

1991

Jimmie L. Butler and Anita M. Butler; Chris
Orlowski and Pamela Sue Orlowski v. EMI Limited
No. 6 Associates, Bryan C. Robinsom, and Does I-
XX : Brief of Appellant

Utah Supreme Court

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BRIEF

910168

IN THE SUPREME COURT OF THE STATE OF UTAH

JIMMIE L. BUTLER and ANITA :
M. BUTLER; CHRIS ORLOWSKI and)
PAMELA SUE ORLOWSKI, :

Plaintiffs/Appellants, :
)

vs. :
)

EMI LIMITED NO. 6 ASSOCIATES, :
BRYAN C. ROBINSON, Trustee;)
and DOES I through XX, :

Defendants/Respondents. :
)

Case No. 910168

Civil No. 900901157 PR

BRIEF OF APPELLANTS

Appeal from a final order following Defendants' Motion to Dismiss from the Fifth District Court in and for Iron County, State of Utah, the Honorable J. Phillip Eves presiding.

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JIMMIE L. BUTLER and ANITA)
M. BUTLER; CHRIS ORLOWSKI and)
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IN THE SUPREME COURT OF THE STATE OF UTAH

JIMMIE L. BUTLER and ANITA)	
M. BUTLER; CHRIS ORLOWSKI and	:	
PAMELA SUE ORLOWSKI,)	
	:	
Plaintiffs/Appellants,)	
	:	
vs.)	
	:	
EMI LIMITED NO. 6 ASSOCIATES,)	
BRYAN C. ROBINSON, Trustee;	:	
and DOES I through XX,)	
	:	
Defendants/Respondents.)	Case No. 910168
	:	Civil No. 900901157 PR
)	

JURISDICTION

The jurisdiction of this Court is established by Utah Code Annotated 78-2-2(3)(j) (1953, as amended), and pursuant to subsection (4) therein the same may be transferred to the Court of Appeals in which jurisdiction is established under Utah Code Annotated Section 78-2A-3(2)(j) (1953, as amended).

NATURE OF THE PROCEEDINGS

This appeal is from a final judgment on Defendants/ Respondents' Motion to Dismiss and Plaintiffs/Appellants' Motion for Summary Judgment from the Fifth District Court of Iron County, State of Utah, whereby an order was issued on the 1st day

of April, 1991, in favor of the Defendants/Respondents and against Plaintiffs/Appellants.

ISSUES PRESENTED ON APPEAL

Were Plaintiffs/Appellants provided an adequate and proper accounting prior to the date of trustee's sale, December 26, 1990?

Were Plaintiffs/Appellants provided adequate notice as defined by the Utah Code where notice of appointment of Successor Trustee had not been mailed to Plaintiffs/Appellants?

Was Defendants/Respondents' filing of the Notice of Default against Plaintiffs/Appellants' property wrongful and/or improper subject to penalty as provided pursuant to Utah Code Annotated 38-9-1 et seq. (1953, as amended)?

DETERMINATIVE STATUTES OR RULES

The statutory and regulatory provisions which are provided to be determinative in this matter are Utah Code Annotated 57-1-22(3) and Section 26(2) and Utah Code Annotated 38-9-1 et seq. (1953, as amended).

NATURE OF THE CASE

This is an appeal from a final judgment in a civil action from the Fifth District Court of Iron County, State of Utah, on Defendants/Respondents' Motion to Dismiss and

Plaintiffs/Appellants' Motion for Summary Judgment wherein the Court held in favor of Defendants/Respondents and against Plaintiffs/Appellants on the issues of adequate and complete accounting, proper notice, and wrongful lien.

COURSE OF PROCEEDINGS

This action was filed on or about the 21st day of December, 1990, by Plaintiffs/Appellants. A Trustee's Sale was conducted on the 26th day of December, 1990. A hearing was held on or about the 1st day of April, 1991, upon Defendants/ Respondents' Motion to Dismiss and Plaintiffs/ Appellants' Motion for Summary Judgment. Upon oral argument and after reviewing the file, the Court ruled in favor of Defendants/Respondents and against Plaintiffs/Appellants. Appeal was taken from the order of the Court on or about the 9th day of April, 1991.

DISPOSITION AT TRIAL COURT

The Fifth Judicial District Court of Iron County, State of Utah, ruled in favor of Defendant/Respondents' Motion to Dismiss and against Plaintiffs/Appellants' Motion for Summary Judgment.

STATEMENT OF FACTS

1. On or about the 24th day of January, 1974, PACIFIC WESTERN EQUITIES, INC., a Utah Corporation, executed and delivered to D. B. ROESNER, Trustee, of the DONALD B. ROESNER

TRUST, and ALMA M. ROESNER, and JOSEPH D. MANDELL, Trustee of the LAWRENCE C. ROESNER TRUST, a certain promissory note in the original amount of TWO HUNDRED FIFTY THOUSAND (\$250,000.00) DOLLARS.

2. Said Promissory Note was secured by a Deed of Trust dated the 24th day of January, 1974, executed and delivered by PACIFIC WESTERN EQUITIES, INC., a Utah Corporation, and recorded January 28, 1974, as Entry No. 171594, in Book 193, at Pages 98-105, of the official records of the Iron County Recorder's Office.

3. On or about the 15th day of May, 1987, the Plaintiffs/Appellants, executed a Promissory Note in the original amount of THREE HUNDRED THOUSAND (\$300,000.00) DOLLARS.

4. Said Promissory Note was secured by a Trust Deed dated the 1st day of May, 1987, executed and delivered by Plaintiffs/Appellants, and recorded May 15, 1987, as Entry No. 275928, in Book 362, at Pages 468-82 of the official records of the Iron County Recorder's Office.

5. On or about the 1st day of May, 1987, Plaintiffs/Appellants, executed and delivered a certain Amendment of Trust Deed dated May 1, 1987, and recorded October 27, 1987, as Entry No. 279862, in Book 371, at Pages 229-33 of the official records of the Iron County Recorder's Office.

6. On or about the 14th day of May, 1990, there was caused to be recorded a certain Substitution of Trustee, appointing Defendant/Respondent, BRYAN C. ROBINSON, as Successor Trustee, as Entry No. 298876, in Book 415, at Pages 204-05, of the official records of the Iron County Recorder's Office. However, Plaintiffs/Appellants were not given notice thereof as required by Utah Code.

7. On or about the 23rd day of July, 1990, the Defendants/Respondents, Successor Trustee, BRYAN C. ROBINSON, executed a Notice of Default, recorded on July 25, 1990, as Entry No. 300359, in Book 418, at Pages 265-67, of the official records of the Iron County Recorder's Office.

8. On or about the 12th day of November, 1990, the Defendant/Respondent, Successor Trustee, BRYAN C. ROBINSON, executed and delivered a Notice of Trustee's Sale, indicating that the sale set for December 26, 1990, at 10:00 a.m. at the east, front door of the main entrance of the Iron County Courthouse in Parowan, Utah.

9. A Trustee's Sale was conducted at the time, place and date designated in the Notice of Trustee's Sale.

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SUMMARY OF ARGUMENTS

A.

THE TRUSTEE'S SALE OF DECEMBER 26, 1990, IS VOID AND SHOULD BE SET ASIDE BY REASON OF DEFENDANTS/RESPONDENTS' FAILURE TO PROVIDE STATUTORY NOTICE AND A PROPER ACCOUNTING.

Foreclosure in the instant case was nonjudicial in the form of a Trustee's Sale foreclosure. This is purely a statutory remedy allowing for power of sale under certain circumstances without requiring judicial judgment, decree, or review. Consequently, strict compliance with the statutory provisions has and continues to be the standard of review. In Utah Code Annotated, Section 57-1-22(3) (1953, as amended), it sets forth the notice requirements in the appointment of a Successor Trustee. In pertinent part it reads:

"If not previously recorded, at the time of recording the Notice of Default, the Successor Trustee shall file for record the Substitution of Trustee, and a copy thereof shall be sent in the manner provided in Section 57-1-26 to all persons to whom a copy of Notice of Default would be required to be mailed to by Section 57-1-26. In addition thereto, a copy shall be sent to the prior Trustee by regular mail to his last known address."

The notice requirements of Section 26 are set forth in Subsection (2) and reads in pertinent part as follows:

"Not later than ten (10) days after recording such Notice of Default, the Trustee or Beneficiary shall mail, by Certified or Registered mail, with postage prepaid thereon, a copy of such Notice with the recording date shown thereon."

The Utah Supreme Court and the Court of Appeals has not addressed the issue of notice when such notice has been for the substitution or succession of trustee. However, the statutory language set forth above with regard to the mailing of such notice is clear and unambiguous. From a procedural standpoint, it is as essential as any of the other notice requirements within the chapter which relate to trustees sales. In addition, the statute not only requires that such notice be sent but actually requires that such notice provide certain information including but not limited to the name and address of the new trustee, the recording information of the trust deed, the legal description of the property in question and the beneficiaries signature which has been properly acknowledged.

Although the Utah Supreme Court and the Utah Court of Appeals have construed the notice requirements liberally with regard to irregularities found within notices of default or Trustee's Sale, they have also maintained a standard of strict compliance in complying with the procedural requirements for giving such notice. In other words, the adequacy and sufficiency of such notice cannot be assumed when no such notice was given

pursuant to the procedural requirements outlined by the statute. In Concepts, Inc., v. First Security Realty Service, 743 P.2d 1158 (Utah 1987) the Utah Supreme Court addressed this matter with particularity. In pertinent part it states:

"The purpose of strict notice requirements in a nonjudicial sale of property secured by Trust Deed is to inform persons with an interest in the property of the pending sale of that property, so that they may act to protect those interests."

The Court went on to state that the parties do not dispute the fact that statutory notice requirements were strictly observed except that the notice by publication dated October 1, 1983, stated that the sale would take place on October 28, 1982. Id at 1159. In short, the procedural requirements had been strictly complied with. Moreover, in the case of Blodgett v. Martsch, 590 P.2d 298 (Utah 1978), this Court remanded a case decided on Summary Judgment and would not affirm a Trustee's Sale where evidence showed that the statutory requirements had not been complied with. In regard thereto, the Court stated:

"That the Trustee owed a duty to the Trustor under a Trust Deed and that such was greater than the mere obligation to sell the property in accordance with the default provision of the Trust Deed instrument, it is a duty to treat the Trustor fairly and in accordance with a high punctilio of honor." Id at 302.

In the instant case, the Defendants/Respondents concede that no Notice of Successor Trustee was sent pursuant to the Utah Code. In addition, Defendants/Respondents were notified of the inadequacy of notice during the three (3) month period to cure the default and Defendants/Respondents made no effort to correct such defect.

Plaintiffs/Appellants further contend that they were entitled to and failed to receive a proper accounting which, by reason of the fact that the transaction involved an "all inclusive Trust Deed" and Promissory Note, required a complete and proper accounting of the first as well as the second obligations. The first Trust Deed is expressly referenced and referred to in the Second Trust Deed and Plaintiffs/Appellants contend that the same was part of their agreement with Defendants/Respondents.

Plaintiffs/Appellants contend that they were justified in refusing to pay before receiving any such accounting and that Defendants/Respondents acted improperly in proceeding with the foreclosure before providing the same.

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B.

**THE NOTICE OF DEFAULT RECORDED JULY 25, 1990,
WAS WRONGFUL AND IMPROPER AND ACCORDINGLY THE
PLAINTIFFS/APPELLANTS ARE ENTITLED TO
DAMAGES.**

Utah Code Annotated Section 38-9-1 et seq., (1953, as amended), provides that if one files a false or improper lien upon another's property, the same is wrongful and subject to penalty and damages. In pertinent part it states:

"A person who claims an interest in, or a lien or encumbrance against real property, who causes or has caused a document asserting that claim be recorded or filed in the office of the County Recorder, who knows or has reason to know that the document is forced, groundless, or contains a material mistake or misstatement or false claim, is liable to the owner of title holder for ONE THOUSAND (\$1,000.00) DOLLARS or for treble actual damages, whichever is greater, and for reasonable attorney fees, and costs as provided in this chapter, if he wilfully refuses to release or correct such document of record within twenty (20) days from written request from the owner or beneficial title holder of real property. This Chapter is not intended to be applicable to mechanics or material men's liens."

In the instant case, the inadequacy of notice and the failure to provide proper accounting was brought before Defendants/Respondents prior to the date of Trustee's Sale and written request and demand to release the same was made in accordance with the Utah Code to release, cancel or correct said

notice within Plaintiffs' Complaint and the time period to do so has now expired.

CONCLUSION

Plaintiffs/Appellants contend that no adequate notice or proper accounting was provided pursuant to statute and therefore the Trustee's Sale conducted on December 26, 1990, was improper and further that the same constituted a wrongful lien against Plaintiffs' property and that the trial court erred in granting Defendants/Respondents' Motion to Dismiss.

Plaintiffs/Appellants request that this matter be remanded to the trial court overturning the trial court's order and instructing the same to enter its ruling in accordance with the statutes of the State of Utah and the cases addressing the same.

DATED this ____ day of _____, 1991.

J. BRYAN JACKSON

MAILING CERTIFICATE

I do hereby certify that I mailed a true and correct copy of the foregoing, BRIEF OF APPELLANT, postage pre-paid thereon, this ____ day of _____, 1991, to STEVEN D. BRANTLEY, SHAPIRO & ROBINSON, 180 South 300 West, Suite 350, Salt Lake City, Utah 84101.

J. BRYAN JACKSON

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substituted "determines" for "decides" at the end of the fourth sentence.

The 1990 amendment, effective April 23, 1990, deleted "next" after "January" and made punctuation changes in Subsection (2); deleted "not" following "chief justice may" in the third

sentence of Subsection (3); deleted "additional" before "duties" in Subsection (5); deleted "where not inconsistent with the law" following "chief justice" and added "as consistent with the law" at the end of Subsection (6).

78-2-2. Supreme Court jurisdiction.

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) a judgment of the Court of Appeals;
- (b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;
- (c) discipline of lawyers;
- (d) final orders of the Judicial Conduct Commission;
- (e) final orders and decrees in formal adjudicative proceedings originating with:
 - (i) the Public Service Commission;
 - (ii) the State Tax Commission;
 - (iii) the Board of State Lands and Forestry;
 - (iv) the Board of Oil, Gas, and Mining; or
 - (v) the state engineer;
- (f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);
- (g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;
- (h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;
- (i) appeals from the district court involving a conviction of a first degree or capital felony; and
- (j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

- (a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;
- (b) election and voting contests;
- (c) reapportionment of election districts;
- (d) retention or removal of public officers;
- (e) general water adjudication;
- (f) taxation and revenue; and
- (g) those matters described in Subsection (3)(a) through (f).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the

Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Chapter 46b, Title 63, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2-2, enacted by L. 1986, ch. 47, § 41; 1987, ch. 161, § 303; 1988, ch. 248, § 5; 1989, ch. 67, § 1.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, substituted "formal adjudicative proceedings" for "cases" in Subsection (3)(e); added Subsection (3)(f); redesignated former Subsections (3)(f) to (3)(i) accordingly; substituted "(i)" for "(h)" at the end

of Subsection (4)(g); and made minor stylistic changes.

The 1989 amendment, effective April 24, 1989, added "and Forestry" at the end of Subsection (3)(e)(iii); rewrote Subsection (4)(a) which read "first degree and capital felony convictions"; substituted "(f)" for "(i)" at the end of Subsection (4)(g); and made minor stylistic changes.

NOTES TO DECISIONS

ANALYSIS

Docketing statement.

—Reference to subsection.

Cited.

Docketing statement.

—Reference to subsection.

In all cases appealed after January 1, 1987, reference in the docketing statement to this

section will be considered insufficient; instead the appropriate subsection must be included to alert the Supreme Court that it has original appellate jurisdiction over the case. *Gregory v. Fourtwest Invs., Ltd.*, 735 P.2d 33 (Utah 1987).

Cited in *Conder v. A.L. Williams & Assocs.*, 739 P.2d 634 (Utah Ct. App. 1987).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — The Utah Court of Appeals, 1988 Utah L. Rev. 150.

78-2-4. Supreme Court — Rulemaking, judges pro tempore, and practice of law.

NOTES TO DECISIONS

Cited in *Stewart v. Coffman*, 748 P.2d 579 (Utah Ct. App. 1988).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Judicial Decisions — Criminal Law, 1987 Utah L. Rev. 137.

78-2-5. Repealed.

Repeals. — Laws 1988, ch. 248, § 50 repeals § 78-2-5, Utah Code Annotated 1953, providing that the Supreme Court is always open, effective April 25, 1988.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

- (a) administer the rotation and scheduling of panels;
- (b) act as liaison with the Supreme Court;
- (c) call and preside over the meetings of the Court of Appeals; and
- (d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court.

History: C. 1953, 78-2a-2, enacted by L. 1986, ch. 47, § 45; 1988, ch. 248, § 7.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, in Subsection (1), divided and rewrote the former third sentence, which read "Thereafter, the term of of

fice of a judge of the Court of Appeals is 6 years and until a successor is appointed and approved under Section 20-1-7.1," into the present third and fourth sentences and made minor stylistic changes.

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees, or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from district court in criminal cases, except those involving a conviction of a first degree or capital felony;

(g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Chapter 46b, Title 63, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8; 1990, ch. 80, § 5; 1990, ch. 224, § 3.

Amendment Notes. — The 1988 amendment by ch. 73, effective April 25, 1988, inserted subsection designations (a) and (b) in Subsection (1); inserted "resulting from formal adjudicative proceedings" in Subsection (2)(a); substituted "state agencies" for "state and local agencies" in Subsection (2)(a); substituted "informal adjudicative proceedings of the agencies" for "them" in Subsection (2)(a); deleted "notwithstanding any other provision of law" at the end of Subsection (2)(a); inserted Subsection (b); redesignated former Subsections (2)(b) to (2)(h) as Subsections (2)(c) to (2)(i); added "except those from the small claims department of a circuit court" at the end of Subsection (2)(d); and made minor stylistic changes.

The 1988 amendment by ch. 210, effective April 25, 1988, added Subsection (2)(h) and redesignated former Subsection (2)(h) as Subsection (2)(i).

The 1988 amendment by ch. 248, effective April 25, 1988, in Subsection (2)(a), rewrote the phrase before "except" which had read "the

final orders and decrees of state and local agencies or appeals from the district court review of them"; deleted "notwithstanding any other provision of law" at the end of Subsection (2)(a); inserted present Subsection (2)(b); designated former Subsections (2)(b) to (2)(h) as Subsections (2)(c) to (2)(i); and substituted "first degree or capital felony" for "first or capital degree felony" in present Subsection (2)(f).

The 1990 amendment by ch. 80, effective April 23, 1990, rewrote Subsection (2)(g), which read "appeals from orders on petitions for extraordinary writs involving a criminal conviction, except those involving a first degree or capital felony" and made punctuation changes in Subsections (2)(h) and (3).

The 1990 amendment by ch. 224, effective April 23, 1990, inserted the subdivision designation (i) in Subsection (2)(b) and added Subsection (2)(b)(ii), and made related stylistic changes.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

Cross-References. — Composition and jurisdiction of military court, §§ 39-6-15, 39-6-16.

NOTES TO DECISIONS

ANALYSIS

Habeas corpus proceedings.

Post-conviction review

Scope.

Cited.

Habeas corpus proceedings.

The language of Subsection (2)(g) is sufficiently broad to include those cases where a criminal conviction is involved in a habeas corpus proceeding challenging extradition. *Hernandez v. Hayward*, 764 P.2d 993 (Utah Ct. App. 1988).

The Court of Appeals lacked original appellate jurisdiction of an appeal from the denial of an extraordinary writ involving an interstate transfer of a prisoner which bore no relation to his underlying criminal conviction, except that "but for" the conviction, he would not have been incarcerated in Arizona and then transferred to Utah. *Ellis v. DeLand*, 783 P.2d 559 (Utah Ct. App. 1989).

Post-conviction review.

Post-conviction review may be used to attack a conviction in the event of an obvious injustice or a substantial and prejudicial denial of a constitutional right in the trial. *Gomm v. Cook*, 754 P.2d 1226 (Utah Ct. App. 1988).

Scope.

This statute defines the outermost limits of appellate jurisdiction, allowing the Court of Appeals to review agency decisions only when the legislature expressly authorizes a right of review. It is not a catchall provision authorizing the court to review the orders of every administrative agency for which there is no statute specifically creating a right to judicial review. *DeBry v. Salt Lake County Bd. of Appeals*, 764 P.2d 627 (Utah Ct. App. 1988).

Cited in *Scientific Academy of Hair Design, Inc. v. Bowen*, 738 P.2d 242 (Utah Ct. App. 1987); *In re Topik*, 761 P.2d 32 (Utah Ct. App. 1988).

(2) The trustee of a trust deed may not be the beneficiary therein, unless the beneficiary is qualified to be a trustee under Subsection (1)(b), (c), (e), or (f).

History: L. 1961, ch. 181, § 3; 1963, ch. 110, § 1; 1969, ch. 162, § 1; 1985, ch. 64, § 1.

Amendment Notes. — The 1985 amendment added Subsection (1)(f); deleted "Clauses (a), (b), (c), (d) and (e)" at the beginning of the undesignated paragraph at the end of Subsection (1) and substituted "chapter, nor to any agreement which is supplemental to that trust deed" for "act, nor to any indenture supplemental thereto" at the end of that paragraph; and substituted "Subsection (1) (b), (c), (e), or (f)"

for "clause (b), (c) or (e) of subsection (1)" at the end of Subsection (2).

Meaning of "effective date of this chapter." — The phrase "effective date of this chapter," appearing in the undesignated paragraph at the end of Subsection (1), first appeared in this section as amended by L. 1985, ch. 64, § 1. That act (L. 1985, ch. 64) took effect on April 29, 1985.

Cross-References. — Utah State Bar, § 78-51-1.

COLLATERAL REFERENCES

C.J.S. — 59 C.J.S. Mortgages §§ 8, 84.

Key Numbers. — Mortgages ☞ 24.

57-1-22. Successor trustees — Appointment by beneficiary — Effect — Substitution of trustee — Recording — Form.

(1) The beneficiary may appoint a successor trustee at any time by filing for record in the office of the county recorder of each county in which the trust property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the power, duties, authority, and title of the trustee named in the deed of trust and of any successor trustee.

(2) The substitution shall:

- (a) identify the trust deed by stating the names of the original parties thereto, the date of recordation, and the book and page where the same is recorded or the entry number;
- (b) include the legal description of the trust property;
- (c) state the name of the new trustee; and
- (d) be executed and acknowledged by all of the beneficiaries under the trust deed or their successors in interest.

(3) If not previously recorded, at the time of recording the notice of default, the successor trustee shall file for record the substitution of trustee, and a copy thereof shall be sent in the manner provided in Section 57-1-26 to all persons to whom a copy of the notice of default would be required to be mailed by Section 57-1-26. In addition thereto, a copy shall be sent to the prior trustee by regular mail to his last-known address.

(4) A substitution of trustee shall be sufficient if made in substantially the following form:

COLLATERAL REFERENCES

C.J.S. — 59 C.J.S. Mortgages § 563.

Key Numbers. — Mortgages ⇌ 352.

57-1-26. Requests for copies of notice of default and notice of sale — Mailing by trustee or beneficiary — Publication of notice of default.

- (1) (a) Any person desiring a copy of any notice of default and of any notice of sale under any trust deed may, at any time subsequent to the filing for record of the trust deed and prior to the filing for record of a notice of default thereunder, file for record in the office of the county recorder of any county in which any part or parcel of the trust property is situated, a duly acknowledged request for a copy of any such notice of default and notice of sale. The request shall set forth the name and address of the person or persons requesting copies of such notices and shall identify the trust deed by stating the names of the original parties thereto, the date of filing for record thereof, the book and page where the same is recorded or the recorder's entry number, and the legal description of the trust property. The request shall be in substantially the following form:

REQUEST FOR NOTICE

Request is hereby made that a copy of any notice of default and a copy of notice of sale under the trust deed filed for record _____, 19____, and recorded in Book _____, Page _____, Records of _____ County, (or filed for record _____, 19____, with recorder's entry number _____, _____ County), Utah, executed by _____ as trustor, in which _____ is named as beneficiary and _____ as trustee, be mailed to _____ (insert name) _____ at _____ (insert address) _____

(Insert legal description)

Signature _____

(Certificate of Acknowledgement)

- (b) Upon filing for record of such request, the recorder shall index such request in the mortgagor's index, mortgagee's index, and abstract record. Except as provided in this section the trustee under any such deed of trust is not required to send notice of default or notice of sale to any person not filing a request for notice as described herein.
- (2) Not later than ten days after recordation of such notice of default, the trustee or beneficiary shall mail, by certified or registered mail, with postage prepaid, a copy of such notice with the recording date shown thereon, addressed to each person whose name and address are set forth in a request therefor which has been recorded prior to the filing for record of the notice of default, directed to the address designated in the request. At least 20 days before the date of sale, the trustee shall mail, by certified or registered mail, with postage prepaid, a copy of the notice of the time and place of sale, addressed to each person whose name and address are set forth in a request

therefor which has been recorded prior to the filing for record of the notice of default, directed to the address designated in the request.

(3) Any trust deed may contain a request that a copy of any notice of default and a copy of any notice of sale thereunder be mailed to any person a party thereto at the address of such person set forth therein, and a copy of any notice of default and of any notice of sale shall be mailed to each such person at the same time and in the same manner required as though a separate request therefor had been filed by each of such persons as provided in this section.

(4) If no address of the trustor is set forth in the trust deed and if no request for notice by such trustor has been recorded as provided in this section, a copy of the notice of default shall be published at least three times, once a week for three consecutive weeks, in a newspaper of general circulation in each county in which the trust property, or some part thereof, is situated, such publication to commence not later than ten days after the filing for record of the notice of default. In lieu of such publication, a copy of the notice of default may be delivered personally to the trustor within the ten days or at any time before publication is completed.

(5) No request for a copy of any notice filed for record pursuant to this section, nor any statement or allegation in any such request, nor any record thereof, shall affect the title to trust property or be deemed notice to any person that any person requesting copies of notice of default or of notice of sale has or claims any right, title or interest in, or lien or claim upon, the trust property.

History: L. 1961, ch. 181, § 8; 1980, ch. 57, § 1; 1981, ch. 100, § 3; 1989, ch. 88, § 4.

Amendment Notes. — The 1989 amendment, effective July 1, 1989, inserted the subsection designations (a) and (b) in Subsection (1); added "the legal description of the trust property" at the end of the second sentence in

Subsection (1)(a); added the heading "REQUEST FOR NOTICE" at the beginning of the form and the lines "(Insert legal description)" and "(Certificate of Acknowledgement)" at the end thereof; and made stylistic changes throughout the section.

NOTES TO DECISIONS

Cited in First Sec. Bank v. Felger, 658 F. Supp. 175 (D. Utah 1987).

COLLATERAL REFERENCES

C.J.S. — 59 C.J.S. Mortgages § 566.
Key Numbers. — Mortgages ⇨ 354.

57-1-27. Sale of trust property by public auction — Postponement of sale.

(1) On the date and at the time and place designated in the notice of sale, the trustee or the attorney for the trustee shall sell the property at public auction to the highest bidder. The trustee, or the attorney for the trustee, may conduct the sale and act as the auctioneer. The trustor, or his successor in interest, if present at the sale, may direct the order in which the trust property shall be sold, if the property consists of several known lots or parcels which can be sold to advantage separately. The trustee or attorney for the trustee shall follow these directions. Any person, including the beneficiary or

History: C. 1953, 38-8-5, enacted by L.
1981, ch. 171, § 5.

CHAPTER 9

PENALTY FOR WRONGFUL LIEN

Section		Section	
38-9-1.	Liability of person filing wrongful lien.		ful lien — Penalty — Misdemeanor.
38-9-2.	Claim of lien not authorized is invalid.	38-9-4.	Action may be brought in district court — Costs and attorney fees.
38-9-3.	Liability of person refusing to correct document containing wrong-		

38-9-1. Liability of person filing wrongful lien.

A person who claims an interest in, or a lien or encumbrance against, real property, who causes or has caused a document asserting that claim to be recorded or filed in the office of the county recorder, who knows or has reason to know that the document is forged, groundless, or contains a material misstatement or false claim, is liable to the owner or title-holder for \$1,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees, and costs as provided in this chapter, if he willfully refuses to release or correct such document of record within 20 days from the date of written request from the owner or beneficial title-holder of the real property. This chapter is not intended to be applicable to mechanics' or materialmen's liens.

History: C. 1953, 38-9-1, enacted by L.
1985, ch. 182, § 1.

38-9-2. Claim of lien not authorized is invalid.

A document purporting to claim an interest in, or a lien or encumbrance against, real property not authorized by statute, judgment, or other specific legal authority is presumed to be groundless and invalid.

History: C. 1953, 38-9-2, enacted by L.
1985, ch. 182, § 2.

38-9-3. Liability of person refusing to correct document containing wrongful lien — Penalty — Misdemeanor.

A person described in Section 38-9-1, who willfully refuses to release or correct the document of record within 20 days from the date of written request from the owner or beneficial title-holder of the real property:

- (1) is liable to the owner or beneficial title-holder of the real property for the sum of not less than \$1,000, or for treble the actual damages caused by the recording or filing, whichever is greater, and for reasonable attorney fees and costs of the action; and
- (2) is guilty of a class B misdemeanor.

IN THE SUPREME COURT OF THE STATE OF UTAH

JIMMIE L. BUTLER and ANITA)	
M. BUTLER; CHRIS ORLOWSKI and	:	ADDENDUM TO APPELLANT'S BRIEF
PAMELA SUE ORLOWSKI,)	
	:	
Plaintiffs/Appellants,)	
	:	
vs.)	
	:	
EMI LIMITED NO. 6 ASSOCIATES,)	
BRYAN C. ROBINSON, Trustee;	:	
and DOES I through XX,)	
	:	Case No. 910168
Defendants/Respondents.)	Civil No. 900901157 PR
	:	

COMES NOW the Appellants, by and through their at
attorney, J. BRYAN JACKSON, and hereby submit the following
Standard on Rewview which was omitted from Appellants' Brief.

STANDARD OF REVIEW

This matter involved the Trial Court's granting of
dismissal pursuant to Rule 12(b)(6) Utah Rules of Civil Procedure
and denying Plaintiff's Motion for Summary Judgment concerning
the interpretation of the statutory provisions for sending Notice
of Substitution of Trustee in conjunction with a non-judicial
foreclosure or Trustee's Sale.

In Ward v. Richfield City, 798 P.2d 757 (Utah 1990) the
Utah Supreme Court in reviewing the District Court's

interpretation of statute and in granting summary judgment ruled that "in reviewing a grant of summary judgment, we consider the facts in the light most favorable to the losing party." See also, Owens v. Garfield, 794 P.2d 1187, 1188 (Utah 1989); Blue Cross and Blue Shield of Utah v. State of Utah, 797 P.2d 634, 6361 (Utah 1989) the Court went on to state that the trial court's interpretation of a statute presents a question of law. See also Asay v. Watkins, 751 P.2d 1135, 1136 (Utah 1988) and Gonzales v. Morris, 610 P.2d 1285, 1286 (Utah 1980).

The Court accords conclusions of law no particular deference but review them for correctness. This in fact was the standard applied in The Matter of the Estate of Robert E. Erickson, 608 P.2d 1186 (Utah 1991), wherein the Court stated that where the evidence is not in dispute, all issues are questions of law and the Court reviews them for correctness;

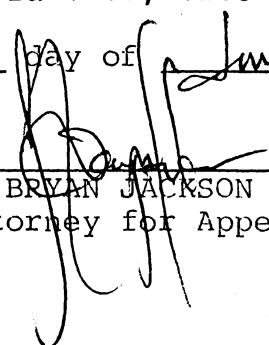
In Coleman v. Utah State Land Board, 795 P.2d 622 (Utah 1990) this Court stated that "a dismissal is a severe measure and should be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of it's claim." See also Liquor Control Commission v. Athas, 243 P.2d 441, 443 (Utah 1952);

The Court went on to state that "the courts are a forum for settling controversies, and if there is any doubt about

whether a claim should be dismissed for the lack of a factual basis, the issue should be resolved in favor of giving the party an opportunity to present the proof." See also, Baur v. Pacific Financial Corp., 383 P.2d 397 (Utah 1963);

Last, the court stated that the court's ruling should be affirmed only if it appears that no set of facts support Appellant's claim. See also, Arrow Industries, Inc. Zions First National Bank, 767 P.2d 935, 936 (Utah 1988); Freegard v. First Western National Bank, 738 P.2d 614, 616 (Utah 1987); Wells v. Walker Bank and Trust Co., 590 P.2d 1261, 1263 (Utah 1979).

DATED this 7th day of June, 1991.



J. BRYAN JACKSON
Attorney for Appellants

MAILING CERTIFICATE

I do hereby certify that I mailed a true and correct copy of the foregoing, STANDARD OF REVIEW, postage pre-paid thereon, this 7th day of June, 1991, to STEVEN D. BRANTLEY, SHAPIRO & ROBINSON, 180 South 300 West, Suite 350, Salt Lake City, Utah 84101.



J. BRYAN JACKSON

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