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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.

Case No. 10516

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APPELLANTS' REPLY BRIEF

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

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TABLE OF CONTENTS

CASES CITED

TEXTS CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

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vs.
COTTONWOOD CONSTRUCTION COMPANY, a corporation, et al.,
Defendants,
* * * * *
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Defendants-Appellants.

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APPELLANTS' REPLY BRIEF

STATEMENT OF FACTS

Struggling to transform their optional agreement into an obligatory one, respondents introduced in their answering brief a number of unsowrn factual assertions unsupported by either pleading or record.

These include:

1. The assertion at page 3 concerning alleged commitment off funds by virtue of alleged transactions between Western and First Security.

2. The assertion at page 4 concerning recording of the mortgage prior to furnishing of labor or materials.

3. The assertion at page 4 concerning demand by Western on Cottonwood for lien waivers.

4. The assertion at page 5 concerning an alleged agreement between the lien claimants and Western wherein Western was to finish the project by making funds available, etc.

5. The assertion at pages 5 and 6 that on the strength of such agreement Western finished the project.

These factual assertions are not cited to the record; they are not supported by the record; they are interjected for the first time on appeal, not having been presented to or passed on by the trial court.[1]

ARGUMENT

POINT I.

ON A MOTION FOR SUMMARY JUDGMENT, THE NON-MOVING PARTY IS OBLIGED TO

[1] Had these assertions been timely raised below, appellants would have denied and controverted them. For example, in items 4 and 5 respondents assert an alleged agreement and that in reliance thereon Western finished the project. Appellants would show this to be false for while there were negotiations looking toward such an agreement, the written draft as prepared by Western's counsel required signing by all interested parties before it could become effective and that in point of fact, *Western* refused to sign it. See the admission of Western's counsel at page 29 of the deposition of James Reed (R. 153) to the effect that the agreement was never signed by all parties and thus never came into full legal effect.

BRING ADDITIONAL FACTS, IF SUCH EXIST, TO THE ATTENTION OF THE TRIAL COURT IN THE MANNER PROVIDED FOR BY RULE 56, UTAH RULES OF CIVIL PROCEDURE.

The various matters asserted as facts by repondents in their answering brief but which are not supported by the record or by the pleadings were not presented to the trial court as is required by Rule 56, Utah Rules of Civil Procedure, if such matters are to be considered in opposition to appellants' motion for summary judgment.

Rule 56(c) provides, in part pertinent,

> The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

As pointed out at 6 *Moore, Federal Practice,* paragraph 56.11[1], "Material which does not come within the above broad category should not be considered" by the trial court on a motion for summary judgment. Matters specifically rejected include unsworn factual assertions unsupported by the record made by counsel in briefs. See, e.g., *Sardo v. McGrath,* 196 F. 2d 20 (C.A. D.C. 1952); *Proctor v. Sagamore Big Game Club*, 265 F. 2d 196 (3 Cir. 1959); *United States v. Lot 800,* 169 F. Supp. 904 (D.C. D.C. 1959). In this last case, the court explained

> "The fact issues claimed to exist are not properly set forth in the answer or by means of affi-

> davit but are merely listed at page 7 of both of defendants' memoranda. . . . By reason of their source and their nature, these questions do not form a sound basis for determining that a genuine issue of material fact exists in this case."

Not having been properly presented to the trial court below, interjection of such new factual material at the appellate stage is, *a fortiori,* improper. In *Watkins v. Simonds,* 14 Utah 2d 406, 385 P. 2d 154 (1963), this Court said, at page 155, "In any event, this court cannot consider facts stated in the briefs which may be true but absent in the official record." See also *Reliable Furniture Co. v. Fidelity & Guaranty Ins. Underwriters, Inc.,* 14 Utah 2d 169, 380 P. 2d 134 (1963); *Cooper v. Foresters Underwriters, Inc.,* 123 Utah 215, 257 P. 2d 540 (1954); *Adamson v. Brockbank,* 112 Utah 52, 185 P. 2d 264 (1947).

POINT II.

BENNETT V. WORCESTER COUNTY NATIONAL BANK DOES NOT SUPPORT RESPONDENTS' POSITION THAT THE MORTGAGEE'S EXPENDITURES AFTER DEFAULT TAKE PRIORITY OVER THE LIENORS, BUT, ON THE CONTRARY, SUPPORTS THE APPELLANTS' POSITION THAT SUCH EXPENDITURES TAKE PRIORITY ONLY AS MADE.

Respondents rely heavily upon the recent case of *Bennett v. Worcester County National Bank,* 213 N. E. 2d 254 (Mass. 1966) for the proposition that the expendi-

tures admittedly voluntarily made by Western after Cottonwood's default are to be given priority as of the date of the recording of the mortgage. Throughout their brief respondents utilize the old Madison Avenue technique of frequent, narcotizing repetition to assert the myth that construction loans, despite the substantive terms of the transaction between the parties, take priority over materialmen's liens. At page 28 of their brief they assert that *Bennett* supports the position that "The loan agreement is the vehicle adopted by the parties to accomplish this end [erection of a completed structure], and its provisions, *including those governing rights upon breach,* are secured by the mortgage. (Emphasis in original)

However, examination of *Bennett* reveals that it does not support respondents' position, but, if anything, supports appellants' position that expenditures admittedly voluntarily made by Western subsequent to Cottonwood's default can take priority only as of the date of each such expenditure.

In *Bennett,* the mortgage expressly provided that it was to be security for the performance of the construction loan agreement. At page 255 the court said

> The language of the mortgage makes it clear that it was executed to secure not only repayment of the . . . note, but also performance of all the terms of the construction loan agreement.

In the instant case, however, while the mortgage — the only document placed of record — refers to the note, neither mortgage or note refers in any manner whatsoever to the collateral agreements between the parties, let alone that the mortgage be security for the performance of the

consruction loan agreement. In point of fact, wordy as it is, the mortgage discreetly avoids any reference to the possibility that the loan might be used for construction purposes. It is phrased throughout as though the premises were already fully improved.

This distinction between *Bennett* and the instant transaction is significant, for the *Bennett* decision is limited to those cases where the mortgage expressly secures the performance of the loan agreement. It is clear that in cases like the instant one where the mortgage does not secure the performance of the loan agreement but is misleadingly silent as to the nature of the true agreement, the rationale of *Bennett* would compel a holding that the admittedly voluntarily made expenditures subsequent to Cottonwood's default are able to take priority only as made.

CONCLUSION

For the reasons stated herein and in appellants' initial brief, appellants respectfully pray that this court grant the relief requested in appellants' initial brief.

Respectfully submitted,

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