

1990

Zions First National Bank and 4447 Associates, a Utah General Partnership, by and through its General Partner, Robert D. Kent v. Overthrust Oil and Gas Corporation a Utah Corporation; Bertagnole Investment Company Limited Partnership, a Utah Limited Partnership; Faust Land, Inc., a Utah Corporation; Joseph L. Pentz; Capitol Thrift and Loan; Richard A. Christenson, John Does 1 thru 100 and any and all persons who may claim any right, title or interest in and to the property which is the subject of this action :

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Recommended Citation

Legal Brief, *Zions First National Bank v. Overthrust Oil and Gas Corporation*, No. 90391.00 (Utah Supreme Court, 1990).
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ZIONS FIRST NATIONAL BANK and)
4447 ASSOCIATES, a Utah General)
Partnership, by and through its)
General Partner, ROBERT D. KENT,)
Plaintiffs and Appellees,)
vs.)

OVERTHRUST OIL & GAS CORPORATION)
a Utah Corporation; BERTAGNOLE)
INVESTMENT COMPANY LIMITED)
PARTNERSHIP, a Utah Limited)
Partnership; FAUST LAND, INC., a)
Utah Corporation; JOSEPH L. PENTZ;)
CAPITOL THRIFT & LOAN; RICHARD A.)
CHRISTENSON, JOHN DOES 1 thru 100)
and any and all persons who may)
claim any right, title or interest)
in and to the property which is)
the subject of this action,)
Defendants and Appellants,)

BRIEF OF ZIONS FIRST
NATIONAL BANK AND
4447 ASSOCIATES

Appeal No. 90 391

OVERTHRUST OIL & GAS CORPORATION)
a Utah Corporation, and FAUST)
LAND, a Utah Corporation,)
Cross Claim Plaintiffs)
and Appellants,)
vs.)

CAPITOL THRIFT & LOAN, a Utah)
Corporation, and RICHARD A.)
CHRISTENSON, an individual,)
Cross Claim Defendants)
and Appellees.)

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FILED

JAN 14 1991

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

ZIONS FIRST NATIONAL BANK and
4447 ASSOCIATES, a Utah General
Partnership, by and through its
General Partner, ROBERT D. KENT,

Plaintiffs and Appellees,

vs.

OVERTHRUST OIL & GAS CORPORATION
a Utah Corporation; BERTAGNOLE
INVESTMENT COMPANY LIMITED
PARTNERSHIP, a Utah Limited
Partnership; FAUST LAND, INC., a
Utah Corporation; JOSEPH L. PENTZ;
CAPITOL THRIFT & LOAN; RICHARD A.
CHRISTENSON, JOHN DOES 1 thru 100
and any and all persons who may
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in and to the property which is
the subject of this action,

Defendants and Appellants,

OVERTHRUST OIL & GAS CORPORATION
a Utah Corporation, and FAUST
LAND, a Utah Corporation,

Cross Claim Plaintiffs
and Appellants,

vs.

CAPITOL THRIFT & LOAN, a Utah
Corporation, and RICHARD A.
CHRISTENSON, an individual,

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BRIEF OF ZIONS FIRST
NATIONAL BANK AND
4447 ASSOCIATES

Appeal No. 90 391

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JURISDICTION

Jurisdiction is established under §78-2-2(3)(f) Utah Code Ann. (1953 as amended) which gives the Supreme Court jurisdiction to review all final orders and decrees of the district court. This case is subject to assignment to the Court of Appeals.

ISSUES PRESENTED ON APPEAL

Appellants have stated nine issues on appeal which these Appellees believe can be succinctly summarized as follows:

1. WHETHER THE TRIAL COURT ERRED IN HOLDING THAT THE SEPTEMBER 1987 SETTLEMENT AGREEMENT DID NOT RELEASE OTHERWISE VALID LIENS SECURING UNPAID NOTES, EITHER BY CONTRACT INTERPRETATION OR BY OPERATION OF LAW.

This question represents a mixed question of fact and law. Insofar as the question involves the intent of the parties to preserve the lien on the property, it is a question of fact. Therefore, whether based on oral or documentary evidence, the finding will not be set aside on appeal unless clearly erroneous. Utah R. Civ. P. 52(a) (as amended, effective January 1, 1987); Grayson Roper Limited Partnership v. Finlinson, 782 P.2d 487 (Utah 1989).

Insofar as the question is one of law involving contract interpretation and the operation of law, the appropriate standard of review is no particular deference, but the lower court decision should be reviewed for its correctness. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Ut. 1985).

2. WHETHER THE TRIAL COURT ERRED IN ITS VALUATION OF CERTAIN PROPERTIES.

This issue presents a question of fact; therefore, the standard of review is whether the lower court's ruling was clearly erroneous.

STATEMENT OF THE CASE

Nature of the Case

Appellants Overthrust Oil and Gas Company (hereinafter "Overthrust") and Faust Land, Inc. (hereinafter "Faust") are appealing a decision of the Third Judicial District Court allowing the judicial foreclosure of a Trust Deed covering undeveloped acreage in Tooele County, Utah.

Course of Proceedings and Disposition in the Court Below

A non-jury trial was held before the Honorable Homer F. Wilkinson on Thursday, August 31, 1989, in Tooele, Utah.

Subsequent to the trial, the District Court made Findings of Fact and Conclusions of Law which were executed by the Court on October 23, 1989. In its decision, the Court ruled in Plaintiffs' favor, holding that Plaintiffs may proceed with a judicial foreclosure of the Tooele County property which is the subject of this case.

The Court's Findings of Fact and Conclusions of Law delayed for future determination the issue of the amount of "boot" to be credited to the Promissory Note which is the subject of this action. A hearing was held on Monday, November 13, 1989, wherein the Court considered this issue and subsequently considered a proposed Supplemental Findings of Fact and Conclusions of Law. Counsel for Defendants Overthrust and Faust objected to the same.

A hearing on the objections was held by the Court on February 8, 1990.

Pursuant to such hearing, the District Court made Superseding Findings of Fact and Conclusions of Law which were intended to supersede all previous Findings and Conclusions. In the Superseding Findings of Fact and Conclusions of Law, the Court found (1) the promissory note which was secured by a Trust Deed from Overthrust was unsatisfied, (2) an amount of \$1,152,115.50 was still owed thereon after application of all appropriate credits, and (3) the Trust Deed had not been released. The Court therefore ordered foreclosure.

No Defendants posted any Supersedeas Bond. As a result, the foreclosure sale was completed on August 14, 1990.

STATEMENT OF MATERIAL FACTS

1. In 1987, three large loans owing to Zions Bank and cumulating over seven million dollars went into default (R. 433). The loans were secured primarily by various parcels of real estate in Summit, Salt Lake and Tooele Counties (Court Finding of Fact Nos. 1-4, 8; R. 435-434, 433). Appellee 4447 Associates had earlier acquired an interest in the notes with Zions Bank (Court Finding of Fact No. 9; R. 433).

2. The bank engaged in extensive settlement negotiations with the obligors on the notes (Court Finding of Fact No. 11; R. 433). A written Settlement Agreement of September 30, 1987, resulted from such discussions (Court Finding of Fact No. 12; R. 433).

3. The obligors of the notes, realizing that substantial deficiency judgments would result following foreclosure of the collateral, agreed to the following:

a. to allow Zions Bank to complete foreclosures of the real estate, (Court Finding of Fact No. 12; R. 433); and

b. to contribute certain other assets ("boot") to the bank in exchange for the bank's agreement to release the obligors from further personal liability on the notes. (Court Finding of Fact Nos. 12, 14(a) - (3); R. 433, 432).

4. Appellants Overthrust and Faust Land Inc. were not makers on the notes (Court Finding of Fact No. 5; R. 434) but claimed some ownership to approximately 3,500 acres of undeveloped real property located in Tooele County, which property was pledged as collateral on one of the loans in default with the bank. Appellant Faust Land Inc. is a wholly-owned subsidiary of Appellant Overthrust (Court Finding of Fact Nos. 4, 10; R. 434, 433).

5. Overthrust and Faust Land Inc., while not direct parties to the September 30, 1987, Settlement Agreement (Court Finding of Fact No. 13; R. 432), actively participated through their President in the settlement negotiations (Court Finding of Fact No. 15; R. 431), knew the consequences of the decisions reached (Court Finding of Fact No. 15; R. 431), never objected to the same, and cooperated in effectuating the terms of the Settlement Agreement (Court Finding of Fact Nos. 15, 17, 18; R. 431). In addition, ownership of Overthrust and other entities who were parties to the September 30, 1987, Settlement Agreement was substantially similar (Court Finding of Fact No. 6; R. 434-433).

6. Following the execution of the Settlement Agreement, Zions Bank and the note obligors began to complete the terms thereof. The "boot" assets were delivered to the bank in trust and the bank began finalizing the foreclosures of the collateral securing the notes. (R. 481, pages 236, 207+208.)

7. Much of the collateral was foreclosed pursuant to sales in the Utah Bankruptcy Court which were ordered pursuant to the September 30, 1987, Settlement Agreement. (R. 481, page 236).

8. The final parcel of property to be foreclosed pursuant to the September 1987 Settlement Agreement was the 3500 acres located in Tooele County to which Appellants claimed some interest. (R. 481, page 236)

9. Pursuant to the September 30, 1987, Settlement Agreement, the President of Overthrust verbally agreed to execute a deed in lieu of foreclosure to the bank. (Court Finding of Fact No. 17; R. 431). Subsequently, he suggested a "friendly foreclosure" would be preferable, with the intent that Overthrust would not contest the same (Court Finding of Fact No. 18; R. 431). Pursuant to its reservation of right in the September 1987 Settlement Agreement, the bank then initiated the instant action to judicially foreclose its trust deed lien on the Tooele collateral. (Court Conclusion of Law No. 3; R. 428).

10. Contrary to the representations of its President, Overthrust (and Faust Land Inc.) then contested the appropriateness of the action, claiming:

a. That despite its reservation of rights in the Settlement Agreement, the release of liability to the obligors

somehow satisfied the note and extinguished the Tooee collateral.

b. Alternatively, the amounts received on foreclosure of collateral securing the other notes, when added to the "boot" received by the bank, have in effect "overpaid" the note in question and thereby satisfied the same. The Tooee collateral, it is claimed, should thereby be released from its lien to the bank. No claim is apparently asserted that the trust deed was invalid and hadn't been a lien on the property, but only that it is no longer enforceable.

11. At trial, the Court held that:

a. The release of liability to the note obligors did not release the collateral from the valid bank lien. The bank had reserved its rights to complete the foreclosures under the September 1987 Settlement Agreement. (Court Conclusion of Law Nos. 9, 17; R. 427, 425).

b. That after application of all appropriate credits (including "boot") to the note secured by the Tooee property, the balance owing on such note was \$1,152,115.50 at the time of trial (Court Conclusion of Law No. 14; R. 426).

c. That foreclosure be completed (Court Conclusion of Law Nos. 9, 21, 22; R. 427, 425).

SUMMARY OF THE ARGUMENT

The September 30, 1987, Settlement Agreement did not "satisfy" the three delinquent notes owed to Zions Bank, nor did it release valid liens against collateral securing the notes. The Settlement Agreement simply released obligors of the notes from further

liability thereon, all while explicitly reserving the bank's right to foreclose on such collateral.

The trial court, as finder of fact, correctly valued all relevant property and still determined that the Tooele property was subject to a note with an unpaid balance of \$1,152,115.50.

The provisions of the Utah Uniform Commercial Code, by its very terms, do not apply to a transaction involving the foreclosure of real estate. Even if such provisions did apply, Overthrust was not an accommodation party.

The one-action rule was not violated, but instead was followed, in the foreclosures completed pursuant to the September 30, 1987, Settlement Agreement.

Contrary to the assertions of Appellants that the bank should have tried to "rescind" the September 30, 1987, Agreement if the bank wasn't happy with its terms, the bank has never wanted to rescind the agreement. All the bank wants is what the agreement provides--nothing more and nothing less. The Settlement Agreement provided for the bank to complete its foreclosure of the Tooele property. That is what the bank did. The district court considered Appellant's arguments and rejected the same.

ARGUMENT

I. THE SEPTEMBER 30, 1987, SETTLEMENT AGREEMENT WAS VALID AND DID NOT "SATISFY" NOR "EXTINGUISH" THE UNPAID PROMISSORY NOTES.

A. Intent of Settlement Agreement Itself.

Appellants argue that by releasing the obligors from further liability on the notes, there is no more note. Consequently,

Appellants argue, the collateral securing the notes must be released.

Such reasoning is contrary to the express terms of the September 30, 1987, Settlement Agreement.

The Settlement Agreement did not "satisfy" nor "extinguish" the unpaid notes. Such words are not found in the agreement. Instead, the intent and language of the agreement was to release contingent personal liability of the note obligors while expressly reserving the right to foreclose the collateral securing the notes. The agreement states:

"Upon the transfer and recordation of the documents required herein, . . . Lenders specifically acknowledge that Borrowers' and Christenson's personal obligations under such Loans will be terminated and Lenders' sole remedy shall be against the real properties which are the subject of this Agreement."

Settlement Agreement, page 8 (First Exhibit to Addendum to Appellants' Brief). If the parties had intended to "satisfy" the notes, they would not have reserved the right to liquidate the collateral.

Finally, Appellants never allege the other foreclosures pursuant to the Settlement Agreement were invalid--instead, Appellants rely upon such sales to argue the notes were overpaid. It is inconsistent to argue that the 1987 Settlement Agreement satisfied notes and released all collateral, while next arguing that all resulting foreclosures were valid but the one affecting the Tooele property.

It is obvious that the 1987 Settlement Agreement did not satisfy the unpaid notes, nor extinguish the collateral security to the same.

B. Validity of Settlement Agreement.

It is unclear from Appellant's brief whether the validity of the Settlement Agreement is being challenged. Its validity was never challenged in the district court; therefore, it may not be challenged now. Mascaro v. Davis, 741 P.2d 938 (Ut. 1987). Appellees Zions Bank and 4447 Associates do not challenge the validity of the Agreement, but only want the terms therein to be completed.

Appellant's brief appears to challenge the validity of the Settlement Agreement for the reason that foreclosure of the Tooele property was not possible in the Bankruptcy Court at the same time as the other properties. This was not possible because the Bankruptcy Court did not have jurisdiction over the Tooele property. (R. 431, R. 481, pages 234-235). However the Settlement Agreement contemplated such a situation and provided that if an order of sale from the Bankruptcy Court was not possible then the property would be foreclosed under the laws of the state. (Settlement Agreement, See first Exhibit to Addendum to Appellants' Brief, page 8.) Therefore, all parties have been able to comply fully with the terms of the Settlement Agreement.

C. Validity of Trust Deed Itself.

It is also unclear from Appellant's brief whether the validity of the trust deed is being challenged. Because it was not challenged in the district court, it may not be challenged now. Mascaro, 741 P.2d 938. However, should it be found to be an issue, the following general rules are relevant and validate the Trust Deed.

A mortgage is a contract and as such it is governed by the same laws which apply to the interpretation of contracts. Therefore, "[t]he consideration required to sustain a mortgage is the same as that required to sustain a simple contract, and may consist of either a detriment to the promisee or a benefit to the promisor." Surety Life Ins. Co. v. Rose Chapel Mortuary, Inc., 514 P.2d 594, 598 (Id. 1973); Abraham v. Abraham, 394 P.2d 385 (Ut. 1964). In Surety Life, the court held that a mortgage was valid even though the mortgagor did not receive the consideration. In Seattle-First Nat. Bank. v. Hart, 573 P.2d 827, 829 (Wa.App. 1978), the Court found a co-owner's interest in real property could be foreclosed even though it didn't sign the note because it did sign the mortgage.

In order to have a valid trust deed no particular form is necessary, but there must be in existence a legal debt or obligation with a specific amount owing. General Glass Corp. v. Mast Const. Co., 766 P.2d 429, 432 (Ut.App. 1988).

Further, the debt need not be for any consequential amount, there need only be some debt. In American Savings and Loan Ass'n v. Blomquist, 445 P.2d 1, 4 (Ut. 1968), a tender of \$147 was found insufficient to defeat foreclosure when the amount of indebtedness, as determined by the court because there was a dispute, was \$149. Id.

In the present case, the Trust Deed is valid because it was supported by adequate consideration (R. 434-433) and it correctly identified the debt which it was intended to secure (R. 428). The district court found that even after all the pledged security and a percentage of the "boot" were applied to the balance of the

Promissory Note it was still unsatisfied and in default. (R. 426, 430).

II. THE RELEASE OF THE OBLIGORS FROM FURTHER PERSONAL LIABILITY ON THE NOTES DID NOT "RELEASE" THE VALID COLLATERAL SECURING THE NOTES.

A. The Parties to the Settlement Agreement Specifically Reserved Their Rights Against the Collateral.

It is a long-standing rule of law that "[t]he debt and the mortgagor's liability for it are not the same thing in law. Hence the mortgage is not discharged if it is the intention of the parties merely to release the mortgagor's personal liability for it and not to extinguish the debt." 59 C.J.S. Mortgages, §444 (1983). Also, "[i]t is not necessary that there should be a personal liability of the mortgagor in order for there to be a mortgage." Seattle First, 573 P.2d at 828-29 and "a mortgage may secure the debt of another without the mortgagor assuming personal liability for the debt." Gallager v. Central Indiana Bank N.A., 448 N.E.2d 304, 308 (Ind. 1983).

Non-recourse loans secured by real estate are common on Utah. Further, note obligors are often discharged in bankruptcy without releasing collateral securing the "discharged" obligation. The 1987 Settlement Agreement merely accomplishes the same result. It released the obligors of various notes from further liability without releasing the collateral--in effect, making the notes "non-recourse".

An express reservation of a right to foreclose against property which secures a debt while releasing an individual of personal liability is valid and enforceable in Utah because the note is independent from the underlying debt. Utah Farm Production

Credit Ass'n v. Watts, 737 P.2d 154 (Ut. 1987). "Whether the intention in any case is to discharge the debt or merely the personal liability is a question of fact, depending on the circumstances of the case or the construction of the release." Korb v. Minneapolis Threshing Mach. Co., 3 P.2d 502, 505 (Kan. 1931). In Grand Rapids Gypsum Co. v. Carter, 302 F.Supp. (E.D.N.Y. 1969) the court found evidence that a general release was not intended to release a mortgage and therefore, in spite of the general wording of the release only the mortgagor's personal liability was released.

Even if an old note is replaced with a new note or agreement, this does not affect the security. Jones v. American Coin Portfolios, Inc., 709 P.2d 303 (Ut. 1985). In Jones the parties to a note entered into a new agreement and the mortgagor argued that this extinguished the first note and hence the mortgage. However, the court found that the evidence indicated that the parties never intended to extinguish the mortgage because the original note was attached as an exhibit to the new agreement and because the indebtedness represented by the original Trust Deed Note or the amended Trust Deed Note had never been extinguished. Jones v. American Coin, 709 P.2d at 306-307.

In the case at bar, a Trust Deed was given to secure a third party's indebtedness on a note. (R. 434) The parties to the original note subsequently entered into a new agreement in which the debtors were released from personal liability upon the note. However, in the agreement, Zions expressly stated that the release was only of the debtor's personal liability on the notes and all rights against the property which secured the note were expressly

reserved. (R. 433-432, R. 425) Additionally, the Promissory Note has never been returned or marked "paid". (R. 481, page 13). Because the original debt has never been satisfied (R. 426), and the intent of the parties was to only release the debtor's of their personal liability on the Promissory Note, (R. 425) the district court correctly determined that Appellees were entitled to foreclose the Trust Deed.

B. The Collateral Securing the Notes Was Not Released by Operation of Law.

1. Because there has been no violation of Section 78-37-1 U.C.A. The trial court properly found foreclosure to be appropriate.

Section 78-37-1 U.C.A. has been termed the "one-action rule." It provides that:

There can be one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate which action must be in accordance with the provisions of this chapter.

In Utah Mortgage and Loan Co. v. Black, 618 P.2d 43 (Ut. 1980), the court explains:

The purpose of the statute was to eliminate harassment of debtors and multiple litigation which sometimes occurred under the common-law rule which allowed a creditor to foreclose and sell the land and to sue on the note. The statute limits the creditor to one remedy in exhausting his security before having recourse to the debtor for a deficiency. Consequently, if the creditor fails to comply with the statute in not applying the security to the defendants obligation in accordance with their agreement, that would preclude its recovery of any deficiency against them.

Id. at 45.

Appellants assert that the one-action rule has been violated in this case. The reasoning for such assertion is unclear from Appellants' brief.

Appellees do not seek any secondary action for deficiency judgment against any of the obligors under any of the notes. The only relief sought was a foreclosure of the real estate pledged on the various notes. All foreclosures were effectuated under a common plan pursuant to the terms of the Settlement Agreement.

It is also unclear how Appellants have been damaged by the process of liquidation of all collateral pledged on the notes. The one-action rule requires a creditor to exhaust a security prior to seeking a personal judgment against an obligor. Such result is exactly the situation which occurred as required by statute. No deficiency is sought against any party.

2. The district court correctly determined that Overthrust was not an accommodation party and that Section 70A-3-606 U.C.A. did not apply.

Appellees Zions Bank and 4447 Associates incorporate the argument in the brief of Appellee Richard A. Christenson by reference.

In addition, the legislature as well as the courts have expressly stated that Utah's Uniform Commercial Code is not applicable "to the creation or transfer of an interest in or lien on real estate ..." Bekins Bar V Ranch v. Huth, 664 P.2d 455, 460 (Ut. 1983) (quoting from §70A-9-104(j) U.C.A.) (Court refused to apply unconscionability section from Utah's Uniform Commercial Code to a Trust Deed). Therefore, Overthrust's arguments relating to accommodation parties are irrelevant.

III. BECAUSE THE DISTRICT COURT'S VALUATION AND APPLICATION OF THE PROMISSORY NOTE'S SECURITY WAS NOT CLEARLY ERRONEOUS, ON REVIEW IT MUST STAND AND FORECLOSURE WAS THEREFORE APPROPRIATE.

A. In General.

The district court listened to testimony and the issues were extensively argued and briefed by counsel for both parties. While another court may have valued the property differently, there is evidence to support the findings of the district court, and it was definitely within the discretion of the district court to make the findings of fact which were made. A finding is clearly erroneous only if it is against the great weight of evidence or if the court is otherwise definitely and firmly convinced that a mistake has been made. Bountiful v. Riley, 784 P.2d 1174 (Ut. 1989).

Additionally, in an attack on the evidence by appellants, the appellate court should begin its analysis with the trial court's findings of fact, not with an appellant's view of the way he or she believes that facts should have been found. Ashton v. Ashton, 733 P.2d 147 (Ut. 1987). In order to challenge a trial court's findings of fact, an appellant must first marshall all the evidence that supports the findings and then demonstrate that, despite this evidence, they are so lacking in support as to be "against the clear weight of the evidence" and, thus, clearly erroneous. In re Estate of Bartell, 776 P.2d 885, 886 (Ut. 1989).

B. Valuation of Overthrust Stock.

The only valuation issue specifically attacked by Appellants is whether the district court clearly erred in valuing one million (1,000,000) shares of Overthrust stock at \$250,000.00. At trial, George Woodhead, President of Appellant Overthrust, gave testimony

that the shares were worth two and one half ($2\frac{1}{2}$) cents each (or \$250,000). (R. 481, pages 149-152, 162). Additionally at trial, an Option to Purchase between Zions and Overthrust was presented as evidence of the value of Overthrust stock. Under the Option to Purchase agreement, Zions was granted the option to purchase Overthrust stock at ten (10) cents per share. Testimony was also given wherein the value of Overthrust stock was shown to be substantially less than two and one half ($2\frac{1}{2}$) cents per share. (R. 481, pages 123, 209-220). Because the value of the stock was hotly contested, it was clearly within the discretion of the district court to rule that the testimony given by George Woodhead (President of Appellant Overthrust) was the best valuation possible of the stock under the circumstances.

C. Application of Credits Due to the Note.

To reach the conclusion that the note was unpaid and foreclosure was appropriate, the district court credited the value of all security which had specifically been pledged to the Promissory Note. (R. 427-426). In addition, the district court applied, on a pro-rata basis, the value of certain other security ("boot") which Zions was to receive from the Settlement Agreement of September 30, 1987. (R. 427-426). Even after all these credits were accounted for, the Promissory Note was still unsatisfied (R. 426), with an unpaid balance of \$1,152,115.50. Therefore, foreclosure of the Tooele property was appropriate.

Appellants' brief seeks to complicate the district court's ruling by engaging in an analysis of speculative values of all property pledged on other notes as well as the "boot" received by Appellants pursuant to the September 30, 1987, Settlement

Agreement. It also raises valuations of property never raised in the district court and first raised in Appellant's brief.

Evidence and new arguments may not be submitted for the first time on appeal, particularly when the problem could have been resolved by the court below. Mascaro v. Davis, 741 P.2d 938 (Ut. 1987). However, on appeal Overthrust has added credits and made arguments for which no evidence was presented at trial. On appeal, Overthrust argues that no debt is owed to Zions and as support has compiled a table wherein credits are allocated to Zions for security allegedly received under the Settlement Agreement. (Overthrust's Brief, page 29). However, no evidence was presented at trial concerning several of the credits; therefore, the district court made no findings on these items. Overthrust gives a credit of \$620,000.00 to Zions-4447 for a "Redwood Road Rear Utility Access". There is no evidence concerning this item anywhere in the record. Also, \$1,422,291.00 is credited to Zions-4447 for "Reverse of Interest Charges". The argument supporting this credit was not presented at trial, nor is there any evidence that this credit was ever presented to the district court for a decision on whether it would be allowed. Any cite to the record is wholly inadequate and inappropriate to explain Overthrust's assertion that it is entitled to a \$1,422,491.00 credit. In addition to being unsupported by the evidence, the portion of the table contained on page 29 of Overthrust's Brief which summarizes alleged credits to Zions-4447 is irrelevant to the issue in this case; namely, whether the Promissory Note secured by the Tooele property was satisfied. Because these assertions were never presented to the district court for consideration, they may not be

considered now. As a result, the findings of the District Court must stand.

Additionally, it was within the sound discretion of the district court to allow a credit to the Promissory Note on a pro-rata basis. In Clovis National Bank v. Harmon, 692 P.2d 1315, 1318 (N.M. 1984), a note was secured by two mortgages and the court ruled that the note should be satisfied proratably from the sale of the mortgaged property. The reviewing court explained that if the parties had intended the property to secure only certain notes or loans, it could have stated that intent. Because the parties did not, the district court refused to do so.

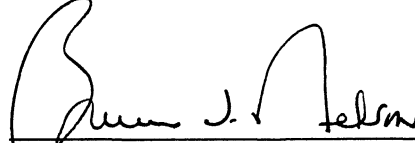
CONCLUSION

The Settlement Agreement of September 30, 1987 was valid, enforceable and all its terms and conditions may be complied with. The Promissory Note, which was secured by a Trust Deed executed by Overthrust, has never been satisfied, nor has the Trust Deed been released. As a result, foreclosure of the Tooele property was properly ordered by the district court.

Zions Bank and 4447 Associates want no more, and no less, than the Settlement Agreement allows. The district court's ruling accomplishes such a result and should be upheld.

DATED this 14th day of January, 1991.

ALLEN NELSON HARDY & EVANS

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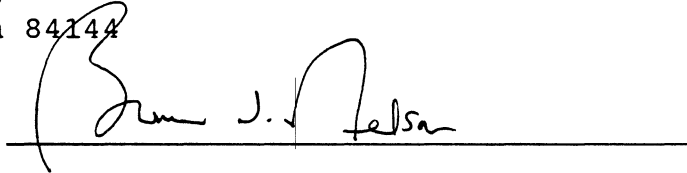
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Cross-Claim Respondents

CERTIFICATE OF HAND-DELIVERY

I hereby certify that on the 14th day of January, 1991, I caused to be hand-delivered a true and accurate copy of the foregoing Brief of Zions First National Bank and 4447 Associates to the following:

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