

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: Reply Brief

Utah Supreme Court

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Thomas N. Crowther; Parsons and Crowther; Attorneys for Appellees.

Frederick N. Green; Julie V. Lund; Green and Berry; Attorneys for Appellants.

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BRIEF

910211

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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.

REPLY BRIEF OF APPELLANTS

Appellate Court No. 910211

District Court No. C85-4313

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

Argument Priority Classification 16

Thomas N. Crowther
PARSONS & CROWTHER
Attorneys for Appellees
Martin S. Ovard, Reva S.
Ovard, Ben F. Ovard,
Helen T. Ovard and
Jax Hayes Pettey
455 South 300 East, #300
Salt Lake City, Utah 84111

Frederick N. Green
Julie V. Lund
GREEN & BERRY
Attorneys for Appellants
Joseph D. Sanders and
Cheryl M. Sanders
622 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111

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CLERK SUPREME COURT
UTAH

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Thomas N. Crowther
PARSONS & CROWTHER
Attorneys for Appellees
Martin S. Ovard, Reva S.
Ovard, Ben F. Ovard,
Helen T. Ovard and
Jax Hayes Pettey
455 South 300 East, #300
Salt Lake City, Utah 84111

Frederick N. Green
Julie V. Lund
GREEN & BERRY
Attorneys for Appellants
Joseph D. Sanders and
Cheryl M. Sanders
622 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111

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GREEN & BERRY
FREDERICK N. GREEN (1240)
JULIE V. LUND (4875)
Attorneys for Plaintiffs/Appellants
622 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

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REPLY BRIEF OF APPELLANTS

Appellate Court No. 910211

District Court No. C85-4313

Appellants Sanders submit the following Reply Brief in the
above-entitled matter.

ARGUMENT

**I. OVARDS' ACTIONS AS A JUNIOR LIENHOLDER DO NOT FALL
WITHIN THE EXCEPTION TO THE ONE-ACTION RULE.**

An exception to the Utah one-action rule has been created
for the situation where the lender's security has been lost
through no fault of the lender. (emphasis added) Lockhart v.
Equitable Realty Co., 657 P.2d 1333, 1334 (Utah 1983); City
Consumer Services, Inc. v. Peters, 815 P.2d 234, 236 (Utah 1991);
First Security Bank v. Felger, 658 F.Supp. 175, 182 (D. Utah

1987). At the time that the Ovards were awarded their judgment against the Sanders, they were still a secured creditor and, as such, had the right to proceed against the real property which secured their trust deed. In fact, the default period had run its course and the Ovards needed only to file their Notice of Sale pursuant to the Stipulation of the parties. The parties also stipulated and the court ordered that the deficiency would be limited by the fair market value of the property.

The Ovards point to the Peters and Felger cases as supporting their position that they were not required to bid at the Mountainwest sale. That argument misses the point that Sanders is attempting to make in this appeal. Sanders does not claim that the Ovards should have bid at the Mountainwest sale. The Ovards should have pursued the security as soon as judgment was entered rather than waiting for Mountainwest to foreclose their interest. Ovard could have, and should have, completed its foreclosure months before the bank actually held its sale. There was equity in the property which could have been applied to reduce the Sanders' obligation to the Ovards. That equity was lost and now the Ovards are claiming that they are entitled to collect the entire amount of the obligation from the Sanders.

This situation is distinguishable from the Peters and Felger cases where the courts held that the second lienholder was not required to bid in at the senior lienholder's sale. In this case the junior lienholder could have, and should have, foreclosed

upon their interest before Mountainwest conducted their sale. The Ovarads' foreclosure would have made the Mountainwest sale unnecessary.

The Ovarads argue that as junior lienholders they should not have been required to go through "a fruitless procedure." The point is that the procedure would not have been fruitless had it been undertaken in a timely fashion. Additionally, Defendants postponed their remedy (noticing and conducting their own sale) in order to negotiate with Mountainwest and bid at its sale. It cannot be seriously argued that the Ovarads lost their security through no fault of their own.

II. THE OVARDS WERE REQUIRED TO PROCEED WITH A NON-JUDICIAL FORECLOSURE SALE.

Finding of Fact No. 11 demonstrates the parties' intention that a non-judicial foreclosure sale be commenced should Defendants have prevailed at trial.

Defendant raised election of remedies as a defense to Defendants Counterclaim, and the parties and the court in conference prior to trial resolved this issue by requiring that if Defendants prevailed they would proceed with a non-judicial trust deed sale provided that all requirements therefor, except for giving and posting of Notice of sale, shall be deemed to have been met and complied with and, pursuant to law applicable to trust deed sales, there shall be no redemption rights after sale and any deficiency will be limited to the difference between amounts found to be owed by Plaintiffs to Defendants, plus allowable costs and fees, and any allowable 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)

The Ovards argue that because the Mountainwest foreclosure proceeding had been initiated at the time judgment was entered, they decided not to conduct their own sale. The fact is that Mountainwest's foreclosure was in the early stages at the time the judgment was entered. All the Ovards needed to do was give notice of the sale and conduct it thirty days later. Instead, they negotiated with Mountainwest in the hope of purchasing the property from them in their sale; in which case the Ovards apparently believed they could still pursue Sanders for a full deficiency without limitation as to fair market value. The Ovards wanted it both ways. They made a conditional offer at the first scheduled sale of the property which was accepted by Mountainwest contrary to §57-1-23 et. seq. Utah Code Ann. (1953 as amended). That sale was vacated by Mountainwest and they conducted a second sale and bid in the amount of their loan on September 1, 1988.

It is undisputed that had the Ovards conducted their sale, any purchase would have been subject to the Mountainwest encumbrance. However, their failure to sell in accordance with the stipulation resulted in the loss of all equity in the property which would have satisfied a portion of the obligation owed to them by Sanders. Sanders submitted evidence of the fair market value, which would have reduced any deficiency dramatically.

III. THE OVARD JUDGMENT SHOULD BE REDUCED.

The stipulation of the parties prior to trial required that the Ovard judgment "be limited to the difference between amounts found to be owed by Plaintiffs to Defendants, plus allowable costs and fees, and any allowable fair market value of the Property at the date of sale." (Finding of Fact No. 11.) It is clear that the parties anticipated that the equity which existed in the property would be credited to any judgment against the Sanders.

The Ovars are now claiming that the judgment should not be reduced, regardless of their stipulation, for statutory reasons. The Sanders argue that the Ovars should be bound by the intent of the stipulation and the Sanders should be given the benefit of the equity which existed in the property at the time that the Ovars could have held their sale. A hearing should be conducted as to the fair market value as contemplated by the Stipulation and Order: "In the event of a deficiency and an action by Defendants therefor [sic], such action may be pursued by motion and evidentiary hearing in this action without the necessity of Defendants commencing a new and separate action." (Paragraph 6 of the JUDGMENT AND DECREE OF FORECLOSURE dated June 6, 1988)

IV. OVARDS ARE NOT ENTITLED TO THEIR FEES ON APPEAL.

This appeal was necessitated by the Ovars' failure to abide by the stipulation they agreed to prior to the trial of this

matter. They should not be awarded fees to defend an appeal caused by their disregard of the stipulation terms.

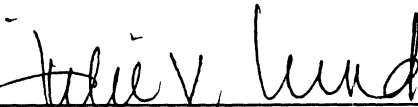
CONCLUSION

The Ovards should have enforced their security interest in the property pursuant to the one-action rule and the terms of the pre-trial stipulation. Their failure to do so in collusion with Mountainwest should result in the forfeiture of their judgment against the Sanders. At a minimum, the Ovard judgment should be reduced by the amount of equity in the property which existed at the time that the Ovards had the ability to sell the property.

DATED this 30 day of January, 1992.

Respectfully Submitted,

GREEN & BERRY



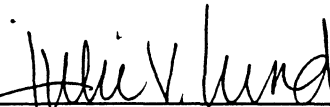
FREDERICK N. GREEN
JULIE V. LUND
Attorneys for Plaintiffs/
Appellants

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 Reply 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 30th day of January, 1992.

DATED this 30 day of January, 1992.

GREEN & BERRY



JULIE V. LUND
Attorney for Plaintiffs/
Appellants