

1990

Zions First National Bank, a national association v. John A. Dahlstrom, an individual; Marylin H. Dahlstrom, an individual; Alexco, a Utah limited partnership; First Security Bank of Utah, N.A., a national association; United States of America; Robert J. Poulsen, attorney for Planned Outdoor Living; valley Bank and Trust Company, a Utah corporation; State Bank of Southern Utah, a Utah corporation; F.R. Reeder, dba F.R. Reeder Leasing; State of Utah, and First Security Mortgage Company, Pacific Sav-Corp., an Hawaiian corporation, and Pac Service Incorporated, an Hawaiian corporation : Brief of Appellant

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BRIEF

900056CA

IN THE UTAH COURT OF APPEALS

ZIONS FIRST NATIONAL BANK, a
national association,

Plaintiff

vs.

JOHN A. DAHLSTROM, an
individual; MARYLIN H.
DAHLSTROM, an individual;
ALEXCO, a Utah limited
partnership; FIRST SECURITY
BANK OF UTAH, N.A., a national
association; UNITED STATES OF
AMERICA; ROBERT J. POULSEN,
attorney for PLANNED OUTDOOR
LIVING; VALLEY BANK & TRUST
COMPANY, a Utah corporation;
STATE BANK OF SOUTHERN UTAH,
a Utah corporation; F.R.
REEDER, dba F.R. REEDER LEASING;
STATE OF UTAH, and FIRST
SECURITY MORTGAGE COMPANY,
PACIFIC SAV-CORP., an Hawaiian
corporation, and PAC-SERVICE,
INCORPORATED, an Hawaiian
corporation,

Defendants.

Case No. 900056 CA

Category No. 16

BRIEF OF THE APPELLANT

APPEAL FROM A SUMMARY JUDGMENT OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, HONORABLE MICHAEL R. MURPHY

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STATEMENT OF JURISDICTION

This appeal was originally taken to the Supreme Court of the State of Utah pursuant to its original appellate jurisdiction over the order and summary judgment appealed from pursuant to Utah Code Ann. § 78-2-2(j) (Supp. 1989). The judgment appealed from had been entered as a final judgment in accordance with Rule 54(b), Utah R. Civ. P.

Pursuant to the authority vested in the Supreme Court, this appeal was poured over to the Court of Appeals for disposition.

STATEMENT OF NATURE OF PROCEEDINGS

This appeal is from the final order of the Third District Court of Salt Lake County, Utah, granting Defendant-Appellee First Security Bank of Utah, N.A., and First Security Mortgage Company's ("First Security") motion for summary judgment of foreclosure against Defendant-Appellant Alexco's Parcel No. 3, and denying Alexco's Rule 56(f) motion for a continuance to permit discovery.

STATEMENT OF ISSUES

1. Did the Court err in granting summary judgment to First Security on the basis of a release agreement signed by Alexco in light of (a) First Security's failure to render agreed accountings which prevented Alexco from specifically

disputing the dollar amounts claimed by First Security to be due, and (b) discrepancies and unexplained increases and decreases in alleged amounts to be due under the loan account obligations shown by, or legitimately to be inferred from, First Security's own pleadings and affidavits, thus presenting a disputed issue of fact?

2. Did the Court abuse its discretion in denying Alexco's Rule 56(f) motion for continuance to pursue discovery of First Security's books and records related to the loan account obligations in question?

STATEMENT OF THE CASE

A. NATURE OF THE CASE

In May 1986 John and Marylin Dahlstrom filed a Chapter 11 bankruptcy petition. Zions First National Bank and First Security Mortgage Company, the assignee of First Security Bank of Utah, filed secured creditors' claims in the bankruptcy case. Alexco, a Dahlstrom-family limited partnership, had pledged certain real properties as security for various Dahlstrom note obligations to First Security, including its "Parcel 3" for a guaranty and a note it had jointly made with the Dahlstroms. In January 1987 the bankruptcy court lifted the automatic stay to allow the banks to pursue remedies against properties which had been pledged to them as security for the Dahlstroms' obligations. Zions commenced the Third

District Court action below to resolve priority conflicts with First Security and to foreclose against pledged properties. First Security counterclaimed and cross-claimed against the Dahlstroms and Alexco for the foreclosure and sale of collateral given by them.

B. COURSE OF THE PROCEEDINGS

In August 1987 the bankruptcy court confirmed the Dahlstroms' Chapter 11 reorganization plan. That plan included the requirement that various issues raised in the Third District Court action between First Security and Zions be resolved before foreclosure could be pursued with respect to certain of the pledged properties. In May 1989 First Security and Zions settled their disputes and stipulated that First Security could proceed with the foreclosure of Alexco's Parcel 3.

In July 1989 First Security moved for a summary judgment of foreclosure on Alexco's Parcel 3. All parties stipulated that the obligations for which Parcel 3 was conveyed as security were in default, and that the trust deed given by Alexco on Parcel 3 was valid and enforceable. The attorneys' fees and costs issues were also resolved by stipulation. The sole issue contested was the amount of Alexco's indebtedness to First Security under the guaranty and note it had made with the Dahlstroms.

C. DISPOSITION AT TRIAL

The trial court ruled that a Mutual Release and Waiver Agreement entered into by the Dahlstroms, Alexco and First Security in connection with the bankruptcy case precluded Alexco from challenging the dollar amounts claimed in First Security's affidavits, thus permitting a finding that no issue existed regarding the sums due under the guaranty and note obligations secured by Alexco's Parcel 3. Accordingly, First Security's summary judgment motion for the foreclosure and sale of Parcel 3 and entry of a deficiency judgment was granted.

The trial court also denied Alexco's Rule 56(f) motion for a continuance to permit discovery of First Security's books and records to make an accounting of the Dahlstrom and Alexco loan accounts.

D. STATEMENT OF FACTS

Between 1982 and 1984 the Dahlstroms executed a series of notes and a guaranty for First Security, namely: a 1982 note for \$2.4 million; an amendment to that 1982 note increasing it to \$9.3 million; a 1983 note for \$2.38 million; a 1984 note for \$1.4 million; and, a note guaranty for \$512,000. (Clerk's paginated index of original papers filed in the Third District Court, hereafter "P.," 2101-03.) Alexco joined Dahlstroms in the guarantee of the \$512,000 note and as a co-maker of the 1984 note, and pledged its Parcel 3 property as security for those obligations. (P. 2103 and 2106) First Security treated and dealt with the notes and guaranty obligations as

interrelated matters and referred to the loans as the "Dahlstrom loan account." (P. 2396) Consistent with this course of dealing First Security applied almost all the funds it received from payments and from collateral proceeds to the interest and principal on whichever note it chose at its sole discretion without notifying Dahlstroms, and no regular or specific reports were given to Dahlstroms as to the allocations of their payments and the collateral proceeds to principal and interest under the various obligations. (P. 2396) Proceeds of the 1982 note included pre-payments of interest for three years, but First Security never provided Dahlstroms with information as to how or when those loan proceeds were disbursed to pay interest. (P. 2396) Dahlstroms paid quarterly interest at the rate of \$75,000 on the 1983 note up to the time of their bankruptcy filing in April 1986. First Security failed to provide information regarding the calculation of that interest or confirming whether it was, in fact, applied to that note obligation, and as of the date of Dahlstroms' bankruptcy First Security claimed \$414,000 accrued interest was owed on that obligation. (P. 2396-97)

First Security also applied partnership distributions from PSR Development, a Utah partnership, to the Dahlstrom loan account which totalled approximately \$701,000 without accounting to them for allocation of those payments to

principal and interest. (P. 2397 and 2449-50) Other collateral given by the Dahlstroms which First Security allocated to principal and interest under their loan accounts at its own discretion and without the Dahlstroms' participation included approximately \$679,000 cash and property from Mr. Dahlstrom's law firm profit sharing trust, \$246,000 from condominiums, and \$2.749 million as a credit bid on the foreclosure sale of the Dahlstroms' residence and other parcels. (P. 2398) The Dahlstroms were given no information concerning either the calculation of that credit bid or the balance due under the 1982 amended note after application of that credit. They received only an IRS Form 1099 from First Security disclosing that credit sum. (P. 2398-99)

In First Security's pleadings and affidavits filed in this action its claims regarding the amounts of principal and interest due on the Dahlstrom loan account obligations at various dates is disclosed. That information is summarized as follows:

<u>Notes</u>	<u>April 18, 1986¹</u>	<u>November 2, 1987²</u>	<u>June 30, 1988³</u>
1982 Note			\$6,190,606
1982 Note			
Amend.	\$5,076,845 pr.	\$6,783,422 pr.	505,875
	<u>1,644,636 int.</u>	<u>1,690,181 int.</u>	<u> </u>
	\$6,721,481	\$8,473,603	\$6,696,481

1983 Note	<u>\$2,377,986 pr.</u> <u>414,482 int.</u>	<u>\$2,377,986 pr.</u> <u>748,785 int.</u>	<u>\$2,792,468</u>
	\$2,792,468	\$3,126,771	\$2,792,468
1984 Note	<u>\$ 688,841 pr.</u> <u>119,144 int.</u>	<u>\$ 783,042 pr.</u> <u>241,683 int.</u>	<u>\$ 807,986</u>
	\$ 807,985	\$1,024,725	\$ 807,986
Guaranteed Note	<u>\$ 512,287</u> <u>90,961</u>		<u>\$ 603,248</u>
	\$ 603,248		\$ 603,248

1. First Security's amended cross-claims, amounts alleged outstanding as of April 18, 1986. (P. 2107)
2. First Security affidavit, amounts presently outstanding to November 2, 1987. (P. 840)
3. First Security affidavit, amounts presently outstanding including interest at April 18, 1986. (P. 1424)

This information in First Security's pleadings and affidavits reflected increases and decreases in the Dahlstrom loan account obligations which they could not explain, for example: The principal and interest under the 1984 note increased by 94,201 and \$122,539, respectively, between April 1986 and November 1987, and then decreased back to the April 1986 totals as of June 1988. First Security did not explain these changes to the Dahlstroms, and they otherwise do not have an explanation for them. (P. 2400) In April 1986, the principal and interest due on the 1982 amended note was

\$6,721,481. In January 1987 First Security conducted a trustee's foreclosure sale on the Dahlstroms' residence and other parcels at which it credit bid \$2,749,147. That credit should have reduced the amount due under the 1982 amended note, but as of November 1987--only ten (10) months later--First Security claimed the total due was \$8,473,603. Based on the interest rate provided in the amended 1982 note, the interest due should not have been \$1.69 million after only ten months if the sale's \$2.749 million credit bid had been applied. (P. 2400-01) The total due under the 1983 note increased by \$334,00 between the bankruptcy filing date and November 1987, but then decreased by June 30th to the April 1986 amount without any explanation to the Dahlstroms. (P. 2401)

It was against this background of the failure by First Security to report how it had allocated payments and collateral proceeds between principal and interest and the apparently inexplicable and conflicting loan account balance claims in its pleadings and affidavits filed in the on-going state court foreclosure action that the Dahlstroms and Alexco negotiated and signed a Letter-Agreement (P. 2496) and a Mutual Release and Waiver Agreement (P. 2247) with First Security in August 1988. It is this release agreement, which incorporates the Letter-Agreement, that First Security asserts as a bar to Alexco's challenge of the amounts it claims due

under the 1984 note and guaranty which were the subject of its summary judgment motion.

In August 1988 First Security's recent bankruptcy proof of claim identified the Dahlstroms' indebtedness in an "aggregate amount of \$11,530,351.75" without specifying the parts thereof attributable to the specific Dahlstrom loan account notes. (P. 2500-02) John Dahlstrom signed the Letter-Agreement for Alexco on the basis, in part, of his understanding of First Security's representation that an accounting would be rendered of the calculations of the amounts due under each promissory note under the Dahlstrom loan account. (P. 2492) Paragraph 7 of the Letter-Agreement provides that the Dahlstroms would withdraw their objections to First Security's filed bankruptcy claims. (P. 2497) The release agreement incorporated that provision in paragraph 6.D. (P. 2251).

Two months later, in October 1988, First Security filed an amended proof of claim with the bankruptcy court which stated it was being filed ". . . to outline the current state of FSMC's [First Security] claims against the Dahlstroms so that the Dahlstroms can comply with paragraph 7 of the Letter Agreement." (P. 2441) That amended claim set out ". . . corrected amounts of the obligations . . . owed by the Dahlstroms . . . after crediting the Dahlstroms for the collateral liquidated to date" and listed each of the Dahlstrom loan account notes, but only a total figure for

principal and interest was given. (P. 2442) First Security then requested John Dahlstrom to execute a written withdrawal of the objections to its claims asserting that the "corrected amounts" in its amended claim provided the accounting of the amounts calculated for each note. Dahlstrom refused for the reason that the amended claim did not constitute First Security's rendering of the contemplated accounting. (P. 2492)

Thereafter, between April and mid-July 1989, Alexco and First Security negotiated regarding First Security's foreclosure of Parcel 3 and the amount of a sale credit bid to which Alexco might stipulate. In the context of those discussions Dahlstrom again requested an accounting from First Security. First Security declined to provide an accounting beginning from 1982, but did state it would provide such information for the post-bankruptcy period, that is, after April 1986. Approximately a week after the last of those discussions First Security filed its summary judgment motion to foreclose against Alexco's Parcel 3, and no information for that agreed partial accounting had been given to Alexco. (P. 2395)

First Security's memorandum supporting its Rule 56 motion asserted as an uncontested fact that \$807,985 was the amount outstanding as of April 1986 on the 1984 note under the Dahlstrom loan account. (P. 2266) Alexco challenged First

Security's failure to recognize a \$90,540 credit against that obligation for the sale of the Dahlstroms' Hatch Ranching Partnership interest, and First Security filed a subsequent affidavit recognizing a credit for those collateral proceeds and correcting its claim. (P. 2475) Because the accountings agreed to in August 1988 and, again, in 1989 before the Rule 56 motion was filed had not been rendered by First Security, Alexco was forced to resist the motion solely on the grounds that the promised accountings had not been rendered and that the conflicts between the information Alexco did have and First Security's own pleadings and affidavits--including the apparently inexplicable increases and decreases in the amounts it claimed were due--permitted inferences that errors may have been made in allocations between principal and interest which created issues of fact.

Alexco also filed a Rule 56(f) motion requesting that First Security's motion be denied with leave to renew or, alternatively, continuing the hearing to permit Alexco to formally request via discovery the accounting information it needed to rebut First Security's affidavits concerning the amounts alleged to be due under the 1984 note and the guaranty. Alexco's motion was supported by the affidavit of its general partner, John Dahlstrom, which showed the reasons for its inability to present all facts essential to its opposition, that the objects of the inquiry it sought to

pursue by discovery would be substantive and material, that Alexco had made request of First Security for production of agreed accountings without success, and that First Security would not be prejudiced by allowing the continuance sought for discovery purposes. (P. 2415) Alexco also estimated the time needed to complete such discovery and an accounting would be under sixty days, and that Parcel 3 would not be subject to waste or deterioration because it was unimproved.

SUMMARY OF THE ARGUMENT

Alexco was prevented from specifically controverting First Security's affidavit allegations of the amounts due under the guaranty and 1984 note because of the bank's refusal to provide an accounting of the applications to the Dahlstrom loan account of payments and proceeds of collateral as it had represented and agreed would be done. First Security's pleadings and affidavits in the trial court contain both inconsistencies and unexplained increases and decreases in the amounts due under specific notes included in the Dahlstrom loan account which would permit legitimate inferences as to the accuracy of its claims made in support of its summary judgment motion. For these reasons, the court's order granting summary judgment of foreclosure and entry of deficiency judgment was improper.

The court's denial of Alexco's Rule 56(f) motion to permit discovery was an abuse of discretion where the accountings promised by First Security were not made which precluded Alexco from specifically controverting the affidavit statements by the bank's officers regarding the status of the Dahlstrom loan account.

ARGUMENT

POINT I

FACTUAL ISSUES WERE SHOWN
TO EXIST, OR COULD BE
INFERRED, WHICH PRECLUDED
A GRANT OF SUMMARY JUDGMENT

First Security argued that the Mutual Release and Waiver Agreement prohibited a challenge to its foreclosure against Parcel 3 because under the release agreement Alexco had stipulated to foreclosure to permit First Security to liquidate its collateral, had waived all claims with respect to the guaranty and 1984 note, and had waived its right to challenge the balances owed to First Security for the 1984 note and guaranty as set out in its amended claim in bankruptcy filed two months after that release agreement.

The trial court agreed with First Security stating, "It appears to the court that the release agreement is everything First Security claims it is" Alexco disagrees with the court's conclusion for these reasons:

Alexco's general partner signed the Letter-Agreement on the basis of a representation that First Security would render

an accounting of its calculation of the amounts it claimed were due under each of the Dahlstrom loan account promissory notes. Those note obligations comprised almost all of its "aggregate" \$11.5 million claim then on file in the bankruptcy court, and the Letter-Agreement, at ¶7, contemplated Dahlstroms would withdraw their objections to that claim. This withdrawal-of-objections provision was incorporated in the release agreement at paragraph 6.D. Neither the Letter-Agreement nor the release agreement provides that First Security is to file an amended claim in the bankruptcy court explaining its \$11.5 million "aggregate" claim. However, two months later it filed a second amended proof of claim ". . . to outline the current state of FSMC's [First Security] claims against the Dahlstroms so that the Dahlstroms can comply with paragraph 7 of the letter-agreement." (See ¶8, second amended proof of claim, P. 2348) In paragraph 10 of that amended proof of claim First Security sets out "corrected amounts" of the Dahlstrom loan account notes to reflect First Security's disposition of certain collateral described therein. The amended proof of claim also recites the Letter-Agreement's requirement that the Dahlstroms would ". . . withdraw their objections to the claims of First Security . . . filed in the bankruptcy proceedings" (¶8, second amended claim, P. 2438) The filing of this amended claim and its language, cited above, evidences an

acknowledgment by First Security of Alexco's assertion that an accounting was to be made as a condition to Dahlstroms' withdrawal of their objections to First Security's claims as to amounts due under the various Dahlstrom loan account notes. When First Security requested John Dahlstrom to execute a written withdrawal of the filed objections to its bankruptcy claims on the basis that the amended proof of claim and its "corrected amounts" constituted the promised accounting he refused to do so. Requests by the Dahlstroms and Alexco for the accounting, and First Security's acknowledgment that it would provide at least partial accountings, continued to be a part of their discussions thereafter and until July 1989 when First Security filed its motion to foreclose Parcel 3.

It would be improper to permit the trial court's foreclosure and deficiency-judgment order to stand on the basis of the release agreement when Alexco has been deprived of the information which may have enabled it to demonstrate facts disputing the amounts First Security claimed were due. The means and method of doing so, that is, an accounting, was promised to Alexco as an inducement to execute the Letter-Agreement. The release agreement was ". . . governed by and subject to the terms . . . of the Letter-Agreement and the documents executed in connection therewith." (P. 2252) The release agreement also stated: ". . . the documentation of the compromises and settlement arrangements related to the

aforesaid indebtedness [of Dahlstroms and Alexco] is being completed." (P. 2247) The release agreement contains no integration clause; to the contrary, it contemplates the completion of further documentation and delineates conditions precedent to be complied with by the borrowers. (P. 2250-51) Accordingly, Alexco's general partners' averment of the understanding that an accounting would be provided in connection with their withdrawal of objections to the bankruptcy claims would not alter or amend the release agreement and is consistent with the parties' subsequent conduct.

Alexco acknowledges that the release agreement states, ". . . the indebtedness set forth in Exhibit "A" [which identifies the guaranty and 1984 note's original principal amount of \$1.4 million] . . . shall remain valid to the extent necessary to allow for the liquidation of and full recourse against the collateral security . . . for said indebtedness." (§4 release agreement, P. 2249-50) Alexco stipulated for summary judgment purposes that it was in default and that the debt represented by that default validated First Security's pursuit of its trust deed remedy. Alexco did not, however, stipulate that the "corrected amounts" stated in First Security's amended proof of claim for its guaranty and 1984 notes were the actual sums due and owing against which a deficiency judgment could be fixed after sale of its Parcel 3.

Likewise, the waiver language in the release agreement which First Security invokes as a bar to Alexco's challenge of the balances it claims are due appears to waive claims for acts associated with the original "transactions" described in the agreement's Exhibit "A." (¶1, release agreement, P. 2247-48) Exhibit "A" merely identifies the guaranty and 1984 note by name and recites the note's original principal amount. (P. 2255) First Security asserts this waiver in a belief that Alexco claims it is guilty of misconduct or improprieties. Alexco makes no claims, as such, but asserts that the waiver invoked by First Security does not have the effect of stipulating that the sums set out in First Security's amended bankruptcy claim cannot be inquired into for accuracy as to the allocations between interest and principal of the payments and collateral proceeds applied to the Dahlstrom loan account notes.

First Security's memorandum supporting its summary judgment motion contained an error regarding the amount due under the 1984 note perpetuated from a bank officer's prior affidavit. Alexco was not prepared to stipulate that other clerical errors had not been made in calculating the amounts First Security set out in its amended proof of claim in bankruptcy, particularly in light of the long and complex history of the Dahlstrom loan account.

Alexco's description of the apparent inconsistencies and the unexplained increases and decreases in some of the Dahlstrom loan account notes, including the 1984 note at issue, is set out in the Statement of Facts to show that inferences can legitimately be drawn from First Security's own pleadings and affidavits that the balances it claimed Alexco owed are open to question. It is held that where a moving party's own affidavits show unresolved issues of material fact summary judgment may not be entered, even if responsive affidavits are not filed. Frisbee v. K & K Construction Co., 676 P.2d 387 (Utah 1984).

POINT II

THE COURT ABUSED ITS DISCRETION IN DENYING ALEXCO'S RULE 56(f) MOTION

Rule 56(f) motions should be treated liberally unless dilatory or lacking in merit. Cox v. Winters, 678 P.2d 311 (Utah 1984). In Cox the plaintiff had served discovery and no response had been served before defendant filed a motion to dismiss. On appeal the Supreme Court reversed the grant of the motion (treated as a summary judgment motion) stating the discovery should have been completed as responses had not been afforded. The Cox court stated:

The granting of the motion for summary judgment was premature because Kimball's discovery was not then complete. It was the information sought in the proceedings for discovery, which Kimball claimed could further infuse the issues with facts sufficient to defeat his motion for

summary judgment, . . . whether such would be the case cannot [sic] be determined, because such facts, if they exist, were not allowed to be discovered.

678 P.2d at 313.

Cox is distinguishable in that Alexco had not served discovery upon First Security before the Rule 56 motion was filed. However, only one week before First Security agreed to give Alexco an accounting in connection with negotiations for a stipulation as to the conduct of a foreclosure sale and the amount of a credit bid. (P. 2395) As of the motion's filing that information had not been produced. So, although Alexco was not "in the midst of discovery" when First Security's motion was filed, as was the situation in Cox, accounting information promised by First Security in 1988 and, again, in 1989 had not been produced and the rationale of Cox is directly analogous.

While Alexco was negotiating with First Security regarding foreclosure of Parcel 3 in the amount of a credit bid at the trustee's sale, First Security and Zions Bank were negotiating a resolution of their conflicting priority claims in collateral given for the Dahlstrom and Alexco obligations. The banks executed a settlement stipulation in May of 1989 (P. 2212-31), and First Security served its summary judgment motion against Alexco just days before the court approved that settlement. (P. 2243 and 2359) That settlement accomplished

a division between the banks of all the remaining Dahlstrom and Alexco collateral, and in light of First Security's refusal to render the accountings the filing of the motion resulted in the frustration of Alexco's legitimate interest in defending First Security's potential deficiency-judgment claims. Alexco would assume that in reaching their settlement Zions Bank and First Security must have compiled and analyzed the very information it thought it would obtain from First Security. Accordingly, First Security's production of that accounting information should have been no burden.

Alexco's affidavit in support of its Rule 56(f) motion described the facts an accounting would produce and showed their materiality, it showed that the time to accomplish that discovery and accounting would not unreasonably delay the proceedings and it demonstrated that the continuance requested to pursue discovery would pose no oppression or prejudice on First Security. (P. 2404-05) Alexco's affidavits also showed good and sufficient reasons for not being able to present all facts crucial to its opposition to First Security's summary judgment motion, specifically, its failure to obtain accountings. (P. 2395 and 2492)

By denying Alexco's Rule 56(f) motion the trial court effectively precluded it from defending First Security's deficiency judgment claims. First Security submitted no evidence disputing Alexco's claims that First Security agreed


to give accountings. First Security refused to furnish that information and, instead, filed its summary judgment motion at the same time it was securing court approval of the settlement with Zions Bank--without notice to Alexco--which settlement made pursuit of foreclosure against Parcel 3 possible under the Dahlstroms' bankruptcy reorganization plan.

CONCLUSION

The trial court's order granting First Security's summary judgment against Alexco should be reversed.

RESPECTFULLY SUBMITTED this 20th day of August 1990.

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CERTIFICATE OF SERVICE

I hereby certify that four (4) true and correct copies of the foregoing Brief of the Appellant were served on each party this 20th day of August 1990 by mail, postage prepaid, addressed as follows:

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