

1981

Stanley Martin Redd, Sheila M. Redd, His Wife;  
Sterling Hardson Redd, Jill D. Redd, His Wife; Paul  
Dutson And Donna Dutson, His Wife v. Western  
Savings & Loan Company : Addition of New  
Authorities To Brief of Respondent

Utah Supreme Court

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Richard W. Giaque and James R. Holbrook; Attorneys for Respondent Neil R. Sabin; Attorney for Appellants

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# FILED

APR 24 1981

IN THE SUPREME COURT OF THE STATE OF UTAH

Clerk, Supreme Court, Utah

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STANLEY MARTIN REDD, )  
 SHEILA M. REDD, his wife; )  
 STERLING HARDSON REDD, )  
 JILL D. REDD, his wife; )  
 PAUL DUTSON and DONNA )  
 DUTSON, his wife, )

Plaintiffs-Appellants, )

v. )

WESTERN SAVINGS & LOAN )  
 COMPANY, )

Defendant-Respondent. )

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ADDITION OF  
 NEW AUTHORITIES TO BRIEF  
 OF RESPONDENT

Case No. 17231

Defendant-respondent Western Savings & Loan Company (Western Savings), pursuant to Rule 75(p)(3), Utah Rules of Civil Procedure, hereby submits additional authorities in support of its position in the above-entitled case.

After the parties submitted their initial appellate briefs to this Court, the Utah Legislature convened and passed H.B. 203. A copy of H.B. 203 is attached hereto as Exhibit "A." H.B. 203 is directly relevant to this case in at least two respects. First, although several of the retro-active aspects of H.B. 203 are questionable as applied to residential property, presently that bill authorizes enforcement of the due-on-sale clause for property having greater than four residential units. See Section 5 of H.B. 203 (enacting § 57-15-5, Utah Code Annotated). In the case at

bar, the property which is the subject of this suit is a 24-unit apartment complex. Therefore, the Utah Legislature has determined by H.B. 203 that Western Savings may rely on the contracts which it entered into with the appellants, and may enforce the due-on-sale provisions therein.

Second, H.B. 203 embodies a public policy determination by the Utah Legislature endorsing Western Savings' arguments herein, at least with respect to the present 24-unit apartment complex, and rejecting the appellants' arguments both that the due-on-sale clause is an unreasonable restraint on alienation as applied to the subject property, and that it may not be used to bring interest rates of loans for such investment property to more current levels.

In addition to H.B. 203, another case recently has been decided which bears directly on the issues before the Court. The case of Krause v. Columbia Savings & Loan Ass'n, Civil No. 80CA0735 (Colo. Ct. App., filed Mar. 19, 1981) held that "due-on-sale" language, similar to that contained in the trust deed and trust deed note between appellants and Western Savings, was deemed to be valid and enforceable and was not an unreasonable restraint on alienation, even though there was no showing of a threat to the lender's security. A copy of Krause v. Columbia Savings & Loan Ass'n, supra, is attached hereto as Exhibit "B."

Pursuant to Rule 73(p)(3), the correcting pages

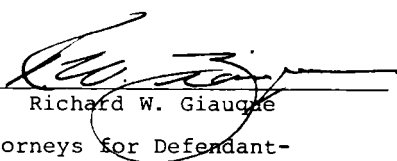
containing the above-described newly uncovered authorities are filed herewith.

DATED this 24th day of April, 1981.

Respectfully submitted,

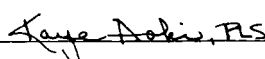
Richard W. Giaugue  
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By   
Richard W. Giaugue  
Attorneys for Defendant-  
Respondent

#### CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Addition of New Authorities to Brief of Respondent; Newly Uncovered Authority for Brief of Respondent, page 9; and Newly Uncovered Authority for Brief of Respondent, page 23, were mailed, postage prepaid, to Neil R. Sabin of Stringham, Larsen, Mazuran & Sabin, 200 North Main Street, Suite 200, Salt Lake City, Utah 84103, this 24th day of April, 1981.

  
Neil R. Sabin, RS

ASSUMPTION OF REAL ESTATE SECURITY INTERESTS

1981

GENERAL SESSION

Engrossed Copy

H. B. No. 203

By Lorin N. Pace

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Jeff Fox

Paul S. Rogers

Robert H. Garff

Dix H. McMullin

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D. Leon Reese

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Clifford S. LeFevre

Mike Daitrich

James J. White

Rob W. Bishop

John E. Smith

Roger F. Rawson

John M. Garr

Alvin S. Merrill

AN ACT RELATING TO REAL ESTATE SECURITY INTERESTS; DECLARING A  
LEGISLATIVE FINDING REGARDING ACCELERATION CLAUSES;  
LIMITING THE SCOPE OF VALIDITY OF ACCELERATION CLAUSES;  
PROVIDING VARIOUS CONDITIONS, EXEMPTIONS, AND LIMITATIONS

WITH REGARD TO ASSUMPTION OF REAL ESTATE SECURITY INTERESTS; PROVIDING FOR FINES AND REMEDIES UPON NON-COMPLIANCE; AND PROVIDING A SEVERABILITY CLAUSE.

THIS ACT ENACTS SECTIONS 57-15-1 THROUGH 57-15-9, UTAH CODE ANNOTATED 1953.

Be it enacted by the Legislature of the State of Utah:

Section 1. Section 57-15-1, Utah Code Annotated 1953, is enacted to read:

57-15-1. The legislature finds that clauses in instruments representing security interests in residential real property which allow a secured party to accelerate or mature an indebtedness secured by property, or increase the interest thereon, upon the sale or transfer of the property or upon assumption of the indebtedness, in certain circumstances, constitute unreasonable restraints on alienation to the detriment of the public welfare.

Section 2. Section 57-15-2, Utah Code Annotated 1953, is enacted to read:

57-15-2. Subject to the limitations and exceptions provided for in this chapter, any provision in an instrument in existence before or after the effective date of this act representing a security interest in real estate is unenforceable as an unreasonable restraint upon alienation if the provision allows or requires the secured party, directly or indirectly, to accelerate or mature the indebtedness secured by the real estate or increase the interest rate specified in the instrument representing the security interest in the real estate, on account of the sale or transfer of all or part of the real estate or on account of the assumption by a new buyer of all or part of the indebtedness, except where the person to whom the real estate would be sold or transferred or by whom the indebtedness would be assumed is reasonably determined by the person holding the security interest to be in such a

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financially insecure position as to substantially impair the lender's prospect of prompt and full payment under the terms of the instrument;

Section 3. Section 57-15-3, Utah Code Annotated 1953, is enacted to read:

57-15-3. For purposes of this act, the lender's prospect of prompt and full payment under the terms of the instrument is substantially impaired when, according to standards normally used by persons in the business of making loans on real estate for original loans under the same or similar circumstances and terms, the person to whom the real estate would be sold or transferred or by whom the indebtedness would be assumed is unable to meet the payment schedule set in the original contract.

Section 4. Section 57-15-4, Utah Code Annotated 1953, is enacted to read:

57-15-4. No fee or charge assessed by a secured party to effect the assumption of an indebtedness secured by an instrument representing an interest in real estate may exceed one per cent of the outstanding indebtedness exclusive of title insurance and recording costs. This fee may be charged only where lender accepts new buyer as obligated party and releases original borrower or borrowers from the obligation.

Section 5. Section 57-15-5, Utah Code Annotated 1953, is enacted to read:

57-15-5. This chapter shall be applicable only to security interests in real property consisting of four or fewer housing units utilized as residential dwelling units other than motels, hotels, or nursing homes.

Section 6. Section 57-15-6, Utah Code Annotated 1953, is enacted to read:

57-15-6. This chapter shall not be applicable to security interests in real estate originated by or for purchase by any

entity established pursuant to chapter 44a, title 63 or by public agencies making noninterest and/or low interest loans and noninterest and/or low interest loans made by private nonprofit corporations for the rehabilitation of existing residential structures.

This chapter shall not be applicable to a person with a security interest in real estate who is not regularly engaged in the business of making real estate loans.

Section 7. Section 57-15-7, Utah Code Annotated 1953, is enacted to read:

57-15-7. If the lender's security interest is substantially impaired, according to the standard of section 57-15-3, the lender may call the entire loan balance due, if that option is provided for in the original loan agreement, though the lender may not charge any penalty or increased interest for prepayment of the indebtedness made as a result of the call.

Section 8. Section 57-15-8, Utah Code Annotated 1953, is enacted to read:

57-15-8. (1) In order to effect an assumption under this chapter the original borrower, or, if the secured party has previously approved, and pursuant to that approval there has been effected, an assumption of the indebtedness secured by an instrument representing a security interest in real estate, the person last approved as an assumer and who has assumed the indebtedness shall give to the lender a written notice and request for assumption. The lender shall either approve or reject a prospective assumer within 30 days after the written notice and request for assumption is received from the original borrower or the party last approved as an assumer. The lender may refuse to release the original borrower or the party last approved as an assumer and who has assumed if the secured party has previously approved the assumption of the indebtedness,



from liability for the payment of the indebtedness to be assumed. With respect to any transfer involving an assumption effected after the effective date of this act, if the written notice and request for an assumption is not timely made before a transfer or within 90 days after transfer, the lender may call the entire loan balance due without a determination that the security interest is substantially impaired, if that option is provided for in the original loan agreement.

(2) The lender shall provide the original borrower or, if the indebtedness has been assumed with the previous approval of the lender, the person last approved with a statement of loan condition within 14 days after receipt of written notice and request. The statement shall include the following information: (a) the amount of the unpaid balance on the secured loan; (b) the interest rate; (c) the amount of the monthly loan installment; (d) the date or dates any real estate taxes and special assessments were last paid; (e) the amount of hazard insurance in effect if that information is contained in the records of the lender; and (f) the amount of any impound balance reserve for payments of taxes, special assessments, and insurance.

Section 9. Section 57-15.8.5, Utah Code Annotated 1953, is enacted to read:

57-15.8.5. Notwithstanding the provisions of sections 57-15-2 and 57-15-4, a lender or secured party may accelerate or mature an indebtedness upon assumption of that indebtedness if:

(1) A written agreement with, or a written instrument executed by, the obligor on the indebtedness allows the secured party or lender to accelerate or mature the indebtedness and/or increase the interest rate thereon upon assumption of the indebtedness; and

(2) The secured party or lender has offered to accept the assumption without acceleration and without maturing the

indebtedness provided the assumer agree to pay the secured party or lender not more than a 1% assumption fee, a not more than 1% interest rate increase effective as of the date of assumption, whichever is earlier, and a further not more than 1% interest rate increase effective a date five years after the date of assumption, whichever is earlier. Neither of said interest rate increases may cause the total interest rate on the indebtedness to exceed 1% below the weighted average yield of the Federal Home Loan Mortgage Corporation weekly auction for purchases of mortgages secured by residential 1 to 4 family dwellings in effect on the date of the increase; and

(3) The assumer has refused to consent to such assumption fee and interest rate increases.

As used in this section, the term "obligor" shall mean the original borrower or, if the secured party or lender has previously approved, and pursuant to that approval there has been effected, an assumption of the indebtedness, the person last approved as an assumer and who has assumed the indebtedness.

If a determination is made by the federal national mortgage association or by the federal home loan mortgage corporation that it will not purchase Utah mortgage loans because of the effects of this act, and such determination is communicated in writing to the legislature or governor of this state, then this act will not apply, after receipt of such communication, to any mortgages originated after the effective date of this act and sold to the entity making such determination.

Section 10. Section 57-15-9, Utah Code Annotated 1953, is enacted to read:

57-15-9. A lender violating any provision of this act, in addition to any other penalties provided by law, shall be liable to an injured party for actual damages plus all

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reasonable attorney's fees and costs incurred by the injured party because of the violation.

Section 11. Section 57-15-10, Utah Code Annotated 1953, is enacted to read:

57-15-10. If any provision of this chapter, or the application of any provision to any person or circumstance, is held invalid, the remainder of the chapter shall not be impaired thereby.

COLORADO COURT OF APPEALS

No. 80CA0735

DAVID P. KRAUSE, PAMELA KRAUSE, )  
RANDOLPH P. KRAUSE, CLARA K. )  
KRAUSE, CLAYTON PROPERTIES, LTD., )  
a limited partnership, JOHN W. )  
PACHECO, BYRON E. BLAKESLEE, )  
and B. MAXINE BLAKESLEE, )

Plaintiffs-Appellants, )

v. )

COLUMBIA SAVINGS AND LOAN )  
ASSOCIATION, a Colorado )  
corporation, and F. J. SERAFINI, )  
as Public Trustee for the City )  
and County of Denver, )

Defendants-Appellees. )

Appeal from the District Court of the City and County of Denver

Honorable Edward Carelli, Judge

DIVISION II

Opinion by JUDGE VAN CISE  
Pierce and Kelly, JJ., concur

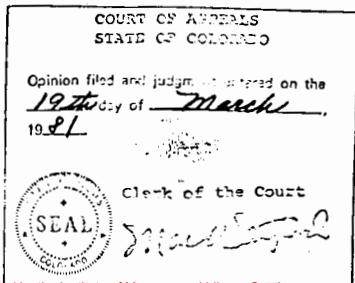
ORDER AFFIRMED

Joseph A. Davies, P.C.  
Joseph A. Davies  
Curtis W. Shortridge  
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Richard W. Breithaupt  
David R. DeMuro  
Denver, Colorado

Attorneys for Defendants-Appellees



Plaintiffs instituted this action seeking a declaratory judgment, damages, and an injunction against enforcement of a "due on sale" provision in a deed of trust securing an indebtedness to defendant Columbia Savings and Loan Association (the lender). From an order denying plaintiff's motion for a preliminary injunction, plaintiffs appeal. We affirm.

The facts are not disputed. In August 1972, plaintiffs Krause (the borrowers) executed a deed of trust to the defendant public trustee for the benefit of the lender. In that deed of trust, borrowers agreed that:

"In the event of the sale or transfer of the real property herein described, at the election of the [lender], the entire balance of the note may become due and payable. If the [lender] agrees that the loan may be transferred and assumed by the purchaser, a reasonable fee for such assumption not to exceed one percent of the principal balance may be assessed."

This is the so-called "due on sale clause."

The borrowers further agreed

"Not to alienate or encumber to the prejudice of the [lender] said real estate . . . and in the event of any sale or transfer of the title to the property herein described, such purchaser or new owners shall be deemed to have assumed and agreed to pay the indebtedness owing [the lender], whether or not the instrument evidencing such sale or transfer expressly provides; and this covenant shall run with said property and remain in full force and effect until said indebtedness is liquidated. . . ."

In January 1979, Randolph P. and Clara K. Krause entered into an "installment land contract" for sale of the property, an apartment building, to plaintiff Clayton Properties, Ltd., (Clayton) for \$284,000. In September 1979, Clayton entered into the same type of contract for sale of the property to plaintiff John W. Pacheco for \$350,000. Pacheco, in October 1979, entered into a similar contract to sell the

property to plaintiffs Byron E. and B. Maxine Blakeslee for \$375,000. All of the plaintiffs except the Krauses (the borrowers) are referred to collectively as the purchasers.

Each of the installment land contracts provided that the contract seller agreed to sell and the purchaser thereunder agreed to buy the property, subject to the 1972 deed of trust (in Clayton's contract), or the January 1979 contract (in Pacheco's contract), or the September 1979 contract (in the Blakeslees' contract). Each specified that the "purchaser does not assume the prior encumbrances on the property, and that seller shall make all payments thereon as they become due and owing, and shall fully discharge said encumbrances prior to or simultaneously with delivery of deed to purchaser." In each transaction, a warranty deed from that contract seller was placed in escrow for delivery to that purchaser when the full purchase price has been paid.

None of the plaintiffs sought out the lender with reference to any attempt to assume the existing deed of trust. Late in 1979 the lender learned of the transaction between the borrowers and Clayton. On December 11, the lender wrote to the borrowers advising them that it was accelerating the balance due on the note and would institute foreclosure proceedings unless application was made for approval of the transfer and the terms and conditions thereof were approved by the lender. No application for approval having been made and payment of the full balance not being received, the lender, in January 1980, instituted foreclosure proceedings by filing with the public trustee a notice of election and demand for sale, alleging that the covenants of the deed of

trust had been violated. Also, it filed with the district court a motion for an order authorizing public trustee's sale pursuant to C.R.C.P. 120, and the plaintiffs received notice thereof.

Plaintiffs commenced this action February 29, 1980. Their motion for a preliminary injunction of the foreclosure proceedings was denied May 13, the court holding that plaintiffs had not established that they lacked a plain, speedy, and adequate remedy at law, or that they would be irreparably harmed if the injunction did not issue, or that there was a reasonable likelihood that they would prevail on the merits of this case. It is that order that is the subject of this appeal.

At oral argument, in response to inquiries as to possible mootness of this appeal, counsel agreed that foreclosure sale has been stayed by stipulation pending the outcome of this appeal.

Plaintiffs challenge all of the grounds on which the trial court based its order. However, we need to address only one -- the likelihood of plaintiffs prevailing on the merits of their case.

This action involves an instrument executed in 1972, and, therefore, the provisions of §38-30-165, C.R.S. 1973 (1980 Cum. Supp.) do not apply.

Although an installment sale may take a different form and more time to complete than an outright sale, the difference is one of procedure and not substance. It is a "sale or transfer of the real property" for purposes of the due on sale clause in the deed of trust. See Carpenter v. Winn, 39 Colo. App. 238, 566 P.2d 370 (1977); Mutual Federal Savings

6 Loan Ass'n v. Wisconsin Wireworks, 58 Wis. 2d 99, 205  
N.W.2d 762 (1973).

The due on sale clause has been held to be valid and  
enforceable and not an unreasonable restraint on alienation.  
Malouff v. Midland Federal Savings Ass'n, 181 Colo. 294,  
509 P.2d 1240 (1973). The rationale of that decision is  
fully applicable to the instant case, and we are bound to  
follow Malouff.

Order affirmed.

JUDGE PIERCE and JUDGE KELLY concur.

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