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Utah Savings & Loan Association v. Robert B. Mecham et al : Answer to Petition of Respondent

Utah Supreme Court

George E. Ballif; Heber Grant Ivins; Thomas S. Taylor; Attorneys for Defendants and Cross-Respondents;

In the Supreme Court of the State of Utah

UTAH SAVINGS & LOAN ASSOCIATION, a corporation,
Plaintiff,
Cross-appellant,
and Respondent,

vs.

ROBERT B. MECHAM, et al,
Defendants,

LUDLOW PLUMBING SUPPLY CO.,
Defendant and
Appellant,

GENEVA ROCK PRODUCTS COMPANY a corporation; MASONRY SPECIALTIES AND SUPPLY, a partnership; and CENTRAL UTAH BLOCK COMPANY, a corporation,
Defendants and
Cross-respondents.

CASE NO. 9159

Defendants and Cross-Respondents' Petition and Brief in Answer to Petition of Respondent and Coss-Appellant, Utah Savings & Loan Association for Re-Hearing.

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Cross-Respondents

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CASES CITED

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TO THE HONORABLE SUPREME COURT
OF THE STATE OF UTAH:

Defendants and cross-respondents, Geneva Rock Products Company, a corporation; Masonry Specialties and Supply, a partnership; and Central Utah Block Company, a corporation, respectfully submit that a re-hearing in the above entitled case should not be granted for the following reasons:

1. That the Supreme Court did not err in remanding this case for further proceedings before the trial court to establish by its findings the exact date upon which the mortgagee became bound to advance monies pursuant to said mortgages.

ARGUMENT

POINT I

THE SUPREME COURT WAS CORRECT IN REMANDING THE CASE FOR FURTHER FINDINGS AS TO THE TIME WHEN THE MORTGAGEE BECAME BOUND TO ADVANCE MONIES PURSUANT TO THE MORTGAGES.

It is respectfully called to the Court's attention and to the attention of opposing counsel that the trial court did, in finding No. 7, state:

> "The notes and mortgages contain no provisions respecting monies to be advanced after the dates of the notes and mortgages nor was there a separate agreement providing for advances. During the course of construction of the homes in question the plaintiff did, from time to time, advance funds to the defendant, Mecham, in amounts and at times wholly within the discretion of the plaintiff's officers."

This finding would suggest that the mortgages and notes sued upon were not obligatory and that with a rehearing by the lower court may well be found that as of a specified date they were not obligatory, thus properly supporting the ruling of the lower court.

The record is replete with factual evidence which would support this finding by the trial court. For example, Robert B. Mecham testified (Page 210 of the Transcript), that he went to plaintiff, Utah Savings & Loan Association to request the advancement of money upon the mortgages and was required, before monies were advanced, to mortgage his own home as additional security. In addition to this, we refer to page 141 of the Transcript which consists of testimony by D. Spencer Grow, President of Utah Savings & Loan, in which re, in response to a question, stated:

> "That we (referring to Utah Savings & Loan Association) would advance the funds if the work progressed satisfactorily."

These questions and answers are set forth in full on pages 11 and 12 of defendant's and cross-respondent's original brief.

In addition to this testimony, it is an undisputed fact that a total of $32,400.00, which was shown upon the face of the notes and mortgages upon the twenty-four LaMesa project homes, was not advanced by the Mortgagee but was claimed by them in the original foreclosure actions. Plaintiff then, subsequent to filing suit, acknowledged that this 10% had been held back by corporations owned by D. Spencer Grow and when it fit the convenience of the plaintiff this $32,400.00 was, allegedly, refunded to Utah

Savings & Loan Association and not made a part of this foreclosure action.

We submit that these actions upon the part of the plaintiff certainly would support a more specific finding by the trial court that the notes and mortgages did not from their very inception, obligate the mortgagee to advance the funds shown therein.

This being the case, there is considerable evidence to support the proposition that the lien claimants shall have priority over the mortgagee.

Ex parte Whitbred, 19 Ves. 209, 34 Eng. Rep. 496;
Elmendorf-Anthony v. Dunn (Wash.) 116 P 2d 253;
W. P. Fuller v. McClure (Calif.) 191 P. 1027;
American Law of Property, Vol. IV, Sec. 16.70, **et seq.**

ARGUMENT

POINT II

THAT THE SUPREME COURT DID NOT ERR IN REMANDING THIS CASE FOR ADDITIONAL FINDINGS FOR THE REASON THAT THE RECORD SHOWS DIVERSION OF FUNDS FROM THE PROJECT WHICH WOULD SUPPORT THE PROPOSITION OF LAW AS CITED BY THE SUPREME COURT.

It was evident throughout th trial of this case that the mortgagee was aware that the defendant, Robert B. Mecham, was insolvent at the time of the execution of the notes and mortgages upon the LaMesa and Rowley projects. This is borne out by the financial statements which were introduced as plaintiff's Exhibit No. 126, Civil 20,575. This fact is substantiated in view of the previous dealings which D. Spencer Grow, through corporations which were

solely owned by him, had had with the defendant, Robert B. Mecham. These dealings had been unsatisfactory financially and at the time of the execution of the notes and mortgages upon Rowley and LaMesa projects the president of Utah Savings & Loan Association, D. Spencer Grow, was heavily involved in Schaurhamer project of which he was the owner and for which he had not bonded Robert B. Mecham and was personally exposed to liability.

A further point to substantiate the diversion of funds from the projects LaMesa and Rowley is the fact, as admitted in the petition of respondents for this re-hearing as shown on page 17 thereof, in which they point out that certain materialmen were paid sums greater than the value of materials furnished upon the LaMesa project which was ultimately liened. Since many of these payments were made directly by the plaintiff to the materialmen, it become obvious that the funds were being applied upon accounts which accrued during the erection of homes upon previous projects.

POINT III

IN THE ALTERNATIVE, IF THE SUPREME COURT GRANTS PLAINTIFF'S PETITION FOR A REHEARING, THEN DEFENDANTS AND CROSS RESPONDENTS CENTRAL UTAH BLOCK COMPANY, MASONRY SPECIALTIES AND SUPPLY, AND GENEVA ROCK PRODUCTS COMPANY PETITION THE COURT FOR A REHEARING TO REINSTATE THE JUDGMENTS OF THESE DEFENDANTS AND CROSS RESPONDENTS.

A. The Supreme Court erred in vacating the judgments of Defendants and Cross Respondents Central Utah Block

Company, Masonry Specialties and Supply, and Geneva Rock Products Company for the reason that the record fully substantiates and supports the fact that the mortgagee had knowledge that money was being borrowed for the purpose of creating improvements on the property mortgaged.

See Amendment to Findings of Fact and Conclusions of Law as to paragraph No. 7 in part as follows:

> "That at the time said notes and mortgages were executed and delivered to Plaintiff, the parcels of land covered by the mortgages were executed for the purpose of procuring money to build dwellings and improvements on the lands in question . . ."

See also TR 138.

B. The Supreme Court erred in vacating the said judgments of Central Utah Block Company, Masonry Specialties and Supply, and Geneva Rock Products Company for the reason that the record fully substantiates the facts that materials were being furnished under circumstances that mortgagee did know or should have known materialmen and laborers were relying upon mortgage money for payment. Plaintiff knew mortgage money was being diverted into another part of the project foreign to the mortgage property.

Mr. Mecham, the general contractor, told Mr. Grow, President of Plaintiff corporation, as follows:

> "I needed some new work desperately to keep things going and pay the bills on Keyridge."
>
> "Did you tell him you didn't have any money to pay the bills on Keyridge?"
>
> "Yes." (TR. 302, 303).

Mr. Grow, President of mortgagee company, was on La Mesa property when materials were being taken from stock pile on La Mesa and used in other areas. (TR. 613).

Plaintiff wrote check payable to materialmen directly from its office for work in Keyridge when there were no more monies to be advanced from Keyyridge loans and money was from loans in other areas. Plaintiff knew materialmen relied upon mortgage money for payment for the reason that materialmen went directly to Plaintiff mortgagee and obtained payments directly from its office (TR. 180, 774, 762).

Plaintiff had no written procedure in the advancement of money to the general contractor. Heavy draws on loan one day and then light draws on other days which would balance out and reduce the amount of bookkeeping (TR. 771, 772).

CONCLUSION

It is our position that the Supreme Court made no error in remanding this matter to the trial court for further findings to determine when the mortgagee became bound to advance monies pursuant to the mortgages and notes. We also agree that the case should be remanded for further hearing upon the premise that sufficient facts appear within the record of the trial court proceedings to show a diversion of funds from the LaMesa and Rowley projects. In the alternative, however, if the Supreme Court grants Plaintiff's Petition for a Rehearing, then Defendants and Cross Respondents Central Utah Block Company, Masonry Specialties and Supply, and Geneva Rock Products Company petition the Court to reinstate the judgments of these parties for the reason that the record on appeal fully substan-

tiates and supports the facts that the mortgagee had knowledge that money was being borrowed for the purpose of creating improvements on the property mortgaged, that materials were being furnished under circumstances that mortgagee did know or should have known materialmen and laborers were relying upon mortgage money for payment, and that mortgagee knew mortgage money was being diverted into another part of the project foreign to the mortgage property.

Respectfully submitted,

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