, and he understood banking well enough that it takes someone really in charge of the entire department, not just a payoff clerk, to authorize the release of the Trust Deed for $50,000.00 where the amount due is $150,000.00 (Tr.100). He did not think he talked to Wayne Hintze. Mr. Howell testified:

> At that time I did not know there was any additional monies owed * * * There might very well be but I probably assumed it might have been a payoff in full (Tr.108).

Title Insurance Agency recorded the Trust Deed from the Johnsons to plaintiff on January 23, 1974, and Title Insurance Agency wrote a policy of title insurance on January 23, 1974, without showing the Trust Deed lien to the Bank (Tr.90). The check for $50,000.00 was dated January 25, 1974. Mr. George Robinson on an unknown date delivered the check to the office of Wayne Hintze at the Bank. He thought he delivered it to Wayne Hintze, or to his secretary, and hi

instructions would have been, "Give this to Wayne. This is the Frank Johnson check transaction that we were handling and Wayne knew all about it" (Tr.119). There was no written letter or instructions other than the notation on the voucher portion of the check (Exhibit 76):

> 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. 33743.

Wayne Hintze testified, and the trial court found that he examined the check but neglected to note at that time the language contained in the voucher portion of the check. He was surprised the check was for $50,000.00 instead of for $75,000.00 which was discussed with Franklin D. Johnson on December 10, 1973. Mr. Hintze instructed his subordinates to hold the check and wait and see if Franklin D. Johnson brought in additional funds. The check for $50,000.00 was deposited by mistake by some person other than Wayne S. Hintze, acting for the Bank on March 1, 1974, with a stamped endorsement and no personal endorsement on the back. On June 12, 1974, an additional $25,000.00 was paid by Franklin D. Johnson, which payment was applied on the loan (Findings of Fact No. 8, 9 and 10; R.145).

The Court found that there was no meeting of the minds between Franklin D. Johnson and Wayne S. Hintze that the Trust Deed would be reconveyed for the sum of $50,000.00 or for the sum of $75,000.00; that Mr. Hintze at all times was only willing to reconvey the Trust Deed lien with the understanding that the real estate loan of $150,000.00 would be paid in full (Findings of Fact No. 11; R.145).

POINT I

THERE WAS NO AGREEMENT AND NO MEETING OF THE MINDS, NO CONSIDERATION PAID FOR ANY RELEASE OF THE BANK'S TRUST DEED SECURING A LIQUIDATED UNDISPUTED AMOUNT, HENCE NO ACCORD AND SATISFACTION

To state the plaintiff's case on appeal in its simplest terms, it is this: Once the Bank cashed the check, which voucher portion stated "payment in full of Trust Deed . . . " then there was a legal binding agreement for the Bank to reconvey its Trust Deed lien. This is claimed to be so notwithstanding the fact that Frank Johnson proposed that he pay the loan in full. When Frank Johnson proposed to Wayne Hintze " . . . that he would be able to pay $75,000 on the principal of the subject loan reducing it to $75,000, that then he would ask that the balance of the $75,000 be taken over by our Commercial Loan Department . . . " (Exhibit 41), he knew the difference between the real estate and commercial loan departments of the Bank (Tr.64). He knew that Wayne Hintze dealt in secured loans (Tr.65) in the Real Estate Loan Department of the Bank (Tr.10). Frank Johnson proposed his own method of full payment on the $150,000.00 Trust Deed Note (Exhibit 41).

This Court, as it stated in Tates, Inc. vs. Little American Refining Co., 535 P.2d 1228, must assume that the trial court believed those aspects of the evidence which may be deemed to support his findings and judgment, citing Memmott vs. United States Fuel Co., 22 Utah 2d 356, 453 P.2d 155. In the instant case, the trial court found that Mr. Hintze at all times was only willing to reconvey the Trust Deed lien with the understanding that the real estate loan of

$150,000.00 would be paid in full (R.145); that there was no accord and satisfaction reached between Franklin D. Johnson or the agents of Title Insurance Agency with Wayne S. Hintze of the Bank (R.146). United American Life or Title Insurance Agency never talked to or wrote to Wayne Hintze to tell him that this money was being paid by plaintiff. Hintze had no knowledge of the letter written by plaintiff to Alton Lund of Title Insurance Agency (Exhibit 45, paragraph 4d.), that it was plaintiff's understanding that the lien of $150,000.00 may be released upon payment of $50,000.00 to the Bank. Wayne Hintze knew that the check was to apply on the Bar-70 Ranches loan because George Robinson, when he delivered the check to Hintze's office said, "This is the Frank Johnson check transaction that we were handling and Wayne knew all about it" (Tr.119). Johnson's letters in the Bank file told Mr. Hintze (Exhibit 37) about selling his Ogden property, and all that Hintze knew was that the payment was made by the title company, presumably as agent for Frank Johnson. There is no evidence that Hintze knew that the $50,000.00 came from the same United American Life that had reneged on the original agreement to purchase the loan from the Bank on the 1st day of November, 1970 (Page 3 of Exhibit 5). Nobody claims they informed Mr. Hintze that United American Life was now trying to pay off the Bank in full, by payment of $50,000.00. There is no evidence in the record to support the statement in Appellant's Brief at page 18 that Hintze "knew the check had been funded by United American Life . . . 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." No one from United American Life ever

appeared or testified at trial. It is now the owner of the property with an owner's title insurance policy (Exhibit 66; Tr.6; Tr.68). Counsel for appellant stated in his opening remarks that Chicago Title Insurance Company (the underwriter for Title Insurance Agency of Utah) is behind the plaintiff "this is where the money is in this case, so to speak . . . " (Tr.6).

There was no agreement, no meeting of the minds; no accord and satisfaction. The trial court's findings are clearly sustained by the weight of the evidence. The plaintiff-appellant tries on appeal to convince the Supreme Court differently without arguing forthrightly that the findings are not supported by the evidence.

To constitute an accord and satisfaction, there must be an agreement and there must be consideration. In Tates, Inc., supra, the Court stated:

> Ordinarily, the payment of part of a debt does not discharge it; and this is true even though the paying debtor exacts a promise that it will do so. The reason for this is that in making the part payment, the debtor is doing nothing more than he is legally obligated to do, and therefore he gives the creditor no consideration for the promise that the part payment will be accepted to discharge the entire debt.

In Browning vs. Equitable Life Assurance Society, 94 Utah 532, 72 P.2d 1060, this court stated:

> There must be consideration for the agreement. Settlement of an unliquidated or disputed claim where the parties are apart in good faith presents such consideration. Where the claim is definite and no dispute but an admittance of its owing, the agreement to take a lesser amount even followed by satisfaction is not good unless attended by some consideration. In this case we do not see the elements of an accord and satisfaction.

Here, there was no disagreement between Frank Johnson and the Bank that the debt was $150,000.00, and that the debt was secured by a first Trust Deed lien on the Bar-70 Ranches property (Exhibits 3 and 4). It was a liquidated debt, not disputed. The ranch with its appurtenant 22 second feet of water rights in the Green River (Tr.35) was of great value. Appellant argues, without citing any evidence in the record, that the Bank was in a situation similar to that of Sugarhouse Finance Co. vs. Anderson, 610 P.2d 1369. In the Sugarhouse case the Supreme Court affirmed the trial court's finding that there was an accord and satisfaction; that the acceptance of a check for $2,200.00 as full payment on a judgment originally for $2,423.86 plus interest, costs and attorney's fees known to have been obtained by Anderson's borrowing the money from a third party constituted consideration. The important distinction is that the parties had several meetings and conversations, all of which led to a clear agreement that Sugarhouse Finance would accept $2,200.00 in full satisfaction of the judgment. Anderson owned a 12-acre tract in Sevier County, Utah, jointly with another party which was otherwise encumbered such that he hoped to receive no more than $2,000.00 from the transaction (610 P.2d at p.1371). It was this uncertainty of being able to collect the difference between $2,200.00 and $2,438.86 that led the trial court and the Supreme Court to hold that consideration existed for the undisputed accord which was reached. The finance company clearly reneged on an agreement to accept $2,200.00, which Anderson borrowed from a third party.

United American Life never pleaded any accord and satisfaction, nor did it plead any promissory estoppel in its Complaint (R.1) wherein the

Bank's Trust Deed sale was temporarily enjoined, nor in its Amended Complaint (R.79), nor in any Reply to the Bank's Counterclaim (R.62). Normally, accord and satisfaction is an affirmative defense which must be pleaded. Hintze vs. Seaich, 20 Utah 2d 275, 437 P.2d 202; Utah Rules of Civil Procedure 8(c); FMA Financial Corp. vs. Build, Inc., 17 Utah 2d 80, 404 P.2d 670. Even though plaintiff did not plead accord and satisfaction, it had the burden of proof, on this affirmative defense oto show all of the essential elements. There was no evidence produced by plaintiff to show that the value of the Bar 70 Ranch was less than $150,000.00; that the Bank was unsecured or uncertain at all of being able to collect in full by foreclosure of its first lien on the 1,000 acres and 22 second feet of water rights. Wayne Hintze testified that he had no recollection of Frank Johns saying he was having problems with United American Life (Tr.149); he was anxious if possible, to help Mr. Johnson (Tr.149). He wanted to avoid foreclosure, if possible (Tr.150). But the reason for this attitude was that he knew Frank Johnson was in financial difficulty (Tr.152) and that foreclosure by the Bank would likely cause Johnson to lose the equity in the property which existed over and above the amount of the $150,000.00 first lien. It is absolutely untrue and completely lacking in evidence for appellant to state that the Bank was in a precarious situation in collecting its loan by foreclosing on its collateral. Appellant filed its Notice of Default against the property on March 30, 1978, setting forth the unpaid balance of $73,591.87 (R.12), giving credit to Johnson for the $75,000.00 which had been applied on the loan.

When Hintze received the check for $50,000.00, he instructed his office "to hold the check until Frank brought in the rest of the money" (Tr.154)

That's why the check was not cashed as soon as we received it" (Tr.155). The check dated January 25, 1974, was cashed March 1, 1974 (Tr.137). Mr. Hintze, on cross-examination by counsel for the appellant, stated:

> No way do we release when we've still got a loan outstanding (Tr.162).
>
> * * *
>
> What would prohibit me on a 30-year mortgage saying "payment in full on a monthly statement," and the bank just automatically cashing the check. Does that mean I'm relieved from my mortgage?
>
> Q. Well, maybe.
>
> A. Well, I'll try it then. I'll try it and see.
>
> THE COURT: I don't think you'd get away with it.
>
> Mr. Garrett: No, I don't either.
>
> The Witness: I don't either. (Tr.164)

Appellant submitted Objections to Findings of Fact and Conclusions of Law and Request for Amendments (R.148), but appellant's request for amendments made no suggestion of any way that the trial court could find that payment of $50,000.00 was consideration for release of the collateral security for $150,000.00. The suggestions in Appellant's Brief (second paragraph at page 25) that somehow there was consideration given to the Bank are ridiculous.

The trial court concluded that there was no consideration given to the Bank to impose any obligation upon it to reconvey the Trust Deed lien upon payment of $50,000.00 only (R.147).

A review of the many Utah cases on accord and satisfaction [1] will show that somebody tried to back out of a definite deal. To enforce the agreement against such party, there had to be a clear agreement and a consideration for such party giving up the balance of his payment.

The following definition from Vol. 1, American Jurisprudence, Accord and Satisfaction, §1, Page 301, succinctly states the rule:

> To constitute an accord and satisfaction there must be an offer in full satisfaction of the obligation, accompanied by such acts and declarations as amount to a condition that if it is accepted, it is to be in full satisfaction, and the condition must be such that the party to whom the offer is made is bound to understand that if he accepts it, he does so subject to the conditions imposed.

If any businessman would reflect a moment on why would any bank release its collateral securing a loan of $150,000.00 upon payment of $50,000.00, it would seem necessary for a title company, or third party to telephone or write to the bank, and confirm such an agreement in writing. We are dealing in this case with a title company, and a bank, two competent capable business entities. The entire difficulty with this case is that the title company wrote a title policy insuring that United American Life had a first lien upon the property (January 23 1974) before it even issued the check (January 25, 1974) without any letter or written confirmation that the Bank would accept such an (unmade) proposal. The ti

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(1) Browning vs. Equitable Life Assurance Society, 94 Utah 532, 72 P.2d 1060; Ralph A. Badger & Co. vs. Fidelity Bldg. & Loan Ass'n, 94 Utah 97, 75 P.2d 669; Bennett vs. Robinson's Medical Mart, Inc., 18 Utah 2d 186, 417 P.2d 761; Hintze vs. Seaich, 20 Utah 2d 275, 437 P.2d 202; Tate's, Inc. vs. Little America Refining Co., 535 P.2d 1228; Sugarhouse Finance Co. vs. Anderson, 610 P.2d 1369.

written confirmation that the Bank would accept such a dubious offer. The title company had represented Frank Johnson on all of his title work at Bloomington and Stansbury (Tr.54). By January, 1974, they had to know that Frank Johnson was in serious financial difficulty. The title company had in its file, letters in writing confirming that Frank Spiecker (Exhibit 38) and Richard Christensen for Capital Thrift and Loan would accept the payments of some $52,000.00 and $50,000.00 respectively as full payment for their respective trust deeds. No explanation has ever been given why the title company dealt so haphazardly with the Bank. It wasn't worth the time to write a letter; it wasn't worth the time for George Robinson, when he delivered the check, to wait and explain that the title company insisted upon obtaining a release of the Trust Deed on the Bar-70 Ranches property, before the check could be cashed by the Bank. Had Mr. Robinson, or the title company, by letter, clearly insisted on a reconveyance, Mr. Hintze testified that "I would have handed (the check) back to the man right then." Q: And said what? A: We will not accept it as full payment." (Tr.156).

Because the trial court found there was no accord and satisfaction, the statute of frauds, pleaded by the Bank was never reached as the decisive point of law in this case. The statute provides:

> 25-5-1. Estate or interest in real property.--No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party

> creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing. (25-5-1 U.C.A. 1953)

It is submitted that the statute of frauds requiring a deed or a mortgage creating an interest in real property to be in writing also requires with equal dignity the surrender of such mortgage, or trust deed to be in writing, subscribed by the party surrendering the same. The machine-stamped endorsement on the back of the check does not constitute a subscribing in writing by the party surrendering its interest in real property. See Conclusion of Law No. 2.

In all of the other cases cited by appellant, such as: Minnesota & Ontario Paper Co. vs. Register & Tribune Co., 219 N.W. 321; Appeal of Crockett, 154 Atl. 180; Richardson vs. Taylor, 60 Atl. 796, there was a letter written which clearly conveyed the intent that the check should not be cashed if the disputed amount involved were not determined to be paid and settled in full.

POINT II

PLAINTIFF'S APPEAL AS TO FAILURE TO FIND ESTOPPEL SHOULD BE BARRED DUE TO PLAINTIFF'S FAILURE TO PLEAD THE SAME.

Plaintiff United American Life is not the real party in interest in this suit. The title company and its underwriter is. By United American Life bringing suit, as the plaintiff, it was able to obtain judgment against Johnson Land Company, Franklin D. Johnson and Glendon E. Johnson, and their wives (R.152), for all damages and indebtedness due to the breach of warranty in the Warranty Deed from Johnsons to the plaintiff on December 1, 1976 (Exhibit 66).

The Green River water rights were so valuable that plaintiff not only wanted a lien of $185,000.00 on the property (Exhibit 43), but three years later it acquired the fee simple title. The title company, because they had issued their previous Trust Deed lien, then insured that plaintiff was the fee simple title owner, without exception as to the Bank's lien, in January, 1977 (Tr.114).

The evidence is without dispute that the Bank made no representations to plaintiff or the title company that it would accept only $50,000.00 and release its lien securing payment of $150,000.00. United American Life had reneged and breached its commitment to purchase the loan from the Bank, when the loan was initially made (Exhibits 5, 18 and 20; Tr.25). The Bank had no knowledge that the $50,000.00 check (Exhibit 75) represented funds which were sent to the title company by plaintiff as a part of the refinancing deal. Plaintiff (not Frank Johnson) wanted to obtain the first lien on the Bar-70 Ranch property, and Frank Johnson "agreed to try and get it for them" (Tr.52).

Plaintiff knew very well that the Bank would not reconvey its $150,000.00 collateral for payment of $50,000.00 by them. So, plaintiff sent the money to the title company to see if $50,000.00 would pay off $150,000.00. With this history of plaintiff putting Frank Johnson on the spot to see if he could get a first lien for them, and the Bank going unsecured, it is galling for plaintiff-appellant to state (at page 29) in its Brief:

> 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.

This is the exact opposite of the truth, and testimony in this case. No estoppel was pleaded, which the trial court noted, at the conclusion of the tr (Tr.174).

No representations were ever made by the Bank to the plaintiff. The Bank didn't even know in January, 1974, that plaintiff was involved in the deal. The trial court stated " . . . there's nothing in the evidence from which the Cou can find that the Bank was aware of the refinancing arrangements that Mr. Johns was making through United, or aware that the Title Insurance Agency was going be the disbursing agency and therefore that they misled anybody, knowing wha the facts were. . . . There was no record that the bank had any knowledge in this, and therefore misleading based on the knowledge they had. . . .

"There very might possibly be some estoppel provision come in if they suffered a loss as a result of somebody else's misconduct. But we can't get into that since Title Insurance Agency is not a party to this particular suit . . . (Tr.175).

"So therefore the Court concludes this does not constitute a conditio delivery. Had it been shown that the Bank knew of this, was aware of it, looked at it and said, 'All right. We'll take it then. Fine. We've got a conditional delivery.' But otherwise there's nothing in the evidence to show that that was brought to the attention of the authorities. Well, I don't want to speculate how it was done, because there is nothing in the evidence how it got in except it was done by mistake as far as the Bank was concerned" (Tr.176-179). The Court should read all of the trial court's remarks, which constitute his verbal findings

just the same as formal later written findings. Some of the remarks have been omitted for the sake of brevity.

If the plaintiff, or the title company had sent a letter with the check, stating clearly their intent to Wayne Hintze, who they knew was the only officer of the Bank with authority to release the collateral, they would have immediately received their money back. As can be seen from Exhibits 17, 18, 19 and 20, the plaintiff had no compunction in writing directly to Mr. Hintze in 1971, when it came to a matter of informing the Bank that United American Life would not honor the commitment to purchase the loan. But, when the delicate task of getting the Bank to release for $50,000.00 came up, they were unwilling to telephone, write or approach Wayne Hintze directly.

The money ($50,000.00) which was paid to the Bank was Frank Johnson's proceeds of the new loan refinance agreement made with plaintiff, pursuant to the Loan Modification Agreement (Exhibit 44). The money did not belong to the title company, nor to United American Life. The argument concerning estoppel is made as though the title company has already sustained a loss because it parted with $50,000.00 of its own funds in reliance upon a promise to release, made by the Bank. This is not so. The loss to the title company is because it wrote a title policy first insuring that plaintiff had a first lien on the premises on January 23, 1974, then insuring that plaintiff was the owner of the property and that the Bank no longer had any lien thereon.

If the title company had demanded the return of the money at any time, prior to suit, they would have received it, because the Bank still had a

first lien on sufficient valuable collateral to pay the loan. The Complaint did not seek return of the money, because had the Bank returned the money, the loan balance with accrued interest would have been that much more, and the Bank would have foreclosed its first lien. The money really belonged to Frank Johnson, and he never demanded its return.

The plaintiff tried to pull a fast one on the Bank. The plaintiff had reneged on its commitment to purchase this loan (Exhibits 18 and 20), as it had on many others, and it knew that its request for a reconveyance for 33% payment would have been emphatically denied. Plaintiff may have known of the practice of the title company in immediately issuing its title policies. Plaintiff's title policy was dated and issued January 23, 1974, two days before the check was issued. The check was not cashed until March 1, 1974.

When the title company insured that the plaintiff was the fee simple title owner in January, 1977, they were then ready to take the position in court that the Bank was not secured; that it had no lien. Still, there were no letters to the Bank advising it that any foreclosure would be resisted. Frank Johnson's financial condition was steadily worsening, and the Bank's efforts at collecting on an unsecured debt would have been greatly impaired, but the title company waited to see if the Bank could collect. This failure to notify the Bank that it had lost its lien by cashing the check would have been met in court with a counter claim for damages, estoppel and waiver by the Bank against the title company, for the four years' delay and failure of the title company to demand the return of the money and notify the Bank of the title company's position. In the meantime

(November 11, 1975), Frank Johnson was promising to make payment to the Bank ". . . on a negotiated sale on most of the ranch property and since they are selling to a co-op who are selling their interest on a share basis . . . (Exhibit 63). See also Exhibits 64, 65 and 67 which letters are all written as though the Bank was still a first lien holder on the Bar-70 Ranch.

The overall result is that counsel for the Chicago Title Company chose not to make the title company the plaintiff in this suit. As stated above, plaintiff has judgment against the Johnsons, because of the Warranty Deed running to plaintiff. The Brief argues equitable or promissory estoppel when no representations or promises were made by the Bank, and when the matter was not pleaded or tried on that theory.

There are no other facts relied upon to constitute estoppel, than in the argument that there was an accord and satisfaction. However, accord and satisfaction require an agreement, and consideration where there were none, whereas promissory estoppel is argued as though the element of a clear understanding and an agreement, and consideration (to-wit: the payment of the additional $100,000.00 plus interest) are not necessary. It would be a grave mistake to classify some of the Utah cases seeking the final satisfaction of the debt without full payment, under the legal doctrine of accord and satisfaction, and some cases with exactly the same facts under the heading of estoppel. Could you have a promissory estoppel or conditional delivery and acceptance of a check for $50,000.00 if the secured Trust Deed Note was $150,000.00 and no consideration given for the release of collateral where the debt is liquidated and not in dispute?

CONCLUSION

In conclusion, the law should place the burden on the debtor (or third party) seeking a full and complete satisfaction of a debt, a judgment, an invoice or a trust deed for less than full payment by taking care to put in writing the complete accord and understanding of the parties with a signed acknowledgment by the creditor, as legally binding as a release agreement signed between lawyers. The statute of frauds sought to achieve this when the creation or surrender of any interest in land was involved.

This case was a factual dispute over whether or not an agreement had been reached, and whether or not any consideration was paid for the release of a first lien securing $150,000.00 upon payment of $50,000.00. The trial court ruled against the plaintiff on all issues. The plaintiff-appellant has completely misstated the facts in its Brief on Appeal.

Respectfully submitted,

GREENE, CALLISTER & NEBEKER

Richard H. Nebeker

MAILING CERTIFICATE

I certify that two copies of the foregoing Brief of Respondent were mailed to Edward M. Garrett, attorney for plaintiff and appellant, 144 South 500 East, Salt Lake City, Utah 84102, and two copies were mailed to Franklin D. Johnson, attorney for third party and additional defendants, 79 South State #700, Salt Lake City, Utah 84111, this _____ day of January, 1981.

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