

1999

Whitewater Whirlpool Baths and Systems, Inc. v. Barbara R. Summerhays, Ran Co Homes, Inc. and Does 1 through 25 : Brief of Appellant

Utah Court of Appeals

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Bruce D. Jenkins; Attorney for Appellee.

Howard Chuntz; Attorney for Appellant.

Recommended Citation

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FIFTH DISTRICT COURT DIVISION II, STATE OF UTAH

COUNTY OF WASHINGTON, ST. GEORGE DEPARTMENT

WHITEWATER WHIRLPOOL BATHS
& SYSTEMS, INC.,

Plaintiff.

v.

BARBARA R. SUMMERHAYS, RAN
CO HOMES INC and DOES 1 through
25,

Civil No 990500591

Defendants.

IN THE UTAH COURT OF APPEALS

Case No 20000592-CA

BRIEF OF APPELLANT

APPEAL

APPEAL FROM FIFTH DISTRICT COURT, WASHINGTON COUNTY

JUDGE JAMES L. SHUMATE

RanCo Homes, Inc.
P.O. Box 910472
St. George, UT 84790

Howard Chuntz, No. 4208
Attorney for Plaintiff/Appellant
1149 West Center Street
Orem, UT 84057

Bruce D. Jenkins
Attorney for Defendant/Appellee, Summerhays
352 East Riverside Drive, Suite C-4
St. George, UT 84790

Argument priority classification from Utah R. App P 29(b)(15)

FILED
Utah Court of Appeals

DEC 12 2000

Paulette Stagg
Clerk of the Court
R. J.

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JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to 78-2a-3(2)(i) of the Utah Code.

ISSUES FOR REVIEW AND STANDARD OF REVIEW

A. Did the trial court abuse its discretion when it denied plaintiff's Motion to Set Aside Stipulation for Dismissal upon the basis of Rule 60(b)(1)(3)(6) of the Utah Rules of Civil Procedure when said Motion was made on the basis of mistake and/or misrepresentation. (Standard of appellate review is correction of abuse of discretion, Crookston v. Fire Ins. Exch., 860 P.2d 937 (Utah 1993).

B. Did the trial court fail to apply the law of mistake (mutual or unilateral) or the contract requirement of meeting of the minds when it denied plaintiff's Motion to Set Aside the Order Dismissing its Complaint with Prejudice. (Standard of appellate review is correction of error, Orton v. Carter, 970 P.2d 1254 (Utah 1998).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES.

RULES AND REGULATIONS

Rule 60(b) of the Utah Rules of Civil Procedure. (See Addendum at page 44).

Statement of the case:

- a. This appeal is from a final order entered in the Fifth District Court, Washington County.
- b. Plaintiff filed Complaint against defendants, a contractor, and homeowner.
- c. The parties reached what they believed was an agreement, and on belief that

they had performed as promised. stipulated to the dismissal of plaintiff's Complaint with prejudice.

d. Said dismissal with prejudice was signed and entered by the Court on September 14, 1999.

e. Plaintiff filed a Motion to Set Aside the Order Dismissing its Complaint with Prejudice and reinstate its claim against defendants on or about November 9, 1999, after discovering that defendant, RanCo Homes had not performed as it had promised.

f. A non-evidentiary hearing was held before the trial court on May 17, 2000, and the Court denied plaintiff's Motion to Set Aside per Order signed June 2, 2000.

STATEMENT OF FACTS

a. Plaintiff provided materials and performed labor in the construction of a home owned by defendant, Summerhays, at the request of the contractor on the job, defendant, RanCo Homes, Inc., (hereafter RanCo). (See plaintiff's Complaint at paragraph 11, page 2 of the record, page 2 of Addendum).

b. Plaintiff was not paid by either the contractor or the owner and filed a timely mechanic's Lien and timely mechanic's lien Complaint against the property and the defendants. (See plaintiff's Complaint at paragraphs 8 and 15, pages 2 and 3 of the record, pages 2 and 3 of Addendum).

c. Plaintiff and defendants entered into an agreement to dismiss plaintiff's Complaint with prejudice in exchange for plaintiff receiving certain trust deeds and trust deed notes against properties owned by defendant, RanCo. (See Stipulation for

Dismissal, page 19 of the record, page 6 of Addendum).

d. Plaintiff, plaintiff's attorney and RanCo's attorney all understood that the Trust Deed given against Painted Desert Estates, Phase I, Lot 4, was a first position Trust Deed. (See letters of May 11, 1999, July 26, 1999, and Affidavit of Richard A. Nelson at paragraph 7, respectively pages 43-44, 45-46, and 30-31 of the record). (Addendum pages 28-29, 30-31 and 15, 16).

e. Subsequent to the dismissal of plaintiff's Complaint with prejudice, plaintiff learned, through a Notice of Foreclosure, that the aforesaid property had a Trust Deed with priority in time over plaintiff's Trust Deed. (See Affidavit of Howard Chuntz, paragraph 4, at page 26 of the record, page 11 of Addendum).

f. Plaintiff filed a Motion to Set Aside the dismissal with prejudice and reinstate plaintiff's Complaint against defendants in this matter on or about November 9, 1999, on the basis that plaintiff entering into said Stipulation for Dismissal was obtained fraudulently or by mutual mistake of the parties.

g. RanCo filed a Memorandum in Opposition to plaintiff's Motion. (See record at pages 34-46, pages 19-31 of Addendum).

h. Plaintiff filed a Reply Memorandum and supporting affidavits. (See record at pages 47-54, pages 32-40 of Addendum).

i. The Court heard oral argument on plaintiff's Motion on May 17, 2000, and denied the same per Order dated June 2, 2000. (See Order Denying Motion to Set Aside at pages 98-99 of the record, pages 41-42 of Addendum).

SUMMARY OF ARGUMENT

a. Failure to set aside order pursuant to Rule 60(b).

Rule 60(b) of the Utah Rules of Civil Procedure sets forth the basis upon which the trial court may relieve a party from a final order in the furtherance of justice. Plaintiff presented reasons under two of the six allowable subheadings, (1) mistake and (3) fraud, misrepresentation or other misconduct of an adverse party. Upon the facts and circumstances presented in plaintiff's Motion, the Court was required, in the furtherance of justice, to set aside the Order of Dismissal.

b. Failure to apply contract law to the stipulation.

The Stipulation to dismiss plaintiff's Complaint was an agreement to which basic contract principles should have been applied. In order for a contract to be binding, there must be a meeting of the minds with respect to the terms of a settlement agreement or the settlement agreement is not enforceable. In addition, if the parties are mutually mistaken as to the terms of the contract or if one party is mistaken, but the other knew of the mistake and remains silent, or acted with fraudulently affirmative behavior, then the contract must be reformed or rescinded or held to be unenforceable.

ARGUMENT

The trial court's ruling denying plaintiff's Motion to Set Aside contains no findings of fact or conclusions of law. Therefore, plaintiff's arguments on appeal are based upon what it surmises were the trial court's unwritten findings and conclusions.

A. FAILURE TO SET ASIDE ORDER PURSUANT TO RULE 60(b):

Rule 60(b) of the Utah Rules of Civil Procedure states that “on motion and upon such terms as are just, the court may in the furtherance of justice, relieve a party . . . from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud . . ., misrepresentation or other misconduct of an adverse party; . . .” Said Rule further indicates that a motion for the above referred to reasons must be made not more than three (3) months after the order was entered. In the present case, plaintiff’s Motion to Set Aside was made within two (2) months of entry of the Order and set forth facts establishing that plaintiff had made a mistake and/or defendant had misrepresented the terms of the agreement to plaintiff.

Plaintiff filed a mechanic’s lien complaint against RanCo as contractor and Summerhays as owner for unpaid labor and materials provided to Summerhays’ home at RanCo’s request. Thereafter, the attorneys for RanCo and plaintiff entered into settlement negotiations wherein RanCo proposed giving plaintiff trust deed notes secured by trust deeds on real property. RanCo’s attorney’s letter to plaintiff’s attorney dated May 11, 1999, (Addendum pages 28-29), referred to two separate first position trust deeds and trust deed notes. The second letter from RanCo’s counsel to plaintiff’s counsel, dated July 26, 1999, (Addendum pages 30-31), clarifies changes in the agreement with respect to a settlement of a matter not dealing with the lawsuit involving Summerhays and reiterating the agreement already reached between the parties with respect to the debt owing by RanCo to plaintiff with respect to the Summerhays

Complaint. Nothing in the July 26th letter makes any reference to an alteration in the agreement that RanCo would give plaintiff a first position trust deed note and trust deed with respect to the Summerhays debt and plaintiff had no reason to expect that any change was intended.

Despite the expectation on plaintiff's part that it would receive a first trust deed securing the debt owing on the Summerhays Complaint, RanCo delivered a note and trust deed that was not a first position trust deed. Plaintiff did not discover this situation until after the Order Dismissing its Complaint with Prejudice was signed and entered by the Court. Plaintiff learned of this mistake when it received a Notice of Trustee's Sale from the party holding the first position trust deed against the property securing plaintiff's note and trust deed.

Richard A. Nelson, president of RanCo, states in his Affidavit at paragraph 7 (Addendum pages 15-16), that "through an oversight and miscommunication, Mr. Mitchell (RanCo's attorney) inadvertently stated in a letter that not only the Tamarack matter would involve a first position deed of trust, but he also erroneously stated that the Summerhays matter would be handled by a deed of trust in first position." At paragraph 16 of Mr. Nelson's Affidavit, (Addendum page 17) he asserts that "I cannot identify why there was a communication break down on whether the deed of trust on Lot 4 would be a first or second position deed of trust as between me and my attorney."

It is clear from these letters and the affidavit that a mistake in understanding of the terms of the agreement between the parties upon which the Stipulation to Dismiss had

occurred. On that basis alone, the Court should have granted plaintiff's Motion to set aside the Order Dismissing its Complaint and not doing so was an abuse of discretion.

If RanCo's president and its attorney knew, at the time of submitting the Stipulation to plaintiff for signature, that it was giving a second position trust deed when a first position trust deed had been promised, then that would certainly constitute a misrepresentation, if not fraud, upon plaintiff, and the Court again should have granted plaintiff's Motion, and not doing so was an abuse of discretion.

B. FAILURE TO APPLY CONTRACT PRINCIPLES TO THE SETTLEMENT AGREEMENT AND RESCIND OR CONCLUDE THAT THE AGREEMENT WAS NOT ENFORCEABLE:

"An agreement of compromise and settlement constitutes an executory accord. Since an executory accord constitutes a valid enforceable contract, basic contract principles affect the determination of when a settlement agreement should be enforced."

John Deere Co. v. A&H Equipment, Inc., 876 P.2d 880 (Utah App. 1994). Citing Goodmansen v. Liberty Vending Sys., Inc., 866 P.2d 581, 584 (Utah App. 1993).

"Contractual mutual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all the terms." ibid, John Deere Co.

In the present case, plaintiff agreed to a first position trust deed and was delivered a second position trust deed. If the parties were not mutually mistaken about the status of the trust deed to be delivered, then there was no meeting of the minds on this term of their agreement and, therefore, no enforceable settlement agreement.

The agreement upon which the parties' Stipulation to Dismiss Plaintiff's Complaint was also unenforceable by reason of the theory of mistake. "It is the rule in this forum that the power to reform a written instrument by reason of mutual mistake exists under three (3) alternative proofs: (1) That the instrument as made failed to conform to what both parties intended; or (2) that the claiming party was mistaken as to its actual content and the other party, knowing of this mistake, kept silent; or (3) that the claiming party was mistaken as to actual content because of fraudulent affirmative behavior." Guardian State Bank v. Stangl, 778 P.2d 1 (Utah 1989), citing Mabey v. Kay Peterson Constr. Co., 682 P.2d 287, 290 (Utah 1984). Again, either plaintiff, its attorney and RanCo's attorney all understood that RanCo was giving plaintiff a first position trust deed for the Summerhays debt and, therefore, all were mutually mistaken about the second position trust deed that was actually given, or plaintiff mistakenly believed it was receiving a first position trust deed for the Summerhays debt from RanCo, but RanCo knew of this mistake and kept silent about only giving plaintiff a second position trust deed.

From the foregoing, it is clear that there was a failure of the parties to reach an understanding with respect to whether plaintiff was receiving a first or second position trust deed, either by mistake or non-agreement. Regardless of how this error came about, the settlement agreement should have been found to be unenforceable or should have been rescinded by the trial court because the elements of an enforceable contract did not exist. The trial court erred in the application of contract law with respect to the

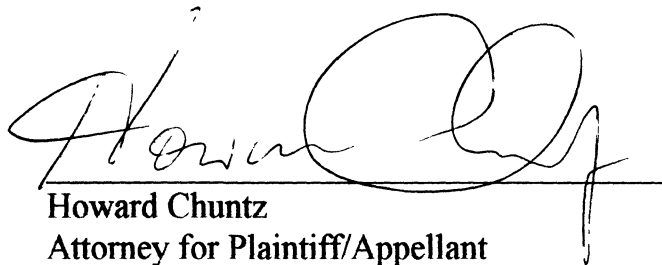
underlying agreement upon which the Stipulation to Dismiss Plaintiff's Complaint was based.

The trial court should have concluded that the agreement between the parties to dismiss plaintiff's Complaint was not enforceable and should have set aside the Order Dismissing Plaintiff's Complaint and reinstated plaintiff's claims against defendants to be heard on their merits.

CONCLUSION

Because the trial court failed to properly apply contract law to the parties' Stipulation and because it abused its discretion by not applying Rule 60(b) Utah Rules of Civil Procedure, this Court should remand the case to the trial court and require it to set aside its Order of Dismissal and reinstate plaintiff's Complaint.

DATED December 8, 2000.



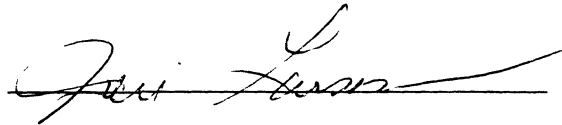
Howard Chuntz
Attorney for Plaintiff/Appellant

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed.
postage prepaid, this 12th day of December, 2000, to the following:

RanCo Homes, Inc.
P.O. Box 910472
St. George, UT 84790

Bruce D. Jenkins
Attorney for Defendant/Appellee, Summerhays
352 East Riverside Drive, Suite C-4
St. George, UT 84790

A handwritten signature in cursive script, appearing to read "Julie L. Jensen", written over a horizontal line.

ADDENDUM

Howard Chuntz, No. 4208
Attorney for Plaintiff
1149 West Center Street
Orem, Utah 84057
Telephone: (801) 222-9700

FIFTH DISTRICT COURT, DIVISION II, STATE OF UTAH
COUNTY OF WASHINGTON, ST. GEORGE DEPARTMENT

WHITEWATER WHIRLPOOL BATHS
& SYSTEMS, INC.,

COMPLAINT

Plaintiff,

v.

Civil No. 990500591

BARBARA R. SUMMERHAYS, RAN CO
HOMES, INC., and DOES 1 through 25,

Defendants.

COMES NOW Whitewater Whirlpool Baths & Systems, Inc., by and through its attorney,
Howard Chuntz, and complains against the above named defendants as follows:

FIRST CAUSE OF ACTION

1. Plaintiff is a Utah corporation, qualified and authorized to do business in this State and was so qualified at all times mentioned herein.

2. The real property which is the subject of this action is located in Washington County, State of Utah.

3. Defendants, Barbara R. Summerhays (hereafter Summerhays) is a resident of Washington County, State of Utah, and defendant, Ran Co Homes (hereafter Ran Co) is a Utah corporation doing business in Washington County, State of Utah.

4. The identities of defendants, Does 1 through 25 are as yet unknown to plaintiff and plaintiff will amend its Complaint to specify said defendants at such time as said identities become known.

5. Summerhays is the owner of the real property that is the subject of this

litigation.

6. Ran Co contracted with plaintiff for plaintiff to provide building materials and labor and agreed to pay plaintiff the sum of \$8,203.34 on or about the 5th day of October, 1998.

7. Said materials and labor were delivered and performed by plaintiff and were accepted by defendants.

8. There remains a balance due on said account in the amount of \$8,203.34 as of December 30, 1998, and defendants are in breach of said contract, having failed and refused to pay said balance.

9. Plaintiff has incurred costs and attorney's fees in bringing this action for which it is entitled to recover.

SECOND CAUSE OF ACTION

10. Plaintiff incorporates paragraphs 1 through 9 above as if set forth here in their entirety.

11. During the period June 23, 1998, through October 5, 1998, plaintiff agreed to furnish and did furnish labor and materials used by Ran Co for the construction of the building and improvements located on the premises described below. Summerhays was the owner and Ran Co was the general contractor for construction on such building and improvements.

12. The materials and labor which were furnished by plaintiff and used in the construction and improvement of the premises described below has value and an agreed price of \$8,203.34.

13. Said materials and labor were actually delivered to said premises and were used in the construction and improvement thereon for the benefit of the owners of said premises.

14. The premises upon which said materials were used are located in Washington County, Utah, and more particularly described as follows:

ALL OF LOT 55, TAMARACK RIDGE ESTATES PHASE NO. 2, AN EXPANDABLE PLANNED UNIT DEVELOPMENT, according to the Official Plat thereof, and in accordance with the Declaration of Covenants, Conditions and Restrictions recorded September 15, 1994 in Book 850, at Page 547, as Entry No.

478750 of Official Records Washington County, State of Utah.

15. Within 90 days of the last work performed by plaintiff on the project, plaintiff filed and recorded a Notice of Mechanic's Lien on said property with the Washington County Recorder. Said Notice of Lien was recorded on December 31, 1998, as Entry No. 630643, in Book 1298, at Page 836, of official records.

16. All named defendants are the owners of said premises or claim some right, title, interest or other lien therein.

17. Plaintiff has and claims a lien against the interest of all defendants in the subject property together with all improvements, pursuant to Utah Code Annotated, 1953, Section 38-1-1, et seq., as amended, for the reasonable value of the materials furnished for improvement of said premises in the amount of \$8,203.34 plus interest thereon and its costs in this action. The rights, titles, claims, liens, and interest of all named defendants, and each of them, and all persons claiming under them, in and to the subject property are subject, junior, subordinate and inferior to the lien and claim of plaintiff.

18. Plaintiff is entitled to have its lien foreclosed as provided by law and the proceeds from such foreclosure applied to the amount due to plaintiff.

19. In accordance with the provisions of the contract mentioned above, and in accordance with Utah Code Annotated 1953, Section 38-1-18 as amended, plaintiff is entitled to a reasonable attorney's fee to be awarded against defendants. Within thirty (30) days after recording said Notice of Lien, plaintiff mailed a copy of said lien to each recorded owner of said real property as shown by the records of the Washington County Recorder.

THIRD CAUSE OF ACTION

20. Plaintiff realleges and incorporates by this reference the allegations contained in paragraphs 1 through 19 above as if set forth here in their entirety.

21. Plaintiff, within 180 days before bringing this action, contracted to furnish materials and services to be incorporated into or in connection with building structures and improvements upon the subject property owned or reported to be owned by defendant Summerhays.

22. The furnishing of the materials and services was in accordance and pursuant to a contract entered into between plaintiff and defendant, Ran Co in the aggregate amount of \$8,203.34.

23. Summerhays, as owner of the property, required said contractor to provide a payment bond as required by Utah Code Annotated, Section 14-2-1.

24. The reasonable value of materials and services furnished and delivered and incorporated in the subject property by plaintiff is \$8,203.34.

25. John Doe 1 through 5 are the sureties on said bond and under the terms of said bond, sureties are liable to plaintiff for the labor and materials on said real property because both the aforesaid owners and the contractor have failed to pay for the materials and labor furnished by plaintiff.

26. Plaintiff is unaware of the identity of said sureties and will amend this Complaint to state the identities thereof when the same becomes known to plaintiff.

27. Plaintiff is entitled to recover a reasonable attorney's fee from said sureties as provided by Utah Code Annotated, as amended, Section 14-2-3.

FOURTH CAUSE OF ACTION

28. Plaintiff realleges paragraphs 1 through 27 as set forth above as if set forth here in their entirety.

29. Summerhays, as owner of the aforesaid property, failed to require Ran Co to furnish a bond as required by Utah Code Annotated, as amended, Section 14-2-1.

30. As a result of the foregoing, Summerhays is liable to plaintiff for the sum of \$8,203.34.

FIFTH CAUSE OF ACTION

31. Plaintiff realleges paragraphs 1 through 30 as set forth above as if set forth here in their entirety.

32. The reasonable value of said materials and labor plaintiff has provided to the subject property and which has been accepted by Summerhays is the sum of \$8,203.34.

33. Plaintiff has not received any payment and there remains the sum of

\$8,203.34 yet unpaid.

34. Plaintiff is entitled to recover from Summerhays the full value of said materials and labor as yet unpaid, or the sum of \$8,203.34, plus interest thereon at the legal rate.

WHEREFORE, plaintiff prays for judgment against defendants as follows:

1. Against defendant, Ran Co, for damages in the sum of \$8,203.34 plus interest, costs and attorney's fees pursuant to Rule 4-505.1.

2. That the Court adjudge that the plaintiff has a valid lien upon the aforementioned property for the amount of \$8,203.34, plus court costs, reasonable attorney's fees of at least an amount allowed by statute, and interest at the rate and in the amount allowed by contract and by law.

3. For an order that plaintiff's mechanic's lien is prior to and superior to the interests of all defendants herein.


4. For a decree of foreclosure of plaintiff's mechanic's lien and for an order that the Sheriff of Washington County conduct a sale and apply the proceeds from said sale first, to the costs of sale; second, to the satisfaction of plaintiff's lien, interest, penalty, court costs and attorney's fees; and third, that any surplus be given to the rightful claimants and owners.

5. Against defendants sureties, defendants Does 1 through 5, for damages in the amount of \$8,203.34 plus interest, costs and attorney's fees pursuant to Rule 4-505.1.

6. Against Summerhays for damages in the amount of \$8,203.34 plus interest, costs and attorney's fees pursuant to Rule 4-505.1.

7. For such other and further relief as the Court deems just and proper.

DATED March 29, 1999.


Howard Chuntz
Attorney for Plaintiff

Plaintiff's address:
195 South Geneva Rd.
Lindon, UT 84042
re cmp

ORIGINAL

100 SEP 14 PM 4:09

Russell S. Mitchell (USB #6938)
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IN THE FIFTH JUDICIAL DISTRICT COURT FOR
WASHINGTON COUNTY, STATE OF UTAH

WHITEWATER WHIRLPOOL BATHS
& SYSTEMS, INC.,

Plaintiff,

vs.

BARBARA R. SUMMERHAYS, RANCO
HOMES, INC., and DOES 1 through 25,

Defendants.

STIPULATION FOR DISMISSAL

Case No. 990500591

Judge James L. Shumate

Plaintiff Whitewater Whirlpool Baths & Systems, Inc., by and through its undersigned attorney, Howard Chuntz, Barbara R. Summerhays, by and through her undersigned attorney, Bruce C. Jenkins, and RanCo Homes, Inc., by and through its undersigned attorney, Russell S. Mitchell, hereby stipulate and agree that, pursuant to Rule 41(a)(2)(i) of the Utah Rules of Civil Procedure, Plaintiff's Complaint in this matter be dismissed with prejudice, each party to bear its own costs and

fees incurred herein.

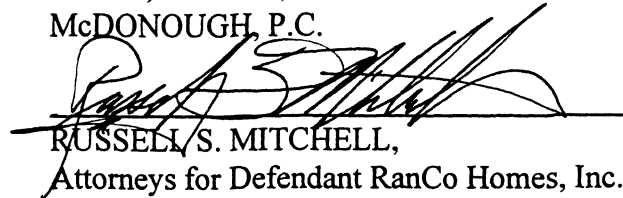
DATED: 8/25/99, 1999.



HOWARD CHUNTZ,
Attorney for Whitewater Whirlpool Baths
& Systems, Inc.

DATED: Sept. 13, 1999.

JONES, WALDO, HOLBROOK &
McDONOUGH, P.C.



RUSSELL S. MITCHELL,
Attorneys for Defendant RanCo Homes, Inc.

DATED: 8/9/99, 1999.



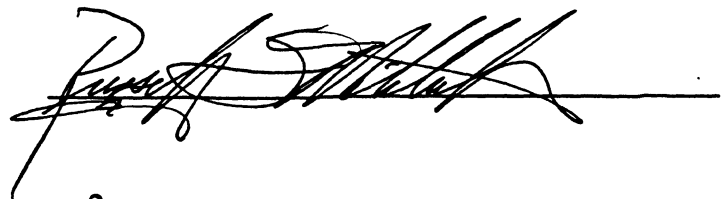
BRUCE C. JENKINS, Attorney for
Defendant Barbara R. Summerhays

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 1999, I mailed, postage prepaid, a true and correct fully executed copy of the foregoing STIPULATION FOR DISMISSAL to:

Howard Chuntz, Esq.
1149 W. Center Street
Orem, Utah 84057

Bruce C. Jenkins, Esq.
352 E. Riverside Drive, Suite C-4
St. George, Utah 84790



ORIGINAL

FILED
199 SEP 15 11:00
BY

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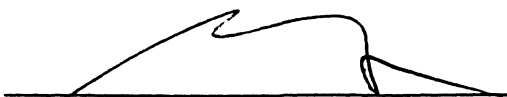
IN THE FIFTH JUDICIAL DISTRICT COURT FOR
WASHINGTON COUNTY, STATE OF UTAH

WHITEWATER WHIRLPOOL BATHS	:	
& SYSTEMS, INC.,	:	
	:	DISMISSAL WITH PREJUDICE
Plaintiff,	:	
	:	
vs.	:	
	:	
BARBARA R. SUMMERHAYS, RANCO	:	
HOMES, INC., and DOES 1 through 25,	:	Case No. 990500591
	:	
Defendants.	:	Judge James L. Shumate


This matter having come before on the parties' Stipulation for Dismissal pursuant to Rule 41(a)(2)(i) of the Utah Rules of Civil Procedure, the Court having reviewed the Stipulation, and for good cause appearing,

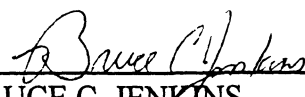
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's Complaint is dismissed with prejudice and on the merits.

DATED this 14 day of Sep, 1999.


JAMES L. SHUMATE, District Judge

Approved as to Form:


HOWARD CHUNTZ, Attorney for Plaintiff



BRUCE C. JENKINS,
Attorney for Defendant Barbara R. Summerhays

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 1999, I mailed, postage prepaid, a true and correct unexecuted copy of the foregoing DISMISSAL WITH PREJUDICE to:

Howard Chuntz, Esq.
1149 W. Center Street
Orem, Utah 84057

Bruce C. Jenkins, Esq.
352 E. Riverside Drive, Suite C-4
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2

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JAN 10 2009
CLERK OF DISTRICT COURT
ST. GEORGE, UTAH

FIFTH DISTRICT COURT, DIVISION II, STATE OF UTAH

COUNTY OF WASHINGTON, ST. GEORGE DEPARTMENT

WHITEWATER WHIRLPOOL BATHS
& SYSTEMS, INC.,

Plaintiff,

AFFIDAVIT OF
HOWARD CHUNTZ

v.

BARBARA R. SUMMERHAYS, RAN CO
HOMES, INC., and DOES 1 through 25,

Civil No. 990500591

Defendants.

_____/

STATE OF UTAH)
 :
COUNTY OF UTAH)

I, Howard Chuntz, upon oath duly sworn, state:

1. Plaintiff filed a mechanic's lien lawsuit against both defendants claiming non-payment for work done upon the premises owned by Barbara Summerhays and completed at the direction of RanCo Homes, Inc.

2. Prior to signing the Stipulation for dismissal, I negotiated a settlement of the matter between plaintiff and the defendants whereby RanCo Homes, Inc., would give to plaintiff a first position trust deed and trust deed note against certain real property located in Washington County and more particularly described as:

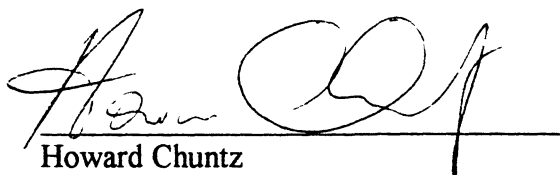
All of Painted Desert Estates, Phase 1, Lot #4.

3. Both myself and counsel for RanCo Homes, Inc., understood and believed that RanCo Homes, Inc., was giving plaintiff a first position trust deed and trust deed note against the aforesaid

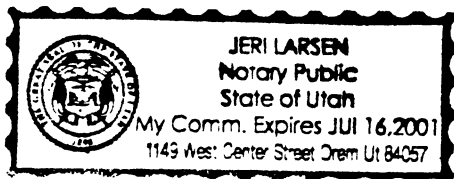
property.

4. Subsequent to the entry of the Order dismissing plaintiff's cause of action with prejudice, the parties learned that the trust deed note and trust deed referred to herein was not a first position note and, in fact, the property was being foreclosed by the holder of the first position note.

DATED November 9, 1999.


Howard Chuntz
Attorney for Plaintiff

Subscribed and sworn to before me this 9th day of November, 1999.




Notary Public

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed, postage prepaid, this 9th day of November, 1999, to the following:

Russell S. Mitchell
Jones, Waldo, Holbrook & McDonough
Attorneys for Defendant, RanCo Homes, Inc.
249 East Tabernacle, Suite 200
St. George, UT 84770

Bruce D. Jenkins
Attorney for Defendant, Summerhays
352 East Riverside Drive, Suite C-4
St. George, UT 84790



re aff

Howard Chuntz, No. 4208
Attorney for Plaintiff
1149 West Center Street
Orem, Utah 84057
Telephone: (801) 222-9700

FIFTH DISTRICT COURT, DIVISION II, STATE OF UTAH

COUNTY OF WASHINGTON, ST. GEORGE DEPARTMENT

WHITEWATER WHIRLPOOL BATHS
& SYSTEMS, INC.,

Plaintiff,

v.

BARBARA R. SUMMERHAYS, RAN CO
HOMES, INC., and DOES 1 through 25,

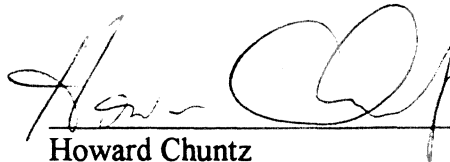
Defendants.

MOTION TO SET ASIDE
DISMISSAL WITH PREJUDICE
AND REINSTATE PLAINTIFF'S
CLAIM AGAINST DEFENDANTS

Civil No. 990500591

COMES NOW plaintiff in the above captioned matter, by and through its attorney, Howard Chuntz, and moves the Court for an order setting aside the Order of Dismissal with Prejudice and ordering that plaintiff's Complaint against defendants be reinstated. This Motion is supported by the Affidavit of Howard Chuntz submitted herewith.

DATED November 9, 1999.

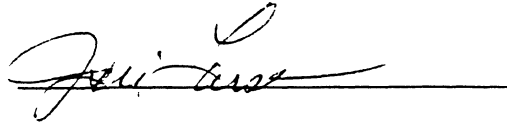

Howard Chuntz
Attorney for Plaintiff

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed, postage prepaid, this 9th day of November, 1999, to the following:

Russell S. Mitchell
Jones, Waldo, Holbrook & McDonough
Attorneys for Defendant, RanCo Homes, Inc.
249 East Tabernacle, Suite 200
St. George, UT 84770

Bruce D. Jenkins
Attorney for Defendant, Summerhays
352 East Riverside Drive, Suite C-4
St. George, UT 84790

A handwritten signature in cursive script, appearing to read "Bruce D. Jenkins", is written over a horizontal line.

re mot

Russell S. Mitchell (USB #6938)
JONES, WALDO, HOLBROOK & McDONOUGH, P.C.
Attorneys for Defendant RanCo Homes, Inc.
249 East Tabernacle, Suite 200
St. George, Utah 84770
Telephone: (435) 628-1627
Fax: (435) 628-5225

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IN THE FIFTH JUDICIAL DISTRICT COURT FOR
WASHINGTON COUNTY, STATE OF UTAH

WHITEWATER WHIRLPOOL BATHS
& SYSTEMS, INC.,

Plaintiff,

vs.

BARBARA R. SUMMERHAYS, RAN CO
HOMES, INC., and DOES 1 through 25,

Defendants.

**AFFIDAVIT OF RICHARD A. NELSON
OPPOSING MOTION TO SET ASIDE
DISMISSAL**

Case No. 990500591

Judge James L. Shumate

RICHARD A. NELSON, being over the age of majority and being first duly sworn, upon his oath deposes and says:

1. I am the President of Ran Co Homes, Inc. (Ran Co"), and have personal knowledge of all things stated herein.

2. Prior to Plaintiff's filing its mechanic's lien lawsuit against Ran Co, I had talked with representatives of Plaintiff, namely, Bryce Whitney, the local St. George manager, and Ann Tucker in Lindon, Utah, regarding Plaintiff's claim for payment for services and materials it had provided in relation to Defendant Barbara R. Summerhays' home.

3. Throughout these discussions, I told them that I could provide to them a trust deed note in a third position against lot 4 in the subdivision of the development, Painted Desert Estates Phase 1.

4. In addition to our discussions regarding the alleged nonpayment on the Barbara R. Summerhays home, I had been negotiating with them regarding another issue involving Plaintiff's supplying materials in the Tamarack Ridge development ("Tamarack Matter") which involved a disputed amount of approximately \$30,000.00. I offered them a shared first position deed of trust on Lot 38, Painted Desert Estates Phase I regarding the Tamarack Matter.

5. I explained to Mr. Whitney and Ms. Tucker that for the Tamarack Matter, I could give Plaintiff an assignment of a shared first position deed of trust for \$25,000.00 and a second position deed of trust on Lot 38 for the remainder of the amount owed on the Tamarack Matter. I showed Mr. Whitney my Master Escrow files which showed on Lot 4 a first position deed of trust for \$21,000.00 and a second position deed of trust for \$5,489.14, leaving a third position available to resolve the Summerhays matter.

6. While we were thus negotiating, Plaintiff filed its mechanic's lien foreclosure action in the Summerhays matter, presumably to keep from missing statutory deadlines. Its attorney, Howard Chuntz, then became involved in the negotiations and I began involving my own attorney, Russell S. Mitchell.

7. I discussed the offer of settlement I had made to Plaintiff with Mr. Mitchell. I had him relay the offer to Plaintiff formally through Mr. Chuntz. Through an oversight and miscommunication, Mr. Mitchell inadvertently stated in a letter that not only the Tamarack Matter

would involve a first position deed of trust, but he also erroneously stated that the Summerhays matter would be handled by a deed of trust in a first position.

8. Lot 4 of Painted Desert Estates Phase I is a lot with a value of over \$40,000.00. At the time I was proposing this offer to Plaintiff, I did not have the ability to give a first position deed of trust on Lot 4 or any other lot. There were already deeds of trust on Lot 4 in the first and second position. Given the amount of Plaintiff's claim, being only \$8,000.00, I would never have put just that amount in a first position deed of trust for a \$40,000.00 lot. Had I had that lot free and clear to be able to a first position deed of trust on it, I would have combined both the Tamarack Matter and the Summerhays matter into that one lot rather than splitting them between different lots.

9. The whole purpose of allowing the deed of trust in favor of Whitewater is to secure its position and payment rather than going through the litigation necessary to resolve its disputed claim. In light of the market value of these lots, and the current market condition, there was and is more than enough equity in the lot to safely secure the deed of trust.

10. After Mr. Mitchell presented the offer to Mr. Chuntz, and presumably after Mr. Chuntz and Plaintiff discussed the letter, Mr. Chuntz rejected the offer as written by Mr. Mitchell, and instead wanted to only do the Summerhays part of the deal and not the Tamarack Matter.

11. I refused to separate these two issues and would only agree to do the deal if it resolved both the Tamarack and Summerhays issues.

12. We did not ever sign any type of **settlement** agreement formalizing the interacting of these different documents other than the two letters sent by my attorney.

13. Pursuant to the agreement, I gave an assignment of a deed of trust on Lot 38, **Painted** Desert Estates Phase II, and a deed of trust on Lot 4, Painted Desert Estates Phase I, to

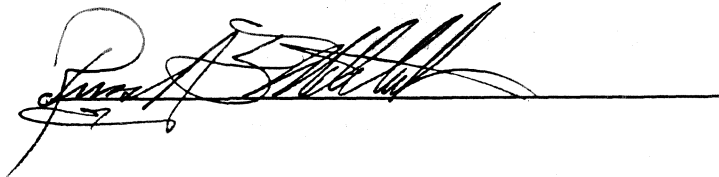
4.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November, 1999, I caused to be mailed, postage prepaid, the foregoing AFFIDAVIT OF RICHARD A. NELSON OPPOSING MOTION TO SET ASIDE DISMISSAL to:

Howard Chuntz, Esq.
1149 W. Center Street
Orem, Utah 84057

Bruce C. Jenkins, Esq.
352 E. Riverside Drive, Suite C-4
St. George, Utah 84790

A handwritten signature in black ink, appearing to read "Richard A. Nelson", is written over a horizontal line.

Russell S. Mitchell (USB #6938)
JONES, WALDO, HOLBROOK & McDONOUGH, P.C.
Attorneys for Defendant RanCo Homes, Inc.
249 East Tabernacle, Suite 200
St. George, Utah 84770
Telephone: (435) 628-1627
Fax: (435) 628-5225



IN THE FIFTH JUDICIAL DISTRICT COURT FOR
WASHINGTON COUNTY, STATE OF UTAH

WHITEWATER WHIRLPOOL BATHS	:	
& SYSTEMS, INC.,	:	
	:	MEMORANDUM IN OPPOSITION TO
Plaintiff,	:	PLAINTIFF'S MOTION TO SET ASIDE
	:	DISMISSAL WITH PREJUDICE
	:	AND
vs.	:	REQUEST FOR HEARING
	:	
BARBARA R. SUMMERHAYS, RAN CO	:	
HOMES, INC., and DOES 1 through 25,	:	Case No. 990500591
	:	
Defendants.	:	Judge James L. Shumate

Defendant Ran Co Homes, Inc. ("Ran Co"), by and through its undersigned attorney, and pursuant to Rule 4-501 of the Utah Rules of Judicial Administration, hereby submits its Memorandum in Opposition to Plaintiff's Motion to Set Aside Dismissal With Prejudice, **and requests a hearing on the same.**

STATEMENT OF FACTS

1. Prior to Plaintiff's filing its mechanic's lien lawsuit against Defendant Ran Co Homes, Inc. ("Ran Co"), Richard A. Nelson ("Nelson") of Ran Co had talked with representatives of Plaintiff, namely, Bryce Whitney, the local St. George manager, and Ann Tucker

in Lindon, Utah, regarding Plaintiff's claim for payment for services and materials it had provided in relation to Defendant Barbara R. Summerhays' home. Affidavit of Richard A. Nelson Opposing Motion to Set Aside Dismissal ("Affidavit"), paras. 1, 2.

2. Throughout these discussions, Nelson told Plaintiff that he could provide to them a trust deed note in a third position against lot 4 in the subdivision of the development, Painted Desert Estates Phase 1. Affidavit, para. 3.

3. In addition to the parties' discussions regarding the alleged nonpayment on the Barbara R. Summerhays home, Nelson had been negotiating with Plaintiff regarding another issue involving Plaintiff's supplying materials in the Tamarack Ridge development ("Tamarack Matter") which involved a disputed amount of approximately \$30,000.00. Nelson offered them a shared first position deed of trust on Lot 38, Painted Desert Estates Phase I regarding the Tamarack Matter. Affidavit, para. 4.

4. Nelson explained to Mr. Whitney and Ms. Tucker that for the Tamarack Matter, Ran Co could give Plaintiff an assignment of a shared first position deed of trust for \$25,000.00 and a second position deed of trust on Lot 38 for the remainder of the amount owed on the Tamarack Matter. Nelson showed Mr. Whitney Ran Co's Master Escrow files which showed on Lot 4 a first position deed of trust for \$21,000.00 and a second position deed of trust for \$5,489.14, leaving a third position available to resolve the Summerhays matter. Affidavit, para. 5.

5. While the parties were thus negotiating, Plaintiff filed its mechanic's lien foreclosure action in the Summerhays matter, presumably to keep from missing statutory deadlines. Its attorney, Howard Chuntz, then became involved in the negotiations and Ran Co began involving my own attorney, Russell S. Mitchell. Affidavit, para. 6.

6. Nelson discussed the offer of settlement he had made to Plaintiff with Mr. Mitchell. Nelson had Mr. Mitchell relay the offer to Plaintiff formally through Mr. Chuntz. Through an oversight and miscommunication, Mr. Mitchell inadvertently stated in a letter that not only the Tamarack Matter would involve a first position deed of trust, but he also erroneously stated that the Summerhays matter would be handled by a deed of trust in a first position. Affidavit, para. 7; May 11, 1999, letter attached hereto as Exhibit "A" and incorporated herein.

7. Lot 4 of Painted Desert Estates Phase I is a lot with a value of over \$40,000.00. At the time Ran Co was proposing this offer to Plaintiff, it did not have the ability to give a first position deed of trust on Lot 4 or any other lot. There were already deeds of trust on Lot 4 in the first and second position. Given the amount of Plaintiff's claim, being only \$8,000.00, Ran Co would never have put just that amount in a first position deed of trust for a \$40,000.00 lot. Had Ran Co had that lot free and clear to be able to a first position deed of trust on it, I would have combined both the Tamarack Matter and the Summerhays matter into that one lot rather than splitting them between different lots. Affidavit, para. 8.

8. Ran Co's whole purpose of allowing the deed of trust in favor of Plaintiff was to secure payment to Plaintiff rather than going through the litigation necessary to resolve its disputed claim. In light of the market value of these lots, and the current market condition, there was and is more than enough equity in the lot to safely secure the deed of trust. Affidavit, para. 9.

9. After Mr. Mitchell presented the offer to Mr. Chuntz, and presumably after Mr. Chuntz and Plaintiff discussed the letter, Mr. Chuntz rejected the offer as written by Mr. Mitchell, and instead wanted to only do the Summerhays part of the deal and not the Tamarack Matter. Affidavit, para. 10.

10. Ran Co refused to separate these two issues and would only agree to do the deal if it resolved both the Tamarack and Summerhays issues. Affidavit, para. 11.

11. Mr. Mitchell sent a letter on July 26, 1999, after further conversations, wherein there was no reference to the deed of trust on Lot 4 being in a first position. July 26, 1999, letter attached hereto as Exhibit "B" and incorporated herein.

12. The parties did not ever sign any type of settlement agreement formalizing the interacting of these different documents other than the two letters sent by Ran Co's attorney. Affidavit, para. 12.

13. Pursuant to the agreement, Ran Co gave an assignment of a deed of trust on Lot 38, Painted Desert Estates Phase II, and a deed of trust on Lot 4, Painted Desert Estates Phase I, to Plaintiff and had the same recorded. Plaintiff signed a plat approval form and reconveyed property in Tamarack Ridge Estates. Affidavit, para. 13.

14. Therefore, Ran Co had completely fulfilled all of the settlement agreement that it had agreed upon and which it had discussed directly with Plaintiff itself. Affidavit, para. 14.

15. Some weeks after the recordings were complete, the person with the first position deed of trust on Lot 4 began a foreclosure action, at which time notice went out to Mr. Chuntz. It is apparently based upon this that Plaintiff has now filed its Motion to Set Aside Dismissal. Affidavit, para. 15.

16. Ran Co cannot identify why there was a communication breakdown between it and its attorney. However, Nelson did have extensive conversations with Plaintiff's representatives, Mr. Whitney and Ms. Tucker, about the property involved, and that Nelson did show

show Mr. Whitney Ran Co's Master Escrow file clearly showing the two deeds of trust ahead of Plaintiff on Lot 4. Affidavit, para. 16.

ARGUMENT

I.

PLAINTIFF'S INITIAL MOTION IS INSUFFICIENT TO SET FORTH LEGAL GROUNDS FOR THE RELIEF IT SEEKS.

Plaintiff filed no Memorandum in support of its Motion to Dismiss, but merely filed a short Affidavit of its attorney supporting its Motion. Plaintiff's Motion, on its face, fails the technical requirements associated with a Motion to Set Aside to be brought before the Court and should fail on that ground alone. "All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities" Code of Judicial Administration Rule 4-501(1)(a) (emphasis added). There was no memorandum filed to support its Motion, nor did Plaintiff refer to a memorandum within its Motion. Furthermore, the Motion fails to set forth what legal grounds it relies on in bringing the Motion. Such a memorandum is mandatory, and failure to include it is fatal to Plaintiff's Motion.

In addition, the Affidavit of Howard Chuntz should be stricken from the record, as it is irrelevant to the issue at hand and contains hearsay statements. The Affidavit cannot take the place of, or serve as, a memorandum of points and authorities. Furthermore, Mr. Chuntz, as Plaintiff's attorney, is not a proper person to give factual evidence regarding Plaintiff's actions. It is one thing for an attorney to give an Affidavit regarding attorney's fees or specific procedural actions he or she has taken, such as what discovery has been completed or what discovery is needed and why, but it is an entirely different thing to try to give factual evidence regarding the understanding of a

settlement agreement between the parties themselves. Therefore, the Court cannot rely on the Affidavit of Mr. Chuntz as a supporting memorandum or as a proper statement of facts. With no support for its Motion, Plaintiff's Motion to Set Aside must be denied.

II.

THERE WAS NO MISTAKE ABOUT THE SETTLEMENT BETWEEN THE PARTIES.

Plaintiff had been in direct communication with Ran Co throughout the negotiations and cannot now attempt to avoid its settlement agreement based on a mistake by the parties' counsel. Plaintiff does not state what legal grounds it has for setting aside the parties' stipulated dismissal. Possibly, Plaintiff is hoping the Court will apply the legal analysis of Rule 60(b)(1) of the Utah Rules of Civil Procedure that orders be set aside based on a mistake. If the Court does decide to apply this analysis, it cannot rely on the Affidavit of Mr. Chuntz, but it should only consider an affidavit of Plaintiff. However, there is no affidavit from Plaintiff claiming there was a mistake on its part or between the parties.

The parties themselves had discussed and agreed on a settlement between them which was fully executed. Both parties knew to what they were agreeing. Mr. Nelson of Ran Co and Mr. Whitney and Ms. Tucker of Whitewater had discussed in detail that the Summerhays matter would be handled by a third position deed of trust. Mr. Nelson had shown Mr. Whitney a Master Escrow file verifying that the deed of trust for Lot 4 was a in a third position, but was still adequately protected by the equity in the property. The only time that a reference to Lot 4 as a first position was made was in one letter in the early part of the discussion between the parties' counsel. All discussions between the parties themselves expressly referred to that deed of trust as a third position

deed of trust. In addition, in a subsequent letter from Ran Co's counsel to Whitewater's counsel, after Whitewater had rejected the offer in the earlier letter, the erroneous reference to this deed of trust being in a first position was not repeated.

"Settlement are favored in the law, and should be encouraged, because of the obvious benefits accruing not only to the parties, but also the judicial system." Tracy Collins Bank & Tr. Co. v. Travelstead, 529 P.2d 605, 607 (Utah 1979). In the case at hand, the parties had reached a settlement. The deeds of trust and other documents clearly put into effect the agreement discussed between the parties themselves. The agreement reached by the parties should not be undone by the Court. A mistaken state of mind of one or both parties' attorneys is not reflective of what the parties themselves knew and intended, and should not be grounds for unwinding a good settlement agreement.

Even if Plaintiff thought there was a discrepancy between what it was hearing from Ran Co directly and what its attorney was telling it, Plaintiff was under a duty to discover on its own the true status of the deed of trust that would be recorded. Utah law on unilateral mistake requires ordinary diligence on the part of the mistaken party regarding the fact in question or the resulting agreement will not be set aside. John Call Engg., Inc. v. Manti City Corp., 743 P.2d 1205, 1209 (Utah 1987). If there was a mistake about the relative position of the deed of trust being given, it was Plaintiff's unilateral mistake. Considering it had see the Master Escrow file showing the other two superior deeds of trust, ordinary diligence would require it to resolve this difference by some direct means, such as having a quick title search done on the affected property, which Plaintiff did not do.

Plaintiff itself knew it was accepting a third position deed of trust on Lot 4, regardless of what its attorney believed. Now that Lot 4 is being foreclosed on, and it stands to lose its equity in

the lot unless it buys out the first position deed of trust, it wants to exploit a confusion between the parties' counsel that did not exist between the parties themselves. The Court should not allow this result, but should deny Plaintiff's request.

III.

IF THE COURT SETS THE DISMISSAL ASIDE, IT MUST UNDO THE ENTIRE AGREEMENT BETWEEN THE PARTIES.

If the Court determines that Plaintiff's Motion is legally sufficient, and if the Court also determines that it should set aside the Order of Dismissal, then the Court must also rescind the entire agreement between the parties, including the other deeds of trust in the Tamarack Matter. The negotiations of the parties clearly shows that they were working to achieve a global resolution of all outstanding issues between them. This deal could not be done, and should not be undone, in a piecemeal fashion. The Court should include in any Order setting aside the dismissal, an Order requiring Plaintiff to sign deeds of reconveyance on all affected property.

CONCLUSION

Based on the foregoing Memorandum and Affidavit filed herewith, the Court should deny Plaintiff's Motion to Set Aside Dismissal With Prejudice. However, if the Court chooses to grant Plaintiff's Motion, the Court should order Plaintiff to sign all necessary documents to reconvey all deeds of trust recorded as part of the settlement agreement between the parties.

DATED this 22nd day of November, 1999.

JONES, WALDO, HOLBROOK & McDONOUGH, P.C.

By: 

Russell S. Mitchell

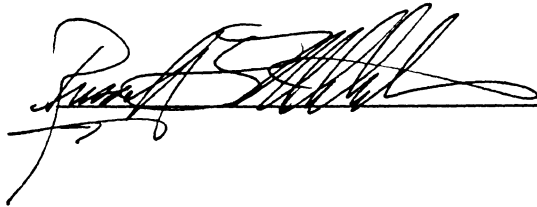
Attorneys for Defendant Ran Co Homes, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November, 1999, I caused to be mailed, postage prepaid, the foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO SET ASIDE DISMISSAL WITH PREJUDICE, AND REQUEST FOR HEARING to:

Howard Chuntz, Esq.
1149 W. Center Street
Orem, Utah 84057

Bruce C. Jenkins, Esq.
352 E. Riverside Drive, Suite C-4
St. George, Utah 84790



JONES, WALDO, HOLBROOK & McDONOUGH

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SUITE 200
249 EAST TABERNACLE
ST. GEORGE, UTAH 84770-2978
TELEPHONE (435) 628-1627
FAX (435) 628-5225

IN REPLY REFER TO:

ST. GEORGE

May 11, 1999

Howard Chuntz, Esq.
1149 West Center Street
Orem, Utah 84057

Re: Whitewater Whirlpool Baths v. RanCo Homes, et al.
Civil No. 990500591
Settlement Negotiations

Dear Mr. Chuntz:

As we discussed on the telephone today, enclosed are copies of documents to be used to complete the settlement being proposed by RanCo Homes ("RanCo"). This letter is for settlement purposes only, and RanCo makes no admissions nor does it waive any defenses hereby.

RanCo proposes to completely resolve all disputes between the parties including the case referenced above, as follows:

- A. Regarding Whitewater's claim for \$30,556.94, RanCo will assign \$25,000.00 of its first position Note in Lot No. 38, proposed PAINTED DESERT PHASE NO. 2., and give a second position Trust Deed and Note in the same property in the amount of \$5,556.94. The amounts will be paid, plus 9% interest, as soon as the lot is sold, or in two years from the date of the Assignment, Deed, and Note, whichever first occurs. If we can conclude this quickly, the two years will run from April 13, 1999. To make this deal work, the following documents need to be executed (copies of all are enclosed herewith):
1. Request for full Reconveyance regarding Proposed Tamarack Ridge Estates, Phase 4, Lot #40;
 2. Request for Full Reconveyance regarding Proposed Tamarack Ridge Estates, Phase 4, Lot #41;
 3. Modification to Note & Trust Deed which sets forth the assignment of \$25,000.00 of the first position Deed of Trust;
 4. Assignment of Deed of Trust for 71.44% of the beneficial interest in Proposed Painted Desert Estates, Phase 2, Lot #38;

EXHIBIT

A

Howard Chuntz, Esq.
May 11, 1999
Page 2

5. Trust Deed Note in the amount of \$5,556.94;
 6. Trust Deed securing the Note for Proposed Painted Desert Estates, Phase 2, Lot #38; and
 7. Consent to Plat.
- B. Regarding Whitewater's claim for \$8,203.34 regarding the Summerhays home and the above-referenced civil claim, RanCo will give a first-position Trust Deed and Trust Deed Note in the amount of \$8,203.34, the same to bear interest at 9% and to be paid in full as soon as the lot is sold, or in two years from the date of the Trust Deed and Note, whichever first occurs. To make this deal work, the following documents need to be executed (copies of all are enclosed herewith):
1. Trust Deed Note in the amount of \$8,203.34; and
 2. Trust Deed securing the Note for All of Painted Desert Estates, Phase 1, Lot #4.

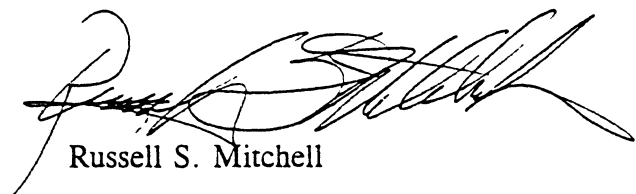
In addition, please find enclosed several pages of marketing materials currently being used to sell the lots at the Painted Desert Subdivision, which includes a price list of the lots being sold in Phase 1 and a layout of the subdivision with lots identified for Phase 1 and one showing all phases. Also enclosed is an appraisal showing the price of Lot #2 in Phase 1 at \$60,000.00.

As you review these materials, I believe you will find that RanCo's proposals give not only a very secure position on real estate, but that Whitewater will also obtain the benefit of a very good interest rate of 9% during the time it takes for the lots to sell.

If you have any questions regarding the above offer, please do not hesitate to call.

Sincerely,

JONES, WALDO, HOLBROOK & McDONOUGH



Russell S. Mitchell

cc: RanCo Homes

JONES, WALDO, HOLBROOK & McDONOUGH

A PROFESSIONAL CORPORATION

ATTORNEYS AND COUNSELORS

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SUITE 200

249 EAST TABERNACLE

ST. GEORGE, UTAH 84770-2978

TELEPHONE (435) 628-1627

FAX (435) 628-5225

IN REPLY REFER TO:

ST. GEORGE

July 26, 1999

Howard Chuntz, Esq.
1149 West Center Street
Orem, Utah 84057

Re: Whitewater Whirlpool Baths v. RanCo Homes, et al.
Civil No. 990500591
Settlement Negotiations

Dear Mr. Chuntz:

This letter is in follow-up of our several conversations regarding the final resolution of the issues involving Whitewater Whirlpool Baths, RanCo Inc. and RanCo Homes (collectively herein "RanCo"). Whitewater and RanCo had previously reached a settlement agreement wherein Whitewater was given a second position trust deed note on two parcels of property in the combined amount of the \$30,556.94 settlement amount. These will now be reconveyed to RanCo Inc. in exchange for an assignment of a first position on a different parcel, located in Painted Desert Phase 2, in the amount of \$25,000 with a second position trust deed note on this same parcel in the amount of \$7,928.53 (this amount represents the interest accrued through July 22, 1999 since the settlement was first reached in addition to the \$5,556.94 principal amount). Interest will accrue on the assignment amount and on the trust deed note at nine percent (9%) from July 23, 1999. This change is in conjunction with the settlement regarding the Summerhays matter, which is resolved by Whitewater being given a trust deed note in the amount of \$8,203.34, in exchange for Whitewater dismissing its above referenced complaint against Summerhays, RanCo Homes, and Does 1-25, and releasing all claims against RanCo Homes.

RanCo has fully executed the modification, assignment, trust deeds, and trust deed notes involved. I will have the trust deeds recorded, and the original trust deed notes sent to you, immediately upon my receiving from you the following documents executed by your client:

- A. Request for full Reconveyance regarding Proposed Tamarack Ridge Estates, Phase 4, Lot #40 (original enclosed);
- B. Request for Full Reconveyance regarding Proposed Tamarack Ridge Estates, Phase 4, Lot #41 (original enclosed);

EXHIBIT B

Howard Chuntz, Esq.
July 26, 1999
Page 2

- C. Modification to Note & Trust Deed which sets forth the assignment of \$25,000.00 of the first position Deed of Trust and calculation of accrued interest (original enclosed);
- D. Consent to Plat (necessary because of the assigned interest in Phase 2 of Painted Desert) (original enclosed); and
- E. Rule 41(a) "Notice of Dismissal" as to RanCo Homes regarding the above referenced case, with the understanding that it will also be dismissed against Summerhays. I will leave it between you and Mr. Jenkins to determine whether to file a stipulation or allow the court to dismiss as to Summerhays for failure to prosecute.

A copy of the following documents are enclosed for your reference. As stated above, I will record the Trust Deeds and mail to you the original Trust Deed Notes as set forth above:

- 1. Assignment of Deed of Trust for 71.44% of the beneficial interest in Proposed Painted Desert Estates, Phase 2, Lot #38;
- 2. Trust Deed and Trust Deed Note in the amount of \$7,928.53 in Proposed Painted Desert Estates, Phase 2, Lot #38; and
- 3. Trust Deed and Trust Deed Note in the amount of \$8,203.34 in Painted Desert Phase 1, Lot #4.

In addition, as you requested, please find enclosed a copy of the original Trust Deed which is the basis for the assignment of interest of \$25,000 to Whitewater. If you have any questions regarding these documents, please do not hesitate to call.

Sincerely,

JONES, WALDO, HOLBROOK & McDONOUGH



Russell S. Mitchell

Howard Chuntz, No. 4208
Attorney for Plaintiff
1149 West Center Street
Orem, Utah 84057
Telephone: (801) 222-9700

FIFTH DISTRICT COURT, DIVISION II, STATE OF UTAH
COUNTY OF WASHINGTON, ST GEORGE DEPARTMENT

WHITEWATER WHIRLPOOL BATHS
& SYSTEMS, INC.,

Plaintiff,

v.

REPLY TO RICHARD A
NELSON'S MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S
MOTION

BARBARA R. SUMMERHAYS, RAN CO
HOMES, INC., and DOES 1 through 25,

Civil No. 990500591

Defendants.

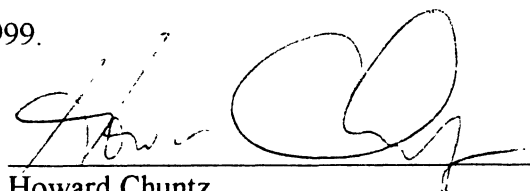
COMES NOW plaintiff in the above captioned matter, by and through its attorney, Howard Chuntz, and replies to the Memorandum in Opposition to plaintiff's Motion submitted by RanCo Homes, Inc. Plaintiff submits the Affidavit of Bryce Whitney (attached hereto Exhibit "A") and the Affidavit Ann Tucker (attached hereto as Exhibit "B"), the two individuals referred to in RanCo's president's Affidavit. Those Affidavits refute the allegations set forth in defendant's Memorandum as well as Mr. Nelson's Affidavit. Whitewater's personnel ceased dealing with Mr. Nelson regarding this matter in or about March of 1999 after the matter was submitted to Whitewater's attorney for the institution of legal action. Thereafter, all of the negotiations and agreements occurred between Whitewater's attorney and RanCo's attorney without any interceding discussions between the parties or any of their agents other than attorneys. In addition to the May 11, 1999, letter between counsel for these parties that RanCo's attorney submitted as Exhibit "A" to RanCo's Memorandum in Opposition, RanCo's attorney sent Whitewater's attorney a July 26, 1999, letter outlining the final

agreement between the parties. (See Exhibit "C" attached hereto). The letters from RanCo's attorney, along with the Affidavits from plaintiff's employees substantiate that the only mistake that was made was in the communications between RanCo and its attorney. There was no mistake or misunderstanding between plaintiff concerning the terms of the agreement. What was being offered prior to March of 1999 was rejected by the institution of a lawsuit. Thereafter, the attorneys for the parties worked out a new agreement with respect to the Summerhays lawsuit.

Finally, there is no need to rescind the entire agreement between the parties. The other matters that were concluded that did not involve the first position trust deed that was offered for settlement of the Summerhays matter was an entirely different matter in time and place and for which separate and distinct consideration was given and accepted by the parties.

WHEREFORE, plaintiff prays that its Motion to set aside the dismissal with prejudice as previously prayed for be granted.

DATED this 15 day of December, 1999.



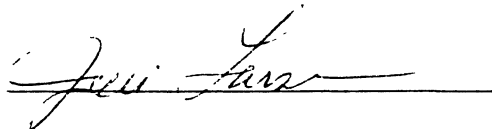
Howard Chuntz
Attorney for Plaintiff

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed, postage prepaid, this 15th day of December, 1999, to the following:

Russell S. Mitchell
Jones, Waldo, Holbrook & McDonough
Attorneys for Defendant, RanCo Homes, Inc.
249 East Tabernacle, Suite 200
St. George, UT 84770

Bruce D. Jenkins
Attorney for Defendant, Summerhays
352 East Riverside Drive, Suite C-4
St. George, UT 84790

A handwritten signature in dark ink, appearing to read "Julie L. Jones", is written over a horizontal line.

re rep

Howard Chuntz, No. 4208
Attorney for Plaintiff
1149 West Center Street
Orem, Utah 84057
Telephone: (801) 222-9700

FIFTH DISTRICT COURT, DIVISION II, STATE OF UTAH

COUNTY OF WASHINGTON, ST. GEORGE DEPARTMENT

WHITEWATER WHIRLPOOL BATHS
& SYSTEMS, INC.,

Plaintiff,

AFFIDAVIT OF
BRYCE WHITNEY

v.

BARBARA R. SUMMERHAYS, RAN CO
HOMES, INC., and DOES 1 through 25,

Civil No. 990500591

Defendants.

_____/

STATE OF UTAH

)

:ss

COUNTY OF WASHINGTON

)

I, Bryce Whitney, upon oath duly sworn, state:

1. I am the manager of plaintiff's St. George outlet and have personal knowledge of the things stated herein.

2. During early 1997 I had discussions with Richard Nelson of RanCo Homes, Inc., regarding debts that he owed to Whitewater with respect to materials and labor Whitewater provided to him long before the Summerhays project began.

3. We discussed taking promissory notes and trust deeds against various properties in the Tamarack Ridge development and in each instance I indicated that I would pass this information along to Whitewater's president for an agreement.

4. Later in 1998 I discuss with Mr. Nelson issues concerning paying his debts with respect to the sums owed on the Summerhays job and he made various proposals with respect to

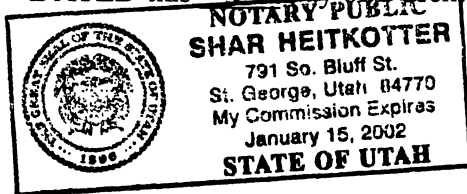
taking different lots as security per a trust deed and trust deed note. As previously done, I indicated that I would pass on all information to Whitewater's president for any arrangements that would be agreed upon.

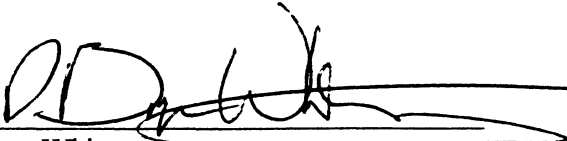
5. By March of 1999 no satisfactory agreement had been reached and I was advised to cease dealing with this matter as it had been turned over to Whitewater's attorney.

6. Subsequent to March, 1999, I had no further discussions with Mr. Nelson or anyone else from RanCo Homes, Inc., with respect to settling the Summerhays matter.


7. At no time did I ever advise Mr. Nelson that Whitewater was willing to accept a third position trust deed on any property as satisfaction of the claims arising out of the Summerhays matter.

DATED this 10th day of December, 1999.




Bryce Whitney

Subscribed and sworn to before me this 10th day of December, 1999.


Notary Public

Howard Chuntz, No. 4208
Attorney for Plaintiff
1149 West Center Street
Orem, Utah 84057
Telephone: (801) 222-9700

FIFTH DISTRICT COURT, DIVISION II, STATE OF UTAH

COUNTY OF WASHINGTON, ST. GEORGE DEPARTMENT

WHITEWATER WHIRLPOOL BATHS
& SYSTEMS, INC.,

AFFIDAVIT OF
ANN TUCKER

Plaintiff,

v.

BARBARA R. SUMMERHAYS, RAN CO
HOMES, INC., and DOES 1 through 25,

Civil No. 990500591

Defendants.

_____ /

STATE OF UTAH)
)
) ss
COUNTY OF UTAH)

I, Ann Tucker, upon oath duly sworn, state:

1. I am the collection's officer for the above named plaintiff and have personal knowledge of the information set forth below and would so testify if called upon to do so in a court of law.

2. Prior to April, 1999, I did have discussions with Richard Nelson regarding the debt that RanCo Homes, Inc., owed to Whitewater with respect to the Summerhays property and listened to various proposals made by him with respect to satisfying that obligation.

3. Mr. Nelson was advised that all proposals would be submitted to Whitewater's president for approval before anything could be done.

4. If Mr. Nelson had told me that he was offering Whitewater a trust deed note in a third position against any particular lot in satisfaction of RanCo's obligation, I would have rejected that offer out of hand and not even submitted it to Whitewater's president. I do not recall ever receiving such a proposal from Mr. Nelson.

5. Prior to April of 1999 no agreement was reached with Mr. Nelson with respect to the Summerhays project and I ceased having discussions with Mr. Nelson concerning after the matter was turned over to Whitewater's attorney in March of 1999.

6. I later was advised by Whitewater's attorney, Howard Chuntz, of various other proposals that Mr. Nelson, through his attorney, was making to settle the Summerhays matter and communicated those to Whitewater's president.

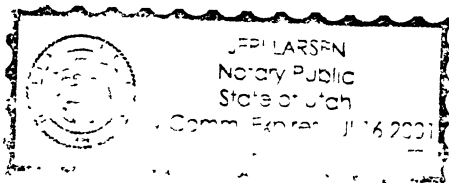
7. The proposal that was finally accepted by Whitewater was a first position note and trust deed in the sum of \$8,203.34.

8. The final agreement was negotiated by Whitewater's attorney, Howard Chuntz, and approved by Whitewater's president.

DATED this 6 day of December, 1999.

Ann Tucker
Ann Tucker

Subscribed and sworn to before me this 6th day of December, 1999.



Jeff Larsen
Notary Public

JONES, WALDO, HOLBROOK & McDONOUGH

A PROFESSIONAL CORPORATION

ATTORNEYS AND COUNSELORS

1500 WELLS FARGO PLAZA

170 SOUTH MAIN STREET

SALT LAKE CITY, UTAH 84101-1644

TELEPHONE (801) 521-3200

FAX (801) 328-0537

www.joneswaldo.com

WASHINGTON, D.C. OFFICE
411 CONSTITUTION AVE., N.E.
WASHINGTON, D.C. 20002
TELEPHONE (202) 547-7711
FAX (202) 547-5717

ST. GEORGE OFFICE
THE TABERNACLE TOWER BLDG.
SUITE 200
249 EAST TABERNACLE
ST. GEORGE, UTAH 84770-2978
TELEPHONE (435) 628-1627
FAX (435) 628-5225

IN REPLY REFER TO:

ST. GEORGE

July 26, 1999

Howard Chuntz, Esq.
1149 West Center Street
Orem, Utah 84057

Re: Whitewater Whirlpool Baths v. RanCo Homes, et al.
Civil No. 990500591
Settlement Negotiations

Dear Mr. Chuntz:

This letter is in follow-up of our several conversations regarding the final resolution of the issues involving Whitewater Whirlpool Baths, RanCo Inc. and RanCo Homes (collectively herein "RanCo"). Whitewater and RanCo had previously reached a settlement agreement wherein Whitewater was given a second position trust deed note on two parcels of property in the combined amount of the \$30,556.94 settlement amount. These will now be reconveyed to RanCo Inc. in exchange for an assignment of a first position on a different parcel, located in Painted Desert Phase 2, in the amount of \$25,000 with a second position trust deed note on this same parcel in the amount of \$7,928.53 (this amount represents the interest accrued through July 22, 1999 since the settlement was first reached in addition to the \$5,556.94 principal amount). Interest will accrue on the assignment amount and on the trust deed note at nine percent (9%) from July 23, 1999. This change is in conjunction with the settlement regarding the Summerhays matter, which is resolved by Whitewater being given a trust deed note in the amount of \$8,203.34, in exchange for Whitewater dismissing its above referenced complaint against Summerhays, RanCo Homes, and Does 1-25, and releasing all claims against RanCo Homes.

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Howard Chuntz, Esq.
July 26, 1999
Page 2

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Sincerely,

JONES, WALDO, HOLBROOK & McDONOUGH



Russell S. Mitchell

FILED
FIFTH JUDICIAL DISTRICT COURT
2000 JUN -5 AM 9:42

WASHINGTON COUNTY

BY 08

Russell S. Mitchell (USB #6938)
JONES, WALDO, HOLBROOK & McDONOUGH, P.C.
Attorneys for Defendant RanCo Homes, Inc.
249 East Tabernacle, Suite 200
St. George, Utah 84770
Telephone: (435) 628-1627
Fax: (435) 628-5225

IN THE FIFTH JUDICIAL DISTRICT COURT FOR
WASHINGTON COUNTY, STATE OF UTAH

WHITEWATER WHIRLPOOL BATHS
& SYSTEMS, INC.,

Plaintiff,

vs.

BARBARA R. SUMMERHAYS, RANCO
HOMES, INC., and DOES 1 through 25,

Defendants.

:
:
: **ORDER DENYING MOTION**
: **TO SET ASIDE**
:
:
:

: Case No. 990500591

: Judge James L. Shumate

This matter came before the Court on May 17, 2000, at 1:29 p.m. at the time regularly scheduled for a telephonic hearing on all pending matters before the Court. Plaintiff was represented through its counsel, Howard Chuntz, connected by telephone in the Judge's chambers. Defendant Barbara R. Summerhays was represented by her attorney, Bruce C. Jenkins. Defendant Ran Co Homes, Inc., was present through its president, Richard A. Nelson, and was represented by its counsel, Russell S. Mitchell of and for Jones, Waldo, Holbrook & McDonough, P.C. The Court

having thoroughly reviewed the related pleadings and affidavits in the file, having heard arguments of all parties through their counsel, and for good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion to Set Aside Dismissal With Prejudice is denied. The Court's earlier ruling made without benefit of a hearing is stricken. This case shall remain dismissed with prejudice.

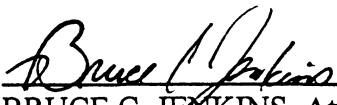
DATED this 2 day of ~~May~~^{Jun}, 2000.



JAMES L. SHUMATE, District Judge

Approved as to Form:

HOWARD CHUNTZ,
Attorney for Plaintiff




BRUCE C. JENKINS, Attorney for
Defendant Barbara R. Summerhays

NOTICE

Please take notice that the undersigned attorney for Plaintiff will submit the above and foregoing Order Denying Motion to Set Aside to the Fifth District Court for signature on the expiration of five (5) days from the date of this Notice unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Rules of Judicial Administration of the State of Utah.

DATED this 18th day of May, 2000.

JONES, WALDO, HOLBROOK & McDONOUGH, P.C.

By: 


Russell S. Mitchell
Attorneys for Defendant Ran Co Homes, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of May, 2000, I mailed, postage prepaid, a true and correct unexecuted copy of the foregoing ORDER DENYING MOTION TO SET ASIDE to:

Howard Chuntz, Esq.
1149 W. Center Street
Orem, Utah 84057

Bruce C. Jenkins, Esq.
352 E. Riverside Drive, Suite C-4
St. George, Utah 84790



A handwritten signature in black ink, appearing to read "Robert S. Mahaffey", is written over a horizontal line.

Rule 60. Relief from judgment or order.

(a) *Clerical mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.