

1967

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

WESTERN MORTGAGE LOAN
CORPORATION, a corporation,

COTTONWOOD CONSTRUCTION
COMPANY, a corporation,

OSCAR E. CRYSTAL
INC., a corporation,
CONCRETE
a corporation,
BOHE OLESEN
a corporation,

RESPONDENTS

FILED

APR 6 - 1957

Clk. L. Supreme Court, Utah

HALLIDAY & BAKER
409 Eastern Building
Salt Lake City, Utah

ROBERT L. BAKER
MILTON V. BAKER
Deseret Building
Salt Lake City, Utah

Attorneys for Western
Mortgage Loan Corporation

BAY, QUINNEY & NEWMAN
Deseret Building
Salt Lake City, Utah
Attorneys for First Security
Bank of Utah, N.A.
Corporation

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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, d/b/a BESTWAY
BUILDING CENTER, a corporation,
Defendants-Appellants.

Case No.
10516

**RESPONDENT'S ANSWER AND BRIEF TO
PETITION FOR REHEARING**

In answer to appellants' petition for rehearing, respondent respectfully submits that this Court is not in error in its opinion in this cause, filed February 27, 1967, and appellants' petition should not be granted, but instead should be dismissed for the reasons set forth below in this brief.

STATEMENT OF FACTS

The only comments that need be made on appellants' statement of facts are first, that it is not a statement of facts, but an argument, and second, that as an argument it incorrectly states the basis of the Court's decision.

POINT I.

THE POINTS RAISED IN APPELLANTS' PETITION AND BRIEF FOR REHEARING WERE FULLY CONSIDERED BY THIS COURT AND ARE APPROPRIATELY REFLECTED IN ITS OPINION. THIS COURT IS NOT IN ERROR IN ITS OPINION IN THIS CAUSE AND APPELLANTS' PETITION SHOULD ACCORDINGLY BE DISMISSED.

A. ALL PROVISIONS OF THE MORTGAGE AND LOAN AGREEMENT WERE OBVIOUSLY CONSIDERED BY THIS COURT IN ITS DETERMINATION THAT ADVANCES MADE PURSUANT THERETO WERE OBLIGATORY.

The sole basis of appellants' petition for rehearing rests on the premise that this Court failed to consider the loan documents governing the subject mortgage transaction. Each of the points raised by appellants has no substance apart from this patently unfounded assumption.

Appellants again refer to certain provisions of the loan agreement covering the disbursement procedure and the rights of the parties in the event of

default.¹ It hardly appears necessary to point out to this Court that the major portions of appellants' and respondent's briefs and oral arguments both here and in the District Court were directed to these provisions relative to the obligatory v. optional advance issue.

This Court has made specific reference in its opinion both to the loan agreement and the rights of the parties under it. And, in affirming the District Court, the Court answered the contention of appellants in terms that clearly preclude the raising of further question on this point, viz.:

"Under the construction loan agreement Western was obligated to pay out the funds as the building progressed."

Yet appellants now suggest that provisions in the loan agreement were "possibly inadvertently overlooked" by this Court in reaching its conclusion. Respondent submits that the opinion of this Court manifestly shows this assertion to be without substance, that the result reached is in accord with the previously stated position of this Court in *Utah Savings & Loan Association v. Mecham*, 12 Utah 2d 355, 366 P.2d 598 (1961) and places Utah squarely in line with the prevailing view of other jurisdictions

1. Appellants claim on pages 6 and 7 of their brief for rehearing that advances after default were admittedly voluntarily incurred and admittedly volitional expenditures. Appellants are in error on two counts. Both in law and in fact, such disbursements were not voluntary nor volitional. Second, neither the respondent, the District Court nor this Court has made any such admission, but on the contrary have denied their voluntary nature and determined such disbursements to be obligatory.

on similar facts. Respondent suggests that the appellants, perhaps inadvertently, have simply failed to take proper note of this Court's opinion.

It should also be pointed out that appellants continue to cite *W. P. Fuller & Co. v. McClure* and *Balch v. Chaffee* as authority for their position. As noted in respondent's brief, these cases both involve other types of mortgages, not construction mortgages, and are not in point. The *McClure* case in fact has specifically been held inapplicable to construction mortgages. See *E. K. Wood Lumber Co. v. Mulholland*, 5 P.2d 669 (Cal. App. 1931) and respondent's brief pages 12 through 14.

B. THE COURT CORRECTLY APPLIED THE RULE OF *Utah Savings & Loan Association v. Mecham* TO THE FACTS OF THIS CASE.

In the last paragraph of their statement of facts, appellants state that this Court based 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*. Actually, what the Court did say on this point was:

"We see no distinction between the mortgage in *Utah Savings & Loan Association v. Mecham* and the mortgage before us in this case."

This Court was correct in so holding; for, in point of fact, *Utah Savings* involved progress pay-

ments under a construction mortgage recorded prior to the commencement of work on the structure, as do the facts of this case. In *Utah Savings* the Court determined that advances under the construction mortgage were obligatory and entitled to priority as of the date the mortgage was recorded. In the present case, this Court made the same finding with respect to funds advanced under the mortgage and loan agreement.

All that the lender in the instant case did was to provide in writing for the same discretion that is enjoyed by every lender under a construction mortgage. The application of the *Utah Savings* rule to the facts of the instant case was entirely proper and consistent. The fact that a written rather than an oral agreement to advance funds was present only strengthens the conclusion arrived at by this Court. Thus, when the Court stated it could see no distinction between the mortgage in *Utah Savings & Loan Association v. Mecham* and the mortgage in this case, it did not mean that the wording of the loan documents was exactly the same, but rather there was no legal distinction between the loan documents in the two cases, i.e., that the loan documents in both cases provided for obligatory advances. With this the respondent agrees.

C. NO RELIANCE AS SUCH WAS MADE BY THE COURT UPON THE PROVISION IN THE MORTGAGE THAT IT SHALL ALSO SECURE ADDITIONAL LOANS THEREAFTER MADE. RATHER, THE COURT PROPERLY

CONSIDERED THE EFFECT OF THIS CLAUSE AND THE CONTEXT OF THE LOAN TRANSACTION AS A WHOLE. THE COURT REACHED THE CORRECT RESULT AND COMMITTED NO ERROR.

The mortgage provision referred to is a common one and appears in many mortgages, including construction mortgages. Its purpose is to extend the lien of the basic mortgage to supplemental loans in addition to the face amount, generally evidenced by a separate promissory note. The lender is ordinarily not obligated to make such additional loan since it is in excess of the face amount of the mortgage and is therefore considered to be optional.

In *Utah Savings & Loan Association v. Mechem* the Court noted that no such provision appeared in the mortgage; hence, the issue involved only advances made for the erection of improvements, which the Court determined to be obligatory.

Under the facts of the instant case the mortgage does contain a clause for additional advances. The Court again found the advances made under the construction mortgage to be obligatory. It was therefore proper for the Court to consider the effect of the additional advance provision in light of the contention made by appellants. However, as stated by the Court, no such additional loans were made, and therefore the Court was not relying on this provision in holding that the advances made under other provisions were obligatory and prior to appellants' mechanics' liens. Why appellants suggest that the Court

relied on an obviously and admittedly optional loan provision in holding the advances obligatory is puzzling to respondent.

Moreover, it is apparent from the Court's opinion that it did not rely on this provision. The Court stated that "under the construction loan agreement Western was obligated to pay out the funds as the building progressed." The decision was based on the terms of the construction loan agreement and not on the "additional loans" provisions of the mortgage as suggested by appellants.

The Court correctly held that the mortgage in this case, being for a single fixed amount, and the respondent being obligated to expend the funds in accordance with the agreement, and no funds having been disbursed in excess of the face amount, was prior to the subsequent mechanics' liens of appellants.

CONCLUSION

In conclusion, respondent respectfully prays that appellants' petition for rehearing be denied for the reason that a reconsideration of the Court's opinion is entirely unwarranted and unnecessary and would only cause further delay and loss to respondent without any change in the end result.

Respectfully submitted,

HALLIDAY & HALLIDAY

BY :

Paul M. Halliday
400 Executive Building
Salt Lake City, Utah

.....
Ralph J. Marsh
1111 Deseret Building
Salt Lake City, Utah

*Attorneys for Respondent
Western Mortgage Loan
Corporation*