

1989

# Vail J. Phillips v. Utah State Credit Union : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

890300

THE SUPREME COURT OF THE STATE OF UTAH

VAIL J. PHILLIPS,

Plaintiff/Respondent,

vs.

UTAH STATE CREDIT UNION,

Defendant/Appellant.

Case No. 89-0300

RESPONDENT'S BRIEF

Appeal from a Summary Judgment and Judgment of the  
Third Judicial District Court of Salt Lake County,  
The Honorable Leonard H. Russon,  
District Court Judge

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**FILED**

FEB 22 1990

Clerk, Supreme Court, Utah

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LIST OF PARTIES

The caption of the case contains the names of all parties.

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## STATEMENT OF THE CASE

### A. Nature of the Case.

The Credit Union, after it had completed a non-judicial foreclosure of a Trust Deed on real property taken by it as primary security for a loan made to Phillips, and after the statutory time had elapsed for the Credit Union to sue Phillips for a deficiency, refused to reassign to Phillips a certain real estate mortgage and note due Phillips, together with all amounts due or to become due thereon, which Phillips had initially given to the Credit Union as additional security for said loan. The real property in said note and mortgage due Phillips being entirely different than that real property covered in the Trust Deed given the Credit Union by Phillips as primary security upon which said Credit Union foreclosed non-judicially. Phillips thereafter brought this action to compel the Credit Union to reassign to Phillips said real estate mortgage and note given as additional security. Phillips further sought to compel the Credit Union to pay over to him the amount of \$27,800, which had been paid on said promissory note and mortgage assigned as additional security to the escrow agent collecting for Phillips on said Note.

### B. Course of Proceedings.

Phillips filed a motion for partial summary judgment to have the note, mortgage and proceeds due and to become due thereon reassigned to him and the District Court granted his Motion for Summary Judgment.

At the same time the Credit Union made a similar motion for summary judgment and the same was denied.

The Credit Union, after entry of the Order on summary judgment adverse to it, filed an interlocutory appeal to this Court, which refused to hear the same and remanded the case to the District Court.

Phillips proceeded to enforce the summary judgment granted him and had the mortgage and note reassigned to him and collected all the funds owing to him thereon.

That the District Court subsequently heard the matters remaining to be tried relating to damages and attorney fees claimed by Phillips, and the Court denied Phillips's claims therefor. The Credit Union thereafter appealed the first Order granting plaintiff's Motion for Summary Judgment.

#### FACTS

The Credit Union, on or about the 18th day of November, 1980, loaned \$150,000 to Phillips and took as security therefor a Trust Deed and Note covering real property located in Tooele County, Utah. As additional security, Phillips assigned to the Credit Union a promissory note and mortgage due him covering different property than that described in the Trust Deed and Note given by Phillips to the Credit Union as primary security. Phillips thereafter failed to make the payments to the Credit Union as required by the Trust Deed and Trust Deed Note, given it as

primary security, and as a result thereof the Credit Union sold the property described on the Trust Deed taken by it as primary security for the loan at a non-judicial foreclosure sale in Tooele County on the 29th day of April, 1986. That subsequent to said non-judicial foreclosure sale of said property the Credit Union failed to sue Phillips for a deficiency judgment within the statutory time required by §57-1-32, Utah Code Annotated, 1953, Volume 6A, as amended. Subsequent to said time running, Phillips requested that the Credit Union reassign to him his note and mortgage that he had given to the Credit Union as additional security for the loan, together with any and all proceeds due or to become due thereon, and the Credit Union declined to honor Phillips request. Phillips thereafter sued the Credit Union for return of said documents together with all proceeds due and to become due thereon. Thereafter, the Credit Union filed an interlocutory appeal and the Supreme Court refused to hear the same and remanded the case to the lower court to resolve the remaining issue, to-wit: damages, if any, suffered by Phillips because of the Credit Union's refusal to deliver the documents in question, together with the funds represented thereby and said District Court, after a hearing on the issue of damages, denied Phillips claim therefor.

All of the foregoing facts are admitted by the Credit Union's pleadings on file.



#### SUMMARY ARGUMENT

The Credit Union failed to initiate a suit for a deficiency judgment against Phillips within the time frame allowed by §57-1-32, supra, which allows three months from the date a non-judicial sale to establish a deficiency, if any. Thus, the total debt due to the Credit Union was extinguished on the date that the time ran for it to sue for a deficiency.

#### ARGUMENT

The facts admitted by the Credit Union in this case show that its trustee sold the property described in the Trust Deed in question at a non-judicial sale on April 29, 1986, and that said trustee bid on said property at said sale the sum of \$90,000, an amount less than the total claimed to be due and owing by Phillips to the Credit Union at said time. That subsequent to the date of sale, the Credit Union's trustee caused the real property being the subject matter of the non-judicial foreclosure sale to be transferred to the Credit Union. That after the sale date, to-wit: April 29, 1986, more than three (3) months elapsed, during which the Credit Union failed to file an action to establish a deficiency judgment against Phillips as required by §57-1-32, supra.

In order for the Credit Union to establish Phillips liability for any additional amounts due, it was required to comply strictly with the requirements of §57-1-32, supra, and in

the event the Credit Union failed to comply with said section it is precluded from pursuing any other remedy. §57-1-32, supra, gave the Credit Union one remedy and one remedy only, and its failure to comply therewith prohibits it from collecting additional funds from Phillips from any sources whatsoever. Because the Credit Union failed to establish a deficiency amount due and owing to it during the period of time allowed by the statute, any debt that might have been established to be due the Credit Union was automatically extinguished by the time running as provided by the statute and no money was thereafter due it from Phillips.

The Credit Union elected to proceed under the statute in question and cannot now abandon said statute in an attempt to collect on some other theory. To allow such would deprive Phillips of the opportunity to protect and defend his rights under the statute and it would allow all creditors in the Credit Union's position to overreach and treat their debtors unfairly, Concepts, Inc. v. First Security Realty Services, Inc., 743 P.2d 1158, 1160-61 (Utah, 1987).

§57-1-32, supra, is clear and unequivocal and provides that the Credit Union must within three (3) months after the non-judicial sale of real property under a trust deed, file an action to establish a deficiency against Phillips. Said statute further requires that the complaint must set forth specific

allegations as follows, to-wit: the entire amount of the indebtedness, the amount for which such property was sold at the non-judicial sale, and what the party attempting to attain a deficiency believes the fair market value of the property sold was at the date of said sale. Said statute further provides that the Court before rendering judgment shall find the fair market value of the property at the date it was sold and said Court may not render judgment for more than the amount by which the amount of indebtedness, with interest, costs and expenses of sale, including trustee and attorney fees, exceeds the fair market value of the property as of the date of the sale, Christenson v. Jewkes, 761 P.2d 1375, 1377-78 (Utah, 1988). The Credit Union failed to do any of the foregoing and therefore it is not entitled to any deficiency because it failed to establish one as required by law.

The statute in question was interpreted in Cox v Green, 696 P.2d 1207 (Utah 1985), wherein this Supreme Court stated that the statute provided the exclusive remedy for securing a deficiency judgment following a non-judicial sale of real property under a trust deed thereby precluding the pursuance of any other remedy once the sale has been made.

In the instant case the purchase of the Tooele property by the Credit Union's trustee at the non-judicial foreclosure sale and the subsequent failure of the Credit Union to file suit for a deficiency within the time period allowed by statute constituted

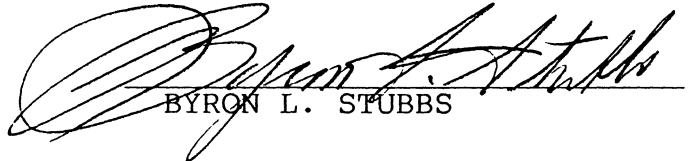
an acceptance by the Credit Union of the property foreclosed upon as full settlement of any indebtedness due the Credit Union from Phillips. The transaction under the statute amounts to nothing more than the Credit Union accepting the property as payment in full for the debt as if Phillips had written a check for the full amount claimed to be due and owing to Credit Union on the indebtedness at the time of the sale.

The other matters raised by the Credit Union in its brief are irrelevant to the issue on appeal in this case.

#### CONCLUSION

In this case the Credit Union failed to comply with the statutory requirements relating to non-judicial foreclosure sales as said statute pertains to deficiency judgments and by reason thereof the Credit Union's appeal must also fail and the judgment of the District Court should be affirmed.

Respectfully submitted this 21st day of February, 1990.

  
BYRON L. STUBBS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27<sup>nd</sup> day of February, 1990, four copies of the Respondent's Brief were delivered to

Dale R. Kent  
McKay Burton & Thurman  
1200 Kennecott Building  
Salt Lake City, Utah 84133

A handwritten signature in cursive script, appearing to read "Dale R. Kent", is written over a horizontal line.