

1983

**Go Real Estate Company, Inc., A Utah Corporation v. R. Niel Smyth,  
As Trustee For Sjm Trust : Appellant's Brief On Appeal**

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

\* \* \* \* \*

GO REAL ESTATE COMPANY, )  
INC., a Utah corporation, )  
 )  
Plaintiff-Respondent, )  
v. )  
 )  
R. NIEL SMYTH, as Trustee )  
for SJM TRUST, )  
 )  
Defendant-Appellant. )

Case Number:  
19057

APPELLANT'S BRIEF ON APPEAL

Appeal from a Summary Judgment  
of the Fifth Judicial District Court  
for Iron County, State of Utah,  
The Honorable J. Harlan Burns Presiding

\* \* \* \* \*

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**FILED**

JUN 23 1983

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Clk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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REAL ESTATE COMPANY, :  
INC., a Utah corporation, :  
 :  
Plaintiff-Respondent, : Case No. 19057  
 :  
 :  
P. NIEL SMYTH, as Trustee :  
for SSM TRUST, :  
 :  
Defendant-Appellant. :

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BRIEF OF DEFENDANT-APPELLANT

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NATURE OF THE CASE

This case is an appeal from a Summary Judgment rendered under Rule 56, Utah Rules of Civil Procedure, by the Fifth District Court, on a complaint based upon a promissory note.

DISPOSITION IN LOWER COURT

The District Court granted Plaintiff-Respondent's Motion for Summary Judgment and entered Judgment against Defendant-Appellant in the amounts set forth in the Statement of Facts.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant asks that the Summary Judgment of the District Court be reversed, and the case remanded for trial. In the alternative, Defendant-Appellant asks that the District Court's Judgment be modified to provide for interest

only upon the principal amount of the note, and not upon any interest at the date of the Judgment.

#### STATEMENT OF FACTS

Plaintiff-Respondent brought an action against Defendant-Appellant in the Fifth District Court of Iron County, State of Utah, seeking judgment on a promissory note allegedly delivered in payment of a real estate commission. The note recited that it was due on June 1, 1981, in the sum of \$11,800 with interest at 12% per annum from April 1, 1981, to June 1, 1981, and at the rate of 14% per annum thereafter. The action additionally sought \$5,000.00 attorney's fees together with interest on the total at the rate of 14% per annum. The action was filed on or about October 19, 1982. Service of process was accepted by counsel on November 16, 1982. A Motion for Summary Judgment was made by Plaintiff-Respondent on December 3, 1982, and set for hearing before the District Court on January 4, 1983. The Motion for Summary Judgment was supported by the Affidavit of W. Dallin Gardner dated October 22, 1982, and the Affidavit of Willard R. Bishop dated December 3, 1982. The Motion for Summary Judgment was opposed by affidavits of O. Douglas Memmott dated November 29, 1982, and December 13, 1982, and the Affidavit of James L. Shumate dated December 9, 1982. The Motion for Summary Judgment was submitted to the Court without argument on January 4, 1983. By Minute Entry dated January 7, 1983, the Court granted Summary Judgment in favor of Plaintiff-Respondent subject to

plaintiff's submission of the promissory note, and set a plenary hearing on the issue of attorney's fees for January 18, 1983. On January 18, 1983, the Court heard testimony on attorney's fees. The "SUMMARY JUDGMENT, FINDINGS, CONCLUSIONS OF LAW, AND JUDGMENT" was prepared and submitted to counsel on January 27, 1983. "Objections to Proposed Summary Judgment" and a "Motion for Re-Bearing" were filed by counsel for Defendant-Appellant on February 4, 1983. The "SUMMARY JUDGMENT, FINDINGS, CONCLUSIONS OF LAW, AND JUDGMENT" was signed by the District Court on February 15, 1983.

#### ARGUMENT

##### POINT I

##### THERE IS A GENUINE ISSUE OF MATERIAL FACT WHICH SHOULD BE TRIED BEFORE THE FINDER OF FACT.

The question of consideration in the promissory note issue was raised by the Defendant-Appellant in the Answer and in both Affidavits of O. Douglas Memmott. It was the claim of the Defendant-Appellant before the trial court that there was no consideration supporting this promissory note because the Plaintiff-Respondent had not re-sold the real estate which was the basis of this reactor's commission.

Because the need for proper consideration is the essence of a contract, including a promissory note, there must be a determination by a court that adequate consideration was exchanged between the parties. This factual issue was raised in

the pleadings before the trial court. Such an issue of fact upon which reasonable minds could differ requires that a request for summary judgment be denied. Jackson v. Dabney, 645 P.2d 126 (1982). Access to the courts for the protection of rights or redress of wrongs is a constitutionally guaranteed privilege. Denial of such access through the process of summary judgment should be effected only upon the appearance that there is no reasonable probability the party moved against might prevail at trial. Utah State University of Agriculture and Applied Science v. Sutro & Co., 646 P.2d 715 (1982).

In the present case the Defendant-Appellant should be accorded the opportunity to present evidence relating to the issues of consideration. These issues of material fact are in dispute and should be tried before a finder of fact. Utah P. Civ. P. 56(c). Where the record reveals disputed issues of material fact, disposition on summary judgment is inappropriate. Amjacs Interwest, Inc., v. Designer Associates, 635 P.2d 53 (1982).

#### POINT II

#### THE "SUMMARY JUDGMENT" IN THE LOWER COURT IMPROPERLY ALLOWS INTEREST TO BE CHARGED ON PREVIOUSLY ACCRUED INTEREST.

The "Summary Judgment" signed by the trial court states: "Said Summary Judgment shall bear interest at the rate of 12% per annum from and after 4 January 1983, until paid in full together with accruing costs." This language, when coupled with the recitations of accrued interest on the \$11,800.00 principal



... on the promissory note itself, appears to provide for the compounding of interest. Such a result is not reasonable or permitted by the Utah Code. The provision on judgment interest, 15-1-4, Utah Code Annotated, 1953, as amended, states "Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties." The contract in this case does not provide for the compounding of interest.

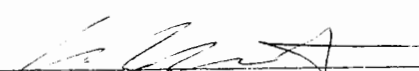
CONCLUSION

The question of consideration in this promissory note case is an issue of material fact which should be resolved at trial. For this reason the "Summary Judgment" in the lower court should be reversed and the case remanded for trial. In the alternative, the judgment should be modified to eliminate any compounding of interest on the note.

DATED this 22nd day of June, 1983.

Respectfully submitted,

JAMES L. SHUMATE

  
\_\_\_\_\_  
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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing APPELLANT'S BRIEF ON APPEAL to Mr. Willard Bishop, Attorney at Law, P.O. Box 279, Cedar City, Utah 84720 postage prepaid, this 22nd day of June, 1983.

  
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JAMES L. SHUMATE