

1992

Howard F. Hatch, Marjorie S. Hatch, & University
Avenue Development Associates, A Limited
Partnership v. Dwane J. Sykes, and William
Christiansen, d/b/a Arapian Valley Livestock Co. :
Reply Brief

Utah Court of Appeals

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Dwane J. and Patricia Sykes; Pro Se; Sam Primavera; Attorney for Appellee; Anthony and Ruth Ragozzine; Pro Se.

Howard F. Hatch; Appellant Pro Se.

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DOCKET NO.

BRIEF

IN THE UTAH COURT OF APPEALS

UTAH

DOCUMENT

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A10 DOCKET NO. 920437-CA

REPLY BRIEF OF DEFENDANTS

Case No. 920437-CA

(Supreme Court No. 910417)

Priority No. 29(b)(16)

(Lower Court No. CV 63-695)

HOWARD F. HATCH, MARJORIE S.
HATCH, & UNIVERSITY AVENUE
DEVELOPMENT ASSOCIATES, A
Limited Partnership,

Plaintiffs and Appellants,

vs.

DWANE J. SYKES, and WILLIAM
CHRISTIANSEN, d/b/a
ARAPIAN VALLEY LIVESTOCK CO.,

Defendants and Appellees.

DWANE J. SYKES and PATRICIA SYKES,

Plaintiffs and Appellants,

vs.

ANTHONY RAGOZZINE and
RUTH W. RAGOZZINE,

Defendants and Appellees.

Supreme Court No. 910409

(Lower Court No. CV 57-125)

Consolidated under No. 910417

APPEAL FROM THE SUMMARY DISMISSAL OF THE FOURTH
JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH
THE HONORABLE DAVID L. MOWER, PRESIDING

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843 South 1150 East
Pleasant Grove, UT 84062
Ph: 785-4818 / 227-6598
Appellant pro se

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1511 S. Carterville Rd.
Orem, UT 84058
Appellees (& Appellants) pro se

Sam Primavera, Esquire
37 East 400 North
Provo, UT 84601
Attorney for Appellee
William Christiansen

Anthony and Ruth Ragozzine
662 West 150 North
Hurricane, UT 84737
Appellees pro se

FILED

NOV 10 1992

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

HOWARD F. HATCH, MARJORIE S.
HATCH, & UNIVERSITY AVENUE
DEVELOPMENT ASSOCIATES, A
Limited Partnership,

Plaintiffs and Appellants,

vs.

DWANE J. SYKES, and WILLIAM
CHRISTIANSEN, d/b/a
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Defendants and Appellees.

REPLY BRIEF OF APPELLANTS

Case No. 920437-CA

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IN THE UTAH COURT OF APPEALS

HOWARD F. HATCH, MARJORIE S.
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DEVELOPMENT ASSOCIATES, A
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Plaintiffs and Appellants,
vs.

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REPLY BRIEF OF APPELLANTS

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(Lower Court No. CV 63-695)

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Plaintiffs and Appellants,
vs.

ANTHONY RAGOZZINE and
RUTH W. RAGOZZINE,

Defendants and Appellees.

(Supreme Court No. 910409)

(Lower Court No. CV 57-125)

Consolidated under 920437-CA

William Christiansen and Dwane Sykes have, in their appellees' brief, restated the issues as though the contested matters had been tried. Such was not the case. Judge Mower dismissed both appellees without so much as a hearing on the motion for summary dismissal, let alone a trial on the merits. We restate the issues as we have framed them based on our appeal. No cross-appeal was filed by Christiansen or Sykes in the only case to which we were parties.

ISSUES

(1) Whether the trial court erred in granting summary judgment dismissing the defendants, Sykes and Christiansen, without a hearing and prior to a trial on the merits?

(2) Whether Judge Mower's finding that "Plaintiffs' amended complaint, as it now stands, does not state a cause of action" was properly founded upon the pleadings?

(3) Whether such a finding is justified even if based upon the pleadings as technically drawn when evidence indicates that a cause of action does in fact exist?

REBUTTAL TO "FACTS"

My opponents have attempted to prejudice this court by an erroneous statement regarding "alter egos" having been "in and out of bankruptcy several times". Simply not true! The limited partnership, University Avenue Development Associates, which was one of the Plaintiffs suing Christiansen and Sykes, had filed for court protection under Chapter 11 during the pendency of this action. Subsequently they, Christiansen and Sykes, sought a stay in the lower court proceedings based on that filing, but we resisted on the basis that we were suing them, not vice versa. There was no justification for a delay in proceedings since there was no claim by them against our partnership, the debtor.

In order to justify such a stay, Christiansen and Sykes, filed a counterclaim out of season. We objected but the counterclaim was allowed anyway.

Later, when the partnership was trying to get out from under the jurisdiction of the bankruptcy court, Sykes objected. And even though his objection was groundless, the court allowed it and refused to grant our motion for dismissal of the bankruptcy proceeding even though the matter was moot at that point and there were no creditors unsatisfied.

It is pure hypocrisy for them to lay the extensive delays on us, as though we were intentionally cumbering the court system, when it was their tactic to delay, not ours. We had nothing to gain by delaying. On the contrary, it was they who gained since they had

achieved their objective by slandering our title to the point it was lost at trustee sale.

"Fact" No. 3, as stated by Christiansen and Sykes, says that Zions Bank and their attorney "scared her (Virginia Flynn) off". Not so, it was Sykes blatant and fraudulent claims at having some kind of prior right to purchase the subject property which scared her and Zions' attorney, to the point that Zions was concerned that if they concluded the transaction with Flynn, and it was later proved that Sykes did have some kind of valid claim, they would be in jeopardy from having consummated the transaction.

REBUTTAL TO AGRUMENTS

Each and every step taken by Sykes was an outrageous example of title slander. And it worked! We had been barred from selling the property or from reborrowing on it, due to his fradulent claims, and finally we were even being stopped from having the old obligation to Zions bought by a friendly party.

Why did Sykes fight so vigorously to resist this transaction? Had Virginia Flynn acquired Zions' position, the property would have still been there available to attach upon whatever legitimate rights Sykes had under his alleged purchase agreement. Why did he go to such great lengths to slander the title, which allowed the property to go to foreclosure and be bought by some third party who was supposed to be independent and apart from all the prior proceedings? Unless he had already arranged things with Christiansen? Christiansen was clearly his accomplice in the slander of title and subsequent fraud.

In "Fact" No. 1, as stated in the Appellee Brief, Christiansen and Sykes admit that at the time of the filing of our action against them we were "owners of a piece of land that was about to be sold at

trustee sale." And yet they argue on page 4, in their Summary of Arguments, that we had no interest in the property being slandered! Exactly the point, we did own the land until it was lost due to the great machinations of Christiansen and Sykes. This was precisely the basis of our complaint and one which has never been heard by the court.

The assertion by appellees, Sykes and Christiansen, on page 6 of their brief, that "the lawsuit was filed after the property had been foreclosed and subsequently sold" is a baldfaced lie and Mr. Primavera and Mr. Sykes should be sanctioned for trying to mislead the Court to this extent! The record will clearly indicate that this action was filed prior to the foreclosure sale in question (R. 1-6). So to argue a Wyoming case that doesn't even fit our circumstances is totally out of place. [Both Sykes and Christiansen were put on notice of our legal claims for damages prior to the time the trustee sale was set to go forward at noon on the 4th of May, 1983, (See Addendum "A" attached), the original complaint having just been filed along with our Lis Pendens (attached hereto as Addendum "B"). It was not until later that afternoon that the trustee's deed was filed of record (see Addendum "C" attached).]

And while we did later acquiesce in Zions' right to sell the property at trustee sale, we never condoned the tortious conduct of either Sykes or Christiansen which was the precipitant cause of our loss of the property.

As regards our claims against Christiansen only, he is clearly charged in our complaint and other pleadings. Though we may have inadvertently failed to mention him by name in paragraph 3 of our prayer for relief, he was surely implicated by his complicity and

should be covered by our final prayer which asks "together with such relief as the court may deem just and proper."

Rule 54(c)(1) of the Utah Rules of Civil Procedure provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Paragraph 30 of the Amended Complaint, as further amended by the stipulation with Zions Bank (R. 1058), stated:

That Plaintiffs believe and therefore allege that Defendant, William Christiansen, was merely a strawman purchaser and had already entered into an agreement with Defendant Sykes for the purchase and sale of the subject premises, and that Christiansen and Sykes together have conspired to defraud Plaintiffs of their rightful claims to the premises.

What the Plaintiffs did in striking a deal with Zions is to absolve Zions of legal wrongdoing. While we acknowledged the validity of the deed which passed from Zions to Christiansen, by virtue of our stipulated settlement with Zions, at no time did we sanction or acquiesce in the slanderous and fraudulent actions of Sykes, aided and abetted by Christiansen. It is from the effects of these acts that we wish to recover damages.

Black's Law Dictionary's definition of fraud is still very applicable to this case:

It consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury... Maier v. Hibernia Ins. Co. 67 N. Y. 292; Alexander v. Church, 53 Conn. 561, etc. And includes anything calculated to deceive, whether it be a single act or combination of circumstances... Actual fraud consists in deceit, artifice, trick, design, some direct and active operation of the mind; it includes cases of the intentional and successful employment of any cunning, deception, or artifice used to circumvent or cheat another...[our emphasis].

Restatement of the Law, Torts Second, Ch. 43, §871, "Intentional harm to a Property Interest" reinforces this definition:

One who intentionally deprives another of his legally protected property interest or causes injury to the interest is subject to liability to the other if his conduct is generally culpable and not justifiable under the circumstances (p. 287).

Restatement then catalogues the methods by which intended torts against property interests may be committed. Under Comment 11e., the Institute refers to "Fraud" in these terms:

Fraud. The actor's conduct is fraudulent if he intentionally causes another to act or refrain from acting by means of intentionally false or misleading conduct or by his intentional concealment of facts, etc. (§871, p. 290).

The rule stated in this Section applies to one who assists another to commit a fraud. A third person who has not participated in the fraud but who acquires property with knowledge of the fraud is subject to liability to pay its value to the owner or to return it, since he became a tortfeasor by the acquisition of the subject matter with knowledge of the fraud (Restatement of the Law, §871, p. 291)

We charge Dwane Sykes as the principal tortfeasor. It was he who defrauded us by his lies and misrepresentations regarding his false claims to the property, his falsification of documents, his outrageous acts in slandering our title, making it impossible to market the property or even refinance it, which would have taken it out of jeopardy and prevented the trustee sale from going forward, thus preserving the title for whatever legitimate claims he might have. We repeat the higher court's definition of a title slanderer:

One who, without privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused. Restatement of Law on Torts, Vol. III, Sec 624, p. 325, as cited in Dowse v. Doris Trust Co., 208 P.2d 956, (UT 1949).

Sykes's fraud lies in his misrepresentations to us, Zions and Flynn of having a rightful claim to the property, his malice in asser-

ting such knowing full well it was not true, his intent to induce reliance by the strenuous actions he took (filing false documents of record, etc.), which caused both Zions and Flynn to back out, which reliance was justified by the possibility his claim might be true (due to his having forged documents which appeared to give him a real claim), and which damaged the plaintiffs by the loss of the property. All of the elements are truly in place! And even though William Christiansen did not participate directly in each of these steps, he becomes jointly liable by virtue of his later actions which made the fraud and slander of title work.

But what is really at issue before this court are not the merits of the case, which the appellees have attempted to argue, but whether the lower court ever allowed us to go to the merits of the case, which it clearly did not. And it has been abundantly established before this court on many prior occasions that:

"A motion for summary judgment should be denied where the evidence presents a genuine issue of material fact which, if resolved in favor of the nonmoving party, would entitle him to judgment as a matter of law." Jackson v. Dabney, 645 P.2d 613 (Utah 1982).

Summary judgment is proper only if pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that moving party is entitled to judgment as matter of law; evidence, when viewed in light most favorable to loser, must show that there is no genuine issue as to any material fact. Livingston Industries, Inc. v. Walker Bank & Trust Co., 565 P.2d 1117 (Utah 1977).

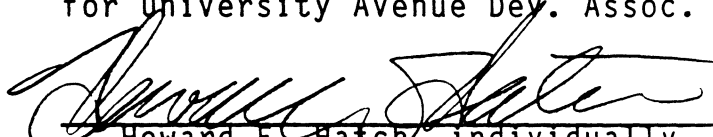
The lower court has summarily dismissed our claims against the remaining two defendants under the mistaken belief that our settlement with Zions somehow disposed of the slander of title issue with its attendant fraud issue. In granting summary dismissal of our claims, Judge Mower has completely overlooked or disregarded the facts supporting the very real issues in our case.

CONCLUSION

This court has never allowed a party's claims to be dismissed summarily where there were yet issues of material fact to be decided. It has always held that causes of action should be decided on their merits. We ask the Supreme Court to reverse Judge Mower's decision in dismissing Sykes and Christiansen and remand this matter to lower court with instructions. We would also ask that our motion for summary judgment against Sykes on the slander of title issue be granted, pending a trial on the extent of damages sustained (R. 1334-61, R. 1378-90).

Respectfully submitted this 9th day of November, 1992.


Howard F. Hatch, as General Partner
for University Avenue Dev. Assoc.


Howard F. Hatch, individually

MAILING CERTIFICATE

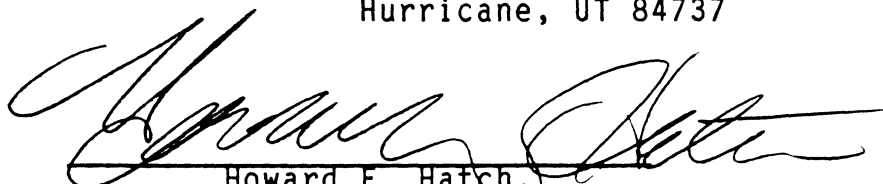
I, Howard F. Hatch, certify that on 11-9-92, I served a copy of the attached Reply Brief of Appellants on the following named parties or their attorney by hand delivery or by mailing it to them first class with sufficient postage to the address noted below:

Mr. Dwaine J. Sykes, et al.
1511 South Carterville Rd.
Orem, UT 84058

Mr. Sam Primavera, Esq.
37 East 400 North
Provo, UT 84601

Spencer F. Hatch, Esq.
19221 Sherborne Lane
Huntington Beach,
California, 92646

Anthony & Ruth Ragozzine
662 West 150 North
Hurricane, UT 84737


Howard F. Hatch,

CORRECTED

NOTICE OF TRUSTEE'S SALE

The following described property will be sold at public auction to the highest bidder, Wednesday, May 4, 1983, payable in lawful money of the United States at the time of sale, at the front steps of the Utah County Courthouse, 51 So. University Ave., Provo, Utah, at 12:00 noon of said day, for the purpose of foreclosing a trust deed executed by Howard F. Hatch and Marjorie S. Hatch, as trustors, in favor of ZIONS FIRST NATIONAL BANK, as beneficiary, recorded April 14, 1978 as Entry No. 14230 in Book 1637, Page 272-275, of the official records of Utah County, State of Utah, covering real property located at 1525 So. Carterville Road, Orem, Utah, and more particularly described as:

Beginning at a point on the East side of Carterville Road, which point is North 829.45 feet and East 1398.23 feet from the West Quarter Corner of Section 25, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence North 3°05' East 62.66 feet; thence south 84°10-1/2' East 323.18 feet along a fence; thence North 41°57' East 61.04 feet along a fence; thence North 37°55' East 166.14 feet along a fence; thence North 52°18' East 37.64 feet along a fence; thence North 73°13' East 26.42 feet along a fence; thence North 83°51' East 59.36 feet along a fence; thence South 7°29' East 194.82 feet; thence South 13°01' West 83.42 feet; thence South 1°53' West 129.41 feet; thence South 16°38' East 9.43 feet; thence West 157.74 feet; thence North 39.08 feet; thence West 160 feet; thence South 45.20 feet; thence North 36°26' West 92.31 feet; thence North 85°12' West 48.11 feet; thence South 64°03' West 54.05 feet; thence South 74°46-1/2' West 130.92 feet; thence North 3°05' East 158.62 feet to the point of beginning.

ADDENDUM "B"

HOWARD F. HATCH
P.O. BOX 190
PROVO, UT 84603
(801) 377-3400/3440

13034

FILED AT THE REQUEST OF
Howard F. Hatch
MAY -4 AM 11:53
H.F. Hatch

13034

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

* * * * *

HOWARD F. HATCH, MARJORIE S. HATCH
& UNIVERSITY AVENUE DEVELOPMENT
ASSOCIATES, a Ltd. Partnership,

Plaintiffs,

LIS PENDENS

-vs-

ZIONS FIRST NATIONAL BANK
and VIRGINIA FLYNN


Civil No: 63695

Defendants,

* * * * *

NOTICE IS HEREBY GIVEN that the above action concerning
and affecting the real property described herein under Exhibit
"A" attached was commenced on the 4th day of May, 1983 and
that Plaintiffs are asking for as one of their prayers for
relief the return of the subject premises.

DATED this 4th day of May, 1983.


Howard F. Hatch, pro se


Marjorie S. Hatch, pro se

BOOK 2047 PAGE 633

EXHIBIT "A"

The following described real property lying in
Utah County, Utah.

Beginning at a point on the East side of Carterville Road, which point is North 829.45 feet and East 1398.23 feet from the West Quarter Corner of Section 25, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence North $3^{\circ}05'$ East 62.66 feet; thence South $84^{\circ}10\frac{1}{2}'$ East 323.18 feet along a fence; thence North $41^{\circ}57'$ East 61.04 feet along a fence; thence North $37^{\circ}55'$ East 166.14 feet along a fence; thence North $52^{\circ}18'$ East 37.64 feet along a fence; thence North $73^{\circ}13'$ East 26.42 feet along a fence; thence North $83^{\circ}51'$ East 59.36 feet along a fence; thence South $7^{\circ}29'$ East 194.82 feet; thence South $13^{\circ}01'$ West 83.42 feet; thence South $1^{\circ}53'$ West 129.41 feet; thence South $16^{\circ}38'$ East 9.43 feet; thence West 157.74 feet; thence North 39.08 feet; thence West 160 feet; thence South 45.20 feet; thence North $36^{\circ}26'$ West 92.31 feet; thence North $85^{\circ}12'$ West 48.11 feet; thence South $64^{\circ}03'$ West 54.05 feet; thence South $74^{\circ}46\frac{1}{2}'$ West 130.92 feet; thence North $3^{\circ}05'$ East 158.62 feet to the point of beginning.

LESS: Beginning at a point on the corner of the East edge of Carterville Road and on the South edge of Hope Lane, which point is North 884.66 feet and East 1,403.79 feet, more or less, from the West Quarter Corner of Section 25, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence South $84^{\circ}10\frac{1}{2}'$ East 100 feet along a hedge and fence on the South side of Hope Lane; thence South $3^{\circ}05'$ West 70 feet; thence North $84^{\circ}10\frac{1}{2}'$ West 100 feet to the east edge of Carterville Road; thence North $3^{\circ}05'$ East 70 feet along the east side of Carterville Road to the point of beginning.

WHEN RECORDED MAIL TO:
WILLIAM CHRISTIANSEN
ARAPIAN VALLEY
LIVESTOCK COMPANY
MAYFIELD, UTAH 84623

ADDENDUM "P"

13079

TRUSTEE'S DEED

Sions First National Bank, National Association,
as Trustee, under that certain Trust Deed executed by
Howard F. Hatch and Marjorie S. Hatch, as Trustees on
April 14, 1978, and recorded April 14, 1978, as Entry No.
14238, at Book 1637, Page 272-273, of the records of the
Utah County Recorder, DOES HEREBY CONVEY TO William
Christiansen, Arapian Valley, Livestock Company, Mayfield,
Utah 84623, the following described property situated in
Utah County, State of Utah:

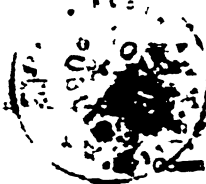
Beginning at a point on the East side of
Carterville Road, which point is North
829.45 feet and East 1398.23 feet from the
West Quarter Corner of Section 25, Township
6 South, Range 2 East, Salt Lake Base and
Meridian; thence North 3°05' East 62.66
feet; thence South 84°10'-1/2' East 323.18
feet along a fence; thence North 41°57' East
61.04 feet along a fence; thence North
37°55' East 166.14 feet along a fence;
thence North 52°18' East 37.64 feet along a
fence; thence North 73°13' East 26.42 feet
along a fence; thence North 83°51' East
59.36 feet along a fence; thence South 7°29'
East 194.82 feet; thence South 13°01' West
83.42 feet; thence South 1°51' West 129.41
feet; thence South 16°38' East 9.43 feet;
thence West 157.74 feet; thence North 19.08
feet; thence West 168 feet; thence South
45.28 feet; thence North 36°26' West 92.31
feet; thence North 85°12' West 48.11 feet;
thence South 64°03' West 54.05 feet; thence
South 74°45'-1/2' West 138.92 feet; thence
North 3°05' East 158.62 feet to the point of
beginning.

LESS: Beginning at a point on the corner of
the East edge of Carterville Road and on the
South edge of Rope Lane, which point is
North 884.66 feet and East 1,403.79 feet,
more or less, from the West Quarter Corner
of Section 25, Township 6 South, Range 2
East, Salt Lake Base and Meridian; thence
South 84°10'-1/2' East 100 feet along a hedge
and fence on the South side of Rope Lane;
thence South 3°05' West 70 feet; thence
North 84°10'-1/2' West 100 feet to the east
edge of Carterville Road; thence North 3°05'
East 70 feet along the east side of
Carterville Road to the point of beginning.

RECORDED IN 7280

STATE OF UTAH)
 : ss
COUNTY OF UTAH)

On May 4, 1983, personally appeared before me
Arnold W. Brown who being by me duly sworn, did say that
Arnold W. Brown is a Vice President of Zions First National
Bank, and that the within and foregoing instrument was
signed in behalf of said National Association by authority
of a resolution of its Board of Directors, and said Arnold
W. Brown duly acknowledged to me that said National Association
executed the same.



Robert A. [Signature]
Notary Public

Commission Expires:

6-2-85

Residing in Orem, Utah County, Utah.

13079
RECORDED AT THE CLERK'S OFFICE
OF THE COUNTY OF UTAH
MAY 11 1983
U.A. 13079-13079
13079-13079