

2003

Joseph Machock v. Carl William ("Bill") Fink; Carl William ("Bill") Fink v. Joseph Machock; Carl William ("Bill") Fink v. John L. Harmer : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS

STATE OF UTAH

JOSEPH MACHOCK,  
Plaintiff and Appellee,

vs.

CARL WILLIAM ("BILL") FINK,  
Defendant and Appellant.

REPLY BRIEF OF APPELLANT  
CARL WILLIAM FINK

Interlocutory Appeal from the Second  
Judicial District Court, Judge Darwin C.  
Hansen

CARL WILLIAM ("BILL") FINK,  
Counterclaim Plaintiff,

vs.

JOSEPH MACHOCK,  
Counterclaim Defendant.

Trial Court Case No. 990700380  
Appellate Court Case No. 20030301-CA

CARL WILLIAM ("BILL") FINK,  
Third-Party Plaintiff,

v.

JOHN L. HARMER,  
Third-Party Defendant.

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ORAL ARGUMENT AND A PUBLISHED DECISION REQUESTED

**FILED**  
Utah Court of Appeals

**JAN 26 2004**

**Paulette Stagg**  
Clerk of the Court

**IN THE COURT OF APPEALS**

**STATE OF UTAH**

<p>JOSEPH MACHOCK, Plaintiff and Appellee,</p> <p>vs.</p> <p>CARL WILLIAM ("BILL") FINK, Defendant and Appellant.</p>	<p><b>REPLY BRIEF OF APPELLANT CARL WILLIAM FINK</b></p> <p>Interlocutory Appeal from the Second Judicial District Court, Judge Darwin C. Hansen</p>
<p>CARL WILLIAM ("BILL") FINK, Counterclaim Plaintiff,</p> <p>vs.</p> <p>JOSEPH MACHOCK, Counterclaim Defendant.</p>	<p>Trial Court Case No. 990700380 Appellate Court Case No. 20030301-CA</p>
<p>CARL WILLIAM ("BILL") FINK, Third-Party Plaintiff,</p> <p>v.</p> <p>JOHN L. HARMER, Third-Party Defendant.</p>	

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**ORAL ARGUMENT AND A PUBLISHED DECISION REQUESTED**

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## REPLY TO MACHOCK'S STATEMENT OF ISSUES

In Fink's Petition for Permission to Appeal, he raised a single issue:

Issue: Is the three-month statutory limitation period of Utah Code Ann. § 57-1-32 (2000), satisfied by the filing of a breach of contract complaint *before* the foreclosure sale and where notice of the sale and the claimed deficiency is afterward given to defendant through means other than the filing of a complaint?

It is on this issue that the Supreme Court granted the petition for interlocutory appeal.

Machock attempts to recharacterize the issues on appeal in his "Statement of Issues."

Though Machock's issues are, perhaps, another way of asking the same question as Fink, the Court should consider only the single issue framed by Fink in his petition.<sup>1</sup>

## REPLY TO MACHOCK'S STATEMENT OF FACTS

In his summary judgment motion, Fink complied with Rule 4-501(2)(A), Utah Rules of Judicial Administration, by providing a separate statement identifying in the record each fact supporting Fink's motion. (R. 199-202.) To survive summary judgment, Rule 4-501(2)(B) required Machock to produce evidence showing a fact in dispute. Rule 4-501(2)(B) provides that the facts raised by Fink "*shall be deemed admitted* for the purpose of summary judgment unless specifically controverted by [Machock]." Id. (emphasis added).<sup>2</sup> Machock's response to Fink's statement of facts is found in the Record at R. 436-41.

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<sup>1</sup> Machock's Issue No. 1 is inaccurate. As shown below in Point I.B. n.4, the trial court did not conclude that "Machock's Complaint states a valid cause of action against Fink for breach of contract for payment on an absolute Guarantee."

<sup>2</sup> This Rule has been replaced by Rule 7(c)(3)(A), Utah Rules of Civil Procedure (effective November 1, 2003).

Fink's statement of facts, and Machock's response, constitute the universe of facts considered by the trial court and it is the factual universe that this Court reviews. This Court should not consider facts raised for the first time on appeal. Smith v. Four Corners Mental Health Ctr., Inc., 2003 UT 23, ¶¶ 40-41, 70 P.3d 904; Lovendahl v. Jordan Sch. Dist., 2002 UT 130, ¶¶ 50-52, 63 P.3d 705; Fennell v. Green, 2003 UT App 291, ¶¶ 7-9, 77 P.3d 339. The following are "facts" that Machock offers for the first time on appeal:

- In Machock's Brief, at 7, 8-10, 31, and 33-34, he cites to the parties' discovery requests and responses. He admits that these were "not filed with the trial court" (Brief of the Appellee ("Machock's Brief"), at 7, ¶ 8, & 8, ¶ 12), but he attaches them to his appellate brief anyway. Machock never mentioned these documents in opposition to Fink's motion (R. 436-41) or in oral argument. They should not be considered on appeal.

- In Machock's Brief, at 14, he claims that "Fink was informed of the trustee's sale, but did not bid at the sale. R. at 498." This contention is not based on any evidence that was before the trial court. In Machock's opposition to Fink's summary judgment motion, at 7, ¶ 1 (R. 441), he claimed that notice had been given, but he did not offer any evidence to support this claim. Specifically, Machock pointed to a letter dated April 18, 2000, but this was written *after* the foreclosure sale – it was not notice. (R. 441 & 463-64.) Machock also referred to a letter dated October 4, 1999, but this letter only states that Machock has instructed his attorney to

commence foreclosure proceedings – it does not give notice of the time or place for a sale. (R. 465-66.)

- In Machock’s Brief, at 3, he claims: “The bank’s successor subsequently foreclosed on the property and was also the successful bidder. R. at 531, Tr. at 24.” Similarly, in Machock’s brief at 15, he claims: “Shortly after the April 18, 2000 letter, the holder of the first deed of trust [Brighton Bank] foreclosed on the Harmer property. R. at 531, Tr. at pp. 24-25.” This is a bald assertion made by Machock’s counsel at oral argument that was never supported as factual in the record below. (R. 436-41). As Machock points out elsewhere in his brief, “argument from counsel . . . is not evidence.” (Machock’s Brief, at 24 n.5.)

None of these facts were in the record before the trial court. This Court should not consider them. Even if this Court were to accept these facts as true, however, and consider them in this appeal, they do not aid Machock’s position on the substantive issue presented here.

## ARGUMENT

### **I. MACHOCK’S BREACH OF CONTRACT CLAIM IS BARRED.**

#### **A. Machock Elected Not to Pursue a Deficiency Claim.**

At all times, Machock has sought to recover the full value of the note and guaranty on a breach of contract claim. (See, e.g., Machock’s Complaint ¶¶ 4-13 & Prayer, (R. 1-3)). Machock has never elected to pursue a section 57-1-32 deficiency claim. At oral argument on Fink’s summary judgment motion, Machock’s counsel



plainly stated that this lawsuit was not a deficiency action under Section 57-1-32. (Transcript of Summary Judgment Hearing on March 6, 2003 (“Tr.”), R. 531, Tr. page 22, lines 20-25; R. 502 (Ruling at 7)). When the trial court inquired whether it was appropriate to seek a windfall by pursuing a breach of contract claim instead of a deficiency, Machock’s counsel said it was. (R. 531, Tr. page 27, lines 5-14); R. 501 (Ruling at 6) (“In the hearing scheduled March 6, 2003, Machock, through counsel, argued that it would be entirely appropriate to foreclose on the property owned by Harmer . . . and also collect the entire \$150,000 from Fink.”)).<sup>3</sup> When the trial court asked whether a section 57-1-32 deficiency is “something that your client is not even asking for,” Machock’s counsel said it was not. (R. 531, Tr. page 28, lines 4-15.)

In Machock’s appellate brief, he continues to argue that he has the right to sue for contract damages independent of section 57-1-32. For example, he argues: “Machock’s breach of contract claim is based on the absolute Guarantee and is therefore independent of any deficiency claim.” (Machock’s Brief, at 18.) Machock asserts further: “Fink’s liability to Machock pursuant to the absolute Guarantee was

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<sup>3</sup> In Machock’s Brief, at 25, footnote 5, he incorrectly says that his counsel “acknowledged that Machock would be preclude from obtaining a double recovery on his breach of contract claim. R. at 531, Tr. p. 27.” This mischaracterizes the discussion between the trial court and Machock’s counsel at oral argument. On this page of the transcript Machock’s counsel argues that Machock can have both the foreclosed property *and* payment in full on the note. R. 531, Tr. page 27, lines 5-14. This is the windfall that is prohibited by section 57-1-32. Further down the page, at lines 23 through 25, and continuing on the following page, lines 1 through 3, Machock’s counsel says that he will give Fink a credit for any money paid by Harmer. This is a different kind of “double recovery” from the windfall that Machock seeks by foreclosing and pursuing contract damages at the same time. (A copy of the pertinent pages from the Transcript are attached as Attachment “A”.)

fixed on September 22, 1999, the date Harmer defaulted on the Note and informed Machock that he was unable to make future payments. Nothing in section 57-1-32 changes this result.” (Machock’s Brief, at 15.) Throughout his brief, Machock refers to his claim as one for breach of contract. (E.g., Machock’s Brief, at 3, 4, 13, 17, & 18.) Machock even devotes an entire section of argument to the idea that the trial court “ruled that Machock’s complaint states a valid cause of action for breach of contract,” even though this was not part of the trial court’s holding.<sup>4</sup> (Machock’s Brief, at 18.) In any event, this Court should accord no deference to the trial court’s ruling under the standard of review on appeal.

Because he failed to file a deficiency claim under section 57-1-32 within three months after the foreclosure sale, Machock’s claims against Fink are barred. Surety Life Ins. Co. v. Smith, 892 P.2d 1, 2-3 (Utah 1995).

#### **B. Machock’s Contract Claim is Barred.**

Machock argues that section 57-1-32 “simply provides the means” whereby he can “pursue his breach of contract claim against Fink.” (Machock’s Brief, at 15.) This misunderstands what section 57-1-32 allows. Section 57-1-32 does not enable a contract claim. Instead, it prohibits recovery of damages for breach of contract. In

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<sup>4</sup> Machock accuses Fink of “ignor[ing] the trial court’s Ruling that Machock’s Complaint states a valid cause of action.” (Machock’s Brief, at 19.) The trial court never made such a ruling. While the trial court held that the guaranty was “absolute,” it never held that Machock had “a valid cause of action” following the foreclosure sale. Rather, the trial court found Machock’s contract claim had to be modified by the requirements of section 57-1-32. (R. 501-02). The trial court rejected Machock’s claim that section 57-1-32 is irrelevant because the guaranty is absolute, saying: “None of this matters in light of the very broad, very expansive reading given to [section 57-1-32] by the Utah Supreme Court.” (R. 501.)

Cox v. Green, 696 P.2d 1207 (Utah 1985), the lender attempted to pursue a breach of contract claim to recover the balance due on the obligation for which the trust deed was given as security. The trial court dismissed the lender's claim, and the Supreme Court affirmed, explaining:

[S]ection 57-1-32 provides the *exclusive procedure* for securing a deficiency judgment following a trustee's sale of the real property under a trust deed. *Plaintiffs' election to sell the property to satisfy the debt precludes them from seeking any other remedy, including damages for breach of contract*, which might have been available to them.

Id. at 1208 (emphasis added). This principle was reaffirmed in Concepts, Inc. v. First Security Realty Services, Inc., 743 P.2d 1158, 1161 (Utah 1987) ("Once a trust deed sale has been made, that remedy [filing an action for a deficiency under section 57-1-32] is the exclusive remedy under statute. . . . [The lender's] failure to bring a deficiency action within three months after the sale of the property terminated all of [the borrower's] remaining obligations"), and in G. Adams Ltd. Partnership v. Durbano, 782 P.2d 962, 963-64 (Utah Ct. App. 1989) ("if the beneficiary of a trust deed elects to foreclose nonjudicially, is owed a deficiency following application of the sale proceeds, and wishes to obtain a deficiency judgment, an action for that purpose must be commenced by the beneficiary under that trust deed within three months of sale or any claim to a deficiency is waived").

Machock tries to distinguish these cases by arguing that they do not apply because they did not involve "a separate claim for liability on an absolute guaranty that was filed prior to the foreclosure." (Machock's Brief, at 23.) None of those

cases, however, held that the timing of the filing of his contract claim made any difference. As argued in more detail in Point II.C., below, the policies underlying the Cox and Concepts opinions apply regardless of the timing of the filing of the lender's claim on the guaranty. Whether or not the lender has previously sued on the guaranty, once he elects to hold a trustee's sale, he is foreclosed from pursuing his breach of contract claim or any remedy other than a deficiency claim under section 57-1-32. To pursue a deficiency action, the lender must file a complaint within three months of the trustee's sale, and this complaint must "set forth the entire amount of the indebtedness which was secured by such trust deed, the amount for which such property was sold, and the fair market value thereof at the date of sale." Utah Code Ann. § 57-1-32 (2000). See also Surety Life Ins. Co. v. Smith, 892 P.2d 1, 2 (Utah 1995). A lender who elects to pursue a breach of contract claim instead of filing a complaint for deficiency under section 57-1-32, is barred from pursuing any claim at all.

Characterizing Fink's guaranty as "absolute," Machock argues that he is not subject to the requirements of section 57-1-32. He says that a section 57-1-32 deficiency action is some "other remed[y]" that he is "not required to pursue." (Machock's Brief, at 18.) Machock cites two cases, neither of which supports his argument. First, Machock cites to Valley Bank & Trust Co. v. Rite Way Concrete Forming, Inc., 742 P.2d 105 (Utah Ct. App. 1987). This case involved a note and an absolute guaranty that was secured by personal property, namely, construction equipment and a truck. Id. at 106. Since there was no real property at issue in Valley

Bank, section 57-1-32 had no application to the case and was not addressed by the court. Valley Bank has no application to this appeal.

Second, Machock cites to In re SLC Ltd. V, 152 B.R. 755 (D. Utah 1993). Machock argues that the holding in this case “demonstrates the soundness of the trial court’s Ruling.” (Machock’s Brief, at 19.) In SLC Ltd., a bankruptcy court reasoned that the protections of section 57-1-32 and Utah’s One Action Rule, Utah Code Ann. § 78-37-1, do not apply to guarantors. Id. at 771. This case might support Machock’s argument, except that two years later the Supreme Court considered this issue and reached a different result. In Surety Life Ins. Co. v. Smith, 892 P.2d 1 (Utah 1995), the Supreme Court held that guarantors are entitled to the protections of section 57-1-32. (See the discussion of Surety Life, below, Point II.) The doctrine of *stare decisis* requires this Court to follow the decision in Surety Life, not the opinion of the bankruptcy court in SLC Ltd. State v. Menzies, 889 P.2d 393, 398, 399 & n.3 (Utah 1994).

Section 57-1-32, as interpreted and applied by Cox, Concepts, Adams, and Surety Life, is Machock’s exclusive remedy. Section 57-1-32 does not allow Machock to pursue his contract claim in any form, regardless of the timing of the filing of his claim on the guaranty.

## **II. SECTION 57-1-32 APPLIES TO THE LENDER/GUARANTOR RELATIONSHIP.**

Machock ignores the plain holding of Surety Life Ins. Co. v. Smith, 892 P.2d 1 (Utah 1995), when he contends that section 57-1-32 does not apply to him.

(Machock's Brief, at 20 ("Section 57-1-32 does not address the situation between Machock and Fink.")) Machock suggests two reasons why he believes section 57-1-32 should not apply to him. First, he says: "Nothing in section 57-1-32 address the contractual arrangement between Machock and Fink." (Machock's Brief, at 16; see also id. at 20 ("Nowhere does section 57-1-32 purport to address the rights and obligations of Fink's Guarantee.")) Second, he contends that section 57-1-32 does not bar a "prior filed Complaint asserting a valid cause of action on a guaranty of payment." (Machock's Brief, page 16; see also page 20). Surety Life disposes of each of these arguments.

A.     **The Facts of *Surety Life* Are Materially Indistinguishable from the Facts of this Case.**

In Surety Life, there was a lender, a borrower, and several guarantors. The lender was secured by a trust deed. The guarantors had signed separate, personal guaranty agreements. 892 P.2d at 2. When the borrower fell into default, the lender sold the real property at trustee's sale and acquired title to the property for a credit bid of \$1,536,000. Id. At the time of the sale, the undisputed fair market value of the property was \$1,860,000, and the unpaid balance due on the promissory note was \$1,839,000. Id. Despite the fact that the fair market value of the property exceeded the amount owed under the note, the lender sued the guarantors on their guaranties seeking to recover \$303,000, i.e., the difference between the lender's credit bid and the amount owed on the note and guaranties. Id.

What the lender sought to recover in Surety Life would have resulted in a windfall. Under the lender's theory, it would have the real property (worth more than the indebtedness) *plus* an additional \$303,000. Machock filed this contract claim hoping to do the same thing that the lender in Surety Life tried to do. The fact that Machock filed his suit against Fink *before* he foreclosed the trust deed makes no difference to the analysis under the rule of Surety Life.

**B. Surety Life Holds that a Guarantor (Like Fink) is entitled to the Protections of Section 57-1-32.**

Machock argues that his contract claim is “independent of any deficiency claim.” (Machock's Brief, at 18.) He argues that Harmer's note and Fink's guaranty are separate contracts. (Machock's Brief, at 21.) This argument was advanced by the lender in Surety Life, and rejected. The Court said that this was a distinction that “has no relevance under section 57-1-32.” Id. at 3. The Court saw that section 57-1-32 “does not concern itself with which contract or instrument the action is founded on,” but rather it applies to any action “to recover the balance due upon the obligation for which the trust deed was given as security.” Id. quoting section 57-1-32. The lender in Surety Life was subject to the restrictions of section 57-1-32.

**C. It Makes No Difference that Machock Filed his Breach of Contract Claim Before the Trustee's Sale.**

Machock argues – without offering any supporting authority – that section 57-1-32 should not apply to him because it does not “address the effect of a prior filed lawsuit based on an obligation represented by a guaranty of payment.” (Machock's

Brief, at 20.) He argues that Surety Life is “inapposite” because his complaint was filed before the foreclosure and four months before the sale. (Machock’s Brief, at 24.) Machock’s argument that the timing of the filing of his contract claim makes all the difference has no merit.

Machock filed this breach of contract lawsuit contemporaneous with the commencement of foreclosure proceedings. (Machock’s Brief, at 4, ¶¶ 1 & 2; R. 465-66.) By failing to file a deficiency claim within three months after the foreclosure, Machock elected to disregard section 57-1-32. Machock must live with the choice he made. The trial court erred when it *sua sponte* changed Machock’s complaint into a section 57-1-32 deficiency claim. A court cannot create or imply the existence of pleadings where there are none.<sup>5</sup>

Pursuing both extra-judicial foreclosure and a contract claim at the same time generates a potentially lucrative windfall for the lender. The purpose of section 57-1-32 is to protect the borrower and the guarantor from losing the property and still having to pay the entire contract indebtedness. In Surety Life, the Court explained:

Because the Act [the Utah Trust Deed Act, Utah Code Ann. § 57-1-19 to -36] does not provide the borrower with any right of redemption, it protects the borrower by another means: if the lender purchases the trust deed property in a nonjudicial foreclosure at less than its fair market value and then uses the Act to collect a deficiency, the lender must credit the fair market value of the property

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<sup>5</sup> Machock’s invocation of Rule 15(b), Utah Rules of Civil Procedure, does not save him. (Machock’s Brief, at 32 n.8.) This rule only applies when an issue not pled is “tried by express or implied consent of the parties.” As demonstrated by Fink’s motion for summary judgment and this appeal, Fink will not consent to try a deficiency claim that was never pled.



against the borrower's debt. Id. § 57-1-32. In short, the Act prevents trust deed lenders from obtaining excessive recoveries. In addition to the fair market value offset requirements, the Act has a three-month statute of limitations.

Id. at 2. The filing of a contract claim *before* the trustee's sale is an attempt to avoid this protection. This is especially true for a lender like Machock who filed his contract claim at nearly the exact same time that he commenced foreclosure proceedings. (Machock's Brief, at 4, ¶¶ 1 & 2; R. 465-66.) Creating a before- and after-foreclosure distinction encourages lenders to do what Machock did: disregard the pleading and filing requirements of section 57-1-32 by filing a contract claim *before* the sale. If the Court creates this before-and-after distinction, a lender will have no reason to comply with section 57-1-32, or file a deficiency claim at all. He will simply file a contract claim before the sale for the purpose of skirting the limitations imposed by section 57-1-32. The best way to prevent this kind of tactic is to require compliance with section 57-1-32 regardless of whether the lender had filed a contract claim prior to the sale. If a prior complaint has been filed, a lender must file a new complaint or amend the existing complaint within the three-month period required by section 57-1-32. That pleading must include all of the facts required by the statute, such as the amount for which the property was sold and the fair market value at the date of sale. The Legislature has already mandated this requirement without distinguishing whether a prior complaint for breach of contract has already been filed. This Court should not judicially impose that kind of distinction on the statute. This is precisely what the trial court did in the present case when it allowed

Machock to go forward with his contract claim “subject to” section 57-1-32 because Machock had previously sued Fink on the guaranty.

Machock chose the same course as the lender in Surety Life. In Surety Life the lender did not bring a deficiency action, opting instead to sue for the balance due on the note and guaranty. 892 P.2d 2. In light of this election, the Court held that the lender was prohibited from proceeding on his contract claim, and it was not allowed to commence a deficiency claim because more than three months had passed since the trustee’s sale. Id. at 3. In the present case, the trial court created an exception to Surety Life, allowing Machock to go forward with his contract claim “subject to” the damages limitations provided in section 57-1-32. Machock wants this Court to affirm. (Machock’s Brief, at 15 & 24 n.5.) The Court in Surety Life did not permit the lender to pursue his contract claim, and this Court should follow that result.

### **III. *KIRKBRIDE* DOES NOT APPLY TO THIS CASE.**

The trial court should have applied Surety Life and dismissed Machock’s contract claim. Instead, the trial court *sua sponte* transformed Machock’s contract claim into a section 57-1-32 deficiency claim. The trial court did this based on an erroneous interpretation of Standard Federal Savings & Loan v. Kirkbride, 821 P.2d 1136 (Utah 1991). Misapprehending Kirkbride, the trial court reasoned that the statutory filing and pleading requirements of section 57-1-32 are “a mere procedural hurdle” (R. 502) that is satisfied “when ‘notice’ is given to the debtor.” (R. 503). This was not the holding of Kirkbride.

In Kirkbride, unlike in this case, the lender filed a timely deficiency action within the three-month limitations period. When the borrowers discovered that the complaint had not been served within 120 days, they moved to dismiss for failure to serve under Rule 4(b), and the trial court granted the motion dismissing the complaint without prejudice. The lender then re-filed the complaint. Whereupon, the borrowers moved to dismiss again, arguing that the second complaint was barred by section 57-1-32's three-month statute of limitations. Id. at 1137. The lender opposed dismissal arguing that it should be allowed to proceed under the savings statute (Utah Code Ann. § 78-12-40) because the second complaint was filed less than one year following dismissal of the first complaint. Id. The trial agreed to let the second lawsuit proceed.

On appeal, the Supreme Court applied the savings statute and affirmed. Analyzing the interplay between the two statutes, the Court held that the savings statute could be applied to a section 57-1-32 deficiency claim. Id. at 1138. The Court allowed the second lawsuit to proceed because the lender had satisfied section 57-1-32's three-month limitation *by timely filing the first lawsuit*. Id.; see also, C.P. v. Utah Office of Crime Victims' Reparations, 966 P.2d 1226, 1228-29 (Utah Ct. App. 1998) (same).

The salient fact of Kirkbride is that the lender filed the *first* deficiency action within the three-month limitations period. The reason the first action did not proceed to a decision on the merits was because of a procedural failing: the summons had not been served in a timely manner. The Court explained that “57-1-32 does not

permanently bar further proceedings any time some procedural failing results in the dismissal of a *properly filed action*.” The primary purpose of that section is satisfied, held the Court, when “the foreclosing party provides notice to the debt that a deficiency will be sought *by filing the action*.” 821 P.2d at 1138.

Machock is not the victim of some “procedural failing” – like not serving the *second* complaint within 120 days – because (unlike the lender in Kirkbride) he never filed a *first* complaint that invoked section 57-1-32 in the first place, and, to date, he has never asserted a claim for deficiency in any form.

Citing to Kirkbride, Machock defends the trial court’s ruling by arguing that “the three-month limitation period of section 57-1-32 is a mere procedural hurdle.” (Machock’s Brief, at 25.) This was not the holding in Kirkbride. Such an exception swallows the rule. If the actual commencement of a lawsuit by filing a complaint is now just a “procedural hurdle,” then this and all statutes of limitation are meaningless. To reach this conclusion this Court would have to distort Kirkbride and all other cases applying statutes of limitations.

In Fink’s opening brief, he pointed out that such a rule would encourage non-compliance with section 57-1-32’s strict pleading and filing requirements, and for litigants in general it would introduce an unstructured “notice” procedure. Kirkbride should not be interpreted to allow such a result.

**IV. MACHOCK IS NOT ALLOWED TO PURSUE  
A DEFICIENCY BECAUSE HE DID NOT  
COMMENCE A LAWSUIT TO DO SO.**

**A. A Plaintiff Commences a Lawsuit by  
Filing a Complaint.**

Section 57-1-32 requires every lender who wishes to pursue a deficiency to “commence” a lawsuit for that purpose, and the complaint must “set forth the entire amount of the indebtedness which was secured by such trust deed, the amount for which such property was sold, and the fair market value thereof at the date of sale.” Utah Code Ann. § 57-1-32 (2000). Few statutes have such precise pleading requirements.

Machock argues that these filing and pleading requirements are “tedious and inefficient,” “unnecessary,” “a waste of time,” and do “not further the purpose of the statute.” (Machock’s Brief, at 16-17.) In their place he advocates extra-judicial “notice.” (*Id.* at 16.) He says that by giving “notice” by means other than the filing of a complaint he “eliminat[ed] the need” to file a second lawsuit or amend his original complaint. (*Id.* at 17.) This argument conflicts with the plain language of section 57-1-32 and the cases interpreting that statute. Under the statute, notice of a claim for a deficiency can only be given through the filing of a complaint containing certain necessary allegations relating to the foreclosure sale.

He has never filed a complaint that alleges the elements required by section 57-1-32, and he has never made a request in this lawsuit to amend his pleading so that it

abandons his contract claim in favor of a deficiency claim under section 57-1-32. It is now too late for Machock to file a new complaint or amend his pleading.

**B. Machock Never Gave any “Notice” that He Intended to Pursue a Deficiency Action under Section 57-1-32.**

The only way to give notice of a deficiency claim is by the filing of a complaint, but even if section 57-1-32 could be satisfied by giving “notice” through means other than the filing of a complaint, Machock has not given any such notice in this case. In his brief, at 26 - 28, Machock references five documents that he says are “examples of Machock placing Fink on notice that he would pursue a deficiency.” (Machock’s Brief, at 25.) None of these satisfies section 57-1-32’s filing and pleading requirements, and none of them give “notice” that Machock will pursue a deficiency claim:

- Correspondence dated October 4, 1999 (R. 456-66). This is a demand letter threatening to file a complaint that ultimately became the complaint in this case. There is no reference in this letter to section 57-1-32, or the fair market value as required by section 57-1-32.
- Machock’s Complaint (R. 1-3). The complaint contains no allegations relating to the foreclosure sale or a claim for a deficiency under section 57-1-32.
- Correspondence dated April 18, 2000 (R. 436-37). This letter acknowledges that Machock has completed the trustee’s sale, and thereby taken title to the property, but it does not satisfy the pleading requirements of section 57-1-32. It

does not state the date of the sale, the amount of the indebtedness, or the fair market value as required by section 57-1-32.

- Machock's Reply to Fink's Amended Counterclaim, dated October 31, 2000 (R. 247-60). In this pleading, Machock continues to assert his contract claim. Instead of invoking section 57-1-32 and giving a credit for the fair market value of the property, Machock says: "this issue has been mooted by the completion of foreclosure proceedings against the Harmer residence, *which failed to yield any funds to satisfy Machock's lien . . .*" (R. at 255.) Machock eschews the very purpose of section 57-1-32: giving a credit based on the fair market value and not the price yielded at the trustee's sale. See Utah Code Ann. § 57-1-32 ("The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale."); Surety Life Ins. Co. v. Smith, 892 P.2d 1, 2 (Utah 1995) (the Act "protects the borrower by" requiring the lender to "credit the fair market value of the property against the borrower's debt.").

- Machock's Responses to Discovery, dated May 5, 2003 (not in the Record).<sup>6</sup> Machock claims that his responses to interrogatories constitute notice because they are "a pleading addressing the restrictions of section 57-1-32."

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<sup>6</sup> Fink objects to the Court's considering Machock's discovery responses, which were not before the lower court when it granted summary judgment. Even if they are considered, however, they do not support Machock's claim that he gave notice to Fink. (See above, Fink's Reply to Machock's Statement of Facts, pages 1 - 2.)

(Machock's Brief, at 33.) This is flawed for several reasons. First, discovery is not a "pleading." Rule 7, Utah Rules of Civil Procedure. Second, Machock did not serve his discovery responses on Fink until more than three years after the trustee's sale and he never filed them with the lower court. Third, and most importantly, the substance of Machock's responses do not address the restrictions of section 57-1-32 in any way. More than anything, these discovery responses show that Fink is not pursuing a statutory deficiency. Fink served these interrogatories after the trial court's ruling, asking Machock to explain what he would claim as the statutory deficiency and fair market value of the property. Remarkably, even after the trial court's ruling, Machock continued to insist on full contract damages. When Fink asked Machock to "State the full amount that you will seek to recover from Fink at trial based on the Note and guarantee," Machock responded that he would seek to recover the full amount owing on the note and guaranty. (Machock's Brief, Ex. B, Response to Interrogatory No. 1.) When Fink asked him to show how he calculated the amount owing, Machock responded that this amount is "calculated by determining the unpaid principal and interest owed to date pursuant to Fink's Guarantee," without reference to the fair market value as required by section 57-1-32 and the trial court's ruling. (Machock's Brief, Ex. B, Response to Interrogatory No. 2). When Fink asked Machock to state what he thought was the fair market value, and to show his calculation, Machock replied that the fair market value should be determined by the amount that Machock bid at the foreclosure sale (which Surety Life held cannot be



done. 892 P.2d at 2). (Machock's Brief, Ex. B, Response to Interrogatories No. 3, 4 & 5).


Even if section 57-1-32 could be satisfied by giving "notice" through means other than the filing of a complaint – and it cannot – Machock has not given any such notice.

### **CONCLUSION**

Fink requests that this Court enter an order reversing the opinion of the trial court, and holding that Machock's breach of contract claim is barred and he cannot proceed with a section 57-1-32 deficiency action because he never filed a pleading to do so within the time allowed by the statute.

Dated: January 26, 2004

**DURHAM JONES & PINEGAR, P.C.**

  
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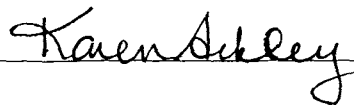
[Attachment: Reply Brief on CD ROM]

**PROOF OF SERVICE**

I hereby certify that on this 26 day of January, 2004, I caused a true and correct copy of the within and foregoing **REPLY BRIEF OF APPELLANT CARL WILLIAM FINK** to be mailed in the U.S. Mail, first-class, postage prepaid, to the following:

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IN THE SECOND JUDICIAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

JOSEPH MACHOCK,

Plaintiff,

v

CARL WILLIAM (BILL) FINK,

Defendant.

: Case No. 990700380 DC

:

: Appellate Case No. 20030301-CA

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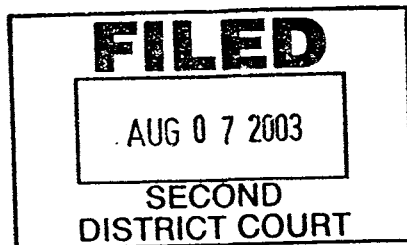
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SUMMARY JUDGMENT HEARING MARCH 6, 2003

BEFORE

HONORABLE DARWIN C. HANSEN



Transcript of Summary Judgment hearing March 6,



VD11198333

990700380 FINK, CARL WILLIAM (BILL)

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\* \* \*

Oral Arguments

Page

Mr. Tufts

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Mr. Veasy

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Mr. Jackson

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1           THE COURT: Yeah, but I'm suggesting that he does get  
2 a benefit.

3           MR. VEASY: Okay.

4           THE COURT: If he does get a benefit, isn't your  
5 position based on the legal theory that he can sue for the full  
6 amount on the guaranty because the guarantor has waived his  
7 right to the collateral for the underlying loan, in this case  
8 the Trust Deed?

9           MR. VEASY: Are you asking?

10          THE COURT: I'm asking you.

11          MR. VEASY: Well, I-

12          THE COURT: Because if that's the case, clearly  
13 there's a windfall and if in indeed that windfall exists, then  
14 how does that square with the Surety Life against Smith case?

15          MR. VEASY: Different causes of action. One is on a  
16 guarantee which the guarantor signed waiving the rights to the  
17 collateral. Besides that, under the Valley Bank case, his debt  
18 is fixed when Mr. Harmer stops making payments on the note.

19          THE COURT: But you would agree, if in deed on the  
20 foreclosure sale of the Trust Deed, that's the collateral for  
21 the loan. Then you've got this unconditional guarantee, if the  
22 lender foreclosures on the Trust Deed and the guarantor doesn't  
23 protect his right of subrogation, that the lender can take the  
24 value of the property, let's assume it has a value, and also  
25 collect full price under the guarantee at the time suit was

1 filed.

2 MR. VEASY: If the guarantor gets the property, he  
3 also has the ability to assign his rights over, whether it's  
4 subrogation or otherwise to the guarantor.

5 THE COURT: But the guarantor isn't getting the  
6 property. The property is going to the lender which is  
7 foreclosed.

8 MR. VEASY: That's correct.

9 THE COURT: And there's value in that property. Now  
10 you're saying that the lender who has taken the underlying  
11 collateral, can now sue the guarantor for the full amount of  
12 the loan.

13 MR. VEASY: If the guarantor doesn't protect his  
14 position.

15 THE COURT: I understand where you're coming from.

16 MR. VEASY: Okay. Now, on the second issue, again,  
17 with respect to the argument that Mr. Fink was released from  
18 his obligations because of a settlement that went on between  
19 Mr. Harmer and Mr. Machock, again, the guarantee is an  
20 independent contractual right. Nothing precludes Mr. Harmer  
21 and Mr. Machock from reaching a resolution on their claim. The  
22 guarantee is a separate contractual obligation and a separate  
23 claim. What happens in this one situation is fine, you cannot  
24 get a double recovery in a windfall because if Mr. Harmer  
25 totally pays down the debt, the guarantor can't get it twice

1 the windfall but the simple fact that as long as that debt is  
2 outstanding because of the guarantee of payment, Mr. Fink is on  
3 the hook for that amount when Mr. Harmer stops making payment.

4 THE COURT: When I asked the question to Mr. Tufts  
5 about the notice and that sort of thing, I applied it to the  
6 Surety Life Insurance and then applying the formula for 57-1-32  
7 to the measure of damages, he said that's something that your  
8 client is not even asking for or looking at and I take it  
9 that's true, that your position is it's simply a separate  
10 contract and therefore your client has a right to sue on that  
11 contract and that the release is something that doesn't apply  
12 for the reasons that you've indicated and the motion should be  
13 denied and you should be able to proceed then based on the  
14 guarantee and collect the full amount?

15 MR. VEASY: Yes, sir.

16 THE COURT: All right.

17 MR. VEASY: And if I may add, and I'll finish up  
18 here.

19 THE COURT: All right.

20 MR. VEASY: The first argument that the code section  
21 applies with an existing lawsuit having been filed on a  
22 contractual claim is nonsensical. It flat out is nonsensical  
23 because what we were saying is, well, then any lawsuit that is  
24 commenced by a guarantor, whether or not a foreclosure has been  
25 commenced that the guarantor under a guarantee of payment is