1983

Utah Farm Production Credit Association v. Milo W. Watts, Et. Al. : Brief of Appellant

IN THE SUPREME COURT STATE OF UTAH

UTAH FARM PRODUCTION CREDIT ASSOCIATION,	)	
Plaintiff and Appellant,	)	
vs.	)	Case No. 19380
MILO W. WATTS, et. al.,	)	
Defendant and Respondents.	)	

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF THE FIFTH JUDICIAL DISTRICT COURT FOR MILLARD COUNTY, HONORABLE J. HARLAN BURNS, JUDGE

JAMES R. BROWN
JARDINE, LINEBAUGH, BROWN & DUNN
Attorneys for Plaintiff, Appellant
370 East South Temple, Suite 401
Salt Lake City, UT 84111
Telephone: (801) 532-7700

Robert C. Cummings
Attorney for Defendant, Respondent, Watts
320 South 3rd East
Salt Lake City, UT 84111

Christopher A. Johnson
Attorney for Defendant, Respondent, Gregory
800 Continental Bank Building
Salt Lake City, UT 841101

LeRay G. Jackson
Attorney for Defendant, Respondent, Farthing
P. O. Box 545
Delta, UT 84624

Steven R. Jackson
Attorney for Defendants, Respondents, Stevenson & Burns
P. O. Box 545
Delta, UT 84624

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NATURE OF CASE

This action was commenced by Utah Farm Production Credit Association (hereinafter "PCA"), to seek payment of three promissory notes and to foreclose a mortgage securing the repayment of said notes against Milo W. Watts and Cleown W. Watts (hereinafter "Watts") and Buford L. Gregory and Elizabeth A. Gregory (hereinafter "Gregory"). In addition, PCA sought payment of an unsecured note which was the obligation of Gregory only.

Watts brought a cross-claim against Gregory under the provisions of a Uniform Real Estate Contract on a farm of approximately 480 acres in size (hereinafter designated as the "Gregory Farm"). The Gregory Farm was originally owned by Watts and purchased by Gregory from Watts. Prior to the sale of the Gregory Farm to Gregory, PCA had a secured position on the Gregory Farm, Watts' home and ranch (hereinafter "Home/Farm"),

crops and equipment to secure an obligation due from Watts to PCA.

DISPOSITION IN LOWER COURT

The complaint was filed in April 1980, and the case was at issue in June 1980. PCA sought summary judgment in August 1980 which was denied on December 16, 1980. Discovery was conducted by all parties.

PCA filed a second motion for summary judgment in October 1981. Partial summary judgment was granted October 20, 1981 in favor of PCA with the only issues remaining as to the exact amount owing to PCA because of farming operations from the year 1980 and whether the Home/Farm is subject to the mortgage. Additional discovery was conducted by the parties.

On December 7, 1981 PCA again sought summary judgment on the only remaining issues and on December 4, 1981 Watts sought summary judgment against PCA. Oral argument was held December 15, 1981 before Judge Burns, and the court took both motions under advisement with additional memoranda to be filed by the moving parties.

Memoranda were subsequently filed by the moving parties the last of which was filed February 1, 1982. Additional discovery and affidavits was completed and filed with the court by June 1982. The trial court did not rule on the pending motions

for summary judgment until June 7, 1983, at which time the court denied PCA's motion for summary judgment and granted summary judgment in favor of Watts, both as to PCA and against Gregory on the cross-claim.

The summary judgment was docketed with the clerk of the court on July 28, 1983. On August 11, 1983, PCA filed its Notice of Appeal.

NATURE OF RELIEF SOUGHT ON APPEAL

PCA seeks a reversal of the summary judgment in favor of Watts, and for judgment against Watts in the amount of $346,346.72 plus interest from and after December 15, 1981, together with a decree of foreclosure against the Gregory Farm, the Home/Farm, crops and equipment.

STATEMENT OF FACTS

Watts had been borrowers from PCA for a number of years prior to 1978. Watts sold to Gregory a farm of approximately 480 acres in size (R. 50). At the time of this sale, Watts were indebted to PCA in the amount of $104,884.00 secured by a mortgage on the 480 acre Gregory Farm, a mortage on the Home/Farm, crops, cattle and equipment (R. 385).

After the sale of the Gregory Farm to Gregory, Watts and Gregory sought additional financing from PCA (R. 386-387). PCA had no experience with Gregory, but had a number of years experience with Watts and approved a loan to Watts-Gregory on January 6, 1980 (R. 15, 386, 387) part of which was a "roll-over" of Watts' $104,804.00 loan in the amount of $105,519.00 (R. 311). Watts was the primary obligor on said note (R. 15, 311, 359-61, 367-69, 379), and it was the property of Watts, with the possible exception of the equitable interest of Gregory in the Gregory Farm, that was the security for the loan of January 8, 1979 (R.15, 18-21, 23-30).

On March 21, 1979 PCA made an additional loan to Watts Gregory in the amount of $20,000.00 (R. 16, 385-86). This additional loan was secured by the Watts properties (R. 16, 18-21, 23-30). On August 21, 1979 PCA loaned to Watts-Gregory the sum of $48,890.00 (R.17), again secured by all of Watts' property.

On June 1, 1979 PCA made a loan to Gregory only in the amount of $38,890.00 (R.22), which was an usecured loan.

Default on all four notes occurred and PCA commenced this action to enforce payment on April 30, 1980 and to foreclose on the security given to insure payment of said notes (R. 1).

PCA, after the matter was at issue, sought summary judgment on August 22, 1980 (R. 75). There were accompanying

affidavits and memorandum submitted in August 1980 in support of PCA's motion (R. 75-100). During the crop year of 1980, PCA entered into an agreement with Watts to farm the property under foreclosure (R. 88-92, 117-119). Watts filed an opposing affidavit which put into issue the amount realized from the operation of the Gregory Farm for the crop year of 1980. (R. 117-119). The summary judgment motion was denied on December 15, 1980 (R. 129).

Additional discovery was completed and a second motion for summary judgment was filed on behalf of PCA (R 231-232), together with accompanying memorandum and affidavits (R. 233-242). On October 20, 1981 the trial court granted PCA's motion for partial summary judgment leaving only the issues of how much was due and owing on the Notes, and whether the Home/Farm was part of the security (R. 251, 332-333).

On July 17, 1981, PCA enterd into a release agreement with Gregory for the satisfaction of the Gregory Note (Exhibit E to the complaint, R. 22), and to release Gregory from any deficiency judgment on the foreclosure of the Gregory Farm, while preserving the right of PCA to either take a deed in lieu of foreclosure of Gregory's interest in and to the Gregory Farm, or continue the foreclosure proceeding and have a stipulated judgment of foreclosure on the interests of Gregorys (R. 268-85), on foreclosure of the Home/Farm.

PCA conducted further discovery on the remaining issues and again sought summary judgment on December 7, 1981 (R. 258)

together with accompanying affidavits and memorandum (R. 262-291, 311-333, 358-395). Watts moved for a summary judgment (R. 256-257) on December 4, 1981 as against PCA and as against Gregory on May 20, 1983 (R. 398-399). The court after hearing oral argument on December 15, 1981 on PCA's and Watt's respective summary judgment motions, took the matter under advisement (R. 298), and requested supplemental memorada by both parties.

PCA and Watts both filed supplemental memoranda the last being filed February 1, 1982 (R. 346). The trial court received additional evidence by way of deposition (Mr. Boyer) and affidavits, the last of which were filed with the court on July 28, 1982 (R. 378).

The trial court finally agreed to rule on the pending motions on June 7, 1983 (R. 396). On June 7, 1983 the trial court made a record of the proceedings and asked to be "refreshed" on the respective positions on Watts' motion for summary judgment (Supp. R. 3). After argument, the trial court made a finding that no justiciable issue of fact and law exists to the status of Watts and found that Watts were "accommodation makers" on the notes (Supp. R. 4). Further, the court found the release of July 17, 1983, released

> . . . Watts to the same extent that the release refers to Gregory's, which the court interprets as a matter of law, to release the property as to claims against Gregorys same applicable to defendant Watts. (Supp. R. 4).

The court denied PCA's summary judgment on the basis of a "justiciable issue of fact" and further granted Watts' motion as against defendant Buford L. Gregory (Supp. R. 4-5).

ARGUMENT

POINT I

THERE ARE TRIABLE ISSUES OF FACT ON WATTS' MOTION

The purpose of summary judgment procedure is to determine whether there are any triable issues of fact requiring a formal trial on the merits. Rule 56(c) of the Utah Rules of Civil Procedure requires a showing that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. It is a well established general principle that a genuine issue of material fact is necessary in order to preclude a summary judgment. A "genuine" issue is one which can be maintained by substantial evidence. In 73 Am. Jur.2d Summary Judgment §22 at pages 743-44 the law is stated:

> The mere presence of an alleged adverse claim is not sufficient to defeat a motion for summary judgment, but to defeat summary judgment a party must substantiate his contradictory version in evidentiary form. It is not enough that one opposing a motion for summary judgment claims that there is a genuine issue of material fact; some evidence showing the existence of such an issue must be presented in the counteraffidavits. In other words, in order to show a triable issue of fact so as to defeat a motion for summary judgment, mere general averments will not suffice, since an evidentiary showing is indispensible. (emphasis supplied)

In accordance with the foregoing, PCA filed several affidavits in opposition to Watts' Motion for Summary Judgment supported by many evidentiary exbibits showing the existence of a

genuine issue of fact. Specifically, there is an issue of fact whether Watts are "accommodation makers" as found by the trial court (Supp. R. 4). An accommodation maker is defined in §70A-3-415 as follows:

> An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it.

Anderson, Uniform Commercial Code, Vol. 2, p. 10002-3 §3-415:9 states in part:

> The intention of the parties is the significant element in determining whether a given party is an accommodation party and the identity of the party accommodated. If the intent is not expressed, the purpose for which the commercial paper is executed or used is the significant element. . . . Where a person receives no direct benefit from the execution of the paper, it is likely that he will be regarded as an accommodation party but not if he receives a benefit. Illustrative of this distinction, it has been held that where a co-signer of a note receives a benefit from the proceeds of the note such person is a co-maker and not an accommodation party. (emphasis supplied)

The intent of PCA and Watts-Gregory is expressed in the loan documents, the promissory notes and the security documents. Watts are co-makers. The intent of PCA is very well established by the affidavits of Wood, Naylor and Mills wherein they stated:

> 10. That the security which PCA was given pursuant to the attachments to the Verified Complaint was on property that was owned in the main by Defendants Milo W. Watts and his wife Cleown W. Watts, and that affiant, in his capacity as a member of the loan committee with the specific responsibility to approve or disapprove loan applications, deemd Defendants Milo W. Watts and Cleown W. Watts, Buford L. Gregory and Elizabeth A. Gregory, his wife, as joint co-makers on said Note and obligation and that said loans per the Verified Complaint were on the auspices and strength of Milo W. Watts, Cleown W. Watts, Buford

L. Gregory and Elizabeth A. Gregory jointly as co-makers in each and every instance, and that the affiant so acted in his capacity as President of PCA and as a member of the loan committee on all loan applications as per the Exhibit "A" attached hereto, which loan action refers to Gerald Naylor and affiant herein and Ferris J. Fitzgerald. (R. 359-60, Mills Affidavit)

3. Said loan was the result of a "roll over" of $105,519.00 of Milo and Cleown Watts' prior obligation and the extension of an additional amount of $93,000.00 per an operating budget submitted by Gregory-Watts.

4. Affiant, of his own knowledge, declares and states that PCA, through its officers and agents, considered this loan to be the loan primarily of Milo and Cleown Watts inasmuch as there was long history established with Mr. and Mrs. Watts and the total security was owned by Mr. and Mrs. Watts and that Gregorys were unknown to PCA and had not established credit with PCA. (R. 311, Wood Affidavit).

4. That affiant, of his own knowledge, declares and states that in his capacity as Branch Manager as well as a member of the loan committee which approved the various loans which are evidenced by Exhibits "A", "B" and "C" to Plaintiff's Verified Complaint.

5. That affiant, of his own knowledge, declares and states that it was discussed on many occasions that the security for the Notes, Exhibits "A", "B" and "C", was a mortgage on certain real property, which real property was, in fact, owned by Defendants Milo Watts and his wife, that said loans would not have been made without said security and as Milo W. Watts and his wife as co-makers as distinguished from a guarantor or an accommodation maker.

. . .

7. That affiant, of his own knowledge, declares and states that Utah Farm Production Credit Association has a special form for a guarantor and/or accommodation maker and that said form is hereto attached as Exhibit "B" and by this reference is incorporate into and made a part of this Affidavit as if fully set out herein, and that Defendants Milo Watts and his wife Cleown

> Watts has never been asked to execute as guarantors as distinguished from co-makers on these obligations. (R. 378-79, Naylor Affidavit).

Finally, Anderson, Uniform Commercial Code, supra, in the 1970-74 supplement states at p. 901 §3-415:9 to the original text:

> When the evidence is conflicting as to whether a person signed commercial paper as an accommodation for the payee, a question of fact is presented which is to be determined by the trier of fact.

Watts asserts and argued before the trial court that whoever received the proceeds of the loan is a "principal obligor" (R. 291). It is submitted that this a secondary test and not the primary test. The primary test is the intent of the parties.

The intent of the parties is evidenced by the loan action documents, the affidavits and the notes. In August, 1978, Watts sold to Gregory 481 acres. Gregorys were new to the Kanosh area and were unknown as far as farming operations, and as to credit worthiness. PCA, in July 1978 (see loan action document #1, R 368-9) made Watts, not Gregory, a loan. The last notation states:

> Recommend approval based on long time experience with member, repayment by maturity, security and financial strength. (emphasis supplied)

The loan of $104,884.00 is one to Watts. It is essential to note what security is given for the Watts' loan. On document #1, the security is spelled out as:

> Crop liquidation
> 1st mortgage 109 acres (Watts' home)

Cattle on hand
Cattle on contracts
Equipment
2nd mortgage on 1257 acres (Watts' farm)

In January, 1979, there is a request for an additional loan and to "roll over" the Watts' loan of $104,000.00 from 1978. Document #2 (R. 366-7) is an action report showing that the loan was to "Gregory - Watts" and the correspondence of January 8, 1979 discloses that $101,073.72, plus interest of $1,445.28, is from the "roll over" of the Watts' loan of 1978.

On document #2, there is a description of the security for this loan as follows:

Hay
1st mortgage on 109 acres (Watts' home)
Cattle on contract receivable
Equipment
2nd mortgage on 1257 acres (Watts' farm)

Even a casual observation discloses this to be the very same security as the Watts' loan of 1978.

The note signed by both Watts and Gregory in the capacity of "makers" appears as Exhibit "A" to Plaintiff's Complaint having a face amount of $198,519.00. It is noted that Watts' names appear first and Gregory's as second. Mr. Richard Wood, a loan officer for PCA, has stated under oath that on behalf of PCA in the capacity of a loan officer he considered Watts as the primary makers and that the loan was secured totally from Watts' property.

A second increase of the loan was made to "Gregory - Watts" with a note dated March 27, 1979. See Exhibit "B" attached to Plaintiff's Complaint. This loan action was documented on

document #5 (R. 364-5). It is an increase of the earlier loan see bottom of the first page of document #5 and again the head "Additional Loan Action." The security for this increase is:

Hay
1st mortgage on 109 acres (Watts' home)
Cattle on contract receivable
Equipment
2nd mortgage on 1257 acres (Watts' farm)

It is noted in the concluding paragraph:

> Recommend approval of this loan increase request based on members' financial strength, repayment capacity, and security position. (emphasis supplied).

It is obvious that this is only an increase not a new loan. It is based upon members' (plural) financial strength and upon the security position. All of the security is from Milo Watts. Watts' names appear first on the note (Exhibit "B").

The last note (Exhibit "C" to Plaintiff's Complaint) was executed by Watts and Gregory and the "Additional Loan Action," document #7 (R. 362-3) indicates the following:

A. This is an increase of existing loan for operating expenses.

B. It is approved with a notation that there is to be "No more increases until Arizona property sold."

C. This increase is $48,890.00 and makes the total $314,863.00.

D. The security is:

Hay
1st mortgage on 109 acres (Watts' home)
Cattle on contract receivable
Equipment
2nd mortgage on 1257 acres (Watts' farm)

becomes very obvious that the last increase, Exhibit "C" signed by Watts first and Gregory second, is the original Watts' loan plus three increases.

Watts has never just "lent" his credit to Gregory as far as PCA is concerned, but was the maker, the member, the owner of the security and was the sole borrower initially of which the full amount is now and has been outstanding. The documents all indicate Watts was really the primary borrower.

Even under the secondary test, Watts is a co-maker and primary obligor. Watts obviously received direct benefit of $105,519.00 (R. 311) on Note "A", the other two notes are extensions of the original loan. If Watts received "benefits" from the notes, they are not accommodation makers. See Fisher v. The Rice Growers Bank, 122 Ark. 602, 184 S.W. 36, MacArthur v. Cannon, 4 Conn. Cir. 208, 229 A.2d 372 (1967), Hansen v. Cheek and Devant, 251 Ark. 897, 475 S.W.2d 526 (1972). Also, 90 A.L.R.3d 243 and Nelson v. Cotham, 595 S.W.2d 693 (Ark. App. 1980), wherein the Court stated:

> While PFS did insist that Mr. Cotham personally sign the Note before credit would be extended to the Corporation, this record shows that Cotham's purpose in signing the Note was not solely to lend his name as a surety to the other comakers. We are persuaded that his primary purpose in signing the Note was to benefit his business interests by obtaining money to keep his corporation going with the expectation that it would ultimately repay the Note. Therefore he was not an accommodation endorser under the circumstances.

Watts personally wanted Gregory to operate the 481 acre farm to be able to pay Watts for said farm. The first note signed by

both Watts-Gregory ($198,519.00) consisted of $105,000.00 ... over, and an operating loan to farm the Gregory Farm. The ... note ($20,000.00) was to make permanent improvement to the Gregory Farm. Watts received a payment from the proceeds of ... last increase of some $27,000.00. Watts cannot be an accommo... tion maker under these circumstances.

POINT II

IF WATTS IS A CO-MAKER AND NOT AN ACCOMMODATION MAKER, THE RELEASE HAS NO EFFECT

It is conceded by all parties that the only basis of relief for Watts is if Watts is an accommodation maker as oppos... to a party of primary obligation. There exists, at the outset, material issue of fact of what the status of Watts is in this instance. If Watts is a primary obligor then the trial court erred in its "Findings" and ruling.

This issue is crucial to Watts' position. In the lead case of Wohlhuter v. St. Charles Lumber and Fuel Co., 338 N.E.2d 179, 62 Ill.2d 16 (1975), the Court concluded at page 182:

> In our opinion the legislative history of the Uniform Commercial Code and its predecessor, the Negotiable Instrument Law, supports the conclusion that the term "any party" as used in section 3-606 of the Uniform Commercial Code was intended to include parties who sign negotiable instruments ostensibly as makers but who are in fact sureties or accommodation makers, and that the provisions of section 3-606(1)(b) do not apply to co-makers."

See also Peoples Bank, Etc. v. Pied Piper Retreat, Inc., 209 S.E.2d 572 (W. Va. 1974), wherein the Court declared at page 573:

> The appellant concedes that this defense of unjustifiable impairment of collateral is available only to secondary or accommodation parties. This is undoubtedly the rule--the defense is available to both secondary parties and accommodation parties, whether the latter are secondary accommodation parties such as accommodation endorsers, or primary accommodation parties such as accommodation makers. The defense is not available to principal debtors, i.e., makers. See the official comment to Code, 46-3-606, where it is indicated that this is a suretyship defense available to a party who has recourse against another party to the instrument. See also I, Hawkland, A Transactional Guide to the Uniform Commercial Code, Section 2.1705, page 551, Section 2.2101, page 563; Oregon Bank v. Baardson, 256 Or. 454, 473 P.2d 1015.

Also see Hooper v. Ryan, 581 S.W.2d 237 (Texas 1979), where it is held that Section 3.606 of the UCC applies to sureties and not to co-makers.

This court has acknowledged the distinction between co-makers and accommodation makers and the effect under the UCC. See Kennedy v. Bank of Ephraim, 594 P.2d 881 (1979 Utah).

Watts cannot be an accommodation maker on his own obligation. The Missouri court in Kopff v. Miller, 501 S.W.2d 532 (Miss. 1973) states at page 537:

> It is also true, however, that "No one can be an accommodation maker of a note given for his own debt" (Citation omitted)

Finally the case of Bell v. Citizens & Southern Nat. Bank, 151 Ga. App. 126, 2585 F.2d 774 (1979) is on all fours with the situation. Mrs. Bell, the wife of a husband who had filed

bankruptcy asserted she was an accommodation maker, while admitting:

A. The note showed her as a maker;

B. The note was a refinancing or renewal of other for which she was liable;

C. Her husband obtained additional funds used in his husband's business;

D. The proceeds were used to pay off joint income tax liability;

E. A draw of some of the money was received in the household account.

Based upon the foregoing, the court held her as a co-maker and not an accommodation maker. Watts, in this instance did the following:

A. Watts signed the notes as makers;

B. The notes were a renewal or refinancing of an obligation of $105,000.00 of Watts' personal obligation;

C. Gregory received operating funds to farm the Gregory Farm to produce income from which to purchase the Gregory Farm from Watts;

D. The loan proceeds were used in part to pay off joint obligations of Watts-Gregory.

E. The proceeds of the loan were used to pay Watts a payment of some $27,000.00 on the contract of purchase between Watts and Gregory.

Watts must be a co-maker as opposed to an accommodation maker which make provisions of §70A-3-606 inapplicable. PCA asserts

the evidence is clear to make Watts a primary obligor or maker. However, if the evidence in the form of affidavits and documents, including the notes themselves, is unclear, it certainly raises an issue of material fact that must be determined by the trier of fact. Therefore, the trial court's decision for summary judgment in favor of Watts must be reversed.

POINT III

PCA SPECIFICALLY RESERVED ITS RIGHTS AGAINST WATTS

PCA asserts that a careful reading of the Settlement Agreement in the context of its execution discloses an express reservation as against Watts on PCA's foreclosure action. In the "recitals" portion of the Settlement Agreement, it states:

> A. Gregorys together with Milo and Cleown Watts (collectively "Watts") are indebted to PCA on three (3) promissory notes executed by Gregorys and Watts in favor of PCA dated January 8, 1979, March 21, 1979 and August 21, 1979 (collectively the "Gregory/Watts Notes"). Additionally, Gregorys are indebted to PCA on a separate note dated June 1, 1979 (the "Gregory Note"). All of said notes are in default and litigation concerning the notes has been commenced by PCA against Gregorys and Watts in the Fifth Judicial District Court, Millard County, State of Utah, in Civil No. 7137, Utah Farm Production Credit Association, plaintiff, against Milo W. Watts, et al. (the "Lawsuit").
>
> B. To secure repayment of the Gregory/Watts Notes, Watts have previously given PCA a certain mortgage (the "Mortgage") over real property located in Millard County, State of Utah. Said Mortgage covers a four hundred eighty-one (481) acre piece of property (the "Gregory Farm") and other properties owned by Watts including his home (collectively the "Home Farm"). The Lawsuit has

been instituted to collect the notes and to foreclose the Mortgage and for other relief.

Then in paragraph E of the recitals, after the laws or litigation has been defined, the Agreement provides:

> E. Gregorys and PCA desire to settle the differences among them and to resolve the Lawsuit insofar as it affects their interrelationships and to work together to conclude the litigation between them and the Watts.

The Agreement then provides for the Release of Gregorys in paragraph 6. It should be noted this is not a release of Watts. Paragraph 6 states:

> 6. Release of Gregorys. From and after the execution hereof and the execution and delivery of the documents and cash described in paragraphs 1 through 5, PCA will and does hereby release and discharge Gregorys and each of them from any and all liability which they may have to PCA under the Gregory/Watts Notes, under the Gregory Note, under the Mortgage, under any security agreements, under the Assignment of Equity and under any other documents of security given to PCA by Gregorys, or either of them, to secure their indebtedness to PCA under the Gregory/Watts Notes and the Gregory Note, provided, however, this release shall not constitute a release of any obligations of Gregorys to PCA under the documents and covenants set forth in paragraphs 1 through 5 hereof. From and after execution hereof, PCA's sole remedy for recovery of the sums due it from Gregorys under the Gregory/Watts Notes shall be through foreclosure sale of the Gregory Farm and/or the Home Farm and PCA's sole remedy for recovery for the sums due it from the Gregorys under the Gregory Note shall and under those documents and covenants set forth in paragraphs 1 through 5 hereof. (emphasis supplied)

Paragraph 8 provides:

> 8. Stipulation in Lawsuit. Upon execution hereof, PCA and Gregorys will enter into a stipulation to be filed in the Lawsuit in the form attached hereto as Exhibit "E".

of the Exhibits is Exhibit E, which provides in paragraphs 2 and 3:

> 2. PCA may have judgment of foreclosure of any right, title and interest of Gregorys in and to any of the real property which is the subject of this action entered at any time without further notice to Gregorys.
>
> 3. In return for the conveyance described above the promises and covenants of Gregorys in the Settlement Agreement, PCA forever releases and discharges Gregorys from liability for payment of the sums due under the promissory notes attached to the verified complaint herein as Exhibits A, B, C and E and from any claims for any deficiency which may arise after foreclosure of any of the real property which is the subject of this action.

Judgment of foreclosure is granted against Gregorys on any of the real property. If foreclosure was not going forward against Watts as provided in paragraph "E", then this stipulation would have no meaning. PCA would have simply dismissed the lawsuit.

Yet PCA expressly reserved the right with Gregorys to ". . . conclude (not dismiss) the litigation. . ." and PCA's ". . . sole remedy for recovery of the sums due it from Gregorys under the Gregory/Watts Notes shall be through foreclosure sale of the Gregory Farm and/or the Home Farm. . . ". This reservation of a foreclosure sale, which can only come about by concluding the pending litigation, is an express reservation.

PCA has actively pursued, since the date of the Settlement Agreement, the foreclosure action. In the treatise of Saunders, Willier & Hart, Vol. 13, p.71, §13.26, under reservation of rights it states:

> Nothing in Section 3-606 requires that the reservation be in writing. . . .
>
> The reservation must occur before or at the time the holder takes the action or fails to take the action.

PCA, before the Settlement Agreement, "reserved" rights against Watts by the filing of this very action. It did not dismiss this action. This action is an express reservation of rights as against Defendant Watts.

Anderson, Uniform Commercial Code, Vol. 2, p. 131, §3-601:11 states:

> The Code declares the effect but does not regulate the form or content of a reservation of rights. Any agreement or declaration which manifests the intention to reserve rights should therefore be deemed sufficient. When it is claimed that there has been a reservation of rights against an accommodation party, such reservation may be shown by a letter written by the holder to the accommodated party and other circumstances of the transaction.

The circumstances of this transaction show that PCA never intended to dismiss its lawsuit but to conclude the foreclosure. The very act of retaining the lawsuit is an express reservation.

Mr. Schofield filed an affidavit found at pages 265-266 of the record disclosing an express reservation by the following:

> That affiant, of his own knowledge, declares and states that it was expressly understood between all parties to the stipulation that Plaintiff in this matter would proceed as against Defendant Watts, and each of them, to effectuate collection of the obligation due to PCA and that the settlement entered into between the parties was settlement of an unsecured portion of an obligation that was due from Gregorys only and the foreclosure of the 481 acre interest of Gregory in said property and that the foreclosure would continue as it relates to Watts' interest, if any, in the 481 acres, together with additional land as

given as security for the three pormissory notes (R.266)

The deposition of Mr. Clark and Mr. Christensen, counsel Gregory confirm this reservation by the following language:

> Q. [by Mr. Brown] And at that time did you make a statement, as near as I can quote you, that if Mr. Gregory would be called on the witness stand and that if you and Mr. Christensen were to be called on the witness stand that you would have to testify it was everyone's understanding that PCA would go forward against Watts?
>
> . . .
>
> A. [Mr. Clark] As nearly as I can recall, subject to the objection that I have made and subject to any prefatory statement as I was speaking to you, is that if it survived an objection I told you that we assumed that PCA would continue with its foreclosure action with respect to the farm. (p. 6 of Clark Deposition)

Mr. Christensen testified:

> Q. Did you ever have any discussions with Mr. Schofield prior to or simultaneously with or about the time of the execution of the settlement agreement about whether or not PCA would continue its litigation as against Watts?
>
> A. We may have had some discussions. I don't recall specifically the discussions in that regard. My recollection is that PCA would pursue against the land.
>
> . . .
>
> Q. And the foreclosure would have to proceed as against whatever interest Watts had in that?
>
> . . .
>
> THE WITNESS: Again, my understanding was PCA would pursue against the land and anybody claiming an interest in the land. I would assume that would include the Watts.
>
> . . .

> Q. And do you recall Mr. Clark making a statement to the following tenure where he said that if he, Mr. Clark, and Mr. Christensen and Dr. Gregory were to be called as witnesses on the witness stand they would have to testify that it was everyone's understanding that PCA would go forward against Watts?
>
> . . .
>
> THE WITNESS: He made a statement regarding going against the property. To the best of my recollection, that was not the precise language used by Mr. Clark, rather it was basically that if we were called as witnesses we would have to testify that we assumed PCA would go against the property and all those claiming an interest in the property. Again, that is not exact, but that was my impression of what he intended to say, the substance of what he communicated to the two of you at that conference. He said that they would go against the property and anybody claiming an interest in the property. (p 5-7 Christensen deposition)

The reasoning behind §70A-3-606, Utah Code Annotated, 1953 as amended, is to preserve to an accommodation maker or surety the right of subrogation and/or contribution. In fact, the summary judgment which Watts obtained against Gregory, and from which no appeal has been filed, grants to Watts such right of subrogation/contribution. Watts, by the present judgment against PCA, has been unjustly enriched at the hands of PCA for moneys they personally borrowed, used and received the benefit of. Such is not the law.

POINT IV

WATTS CANNOT BE RELEASED FROM ANY OBLIGATION OTHER THAN ANY DEFICIENCY

In Benders, Willier & Hart, Vol. 13, p. 69, §13:24[4], states:

> Any discharge under subsection (1) of Section 3-606 is available only "to the extent" that the conduct affects the accommodation party's obligation.

The "extent" Gregorys were released on the mortgage notes was for any deficiency claim. See Exhibit "E" to the Settlement Agreement, which states in part:

> . . . PCA . . . releases . . . Gregorys . . . for any deficiency which may arise after foreclosure of any of the real property which is the subject matter of this action.

PCA hereby acknowledges and consents that they will not take any deficiency judgment against Watts after the "foreclosure of . . . the real property which is the subject matter of this action." PCA did not release any rights of foreclosure, but only of any deficiency. Foreclosure was contemplated and expressly provided in the Settlement Agreement. Utah law at §70A-3-606 is concise in that the release is only ". . . to the extent . . ." a party is released.

POINT V

THE JOINT OBLIGATIONS STATUTORY PROVISIONS DO NOT RELEASE WATTS

The summary judgment against PCA in favor of Watts §70A-3-606 and §15-4-1, et. seq. U.C.A., 1953 as amended. Sec. 15-4-4 provides:

> Subject to the provisions of section 15-4-3, the obligee's release or discharge of one or more of several obligors, or of one or more of joint or of joint and several obligors, shall not discharge co-obligors against whom the obligee in writing and as a part of the same transaction as the release or discharge expressly reserves his rights; and in the absence of such a reservation of rights shall discharge co-obligors only to the extent provided in section 15-4-5.

First, PCA expressly reserved its rights against Watts in writing by the following:

A. Reservation of the pending litigation.

B. The terms and provisions of the release of July 17, 1981.

PCA has never dismissed the litigation against either Watts or Gregory. This litigation was of primary importance, was specifically referred to in the release, and was to be "concluded" by foreclosure or deed in lieu of foreclosure, and not dismissed by the very terms of the release.

Second, assuming arguendo that the release is not an express reservation as required by 15-4-4, U.C.A, 1953 as amended, the release is only to the extent of the provisions 15-4-3 U.C.A., which provides that credit will be given to

co-obligors if the released obligor is not a surety of the co-obligors. Watts has consistently argued that they were accommodation makers and hence a surety of Gregory. Gregory has never argued an accommodation status and hence is not a surety. PCA is and always has been willing to give credit to Watts for the consideration paid by Gregory. PCA has consistently agreed to waive any deficiency.

Assuming, arguendo, that Gregory is a surety of Watts, then Section 15-4-4, U.C.A. is applicable. Section 15-4-4, U.C.A. simply provides the effect of the lack of an express reservation releases co-obligors to the extent of 15-4-5, U.C.A. Section 15-4-5 states:

> If an obligee releasing or discharging any obligor without express reservation of rights against a co-obligor then knows or has reason to know that the obligor released or discharged did not pay as much of the claim as he was bound by his contract or relation with that co-oblgor to pay, the obligee's claim against that co-obligor shall be satisfied to the amount which the obligee knew or had reason to know that the released or discharged obligor was bound to such co-obligor to pay.
>
> If an obligee so releasing or discharging an obligor has not then such knowledge or reason to know, the obligee's claim against the co-obligor shall be satisfied to the extent of the lesser of two amounts, namely: (a) the amount of the fractional share of the obligor released or discharged, or (b) the amount that such oligor was bound by his contract or relation with the co-obligor to pay.

Whether PCA knew or had reason to know of Gregory's relation of the obligation is a question of fact. There is no evidence, affidavit or discovery dealing with this question of

fact. Hence, summary judgment is inappropriate. However, assuming arguendo, that PCA did not know or have reason to know then the second paragraph of 15-4-5 is applicable and PCA must give credit of the "lesser of two amounts", i.e., the amount of the fractional share of the released or discharged obligor. Again PCA has always been willing to do that by waiving any deficiency.

POINT VI

THE ONLY ISSUE REMAINING IS THE AMOUNT DUE UNDER THE NOTES AND PCA IS ENTITLED TO SUMMARY JUDGMENT AND DECREE OF FORECLOSURE

The trial court earlier granted PCA a partial summary judgment in the following respects:

A. Defendants Watts have executed the three notes;

B. The notes are regular on their face;

C. The notes are genuine; and

D. A decree of foreclosure on the 481 acre property is granted, subject only to the ascertainment of the amount due on said note.

E. An issue of fact exists on the amount due under said notes, and whether the Home/Farm is security for the Notes (R. 251, 332-33).

The only remaining issue to the granting of PCA's motion for summary judgment is the establishment of the amounts due thereon

PCA, by and through Mr. Thad Allen, filed two affidavits, the first being dated October 9, 1981, wherein the principal and interest has been detailed to that date, leaving a combined balance of $340,610.60, plus a per diem of $149.69 from and after the 9th of October, 1981. Since that date, per an internal audit and an audit conducted by FCA, there has been an additional adjustment of $8,783.81. (See Thad Allen Affidavit of December, '81 and document #11). At the time of the second affidavit of Thad Allen, December 7, 1981, there remained an unpaid balance of $346,346.72. No counter affidavit has been filed to rebut or put into issue this amount.

PCA also took the deposition of defendants Watts on the 2nd of December, 1981 prepatory for its motion for summary judgment on the only remaining issue. Defendant Milo Watts filed an affidavit in November, 1980 about the crop proceeds, in which Milo Watts states that there should be crop proceeds of $29,969.00. The actual proceeds, together with the adjustments, is $46,553.59. When asked about the calculation of the $29,969 figure, Milo Watts states at pages 4 and 5 of his deposition:

> Q (by Mr. Brown) Would you tell me, sir, how you had arrived at $29,969 figure in your Affidavit?
>
> A. I didn't arrive at that.
>
> Q. Who did?
>
> A. I don't know
>
> . . .
>
> Q. Do you have any knowledge of how much the reasonable value of the crops for the 1980 year should have been or was?

A. I don't think so.

On page 6, Mr. Watts was asked:

Q. Now, do you know how much grain was raised or harvested, I should say?

A. No, not exactly.

At page 6, Mr. Watts admitted:

Q. As I understand it, there were two crops of hay simply because everybody got started late, I guess?

A. Yes.

Q. And that you got perhaps 400 bushels of grain and perhaps $4,000 worth of seed, is that right?

A. I think.

Q. Any other crop that we haven't covered that was grown that year?

A. No.

In the Affidavit of Mr. Watts, specifically in paragraph 7, Mr. Watts simply disagrees with the interest calculation of PCA. Yet, when asked about that, at pages 9 and 10 of his deposition, he admits:

Q. You have not made any independent or separate calculation of the interest yourself, have you?

A. No.

Q. So you really don't know whether that figure is incorrect or correct?

A. No, I don't.

Finally, when asked whether Mr. Watts had ever received an accounting (which PCA asserts was given to him), Mr. Watts testified:

Q. Have you ever inquired of anyone at PCA or any other person what happened to the crops, how they were accounted for?

A. No.

Under these circumstances and by Milo Watts' own admissions, he has no knowledge upon which to refute or even challenge the uncontroverted Affidavits of Thad Allen.

Mrs. Cleown Watts had no knowledge of how much crop was grown or the results from the sale of said crops (pages 8-9 of Mrs. Watts' deposition). It is therefore apparent that the uncontroverted Affidavits of Mr. Thad Allen be and are controlling as to the amount due and owing to PCA.

In the Complaint, paragraph 9 (R. 2), PCA alleged the giving to PCA a mortgage (Ex. D) to the Complaint. In paragraph 1 of the Answer of Watts, Watts admits the execution of said mortgage (R. 44). The mortgage covers not only the Gregory Farm, but also the Home/Farm.

PCA therefore is entitled to a decree of foreclosure on both the Gregory Farm and the Home/Farm with a provision that no deficiency judgment may attach in the event the sheriff's sale proceeds are inadequate to pay the costs of sale and PCA in full.

CONCLUSION

The summary judgment in favor of Watts against PCA is inappropriate for the following reasons and must be reversed:

A. There is a material issue of fact as to Watts' status as co-maker or accommodation maker.

B. The pending litigation is an express reservation a claim against Watts.

C. The release of July 17, 1981 contains an express reservation of the claim against Watts.

D. There was an express oral reservation of the claim against Watts.

E. The extent of the release of July 17, 1981 is for "no deficiency."

F. PCA has given credit under §15-4-3, U.C.A. to Watts

G. PCA has given full credit to Watts under §15-4-5 U.C.A.

H. If the judgment is not reversed, Watts will be unjustly enriched by receiving full satisfaction by way of subrogation/contribution from Gregory while being relieved of responsibility to PCA.

Summary judgment and decree of foreclosure should be granted to PCA against Watts and Gregory, without a right of deficiency, on the Gregory Farm and the Home/Farm for the following reasons:

A. PCA obtained a partial summary judgment with the only issues of how much was due and owing under the notes and whether the Home/Farm is under the mortgage.

B. There is no contravention of the affidavits of P on the amount owing.

C. Watts has admitted the execution of the notes and mortgage, which by their terms provide for the relief to PCA of decree of foreclosure on both the Gregory Farm and the Home/Farm.

Respectfully submitted this the 17 day of November, 1983.

JARDINE, LINEBAUGH, BROWN & DUNN

By: _____
JAMES R. BROWN
Attorneys for Utah Farm Production Credit Association

CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing Appellant's Brief were mailed, postage prepaid to Mr. Robert C. Cummings, 320 South 300 East, Salt Lake City, Utah 84111; Mr. Christopher A. Johnson, 800 Continental Bank Building, Salt Lake City, Utah 84101; LeRay G. Jackson, P.O. Box 545, Delta, Utah 84624; Steven R. Jackson, P.O. Box 545, Delta, Utah 84624 on the 14 day of November, 1983.