

2002

Five F L.L.C v. Heritage Savings : Reply Brief

Utah Court of Appeals

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Brian W. Steffensen; Steffensen Law Office; attorneys for appellant.

James S. Jardine; Ray Quinney & Nebeker; George W. Pratt; Jones Waldo Holbrook & McDonough; Attorneys for Appellee; Daniel W. Anderson; Fabian & Clendenin; Attorneys for Amicus Curiae, Utah Bankers Association .

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IN THE UTAH COURT OF APPEALS

FIVE F, LLC,

Plaintiff/Appellant,

vs.

HERITAGE SAVINGS BANK

Defendant/Appellee.

APPELLANT'S REPLY BRIEF

Case Nos. 20020088 CA

Appeal from the Fifth District Court,
Washington County, State of Utah
Honorable J. Philip Eves
Argument Priority Classification: 15

James S. Jardine
Ray Quinney & Nebeker
P.O. Box 45385
Salt Lake City, Utah
Attorneys for Defendant/Appellee

George W. Pratt
Jones Waldo Holbrook & McDonough
170 South Main Street #1500
Salt Lake City, Utah 84101
Attorneys for Defendant/Appellee

Daniel W. Anderson
Fabian & Clendenin
215 South State Street, 12th Floor
Salt Lake City, Utah 84111
Attorneys for Amicus Curiae
Utah Bankers Association

Brian W. Steffensen
Steffensen Law Office
2159 South 700 East, Suite 100
Salt Lake City, Utah 84106
Attorneys for Plaintiff/Appellant

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James S. Jardine
Ray Quinney & Nebeker
P.O. Box 45385
Salt Lake City, Utah
Attorneys for Defendant/Appellee

Brian W. Steffensen
Steffensen Law Office
2159 South 700 East, Suite 100
Salt Lake City, Utah 84106
Attorneys for Plaintiff/Appellant

George W. Pratt
Jones Waldo Holbrook & McDonough
170 South Main Street #1500
Salt Lake City, Utah 84101
Attorneys for Defendant/Appellee

Daniel W. Anderson
Fabian & Clendenin
215 South State Street, 12th Floor
Salt Lake City, Utah 84111
Attorneys for Amicus Curiae
Utah Bankers Association

**Heritage and the Utah Banker's Association Essentially Ignore
Judge Eves' Express and Unappealed Finding that
Heritage Owed Five F a Fiduciary Duty**

Heritage tries to argue that it did not owe Five F a fiduciary duty. That argument must be rejected because Judge Eves expressly found that Heritage did owe Five F a fiduciary duty. This ruling was based in part on the fact that Heritage chose to be not just the Beneficiary under the Trust Deeds in question herein, but also to act as the Trustee. This ruling is not on appeal herein and is the law of this case. Heritage owed Five F a fiduciary duty.

The Utah Banker's Association's brief never even acknowledges that Judge Eves found that Heritage owed a fiduciary duty to Five F, and does not address whether the existence of that fiduciary duty imposed higher duties upon Five F than Heritage would otherwise have under the contracts and Utah trust deed law in the absence of such a fiduciary duty. As such, the Utah Banker's Association's brief offers no assistance whatsoever with respect to the fundamental issues raised in this appeal and essentially should be ignored.

**Heritage Mischaracterizes Five F's Arguments by Stating that Heritage
Believes That a Lender Always Has a Duty to "Bid Fair Market Value" at a
Trustee's Sale**

Heritage and the Utah Banker's Association both mischaracterize Five F's position on appeal. They say that Five F claims that a Lender always has a duty to

“bid fair market value” at a trustee’s sale. This is not Five F’s position. It was not necessarily Heritage’s failure to “bid fair market value” when it foreclosed on the 10.44 acres. It was what Heritage did after it foreclosed upon the 10.44 acres, given its fiduciary duty and its knowledge of the value of that 10.44 acres, that is the gravamen of Five F’s claims herein.

The facts of this case are unique. This case involves:

(a) a Lender who also caused itself to be named the Trustee under the trust deeds,

(b) a Lender who was expressly found by the Court to owe Five F the highest Fiduciary Duty,

(c) a Lender who had three appraisals prior to the trust deed foreclosures which gave it absolute certainty that the first piece of collateral (the 10.44 acres) had more than enough value to fully pay off Five F’s debt,

(d) a Lender who submitted a credit bid to itself as Trustee and acquired the first piece of collateral pursuant thereto (the 10.44 acres) which the Lender, as Trustee, KNEW fully satisfied the borrower’s debt,

(e) but which Lender refused to stop and accept the foreclosed upon 10.44 acres as satisfaction of Five F’s debt, but rather proceeded to conduct additional foreclosure efforts – all while knowing full well that it had already been paid in

full.

Five F argues that under these unique and undisputed facts:

1. Heritage's fiduciary duty precluded it from *proceeding to foreclose upon the second piece of collateral* – the \$300,000 four-plex – once it had obtained title via the first foreclosure on more than enough collateral to satisfy the entire debt.

2. It was a violation of Heritage's obligation to deal fairly and in good faith with Five F *to proceed to foreclose upon the second piece of collateral* –the \$300,000 four-plex, once Heritage knew that it had been paid in full via the foreclosure on the first piece of collateral (the \$1.68 to \$1.8 million 10.44 acres).

3. Heritage was unjustly enriched through its actions.

Heritage's Fiduciary Duty Imposed Upon It the Obligation Not to Proceed to Foreclose Upon the \$300,000 Four-Plex Once it Knew that the 10.44 Acres More than Satisfied Five F's Debt

A Fiduciary Duty is “a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person.” (Blacks Law Dictionary). Heritage and the Utah Banker's Association are good at repeating their mantra “but we had the right under the express language of the contract and the law to do what we did,” over and over again. But a Fiduciary does not have the right to do what a non fiduciary would otherwise have the right to do. A fiduciary under certain circumstances has an obligation ^{to refrain} from doing what it

otherwise could claim that it should be allowed to do, if that would be against the interests of the entity to which it owes the fiduciary duty. Fiduciaries have “higher obligations.” When Heritage knew that the 10.44 acres had paid it in full, the fiduciary duty which it owed to Five F precluded it from proceeding to foreclose upon the second piece of collateral – the \$300,000 four-plex. To hold otherwise would absolutely eviscerate fiduciary duty law.

Heritage’s Obligation to Deal with Five F Fairly and in Good Faith Also Imposed Upon Heritage the Obligation Not to Proceed to Foreclose Upon the \$300,000 Four-Plex Once it Knew that the 10.44 Acres More than Satisfied Five F’s Debt

Heritage had a reasonable expectation to be paid the monies that Five F owed – not more. Five F had a reasonable expectation that it would have to pay its debt owed to Heritage, but not more. Once Heritage knew that it had ~~been~~ essentially been paid in full via the foreclosure upon the 10.44 acres, it was bad faith and unfair for Heritage to proceed to also foreclose upon Five F’s other piece of collateral – the \$300,000 four-plex.

Five F Argued in its Attempt to Get an Order Restraining Heritage from Proceeding with the Foreclosure on the \$300,000 Four-Plex that Said Foreclosure was Tantamount to an Illegal Deficiency Judgment

Heritage incorrectly argues that Five F did not preserve for appeal its argument that the foreclosure on the second piece of collateral – the \$300,000

four-plex – was tantamount to obtaining an illegal deficiency judgment. Five F made just this argument in connection with its Motion for Temporary Restraining Order, which is the very first pleading in the record in this matter. R. 1-44. Five F knows that Heritage did not literally obtain a deficiency judgment against Five F. But, if the second piece of collateral had not been on a trust deed, Heritage would have been barred by Utah law from getting a deficiency judgment against Five F and then from executing on the four-plex. Why? Because Utah law does not allow deficiency judgments when the collateral already foreclosed upon has a fair market value in excess of the borrower's debt.

There are sound policies and clear principles of equity and fairness which underlie these statutory anti-deficiency judgment rules. These same policies and principles of equity and fairness should be followed by this Court in finding that fiduciary duties and/or duties of good faith and fair dealing should operate to achieve the same result. Heritage should not be allowed to foreclose upon and keep the value of the \$300,000 four-plex once it had been paid in full through the foreclosure upon the 10.44 acres.

Five F Has a Viable Unjust Enrichment Claim

Unless or until this or the trial court rules that there is another, legal remedy available to Five F, then Five F's Unjust Enrichment Claim remains viable as an

alternative theory of relief. Heritage correctly notes that Five F offered to elect its remedies, and did state that if the trial court allowed its breach of the implied covenant of good faith and fair dealing claim to go to the jury, Five F would relinquish its Unjust Enrichment Claim. Since Judge Eves never submitted the Good Faith and Fair Dealing claim to the jury, there has yet to be an election of remedies.

If This Court Rules in Favor of Five F's Appeal, The Banking Industry as we Know it Will Not Cease to Exist as Heritage and the Utah Banker's Association Shrilly Claim – The Sky Will Not Fall

Both Heritage and the Utah Banker's Association argue that the mortgage lending business as we know it will some how cease to exist if this Court rules in Five F's favor in this appeal. This is simply not true. The Sky will not Fall if Five F's appeal is granted. This case involves a unique factual situation. If Lenders do not act in the dual role of beneficiary and trustee, they can almost entirely avoid the entanglements which have arisen in this case.

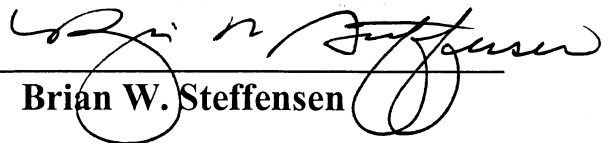
SUMMARY OF RELIEF REQUESTED

Appellant Five F requests that this Court reverse Judge Eves' granting of a directed verdict in favor of Heritage, and direct the trial court on remand to enter judgment finding that Heritage's admitted actions did in fact violate its fiduciary

duties and/or the covenant of good faith and fair dealing, and grant judgment in favor of Five F and against Heritage for not less than the \$300,000 lost value of the unfairly foreclosed upon four-plex, plus interest thereon from the date of foreclosure both before and after judgment, and for costs of suit and attorney's fees, and that the issues of whether additional compensatory and punitive damages should be awarded be tried before another jury with all of Judge Eves' other rulings on the law in place.

DATED this 2nd day of June, 2003.

Steffensen ❖ Law ❖ Office

By 
Brian W. Steffensen

CERTIFICATE OF SERVICE

I hereby certify that I mailed two copies of the foregoing Appellant's Reply Brief on this day of June 2, 2003, via the United States Postal Service, postage prepaid, to:

James Jardine
Brent Wride
Elaina Maragakis
Ray, Quinney & Nebeker
79 South Main Street, Suite 500
P.O. Box 45385
Salt Lake City, Utah 84145-0385

George W. Pratt
Jones Waldo Holbrook & McDonough
170 South Main Street, #1500
Salt Lake City, Utah 84101

Daniel W. Anderson
Fabian & Clendenin
215 South State Street, 12th Floor
Salt Lake City, Utah 84111

