

1967

Western Mortgage Loan Corporation v.
Cottonwood Construction Company, a
Corporation, et al. : Appellants' Petition and Brief
For Rehearing

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IN THE SUPREME COURT OF THE STATE OF UTAH

WESTERN MORTGAGE LOAN
CORPORATION, a corporation,

Plaintiff-Respondent,

vs.

COTTONWOOD CONSTRUCTION
COMPANY, a corporation, et al.,

Defendants,

* * * *

OSCAR E. CHYTRAUS COMPANY,
INC., a corporation, GIBBONS & REED
CONCRETE PRODUCTS COMPANY,
a corporation, RICHARD P. GARRICK,
BOISE CASCADE CORPORATION,
a corporation,

Defendants-Appellants.

FILED
MAR 17 1967

Clerk, Supreme Court, Utah
Case No.

10516

APPELLANTS' PETITION AND BRIEF FOR REHEARING

Intermediate Appeal from Interlocutory Pretrial Rulings
of the 3rd District Court for Salt Lake County,
Honorable Aldon J. Anderson, Judge

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vs.

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COMPANY, a corporation, et al.,
Defendants,

* * * *

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INC., a corporation, GIBBONS &
REED CONCRETE PRODUCTS
COMPANY, a corporation, RICHARD
P. GARRICK, BOISE CASCADE
CORPORATION, d/b/a BESTWAY
BUILDING CENTER, a corporation,
Defendants-Appellants.

Case No.
10516

APPELLANTS' PETITION FOR REHEARING

Appellants respectfully petition this Court for a rehearing in this matter on the grounds that the Court erred in its opinion filed on February 27, 1967, and as reasons for such requested rehearing submit the following brief.

STATEMENT OF FACTS

Following are the facts essential to the questions raised by this petition for rehearing:

The respondent, Western Mortgage Loan Corporation, and Cottonwood Construction Company entered into a loan transaction for the purpose of building a house on the lot in question. The agreement consisted of several documents. In addition to a conventional note and mortgage, these related documents embodying the agreement of the parties included a "Building and Loan Agreement and Assignment of Account" and another document entitled "Release, Indemnity and Schedule A."

The "Release, Indemnity and Schedule A" provided "that such disbursement of funds are to be made wholly within the discretion of the" lender, and included another provision that changes "as to amounts and time of disbursements may be made at any time by the [lender] as it may, in its sole discretion, determine."

The "Building and Loan Agreement and Assignment Account" included a provision in paragraph 10 thereof which upon specified default of the borrower empowered the lender at its option to be released from all obligations under the agreement, and allowed it, again at its option, to take over the project, complete it and charge to the borrower the funds so expended.

Part way through the building of the house the borrower defaulted while still owing the lienor-appellants for materials furnished for the house. The lender elected to complete the house, did so, charged its expenditures to the borrower and brought this foreclosure suit.

This Court granted interlocutory appeal from pre-trial rulings of the trial court to the effect that the construction financing transaction provided for obligatary advances and that certain work constituted the "commencement to do work . . ." within the meaning of the mechanics' lien law.

By its opinion filed February 27, 1967, this Court upheld the rulings of the trial court, basing its decision in material part upon the view that the construction loan agreement here was the same as the agreement in *Utah Savings & Loan Association v. Mecham*, 12 Utah 2d 335, 336 P. 2d 598 (1961), and upon language in the mortgage providing that the mortgage "shall also secure additional loans hereafter made. . . ."

APPELLANTS' CONTENTIONS

There are significant differences between the agreement in the instant case and *Utah Savings & Loan Association v. Mecham*, differences which render the two cases exactly opposite, differences apparently not adequately called to the Court's attention in the first instance.

In addition, appellants respectfully submit that the Court's reliance upon the "shall also secure additional loans hereafter made" provision induced error because that particular provision is not pertinent to the issues on appeal, and was not raised by or relied upon by either appellants or respondents.

ARGUMENT

POINT I.

UTAH SAVINGS & LOAN ASSOCIATION V. MECHAM IS NOT CONTROLLING FOR THE REASON THAT IN THAT CASE THE OPERATIVE DOCUMENTS DID NOT INCLUDE A PROVISION RENDERING THE ADVANCES VOLITIONAL OR NON-OBLIGATORY WHEREAS IN THE INSTANT CASE THE OPERATIVE DOCUMENTS DO CONTAIN SUCH PROVISIONS.

The transaction in the instant case is not similar to the transaction in *Utah Savings & Loan Association v. Mecham*, 12 Utah 2d 335, 366 P. 2d 598 (1961), for there, according to the opinion and the briefs, there were but a conventional note and mortgage to show the entire agreements of the parties. On these facts this Court found an implied obligation to make advances up to the amount of the note.

In the instant case there are express terms of the agreement between the parties which negative any such implied obligation. These terms, possibly inadvertently overlooked by the majority opinion, are contained in the "Release, Indemnity and Schedule A" document and in Paragraph 10 of the "Construction Loan Agreement and Assignment of Account" document, all of which are integral parts of the loan agreement. (R. 151, Exhibits W-2; Exhibits G and H to the Petition for Interlocutory Appeal.)

The complexity, factual and legal, of this case and the large amount of small print involved may have ob-

scured the above provisions which are the ones which form the issues involved in paragraph 1 of the trial courts pretrial order.

The significant difference between the two cases is noted in the dissenting opinion and is patent upon careful examination of the briefs and opinion in *Utah Savings & Loan Association v. Mecham*, *supra*.

In view of the language in the instant loan documents rendering wholly discretionary with the lender the piecemeal advances of funds purportedly already loaned, the anomolous result of the opinion appears to be that *even obviously optional loan agreements* are, now by law, obligatory in Utah.

This result is contrary to the rule universally applied to such agreements by the courts See e.g., *W. P. Fuller & Co. v. McClure*, 48 Cal. App. 2d 185, 191 Pac. 1027 (1920); *Balch v. Chaffee*, 73 Conn. 318, 47 Atl. 327 (1900) and additional authorities cited at page 12 of appellants' initial brief.

Clearly such a holding will serve unjustly to deprive materialmen and laborers of the benefits of the mechanics' lien statute intended to protect them from the combined economic advantage of the lender and the borrower.

POINT II.

RELIANCE UPON THE PROVISION IN THE MORTGAGE THAT IT SHALL ALSO SECURE ADDITIONAL LOANS THEREAFTER MADE CAUSED THE COURT TO ARRIVE AT A WRONG RESULT AND IS ERROR BECAUSE THAT PRO-

VISION IS NOT PERTINENT TO THE ISSUES ON APPEAL AND WAS NOT RAISED OR RELIED UPON BY EITHER APPELLANTS OR RESPONDENTS.

The majority opinion states that the appellants rely upon certain language in the mortgage concerning loans in the future, sometimes loosely referred to as "future advances." The fact that this expression, "future advances," may have been used by the parties to describe varying situations may have unintentionally led the court to the conclusion that appellants were relying upon the cited provision.

In point of fact, however, neither appellants nor respondents relied upon this provision below, or raised it on appeal or argued it. The reason is that it is not pertinent to the issues raised on appeal.

Nor is there any argument that the lender made such "additional loans."

What appellants do contend is that the provisions in the "Release, Indemnity and Schedule A" document make the agreement volitional or non-obligatory as to advances before default and that the terms of paragraph 10 of the "Building and Loan Agreement and Assignment of Account" document (both of which are integral parts of the loan transaction) make, in any event, the advances admittedly voluntarily incurred by the lender after default volitional or non-obligatory with the result that such volitional advances take priority only as of the time of each such advance. *W. P. Fuller & Co., v. McClure, supra.*

Using this "additional loans hereafter made" provision to justify holding admittedly volitional expenditures obligatory is erroneous on the facts of the instant case and interjects into the law an undesirable twist. Under the present opinion, regardless of the amounts involved so long as they do not exceed the face of the note, and even though there clearly is no obligation to make advances, such advances will be held to be obligatory and thus prior to the rightful liens of materialmen and laborers who have by substance and labor improved the land of others.

The present opinion gives construction lenders the best of both possible worlds. As written, such lenders are in Utah, without being obliged to make future advances, afforded priority over intervening liens as though they were so obliged. Appellants respectfully submit that — in an economy in which state lines do not constitute a barrier to the flow of commerce and the trend is all in the direction of uniform commercial laws — Utah should not thus break with the optional — obligatory rule which elsewhere prevails. This is especially true as regards discretionary advancements before default.

CONCLUSION

For the reasons above stated, appellants respectfully pray that this Court grant a rehearing in order that this Court may reconsider its opinion herein.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.
