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Bodell Construction Company, Inc. v. David I. McOmber, Rachael B. McOmber, Steven M. Snelson and David I. McOmber and Rachael B. McOmber, Trustees of the David I. McOmber Family Trust : Reply to Brief in Opposition

Utah Supreme Court

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 900338-CA
IN THE ~~UTAH~~ SUPREME COURT

STATE OF UTAH

BODELL CONSTRUCTION COMPANY,)
INC. ,)
)
Plaintiff/Appellant)
Petitioner,)
)
vs.)
)
DAVID I. MCOMBER, RACHAEL B.)
MCOMBER, STEVEN M. SNELSON)
and DAVID I. MCOMBER and)
RACHAEL B. MCOMBER, Trustees)
of the David I. McOmber)
Family Trust,)
)
Defendants/Appellees.)

Supreme Court Docket No. *910188*
Utah Ct. of Appeals 900338-CA

REPLY BRIEF OF PETITIONER, BODELL CONSTRUCTION COMPANY, INC.
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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UTAH

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McOMBER, STEVEN M. SNELSON)
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Bodell Construction Company, Inc. files this Reply Brief in Support of its Petition for Writ of Certiorari and in response to some of the matters advanced by Steven M. Snelson in his Brief in Opposition to the Petition.

REPLY TO STEVEN M. SNELSON' S STATEMENT OF FACTS

The following matters are submitted in response to "Statement of Facts" advanced by Steven M. Snelson (hereinafter, "Snelson").

1. It remains without dispute, as testified to by Landmark Mortgage, Bodell Construction and Associated Title, that there was no express authority given to Associated Title by anyone to enter or determine a bid on behalf of Bodell at the August, 1984 trustee's sale. (R. 211-214; 500-503.)

2. The January 9, 1984 letter upon which Snelson relies as creating actual authority was accompanied in its transmission to Associated Title with a letter from Landmark Mortgage stating in part that:

As per our telephone conversation, enclosed is the following documents or copies of documents to authorize you to start a FORECLOSURE ACTION IMMEDIATELY. (emphasis added by underlining) (R. 587, Exhibit 9.)

3. There is not a single fact in the record to support any contention that Bodell and McOmbers spoke regarding Associated Title or Associated Title's authority or the details of the foreclosure sale.

4. Contrary to the implications of paragraph 8, Bodell had received a copy of the appraisal of the McOmber property at the

time the loan was made. Prior to the trustee's sale, Bodell had received informal appraisals regarding the value of the property being foreclosed that showed a much lower value. (Bodell deposition, R. 589 at 40, 41.)

5. Contrary to the statements contained in paragraph 10 regarding the trustee's sale, Bodell testified that he did not know the mechanics of the foreclosure process at the time of the sale, but "with what I know now and so forth it would be fair to say that I knew there would be some kind of auction or process whereby we got deeded over the land." (Bodell deposition, R. 589, p. 53.)

6. There is no evidence that Bodell ever understood the legal implications of the foreclosure sale. (R. 501-504.)

ARGUMENT IN REPLY

1. There Was No Authority For Associated Title to Bid at the Sale.

Snelson's argument in reply carefully avoids the testimony of Bodell, Blake Heiner (Associated Title) and Roger Terry (Landmark) that Associated Title did not have authority to determine or enter a bid at the sale on behalf of Bodell, and the testimony of Heiner that he did not understand the January 9, 1984 letter as creating authority in Associated to determine or enter a bid. (R. 211-214, 501-503.) In spite of these statements to the contrary, the trial court found that express authority existed.

In responding to Bodell's argument that there could be no apparent authority, Snelson appears to rely upon conversations between Bodell and McOmber as creating apparent authority in

Associated Title. However, it is undisputed that there was no discussion between Bodell and McOmber regarding Associated Title's authority to act for Bodell or even regarding the sale itself. As with implied authority, discussed in the subsequent paragraph, the only basis for apparent authority arises from the sale itself. As discussed in the Petition, and emphasized by the Utah case of Blodgett v. Martsch, 590 P.2d 298 (Utah 1978), there is no legal basis for apparent or implied authority to automatically arise where the Trustee owes obligations to both the beneficiary and the trustor. Snelson has not addressed the conflict that the Court of Appeal's decision creates with the Blodgett v. Martsch, supra, decision.

The final basis for authority found by the trial court was implied authority. This argument, and the Court of Appeal's decision, creates a rule of law in Utah that a statutory trustee (Associated Title) foreclosing a trust deed has implied authority to make and enter a bid on behalf of a beneficiary of a trust deed without instructions or express authority to do so. Such a rule of plenary authority would place a foreclosing trustee in a position of conflict as opposed to a position of a fairness owed to both parties. Such a broad construction would also create a conflict with the statute of frauds and the requirements in this state generally that power with respect to real property be granted in writing. Williams v. Singleton, 723 P.2d 421 (Utah 1986); Bradshaw v. McBride, 649 P.2d 74 (Utah 1982). Snelson has not addressed this issue.

2. There Has Been No Ratification of the Sale.

Ratification was never raised as an issue in this matter until after the case had been remanded and the record augmented in the District Court. The Third District Court in the companion case referred to by Snelson in its Reply, determined that summary judgment was not appropriate on the facts of this case on the issue of ratification. (Civil No. C88-5531, Third District Court, Salt Lake County, State of Utah.)

Instead of addressing the legal issues regarding ratification, Snelson argues that Bodell's claims for relief should be directed against Associated Title. However, if the judgment of the District Court and the Court of Appeals is not reversed through this Petition, Associated Title will argue before the Third District Court, perhaps successfully, that further litigation against it is precluded based upon the Court of Appeal's decision regarding ratification.

Here again, it is impossible to imagine how summary judgment could have been entered on the issue of ratification in light of the fact that as soon as Bodell received the trustee's deed, it transferred title back to and Associated Title accepted title and conducted a second sale. In addition, Bodell's lack of knowledge and understanding regarding the foreclosure process preclude a finding of ratification by summary judgment. 3 Am. Jur. 2d Agency §187; 28 Am. Jur. 2d, Estoppel and Waiver §31.

Snelson has not addressed the requirement of this court that ratification of conduct which requires written authority must

also be given in writing. Bradshaw v. McBride, supra; Williams v. Singleton, 723 P.2d 421 (Utah 1986). There is no written ratification.

The balance of the issues raised by Snelson, including the issue of the unilateral mistake, were addressed in the Petition.

3. The Lower Courts Have Ignored Fundamental Rules Applicable to Summary Judgment.

On each of the issues determined by the trial court, there were facts in the record supporting the opposite result. In each instance, the lower courts have apparently weighed the evidence and reached a conclusion against Bodell. Evidence is not to be weighed in the summary judgment process. Sandberg v. Klein, 576 P.2d 1291 (Utah 1978).

CONCLUSION

For the foregoing reasons, this court should grant the Petition for Certiorari to address the trial court and the Court of Appeal's conclusions regarding summary judgment and to address the conflict which the decision creates with prior decisions of this court, including Blodgett v. Martsch, 590 P.2d 298 (Utah 1978); Bradshaw v. McBride, 649 P.2d 74 (Utah 1982); and Williams v. Singleton, 723 P.2d 421 (Utah 1986).

DATED this _____ day of May, 1991.

COHNE, RAPPAPORT & SEGAL, P. C.

Keith W. Meade
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member of and/or employed in the law firm of *COHNE, RAPPAPORT & SEGAL, P.C.*, 525 East First South, Suite 500, P.O. Box 11008, Salt Lake City, Utah 84147-0008, and that in said capacity, I caused a true and correct copy of the foregoing *REPLY BRIEF OF PETITIONER BODELL CONSTRUCTION COMPANY, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI* to be mailed/delivered to the person(s) named below: *PK 5/16/91*

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