

2002

# Bahman Dadgari v. Niloofar Bakti : Brief of Appellant

Utah Court of Appeals

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Scott B. Mitchell; attorney for appellant.

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IN THE UTAH COURT OF APPEALS

\* \* \* \*

BAHMAN DADGARI,  
Plaintiff/Appellant,  
vs.  
NILOOFAR BAKTI,  
Defendant/Appellee.

\*  
\* **APPELLANT'S OPENING BRIEF**  
\*  
\*  
\*  
\*  
\* Case No. 20020682-CA  
\*  
\*

\* \* \* \*

PLAINTIFF'S APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL  
DISTRICT COURT, THE HONORABLE MICHAEL BURTON PRESIDING

\* \* \* \*

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PUBLISHED DECISION REQUESTED

  
Court of Appeals  
33  
Doulette Stagg  
of the Court

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### **STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction over this appeal by virtue of Utah Code Ann. § 78-2a-3(2)(j).

### **STATEMENT OF ISSUES AND STANDARDS OF REVIEW**

1. Whether the trial court erred in granting summary judgment in favor of defendant. Summary judgment presents only questions of law reviewable for correctness. *Mills v. Brody*, 929 P.2d 360 (Utah App. 1996). This issue was preserved for appeal in Plaintiff's Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment. (R. 66-71)

2. Whether the trial court erred in denying plaintiff's cross-motion for summary judgment. Summary judgment presents only questions of law reviewable for correctness. *Mills v. Brody*, 929 P.2d 360 (Utah App. 1996). This issue was preserved for appeal in Plaintiff's Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment. (R. 66-71)

3. Whether the trial court erred in its conclusion that the statutes of limitation for enforcing both the Promissory Note and the Deed of Trust set forth in Utah Code Ann. §§ 78-12-23 and 57-1-34 have not expired and that the Promissory Note and the Deed of Trust remain enforceable. This is a question of law reviewable for correctness. See, e.g., *Hom v. Utah Dept. of Public Safety*, 962 P.2d 95 (Utah App. 1998). This issue was preserved for appeal in Plaintiff's Response to Motion for

Summary Judgment and Cross-Motion for Summary Judgment. (R. 66-71)

#### DETERMINATIVE STATUTES

**Utah Code Ann. § 57-1-34. Sale of trust property by trustee - Foreclosure of trust deed - Limitation of actions.** The trustee's sale of property under a trust deed shall be made, or an action to foreclose a trust deed as provided by law for the foreclosure of mortgages on real property shall be commenced, within the period prescribed by law for the commencement of an action on the obligation secured by the trust deed.

**Utah Code Ann. § 78-12-23. Within six years - Mesne profits of real property - Instruments in writing.** An action may be brought within six years: (1) for the mesne profits of real property; (2) upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.

#### STATEMENT OF THE CASE

##### **I. Nature of the Case**

This is an appeal from a order of the Third Judicial District Court of Salt Lake County.

##### **II. Statement of Facts**

1. Plaintiff is a co-owner of the real property located at 4490 Highland Drive, Salt Lake City, Utah. (R. 1 & 33)

2. On or about August 26, 1986, plaintiff executed a Promissory Note and Deed of Trust in favor of U.S. Thrift & Loan. (R. 4-11)

3. The Promissory Note and Deed of Trust were subsequently assigned to defendant. (R. 12)

4. The Promissory Note provides for monthly payments in the amount of \$1,320.92 commencing September 15, 1986. (R. 4)

5. No payments have been made in accordance with the terms of the Promissory Note since in or around August 1993. (R. 2 & 33)

6. The Promissory Note authorizes acceleration of its entire unpaid balance upon an event of default, including non-payment of the monthly payments. (R. 6)

7. On or about February 27, 1995, defendant recorded a Notice of Default in which defendant exercised her option to accelerate the entire unpaid balance of the Promissory Note. (R. 13-14)

8. More than six years later, on November 21, 2001, defendant recorded a second Notice of Default in connection with her Promissory Note and Deed of Trust and on or about February 25, 2002, defendant's Substitute Trustee gave notice of a Trustee's Sale of the property to be held April 10, 2002. (R. 15)

9. On March 14, 2002, plaintiff filed his Complaint commencing the case at bar in which he alleged the foregoing facts and, based upon the expiration of the six-year statute of limitations set forth in Utah Code Annotated §§ 57-1-34 and 78-12-23, prayed, inter alia, for the following relief:

1. for a declaration that the Promissory Note and Deed of Trust at issue are unenforceable and do not constitute a

lien or encumbrance upon the subject real property; and

2. for an order quieting plaintiff's title to the property in plaintiff's name free and clear of any claim by defendant.

(R. 1-15)

10. On or about May 20, 2002, defendant filed a Motion for Summary Judgment. (R. 64-65) Plaintiff filed his Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment on or about June 3, 2002 (R. 66-71), and defendant filed her Reply/Response memorandum on or about June 11, 2002. (R. 72-78)

11. Apparently concluding that the six-year statute of limitations set forth in Utah Code Annotated §§ 57-1-34 and 78-12-23 is not applicable to this case, on July 29, 2002 the District Court issued its Order of Summary Judgment in which it granted defendant's motion for summary judgment, denied plaintiff's cross-motion for summary judgment, and dismissed this case with prejudice. (R. 85-86)

12. Plaintiff timely filed his Notice of Appeal on August 20, 2002. (R. 87-88)

#### **SUMMARY OF ARGUMENT**

As set forth above, on or about February 27, 1995, defendant recorded a Notice of Default in which she exercised her option to accelerate the entire unpaid balance of the Promissory Note at issue in this action. Pursuant to Utah Code Annotated §§ 57-1-34

and 78-12-23, defendant had six years in which to either conduct a non-judicial trustee's sale of the property or commence an action to judicially foreclose the Deed of Trust. Because defendant's cause of action accrued on February 27, 1995, when she exercised her option to accelerate the entire unpaid balance of the Promissory Note at issue, defendant was required to conduct a trustee's sale on or before February 27, 2001. Having failed to do so, the statutes of limitation for enforcing both the Promissory Note and the Deed of Trust as set forth in Utah Code Ann. §§ 78-12-23 and 57-1-34 have expired and neither the Promissory Note nor the Deed of Trust is enforceable.

#### **ARGUMENT**

**The trial court erred in concluding that the statute of limitations for enforcing the Promissory Note and the Deed of Trust have not expired and that both instruments remain enforceable.**

On or about February 27, 1995, defendant recorded a Notice of Default in which she exercised her option to accelerate the entire unpaid balance of the Promissory Note at issue in this action. Pursuant to Utah Code Annotated §§ 57-1-34 and 78-12-23, defendant had six years in which to either conduct a non-judicial trustee's sale of the property or commence an action to judicially foreclose the Deed of Trust. Section 57-1-34 provides as follows:

The trustee's sale of property under a deed of trust shall be made, or an action to foreclose a trust deed as provided by law for the foreclosure of mortgages on real property

shall be commenced, within the period prescribed by law for the commencement of an action on the obligation secured by the trust deed.

In the case at bar, the "period prescribed by law for the commencement of an action on the obligation secured by the trust deed" is set forth in section 78-12-23, U.C.A.:

An action may be brought within six years:

...  
(2) upon any contract, obligation, or liability founded upon an instrument in writing ...

Because defendant's cause of action accrued on February 27, 1995, when she exercised her option to accelerate the entire unpaid balance of the Promissory Note at issue, *see, e.g., 51 Am Jur 2d*, p. 588 § 166 (the statute of limitations begins to run upon the creditor's exercise of the option to accelerate the maturity of the debt), defendant was required to conduct a trustee's sale on or before February 27, 2001. Having failed to do so, the statutes of limitation for enforcing both the Promissory Note and the Deed of Trust as set forth in Utah Code Ann. §§ 78-12-23 and 57-1-34 have expired and neither the Promissory Note nor the Deed of Trust is enforceable.

Defendant, however, argues that she "commenced" a non-judicial foreclosure by the recording of a Notice of Default in February 1995 within the six-year period of limitations. (R. 44) Defendant misreads § 57-1-34. Section 57-1-34 recognizes and provides the limitations period for both methods of foreclosing a trust deed, non-judicial (see Utah Code Ann. § 57-1-28) and

judicial (see UCA § 78-37-1). With respect to non-judicial foreclosures, § 57-1-34 provides that "[t]he trustee's sale of property under a deed of trust **shall be made** ... within [six years of acceleration of the trust deed note]." (Emphasis added). With respect to judicial foreclosures, § 57-1-34 provides that "[a]n **action** to foreclose a trust deed as provided by law for the foreclosure of mortgages on real property **shall be commenced** [within six years of acceleration]." (Emphasis added). Accordingly, fairly read, § 57-1-34 requires that a non-judicial foreclosure sale must take place within six years of acceleration and that an action for judicial foreclosure must be commenced within six years of acceleration. Defendant neither "made" a non-judicial foreclosure sale nor "commenced" a judicial foreclosure action within six-years of acceleration and her right to do so is now time barred.

If the Court were to accept defendant's interpretation of § 57-1-34, the filing of her February 1995 Notice of Default effectively tolled the statute of limitations forever. Having "commenced" her non-judicial foreclosure, there would be nothing to prevent defendant from noticing up her foreclosure sale in ten years, twenty years, or in the year 2050. That is clearly an absurd result unwarranted by the language of § 57-1-34.

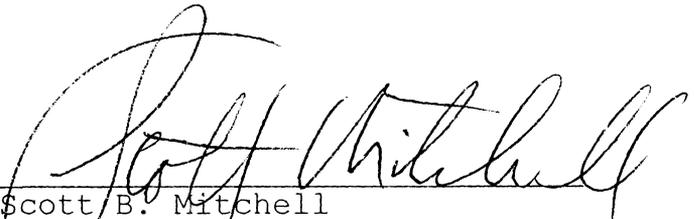
Defendant also asserts that "the intervening contract between the parties tolls the running of the statute." (R. 45) In

support of this assertion, defendant alleges that "[i]n December of 1997, the Defendant and the Owners entered into the agreement which specifically provides that the issue of the 'bank payments' would not be resolved until other matters set out in Part A of the agreement were disposed of first." (R.45) According to defendant, "[t]he agreement specifically tolls the running of the statute until Part A has been completed..." (R. 45) Again, defendant's argument is without merit. In the first place, defendant is not a party to the Settlement Agreement. (R.59-62) Nor does the settlement agreement say anything about tolling any statute of limitations, let alone "specifically" toll it as defendant would have the Court believe.

#### CONCLUSION

Based on the foregoing, plaintiff respectfully requests that the trial court's Order of Summary Judgment be reversed and that this action be remanded to the trial court with instructions for the entry of summary judgment in plaintiff's favor.

DATED this 17<sup>th</sup> day of June 2003.

  
Scott B. Mitchell  
Attorney for Appellant

**MAILING CERTIFICATE**

Undersigned certifies that two copies of the foregoing were mailed this 17<sup>th</sup> day of June 2003 via first class U.S. Mail, postage prepaid, to the following:

J. Thomas Bowen  
935 E. South Union Avenue, Suite D-102  
Midvale, Utah 84047



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Addenda



5. Plaintiff's cross-motion for summary judgment is denied.

6. This case is dismissed with prejudice.

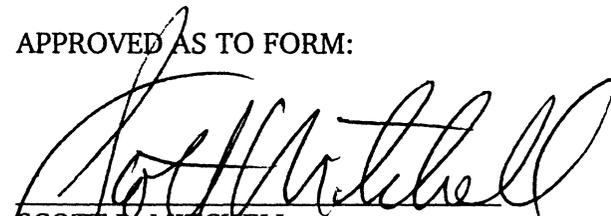
DATED this 29 day of July, 2002.

BY THE COURT:

  
DISTRICT JUDGE



APPROVED AS TO FORM:

  
SCOTT B. MITCHELL  
Attorney for Plaintiff