

2003

Joseph Machock v. Carl William Fink : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOSEPH MACHOCK,

Plaintiff and Appellee,

vs.

CARL WILLIAM FINK,

Defendant and Appellant.

Appellate Case No. 20030301-CA

CARL WILLIAM FINK,

Counterclaim Plaintiff,

vs.

JOSEPH MACHOCK,

Counterclaim Defendant.

CARL WILLIAM FINK,

Third-Party Plaintiff,

vs.

JOHN L. HARMER,

Third-Party Defendant.

BRIEF OF THE APPELLEE

**Interlocutory Appeal From A Summary Judgment Ruling
Honorable Darwin C. Hansen
Second Judicial District Court, Davis County, Utah**

FILED
Utah Court of Appeals

DEC 23 2003

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ORAL ARGUMENT REQUESTED

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JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2003).

STATEMENT OF ISSUES

1. Did the trial court correctly conclude that Machock's Complaint states a valid cause of action against Fink for breach of contract for payment on an absolute Guarantee?

The trial court's denial of Fink's motion for summary judgment on this issue is reviewed for correctness. Malibu Investment Company v. Sparks, 2000 UT 30, ¶ 12, 996 P.2d 1043, 1047 (trial court's decision granting or denying summary judgment is reviewed for correctness).

This issue was preserved in the trial court. R. at 496-506.

2. Did the trial court correctly conclude that Machock complied with the purpose of section 57-1-32 of the Utah Code and the restrictions of section 57-1-32 apply to Machock's suit against Fink for payment on the Guarantee?

The trial court's denial of Fink's motion for summary judgment on this issue is reviewed for correctness. State v. Tooele County, 2002 UT 8, ¶ 8, 44 P.3d 680, 684 (trial court's conclusions of law and interpretation of a statutory provision are questions of law reviewed for correctness).

This issue was preserved in the trial court. R. at 496-506.

DETERMINATIVE PROVISIONS

Utah Code Ann. § 57-1-32 (2003). Sale of trust property by trustee. Action to recover balance due upon obligation for which trust deed was given as security. Collection of costs and attorney's fees.¹

At any time within three months after any sale of property under a trust deed as provided in Sections 57-1-23, 57-1-24 and 57-1-27, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in that action the complaint shall set forth the entire amount of the indebtedness that was secured by the trust deed, the amount for which the property was sold, and the fair market value of the property at the date of sale. Before rendering judgment, the court shall find the fair market value of the property at the date of sale. 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. In any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred.

STATEMENT OF THE CASE

A. Nature of the Case.

This dispute involves the attempt by defendant and appellant Carl William Fink ("Fink") to avoid payment to plaintiff and appellee Joseph Machock ("Machock") pursuant to a written Guarantee agreement for a Note Secured by Deed of Trust ("Note") executed by third-party defendant John Harmer ("Harmer"). The Guarantee agreement is one of absolute payment, making Fink's liability to Machock fixed upon Harmer's default. R. at 273-77.

¹ Although amended in 2001, no substantive changes were made to this section.

On May 29, 1998, Harmer executed the Note in the principal amount of \$150,000, payable on demand to Machock. R. at 269. The Note was secured with a second priority Trust Deed against Harmer's residence. R. at 271. A first priority May 1, 1997 trust deed was held by Brighton Bank in the principal amount of \$293,742. R. at 454-58. As a condition to extending the loan evidenced by the Note, Machock required Harmer to obtain a guaranty from Fink. R. at 273. On May 29, 1998, Fink executed the Guarantee agreement whereby Fink unconditionally guaranteed the full and timely performance by Harmer of all of his obligations under the Note. R. at 273-77.

On September 22, 1999, Harmer informed Machock that he was not able to pay the remaining balance owed on the Note. R. at 465-66. On October 4, 1999, David Detton, prior counsel for Machock, informed Gregory Barrick of Durham, Jones & Pinegar, counsel for Fink, that he would be filing a Complaint against Fink for payment under the Guarantee agreement, and that a nonjudicial foreclosure of the Harmer' Trust Deed would also be commenced. R. at 465-66.

Machock's Complaint was filed on October 15, 1999. R. at 1-3. It alleges a cause of action for breach of contract for payment on the Guarantee agreement. The trustee's sale of the Harmer' Trust Deed was held on February 29, 2000. R. at 283. Machock was the successful bidder at the sale with a credit bid of \$1,000 subject to the pending nonjudicial foreclosure of Brighton Bank's trust deed. R. at 463-64. The bank's successor subsequently foreclosed on the property and was also the successful bidder. R. at 531, Tr. at p. 24.

This appeal involves Fink's efforts to reverse that part of the trial court's March 19, 2003 Ruling denying Fink's motion for summary judgment. Fink argues that with the trustee's sale of Harmer's Trust Deed on February 29, 2000, Machock's Complaint should be dismissed because Machock failed to file a second Complaint, or amend his original Complaint, within the three-month limitation period of section 57-1-32 of the Utah Code to allege the restrictions stated in section 57-1-32.

B. Course of Proceedings.

1. On October 15, 1999, Machock filed a breach of contract action against Fink in the Second Judicial District Court to collect payment on a Guarantee agreement. R. at 1-3. Paragraph 7 of Machock's Complaint specifically alleges that "[b]ut for the execution and delivery of the Guarantee, Plaintiff would not have extended the loan to Harmer evidenced by the Note and the loan was made in reliance upon Defendant's Guarantee." R. at 2.

2. On October 21, 1999, Machock commenced a nonjudicial foreclosure of Harmer's second priority Trust Deed by recording a Notice of Default. R. at 286.

3. On January 10, 2000, Fink filed an Answer and Counterclaim ("Answer"). R. at 4-19. In his Answer, Fink asserts that he "demanded that Machock seek foreclosure of the collateral pledged by Harmer to secure the loan." R. at 7. Fink's Seventh Affirmative Defense likewise asserts that "Machock's purported claim for relief in his Complaint is barred by the one action rule." R. at 8. Fink's Eighth Affirmative Defense asserts that "Machock's purported claim for relief is barred by his failure to exhaust the collateral that secures the Note and by the provisions of the Once Action Rule, Utah Code

Ann. § 78-37-1 (1996).” R. at 8. In his Counterclaim, Fink asserts that he is entitled to a declaratory judgment that Machock must first seek to foreclose upon and otherwise exhaust the real property collateral pledged by Harmer to secure his obligations under the Note before he can seek to recover from Fink any unsatisfied obligation under the Note, if he is entitled to any such recovery at all. R. at 15, 19.

4. On February 29, 2000, Machock held a trustee’s sale on Harmer’s second priority Trust Deed. R. at 283. Machock submitted the only bid at the foreclosure sale, which was a credit bid of \$1,000 subject to the outstanding obligation owed under the pending foreclosure of the first priority trust deed of Brighton Bank in the amount of approximately \$300,000. R. at 463-64. Machock therefore took title to the real property subject to the pending foreclosure of the first priority trust deed. R. at 283; 286-87.

5. On July 31, 2000, Machock and Harmer entered into a Settlement Agreement and Mutual Release (“Settlement Agreement”). R. at 289-92. Pursuant to this Settlement Agreement, Harmer executed a Confession of Judgment for the entry of judgment against him in the amount of \$152,757. R. at 293-95.

6. On October 11, 2000, Fink filed an Amended Answer, Amended Counterclaim and Third-Party Complaint (“Amended Answer”). R. at 84-106. Fink’s First Defense in the Amended Answer states that “[t]he Complaint fails to state a claim on which relief can be granted against Fink.” R. at 85. Fink also asserts in his Eleventh Affirmative Defense that Machock failed to mitigate his damages. R. at 89. Fink’s Twelfth Affirmative Defense asserts that “Fink’s obligation under the Guarantee, if any such obligation there is or was, should be reduced by the fair market value of the real

property *upon which Machock foreclosed.*” R. at 89. (emphasis added). In his Amended Counterclaim, Fink asserts that “Machock’s only recourse to recover Harmer’s obligation under the Note is for him to foreclose on the real property pledged by Harmer to secure his obligations under the Note.” R. at 97. Fink further asserts that he is entitled to a declaratory judgment that Machock’s only recourse “is the foreclosure on the real property pledged by Harmer *which Machock has pursued*, and to pursue repayment from Harmer.” R. at 98 (emphasis added).

7. On October 31, 2000, Machock filed a Reply to Fink’s Amended Counterclaim. R. at 247-60. In paragraph 26 of the Amended Counterclaim, Fink alleges that Machock claims his right to recovery regardless of whether he has foreclosed upon the Harmer property. In his Reply to Fink’s allegations, Machock states that “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 when Machock was unable to sell the Harmer residence before the foreclosure of the prior first trust deed.” R. at 255. Machock further asserts in his Eighth Affirmative Defense to Fink’s Amended Counterclaim that:

Defendant’s claims are barred, in whole or in part, by his failure to mitigate damages, including without limitation Defendant’s failure to accept the tender of the Trust Deed, Defendant’s failure to accept the tender of the opportunity to direct the marketing and sale of the Harmer residence, Defendant’s failure to accept the tender of the opportunity to maintain and repair the Harmer residence pending its sale to preserve the fair market value of the property, Defendant’s failure to respond with reasonable promptness to potential offers to purchase the Harmer residence, and Defendant’s

failure to accept the tender of the Judgment by Confession entered against Harmer.

R. at 258.

8. On December 29, 2000, Machock served Fink with Machock's Second Set of Interrogatories and Requests for Production of Documents. R. at 152-56. On January 29, 2001, Fink served his responses to Machock's Second Set of Interrogatories and Requests For Production of Documents. R. at 192-93. Fink's responses were not filed with the trial court, but Interrogatory No. 15, with Fink's response, provides as follows:

INTERROGATORY NO. 15: Please identify any expert retained in this matter, the subject of any such expert's opinion, and the basis for that opinion.

RESPONSE: Fink has retained Marty Bodell to give an opinion as to the fair market value of the Harmer residence as of February 2000. Fink will produce a copy of Mr. Bodell's written appraisal which states the substance of Mr. Bodell's opinion and the basis for that opinion.

See Addendum, Exhibit "A."

9. On February 1, 2001, Fink filed a motion for summary judgment against Machock on two issues. R. at 195-97. The first issue, pursuant to Fink's First Defense in his Amended Answer, was that Machock's Complaint failed to state a claim upon which relief could be granted. The second issue, pursuant to the Thirteenth Affirmative Defense in the Amended Answer, was that Machock expressly released Harmer from his obligation under the Note and that the release also relieved Fink from his obligations pursuant to the Guarantee agreement. R. at 195-97.²

² Fink has not appealed the trial court's Ruling on the second issue.

10. On March 19, 2003, the trial court granted in part, and denied in part Fink's motion for summary judgment. R. at 496-505. In the Ruling on Fink's first issue that Machock's Complaint failed to state a claim upon which relief could be granted, the trial court held that Machock's Complaint stated a valid cause of action against Fink. R. at 500. The trial court also held that Machock complied with the purpose of section 57-1-32 and the restrictions of section 57-1-32 would be applied to Machock's claim. R. at 505. Specifically, the trial court ruled:

This court could provide Machock with an opportunity to amend his Complaint to conform to the parameters of § 57-1-32, however, a more efficient approach would simply apply the restrictions of the statute to the current complaint. Under the "more sensible view" of Kirkbride, the Act is satisfied when "notice" is given to the debtor. Machock filed a complaint against Fink prior to the foreclosure, informed Fink of the foreclosure sale, and has been in fairly regular contact with Fink regarding the suit, the damages, and any potential deficiencies. This Court rules that the three month notice and filing requirement has been well satisfied by Machock, and although Machock's action is now governed by the terms of § 57-1-32, he may now proceed having fulfilled the three month filing requirement.

R. at 502-03.

11. On April 9, 2003, Fink filed a Notice of Filing of Petition for Permission to Appeal requesting an interlocutory appeal of the trial court's Ruling. R. at 515-16.

12. On May 5, 2003, Machock served Fink with responses to Fink's April 2, 2003 discovery requests. R. at 525-26. Relevant interrogatories, with Machock's responses, were not filed with the trial court, but provide as follows:

INTERROGATORY NO. 1: State the full amount that you will seek to recover from Fink at trial based on the Note and guarantee.

RESPONSE: Machock will seek to recover the entire amount of principal and interest due and owing under the Guarantee, in addition to all costs and attorneys' fees incurred to date, which include Machock's Opposition to Fink's Motion for Summary Judgment and Machock's Answer to Fink's Petition for Interlocutory Appeal. As of May 15, 2003, the outstanding debt owed by Fink, exclusive of attorneys' fees and costs, totals \$157,033.42, which includes interest at the rate of 10% per annum from September 22, 2001 to date. As interest is accruing on this unpaid balance and attorneys' fees and costs continue to be incurred, which are excluded from the above balance, the amount that Machock will seek to recover at trial will continue to increase.

INTERROGATORY NO. 2: State in detailed [sic] how you calculate the amount identified in response to interrogatory no. 1, and identify all documents that pertain to this calculation.

RESPONSE: The amount identified in interrogatory no. 1 was calculated by determining the unpaid principal and interest owed to date pursuant to Fink's Guarantee. Interest on this amount was determined pursuant to section 15-1-1(2) of the Utah Code. All costs and attorneys' fees will be based on an Affidavit of Fees and Costs from counsel to be filed at trial.

INTERROGATORY NO. 3: State what you will claim at trial as the fair market value for the property at 1963 E. Ridgehill Drive, Bountiful, Utah, as of February 29, 2000 (the date of the trustee's sale based on the deed of trust given in favor of Joseph Machock).

RESPONSE: As of February 20 [sic], 2000, Machock believes that the fair market value of the property at 1963 Ridgehill Drive to be \$308,613.38.

INTERROGATORY NO. 4: State in detailed [sic] how you calculate the fair market value identified in response to

interrogatory no. 3, and identify all documents that pertain to this calculation.

RESPONSE: As of February 29, 2000, Machock had received notice of Brighton Bank's Notice of Default and Election to Sell, dated February 2, 2000. Upon receiving this notice, Machock informed Fink that he did not have the ability to pay the amount due and owing under Brighton Bank's trust deed and that Fink should therefore protect his interests as Machock intended to pursue Fink's liability pursuant to his guarantee of payment. Accordingly, the fair market value of the property at 1963 Ridgehill Drive was determined by calculating the amount Machock bid at the June [sic] 29, 2000 foreclosure sale to obtain title to the property. See also Response to Interrogatory no. 5, below.

INTERROGATORY NO. 5: Identify the amount you paid to acquire title to the property at 1963 E. Ridgehill Drive via the trustee's sale on February 29, 2000.

RESPONSE: Machock submitted a credit bid of \$1,000 over the amount due and owing pursuant to the first priority deed of trust held by Brighton Bank. At this time, upon information and belief, Machock believes the amount due and owing pursuant to the Brighton Bank deed of trust to be approximately \$307,613.38, which represents the principal and interest due under the deed of trust, together with costs of foreclosure and attorneys' fees. . .

See Addendum, Exhibit "B."

13. On June 10, 2003, the Utah Supreme Court granted Fink permission to appeal from the trial court's Ruling. R. at 527.

C. Disposition at the Trial Court.

On March 19, 2003, the trial court issued its Ruling on Fink's motion for summary judgment in which it granted Fink's motion for summary judgment in part, and denied Fink's motion for summary judgment in part. R. at 496-505. The trial court ruled that Machock's Complaint stated a valid breach of contract claim against Fink, Machock

complied with the purpose of section 57-1-32 and the restrictions of section 57-1-32 would be applied to Machock's Complaint. In applying these restrictions, the trial court ruled that Machock complied with the three-month limitation for filing a deficiency action under that section and accordingly denied Fink's motion.

D. Statement of Facts.

The undisputed facts material to the trial court's grant in part, and denial, in part, of Fink's motion for summary judgment are as follows:

1. On May 29, 1998, Harmer executed a Note whereby Machock agreed to loan Harmer \$150,000, secured by a Trust Deed in the sum of \$150,000. R. at 269, 271.

2. As a condition of securing the loan to Harmer, Machock required Fink to execute an absolute Guarantee agreement, guaranteeing full and timely payment and performance of Harmer's obligations under the Note. R. at 273-77. Relevant provisions of the Guarantee include the following:

RECITALS

B. As a condition to extending the Loan, Lender has required Borrower to obtain a personal guarantee from Guarantor of the full and timely payment and performance of all of Borrower's obligations under the Note.

C. Guarantor is willing to enter into this Guarantee in order to facilitate Borrower's obtaining the Loan and to guarantee Borrower's full and timely payment and performance of all of his obligations under the Note.

AGREEMENT

1.1 Guaranty. Guarantor hereby unconditionally guarantees the full and timely performance by Borrower of all of his obligations under the Note (the "Guaranteed Obligations"). This guarantee is a guarantee of payment and

performance and not of collection, and is primary, not secondary, in nature.

2.1 Lender's Rights. Guarantor hereby agrees that Lender may, at his option, without notice to or further consent from Guarantor, take any of the following actions without impairing in any way the obligations of Guarantor hereunder (it being the intent of the Guarantor and Lender that the obligations of Guarantor hereunder shall be absolute and unconditional and shall not be discharged except by payment or performance or in accordance with this Guarantee): . . .

2.1.4 Retain or obtain the primary or secondary liability of any party in addition to the Guarantor with respect to the performance by Borrower of all or any part of the Guaranteed Obligations;

2.1.5 Release his security interest in any property, including without limitation all or part of the property covered by the Trust Deed, securing the performance by Borrower of all or any part of the Guaranteed Obligations; . . .

Waiver by Guarantor. Guarantor hereby expressly waives: ...

3.1.4 Any right to require Lender to proceed against Borrower, the property covered by the Trust Deed, or any other property or security held in relation to the Obligations or to pursue any other remedy in Lender's power. . . .

4.2. Remedies. Upon the occurrence of an Event of Default, Lender shall have the option, but not the obligation, to declare this Guarantee in default and thereupon Lender is authorized to demand and receive from Guarantor the unconditional, prompt payment or performance, as the case may be, of the Guaranteed Obligations. In addition to the rights and remedies provided in this Guarantee, Lender shall further have the right to exercise any and all other applicable legal or equitable rights and remedies. . . .

R. at 273.

3. The Trust Deed was recorded in the public records of Davis County, Utah and pledged Harmer's Bountiful, Utah, home as collateral to secure payment of the indebtedness of the Note. R. at 271.

4. Harmer made several payments on the loan. However, as of September 22, 1999, he failed to repay the full balance, including interest and fees, owed under the Note and informed Machock that he was not in a position to make any further payments. R. at 465. Although Harmer again commenced payments to Machock on the Note in approximately March, 2001, the last payment was received by Machock in September, 2001. R. at 318-20.

5. By letter dated October 4, 1999, David Detton, prior counsel for Machock, informed Gregory Barrick of Durham, Jones & Pinegar, counsel for Fink, that Machock would be filing a complaint against Fink to enforce the Guarantee agreement, enclosing a copy of Machock's Complaint, and also informed Mr. Barrick that "[a]s a courtesy to Mr. Fink and to avoid further delay in proceeding against the property securing the Note, Mr. Machock has instructed me to commence default proceedings under the Trust Deed. Again, these proceedings are being commenced as a courtesy to Mr. Fink and in no way waive or constitute a prerequisite to Mr. Machock's demand for immediate payment of all amounts due by Mr. Fink under his Guarantee." R. at 465-66.

6. On October 15, 1999, Machock filed suit against Fink for payment on the Guarantee. R. at 498.

7. On February 29, 2000, Machock foreclosed on Harmer's second priority Trust Deed by holding a trustee's sale. R. at 283. "This trustee's sale was commenced

after the Notice of Default and Notice of Trustee's Sale had been given as required by Utah Code Ann. § § 57-1-24 and 25." R. at 201, ¶ 9. Fink was informed of the trustee's sale, but did not bid at the sale. R. at 498. Machock submitted the only bid at the foreclosure sale, which was a credit bid of \$1,000 subject to the outstanding obligation owed under the pending foreclosure of the first priority trust deed held by Brighton Bank in the amount of approximately \$300,000. Machock therefore took title to the real property subject to the pending foreclosure of the first priority trust deed. R. at 283; 286-87.

8. By letter dated April 18, 2000, David Detton, prior counsel for Machock, informed Gregory Barrick of Durham, Jones & Pinegar, counsel for Fink, that "you are aware that a notice of default has been filed against the former Harmer property by the holder of the first trust deed [Brighton Bank]." R. at 463. Counsel for Fink was also informed:

Although Mr. Machock has completed his foreclosure proceedings under his trust deed and has listed the property for sale with the same realtor who has the listing on Mr. Machock's former residence in the same area, there can be no assurance that a buyer can be found for the former Harmer residence before foreclosure proceedings under the first trust deed are completed.

Please be advised that Mr. Machock is not in a position to make any payments to cure the default under the first trust deed, to advance any additional sums to purchase the underlying obligation or otherwise to provide any financial consideration to extend the period before foreclosure. You should also be aware that the consideration provided by Mr. Machock at the foreclosure proceedings on his trust deed was limited to a credit bid in the amount of the outstanding obligations under the first trust deed. In the event the first

trust deed is foreclosed, Mr. Machock will continue to seek recovery under Mr. Fink's guarantee for the entire amount of the deficiency represented by Mr. Harmer's note, together with his costs incurred in enforcing the guarantee.

Again, Mr. Machock would strongly encourage Mr. Fink to reconsider his position with respect to mitigating his damages by performing his obligations under the guarantee and taking an assignment of Mr. Machock's position in the former Harmer property and in Mr. Harmer's note. Mr. Fink will then be in a position to make such arrangements, if any, as he deems appropriate with the holder of the first trust deed prior to the completion of the foreclosure. He will also then be in a position to preserve and capture whatever value may be available from the Harmer property in excess of the amount of the first trust deed lien and to pursue a deficiency action for any remaining balance directly against Mr. Harmer.

R. at 463-64.

9. Shortly after the April 18, 2000 letter, the holder of the first trust deed [Brighton Bank] foreclosed on the Harmer property. R. at 531, Tr. at pp. 24-25.

10. On July 31, 2000, a Settlement Agreement and Mutual Release was signed between Machock and Harmer in exchange for a Stipulation for Confession of Judgment. R. at 498.

SUMMARY OF ARGUMENTS

Fink's liability to Machock pursuant to the absolute Guarantee was 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. Rather, section 57-1-32 simply provides the means by which Machock, having elected to foreclose the Harmer' Trust Deed, can now pursue his breach of contract claim against Fink.

The trial court correctly recognized that Machock's Complaint states a valid cause of action for breach of contract against Fink. It was only on February 29, 2000, the date the property was foreclosed by Machock, that section 57-1-32 became activated. However, rather than require Machock to go through the tedious and inefficient process of amending his Complaint to allege the restrictions of that section, the trial court correctly applied the restrictions of the statute to Machock's breach of contract action.

Fink argues that under section 57-1-32, Machock had to file a second Complaint, or amend the original Complaint, within three-months of the trustee's sale to allege the restrictions of section 57-1-32. This argument is incorrect. Nothing in section 57-1-32 addresses the contractual arrangement between Machock and Fink, nor does it constitute an absolute bar to a prior filed Complaint asserting a valid cause of action on a guaranty of payment. Requiring Machock to file a new case directly against Fink, which would presumably simply be consolidated with the original action, would not only be a waste of the parties' and court's time, but would not further the purpose of the statute. Requiring Machock to amend the original Complaint within the three-month limitation was also unnecessary. Based on the pleadings, the deficiency was at issue both before and after the trustee's sale. Moreover, after the trial court's Ruling and prior to the Utah Supreme Court granting this interlocutory appeal, Machock responded to Fink's discovery by addressing the restrictions of section 57-1-32.

The Utah Supreme Court has stated the primary purpose of section 57-1-32 is satisfied when there is notice to the debtor that a creditor will pursue a deficiency after foreclosure of the property. Notice to the debtor has never been interpreted by statute,

case law, or otherwise, as not being satisfied when, as in this action, the creditor has placed the debtor on notice of the deficiency prior to and after the foreclosure and as acknowledged both before and after the foreclosure in the debtor's pleadings.

The trial court correctly ruled that Machock met the purpose of section 57-1-32 by providing numerous notices to Fink that Machock would pursue a deficiency: (1) in correspondence to Fink's counsel on October 4, 1999; (2) in Machock's Complaint; (3) in correspondence to Fink's counsel on April 18, 2000; and (4) in Machock's Reply to Fink's Amended Counterclaim. Any of these examples, along with Machock's responses to Fink's discovery requests specifically addressing the restrictions of section 57-1-32, would alone satisfy the purpose of section 57-1-32. Taken together, these notices leave no doubt that Machock amply satisfied section 57-1-32, eliminating the need for Machock to file a second lawsuit, or amend the original Complaint, to set forth the restrictions of section 57-1-32.

Accordingly, the Court should affirm the trial court's Ruling that Machock's Complaint states a valid cause of action against Fink for breach of contract, Machock complied with the purpose of section 57-1-32 and the restrictions in section 57-1-32 apply to Machock's suit against Fink for payment on the Guarantee.

ARGUMENT

I THE TRIAL COURT CORRECTLY RULED THAT MACHOCK'S COMPLAINT STATES A VALID CAUSE OF ACTION AGAINST FINK.

Fink moved for summary judgment based on the First Defense in his Amended Answer that Machock's Complaint failed to state a claim against Fink for which relief

could be granted.³ R. at 195-97. The trial court correctly ruled that Machock's Complaint states a valid cause of action for breach of contract against Fink. In the Ruling, the trial court states:

The Court recognizes that this is an absolute, as opposed to a conditional guarantee. Carrier Brokers, Inc. v., Spanish Trail, 751 P.2d 258, 261 (Utah Ct. App. 1988) ("An absolute guaranty is defined as a guaranty of the payment of an obligation without words of limitation or condition... A conditional guaranty exists when its terms import some condition precedent to the liability of the guarantor.") The Guarantee language is clear and specific, stating that "[t]his guarantee is of payment and performance and not of collection, and is primary, not secondary, in nature." Guarantee, article 1. Machock is correct in arguing that he may directly pursue the payment of the \$150,000 without taking legal action against Harmer. In fact, Machock filed suit against Fink on October 15, 1999, well before taking legal action against Harmer. However, on February 29, 2000, Machock did foreclose on the trust deed on Harmer's property.

R. at 500.

Machock's breach of contract claim is based on the absolute Guarantee and is therefore independent of any deficiency claim. Indeed, Fink provided no security for the Guarantee. Because the Guarantee was absolute, Machock was not required to pursue other remedies against Harmer or Harmer's collateral before proceeding directly against Fink. Valley Bank & Trust v. Rite Way Concrete, 742 P.2d 105, 108 (Utah Ct App. 1987) (holding a guaranty of payment is "absolute, and the guaranteed party need not fix

³ Interestingly, even after Fink's trustee's sale held on February 29, 2000, the October 11, 2000 Amended Answer does not include an affirmative defense that Machock's Complaint is barred under section 57-1-32 for its failure to file a second Complaint within the three-month limitation period or for its failure to allege the restrictions of section 57-1-32. R. at 84-105.

its losses by pursuing its remedies against the debtor or the security before proceeding directly against the guarantor.”).

An absolute guaranty of payment has been recognized as a separate obligation from a note and trust deed. In re SLC Limited V., 152 B.R. 755, 770 (D. Utah 1993). In SLC Limited V., a secured creditor of the debtor amended its complaint to seek a claim against the debtor’s guarantors. The bankruptcy court held that because the guarantors were not co-obligors on the debt secured by the property, they could be sued independently from the debtor’s obligation under the note and trust deed, reasoning, “[t]he Guaranty Agreement significantly enlarged [the guarantors’] liability on the debt. [The guarantors’] status . . . was not the equivalent status of co-obligors on the underlying debt.” Id. at 770-71. This principal demonstrates the soundness of the trial court’s Ruling that Machock stated a valid breach of contract claim against Fink based on the Guarantee because Fink’s obligation pursuant to the Guarantee is entirely distinct from Harmer’s obligation pursuant to his Note and the Trust Deed.

In his brief, Fink ignores the trial court’s Ruling that Machock’s Complaint states a valid cause of action. Instead, Fink argues that section 57-1-32 is an absolute bar to Machock’s Complaint to enforce the Guarantee because Machock did not file a second Complaint, or amend the original Complaint, within three-months of the trustee’s sale of Harmer’s Trust Deed to assert the restrictions of section 57-1-32. Fink’s argument is incorrect. It ignores the effect of the prior filed Complaint and attempts to sidestep the Utah Supreme Court’s stated purpose of section 57-1-32. Moreover, Fink’s argument is belied by the fact that he knew Machock would seek a deficiency against him. Not only

did Machock send numerous notices to Fink stating that Machock would pursue a deficiency, but Fink's own pleadings unquestionably demonstrate he was aware of the foreclosure and deficiency.

II. THE TRIAL COURT CORRECTLY RULED THAT SECTION 57-1-32 DOES NOT BAR MACHOCK'S COMPLAINT.

Section 57-1-32 of the Utah Code states:

At any time within three months after any sale of property under a trust deed as provided in Sections 57-1-23, 57-1-24 and 57-1-27, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in that action the complaint shall set forth the entire amount of the indebtedness that was secured by the trust deed, the amount for which the property was sold, and the fair market value of the property at the date of sale. Before rendering judgment, the court shall find the fair market value of the property at the date of sale. 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. In any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred.

Utah Code Ann. § 57-1-32 (2003).

Section 57-1-32 does not address the situation between Machock and Fink. Nowhere does section 57-1-32 purport to address the rights and obligations of Fink's Guarantee, nor does section 57-1-52 purport to address the effect of a prior filed lawsuit based on an obligation represented by a guaranty of payment.

A simple review of the statutory language establishes that “. . . an action may be commenced to recover the balance due upon the obligation for which the trust deed was

given as security” Applying the statute to the instant action establishes that the obligation for which the trust deed was given as security is the Harmer’ Note and Trust Deed, not Fink’s Guarantee. The Trust Deed was not given as security for the Guarantee, but rather the Trust Deed was given as security for the Note.

The trial court correctly ruled that section 57-1-32 was not an absolute bar to Machock’s Complaint. In the Ruling, the trial court states:

This court could provide Machock with an opportunity to amend his Complaint to conform to the parameters of § 57-1-32, however, a more efficient approach would simply apply the restrictions of the statute to the current complaint. Under the “more sensible view” of Kirkbride, the Act is satisfied when “notice” is given to the debtor. Machock filed a complaint against Fink prior to the foreclosure, informed Fink of the foreclosure sale, and has been in fairly regular contact with Fink regarding the suit, the damage, and any potential deficiencies. This Court rules that the three month notice and filing requirement has been well satisfied by Machock, and although Machock’s action is now governed by the terms of § 57-1-32, he may now proceed having fulfilled the three month filing requirement.

R. at 503.

The primary purpose of section 57-1-32 is to provide notice to the debtor that a deficiency will be pursued by the lender after foreclosure of the property. Standard Federal Savings & Loan v. Kirkbride, 821 P.2d 1136, 1138 (Utah 1991). As explained by the Utah Supreme Court in Kirkbride, “[a] more sensible view of the operation of the three-month limitation period contained in section 57-1-32 is that its primary purpose is satisfied when the foreclosing party provides notice to the debtor that a deficiency will be sought by filing the action.” Id. at 1138.

The Utah Supreme Court has never interpreted section 57-1-32 to be an absolute bar to a prior filed action by a lender against a guarantor. In Kirkbride, the defendants, like Fink, argued that the purpose of section 57-1-32 is to “bar any action not initiated within three months and then resolved on the merits for the plaintiff.” Id. at 1138. The Utah Supreme Court disagreed, holding that “there is nothing in the language of the statute suggesting an intent to reach such a draconian result.” Id. Further explaining its holding that section 57-1-32 did not bar the plaintiff’s complaint, the Court stated:

In the absence of such a plain expression of intent, we have generally read statutes that impose preconditions to filing suit as establishing only *procedural hurdles to suit, hurdles that can be cleared, rather than absolute bars to suit*. . . . We conclude that section 57-1-32 does not permanently bar further proceedings anytime some procedural failing results in the dismissal of a properly filed action. . . .

The relevant inquiry is whether the legislature made plain an intention to bar forever claims of those who are guilty of a procedural misstep. (Citations omitted) As previously noted, we find no such intention here. A more sensible view of the operation of the three-month limitation period contained in section 57-1-32 is that its primary purpose is satisfied when the foreclosing party provides notice to the debtor that a deficiency will be sought by filing the action.

Id. (emphasis added). See also C.P. v. Utah Office of Crime Victims’ Reparations, 966 P.2d 1226, 1228-1229 (Utah Ct. App. 1998) (applying the analysis in Kirkbride to savings statute and holding because plaintiff timely filed original complaint, defendant was placed on notice of plaintiff’s intent to seek judicial review of administrative decision).

The Utah Court of Appeals has similarly held that section 57-1-32 is not an absolute bar to an action against junior notes and trust deeds which by nonjudicial foreclosure become unsecured. In G. Adams Limited Partnership v. Durbano, 782 P.2d 962 (Utah Ct. App. 1989), the plaintiffs held a note executed by the defendants which was secured by a trust deed, which was junior to a trust deed which was foreclosed nonjudicially. The defendants argued that the plaintiffs’ action to collect the full amount due on their note was barred because it was not commenced within three months of the trustee’s sale conducted pursuant to the senior trust deed. This Court disagreed, reasoning that the plain language of section 57-1-32 “clearly indicates the statute limits only the rights of the beneficiary under the trust deed that was foreclosed—it does not affect the rights and obligations of parties to other trust deeds.” Id. at 963.⁴ Accordingly, “[t]he statute does not purport to address the status of obligations secured by junior trust deeds following a trustee sale pursuant to a senior trust deed.” Id. at 964.

Fink’s reliance on Concepts, Inc. v. First Security Realty Services Inc., 743 P.2d 1158 (Utah 1987), Cox v. Green, 696 P.2d 1207 (Utah 1985) and Surety Life Ins. Co. v. Smith, 892 P.2d 1 (Utah 1995) is therefore wholly misplaced. None of these cases involved a separate claim for liability on an absolute guaranty that was filed prior to the foreclosure. Rather, those cases dealt with situations in which the lender pursued a deficiency against the borrowers or guarantors after the foreclosure. This is not the case

⁴ The plain language of section 57-1-32 referred to by the Court states that “an action may be commenced to recover the balance due upon *the* obligation for which *the* trust deed was given as security.” Durbano, 782 P.2d at 963 (emphasis in original).

here. Because Machock's Complaint was filed before the foreclosure and four months before the sale, those cases are inapposite.⁵

Fink is likewise mistaken that Durbano supports his claim that Machock's Complaint should be barred. In fact, the Durbano Court specifically held that the defendants' interpretation of the statute, like Fink's:

[w]ould work anomalous results in several situations. For example, if a senior trust deed was foreclosed nonjudicially, the beneficiary of a junior trust deed would have only three months to bring an action on the note formally secured by his or her trust deed. But what if that note was not in default? In appellants' view, the beneficiary would still have only three months to bring an action even though no action could be brought if no default existed. If the debtor could stay current for those three months, he or she could then cease making any payments whatsoever with absolute impunity.

Id.

⁵ Fink likewise attempts to make much of the fact that at the March 6, 2003 hearing on his motion for summary judgment, counsel for Machock argued that this suit against Fink was not a deficiency. Br. of Appellant at 10-11. This argument from counsel, however, is not evidence, see State v. Dunn, 850 P.2d 1201, 1225 (Utah 1993), and did not matter to the trial court, "in light of the very broad, very expansive reading given to the statute by the Utah Supreme Court." R. at 501. More importantly, it is irrelevant under the trial court's Ruling that Machock could still pursue his breach of contract claim against Fink, subject to the restrictions of section 57-1-32. R. at 500. In fact, counsel's isolated statement is taken entirely out of context. Although counsel for Machock informed the trial court that "[t]his suit is an action to enforce a guarantee of payment and contractual rights," R. at 531, Tr. p. 22, counsel went on to state, "[t]hat is a distinct difference between bringing a deficiency claim within three months after a foreclosure sale. This suit existed prior in time as the Court knows to the sale." R. at 531, Trans. p. 23. Accordingly, counsel's statements merely demonstrate that this action is distinct from those in First Sec. Realty, Green, and Surety Life because here, Machock had already filed a Complaint. In fact, at the hearing, counsel for Machock acknowledged that Machock would be precluded from obtaining a double recovery on his breach of contract claim. R. at 531, Tr. p. 27 ("[w]hat happened in this one situation is fine, you cannot get a double recovery in a windfall. . . .").

An application of these principals in Durbano illustrates the futility of Fink's proposed interpretation of the statute as an absolute bar, especially with a pending action against an absolute Guarantee agreement. If, as in Durbano, the statute does not affect the rights and obligations of parties to other trust deeds, sound logic dictates that it likewise does not apply to a prior filed Complaint asserting a valid cause of action under an absolute Guarantee agreement.

III. THE TRIAL COURT CORRECTLY APPLIED SECTION 57-1-32 TO MACHOCK'S COMPLAINT.

The trial court correctly ruled that section 57-1-32 became activated once the trustee's sale of Harmer's Trust Deed occurred on February 29, 2000. R. at 500. Relying on Kirkbride, the trial court recognized that the three-month limitation period of section 57-1-32 is a mere procedural hurdle and the purpose of section 57-1-32 of providing Fink with notice that Machock would pursue a deficiency had been well satisfied by Machock. R. at 502-03. The trial court noted that it could provide Machock with an opportunity to amend his Complaint to conform to the parameters of section 57-1-32, but found that a more efficient approach would be to simply apply the restrictions of the statute to the current Complaint. R. at 503.

The record is replete with examples of Machock placing Fink on notice that he would pursue a deficiency against Fink, thereby satisfying the purpose of section 57-1-32. These notices to Fink are both before and after the February 29, 2000 trustee's sale. In addition, Fink conveniently ignores the effect of the prior filing of Machock's

Complaint and his own pleadings placing the foreclosure of the Harmer' property at issue.

First, before even filing the Complaint on October 15, 1999, David Detton, prior counsel for Machock, sent a letter dated October 4, 1999 to Gregory Barrick of Durham, Jones & Pinegar, counsel for Fink, placing Fink on notice that Machock would be filing an action and pursuing a deficiency against Fink. R. at 465-66. Counsel for Machock also enclosed a courtesy copy of Machock's Complaint with this letter and was informed that "Mr. Machock has instructed me to commence default proceedings under the Trust Deed." R. at 465.

Second, Machock's Complaint against Fink for breach of contract was filed on October 15, 1999. R. at 1-3. In the Complaint, filed four months before the trustee's sale, Machock alleged that Fink was liable under the Guarantee for the full amount of the Note. R. at 2-3.

Third, in Fink's January 10, 2000 Answer and Counterclaim, Fink acknowledges that he was aware that the deficiency was an issue, asserting in his Answer that Machock seek foreclosure of the collateral pledged by Harmer and that Machock's claim is barred by the one action rule and by Machock's failure to exhaust the collateral that secures the Note. R. at 7-8. Likewise, in his Counterclaim, Fink alleges that he is entitled to a declaratory judgment that Machock must first seek to foreclose upon and otherwise exhaust the real property collateral pledged by Harmer to secure his obligations under the Note before he can seek to recover from Fink any unsatisfied obligation under the Note. R. at 15, 19.

Fourth, in a second letter, dated April 18, 2000, Fink's counsel was informed that "[a]lthough Mr. Machock has completed his foreclosure proceedings under his trust deed and has listed the property for sale. . . there can be no assurance that a buyer can be found for the former Harmer residence before foreclosure proceedings under the first trust deed are completed." R. at 464. This same letter also informed Fink of the following:

Please be advised that Mr. Machock is not in a position to make any payments to cure the default under the first trust deed, to advance any additional sums to purchase the underlying obligation or otherwise to provide any financial consideration to extend the period before foreclosure. You should also be aware that the consideration provided by Mr. Machock at the foreclosure proceedings on his trust deed was limited to a credit bid in the amount of the outstanding obligations under the first trust deed. In the event the first trust deed is foreclosed, Mr. Machock will continue to seek recovery under Mr. Fink's guarantee for the entire amount of the deficiency represented by Mr. Harmer's note, together with his costs incurred in enforcing the guarantee.

R. at 464. Finally, counsel for Machock invited counsel for Fink to "strongly encourage Mr. Fink to reconsider his position with respect to mitigating his damages by performing his obligations under the Guarantee and taking an assignment of Mr. Machock's position in the former Harmer property and in Mr. Harmer's note." R. at 464. Despite this invitation, Fink failed to take any action to protect his interests as the guarantor of Harmer's obligation.

Fifth, on October 11, 2000, Fink filed an Amended Answer, Counterclaim and Third Party Complaint. R. at 84-106. In his Amended Answer, Fink asserts that Machock's claim is barred for failure to mitigate, and that Fink's obligation "should be reduced by the fair market value of the real property upon which Machock foreclosed."

R. at 89. Similarly, in his Amended Counterclaim, Fink asserts that he is entitled to a declaratory judgment that Machock's only recourse "is the foreclosure on the real property pledged by Harmer *which Machock has pursued*, and to pursue repayment from Harmer." R. at 98 (emphasis added).

Finally, on October 31, 2000, Machock filed a Reply to Fink's Amended Counterclaim. R. at 247-60. In paragraph 26 of his Reply, Machock asserts in response to Fink's allegation that Machock claims a right to recover from Fink the full amount of the Note regardless of whether Machock has foreclosed the real property, that "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 when Machock was unable to sell the Harmer residence before the foreclosure of the prior first trust deed." R. at 255. Machock further asserts in his Eighth Affirmative Defense to Fink's Amended Counterclaim that:

Defendant's claims are barred, in whole or in part, by his failure to mitigate damages, including without limitation Defendant's failure to accept the tender of the Trust Deed, Defendant's failure to accept the tender of the opportunity to direct the marketing and sale of the Harmer residence, Defendant's failure to accept the tender of the opportunity to maintain and repair the Harmer residence pending its sale to preserve the fair market value of the property, Defendant's failure to respond with reasonable promptness to potential offers to purchase the Harmer residence, and Defendant's failure to accept the tender of the Judgment by Confession entered against Harmer.

R. at 258.

This evidence undeniably demonstrates that Fink possessed notice of the foreclosure and Machock's intent to pursue a deficiency, satisfying the purpose of section 57-1-32. Fink contends that, despite these numerous notices, Machock's Complaint should be dismissed because Machock did not present any evidence that he had informed Fink about the *time and place* of the foreclosure sale. Br. of Appellant at p. 14, n3. The Court's reasoning in Kirkbride disposes of this argument. Further, Fink admitted in his memorandum in support of motion for summary judgment that notice of the time and place of the trustee's sale was properly provided pursuant to section 57-1-25 of the Utah Code.⁶ R. at 201. Section 57-1-32 does not require that that lender actually inform the debtor of the time and place of the sale. Because Machock provided the required notice on numerous occasions, as explained above, Fink is unable to demonstrate any prejudice resulting from the restrictions of section 57-1-32 imposed on Machock's Complaint.

IV. FINK'S REMAINING ARGUMENTS THAT MACHOCK'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH SECTION 57-1-32 ARE MERITLESS.

Fink makes several additional arguments to support his claim that the trial court's Ruling should be reversed. Each argument lacks merit.

⁶ Section 57-1-25 provides that "[t]he trustee shall give written notice of the time and place of sale particularly describing the property to be sold: (a) by publication of the notice. . . and (b) by posting the notice: (i) at least 20 days before the date of sale is scheduled; and (ii) (A) in some conspicuous place on the property to be sold: . . ." Utah Code Ann. § 57-1-25 (2003). Recital of this required notice in the trustee's deed is prima facie evidence of compliance with the notice requirements. See Utah Code Ann. § 57-1-28 (2)(c)(i) (2003) ("The recitals . . . constitute prima facie evidence of compliance with Sections 57-1-19 through 57-1-36. . . .").

A. The Trial Court Did Not *Sua Sponte* Remedy A Pleading Defect.

Fink complains that the trial court's Ruling has *sua sponte* "turn[ed] the complaint into something that it could not be: a timely-filed claim for a deficiency." Br. of Appellant at 10-12. The Ruling did no such thing. Rather, as demonstrated above, the trial court properly ruled that Machock's Complaint stated a valid claim for breach of contract against Fink, Machock's notices to Fink met the purpose of section 57-1-32 and the restrictions in section 57-1-32 would be applied to Machock's suit against Fink for payment on the Guarantee. R. at 501. Fink's reliance on Wells v. Arch Hurley Conservancy Dist., 89 N.M. 516, 554 P.2d 678 (N.M. 1976) and Kaiserman Assocs., Inc. v. Francis Town, 977 P.2d 462, 464 (Utah 1998) for this proposition is therefore misplaced, as the trial court did not *sua sponte* remedy a pleading defect.

Fink was on notice of Machock's intent to seek a deficiency against him and in fact actually placed the deficiency at issue. In his Answer, Fink asserts that he "demanded that Machock seek foreclosure of the collateral pledged by Harmer to secure the loan," that "Machock's purported claim for relief in his Complaint is barred by the one action rule," and that "Machock's purported claim for relief is barred by his failure to exhaust the collateral that secures the Note and by the provisions of the One Action Rule, Utah Code Ann. § 78-37-1 (1996)." R. at 7-8. Fink also raised this issue in his Counterclaim by alleging that he is entitled to a declaratory judgment that Machock must first seek to foreclose upon and otherwise exhaust the real property collateral pledged by Harmer to secure his obligations under the Note before he can seek to recover from Fink any unsatisfied obligation under the Note. R. at 15, 19.

Fink also asserts similar affirmative defenses in his Amended Answer, contending that Machock failed to mitigate his damages and, in particular, that Fink's obligations pursuant to the Guarantee "should be reduced by the fair market value of the real property upon which Machock foreclosed." R. at 89. His Amended Counterclaim also asserts that he is entitled to a declaratory judgment that Machock's only recourse "is the foreclosure on the real property pledged by Harmer *which Machock has pursued*, and to pursue repayment from Harmer." R. at 98 (emphasis added).

In his responses to Machock's Second Set of Interrogatories and Requests For Production of Documents dated January 29, 2001, Fink again placed the deficiency at issue when he informed Machock that Fink "has retained Marty Bodell to give an opinion as to the fair market value of the Harmer residence as of February 2000. Fink will produce a copy of Mr. Bodell's written appraisal which states the substance of Mr. Bodell's opinion and the basis for that opinion." See Addendum, Exhibit "A."

In his responses to Fink's discovery requests addressing the restrictions of section 57-1-32, Machock informed Fink that he believed the fair market value of the Harmer property as of the date of sale to be \$308,613.38, informed Fink how he calculated that figure, and that Machock submitted a credit bid of \$1,000 over the amount due pursuant to the first priority deed of trust.⁷ It is now within the province of the court, pursuant to section 57-1-32 to determine the amount Fink owes under the Guarantee, the sale price of

⁷ Fink's statement that "[t]o date, Machock has not informed Fink what the fair market value is or the amount of any alleged deficiency," Br. of Appellant at p.14, n3, is a misrepresentation of the record.

the Harmer property, and the fair market value of the Harmer property at the date of sale. See Utah Code Ann. § 57-1-32 (2003) (“Before rendering judgment, the court shall find the fair market value of the property at the date of sale.”).

In short, Fink’s affirmative defenses in his pleadings and discovery demonstrate that Machock’s intent to claim a deficiency was at issue in this case. Thus, there was no need for Machock to amend his Complaint or file a second Complaint to add a deficiency claim.⁸ Fink can demonstrate no prejudice resulting from the Ruling and the restrictions of section 57-1-32 imposed on Machock’s Complaint. As Fink possessed notice of the foreclosure and Machock’s intent to seek a deficiency, the trial court’s Ruling should be affirmed.

B. Kirkbride’s Analysis Of Section 57-1-32 Is Applicable To This Case.

Fink contends that Machock is not the victim of a “procedural failing” since “he never filed an action under section 57-1-32 in the first place.” Br. of Appellant at 15. Fink’s argument lacks merit. It ignores the prior filed Complaint and the Utah Supreme

⁸ Assuming the deficiency issue was not raised by the pleadings, Machock did not need to file an Amended Complaint or a second Complaint for an additional reason. Rule 15(b) of the Utah Rules of Civil Procedure provides for amendment of the pleadings to conform to the evidence. Based on Fink’s affirmative defenses in his Amended Answer and discovery to date, including Machock’s responses to Fink’s interrogatories addressing the restrictions of section 57-1-32, the deficiency issue will be tried without any prejudice to Fink “by express or implied consent of the parties.” *Id.* See also Armed Forces Insurance Exchange v. Harrison, 2003 UT 14, ¶¶ 24-25, 70 P.3d 35, 42 (Utah 2003). In Harrison, the plaintiff failed to allege its fraud claim against the defendant with particularity. At trial, however, the defendant presented evidence in her own defense on this issue. *Id.* at ¶ 24, 70 P.3d at 42. On appeal, the Court held that, pursuant to Rule 15(b), because the defendant “knew about the fraud allegations against her and was able to present her own evidence at trial to challenge those allegations, she was not prejudiced by the technical failings of [the plaintiff’s] pleadings.” *Id.*

Court's analysis of section 57-1-32 in Kirkbride. Using that analysis, the trial court recognized, "[t]his court could provide Machock with an opportunity to amend his Complaint to conform to the parameters of § 57-1-32, however, a more efficient approach would simply apply the restrictions of the statute to the current complaint." R. at 502. The trial court correctly concluded that the more efficient approach would be to simply apply the restrictions to Machock's Complaint against Fink for breach of contract.

C. Machock's Notices And Responses To Fink's Discovery Concerning The Restrictions Of Section 57-1-32 Satisfies The Statute.

Fink argues that Machock's Complaint is barred because "he has never given notice *in any pleading* of the foreclosure sale, the amount for which the property was sold, and the fair market value thereof at the date of the sale, all elements that must be pled in a complaint, according to section 57-1-32." Br. Of Appellant at 15 (emphasis added). This argument is incorrect for several reasons. First, the argument that Machock was required to give notice in a pleading of the foreclosure sale ignores the purpose of section 57-1-32 as discussed in Kirkbride, and Machock's numerous notices sent to Fink both before and after the foreclosure. See discussion at p. 25-29, including note 6. Second, Machock has in fact provided Fink with a pleading addressing the restrictions of section 57-1-32 in Machock's responses to Fink's specific interrogatories addressing the restrictions of section 57-1-32.⁹ See Addendum, Exhibit B.

⁹ In addition, after placing the deficiency at issue in his pleadings, Fink's argument ignores his lack of diligence in pursuing discovery on his affirmative defenses addressing the deficiency. Fink failed to conduct any discovery on the restrictions of section 57-1-32, including the particulars of the foreclosure sale of the Harmer' Trust Deed held on

Under Fink’s theory, the only way Machock could pursue his breach of contract claim prior to foreclosure of the property would be to independently file a second lawsuit pleading the requirements of section 57-1-32, despite the fact that the foreclosure sale at the time of filing the Complaint had not yet occurred. This reasoning defies sound logic and is completely unnecessary. As succinctly stated in Kirkbride, the creditor “must promptly put the debtor on notice as to whether it will seek any balance due by commencing *an action*. Once this notice is given **or** the three-month time period runs, the debtor can plan accordingly.” Kirkbride, 821 P.2d at 1138. (emphasis added).¹⁰ Here, Machock filed “an action” when he filed his Complaint against Fink for breach of contract. Fink never addresses why it would be necessary to have two complaints on file. To require Machock to file a second new case against Fink, which would presumably simply be consolidated with the original action, would be a waste of the parties’ and the court’s time and would not further any of the goals of the statute as articulated by the Kirkbride court.

D. The Trial Court’s Ruling Will Not Allow Lenders To Ignore The Notice Requirements Of Section 57-1-32.

Lastly, Fink complains that under the trial court’s interpretation of Kirkbride, lenders would be permitted to ignore the statutory requirement of section 57-1-32 and guarantors would be deprived of affirmative defenses since they would not be on notice

February 29, 2000 until April 3, 2003, after the trial court denied his motion for summary judgment. R. at 513.

¹⁰ In fact, section 57-1-32 states that “[a]t any time within three months after any sale of property under a trust deed . . . *an action* may be commenced to recover the balance due” Utah Code Ann. § 57-1-32 (2003) (emphasis added).

of the foreclosure sale when answering the Complaint. Br. of Appellant, p. 18-19. These arguments are not only pure speculation, but completely unfounded.

The trial court's interpretation of Kirkbride was correct. Under that interpretation, lenders will not be permitted to ignore section 57-1-32 and guarantors will not be deprived of affirmative defenses. Because of the evidence that Fink had actual notice of the foreclosure and deficiency claim, the trial court ruled that rather than force Machock to go through the tedious process of amending his Complaint to include the claim, "a more efficient approach would simply apply the restrictions of the statute to the complaint." R. at 503. The Ruling has the same effect as allowing Machock to amend his Complaint to include the deficiency claim.

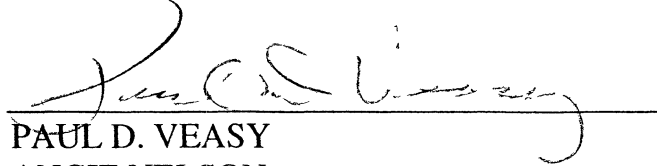
The Ruling does not preclude Fink from asserting affirmative defenses to the restrictions of section 57-1-32 now being applied to Machock's suit against Fink for payment on the Guarantee. This case has not been set for trial, and, although Fink could seek to amend his Amended Answer, asserting any additional defenses to Machock's deficiency claim, he has not done so but rather chose to pursue discovery on the restrictions of section 57-1-32. In sum, lenders will still be required to comply with section 57-1-32 by providing actual notice to the debtor that a deficiency will be sought after a foreclosure sale.

CONCLUSION

The Ruling should accordingly be affirmed.

DATED this 23 day of December, 2003.

PARSONS BEHLE & LATIMER



PAUL D. VEASY

ANGIE NELSON

Attorneys for Plaintiff and Appellee

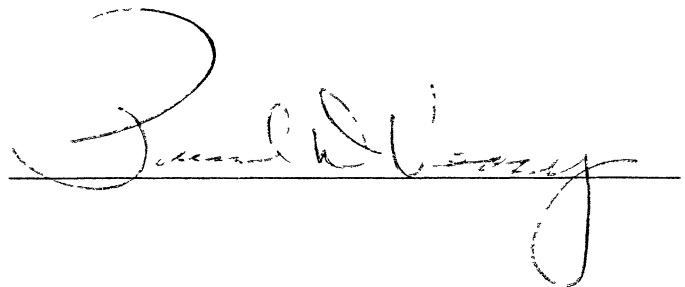
Joseph Machock

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of December, 2003, I caused to be mailed, first class, postage prepaid, two true and correct copies of the foregoing BRIEF OF THE APPELLEE, to:

R. Stephen Marshall
David W. Tufts
Durham, Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84111

W. Kevin Jackson
W. Kevin Jackson, P.C.
311 South State Street, Suite 380
Salt Lake City, Utah 84111



ADDENDUM

- A. Defendant's Responses to Plaintiff's Second Set of Interrogatories and Request for Production of Documents.**
- B. Plaintiff's Responses to Interrogatories and Requests for Production of Documents to Defendant.**

Tab A

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Attorneys for Bill Fink

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

<p>JOSEPH MACHOCK,</p> <p>Plaintiff,</p> <p>v.</p> <p>CARL WILLIAM ("BILL") FINK,</p> <p>Defendants.</p>	<p>RESPONSE TO PLAINTIFF'S SECOND SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS</p> <p>Civil No. 990700380</p> <p>Hon. Darwin C. Hansen</p>
<p>CARL WILLIAM ("BILL") FINK,</p> <p>Counterclaim Plaintiff,</p> <p>v.</p> <p>JOSEPH MACHOCK,</p> <p>Counterclaim Defendant.</p>	

Bill Fink ("Fink") hereby responds to the Second Set of Interrogatories and Requests for Production of Documents served by Joseph Machock ("Machock"), as follows:

RESPONSE TO INTERROGATORIES

Preliminary Statement

Fink's responses to these interrogatories are neither admissions nor acknowledgments that the information revealed is relevant to the subject matter of this action. Each of these responses is subject to all objections as to competence, relevance, materiality, propriety, and admissibility, and any and all other objections and grounds which would require the exclusion of any statement herein if the interrogatories were asked of, or any statement contained herein were made by, a witness present and testifying in court, all of which objections and grounds are reserved and may be interposed at the time of trial.

Except for explicit facts stated herein, no incidental or implied admissions are intended hereby. The fact that Fink has answered any interrogatory should not be taken as an admission that either of them accept or admit the existence of any fact set forth or assumed by such interrogatory, or that such response constitutes admissible evidence. The fact that Fink has answered a part or all of any interrogatory is not intended and shall not be construed to be a waiver of all or any part of their objection to any interrogatory.

Fink's investigation and discovery with regard to this litigation are not yet completed and are continuing. The following responses are given without prejudice to Fink's rights to supplement these responses, produce evidence of any subsequently discovered facts before trial if Fink should discover additional facts after service of these responses.

General Objections

Fink makes the following general objections to these interrogatories. Every general objection applies to each and every interrogatory and is incorporated into each response herein. The assertion of the same, similar or additional objections or the provision of partial answers in the individual responses to these interrogatories does not waive any of Fink's general objections or limit the applicability or effect of these general objections to that particular interrogatory or any other interrogatory.

A. Fink objects to these interrogatories to the extent they impose requirements different or greater than those set forth in the Utah Rules of Civil Procedure.

B. Fink objects to each interrogatory to the extent that it calls for information protected from disclosure by the attorney-client privilege and/or the attorney work product doctrine.

C. Fink objects to each interrogatory to the extent that it seeks information not in Fink's possession, custody or control.

D. Fink objects to the interrogatories to the extent they impose an obligation on him to provide a response or produce information for, or on behalf of, any person or entity other than himself.

E. Fink objects to each interrogatory to the extent that it seeks information more readily or equally available to the Machock.

F. Fink objects that these interrogatories are collectively vexatious, harassing and annoying. Most of these interrogatories are repetitive of discovery that Machock has already conducted in this action.

These objections are incorporated into each of the following responses.

INTERROGATORY NO. 1

Interrogatory

If you contend, as set forth in Paragraph 8 of your Answer to the Complaint, that the Guarantee is not of payment and performance and is not primary in nature, please state all facts that support such contention.

Response

Among the other defenses raised in Fink's Amended Answer, Fink contends that the Guarantee is invalid because it was procured by Machock's fraud. As such, it is not a guarantee of payment and performance and it is not primary in nature. The factual basis for Fink's contentions in this regard are recited in response to interrogatory no. 4, below. *See* Fink's response to interrogatory no. 4.

INTERROGATORY NO. 2

Interrogatory

Please state all facts that support your contention as averred in Paragraph 10 of the Answer to the Complaint that Machock has failed and refused to take adequate steps to enforce Harmer's obligation under the Note.

Response

This allegation is supported by the fact that Machock has not undertake any serious effort to enforce Harmer's obligation under the Note. Fink has been unable to discover evidence of any effort undertaken by Machock to enforce Harmer's obligation under the note.

For example, on July 31, 2000, Machock expressly released Harmer from his obligations under the Note. The Settlement Agreement and Mutual Release expressly reserves Machock's right to seek satisfaction of Harmer's obligation "through judicial liens on any assets or property acquired by Harmer in the future." However, even though Harmer recently stated that he has a steady income and can pay Machock \$10,000 down and \$3,000 per month, Machock has not undertaken any effort to garnish or otherwise collect this income from Harmer.

INTERROGATORY NO. 3

Interrogatory

Please state all facts that support your contentions as averred in Paragraph 11 of the Answer to the Complaint that "Harmer is not without resources to pay all or a portion of the amount due under the note."

Response

Harmer testified during his deposition that he wished to sell the house and give the equity from the sale to Machock in partial satisfaction of Harmer's obligation to Machock. On November 29, 1999, Keith Cook offered to pay \$390,000 to purchase the house. This would have generated approximately \$80,000 in equity to pay down Harmer's obligation. On approximately January 28, 2000, an unidentified "prospective buyer" offered to pay \$350,000 to purchase the house. This would have generated approximately \$40,000 in equity to pay down Harmer's obligation.

Harmer testified during his deposition that he has numerous business opportunities which he expects to produce income sufficient to pay all or a portion of Harmer's obligation to Machock.

Harmer is presently the beneficiary of an employment contract which, according to Harmer, allows him to pay \$3,000 per month to Machock. Fink does not at the present time know the total amount of money that Harmer receives monthly from this contract, but Fink is informed that Machock knows this information.

Harmer has also represented that he presently has \$10,000 that he is willing to pay to Machock.

INTERROGATORY NO. 4

Interrogatory

Please state all the facts that support the contention as set forth in your Third Defense to the Complaint that the relief claimed by Machock in his Complaint “is barred because of Machock’s fraud.”

Response

Fink, Machock, and Harmer have been acquaintances and friends since approximately 1997. From that time until at least May, 1998, Fink, Machock, and Harmer lived within close proximity to one another in Bountiful, Utah. During this time, Machock and Fink joined the Church of Jesus Christ of Latter-day Saints and began attending the same ward as Harmer and David Detton. In this regard, Harmer taught a Sunday school class for new church members that was regularly attended by Machock and Fink.

In or about April 1998, Harmer desperately needed \$125,000 to pay off a judgment that had been entered against him in the Fourth District Court for Utah County, State of Utah. Harmer was required to pay off this judgment on or before June 1, 1998.

In early May 1998, Harmer sought to borrow \$125,000 from Machock.

Machock had loaned money to Harmer on at least one prior occasion.

Machock responded to Harmer's request to borrow money by telling Harmer that he could lend him the necessary \$125,000, that he had a source of funding for a \$125,000 loan but that the majority of the loan would not come from Machock's personal funds, and that Harmer would have to pledge some kind of collateral before the loan could be made.

In connection with his request to borrow \$125,000, Harmer told Machock that several years prior he had been declared bankrupt and, in part because of this bankruptcy, was not considered a good credit risk for such a loan. In making this disclosure to Machock, Harmer gave Machock his social security number so that Machock could run a credit check for himself.

Machock communicated Harmer's social security number and the fact of Harmer's bankruptcy to Dr. Edward Grootendorst ("Grootendorst"). Grootendorst was the intended source of \$75,000 of the \$125,000 that Harmer needed to borrow. Machock and Harmer knew that Grootendorst would be the source of \$75,000 of the anticipated loan, but this was not disclosed to Fink.

Grootendorst ran a credit check on Harmer. Grootendorst also interviewed Harmer about the proposed loan. Based on this, Grootendorst told Machock that he did not think Harmer was a good candidate to borrow \$125,000. Grootendorst said that he did not want to participate in the loan. Neither Machock nor Grootendorst told Fink that Grootendorst did not think Harmer was a good candidate to borrow money.

Machock continued to tell Harmer that he could make \$125,000 available for a loan so long as Harmer would pledge some kind of collateral to secure the loan.

Harmer proposed to pledge the house that he lived in, located at 1963 East Ridgehill Drive, Bountiful (the “Harmer residence”), as collateral for the loan. However, Harmer did not own any interest in this home. Greg Stuart (“Stuart”) owned the Harmer residence, and Stuart’s interest was subject to various encumbrances. Harmer gave Machock a title report showing that the property was owned by Stuart and that it was subject to various encumbrances.

In or about late May 1998, Machock and Harmer approached Fink, telling Fink that Machock was going to loan \$125,000 to Harmer to be secured by a pledge of the Harmer residence, and they solicited Fink to participate in the loan by executing a “guarantee.” No one ever gave Fink a copy of the title report that had been given to Machock, but Machock and Harmer did state that there were encumbrances on the property but that these encumbrances would be subordinated to Machock’s trust deed.

Specifically, on May 28, 1998, at a face-to-face meeting at Fink’s home, Machock and/or Harmer represented the following to Fink:

- a. Machock and Harmer represented to Fink that Machock would loan \$125,000 to Harmer and that Harmer would execute a promissory note requiring him to repay Machock \$150,000;
- b. Machock and Harmer represented to Fink that the loan would be secured by a first-priority trust deed on the Harmer residence, and that the Machock trust deed would take its first-priority position because the encumbrances that were already on the property would be subordinated to Machock’s trust deed;

- c. Machock and Harmer represented to Fink that Harmer would use a portion of the loan proceeds to pay off an indebtedness Harmer owed (but no one explained that this indebtedness resulted from a judgment or the amount of this indebtedness), and that Harmer would use the remainder of the proceeds to perform physical improvements to the Harmer residence so that it could be immediately put up for sale;
- d. Machock represented to Fink that he intended to obtain repayment of the loan from proceeds of the sale of the Harmer residence;
- e. Machock represented to Fink that he desired to fund the loan from money that was available to him through a trust fund, but that in order for him to do so the trust fund required him to obtain a “guarantee”;
- f. Machock and Harmer asked Fink if he would sign a “guarantee” so that Machock could access the money in the trust fund and use it to fund the loan to Harmer;
- g. Machock represented to Fink that this “guarantee” was a mere formality necessary in order for him to access the money in the trust fund and that he would not seek to enforce the “guarantee” if Harmer failed to repay the loan;
- h. Machock represented to Fink that, in the event Harmer failed to repay the loan, Machock would only seek recourse of foreclosure against the Harmer residence to recover the money lent to Harmer;

- 1 Machock represented to Fink that the Harmer residence was more than sufficient collateral for the loan and, because of this, Machock would not seek any recourse against Fink under the proposed “guarantee”,
- j Machock and Harmer represented to Fink that what they were asking of Fink was a “no risk proposition” because under no circumstances would Machock seek to enforce the “guarantee” and under no circumstances would Machock attempt to collect repayment of the loan proceeds from Fink;
- k. Machock represented to Fink that the proposed “guarantee” would not subject Fink to any liability whatsoever for repayment of the money that Machock would lend to Harmer, and
- l. Machock represented to Fink that by signing the proposed “guarantee” Fink would in no way be bound to repay any of the money that Machock intended to loan to Harmer.

Despite the fact that Fink received nothing from either Harmer or Machock for his part in the proposed transaction, and no consideration whatsoever for his execution of the “guarantee,” in reliance on these representations, Fink agreed to provide Harmer and Machock the assistance they requested with respect to the loan by executing the “guarantee” proposed by Machock.

On May 29, 1998, (i) Harmer executed a promissory note payable to Machock in the amount of \$150,000 and (ii) Stuart executed a Trust Deed pledging the Harmer residence as collateral to secure the loan. Unknown to Fink at the time, this trust deed was not a first-priority

encumbrance on the Harmer residence. Instead, the Harmer residence was already subject to encumbrances that potentially left insufficient equity to satisfy payment of the Note.

That same day, Detton drafted the Guarantee. This Guarantee did not reflect any of the representations and promises that were made to Fink the day before. Machock was out of the country when Detton drafted the Guarantee, and did not review what his attorney had drafted.

That same day, before Fink had executed the Guarantee, Machock gave Harmer access to a portion of the loan proceeds.

Later that same day, at approximately 4:30 p.m., acting on Machock's instruction, Harmer retrieved the Guarantee from Detton and took it to Fink at Fink's office to have him execute it. At this meeting Harmer was very emotional, and on the verge of crying, when he explained to Fink that he was in dire need of the \$125,000 loan from Machock and that Machock was waiting for Fink to execute the "guarantee" that they had discussed before Machock would disburse the loan proceeds to Harmer.

Harmer gave Fink the Guarantee, explained to Fink that the Guarantee had been prepared by Machock's attorney, and implored Fink to execute the Guarantee without delay so that he could quickly return it to Machock and thereby obtain the loan proceeds before the close of business that day.

Fink was never given an opportunity to review the Note.

Under these circumstances, and in reliance on Machock's representations, Fink executed the Guarantee without having his attorney review it.

Neither Machock nor Harmer ever told Fink about Harmer's bankruptcy or the fact that Harmer was not creditworthy for this loan. Nor did Machock or Harmer tell Fink that Harmer

did not own any interest in the Harmer residence, that the Trust Deed would not be a first priority encumbrance on the Harmer residence, or that the majority of the funds for the loan would not be provided by Machock.

Following his execution of the Guarantee, the \$125,000 was loaned to Harmer. Only \$20,000 of this \$125,000 was provided by Machock, the balance came from money that Machock held in trust, from Machock's nephew, and from Dr. Grootendorst.

Harmer did not use any of the loan proceeds to perform improvements on the Harmer residence.

Harmer never contracted with a real estate professional to sell the Harmer residence. While Harmer did place a "for sale by owner" sign on the property on several occasions, Fink is informed and believes, and on that basis alleges, that Harmer did not take reasonable steps to sell the house.

INTERROGATORY NO. 5

Interrogatory

Please state all facts that support the contention as set forth in your Sixth Defense to the Complaint that Machock's claim is barred by the doctrine of mistake.

Response

The facts that support this allegation are stated in Fink's response to interrogatory no. 4, above. *See* Fink's response to interrogatory no. 4.

INTERROGATORY NO. 6

Interrogatory

Please state all facts that support the contention as set forth in your Eighth Defense to the Complaint that Machock's claim is barred by "Machock's own breaches of Contract."

Response

The facts that support this allegation are stated in Fink's response to interrogatory no. 4, above. *See* Fink's response to interrogatory no. 4.

In particular, a contract was formed when Machock promised Fink that he would not seek to enforce the Guarantee in exchange for Fink executing the Guarantee so that Machock could access the funds that he held in trust. Machock has breached this promise when he made demand on Fink under the Guarantee and when he brought this lawsuit.

INTERROGATORY NO. 7

Interrogatory

Please state all facts that support the contention as set forth in your Ninth Defense to the Complaint that Machock's claim is barred by "Machock's breaches of the implied covenant of good faith and fair deal [sic]."

Response

The facts that support this allegation are stated in Fink's response to interrogatory no. 4, above. *See* Fink's response to interrogatory no. 4.

In particular, a contract was formed when Machock promised Fink that he would not seek to enforce the Guarantee in exchange for Fink executing the Guarantee so that Machock could access the funds that he held in trust. Machock breached the implied covenant of good faith and fair dealing that is inherent in this contract promise when he made demand on Fink under the Guarantee and when he brought this lawsuit.

INTERROGATORY NO. 8

Interrogatory

To the extent you contend as set forth in the Eleventh Defense to the Complaint, that Machock “has failed to take all reasonable, necessary, and appropriate action to mitigate” the damages complained of in the Complaint, please state all facts that support such contention.

Response

The facts that support this allegation are stated in Fink’s response to interrogatories no. 2 and no. 3, above. *See* Fink’s response to interrogatories no. 2 and 3.

INTERROGATORY NO. 9:

Interrogatory

Please state all facts that support the contention that Fink’s obligation under the Guarantee was released, as set forth in your Thirteenth Defense to the Complaint.

Response

On July 31, 2000, Machock and Harmer entered into a Settlement Agreement and Mutual Release. By this Settlement Agreement and Mutual Release, Harmer stipulated to the entry of judgment against him in the amount of \$152,567.00 and Machock expressly released Harmer from his obligations under the Note. The Settlement Agreement and Mutual Release provides:

For and in consideration of Harmer’s execution of this Stipulation for Confession of Judgement, Machock, his heirs and assigns, release and forever discharge Harmer, his heirs and assigns, from any and all past, present or future claims, causes of action, attorney’s fees, expenses and compensation of any nature whatsoever, and whether for actual, compensatory or punitive damages, which Machock knows about at this time, or should have known about, and which now exists or may hereinafter accrue, on account of,

on in any way arising out of, the underlying loan transaction between Harmer and Machock. Nothing in this paragraph shall be construed to affect Machock's ability to file the Stipulation for Confession of Judgment, obtain a final judgment against Harmer for the amount due on the promissory note, and seek satisfaction of that judgment through judicial liens on any assets or property acquired by Harmer in the future. (Settlement Agreement and Mutual Release, ¶ 2.a.)

Nowhere does the Settlement Agreement and Mutual Release reserve Machock's right to pursue Fink to repay Harmer's obligation as expressed in the Note. Fink has not consented to any liability to Machock under the terms of the Guarantee, and he has not consented to remain liable notwithstanding Machock's release.

INTERROGATORY NO. 10:

Interrogatory

Please state all material misrepresentations that you allege in the Sixteenth Defense to the Complaint were made by Machock, the location that each alleged misrepresentation was made, all individuals present at the time each alleged misrepresentation was made, and the circumstances surrounding each such alleged misrepresentation.

Response

The material misrepresentations, and omissions of material facts, are recited in Fink's response to interrogatory no. 4, above. *See* Fink's response to interrogatory no. 4.

INTERROGATORY NO. 11:

Interrogatory

Please state all facts that support the contention that [sic] as alleged in your Nineteenth Defense to the Complaint that Machock failed to take advantage of a bona fide offer from a third

party to purchase the collateral, including the identity of any alleged third party, the date such a bona fide offer was made, the terms of such offer(s), any evidence of the alleged third party's ability to perform such offer and when such offer(s) expired.

Response

On November 29, 1999, Keith Cook offered to pay \$390,000 to purchase the house. The terms of this offer are as stated in the Real Estate Purchase Contract that is attached to the transcript of the Harmer Deposition taken on July 11, 2000.

On approximately January 28, 2000, an unidentified "prospective buyer" offered to pay \$350,000 to purchase the house. The terms of this offer are as stated in the memorandum from John Harmer to John Baird and David Detton of January 28, 2000. During his deposition on July 11, 2000, Harmer testified that this offer was made by one of his children, and her spouse, Mr. and Mrs. Dionne, and that it was a good faith offer. The terms of the offer are also memorialized in the memorandum from John Harmer to David Detton of February 15, 2000.

INTERROGATORY NO. 12:

Interrogatory

Please state all the reasons you executed the Guarantee attached as Exhibit B to the Complaint.

Response

Fink executed the Guarantee because he was requested to do so by Harmer and Machock, because he Machock told him that the Guarantee was necessary in order to allow Machock to access trust money but that Machock would not take any action to enforce the Guarantee, because Machock promised that Fink would have no obligation under the Guarantee, and

because Machock and Harmer represented to Fink that Harmer's residence would be the sole source of security for the loan.

Fink's reasons for executing the Guarantee are more particularly described in his response to interrogatory no. 4. *See* Fink's response to interrogatory no. 4.

INTERROGATORY NO. 13:

Interrogatory

Please describe all investigation you undertook in relation to the loan to Mr. Harmer and/or the Guarantee prior to executing the Guarantee attached as Exhibit B to the Complaint.

Response

Fink objects to this interrogatory on the basis that it is vague and unintelligible in its use of the undefined term "investigation." It is not understood what is intended by the use of the term "investigation." Without waiving his objection Fink responds to the best he understands this interrogatory, as follows:

Fink relied on the representations of Machock and Harmer, as more fully described in Fink's response to interrogatory no. 4. In reliance on these representations, Fink did not undertake an examination of the title of the Harmer residence and he did not perform a credit check of Harmer.

INTERROGATORY NO. 14:

Interrogatory

Please identify all other guarantees that you have executed, including the identity of the party's whose obligation was being guaranteed, the amount of the guarantee, and the date that the guarantee was executed.

Response

None.

INTERROGATORY NO. 15:

Interrogatory

Please identify any expert retained in this matter, the subject of any such expert's opinion, and the basis for that opinion.

Response

Fink has retained Marty Bodell to give an opinion as to the fair market value of the Harmer residence as of February 2000. Fink will produce a copy of Mr. Bodell's written appraisal which states the substance of Mr. Bodell's opinion and the basis for that opinion.

RESPONSES TO REQUESTS FOR PRODUCTION

Preliminary Statement

Fink's responses to these requests for production and the production of documents in response thereto are neither admissions nor acknowledgments that the documents or the information revealed therein is relevant to the subject matter of this action. All such documents or information is subject to all objections as to competence, relevance, materiality, propriety, and admissibility, and any and all other objections and grounds which would require the exclusion thereof if the document, or any statement contained therein, were produced by a witness present and testifying in court, all of which objections and grounds are reserved and may be interposed at the time of trial.

Fink's investigation and discovery with regard to this litigation are not yet completed and are continuing. The following responses are given without prejudice to Fink's right to

supplement these responses, produce evidence of any subsequently discovered facts, or to make appropriate changes in such responses if it should appear at any time that omissions or errors have been made.

General Objections

Fink makes the following general objections to these requests for production. Every general objection applies to each and every request for production and is incorporated into each response herein. The assertion of the same, similar or additional objections in the individual responses to these requests for production does not waive any of Fink's general objections or limit the applicability or effect of these general objections to that particular request or any other request.

- A. Fink objects to these requests for production to the extent they impose requirements different or greater than those set forth in the Utah Rules of Civil Procedure.
- B. Fink objects to each request for production to the extent that it seeks confidential, non-public, proprietary, and/or commercially sensitive information.
- C. Fink objects to each request for production to the extent that it calls for information protected from disclosure by the attorney-client privilege and/or the attorney work product doctrine.
- D. Fink objects to each request for production to the extent that it seeks information more readily or equally available to the plaintiffs.

These objections are incorporated into each of the following responses.

REQUEST NO. 1:

Request

Please produce all documents that support your denial of the statement set forth in Paragraph 8 of your Answer that “the Guarantee is a guarantee of payment and performance and not of collection, and is primary, not secondary in nature.”

Response

Fink objects to this request on the grounds that it seeks the production of documents protected by the attorney-client privilege and/or work product doctrine, and documents that are not in Fink’s possession, custody or control. Without waiving his objections, Fink responds as follows:

Relevant, non-privileged documents that are in Fink’s possession, custody or control will be made available for inspection and copying at the offices of Durham Jones & Pinegar at a mutually convenient time to be agreed upon by the parties.

REQUEST NO. 2:

Request

Please produce all documents that support your contention as set forth in your Third Defense to the Complaint that Machock’s claims are barred “because of Machock’s fraud.”

Response

Fink objects to this request on the grounds that it seeks the production of documents protected by the attorney-client privilege and/or work product doctrine, and documents that are not in Fink’s possession, custody or control. Without waiving his objections, Fink responds as follows:

Relevant, non-privileged documents that are in Fink's possession, custody or control will be made available for inspection and copying at the offices of Durham Jones & Pinegar at a mutually convenient time to be agreed upon by the parties.

REQUEST NO. 3:

Request

Please produce all documents that support the contention set forth in your Eighth Defense to the Complaint that Machock's claims are barred by "Machock's own breaches of contract."

Response

Fink objects to this request on the grounds that it seeks the production of documents protected by the attorney-client privilege and/or work product doctrine, and documents that are not in Fink's possession, custody or control. Without waiving his objections, Fink responds as follows:

Relevant, non-privileged documents that are in Fink's possession, custody or control will be made available for inspection and copying at the offices of Durham Jones & Pinegar at a mutually convenient time to be agreed upon by the parties.

REQUEST NO. 4:

Request

Please produce all documents that support the contention set forth in your Ninth Defense to the Complaint that Machock's claims are barred by "Machock's breaches of the implied covenant of good faith and fair deal [sic]."

Response

Fink objects to this request on the grounds that it seeks the production of documents protected by the attorney-client privilege and/or work product doctrine, and documents that are not in Fink's possession, custody or control. Without waiving his objections, Fink responds as follows:

Relevant, non-privileged documents that are in Fink's possession, custody or control will be made available for inspection and copying at the offices of Durham Jones & Pinegar at a mutually convenient time to be agreed upon by the parties.

REQUEST NO. 5:

Request

Please produce any documents furnished to or relied upon by any expert retained by you concerning the fair market value of the former Harmer residence.

Response

Fink objects to this request on the grounds that it seeks the production of documents protected by the attorney-client privilege and/or work product doctrine, and documents that are not in Fink's possession, custody or control. Without waiving his objections, Fink responds as follows:

Relevant, non-privileged documents that are in Fink's possession, custody or control will be made available for inspection and copying at the offices of Durham Jones & Pinegar at a mutually convenient time to be agreed upon by the parties.

REQUEST NO. 6:

Request

Please produce any report prepared by any expert retained by you in this matter.

Response

Fink objects to this request on the grounds that it seeks the production of documents protected by the attorney-client privilege and/or work product doctrine, and documents that are not in Fink's possession, custody or control. Without waiving his objections, Fink responds as follows:

Relevant, non-privileged documents that are in Fink's possession, custody or control will be made available for inspection and copying at the offices of Durham Jones & Pinegar at a mutually convenient time to be agreed upon by the parties.

REQUEST NO. 7:

Request

Please produce all documents that support your contention that Fink has been released from his obligation set forth in the Guarantee.

Response

Fink objects to this request on the grounds that it seeks the production of documents protected by the attorney-client privilege and/or work product doctrine, and documents that are not in Fink's possession, custody or control. Without waiving his objections, Fink responds as follows:

Relevant, non-privileged documents that are in Fink's possession, custody or control will be made available for inspection and copying at the offices of Durham Jones & Pinegar at a mutually convenient time to be agreed upon by the parties.

REQUEST NO. 8:

Request

Please produce all documents related to any offer to purchase the former Harmer residence.

Response

Fink objects to this request on the grounds that it seeks the production of documents protected by the attorney-client privilege and/or work product doctrine, and documents that are not in Fink's possession, custody or control. Without waiving his objections, Fink responds as follows:

Relevant, non-privileged documents that are in Fink's possession, custody or control will be made available for inspection and copying at the offices of Durham Jones & Pinegar at a mutually convenient time to be agreed upon by the parties.

REQUEST NO. 9:

Request

Please produce all documents that support the contention as alleged in Paragraph 12 of the Counterclaim that the loan would be secured by a first-priority deed of trust on the Harmer residence.

Response

Fink objects to this request on the grounds that it seeks the production of documents protected by the attorney-client privilege and/or work product doctrine, and documents that are not in Fink's possession, custody or control. Without waiving his objections, Fink responds as follows:

Relevant, non-privileged documents that are in Fink's possession, custody or control will be made available for inspection and copying at the offices of Durham Jones & Pinegar at a mutually convenient time to be agreed upon by the parties.

REQUEST NO. 10:

Request

Please produce all documents that Machock ever provided to Fink in connection with or concerning the Harmer loan or the Guarantee.

Response

Fink objects to this request on the grounds that it seeks the production of documents protected by the attorney-client privilege and/or work product doctrine, and documents that are not in Fink's possession, custody or control. Without waiving his objections, Fink responds as follows:

Relevant, non-privileged documents that are in Fink's possession, custody or control will be made available for inspection and copying at the offices of Durham Jones & Pinegar at a mutually convenient time to be agreed upon by the parties.

REQUEST NO. 11:

Request

Please produce all documents that support the contention set forth in Paragraph 12 of the Counterclaim that Machock represented that "Machock would not seek any recourse against Fink under the proposed 'guarantee.'"

Response

Fink objects to this request on the grounds that it seeks the production of documents protected by the attorney-client privilege and/or work product doctrine, and documents that are not in Fink's possession, custody or control. Without waiving his objections, Fink responds as follows:

Relevant, non-privileged documents that are in Fink's possession, custody or control will be made available for inspection and copying at the offices of Durham Jones & Pinegar at a mutually convenient time to be agreed upon by the parties.

REQUEST NO. 12:

Request

Please produce all documents that support the contention set forth in Paragraph 12 of the Counterclaim that Machock represented that "Fink would in no way be bound to repay any of the money that Machock intended to loan to Harmer."

Response

Fink objects to this request on the grounds that it seeks the production of documents protected by the attorney-client privilege and/or work product doctrine, and documents that are not in Fink's possession, custody or control. Without waiving his objections, Fink responds as follows:

Relevant, non-privileged documents that are in Fink's possession, custody or control will be made available for inspection and copying at the offices of Durham Jones & Pinegar at a mutually convenient time to be agreed upon by the parties.

REQUEST NO. 13:

Request

Please produce all documents related to any investigation that Fink conducted with respect to the loan to Harmer or the Guarantee.

Response

Fink objects to this request on the grounds that it seeks the production of documents protected by the attorney-client privilege and/or work product doctrine, and documents that are not in Fink's possession, custody or control. Fink further objects to this request on the basis that it is vague and unintelligible in its use of the undefined term "investigation." It is not understood what is intended by the use of the term "investigation." Without waiving his objections, Fink responds to the best he understands this request, as follows:

Relevant, non-privileged documents that are in Fink's possession, custody or control will be made available for inspection and copying at the offices of Durham Jones & Pinegar at a mutually convenient time to be agreed upon by the parties.

REQUEST NO. 14:

Request

Please produce all documents identified in your response to or relied upon to respond to Plaintiff's Interrogatories.

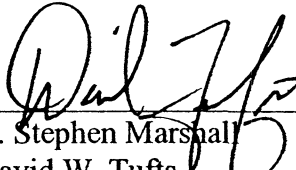
Response

Fink objects to this request on the grounds that it seeks the production of documents protected by the attorney-client privilege and/or work product doctrine, and documents that are not in Fink's possession, custody or control. Without waiving his objections, Fink responds as follows:

Relevant, non-privileged documents that are in Fink's possession, custody or control will be made available for inspection and copying at the offices of Durham Jones & Pinegar at a mutually convenient time to be agreed upon by the parties.

DATED this 29th day of January, 2001.

DURHAM JONES & PINEGAR



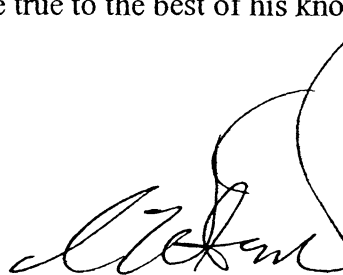
R. Stephen Marshall
David W. Tufts
Attorneys for Bill Fink

VERIFICATION

STATE OF UTAH)
 :SS
COUNTY OF SALT LAKE)

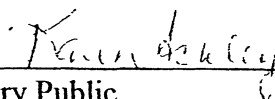
Bill Fink, having been first duly sworn, hereby deposes and states: that he reviewed the foregoing interrogatory answers; and that the same are true to the best of his knowledge, information, and belief.

DATED this 10 day of January, 2001.

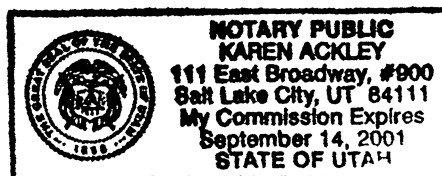


Bill Fink

SUBSCRIBED AND SWORN TO before me this 10 day of January, 2001.



Notary Public



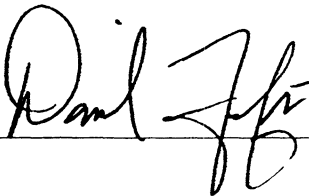
CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the within and foregoing **DEFENDANT'S RESPONSE TO PLAINTIFF'S SECOND SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS** to be mailed, postage prepaid by United States mails, this 29th day of January, 2001, to the following:

David K. Detton
Dorsey & Whitney LLP
170 South Main St., Suite 925
Salt Lake City, Utah 84101

Gregory S. Tamkin
Dorsey & Whitney LLP
Republic Plaza Building, Suite 4400
370 Seventeenth Street
Denver, Colorado 80202
Facsimile (303) 629-3450

W. Kevin Jackson
Jensen, Duffin, Carman, Dibb & Jackson
311 South State Street, Suite 380
Salt Lake City, UT 84111-2379



S:\DWT\Fink, William_Machock, Joseph\pleadings\Disc Resp, 2nd Req Prod wpd

Tab B

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ANGIE NELSON (8143)
PARSONS BEHLE & LATIMER
Attorneys for Plaintiff
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, UT 84145-0898
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

**IN THE SECOND JUDICIAL DISTRICT COURT
DAVIS COUNTY, STATE OF UTAH**

JOSEPH MACHOCK,
Plaintiff,

vs.

CARL WILLIAM ("BILL") FINK,
Defendant.

AND RELATED COUNTERCLAIMS AND
CROSS-COMPLAINTS

**PLAINTIFF'S RESPONSES TO
INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF
DOCUMENTS**

Case No. 990700380

Judge Darwin C. Hansen

Plaintiff Joseph Machock ("Machock") answers under oath the following interrogatories and provides responses to the requests for production of documents submitted by defendant Carl William Fink ("Fink").

GENERAL OBJECTIONS

1. Machock objects to Fink's interrogatories and requests for production of documents to the extent it calls for answers which are privileged, including, but not limited to, documents and other items of information prepared in anticipation of litigation or for trial or

requests for information or documents which fall within the attorney-client privilege and/or work-product doctrine

2. Machock objects to Fink's interrogatories and requests for production of documents to the extent they are vague, overbroad, oppressive and unduly burdensome.

3. Each of the general objections set forth herein shall be deemed to have been made with respect to each specific interrogatory and request for production of documents unless otherwise indicated.

Subject to the foregoing objections and reservations, which are incorporated into each and every answer and response by Machock to Fink's interrogatories and requests for production of documents, the answers and responses are given based upon a review of matters to date. Machock reserves the right to supplement his answers if and when additional information is obtained.

INTERROGATORIES

INTERROGATORY NO. 1: State the full amount that you will seek to recover from Fink at trial based on the Note and guarantee.

ANSWER: Machock will seek to recover the entire amount of principal and interest due and owing under the Guarantee, in addition to all costs and attorneys' fees incurred to date, which include Machock's Opposition to Fink's Motion for Summary Judgment and Machock's Answer to Fink's Petition for Interlocutory Appeal. As of May 15, 2003, the outstanding debt owed by Fink, exclusive of attorneys' fees and costs, totals \$157,033.42, which includes interest at the rate of 10% per annum from September 22, 2001 to date. As interest is accruing on this

unpaid balance and attorneys' fees and costs continue to be incurred, which are excluded from the above balance, the amount that Machock will seek to recover at trial will continue to increase.

INTERROGATORY NO. 2: State in detailed [sic] how you calculate the amount identified in response to interrogatory no. 1, and identify all documents that pertain to this calculation.

ANSWER: The amount identified in interrogatory no. 1 was calculated by determining the unpaid principal and interest owed to date pursuant to Fink's Guarantee. Interest on this amount was determined pursuant to section 15-1-1(2) of the Utah Code. All costs and attorneys' fees will be based on an Affidavit of Fees and Costs from counsel to be filed at trial.

INTERROGATORY NO. 3: State what you will claim at trial as the fair market value for the property at 1963 E. Ridgehill Drive, Bountiful, Utah, as of February 29, 2000 (the date of the trustee's sale based on the deed of trust given in favor of Joseph Machock).

ANSWER: As of February 20, 2000, Machock believes the fair market value of the property at 1963 E. Ridgehill Drive to be \$308,613.38.

INTERROGATORY NO. 4: State in detailed [sic] how you calculate the fair market value identified in response to interrogatory no. 3, and identify all documents that pertain to this calculation.

ANSWER: As of February 29, 2000, Machock had received notice of Brighton's Bank Notice of Default and Election to Sell, dated February 2, 2000. Upon receiving this notice, Machock informed Fink that he did not have the ability to pay the amount due and owing under

Brighton Bank's trust deed and that Fink should therefore protect his interests as Machock intended to pursue Fink's liability pursuant to his guarantee of payment. Accordingly, the fair market value of the property at 1963 E. Ridgehill Drive was determined by calculating the amount Machock bid at the June 29, 2000 foreclosure sale to obtain title to the property. See also Response to Interrogatory No. 5, below.

INTERROGATORY NO. 5: Identify the amount you paid to acquire title to the property at 1963 E. Ridgehill Drive via the trustee's sale on February 29, 2000.

ANSWER: Machock submitted a credit bid of \$1,000 over the amount due and owing pursuant to the first priority deed of trust held by Brighton Bank. At this time, upon information and belief, Machock believes the amount due and owing pursuant to the Brighton Bank deed of trust to be approximately \$307,613.38, which represents the principal and interest due under the deed of trust, together with costs of foreclosure and attorneys' fees. Machock reserves the right to supplement this answer if additional information regarding this amount is obtained.

INTERROGATORY NO. 6: Identify the amount of each and every payment you have received from John Harmer or from someone on Harmer's behalf.

ANSWER: To date, the following payments have been received from John Harmer or from someone on Harmer's behalf:

1. Payment of \$16,000 on February 15, 2000;
2. Payment of \$3,000 in check from Kevin Jackson dated March 29, 2001;
3. Payment of \$3,000 via check from Kevin Jackson dated April 28, 2001;

4. Payment of \$3,000 via check dated June 13, 2001 from Dorsey & Whitney, LLP, as Trustee for Machock;

5. Payment of \$3,000 via check dated July 6, 2001 from Dorsey & Whitney, LLP, as Trustee for Machock;

6. Payment of \$3,000, via check dated August 6, 2002 from Dorsey & Whitney, LLP, as Trustee for Machock;

7. Payment of \$3,000, via check dated September 14, 2001 from Dorsey & Whitney, LLP as Trustee for Machock;

8. Payment of \$3,000, via check from Kevin Jackson, dated September 25, 2001.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: All documents identified in response to the preceding interrogatories.

RESPONSE: Machock will provide responsive, non-privileged documents not already in the possession of Fink at a time to be arranged with Fink's counsel.

REQUEST NO. 2: Copies of any checks, drafts or other instruments that reflect a payment made by or on behalf of John Harmer to you.

RESPONSE: Machock will provide responsive, non-privileged documents at a time to be arranged with Fink's counsel.

DATED this 5th day of May, 2003.

PARSONS BEHLE & LATIMER



PAUL D. VEASY

ANGIE NELSON

Attorneys for Plaintiff

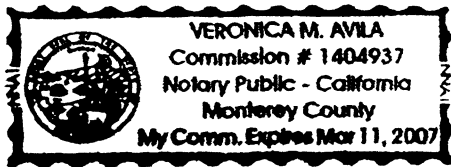
VERIFICATION

STATE OF California)
COUNTY OF Monterey)^{ss}

Joseph Machock, being first duly sworn, says that he is the plaintiff and counterclaim defendant in the foregoing action; that he has read the foregoing and knows the contents thereof; and that the same is true to his knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes the same to be true and correct.

Joseph Machock
Joseph Machock

SUBSCRIBED AND SWORN to before me this 5 day of May, 2003.



Veronica M Avila
NOTARY PUBLIC