2011

Utah Community Credit Union v. Mike L. Robertson : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS
STATE OF UTAH

UTAH COMMUNITY CREDIT UNION, Plaintiff / Appellee, **vs.** **MIKE L. ROBERTSON, SR.,** Defendant / Appellant.	**APPELLEE'S RESPONSE BRIEF** Case No.20110969-CA District Ct. No. 100402192

APPELLEE'S RESPONSE BRIEF

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STANDARD OF REVIEW

A challenge to a summary judgment generally "presents for review only conclusions of law because, by definition, cases decided on summary judgment do not resolve factual disputes." *Schurtz v. BMW of North America,* 814 P.2d 1108, 1111 (Utah 1991). Because summary judgment is granted as a matter of law rather than fact, the appellate court is free to reappraise the trial court's legal conclusions. *Winegar v. Froerer*

Corp., 813 P.2d 104, 107 (Utah 1991). The appellate court reviews those conclusions for correctness, without according deference to the trial court. *Country Oaks Condominium Management Comm. v. Jones,* 851 P.2d 640, 641 (Utah 1993); *Allen v. Prudential Property & Casualty Ins. Co.,* 839 P.2d 798, 800 (Utah 1992). This nondeferential standard of review also applies to the threshold issue of whether there are no material issues of fact such that summary judgment is in order. *Neiderhauser Builders & Dev. Corp. v. Campbell,* 824 P.2d 1193, 1196 (Utah App.1992).

In the present case, Mr. Robertson's Appellate Brief not only challenges the granting of summary judgment in favor of UCCU, but also claims that the District Court denied a motion based upon Rule 56(f) of the Utah Rules of Civil Procedure. "[The Supreme Court of Utah] has held that when a party timely presents an affidavit under rule 56(f) stating reasons why it is unable to proffer an evidentiary affidavit in opposition to its opponent's motion for summary judgment, the trial court's discretion is invoked." *United Park City Mines Co. v. Greater Park City Co.,* 870 P.2d 880, 893 (Utah 1993); *see also Cox v. Winters,* 678 P.2d 311, 312-13 (Utah 1984); *Jones v. Bountiful City Corp.,* 834 P.2d 556, 561 (Utah Ct.App.1992). Accordingly, the appellate court reviews a trial court's decision to grant or deny a rule 56(f) motion under the abuse of discretion standard. "Under this standard, [the appellate court] will not reverse unless the decision exceeds the limits of reasonability." *State v. Larsen,* 865 P.2d 1355, 1361 (Utah 1993) (citations omitted); *see also Crookston v. Fire Ins. Exch.,* 860 P.2d 937, 938 (Utah 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Rule of Civil Procedure 56(f)

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Utah Code Annotated § 57-1-31

§ 57-1-31. Trust deeds--Default in performance of obligations secured--Reinstatement--Cancellation of recorded notice of default

(1) Whenever all or a portion of the principal sum of any obligation secured by a trust deed has, prior to the maturity date fixed in the obligation, become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust deed, including a default in the payment of interest or of any installment of principal, or by reason of failure of the trustor to pay, in accordance with the terms of the trust deed, taxes, assessments, premiums for insurance, or advances made by the beneficiary in accordance with terms of the obligation or of the trust deed, the trustor or the trustor's successor in interest in the trust property or any part of the trust property or any other person having a subordinate lien or encumbrance of record on the trust property or any beneficiary under a subordinate trust deed, at any time within three months of the filing for record of notice of default under the trust deed, if the power of sale is to be exercised, may pay to the beneficiary or the beneficiary's successor in interest the entire amount then due under the terms of the trust deed (including costs and expenses actually incurred in enforcing the terms of the obligation, or trust deed, and the trustee's and attorney's fees actually incurred) other than that portion of the principal as would not then be due had no default occurred, and thereby cure the existing default. After the beneficiary or beneficiary's successor in interest has been paid and the default cured, the obligation and trust deed shall be reinstated as if no acceleration had occurred.
(2) If the default is cured and the trust deed reinstated in the manner provided in Subsection (1), and a reasonable fee is paid for cancellation, including the cost of recording the cancellation of notice of default, the trustee shall execute, acknowledge, and deliver a cancellation of the recorded notice of default under the trust deed; and any trustee who refuses to execute and record this cancellation within 30 days is liable to the person curing the default for all actual damages resulting from this refusal. A reconveyance given by the trustee or the execution of a trustee's deed constitutes a cancellation of a notice of default. Otherwise, a cancellation of a recorded notice of

default under a trust deed is, when acknowledged, entitled to be recorded and is sufficient if made and executed by the trustee in substantially the following form:

Cancellation of Notice of Default

The undersigned hereby cancels the notice of default filed for record _____(month\day\year), and recorded in Book ____, Page ____, Records of ____ County, (or filed of record _____(month\day\year), with recorder's entry No. ____, ____ County), Utah, which notice of default refers to the trust deed executed by ____ and _____ as trustors, in which ____ is named as beneficiary and ____ as trustee, and filed for record _____(month\day\year), and recorded in Book ____, Page ____, Records of ____ County, (or filed of record _____(month\day\year), with recorder's entry No. ____, ____ County), Utah.

(legal description)

Signature of Trustee

Utah Code Annotated § 57-1-32

§ 57-1-32. Sale of trust property by trustee--Action to recover balance due upon obligation for which trust deed was given as security--Collection of costs and attorney's fees

At any time within three months after any sale of property under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in that action the complaint shall set forth the entire amount of the indebtedness that was secured by the trust deed, the amount for which the property was sold, and the fair market value of the property at the date of sale. Before rendering judgment, the court shall find the fair market value of the property at the date of sale. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale. In any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred.

Utah Code Annotated § 78B-6-908

Attorney fees

(1) In all cases of foreclosure when an attorney's fee is claimed by the plaintiff, the amount shall be fixed by the court. No other or greater amount shall be allowed or decreed than the sum which shall appear by the evidence to be actually charged by and to be paid to the attorney for the plaintiff.

(2) If it shall appear that there is an agreement or understanding to divide the fees between the plaintiff and his attorney, or between the attorney and any other person except an attorney associated with him in the cause, the defendant shall only be ordered to pay the amount to be retained by the attorney or attorneys.

Utah Constitution: Article I, Section 11

Courts open--Redress of injuries

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

STATEMENT OF THE CASE

In May of 2009, Mr. Robertson obtained a loan from UCCU for the purchase of real property. After closing and funding the loan, UCCU attempted to transfer the loan to Wells Fargo Bank. Wells Fargo Bank discovered that the tax returns that Mr. Robertson had submitted to UCCU were substantially different than the tax returns that Mr. Robertson had actually filed with the United States Internal Revenue Code. Due to Mr. Robertson's fraud, Wells Fargo Bank refused to receive the loan. Mr. Robertson's false representations to UCCU during the loan application process were a clear breach of the subject credit agreement. In addition, Mr. Robertson failed to occupy the home as his primary residence in breach of the subject credit agreement. As Mr. Robertson's had breached the subject credit agreement, UCCU demanded that Mr. Robertson cure his breaches of contract and UCCU elected to accelerate the full balance of the loan. When he failed to do so, UCCU filed a judicial foreclosure action. The District Court found that Robertson had breached the subject credit agreement and ordered that the property may be sold pursuant to the judicial foreclosure statute.

STATEMENT OF FACTS

On or near May 1, 2009, Defendant Mike L. Robertson Sr. (hereinafter "Mr. Robertson" or "Defendant") applied for a loan from Utah Community Credit Union (hereinafter "UCCU" or "Plaintiff") to enable the purchase of real property located at 445 North 100 East, Spanish Fork, Utah 84660 (the "Subject Property"). R548. At the time of the loan closing on May 28, 2009, Mr. Robertson signed a Deed of Trust which provided at paragraph 6 that Robertson (as "Borrower") would occupy the property as his principal residence "unless extenuating circumstances exist which are beyond [his] control." R547. The security agreement also provided, in paragraph 8 that the Borrower would be in default if "materially false, misleading, or inaccurate information or statements" were made during the application process. *Id.* The loan closed, the funds were disbursed, and title to the Subject Property was transferred to Mr. Robertson on May 28, 2009. *Id.*

Several weeks later, when UCCU attempted to transfer the loan to Wells Fargo, it was discovered that Robertson had filed actual tax returns with the Internal Revenue Service for the years 2007 and 2008 that were not the same as the returns Robertson provided to UCCU when he applied for the loan from UCCU. R546. Robertson now insists that he was never asked to provide actual signed tax returns but that he elected, in this case, to provide financial information on IRS forms to support the application. R545. In response to inquiries from UCCU as to why Mr. Robertson had submitted inaccurate tax forms, Mr. Robertson sent a letter to UCCU that is now pages 76-77 of the Appellate Record and is included in the Addendum hereto. Before Mr. Robertson fully contemplated that he was going to be

involved in litigation, he simply admitted that he adopted the practice of providing lenders with false tax returns because lenders would not lend him sufficient funds when he provided accurate tax returns. R76-77.

Counsel for UCCU sent a letter on June 26, 2009, informing Robertson that because of the inaccuracies regarding his income in the application process the obligation was in default. R545. Mr. Robertson swears that because of the uncertainty generated by the foreclosure and collection procedures he decided to not move into the home. *Id.* The home was vacant for three months and then became occupied by Mr. Robertson's daughter; it has never been occupied as a residence by Robertson. R545.

After the litigation ensued, UCCU filed a Motion for Summary Judgment on October 4, 2010. R100-110. Mr. Robertson opposed the Motion For Summary Judgment. R278-298. The District Court partially granted the Motion for Summary Judgment, holding that Mr. Robertson breached the contract and was in default under the Deed of Trust because he provided materially misleading information during the loan application process and because he has failed to occupy the property within 60 days of closing. R543-44. The District Court also ruled that the only possible reason for Robertson's use of the complete set of IRS forms was to mislead UCCU to create the impression that Robertson's declaration of income corresponded to his declaration of income to the federal government. R543. However, the District Court held at that time that on the present state of the record, the Court was precluded from awarding judgment for the acceleration amount, together with costs and fees because formal compliance with the

notice requirements of paragraph 22 of the Deed of Trust was a necessary predicate to acceleration of the debt to continue with foreclosure. R541.

UCCU filed a Second Motion for Summary Judgment on February 15, 2011 for the purpose of presenting the District Court with a more complete record that demonstrated that UCCU had in fact complied with the notice requirements of the contract. R624-640. In connection to that motion, UCCU attached a letter that counsel for UCCU had mailed to Mr. Robertson and his attorney on June 24, 2010, informing Mr. Robertson of his right to cure. R605-606. Upon reviewing the said letter and the second affidavit of counsel for UCCU, the District Court ruled that Mr. Robertson was provided adequate and sufficient notice of the default and right to cure. R1020. The District Court granted UCCU's Second Motion for Summary Judgment by executing an Order dated October 3, 2011. R1012-1026

The District Court held that Mr. Robertson's loan was due and payable in full in the amount of One Hundred and Fifty One Thousand Three Hundred and Eighty-Four Dollars and Seventy-Three Cents ($151,384.73) as of May 24, 2010, plus interest thereafter at the rate of 4.75% until paid in full, plus attorney's fees and costs incurred after April 5, 2011. R1012.

Even though the litigation went on for 15 months at the District Court level, Mr. Robertson never completed any discovery disclosures or sought any discovery from UCCU. Both parties were in possession of a complete set of the loan application and documentation, and both parties had a copy of the letter wherein Mr. Robertson openly

admitted that he had adopted a practice of providing lenders with inaccurate tax returns so that he could obtain the loans he believed he rightfully deserved.

SUMMARY OF ARGUMENT

The Court did not fail to properly rule upon a Rule 56(f) Motion. Mr. Robertson did not file a motion. Mr. Robertson simply inserted a reference to Rule 56(f) in his Opposition to UCCU's first Motion For Summary Judgment and claimed that "[t]he issues that needed to be ferreted out [were] many". In light of the absence of affidavits complying with Rule 56(f) and in light of Mr. Robertson's admission that he adopted the practice of providing lenders with false tax returns so that they would lend him money, it was well within the boundaries of reason for the District Court to conclude that Mr. Robertson had intentionally misled UCCU and that Mr. Robertson's mention of Rule 56(f) was entirely dilatory.

Mr. Robertson erroneously asserts in his Appellate Brief that the principal and interest balance was still in dispute when the District Court granted final summary judgment in favor of UCCU. However, the total amount owed was not disputed by Mr. Robertson at the time that the District Court granted UCCU's Second Motion for Summary Judgment. UCCU presented the Court with an affidavit setting forth the amount owed, and Mr. Robertson did not dispute the affidavit.

When the Court granted UCCU's Motion for Summary Judgment, there was no dispute regarding the fact that Mr. Robertson had provided inaccurate 1040s to UCCU during the application process or that Mr. Robertson had not moved into the Subject

Property. Mr. Robertson's breaches were clear violations of his contractual obligations. The only issues before the District Court regarding the false representations and failure to occupy were issues of contractual interpretation, not fact.

The District Court did not err in ruling that Mr. Robertson could not cure his defaults under U.C.A. § 57-1-31. Utah Code § 57-1-31 is inapplicable to the present case, the defense was moot by the time that Mr. Robertson raised it, and Mr. Robertson did not comply with section even if it was applicable and timely.

The District Court did not err in ruling that UCCU had given Mr. Robertson notice required by the contract. Counsel for UCCU provided actual notice to Mr. Robertson and Mr. Robertson's attorney. The notice was provided more than 30 days before suit was filed and the counting of time should be conducted as provided in the contract, not as the Utah Rules of Civil Procedure dictate for court filings that require service under the Rules.

The District Court did not err in dismissing Mr. Robertson's Counterclaim without giving him his "day in court". The granting of summary judgment in this case by the District Court did not violate either state or federal constitutional rights of Mr. Robertson by denying him his "day in court." Mr. Robertson had full access to the Fourth District Court of Appeals.

ARGUMENT

I. It was proper for the District Court to grant summary judgment despite Mr. Robertson's passing mention of Rule 56(f) in a paragraph of his Opposition to UCCU's Motion for Summary Judgment.

In his Appellate Brief, Mr. Robertson asserts that the District Court erred by granting summary judgment despite a pending Rule 56(f) Motion. However, Mr. Robertson did not file a motion. Mr. Robertson simply inserted a paragraph in his Opposition to UCCU's first Motion For Summary Judgment that Mr. Robertson titled "56(f)". R279. In that paragraph, Mr. Robertson asserted that "[t]he issues that needed to be ferreted out are many." *Id.* Utah Rule of Civil Procedure **56(f) provides:**

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

As stated in the "Standard of Review" section above, an Appellate Court reviews a trial court's decision to grant or deny a rule 56(f) motion under the abuse of discretion standard. The District Court's decision in the present case to grant summary judgment was entirely within the limits of reasonability. Mr. Robertson did not file any affidavit in support of his Rule 56(f) assertion. Mr. Robertson did attach an affidavit to his Opposition to UCCU's Motion for Summary Judgment (R266-277), but Mr. Robertson's affidavit contained absolutely no Rule 56(f) component in that it did not provide any tangible or even colorable reason why Mr. Robertson was unable at that time to present additional information or facts essential to justify his opposition. In fact, Mr. Robertson proactively asserted a factual position in that affidavit and throughout this dispute –Mr. Robertson asserted that he was never asked for nor provided any tax returns. R268; *see also*, Mr. Robertson's Appellate Brief, line 7 page 21. Mr. Robertson contends that he

simply provided financial statements that happened to be on tax forms as opposed to "signed and filed" tax returns. R275, ¶ 9, 13. Mr. Robertson has never disputed that as part of the application process he submitted the documents to UCCU that are now pages 22-34 of the Appellate Record. As the Court can plainly see, said pages of the Appellate Record are 1040 tax forms. The Court can also see that the 2008 return is signed by Mr. Robertson. Mr. Robertson would have this Court believe that Mr. Robertson submitted the filled-out 1040 tax forms as mere income statements with no intent to deceive or defraud UCCU even though he never provided a 56(f) affidavit claiming that he was asked for "income statements" or that further discovery would show that UCCU asked him to provide income statements and not tax returns.

When the District Court ruled on Plaintiff's First Motion for Summary Judgment and found that Mr. Robertson did have intent to mislead and deceive UCCU, the District Court had possession of the letter drafted by Mr. Robertson that is now pages 76-77 of the Appellate Record. Mr. Robertson stated in an affidavit that he provided the said letter to UCCU in response to inquiries from UCCU as to why Mr. Robertson had submitted the subject 1040s for 2007 and 2008 that were different than the actual tax returns he had filed with the Internal Revenue Service for those years. R273. It is also apparent on the face of the letter that Mr. Robertson was replying to an inquiry by UCCU as to why Mr. Robertson had provided the inaccurate 1040s during the application process. R76-77. Before Mr. Robertson fully contemplated that he was going to be involved in litigation he simply outlined the truth in the letter and substantively admitted that he adopted the

practice of providing lenders with false tax returns because lenders would not lend him sufficient funds when he provided accurate tax returns. R76-66. Mr. Robertson implies in his Appellate Brief that the key question is whether UCCU had ever asked Mr. Robertson for tax returns. Mr. Robertson doesn't want the Court to focus on the fact that Mr. Robertson provided tax returns whether UCCU asked for them or not, leading the District Court to find that:

> "Robertson noted that before he adopted the practice of providing different versions of tax returns to lenders and the IRS that he was not able to obtain the credit he thought he deserved. He knew that the lenders expected tax returns. The only possible reason for his use of the complete set of IRS forms was to mislead the lender to create the impression that his declaration of income corresponded to his declaration of income to the federal government."
>
> R543-544.

Even if, in an attempt to view the facts in the light most favorable to Mr. Robertson, the District Court accepted Mr. Robertson's claim that he had not been asked for tax returns, it was entirely reasonable for the District Court to conclude that the evidence before the District Court left no material fact in dispute and that Mr. Robertson had intentionally misled UCCU.

Mr. Robertson's claim in his Appellate Brief that the Court never ruled on his Rule 56(f) Motion is simply untrue, as the only mention of Rule 56(f) by Mr. Robertson was part of his Opposition to UCCU's Motion for Summary Judgment (R278-79) and the trial Court issued a ruling detailing why it partially granted UCCU's Motion. R539-548.

This Court has consistently held that a trial court need not grant rule 56(f) motions that are dilatory or lacking in merit. *United Park City Mines*, 870 P.2d at 893; *Cox*, 678 P.2d at 312-13; *Strand v. Associated Students of University of Utah*, 561 P.2d at 194; *see also Jones*, 834 P.2d at 561; *Sandy City v. Salt Lake County*, 794 P.2d 482, 488 (Utah Ct.App.1990). In the present case, Mr. Robertson could have presented an affidavit proactively claiming that UCCU asked him for a financial statement on tax forms; Mr. Robertson could have asserted that he needed time to depose a UCCU employee to collaborate such a claim. By simply claiming repeatedly that he was not asked for tax returns, however, Mr. Robertson did not identify for the District Court any colorable reason why additional delay would have resulted in evidence that a material fact was in dispute. Mr. Robertson simply failed to provide any statement that would have indicated for the District Court that his passive mention of Rule 56(f) was anything more than dilatory.

Mr. Robertson also could have sought discovery in this case if he had any reason to believe that discovery would have indicated that he was asked for "financial statements" and that UCCU knew the 1040s were not his actual tax returns. The parties and attorneys for the parties communicated for several months before litigation was filed, and both parties were in possession of all relevant documentation because Mr. Robertson was given a copy of the loan documents at closing. Mr. Robertson did not even attempt to initiate any formal discovery during the 15 months between the time the Complaint was filed and the time the Court granted final summary judgment. Not only did Mr. Robertson

not seek to initiate any formal discovery, Mr. Robertson filed his own Motion for Summary Judgment, which inherently took the position that no material facts remained in dispute (R851-863). In many respects, the present case is factually similar to *Crossland Savings v. Hatch*, 877 P.2d 1241. In *Crossland*, the Supreme Court of Utah found that even though little time passed between the filing of the complaint and the granting of summary judgment by the relevant district court, the case was relatively simple and the defendant in the case had displayed an apparent lack of interest in discovery such that the district court did not exceed the limits of reasonability when it concluded that the defendant's Rule 56(f) motion was dilatory. The present case is also simple. Mr. Robertson did not file any affidavit in support of his Rule 56(f) motion; the Fourth District Court had Mr. Robertson's written admission that he had adopted a practice of providing lenders with inaccurate information (R76-77); Mr. Robertson did not seek any discovery; and Mr. Robertson's own motion for summary judgment inherently took the position that no facts were in dispute. R851-863.

Even though counsel for Mr. Robertson and counsel for UCCU communicated frequently about the case and shared any necessary information at will, Mr. Robertson now claims that he was unable to proceed with discovery because the parties did not complete initial disclosures. Mr. Robertson did not raise that proposition with the trial court in any motion. "In order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." *Pratt v Nelson*, 2007 UT 41, 164 P.3d 366, 372-373. The Supreme Court of Utah has set

forth three factors that help determine whether the trial court had such an opportunity: " '(1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority.' " *Id.* In short, a party may not claim to have preserved an issue for appeal by "merely mentioning ... an issue without introducing supporting evidence or relevant legal authority." *Id.* Ultimately, the preservation requirement "is based on the premise that, 'in the interest of orderly procedure, the trial court ought to be given an opportunity to address a claimed error and, if appropriate, correct it.'" Id. In the present case, Mr. Robertson did not raise the issue that initial disclosures were not made, therefore, it was not raised in a timely or specific fashion and was not raised with any supporting legal authority.

Though Mr. Robertson did not raise a Rule 26(e) issue with the District Court and though he filed his own motion for summary judgment seeking to end the case, he now proposes on page 15 of his Appellate Brief that the current version of Utah Rule of Civil Procedure 26 precluded him from moving forward with discovery. At the time this case began, however, the previous version of the Rule was still applicable and Mr. Robertson also made no effort to produce initial disclosures. The District Court simply did not commit err because Mr. Robertson had admitted in writing what he had done and no facts were in dispute.

II. No material issues of fact remained when the District Court granted UCCU's Second Motion for Summary Judgment.

Mr. Robertson erroneously asserts that material issues of fact were still at issue when the District Court granted final summary judgment in favor of UCCU. In particular, pages 18 through 20 of Mr. Robertson's Appellate Brief assert that when the District Court granted UCCU's Second Motion for Summary Judgment, the total dollar amount that Mr. Robertson owed was still in dispute. However, the total amount owed was not disputed by Mr. Robertson at the time that the District Court granted UCCU's Second Motion for Summary Judgment.

On lines 14-16 of page 19 of Mr. Robertson's Appellate Brief, Mr. Robertson quotes the District Court's ruling on UCCU's First Motion for Summary Judgment, wherein the District Court found that Mr. Robertson had at that time disputed the balance asserted by UCCU. R543. The paragraph of the District Court's ruling that is quoted by Appellant is found on page 543 of the Appellate Record. At that time, Defendant had claimed in his Opposition to UCCU's first motion for summary judgment that UCCU did not have the right to accelerate the full debt. In the Statement of Undisputed Facts contained in Plaintiff's Second Motion for Summary Judgment, UCCU asserted at paragraph 16 that Defendant owed $145,102.08 in principal and interest as of February 11, 2011. R637. The balance set forth in Paragraph 16 of UCCU's Second Motion for Summary Judgment was supported by an affidavit of Jeff Meyers, UCCU's Vice President of Real Estate Lending. R602-603. In Mr. Robertson's Opposition to UCCU's Second Motion for Summary Judgment, Mr. Robertson responded to paragraph 16 of UCCU's "Undisputed Facts" by saying only "Disputed. Plaintiff has not complied with the default

provisions of the Deed of Trust. There has been no proper notice." R699. Defendant did not assert in opposition to UCCU's Second Motion For Summary Judgment that the principal and interest amount was incorrect or in dispute, he only argued to the District Court that UCCU still did not have the ability to accelerate.

In *Jones v. Hinkle*, 611 P.2d 733 (1980), the Supreme Court of Utah held that when a motion for summary judgment is made, "the affidavit of an adverse party must contain specific evidentiary facts showing that there is a genuine issue for trial." Summary Judgment was proper in the present case and UCCU was entitled to judgment as a matter of law because Mr. Robertson failed to identify with specificity any material fact.

III. The District Court properly held Mr. Robertson had breached the credit agreement.

The Third and Fourth Sections of Mr. Robertson's Appellate Brief argue that the District Court erred by finding that Mr. Robertson had breached the subject credit agreement. The District Court found that Mr. Robertson had breached the subject credit agreement by 1) making a material misrepresentation to UCCU during the application process, and 2) failing to occupy the subject residence as Mr. Robertson's primary residence. R543.

A. Material misrepresentations to UCCU during the application process.

Defendant breached the contract with Plaintiff by providing materially false, misleading or inaccurate information, or by failing to provide material information. The Deed of Trust in the present action sets forth in section 8, page 6:

Borrower shall be in default if, during the Loan application process, Borrower or

> any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan.
>
> R0015.

As set forth above, Mr. Robertson has contended throughout the litigation that he "was never asked for nor provided any [tax returns]." R268; *see also*, Mr. Robertson's Appellate Brief, line 7 page 21. Mr. Robertson contends that he simply provided financial statements that happened to be on tax forms as opposed to what Mr. Robertson refers to as "signed and filed" tax returns. R275, ¶¶ 9, 13. As set forth above, however, Mr. Robertson has never disputed that he submitted the documents to UCCU that are now pages 22-34 of the Appellate Record. Those documents are clearly 1040 tax forms. The tax returns that Defendant submitted to Plaintiff represented that Defendant had made more than $100,000.00 each of the subject years, but the actual tax returns that Plaintiff had submitted to the Internal Revenue Service reported that Defendant had business income of less than $20,000.00 each of the subject years. R888. After the loan had funded, UCCU attempted to transfer the servicing of the loan to Wells Fargo Bank. R109. Wells Fargo Bank spot audited the application and discovered what Mr. Robertson had done. R108. UCCU was not aware that Mr. Robertson had provided false tax returns to Plaintiff until after the loan had funded and until Wells Fargo Bank discovered it. R105.

Mr. Robertson would have this Court believe that he submitted the filled-out 1040 tax forms as mere income statements with no intent to deceive or defraud UCCU. However, Mr. Robertson has never denied that he authored the letter that is now pages 76-77 of the Appellate Record. Mr. Robertson admitted in the letter that he adopted the practice of providing lenders with false tax returns because they would not lend him sufficient funds when he provided actual tax returns. R76-77. Therefore, there was no material fact in

dispute when the District Court found that Mr. Robertson breached Section 8 of the credit agreement by providing materially false, misleading or inaccurate information, or by failing to provide Lender with information he knew to be material. R541. It was clearly material to the loan process that the tax returns Mr. Robertson submitted were not his actual tax returns. Because Mr. Robertson had a contractual obligation to not provide UCCU with any misleading information, Mr. Robertson had a contractual obligation to inform UCCU that the 1040s he submitted were not his filed tax returns and did not accurately represent his tax returns.

B. Failure of Mr. Robertson to occupy the Subject Property.

Paragraph 6 of the subject Deed of Trust provides that:

> "Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy." (R016).

UCCU asserted in its First Motion for Summary Judgment that Mr. Robertson breached Paragraph 6 by failing to occupy the Subject Property within 60 days. (R104). In his Appellate Brief, Mr. Robertson suggests that UCCU knew Mr. Robertson would retain his old residence. Mr. Robertson has never asserted that UCCU agreed that his retaining a rental property excused Mr. Robertson from occupying the Subject Property as his primary residence. The only argument that Mr. Robertson made to the District Court in his Opposition to UCCU's Motion for Summary Judgment for why he did not move into the Subject Property within 60 days was that UCCU contacted legal counsel regarding Mr. Robertson's fraud and that the threat of litigation created great uncertainty that was

"beyond his control." (R272). The District Court was correct in finding that even if the threat of litigation worried Mr. Robertson, the mental wrangling presented no tangible barrier to Mr. Robertson moving into the house.

The fact that Mr. Robertson has appealed the District Court's finding that he breached the subject Deed of Trust by failing to occupy the home is inconsistent with admissions that Mr. Robertson made to the District Court. Counsel for Mr. Robertson stated during oral arguments before the District Court that:

> "[Robertson] had a decision point when he decided to move his daughter in and some of his stuff in, but not occupy [the subject home himself]. Those are decision points and those things have consequences for [Mr. Robertson]. And the Court has imposed the consequences of those decisions points on him, and fairly so." (R1054, pg12, ln 106).

No material fact was in dispute when the District Court concluded that Mr. Robertson should not be excused from a contractual obligation due to uncertainty that he caused. The only issue before the District Court regarding failure to occupy was one of contractual interpretation, not fact. The District Court rightfully found that Mr. Robertson's failure to move into the Subject Property was not beyond his control.

IV. The District Court did not err in ruling that Mr. Robertson could not cure his defaults under U.C.A. § 57-1-31.

Defendant asserted to the District Court in opposition to UCCU's Second Motion for Summary Judgment (and has now asserted in his Appellate Brief) that he cured any default for fraud or failure to occupy the home. R695-697. He asserted that his breach was cured when he availed himself of rights provided in Utah Code § 57-1-31(1). Utah Code Section

57-1-31(1) provides that:

> (1) Whenever all or a portion of the principal sum of any obligation secured by a trust deed has, prior to the maturity date fixed in the obligation, become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust deed, including a default in the payment of interest or of any installment of principal, or by reason of failure of the trustor to pay, in accordance with the terms of the trust deed, taxes, assessments, premiums for insurance, or advances made by the beneficiary in accordance with terms of the obligation or of the trust deed, the trustor or the trustor's successor in interest in the trust property or any part of the trust property or any other person having a subordinate lien or encumbrance of record on the trust property or any beneficiary under a subordinate trust deed, at any time within three months of the filing for record of notice of default under the trust deed, if the power of sale is to be exercised, may pay to the beneficiary or the beneficiary's successor in interest the entire amount then due under the terms of the trust deed (including costs and expenses actually incurred in enforcing the terms of the obligation, or trust deed, and the trustee's and attorney's fees actually incurred) other than that portion of the principal as would not then be due had no default occurred, and thereby cure the existing default. After the beneficiary or beneficiary's successor in interest has been paid and the default cured, the obligation and trust deed shall be reinstated as if no acceleration had occurred.

At the time that Mr. Robertson raised Section 57-1-31 in opposition to UCCU's Second Motion for Summary Judgment, the District Court had already decided in its December 6, 2010, Memorandum Decision (partially granting UCCU's First Motion for Summary Judgment) that Defendant was in default. R541. Mr. Robertson did not raise Section 57-1-31 in his Answer or in opposition to UCCU's First Motion for Summary Judgment. R278-298. The issue of liability was moot when Defendant first raised the issue in his own, subsequent Motion for Summary Judgment and in his Opposition to Plaintiff's Second Motion for Summary Judgment. Mr. Robertson's filings regarding the meaning of Section 57-1-31 amounted to an impermissible motion to reconsider.

Even if any argument based on Utah Code Annotated § 57-1-31 was not moot when raised by Defendant, Utah Code § 57-1-31 was not applicable to the present matter. Utah

Code sections 57-1-23 through 57-1-32 relate to the non-judicial foreclosures of trust deeds. The property in the present case was foreclosed judicially in the manner permitted for mortgages. R758. The proper portion of the Code that governs this case is Title 78B, Section 6, Part 9. Defendant acknowledged Title 78B of the Utah Code when it suited him; Defendant acknowledged Section 78B-6-908 when he argued that Plaintiff's attorney's fees should be limited in the present case. R698. Utah Code Annotated Section 57-1-31 applies when attorneys are overseeing non-judicial foreclosure, but the Courts of Utah are not rendered powerless to rectify fraud and failure to occupy a primary residence simply because a defendant makes monthly payments that are less than the accelerated amount due and that do not address the underlying problem. If Defendant's position were the law, courts would be powerless to provide relief in any mortgage fraud case if the defendant simply makes payments. Surely, Defendant's position is not the public policy adopted or intended by the Utah Legislature. Indeed, it was within the District Court's discretion to find that "Perhaps the only possible cure was immediate repayment of all sums borrowed." R541.

Even if Defendant's argument regarding having cured under Utah Code Annotated § 57-1-31 has not been mooted or is not inapplicable as set forth above, Section 57-1-31 clearly does not apply to non-financial defaults. The first line of the Section expressly refers to the "sum of any obligation". The word obligation refers to financial sums or financial amounts owed. The present case has been brought because of Defendant's false representations and his lack of occupying the subject residence as his primary residence. When delineating what defaults can be cured pursuant to Utah Code Annotated § 57-1-31, the Utah legislature expressly delineated that it included "a default in the **payment** of interest or of any installment of principal, or by reason of failure of the trustor **to pay**, in accordance with the

terms of the obligation or of the trust deed ..." (emphasis added). Therefore, the plain language of the text indicates the section is simply inapplicable to this judicial foreclosure.

Even if Utah Code § 57-1-31 was not moot when raised by Defendant or inapplicable to the present judicial foreclosure, Defendant only claimed to have made monthly payments. Defendant did not otherwise comply with the Section by paying all of the attorneys fees, costs and expenses incurred. Therefore, the District did not err in finding that Mr. Robertson could not raise the Section as a defense and had not complied with the Section even if it was applicable.

V. **The District Court did not err in ruling that UCCU had given Mr. Robertson notice required by the contract.**

Mr. Robertson asserts in his Appellate Brief that there are two reasons for finding that the District Court erred when it found that UCCU had satisfied paragraph 15 of the Deed of Trust. The two reasons that Mr. Robertson claims are that 1) UCCU did not give notice to the proper attorney, and 2) UCCU did not give notice a full 30 days before filing suit.

A. UCCU gave notice more than 30 days before filing suit.

The second assertion by Mr. Robertson was never raised at the District Court. Mr. Robertson never argued to the District Court that by applying "proper counting" of time under the Utah Rules of Civil Procedure, UCCU did not give a full 30 days of notice to Mr. Robertson of its intent to file suit. As set forth above, an issue must be preserved at the trial court in order to be raised at an appellate court. Mr. Robertson should be barred

from raising the issue for the first time on appeal when he failed to preserve the argument at the District Court.

Even if Mr. Robertson had raised the argument at the District Court, the affidavit of counsel for UCCU that is part of the record indicates that the subject notice was mailed on May 24, 2010. R608. Mr. Robertson proffers to the Court that the Utah Rules of Civil Procedure dictate that the counting of days should not include three days for mailing, weekends, or holidays. However, the Deed of Trust was a contract, not a Court filing requiring service of process. The Contract provides at paragraph 15 that "Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means." R89-90. Therefore, the 30 days began when the letter was mailed and the only affidavit in this case that even mentions the letter (an affidavit of counsel for UCCU), provides that the letter was mailed on May 24, 2010. R608. Suit was filed on June 25, more than 30 days after giving the notice.

B. Notice was properly given to counsel for Mr. Robertson.

Mr. Robertson asserts in his Appellate Brief that the District Court erred by finding that Mr. Robertson had received adequate notice from UCCU of his right to cure before UCCU could file suit pursuant to the credit agreement. Defendant asserts notice was not proper because counsel for UCCU mailed the notice (R691-695) to the property that is the subject of this litigation (the property Mr. Robertson failed to occupy). Mr. Robertson claims that the subject property was not the proper address for notice because he had

designated in writing that a different address should have been used. *Id.* However, paragraph 25 of the Deed of Trust expressly provides that "Borrower requests that copies of the notices of default and sale be sent to Borrower's address which is the Property Address." R086. Page 2 of the Deed of Trust defines the term "Property Address" as the property that was purchased with the loan proceeds (the property Mr. Robertson failed to occupy). R94. Paragraph 25 of the Deed of Trust is more specific than paragraph 15 of the Deed of Trust and expressly directs that notice was to be sent to the Subject Property as was done by counsel for UCCU.

Furthermore, when counsel for UCCU first contacted Mr. Robertson to demand payment in the present case, Mr. Robertson replied with a letter. R74-75. Mr. Robertson's own letter designated the Subject Property as his address; the envelope that was used by Mr. Robertson to send the letter also designated the Subject Property as Mr. Robertson's return address. *Id.* In addition, Mr. Robertson was replying to a demand letter sent by counsel for Plaintiff to the subject property. R747.

Not only did counsel for Plaintiff comply with the Deed of Trust and reply to the address Mr. Robertson was expressly using to communicate, Mr. Robertson received actual notice. At the District Court, Defendant did not deny that he received the letter at issue; Defendant only claimed that the letter was not served to the "legal" address. R691-695. Defendant provides no case law in support of the proposition that "legal notice" is not received when a party to a contract receives actual notice in satisfaction of the intent of the parties. "Well accepted rules of contract interpretation require that [the Court] examine the language of the contract to determine meaning and intent." *Café Rio, Inc. v. Larkin-Gifford-*

Overton, LLC, 2009 UT 27, paragraph 25. At the time of contracting with each other, the parties intended that Mr. Robertson would be notified of how he could cure a given default and of the 30 day deadline by which he had to do so. The Supreme Court of Utah has repeatedly recognized that:

> ¶ 17 The underlying purpose in construing or interpreting a contract is to ascertain the intentions of the parties to the contract. *Peterson v. Coca-Cola USA,* 2002 UT 42, ¶ 9, 48 P.3d 941; *SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc.,* 2001 UT 54, ¶ 14, 28 P.3d 669. " 'In interpreting a contract, the intentions of the parties are controlling.' " *Dixon v. Pro Image, Inc.,* 1999 UT 89, ¶ 13, 987 P.2d 48 (quoting *Winegar v. Froerer Corp.,* 813 P.2d 104, 108 (Utah 1991)); *see also Peterson v. Sunrider Corp.,* 2002 UT 43, ¶ 18, 48 P.3d 918.

In the present case, Mr. Robertson was given notice of how he could cure the contract and the deadline by which he had to do so; the intention of the parties was clearly met. Additionally, Utah appellate courts recognize that a party receives notice for contractual purposes when he receives actual notice even if the notice is sent to an address other than the address specified in an agreement. In the Utah case of *Chrysler Dodge Country, U.S.A., Inc. v. Curley*, the defendant argued that she had not received adequate notice of a repossession sale of her vehicle because the notice in that case was sent to the home of her family member . 782 P.2d 536. The case indicates that "[a] person "receives" a notice or notification when: (a) it comes to his attention; **or** (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications." 782 P.2d 536 (1989) at page 539-540 (emphasis added). The Utah Court of Appeals found in *Curley* that the defendant had received sufficient notice. In the present case, not only did paragraph 25 of the Deed of Trust require counsel for Plaintiff to mail the notice to the subject property, sending the notice to that property was not a material breach because Defendant had held the property out as a place of receipt of communication.

Not only did Mr. Robertson receive the letter at issue in the present case, Mr. Robertson's attorney also received the letter. R748. Defendant asserts for the first time on appeal that the notice was not proper because it was received by Richard D. Bradford rather than Mr. Bradford's former partner M. James Brady. The subject firm was once Bradford and Brady, PC, but Mr. Brady was appointed as a Fourth District Judge and left the practice. Not only has Mr. Bradford come to the office of counsel for UCCU and called counsel for UCCU several times before the notice was sent to his attention, but Mr. Brady indicated in writing to UCCU that Mr. Bradford was co-counsel before Mr. Brady left the practice. *See* letter at R500-501. The letter from Mr. Brady that is page 500-5001 of the appellate record indicates that Mr. Bradford was representing Mr. Robertson at the time that the notice from UCCU was mailed on May 24, 2010.

"[A]n attorney is the agent of the client and knowledge of any material fact possessed by the attorney is imputed to the client." *Von Hake v. Thomas*, 858 P.2d 193, 194 n. 3 (Utah Ct.App.1993). When counsel for Mr. Robertson received the notice at issue in the present case, Mr. Robertson was imputed to have received the notice. Mr. Robertson received notice at the address required by paragraph 25 of the Deed of Trust, received notice at the address that he had used to communicate with counsel for Plaintiff (which address Mr. Robertson had promised to make his primary residence), and received notice at the office of his attorney. It is frivolous for Mr. Robertson to continue arguing that he did not receive "legal" notice.

VI. <u>The District Court did not err in dismissing Mr. Robertson's Counterclaim without giving him his "day in court"</u>.

The first portion of the final section of Mr. Robertson's Appellate Brief makes the same substantive argument as the first section of the Brief – i.e., that the Court should have

allowed more discovery before final rulings were issued in this case. As this Court already has UCCU's response set forth above, UCCU will not fully restate the argument made above. UCCU does request that this Court take notice that the final section of Mr. Robertson's Brief does not cite a single fact that remained in dispute or that would have been better understood through more discovery. Nor does that section state what err the District Court may have made in connection to any federal or state statute.

The final section of Mr. Robertson's Appellate Brief, set forth on pages 36 and 37 thereof, asserts that the granting of summary judgment in this case violated either state or federal constitutional rights of Mr. Robertson by denying him his "day in court." Inherent within Mr. Robertson's argument is the proposition that a court can never grant summary judgment, that a court must always permit a case to go to trial. Mr. Robertson ignores the fact that oral arguments were held in this matter. Mr. Robertson proposes, or at least implies, that *Jenkins v. Percival*, 962 P.2d 796 (Utah 1998), supports the proposition that the Constitution guarantees him a "day in court" other than the day he and his counsel already spent in court. The *Jenkins* ruling considers mandatory arbitration clauses in contracts; there is certainly no portion of the *Jenkins* ruling that can be interpreted to mean that a district court cannot grant summary judgment, even if oral arguments are not held as they were in this case. Likewise, the other cases cited by Mr. Robertson do not support the proposition that a district court may not grant summary judgment.

Article I, Section 11 of the Utah Constitution provides:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

In the present matter, both parties have had complete access to the District Court, and neither party has been barred from seeking remedies through it.

VII. UCCU respectfully requests that this Court grant its attorney's fees incurred opposing this appeal.

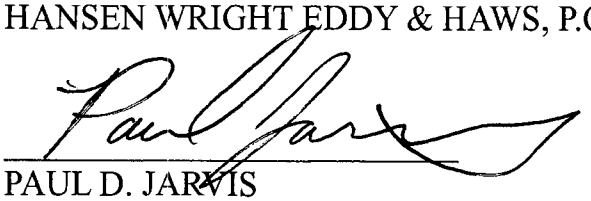
UCCU respectfully requests that this Court order Mr. Robertson to pay UCCU's attorney's fees incurred in the course of researching, drafting this brief, and any oral arguments that may occur. The District Court in this matter awarded UCCU all attorney's fees it incurred at the District level. R1012. Attorney's fees are also awardable pursuant to the credit agreement and Utah Code § 78B-6-908(1).

CONCLUSION

For the foregoing reasons, UCCU respectfully requests that this Court deny Mr. Robertson's appeal in its entirety and affirm the rulings of the District Court in their entirety.

DATED this 9th day of April, 2012.

HANSEN WRIGHT EDDY & HAWS, P.C.



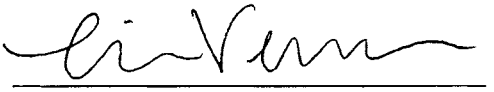
PAUL D. JARVIS
Attorneys for Plaintiffs

Certificate of Mailing

I hereby certify that I personally mailed two true and correct copies of the forgoing Brief of Appellee to:

Mike L. Robertson, Sr., Appellant
445 North 100 East
Spanish Fork, UT 84660

Mike L. Robertson, Sr., Appellant
444 W Center Street
Provo, UT 84601



Secretary/Paralegal

Certificate of Compliance with Rule 24(f)(1)

This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because:

1. it contains 9,199 words, excluding the parts of the Brief exempted by Utah R. App. P.24(f)(1)(B); and

2. it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 13 pt., Times New Roman font.

Dated: 9 April 2012

PAUL D. JARVIS

ADDENDUM

Utah Rules of Civil Procedure, Rule 56

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.
(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.
(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.
(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.
(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a

continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Amended effective November 1, 1997; November 1, 2004.]

Utah R. Civ. P. 56

U.C.A. 1953 § 57-1-32

§ 57-1-32. Sale of trust property by trustee--Action to recover balance due upon obligation for which trust deed was given as security--Collection of costs and attorney's fees

At any time within three months after any sale of property under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in that action the complaint shall set forth the entire amount of the indebtedness that was secured by the trust deed, the amount for which the property was sold, and the fair market value of the property at the date of sale. Before rendering judgment, the court shall find the fair market value of the property at the date of sale. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale. In any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred.

Credits

Laws 1961, c. 181, § 14; Laws 1985, c. 68, § 4; Laws 2001, c. 236, § 13, eff. April 30, 2001.

U.C.A. 1953 § 78B-6-908

Formerly cited as UT ST § 78-37-9

§ 78B-6-908. Attorney fees

(1) In all cases of foreclosure when an attorney's fee is claimed by the plaintiff, the amount shall be fixed by the court. No other or greater amount shall be allowed or decreed than the sum which shall appear by the evidence to be actually charged by and to be paid to the attorney for the plaintiff.

(2) If it shall appear that there is an agreement or understanding to divide the fees between the plaintiff and his attorney, or between the attorney and any other person except an attorney associated with him in the cause, the defendant shall only be ordered to pay the amount to be retained by the attorney or attorneys.

Credits

Laws 2008, c. 3, § 1004, eff. Feb. 7, 2008.

Utah Code Ann. § 78B-6-908 (West)

Kevin has asked that I give an explanation on the differences in tax returns.

Before I begin, let me stress that the forms you have reflect an honest, true, and accurate reflection of the income that I receive.

Now for the explanation.

Over 25 years ago, we found that as a business there were several very major and legal means to reduce the income we received for tax purposes. And we set out to use all that were available to us. But this created several problems as well.

One, I am in the habit of not only giving a full 10% tithe to our church, but I am also very generous in other areas like missionary, humanitarian aid, and education funds. These usually amount to about 19-20% of my gross income before any deductions or means of tax reduction. These by themselves could cause a tax audit even if there were no other deductions.

But, to make it worse, by taking full advantage of all the means available by law, we ended up with it showing more in the 50% to 60% range and that did trigger an audit every year for a number of years. Each time, the IRS came in and looked at our figures and in the end agreed that we were in compliance with their code and that no taxes were due. But it took a great deal of time and frustration on our part to do this. At that time, we decided that a better method would be for us to do the complete return and then take the final figures and submit those on a simple form. Again, in full compliance, but just not in a way that triggered an audit every year. Since filing this way, we have not had a single audit. But, if we did, we can show the exact amounts we did bring in, the deductions allowed by law we take, and for what purpose, and we end up with the exact same figures in the net results. It just does not bring up the continual red flags.

Then, that brought up other problems. Even though we were making a great deal of money, we did not have tax returns that showed the actual income. And even if we took the long forms, they too appeared that with all the business expenses that we were not making very much money. We were then unable to get any credit with local banks. We fought with this for years. We tried to show that we were indeed making money, but that it was used in ways that we could show a deduction instead of a profit. Banker after banker said they were sorry, but they had to go with the net amounts on our returns.

Maybe we are wrong, but we started doing the returns with the honest, true, and accurate amounts based on the 10% of gross income that I pay as a tithe. Then we show the basic deductions of normal expenses used to get us to that point. We did not show the other tax write offs that bring us down to the point where we show little income. From that point on, we have been able to get the credit we deserve with our local banks. I am sorry that this has caused a problem in this case.

Let me stress that the papers you have do in fact show a true portrayal of the actual take home income that I take. They are not inflated in any way. They are what I have as an income.

Now, if you want a well performing loan that will be paid on time each and every month without problems, I promise that this will be it. I promise that it will be paid on the first day of each month, without fail. In full. You will never have a problem with this loan because of lack of payment.

But, if the paperwork causes a problem, and you do not wish for me to proceed, let me know and I will transfer it to someone else who knows that I will pay my obligations on time without fail.

Sincerely,

Mike Robertson 6-16-09

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

UTAH COMMUNITY CREDIT UNION,		
Plaintiff,	:	Memorandum Decision
vs.	:	Date: June 1, 2011
MIKE L. ROBERTSON, SR.,	:	Case No.: 100402192
Defendant.	:	Division VII: Judge James R. Taylor

This matter is before the Court on Plaintiff's Second Motion for Summary Judgment. The Plaintiff (hereinafter "UCCU") has asked for summary judgment 1) dismissing the Defendant's Counterclaim with prejudice and 2) ruling that UCCU has complied with paragraph 22 of the Deed of Trust so that UCCU may proceed with foreclosure of the subject property.

Undisputed Facts

From a careful consideration of the submissions and affidavits the Court finds that some facts are not capable of reasonable dispute. On or near the first of May, 2009 Robertson applied for a loan from UCCU to enable the purchase of real property including a home in Spanish Fork. In support of the "Uniform Residential Loan Application," Robertson provided income information, disclosing an adjusted gross income in 2007 of $126,168 and in 2008 of $109,920. The Deed of Trust provided in paragraph 6 that Robertson would occupy the property as his

principal residence "unless extenuating circumstances exist which are beyond Borrower's control." The Deed of Trust also provided in paragraph 8 that Robertson would be in default if "materially false, misleading, or inaccurate information or statements" were made during the application process. The scope of paragraph 8 explicitly but not exclusively included statements relating to intended occupancy of the property. It was disclosed and Robertson understood that at the time of closing, UCCU intended to sell servicing rights to the account to Wells Fargo, effective July 29, 2009. The loan closed, the funds were disbursed, and title to the property subject to the Deed of Trust and Trust Deed Note was transferred to Robertson on May 28, 2009.

Several weeks later during the transfer process to Wells Fargo it was discovered that Robertson had filed actual tax returns for the years 2007 and 2008 that were not the same as the returns provided during the loan application. In those returns he declared a gross income of less than $20,000 for each year. Robertson explained to an agent of UCCU that he had some time earlier adopted a business strategy of declaring less than his actual income to the Internal Revenue Service to avoid audits regularly triggered when he declared his full income but took advantage of legitimate deductions to reduce his taxable income. Unsatisfied with Robertson's explanation, UCCU referred the matter to counsel. Counsel notified Robertson in a letter dated June 26, 2009 that the obligation was being accelerated and considered in default because of the inaccuracies regarding his income in the application process. Robertson swears that because of the uncertainty generated by the foreclosure and collection procedures he decided not to move

into the home. It was vacant for three months and then became occupied by Robertson's daughter. It has never been occupied as a residence by Robertson.

UCCU filed a Motion for Summary Judgment to allow entry of a money judgment for the balance due under the Trust Deed Note. UCCU could then proceed with sale of the property to apply the proceeds to the obligation and seek an appropriate deficiency judgment if necessary. In its Memorandum Decision dated December 6, 2010 this Court found Robertson in default under the Deed of Trust because he provided materially misleading information during the loan application process and because he has failed to occupy the property within 60 days of closing. However, this Court denied UCCU's request for immediate judgment and authorization to continue with the trustee's sale because UCCU failed to demonstrate compliance with the contract requirement for acceleration of the balance due.

Legal Standard

Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). Additionally, "the facts and all reasonable inferences drawn therefrom [are viewed] in the light most favorable to the nonmoving party." Jackson v. Mateus, 70 P.3d 78, 80 (Utah 2003) (internal citations omitted). Summary judgment "denies the opportunity of trial [and so] should be granted only when it clearly appears that there is no

reasonable probability the party moved against could prevail." Utah State Univ. of Agric. Applied Sci. v. Sutro & Co., 646 P.2d 715, 720 n.14 (Utah 1982).

Furthermore, "it is inappropriate for courts to weigh disputed material facts in ruling on a summary judgment. It matters not that the evidence on one side may appear to be strong or even compelling. One sworn statement under oath is all that is needed to dispute the averments on the other side of the controversy and create and issue of fact, precluding the entry of summary judgment." Lucky Seven Rodeo Corp. v. Clark, 755 P.2d 750, 752 (Utah Ct. App. 1988) (internal citations omitted).

This Court will first address the notice requirements of the Deed of Trust and Robertson's alleged cure of the default. The Court will then examine each cause of action that Robertson asserted in his counterclaim in light of the Court's findings on these preliminary issues. Finally, the Court will address the issue of attorney's fees.

Notice Requirements of Paragraph 22 of the Deed of Trust

Paragraph 22 of the Deed of Trust provides a very specific process that must be followed prior to acceleration following a breach of any covenant by the Robertson. Notice of a breach must specify: "(a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice. . . by which the default must be cured; and (d) that failure to cure the default will result in acceleration of the sums secured. . . and the sale of the property." UCCU sent a letter dated May 24, 2010 that satisfies the requirements of Paragraph 22 of the

Deed of Trust. It notified Robertson that he was in default because he failed to occupy the home within 60 days of executing the Deed of Trust as the Deed of Trust required and because he "provided false tax returns . . . in connection to his application." The notice advised Robertson of the action required to cure the default by stating 1) he must occupy the home as his primary residence and 2) he must either provide documentation verifying that the tax returns he provided to UCCU were the tax returns he filed with the United States or paying UCCU "all principal, interest, attorney's fees, costs, interest and applicable fees to date." The notice gave Robertson until June 24, 2010, 30 days from the date of the notice, to cure the default. Lastly, the notice provided that "[i]f Mr. Robertson does not cure the default by June 24, 2010, UCCU may accelerate the debt. . . and may foreclose upon the property that secures the loan."

Robertson argues that the May 24, 2010 notice was not "legal notice" because it was not sent to the correct address. Robertson declared that he did not see the notice until UCCU filed this motion, and the Court will assume this fact is true for purposes of this motion. Although Robertson did not receive a copy of the notice, the notice was also sent to Robertson's attorney, Richard D. Bradford. This fulfilled the notice requirement because "an attorney is the agent of the client and knowledge of any material facts possessed by the attorney is imputed to the client." Von Hake v. Thomas, 858 P.2d 193, 194 n.3 (Utah Ct. App. 1993). This is sufficient to satisfy the notice requirements of the Deed of Trust.

Robertson's Alleged Cure of the Default

Robertson argues that he cured his default in accordance with Utah Code Ann. § 57-1-31 by timely making each payment due under the Note. Prior to 1985, UCA. § 57-1-31 provided a debtor in default with a statutory opportunity to cure the default in a judicial foreclosure. Washington Nat. Ins. Co. v. Sherwood Associates, 795 P.2d 665, 666 (Utah App. 1990). Since this section of the Code was amended in 1985, no statutory right to cure remains under this section if the beneficiary chooses to enforce his or her rights by judicial foreclosure. Id. at 666-667. Under Utah Code Ann. § 57-1-23, "it is made optional with the beneficiary of the trust deed whether to foreclose the trust property after a breach of an obligation in a manner provided for foreclosure of mortgages or to have the trustee proceed under the power of sale provided therein." Security Title Co. v. Payless Builders Supply, 407 P.2d 141, 142 (Utah 1965). Because UCCU chose the option of commencing a judicial mortgage foreclosure action, UCA § 57-1-31 is not applicable to this action. Title 78B, Chapter 6, Part 9 of the Utah Code governs this action, and it does not provide any statutory method of curing the debtor's default in order to avoid foreclosure. See UCA §§ 78B-6-901 through 78B-6-909.

Furthermore, Robertson cannot cure his default under the Deed of Trust by simply remitting payment under the Note because his default stemmed from his misrepresentation to UCCU during the application process and his failure to occupy the property as his residence within 60 days of closing. Robertson's default would only be cured if he "fully and timely perform[ed] his obligations under the agreement." Grossen v. DeWitt, 982 P.2d 581, 585 (Utah

Ct. App. 1999) (holding that defendant did not cure the default by making payment "because the taxes remained unpaid and the property remained uninsured" as required by the parties' agreement).

Defendant's Counterclaim

Economic Loss Doctrine (Fifth, Sixth, Seventh, Eighth, and Ninth Causes of Action)

"[A] party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach *absent an independent duty of care* under tort law." Hermansen v. Tasulis, 48 P.3d 235, 240 (Utah 2002) (emphasis in original). Economic loss is defined as:

> Damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits–without any claim of personal injury or damage to other property . . . as well as the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.

American Towers Owners Ass'n, Inc. v. CCI Mechanical, Inc., 930 P.2d 1182, 1189 (Utah 1996) (internal citations and quotations omitted).

Robertson's Counterclaim does not allege personal injury or damage to other property, but asserts damages properly characterized as an economic loss. UCCU did owe a duty to deal fairly and honestly with Robertson, but that duty is not independent of the parties' contractual relationship. A lender has no duty to "specifically request tax returns if it is going to sell a loan to another institution." See Def.'s Mem. in Opp'n to Pl.'s Second Mot. for Summ. J. at 18.

Robertson's fifth, sixth, seventh, eighth, and ninth causes of action are barred by the economic loss doctrine because UCCU did not owe a duty to Robertson independent of their contractual relationship. Each of these causes of action is dismissed.

Specific Performance (First Cause of Action)

This Court ruled in its Memorandum Decision dated December 6, 2010 that "Robertson is in default under the Deed of Trust because he provided materially misleading information during the loan application process and because he has failed to occupy the property within 60 days of closing." Mem. Decision at 8. Robertson's specific performance cause of action to enforce the contract is rendered moot because of Robertson's default under the Deed of Trust, and is therefore dismissed.

Breach of Covenant of Good Faith and Fair Dealing (Second Cause of Action)

Robertson asserts that UCCU breached the implied covenant of good faith and fair dealing by accelerating the Note without providing Robertson with notice of his right to cure. As this Court established, UCCU provided Robertson with proper notice, and Robertson failed to cure the default. Furthermore, in seeking equitable relief, Robertson himself must act in good faith. Hone v. Hone, 95 P.3d 1221, 1223 (Utah App. 2004).

Robertson did not act in good faith because "he provided materially misleading information during the loan application process and because he. . . failed to occupy the property within 60 days of closing." Mem. Decision dated Dec. 6, 2010 at 8. UCCU acted in good faith

when it initiated foreclosure proceedings against Robertson because it had determined that Robertson was in default under the Deed of Trust after consulting with Robertson about the alleged tax returns that Robertson provided. UCCU properly provided notice, and Robertson did not properly cure his default by continuing to make payments to UCCU. By accepting Robertson's payments, UCCU did not waive Robertson's breach. The Deed of Trust expressly provides that "[a]ny forbearance by Lender in exercising any right or remedy. . . shall not be a waiver of or preclude the exercise of any right or remedy." ¶ 12. Consequently, this Court finds that because UCCU did not breach the implied covenant of good faith and fair dealing, this cause of action is dismissed.

Declaratory Relief (Third Cause of Action)

Robertson's request for a judicial determination of his rights and duties is rendered moot because this Court held Robertson to be in default of the contract. Mem. Decision dated Dec. 6, 2010 at 8. Because Robertson defaulted by providing misleading information to UCCU, he is not entitled to pay less than the full amount of the Note. Robertson's cause of action for declaratory relief is dismissed as moot.

Breach of Contract (Fourth Cause of Action)

UCCU did not breach the contract by seeking a judicial foreclosure because Robertson was in default. Mem. Decision dated Dec. 6, 2010 at 8. UCCU was entitled to seek legal redress upon Robertson's default. Therefore, Robertson's cause of action for breach of contract is

dismissed.

Promissory Estoppel (Tenth Cause of Action)

The doctrine of promissory estoppel is applicable when enforcement of a promise is the only way to avoid injustice. Hess v. Johnston, 163 P.3d 747, 754 (Utah App. 2007). In order to prevail in a promissory estoppel claim, Robertson must demonstrate the following four elements:

> (1) [Robertson] acted with prudence and in reasonable reliance on a promise made by [UCCU]; (2) [UCCU] knew that [Robertson] relied on the promise which [UCCU] should reasonably expect to induce action or forbearance on the part of [Robertson] or a third person; (3) [UCCU] was aware of all material facts; and (4) [Robertson] relied on the promise and the reliance resulted in a loss to [him].

Id. (quoting Youngblood v. Auto-Owners Ins. Co., 158 P.3d 1088 (Utah 2007)).

Robertson has demonstrated that he did not act with prudence and could not have reasonably relied on a statement from UCCU that his paperwork was in order because Robertson had actual knowledge that the paperwork he provided to UCCU contained material misrepresentations about his financial status. Furthermore, at the time Robertson submitted these financial documents, UCCU was not aware of the material fact that the financial documents were not what Robertson purported them to be. Robertson has not proved a valid claim of promissory estoppel, and his tenth cause of action is therefore dismissed.

Attorney's Fees and Costs

UCCU requests that Robertson pay all of its attorney's fees and costs, which totaled

$20,409.72 as of the date UCCU filed its reply. When a plaintiff to a foreclosure action requests attorney's fees, the Court sets the amount of attorney's fees that should be paid. UCA § 78B-6-908 (2010). The fee must be reasonable under all the facts and circumstances as well as the evidence in the record. Associated Indus. Developments, Inc. v. Jewkes, 701 P.2d 486, 488 (Utah 1984) (citing Jensen v. Lichenstein, 45 Utah 320 (1914)).

Counsel for UCCU charges an hourly rate of $200.00 per hour. This is a reasonable hourly rate in light of the rates charged by attorneys in the area. Robertson has not prevailed on any issue set forth in his counterclaim. Furthermore, given Robertson's intentional misrepresentation to UCCU, which fueled the judicial foreclosure process, an award of attorney's fees is appropriate in this matter. Robertson's argument that UCCU is not entitled to attorney's fees because Robertson never received notice under the requirements of paragraph 22 of the Deed of Trust fails because this Court holds that he received valid notice through his attorney. Under the circumstances of this case, UCCU is entitled to full payment of their attorney's fees in the amount of $20,409.72.

Conclusion

Robertson defaulted by providing false or misleading information during the loan application process which was specifically intended to mislead the lender. Moreover, he failed to personally occupy the premises as agreed. The loan was properly accelerated and Robertson failed to cure the default by repaying the note as agreed. Attorney fees and costs are the liability

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of Robertson under the terms of the note and the amounts claimed by counsel for UCCU are reasonable and appropriate. As a matter of law, the counterclaims asserted by Robertson cannot be sustained. The motion for summary judgment is granted. Counsel for UCCU should prepare an appropriate order pursuant to Rule 7, URCP.

Dated this 1 June day of ~~May~~, 2011

Judge James R. Taylor
Fourth Judicial District Court

A certificate of mailing is on the following page.

Utah Community Credit Union v. Robertson 100402192 Memorandum Decision 5/___/11

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Mailed this 6 day of June, 2011, postage pre-paid as noted above.

Court Clerk