

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 Appellee

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Utah Court of Appeals
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BRIEF

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DOCKET NO. 900056-CA IN THE UTAH COURT OF APPEALS

ZIONS FIRST NATIONAL BANK, a
national association,

Plaintiff,

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 & 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.

BRIEF OF APPELLEE

Case No. 900056 CA

Category No. 16

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

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First Security

IN THE UTAH COURT OF APPEALS

ZIONS FIRST NATIONAL BANK, a	:	
national association,	:	
	:	BRIEF OF APPELLEE
Plaintiff,	:	
	:	
v.	:	
	:	
JOHN A. DAHLSTROM, an	:	Case No. 900056 CA
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,	:	Category No. 16
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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.	:	

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STATEMENT OF JURISDICTION

The Utah Supreme Court had original jurisdiction of this appeal pursuant to Utah Code Annotated §78-2-2(3)(j) (Supp 1989). Pursuant to Rule 42 of the Utah Rules of Appellate Procedure, this appeal was transferred to the Utah Court of Appeals for disposition.

STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court properly granted summary judgment in favor of First Security Bank of Utah, N.A. and First Security Mortgage Company (collectively "First Security"), based on the Release Agreement voluntarily signed by Alexco, which allowed First Security to foreclose Parcel 3 owned by Alexco.

2. Whether the trial court abused its discretion in denying Alexco's Motion for Continuance pursuant to Rule 56(f) of the Utah Rules of Civil Procedure.

STATEMENT OF CASE

In 1984, Alexco, a Dahlstrom family limited partnership ("Alexco"), and John and Marilyn Dahlstrom ("the Dahlstroms") executed and delivered to First Security a guaranty and a revolving note. To secure payment of the guaranty and note, Alexco executed a trust deed that encumbered, among other property, a one and one-half acre parcel of real property located in the Olympus Cove area of Salt Lake County known in this case as "Parcel 3."

After First Security had commenced an action to foreclose its trust deed encumbering Parcel 3, Alexco, the Dahlstroms, and First Security entered into a Mutual Release and Waiver Agreement. Pursuant to the terms of that release agreement, Alexco agreed that the obligations of Alexco evidenced by the guaranty and the note were valid and enforceable to the extent necessary to foreclose and liquidate the collateral given by Alexco as security for the obligations. However, First Security's ongoing attempt to foreclose judicially its trust deed encumbering Parcel 3 was met with unexpected opposition from Alexco.

On or about July 21, 1989, First Security filed a Motion for Summary Judgment against Alexco and other parties seeking the foreclosure of the First Security trust deed encumbering Parcel 3. Alexco filed a brief opposing First Security's Motion for Summary Judgment and made a Motion for Continuance pursuant to Rule 56(f) of the Utah Rules of Civil Procedure. Judge Michael Murphy of the Third Judicial District Court for Salt Lake County granted First Security's Motion for Summary Judgment and Alexco has filed this appeal.

STATEMENT OF FACTS

1. On or about November 1, 1984, Alexco and the Dahlstroms executed and delivered to First Security that certain Continuing and Unconditional Guaranty ("the Guaranty"), guaranteeing payment of the obligations of Tracy Bancorp and of Trabanc under that certain Term Commercial Credit Note dated

November 1, 1984, in the original principal sum of \$512,287.42 (the "Guaranteed Note"). On or about December 31, 1984, the Dahlstroms and Alexco (with others) made, executed and delivered to First Security that certain Revolving Commercial Credit Note (the "1984 First Security Note") in the original principal amount of \$1,400,000.00. See Affidavit of Mark D. Howell, ¶ 5, dated November 6, 1987 (the "Howell Affidavit"), Record at p. 836.

2. To secure payment and satisfaction of their obligations under the Guaranty and the 1984 First Security Note, the Dahlstroms and Alexco made, executed, and delivered to First Security that certain Trust Deed with Assignment of Rents (the "1984 First Security Trust Deed") dated December 31, 1984, and recorded on December 31, 1984, as Entry No. 4034005 in Book 5618 at Pages 3430, et seq. with the Salt Lake County Recorder, which encumbered real property located in Salt Lake County, including the one and one-half acre parcel owned by Alexco and known in this case as "Parcel 3." See Howell Affidavit, ¶ 11, Record at p. 838.

3. The Dahlstroms and Alexco are in default under the terms of the Guaranty and the 1984 First Security Note for failure to make payments when due. See Supplemental Affidavit of Mark D. Howell, ¶ 3, dated June 30, 1988 (the "Howell Supplemental Affidavit"), Record at p. 1424.

4. On April 16, 1986, the Dahlstroms filed a petition for relief under Chapter 11 of the Bankruptcy Code. See Affidavit of John A. Dahlstrom, dated August 9, 1989 (the "Dahlstrom Affidavit"), Record at p. 2410.

5. First Security filed a proof of claim with the Bankruptcy Court. See Dahlstrom Affidavit, Record at p. 2410.

6. On or about January 13, 1987, Zions First National Bank ("Zions"), initiated this case to resolve priority conflicts with First Security regarding various collateral, including Parcel 3. See Complaint, Record at pp.2-86.

7. Pursuant to a Second Supplemental Counterclaim and Second Supplemental Cross-Claims, dated June 23, 1988, First Security counterclaimed against Zions and cross-claimed against Alexco for the foreclosure of First Security's trust deed encumbering Parcel 3, which secured the Guaranty and the 1984 First Security Note. See Record at pp. 2121-2123.

8. On or about August 1, 1988, Alexco, the Dahlstroms, and First Security entered into a Mutual Release and Waiver Agreement (the "Release Agreement"). See Second Supplemental Affidavit of Mark D. Howell, ¶ 3, dated July 19, 1989 (the "Howell Second Supplemental Affidavit"), Record at p. 2245.

9. The Release Agreement was approved by each of the limited partners of Alexco. See Howell Second Supplemental Affidavit, ¶ 4, Record at p. 2245.

10. Pursuant to the Release Agreement, Alexco agreed that the obligations of Alexco evidenced by the Guaranty and the 1984 First Security Note are valid and enforceable to the extent necessary to foreclose and liquidate the collateral given by Alexco as security therefor, including without limitation all real

property located in Salt Lake County (which includes Parcel 3). See Release Agreement, ¶ 4, Record at p. 2328.

11. Pursuant to the Release Agreement, First Security expressly waived any right to seek deficiency judgments against any of the non-general partners of Alexco (the Dahlstroms' children) arising out of the obligations owed by Alexco to First Security and waived any nondischargeability claims against the Dahlstroms as the general partners of Alexco in the Dahlstroms' bankruptcy case. See Release Agreement, ¶ 4, Record at p. 2329.

12. Notwithstanding the terms of the Release Agreement, Alexco filed an answer purporting to challenge the right of First Security to foreclose its trust deed encumbering Parcel 3. See Record at pp. 2207-2211.

13. On or about May 17, 1989, Zions, who had previously filed an answer, stipulated pursuant to the terms of a Stipulation and Settlement Agreement to First Security's foreclosure of the trust deed encumbering Parcel 3. See Record at pp. 2212-2231.

14. On or about July 21, 1989, First Security filed a Motion for Summary Judgment against Alexco, Zions and other parties to complete the foreclosure of the trust deed encumbering Parcel 3 (the Eighth and Ninth Claims for Relief in First Security's Second Supplemental Counterclaim and Supplemental Cross-Claims). See Record at pp. 2241-2243.

15. The balances outstanding under the Guaranty and the 1984 First Security Note as of the date of the hearing to consider

First Security's motion for summary judgment was \$603,248.86 and \$717,446.50 respectively (which does not include interest accrual since the filing of the Dahlstroms' bankruptcy case). See Affidavit of Mark J. Carpenter, Record at p. 2475.

16. Again, notwithstanding the Release Agreement, Alexco filed a brief opposing First Security's Motion for Summary Judgment and made a Motion for Continuance pursuant to Rule 56(f) of the Utah Rules of Civil Procedure. See Record at pp. 2385-2393; 2415-2442.

17. On or about October 31, 1989, Judge Michael Murphy of the Third Judicial District Court for Salt Lake County ruled as a matter of law that First Security was entitled to summary judgment based on the terms of the Release Agreement ("the Release Agreement is everything that First Security claims it is"), permitting the foreclosure of Alexco's interest in Parcel 3¹. Judge Murphy denied Alexco's Motion for Continuance. See Record at pp. 2507-2509.

SUMMARY OF ARGUMENT

Pursuant to the terms of the Release Agreement, Alexco, the Dahlstroms and First Security, after negotiations, settled

¹A Sheriff's sale was held on January 9, 1990, at which Parcel 3 was sold for \$130,000 pursuant to the Third Judicial District Court's decree of foreclosure and order of sale.

and compromised various issues and disputes to avoid ongoing litigation. Releases of liability and nondischargeability were provided for the benefit of the Dahlstroms and the other partners of Alexco. In exchange, First Security was given certain assurances, including the right to foreclose its trust deed encumbering Parcel 3. Alexco has violated the Release Agreement by challenging First Security's foreclosure action. Alexco's claims are contrary to (or have been waived by) the Release Agreement. Even if the Court was inclined to ignore the Release Agreement, Alexco's claims are irrelevant, contrary to facts of record, and totally without specific evidentiary support. Furthermore, Alexco's attempt to rewrite the Release Agreement to receive the alleged "accounting" contradicts the terms of the Release Agreement and violates the parol evidence rule. Finally, in denying Alexco's Rule 56(f) motion, the trial court did not abuse its discretion; it only fulfilled the parties intent as expressed in the Release Agreement -- to end litigation once and for all.

ARGUMENT

I. THE STANDARD OF REVIEW OF SUMMARY JUDGMENT ON APPEAL.

Upon review of a grant of a motion for summary judgment, the appellate court applies the same standard as that applied by the trial court. Briggs v. Hocomb, 740 P.2d 281 (Utah Ct. App. 1987). Therefore, the appellate court should affirm the granting of summary judgment where it appears there are no genuine issues

of fact, or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law. Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636 (Utah Ct. App. 1988).

Applying this standard to this case, summary judgment was properly granted by the trial court because under the express terms of the Release Agreement First Security was entitled to judgment as a matter of law, and Alexco failed to genuinely controvert the facts presented by First Security.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS A MATTER OF LAW BECAUSE ALEXCO'S CLAIMS ARE BARRED BY THE TERMS OF THE RELEASE AGREEMENT.

It is undisputed that the Dahlstroms and Alexco negotiated and executed the Release Agreement with First Security. Pursuant to the Release Agreement, First Security granted broad releases to the Dahlstroms and their children (the general and limited partners of Alexco). First Security waived any right to seek individual judgments against any of the non-general partners of Alexco (the Dahlstroms' children) on the obligations owed by Alexco to First Security and waived any nondischargeability claims against the Dahlstroms as the general partners of Alexco in the Dahlstroms' bankruptcy case. In addition, First Security released its claim to certain collateral owned by the Dahlstroms. In exchange for these releases, the Dahlstroms and Alexco agreed to permit First Security to foreclose its interest in Parcel 3.

In direct contradiction to the Release Agreement, Alexco has denied the right of First Security to complete its foreclosure of Parcel 3. Although the liability of the partners of Alexco has been waived by First Security, they insist that First Security must answer suppositions and conjecture as to conduct by First Security under various credit obligations entered into by Alexco and the Dahlstroms. The terms of the Release Agreement, as Judge Murphy recognized, do not allow Alexco and the Dahlstroms to deny First Security's right to foreclose its trust deed encumbering Parcel 3.

A. The Dahlstroms And Alexco Stipulated To The Foreclosure Of Parcel 3.

In the Release Agreement and to settle the pending litigation between the parties, the Dahlstroms and Alexco expressly agreed to the foreclosure of Parcel 3:

Notwithstanding the foregoing and anything to the contrary in this Agreement, First Security shall retain all rights which it presently has as an undersecured creditor and administrative claimant in the Dahlstroms Bankruptcy Case, and the indebtedness set forth in Exhibit "A" [which list includes the Guaranty and the 1984 First Security Note] and any other existing indebtedness of the Borrowers [including the Dahlstroms and Alexco] to First Security shall remain valid to the extent necessary to allow for the liquidation of and full recourse against the collateral security (or the assets otherwise assigned to First Security pursuant to the terms of the Letter Agreement) for said indebtedness. Such collateral shall include, without any limitation, the interests in Hatch Ranching assigned absolutely to First Security pursuant to the Letter Agreement, the real property in Salt Lake County, the Pacific Sav-Corps notes (if any), the E.R.I. stock, and the Trabanc stock.

See Release Agreement, Record at p. 2328. (Emphasis added). This provision prohibits Alexco from continuing to litigate First Security's right to foreclose Parcel 3.

B. The Dahlstroms And Alexco Waived All Claims With Respect To The Guaranty And The 1984 First Security Note And Other Obligations Owed To First Security.

Pursuant to the terms of the Release Agreement, the Dahlstroms and Alexco have also expressly waived and released any direct or indirect claims against First Security regarding the Guaranty and the 1984 First Security Note, which are the Alexco obligations secured by Parcel 3:

Borrowers [including the Dahlstroms and Alexco] and each of them, jointly and severally, do hereby waive, release, relinquish and forever disavow any and all claims, interests, rights, remedies, and causes of action assertable, directly or indirectly, against First Security or any of its agents, employees, officers, advisers, directors or consultants (whether or not any of the same were acting within or without the scope of their employment, agency or engagement with First Security) for any acts, actions, failures to act, representations, commitments, statements, warranties, failures to disclose or agreements, including without limitation any such conduct arising out of or in connection with (directly or indirectly) or otherwise contemplated or associated in any way with the transactions that are described on Exhibit "A" attached hereto and incorporated herein [which list includes the Guaranty and the 1984 First Security Note]. The waiver, release, relinquishment and disavowal herein made shall be construed broadly in favor of First Security, its agents, attorneys, employees, officers, advisers, directors and consultants, and any ambiguity, doubt or question as to applicability of the same shall be resolved in all events in favor of waiver, release, relinquishment and disavowal. Borrowers agree that the waivers, releases, relinquishments and

disavowals herein granted shall be with respect to claims, interests, rights, remedies and causes of action known or unknown, matured or unmatured, contingent or direct, existing or hereafter arising. Borrowers' agreements herein are made without reliance upon any warranty, representation or statement of First Security with respect to any of the matters herein.

See Release Agreement, Record at pp. 2326-2327 (emphasis added).

The clear intent of the Release Agreement was to settle any remaining litigation between Alexco and First Security. Despite this intent, Alexco continues to ignore the terms of the Release Agreement and speculates as to alleged misapplications of loan payments and other improprieties by First Security. Alexco insists that these questions must be litigated before First Security can foreclose Parcel 3. Alexco breaches the Release Agreement by making these allegations. Any claim expressed in or implied by Alexco's pleadings that First Security misapplied or misallocated loan payments or the proceeds of collateral has been waived².

² Pursuant to the terms of the Release Agreement, the Dahlstroms also agreed to withdraw their objections to the claims of First Security filed in the Dahlstroms' bankruptcy proceedings. First Security's Second Amended and Supplemental Proof of Claim (which was filed to outline the current status of First Security's claims so that the Dahlstroms could comply with this obligation) sets forth the following claims with respect to the obligations at issue in this appeal:

Guaranteed Note:	\$603,248.86
1984 First Security Note:	\$717,446.50

See Dahlstrom Affidavit, Record at p. 2414. Alexco has waived any right to contest or challenge these claims.

In a further attempt to penetrate the express language in the Release Agreement, Mr. Dahlstrom filed a last minute affidavit at the hearing to consider First Security's summary judgment motion, in which Mr. Dahlstrom claims that representations regarding an "accounting" by First Security had been made at the time the Release Agreement was signed. See Supplemental Affidavit of John A. Dahlstrom, Record at p. 2492. And yet, the Dahlstroms and Alexco agreed in the Release Agreement that the releases provided in favor of First Security were "made without reliance upon any warranty, representation or statement of First Security" See Release Agreement, Record at p. 2327. Once again, Mr. Dahlstrom's claim contradicts the terms of the Release Agreement.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THERE ARE NO GENUINE ISSUES OF MATERIAL FACT.

Alexco has attempted to create a series of questions and innuendo in an attempt to obscure the rights of First Security to foreclose Parcel 3. As stated previously, Alexco's speculations regarding First Security misdeeds have been waived and released in the Release Agreement and the right to foreclose affirmed. Even if the Court were inclined to disregard the express terms of the Release Agreement, Alexco's speculations are irrelevant to First Security's motion and are not supported by any specific evidentiary facts.

A. Any Claims Regarding Obligations Other Than The 1984 First Security Note And The Guaranty Are Irrelevant.

In its motion for summary judgment, First Security sought the foreclosure of Parcel 3, which secures Alexco's obligations under the Guaranty and the 1984 First Security Note. Alexco does not question or challenge the amounts advanced by First Security under the 1984 First Security Note or the Guaranty. Nonetheless, in an attempt to obfuscate the limited nature of First Security's motion, Alexco has made allegations regarding obligations not addressed or at issue in the foreclosure of Parcel 3. Alexco asserts that the entire history of the Dahlstroms' loan portfolio with First Security must be examined and litigated before First Security may liquidate, as permitted by the Release Agreement, the collateral securing the 1984 First Security Note and the Guaranty.

For example, Alexco claims that it is entitled to an accounting regarding interest paid on the 1982 and the 1983 First Security Notes. However, this information has absolutely no bearing on the obligations due under the 1984 First Security Note or Guaranty, and whether First Security is entitled to foreclose its trust deed encumbering Parcel 3. Therefore, such claim is irrelevant to First Security's motion for summary judgment.

As another example, Alexco has claimed that there were partnership distributions from PSR Development in August, 1983 and September, 1984, for which First Security has not accounted. These distributions predated both the Guaranty (November 1, 1984)

and the 1984 First Security Note (December 31, 1984). Again, this "red herring" has no bearing on the foreclosure of Parcel 3.

B. First Security Has Accounted For The Proceeds Received From The Liquidation Of Collateral.

In addition to Alexco's irrelevant references to the 1982 and 1983 First Security Notes, Alexco has claimed that unanswered questions remain regarding collateral such as (1) the liquidation of ERI corporation stock; (2) the credit bid on the foreclosure sale of the Dahlstroms' residence; and (3) the proceeds received from the sale of the Hatch Ranch. Alexco's allegations are misplaced. First Security has accounted for each of the items of collateral from which it has received proceeds. For example:

1. ERI Stock. The credit bid by First Security for the purchase of the ERI Stock was applied to the obligations owed by Mr. Dahlstrom to Central Bank & Trust Company, which represented the first lien against the ERI stock. First Security had acquired the Central Bank loan through the issuance of a letter of credit. None of the proceeds reached the 1984 First Security Note or the Guaranty. See Dahlstrom Affidavit, Record at p. 2412.

2. Foreclosure of the Residence and Parcels 4, 5 and 6. The \$2,749,147.00 credit bid for the purchase of the Residence and Parcels 4, 5 and 6 was applied against the 1982 First Security Note (as amended). Mr. Dahlstrom admits this fact in his affidavit. See Dahlstrom Affidavit, Record at pp. 2400-2401.

3. Hatch Ranch. At the time of the filing of First Security's motion for leave to file its Second Supplemental Counterclaim and Supplemental Cross-Claims, First Security's interest in Hatch Ranch had not been liquidated. Since that time, pursuant to the Release Agreement, the Dahlstroms assigned to First Security their interest in Hatch Ranch for a credit of \$90,540.00. As set forth in the Second Amended and Supplemental Proof of Claim, the \$90,540.00 credit was applied against the 1984 First Security Note. See Dahlstrom Affidavit, Record at p. 2411.

In short, Mr. Dahlstrom makes these and other claims regarding proceeds received by First Security without a stitch of documentation or detailed testimony that any such questions exist or that they have any relevance or bearing on the right of First Security to foreclose its trust deed encumbering Parcel 3. This attempt to unwind the terms of the Release Agreement should not be permitted.

C. Alexco's Claim That The Balances Owed On The 1984 First Security Note And Guaranty Are In Dispute Is Not Supported By Specific Evidentiary Facts.

To avoid a summary judgment motion, the opposing party must set forth specific facts showing there is a genuine issue for trial. Treloggan v. Treloggan, 699 P.2d 747 (Utah 1985). Mere allegations or denial of the pleadings are not a sufficient basis for opposing summary judgment. Hall v. Fitzgerald, 671 P.2d 224 (Utah 1983).

Alexco has not controverted the facts presented by First Security regarding the 1984 First Security Note or the Guaranty. Rather, Alexco has only raised a series of unsubstantiated questions in an attempt to obscure the rights of First Security under the Release Agreement. To avoid summary judgment, Alexco must do more than merely allege that there have been misapplications and improprieties on the part of First Security. Alexco fails to meet its burden in this case.

IV. ALEXCO'S CLAIM THAT IT IS ENTITLED TO AN ACCOUNTING FROM FIRST SECURITY IS CONTRARY TO THE TERMS OF THE RELEASE AGREEMENT AND IS BARRED BY THE UTAH PAROL EVIDENCE RULE.

In an attempt to dodge the effect of the Release Agreement and to find merit in this appeal, Alexco now claims that First Security promised some type of an "accounting" as part of the Release Agreement. The Release Agreement contains no such promise; indeed, the Release Agreement states otherwise. The releases provided by the Dahlstroms and Alexco were "made without reliance upon any warranty, representation or statement of First Security. . . ." See Release Agreement, Record at p. 2327. In any event, Alexco's claim is barred by the Utah parol evidence rule.

A. Evidence Of The Alleged Oral Agreement Between Alexco And First Security For An Accounting Is Barred By The Parol Evidence Rule.

The Utah parol evidence rule provides generally that oral evidence of antecedent understandings and negotiations may not be admitted to vary or contradict the terms of a document unless it is intended to clarify the meaning of ambiguous provisions.

Rowley v. Marrcrest Homeowners' Ass'n., 656 P.2d 414, 417 (Utah 1982); Union Bank v. Swenson, 707 P.2d 663, 665 (Utah 1985). The rule adopts the policy that a written culmination of oral discussions and negotiations, if unambiguous, is far better evidence of the agreement and excludes attempts to admit extrinsic utterances to serve the same purpose for which the writing was prepared. Garrett v. Ellison, 72 P.2d 449, 451-52 (Utah 1937).

In this case, Alexco has not alleged that the express terms of the Release Agreement are ambiguous or unclear. Rather, Alexco asserts that a separate, prior oral agreement existed wherein First Security agreed to render some type of an "accounting." This alleged oral agreement, which contradicts the clear unambiguous terms of the Release Agreement, allowing for the foreclosure of Parcel 3, is precisely the type of agreement the parol evidence rule is designed to exclude from consideration.³

The uniformity of decisions excluding evidence of prior or contemporaneous oral statements in conflict with the terms of written agreements serves to underscore the policy behind the parol evidence rule: the integrity of written documents must be preserved. FMA Financial Corp. v. Hansen Dairy, Inc., 617 P.2d

³The fact that conditions precedent are provided by the Release Agreement does not undermine, as Alexco claims, the "integrating" effect of the Release Agreement. Indeed, the inclusion of expressed conditions only weakens Alexco's claim that an unwritten condition exists. It is apparent that Alexco's supposed desire for an "accounting" did not exist when the conditions to the Release Agreement were negotiated.

327, 329 (Utah 1980). Absent any allegation that the Release Agreement contains provisions to the contrary, the parol evidence rule renders evidence of the alleged agreement that First Security would render an accounting to Mr. Dahlstrom inadmissible. Moreover, where the Release Agreement was the result of negotiations between parties with expertise and business sophistication (Mr. Dahlstrom is an experienced lawyer), a strict application of the parol evidence rule is warranted. See Pinnacle Peak Developers v. TRW Investment Corp., 631 P.2d 540, 547 (Ariz. App. 1980).

V. THE TRIAL COURT PROPERLY DENIED ALEXCO'S MOTION FOR A CONTINUANCE PURSUANT TO RULE 56(F).

In order for an appellate court to reverse the denial of a Rule 56(f) motion, it must be shown that the trial court "abused its discretion." Cox v. Winters, 678 P.2d 311, 315 (Utah 1984). The Utah Supreme Court has held that "a court should deny a motion to continue [pursuant to Rule 56(f)] if the motion opposing summary judgment is dilatory or without merit." Downtown Athletic Club v. Horman, 740 P.2d 275, 278 (Utah App. 1987). The court has also stated that Rule 56(f) motions should not be used as mere "fishing expeditions" for purely speculative facts after sufficient opportunity exists for discovery to be undertaken and the available evidence shows no wrongdoing by the party moving for summary judgment. Id.

Applying these rules to this case, it is apparent that the trial court properly held that Alexco should not be entitled to defer summary judgment under Rule 56(f). See Record at pp. 2507-2509. Rule 56(f) is not applicable in those instances in which the parties have entered into a release agreement intended to eliminate the need for additional litigation. Pursuant to the terms of the Release Agreement it is clear that Alexco and the Dahlstroms agreed that the obligations evidenced by the Guaranty and the 1984 First Security Note are valid and enforceable to the extent necessary to foreclose and liquidate the collateral given by Alexco as security therefor, including without limitation all real property located in Salt Lake County. Moreover, Alexco has asserted no specific evidence which shows any misapplication of collateral proceeds or other improprieties on the part of First Security as to the 1984 Note or Guaranty (which, in any event, have been waived by Alexco). Finally, Alexco had months to undertake discovery in this case to uncover evidence that would support its speculations.

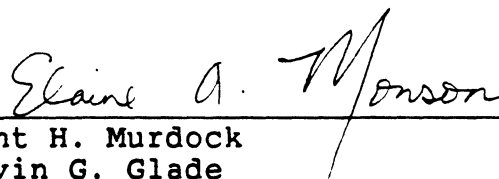
By its Motion for Continuance, Alexco has attempted to protract litigation that violates the Release Agreement in order to "fish" for speculative facts as to improprieties by First Security that do not exist. Certainly Alexco has not shown that Judge Murphy abused his discretion in denying Alexco's Motion to Continue.

CONCLUSION

First Security requests that this Court affirm the trial court's granting of First Security's Motion for Summary Judgment on the foreclosure of Parcel 3.

DATED this 9th day of October, 1990.

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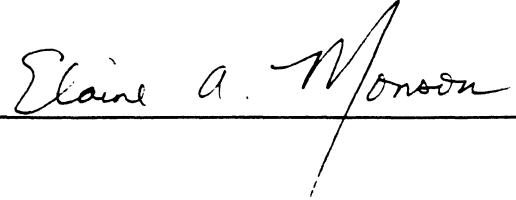
CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of October, 1990, true and correct copies of the BRIEF OF APPELLEE were served by first-class United States mail, postage prepaid, addressed to the following:

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A handwritten signature in cursive script, reading "Elaine A. Monson", is written over a horizontal line. The signature is fluid and extends slightly below the line.

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