

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 Appellee

Utah Supreme Court

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BRIEF

910211

IN THE SUPREME COURT  
FOR THE STATE OF UTAH

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JOSEPH D. SANDERS and	)	
CHERYL M. SANDERS,	)	
	)	
Plaintiffs/Appellants,	)	BRIEF OF APPELLEES
	)	
vs.	)	
	)	
MARTIN S. OVARD, REVA S.	)	
OVARD, BEN F. OVARD, HELEN T.	)	No. 910211
OVARD and JAX HAYES PETTEY,	)	C85-4313
	)	
Defendants/Appellees.	)	

---

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

Oral Argument Priority, No. 16

---

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IN THE SUPREME COURT  
FOR THE STATE OF UTAH

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

The Utah Supreme Court has jurisdiction over this appeal pursuant to Rule 4 of the Utah Rules of Appellate Procedure and Utah Code Ann. § 78-2-2(3)(j) (1988, as amended).

### ISSUES PRESENTED

1. Is an creditor precluded from collecting on a judgment arising out of a debt secured by a second trust deed on real property when by the time such creditor is able to foreclose on the property a first trust deed holder on the same property has already commenced foreclosure proceedings and thereafter forecloses ahead of such judgment creditor.

The trial court's ruling on this issue is a conclusion of law. Trial court conclusions of law are accorded no particular deference and are reviewed for correctness. Ward v. Richfield City, 798 P.2d 757 (Utah 1990).

2. Should the amount which can be collected on the judgment referred to in issue no. 1. above be limited to the fair market value of the property securing the trust deeds and the amount of the judgment.

The trial court's ruling on this issue is a conclusion of law. Trial court conclusions of law are accorded no particular deference and are reviewed for correctness. Ward v. Richfield City, 798 P.2d 757 (Utah 1990).

### RELEVANT STATUTES

Form of Action -- Judgment -- Special Execution.

There can be one action for the recovery of any debt or the enforcement of any rights 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 in disbursements and the sale of mortgage 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.

Utah Code Ann. § 78-37-1 (1953)

Sale of trust property by trustee -- action to recover balance due upon obligation for which trust deed was given as security -- Collection of costs and attorney's fees.

At any time within three months after any sale of property under a trust deed, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in such action the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed, the amount for which such property was sold, and the fair market value thereof at the date of sale. Before rendering judgment, the court shall find the fair market value at the date of sale of the property sold. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale. In any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred in bringing an action under this section.



Utah Code Ann. § 57-1-32 (1953).

**STATEMENT OF THE CASE**

**Nature Of The Case, Course Of Proceedings  
And Disposition In The Court Below**

This action and lower Court proceedings involved a complaint by Plaintiffs/Appellants Joseph D. Sanders and Cheryl M. Sanders (hereinafter collectively, "Sanders") seeking relief against Defendants/Appellees Martin S. Ovard, Reva S. Ovard, Ben F. Ovard and Helen Ovard (hereinafter collectively, "Ovards") and Jax Hayes Pettey who was the trustee under a trust deed given by Sanders to Ovards. Sanders' Complaint alleged fraud on the part of Ovards in the sale of real property by Ovards to Sanders and sought relief in the form of damages or, in the alternative, rescission of contract and for injunctive relief precluding Ovards from continuing foreclosure proceedings upon real property under a trust deed given by Sanders to Ovards. Ovards' counterclaimed seeking judgment against Sanders on a promissory note given by Sanders to Ovards and seeking judicial foreclosure of the trust deed given by Sanders to Ovards to secure such note. After trial the lower court entered judgment denying relief to Sanders, awarding monetary judgment to Ovards and allowing Ovards to conclude their non-judicial foreclosure proceeding. Such judgment was previously affirmed by the Utah Court of Appeals on an appeal by Sanders.

### Statement of Facts

1. In September 1982, Ovarids' sold to Sanders certain residential real property located in Draper, Salt Lake County, State of Utah (the "Property"), and as a part of the purchase price, Sanders gave to Ovarids a promissory note (the "Note") secured by a second trust deed on the Property (the "Trust Deed"). (R. 201-202).

2. Sanders made only one payment required under the Note, and Defendants attempted to foreclose the Trust Deed in non-judicial trust deed foreclosure proceedings. (R. 204-205).

3. Such trust deed foreclosure proceedings were enjoined after Sanders commenced this action, and Ovarids then filed a counterclaim to foreclose the Trust Deed in the manner provided by law for the foreclosure of mortgages on real property. (R. 204-205).

4. Sanders raised election of remedies as a defense to Ovarids' counterclaim, and the parties and the lower court, in conference prior to trial, resolved the issue of election of remedies by requiring that if Ovarids prevailed at trial they would not continue with the judicial mortgage foreclosure, but would proceed with their non-judicial trust deed foreclosure procedure. (R. 203).

5. The lower Court concluded that Sanders had not been defrauded by Ovars as alleged in Sanders' Complaint, that Sanders were not entitled to damages or rescission of contract, and the injunction previously issued precluding Ovars from foreclosing their Trust Deed should be terminated. (R. 205-206).

6. The lower court, concluded that Plaintiffs had defaulted in payments to Ovars under the Note and that Ovars were entitled to Judgment for principal and interest and for attorneys' fees and costs attributable to Ovars' counterclaim. (R. 206 and 207).

7. Based upon the foregoing, judgment (the "Judgment") was awarded by the lower court on June 6, 1988:

(a) Denying Sanders the relief requested in their complaint and terminating the injunction theretofore entered which enjoined Ovars from completing their trust deed foreclosure proceedings;

(b) Awarding judgment in favor of Ovars and against Sanders in the amount of \$40,600.50 consisting of principal, interest, costs and attorneys' fees;

(c) Adjudicating that Ovars had a valid lien on the Property and that Ovars were entitled to complete their non-judicial foreclosure of the Trust Deed. (R. 210-214).

8. Sanders' appealed the Judgment (R. 257), and the Utah Court of Appeals affirmed the Judgment by order of affirmance dated March 14, 1990. (R. 269-270).

9. Sanders then petitioned the Utah Supreme Court for a Writ of Certiorari, which petition was denied July 6, 1990. (Addendum 1.).

10. Prior to the Judgment and on February 1, 1988, Mountainwest Savings & Loan ("Mountainwest") began foreclosure proceedings on the Property pursuant to a trust deed recorded prior to the Ovarads' Trust Deed. (R. 297 Exhibit "A", p. 2) and (R. 201-202).

11. Mountainwest held its Trustee's Sale on the Property on September 1, 1988 and received from such foreclosure sale only an amount equal to that owed to Mountainwest, leaving no excess amounts available for junior encumbrances. (R. 297 Exhibit "A", pp. 2-3).

12. On August 7, 1990, Ovarads filed a motion for deficiency judgment in the amount of the Judgment, plus interest and attorneys' fees, (R. 289-297), but withdrew such motion on August 31, 1990. (R. 329-330). The motion was withdrawn because it was determined that in light of Ovarads' security having been exhausted by Mountainwest's trust deed sale, such motion was unnecessary and that Ovarads could proceed to execute directly on the Judgment. (R. 349).

13. Sanders filed a motion for an order clarifying the Judgment and seeking credit against the Judgment for the fair market value of the Property which Sanders would have received if Ovars had conducted a trust deed sale after being awarded the Judgment. (R. 329-336).

14. The trial court entered its order clarifying the Judgment and ordering that:

(a) The Judgment entitled Ovars to proceed with a non-judicial foreclosure sale, but did not require them to do so;

(b) The Judgment is a valid and binding judgment and Ovars are entitled to collect thereon;

(c) The first lienholder [Mountainwest] had already foreclosed on the Property, and any lien Ovars may have had on the Property had been extinguished and Ovars were entitled to maintain a direct action to collect on the Judgment.

(R. 284-286).

#### **SUMMARY OF ARGUMENT**

Ovars, as a junior lienholder, did not violate the one action rule by not bidding at the trust deed foreclosure sale of a senior lienholder or by not holding their own foreclosure sale. Any loss of value of the property is not the fault or responsibility of Ovars, but is the fault of Sanders for not paying the senior lien and thus causing its foreclosure. Limitation on the amount of

deficiencies in trust deed foreclosures is not applicable to this case and does not limit the amount of the Judgment. Ovarads are entitled to collect the full amount of the Judgment, and they are entitled to attorney's fees on appeal.

### ARGUMENT

I. Ovarads' Actions as a Junior Lienholder Have Not Violated Utah's "One Action Rule".

A. Utah's One Action Rule.

The one action rule is found in Utah Code Ann. § 78-37-1 (1953), and provides that "There can be one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate . . . ." While this rule refers to mortgages, it is well established that the provision applies equally to trust deeds. City Consumer's Services, Inc. v. Peters, 815 P.2d 234, 236 (Utah 1991); First Sec. Bank v. Felger, 658 F.Supp. 175, 181 (D. Utah 1987). The rule allows a lender to pursue a borrower on a deficiency claim only after the collateral has been exhausted through foreclosure by the lender or by a senior lienholder. Felger at 181; Lockhart v. Equitable Realty Co., 657 P.2d 1333, 1334 (Utah 1983).

The purpose of the one action rule, often referred to as the security first rule, is two-fold. First, it is "to protect the

borrower against a multiplicity of actions when the separate actions are so closely connected that normally they can and should be decided in one proceeding. The second purpose is to compel a lienholder who has been given a lien on land to exhaust his security before attempting to reach any unmortgaged property to satisfy his lien. G. Nelson & D. Whitman, Real Estate Finance Law, § 8.2 (2d ed. 1985). The lienholder cannot disregard his security nor may there be a waiver of the security through a provision in the mortgage or trust deed.

B. The Exception to the One Action Rule.

The consequences of the one action rule can be avoided if lenders, such as Ovarids, satisfy the conditions for the exception to the rule. That is, a lender can exercise his right to recover on the debt that was once secured by a lien on real property if the security has been lost through no fault of the lender. The court in Lockhart stated that the "Mortgagee must show the security has been foreclosed and sold or otherwise lost by no fault of the mortgagee . . . ." Lockhart at 1336. See also, City Consumer Services, Inc. v. Peters, 815 P.2d 234, 236 (1991); Cache Valley Banking Company v. Logan, 56 P.2d 1046, 1049 (Utah 1936). .

Appellants claim that Ovarids' were required by the one action rule to protect their security by purchasing the Property at

Mountainwest's foreclosure sale, or by holding their own foreclosure sale.

The issue of whether a junior lienholder is at fault by not bidding at a senior lienholder's foreclosure sale arose in Felger. Judge Winder ruled in favor of the non-bidding junior lienholder bank. As a matter of law, "the bank's action in allowing the second lien to be extinguished by not bidding at the sale of the first priority trust deed was not negligent or blameworthy." Id. at 182.

This Court more recently in Peters held that a junior lienholder is not barred by the one action rule from proceeding against the debtor after the junior lienholder failed to bid at a senior lienholder's trust deed sale. Peters, dealt with the same issue as presented in the instant case. The Court reasoned that the effect of the one action rule is to regulate the procedure of recovery by a secured creditor, but not to deny the right to recover. Peters at 237. Further, the court stated that a junior lienholder's failure to participate in a senior lienholder's foreclosure is not blameworthy. "It was no fault of the junior lienholder that the security for its note was lost. The fault is rather with the debtor for failing to pay the first mortgage and thus causing it to be foreclosed." Id. at 236, quoting Logan at 1049.



Utah's one action rule is virtually identical to California's version of the one action rule. Peters at 236. In interpreting California's One Action Rule, Justice Traynor in Roseleaf Corp. v. Chierighino, 378 P.2d 97 (Cal. Sup. Ct. 1963), emphasized that once a senior lienholder had exhausted the security, a junior lienholder was free to execute and enforce his right to recover. Supportive reasoning given by Justice Traynor, and as quoted by this court in Peters, involves comparing the respective positions of a junior and senior lienholder:

The position of a junior lienor whose security is lost through a senior sale is different from that of a selling senior lienor. A selling senior can make certain that the security brings an amount equal to his claim against the debtor or the fair market value, whichever is less, simply by bidding in for that amount. **He need not invest any additional funds.** The junior lienor, however, is in no better position to protect himself than is the debtor. Either would have to invest additional funds to redeem or buy in at the sale. Equitable considerations favor placing this burden on the debtor, not only because it is his fault that provokes the senior sale, but also because he has the benefit of his bargain with the junior lienor who, unlike the selling senior, might otherwise end up with nothing.

Roseleaf at 100, cited by Peters at 236-237. (Emphasis added in Peters).

Thus, Ovarde, as a junior lienholder, are not required to go through a fruitless procedure. They decided not to hold their own foreclosure sale or to bid at the first lienholder's foreclosure

sale. There was no economic justification for doing so. This is sufficient reason for their action or inaction

II. Ovards Were Not Required to Hold Their Own Foreclosure Sale.

Sanders' argues that the Judgment required Ovards to immediately conduct their own foreclosure sale after entry of the Judgment and notwithstanding that Mountainwest had already commenced its non-judicial foreclosure proceedings. The basis for Sanders' position is paragraph 6. of the Judgment, which states that Ovards were entitled to complete their non-judicial foreclosure of the Trust Deed and providing for a procedure by which Ovards would seek a deficiency if there was a deficiency after such a sale. (R. 213, Addendum 2.).

While the Judgment stated Ovards were entitled to complete foreclosure of the Trust Deed it did not state that they were required to do so, and the basis for this provision in the Judgment was not that the lower court was ordering Ovards to complete their foreclosure. Rather, the reason for such provision is found in the lower court's finding of fact number 11. (R. 203, Addendum 3.). In their reply to Ovards' counterclaim seeking to foreclose the Trust Deed as a mortgage, Sanders' asserted an affirmative defense of election of remedies (R. 81). Evidently, Sanders were asserting that Ovards had elected to foreclose the Trust Deed through the

non-judicial foreclosure proceeding and therefore could not later seek to foreclose the Trust Deed as a mortgage notwithstanding that Sanders had sought and obtained an injunction against Ovars proceeding with the non-judicial foreclosure proceeding.

This issue of whether Ovars, if successful at trial, would proceed with non-judicial or judicial foreclosure of the Trust Deed was resolved by the court and the parties prior to trial as noted in the above referenced finding of fact. As in the Judgment, the court did not in the finding of fact require Ovars to conduct a foreclosure sale. The court simply noted in finding of fact number 11 that this issue had been raised by Sanders and that it would be resolved by Ovars proceeding with the remedy of a non-judicial foreclosure sale if they were successful at trial. The court later so clarified the Judgment. (R. 284-286, Addendum 4.).

By the time Ovars were successful at trial and had obtained the Judgment, Mountainwest had already commenced its non-judicial foreclosure proceeding and completed it just under three months later. Based upon Mountainwest's pending and ongoing foreclosure proceeding, Ovars determined not to conduct their own foreclosure sale prior to Mountainwest's foreclosure sale. Because Ovars were in a position junior to Mountainwest, any foreclosure sale conducted by Ovars and any purchase at that sale would have been inferior and subject to Mountainwest's position and sale, whether

Ovards' sale occurred prior to or subsequent to Mountainwest's sale.

III. Ovards are entitled to Collect the Full Amount of the Judgment.

A. Equity Does Not Bar Ovards From Pursuing Collection of the Full Amount of the Judgment.

Sanders' argues that in failing to protect their interest in the Property prior to Mountainwest's foreclosure sale, Ovards caused Sanders to lose a claimed equity amount in the property over and above Mountainwest's lien and that the equities involved require that the Judgment should be reduced by that amount.

Even if there was equity in the property over and above Mountainwest's lien, such exact situation existed in Peters, where the property in that case was appraised at \$70,000, the first lienholder was owed approximately \$50,000 and the second lienholder was owed approximately \$17,000. Peters at 235. It could thus have been projected that the second lienholder could have purchased at the first lienholder's sale by paying the approximately \$50,000 to the first lienholder, and the second lienholder could then have made itself whole on the \$17,000 owed to it out of the \$20,000 equity remaining after payment to the first lienholder. Nevertheless, this Court did not require such action by a junior lienholder.

Furthermore, this Court has held that it is not the fault of a junior lienholder that property securing such lien is lost through foreclosure by a first lienholder.

It was no fault of the Plaintiff that the security for its note was lost. The fault is rather with Defendant for failing to pay the first mortgage and thus causing it to be foreclosed.

Logan, supra at 1049. Also, as Justice Traynor stated:

A junior lienholder is in no better position to protect himself than is a debtor. He either would have to invest additional funds to buy or protect the property. Equitable considerations favor placing this burden on the debtor, not only because it is his fault that provokes the senior sale, but also because he has the benefit of his bargain with the junior lienor who, unlike the selling lienor, might otherwise end up with nothing.

Roseleaf, supra at 100.

Therefore, the burden of protecting property subject to multiple liens falls upon the debtor, not the creditor. The debtor not only causes loss from foreclosure and sale by the first lienholder by not having paid the first lien, but also has received the benefit of a second lien by receipt of the consideration for which the second lien was given. Thus, contrary to Sanders' position, it is they who were required to have protected the Property by prior redemption or by bidding at Mountainwest's

foreclosure sale, and they cannot complain that Ovarads did not do so.

B. Utah Code Ann. § 57-1-32 (1953) Does Not Require Limitation of the Amount of the Judgment.

Without citing Utah Code Ann. 57-1-31 (1953), Sanders' claim and argue for its benefit. This statute limits any deficiency after a trust deed sale to the difference between the total amount owed to the creditor and the fair market value of the property sold. Sanders' argue that the Judgment should be reduced by the amount which fair market value of the Property exceeded the amount of Mountainwest's lien.

This Court held in Peters that § 57-1-31 is not applicable to a junior lienholder when the security has been lost through a prior foreclosure by a senior lienholder.

IV. Ovarads are Entitled to Attorney's Fees on Appeal.

The trial court ruled that Ovarads were entitled to and it awarded them contractual attorney's fees against Sanders for their default under the Note and in connection with Ovarads' counterclaim. The Judgment, including attorney's fees, has been affirmed by the Utah Court of Appeals. This appeal involves rights asserted by Ovarads in the counterclaim and that portion of the Judgment awarded on the counterclaim.

The general rule is that when a party who received attorney's fees in the trial court prevails on appeal, that party is also entitled to attorney's fees on appeal. Utah Dept. of Social Services v. Adams, 806 P.2d 1193, 1197 (Utah 1991). Contractual provisions for payment of attorney's fees include fees incurred by the prevailing party on appeal. Management Services Corp. v. Development Associates, 617 P.2d 406, 409 (Utah 1980).

Ovards should be awarded attorney's fees, and remand should be made to the trial court to determine the amount of such fees.

#### CONCLUSION

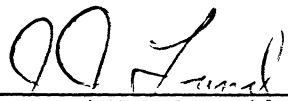
Ovards are entitled to collect the Judgment, and it is not required to be reduced by the amount, if any, by which the value of the Property exceeded the amount of Mountainwest's lien.

Ovards are entitled to attorney's fees on appeal.

DATED December 30, 1991.

Respectfully submitted,


CROWTHER & REED

By   
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James J. Lund  
Attorneys for Defendants/  
Appellees

CERTIFICATE OF SERVICE

The foregoing Brief of Appellees was served upon Plaintiffs-  
/Appellants by mailing, postage prepaid, four true and correct  
copies thereof to Appellant's counsel, Frederick N. Green and July  
V. Lund, at 528 Newhouse Building, 10 Exchange Place, Salt Lake  
City, Utah 84111 this 30 day of December, 1991.

CROWTHER & REED

By   
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Attorneys for Defendants/  
Appellees



## ADDENDUM 1

STATE OF UTAH  
SALT LAKE CITY, UTAH

July 6, 1990

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Suite 300  
Salt Lake City, Utah 84111

Joseph D. Sanders and  
Cheryl M. Sanders,  
Plaintiffs and Petitioners,

v.

No. 900169

Martin S. Ovard, Reva S.  
Ovard, Ben F. Ovard, Helen T.  
Ovard and Jax Hayes Pettey,  
Defendants and Respondents,

v.

Joseph D. Sanders, Cheryl M.  
Sanders, Utah State Tax  
Commission, Salt Lake County,  
and Insurance Company of North  
America,  
Counterdefendants.

This day Petition for Writ of Certiorari having been heretofore considered, and the Court being sufficiently advised in the premises, it is ordered that the same be, and hereby is, denied.

Geoffrey J. Butler, Clerk

## ADDENDUM 2

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Salt Lake County, Utah

JUN 6 1988

H. Bruce Lindsey, Clerk 3rd Dist. Court  
By Patricia Snow  
Deputy Clerk

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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.

*Jane*  
DATED ~~May~~ *June* 6, 1988.

BY THE COURT:

*Frank G. Noel*  
\_\_\_\_\_  
Frank G. Noel  
District Court Judge

APPROVED AS TO FORM:

SUITTER, AXLAND, ARMSTRONG  
& HANSON

By *Gary R. Hanson*  
\_\_\_\_\_

ATTEST  
H. DIXON HINDLEY

By *Pat Jones*  
\_\_\_\_\_



EXHIBIT "A"

Beginning at a point 716.85 feet North  $0^{\circ}23'08''$  East from the East quarter corner of Section 6, Township 4 South, Range 1 East, Salt Lake Base and Meridian, and running thence South  $76^{\circ}11'02''$  West 186.90 feet; thence North  $0^{\circ}23'08''$  East 202.5 feet; thence North  $76^{\circ}11'02''$  East 186.90 feet; thence South  $0^{\circ}23'08''$  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  $89^{\circ}39'27''$  West from the East quarter corner of Section 6, Township 4 South, Range 1 East, Salt Lake Base and Meridian and runs thence North  $0^{\circ}23'08''$  East 311.30 feet; thence North  $16^{\circ}51'02''$  East 332.85 feet; thence North  $0^{\circ}23'08''$  East 200.88 feet.

ADDENDUM 3

FILED IN CLERK'S OFFICE  
Salt Lake County, Utah

JUN 6 1988

Thomas N. Crowther - #0773  
PARSONS & CROWTHER  
Attorneys for Defendants  
455 South Third East, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 531-9865

H. Director  
By Pat - K. R. C.

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. )

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

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, the Court hereby makes and enters the following Findings of Fact and Conclusions of Law.

### FINDINGS OF FACT

1. On or about September 18, 1982, Plaintiffs and Defendants entered into an Earnest Money Receipt and Offer to Purchase (the "Agreement"), pursuant to which Defendants agreed to sell and Plaintiffs agree to purchase certain real property (the "Property") described as one acre of land adjacent to and directly north of Joseph W. Sanders' property at 13735 South Shadow Mountain (655 East), Draper, Utah. The purchase price to be paid by Plaintiffs to Defendants for the Property was \$26,000.

2. In accordance with the Agreement and pursuant to a Warranty Deed and a Quit Claim Deed, Defendants conveyed to Plaintiffs the Property which is located in Salt Lake County, State of Utah, and more particularly described in Exhibits "A" and "B" attached hereto.

3. In connection with the Agreement and the giving of the Warranty Deed and Quit Claim Deed by Defendants to Plaintiffs, Plaintiffs on or about November 8, 1982, made and delivered to Defendants, Plaintiffs' Trust Deed Note in the amount of \$25,900, with interest at 15% per annum, with interest accrued at January 15, 1984, being payable on that date, and with the \$25,900 principal, plus then accrued interest, being payable on January 15, 1985 (the "Note").

4. To secure payment of the indebtedness evidenced by the Note, Plaintiffs on or about November 8, 1982, executed and

delivered to Defendants a Trust Deed recorded November 8, 1982, in book 5418 at page 1755 as entry no. 3727947 (the "Trust Deed") covering other property located in Salt Lake County, State of Utah and described in Exhibit "C" attached hereto (the "Trust Deed Property").

5. Prior to closing of the sale between Defendants and Plaintiffs, Defendants had in their possession a copy of a subdivision map showing the Property as a lot in a subdivision.

6. Defendant Sam Ovard knew that Plaintiffs home adjacent to the Property had been built by authority of a variance placing the home on a two acre parcel, one acre of which was the Property. Plaintiffs did not purchase their home from any of the Defendants.

7. No Defendant nor agent of any of the Defendants disclosed to Plaintiffs prior to sale of the Property to Plaintiffs that such subdivision map was or was not approved nor that the Sanders' home was or was not built pursuant to a variance, and Plaintiffs did not ask for or request any such information.

8. Plaintiffs have made only one payment to Defendants under the Note, which payment was an interest payment in the amount of \$5,000 made on or about March 1, 1984.

9. Defendants have heretofore attempted to foreclose the Trust Deed in a non-judicial trust deed foreclosure, which

foreclosure, pursuant to commencement of this action by Plaintiffs, has been enjoined at Plaintiffs' request.

10. Defendants filed a Counterclaim to foreclose the Trust Deed in the manner provided by law for the foreclosure of mortgages on real property.

11. 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.

12. The Note provides that Plaintiffs will pay costs and expenses, including reasonable attorney's fees, incurred in collection of the Note.

13. Defendants have incurred costs and expenses, including attorney's fees, in connection with this action and collection on the Note.

14. Plaintiffs claim that Defendants and/or their agents misrepresented facts and failed to state facts concerning whether the Property was a "building lot", thereby connoting that the Property was an "approved" building lot.

#### CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court hereby makes and enters the following Conclusions of Law:

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

2. Plaintiffs have defaulted and are in default in payment to Defendants of amounts required to be paid under the Note.

3. As a result of such default, Defendants are entitled to judgment against Plaintiffs, jointly and severally, in the amount of \$40,600.50, which consists of \$25,900 principal, interest in the amount of \$14,285.54 accrued and unpaid to and including October 26, 1987 (as the trial date to which interest was previously calculated) and \$10.64 per diem for each day thereafter to and including December 4, 1988, the date of the Court's decision in this matter.



4. Defendants are not entitled to attorney's fees incurred in defense of Plaintiffs' complaint and are entitled only to attorney's fees attributable to Defendants' counterclaim. Defendants have incurred and should be awarded attorney's fees in the amount of \$2,000 in connection with the attributable to their counterclaim and in the amount of \$508.51 as costs incurred by Defendants in connection with the counterclaim.

5. Defendants are entitled to judgment for interest at the statutory rate on the monetary amounts of their judgment.

6. The Trust Deed is a lien upon the Trust Deed Property securing amounts owed by Plaintiffs to Defendants as reflected in the amounts recited in the foregoing paragraph.

7. Statements and omissions relied upon by Plaintiffs in support of their claims were not fraudulent nor did they constitute negligent misrepresentations to Plaintiffs.

8. Even if the statements and omissions relied upon by Plaintiffs were deemed to be fraudulent or negligent misrepresentations, there was no justifiable reliance by Plaintiffs upon those statements.

9. Plaintiffs failed to exercise due diligence at the time of purchase to determine the status of the Property.

10. Due to the location of the Property, the location and placement of the home in front of the Property, the road leading from the main paved road ending in what appears to be somewhat of

a cul-de-sac, and under the totality of circumstances, a reasonable person should have been alerted that there may be access problems associated with the Property that should have been investigated.

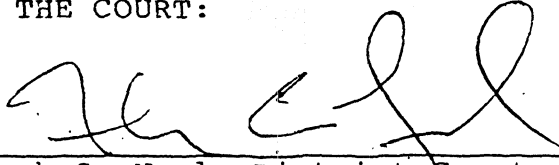
11. Plaintiffs are not entitled to damages or rescission under any of their causes of action.

12. The injunction heretofore entered by the Court enjoining Defendants from pursuing any foreclosure process under the Trust Deed should be terminated, and judgment should be entered awarding Defendants the monetary amounts above set forth and providing for completion of Defendants' foreclosure of the Trust Deed under the conditions set forth in Finding of Fact no.

11.

*June*  
DATED *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  
Clerk

By 

Deputy Clerk

EXHIBIT "A"

Beginning 919.35 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 221.90 feet, thence North 0°23'08" East 163.44 feet, thence North 57°28'51" East 137.16 feet, thence North 62°46'20" East 112.81 feet, thence South 0°23'08" West 235.80 feet to the point of beginning. Together with a right-of-way 35 feet wide connecting to 13800 South Street.

Subject to that certain Uniform Real Estate contract dated March 28, 1974, in which LAWRENCE T. FRANTZ and ELSIE FRANTZ, his wife, are sellers and DAVID H. DAY and SUSAN B. DAY are buyers (effects only approximately the west 25 feet of the subject property). Grantors herein do not warrant fee title in grantees to said portion at this time, but do hereby convey any and all interest they may have in the same.

Subject to two trust deeds of even date herewith in the amounts of \$910.00 and \$810.00, which Seller warrants will be reconveyed upon receipt of such sums by Grantor from Grantee.

EXHIBIT "B"

Beginning at a point 716.85 feet North 0°23'08" East and 186.90 feet South 76°11'02" West 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 35 feet; thence North 0°23'08" East 202.5 feet; thence North 76°11'02" East 35 feet; thence South 0°23'08" West 202.5 feet to the point of beginning.

Together with and subject to the following described 35 foot wide right of way:

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.

EXHIBIT "C"

Beginning at a point 716.85 feet North  $0^{\circ}23'08''$  East from the East quarter corner of Section 6, Township 4 South, Range 1 East, Salt Lake Base and Meridian, and running thence South  $76^{\circ}11'02''$  West 186.90 feet; thence North  $0^{\circ}23'08''$  East 202.5 feet; thence North  $76^{\circ}11'02''$  East 186.90 feet; thence South  $0^{\circ}23'08''$  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  $89^{\circ}39'27''$  West from the East quarter corner of Section 6, Township 4 South, Range 1 East, Salt Lake Base and Meridian and runs thence North  $0^{\circ}23'08''$  East 311.30 feet; thence North  $16^{\circ}51'02''$  East 332.85 feet; thence North  $0^{\circ}23'08''$  East 200.88 feet.

**ADDENDUM 4**

FILED BY: J. H. H. H.  
Third Judicial District

MAY 31 1991

By Bruce K. Miller  
B. K. Miller

Thomas N. Crowther - 0773  
CROWTHER & REED  
Attorneys for Defendants  
455 South 300 East, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 531-9865

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

JOSEPH D. SANDERS and  
CHERYL M. SANDERS,

Plaintiffs,

VS.

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

Defendants.

ORDER

Civil No. 850904313 CV

Plaintiffs' Motion for Order Clarifying Judgment came on for hearing before the Honorable Frank G. Noel, Judge of the above entitled Court, on January 18, 1991, at 9:00 a.m. with Frederick N. Green appearing as counsel for Plaintiffs and with Thomas N. Crowther appearing as counsel for Defendants Ovard. The Court having considered memoranda submitted in connection with such Motion, having heard oral argument, having taken the matter under advisement and being fully advised,

IT IS HEREBY ORDERED and the June 6, 1988 Judgment (the "Judgment") heretofore entered by this Court is clarified as set forth below:

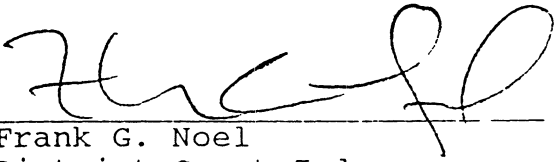
1. The Judgment entitled Defendants Ovard to proceed on a non-judicial foreclosure sale under their trust deed but did not require them to do so.

2. The Judgment is a valid and binding judgment and Defendants Ovard are entitled to collect thereon.

3. The first lienholder in this matter has already foreclosed on the property which was subject to the trust deed of Defendants Ovard, and any lien said Defendants may have had on such property has been extinguished, and Defendants Ovard are therefore entitled to maintain a direct action to collect on their note secured by their trust deed, or more accurately stated in terms of this case are entitled to collect on the Judgment they have already obtained on such promissory note.

DATED ~~April~~ May 31, 1991.

BY THE COURT

By   
Frank G. Noel  
District Court Judge



CERTIFICATE OF SERVICE

The foregoing Order was served upon Plaintiffs by causing a copy of the same to be mailed, postage prepaid, to their attorney at the following address this 2nd day of March, 1991.

Frederick N. Green  
528 Newhouse Building  
10 Exchange Place  
Salt Lake City, Utah 84111

  
\_\_\_\_\_  
Thomas N. Crowther