1981

Strevell Paterson v. Michael R. Francis : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF UTAH, STATE OF UTAH

STREVELL PATERSON,	:	
	:	
Plaintiff-Respondent,	:	
	:	Case No. 17598
vs.	:	
	:	
MICHAEL R. FRANCIS	:	
	:	
Defendant-Appellant,	:	

BRIEF OF APPELLANT

APPEAL FROM THE SUMMARY JUDGMENT ENTERED IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

HONORABLE KENNETH RIGTRUP, JUDGE

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Plaintiff brought suit against Defendant based on Defendant's written guarantee of the debts of Mountainland Sports, Inc. Plaintiff had previously obtained a Judgment against said Corporation which Plaintiff alleges has been unsatisfied. Defendant filed a Third-Party Claim against DAVID J. TOUSSANT, seeking indemnity from him to the extent he may be found liable to Plaintiff.

DISPOSITION IN THE LOWER COURT

A hearing was held in the Third Judicial District Court of Salt Lake County, before the Honorable Kenneth Rigtrup, Judge, on the 9th day of December, 1980, on Plaintiff's Motion for Summary Judgment. After oral arguements the Court granted Plaintiff's

Motion and signed an Order to that effect on the 29th day of December, 1980. Notice of Appeal was timely filed within the extended time period granted the Defendant-Appellant in the Court below.

RELIEF SOUGHT ON APPEAL

Appellant respectfully requests that the Supreme Court vacate the Summary Judgment entered against Defendants in the District Court below and remand the case for further proceedings.

STATEMENT OF THE FACTS

On or about January 19, 1977, Defendants, MICHAEL R. FRANCIS, and LLOYD UNGRICHT, signed a guarantee whereby they agreed to personally and continually guarantee payment of the purchase price of all goods and merchandise sold to Mountainland Sports, Inc. (hereinafter referred to as "the Corporation") by Plaintiff STRAVELL PATERSON. Defendant was then a stockholder and Director of the Corporation. This guarantee could be revoked by the guarantors upon giving 30-days written notice thereof to STRAVELL PATERSON, leaving the guarantors liable only as to past debts of the Corporation.

On or about the first day of April, 1978, Defendant, MICHAEL R. FRANCIS, sold all interest he owned in the Corporation to DAVID

J. TOUSSANT, and notified Plaintiff, STRAVELL PATERSON, of the sale in writing and further exercised his right to terminate the guarantee.

On or about the 5th day of April, 1978, Plaintiff by its agent, MR. GANETT, acknowledged the above Notice of Defendant, MICHAEL R. FRANCIS. Plaintiff, through its agent, KEITH HYATT, offered to release Defendant, MICHAEL R. FRANCIS, from all liability, including past liability, under his guarantee of the debts of the Corporation if Defendant, MICHAEL R. FRANCIS, as agent for the Corporation, would sign a Promissory Note and Security Agreement obligating the Corporation for a certain amount. Defendant, MICHAEL R. FRANCIS, did in fact execute a Promissory Note and Security Agreement as agent for said Corporation in exchange for Plaintiff's promise that his personal guarantee for the Corporate debt would be entirely cancelled and released.

The Corporation apparently only made partial payments to the Plaintiff, STRAVELL PATTERSON, for its outstanding debts and a Default Judgment was rendered against the Corporation for the unpaid balance. The trial court in that case ordered the remaining inventory of the Corporation sold and applied to the Judgment. Plaintiff then brought this action seeking to enforce Defendant's guarantee of the Corporation's debts.

ARGUMENT

POINT I

THE TRIAL COURT IMPROPERLY GRANTED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN SPITE OF CERTAIN UNRESOLVED DISPUTES REGARDING MATERIAL ISSUES OF FACT

The purpose of Summary Judgment is to bar from the Courts unnecessary litigation. This occurs only when the pleadings, depositions, affidavits, and admissions show there are no genuine issues of material fact and one Party is entitled to Judgment as a matter of law. In re Williams Estate, 348 P.2d 683 (Utah 1960); Harvey vs. Sanders, 534 P.2d 905 (Utah 1974). However, Summary Judgment should not be granted when it appears that there are disputed issues of fact, which if resolved in favor of the nonmoving Party, would entitle it to prevail. Wingets, Inc. vs. Bitters, 500 P.2d 1007 (Utah 1972).

Defendant-Appellant does not deny that the Promissory Note, upon which Plaintiff brought this action, was duly executed by the Corporation, but asserts that said Note was given in exchange for an agreement by the Plaintiff to release the Defendant from any liability as a guarantor. Plaintiff obviously disputes

Defendant's account of the oral release of Defendant from any potential guarantor liability, but Plaintiff asserts that any such agreement is void, as within the statute of frauds and for failure of consideration in any event.

The very heart of this matter centers around Defendant's guarantee of the Corporate liability and the Defendant's effort to prove an oral release made by the Plaintiff upon receipt of a Note and Security agreement from the Corporation. In Defendant's Answers to Plaintiff's Interrogatories and Request for Admissions dated April 7, 1980, the Defendant asserted by means of a sworn statement the existence of an oral release made by the Plaintiff through a "KEITH HYATT". (Answer to Interrogatory Number 1; Answer to Interrogatory Number 4) In Holbrook Company vs. Adams, 542 P.2d 191 (Utah 1975) this Court vacated the Trial Court's Summary Judgment and remanded the case for further proceedings. The Court said:

> (I)t only takes one sworn statement under oath to disputes the averments on the other side of the controversy and creates an issue of fact. This is analogous to the elemental rule that the fact trier may believe one witness as against many, or, many against one...
>
> It is not the purpose of the Summary Judgment procedure to judge the credibility of the averments of Parties, or witnesses, or the weight of evidence. Neither is it to deny Parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time,

> trouble and expense of trial when upon any view taken of the facts as asserted by the Party ruled against, he would not be entitled to prevail. Only when it so appears is the Court justified in refusing such a Party the opportunity of presenting his evidence and attempting to persuade the fact trier to his views. Conversly if there is any dispute as to any issue, material to the settlement of the controversy, the Summary Judgment should not be granted. (Emphasis added) 542 P.2d at 193.

Defendant-Appellant has alleged in a sworn statement the existance of an oral release by the Plaintiff herein as to the Defendant's liability as a Guarantor for the Corporation's debts. This alone suffices to create a dispute as to a material issue of fact which precludes the granting of Summary Judgment. Therefore the Trial Court's granting of the Plaintiff's Motion for Summary Judgment was error, and should be vacated by this Court.

In Mel Hardman Productions, Inc. vs. Robinson, 604 P.2d 113 (Utah 1979) this Court reversed and remanded a Trial Court's Judgment notwithstanding the verdict against Defendant's Counterclaim. The Court stated:

> (T)he right of trial by jury is one which should be carefully safeguarded by the Courts, and when a Party has demanded such a Trial, he is entitled to have the benefit of the jury's findings on issues of fact; and it is not the Trial Court's prerogative to disregard or nullify them by making findings of his own. Therefore, in ruling on motions which take issues of fact from the jury (this includes both Motions for directed Verdict and Judgment not Withstanding the Verdict), the Trial Court is obliged to look at the evidence and all reasonable inferences

that fairly may be drawn therefrom in the light favorable to the Party moved against; and the granting of such a Motion is justified only if, in so viewing the evidence, there is no substantial basis therein which would support verdict in his favor. On appeal, in considering the Trial Court's granting of such Motions, we will look at the evidence in the same manner. 604 P.2d at 917.

A Motion for Summary Judgment obviously takes the issue of fact from the jury. Therefore the Trial Court below should have looked at the evidence with all reasonable inferences in the Defendant's favor. Because the Defendant has submitted a sworn statement alleging a dispute upon a material issue of fact in this case, the Court erred in granting the Plaintiff's Summary Judgment. For that reason, and the reasons stated below, this Court should vacate the Summary Judgment in favor of Plaintiff entered in the Trial Court and remand the case for further proceedings below.

POINT II

THE AGREEMENT TO RELEASE DEFENDANT AS GUARANTOR WAS OBTAINED IN EXCHANGE FOR THE CORPORATION'S EXECUTION OF A PROMISSORY NOTE TO THE PLAINTIFF, AND WAS NOT REQUIRED TO BE IN WRITING.

A. The disputed release is not within the Statute of Frauds and need not be written.

Plaintiff's Memorandum in Support of its Motion for Summary Judgment cited Utah Code Annotated, 1953, Section 25-5-4, the Statute of Frauds, which requires that agreements to answer for the debt, default, or miscarriage of another be in writing or be void. Plaintiff failed to cite Section 25-5-6, which provides in part:

> A promise to answer for the obligation of another in any of the following cases is deemed an original obligation of the Promissor and need not be in writing: ... (3) where the promise, being for an antecedent obligation of another, is made upon consideration that the Party receiving it cancel the antecedent obligation, accepting the new promise as a substitute therefor; (Emphasis added)

The language of this Statute excludes the disputed release of Defendant as Guarantor from being within the Stutute of Frauds. The Promissory Note was executed by the Defendant as agent of the Corporation, and in consideration of the Plaintiff's promise to cancell the Defendant's personal obligation as Guarantor of Corporate debts. The Corporation had no obligation to execute a Note and Security Agreement, and Defendant personally had no obligation to execute the Note and Security Agreement. The agreement by the Corporation to execute the Note and Security Agreement was obtained in exchange for the Plaintiff's release of the Defendant in his personal capacity as Guarantor. Plaintiff's

act in receiving the Promissory Note and Security Agreement cancelled the Defendant's personal obligation regarding Corporate debts. Because the oral promise by the Plaintiff through its agent, KEITH HYATT, was not void as being within the Statue of Frauds, Defendant should have the opportunity to present evidence to establish the nature of the transaction between the Parties.

The only writings which evidence the transaction disputed by the Parties herein are the Note and Security Agreement which the Defendant signed as agent for the Corporation. It is well established that parol evidence is not admissible to vary the terms of a written instrument. But the documents referred to above do not deal with the release of Defendant in his Guarantor capacity and no attempt is being made to vary their terms. In this regard the Utah Supreme Court has stated:

> The inquiry is whether the writing was intended to cover a certain subject of negotiation; for if it was not, then the writing does not embody the transaction on that subject ... whether a particular subject of negotiation is embodied by the writing depends fully on the intent of the Parties thereto... This intent must be sought ... in the conduct and language of the Parties and surrounding circumstances... The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were, in fact, covered ... in deciding upon this intent the chief and most satis-

> factory index for the Judge is found in the circumstances, whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation. (Citing Whigmore) Farr vs. Wasatch Chemical Company, 143 P.2d 281, 283 (Utah 1943).

In the case at bar the only writings which evidence the disputed transaction are the Note and Security Agreement. The writings do not mention, cover, or deal with the release of Defendant as guarantor. This is so because the Note and Security Agreement were not intended to contain all aspects of the transaction. Plaintiff's oral release may, therefore, be proven by the "conduct and language of the Parties and the surrounding circumstances", and evidence should be received on that point at Trial.

In Christensen vs. Abbott, 595 P.2d 900,902 (Utah 1979), this Court stated:

> (T)he parol evidence rule is not applicable to a writing which is not intended by the Parties as a final and complete expression of their bargain.

In that case the Supreme Court upheld the admission by the Trial Court of oral evidence concerning the cancellation of a Promissory Note, and held that the parol evidence rule was not

violated because the Note and an accompanying Assumption Agreem were not intended as a total expression of the parties transaction. In the case at bar, Defendant alleges that the release agreement was not intended to be covered in the written Promissory Note or Security Agreement. And because of the oral nature of the Release Agreement Defendant should have been allow the opportunity to present evidence as to its scope and effect a trier of fact.

In Oberhansly vs. Earle, 572 P.2d 1384 (Utah 1977) the Uta Supreme Court stated:

> The burden of proving the existence of a contract is on the Party seeking the enforcement of it. Of course the intentions of the Parties are controlling, and normally these intentions would be found in the instrument itself. If a writing is not sufficient to establish meaning, however, resort may be had to extraneous evidence manifesting the intentions of the Parties. 572 P.2d at 1386.

The actions of the Corporation and Defendant as agent of th Corporation in executing a Promissory Note and Security Agreement portend something more than a desire to be accommodati to the Plaintiff herein. There is no reasonable explaination fo why the Defendant herein on behalf of the Corporation would have executed the Promissory Note and Security Agreement unless some benefit would have been obtained thereby. The benefit which

Defendant alleges is the release by the Plaintiff of the Defendant in his individual capacity for all debts of the Corporation, past or present. Defendant seeks the opportunity to present evidence at Trial which will support this allegation, and is anxious to meet his burden of showing the intentions of the Parties by their conduct and by attendant circumstances.

It is well settled that the parol evidence rule does not have any application to subsequent agreements. Therefore evidence of subsequent modifications of an integration may be shown even if it contradicts the original statement. Contracts, Calamari & Perillo 2nd Ed. West Publishing Co., Section 3-7. Because the oral release by Plaintiff of Defendant in his Guarantor capacity was a modification of an original contract whereby Defendant did guarantee Corporate debts, parol evidence is admissible to establish the nature of that modification.

Utah Code Annotated, 1953, Section 70A-2-202 of the Uniform Commercial Code provides:

> Terms with respect to which the confirmatory memoranda of the Party agree, or, which are otherwise set forth in a writing intended by the Parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement, but may be explained by (a) course of dealing or usage of trade or by course of performance; and (b) by evidence of consistent additional terms un-

less the Court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

The oral release by Plaintiff of Defendant does not contradict the Note and Security Agreement, but it explains why these instruments were executed. The Note and Security Agreement executed by Defendant in his capacity as agent were not intended by the Parties as a final expression of their agreement only as to the agreed-upon amount of Corporate indebtedness and security therefor. The writings were intended to provide a benefit to the Plaintiff in coming to an agreement with a Corporation as to the extent of its obligations, and evidencing the extent of that debt in clear and uncertain terms, as well as to secure that debt by the inventory owned by the Corporation. These writings were not intended to contain the agreement between Plaintiff and Defendant as to the release of Defendant's individual liability as Guarantor of Corporate debts. Therefore the writings were not a total integration of the Party's overall agreement. Comment 3 of the above-cited section states that under the Code there is not a total integration unless the alleged additional terms "would certainly have been included in the document in view of the Court". That is, for there to be a total integration which would exclude any parol evidence regarding the oral release, the Trial

Court would have to find as a matter of law that the Parties intended to include all aspects of their transaction in the Promissory Note and Security Agreement signed by the Defendant as agent of the Corporation. As noted above, Defendant has submitted a sworn statement in answering Plaintiff's Interrogatories which disputes this allegation. Therefore the existence and terms of this oral release are material issues of fact disputed by the Parties in the instant case, and the Trial Court improperly granted Plaintiff's Motion for Summary Judgment.

The Guarantee Agreement on behalf of the Corporation by MICHAEL FRANCIS and LLOYD UNGRICHT contains a clause requiring that revocation by said Guarantors of prospective liability could be obtained only by written notice after thirty (30) days had expired. This requirement in no way renders void the oral release by the Plaintiff through its agents. The guarantee clause requires that a written notice of termination must be sent in order to abrogate the Guarantor's liability for any future debts of the Corporation. This Notice was sent by the Defendant and received by the Plaintiff, and is not the subject of the dispute between the Parties. The oral release which Defendant seeks to establish on behalf of the Plaintiff resulted from a subsequent transaction and concerns the liability of Defendant as Guarantor

for past Corporate debts, including the Promissory Note. Therefore an oral agreement is sufficient to release Defendant from his liability as Guarantor of Corporate debts.

B. No consideration is required for an instrument given as security for an antecedent obligation.

Utah Code Annotated, Section 70A-3-408 of the Utah Uniform Commercial Code provides:

> Want or failure of consideration is a defense against any person not having the right of a holder in due course, except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an anticedent obligation of any kind...

Comment Two to that Section provides:

> The "Except" Clause is intended to remove the difficulties which have arisen where a note or a draft, or an endorsement of either, is given as payment or security for a debt already owed by the party giving it, or by a third party...

In the case at bar, Plaintiff's oral promise to release Defendant from his individual liability as Guarantor of corporate debt was obtained by the Defendant giving the Plaintiff a Promissory Note and Security Agreement on behalf of the Corporation. Therefore, no separate consideration was necessary for Plaintiff to be bound in releasing Defendant from his liability. By the Corporation executing a valid note and security agreement the Plaintiff became bound on it's promise to release Defendant.

In Castle & Co. vs. Bagley , 467 P.2d 408 (Utah 1970) this Court affirmed the decision that the Trial Court rendered in favor of the Plaintiff. There the Defendant orally agreed to personally pay any prior indebtedness of his company, if the Plaintiff would extend him further credit and deliver merchandise to him. Defendant there executed a Promissory Note in his individual capacity, but later refused to pay said Note. The Trial Court concluded that no consideration for the Note executed by the Defendant was necessary for the obligation to be binding upon Defendant. In the case at Bar, the maker of the Note, the corporation, had no obligation to give the Note to the Plaintiff herein, but did so upon reaching an agreement as to the amount of corporate obligation and the release of the Defendant from his guarantee of that corporate debt. Therefore Plaintiff should be bound by it's oral promise to release the Defendant from his individual liability, and the Trial Court's granting of Summary Judgment against Defendant without hearing evidence thereon, was improper.

Under the sales portion of the Utah Uniform Commercial Code, Section 70A-2-201 (1) one finds: "An agreement modifying a contract within this article needs no consideration to be binding." The Section does not require the modifying agreement to

be writen except in two instances. First a writing is r
the contract, as modified, is withing the Staute of Frau
provision of the Code, or, second, if the original contr
its terms, excludes modification or recission by mutual
except by a writing. Utah Code Annotated, 1953, Utah Un
Commercial Code, Section 70A-2-209 (2) (3). Since the d
transaction does not come within the Statute of Frauds,
writing is not required for a recission or cancellation
liability for past debts by the terms of the agreement i
there need not have been consideration given by the Part
agreement to release Defendant herein from his liability
Corporate Guarantor.

In any event pre-UCC case law has held that the giv
a Note and Mortgage as an additional security for a pre-
debt is done upon valuable consideration. Abraham vs. A
349 P.2d 385 (Utah 1964); Bowman vs. White, 369 P.2d 962
1962). The fact that the Corporation gave to the Plaint
Promissory Note and Security Agreement which it had prev
never given to Plaintiff, was sufficient consideration t
the oral agreement between Plaintiff and Defendant bindi
Plaintiff. This act clearly benefited the Plaintiff in
now had a sum certain upon which it could hold the Corpo

accountable, which was not clearly fixed or agreed upon prior to that time, and it further secured said indebtedness by means of a Security Agreement covering the Corporation's inventory.

C. The agreement whereby Plaintiff received a Note and Security Agreement from the Corporation in exchange for Plaintiff's release of Defendant in his Guarantor capacity constitutes an accord and satisfation.

Plaintiff argued below that the receipt by it of the Promissory Note and Security Agreement by the Corporation cannot discharge Defendant's guarantee for Corporate debts because the Corporation was already obligated and indebted to Plaintiff. However the Corporation had no duty to give Plaintiff the Promissory Note referred to, nor enter into a Security Agreement which covered its inventory. Rather the Corporation, through its agent who is the Defendant herein, was induced to do so at the request of Plaintiff, and therefore, suffered a legel detriment in executing the documents. The amounts which the Corporation owed the Plaintiff on an open account basis became a sum certain and an admitted liability by the Corporation. Because the Parties agreed to compromise their claims against each other and settled on an amount for which the Corporation would be indebted to the Plaintiff, and Plaintiff received a Note and Security Agreement as requested, and Plaintiff agreed to release

the Defendant as to his individual liability, the guarantee of Defendant should be discharged because of an accord and satisfaction. Utah's highest Court has stated:

> This doctrine requires that there be a dispute or uncertainty as to the amount due and that the Parties enter into an agreement that the debtor will pay and the creditor will accept, the lesser amount as a compromise of their differences and in satisfaction of the debt ... it must clearly appear that the Parties so understood and entered into a new and substitute contract. To state the matter in traditional contract writting: That there was a definite meetings of the minds on such an agreement. Tates, Inc. vs. Little America Refining Co., 535 P.2d 1228, 1229 (Utah 1975).

This Court has further stated:

> An accord and satisfaction is a method of discharging a contract or settling a claim arising from a contract, by substituting for such contract or claim an agreement for the satisfation therein, and the execution of the substituted agreement.
>
> To constitute an accord and satisfaction there must be an offer in full satisfaction of the obligation, accompanied by such acts and declarations as amount to a condition that if it is accepted, it is to be in full satisfaction, and the condition must be such that the Party to whom the offer is made is bound to understand that if he accepts it, he does so subject to the conditions imposed ... the accord is the agreement and the satisfaction is the execution or performance of such an agreement. Cannon vs. Stevens School of Business, Inc., 560 P.2d 1383, 1386 (Utah 1977), citing 1 Am.Jur.2d, Accord and Satisfaction,1.

That Court noted that where consideration is necessary for the substitute agreement, consideration may rest on the settler:

of the dispute. In the instant case the Trial Court, by entering Summary Judgment against Defendant below, denied the Defendant the opportunity to present evidence that the Parties reached an accord as to how to discharge their various disputed debts, and that satisfaction thereof was obtained by the Plaintiff which received a Note and Security Agreement from the Corporation. However Defendant herein was denied his satisfaction in that he was not released as Guarantor for Corporate debts as the Plaintiff had promised. By denying the Defendant an opportunity to present evidence as to the substituted agreement, the Trial Court improperly decided a disputed issue of material fact in favor of the Plaintiff without hearing evidence thereon.

In Christensen vs. Abbott, supra, the Utah Supreme Court upheld a Trial Court decision which allowed the cancellation of a Promissory Note after receiving evidence of an oral agreement constsituting an accord and satisfaction. The Court noted that "There is no requirement that an accord and satisfaction must be in writing". 595 P.2d at 902. As to the argument that allowing evidence of an oral agreement to cancel the Promissory Note would violate the parol evidence rule, the Court stated:

> (T)he parol evidence rule is not applicable to a writing which is not intended by the Parties as a final and complete expression of their bargain. Here the District Court's conclusions necessarily contemplate a finding that the written agreement

> was not intended as the total expression of the agreement ... We believe that such a finding is correct and hold that the Court properly received the evidence of the alleged oral agreement concerning the cancellation of the Note. 595 P.2d at 902,903.

The fact that the accord and satisfaction alleged by Defendant herein is not in writing does not prevent the Trial Court from allowing evidence in establishing the same. And since Defendant has submitted a sworn statement alleging the existence of such an agreement, a disputed issue of material fact exists precluding a granting of Summary Judgment on behalf of either Party. Defendant alleges in paragraphs 5, 6, and 7 of his Answer the factual basis for his affirmative defenses, including accord and satisfation. Although the words of accord and satisfaction are not specifically used, the transactions therein described clearly constitute a basis for that defense and should be sufficient. Counsel for Defendant argued the same point orally before the Trial Court below. Whether or not there was an accord and satisfaction is a question of fact upon which the Court has a duty to hear evidence. Therefore the Trial Court's granting of the Plaintiff's Motion for Summary Judgment was improper and should be vacated.

The Defendant does not assert that the giving of the Note and Security Agreement by the Corporation to the Plaintiff herein

extinguished the Defendant's liability automatically, by operation of law. Rather Defendant asserts that it was an express agreement between Plaintiff and Defendant on behalf of the Corporation that Defendant's personal liability would be cancelled. It is not the giving of the Note which released the Defendant of his liability as Guarantor, but the agreement by the Plaintiff to accept the Note and Security Agreement in exchange for the release which cancelled the Defendant's liability. In Ford Motor Credit Company vs. Bob Jones Interprises, Inc., 240 F.Supp. 667 (Colo. Dist. 1965) the Court considered the question of release by operation of law. After noting that the giving of a Note does not by itself satisfy an obligation and release the Guarantor, the Court stated:

> It is, of course, possible to contract to release a guarantee such as this by the giving of the Note but the intention to do so must be apparant ... (T)o bring about a discharge, it would have to appear that an accord and satisfaction had been intended by the delivery of this subsequent Note.

In that case the Court looked to the intention of the Parties as manifested in the surrounding circumstances and basic facts which might give rise to any inference of their intent. But the Trial Court in the case at bar failed to allow this. Defendant was therefore improperly prevented from presenting evidence

regarding the Parties intentions about the disputed transaction. This again is a material issue of fact as to whether the Note given by the Corporation in connection with the Security Agreement was a renewal of a prior Corporate obligation, as the Plaintiff contends, of whether there was, in fact, a new agreement in lieu of the earlier one, as contended by the Defendant. The Trial Court's Summary Judgment in favor of Plaintiff improperly decided a material issue of fact disputed by the Parties without receiving evidence thereon, which Judgment should be vacated.

POINT III

PLAINTIFF HAS FAILED TO ALLEGE OR PROVE COMPLIANCE WITH THE TERMS OF ITS PRIOR JUDGMENT AGAINST THE CORPORATION, THUS PRECLUDING PLAINTIFF'S PRESENT CLAIM AGAINST DEFENDANT.

The default Judgment rendered for Plaintiff herein against the Corporation, exhibit "D" in Plaintiff's Motion for Summary Judgment, contains an Order that:

> The inventory of stock in trade of Defendant, MOUNTAIN-LAND SPORTS, INC., including all materials to be used or consumed in the business of said Defendant, and all products of said Defendant, possessed or maintained by the Defendant in connection with its business, and all Defendant's personal property, furniture, furnishings, equipment and fixtures be sold in a commercially reasonable manner in accordance with the Utah Uniform Com-

mercial Code and the proceeds therefrom shall be applied to the amount owing from the Defendant to Plaintiff as provided herein. (Empasis added)

Nowhere has the Plaintiff made any allegations that the provisons of this Order and the Judgment have been followed or complied with, other than the sweeping assertion that: "the Judgment has not been satisfied". (Plaintiff's Complaint, paragraph 4) Nowhere does the Plaintiff allege that any efforts have been made towards a private or public sale of the property covered by the Security Agreement as ordered by the prior Court. No claim has been made that an effort to levy on the property of the Defendant in the prior action was made and was unsuccessful. No statement or allegation by the Plaintiff has been made which might account for any proceeds from such sale, if one was held.

Failure by the Plaintiff to establish its compliance with the terms of the Judgment rendered by the prior Court against the Corporation is fatal to whatever cause of action might now seek to establish. That Court's affirmative Order that the goods and inventory of the Corporation be sold in a commercially reasonable manner and in accordance with the provisions of the Utah UCC requires certain acts by the Plaintiff in order for it to proceed upon that debt.

Utah Code Annotated, 1953, Section 70A-9-504 states:

> Disposition of the collatoral may be by public or private proceedings and may be made by one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place upon any terms, but every aspect of the disposition, including the method, manner, time, and place, must be commercially reasonable ... reasonable notification of the time and place of any private sale or any other intended disposition is to be made shall be sent by the secured Party to the debtor.

This Court has held that the creditor's failure to comply with the requirements governing disposition of repossessed collateral serves as an absolute bar to the creditor's right to a deficiency judgment. FMA Financial Corp. vs Pro-Printers, 590 P.2d 803 (Utah 1979). (Hereinafter Pro-Printers) In the instant case Plaintiff seeks to establish that Defendant now stands in the shoes of the debtor-corporation, and he should be individually liable therefore. By that logic the Defendant herein would need to receive all notices of the sale and disposition of the Corporation's goods and assets which the UCC requires be given to the debtor. If Plaintiff has, indeed, executed on the goods as ordered by the prior Court, then Plaintiff had the responsibility of giving Defendant herein reasonable notice of the sale and conducting the sale in a commercially reasonable manner. In Pro-Printers, supra, this Court stated:

> (T)he secured Party has the burden of establishing that the disposition of the property was done in a commercially reasonable manner and that reasonable notice to the debtor(s) was given. We have held that a guarantor,

> We have have held that a Guarantor, ... is a debtor under the Uniform Commercial Code, and therefore entitled to notice under 70A-9-504(3). (Emphasis added) 590 P.2d at 806, 807.

In the instant case Plaintiff has obviously not met the burden of establishing reasonable notice in a commercially reasonable manner, because Plaintiff has never alleged, and Defendant has in fact never received notice whatsoever in this regard. Plaintiff's failure to give Defendant the statutorily required notice is fatal to its cause of action, and certainly precludes summary judgment in its favor in this action.

Plaintiff has also failed to allege whether or not a sale--reasonable or not--occurred or efforts to that end were ever made, as ordered by the Trial Court. These are essential requirements which must be alleged and proven before Plaintiff can prevail upon his alleged cause of action. In Chrysler Credit Corp. vs. Burns, 562 P.2d 233 (Utah 1977) this Court held that where no notice of time, date, place and manner of sale was given to a debtor by a secured Party-Seller, the sale was not commercially reasonable and, not only was the Creditor not entitled to a dificiency judgment or attorney's fees, but the debtor was entitled to damages for the secured Party's failure to comply with the statute governing repossession and sale under Section 70A-9-507. Plaintiff has no where alleged compliance with

these provisions, and these defects are fatal to Plaintiff's Motion for Summary Judgment and his cause of action as well. Therefore the Trial Court improperly granted the Plaintiff Summary Judgment without requiring the Plaintiff to allege, much less prove, compliance with the UCC requirements for disposing of the Coporation's secured collateral.

CONCLUSION

Because of the many disputed issues of material fact which exist in this case, the Trial Court's granting of Plaintiff's Motion for Summary Judgment was improper as a matter of law. This case cannot be decided without receiving evidence on the many disputed issues of material fact alleged by both Parties. Defendant has alleged a sufficient factual basis which would, if resolved in his favor, defeat Plaintiff's claims. Plaintiff's cause of action contains defects which, if resolved in Defendant's favor, would prevent the Trial Court from ruling for the Plaintiff. The Trial Court's granting of Defendant's Motion for Summary Judgment was error and should be reversed by this Court. Defendant therefore respectfully requests this Court to vacate the

Corrected Page

Trial Court's Order of Summary Judgment in favor of Plaintiff and to remand the case for further proceedings.

DATED this 4th day of June, 1981.

Respectfully submitted,

ALDRICH, NELSON, WEIGHT
ESPLIN & ANDERSON

By Gary H. Weight
GARY H. WEIGHT
Attorney for
Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed two copies of the foregoing Brief of Appellant to DANNY C. KELLY & DAVID J. JORDAN, of VAN COTT, BAGLEY, CORNWAL & MC CARTHY, Attorneys for Plaintiff-Respondent at 236 State Capitol, Salt Lake City, Utah 84114, this 4 day of June, 1981.

Jackie Murphy
Secretary

Trial Court's Order of Summary Judgment in favor of Plaintiff and to remand the case for further proceedings.

DATED this 4th day of June, 1981.

Respectfully submitted,

ALDRICH, NELSON, WEIGHT
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By Gary H. Weight
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Attorney for
Defendant-Appellant

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I hereby certify that I mailed two copies of the foregoing Brief of Appellant to the Utah Attorney General, DAVID WILKINSON, at 236 State Capitol, Salt Lake City, Utah 84114, this 4th day of June, 1981.

Jackie T. Brady
Secretary