1982

First National Bank of Layton v. Scott L. Egbert, Mack G. Egbert and Cora Egbert : Brief of Appellants

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

FIRST NATIONAL BANK OF LAYTON,	:	
Plaintiff/Respondent,	:	Case No. 18324
vs.	:	
SCOTT L. EGBERT, MACK G. EGBERT and CORA EGBERT,	:	
Defendants/Appellants.	:	

BRIEF OF RESPONDENT

APPEAL FROM A DECISION GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THE SECOND JUDICIAL DISTRICT COURT, COUNTY OF DAVIS, STATE OF UTAH, THE HONORABLE J. DUFFY PALMER PRESIDING.

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellants, Mack and Cora Egbert, appeal from a decision granting respondent's motion for summary judgment in the Second Judicial District Court, County of Davis, State of Utah, the Honorable J. Duffy Palmer presiding. The court ruled that a proposed fourth promissory note between the respondent and Scott and Pamela Egbert failed for lack of completion sufficient to be a legal contract binding the parties and as a matter of law, the respondent was entitled to a summary judgment.

DISPOSITION IN THE LOWER COURT

Respondent's motion for summary judgment was granted after oral argument before the Honorable J. Duffy Palmer, on December 24, 1981. The final amended judgment was entered against Mack and Cora Egbert on February 25, 1982.

STATEMENT OF THE FACTS

This case involved a series of three notes representing loans taken out by Scott Egbert from the First National Bank of

Layton and a proposed fourth note between Scott Egbert and the bank intended to be a consolidation of the unpaid amounts of the first three notes. The appellants, Mack and Cora Egbert, are the parents of Scott Egbert and were co-signers on two of the first three loans.

The first of these notes was signed by Scott Egbert and Mack Egbert on September 30, 1975 in the amount of $9,171.60. The loan included interest at the rate of 12.5% and carried as security the pledge of a 1976 Ford pickup truck belonging to Scott Egbert. Sixty payments of $152.86 each were to be made by Scott Egbert. Only twenty payments were made and of those twenty payments, fourteen payments were made late. The last payment on the first note was made July 18, 1977.

The second note was signed by Scott Egbert and Cora Egbert on September 17, 1976 in the amount of $1,167.36. This note included interest at the rate of 13.8%. Scott Egbert's 1976 Ford pickup truck was also assigned as collateral on this loan. Twenty-four payments of $48.64 each were to be made by Scott Egbert. Only eight payments were made and of those eight, five were made late. The last payment on the second note was made June 9, 1977.

A third note was signed by Scott Egbert on June 16, 1977 in the amount of $350.00. This note carried an interest rate of 12%. One payment of $360.50 (including $10.50 interest) was to be paid by Scott Egbert at the note's maturity, but that payment was never made by Scott Egbert.

On August 24, 1978, over a year after the last payment had been received on any of the three notes, a proposed fourth

promissory note was set up in both the names of Scott Egbert and his wife, Pamela Egbert. Scott Egbert alone signed the note in the amount of $13,957.92. Pamela Egbert was not present and never signed the note. The proposed note was intended to be a consolidation and renewal of the amounts outstanding on the prior three notes. It did include other items of unpaid charges for insurance incurred on the truck posted as collateral on the prior notes, a charge for credit life insurance, late charges, and principal and interest accrued on the previous notes. The note provided for equal monthly installment payments of $193.86, which would have paid off the loan in a period of six years. This proposed note stated an interest rate of 13.12%.

The loan disclosure statement attached to loan number four was also prepared in the names of Scott Egbert and Pamela Egbert. It was only signed by Scott Egbert and never signed by Pamela Egbert. It stated the 1976 Ford pickup truck would be posted as collateral, and that the borrower(s) would assign a certain real estate contract on property they said they owned in Ogden as security for the loan. In addition, the loan disclosure statement indicated the proceeds of the loan would be utilized to pay off the principal and interest of the three prior loans, pay the automobile insurance, provide credit life for the borrower and pay the abstract and recording fees and charges on the deed and assignment of escrow.

The quit-claim deed and an assignment of escrow associated with the proposed fourth note were prepared in both Scott Egbert and Pamela Egbert's names to cover the pledged real estate. They were signed by Scott Egbert, but were never signed

by Pamela Egbert, who was listed as the joint owner of the Ogden property. Scott Egbert's signature was never notarized. The assignment of escrow was never signed by the bank as vendee. No notarization of Scott Egbert's signature was made although information was put on the assignment for it. No notarization of the bank president's signature was ever made either, although information was typed on the assignment for the notarization. The respondent did not record the quit-claim deed, nor did it file the assignment of escrow with the escrow holder because the bank learned in checking the title of the property which the Egberts were going to assign the bank as security for the proposed fourth promissory note that on July 3, 1978 the Egberts had transferred their interest in that property to a third party. Without the agreed upon security and the signature of Pamela Egbert the bank did not complete the paperwork and steps necessary to finalize the proposed fourth promissory note and loan.

The appellants allege they were informed by Scott Egbert that their obligation on the first two notes was taken care of with his signing the proposed fourth promissory note, and therefore, the appellants took no further action to insure payments on any of the loans. However, the bank alleges in its affidavits it contacted the Egberts and informed them of their obligation on the three previous notes if the proposed fourth promissory note was not consummated and paid in full by Scott and Pamela Egbert.

Contrary to the facts stated by appellants, the bank did not stamp the words "cancelled by renewal" on the first three

notes at the time of the signing of the proposed fourth note. That action was done approximately September 15, 1978, about three weeks after Scott Egbert signed the proposed note and was done pursuant to internal procedures in the bank which they used in processing a loan. Different individuals in the bank were responsible for different functions in processing a loan application. The procedure of stamping "cancelled by renewal" was a standard procedure to be done prior to the loan information being put on the computer. Many times this was done prior to a loan being finalized in order to speed up the procedure of having the information from the handwritten paperwork entered on the computer so that when the loan was finalized and completed, all other procedures would have been implemented so the computer would reflect up-to-date information and status on the account. The bank still has in its possession the original three notes and never surrendered them to the appellants or Scott Egbert. Computer billings were inadvertently sent out to Scott Egbert but this was because of the delay in finalizing the loan application due to the title check and the status of the Egberts' property in Ogden. The loan application had started its normal process of being computerized and indeed, was put on the computer September 11, 1978 as stamped on the loan disclosure statement.

Contact was made with the appellants by the bank concerning their obligation on the first two notes prior to suit being initiated against them. On February 22, 1980 the respondent instigated legal action against the appellants and Scott Egbert to obtain possession of the truck which had been used as

collateral on the first three loans. A Writ of Replevin issued on February 26, 1980. The truck was not voluntarily surrendered but was obtained and seized by the Weber County Sheriff's office pursuant to the Writ of Replevin.

The respondent amended its complaint in September 1981 after discovery to conform the amended complaint with the new facts and evidence obtained through discovery and to correct misstatements in the original complaint.

After a denial of appellants' motion for summary judgment, on October 22, 1981, the responent filed a motion for summary judgment alleging, among other things, that the proposed fourth promissory note was invalid because the loan process was never completed and lacked sufficient consideration to bind the parties. Respondent further requested that judgment be granted against the appellants on the previous promissory notes if the court ruled the proposed fourth note was invalid.

On December 24, 1981, after hearing arguments, the Honorable J. Duffy Palmer granted respondent's motion for summary judgment. A motion was made by the appellants challenging the costs assessed in said judgment and after arguing said motion on January 28, 1982, both appellants' and respondent's counsel agreed to an amended judgment amount to reflect the fact that Scott Egbert had filed a petition in bankruptcy and to compromise the contested amount of the judgment. Pursuant to said agreement, the final amended judgment was signed by the court on February 25, 1982 and from which appellants now appeal said judgment.

ARGUMENT

POINT I

THE PROPOSED FOURTH RENEWAL PROMISSORY NOTE WAS NEVER CONSUMMATED BETWEEN THE PARTIES AND WAS, THEREFORE, NOT A LEGALLY ENFORCEABLE CONTRACT.

In order for the proposed fourth promissory note with the given date of August 24, 1978, intended to be a renewal note, to have been a valid and binding legal instrument, the same legal principles apply as if the proposed renewal note had been an original first note.

In 11 Am Jur 2d, Bills and Notes, Section 302, page 328, it states:

> "There must be a good and sufficient consideration for an extension agreement, in order to render it legally binding. The underlying principles of consideration are the same in this class of cases as in the case of contracts generally."

There was an attempt between the bank and Scott and Pamela Egbert to make a consolidation of the three previous loans. The consolidation of those loans was to be the proposed fourth promissory note dated August 24, 1978. The Egberts' equity in the Ogden property they had acquired October 1, 1977 would be given as security for the consolidated loan and the loan was to be in the names of Scott and Pamela Egbert. But, the proposed fourth promissory note never came to fruition because of a lack of consideration and the lack of having both Scott Egbert and Pamela Egbert's signatures on the appropriate paperwork.

The exhibits of the respondent, (Appendix A includes the promissory note, the loan disclosure statement, the Uniform Real

Estate Contract, the quit-claim deed and the assignment of escrow, all of which are associated with the August 24, 1978 proposed consolidation), clearly showed both Scott Egbert and Pamela Egbert were to be included on the fourth note and all the associated documents, but Pamela Egbert never signed any of the instruments. The exhibits also show the fourth note was to be supported by additional consideration in the form of additional security from an assignment of the Egbert's contract and escrow on their Ogden property. The documents were prepared, but that additional security was never received because the bank learned in a title check on the property that the Egberts had previously transferred their equity. Therefore, there was no additional consideration given for the proposed fourth promissory note. Without that consideration, there cannot be a legally binding enforceable renewal promissory note, i.e., no contract.

Peterson v. Intermountain, 508 P.2d 536, 29 U.2d 271; Williston on Contracts, Revised Edition, Section 814.

It is critical to note all the instruments associated with the proposed fourth promissory note made specific reference to the additional consideration of the assignment of escrow and deed and the necessity of the signatures of both Scott and Pamela Egbert. This is important in view of the general principle of law that the consideration necessary to support a contract is the consideration intended by the parties. 139 ALR 1036. This is stated in 17 Am Jur 2d, Contracts, Section 92, page 434 as follows:

> ". . . Nothing is consideration for a contract that is not accepted or regarded as such by both parties. The mere presence of some incident to a

> contract which might under certain circumstances be upheld as a consideration for a promise does not necessarily make it the consideration for the promise in that contract; to give it that affect, it must have been offered by one party and accepted by the other as an element of the contract. Accordingly, the fortuitous presence in a transaction of some possibility of detriment, latent but unthought of, is not enough to furnish a consideration for a contract. The promissor and promissee must have dealt with it as the inducement to the promise." (Emphasis Added)

The only consideration anticipated and intended by the parties to be the security for this proposed fourth promissory note was the truck and the assignment of escrow and deed on the Ogden property. No facts were alleged by appellants in lower court to show otherwise. In fact, no argument was even made alleging otherwise.

The items appellants raise in their Point I to justify a reversal of the lower court's decision are clearly incidental and not agreed upon by the parties to be the consideration for the proposed fourth note.

Appellants' argument that the note itself is consideration has no weight when the parties agreement was to have the consideration the transfer of the Ogden property as shown on the loan disclosure statement. The intent of the parties cannot be replaced by an incidental item. 139 ALR 1036. The same is true of the additional charges for automobile insurance and credit life insurance. The auto insurance is a mandatory right of the bank to secure its collateral and if buyer doesn't maintain insurance, the bank has the right to obtain insurance. This is shown on the loan disclosure statement as number 11.

The different interest rate is an incidental item and not the consideration intended by the parties. Further, it is shown that the interest rate on the first note was 12.50 percent, the second note 13.80 percent, the third note 12.00 percent, and the proposed fourth note 13.12 percent. Thus, the interest rate of the proposed fourth note was both above and below the interest rate of some of the previous notes. The weighted average of the first three loans' interest was 12.73%, making the interest on the intended fourth note only .39 of 1% greater. The State Bank of Lehi and Hackin cases which Appellants cite are not relevant to this case because the interest referred to as consideration in those cases was not the agreed upon consideration in this case. The loan disclosure statement specifically mentions the truck and the Ogden property as the stated consideration. George Wilcox affirms this in his October 21, 1981 affidavit and further states that the renewal and extension of time of the previous notes proposed by the fourth note was conditioned on the additional security. Appellants have never shown any facts to indicate any other agreed upon consideration.

The fact the 1976 Ford truck was also listed as security can be shown as a routine matter because the second note also listed the truck as security, even though the truck was already given as security on the first note. The important fact which exists with the second note which does not exist with the proposed fourth note is that Scott Egbert received money from the bank as a result of the second note but not as a result of the fourth note. The lending of the money was the consideration and

the benefit and detriment accordingly to each of the parties in the second note. The fact that Scott Egbert never performed on the proposed fourth note shows that no detriment came to him as a result of said note and he did not rely on said note to his detriment. The truck clearly amounted to past consideration and is insufficient to support the proposed fourth note. 17 Am Jur 2d, Contracts, Section 125, page 471. The value of the truck was so much less than the amount of the proposed fourth note the bank needed the Ogden property to secure the note.

It is also significant in viewing the point of consideration to take into account the fact both Scott and Pamela Egbert's names were listed throughout the instruments that were intended to support the proposed fourth promissory note but that Scott Egbert alone signed the applicable instruments and Pamela Egbert never signed any of them. In addition, Scott Egbert's signature was never notarized. Obviously, it was the intention of the parties to have both Scott and Pamela Egbert sign the applicable instruments and the proposed fourth promissory note. If it was the intention of the parties to delete the requirement of Pamela Egbert's signature, then Pamela Egbert's name should have been crossed out or new forms typed, which wasn't done. It is clear Pamela Egbert's name was not intended to be deleted because:

1. Her name was necessary in order to have a valid assignment of escrow and deed, on the Ogden property because Scott and Pamela were both listed as jointly receiving that property, and

2. Scott Egbert had defaulted on his payments on the three previous loans. It made no sense to consolidate his loans into the proposed fourth promissory note without requiring additional security or additional co-signatures.

On pages 9 and 10 of Appellants brief, they state the bank was wrong for not recording the documents after Scott Egbert signed them. They go on to say in effect one signature is better than none. But they fail to realize the bank was under no obligation to take any action until the agreed upon conditions had been met by the Egberts. One of those conditions was the signing of the documents by both Scott and Pamela Egbert. The fact Scott's signature was never notarized on any of the documents is a good indication both signatures were required. It is a common practice to wait to notarize a document which two people are to sign until the second person has signed. If only Scott's signature was required or agreed upon, then the notarization would have taken place and the loan process would move on to the next step. But, in this case both signatures were required because the property to be used as security was in both names and all related documents were in both names.

It makes more sense and is consistent with the written instruments to believe the bank was willing to consolidate the unpaid amounts of the three prior loans into one loan if additional security was given to cover that loan. It makes little sense and is not consistent with the written instruments to believe that the bank would give up its recourse against the Appellants on the two prior loans to just have Scott Egbert's

signature and the 'incidentals' of consideration which Appellants have referred to. Especially is this not realistic when the facts show that no payments had been made by Scott Egbert for over 12 months prior to August 24, 1978. Obviously, and the documents verify it, the bank was only willing to enter into a renewal and extension if additional substantial security was obtained. And that did not occur.

Thus, the intention of the parties in preparing the proposed fourth promissory note never was completely realized and therefore, the proposed fourth promissory note was not a valid contract and obviously, then, not binding upon the parties.

POINT II

THE APPELLANTS' FACTS DO NOT SUPPORT THEIR CLAIM OF CONSIDERATION AND ARE NOT RELEVANT TO THE ISSUE ON APPEAL

In appellants' Point II they state the items asserted in their Point I as consideration were agreed upon by the parties and further state four facts which they claim support that conclusion.

As to the "cancelled by renewal" stamped on the first three notes, the president of the bank, George Wilcox, states in his affidavits of September 4, 1981 and October 21, 1981 that this was an "internal procedure" normally done in a loan process. This issue is not relevant unless there is a valid fourth note. This argument doesn't go to the validity of the proposed fourth note, but rather to the question that is raised if the fourth note were valid, i.e. what effect would the fourth note have on the previous three notes?

The case law in Utah is clear that a subsequent note may not relieve the parties to be charged of their obligations under previous notes. Marking Systems, Inc. v. Interwest Film Corporation, 567 P.2d 176; Deseret National Bank v. Dinwoody, 17 U. 43, 53 P. 215 (1989); First Security Bank of Utah v. Proudfit Sporting Goods Company, 552 P.2d 123 (Utah 1976); and Gray v. Kappos, 90 U. 300, 61 P.2d 613 (1936). The distinguishing feature in these Utah cases which hold that the subsequent note did not discharge the parties of the previous obligations is that in all of those cases there was a valid subsequent note and the Court was limited to the specific question of the meaning, intent and effect of that last note on the previous notes. (underlining added) Without a valid subsequent note, you don't need to answer the question of its effect or prior notes - the prior notes are still enforceable.

The fact the bank still has the notes and never surrendered them shows the bank did not intend to relieve the appellants of their financial obligation.

The reason computer billings were sent to Scott Egbert is explained by the fact the bank computerized the account on September 11, 1978 as shown on the loan disclosure statement. This was a normal procedure in the bank's loan process so that when the loan was finalized it would already be on the computer. The computer doesn't know if a loan is legal or not, so it continued to assess late charges which later had to be manually corrected. Again, however, this argument doesn't go to the validity of the proposed fourth note, but its effect on the three previous notes if the fourth note were valid.

The respondent's and appellants' facts differ as to what contacts were made between the two parties and what was said. Legal procedures were taken by respondent to collect on all the notes with the filing of the complaint in this action.

In appellants statement number 4 on page 12 of their brief they make reference along with Point 5 on page 14 to the fact respondents changed their position with their amended complaint. This issue was never raised in the lower court and should not be considered on appeal.

> "The invariably accepted rule of appellate review is that no issue will be considered by the appellate court unless it was properly raised in the lower court in order to give the parties and the court notice and fair opportunity to meet, consider and pass upon that issue." State v. Gandee, 587 P.2d at 1067.

Since it was raised, respondent will address it by saying the purpose of Rule 15 of the Utah Rules of Civil Procedure is to liberally allow amendments to conform to evidence and succinctly address the relevant issues. Blyth & Fargo Co. v. Swenson, 15 U. 345, 49 P. 1027. Many complaints are amended for various reasons and the URCP provide that the amended pleadings relate back to the original filing time. To use the filing of an amended pleading against the party who filed it would thwart the use of amended pleadings and their intended purpose.

The history of this case shows the complaint was filed for the purpose of proceeding on a Writ of Replevin. It, therefore, was used to support the issuance of a Writ to allow the Sheriff to attach the truck. The original complaint contained several misstatements but the only one appellants chose to men-

tion concerned the fourth note. It should be noted, however, the complaint did pray for the alternative relief of either judgment on the entire consolidated amount of the fourth note or judgment on each of the notes separately, with the last alternative being the one used in the amended complaint.

Other mistakes were made in the original complaint and corrected in the amended complaint, such as the interest on each note, etc. If this had been raised in the lower court and the court considered it relevant, respondent could have shown why the complaint was written the way it was and what facts respondent's attorney had before filing the complaint.

Therefore, of the four "facts" which appellants state in their Point II as grounds for reversal, the first three primarily relate to the question of the effect of a valid fourth note on the three previous notes and not to the validity of the proposed fourth note. The fourth "fact" is raised for the first time on appeal and should not be considered and is inappropriate anyway.

In appellants' Point III they raise five facts which they state would justify sending this case to trial.

The first, why Pamela Egbert did not sign any of the documents, was not raised in the lower court by appellants as an issue. In Scott Egbert's Answers to Interrogatories he denies that it was anticipated that Pamela Egbert would sign. No other averments are made concerning this issue even though respondent made it a definite point in its memorandums that she was to sign and the exhibits clearly showed Pamela Egbert's name typed and ready to be signed. To rest on that general denial and just say

it wasn't intended for her to sign without further factual representations is not enough. Rainford v. Rytting, 22 U.2d 252, 451 P.2d 769 (1969); Summerhays v. Holm, 24 U.2d 190, 468 P.2d 366 (1970).

Point 2 on page 14 of appellants' brief concerning the impairment of security by Pamela not signing is again a new issue on appeal. Appellants knew what respondent's position was in relation to this because it was mentioned in the October 21, 1981 affidavit of George Wilcox and referred to by respondent in its memorandum. Therefore, appellants had notice and should have raised the issue earlier. Burningham v. OTT, 525 P.2d 620.

As to Point 3 on page 14, there is dispute as to what conversations took place between the parties, but this issue is immaterial because Scott Egbert never showed any reliance on what he said occurred. If he had thought there was a valid fourth note and made even one payment which the bank accepted, he might have a case for estoppel. But no facts are alleged by appellants to support an estoppel argument. Reliance is necessary for an estoppel argument. Corbin on Contracts, Section 194.

Appellants' Point 4 on page 14 alleges collection efforts were made by respondent which shows the proposed fourth note was valid. Respondent agrees there was contact between the parties but what occurred is disputed. However, even if respondent had tried to collect on the proposed fourth note, would that make an invalid note valid? Only if one can overcome the legal requirements through the equitable remedy of estoppel, if

then. And appellants have shown no reliance or detriment because Scott Egbert never made any payments after the proposed fourth note was signed by him. Therefore, there is no equitable relief and legally the note cannot stand as a valid one without the supporting legal elements such as consideration.

Appellants Point 5 on page 14 has been previously addressed by respondent in this brief. It is again a new issue on appeal.

Therefore, out of 5 alleged "facts and unanswered questions" which appellants in their Point III of their brief say should be determined by a trier of fact, none were argued by appellants in the lower court, although two, numbers 3 and 4, were addressed in affidavits. And respondent claims these two are not relevant because no estoppel or other legal basis was alleged to overcome the illegality of the proposed fourth note.

The appellants have, therefore, not raised a sufficient legal or factual issue on appeal which would warrant this court reversing the lower court's summary judgment.

POINT III

THE COURT HAD THE POWER TO GRANT RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE BASIS OF RESPONDENT'S MOTION IS A QUESTION OF LAW AND NOT A QUESTION OF FACT

The basic policy of Rule 56 of the Utah Rules of Civil Procedure is if there is no material dispute as to the facts, then the moving party should prevail if by law the party would be entitled to do so. Burningham v. OTT, 525 P.2d 620. The basis of respondent's Motion for Summary Judgment was that the proposed fourth promissory note was not a valid contract. The basic facts were not contested by either party. The intentions

of the parties were clearly manifest on the face of the instruments. They showed that both Scott and Pamela Egbert were to sign the instruments and that the additional consideration of the assignment of escrow and deed was needed as a condition for issuing the proposed fourth promissory note. These two items were never done and therefore, the proposed fourth promissory note was not a binding instrument. 11 Am Jur 2d, Bills and Notes, Section 216, page 245 states:

> "Consideration is not always a fact question. If all the facts concerning the issue of consideration are without dispute, such issue becomes a question of law."

Respondent's Motion for Summary Judgment questioned the validity of the proposed fourth promissory note. The question of validity is a legal one to be determined by the court if all the facts before the court are uncontested.

> ". . . the evidence upon which one relies for judgment can be, and should be, known to the opponent; and when all the evidence is known, if there is no dispute on any material issue of fact, the rules provide that the court may apply the law and thus terminate the matter, thereby conserving the time of the court and avoiding expense to the state and to the litigants." Burningham v. OTT, 525 P.2d at 621-622.

There were no new facts alleged by appellants at the time of respondent's Motion for Summary Judgment which would go to the validity of the note which were not already before the court by way of pleadings, affidavits and exhibits of the parties. Therefore, respondent's Motion for Summary Judgment was correctly within the province of the court to grant.

POINT IV

IN ORDER TO DEFEAT A MOTION FOR SUMMARY JUDGMENT THE OPPOSING PARTY HAS TO ALLEGE FACTS WHICH CONTROVERT THE MOVING PARTY'S FACTS.

In appellants' Memorandum and Affidavit in Opposition to Plaintiff's Motion for Summary Judgment there was not one substantial fact which the appellants raised which would controvert any of the facts which the respondent relied upon in seeking its Motion for Summary Judgment from the lower Court. All the appellants alleged was the Court had already addressed this question in its October 22, 1981 ruling and that the respondent was inconsistent in its approach and its position illogical. The facts and affidavits of the appellants went to the second step of determining the meaning, intent and effect of the proposed fourth promissory note on the three previous notes but did not challenge the respondent's facts concerning the validity of the proposed fourth promissory note which is the first step that must be taken before the second step can be addressed.

The appellants did not challenge the respondent's facts other than to say that they were intentions, and not facts. This type of allegation is insufficient to defeat a Motion for Summary Judgment.

> "(1) An affidavit, supporting or opposing a motion for summary judgment is an evidentiary affidavit, whose form and content is governed by Rule 56(e), U.R.C.P. Such an affidavit must be made on personal knowledge of the affiant, set forth facts that would be admissible, in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein." Western States Thrift and Loan Co. v. Blomquist, 29 U. 2d at 60-61.

In the affidavit of appellants' counsel given in opposition to respondent's Motion for Summary Judgment, he only stated, "at the time of trial said appellants will introduce evidence . . . " (paragraph 4, page 2) with no supporting facts of what that evidence would be. This is not enough to put the moving party's facts in issue to the degree the Court should have denied respondent's Motion for Summary Judgment.

The lower court had before it all the pleadings, discovery, arguments and affidavits which either party was going to submit since both parties had made motions for summary judgment indicating all the facts were before the court for a decision. It was able to view the whole matter and get to the heart of the issue, which Rule 56 allows.

> "The rule has been interpreted more articulately by eminent authorities on the subject who suggest that the rule permits us to pierce the pleading, resulting in a summary judgment, if an examination of facts developed under the discovery procedure, by affidavit, deposition, admission and the like, makes it appear that no genuine issue of fact is presentable. To travel beyond that point would be a waste of time, energy and cost. The rule designedly seeks to eliminate protraction, absent issues of fact, expediting litigation in an area where possible congested calendars point up the truism that justice delayed is justice denied." Continental Bank & Trust Co. v. Cunningham, 10 U.2d at 332.

Therefore, the lower court correctly granted respondent's Motion for Summary Judgment.

CONCLUSION

Based upon the facts raised and the documents before it, the lower court could see what the parties had intended on doing but their intentions never came about because Pamela Egbert

failed to sign the documents and the agreed upon security was never given the bank. There was no valid fourth note.

The appellants are now on appeal trying to make a meal without the main course. Both parties, by the written instruments, and their affidavits, have shown that the agreed upon consideration was to be the deed and assignment by both Scott Egbert and Pamela Egbert to property in Ogden. Without that security, there was no loan. The appellants did not contest that fact prior to summary judgment being granted. They are trying now, on apeal, to make a valid loan from an invalid one by using incidentals instead of the agreed upon consideration.

Most of the issues mentioned in their brief were never raised in the lower court and they never asserted any material facts to contradict the exhibits and affidavits of the respondent.

The simple summation of this case is there never was a contract, i.e. fourth note, because Scott Egbert and Pamela Egbert failed to perform on their agreed upon promises.

Judge Palmer was legally and factually justified in granting respondent's Motion for Summary Judgment based on the pleadings, facts and exhibits before him at the time, which showed the respondent was entitled as a matter of law to summary judgment.

The respondent therefore respectfully asks that the lower court's judgment be affirmed.

Respectfully submitted this 14th day of June, 1982.

C. BRUCE BARTON
Attorney for Plaintiff/Respondent
437 North Wasatch Drive
Layton, Utah 84041

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Respondent was duly served on counsel for the appellants, Reed M. Richards, 2568 Washington Boulevard, Ogden, Utah 84401, by mailing two (2) copies thereof this 14th day of June, 1982.

C. BRUCE BARTON

"APPENDIX A"

Scott Egbert, AKA Scott L. Egbert and Pamela Egbert, AKA Pam Egbert
1767-27th Street, Ogden, Utah **INSTALLMENT PROMISSORY NOTE** E0691

$ 13957.92 Layton, Utah August 24th, 19 78

The Undersigned, jointly and severally, promise to pay to the order of THE FIRST NATIONAL BANK OF LAYTON at LAYTON, Utah, or at such other place as the holder hereof may designate in writing the sum of Thirteen Thousand Nine Hundred Fifty Seven and 92/100 ---------- DOLLARS ($13,957.92), in successive monthly installments of $ 193.86 each, due on the same day of each month commencing September 25th, 19 78 and continuing until the whole amount thereof has been paid

The **ANNUAL PERCENTAGE RATE** is 13.12 %

The unpaid balance may be paid in full at any time and any unearned finance charge will be refunded based on the "Rule of 78's."

If any installment is not paid in full within 10 days after its due date, a charge may be assessed of $ 5.00, or at holder's election, an amount equal to the annual percentage rate stated above times the unpaid amount of the installment from the due date of the installment until paid in full.

If the holder deems itself insecure or if default be made in payment in whole or in part of any installment at the time when or the place where the same becomes due and payable as aforesaid, then the entire unpaid balance, shall, at the election of the holder hereof and without notice of said election, at once become due and payable. In event of any such default or acceleration, the undersigned, jointly and severally, agree to pay to the holder hereof reasonable attorneys' fees, legal expenses and lawful collection costs in addition to all other sums due hereunder. Any balance unpaid on maturity of this note shall bear interest thereafter, both before and after judgment, at the annual percentage rate stated above.

Presentment, demand, protest, notice of dishonor and extension of time without notice are hereby waived and the undersigned consent to the release of any security, or any part thereof, with or without substitution.

This note is secured by a Security Agreement of even data.

Address 1767 -27th Street, Ogden, Utah. Scott L Egbert

Address Same

Purpose: - To Refinance Loans
Re-pay; From Income and sale of property
01-391 3-0-33
Class 80
O.W.

LOAN DISCLOSURE STATEMENT

(Direct Loan-Unsecured or Non-Real Estate Security)

Lender: THE FIRST NATIONAL BANK OF LAYTON, LAYTON, UTAH
(Street address, City, State, Zip)

Borrower: Scott Egbert, AKA Scott L. Egbert and Pamela Egbert, AKA Pam Egbert
Name 1767-27th Street, Ogden, Utah. (Street address, City, State, Zip)

1. Proceeds of Loan	01-39163-0-32 - $6664.23, 33 $1668.41, 76481 $350	-	$ 8996.57
2. Other charges:	Int. to 8-23-78 - $49.93 Auto Ins. eff 11-26-77-$264.00 ($398.00 Less $134.00)		
Fees or taxes:	Abstract & Rec.	$ 86.00	
Credit Life and/or Disability Insurance not required by Lender	-	$ 544.36	
Physical Damage Insurance	-	$	
Misc. charges:		$	
		$	$
3. Amount financed (1 + 2)			$ 9626.93
4. FINANCE CHARGE			$ 4330.99
5. Total of Payments (3 + 4)			$ 13957.92

Payable as checked:

☐ Single payment on ....., 19.....

☒ 72 successive monthly installments of $ 193.86 each on the 25th day of each month commencing September 25th, 19 78, with final installment in amount of $..... due on ....., 19.....

☐ .....

.....

.....

☐ Balloon payment of $..... due ....., 19..... may be refinanced as follows: .....

6. ANNUAL PERCENTAGE RATE - - - - - - - - - - - 13.12 %

7. Any charges paid by Borrower not included in Amount Financed or Finance Charge:

..... $..... ..... $.....

..... $..... ..... $.....

8. Prepaid Finance Charge $.....; Required Deposit Balance $.....; Total Prepaid Finance Charge and Required Deposit Balance $.....

9. Late charges may be imposed as to any installment not paid in full within 10 days after its due date and if imposed will be computed in the manner checked (If both methods are checked, either may be used):

☒ A late charge of 5 % of the installment, but not exceeding $5.

☒ An amount equal to the annual percentage rate stated above times the amount of the installment for the period from the due date of the installment until payment thereof, counting each day as 1/30th of a month.

Reasonable attorney's fees, legal expenses and lawful collection costs incurred after default may also be imposed.

10. Prepayment:
If loan is prepaid in full, any unearned finance charge will be refunded based on the rule of 78's unless refund is less than $5 where amount financed is $75 or less or $7.50 where amount financed is more than $75.

11. Security for loan:
Lender may off set against this loan any account or amounts owed by Lender in any capacity to Borrower.

☐ The loan is otherwise unsecured.

☒ This loan (and any future or other indebtedness) will be secured by a Security Agreement covering the following personal property now owned or hereafter acquired by Borrower: .....
1976 Ford F-250 Pickup, Serial No.F26YRA 32410
And Assignment of Real Estate Contract

Physical damage insurance for such property:

☐ Is not required by Lender

☒ Is required by Lender and may be obtained by Borrower from any source, the Lender reserving the right to refuse to accept any insurer for reasonable cause.

I will obtain physical damage insurance.		Lender is authorized to obtain physical damage insurance.	
			8-24-78
Borrower's signature	Date Signed	Borrower's signature	Date Signed

If Lender is authorized to obtain such insurance, the cost for a policy expiring ..... months from issue will be $..... based upon current rates and representations of Borrower as to the use of the property and the classification of such property and of Borrower for insurance purposes. Coverage will be against loss of or damage to such property only and w ill not include coverage for public liability or damage to other property.

12. Credit Insurance:

☐ Credit life insurance is required by Lender and cost is included in Finance Charge.

☒ Credit life and/or disability insurance is not required to obtain this loan, purchase of such through Lender being voluntary on part of Borrower. If Borrower wishes such credit insurance, the Borrower to be insured must sign the appropriate statement below:

I desire credit and disability insurance. Cost $.....		I desire credit life insurance only. Cost $ 544.36	
			8-24-78
Borrower's signature	Date Signed	Borrower's signature	Date Signed

ACKNOWLEDGMENT OF RECEIPT

The undersigned Borrower acknowledges receipt of a copy of this statement prior to the signing of any documents evidencing or securing the proposed loan.

Date: August 24th 1978
(Date statement received)

.....
(Signature of Borrower)

COMPUTERIZED ACCOUNT SEP 11 1978

W-9017

"THIS IS A LEGALLY BINDING CONTRACT, IF NOT UNDERSTOOD SEEK OTHER COMPETENT ADVICE."

UNIFORM REAL ESTATE CONTRACT

1. THIS AGREEMENT, made in duplicate this 29th day of September, A. D. 19 77, by and between LELAND F. BROADBENT AND BELVA M. BROADBENT, his wife hereinafter designated as the Seller, and SCOTT L. EGBERT AND PAM EGBERT, his wife hereinafter designated as the Buyer, of Ogden, Utah

2. WITNESSETH: That the Seller, for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned agrees to purchase the following described real property, situate in the county of Weber, State of Utah, to-wit: 1767 - 22nd Street Ogden, Utah
ADDRESS
More particularly described as follows:

All of Lot 17, Block 39, NOB HILL ADDITION, to Ogden City, Weber County, Utah, according to the official plat thereof.

3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of TWENTY FOUR THOUSAND AND NO/100 - Dollars ($24,000.00) payable at the office of Seller, his assigns or order ESCROWS, INC. strictly within the following times, to-wit: THREE THOUSAND AND NO/100 - - - - - - - ($ 3,000.00) cash, the receipt of which is hereby acknowledged, and the balance of $ 21,000.00 shall be paid as follows: $190.00, or more, beginning November 1, 1977 and $190.00, or more, on the 1st day of each month thereafter until the Principal Balance together with accrued Interest has been paid in full.
In addition to the above mentioned payment, the Buyers agree to make an additional payment of $31.00 for a Reserve Account as follows: $25.00 for taxes and $6.00 for fire insurance premiums.
The Buyers agree to increase said Reserve payment, if necessary, due to an increase in taxes and/or insurance premiums.

Possession of said premises shall be delivered to buyer on the 1st day of October, 19 77

4. Said monthly payments are to be applied first to the payment of interest and second to the reduction of the principal. Interest shall be charged from October 1, 1977 on all unpaid portions of the purchase price at the rate of Eight & 1/2 per cent (8½ %) per annum. The Buyer, at his option at anytime, may pay amounts in excess of the monthly payments upon the unpaid balance subject to the limitations of any mortgage or contract by the Buyer herein assumed, such excess to be applied either to unpaid principal or in prepayment of future installments at the election of the buyer, which election must be made at the time the excess payment is made.

5. It is understood and agreed that if the Seller accepts payment from the Buyer on this contract less than according to the terms herein mentioned, then by so doing, it will in no way alter the terms of the contract as to the forfeiture hereinafter stipulated, or as to any other remedies of the seller.

6. It is understood that there presently exists an obligation against said property in favor of None with an unpaid balance of $_____, as of _____

7. Seller represents that there are no unpaid special improvement district taxes covering improvements to said premises now in the process of being installed, or which have been completed and not paid for, outstanding against said property, except the following None

8. The Seller is given the option to secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder, bearing interest at the rate of not to exceed Eight and 1/2 percent (8½ %) per annum and payable in regular monthly installments; provided that the aggregate monthly installment payments required to be made by Seller on said loans shall not be greater than each installment payment required to be made by the Buyer under this contract. When the principal due hereunder has been reduced to the amount of any such loans and mortgages the Seller agrees to convey and the Buyer agrees to accept title to the above described property subject to said loans and mortgages.

9. If the Buyer desires to exercise his right through accelerated payments under this agreement to pay off any obligations outstanding at date of this agreement against said property, it shall be the Buyer's obligation to assume and pay any penalty which may be required on prepayment of said prior obligations. Prepayment penalties in respect to obligations against said property incurred by seller, after date of this agreement, shall be paid by seller unless said obligations are assumed or approved by buyer.

10. The Buyer agrees upon written request of the Seller to make application to a reliable lender for a loan of such amount as can be secured under the regulations of said lender and hereby agrees to apply any amount so received upon the purchase price above mentioned, and to execute the papers required and pay one-half the expenses necessary in obtaining said loan, the Seller agreeing to pay the other one-half, provided however, that the monthly payments and interest rate required, shall not exceed the monthly payments and interest rate as outlined above.

11. The Buyer agrees to pay all taxes and assessments of every kind and nature which are or which may be assessed and which may become due on these premises during the life of this agreement. The Seller hereby covenants and agrees that there are no assessments against said premises except the following:

ASSIGNMENT OF ESCROW

BUYER — SELLING

KNOW ALL MEN BY THESE PRESENTS:

That (vendor) Scott L. Egbert and Pam Egbert, of Ogden, Utah, for and in consideration of the sum of Thirteen Thousand Nine Hundred Fifty Seven and 92/100 ---------- DOLLARS, and other valuable considerations, to (him) (her) (them) in hand paid by (vendee) THE FIRST NATIONAL BANK OF LAYTON of LAYTON, UTAH, receipt of which is hereby acknowleged, (do) (does) hereby sell, transfer, assign and set over unto the vendee all right, title, interest and equity in that certain contract and escrow agreement executed by Leland F. Broadbent and Belva M. Broadbent, party of the first part and Scott L. Egbert and Pam Egbert, his wife, party of the second part, dated September 29th, 19 77, and filed with the First National Bank of Layton, Utah, covering the sale of the real estate described as follows:

All of Lot 17, Block 39, NOB HILL ADDITION, to Ogden City, Weber County, Utah, according to the official plat thereof.

The balance of principal due on said escrow on August 24th 1978, is ..... DOLLARS, and the interest on said escrow is paid to ....., 19....., which balance of principal and interest the said vendee assumes and promises and agrees to pay.

To have and to hold the same unto the said vendee, heirs, executors, administrators, and assigns, subject, nevertheless, to the covenants and conditions contained in said escrow agreement.

Further (I) (we) have executed and delivered herewith, in order to more effectively transfer all equity, a deed covering the property described in the deed held with the escrow agreement herein referred to, and hereby authorize and instruct the escrow holder in case of the forfeiture of said escrow agreement, to cancel such deed and return it to us, or to retain it in its files, but if the payments shall be made as specified, then upon delivery of the other papers to the purchaser, the escrow holder is hereby instructed to deliver this deed with the other papers.

Vendee assumes and agrees to pay said contract as therein provided, and further to assume all the obligations of said contract as therein provided, and to perform in accordance with the covenants and conditions thereof.

In Witness Whereof, we have hereunto set our hands and seals this 24th day of August, 19 78.

(Vendor) (Vendee)

STATE OF UTAH
County of Davis } ss.

On this 24th day of August, 19 78 personally appeared before me Scott L. Egbert and Pam Egbert, the signer.s of the within instrument, who duly acknowledged to me that they executed the same.

My Commission Expires: 7-10-82

Notary Public residing in Layton, Utah.

STATE OF UTAH
County of Davis } ss.

On this 24th day of August 19 78, personally appeared before me George B. Wilcox, who, being by me duly sworn, did say that he is President of The First National Bank of Layton, a corporation and that said instrument was signed in behalf of said corporation by authority of a resolution of its Board of Directors, and said George B. Wilcox, acknowledged to me that said corporation executed the same

My Commission Expires: Comm. Exp. 7-10-82

Notary Public, Residing in Layton, Utah.

Vendor — Seller

Vendee — Buyer

"THIS IS A LEGALLY BINDING CONTRACT. IF NOT UNDERSTOOD SEEK COMPETENT ADVICE."

Recorded at Request of.....

at..... M. Fee Paid $.....

by..... Dep. Book..... Page..... Ref.:.....

Mail tax notice to..... Address.....

QUIT-CLAIM DEED

Scott L. Egbert and Pam Egbert, his wife grantor s of Ogden, County of Weber, State of Utah, hereby QUIT-CLAIM to THE FIRST NATIONAL BANK OF LAYTON, grantee of LAYTON, UTAH ---------- for the sum of Ten Dollars and other good and valuable considerations ----------DOLLARS,

the following described tract of land in Weber County, State of Utah:

All of Lot 17, Block 39, NOB HILL ADDITION, to Ogden City, Weber County Utah, according to the official plat thereof.

WITNESS the hand of said grantor s, this 24th day of August, A. D. one thousand nine hundred and Seventy Eight

Signed in the presence of

STATE OF UTAH, } ss.
COUNTY OF Davis

On the 24th day of August, A.D. 19 78 personally appeared before me Scott L. Egbert and Pam Egbert,

the signer s of the within instrument, who duly acknowledged to me that t hey executed the same.

Notary Public.

My commission expires 7-10-78 Residing in Layton, Utah

APPROVED FORM - UTAH SECURITIES COMMISSION

FORM 103—QUIT CLAIM DEED—KELLY CO. 55 W. NINTH SOUTH S.L.C. UTAH