

2003

Wells Fargo Bank, N.A., formerly known as First Interstate Bank of Utah, as personal representative of the Estate of Franklin J. Bradshaw and as representative and attorney in fact of the selling shareholders of Bradshaw Auto Parts Company of Mt. Pleasant, Inc., Bradshaw Automotive Parts Company Incorporated, Bradshaw Auto Parts Whse., and Bradshaw Auto Parts company v. Temple View Investments, Greg Stuart, William D. Evelyn and Richard C. Bennion : Brief of Appellee

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Randle, Deamer & Lee; Michael L. Deamer; Counsel for Appellees.

John A. Snow; Bradley M. Strassberg; Van Cott, Bagley, Cornwall and McCarthy; Attorneys for Plaintiff/Appellant.

Recommended Citation

Brief of Appellee, *Wells Fargo Bank v. Temple View Investments*, No. 20030050 (Utah Court of Appeals, 2003).
https://digitalcommons.law.byu.edu/byu_ca2/4149

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

JUL 02 2003

IN THE UTAH COURT OF APPEALS

Paulette Stagg
Clerk of the Court

WELLS FARGO BANK, N.A., formerly	:	
known as FIRST INTERSTATE BANK	:	
OF UTAH, as personal representative	:	
of the Estate of Franklin J. Bradshaw and	:	
as representative and attorney in fact of the	:	
selling shareholders of Bradshaw Auto Parts	:	Case No. 20030050-CA
Company of Mt. Pleasant, Inc., Bradshaw	:	
Automotive Parts Company Incorporated,	:	
Bradshaw Auto Parts Whse., and Bradshaw	:	
Auto Parts Company,	:	
	:	
Plaintiff/Appellant,	:	
v.	:	
TEMPLE VIEW INVESTMENTS,	:	
GREG STUART, WILLIAM D'EVELYN,	:	
and RICHARD C. BENNION,	:	(Oral Argument Requested)
	:	
Defendants/Appellees.	:	

BRIEF OF APPELLEES

APPEAL FROM SUMMARY JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH CIVIL NO.
020904189, HONORABLE ANTHONY B. QUINN, DISTRICT COURT JUDGE

JOHN A SNOW - NO. 3025
BRADLEY M. STRASSBERG NO. 7994
VAN COTT, BAGLEY, CORNWALL
& MCCARTHY
Attorneys for Plaintiff/Appellant
50 South Main Street, Suite 1600
Salt Lake City, UT 84145
Telephone: (801) 532-3333

MICHAEL L. DEAMER - NO. 844
RANDLE, DEAMER & LEE, P.C.
Attorneys for Defendants/Appellees
139 East South Temple, Suite 330
Salt Lake City, UT 84111
Telephone: (801) 531-0441
Facsimile: (801) 531-0444

WELLS FARGO BANK, N.A., formerly :
known as FIRST INTERSTATE BANK :
OF UTAH, as personal representative :
of the Estate of Franklin J. Bradshaw and :
as representative and attorney in fact of the :
selling shareholders of Bradshaw Auto Parts :
Company of Mt. Pleasant, Inc., Bradshaw :
Automotive Parts Company Incorporated, :
Bradshaw Auto Parts Whse., and Bradshaw :
Auto Parts Company, :
:
Plaintiff/Appellant, :
v. :
:
TEMPLE VIEW INVESTMENTS, :
GREG STUART, WILLIAM D'EVELYN, :
and RICHARD C. BENNION, :
:
Defendants/Appellees. :

Case No. 20030050-CA

(Oral Argument Requested)

APPEAL FROM SUMMARY JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH CIVIL NO.
020904189, HONORABLE ANTHONY B. QUINN, DISTRICT COURT JUDGE

MICHAEL L. DEAMER - NO. 844
RANDLE, DEAMER & LEE, P.C.
Attorneys for Defendants/Appellees
139 East South Temple, Suite 330
Salt Lake City, UT 84111
Telephone: (801) 531-0441
Facsimile: (801) 531-0444

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
ISSUES FOR REVIEW	1
STANDARD OF REVIEW	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
POINT I	
THE TWO SIX YEAR STATUTES OF LIMITATIONS BAR APPELLANT'S ACTION ON THE PROMISSORY NOTE	6
POINT II	
THE LANGUAGE OF THE PROMISSORY NOTE DOES NOT EXTEND THE STATUTE OF LIMITATIONS	9
POINT III	
THE ROGAN LETTER AND U.C.A. §78-12-44 (1966) DO NOT EXTEND THE STATUTE OF LIMITATIONS	11
POINT IV	
THE ANDERSON AFFIDAVIT IS INADMISSIBLE FOR LACK OF FOUNDATION, HERESAY AND RELATING SETTLEMENT DISCUSSIONS NOT ALLOWED UNDER RULE 408 OF THE UTAH RULES OF EVIDENCE	15

POINT V

THE MOTION FOR NEW TRIAL PRESENTED NO NEW EVIDENCE
AND FACTS 16

CONCLUSION 17

ADDENDUM

EXHIBIT A

AFFIDAVITS OF STUART, BENNION, D'EVELYN

TABLE OF AUTHORITIES

Cases Cited:

<u>APS v. Briggs</u> , 927 P.2d 670 (Ut. Ct. App. 1996)	8
<u>Bearden v. Croft</u> , 31 P.3d 537 ¶5, 2001 UT. 76, 428 Ut. Adv. Rep. 18 (UT 2001)	1
<u>Beck v. Dutchman Coalition Mines Co.</u> , 269 P.2d 867, 870 (UT 1954)	13, 14
<u>Davidson v. Prince</u> , 813 P.2d 1225 (Ut. Ct. App. 1991) cert. denied 826 P.2d 651 (UT 1991)	13
<u>Federal Deposit Insurance Corp. v. Louisiana National Bank</u> , 653 F.2d 927 (CA 5 th 1981)	10
<u>Fisher v. Fisher</u> , 907 P.2d 1172 (Ut. Ct. App. 1995)	10
<u>Gaw v. State</u> , 798 P.2d 1130 (Ut. Ct. App. 1990)	13, 15
<u>Hirtler v. Hirtler</u> , 566 P.2d 1231 (UT 1977)	7, 8
<u>In re Colasante</u> , 12 BR 635 (E.D. Pa. 1981)	10
<u>In re Gillman, Son and Company (DC)</u> , 57 F.2d 294	14
<u>Preston v. Lamb</u> , 436 P.2d 1021 (UT 1968)	13, 15
<u>Rainford v. Rytting</u> , 22 UT. 2d 252, 451 P.2d 769 (UT 1969)	13, 15
<u>Roark v. Crabtree</u> , 893 P.2d 1058 (UT. 1995)	7
<u>Salt Lake Transfer Company v. Shurtleff</u> , 83 UT 488, 489, 30 P.2d 733, 736	14
<u>Treloggan v. Treloggan</u> , 699 P.2d 747 (UT 1985)	13, 15
<u>Walker v. Rocky Mountain Recreation Corp.</u> , 29 UT. 2d 274, 508 P.2d 538 (1973)	15

<u>Western States Thrift and Loan Company v. Blomquist</u> , 29 UT. 2d 58, 504 P.2d 1019, (1972)	15
---	----

Statutes Cited:

U.C.A. §78-2a-3(2)(j)	1
U.C.A. §70A-3-108(2)	6
U.C.A. §70A-3-118	6
U.C.A. §78-12-22	7
U.C.A. §78-12-23	7
U.C.A. §78-12-44	11, 14

Rules Cited:

Rule 56(e) of the Utah Rules of Civil Procedure	1, 5, 6, 13, 15, 17
Rule 408 of the Utah Rules of Evidence	2, 5, 8, 11, 13, 15, 16, 17
Rule 103 of the Utah Rules of Evidence	16
Rule 201 of the Utah Rules of Evidence	4
Rule 1101(a) of the Utah Rules of Evidence	12

JURISDICTION

Appellees Temple View Investments, Greg Stuart, William D'Evelyn and Richard Bennion (herein collectively referred to as "Appellees") do not contest the jurisdiction of the Utah Court of Appeals and admit this Court has jurisdiction under U.C.A. §78-2a-3(2)(j).

ISSUES FOR REVIEW

1. Are there any "material facts" that would prevent the District Court from granting Summary Judgment?

STANDARD OF REVIEW

Appellate Courts view facts in the light most favorable to the losing party below. Questions of law are reviewed for correctness. Bearden v. Croft, 31 P.3d 537 ¶5, 2001 UT. 76, 428 Ut. Adv. Rep. 18 (UT 2001).

2. Can a Motion for Summary Judgment be successfully refuted under Rule 56(e) of the Utah Rules of Civil Procedure by inadmissible evidence?

STANDARD OF REVIEW

Correctness standard. Bearden v. Croft, supra.

STATEMENT OF THE CASE

Appellant Wells Fargo brought an action for Breach of Contract - Note and Breach of Guarantees against the Appellees on May 15, 2002, arising out of a promissory note dated November 1, 1985 in the principal amount of \$339,232.30. Said note was due and payable on or before June 1, 1995. Wells Fargo's action was commenced some 6 years and 11 ½ months after the due date of the note. Appellees moved to dismiss Wells Fargo's action as being beyond the six (6) year statute of limitations from the due date of the note based upon two separate Utah State statutes. Wells Fargo responded with an Affidavit from its former legal counsel, John Anderson, which introduced into the Court file a letter written by Appellees' attorney Thomas Rogan in August of 1997 in an effort to settle and compromise the dispute. Appellees in turn moved to strike the affidavit of John Anderson on the grounds that the affidavit lacked foundation, constituted hearsay and otherwise introduced a document that is inadmissible in evidence under Rule 408 URE as an offer to settle a disputed matter. The District Court held that the Rogan letter was not a reaffirmation of the debt. The Court granted Appellee's motion for summary judgment on the statute of limitations. Wells Fargo filed a motion for new trial which was denied by the Court on the grounds that there was nothing new in the facts or the law submitted by Wells Fargo. Wells Fargo appealed.

STATEMENT OF FACTS

Some additional background information may be helpful to put this case in perspective.

1. In 1985, Appellees acquired an office complex in Utah County by delivering a promissory note of approximately \$1,000,000.00 to First Security Bank and a second unsecured promissory note to DeLance W. Squires doing business as Temple View Associates, a Utah partnership¹. (The enforceability of this note is the issue in the present litigation). The real property turned out to be grossly misrepresented and resulted in substantial litigation, foreclosure of the property and bankruptcy proceedings. On July 15, 1991, Appellees entered into a “Deed in Lieu of Foreclosure, Agreed Deficiency and a Trust Deed Note Renewal Agreement” with First Security Bank. Appellees have fully performed their obligations under that settlement agreement with Wells Fargo’s predecessor First Security Bank. Wells Fargo’s predecessor (First Interstate Bank) continued to pursue action against DeLance Squires and through a bankruptcy adversary proceeding apparently obtained the second note in question. There was a January 5, 1995 Mutual Release and Settlement Agreement in that adversary proceeding that Appellees were not parties to, nor was John Anderson, former

¹ The use of the name Temple View Associates and Temple View Investment by both the holders and makers of the note creates confusion. These are two (2) separate unrelated entities. Hence, Appellees herein are referred to as ‘Appellees’.

legal counsel to Wells Fargo. Wells Fargo at all times appears to be acting as personal representative of the Franklin Bradshaw Estate and as successor in interest to both First Interstate Bank and First Security Bank. All of that is irrelevant to the present litigation except to the extent that the John Anderson affidavit herein appears to be confusing the two separate transactions². Hence, the Anderson affidavit creates confusion in the present action because it lacks sufficient foundational clarity, contains hearsay and other inadmissible statements. Appellees in their original and Reply Memorandum in Support of their Motion to Strike the Affidavit of John Anderson specifically objected to paragraphs 2, 4, 5, 6, 8, 11, 12, 13, 14, 15, 16, 17 and 18, as well as the Thomas Rogan letter attached thereto dated August 29, 1997. See Court file pages 80-99.

2. On approximately April 19, 1989, Temple View Associates, a Utah partnership (DeLance Squires), and the purported holder of the note in question in the present action, commenced a legal action in Civil No. CV89-842 in the Fourth Judicial District Court of Utah County, State of Utah to collect on said note. Appellees appeared through legal counsel, filed an Answer in said action and denied any liability. The case was dismissed for failure to prosecute on November 30, 1990³.

3. The affidavits of Greg Stuart, William D'Evelyn and Richard Bennion supporting their motion for summary judgment are attached hereto collectively as

² The original note was payable to First Security Bank in the amount of \$1,000,00.00 and was secured by the office complex. The second is an unsecured note to Temple View Associates, a Utah corporation (DeLance Squires) in the amount of \$339,232.00.

³ This Court may take judicial notice of the public record. U.R.E - 201.

Exhibit “A”. Said affidavits contain uncontroverted evidence that: (1) there have been no payments on said promissory note from July 1, 1994 to the present, (2) these individuals never executed personal guarantees, (3) these individuals never agreed to a forbearance, or that the holder could stop payments or delay payments or postpone payments nor signed any forbearance agreement, and (4) the note was unsecured and has been since its inception. Court file pages 13-21, inclusively.

4. The Thomas F. Rogan letter dated August 29, 1997 is attached as an exhibit to Appellant’s brief. Wells Fargo’s response dated September 19, 1997 (Court’s file pages 67-77) is attached to Appellant’s brief as Exhibit 7c and acknowledges that said letter was “your client’s offer of compromise”. Said letter is an acknowledgment that the Rogan August 29, 1997 letter was an offer of compromise in a disputed matter and an acknowledgment of the existence of the obligation nearly five (5) years prior to Wells Fargo’s commencement of the present action.

SUMMARY OF ARGUMENT

The two separate state statutes limiting collection of promissory notes to six years clearly bars Appellant’s action. Wells Fargo cannot defeat a Motion for Summary Judgment with inadmissible evidence, under Rule 56(e) of the U.R.C.P. The Rogan letter of August 1997 is not a “clear, distinct reaffirmation of debt” by Appellees, is not a reaffirmation of debt at all, and is inadmissible under Rule 408 of the Utah Rules of

Evidence and therefore cannot be the basis for denying a Motion for Summary Judgment under Rule 56(e). The Anderson affidavit likewise is clearly inadmissible for lack of foundation and contains inadmissible settlement discussions and heresay. The language of the note is not an agreement to extend the statute of limitations by its own terms because it would otherwise affect the liability of the maker thereby nullifying part of the note language itself. There was no agreement to extend payment terms, there was no payment after the due date of the note, and the statute of limitations has clearly run.

ARGUMENT

POINT I

THE TWO SIX YEAR STATUTES OF LIMITATIONS BAR APPELLANT'S ACTION ON THE PROMISSORY NOTE

The note was signed and delivered on November 1, 1985. On page 2 of the note it expressly provides:

“The full amount principal and interest remaining unpaid shall be due and payable on or before June 1, 1995.”

A promissory note is payable “at a definite time” if there is a fixed date which is readily ascertainable at the time the promise or the order is issued. U.C.A. §70A-3-108(2).

U.C.A. §70A-3-118 provides in relevant part:

“STATUTE OF LIMITATIONS.

1. Except as provided in sub-section (5), an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or date stated in the note, or if a due date is accelerated, within six years after the accelerated due date. ...
5. (Not applicable as pertaining to a certificate of deposit).” (Our emphasis).

This provision of the Uniform Commercial Code adopted in the State of Utah indicates that “the due date” is the starting period for the six year statute of limitations, which cause of action accrues or begins on the day after June 1, 1995.

U.C.A. §78-12-23 provides in relevant part:

“WITHIN SIX YEARS - MESNE PROFITS OF REAL PROPERTY - INSTRUMENT IN WRITING.

An action may be brought within six years: ... (2) upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in §78-12-22⁴.”

Wells Fargo’s action was not filed until May 15, 2002, some 6 years and 11 ½ months after its cause of action on the note accrued.

The defense of an expired statute of limitations is a vested right. Roark v. Crabtree, 893 P.2d 1058 (UT. 1995). As a general rule, a promissory note cannot waive the statute of limitations. Hirtler v. Hirtler, 566 P.2d 1231 (UT 1977). The Court in Hirtler, noted:

⁴ 78-12-22 provides for an eight year statute of limitations based on a judgment or a decree and is not applicable to the present matter.

“Statutes of limitation are not designed exclusively for the benefit of individuals but are also for the public good. These statutes of repose are intended to prevent the revival and enforcement of stale demands; against which it may be difficult to defend, because of lapse of time, fading of memory and possible loss of documents.” At page 1231.

Hirtler noted that waivers of the statute of limitations are void and unenforceable as contrary to public policy.

It is important to note that the promissory note in question has always been unsecured. Affidavits of Stuart, Bennion and D'Evelyn. Hence, law in Utah that the statute does not run against the co-maker until the security is lost under APS v. Briggs, 927 P.2d 670 (Ut. Ct. App. 1996) has no application to the facts in the present matter.

Appellant's action was filed on May 15, 2002, some six (6) years and 11 ½ months after the note matured and was due and payable. Appellant's action is clearly barred by the statute of limitations. Appellant cannot toll or extend the statute of limitations by indicating that a promissory note is not in default when the plain language of the promissory note indicates it is due and payable on June 1, 1995. Appellant's assertion that a default was not declared is irrelevant and Appellant has cited no reliable authority for the proposition that Appellant can unilaterally extend the statute of limitations by not demanding payment. Failure to declare a default does not automatically extend the statute of limitations when there is a specific due date in the note. Appellant's reliance upon settlement discussions is inadmissible under Rule 408 and affords no legal basis for extending the six year statute of limitations. It is clear

from the record that Appellant had knowledge of the existence of the obligation for at least 5 years prior to filing its action and simply dallied until its legal rights were lost.

POINT II

THE LANGUAGE OF THE PROMISSORY NOTE DOES NOT EXTEND THE STATUTE OF LIMITATIONS

Appellant argues that the pre-printed form language of the promissory note constitutes an agreement that the note may be extended from time to time and was extended because Appellant's counsel did not demand payment until September 19, 1997. (Appellant's opening brief pages 14-18). The sentence in the note contains this important qualifier:

“The makers...expressly agree that this note, or any payment thereunder, may be extended from time to time without in any way effecting (sic) the liability of the makers and endorsers thereof. (Our emphasis).”

A fair reading of this qualification in the sentence is that the makers did not intend to extend their liability on the underlying obligation and therefore could not have agreed to extend the statute of limitations by this language. In fact, the makers (Appellees) believed that sentence entitled the holders to demand strict compliance or declare default even if the holders allowed Appellees to continue their payments beyond the due date. Consequently, the note language did not alter the liability of the makers under the note. However, no payment was made by anyone after 1994. Affidavits of Stuart, Bennion and D'Evelyn. Lastly, there was no express agreement at any time by Wells Fargo to

extend the repayment obligation, or was there any request to extend it by the makers (Appellees). See Affidavits of Bennion, Stuart and D'Evelyn.

Appellant's reliance on Fisher v. Fisher, 907 P.2d 1172 (Ut. Ct. App. 1995) at pages 16-17 of Appellant's opening brief is misplaced. In Fisher, the court after trial found that an equitable, (not legal) basis existed to modify the original agreement based on facts unique to that case. The record supported the finding that there was an express agreement to modify the contract that Plaintiff Fisher knew of and acquiesced in. Here, there is no such agreement and the note is definite and distinct and covered by a specific statute of limitations.

In a bankruptcy proceeding, a Court held that a forbearance by a creditor to call a demand note is "not an extension or renewal of credit" within the meaning of the Bankruptcy Act. In re Colasante, 12 BR 635 (E.D. Pa. 1981). In Federal Deposit Insurance Corp. v. Louisiana National Bank, 653 F.2d 927 (CA 5th 1981), the court held that under Louisiana law..."the obligee's mere gratuitous forbearance from exercising its legal rights under an instrument of indebtedness has been held not to create an agreement to extend the period of indebtedness." Page 940. Here, there can be no extension simply because Wells Fargo failed to demand payment for a couple of years, being fully aware of the existence of the note.

POINT III

THE ROGAN LETTER AND U.C.A. §78-12-44 (1966) DO NOT EXTEND THE STATUTE OF LIMITATIONS

Appellant argues that U.C.A. §78-12-44 (1966) constitutes “an acknowledgment of an existing liability, debt or claim”. The statute in relevant part provides:

“In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the time prescribed for the same after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby. When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense.” (Our emphasis).

In the present case there are no writings signed by any of the named Appellees, Stuart, D'Evelyn, Bennion or Temple View after the original note was made in 1985 that extend the statute of limitations. There is no express acknowledgment of this obligation by these same individuals after the maturity date of June 1, 1995.

A. Wells Fargo claims that the Thomas Rogan letter dated August 29, 1997 is such an acknowledgment of an outstanding liability or obligation. Appellees moved to strike the affidavit of John Anderson which contained the Rogan letter as inadmissible evidence under Rule 408 of the Utah Rules of Evidence. Rule 408 of the Utah Rules of Evidence provides in relevant part:

“Compromise and Offers to Compromise.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or

attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. ...” (Our emphasis).

The above-cited Rule of Evidence provides that not only are statements made in compromise negotiations not admissible, the statements are not admissible “to prove liability for” a claim. District Courts are bound to follow the Rules of Evidence. Rule 1101(a) of the Utah Rules of Evidence (1974).

Thomas Rogan was an attorney retained to defend the litigation on this note in Utah County in 1989 in Civil No. 89-842. That action was dismissed for failure to prosecute. A close examination of the August 1997 Rogan letter demonstrates that Appellees variously denied liability because they were “fraudulently induced...into making the note”, and that there was a failure to disclose other items to the makers of the note. Paragraph 7 of the Rogan letter specifically is a proposed compromise of a claim that is “disputed as to liability and amount” and refers to the document as a “settlement proposal”. Paragraph 8 also intimates that it is an attempt to resolve “this dispute”. The responsive letter of September 19, 1997 on Van Cott Bagley letterhead attached as Exhibit 7c to Appellant’s brief and to the Anderson affidavit (Court file 67-77) acknowledges receipt of the Rogan letter and “of your client’s offer of compromise in the above-captioned matter”. “I forwarded the offer to my client who quite frankly finds the offer rather insulting”. There can be no legal question that the Rogan letter was an attempt to compromise a disputed claim wherein Appellees denied liability

because of fraudulent inducement, and the same letter is treated or acknowledged by Appellant's attorney as a "offer of compromise" and an insulting offer at that. This offer of compromise and Wells Fargo's attorney's acknowledgment of it being an offer of compromise clearly brings the document within Rule 408 of the Utah Rules of Evidence and renders it inadmissible. Rule 56(e) of the Utah Rules of Civil Procedure provides that supporting and opposing affidavits to a motion for summary judgment "shall set forth such facts as would be admissible in evidence". Appellees submit that the court cannot deny its motion for summary judgment that was otherwise appropriate, based on factual issues that are not admissible in evidence. See, generally: Treloggan v. Treloggan, 699 P.2d 747 (UT 1985); Gaw v. State, 798 P.2d 1130 (Ut. Ct. App. 1990); Preston v. Lamb, 436 P.2d 1021 (UT 1968). An affidavit consisting of inadmissible parole evidence used for the purpose of altering terms of a written agreement was ineffective. Rainford v. Rytting, 22 UT. 2d 252, 451 P.2d 769 (UT 1969).

Appellees submit that under Davidson v. Prince, 813 P.2d 1225 (Ut. Ct. App. 1991) cert. denied 826 P.2d 651 (UT 1991) and Rule 408 of the Utah Rules of Evidence, the letter from Thomas Rogan dated August 29, 1997 is inadmissible and cannot be relied upon to set forth factual disputes in opposition to Appellees' motion for summary judgment.

B. The District Court concluded that the Rogan letter of August 1997 was not a reaffirmation of the debt in the first instance. In Beck v. Dutchman Coalition Mines

Co., 269 P.2d 867, 870 (UT 1954), the Supreme Court in interpreting U.C.A. §78-12-44 noted with approval:

“In Salt Lake Transfer Company v. Shurtleff, 83 UT 488, 489, 30 P.2d 733, 736, Mr. Justice Folland, speaking for this Court, noted that later Kansas cases announced the rule that ‘nothing short of a distinct, direct, unqualified, and intentional admission of a present, subsisting debt on which a party is liable will be sufficient to take the obligation out of the statute and start it running anew.’ He stated that ‘the acknowledgment necessary to start the statute [running] anew must be more than a hint, a reference, or a discussion of an old debt; it must amount to a clear recognition of the claim and liability as presently existing. In re Gillman, Son and Company (DC), 57 F.2d 294.’” (Our emphasis).

The language in the Rogan letter in paragraph 1 is merely a reference or an introductory paragraph used to identify the promissory note whose liability and amount is disputed by Appellees. It does not rise to the level of the Beck requirements that it be “distinct, direct and unqualified admission of a present existing debt”. Secondly, it does not meet the requirements of U.C.A. §78-12-44 which requires that an acknowledgment of debt must be in writing, signed by the parties sought to be charged thereby. While it is true that Rogan defended Appellees as an attorney at law with respect to this claim, there is no affirmative evidence that he was authorized by Appellees to admit any liability for the obligation or to re-affirm the debt. The District Court never got to that issue because on its face the Rogan letter does not constitute a clear, distinct reaffirmation of the debt, but taken as a whole, constitutes an offer in compromise of a disputed matter as to liability.

POINT IV

THE ANDERSON AFFIDAVIT IS INADMISSIBLE FOR LACK OF FOUNDATION, HERESAY AND RELATING SETTLEMENT DISCUSSIONS NOT ALLOWED UNDER RULE 408 OF THE UTAH RULES OF EVIDENCE

There should be no dispute that Rule 56(e) of the Utah Rules of Civil Procedure requires that affidavits be made on personal knowledge, set forth such facts as would be admissible in evidence and show affirmatively that affiant is competent to testify as to the matters stated therein. See, generally: Treloggan, supra, Gaw, supra, Preston, supra and Rainford, supra. Heresay testimony that would not be admissible if testified to at a trial may not properly be set forth in an affidavit opposing summary judgment. Western States Thrift and Loan Company v. Blomquist, 29 UT. 2d 58, 504 P.2d 1019, (1972); Walker v. Rocky Mountain Recreation Corp., 29 UT. 2d 274, 508 P.2d 538 (1973).

In its Memorandum to Strike (Court file pages 94-97) Appellees objected to paragraphs 2, 4, 6, 8, 11, 12, 13, 14, 15, 16, 17 and 18 of the John Anderson affidavit as violative of Rule 408 of the Utah Rules of Evidence and containing inadmissible settlement discussions. The same paragraphs were objected to as heresay statements. In paragraph 4 of the Anderson affidavit, Appellees objected to language that Defendants “were instructed to stop making payments on the note” until September 19, 1997. This statement lacks foundation, constitutes heresay and is violative of Rule 408 of the Utah Rules of Evidence regarding settlement discussions. Paragraph 5 of the

Anderson affidavit is not based on any personal knowledge of Anderson because Anderson himself was not signatory or party to the January 5, 1995 Settlement Agreement, nor were Appellees, and the January 5, 1995 Mutual Release and Settlement Agreement has no application to the present case and is irrelevant. Many of the other statements of Anderson in paragraph 6 throughout the balance of the agreement were referred to in Defendants' Reply Memorandum (case file 80-93).

The District Court was not persuaded that the Anderson affidavit had sufficient foundational basis to be admissible in court. The Court, in its discretion, may exclude such evidence unless it would be plain error affecting a substantial right. Rule 103 of the Utah Rules of Evidence and cases thereunder. The District Court granted Appellees Motion to Strike the Affidavit of John Anderson as lacking foundation even though Appellees additionally argued that the statements were also inadmissible under Rule 408 of the Utah Rules of Evidence and constituted hearsay.

POINT V

THE MOTION FOR NEW TRIAL PRESENTED NO NEW EVIDENCE AND FACTS

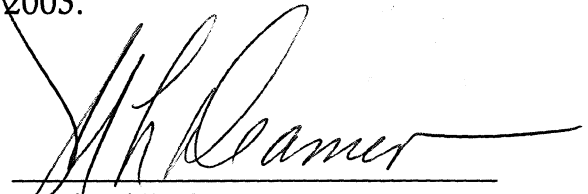
Wells Fargo in its motion for a new trial presented no relevant new facts and no new case law. The motion for a new trial included additional letters that predated the due date of the note on June 5, 1995. There was no new case law or other affidavits submitted and, as such, the court denied the motion for a new trial.

Appellees in their original motion for summary judgment and in a subsequent response to the motion for new trial sought an award of attorneys' fees and court costs for being compelled to respond to an action that appears clearly barred by the six (6) year statute of limitations and on the motion for new trial there was nothing new presented or argued of any material bearing. Appellees believe they still should be awarded their reasonable attorneys' fees, court costs and expenses in responding to this unjustified action.

CONCLUSION

Wells Fargo's promissory note from 1985 is clearly barred by two state statutes of limitations limiting said actions to six years after the due date. There is no evidence of any grounds to extend or toll the statute of limitations. The Rogan letter is not a reaffirmation of the debt, and is otherwise inadmissible under Rule 408 of the Utah Rules of Evidence and cannot be the basis for denying a motion under Rule 56(e) of the Utah Rules of Civil Procedure. The Anderson affidavit is likewise inadmissible for numerous reasons including hearsay, lack of foundation and violations of Rule 408. There are no material factual disputes which would prevent the granting of the motion for summary judgment or otherwise alter the six year statute of limitations. The decision of the District Court granting summary judgment and denying the motion for new trial should be affirmed in all respects and Appellees should be awarded their reasonable attorneys' fees, court costs and expenses.

Respectfully submitted this 1 day of July, 2003.



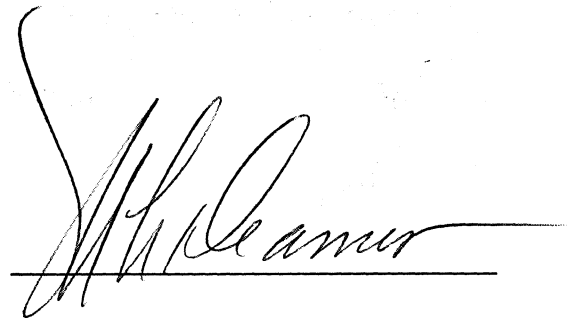
Michael L. Deamer
Attorneys for Appellees
Temple View Investments,
Greg Stuart, William D'Evelyn
and Richard C. Bennion

CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the within and foregoing BRIEF OF APPELLEES to be mailed, postage prepaid, this 2 day of July 2003, to the following counsel of record:

John A Snow
Bradley M. Strassberg
VAN COTT, BAGLEY, CORNWALL
& MCCARTHY
50 South Main Street, Suite 1600
Salt Lake City, UT 84145

Attorneys for Appellant Wells Fargo Bank, N.A.



16cqmd!674

EXHIBIT A

**IN THE THIRD JUDICIAL DISTRICT COURT FOR
SALT LAKE COUNTY, STATE OF UTAH**

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

On this 10th day of July, 2002, personally appeared before me, a Notary Public, Richard C. Bennion, Affiant herein, who being first duly sworn upon oath, deposes and says:

1. Affiant is a defendant in the above-entitled action, signatory to the promissory note referred to in Plaintiff's Complaint and has personal knowledge of the matters herein set forth.

2. The promissory note in the amount of \$339,232.30 dated November 1, 1985, payable to Temple View Associates, is an unsecured promissory note and has been unsecured since its inception.

3. Affiant knows of his own knowledge and information that the last payment that could be construed to be a payment on said note was made on July 1, 1994 and there have been no other payments on said promissory note from July 1, 1994 to the present.

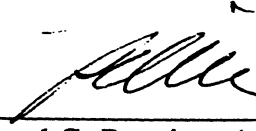
4. Affiant never executed or delivered a personal guarantee for the obligation reflected in the promissory note dated November 1, 1985 attached as Exhibit "A" to Plaintiff's Complaint in the amount of \$339,232.30.

5. Affiant has never signed a forbearance agreement or any other kind of agreement nor has Affiant at any time agreed with the holder of the above-referred to note to stop payments or delay payments or to postpone payments.

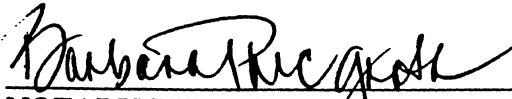
6. The above-referred to promissory note, by its own terms and conditions, was due and payable on or before June 1, 1995.

7. Affiant has been compelled to retain legal counsel to assist in defense of the matter and has incurred legal fees and costs in defending against Plaintiff's claims.

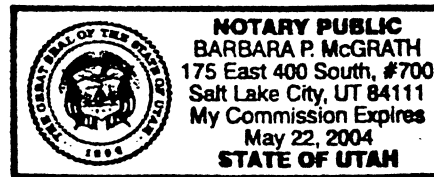
8. The above matters are true and correct of Affiant's own knowledge and information.


Richard C. Bennion, Affiant

SUBSCRIBED AND SWORN to before me this 10th day of July, 2002.


NOTARY PUBLIC
Residing at:
My Commission Expires:

10cqmld/1055



MICHAEL L. DEAMER - NO. 844
RANDLE, DEAMER & LEE, P.C.
Attorneys for Defendants
139 East South Temple, Suite 330
Salt Lake City, UT 84111
Telephone: (801) 531-0441
Facsimile: (801) 531-0444

**IN THE THIRD JUDICIAL DISTRICT COURT FOR
SALT LAKE COUNTY, STATE OF UTAH**

WELLS FARGO fka FIRST	:	AFFIDAVIT OF GREG STUART
INTERSTATE BANK OF UTAH, as	:	
personal representative of the Estate of	:	
Franklin J. Bradshaw et al,	:	
	:	
Plaintiffs,	:	
v.	:	
	:	
TEMPLE VIEW INVESTMENTS,	:	
GREG STUART, WILLIAM	:	
D'EVELYN, and RICHARD C.	:	Civil No. 020904189
BENNION,	:	
	:	Judge Anthony B. Quinn
Defendants.	:	

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

On this 10th day of July, 2002, personally appeared before me, a Notary Public, Greg Stuart, Affiant herein, who being first duly sworn upon oath, deposes and says:

1. Affiant is a defendant in the above-entitled action, signatory to the promissory note referred to in Plaintiff's Complaint and has personal knowledge of the matters herein set forth.

2. The promissory note in the amount of \$339,232.30 dated November 1, 1985, payable to Temple View Associates, is an unsecured promissory note and has been unsecured since its inception.

3. Affiant knows of his own knowledge and information that the last payment that could be construed to be a payment on said note was made on July 1, 1994 and there have been no other payments on said promissory note from July 1, 1994 to the present.


4. Affiant never executed or delivered a personal guarantee for the obligation reflected in the promissory note dated November 1, 1985 attached as Exhibit "A" to Plaintiff's Complaint in the amount of \$339,232.30.

5. Affiant has never signed a forbearance agreement or any other kind of agreement nor has Affiant at any time agreed with the holder of the above-referred to note to stop payments or delay payments or to postpone payments.


6. The above-referred to promissory note, by its own terms and conditions, was due and payable on or before June 1, 1995.

7. Affiant has been compelled to retain legal counsel to assist in defense of the matter and has incurred legal fees and costs in defending against Plaintiff's claims.

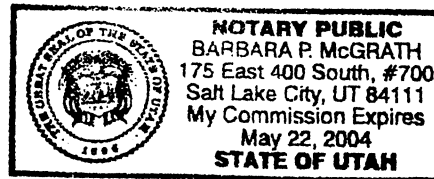
8. The above matters are true and correct of Affiant's own knowledge and information.


Greg Stuart, Affiant

SUBSCRIBED AND SWORN to before me this 10th day of July, 2002.


NOTARY PUBLIC
Residing at:
My Commission Expires:

10cquld/1053



MICHAEL L. DEAMER - NO. 844
RANDLE, DEAMER & LEE, P.C.
Attorneys for Defendants
139 East South Temple, Suite 330
Salt Lake City, UT 84111
Telephone: (801) 531-0441
Facsimile: (801) 531-0444

IN THE THIRD JUDICIAL DISTRICT COURT FOR
SALT LAKE COUNTY, STATE OF UTAH

WELLS FARGO fka FIRST	:	AFFIDAVIT OF
INTERSTATE BANK OF UTAH, as	:	WILLIAM D'EVELYN
personal representative of the Estate of	:	
Franklin J. Bradshaw et al,	:	
	:	
Plaintiffs,	:	
v.	:	
	:	
TEMPLE VIEW INVESTMENTS,	:	
GREG STUART, WILLIAM	:	
D'EVELYN, and RICHARD C.	:	Civil No. 020904189
BENNION,	:	
	:	Judge Anthony B. Quinn
Defendants.	:	

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

On this 10th day of July, 2002, personally appeared before me, a Notary Public, William
D'Evelyn, Affiant herein, who being first duly sworn upon oath, deposes and says:

1. Affiant is a defendant in the above-entitled action, signatory to the promissory note referred to in Plaintiff's Complaint and has personal knowledge of the matters herein set forth.

2. The promissory note in the amount of \$339,232.30 dated November 1, 1985, payable to Temple View Associates, is an unsecured promissory note and has been unsecured since its inception.

3. Affiant knows of his own knowledge and information that the last payment that could be construed to be a payment on said note was made on July 1, 1994 and there have been no other payments on said promissory note from July 1, 1994 to the present.

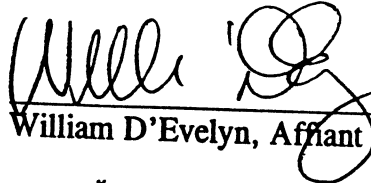
4. Affiant never executed or delivered a personal guarantee for the obligation reflected in the promissory note dated November 1, 1985 attached as Exhibit "A" to Plaintiff's Complaint in the amount of \$339,232.30.

5. Affiant has never signed a forbearance agreement or any other kind of agreement nor has Affiant at any time agreed with the holder of the above-referred to note to stop payments or delay payments or to postpone payments.

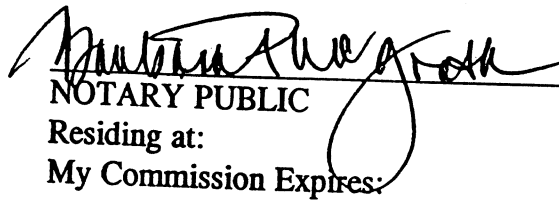
6. The above-referred to promissory note, by its own terms and conditions, was due and payable on or before June 1, 1995.

7. Affiant has been compelled to retain legal counsel to assist in defense of the matter and has incurred legal fees and costs in defending against Plaintiff's claims.

8. The above matters are true and correct of Affiant's own knowledge and information.


William D'Evelyn, Affiant

SUBSCRIBED AND SWORN to before me this 10th day of July, 2002.


NOTARY PUBLIC
Residing at:
My Commission Expires:

10cqmld/1054

