1983

Continental Bank & Trust v. A Corporation, F. A. Badger, Adrienne Badger, John N. Busk, Patricia C. Busk, H. Mervin Wallace, Virginia S. Wallace, Robert M. Wallace And Carolyn M. Wallace : Brief of Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

CONTINENTAL BANK & TRUST, a corporation,	)	
Plaintiff-Respondent,	)	
vs.	)	
UTAH SECURITY MORTGAGE, INC., a corporation, F. A. BADGER, ADRIENNE BADGER, JOHN N. BUSK, PATRICIA C. BUSK, H. MERVIN WALLACE, VIRGINIA S. WALLACE, ROBERT M. WALLACE AND CAROLYN M. WALLACE,	)	Supreme Court No. 19086
Defendants-Appellants.	)	

BRIEF OF APPELLANT

JAMES R. BROWN
JARDINE, LINEBAUGH, BROWN & DUNN
370 East South Temple, Suite 401
Salt Lake City, UT 84111

Attorneys for Defendants-Appellants

ALBERT J. COLTON
FABIAN & CLENDENIN
800 Continental Bank Building
Salt Lake City, UT 84101

Attorneys for Plaintiff-Respondent

RONALD C. BARKER
2870 South State Street
Salt Lake City, Utah 84111

Attorney for Defendant-Appellant
Adrienne Badger

IN THE SUPREME COURT

OF THE STATE OF UTAH

CONTINENTAL BANK & TRUST, a corporation,	)	
Plaintiff-Respondent,	)	
vs.	)	
UTAH SECURITY MORTGAGE, INC., a corporation, F. A. BADGER, ADRIENNE BADGER, JOHN N. BUSK, PATRICIA C. BUSK, H. MERVIN WALLACE, VIRGINIA S. WALLACE, ROBERT M. WALLACE AND CAROLYN M. WALLACE,	)	Supreme Court No. 19086
Defendants-Appellants.	)	

BRIEF OF APPELLANT

JAMES R. BROWN
JARDINE, LINEBAUGH, BROWN & DUNN
370 East South Temple, Suite 401
Salt Lake City, UT 84111

Attorneys for Defendants-Appellants

ALBERT J. COLTON
FABIAN & CLENDENIN
800 Continental Bank Building
Salt Lake City, UT 84101

Attorneys for Plaintiff-Respondent

RONALD C. BARKER
2870 South State Street
Salt Lake City, Utah 84111

Attorney for Defendant-Appellant
Adrienne Badger

TABLE OF CONTENTS

STATUTES CITED

CASES CITED

IN THE SUPREME COURT

OF THE STATE OF UTAH

CONTINENTAL BANK & TRUST, a corporation, Plaintiff-Respondent, vs. UTAH SECURITY MORTGAGE, INC., a corporation, F. A. BADGER, ADRIENNE BADGER, JOHN N. BUSK, PATRICIA C. BUSK, H. MERVIN WALLACE, VIRGINIA S. WALLACE, ROBERT M. WALLACE AND CAROLYN M. WALLACE, Defendants-Appellants.	)	Supreme Court No. 19086

BRIEF OF APPELLANTS

NATURE OF CASE

This case involves the determination of the rights and liabilities of six guarantors under a loan agreement, who guaranteed the payment of certain loans secured by trust deeds and notes.

DISPOSITION OF CASE IN LOWER COURT

On February 22, 1983, Honorable Phillip R. Fishler of the Third District Court for Salt Lake County, State of Utah, found for plaintiff-respondent Continental Bank & Trust Company, and against defendant-appellants John M. Busk, Patricia C. Busk,

H Mervin Wallace, Virginia S. Wallace, Robert M. Wallace and Carolyn M. Wallace, jointly and severally in the amount of $101,605.76 plus interest and attorneys' fees.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the lower court's fail to discharge and release appellants in their capacity as acco dation makers, guarantors and/or sureties from all liability the loan agreement; of the lower court's failure to find tha respondent Continental Bank & Trust unjustifiably impaired its security in that it did not protect its security interest in trust deeds and notes by proper recordation thereof as require by the loan agreements and corporate authorization, and beca it did not protect its security interest in certain stock of Bonneville Thrift & Loan in that it refused or neglected to follow through with a sale of the stock to an existing, willi ready and able buyer; of the lower court's failure to find tha respondent Continental Bank waived any language in the guaran agreement giving it rights to go against the guarantors, by having taken possession of the secondary collateral commenci foreclosure suit but failing to follow through with such sale and with the lower court's finding that Appellants waived the subrogation rights by signing the Guarantee.

STATEMENT OF FACTS

On June 28, 1977, Appellants H. Mervin Wallace, Robert M. Wallace and co-defendant F. A. Badger, in their capacity as directors of the board of directors of Utah Security Mortgage, Inc, a Utah corporation (hereinafter "Utah Security"), passed a corporate resolution authorizing Utah Security to obtain loans from Respondent Continental Bank, hereinafter "Continental" (Ex 71A). The resolution stated that the loans would be secured by trust deeds and notes (warehousing arrangement) on mortgages which F.N.M.A. had committed to purchase on the secondary market. Based upon this corporate authority and upon the express direction of Continental's loan committee to have the loans secured, Continental did make loans to Utah Security from time to time. Thus, Appellants both orally and in writing communicated to Continental that they would only borrow the money if it was secured.

Pursuant to the corporate resolution, F. A. Badger executed three promissory notes from Utah Security to Continental for the loans. Two of these notes stated on their face they were secured by trust deeds and assignments thereof (Ex. 76-79). Utah Security also assigned its trust deed and notes to Continental, as agreed (Ex. 75, 177-197). All of these loans to Utah Security were secured by these trust deeds and notes which had been sold to F.N.M.A. and/or Utah Housing.

Utah Security provided to Continental a specific form for the trust deeds and notes which were sold to F.N.M.A.,

whereby payment would be made directly to F.N.M.A. to Contin tal. Continental did not complete the form as provided by th Security to receive payment directly from F.N.M.A. nor did it any time ever record and perfect the security interest in the trust deed and notes that were assigned to them as security f such loans. As of the present time, all of the trust deeds a notes which were given as security to Continental on said promissory notes have been paid for by F.N.M.A. or Utah Housi

Although each trust deed, note, and assignment there was capable of being recorded, and should have been to perfect its secured position as required by the corporate resolution, Continental did not record any of the trust deeds, notes or assignments thereon. Continental did not obtain the consent, either orally or in writing, from the Appellants to dispose of otherwise fail to take the proper steps to perfect the securit interest. These notes are still due and payable as follows: n dated August 20, 1979, originally in the amount of $143,450.00 now due, $4,625.50; note dated September 13, 1979, originaly i the amount of $28,591.73, now due, $28,591.73; and note dated October 25, 1979, originally in the amount of $29,450.00, now due, $29,450.00, together with interest on all of the three no

Appellants executed guarantee agreements to further guarantee the payment of said loans (Ex. 174, 175, 176). In November 1979, in addition to he above mentioned trust deeds a notes, promissory notes, and guarantees as security to Contin tal, Continental, after discovering its unsecured status on loans, required as additional security certain stock interes

which Utah Security and F. A. Badger had in an entity known as Bonneville Thrift & Loan (hereinafter "Bonneville").

After Continental obtain the Bonneville stock, Bonneville became an "impaired" thrift. As an "impaired" company in order to keep operating, there would be, by necessity, a need for a infusion of additional equity capital. Appellants procured a buyer, Citizen's Bank Shares and/or an individual Bunker, who offered to purchase the stock interest of Utah Security and F. A. Badger in Bonneville for an amount sufficient to pay the obligation represented by the notes. Appellents sent a demand letter to Continental on May 29, 1980 for Continental to take the necessary steps to sell the Bonneville stock (Ex. 80) and although on June 3, 1980, Continental gave Utah Security and F. A. Badger notice of its intent to exercise its right as a secured party to sell (Ex. 82, 83), no sale was held. Continental knew of the impaired status of Bonneville and was aware of the necessity to act rapidly to realize any return on the stock. Subsequently, Citizen's Bank Shares' offer to purchase the stock interest of Bonneville was reduced substantially. Eventually this offer was totally withdrawn by Citizen's Bank Shares. Bunker's offer to purchase was also withdrawn after certain litigation in Davis County was adverse to their proposal. Consequently, the value of the Bonneville stock held as security after August, 1980, because zero due to the inactivity of Continental.

Appellants did not consent to any impairment of the Bonneville stock which was held by Continental for security for their obligations, but rather specifically requested Continental

to take steps to perfect their interest. On February 22, 19 the Third District Court for Salt Lake County, State of Uta that Appellants-Guarantors fully consented to a waiver of the impairment of collateral defense under Utah Code Annotated §70A-3-606 and held them all liable to Continental under the terms of the absolute guarantee of payment, and granted Conti nental's motion for summary judgment.

ARGUMENT

POINT I

RESPONDENT CONTINENTAL BANK BREACHED ITS DUTY TO PER ITS SECURITY INTEREST IN THE LOAN COLLATERAL AND THI UNJUSTIFIABLY IMPAIRED THE SECURITY, RELEASING APPEL- LANTS FROM ALL LIABILITIES AS ACCOMMODATION MAKERS, GUARANTORS AND/OR SURETIES.

The Appellants are accommodation makers, guarantors and/or sureties as defined in Section 70A-3-606 of the Utah C Annotated, as amended, which section covers commercial paper a provides in part as follows:

> The holder discharges any party to the instrument to the extent that without such party's consent the holder . . . .
>
> (b) Unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

The courts have uniformly held that "impairment" can mean, among other things, that if Continental, in this insta fails to perfect the security interest and damage results, th the same is an "impairment" to the extent of any damage.

In the leading treatise entitled Uniform Commercial Code 2d, White and Summers, at page 525, it says:

> Under Section 3-606(1)(b) the surety is also discharged when without his consent, the creditor "unjustifiably impairs any collateral for the instrument." Often the creditor on a guaranteed obligation will have two kinds of back up for the debtors promise, the surety's promise and a security interest in the debtor's collateral. If the creditor handles the collateral carelessly so that its value is diminished or acts in a way which makes the collateral unavailable to the surety (for example, fails to perfect his security interest) then the surety may claim discharge under 3-606(1)(b).

This same position has been followed by all jurisdictions which have been called upon to rule on this particular aspect of impairment. First Bank & Trust Company v. Post, 10 Ill. App. 3d 127, 293 N.E.2d 907, 12 U.C.C.R.S. 512 (1973) was a case directly on point. In that instance, the defendant corporate officers, in order to enable the corporation to purchase equipment, negotiated a loan with plaintiff bank, signed a chattel mortgage note as guarantors, and the corporation was subsequently placed in bankruptcy. The equipment was sold by the receiver in bankruptcy. The bank had failed to properly file a financing statement and thus perfect its security interest in the collateral. The court held that this constituted an unjustifiable impairment of the collateral under U.C.C. §3-606(1)(b). The court said that by not filing a financing statement in accordance with U.C.C. Article 9, the bank held an unperfected security interest, which became subordinate to that of the trustee in bankruptcy of the corporation. That subordinate position produced unjustifiable impairment of the collateral in that the bank was prevented

to take steps to perfect their interest. On February 22, 19[illegible] the Third District Court for Salt Lake County, State of Utah that Appellants-Guarantors fully consented to a waiver of the impairment of collateral defense under Utah Code Annotated §70A-3-606 and held them all liable to Continental under the terms of the absolute guarantee of payment, and granted Continental's motion for summary judgment.

ARGUMENT

POINT I

RESPONDENT CONTINENTAL BANK BREACHED ITS DUTY TO PE[illegible] ITS SECURITY INTEREST IN THE LOAN COLLATERAL AND THU[illegible] UNJUSTIFIABLY IMPAIRED THE SECURITY, RELEASING APPEL[illegible] LANTS FROM ALL LIABILITIES AS ACCOMMODATION MAKERS, GUARANTORS AND/OR SURETIES.

The Appellants are accommodation makers, guarantors and/or sureties as defined in Section 70A-3-606 of the Utah C[illegible] Annotated, as amended, which section covers commercial paper [illegible] provides in part as follows:

> The holder discharges any party to the instrument to the extent that without such party's consent the holder . . . .
>
> (b) Unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

The courts have uniformly held that "impairment" ca[illegible] mean, among other things, that if Continental, in this insta[illegible] fails to perfect the security interest and damage results, t[illegible] the same is an "impairment" to the extent of any damage.

In the leading treatise entitled Uniform Commercial Code 2d, White and Summers, at page 525, it says:

> Under Section 3-606(1)(b) the surety is also discharged when without his consent, the creditor "unjustifiably impairs any collateral for the instrument." Often the creditor on a guaranteed obligation will have two kinds of back up for the debtors promise, the surety's promise and a security interest in the debtor's collateral. If the creditor handles the collateral carelessly so that its value is diminished or acts in a way which makes the collateral unavailable to the surety (for example, fails to perfect his security interest) then the surety may claim discharge under 3-606(1)(b).

This same position has been followed by all jurisdictions which have been called upon to rule on this particular aspect of impairment. First Bank & Trust Company v. Post, 10 Ill. App. 3d 127, 293 N.E.2d 907, 12 U.C.C.R.S. 512 (1973) was a case directly on point. In that instance, the defendant corporate officers, in order to enable the corporation to purchase equipment, negotiated a loan with plaintiff bank, signed a chattel mortgage note as guarantors, and the corporation was subsequently placed in bankruptcy. The equipment was sold by the receiver in bankruptcy. The bank had failed to properly file a financing statement and thus perfect its security interest in the collateral. The court held that this constituted an unjustifiable impairment of the collateral under U.C.C. §3-606(1)(b). The court said that by not filing a financing statement in accordance with U.C.C. Article 9, the bank held an unperfected security interest, which became subordinate to that of the trustee in bankruptcy of the corporation. That subordinate position produced unjustifiable impairment of the collateral in that the bank was prevented

from disposing of the collateral and crediting the amount rec to the indebtedness owed to it by the corporation.

In Schaffer v. Davidson, 445 P.2d 13, 5 U.C.C.R.S. (Wyo. 1968), the principal debtor gave the creditor a chatte mortgage on his automobile but then sold the car and disappe When the creditor sued, the accommodation maker argued that t creditor's failure to perfect the security interest impaired collateral and discharged her. The trial court set off the of the automobile against the face amount of the note, accru interest and attorneys' fees. On appeal, the creditor argued that "impairment of collateral" in 3-606(1)(b) refers only to disminishment of the value of the physical property subject t the security interest and not to impairment of the security itself. But the Wyoming Supreme court rejected his argument held that the accommodation maker was discharged by the payee failure to perfect. In accord with this view see Security National Bank v. Temarantz, 6 U.C.C. 157, N.Y. Sup. Ct. 1969, White v. Household Finance Company, 158 Ind. App. 394, 302 N. 828, 13 U.C.C. 858 (1973).

Thus, where a statute requires filing in order to perfect a security interest in collateral, and the loan that secured by the collateral has been guaranteed, if the secure party fails to file, the law implies a duty on the part of t secured party to make such filing and the guarantor is entit to be discharged and released from his liability on the loan the extent of the loss sustained by virtue of the secured p failure to file. In support of this view, also see American

of Commerce v. Covolo, 540 P.2d 1294, N.Mexico (1975); Behlen Mfg. Company v. First National Bank of Englewood, 472 P.2d 703, (Col. App. 1970); St. Paul Fire & M. Ins. Company v. New Jersey Bank & Trust Company, 250 A.2d 57 (N.Jersey 1969); and D. W. Jaquays & Company v. First Security Bank, 419 P.2d 85 (Ariz. 1966).

In this instance, F.N.M.A. has succeeded to the interest that Continental was assigned by way of security from Utah Security and is now of record in each and every instance. Mr. Livingston of Continental specifically asserted the following in his deposition on May 5, 1982 at page 25 and 26:

> Q. (By Mr. Brown) I take it that the bank had the . . . at least the option to perfect the security by recording the assignment of the trust deed; isn't that correct?
>
> A. Yes.
>
> Q. During your period of handling the account, did you ever record any assignments of the trust deed?
>
> A. No, we did not.
>
> Q. You didn't ever perfect any of the secured positions, then?
>
> A. No.
>
> Q. That was the decision, I take it, then, by the bank or by you not to perfect the security interest?
>
> A. That would be correct.

The terms and conditions of the loans to be made were strictly on a secured basis. Mr. Willard S. Jensen, Senior Vice President of Continental , testified in his deposition of February

5, 1982, that the corporate resolution dated 28 June 1977 con-
tained two sheets and that they were stapled together and th-
the second sheet of that corporate resolution specifically
provides:

> At a meeting held June 28, 1977, the Board of Directors resolved to allow F. Allonzo Badger to negotiate a loan with Continental Bank. This loan is to be secured by trust deed notes on mortgages that F.N.M.A. have committed to purchase.

Further, in all of the documentation of the loan committee of
all the loans that were taken by Utah Security required that t
loans be secured by assignments of notes and trust deeds on re
estate.

In Langevald v. L. R. Z. H. Corp., 74 N.J. 45, 376 A.
1931, 22 U.C.C.R.S. 106 (N.Jersey 1977) the court there dealt
with a very similar situation. The court held that the failur
of a note holder to record a mortgage securing an indebtedness
which defendants had guaranteed constituted an unjustifiable
impairment of the collateral under U.C.C. 3-606(1)(b). The
plaintiff creditor failed to record the mortgage for about a
year, during which time several other liens of substantial
amounts were recorded.

In the recent case of Mack Financial Corporation v.
Scott, 606 P.2d 993, (Idaho 1980), the court discussed at gre
length the term "unconditional guarantee" and asserted that
term "unconditional guarantee" has an established meaning wit
the realm of commercial law. It went on to indicate that the
are two types of guarantees, one being an absolute guarantee
the other being a conditional guarantee, the distinction bet

that an absolute guarantee, unlike a conditional one, casts no duty upon the creditor or holder of the obligation to attempt collection from the principal debtor before looking to the guarantor. In this instance, it appears that the guarantee executed by these defendants is, in fact, an absolute guarantee. The court then went on to determine whether a guarantor under an absolute or unconditional guarantee could avail himself of the defenses under the U.C.C. and held as follows as page 998:

> The question to be decided is whether an unconditional guarantor may avail himself of the defense of the commercial unreasonableness of creditor's disposition of collateral securing the obligation in an action by the creditor against the guarantor. The courts which have addressed the question have held that where the actions of a creditor impair the value of the collateral in its possession which secures an obligation guaranteed by a guarantor, either absolute or conditional, the guarantor will be discharged to the extent of the loss occasioned by the creditor. (Emphasis supplied and citations omitted.)

The Idaho Court cited with approval the case of Zion's First National Bank v. Hurst, 570 P.2d 1031 (Utah 1977).

In the case of Behlen Mfg., supra, the Colorado court discussed at great length whether or not a guarantor on an unconditional guarantee could be released where the creditor had failed to record an assignment and mortgage, which resulted in a loss to the guarantor. The court discussed at length the various authorities and then cited with approval general law that is reported in Am. Jur.2d under Suretyship, and then concluded at 706 as follows:

> The above quoted section of Am. Jur. accurately state the law as to suretyship and this law is equally applicable to an unconditional guarantee.

> The guarantor has a right of subrogation to the security upon the payment of the obligation.

In a case cited by the Colorado court, the law is further delineated as follows:

> It is well settled that where one secondarily liable is called on to make good on his obligation and pay the debt, he steps into the shoes of the former creditor. He becomes subrogated to all rights of the credit against the principal debtor, including the security given to secure the debt. Allen v. See, 10th Cir. 196 F.2d 608.

In our instance, we no longer have any collateral that has value because of the failure of Continental to record its interest in the trust deed and note in the appropriate county recorder's office, or to take the necessary steps to effectuate sale of the stock interest to Citizen's Bank Shares of Bonneville Thrift at a time in which the same had value. Subsequently, Citizen's Bank Shares offer was withdrawn in its entirety and Bonneville Thrift & Loan went through reorganization and the stock is no longer of any value.

In 74 Am. Jur.2d page 68, Section 93 under Suretyship it states in part:

> The collateral security taken by a creditor may require some act on the part of the creditor to make it a valid security. Where such is the case, the law implies an agreement on his part to perform the act. If he neglects or fails to do so and the security is thereby lost or impaired, the surety may be discharged to the extent of his loss or injury. Thus, where collateral security is given in the form of a mortgage, deed of trust, or similar instrument, and the statute requires it to be filed or recorded in order to make it valid against innocent purchasers, it is the duty of the creditor to see that the instrument is properly filed or recorded; and if he negligently fails to act, the surety will be discharged to the extent

of the loss occasioned, or perhaps, completely discharged.

POINT II

APPELLANT-GUARANTORS DID NOT WAIVE THEIR RIGHT TO SUBROGATION BY SIGNING THE GUARANTY FORM PROVIDED BY RESPONDENT BANK

The right of a guarantor-surety to subrogation can be waived by a guarantor only by the most express and unequivocal language. The right does not originate in contract and cannot likely be destroyed by contract. National Acceptance Company of America v. Demes, 446 F. Supp. 388 (N.D. Ill. E.D. 1977); American Bank of Commerce v. Corvolo, supra, at 1299; First National Bank in Grand Forks v. Haugen Ford, Inc., 219 N.W.2d 847 (N.D. 1974). Behlen Mfg, supra, at 707, 708; and Jacquays, supra, at 89.

It is well settled that the rights of the guarantor as against the creditor are determined by the terms of the contract of the parties. 38 Am. Jur.2d, Guaranty, Section 126, Behlen Mfg, supra, at 705. In Behlen, supra, the court recognized that where there is more than one contract, i.e. a guaranty and a loan agreement, the rights and obligations of the parties are to be determined from all the documents and the law applicable thereto. In Joe Heaston Tractor and Implement Company v. Securities Acceptance Corporation, 248 F.2d 196, 200, the court held it was necessary to consider the contract as a whole, the purpose for which it was given, together with all the surrounding circumstances existing at the time the guarantee was executed.

This court in Zions v. Hurst, supra, determined that looking at guaranty contract disputes, one should look to the "fundamentals of contract law; i.e., the ascertaining of the intent upon which there was a meeting of the minds" supra at 1033. Also, in Union Pacific Railroad Company v. El Paso Nat. Gas Company, 408 P.2d 910, this court said that the law does look with favor upon one exacting a covenant to relieve himself of a basic duty which the law imposes on him and that when interpreting the contract, the objective is to determine what parties intended at the time it was executed, and that it be clearly expressed and understood.

Of concern to the lower court in this instance was the fact that Appellant-Guarantors allegedly consented to a waiver release of right in the collateral by having signed Continental guaranty form. It is Appellants' contention that the alleged waiver was not by the required express and unequivocal language because as evidenced by the corporate resolution authorizing the loan, it was Appellants' intent that the loan be made on the condition that it be secured by trust deeds and notes thereon. Appellants argue that any boilerplate language to the contrary the guaranty was not their intent at the time they executed the contract. The loan committee required that for any loan to be made to Utah Security, it was to be secured by assignments of trust deeds and notes.

Continental and the lower courts both rely upon American Bank of Commerce v. Covolo, supra, as the controlling law. In that case a bank took a second lien upon the corporation's

license, as part of the security for $100,000.00 loan to the corporation who was entering the restaurant business, but the bank failed to perfect the security interest in it. The $100,000.00 loan was guaranteed by the corporation's four stockholders. Thereafter, an additional $10,000.00 promissory note was executed by the corporation, and also three personal notes in the amount of $4,000.00 each. In an action by the guarantors of the loan the court agreed with the guarantors that under U.C.C. §3-601(1)(b) the bank had a duty of timely perfecting the security interest in the liquor license. But the court reversed itself saying that the guarantors expressly waived their right to subrogation and any benefit to participate in the security.

However, some very key distinctions between Covolo and the case at hand have been ignored. First of all, in deciding that the guarantors in Covolo expressly waived their right of subrogation by signing the guaranty, the New Mexico court says, "The Guarantors waive their rights to subrogation, the very right they now claim was impaired, and waive and release any claims to the security and 'any benefit of, and any right to participate in any security now or hereafter held by Bank.'" Covolo at 1298. There is no such language in the guaranty between Utah Security and Continental. Nowhere in that guaranty do the Appellant-Guarantors waive or release any claim to, or benefit of the security, or to participate in the security. This distinction is crucial inasmuch as this waiver and release language found in the Covolo guaranty, and absent in Utah Security's

guaranty, left the New Mexico Court no choice but to find tha the guarantors had waived their subrogration rights. Hence, Covolo cannot be the standard for imposing the same determina on Appellant-Guarantors. Our case parts company with Covolo the following particulars:

a. The waiver and release language found in th Covolo guaranty does not exist in the Continental - Security guaranty.

b. The New Mexico court also said in Covolo, "s was no loan agreement or contract of broader compass touching the guarantor's obligations, other than the continuing guarantees." Covolo at 1298. Covolo turn simply on reading and interpreting the provisions of guaranty agreement to determine whether the guarantor should be relieved of liability under the general la suretyship. In our case, however, we are not merely left with the guaranty agreement to determine the ri and obligations of the guarantors. We also have a l agreement which can be considered and construed toge with the guarantees. Such consideration is proper t determine the intent of the parties at the time they exercised the guaranty. It was clearly their intent that the loans were to be secured, and not that thi right be waived, as it was in Corvolo.

c. Continental's own loan committee required t loans to be secured.

On page 35 of his deposition taken on February 5, 1982, Willard S. Jensen, executive vice-president of Continental said:

> Q. (By Mr. Brown) Did you ever make, to your knowledge, Utah Security Mortgage, Inc. a loan that was not secured by an assignment of a trust deed and a trust deed note and/or mortgage or mortgage note?
>
> A. Not to my knowledge.

In its course of dealing with Utah Security, Continental never made a loan to Utah Security unless it was secured. Appellant-Guarantors had no reason to believe any loan would ever be given to them without such security.

d. The New Mexico court in Covolo decided the notes in that case were intended to be unsecured because they were so specified on their faces. But again, two of the three promissory notes given by Utah Security to Continental indicate on their faces that they are secured by trust deeds or assignments of trust deeds (Ex. 78, 79). Continental admits, however, that even the third note, although not shown on its face, was secured (Ex. 5 of the Willard S. Jensen deposition).

From all of the foregoing, it is clear that the intent of the parties was that the loans be secured, and, that there was never any waiver by Appellant-Guarantors.

In addition, the New Mexico court, despite finding the bank's omissions to perfect its security interest were arguably

negligent, found that the bank had acted in good faith, diligence, reasonableness and care in having the guarantors execute the guarantees. The U.C.C. §1-201(9) defines "good faith" as "honesty in fact in the conduct or transaction concerned." Appellants maintain that Continental's conduct in the transaction was not honesty in fact, in that Continental knew that Appellants would not, nor were they authorized to by the corporation, obtain a loan unless it was secured.

Finally, in St. Paul Fire, supra, the New Jersey Supreme Court took an even more protective stand toward guarantors. There the plaintiff bank failed to file a notice of lending on loans extended and secured by monies to be earned in the construction project. Despite the fact that the guarantor had signed a guaranty with the standard waiver language, the court found that the guaranty language included no provision exonerating the bank from the legally implied consequences of failure to file. The court also said at page 59:

> In situations where the creditor alone can take the action necessary for the preservation of security, he will be required to do so. Where he neglects to record a mortgage or transfer, or gives no notice to the obligor on a chose in action of its assignment, the security will be discharged to the extent of his loss. . . .
>
> Furthermore, a contract of suretyship is, at least in general, construed in favor of surety. . . .
>
> This contract of guaranty is in the form of a lengthy document in fine print, obviously prepared by the bank's attorneys. Such an instrument, like a policy of insurance, documents used in consumer credit sales and other forms of agreement in common use, will be most strictly construed against the party which has prepared and offer the

particular instrument for execution. (Emphasis added).

Appellants urge this court to recognize that this particular case involves unique facts and issues, such which beg for the application of the policy of protecting the surety's rights of subrogation. Such an application would be more than warranted here, where the intent of these Appellants was to in no wise consent to an exoneration of Continental from its duty to protect its security by filing, that in fact Continental is not relieved of this duty, even by their own guaranty form, which should be strictly construed against them. These Appellants made very clear their intent to Continental, both orally and in writing, and Continental should thus not be permitted to circumvent and over reach this intent by the subsequent execution of the guaranties.

POINT III

RESPONDENT CONTINENTAL BANK ACTED COMMERCIALLY UNREASONABLE AND THUS WAIVED ANY RIGHT THEY HAD UNDER THE GUARANTY TO LOOK TO APPELLANTS IN THEIR CAPACITY AS ACCOMMODATION MAKERS, GUARANTORS AND/OR SURETIES FOR THE SATISFACTION OF THEIR CLAIM BY HAVING TAKEN POSSESSION OF THE SECONDARY COLLATERAL, AND THE COMMENCING, BUT NOT COMPLETING FORECLOSURE PROCEEDINGS.

Section 70A-9-207 of the Utah Code Annotated, 1953 as amended, requires a secured party to act in a commercially reasonable manner with regard to the debtors collateral. In F.M.A. Financial Corporation v. Pro Printers, 590 P.2d 803 (1979) this court determined that when a creditor who respossesses

security does not give notice of the sale or the sale is commercially unreasonable, the creditor can obtain no deficiency from the guarantor. Also see Zions v. Hurst, supra, which is in accordance with this law. In Strevell-Paterson Company, Inc. v. Francis, 646 P.2d 741 (1982) this court upheld the foregoing requirement of Pro Printers, supra, but also stood for the proposition that a creditor does not have to exhaust the security before a guarantor could be held liable, when the security was not repossessed.

Appellants agree that they can be held liable for the debt in their capacity as guarantors without Continental having to first exhaust the security. However, Appellants argue that once the security was in the possession of Continental, Strevell-Paterson was no longer controlling. As was the situation in Pro Printers, similarly Continental had in their possession the secondary collateral, the Bonneville stock. Continental had given notice of their election to exhaust the security at a sale. Having made that election and taken only the first of the two required steps, Continental waived any right it might have previously had to hold Appellant-Guarantors liable. Appellant-Guarantors asked the court to consider applying the law of election of remedies in this situation. Once a party has made affirmative act of election of remedies, he is bound. Utah has adopted this view. When two or more co-existing remedies, of which the party has a right to elect, exist, and the alternate remedies are inconsistent, and the party chooses one by bringing an action based on one of the inconsistent remedies, the elec-

is final, and failure to secure satisfaction by means of the remedy which he has adopted furnishes no legal reason to permit him to resort to the other. Utah Idaho C.R. Company v. Industrial Commission, 86 Utah 363, 35 P.2d 842; Farmers and Merchants Bank v. Universal C.I.T. Credit Corporation, 4 Utah 2d 155, 298 P.2d 1045; and Cook v. Covey-Ballard Motor Company, 69 Utah 161, 253 P. 196.

An election between two inconsistent remedies is final, conclusive, and irrevocable, and constitutes an absolute bar to any action, suit, or proceeding inconsistent with that asserted by the election. It is the first act of election that acts as a bar. Section 32 Election of Remedies, 25 Am. Jur. at 674, 675; and Salt Lake City v. Industrial Commission, 81 Utah 213, 17 P.2d 239.

Section 70A-1-102(3) of the Utah Code Annotated, 1953 as amended, states that an unconditional guaranty agreement cannot waive the obligation of good faith, diligence, reasonableness and care. That provision also says that "parties may by agreement determine the standards by which the performance of such obligation is to be measured if such standards are not manifestly unreasonable."

Respondent bank has asserted that the language of the guaranty provides some standard of performance of the surety obligation, which language does not impose on Continental a duty to sell the Bonneville stock. While this standard may be quite reasonable given total inaction on the part of Continental, Appellants vigorously contend that the absence of such a duty is

wholly unreasonable when the creditor, Continental, half-way embarks using one form of action, but then midway through the course of action, either intentionally or negligently, fails follow through, but rather attempts to backtrack and pursue another cause of action. When Continental gave notice of its intention to exhaust and sell the security, then only to change its mind by failure to consummate a sale and deciding to go against Appellant-Guarantors, such action was a violation of faith, diligence, reasonableness and care, which care was not, and cannot be, waived by Appellants.

Appellants pray for a decision preventing a creditor, such as Continental, from arbitrarily waivering between one remedy and another, and yet being able to perserve its rights against the guarantor under the blanket protection of good faith diligence, reasonableness and care.

CONCLUSION

It is respectfully submitted that the lower court erred in not releasing or discharging the Appellant-Guarantors from their liability on the loan agreement, inasmuch as Continental impaired its security by failing to perfect such interest and ignoring the intent and request of Appellants that the same be secured, and because no language in the guarantee waived Appellant-Guarantors' right to subrogation nor exonerated Continental of the duty to perfect its interest, and inasmuch

Continental was unreasonable and in bad faith when it proceeded to take steps to exhaust the security interest, but then failing to follow through with the same.

Dated this 2nd day of June, 1983.

Respectfully submitted,

JARDINE, LINEBAUGH, BROWN & DUNN

By: _____
JAMES R. BROWN
Attorneys for Defendants-Appellants

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing Brief of Appellant was mailed to:

ALBERT J. COLTON
FABIAN & CLENDENIN
800 Continental Bank Building
Salt Lake City, UT 84101

RONALD C. BARKER
2870 South State Street
Salt Lake City, Utah 84111

on the 2nd day of June, 1983, postage prepaid.

_____