

1983

**Haggis Management, Inc. v. Turtle Management, Inc., Jeffrey Meacham, Stephen Mccaughey And Dan Lee Briggs : Reply Brief of Plaintiff-Appellant Nature of the Case**

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IN THE SUPREME COURT OF THE STATE OF UTAH

\*\*\*\*\*  
HAGGIS MANAGEMENT, INC., )  
a Utah corporation, )  
 )  
Plaintiff-Appellant ) Case No. 19017  
vs. )  
 )  
TURTLE MANAGEMENT, INC., )  
JEFFREY MEACHAM, STEPHEN )  
McCAUGHEY and DAN LEE BRIGGS )  
 )  
Defendants-Respondents. )  
\*\*\*\*\*

REPLY BRIEF OF PLAINTIFF-APPELLANT  
NATURE OF THE CASE

\*\*\*\*\*

APPEAL FROM SUMMARY JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT,  
SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE PHILLIP FISHLER

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FILED

OCT 6 1983

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

  \* \* \* \* \*

HAGGIS MANAGEMENT, INC.,                  )  
a Utah corporation,                          )  
  )  
    Plaintiff-Appellant                    )  
  )          Case No. 19017  
vs.  )  
  )  
TURTLE MANAGEMENT, INC.,                  )  
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MCCAUGHEY and DAN LEE BRIGGS              )  
Defendants-Respondents.                      )

  \* \* \* \* \*

REPLY BRIEF OF PLAINTIFF-APPELLANT

NATURE OF THE CASE

This is an action to collect approximately \$137,000.00 due on a promissory note executed in conjunction with the sale of a private club in Salt Lake City, Utah. In September of 1981, Judgment was entered against Defendant Turtle Management, Inc. which subsequently filed for protection under the Bankruptcy Act. The action then continued against the individual Defendants who had executed a guarantee of the promissory note. After the default and bankruptcy of the principal debtor, Turtle Management, Inc., the Plaintiff retook possession of the business and later sold it to a third entity. In conjunction with the original sale, Plaintiff-Appellant retained a security interest in some of the personal property located on the business premises. The central issue is whether as a matter of law, the Plaintiff's disposition of this collateral was commercially reasonable and if not, whether the disposition should bar the Plaintiff from any recovery under the original promissory note, irrespective of the value of the collateral or an opportunity for the Plaintiff to establish the fair market value of the property at the

time of its disposition, since the collateral had been appraised by experts employed by both the Appellant and Respondents.

#### DISPOSITION IN THE LOWER COURT

On January 26, 1983, Judge Phillip Fishler entered an Amended Summary Judgment dismissing Plaintiff's Complaint against the individual defendants in this action. These individuals had signed a written guarantee of the Promissory Note given by Turtle Management, Inc., to Haggis Management, Inc., as partial consideration for the purchase-sale of The Haggis, a private club in Salt Lake City, Utah. The Amended Summary Judgment did not set forth any reason for dismissal of the Complaint (R. p. 435), but the minute entry reflects that the Court ruled, as a matter of law, that the sale of the collateral was not made in a commercially reasonable manner and, therefore, Plaintiff was barred from any deficiency judgment under the rule prescribed in Pioneer Dodge Center vs. Glaubensklee 646 P. 2d 28 (Utah 1982).

#### RELIEF SOUGHT ON APPEAL

Appellant requests that the Amended Summary Judgment of the Trial Court be reversed and this action be remanded for trial.

#### STATEMENT OF FACTS

Appellant has previously set forth the Statement of Facts in its original Brief.

The Statement of Facts of the Respondents' Brief is inconsistent with the record in crucial areas. On Page 6 of the Brief there are four (4) citations to the deposition of Howard Landa regarding the fact that the collateral was disposed out of a private sale and without notice. The deposition of Howard

Landa is not a part of the record in this action and a Statement of Facts citing that deposition is improper. A review of the record demonstrates that the deposition of Howard Landa was not published nor is it contained within the records before this Court.

On Page 8 and Page 9 of Respondents' Brief, there is reference to a Supplemental Motion to Vacate Summary Judgment (Respondents' Brief Pages 8 and 9) and it is submitted that the record demonstrates that this Motion was never heard nor an order entered pursuant to that Motion. In fact, no supporting affidavits or other document were submitted subsequent to the filing of that Motion because Appellants were unable to recover the property prior to the hearing. This does not change the fact that the collateral currently exists, has been appraised on two occasions, and is available for any future appraisals which either party may require.

The statement that the Supplemental Motion was denied is not supported by the record in that neither that Motion nor Appellants' Motion for Summary Judgment were heard nor rulings entered thereon because of the Order dismissing Plaintiff's cause of action.

#### ARGUMENT

##### I

RELIANCE UPON DEPOSITIONS WHICH WERE NOT A PART OF THE RECORD NOR UTILIZED BY THE COURT WAS IMPROPER. INCONSISTENCY IN THE RECORD REQUIRES REVERSAL OF THE SUMMARY JUDGMENT

It should be noted that there is no transcript before this Court of the hearing for Summary Judgment held before Judge Fishler. Prior to filing its Brief, the Plaintiff-Appellant moved this Court to amend the records pursuant



to Rule 75(h) of the Utah Rules of Civil Procedure to strike certain depositions reflected as Pages 447 and 448 of the Record on the grounds that those depositions were still sealed and could not have been utilized by the trial court in the determination that there were no genuine issues of fact or law in this case. This Court denied the Motion to Amend the Record without prejudice and that issue is again presented for review.

It is impossible for the lower Court to have relied upon the depositions since they were sealed and never opened. For that reason, the only information which could have reasonably been utilized to deprive Appellant of its right to a trial in this action are the pleadings on file. Further, the memoranda of Respondents cite a deposition which was never before the Lower Court, that of Howard Landa. It was stated in Rich v. McGovern 551 P 2nd 1266, 1267 (Utah, 1976):

"The purpose of the Motion for Summary Judgment is to provide a means for searching out the undisputed facts as shown by the "submissions" to the Court, i.e., the pleadings, depositions, admissions and answers to interrogatories and documents; and if on that basis the controversy can be settled as a matter of law, that will save the time, trouble and expense of a trial. However inasmuch as the party moved against is being defeated without the privilege of the trial, the Court should carefully scrutinize the "submissions" and contention he makes thereon to see if his contentions and proposals as to proof of material facts, if resolved in his favor, would entitle him to prevail . . ."

The Record in this case does not meet this high standard, because there are numerous, disputed facts, such as the value of the collateral and Respondents' allegations of material misrepresentations (i.e., fraud) in the execution of the original agreement. This coupled with our inability to understand or determine Judge Fishler's basis for granting Summary Judgment, his failure to even look at the deposition, and the reference both in the

Court below and in this Court, to the deposition of Howard Landa to support Respondents' position when, in fact, that deposition has never been part of the record, requires that Appellant not be denied its day in court. It must be provided the opportunity to prove that the value of the collateral is that as contend and the Respondents received all credit to which they are legally entitled to.

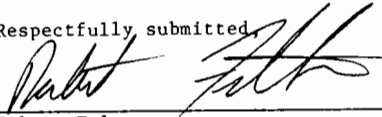
In reviewing a summary judgment, this Court should apply the same standard as that applied by the lower court. Durham v. Margetts 571 P 2nd 1332 (Utah, 1977). In order to do that, the Court must approach the record in a light towards analyzing what information was available and/or utilized by the lower court rather than attempting to structure a basis to affirm that decision and thereby deny Appellant a full judicial determination of the merits of their claim.

Within Point III of Respondents' Brief (Resondents' Brief, Page 25) there is reference to the proposition that the trial court decision should be upheld if any basis can be found to do so. This is not the proper standard for review of a summary judgment. All facts and presumptions must be viewed in favor of Appellant. This is especially true in light of this Court's often expressed view that summary judgment should not be taken lightly. It should be granted only when the record precludes all possibility that the losing party might be entitled to judgment. Bullock v. Desert Truck Center, Inc. III U. 2d 1, 354 P 2d 559 (1960). Both the value and content of the collateral are in issue here as well as whether Respondents have suffered any less through the disposition.

**CONCLUSION**

There is simply too much confusion as to the basis upon which the lower court entered Summary Judgment against the Appellant because of the sparse and inconsistent record. This, coupled with the many issues of disputed facts which are addressed in Appellant's brief, require this matter be remanded for trial and that the Summary Judgment be reversed.

Respectfully submitted,

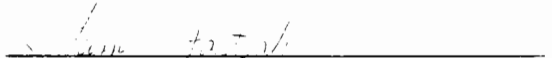


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**CERTIFICATE OF SERVICE**

I, the undersigned do hereby certify that a true and correct copy of the foregoing instrument was mailed, postage prepaid, to Kent Casting, 1000 Boston Building, Salt Lake City, Utah 84111 and to B. L. Dart 430 Ten West Broadway Building, Salt Lake City, Utah 84101 on this, the 21 day of October, 1983.



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