1967

American Savings & Loan Association, A Corporation v. Wayne T. Blomquist and Ruth E. Blomquist, His Wife, Zions Savings & Loan Association, A Corporation, Joseph E. Nelson and People's Finance & Thrift, a Corporation : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

AMERICAN SAVINGS & LOAN ASSOCIATION, a corporation,
Plaintiff and Respondent,

vs.

WAYNE T. BLOMQUIST and RUTH E. BLOMQUIST, his wife, ZIONS SAVINGS & LOAN ASSOCIATION, a corporation, JOSEPH E. NELSON and PEOPLE'S FINANCE & THRIFT, a corporation,
Defendants and Appellant.

Case No. 10,856

APPELLANTS BRIEF

Appeal from Summary Judgment of Foreclosure
of Real Estate Mortgage
by District Court for Salt Lake County,
Honorable Leonard W. Elton, District Judge

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APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

Suit by American Savings & Loan to Foreclose a real estate mortgage on residence of Wayne T. & Ruth E. Blomquist.

DISPOSITION IN LOWER COURT

Court discharged jury without hearing evidence and awarded judgment of foreclosure of said mortgage in the nature of summary judgment or judgment on the pleadings.

RELIEF SOUGHT ON APPEAL

Blomquists seek an order determining that Respondent was not entitled to accelerate the unpaid mortgage debt balance at the time that it purported to do so or in the alternative for a new trial with a jury.

STATEMENT OF FACTS

Appellants are indebted to Respondent on a note and mortgage (Exhibits P-1 and P-2). Appellants were late in making most of the payments due on that loan and late charges of $5.94 per late payment were assessed. In addition to the monthly payment on principal and interest of the note, appellants were required to pay a monthly installment to Respondent to be accumulated for payment of property taxes and insurance on the mortgaged premises. Respondent increased the escrow fund payment by $2.00 effective December 15, 1963, but Appellants disputed their right to increase payments and failed to increase their remittal by this $2.00.

Appellants also disputed Respondent's right to assess a late charge and failed to remit late charges during approximately the last year. On December 14, 1964 Respondent made demand upon Appellants to pay the following amounts (Exhibit P-4):

November 15 payment	$149.00
11 payments short at $2.00 (Escrow)	22.00
14 unpaid late fees at $5.94	83.16
Total Demanded	$254.16

In that letter Respondent stated that it would not accept a partial payment and that if payment were made after

December 25, 1964 that it would be necessary to include the December 15, 1964 payment.

On December 21, 1964 (R. 132) Appellants tendered $147.00 to Respondent (Exhibit D-8) (R. 130-131) in payment of the $118.75 principal and interest due on November 15, 1964, and in payment of all but $2.00 of the amount that should have been paid into the escrow fund with the November payment, but Appellants did not include a tender of the $22.00 prior underpayments to the escrow fund or the $83.16 late charges that had been demanded by Respondent. (Exhibit P-4).

On December 28, 1964 Respondent rejected the tender and returned that check with a letter (Exhibit P-5) wherein it, in effect, indicated that the tender was rejected because it did not include the escrow fund underpayments and late charges demanded in its letter of December 14, 1964 (Exhibit P-4). In the letter of December 28, 1964 (Exhibit P-5) Respondent stated that it would waive late charges on the December 15, 1964 payment (which was then also past due) if it were paid at that time. Respondent did not in that letter refuse the tender because the December 15, 1964 payment had not been included as contended by counsel. (R. 131) Nothing was said in that letter which would in any manner put Appellants upon notice that Respondent was even considering declaring the entire balance of the note to be due.

Appellant again tendered the $147.00 check (Exhibit D-8) to Respondent about January 6, 1965, which tender was again rejected by a letter of January 6, 1965 (Ex-

hibit P-6) wherein Respondent made reference to prior correspondence (Ex P-4 & P-5) and rejected the tender because the amount was less than had been demanded. In that letter Respondent also assessed a late charge on the December 15, 1964 payment and, in effect, demanded payment of the following amounts:

November 15 payment	$149.00
December 15 payment	149.00
11 payments short at $2.00 (escrow)	22.00
15 late fees at $5.94	89.10
Total Demanded	$409.10

Nothing was said in that letter about accelerating the balance due on the note. Respondent stated in that letter that the amount demanded " . . . must reach our office immediately if *additional expense and inconvenience* are to be eliminated."

Appellant again tendered the $147.00 check (Exhibit D-8) about January 8, 1965, which tender was rejected by Respondents through their letter of January 8, 1965 from their attorney (Exhibit P-7) wherein Respondent declared the full amount of the mortgage debt due and payable.

About January 14, 1965 Appellants tendered an amount in the excess of the amount demanded by Respondent in the letter of January 6, 1965, which tender was rejected by Respondent (Exhibit D-9). About January 21, 1965 and February 3, 1965 Appellants tendered all amounts demanded by Respondents in their letter of January 6, 1965 plus the January payment, which ten-

ders were also rejected by Respondents (Exhibit D-10 and D-12).

On or about January 23, 1965, Appellants received a demand from Respondent for payment of $409.16 due as of December 15, 1964 including late charges (Exhibit D-11), (R. 127-128). Respondents dispute the date that said notice was received. (R. 127-128).

POINT I

THE COURT ERRED IN DISMISSING THE JURY AND GRANTING SUMMARY JUDGMENT OF FORECLOSURE

After extensive pre-trial hearings before Judge Elton and a demand by Appellants for trial by jury the case was set by Judge Elton for jury trial. The morning of the trial after the jury was in the court room and defendants were ready to proceed with their evidence the Court dismissed the jury and granted summary judgment of foreclosure against Defendants without permitting Defendants to present evidence. (R 117). Several substantial factual issues remained which should have been submitted to the jury, which if resolved in favor of Defendants would have resulted in a judgment in favor of Defendants, including the following:

1. Whether the check dated December 21, 1964 (Exhibit D-8) was tendered prior to or after the 25th day of December, 1964. If the tender were made prior to that date as contended by Appellants (R. 132) then the tender would not be insufficient because the 10 day grace period on the December 15, 1964 payment had not then passed.

Respondents contend that this tender was rejected because the December 15, 1964 payment was not tendered (R. 131). This is an issue of fact that should have been submitted to the jury.

2. In the amended pre-trial order (R. 77, Par. 3) the Court set up as an issue of fact to be determined by the jury the issue as to whether the Respondent by its letter of December 14, 1964 (Ex. P-4) waived any existing default by Appellants and was therefore not entitled to accelerate the note and demand payment in full as it attempted to do on January 8, 1965 (Exhibit P-7). After that waiver no new default occurred which would entitle Respondent to accelerate the note. The jury could well have found that Respondent had by its letter of December 14, 1964 (Exhibit P-4) elected to collect a late charge by reason of the late payment for November, 1964, and that accordingly any attempt to accelerate was premature. That letter expressly states the Respondent had elected to collect a late charge and had not then elected to accelerate. It further states that it would not be necessary to include the December 15, 1964 payment unless payment was made after December 25, 1964. The pre-trial order determined the issues to be tried by the jury. The Court erred in refusing to submit those issues to the jury and in refusing to permit Appellants to present evidence in support thereof.

3. Whether or not the letters sent to Appellants by Respondents (Exhibit P-4 of December 14, 1964; Exhibit P-5 of December 28, 1964; and Exhibit P-6 of January 6, 1964) gave Appellants reasonable notice of intent not to continue to accept late payments, charging only a late

charge for the delinquency, and of their intent to suddenly shift their position by accelerating the note and mortgage balance. The jury could well have found from those letters and other evidence that Respondent failed to give reasonable notice to Appellants and therefore had no right to accelerate after toleration of delinquent payments over such a long period of time. Pacific Development Company v. Stewart (1948 Ut.) 195 P.2d. 748; Ashback v. Wenzel (1959) 141 Colo. 35, 346 P2d. 295; Edwards v. Smith (1959, Mo.) 322 S.W.2d. 770; Scelza v Ryba (1957) 10 Misc. 2d. 186, 169 N.Y.S. 2d, 462; Brown v. Hewitt (1940 Tex. Civ. App.) 143 S.W.2d. 223. See further 97 A.L.R. 2d. 1006 - 1008.

In the Brown v. Hewitt case cited above the court held that where plaintiff had, for 14 consecutive months, accepted from defendant overdue installments on a note plaintiff would not be permitted suddenly to revert to the terms of the note so as to enforce an optional acceleration clause, based on a subsequent installment which was paid 4 days late, without first giving defendant specific notice of his intention.

The Utah Supreme Court has reached exactly the same conclusion in Pacific Development Company v. Stewart. 195 P.2d. 748. Justice Pratt, speaking for the court stated on page 750 as follows: "There is no question that the acceptance by the seller of buyers' past due payments and its other conduct toward the buyers leading the latter to believe that strict performance would not be required by the seller, imposes upon the seller the duty of giving to the buyer a reasonable notice before it may insist on strict performance by the buyers."

And in Brown v. Chowchilla Land Co., 59 Cal. App. 164, 210 P. 424 at page 427, the California court stated:

"The requirement of notice after the receipt of overdue payments without objection is based upon the equitable consideration that by his conduct the vendor has led the vendee into the belief that the former will continue to waive the strict performance of the contract."

The import of all of the above (and the case law is explicit on this point) is that where the vendor has waived strict performance of one or more of the provisions of the contract, he must give reasonable notice of his intention to change his position before insisting upon strict performance in the future, at least as to those provisions where he has waived strict performance in the past.

A careful examination of Exhibits P-4, P-5, and P-6 fails to disclose any indication or notice to Appellants that Respondent intended to shift its position by suddenly refusing late payments and declaring the entire balance to be due.

4. The jury may well have found that the demand made by Respondent on or about January 22, 1965 for payment of the December 15, 1964 payment with a late charge (Exhibit D-11) constituted a waiver by respondent of the acceleration of the note and mortgage balance demanded and elected in the letter of January 8, 1965 (Exhibit P-7), and accordingly that subsequent tenders made by Appellants (Exhibits D-9, D-10 and D-12) prevented acceleration of the mortgage balance by Respondent.

Appellants are entitled to a trial by jury of the issues of fact as a matter of law. 78-21-1 and 78-21-2, UCA, 1953. Holland v. Wilson, 8 U.2d 11, 327 P.2d 250; Finlayson v. Brady, 121 U.204, 240 P.2d 491. Judge Elton himself ruled at time of pretrial that at least one issue of fact remained to be determined by a jury and ordered that a jury be empanneled to hear the case (R. 77). Judge Hanson previously determined that the case should be heard by a jury and ordered a jury trial (R. 64).

The decision by Judge Elton that no issues of fact remained to be resolved by a jury (R. 117) and to decide the case as a matter of law constitutes, in effect, a summary judgment. Accordingly Appellants are entitled for purposes of this appeal to have the court survey the evidence and all reasonable 'inferences' fairly to be drawn therefrom in the light most favorable to them. Thompson v. Ford Motor Co., 16 U.2d. 30, 395 P.2d. 62. The party in whose favor a summary judgment is granted must establish facts such as to preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor. Green v. Garn, 11 U. (2d) 375, 359 P.2d 1050. The appellant from a summary judgment is entitled to have all of the evidence and every inference fairly to be derived therefrom resolved in his favor in the appellate courts. Richard v. Anderson, 9 U(2d) 17, 19, 337 P.2d 59.

It appears obvious that the jury, if permitted to do so, could well have found the facts to sustain the position of Appellants on one or more of the foregoing issues which would have entitled Appellants to win. Accordingly the

case should be remanded to the District Court for a new trial before a jury.

POINT II

THE COURT ERRED IN GRANTING SUMMARY JUDGMENT OF FORECLOSURE

The actions by the Court in discharging the jury and deciding the issues in the case without hearing evidence or testimony (other than the matters stipulated upon between the parties) constitutes summary judgment in favor of Respondent. Accordingly all disputed issues of fact should for purposes of this appeal be considered in manner most favorable to Appellant and all proffers of proof should for purposes of this appeal be considered as established and proven facts. Thompson v Ford Motor Co., 16 U. 2d. 30, 395 P.2d. 62; Green v. Garn, 11 U.2d. 375, 359 P.2d. 1050; Richard v. Anderson, 9 U.2d. 17, 19, 337 P.2d. 59.

Acceleration of the entire unpaid balance due on the note and mortgage is a harsh remedy and should not be permitted unless the right to do so is clearly established under the terms of the agreements between the parties.

If Respondent's judgment is to stand it must be by a clear showing that Appellants were guilty of a default under the express terms of the note or mortgage, and that said default had not been waived. If Respondents cannot establish that a right to accelerate in fact existed on January 9, 1965 then it must fail and the judgment of foreclosure must be set aside and a new trial ordered. An examination of the Appellants purported defaults shows that no default in fact existed which under

the terms of the note and mortgage authorized an acceleration of the unpaid balance. The defaults claimed by Respondent are as follows:

1. *Failure to pay late charges.* (R. 131; Exhibits P-4, P-5 and P-6). The note (Exhibit P-1) does provide for a late charge but does not provide for acceleration of the unpaid note balance for failure to pay late charges. Accordingly failure to pay late charges did not give Respondents a right to accelerate the unpaid note and mortgage balance.

2. *Failure to pay full amount into reserve for taxes and insurance.* The note (Exhibit P-1) does not require payment of any amounts into the escrow account but simply calls for payment of $118.75 principal and interest. The mortgage (Exhibit P-2) does require payment into an escrow account for payment of taxes and insurance. The mortgage further requires payment of taxes and insurance by Appellants and provides that if Appellants fail to pay promptly all taxes, assessments, liens, etc. that may accrue against the property, or for repairs to protect the property, or to pay the insurance premiums, that the Respondent may pay said amounts, demand repayment from Appellants and that the money paid therefor by Respondent then is secured by the mortgage. The mortgage further provides that Respondent can accelerate its mortgage balance in the event that Appellants default in the payment of money *secured* by the mortgage or the payment of *taxes* or assessments. Accordingly nonpayment of money into the escrow fund is not a default that would entitle Respondents to accelerate the unpaid balance of the mortgage debt. It is not until Appellants

have defaulted in the actual payment of *taxes* or repayment after demand of money actually *expended* by Respondents in payment of taxes or insurance that Respondents would be entitled to accelerate the mortgage balance. Respondent stipulated that no demand was made by it for repayment of taxes and insurance paid by Respondent after said payments had been made (R. 134) Accordingly payment by Respondent of taxes and insurance (which payment appears to have been made after the attempted acceleration of the unpaid mortgage balance and accordingly is immaterial to issues in this case) does not constitute grounds for acceleration because of failure to demand repayment. Failure to pay the disputed $2.00 per month into the reserve account is not grounds for acceleration under the terms of the note and mortgage. In any event no evidence was presented to show that under the terms of the mortgage Respondent was in fact entitled to increase the escrow payments by said disputed $2.00 per month.

In the case of Homeowners Loan Corp. v. Washington. 108 U. 469, 161 P2d 355 this court was met with a similar situation and held that where a note and mortgage required payment by the mortgagee of taxes and assessments and demand for repayment before it could declare a forfeiture, that a mortgagee which failed to comply with that provision was not in a position to declare the entire sum due. Respondents simply have failed to make the required payment of taxes and insurance and to demand repayment (see stipulation by counsel for Respondents - R. 120) and cannot accelerate the unpaid mortgage loan because of non-payment of taxes or insurance. If

Respondent intends to rely upon rights created under the terms of the note and mortgage it must comply with the terms of those instruments to create those rights.

3. *Failure to tender December* 15, 1964 *payment with the payment of December* 21, 1964 (Exhibit D-8). In the letter of December 14, 1964 (Exhibit P-4) Respondents stated that the December 15, 1964 payment need not be tendered with the November 15, 1964 payment unless it was paid after December 25, 1964. Accordingly the tender of December 21, 1964 was not insufficient by reason of the non-tender of the December 15, 1964 payment. Under the provisions of 78-27-3, Utah Code Annotated, 1953, Respondent waived its right to object to the purported insufficiency of the December 21, 1964 tender by failing to include a demand therefor or to raise any additional objections in the letter of rejection. 78-27-3 reads as follows:

> "Objection to Tender—Must be specified or deemed waived.—The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument or property, or he is deemed to have waived it; and, if the objection is to the amount of money, the terms of the instrument or the amount or kind of property, he must specify the amounts, terms or kind which he requires, or be precluded from objection afterwards."

4. *The amount tendered exceeded the amount due on the note.* The $147.00 tendered (Exhibit D-8) was tendered in payment of the $118.75 principal and interest due under the terms of the promissory note (Ex. P-1) with the balance to be credited to the escrow account

(R. 130-131). Accordingly this tender cut off any right that may have theretofore existed for Respondent to accelerate the mortgage debt balance.

5. *December* 15, 1964 *payment was not in default at time of acceleration.* Under the terms of the note default in payment of a monthly installment did not give Respondent a right to accelerate until payment was more than one month past due. (Ex. P-1). Accordingly Respondents cannot rely upon any rights to accelerate created by non-payment of December 15, 1964 installment because those rights had not yet accrued.

6. *Respondent waived its right to accelerate mortgage balance for non-payment of November* 15, 1964 *payment:* Respondent is also estopped to claim a right to accelerate by reason of non-payment of the November 15, 1964 payment by December 15, 1964 as is clearly shown by the contents of the letters of December 14, 1964 (Ex. P-4), December 28, 1964 (Ex. P-5) and January 6, 1965 (Ex. P-6) wherein Respondent elected to charge a late charge and made no mention of acceleration of the mortgage debt balance. The express terms of the promissory note specify that failure to exercise the option to accelerate shall not constitute a waiver of the right to exercise that option in the event of a *"subsequent"* default. Having waived its right to declare an acceleration by reason of the November 15, 1964 payment by electing to accept a late charge as shown by said letters precludes Respondents by the express terms of said promissory note from declaring an acceleration except in the event of a *"subsequent"* default. The December 15, 1964 payment was not in default the requisite month required by the ex-

press terms of said promissory note (Ex. P-1) and accordingly was not a "subsequent" default which would entitle Respondents to accelerate the mortgage debt balance. Having elected to demand payment of the late charges, underpayments into the escrow fund and of the November 15, 1964 payment the Respondent was not entitled to rely on those purported defaults to declare the mortgage debt due, but was required to wait for a *"subsequent"* default before it could accelerate said debt. Respondent failed to do so and its right to accelerate was clearly cut off by the tenders mentioned in exhibits D-9, D-10 and D-12.

7. Respondent waived its purported acceleration by the subsequent demand for payment of the December 15, 1964 balance with a late charge.

For purposes of this appeal and by reason of the summary nature of the proceedings, the evidence must be viewed most favorably to Appellant. Accordingly we must assume that Appellant's contentions that he received a demand for payment of the December 15, 1964 payment together with a demand for payment of a late charge from Respondent on or about January 23, 1965 (R. 127-128) is true.

Appellants complied with this demand, and in fact tendered amounts in excess of the amounts requested but their tenders were refused. (Ex. D-9, D-10 and D-12). That demand constituted a waiver by Respondent of any rights that it may have acquired by its letter of January 8, 1965 (Ex. P-7) and the later tenders by Appellants cut off any further right to accelerate.

CONCLUSION

The minor dispute that arose between the parties concerning payment of late charges and the right of Respondent to increase the escrow payment for taxes and insurance by $2.00 per month does not justify the harsh remedy of declaring the entire mortgage due without notice by Respondent. This remedy is in the nature of a forfeiture and should not be permitted unless the right to do so is clear under the terms of the instruments. We feel that under the facts no default in fact existed which would entitle Respondents to accelerate the mortgage debt at the time that Respondent attempted to do so. Respondent's refusal of tenders, including tenders by Appellants of all amounts claimed by Respondents as soon as Appellants learned that Respondent intended to shift its long established procedure and to accelerate the debt illustrates that tempers rather than reason created this problem. Appellants have been deprived of their day in court and their right to trial by jury of the issues of fact involved in this matter. To require Respondents to reinstate the mortgage loan and to permit Appellants to pay that loan over a period of years as the parties originally agreed would do justice to all parties. Appellants are entitled, in view of the summary nature of the proceedings that resulted in judgment against Appellants, to have all evidence considered in the manner most favorable to them. Applying this rule it is clear that Appellants are

entitled to have the judgment vacated and set aside, and their loan reinstated, or that failing, to a new trial before a jury.

Respectfully submitted,

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