

2003

# Joseph Machock; John L. Hamer v. Carl William ("Bill") Fink : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS

STATE OF UTAH

|  |   |
|--|---|
| JOSEPH MACHOCK,<br>Plaintiff and Appellee,<br><br>vs.<br><br>CARL WILLIAM ("BILL") FINK,<br>Defendant and Appellant. | <b>BRIEF OF APPELLANT CARL<br/>WILLIAM FINK</b><br><br>Interlocutory Appeal from the Second<br>Judicial District Court, Judge Darwin C.<br>Hansen<br><br>Trial Court Case No. 990700380<br>Appellate Court Case No. 20030301-CA |
| CARL WILLIAM ("BILL") FINK,<br>Counterclaim Plaintiff,<br><br>vs.<br><br>JOSEPH MACHOCK,<br>Counterclaim Defendant.  |   |
| CARL WILLIAM ("BILL") FINK,<br>Third-Party Plaintiff,<br><br>v.<br><br>JOHN L. HARMER,<br>Third-Party Defendant.     | <b>FILED</b><br>Utah Court of Appeals<br><b>NOV 26 2003</b><br><br>Paulette Stagg<br>Clerk of the Court   |

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**ORAL ARGUMENT AND A PUBLISHED DECISION ARE REQUESTED**

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## **JURISDICTION OF THE APPELLATE COURT**

On June 10, 2003, the Utah Supreme Court granted permission to pursue this interlocutory appeal. (R. 527.) At the same time the Court transferred this appeal to the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4) (2002) (R. 527.)

The Utah Supreme Court has original appellate jurisdiction over this interlocutory appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (2002) because this appeal involves the review of an order of a trial court over which the Utah Court of Appeals does not have original jurisdiction under Utah Code Ann. § 78-2a-3(2) (2002) and because this is a case transferred to this Court from the Supreme Court under Utah Code Ann. § 78-2a-3(2)(j) (2002).

## **ISSUE PRESENTED**

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

Standard of Review: This is a question of law that was raised below and ruled upon in the trial court's Ruling on Defendant's [Fink's] Motion for Summary Judgment (the "Ruling"). (R. 496-506.) This issue was decided based on undisputed facts submitted in connection with Fink's Motion for Summary Judgment. (R. 496-97; 199-202; 436-41.) This Court should review the trial court's denial of Fink's motion for correctness without deference to the trial court's ruling. Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co., 844 P.2d 322,

326 (Utah 1992); see also Petersen v. Board of Educ. of Davis School Dist., 855 P.2d 241, 242 (Utah 1993) (the trial court's denial of the motion to dismiss is one of law which is reviewed for correctness without deference to the trial court's ruling).

**CITATION TO THE RECORD SHOWING THAT THE ISSUE WAS  
PRESERVED IN THE TRIAL COURT**

This issue was properly raised in the Motion for Summary Judgment that Fink filed in the trial court. (R. 195-198 & 199-296.) The trial court ruled on this issue in a written opinion. (R. 496-506 (Ruling on Defendant's [Fink's] Motion for Summary Judgment (the "Ruling"))).

**A STATUTE OF CENTRAL IMPORTANCE  
TO THIS APPEAL**

The issue presented on this appeal is governed by Utah Code Ann. § 57-1-32 (2000), which provides:

At any time *within three months* after any sale of property under a trust deed, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in such action *the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed, the amount for which such property was sold, and the fair market value thereof at the date of sale.* Before rendering judgment, the court shall find the fair market value at the date of sale of the property sold. 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 in bringing an action under this section.

Utah Code Ann. § 57-1-32 (2000) (emphasis added).<sup>1</sup>

### **STATEMENT OF THE CASE**

On October 15, 1999, Joseph Machock (“Machock”) filed a complaint against Carl William Fink (“Fink”) claiming breach of a written guaranty pertaining to a loan Machock made to John Harmer (“Harmer”). This loan was secured by a deed of trust pledging Harmer’s residence as collateral. Thereafter, Machock pursued foreclosure of the Harmer residence. On February 19, 2000, Machock foreclosed on Harmer’s residence.

More than three months elapsed after the foreclosure sale and Machock did not file a complaint seeking a deficiency judgment under Utah Code Ann. § 57-1-32. On February 2, 2001, Fink filed a motion for summary judgment on this basis, among others, arguing that Machock’s complaint in this case is barred because Machock failed to file a deficiency action to recover the balance due on the obligation for which the trust deed was given as security within three months following the sale, as required by section 57-1-32. Machock opposed Fink’s motion.

On March 6, 2003, the trial court heard oral arguments on Fink’s motion and took the matter under advisement. On March 19, 2003, the trial court denied Fink’s motion in a written ruling. This interlocutory appeal seeks review of an issue presented in Fink’s motion.

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<sup>1</sup> Utah Code Ann. § 57-1-32 was amended in 2001. The amendment is not relevant to the issues in this appeal because all pertinent facts occurred prior to this amendment. In addition, the 2001 amendments are primarily stylistic and do not influence the issue raised in this appeal.



## **STATEMENT OF FACTS**

The following is a statement of the facts relevant to the issue presented for review. These facts were undisputed in the trial court and were used by the trial court as the basis for its ruling on Fink's Motion for Summary Judgment. (R. 497-98 (Ruling at 2, ¶¶ 1-9); R. 199-202 (Statement of Undisputed Material Facts, Memorandum of Points and Authorities in Support of Defendant's [Fink's] Motion for Summary Judgment ("Fink's Statement of Facts"), at 2-5); R. 436-41 (Response to Fink's Statement of Facts, Memorandum in Opposition to Defendant's [Fink's] Motion for Summary Judgment ("Machock's Response"), at 2-7)). The pertinent undisputed facts are as follows:

1. On May 29, 1998, Joseph Machock ("Machock") loaned \$125,000 to John L. Harmer ("Harmer"). (R. 497 (Ruling, ¶ 1); R. 199 (Fink's Statement of Facts, ¶ 5); R. 437 (Machock's Response, ¶ 5)).
2. In connection with this loan:
  - a. Harmer executed and delivered to Machock a Note Secured by Deed of Trust wherein Harmer promised to pay Machock \$150,000 on demand (the "Note"). (R. 497 (Ruling, ¶ 1); R. 200 (Fink's Statement of Facts, ¶ 6(a)); R. 437 (Machock's Response, ¶ 6)).
  - b. Harmer caused a Trust Deed to be executed and recorded in the public records of Davis County, Utah (the "Trust Deed"). The Trust Deed pledged Harmer's Bountiful, Utah, home (the

“Harmer Residence”) as collateral to secure payment of the indebtedness evidenced by the Note. (R. 497 (Ruling, ¶ 1); R. 200 (Fink’s Statement of Facts, ¶ 6(b)); R. 437 (Machock’s Response, ¶ 6)).

- c. Fink executed a personal guaranty (the “Guaranty”) of the “full and timely performance by [Harmer] of all of his obligations under the Note.” (R. 413-17 (Guaranty, ¶ 1.1)); (R. 497 (Ruling, ¶ 2); R. 200 & 273-277 (Fink’s Statement of Facts, ¶ 6(c) & Ex. G); R. 437-39 (Machock’s Response, ¶ 6)).

3. Harmer failed to repay the full balance of the loan. (R. 498 (Ruling, ¶ 3); R. 200-01 (Fink’s Statement of Facts, ¶ 7); R. 439-40 (Machock’s Response, ¶ 7)).

4. On October 15, 1999, Machock filed this lawsuit against Fink. Machock’s complaint seeks to collect from Fink the \$150,000 due under the Note, plus interest and attorneys’ fees, pursuant to the terms of the Guaranty. (R. 1-3 (Complaint); R. 498 (Ruling, ¶ 5); R. 201 (Fink’s Statement of Facts, ¶ 8); R. 440 (Machock’s Response, ¶ 8)).

5. On February 29, 2000, Machock foreclosed on the Trust Deed by holding a trustee’s sale under the Trust Deed pursuant to the provisions of Utah Code Ann. § 57-1-28. (R. 498 (Ruling ¶ 6)). 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. 201 (Fink’s Statement of Facts, ¶ 9); R. 440 (Machock’s Response, ¶ 9)).

6. Machock was the highest bidder at the trustee's sale and he took title to the Harmer Residence through the Trustee's Deed. (R. 498 (Ruling, ¶ 6); R. 201 (Fink's Statement of Facts, ¶ 10); R. 440 (Machock's Response, ¶ 10)).

7. Machock never filed a deficiency action against Fink pursuant to Utah Code Ann. § 57-1-32. (R. 201 (Fink's Statement of Facts, ¶ 11); R. 440 (Machock's Response, ¶ 11)). The complaint Machock is pursuing in this action seeks to recover the full amount of the note without regard to the fact that Machock foreclosed on the Harmer Residence, and without regard to the requirements of section 57-1-32. (R. 1-3 (Complaint)). On March 6, 2003, at the hearing on Fink's motion for summary judgment, Machock's counsel stated that this suit against Fink was not a deficiency action under Section 57-1-32. (R. 502 (Ruling at 7 ("[A]t the March 6, 2003 hearing, counsel for Machock plainly argued that the suit against Fink was not a deficiency action under § 57-1-32.")); Transcript of Summary Judgment Hearing on March 6, 2003 ("Tr."), R. 531, Tr. page 22, lines 20-25.)

8. On February 1, 2001, Fink filed a motion for summary judgment on the basis, among others, that Machock's complaint in this case is barred because Machock failed to file a deficiency action to recover the balance due on the obligation for which the Trust Deed was given as security within three months following the sale, as required by section 57-1-32. (R. 195-197 & 198-296 (Fink's Motion and supporting Memorandum.) On March 6, 2003, the trial court heard oral arguments on Fink's motion. (R.507; and R. 531, Tr. page 1, lines 4-7.)

9. On March 24, 2003, the trial court issued its Ruling on Defendant's [Fink's] Motion for Summary Judgment (the "Ruling"), holding that Machock's breach of contract claim would be treated as a section 57-1-32 deficiency claim that satisfied the requirements of the statute. (R. 501-02 (Ruling at 7-8)). The court entered this ruling despite the fact that Machock had never filed a complaint for a deficiency, and continued to insist that his claim was for the full amount of the note and *not* for a deficiency. (R. 502 (Ruling at 7 ("[A]t the March 6, 2003 hearing, counsel for Machock plainly argued that the suit against Fink was not a deficiency action under § 57-1-32."); R. 531, Tr. page 22, lines 20-25) (R. 501 (Ruling at 6 ("In the hearing scheduled March 6, 2003, Machock, through counsel, argued that it would be entirely appropriate to foreclose on the property owned by Harmer . . . and also collect the entire \$150,000 from Fink."); R. 531, Tr. page 27, lines 5-14).

### **SUMMARY OF ARGUMENT**

Machock became subject to the requirements of section 57-1-32 when he elected to foreclose on the Harmer residence. Surety Life Ins. Co. v. Smith, 892 P.2d 1, 2-8 (Utah 1995). Section 57-1-32 requires a lender who wishes to recover an alleged deficiency to file a complaint within three months immediately following the foreclosure sale. If the lender does not file such an action he cannot pursue a deficiency claim or any other action to recover on the underlying obligation. Concepts, Inc. v. First Sec. Realty Services, Inc., 743 P.2d 1158, 1161 (Utah 1987); Cox v. Green, 696 P.2d 1207, 1208 (Utah 1985); G. Adams Ltd. Partnership v. Durbano, 782 P.2d 962, 963-964 (Utah App. 1989).

Machock did not file a deficiency action within the time allowed by section 57-1-32. Machock has never filed or asserted a deficiency claim under the statute. A court cannot covert the breach of contract claim that Machock presently asserts into a deficiency action under the section 57-1-32.

### **ARGUMENT**

#### **I. MACHOCK DID NOT FILE A TIMELY CLAIM FOR A DEFICIENCY UNDER SECTION 57-1-32.**

##### **A. As a Guarantor, Fink is Entitled to the Protection of the Three-Month Statute of Limitations Under Section 57-1-32.**

Machock's complaint fails to state a claim against Fink because it is not a claim for a deficiency judgment as mandated by Utah Code Ann. § 57-1-32 (2000), which provides:

At any time *within three months* after any sale of property under a trust deed, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in such action *the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed, the amount for which such property was sold, and the fair market value thereof at the date of sale.* Before rendering judgment, the court shall find the fair market value at the date of sale of the property sold. 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 in bringing an action under this section.

Utah Code Ann. § 57-1-32 (2000) (emphasis added).<sup>2</sup>

Machock's failure to sue Fink for a deficiency within three months of his foreclosure sale is fatal to his case. Once a lender has sold the property at foreclosure, resort to section 57-1-32 is the lender's only remedy. Concepts, Inc. v. First Sec. Realty Servs., Inc., 743 P.2d 1158, 1161 (Utah 1987) (holding that lender's failure to file an action under section 57-1-32 precludes the lender's right to recover any deficiency); Cox v. Green, 696 P.2d 1207, 1208 (Utah 1985) ("Section 57-1-32 provides the exclusive procedure for securing a deficiency judgment following a trustee's sale of the real property under a trust deed."); G. Adams Ltd. Partnership v. Durban, 782 P.2d 962, 963-964 (Utah App. 1989). In Cox, this Court explained that a lender's election to sell the property at foreclosure "precludes [the lender] from seeking any other remedy." Cox, 696 P.2d at 1208. The protections of section 57-1-32 apply to guarantors the same as to principal obligors. Surety Life Ins. Co. v. Smith, 892 P.2d 1, 2-3 (Utah 1995).

Under section 57-1-32, if the lender elects to seek a deficiency, he must (i) **file** a complaint within three months of the foreclosure sale, and (ii) his complaint must "set forth the entire amount of the indebtedness which was secured by such trust deed, the amount for which such property was sold, and the fair market value thereof at the

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<sup>2</sup> Utah Code Ann. § 57-1-32 was amended in 2001. The amendment is not relevant to the issues in this appeal because all pertinent facts occurred prior to this amendment. In addition, there is nothing in the amendment that would change the outcome of this issue.

date of sale.” Utah Code Ann. § 57-1-32. See also Surety Life Ins. Co. v. Smith, 892 P.2d 1, 2 (Utah 1995).

Machock did not do so in this case. Machock’s complaint does not state a claim for a deficiency under section 57-1-32. The complaint pleads none of the elements required by section 57-1-32. (R. 1-3 (Complaint)). Machock lost the ability to pursue such a claim when he failed to file a complaint alleging the elements required by section 57-1-32. G. Adams Ltd. Partnership v. Durbano, 782 P.2d 962, 963-964 (Utah App. 1989) (“Very simply, if the beneficiary of a trust deed elects to foreclose nonjudicially, is owed a deficiency following application of the sale proceeds, and wishes to obtain a deficiency judgment, an action for that purpose must be commenced by the beneficiary under that trust deed within three months of sale or any claim to a deficiency is waived.”).

**B. The Trial Court Erroneously Treated Machock’s Complaint as one for a Deficiency Under the Trust Deed Statute.**

Although Machock insisted below that he was not seeking a deficiency under section 57-1-32, the trial court held that the statute does apply. The Court ruled that, once Machock foreclosed on the trust deed, “§ 57-1-32 became activated” and “the Act’s language regarding damages and fair market value will apply to the case at hand.” (R 500, 502 (Ruling at 5 & 7.)) This was error. The trial court could not turn the complaint into something that it could not be: a timely-filed claim for a deficiency. The court could not deem the complaint to include a claim for a deficiency under section 57-1-32, particularly when Machock did not seek to amend

his complaint but insisted, even at the summary judgment hearing, that he was not suing for a deficiency. (R. 502 (Ruling at 7); R. 531, Tr. page 22, lines 20-25.)

Machock made a deliberate decision in this matter not to seek a deficiency. The trial court was not entitled to “activate” the provisions of section 57-1-32 and apply the statute without a motion from Machock seeking to amend his complaint. Had Machock sought to amend his complaint to state a claim for a deficiency within three months of the foreclosure sale, it would have been within the discretion of the trial court to allow the amendment. Machock’s claim would have been timely.

As it was, however, Machock did not seek to amend and did not otherwise commence an action for a deficiency. He continued to assert that he was entitled to the full amount of the obligation from Fink, not merely a deficiency. The trial court correctly held that Machock’s could only sue for a deficiency, but incorrectly held that the deficiency statute had become “activated” (R. 500 (Ruling at 5)) and that Machock was entitled to a deficiency under the statute. In effect, the trial court amended Machock’s complaint to state the correct claim even though Machock did not ask the court to do so.

In Wells v. Arch Hurley Conservancy Dist., 89 N.M. 516, 554 P.2d 678 (1976), the court faced a similar issue. There, the plaintiffs sued a conservancy district alleging that the district had damaged the plaintiffs’ property as a result of the drainage of water from a lake. The plaintiffs sued under a statute that entitled them to recover damages for injury to their property. The defendant conservancy district did not file a counterclaim. Acting *sua sponte*, the trial court “transformed [the



plaintiffs'] claim into an eminent domain proceeding, the same as though it were brought by the defendant against the plaintiffs to condemn all of plaintiffs' properties." 554 P.2d at 679. On appeal, the plaintiffs argued that the trial court's *sua sponte* order was error. The Court of Appeals agreed, holding that the case could not have been transformed into an eminent domain proceeding. The concurring opinion by Judge Hernandez explained the Court's ruling in greater detail. He noted that the issue on appeal was whether the trial court had authority "to *sua sponte* change plaintiffs' complaint" from a claim for damages under one statute to an eminent domain proceeding. *Id.* at 681. "The rules of pleading cannot be totally disregarded if there is to be an orderly disposition of cases," stated Judge Hernandez. "This is particularly true when a party claims a statutory right, his pleading must contain all of the allegations necessary to bring him within the purview of the statute." Judge Hernandez explained that, "[u]nder our adversary system of jurisprudence the course of the law suit is controlled by the litigants, except in a few limited circumstances. That is, the initiative rests with the litigants. The role of the trial court is to consider only those questions raised by the parties." *Id.* at 683.

Although a court has authority to consider an "overlooked or abandoned argument" where it would otherwise "compel an erroneous result," Kaiserman Assocs., Inc. v. Francis Town, 977 P.2d 462, 464 (Utah 1998), the court cannot remedy a *pleading deficiency* that resulted from a deliberate tactical decision by plaintiff. Considering an overlooked argument is one thing, but *sua sponte* remedying a pleading mistake is another. The court's authority does not go that far. The

requirements of notice pleading, though broadly construed, still require “a short plain statement of the claim showing that the pleader is entitled to relief.” Rule 8(a), Utah Rules of Civil Procedure. In the present case, Machock’s pleadings contain no such statement showing his entitlement to a deficiency. The trial court erred in remedying that lack on its own initiative. The trial court’s effort to fix Machock’s pleading for him is particularly egregious in a case where, like this one, specific facts must be plead in a complaint. Section 57-1-32 requires that the pleading (which must be filed within three months of the sale) “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.” See also Reedeker v. Salisbury, 952 P.2d 577, 589 (Utah Ct. App. 1998) (even though the law did not bar a claim for intentional misconduct, the court held that dismissal of the plaintiff’s claim was proper because plaintiff had not alleged intentional misconduct in the complaint).

In the present case, the trial court had no authority to transform Machock’s case into a claim for a deficiency when Machock himself failed to file such an action as required by the statute.

**II. THE TRIAL COURT MISINTERPRETED KIRKBRIDE IN HOLDING THAT MACHOCK SATISFIED SECTION 57-1-32 BY GIVING NOTICE TO FINK THROUGH MEANS OTHER THAN THE FILING OF A COMPLAINT.**

Beyond finding that section 57-1-32 governed Machock’s claim, the trial court went even further, holding that the statute of limitations had been satisfied. The trial court ruled 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. 503 (Ruling at 8)). The court based its ruling on the fact that Machock "informed Fink of the foreclosure sale, and has been in fairly regular contact with Fink regarding the suit, the damages and any potential deficiencies."<sup>3</sup> (R. 503 (Ruling at 8)).

The trial court erred in holding that Machock could pursue his breach of contract claim as if it were a timely-filed deficiency action under section 57-1-32, even though Machock filed no claim for a deficiency within three months after the foreclosure sale. The trial court incorrectly applied the case of Standard Federal Savings & Loan Assn. v. Kirkbride, 821 P.2d 1136 (Utah 1991). In Kirkbride, a lender filed a deficiency action within the three-month limitations period, giving the borrowers notice of the pending lawsuit, but failed to serve the complaint within 120 days. When the borrowers discovered this, they moved to dismiss for failure to serve under Rule 4(b), which the trial court granted dismissing the complaint without prejudice. The lender then re-filed and served the complaint. The borrowers moved to dismiss, arguing that the second complaint was barred by the three-month statute of limitations. Id. at 1137. On appeal, the Utah Supreme Court held that the case should

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<sup>3</sup> Fink disputes this "finding." Machock did not present evidence that he had informed Fink about the sale. He offered two letters and the pages of his deposition where he identified these letters. R. 441 (Machock's Additional Statement of Material Facts, ¶ 1); R. 463-70 (copies of the letters and pages from the deposition transcript). Neither of these letters advised Fink of the time and place of the sale and neither contained any discussion of a "deficiency." To date, Machock has not informed Fink what the fair market value is or the amount of any alleged deficiency. See R. 531, Tr. page 14, line 23 - page 15, line 20.

be allowed to proceed because the lender had filed a complaint within the statutory three-month period. The Supreme Court characterized the lender's failure to serve the complaint within 120 days as a "procedural failing." The Court explained:

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*. . . .

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*. . . .

. . . . Under trust deed statutes such as section 57-1-32, the creditor is given a speedy remedy of foreclosure and sale, but in exchange, it 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.

Id. at 1138 (emphasis added) (citations omitted).

Machock is not the victim of some "procedural failing" – like not serving the second complaint within 120 days – since he never filed an action under section 57-1-32 in the first place. 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.

The trial court ruled in the present case that "[u]nder the 'more sensible view' of Kirkbride, the Act is satisfied when 'notice' is give to the debtor." (R. 503 (Ruling at 8)). This interpretation of Kirkbride goes far beyond the facts of that case and

could vitiate the applicability of all statutes of limitation where actual notice had been given by a plaintiff through means other than the filing of a complaint. This is not what Kirkbride stands for.

In C.P. v. Utah Office of Crime Victims' Reparations, 966 P.2d 1226 (Utah App. 1998), this Court interpreted and applied Kirkbride. In C.P., as in Kirkbride, the plaintiff had filed a complaint within the time allowed under the 30-day statute of limitations, but the complaint was later dismissed for failure to serve. When the plaintiff re-filed the complaint – this time after the statute had run but within the one year “savings” period – the defendant asserted that the second complaint should be dismissed because it was not filed within the 30-day statute of limitations. Id. at 1228.

This Court rejected the defendant’s contention. The Court quoted from Kirkbride: “[a] more sensible view of the operation of the [statute imposing the limitations period] 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. (quoting Kirkbride, 821 P.2d at 1138) (emphasis added). This Court then stated that because the plaintiff had filed the original complaint in time the defendant “was placed on notice that [the plaintiff] intended to pursue her claim and thus ‘received all the benefit the [thirty-day] limit conferred on them.’” Id. at 1229 (quoting Kirkbride, 821 P.2d at 1139).

Kirkbride and C.P. are distinguished because in each the first complaint was filed within the statute of limitations period. In the present case, Machock has never

filed a complaint for deficiency as required by section 57-1-32. The trial court noted in its Ruling that “at the March 6, 2003 hearing, counsel for Machock plainly argued that the suit against Fink was not a deficiency action under § 57-1-32.” (R. 502 (Ruling at 7)) (see also R. 531, Tr. page 22, lines 20-25.) Machock’s complaint states a claim for breach of contract on Fink’s guaranty, but does not allege that a foreclosure had occurred or that a deficiency was owed. (R. 1-3 (Complaint)). It does not contain the elements required by section 57-1-32. The trial court further recognized that “[i]n the hearing scheduled March 6, 2003, Machock, through counsel, argued that it would be entirely appropriate to foreclose on the property owned by Harmer . . . and also collect the entire \$150,000 from Fink.” (R. 501 (Ruling at 6); see also R 531, Tr. page 26, line 19- page 27, line14.)

Machock’s complaint is precisely the type of action that is precluded if, after he elects to foreclose, he fails to file a complaint within three months that specifically alleges that a sale has occurred, together with the amount for which the property sold and the fair market value at the date of sale. Concepts, 743 P.2d at 1161; Cox, 696 P.2d at 1208; Surety Life, 892 P.2d at 2-3. This Court explained:

Very simply, if the beneficiary of a trust deed elects to foreclose nonjudicially, is owed a deficiency following application of the sale proceeds, and wishes to obtain a deficiency judgment, an action for that purpose must be commenced by the beneficiary under that trust deed within three months of sale or any claim to a deficiency is waived.

G. Adams Ltd. Partnership v. Durbano, 782 P.2d 962, 963-964 (Utah App. 1989).

Machock is not saved by Kirkbride because he has never filed a complaint for

deficiency under section 57-1-32. If he were to attempt to do so now, such a claim would be barred by section 57-1-32's three month limitations period.

**III. IF ADOPTED BY THIS COURT, THE TRIAL COURT'S  
ERRONEOUS INTERPRETATION OF KIRKBRIDE WILL  
ENCOURAGE NONCOMPLIANCE WITH THE  
REQUIREMENTS SECTION 57-1-32.**

Under the trial court's ruling, Machock was exempted from complying with section 57-1-32's filing requirement because Fink had notice that there was to be a foreclosure sale and because Machock "has been in fairly regular contact with Fink regarding the suit, the damages, and any potential deficiencies." (R. 503 (Ruling at 8)). Fink disagrees that Machock has notified him of the amount of the sale, the damages, or the potential deficiency. (R. 531, Tr. page 14, line 23 - page 15, line 20.) Even had such verbal notice been given, however, it would not satisfy the pleading requirements of the statute, which mandates that these facts be specifically pled in a complaint filed within three months after the sale.

More broadly, under the trial court's interpretation of Kirkbride, lenders would be permitted to ignore the statutory requirement of section 57-1-32. Very few statutes are as precise in specifying pleading requirements. Yet, the trial court has permitted Machock to proceed without complying with these requirements. Under this ruling, any lender would be permitted to file suit for the face value of the note, conduct a foreclosure sale, and proceed to seek a deficiency without complying with the statutory requirements that a pleading be filed within three months, so long as some

kind of notice was given to the borrower or guarantor. This abandons the statutory requirements mandated by the Utah Legislature in section 57-1-32.

The trial court's ruling ignores the statute of limitations, finding that the statute is satisfied "when 'notice' is given to the debtor." (R. 503 (Ruling at 8)). Applying the trial court's ruling, a lender would not have to file a deficiency claim at all. Instead, he could sue for breach of contract – or some other claim – and the action would be deemed timely provided the creditor gave some other kind of notice to the debtor of the sales price and fair market value. The trial court's ruling has the effect *nunc pro tunc* of making Machock's action timely, even though he never filed a claim for a deficiency within the three-month limitation period.

In addition, under the trial court's analysis, if a secured lender could convert its breach of contract claim against a guarantor into a claim for a deficiency action without filing the pleading required by section 57-1-32, the guarantor could be deprived of affirmative defenses since he would not be on notice of the foreclosure sale when he answered the complaint. Yet, because Machock's action has now been converted to a deficiency action by judicial fiat, Fink has no opportunity to respond with an answer that sets forth his affirmative defenses.

The trial court's ruling sets a procedural rule that abandons the express instructions of the Utah Legislature as set forth in section 57-1-32. If that section is to be abandoned or changed, it must be done by the Legislature, not the court. See Knox v. Thomas, 30 Utah 2d 15, 512 P.2d 664, 665 (1973) ("The wisdom of the statutory scheme is not for the court to decide"); Gord v. Salt Lake City, 20 Utah 2d 138, 434



P.2d 449, 451 (1967) (“it is not the court’s prerogative to consider its wisdom, or its effectiveness, nor even the reasonableness or orderliness of the procedure set forth, but it has a duty to let it operate as the legislature has provided”).

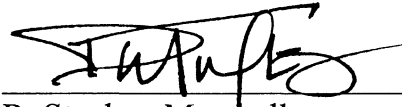
If this Court adopts the reasoning of the trial court, lenders will no longer feel compelled to comply with the plain language of the statute, which requires them to give notice of a foreclosure sale in a complaint, both to borrowers and to guarantors, within three months after the sale. The three month requirement will lose its meaning if a lender can sue before the sale and then give notice through some other means that the sale has occurred. This Court should not interpret a statute in that way. Reedeker v. Salisbury, 952 P.2d 577, 583 (Utah App. 1998) (“a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant”). This Court should reverse the trial court and should direct the dismissal of Machock’s claims against Fink.

### **CONCLUSION**

Fink respectfully requests that this Court enter an order reversing the opinion of the trial court, and enter an order holding that Machock’s breach of contract claim is barred since he failed to file a deficiency action against Fink under section 57-1-32. That section provides Fink with his exclusive remedy against Fink after the property was foreclosed.

Dated: November 25, 2003

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

A handwritten signature in black ink, appearing to read "Tufts", written over a horizontal line.

R. Stephen Marshall

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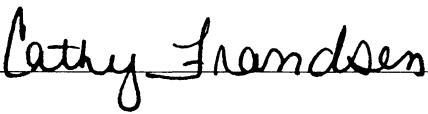
[Attachment: Brief on CD ROM]

**PROOF OF SERVICE**

I hereby certify that on this 26<sup>th</sup> day of November, 2003, I caused a true and correct copy of the within and foregoing **BRIEF OF APPELLANT CARL WILLIAM FINK** to be mailed in the U.S. Mail, first-class, postage prepaid, to the following:

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\_\_\_\_\_

**ADDENDUM**

(Containing a Copy of the Ruling on Defendant's Motion for Summary  
Judgment, dated March 19, 2003)

**FILED**

MAR 24 2003

SECOND  
DISTRICT COURT

IN THE SECOND DISTRICT COURT OF DAVIS COUNTY  
STATE OF UTAH

JOSEPH MACHOCK,  
  
Plaintiff,

v.

CARL WILLIAM ("BILL") FINK,  
  
Defendant.

**RULING ON DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT**

Case No. 990700380

Judge Darwin C. Hansen

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

v.

JOSEPH MACHOCK,  
  
Counterclaim Defendant.

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

v.

JOHN L. HARMER  
  
Third-Party Defendant.

The above-entitled matter having come before the Court on Defendant's Motion for Summary Judgment; and the Court having reviewed the Motion; and Plaintiff's Objection

thereto; and Defendant's Reply thereto; and the Court being fully advised in the premises enters the following findings of fact, and rules as follows.

### **BACKGROUND**

The matter before the Court concerns a suit to recover \$150,000 from Defendant based on a Guarantee signed by Defendant. Plaintiff filed a Complaint on October 15, 1999. Defendant's Motion for Summary Judgment with Supporting Memorandum was filed on February 2, 2001. After various filings, Plaintiff's Memorandum in Opposition was filed on December 19, 2002. Defendant's Reply was filed on February 14, 2003. A hearing was held before this Court on March 6, 2003, where the Court stated that it would take the Motion under advisement and issue a written ruling.

### **FINDINGS OF FACT**

The Court finds the following facts relevant to the Court's Ruling:

1. Machock loaned Harmer \$125,000 on May 29, 1998, under a Note Secured by a Trust Deed for \$150,000.
2. Also on May 29, 1998, Fink executed a Guarantee to Machock, guaranteeing the performance of Harmer under the Note Secured by a Deed of Trust.

3. Machock made a written demand to Harmer for payment of the full amount due under the note on September 22, 1999, but Harmer was unable to pay.
4. Machock then made a written demand on Fink for performance on the Guarantee.
5. On October 15, 1999, Machock filed suit against Fink for payment on the Guarantee.
6. On February 29, 2000, Machock foreclosed on the trust deed and was the highest bidder at a trustee's sale of Harmer's residence.
7. Fink was informed of the trustee's sale but did not bid at the sale.
8. 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.
9. Harmer has paid over \$30,000 to Machock on the Note Secured by a Trust Deed, and Harmer has also forfeited title to his primary residence to Machock through the trustee's sale.

### ANALYSIS

The purpose of summary judgment is to avoid unnecessary trial by allowing the parties to submit the matter on the pleadings where there is no genuine issue to present to the fact finder. In accordance with this purpose, specific facts are required to show whether there is a genuine issue for trial. Reagan Outdoor Adv., Inc. v. Lundgren, 692 P.2d 776 (Utah 1984). In considering a motion for summary judgment, the Court must examine the evidence in "a light most favorable to the party opposing summary judgment." Hunt v. Hunt, 785 P.2d 414, 415 (Utah 1990).

Having reviewed the parties' arguments, the Court examines the following issues: 1) Whether Utah Code Ann. § 57-1-32 applies to Machock's suit of Fink for payment on the Guarantee; and 2) Whether Machock's release of Harmer also releases Fink from performance under the Guarantee. The Court addresses each in turn.

**1) (A) Application of Utah Code Ann. § 57-1-32**

Section 57-1-32 of the Utah Code reads as follows:

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.

In Defendant's Motion for Summary Judgment, Fink claims that Machock's claims against Fink are controlled by § 57-1-32. Fink argues that this section provides the exclusive mechanism which Machock may use in recovering any monies from Fink. Fink cites to Surety Life Ins. Co. v. Smith, 892 P.2d 1 (Utah 1995), a similar case where the plaintiff Surety foreclosed on a property secured by a trust deed and then pursued a deficiency action against the guarantors.

Machock argues that because Fink's Guarantee was one of an unconditional guarantee of payment and not collection, Fink's liability is absolute, is set upon the date Harmer defaulted on



the Note, and that § 57-1-32 is irrelevant to the case at hand. Machock cites to Valley Bank and Trust Co. v. Rite Way Concrete Forming, Inc., 742 P.2d 105, 108 (Utah Ct. App. 1987), to argue that with an absolute guarantee, "the guaranteed party need not fix its losses by pursuing its remedies against the debtor before proceeding directly against the guarantor."

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.

At this point, § 57-1-32 became activated. In Surety Life Insurance Co., 892 P.2d at 6 (internal citations omitted), the Utah Supreme Court stated that

Although Surety's assertion is correct to the extent that the Smiths' obligations as guarantors are not obligations for which the trust deed was given as security, this distinction has no relevance under section 57-1-32. The Act does not concern itself with which contract or instrument the action is founded on. Rather, the issue is whether the action is one "to recover the balance due upon the obligation for which the trust deed was given as security."

It is clear from the plain language of the Act that its protections apply to any action to recover the balance due on the obligation secured by a trust deed, following a nonjudicial foreclosure sale. The Act makes no distinction as to whether the action is brought against the debtor or a guarantor.

The Act's protections apply to "any action to recover the balance due upon the obligation for which the trust deed was given as security" following a nonjudicial foreclosure. Id. "Any action" is a very broad phrase.

Machock argues that Fink's debt became fixed on the day of Harmer's default, and that Machock filed his suit before, and not in relation to, the foreclosure. None of this matters in light of the very broad, very expansive reading given to the statute by the Utah Supreme Court. Machock argues that this is an absolute guarantee, however, "[t]he Act does not concern itself with which contract or instrument the action is founded upon." Id. This Court rules that the statute applies to the case at hand.

Machock would question the fairness of applying a statute to a clear, absolute guarantee, but the purpose of the Act is clear. "In short, the Act prevents trust deed lenders from obtaining excessive recoveries." Id. at 4. Machock received the title to Harmer's personal residence; Machock has received over \$30,000 from Harmer, along with a promise to pay \$3,000 per month toward the debt from Harmer; and yet, Machock is still pursuing the entire \$150,000 from Fink. In the hearing scheduled March 6, 2003, Machock, through counsel, argued that it would be entirely appropriate to foreclose on the property owned by Harmer (assuming for the sake of argument that the property was unencumbered other than the trust deed) and also collect the entire \$150,000 from Fink. The Act is designed to stop excessive recoveries, preventing an unjust windfall on the part of the lender. With the Act's purpose clear, it is appropriate to cite the Utah Supreme Court once more, replacing the word "Surety" with Machock, "[b]ecause the case brought by [Machock] is an action to recover the balance due on the indebtedness secured by the trust deed, it is the very type of action contemplated by the Act." At this point, the Court

would remind all parties that § 57-1-32 is in effect here, and the Act's language regarding damages and fair market value will apply to the case at hand.

### **1) (B) The Three Month Deficiency Action Limitation**

With the Act's application firmly in place, Fink would argue that the Act's three month statute of limitations would apply, and that Machock's claim is barred for failure to file a deficiency action against Fink within the three month period. Fink cites to Concepts, Inc. v. First Security Realty Services, Inc., 743 P.2d 1158, 1161 (Utah 1987), where the "Defendant's failure to bring a deficiency action within three months after the sale of the property terminated all of plaintiffs' remaining obligations." Moreover, at the March 6, 2003 hearing, counsel for Machock plainly stated that the suit against Fink was not a deficiency action under § 57-1-32. However, this Court has already ruled that Machock's suit falls under the requirements and restrictions of § 57-1-32. On Fink's behalf, the Utah Supreme Court has found that the three month limitation is a mere procedural hurdle:

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....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.

Standard Fed. Savings and Loan Assoc. v. Kirkbride, 821 P.2d 1136, 1138 (Utah 1991). 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.

## **2) The Settlement Agreement and Mutual Release Between Machock and Harmer**

The Court now addresses Fink's argument that by releasing Harmer of his obligations under the Note, Machock has also released Fink from his obligations under the Guarantee. Fink argues that common law favors his position, citing Horman v. Gordon, 740 P.2d 1346, 1354 (Utah Ct. App. 1987), where

Under a surety relationship, the creditor is "affected as to his own powers and privileges," and "must especially guard against discharging the surety by dealings with the new principal which alter the principal's obligation...." Restatement of Security § 83, comment on clause (c) (1941). The Restatement states that "where the creditor releases a principal, the surety is discharged, unless (a) the surety consents to remain liable notwithstanding the release, or (b) the creditor in the release reserves his right against the surety. ... This is true whether or not the surety and principal are bound jointly on the same instrument.

Fink argues that by releasing Harmer without clearly stating in the Release that Machock was not also releasing Fink, that Machock also released Fink. Machock counters with the assertion that

Fink explicitly waived his rights to raise this defense in the Guarantee, citing to Valley Bank, 742

P.2d at 108. In the Release, Machock argues that the following language is pertinent:

For and in consideration of Harmer's execution of this Stipulation for Confession of Judgment, 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, expense 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 exist or may hereinafter accrue, on account of, or 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.

The Guarantee language in question reads

2.1 Lender's Rights. Guarantor hereby agrees that Lender may ... take any of the following actions without impairing in any way the obligations of Guarantor hereunder...:

2.1.2 Amend, modify, delete or add any term or condition of or to the Guaranteed Obligations; ...

2.16 Release or compromise any liability of Guarantor or any other party with respect to the performance by the Borrower of all or any part of the Guaranteed Obligations; and ...

2.1.7 Any other action that may or might constitute a legal or equitable discharge of the surety or guarantor.

Looking at recent case law, in Westside Dixon Assoc. L.L.C. v. Utah Power & Light Co., 44

P.3d 775, 780 (Utah 2002) (internal citations omitted), the Utah Supreme Court gave the elements for a waiver of an existing right, "[a] waiver is the intentional relinquishment of a known right.... There must be an existing right, benefit or advantage, a knowledge of its existence, and in intention to relinquish it." For the Release to waive Machock's right to pursue Fink, the waiver must be intentional. Fink would argue that the intent to release Harmer was sufficient, however, the Release language does not clearly release any claims against Fink.

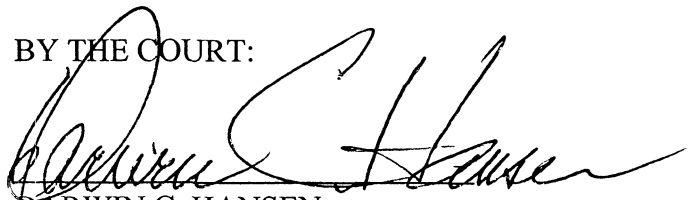
Moreover, the Guarantee language quoted above permits Machock to "release or compromise any liability of Guarantor or any other party with respect to the performance by the Borrower of all or any part of the Guaranteed Obligations...." This Court finds that the Guarantee language gave Machock the right to release Harmer without damaging Machock's claims against Fink. The Release was a release of Harmer solely, and Machock may still pursue his action against Fink.

### **RULING**

For the foregoing reasons, the Court Grants Defendant's Motion for Summary Judgment in part, and Denies Defendant's Motion for Summary Judgment in part. The Court rules that § 57-1-32 applies to the present case, limiting Machock's claims to a deficiency action subject to the fair market value damages provision of the Act, but the Court also finds that Machock did comply with the three month requirement for filing a deficiency action under said Act. The Court also rules that the Release of Harmer did not effectuate a release of Fink, and Machock may continue to pursue his claims against Fink subject to the provisions of § 57-1-32.

Dated March 19, 2003.

BY THE COURT:

  
DARWIN C. HANSEN  
DISTRICT COURT JUDGE

## CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Ruling on March

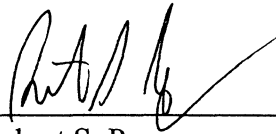
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