

1991

Joseph D. Sanders and Cheryl M. Sanders v. Martin
S. Ovard, Reva S. Ovard, Ben F. Ovard, Helen T.
Ovard and Jax Hayes Pettey: Brief of Appellant

Utah Supreme Court

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DOCKET NO. 910211

BRIEF

IN THE SUPREME COURT FOR THE STATE OF UTAH

JOSEPH D. SANDERS and
CHERYL M. SANDERS,

Plaintiffs/
Appellants,

vs.

MARTIN S. OVARD, REVA S.
OVARD, BEN F. OVARD, HELEN T.
OVARD and JAX HAYES PETTEY,

Defendants/
Appellees.

BRIEF OF APPELLANTS

District Court No. C85-4313

Appellate Court No. 910211

Appeal from the Third Judicial District Court,
Salt Lake County, Judge Frank G. Noel

Argument Priority Classification 16

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FILED

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CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT FOR THE STATE OF UTAH

JOSEPH D. SANDERS and
CHERYL M. SANDERS,

Plaintiffs/
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JURISDICTION

The jurisdiction of this court is properly based upon Rule 4 of the Utah Rules of Appellate Procedure and pursuant to §78-2-2(3)(j) Utah Code Ann. (1953 as amended).

NATURE OF THE CASE

This is an appeal from an Order signed and entered by the Honorable Frank G. Noel on March 29, 1991, which clarified a previous judgment and order regarding non-judicial foreclosure of the property which was the subject of the litigation.

ISSUES PRESENTED

1. Were Defendants Ovard required by §78-37-1 Utah Code Ann. (1953 as amended) to pursue the non-judicial foreclosure of Plaintiffs' property as the second trust deed holders before seeking a deficiency judgment against the Plaintiffs?

Standard of Review:

The trial court's interpretation of a statute presents a question of law and such conclusions of law are accorded no particular deference but reviewed for correctness. Ward v. Richfield City, 798 P.2d 757 (Utah 1990).

2. Should the Defendants' damages have been limited to the difference between the fair market value of Plaintiffs' property and the judgment awarded them on June 6, 1988, due to their voluntary refusal to immediately pursue the non-judicial foreclosure sale?

Standard of Review:

The trial court's interpretation of a statute presents a question of law and such conclusions of law are accorded no particular deference but reviewed for correctness. Ward v. Richfield City, 798 P.2d 757 (Utah 1990).

DETERMINATIVE STATUTE

§78-37-1 Utah Code Ann. (1953 as amended) attached as "Addendum."

STATEMENT OF THE CASE

1. A judgment was rendered against the Plaintiffs in the above-entitled action on June 6, 1988. (R. 210-215)

2. The terms of that judgment awarded Defendants \$40,600.50 and provided that, among other things, the property which was the subject of that litigation be sold by a trustee's sale and that Defendants be awarded a deficiency judgment after crediting Plaintiffs with the fair market value of the property on the date of sale. (R. 213)

3. The subject property was subsequently sold by MountainWest Savings (the first trust deed holder) on September 1, 1989. This sale occurred nearly 3 months after judgment was awarded to the Defendants, giving them the right to immediately sell the property after posting notice of the sale. (R. 297, Exhibit "A")

4. At the time of the sale the subject property was worth approximately \$130,000 but it was sold by MountainWest for a bid of approximately \$107,000. (R. 297, Exhibit "A", 324-325)

5. Defendants were obligated under §78-37-1 Utah Code Ann. (1953 as amended) to pursue the property first and yet they failed to do so, despite having the ability and opportunity. (R. 303-305)

6. Rather, Defendants voluntarily delayed their sale and allowed the bank to proceed with its foreclosure so that they could bid on the property in that sale and still retain their judgment against the Plaintiffs. (R. 347-350)

7. On August 7, 1990, Defendants filed a motion with the trial court seeking entry of a deficiency judgment in the amount of their judgment plus interest and attorney's fees. Defendants subsequently withdrew that motion on August 31, 1990. (R. 289-297, 329)

8. Plaintiffs then filed a Motion for Order Clarifying Judgment which sought to have the trial judge limit the 1988 judgment to those amounts which exceed the fair market value of the property at the time Defendants could have sold it but failed to. (R. 331-337)

9. The trial judge ruled that his judgment did not require the Defendants Ovard to proceed on a non-judicial foreclosure sale under their trust deed and that Order is being appealed in this matter. (Order dated March 29, 1991)

SUMMARY OF ARGUMENT

The Appellants/Sanders contend that §78-37-1 Utah Code Ann. compelled the Ovarids to pursue the property which secured their

judgment for satisfaction of that judgment. The Ovarads' failure to execute upon the property should bar them from recovering from the Sanders.

Alternatively, the Sanders argue that they are being penalized by the Ovarads' failure to protect their security interest in the property under §78-37-1. The Ovarads' judgment should be reduced by the amount of equity which was lost when MountainWest Savings foreclosed on their first trust deed.

INTRODUCTION

The facts in this case present an unusual situation for the application of §78-37-1 (hereinafter sometimes referred to as the "One-Action Rule"). The cases interpreting this statute generally involve second trust deed holders seeking to enforce a contract after the property securing the obligation has been lost. In this case, the Defendants Ovard were awarded and continue to hold a judgment against the Plaintiff Sanders.

The issue raised here concerns the application of the one-action rule to the Ovard judgment which was initially secured by the Sanders property.

ARGUMENT

DEFENDANTS ARE PRECLUDED FROM EXECUTING ON THE FULL AMOUNT OF THEIR JUDGMENT WHERE THEY FAILED TO COMPLY WITH THE ONE-ACTION RULE §78-37-1 UTAH CODE ANN.

When this action was initiated in July of 1985, the Sanders sought and received, pursuant to stipulation, a permanent injunction restraining the Ovarads from foreclosing on the

property. Two years later the Ovarads filed a counterclaim seeking a judicial foreclosure of the Sanders property. On June 6, 1988, Judge Noel signed the Judgment and Decree of Foreclosure which awarded the Ovarads a money judgment in the amount of \$40,600.50. A copy of that Judgment is attached hereto as "Addendum". In addition, that judgment affirmed the Ovarads' lien on the property and addressed the foreclosure on the property. Paragraph 6 reads as follows:

Defendants shall be entitled to complete their non-judicial foreclosure of the Trust Deed. All requirements for such foreclosure are deemed to have complied with except for the giving and posting of notice of sale, which must still be accomplished by Defendants. Pursuant to law applicable to trust deed sales there shall be no redemption rights after sale, and **any deficiency shall be limited to the difference between amounts owed by Plaintiffs to Defendants hereunder, plus any subsequent allowable costs and fees, and the fair market value of the Property at the date of sale.** In the event of a deficiency and an action by Defendants therefor, such action may be pursued by motion and evidentiary hearing in this action without the necessity of Defendants commencing a new and separate action. (emphasis added)

It is, and has been, the Sanders' position that Paragraph 6 contemplates that the Ovarads promptly pursue the sale of the property to satisfy all or a portion of their judgment. Instead, the Ovarads were negotiating with MountainWest in an attempt to purchase the property from them at their foreclosure sale. In a questionable procedure, MountainWest accepted a bid from Ovard at the sale on June 6, 1988, subject to certain terms and

conditions. Ovard was unable to meet those conditions and the property was subsequently sold on September 1, 1988.

The Ovards then sought to execute on the full amount of their judgment against the Sanders claiming that their security in the property had been extinguished by the MountainWest foreclosure. Sanders objected on the basis that there was equity in the property which would have satisfied the Ovard judgment and the Ovards had a duty to pursue that remedy under §78-37-1.

The Ovards rely upon the exception to the one-action rule which would relieve them from pursuing the security where it has been lost or disposed of without any fault on their part.

Lockhart Co. v. Equitable Realty Co., 657 P.2d 1333, 1335 (Utah 1983); Utah Mortgage and Loan Co. v. Black, 618 P.2d 43, 45 (Utah 1980). In response to Plaintiffs' Motion to Clarify Judgment, the Ovards argued that they fell within this exception as MountainWest foreclosed upon the property and extinguished their lien.

A. **The Ovards Failed to Protect Their Interest in the Property.**

The exception to the one-action rule applies only where it is established that the security was lost without fault or blameworthy conduct on the part of the creditor. Lockhart Co. v. Equitable Realty Co., 657 P.2d 1333, 1335 (Utah 1983); Utah Mortgage and Loan Co. v. Black, 618 P.2d 43, 45 (Utah 1980); Cache Valley Banking Co. v. Logan, 56 P.2d 1046, 1049 (Utah

1936). The question of what types of conduct preclude a creditor from seeking a deficiency was addressed in First Security Bank of Utah, N.A. v. Felger, 658 F. Supp. 175 (D. Utah 1987) which interpreted Utah law. In his opinion, Judge Winder found that recovery by a secured creditor was barred when:

(1) the creditor lost its lien because of failure to record a notice of assignment of mortgage, Donaldson v. Grant, 15 Utah 231, 49 P. 799 (1897); (2) the creditor released its lien because of its belief that there was no equity in the collateral, Lockhart, supra; (3) the creditor disposed of the collateral by private sale under an illegal self-help remedy, Rein v. Callaway, 7 Idaho 634, 65 P. 63 (1901) (cited with approval by the Utah Supreme Court in Black, supra); and (4) the creditor lost its interest in the collateral because of its failure to present a claim in a related probate proceeding, Hibernia Savings & Loan Society v. Thornton, 109 Cal. 427, 42 P. 447 (1895) (cited with approval in Black).

Id. at 182 (cited with approval in City Consumer Services, Inc. v. Peters, 815 P.2d 234 (Utah 1991)). Sanders contends that the Ovarads' failure to pursue the remedy awarded to it by the trial court is "blameworthy" and should bar them from seeking a deficiency from the Sanders.

The trial judge recognized that there was equity in the subject property which is why he allowed them to proceed with the sale and limited any deficiency to the difference between the fair market value of the property and any amounts still owing to the Defendants. Ovarads' failure to protect their equity is clearly blameworthy and should preclude them from pursuing Sanders for a deficiency. At a minimum, the Ovarads should have

their judgment reduced by the difference between the fair market value of the property when sold by MountainWest and the amount paid by MountainWest.

B. Sanders is Penalized by the Ovars' Failure to Protect Their Interest in the Property.

The equities involved in this case demand that the Ovars be barred from pursuing their judgment or, in the alternative, that the judgment be reduced as set forth above. Judge Noel awarded the Ovars a money judgment and anticipated that they would initially proceed against the real property to collect it. The equity was there until MountainWest foreclosed on the property in September of 1988. In fact, the Ovars were attempting to purchase the property from MountainWest at approximately the same time as judgment was entered.

In failing to protect their interest in the property, the Ovars have effectively penalized Sanders in an amount equivalent to the equity which existed in the property when it was sold by MountainWest. Had the Ovars bid unconditionally at the sale conducted by MountainWest, Sanders would only be required to pay to them a deficiency as contemplated by Judge Noel's Order. Instead, the Ovars' inaction has allowed them to pursue Sanders for the full amount of the judgment plus the interest which is accruing thereon.

A similar issue was recently presented to this court in City Consumer Services, Inc. v. Peters, 815 P.2d 234 (Utah 1991). That case, however, is not dispositive of the present situation. In Peters, as in most cases involving this statute, the issue is whether the previously secured creditor can bring an action on the underlying obligation. Here, however, the Ovards had already brought their action in a counterclaim, prevailed at trial, received a money judgment and all but completed their foreclosure.

CONCLUSION


The Sanders are asking this court for two alternative forms of relief. The first would be to find that, pursuant to §78-37-1 Utah Code Annotated and the Judgment and Decree of Foreclosure, the Ovards were obligated to pursue the security for their judgment and as a result of their failure to do so, they should be barred from recovering their judgment against the Sanders.

In the alternative, Sanders ask that this court reduce the Ovard judgment by the difference between the amount paid by MountainWest for the property of \$107,000 and the fair market value of the property of \$130,000 at the time of sale on the basis that equity demands that Sanders not be penalized for the Ovards' decision to sit back and allow MountainWest to foreclose.

DATED this 26 day of November, 1991.

Respectfully Submitted,

GREEN & BERRY



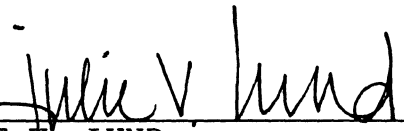
FREDERICK N. GREEN
JULIE V. LUND
Attorneys for Plaintiffs/
Appellants

CERTIFICATE OF SERVICE

COMES NOW Julie V. Lund, attorney for the Plaintiffs/Appellants in the above-entitled action, and hereby certifies that she has served the Defendants/Appellees with a Brief of Appellants by mailing four (4) true and correct copies thereof to Thomas N. Crowther of the firm of Parsons & Crowther, attorneys for Defendants/Appellees, at 455 South 300 East, Suite 300, Salt Lake City, Utah 84111, on this 26th day of November, 1991.

DATED this 26 day of November, 1991.

GREEN & BERRY



JULIE V. LUND
Attorney for Plaintiffs/
Appellants

ADDENDUM

(d) the amount of rent due, if the alleged unlawful detainer is after default in the payment of rent.

(3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2)(a) through (2)(c), and for reasonable attorney's fees, if they are provided for in the lease or agreement.

(4) If the proceeding is for unlawful detainer after default in the payment of the rent, execution upon the judgment shall be issued immediately after the entry of the judgment. In all cases, the judgment may be issued and enforced immediately 1987

78-36-11. Time for appeal.

Either party may, within ten days, appeal from the judgment rendered 1953

78-36-12. Exclusion of tenant without judicial process prohibited — Abandoned premises excepted.

It is unlawful for an owner to willfully exclude a tenant from the tenant's premises in any manner except by judicial process, provided, an owner or his agent shall not be prevented from removing the contents of the leased premises under Subsection 78-36-12.6(2) and retaking the premises and attempting to rent them at a fair rental value when the tenant has abandoned the premises. 1981

78-36-12.3. Definitions.

(1) "Willful exclusion" means preventing the tenant from entering into the premises with intent to deprive the tenant of such entry.

(2) "Owner" means the actual owner of the premises and shall also have the same meaning as landlord under common law and the statutes of this state

(3) "Abandonment" is presumed in either of the following situations:

(a) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent within 15 days after the due date, and there is no reasonable evidence other than the presence of the tenant's personal property that the tenant is occupying the premises; or

(b) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent when due and the tenant's personal property has been removed from the dwelling unit and there is no reasonable evidence that the tenant is occupying the premises. 1981

78-36-12.6. Abandoned premises — Retaking and rerenting by owner — Liability of tenant — Personal property of tenant left on premises.

(1) In the event of abandonment the owner may retake the premises and attempt to rent them at a fair rental value and the tenant who abandoned the premises shall be liable.

(a) for the entire rent due for the remainder of the term; or

(b) for rent accrued during the period necessary to re-rent the premises at a fair rental value, plus the difference between the fair rental value and the rent agreed to in the prior rental agreement, plus a reasonable commission for the renting of the premises and the costs, if any, necessary to restore the rental unit to its condition when rented by the tenant less normal wear and tear. This subsection applies, if less than Subsec-

tion (a) notwithstanding that the owner did not re-rent the premises.

(2) If the tenant has abandoned the premises and has left personal property on the premises, the owner is entitled to remove the property from the dwelling, store it for the tenant, and recover actual moving and storage costs from the tenant. The owner shall make reasonable efforts to notify the tenant of the location of the personal property; however, if the property has been in storage for over 30 days and the tenant has made no reasonable effort to recover it, the owner may sell the property and apply the proceeds toward any amount the tenant owes. Any money left over from the sale of the property shall be handled as specified in Section 78-44-18. Nothing contained in this act shall be in derogation of or alter the owner's rights under Chapter 3, Title 38 1986

CHAPTER 37

MORTGAGE FORECLOSURE

Section 78-37-1.	Form of action — Judgment — Special execution
78-37-2	Deficiency judgment — Execution.
78-37-3	Necessary parties — Unrecorded rights barred
78-37-4	Sales — Disposition of surplus moneys
78-37-5	Sales — When debt due in installments
78-37-6	Right of redemption — Sales by parcels — Of land and water stock.
78-37-7	Repealed.
78-37-8	Restraining possessor from injuring property.
78-37-9	Attorney fees.

78-37-1. Form of action — Judgment — Special execution.

There can be one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate which action must be in accordance with the provisions of this chapter. Judgment shall be given adjudging the amount due, with costs and disbursements, and the sale of mortgaged property, or some part thereof, to satisfy said amount and accruing costs, and directing the sheriff to proceed and sell the same according to the provisions of law relating to sales on execution, and a special execution or order of sale shall be issued for that purpose. 1963

78-37-2. Deficiency judgment — Execution.

If it appears from the return of the officer making the sale that the proceeds are insufficient and a balance still remains due, judgment therefor must then be docketed by the clerk and execution may be issued for such balance as in other cases, but no general execution shall issue until after the sale of the mortgaged property and the application of the amount realized as aforesaid. 1953

78-37-3. Necessary parties — Unrecorded rights barred.

No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded convey-

Nov 6 1988

H. D. [Signature] Clerk 3rd Dist Court
C/ [Signature] Dep. Cl.

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Telephone: (801) 531-9865

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

JOSEPH D. SANDERS and CHERYL M.)
SANDERS,)

Plaintiff,)

v.)

MARTIN S. OVARD, REVA S. OVARD,)
BEN F. OVARD, HELEN T. OVARD,)
AND JAX HAYES PETTEY,)

Defendants and)
Counterclaimants,)

v.)

JOSEPH D. SANDERS, CHERYL M.)
SANDERS, UTAH STATE TAX)
COMMISSION, SALT LAKE COUNTY,)
and INSURANCE COMPANY OF)
NORTH AMERICA,)

Counterdefendants.)

JUDGMENT AND DECREE OF
FORECLOSURE

Bk 214 No. 543
6-9-88-802am.

Civil No. C85-4313

Judge Noel

The above entitled action came on regularly for trial on
October 26 and 27, 1987, before the Honorable Frank G. Noel,

Judge of the above-entitled court, sitting without a jury, with David R. Olsen and Gary R. Henrie of the law firm of SUITTER, AXLAND, ARMSTRONG & HANSON appearing as counsel for Plaintiffs, and with Thomas N. Crowther of the law firm of PARSONS & CROWTHER appearing as counsel for Defendants and with no appearance having been made by or on behalf of Counterdefendants Utah State Tax Commission, Salt Lake County and Insurance Company of North America, with Defendants having stipulated to the dismissal of Counterdefendants Utah State Tax Commission and Salt Lake County and Defendants and Counterdefendant Insurance Company of North America having stipulated as to issues between them. Having heard testimony of witnesses, having received and reviewed exhibits, having heard arguments of counsel at trial and having heard arguments of counsel at a hearing on February 12, 1988, on Defendant's Motion for Attorney's Fees, having taken the issues and matters raised at trial and upon Defendant's Motion for Attorney's Fees under advisement, the Court with the parties agreement having personally viewed the property in question, having heard arguments of Counsel on Plaintiff's objections to Defendants' proposed findings of fact and conclusions of law and judgment and decree of foreclosure, and being now fully advised in the premises and of the law and facts in this matter, and having heretofore entered its Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. Defendants' claims against Counterdefendants Utah State Tax Commission and Salt Lake County are dismissed without prejudice.

2. Plaintiffs are not entitled to and are not awarded any relief requested in their complaint, and the injunction heretofore entered by the Court enjoining Defendants from pursuing any foreclosure process under the Trust Deed referred to in Plaintiffs' complaint and Defendants' counterclaim and hereinbelow identified is terminated.

3. Defendants are entitled to and are hereby awarded judgment against Plaintiffs, jointly and severally, in the amount of \$40,600.50, which consists of \$25,900 principal, \$14,285.54 accrued and unpaid interest to and including October 26, 1987, and \$10.64 per day interest from and after such date to and including December 4, 1987, \$2,000 attorney's fees and \$508.51 costs, together with interest on such total amount at the statutory judgment rate from and after December 4, 1987.

4. Pursuant to that certain Trust Deed executed by Plaintiffs as Trustors in favor of Defendants as Beneficiaries and recorded November 8, 1982, in Book 5418 at Page 1755 as Entry No. 3727947, Defendants have a good and valid lien upon certain real property located in Salt Lake County, State of Utah, more particularly described in the Trust Deed and in Exhibit "A"

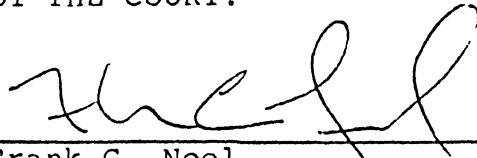
attached hereto (the "Property") for payment of the amounts and judgment referred to in the immediately preceding paragraph.

5. Any claimed right, title or interest of Counterdefendant Insurance Company of North America is subordinate and inferior to the Trust Deed and Defendants' interest in the Property.

6. Defendants shall be entitled to complete their non-judicial foreclosure of the Trust Deed. All requirements for such foreclosure are deemed to have complied with except for the giving and posting of notice of sale, which must still be accomplished by Defendants. Pursuant to law applicable to trust deed sales there shall be no redemption rights after sale, and any deficiency shall be limited to the difference between amounts owed by Plaintiffs to Defendants hereunder, plus any subsequent allowable costs and fees, and the fair market value of the Property at the date of sale. In the event of a deficiency and an action by Defendants therefor, such action may be pursued by motion and evidentiary hearing in this action without the necessity of Defendants commencing a new and separate action.

DATED ^{June} May 6, 1988.

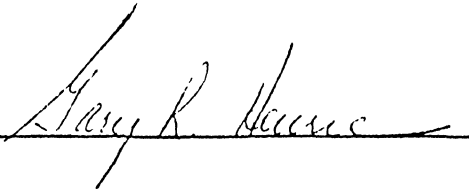
BY THE COURT:



Frank G. Noel
District Court Judge

APPROVED AS TO FORM:

SUITTER, AXLAND, ARMSTRONG
& HANSON

By _____

ATTEST
H. DIXON HINDLEY

By Pat Jones

EXHIBIT "A"

Beginning at a point 716.85 feet North 0°23'08" East from the East quarter corner of Section 6, Township 4 South, Range 1 East, Salt Lake Base and Meridian, and running thence South 76°11'02" West 186.90 feet; thence North 0°23'08" East 202.5 feet; thence North 76°11'02" East 186.90 feet; thence South 0°23'08" West 202.5 feet to the point of beginning.

Together with a 35 foot wide right of way connecting to 13800 South Street, and subject to a 35 foot wide right of way adjacent to and parallel with the West line of subject property described as follows:

A 35 foot wide strip of land, the center line of which begins 299.95 feet North 89°39'27" West from the East quarter corner of Section 6, Township 4 South, Range 1 East, Salt Lake Base and Meridian and runs thence North 0°23'08" East 311.30 feet; thence North 16°51'02" East 332.85 feet; thence North 0°23'08" East 200.88 feet.