1984

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

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENTS, MILO W. AND CLEOWN WATTS

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

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NATURE OF THE CASE

This action was in the nature of a foreclosure brought by plaintiff/appellant, Utah Farm Production Credit Association, (commonly and hereafter called PCA) on four promissory notes against respondents (hereinafter called Watts) and one Buford L. and Elizabeth A. Gregory (referred to as Gregorys hereafter). Joined in the action were Agricultural Stablization and Conservation Service, Commodity Credit Corporation, Scott Stephenson, and Ron Burns, dba Stephenson & Burns Pump Service, and Paul Farthing, dba Paul Farthing Grading Contractor, who were junior mortgagees or lien claimants on the subject property.

Respondents crossclaimed against Gregorys on a Uniform Real Estate Contract covering 481 acres sold by Watts to Gregorys, which covered a portion of the land included in the mortgage upon which PCA sought foreclosure. In addition PCA attempted to foreclose a purported security interest in equipment and crops

pursuant to a security agreement executed July 18, 1978, by the Watts and Gregorys.

DISPOSITION IN LOWER COURT

Watts take serious issue with PCA's Statement of Disposition in Lower Court and assert that the "Partial Summary Judgment" alluded to in PCA's said statement was only an acknowledgment or admission on the part of both Watts and Gregorys that the promissory notes being sued on by PCA had in fact been signed by the respective parties and a ruling of the court that such fact was established. PCA's assertion (without reference to any part of the record) that "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 (remaining property owned by Watts not sold to Gregory) is subject to the mortgage" is an absolute misstatement of fact.

Indeed many other issues had been raised by the pleadings (about which discovery had been conducted and on which the Court had not ruled) that remained to be tried. It is true that counsel for PCA did submit a Proposed Partial Summary Judgment to the Court couched in the language used in their statement. Such Proposed Partial Summary Judgment was objected to by the undersigned, and the Court refused to sign it. Accordingly, it is not a part of the record, and PCA attached a copy thereof as an exhibit to its Memorandum Opposing Watts' Motion for Summary Judgment. (R.332-3)

On December 15, 1981, when both sides had moved for summary Judgment and the matter was then argued, there were some additional exhibits offered to the Court by Watts (which had just prior thereto been received from PCA pursuant to Watts' Motion to Produce Documents), which exhibits are attached as an additional supplemental record, and to which reference will be made hereinafter. Said exhibits were indeed received by the Court on December 15, 1981, and admitted as exhibits by stipulation of the parties, even though no reference was made to that in the minute entry of the court on said date. (R.298) These "Items"or exhibits were before the trial court, were quoted in memoranda of both parties and were alluded to in subsequent depositions. (See, for example, R.291)

(We note in examining the record that in Volume 1 of the transcript the numbering of pages runs to 298 and then resumes in Volume 2 with number 290, so there are two sets of record pages running from 290 through 298. The reference above to page 298 is in Volume 1. The reference to 291 above is in Volume 2.)

The thrust of Watts' Motion for Summary Judgment was that a settlement agreement had been entered into between PCA and defendants Gregory on July 16, 1981, (R.268 to 285) which agreement, Watts contended, failed to expressly reserve PCA's rights against Watts as part of the same transaction and accordingly constituted a release of Watts from all obligation to PCA.

Following the submittal of the remaining memoranda, docketing of depositions, motions to strike, and filing of affidavits, the matter was submitted and the court renoticed the matter, together with defendants Watts' Motion for Summary Judgment and Foreclosure on the Uniform Real Estate Contract against defendant Gregory and remaining defendants, for hearing on June 7, 1983. At that time the court granted defendants Watts' Motion for Summary Judgment against plaintiff, struck the earlier Partial Summary Judgment for plaintiff, denied plaintiff's Motion for Summary Judgment and granted Watts' Motion for Summary Judgment and Judgment of Foreclosure over and against defendant Gregory and remaining defendants. (R.411 and Supplemental Record "Court Proceedings" filed October 11, 1983, with this court.) The Summary Judgment and Judgment of Foreclosure were docketed with the Clerk of the Court July 28, 1983, and PCA filed its Notice of Appeal August 11, 1983.

NATURE OF RELIEF SOUGHT ON APPEAL

Defendants Watts seek to have the judgment of the lower court affirmed in all particulars.

STATEMENT OF FACTS

Counsel for respondents discovered in preparing this brief (as noted above) that a series of exhibits received by the court at the time of argument of defendants' Motion for Summary Judgment on December 15, 1981, which were identified as Items 1 through 17, were not included as part of the record on appeal and

not mentioned in the Minute Entry of the trial court for that date (R.298) Said Items constituted documents furnished by the plaintift to these defendants pursuant to a Motion to Produce documents, and the parties stipulated that they be received into evidence. (Items 12 through 15 and Item 17 were copies of cases used at argument, but the remaining Items 1 through 11 and 16 are the exhibits with which we are concerned.)

The undersigned furnish the exhibits therefore as a supplement to the record because, while most of them appear as attachments to affidavits or depositions, four of them do not otherwise appear in the record, and reference will be made to them hereafter. Moreover, these exhibits were referred to in several depositions by those numbers (sometimes the number is prefaced with the word "item" and sometimes with the word "exhibit"), and without them in that form and order being available to the court would make the language of the depositions meaningless.

It should also preliminarily be observed that double depositions of several parties--Milo Watts, Cleown Watts, Buford Gregory and Tom Boyer--were taken. Accordingly, the undersigned will refer to the depositions with a Roman numeral in front to indicate which of the two is intended, such as I Boyer or II Boyer for clarity.

PCA's Statement of Fact is both sketchy and selective and cannot therefore be adopted by Watts. Accordingly there

follows a chronological summary of the facts as disclosed by the record and depositions.

PCA is a lending institution in the business of financing agriculture, and in order to obtain a loan the farmer must buy stock in PCA. The amount of stock required is directly related to the amount of the loan obtained. (Childs Depo. 13.)

To obtain a loan a farmer would complete an application, furnish a financial statement, a profit and loss statement for the three years prior to the application, and a budget or projection as to how the asked-for funds would be used during the coming operating year. (Childs Depo. 17.) The loan would then be considered by the loan officer or lending committee depending on the amount sought. The necessary documents, security instruments, promissory notes, etc., would then be executed. (Childs Depo. 19-20.)

In the event a loan was not repaid within the usual twelve month loan period, the note could be renewed and new security agreements reflecting changes in collateral or real estate being pledged would be executed. Each time an application for renewal occurred a new budget or summary of the purpose of the loan and proposed expenditures would be worked out with the member borrower.(Childs Depo. 20; I Boyer Depo. 69 -71; II Milo Watts Depo. 20-22.)

Watts had mortgaged their home, farm and range ground in and around the Kanosh, Utah, area comprising approximately 1,366

acres to PCA in connection with annual operating loans beginning in 1947.(I Milo Watts Dep. 4) The last recorded mortgage on said property was executed August 9, 1974, recorded August 16, 1974, in the Millard County Recorder's Office. (R.18-21) Included within said acreage was a 481-acre irrigated hay and grain farm which Watts sold to Buford L. Gregory on August 14, 1978, on a Uniform Real Estate Contract which provided, among other things, that the buyer, Gregory, as his down payment would assume and pay to PCA the then balance of the Watts loan of $74,343.65, together with a first mortgage to Ag Land Mortgage Company in the amount of $26,194.19, and the remaining $260,462,16 balance to be paid in 20 annual installments of $24,585.00, the first payment to be due August 1, 1979.(R.25-27) Also sold at the same time were some items of equipment relating to the farm: a hay chopper, baler, swather, two-ton truck, ditcher, two feed wagons, a combine and a carryall scraper (Bill of Sale, R-28). Even prior to the execution of the aforementioned contract, Watts and Buford Gregory and his wife, Elizabeth, executed jointly a Security Agreement with PCA pledging certain equipment used on the said farm, in a document which was blank at the time the Watts signed it (I Cleown Watts Depo. 44, 49-53), but which now shows on its face 15 cows, 5 heifers, and bears a date of July 18, 1978 (R.30).

At or about the time of the sale from Watts to Gregory a loan application was made increasing the principal on the PCA loan from $74,343.65 to $104,884.00. That application appears

repeatedly in the record, but the clearest copy of its pages is Item 1 in the Supplemental Record noted above. It is to be observed on this PCA document that it was signed by the president, Vaughn Mills, July 21, 1978, as having been approved, along with the signatures of the other members of the loan committee, and on its face showed that new credit life insurance in the upper right-hand block was written on Dr. Gregory for $60,000.00 and Elizabeth Gregory for $10,000.00 with the note that Milo and Cleown Watts' insurance was "in force until 1-79." Also on the face of page 1 it shows an entry January 1, 1978: "proceeds from sale of farm (14 acres)" and on the second page under the heading "Ownership and Management" indicates the sale of the irrigated farm to a medical doctor for the sum of $369,000, includes 480 acres plus the hay and equipment and continues "that the purchaser, Dr. Buford L. Gregory and his wife, Elizabeth A., have agreed to sign on the full loan balance until paid in full, as a result of new funds set up to operate in the sum of $20,000." It concludes, "Milo Watts has agreed to continue with the operation this year principally in the role of an advisor and consultant."

Under the following heading, "Financial Information," the financial statements of Milo Watts as of May 1978 and of Buford Gregory as of February 1978 are outlined, showing a net worth in Watts of $538,914 and in Gregory $808,294. (This, of course, disputes PCA's Statement of Fact which claims that "at the time of this sale Watts were indebted to PCA in the amount of

$104,884.00"--PCA Brief, Page 3). So $20,000.00 of additional funds were loaned to Gregory at the time the Gregorys became member-borrowers and took over the 481-acre farm.

Watts stated that Gregory was not only to take over the loan at PCA and the first mortgage and to make annual payments of the balance as the contract states, but that substitute collateral in the form of real estate owned by Gregory in Arizona was to replace the Watts ground and mortgage as of the annual renewal time, January 1979.(I Milo Watts Depo. 20-23 and 35-36; I Cleown Watts Depo. 14-15 and 17.) (Cleown Watts states that this representation was given to them expressly by the PCA representative who handled the transaction, Steven L. Adamson, when the Watts first came to the Salt Lake office of PCA with Dr. Gregory at the time of the sale of the farm)(Pages 14-15). That testimony is corroborated by Thomas Boyer, PCA's representative, who was the agent handling the Watts-Gregory loan and the party most familiar with it (Childs Depo. 32-33). Mr.Boyer repeatedly discussed with his superiors and PCA's attorney, James Dunn, the substituting of the Arizona collateral for the Watts property (I Boyer Depo. 49), had discussions with the Watts regarding it,(I Boyer Depo. 12-15), made notes on a loan document and made efforts to secure a trust deed and mortgage on the Arizona property as will be demonstrated later (I Boyer Depo. 11). He made efforts to accomplish the release of Watts' collateral and substitution of Gregory collateral (II Boyer Depo. 28-29), and it was his intent

on behalf of PCA to get Gregory to sell the Arizona property and pay off the loan (II Boyer Depo. 55-56), which is further corroborated by Item 6--page 3, and Items 7, 8, 9 and 10 in the Supplemental Record.

Dr. Gregory further confirms that understanding in his deposition, acknowledging that he went with Watts to PCA at the time of the real estate contract and assumed the Watts debt (I Buford Gregory Depo. 12, hereafter IB Gregory Depo."), that he intended to substitute the Arizona property on the loan and to pay off Watts and release them therefrom on condition that PCA would give him long-term financing (IB Gregory Depo. 24-25, 29-31) and further that such long-term financing would either pay off or pay down the Watts obligation (IB Gregory depo. 43 and 46). Finally, he was asked in his first deposition at page 48 by his own counsel:

> "When you were talking about the long-term financing with PCA, did you intend to borrow enough from the PCA to pay off your obligation to Watts on the Uniform Real Estate Contract?"

Answer: "I am not really sure at this time, but it seems to me that that was discussed, but I couldn't tell you with any real degree of certainty at this time. I think so, but I am not sure."

So indeed he thinks the intention in getting the long-term financing would have been not only to pay off Watts' loan, but the whole Watts contract.

In January of 1979 a new annual loan was written up on Item 2 which shows continuing in force the credit life insurance

Dr. Gregory and Elizabeth Gregory, but no renewal of the Watts credit life. In the section under the heading, "Loan Liquidation" it shows land sales proceeds at $80,000.00, referring to the Arizona property as is made more explicit on page 2 under heading "Repayment"

> "to further explain members' proposed land sale the following may be helpful. Member is selling 14 acres of land zoned for multiple dwellings in the Mesa area. The land is valued at $1.00 per square foot with member asking $40,000.00 per acre for a total selling price of $560,000.00. With a mortgage balance due of $20,000.00 member has equity of $540,000.00. These sale proceeds will be used to provide the necessary funds to pay off subject loan in full."

It continues under the heading, "Financial Information":

> "Dr. Gregory has a very strong financial statement characterized by excellent real estate equities. Member's current statement shows a net worth of $1,606,000.00 against total liabilies of $590,000. His financial statement dated 2/78 showed a net worth of $808,000.00 with total liabilities of $288,000.00. The increase in liabilities reflects the farm purchase and a balance due of $250,000.00. It is the opinion of this writer that some of the borrower's real estate holdings are overstated as they are listed at optimum market prices. Nevertheless, member has a strong statement in addition to having an excellent earning potential from his medical practice."

Under heading "Recommendation":

> "We recommend the approval of the subject loan as presented based on member's financial strength and repayment capacity. In doing so it is recommended that we continue to include Milo Watts on the loan including the present real estate mortgage until Dr. Gregory's land sale can be finalized with subject loan balance paid off in full."

Item 3 is the transmittal letter to Dr. Gregory advising that the new loan increase of $198,000.00 has been approved, including the $74,000.00-plus of the Watts debt he assumed, plus the additional $20,000.00 Gregory borrowed to operate the farm in

1978. It is to be noted that the letter is addressed solely to Dr. Gregory, not to Gregory and Watts. This is confirmed by the Milo Watts testimony that following the sale to Gregorys he was never consulted about a proposed annual budget with regard to operating the farm, nor was he given any accounting regarding disbursements made and for what after August of 1978 (II Milo Watts Depo. 20-22). Tom Boyer adds that no annual renewal of documentation with regard to security agreements or projected budgets was done in January of 1979 (I Boyer Depo. 70-71). He says specifically,

> "But annually it would be updated and brought into focus. Normally the way that is done is an inventory would be done and those items found in that inventory would be listed on there with serial numbers. Those serial numbers would then be related directly onto the security agreement and that would be the normal course."

Q. "So no new renewal security agreement as of January '79 ever was prepared for the Watts's signature. Is that correct?"

A. "That is correct."

Q. "That gives you some reason to believe that alternate security or collateral should have been obtained and that was the original intention, correct?"

A. "This is what I am basing my opinion on, yes." (page 71)

Item #5 was the additional loan report on March 19, 1979, seeking an additional loan of $20,000.00 for the purpose of building a shed on the farm, for which Gregory applied. It is noted in page 2 of the repayment plan that 75% or $18,000.00 of the cost of the shed was to be repaid from ASCS.

Tom Boyer identified ASCS as "the Agricultural Stabilization & Conservation Service." When asked about this Item 5 Mr. Boyer indicated that it had been written prior to his becoming an employee of PCA, but that he had some involvement with it after he became an employee and more particularly after relations with Gregory had soured some time in October of 1979 and that he had contacted a Mr. Ron Childs (no relation to his supervisor, Les Childs) to advise ASCS that PCA was in a "foreclosure posture" and notwithstanding the language on page 2 of Item 5 that "repayment to PCA for the $18,000.00 increase will come from ASCS after the shed has been constructed. This is not expected to be received until September of 1979," that no payment was received from ASCS and that he, Boyer, "suggested (to Mr. Ron Childs) that he might hold that for a while until such time as we were able to solve out or see what direction we were going to take. And to my knowledge, no payment was ever made to PCA." (Bill Boyer Depo. 31-34). He concluded that no such payment came, at least during the term he was in PCA's employ from June of 1979 through December of 1980. (p. 34)

Boyer dictated and signed the remaining Items 6, 7, 9 and 10, and was the addressee on Item 8 and therefore testified from direct personal knowledge.

Item 6 was titled "Crop Inspection Report" and was typed at his direction following his inspection of the Gregory farm made sometime around the 14th of August 1979. Page 3 of Item 6 states:

"The Gregory loan has excellent potential of becoming one of our best loans. Current problems are centered around the transition from Mesa, Arizona, Kanosh area. The farming is different, the people different and that has required change. The sale of 13.2 acres in Arizona will conclude the change and then a year or two of operating here will give them adequate experience required to make the change. They also plan to purchase the farm bordering them on the north. The SCS is presently studying soil and water information for production possibilities if Dee's check on the deal will be on track. This addition will make the farm a good sized operation." Dr. Gregory is currently in a lawsuit with a character in Phoenix who is attempting to force sale of his 13.2 acres. It is fully anticipated that Dr. Gregory will win and if he does he has sale for the property at $400,000. This will help him to clear us out and make a sizable down payment on the new farm. Then we will provide annual operating money with possibly a cattle loan also. These people are learning fast and will be an excellent group of operators in a short while. The financial position is strong. Dr. Gregory still has his medical profession backing him up. All things considered we are looking at a number 1 or number 2 loan at renewal. (Emphasis added)

Boyer was asked if that language were his own, if he had proofread the document after it had been typed, and if it fairly reflected what he wanted to say, to all of which questions he answered yes. He continued, the said Item 6 was critically necessary as basis for getting Item 7 approved. (II Boyer Depo. 31) Item 7, the additional loan action report shows on its face the sale of 13.2 acres in Mesa, Arizona, for a liquidating amount of $400,000.00. Under the box "Additional Loan Papers to be Obtained" is listed "mortgage on 13.2 acres, description attached," and a handwritten note saying "no more increases until Arizona property sold" with initials and the date of December 7, 1978. Page 2 of the Item says under the heading "Loan Purpose" "increase to provide interim financing of $48,890.00 and living

expenses. Expenses have run more than was originally anticipated. Also some attorney's fees are needed for a lawsuit involving the 13.2 acres in Arizona. Even if Gregory loses, he will still get $365,000.00."

Under the heading "Repayment" it states "they have a commitment on the '79 hay crop which will approximate $66,000.00. The sale of the Arizona property will liquidate most of the total liability ($314,863.00)."

Boyer testified about that exhibit at some length, to which we will refer in a moment, but in connection therewith testified that Item 8 was received by him from Thomas Christensen of Fabian & Clendenin, Dr. Gregory's attorney, pursuant to his request for a copy of the legal description of the Arizona property. He was asked the question, "Why did you ask for the description?" and answered, "In order that we might obtain a deed of trust." (II Boyer Depo. 10) He continued that having received the description he prepared the promissory note, the deed of trust, and Item 9. When asked about that he said it bore two dates originally, the date of August 21, 1979, corrected to September 13, 1979, and that Items 9 and 7 were typed at essentially the same time, that it (Item 9) was indeed mailed to Dr. Gregory on the later date, and that enclosed with it were a promissory note and a deed of trust. He was asked the question: "What was the deed of trust?" and answered, "The deed of trust pertained to this 13.2 acres of land in Arizona."

Q. "Who prepared the deed of trust?"

A. "We did."

Q. "We meaning?"

A. "Utah Farm Production Credit, secretary Lucille Williams."

Q. "Did you furnish her the description as received from Mr. Christensen?"

A. "Yes as accompanied in the letter of Item 8."

Q. "Did you mail out that deed of trust?"

A. "Yes."

Q. "In this reg. letter Item number 9?"

A. "Yes."

Q. "Along with the promissory note?"

A. "Yes."

Q. "Did you get either the trust deed or the promissory note back from Mr. Gregory?"

A. "We received back the promissory note. We did not receive back the deed of trust."(II Boyer Depo. 12.)

At pages 5 through 18 in the same deposition Mr. Boyer indicates that the additional increase of $48,890.00 reflected in Item 7 was not to have been disbursed until the trust deed enclosed with Item 9 had been returned and that the penciled-in note on Item 7 was in the handwriting of Vaughn Mills, the president, and corroborated his earlier testimony in his first deposition in which from memory he had said he had remembered a notation to the effect, "Hold funds until Arizona property has been secured." (I Boyer Depo. 11, line 8) He then continues on pages 18 and 19 to indicate that Mr. Naylor, the Salt Lake office

manager at the time released to Gregory without condition the funds conditionally authorized in the said $48,000.00 increase, and did so without the trust deed because there was a lien on the Arizona property that would need to be lifted before they could record a trust deed and further because the Gregorys' account was overdrawn. (II Boyer Depo. 18-19)

Boyer was asked:

"Q. Was there any discussion held at that time about the trust deed on the Arizona property that you referred to in Item 9?

"A. Yes

"Q. What was the discussion about that?

"A. It was not much of a discussion actually. Dr. Gregory simply informed me that we would not be receiving the deed of trust on the Arizona property; that since we had backed out on our end of things he was not about to give us the deed of trust on the Arizona property.

"Q. Did he talk in terms of long-term financing with regard to that deed of trust?

"A. No.

"Q. Didn't he indicate one of the reasons for backing out was that he expected a long-term financing in order to give you a deed of trust on the Arizona property?

"A. I understand. By long-term financing, you are talking about a long term relationship.

"Q. Over a period of years rather than a one-year budget situation?

"A. Okay, yes, he expected us to carry him from year to year rather than being paid out annualy as we normally would--as Utah Farm Production Credit normally expected its customers to do in this type of a situation.

"This was an annual loan. We normally expected this type of loan to be paid out yearly or at least reduced to a very minimum carry-over. And Dr. Gregory felt that since he was

just starting we should carry the whole amount over. And we were simply not in a position. The loan was too weak to do that." (II Boyer Depo. 14-15)

In his earlier deposition Boyer had indicated as follows:

"I met with Dr. Gregory several times, but to the best of my memory, I discussed this loan increase of 48, nearly $49,000.00 with him with the intention that we would tie up the Arizona property for this and that if we did tie up the Arizona property with this, that there would be additional advances to come." (I Boyer Depo. 59).

So, when relations with Dr. Gregory soured, he then mailed Item #10 to Gregory suggesting, "You may want to make plans for selling the Arizona property as soon as possible." This Item is dated November 21, 1979.

It was in this same time frame that drafts came in against the said $48,000.00 increase as reflected in Item 4. The first of these dated September 19, 1979, is for $24,500.00 and indicates that it was a land payment to Milo Watts. Mr. Boyer identified that draft and indicated the signature of Lindy Ann Gregory was that of Dr. Gregory's daughter, who was an authorized signatory. (II Boyer Depo. 16) He was asked specifically:

"Q. Is there anything on the document that indicates who at PCA approved the draft and permits the funds to be transferred?"

"A. Yes."

"Q. Whose initials appear on that?"

"A. It is his name, Thad. The name Thad appears on there, indicating it is Thad Allen, one of the loan officers at Production Credit, is the one who authorized in fact all three of these drafts on item 4." (II Boyer Depo. 16-17)

Boyer later admitted that there is nothing in Item 7 that would suggest that $24,000.00 of the $48,000.00 increase

ished was to go toward making the land purchase payment to the Watts and then asked if he ever communicated to the Watts that this money was being borrowed from PCA to pay on their real estate contract with Gregory, his answer was,

"I have no recollection of a discussion of that nature."

He was then asked the question, "At any time?", and answered,

"At any time. I better correct that. I may have discussed with them after the fact and after things had deteriorated that that's where it did come from, but prior to that and immediately thereafter there was no discussion." (II Boyer Depo. 21-22)

In the same deposition, under examination by Gregorys' attorney, Mr. Boyer elaborated further as follows:

"Q. What is a number 1 or a number 2 loan?"

"A. At PCA, we had four, five interest rates. We have two better than average interest rates, a B rate, we called it for our average customer, and then two higher rates for our poorer customers, so to speak. At this point in time, it was my opinion that we would get the Arizona property sold and we'd have the loan paid down or out, in which case we would be in an excellent financial position with them, because of the security strength and so forth, and in that case we would have a 1 or a 2 loan."

"Q. A number 1 or number 2 would have been --"

A. Indicating one of our better loans." (II Boyer Depo. 56)

On further examination by the undersigned he was asked:

Q. Now, in fact the items on the first page of item #7 relating to the Mesa property, and the reference to having it sold and getting the trust deed, had they not been there, would you have recommended that this increase would have happened?

A. No. I might add that the reason the 13.2 acres is only on the front and not under the security, is it had the lis pendens on it. And I was instructed not to list it as security, because we could not get free clear title on it.

"Q. You would not have been able to have a valid claim against with this lis pendens against you?

"A. Yes.

"Q. With regard to that I think you have testified to it. Who was it that asked for the increases, Gregory or Watts?

"A. Gregory." (II Boyer Depo. 61-62)

He was then asked whether Watts and Gregory were co-makers or principal guarantors and following objections and a colloquy for some pages, he then expressed his opinion and summarized the facts as follows:

> "It was and currently is my understanding that they basically define each as follows: A co-signer is a person who signs a promissory note, who has a direct involvement in the funds being borrowed, and the repayment of those funds and in the use of those funds. Most commonly, the co-signer has a financial interest in the funds.
>
> "Guarantor, a person who signs the promissory note, who has an indirect involvement in the funds being borrowed. The person is offering his or her financial strength to support another's endeavor. In case of default, his or her assets will be called upon in amounts sufficient to meet the delinquent loan amount.

"Q. Is that your understanding?

"A. That was my understanding as I worked at PCA and the banks and so forth. Therefore, as follows:

> "My testimony is based on those terms being defined as just heretofore defined them. The Gregorys were the sole managers of the property, funds and equipment on the Gregory/Watts farm, as referred to by the Gregory/Watts farm to distinguish between this and the loans on other Watts property. Gregorys requested and drafted all funds that were disbursed. Watts requested none of them, but did sign the notes, indicating some level of acceptance. In all cases, repayment was to come from Gregory's income, either from farm production or real estate holdings. Watts were not expected to make any repayment, except in case of default.

"In cases of the primary security in all cases, the primary security was that of Gregorys and secondarily that of Watts.

"That was my understanding of the 109 acres, that it was the Gregorys' and that the cattle were Gregorys'. That is what I was sent down there to collect. That is what I was after.

"So based on that definition and those facts I would make the judgment that in my opinion, Watts were guarantors to Gregorys." (II Boyer Depo. 62-65).

Perhaps Mr. Boyer's understanding of the facts is best summarized in the following exchange in his first deposition:

"Q. Were you ever involved in a conversation either before you left PCA's employ or afterward, in which you discussed with Mr. Childs the fact that it was the Watts's understanding that when the January following the Gregory purchase rolled around that the Watts's remaining property was to be released from the mortgage and alternate security or collateral in Arizona or elsewhere was to be supplied by Gregorys? Do you remember having any discussion along those lines with Mr. Childs at any point in time?

"A. I do not remember discussing it, in other words going into his office and saying,'Here's the way I see it.' At various times when we would travel to the attorney together or when we were in discussion of the case, I did indicate to him that I felt that Milo was basically--maybe I shouldn't use this term--an innocent victim of this loan." (I Boyer Depo. 48-49)

There was one additional loan to Gregorys only in June of 1979, which concerned Watts in only two ways: First, in connection with said loan Gregorys executed an assignment of their equity in the farm purchase agreement (the Uniform Real Estate Contract noted above) to PCA, which was recorded June 28, 1979, in the Millard County Recorder's Office. (R.23-24) That increased loan is reflected by promissory note in the amount of $38,890.00 dated June 1, 1979, signed only by the Gregorys and marked Exhibit

A attached to the original Complaint of plaintiffs (R.22) That note and assignment will figure into the security agreement referred to above executed by the Watts and the Gregorys in July of 1978 and which is attached as Exhibit H to plaintiff's Complaint (R.29-30) as will be discussed hereinafter.

We should here mention that out of the increase reflected in Item 7 above, Gregorys got permission from Boyer to pay $5,000.00 attorney's fee to an Arizona counsel (IB Gregory Depo. 26).

Cleown Watts was asked several times why she and her husband signed the promissory notes of January, March and September of 1979 (I Cleown Watts Depo. 9, 12) and explained that it was her understanding that as of the first of the year (1979) the matter would be straightened out and substitute collateral provided and that the note would be exclusively the Gregorys' thereafter. (IC Watts Depo. 13-19) She reiterates that she was reassured of that by Steven L. Adamson, PCA's representative, with whom they dealt at the time of the sale to the Gregorys. (P.14-15) Perhaps the most explicit testimony came in response to cross-examination from Dr. Gregory's attorney. The witness testified the promissory notes were brought to Watts' residence by members of the Gregory family. She was then asked:

"Q. Do you recall when those notes were presented to you any statements being made by any member of the Gregory family;

I don't recall any statements at the time, no.

Q. Any reasons why you were being asked to sign expressed by any member of the Gregory family?

A. Just that we owned the property and the property was still in our name and we were just signing for that reason.

Q. Did a member of the Gregory family tell you that or was that your understanding through your relationship with PCA?

A. It was more our understanding with the relationship with PCA.

Mr. Christensen: "Okay."

FURTHER EXAMINATION

BY MR. SCHOFIELD:

Q. With respect to that, Mrs. Watts, that, you think, came about because of your conversation with Mr. Adamson.

A. Yes.

Q. And did it come about because of any other conversations or discussions someone from PCA.

A. I don't recall.

Q. The only one you do recall is this conversation in August with Mr. Adamson?

A. Yes." (I C.Watts Depo. 57-58)

Sometime in 1980 Dr. Gregory vacated the subject farm and PCA, while denying that it "had taken possession" of the real property, did admit that they entered into an agreement with Milo Watts on June 1, 1980, to "finance the farming operation of the property." (PCA Answers to Interrogatories #10, R.181)

Boyer indicated:

"In the forepart of '80, which would have gone from March into June, we made efforts to talk with Milo as to the

possibility of operating the farm for the summer. He was very hesitant to do so and did not want to become involved with it. As a last resort after attempts to hire individuals to custom harvest the hay, and things appeared to be unfeasible, Milo did offer to come in and take charge of the operation leaving all management to myself as a PCA representative.

"Q. Did you manage it for that summer?

"A. Yes, I did." (I Boyer Depo. 27)

Mr. Watts spent the summer of 1980 harvesting hay, releveling the ground and irrigating (I Milo Watts Depo. 24-5, 33-34, 41-2; I Boyer Depo. 27). At the end of the season, after preparing the ground for replanting seed, PCA, through its representative, Mr. Childs, refused to pay the $1,500.00 or so dollars needed to buy the necessary seed for planting. (I M Watts Depo. 34-5; I Boyer Depo. 29-31, 56-7) There was considerable conflicting testimony about efforts at mitigation in three areas: attempted reselling of the farm (I Boyer Depo. 43-46; Childs Dep. 33-40); interference by PCA with efforts to resell the property (I M Watts Depo. 25-28; I Boyer Depo. 44-46; I C Watts Depo. 24-30); reasonability of proceeds from the sale of the 1980 crop of hay and grain (I C.Watts Depo. 22-3; I Boyer Depo. 32-37); whether the stamped-on legal description on the three promissory notes signed by the Watts was filled in describing the real property at the time of the signature or not (I Boyer Depo. 9-11, 68; I Boyer Depo. 51-2; I B.Gregory Depo. 41-42; I C.Watts Depo.); whether the Security Agreement signed in blank and entered on July 14, 1978, should have included the Milo Watts livestock

Gregory livestock (I Boyer Depo. 50-51; I C.Watts Depo. 44, 49-50) whether certain expenditures, including expenditures for Arizona attorneys and Arizona taxes without consultation or approval from Watts are chargeable to Watts (I B.Gregory Depo. 26, I Boyer Depo. 14-15; R. 90); and specific matters regarding the application of proceeds, credits and payments on PCA's accounting (R. 90-1; Amended by Allen Affid., R. 262; Brown Letter-Exhibit 11 of Supp. Record).

From the foregoing, it must be obvious to all that as of the end of 1980, had the matter come to trial, there would have been no possibility for summary judgment in favor of any party, there being a multitude of factual questions to be resolved.

This was all dramatically changed by the execution of the Settlement Agreement by PCA and Gregorys on July 16, 1981. (268-285) It was on the basis of that Settlement Agreement that defendants Watts made their Motion for Summary Judgment, which the Court ultimately granted. More will be said about that and the facts relating to it and the consequences flowing therefrom in the Argument portion of this brief.

ARGUMENT

POINT I. THE COURT BELOW PROPERLY RULED THAT DEFENDANTS WERE ACCOMMODATION MAKERS.

Counsel for PCA, in Point I of his Argument, under the claim that there are issues of fact, argues that defendants Watts were primary obligors, rather than accommodation makers and

in support of that assertion selectively chooses from the documents noted heretofore in our Statement of Facts at length so much of them as allude to the original collateral first pledged in the Watts loan of 1974, coupled with some after-the-fact affidavits acquired from three former employees of PCA (Mills, Naylor and Wood). All of those affidavits were objected to and were moved to be stricken by Watts for several reasons, not the least of which that they were self-serving, presumed to express a corporate opinion, and further presumed to suggest what was in the minds of parties not testifying and could not accordingly be based on personal knowledge. The Court did not rule on any of the Motions to Strike, and it is submitted by the undersigned that it is immaterial whether they were to be accepted as part of the record or not because the affidavits miss the point, as does the Argument of PCA's counsel.

Being an accommodation maker or a primary obligor is not a question of the "intent" of the would-be creditor or holder of creditor or beneficiary of an obligation, but rather a matter of fact. It is to be noted, however as an example, that the paragraph cited from Mr. Wood, who was incidentally involved with the renewal note, loan action report and credit notice letter (Items 2 and 3 noted above) is impeached by those very documents as noted above under the heading "Loan History," "Financial Information," the letter addressed solely to Gregory, and the fact

al Gregory's financial statement, as well as Watts', was spelled
ude.

It is also to be noted that counsel for PCA adds language at page 10 and 11 of its brief that does not appear in the record, calling the first mortgage on 109 acres, the "(Watts home)" and the second mortgage on 1,257 acres "(Watts farm)." The parentheses additions are voluntary surplus of counsel and are not in the original documents and were never identified as such in the record or in the depositions. Indeed, Tom Boyer thought 109 acres was acreage owned by Gregory located somewhere in the Fillmore area. (II Boyer Depo. 41, 48, 50, 51) Unquestionably part of the mortgaged property described in the exhibits belonged to Milo Watts as obviously a portion of it was the 480 acres sold to Gregory, but there is nothing in the record to identify on any of the documents listing collateral to actually specifically identify the 480 acres with which we are here involved.

The undersigned also disputes PCA's counsel's argument that Watts received a "direct benefit" in these transactions. Apart from the fact that the amount assumed by Gregorys was approximately $74,000.00, not $105,000.00 as noted in the Statement of Facts above, the matter of benefit is a question of consideration running between Gregorys and Watts, not between PCA and Watts.

PCA asserts that Section 70A-3-606, Utah Code Annotated, 1953, is not applicable in this case since it relates only to

parties holding a right of recourse, i.e., accommodation parties and PCA asserts that Watts are not accommodation parties.

PCA's assertion, it appears, is based upon a misunderstanding of the law of accommodation parties as it relates to the law of primary and secondary liability. PCA asserts that because the Watts' signatures appear on the note as co-signers, they cannot be accommodation parties. It is apparently PCA's belief that since a co-signer is primarily liable, he cannot be an accommodation party. Under this view only parties secondarily liable on instruments can be accommodation parties. That is, of course, clearly not the law. The doctrine of primary and secondary liability is a doctrine which relates primarily to the holder of the note (creditor). If a party to the note is primarily liable, then the holder can proceed against him forthwith. On the other hand, a party who is secondarily liable can only be proceeded against after the creditor has taken certain preliminary steps as to the party or parties primarily liable.

It is irrelevant whether a party is primarily or secondarily liable as it relates to accommodation parties. The rights of the creditor against parties primarily liable are the same whether such parties receive the benefit of the consideration or merely sign to allow someone else to receive that benefit (aside from issues relating to discharge). On the other hand, the doctrine of accommodation parties is a doctrine which relates primarily to the relationship between the debtors themselves.

:ine states in substance that as between debtors, the party
receives the benefit of the consideration must reimburse the
:y to the note who did not receive such consideration in the
:ent such party sustains a loss by virtue of default on the note,
:at is to say the accommodation party is given recourse over
:ainst the accommodated party for any loss sustained by the
:commodation party.

Section 70A-3-415 states in subparagraph 1 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." (Emphasis added.)

It is thus clear that the accommodation party can be a
aker, drawer, endorser, co-maker, or can sign on a note in any
:her capacity. Subparagraph 5 of said section states:

"An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party." (Emphasis added.)

Comment 1 to the official text of the Uniform Commercial
:e found under Section 3-415 states as follows:

"1. Subsection (1) recognizes that an accommodation party is always a surety (which includes a guarantor), and it is his only distinguishing feature. He differs from other sureties only in that his liability is on the instrument and he is a surety for another party to it. His obligation is therefore determined by the capacity in which he signs. An accommodation maker or acceptor is bound on the instrument without any resort to his principal, while an accommodation indorser may be liable only after presentment, notice of dishonor and protest. The subsection recognizes the defenses of a surety in accordance with the provisions subjecting one not a holder in due course to all simple contract defenses, as well as his rights against his principal after payment. Under subsection (3) except as against a holder in due course without notice of the accommodation, parol evidence is

admissible to prove that the party has signed for accommodation."

As 2 F. Hart and W. Willier, Bender's Uniform Commercial Code Service § 13.03 states at 13-10 (1983):

> "Equally confused and misleading has been the use of the terms 'secondary'and 'primary' with reference to contractual liability and to the suretyship transaction. In the suretyship sense, 'secondary' simply refers to the fact that the obligor rather than the surety ought to pay or perform; hence, his obligation is 'primary' and the surety's 'secondary.' However, in a contractual sense, 'secondary' refers to conditional liability, i.e., conditions precendent to the promisor's duty of performance, while 'primary' refers to an unconditional or absolute duty to perform. Thus, a surety is always 'secondarily' liable in the suretyship sense, but he may be either 'primarily' or 'secondarily' liable in the contractual sense, depending upon the terms of his agreement with the obligee. (Emphasis added.)

Thus an accommodation maker is primarily or secondarily liable to the holder of the note depending on the capacity in which he signs, a maker being primarily liable, and an endorser being secondarily liable, but as between an accommodation party and the accommodated party, the accommodation party is "always a surety."

The Watts then as accommodation parties are always sureties as to the Gregorys and thus are entitled to recourse against Gregorys on the notes.

This is obviously a doctrine based upon principles of fair play and good conscience. If the accommodation party is made to pay the obligation, but has no right of recourse against the accommodated party, then the accommodated party is granted an unconscionable benefit. He gets the benefit of the proceeds of

he note, but never has to pay anyone for them. The same is true f the right of recourse is in any way limited or impaired.

It is clear in the instant case that from and after the signing of the Uniform Real Estate Contract between Watts and Gregory, the Watts became accommodation parties as to Gregory. It is true that at the time of the signing of that note the Watts owed PCA an indebtedness on the farm of approximately $74,000.00. However, Gregory assumed that indebtedness as a part of the purchase price (i.e., he got an equity in the land commensurate with said assumed debt), and thus as between Watts and Gregory it became the indebtedness of Gregory. Indeed we can say that in effect Watts paid Gregory to assume said debt--to make it his. It is thus clear that from and after the signing of that contract, the original Watts' indebtedness became the indebtedness of Gregory as between Watts and Gregory. Gregory had received a consideration for assuming that debt in the nature of part payment of the purchase price.

Furthermore, from and after the date of the signing of that contract, all monies disbursed by PCA for the farm or in connection therewith inurred to the benefit of the equitable owner of the farm, to-wit, Gregory, the contract purchaser. Disbursements from PCA for improvements on the farm could not inure to the benefit of Watts. Even if the value of the farm had been doubled or tripled by said disbursements, that increase in value could not help Watts. Any improvements to the farm through

disbursements from PCA would inure in law to the benefit of Gregory. From and after the date of the signing of that contract, Gregory was deemed the owner of the farm in equity, and Watts were deemed to have a scurity interest only. It is thus inescapable that as between Watts and Gregory, Watts was an accommodation maker and Gregory was the accommodated party, both as to the original debt and as to all subsequent loans, the proceeds of which went entirely to Gregorys by the undisputed facts.

As noted throughout the Statement of Facts above, Gregorys asked for and received all the increases extended by PCA, wrote all the drafts spending the same to pay their bills--including the only installment paid to Watts on the Uniform Real Estate Contract.

PCA has claimed that Watts did get one benefit, and that is that one of the disbursements to Gregory was used by him to pay one annual installment to Watts on the Uniform Real Estate Contract. This cannot be deemed to be a disbursement to Watts from PCA, such as would preclude Watts from being an accommodation party for a number of reasons: First, the Watts were not advised until long after the fact that Gregory had so used the money. Second, only after the money was chargeable to Gregory did he then use it to pay <u>his</u> debt to Watts. Third, Gregory had a duty to pay Watts an annual payment of $24,500.00. The money he got from PCA he used to discharge that debt. He borrowed $24,500.00 and got the full use of it in paying his debt in that amount. Watts on

he other hand had a right to receive $24,500.00 on the annual payment without having that amount charged against his collateral. For the $24,500.00 Watts received he cancelled $24,500.00 of debt which Gregory owed him in the land contract and he got charged with $24,500.00 against his home and other land. The net result to Watts therefore is a $24,500.00 deficit. It must therefore be obvious that Gregory got the only real benefit and Watts once again just got used.

Furthermore, the PCA indebtedness was at a much higher interest rate (12.18% - R.17) than the land contract (7% - R.50), so Watts is additionally hurt in that regard.

PCA asserts that some of the money went to pay "joint obligations" of Watts and Gregory. There is not one shred of evidence of this. Watts and Gregory did not owe anyone anything jointly, except PCA, and the disbursements from PCA obviously did not go back to PCA. Watts and Gregory were not joint operators of the farm and there simply were no such joint debts.

Finally, on this point, PCA, in knowingly and secretly advancing money to Gregory for him to make an illusory payment to Watts, does not constitute good faith dealing. Watts as accommodation maker was entitled to know of any significant fact known to PCA that effected his suretyship position. Watts had a right to be timely advised that Gregory did not have money for the annual payment in order to permit Watts to take steps to timely protect himself. Instead PCA let him become so deeply enmeshed in

debt with Gregory that there was little hope that the debt [illegible] be paid from the one-year's earnings of the 481 acres as [illegible] normally required, and the stage was set for PCA to undertake [illegible] takeover of all of Watts' land.

The Court below therefore properly ruled that the Watts were accommodation parties as to the Gregorys and that ruling should be affirmed.

POINT II. PCA, IN EXECUTING ITS SETTLEMENT AGREEMENT WITH GREGORYS, FAILED TO MAKE AN EXPRESS RESERVATION OF RIGHTS AGAINST WATTS, AND THE WATTS WERE ACCORDINGLY PROPERLY RELEASED FROM LIABILITY BY THE COURT BELOW.

The Uniform Joint Obligations Act, which is found [illegible] Utah Code as section 15-4-1 to 7, governs the facts of this [illegible]. Section 15-4-4 provides as follows:

> "Release of co-obligor--Reservation of rights.-- 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 <u>in writing as part of the same transaction as the release or discharge expressly reserves his rights</u>; and in the absence of such a reservation of rights shall discharge co-obligors only to the extent provided in section 15-4-5." (Emphasis added.

Section 15-4-5 provides in relevant part:

> "Release of co-obligor--Effect of knowledge of obligee. -- If an obligee releasing or discharging an 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-obligor 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 the released or discharged obligor was bound to such co-obligor to pay."

The section goes on to set forth the result where the [illegible] not have knowledge, but that part is irrelevant [illegible] PCA clearly had knowledge of the accommodation status of

It is thus clear under the foregoing provisions that [illegible] PCA made an "express reservation of rights" against Watts, [illegible] Watts are released by virtue of PCA's release of Gregorys. [illegible] without dispute, knew that the monies advanced by it went to [illegible] Gregorys and not to Watts. PCA knew that the monies went to [illegible] buy the farm which Gregorys were buying from Watts and that [illegible] advancement would in nowise inure to the benefit of the [illegible] Since PCA knew that, although Watts were co-signers on the [illegible] Gregorys were bound by the law applicable to the Uniform [illegible] Sales Contract existing between them and by the law of [illegible] negotiation makers to reimburse Watts for any amount which Watts [illegible] pay by virtue of the loans of PCA to Gregorys.

A further statutory provision applicable to the facts of [illegible] is found in the Uniform Commercial Code at Section 70A-3-[illegible] which provides:

"Impairment of recourse or of collateral.

(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder

(a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any [illegible] presentment, protest or notice of dishonor with

respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or

(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

(2) By express reservation of rights against a party with a right of recourse the holder preserves

(a) all his rights against such party as of the time when the instrument was originally due; and

(b) the right of the party to pay the instrument as of that time; and

(c) All rights of such party to recourse against others." (Emphasis added.)

The Uniform Commercial Code thus also provides that if the holder of a note (PCA in this case) discharges any party to the instrument (Gregorys in this case) without "express reservation of rights as "against a party" thereto, such party or parties are released, and it is thus clear that the Watts must be deemed to be totally released under the circumstances of this case inasmuch as there certainly was no express reservation of rights against them.

It its brief PCA attempts to rely on the fact that the name "Watts" appears in the Settlement Agreement. It is true that the Watts name does appear in the Agreement, but it cannot, by any stretch of the imagination, be deemed to be an "express reservation of rights." We do not think that the references to the Watts are even an implied reservation of rights, but even if

:ney are granted that exalted status, such reservation certainly does not amount to an "express reservation of rights."

"Express" is defined by Black's Law Dictionary as follows:

> "EXPRESS. Clear; definite; explicit; unmistakable; not dubious or ambiguous. In re Moon's Will, 107 Vt. 92, 176 A. 410, 412. Clear, definite, plain, direct. State ex rel. Andrews v. Zangerle, 101 Ohio St. 235, 128 N.E. 165, 167. Declared in terms; set forth in words. Directly and distinctly stated. State ex rel. Ashauer v. Hostetter, 344 Mo. 665, 127 S.W. 2d 697, 699. Explicit. Elliott v. Hudson, 117 W.Va. 345, 185 S.E. 465,467; made known distinctly and explicitly, and not left to inference. Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, 274. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with 'implied.' State v. Denny, 118 Ind. 449, 21 N.E. 274, 4 L.R.A. 65." (See page 691 of the 4th Edition.)

The Settlement Agreement was executed July 16, 1981, and is clearly a document running solely between PCA and Buford A. and Elizabeth A. Gregory, who were the only signatories thereon. There are some ancillary references only to Watts. These largely appear in the "Recitals" where the Watts name is mentioned only in connection with the instant lawsuit. The critical paragraph is No. 6 on page 4 where, after excluding the new obligations agreed to by the parties in paragraphs 1 through 5 of the Agreement, PCA then does

> "release and discharge Gregorys and each of them from <u>any and all liability which they may have to PCA under the Gregory/Watts notes, under the Gregory note, under the mortgage</u>, 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 the execution hreof, PCA's sole remedy for 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 added.)

The most that can be said about the above language is the use of the words "foreclosure sale" and the use of the phrase "the Home Farm" are in PCA's view implied references to Watts, but that language, when it is qualified twice by the underlined language reducing it to remedies against Gregorys "for sums due it from the Gregorys" clearly negates such an argument.

PCA then alludes to paragraph 8 proposing it a stipulation to be filed in the lawsuit in the form as the attached Exhibit E provides. (R.284-5) It is to be noted that all four paragraphs of said stipulation make no reference whatever--implied or expressed--to the Watts, and that document is the release of parties in this matter. PCA's counsel quotes paragraphs 2 and 3 again with relation to foreclosing any right, title and interest "of Gregorys" and counsel then makes the novel argument that not mentioning Watts is somehow an express reservation of rights against them and further attempts to buttress his argument by quoting from an affidavit of Anthony Schofield in which Schofield presumes to say, "It was expressly understood between all parties to the stipulation that plaintiff in this matter would proceed as

against defendant Watts." (R.266) Watts, through their counsel, moved to strike this affidavit on the grounds that the statement cannot be based upon personal knowledge and cannot presume to suggest what was in the mind of other parties or persons. (R.292) Apart from its self-serving character and presumptuousness in purporting to allege what was in the minds of Gregorys and/or their attorneys, there is the direct contradiction in the unequivocal language of the Glen Clark and Tom Christensen Affidavit (R.Vol.1,296) at paragraph 2, which reads in part:

> "At no time during the settlement negotiations or thereafter until November 11, 1981, did any of the parties to the Settlement Agreement and/or their counsel request, give or in any form mention an express reservation of rights as to Milo and Cleown Watts in connection with the three promissory notes referred to in paragraph A of the Recitals contained in the Settlement Agreement." (Emphasis added.)

It was at this November 11, 1981, meeting that counsel for PCA attempted to obtain signatures of the Gregorys to the Addendum to Settlement Agreement (R.309-10), which by a cursory reading makes it clear that PCA was then--five months after the fact--trying to include an express reservation of rights against the Watts that they failed to do on July 16, 1981, when they executed the Settlement Agreement. That position is repeatedly borne out in the testimony taken in the short depositions of Glen Clark, Tom Christensen and Dr. Buford Gregory on November 19, 1981. While counsel for PCA repeatedly tried to put the words in the witnesses' mouths that there was an intent or an understanding

or an agreement about reserving claims against the Watts, such questions were objected to, but responded to in the negative.

As PCA's brief notes, they repeatedly allude to the "Farm" rather than the Watts personally. PCA's counsel fails to note Clark's own objection except as he alluded to it in his answer.

But such parole evidence is inadmissible, particularly in light of paragraph 13 of the Settlement Agreement, entitled "Integration:"

> "This agreement constitutes the entire agreement among the parties pertaining to the subject matter hereof, and supersedes all prior agreements and understandings pertaining thereto. No covenant, representation or condition not expressed in this agreement shall affect or be deemed to interpret, change or restrict the express provisions hereof." (Emphasis added.)

Such provision, if it is to be given any effect at all precludes PCA from here and now trying to represent some other intent beyond what is clearly expressed in the language within the four corners of the document itself. That argument should further be buttressed by the fact that the Clark/Christensen Affidavit makes it clear that the Settlement Agreement was prepared by counsel for PCA with only some minor changes suggested by Christensen with regard to the new collateral referred to in said Agreement. (R.Vol.1,296)

Accordingly, the long-standing rule that a document shall be construed most strictly against the party preparing it should here be given effect.

The Clark/Christensen testimony is further inadmissible for the reasons stated by Clark (omitted in PCA brief) before he answered: "Mr. Clark: I will object to questions about that conversation on the ground that the conversation was in connection with an Addendum in the Settlement Agreement, and the conversation involved settlement and, therefore, is not admissible." (Clark Depo. 6)

It is thus clear that the Watts must be deemed to be released by failure of PCA to provide for an "express reservation." The case law likewise makes inevitable the the same conclusion.

Melo v. National Fuse, 267 Fed Supp 611 (D.Colo., 1967) involved a mining accident which injured the plaintiff. The plaintiff initially brought suit in the state of Utah against Trojan Powder Co., and that case was settled and a stipulation of dismissal signed and an order of dismisal entered pursuant thereto. Later on the plaintiff sued another defendant in the District of Colorado for the same injury. The court held that the Utah law governed and that the action of the plaintiff was foreclosed by the provisions of the Uniform Joint Obligations Act found at 15-4-1 et seq. The court stated at page 613:

> "Having received a substantial amount from the Trojan Powder Co. in full settlement, and having dismissed his action against that company on the merits and with prejudice but without reserving any rights, plaintiff thus released the present defendant. The motion for summary judgment is well taken." (Emphasis added.)

In Williams v.Greene, 506 P2d 64, the Supreme Court of Utah affirmed the granting of a motion for summary judgment dismissing the action. In that case the plaintiff sustained severe burns, for which he brought an action against an oil company. That action was settled and a release executed. The court action against the oil company was "fully compromised and settled" and that action dismissed with prejudice. Ten months later plaintiff brought a suit for the same injuries against a physician for malpractice, and the court held at page 65:

> "The appellant, not having responded to facts properly demanded under the rules, but preferring to argue about the elusive factor of intent in signing the full, complete, unreserved release of all claims, hardly can pursue a claim years later without substantial and meaningful reason." (Emphasis added.)

It is thur clear that having failed to reserve his rights against the doctor in the Williams case, the same were lost to the plaintiff.

In Greenhalch v. Shell Oil Co., 78 Fed 2d 942 (10 Cir. 1935), a case applying Utah law, the injured plaintiff executed an agreement releasing and discharging one obligor, and the agreement contained a reservation of rights which would still permit him to sue "any physician or surgeon for malpractice or neglect." The court there recognized plaintiff's right under the Act to make such a reservation and the court held that in a later suit against Shell Oil Co. the prior release operated as an absolute defense. The court stated at page 945 as follows:

"There being no written reservation of right against defendant, as provided in section 4, we conclude that the release given discharged defendant from liability, if any, for plantiff's fall."

We also cite to the court the case of Mills v. Standard Title, 577 P2d 756, a 1978 Colorado case, where the court held at page 759:

"Here, if Standard were not released, then the estate would be liable on the indemnity agreement for damages later recovered by Mills against Standard. Obviously, that was not the intent of the release issued to the estate. We agree with the view that the objective circumstances were not sufficient to indicate an intention not to release Standard." (Emphasis added.)

In Sims v.Western Steel Co., 551 F.2d 811, 818 (10thCir. 1977) a release of a direct infringer of patent also operated to release the party which allegedly induced the infringement, since the release did not contain any reservation of rights against the second party.

In Matland v. U.S., 285 F.2d 752, 755 (3rd Cir. 1961) the release of an airline by the surviving spouse of a passenger killed in a collision released the United States from a claim based upon the alleged negligence of its employees, since the settlement agreement with the airline did not include reservation of rights against the United States.

Thus, a review of the cases in which these statutes have been applied indicates that the courts strictly construe these statutes to release from liability a co-obligor against whom an obligee does not make an express reservation of rights in a settlement agreement with another co-obligor. In none of the

cases in which Section 15-4-4 has been applied did a court, on "equitable" or other grounds, refuse to find that a settlement agreement in which an obligee released one co-obligor from liability failed to discharge another co-obligor against whom no express reservation of rights had been made in the settlement agreement. Neither did a court, in any of these cases, look outside the terms of the settlement agreement to find reservation of rights against a co-obligor, or that, notwithstanding the express terms of the settlement agreement, a party intended to reserve its rights against another and that, therefore, an express reservation of rights should be read into the settlement agreement on "equitable" grounds.

Although a mortgage foreclosure action is equitable in nature, that very fact militates against PCA. It is a well-established maxim that equity will not lend its aid to assist a party in achieving an unfair or inequitable purpose.

It must be clear to every fair-minded person that Gregory ought in good conscience to have paid the entire debt to PCA because he assumed for a valuable consideration the original debt and because all subsequent disbursements went to him. Not only does PCA make no effort to bring about that result, or even assist therein, but it actually takes the unbelievable step of releasing Gregory from the entire secured debt. In so doing PCA is saying in effect that it has no need to pursue equity. It is saying that, although you, Dr. Gregory, got the money from us, we

make Watts pay the bill in its entirety. PCA has deliberately and with cold and calculated purpose chosen to ignore equity.

PCA sought to lay a snare for Watts and make them pay with their home and everything they have for that which they did not get, and instead it complains that is has ensnarred itself.

Having failed to do equity, it can scarcely seek it here.

In the instant case, if the Watts are not released, then Gregorys have achieved nothing by virtue of the aforesaid Settlement Agreement with PCA because they are still subject to suit by Watts, and it is clear that Gregorys did not enter into an agreement which would yield them no benefit whatsoever.

PCA urges special significance to the language in the Settlement Agreement that PCA and Gregorys will "work together to conclude the litigation between them and Watts." If Watts are not released, however, by the Settlement Agreement, how can PCA help Gregory in the Crossclaim of Watts against Gregory? PCA would try to get as large a judgment as it could against Watts, and Watts will then be entitled to that same large judgment against Gregorys. How does that help Gregory? Furthermore, how can Gregory help PCA? If Watts is not released from liability, it will be in the best interests of Gregory to work to keep any PCA judgment small. No doubt Gregory felt that in signing the Settlement Agreement he was concluding the litigation as to Watts.

PCA has urged that the existence of the suit is an express reservation. Under Section 15-4-4 the express reservat must be "in writing and as part of the same transaction as the release." The suit was filed years before and is not a part of the same transaction. Whether suit has been filed or not, the obligors are such because of certain conduct or a contract existing before the suit. Settlement of that conduct or contract is the same, whether or not the suit exists--only the mechanics may be different.

PCA sets out a quotation from Anderson, Uniform Commercial Code, Vol. 2, page 131, Section 3-601:11. This is found at page 20 of appellant's brief. (This language is now found in Volume 3 of the Second Edition at page 131, Section 3-606:11.) The author in support of his statement that "other circumstances of the transaction" may disclose the reservation cites only one case, Parnes v. Celia's, Inc., 99 New Jer. Sup. 179, 239 Atl.2d 19. In that case the reservation was in the contractual documents (exchange of letters) and was an express reservation. It is therefore no authority for the proposition that circumstances may show an express reservation. It is true that the Uniform Commercial Code Section (70A-3-606) does not require a writing, but Section 15-4-4 does require a writing, and thus even if circumstances could show a reservation under the UCC provision, they cannot show the same under Section 15-4-4.

PCA's efforts at construction of the Settlement Agreement in an attempt to make what is at best inference and implication rise to the measure of express language, regardless of how it tries to torture the language of its own choosing in that Settlement Agreement, there is not by any reasonable rendering "an express reservation of rights" against the Watts. If PCA has believed that it could release all liability on the notes and still proceed on the collateral, it has made an erroneous decision as to the law, which clearly provides that release of the debt releases the collateral.[1] In this connection it should also be noted that in paragraph 6 of the Settlement Agreement Gregory is being released from the notes and from the "Mortgage."

PCA had the opportunity and indeed the duty to obtain from Gregory his collateral in the form of Arizona land to secure (or pay) the entire PCA debt, which was rightfully his debt. Instead of doing that, PCA has actually taken an assignment of the entire Arizona collateral (which at the time of the Settlement Agreement was in the form of a contract receivable providing for payment to Gregorys of the sum of $283,961.38 secured by a trust deed on said Arizona land) as security for PCA's unsecured debt of approximately $30,000.00. (R.281,282) PCA has therefore released Gregorys of all liability on the notes and entered into machinations designed to allow Gregorys to retain all but about $30,000.00 of the Arizona collateral, being a net amount of about $253,000.00, and after all of that asserts the right to require

[1] 55 Am Jur 2d, Mortgages, Section 394.

Watts to pay the whole debt. That, we respectfully submit, is not equity.

POINT III. NUMEROUS FACTUAL ISSUES EXIST RELATIVE TO THE CLAIM OF PCA WHICH PRECLUDE SUMMARY JUDGMENT IN ITS FAVOR EVEN IF WATTS WERE NOT ENTITLED TO SUMMARY JUDGMENT.

The thrust of PCA's Point V is that it is entitled to summary judgment. We believe that the foregoing arguments as contained in this brief show that Watts were entitled to summary judgment. However, even if Watts were not entitled to said summary judgment, there would still remain in the action a multitude of factual issues raised in the lower court regarding PCA's claims which would have to be tried, including at least the following:

1. Were the increases in the loans made upon the representation that substitute collateral would be obtained?

2. The three promissory notes signed by the Watts as accommodation makers as they now appear bear a stamp imprint thereon purporting to render them secured by the original mortgage. Watts assert that said stamps were placed thereon after they were signed. Is that the fact and, if so, were they intended to be collateralized by the substitute collateral belonging to Gregory?

3. Was the security agreement intended to include cattle of Watts? or of Gregory? or did it relate to crops only contained in the printed portions, since it was signed in blank? Was it signed in blank?

4. Would Watts be chargeable with expenditures on the ons made for purposes not related to the farm, such as expenses Arizona and payments to Watts themselves on the Uniform Real ate Contract?

5. Having undertaken to run the farm, and thereafter abandoning that undertaking, did PCA properly mitigate damages?

6. Watts assert that during the time PCA operated the farm (after commencement of this action) it has failed to account for the amounts earned by it.

7. Did an impairment of collateral take place when pipe purchased for use on the farm for $38,000.00 and constituting additional collateral, was sold for $7,500.00? (See R.303-306)

8. Watts assert that PCA hindered efforts of Watts to sell the farm and have, among other things, instructed personnel at PCA to inform prospective buyers inquiring about the property that it was unavailable, have failed and refused to disclose information concerning the farm to interested parties, and that PCA has sought to hinder efforts of sale to force the property to go to sheriff's sale in an attempt to obtain all of the Watts' land for a depressed and devalued price.

9. What is the balance owing, if any, after resolution of the above issues?

10. The affidavits of the Watts stand in opposition to the affidavits of Thad Allen. The weight to be given would be for the court sitting as a fact finder.

The trial court found on page 3 of the Summary Judgment (R.402) with regard to PCA's Motion for Summary Judgment that:

> "Issues of fact exist which preclude the granting thereof, but further finds and determines that the granting of the Watts' Motion for Summary Judgment disposes of this litigation as to the plaintiff."

We respectfully submit that the trial court was entirely correct in so ruling.

CONCLUSION

The Watts have taken nothing from PCA. The decision of the trial court has taken nothing from PCA. PCA volunatrily gave up its rights. There just is no "express reservation." There has been no unjust enrichment of Watts. Watts didn't get the money; they were accommodation makers. As noted by Mr. Boyer, PCA's own employee, Watts were "innocent victims" of these loans. If anyone has been unjustly enriched, it is Gregorys--but this is voluntarily agreed to do.

RESPECTFULLY SUBMITTED,

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