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IN THE SUPREME COURT OF THE STATE OF UTAH

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RICHARD M. JOHNSTON, SHAUNA M. JOHNSTON, THOMAS W. McDONALD, and LOIS S. McDONALD,

Plaintiffs/Appellants,

v.

LLOYD H. AUSTIN, VIRGINIA ANN AUSTIN, INCOME REALTY AND MORTGAGE, INC., a Utah corporation, BOYD E. NELSON, BARBARA L. NELSON, JOHN FRANKS, DAVID J. ISBELL and RUTH ANN ISBELL,

Defendants/Respondents.

Case No. 19401

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APPELLANTS' BRIEF

AN APPEAL FROM AN ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

THE HONORABLE DOUGLAS L. CORNABY, PRESIDING

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v.	:	
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Defendants/Respondents.	:	

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NATURE OF THE CASE

This is Plaintiffs' appeal of an Order entered by the Honorable Douglas L. Cornaby on August 19, 1983, denying Plaintiffs' Motion for Summary Judgment, dismissing their Complaint with prejudice, and granting Defendants' Nelson's Motion for Summary Judgment.

DISPOSITION IN THE LOWER COURT

This is a case dealing with a Sellers' remedies under a Uniform Real Estate Contract. On September 15, 1982, Appellants, the Sellers, filed a Complaint in Davis County, Utah, seeking to foreclose as a mortgage Respondents' (Austin's) interests in certain real property because of a failure by Austins to timely

pay amounts due under the Contract. The Trial Court denied Appellants' Motion for Summary Judgment seeking an Order of foreclosure and granted Respondents Boyd E. and Barbara L. Nelson's Motion for Partial Summary Judgment which resulted in the dismissal of Appellants' Complaint.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the Trial Court's Orders dismissing Plaintiffs' Complaint and granting Respondents Nelsons' Motion for Partial Summary Judgment. Appellants also seek an Order granting Appellants' Motion for Summary Judgment allowing Appellants to foreclosure the Respondents' interest in the subject property, pursuant to the terms of the original Uniform Real Estate Contract executed between Appellants and Respondents Austins.

STATEMENT OF FACTS

On January 15, 1979, Appellants Richard M. and Shauna M. Johnston, and Thomas W. and Lois W. McDonald (hereinafter referred to as "Sellers"), and Respondents Lloyd H. Austin and his wife, Virginia Ann Austin (hereinafter referred to as "Buyers"), executed a Uniform Real Estate Contract (hereinafter referred to as "Contract") (R-7). Under the Contract, Sellers agreed to sell to Buyers a four-plex apartment house known as 10 South Main Street, North Salt Lake, Utah.

The Buyers Austin agreed to pay Sellers the principal sum of $75,000 payable with a $10,000 down payment and the balance of $65,000 to be paid in monthly installments of $579.02, which included payments of interest and principal, in addition to insurance and taxes.

A Notice of Interest of the Contract was recorded on January 15, 1979, in the Davis County Recorder's Office. Thereafter Austins sold their interest in the subject property which was, then sold four more times to the other Respondents named above, none of whom had any direct contractual relationship with Appellants. The Austins installment payment for August, 1980, was not timely made because their check was dishonored due to insufficient funds. Appellants, at that time, advised Respondents Austins that late payments would not be tolerated (R-156,171).

Then, on September 4, 1980, an escrow agreement with Escrow Services, Inc., was entered into between the Buyers Austins and their subpurchasers (R-158,197). The escrow agreement, among other things, appointed Escrow Services as agent for Austins and their subpuchasers for the payment of the Contract installments to Appellant. Appellants were not parties to this agreement nor was the original contract in any way modified to permit a change in the ultimate responsibility for payments.

In June, 1982, Appellants received a check from Escrow Services, Inc., for the June 15, 1982, payment. This check was

returned due to insufficient funds (R-222). Appellant Richard M. Johnston personally notified Virginia Ann Austin <u>before</u> June 15, 1982, of the dishonored check (R-222). Likewise, Appellants did not receive the payment due them on July 15, 1982 (R-170). On four separate occasions between June 15, 1982, and July 19, 1982, the Appellant, Richard M. Johnston, personally contacted Virginia Ann Austin concerning the Austins failure to make the June 15 and July 15 payments (R-222). Finally, on July 19, 1982, Sellers caused formal written notice of default and acceleration of the Contract balance to be given Respondent Austins (R-9). On August 16, 1982, the Buyers Austins tendered a check for the past due June and July payments, which tender was refused by Appellants (R-24). On September 15, 1982, Appellants instituted this action by filing a Complaint in the District Court of Davis County seeking foreclosure against the property pursuant to paragraph 16(C) of the Contract and §78-37-1 <u>Utah Code Ann</u>. (1953).

All Respondents, except the Austins, are subpurchasers of the property. None of these Respondents have a direct contractual relationship with the Appellants. All Respondents were personally served, except for Income Realty and Mortgage, Inc., a Utah corporation, for which the registered agent could not be found and, pursuant to statute, service was made upon the Secretary of State of the State of Utah. Respondents Income Realty and Mortgage, Inc., David J. Isbell and Ruth Ann Isbell failed to answer Appellants' Complaint and their default was

entered (R-43,44,70). Respondents Austins (the original Buyers) answered Appellants' Complaint pro se, but have not been represented by counsel at any hearings on this matter nor have they appeared in person.

Pursuant to Appellants' Request for Admissions, the Respondents Austins admitted that Appellants notified them, as above indicated, concerning the delinquencies of the June 15, 1982, and July 19, 1982, installments before they received written notice of default and acceleration (R-155). Based upon the Austins admissions and upon the Affidavit filed by Richard M. Johnston, Appellants moved for a Summary Judgment against the Respondents allowing for a foreclosure against the Respondents' interest in the property.

ARGUMENT

POINT I

THE DEMAND FOR CURE RECEIVED BY THE BUYERS AND NOTICE OF ACCELERATION COMPLIED WITH THE TERMS OF THE UNIFORM REAL ESTATE CONTRACT AND WAS SUFFICIENT TO PERMIT THE SELLERS TO FORECLOSE THE BUYERS' INTEREST IN THE PROPERTY

The January 15, 1979, Uniform Real Estate Contract entered into between Sellers and the Austins states as follows concerning notice requirements:

> 16. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within thirty days thereafter, the Seller, at his option, shall have the following alternative remedies . . .

> C. Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this Contract as a note and mortgage, and pass title to the Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah, and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorney's fees; and the Seller may have a judgment for any deficiency which may remain. . . . (R-7)

The Buyers did not make the June 15, 1982, and the July 15, 1982, payments as required by the Contract. The check received for the June 15, 1982, payment was returned due to insufficient funds. Austins were given notice of this fact prior to June 15, 1982 (R-222). On four separate occasions between June 15, 1982, and July 19, 1982, Richard M. Johnston, one of the Sellers, personally contacted Virginia Ann Austin, concerning the failure to receive these payments (R-222). After the thirty day period called for in the Contract, the Sellers gave written notice of default and exercised their option under the Contract to accelerate the balance of payments due and owing under the Contract, and treat it as a note and mortgage (R-9). On August 16, 1982, sixty-two days after the June 15, 1982, payment was due, the Austins for the first time attempted to tender a check for the past due June and July payments. The Sellers returned the tendered check and indicated to the Austins that they were continuing to declare the entire unpaid balance due and payable due to the delinquency. Under the terms of the Contract, nothing further was required by Appellants by way of notice. The

Appellants gave the Austins ample time to cure the June 15 default before written notice of acceleration was given on July 19, 1982. The Austins had actual notice in excess of thirty days before the Appellants gave written notice of acceleration. The Austins had a contractual right to cure, within thirty days of their default, but did not do so. Furthermore, paragraph 17 of the Contract provides that time is of the essence in the Contract. The Trial Court erred in its conclusion of law that the tender on August 16, 1982, was timely when it was, in fact, sixty-two days late and after the Appellants had exercised their option to accelerate the principal due under the Contract.

Not only did the Appellants comply with the requirements of the Contract, but the Appellants went further and on five occasions, before the written notice of July 19, 1982, gave verbal notice to the Austins that the June and July, 1982, payments had not been made (R-222). The Trial Court erred by holding that written notice of non-payment and demand for payment be given before the Sellers could give written notice of acceleration of the unpaid balance (R-223).

Utah cases dealing with similar situations require that the buyer be given sufficient notice so that he will fully understand what was being required of him to bring the contract current. In Grow v. Marwick Development, Inc., 621 P.2d 1249 (Utah, 1980), this Court stated that:

> The provisions in the Uniform Real Estate Contract are not self executing, and to enforce them, it requires some affirmative act on the part of the Seller to

> notify the Buyer of what specific provision in the Contract the Seller is proceeding under and state what the Buyer must do to bring the Contract current. Id. at 1251. [Emphasis added]

It is undisputed that when the check for the June 15, 1982, payment was returned due to insufficient funds, the Sellers gave the Austins immediate notice of such (R-222). It is also undisputed that on four other occasions between June 15 and July 19 the Appellants gave Austins notice that they expected the June 15 and July 15, 1982, payments to be made and the defaults cured. The Austins were allowed a period in excess of thirty days after they received notice of their default to cure such default. In spite of that, they did not even attempt to cure their default until after the notice of acceleration was sent to them. No allegation has been made by Austins that they were confused about what was required to cure the defaults. The only defense which Respondents have raised has been that the notice should have been in written form rather than in verbal form and this was raised only by the Nelsons, the subpurchasers, not the original purchasers (R-192).

It is clear that the Appellants acted affirmatively in this case to notify the Buyers of their default. The question before this Court is whether or not the affirmative action that was taken by the Appellants, namely verbal notice on five separate occasions to the Austins within the thirty day grace period, was sufficient notice to allow the Appellants to exercise the remedy of declaring the entire unpaid balance accelerated under

paragraph 16(C) of the Uniform Real Estate Contract. The Trial Court was clearly in error in its conclusion that the law requires that a Seller give written notice to Buyer of its default and that the only affirmative act that is satisfactory under a Uniform Real Estate Contract is written notice before the Seller can elect to accelerate the Contract balance. Such an error of law requires a reversal by this Court.

POINT II

NOTICE OF DEFAULT NEED ONLY BE GIVEN TO THOSE WITH WHOM THE SELLER IS IN PRIVITY OF CONTRACT

The Trial Court in granting Partial Summary Judgment against the Appellants erred in concluding as a matter of law that written notice of default must be given by an original Seller to each party claiming an interest in the property under the Uniform Real Estate Contract (R-223). By so ruling, the Trial Court erroneously concluded that even though the Sellers were not in privity of contract with everyone claiming an interest in the subject property, they still should be required to give notice of default to each of those individuals.

In the case of Lamont v. Evjen, 29 Ut.2d 266, 508 P.2d 532 (1973), this Court in ruling on the adequacy of the seller's notice, said that the seller "must give the purchaser notice of the default . . ." Id. at 534. [Emphasis added] This Court then quoted from 52 Am.Jur., Tender, §41, which deals with tender in contractual situations,

> . . . The debt does not become due on the mere default in payment, but by affirmative action by which the creditor makes it known to the debtor that he intends to declare the whole debt due. . . . Such acceleration stipulations should be so construed, if possible and consistent with the language employed, as to give the protection intended thereby to both the debtor and the creditor . . . Id. at 534. [Emphasis added]

In this case, the Respondents Austins, the original purchasers sold their interest, under contract, to Income Realty and Mortgage, Inc., who then sold its interest by contract to Respondents Nelsons. The Nelsons in turn sold their interest, under contract, to Respondent Franks who, in turn, sold his interest to Respondents Isbells, the persons currently in possession of the property. Given those facts, the Trial Court erroneously concluded that there was some contractual duty imposed on Appellant to notify anyone who may have claimed an interest in the property of the contractual default of the Austins regardless of whether or not privity of contract existed.

This Court has not been faced with this particular issue, but in a case very similar to the case at hand, the Supreme Court of New Mexico in Campbell v. Kerr, 95 N.M. 73, 618 P.2d 1237 (1980), reviewed a situation in which the original purchaser was in default under a Real Estate Contract with the original vendor. That Court, upon reviewing the facts, stated:

> We know of no affirmative duty placed upon the vendor in this situation to attempt to . . . contact subpurchasers. We have stated that the vendee is entitled to reasonable notice of demand. The Samuells-Kerr contract provides for such reasonable notice unambiguously, and it is our function to enforce it as made. Schaefer v. Hinkle, 93 N.M. 129, 579 P.2d

> 314 (1979). . . . Likewise, there is privity of estate, but not privity of contract between a vendor and subpurchasers. Ex parte Robinson, 244 Ala. 313, 13 So.2d 402 (1943); Geo. V. Clark Co. v. New York New Haven and H. R. Co., 279 App.Div. 39, 197 N.Y.S.2d 721 (1951). Stebnowski had no legal duty to notify Campbell of his demand upon Kerr. A subpurchaser of land from a purchaser with notice of the terms of the contract between the original vendor and the purchaser takes the land subject to such terms. Frye v. Partridge, 82 Ill. 267 (1876). . . . We can see no equities in Campbell's favor which would require Stebnowski to notify Campbell of her demands upon Kerr. Id. at 1243.

The Court, in Campbell, supra, applied elementary principles of contract law and in so doing protected the rights of that seller under the contract which the Trial Court in this case failed to apply and in so doing violated and infringed upon the contract rights of the Appellant. The Idaho Supreme Court has also recognized these principles and stated that a Uniform Real Estate Contract should be governed by contract principles and consequently the terms of the contract should govern the transaction. In Ellis v. Butterfield, 98 Ida. 644, 570 P.2d 1334 (1977), the Court compared the three common devices used to transfer interest in real property. It stated:

> An installment land sale contract is one of three security devices generally used in credit transactions in real estate and is, in essence, a hybrid composed of property law concepts on the one hand and contract law on the other. While the transaction involves the transfer of ownership of real property, it is governed by the terms of a contract in which vendor and purchaser join. . . . The contract is frequently called a "poor man's mortgage" because the vendor, as with a mortgage, finances the purchaser's acquisition of the property by accepting installment payment on the purchase price over a period of years, but the purchaser does not receive the benefit of those remedial statutes protecting the right of mortgagors.

> The advantage to the purchaser is that he does not have to procure the expensive (and sometimes unavailable) institutional financing; the advantage to the vendor is the theoretically simple procedure of terminating the purchaser's interest in the event of default as contrasted with the expensive and time consuming mortgage foreclosure action, with its right of redemption. . . . But when the purchaser is in default, what is his interest and what are his rights under the defaulted contract? The parties to the transaction chose the contract as the vehicle by which the transfer of the property would be governed. . . . We conclude, therefore, that these defaulting purchasers had no right to specific performance of the contract after the thirty day period had run and the vendors had terminated the contract, nor did they have an equitable right of redemption. The rights of these parties were defined by the contract . . ." *Id.* at 1336, 1339. [Emphasis added]

In this case, the Appellants chose to accelerate the balance and declare it due and payable and treat the contract as a mortgage as they were allowed to do under the Contract which is certainly more preferable to declaring a forfeiture which was also an option of the Appellants.

The Trial Court incorrectly attempted to give all subpurchasers, who were not parties to the original contract, additional protection above and beyond their rights to redeem under the mortgage statutes. Consequently, it ignored the contract and nullified the practical economic benefit of allowing individuals to sell and purchase property on the basis of a Uniform Real Estate Contract. By this ruling, sellers would be required to go to the extraordinary legal expense of purchasing a title report and determining all those who have an interest in the property before it could make demand upon an original

purchaser to remedy a default under the Contract. This is clearly an error which requires reversal by this Court.

POINT III

PAYMENT TO AN ESCROW COMPANY, WHO WAS NOT AN AGENT OF APPELLANTS, DID NOT CONSTITUTE PAYMENT TO THE APPELLANTS

The law is clear concerning what actions constitute payment of a debt. The Trial Court, however, erred in its ruling that the action by Respondents Austins in this case was a valid payment of the installment debt contained in the Uniform Real Estate Contract. Respondents Austins, and possibly other subpurchasers from them, made arrangements with a company by the name of Escrow Services, Inc., in which all payments by the subpurchasers were to be made to Escrow Services, Inc., which would then make payments to those individuals to whom payment was due, including the Appellants (R-221). Appellants were not parties to this arrangement. The Austins allege that monies were paid to Escrow Services, Inc., during the beginning of June, 1982, out of which Escrow Services, Inc., was to pay the amount called for under the Contract to Appellants. Escrow Services, Inc., transmitted a check to the Appellants for the June 15, 1982, payment which was dishonored upon presentment for payment due to insufficient funds. It was upon this dishonorment of the check that Appellants immediately notified the Austins that the check for the June payment had been dishonored and that Appellants expected payment of the June installment immediately.

The Trial Court made a serious error in determining that the remittance of monies to Escrow Services, Inc., by the Buyers was a payment of their obligation to the Appellants. The Trial Court stated:

> . . . Defendants made their payments. Now, its unfortunate that Defendant [sic] or the Plaintiff didn't get their payments. We use escrow companies constantly. We ought to be able to rely on them, and they are like everybody else. They can have their problems and did so in this case. (R-258)

The law is very clear that this construction by the Trial Court is erroneous. In 60 Am.Jur.2d, Payment, §17, the following rule is stated: "An obligor is bound to pay his obligee in person or by agent, and does not discharge his obligation merely by making all reasonable efforts to transmit to the obligee the amount due him". It is clearly the law that the risk is placed upon the obligor to make sure that the obligee, or Appellants in this case, receive the monies that are due them under the Contract.

In an analogous situation, transmittal of payment by mail places the risk on the obligor and not the obligee.

> Therefore, depositing in the mail a letter containing money and addressed to the obligee does not discharge the obligation if the remittance is not received by the obligee . . . 60 Am.Jur.2d, Payment, §17, page 622.

The Trial Court's ruling was also erroneous due to the fact that the Respondents had never plead that the payment to Escrow Services, Inc., was a sufficient payment of the debt.

> A plea of payment to one other than the creditor is insufficient, absent allegations that the payee was the

creditor's agent, or is authorized to receive payment on the creditor's behalf. 60 Am.Jur 2d, Payment, §118, page 699.

Furthermore, 60 Am.Jur.2d, Payment, §72, states that:

To discharge an obligation, payment must be made to the obligee himself or to some third person authorized to receive it. A payment to an unauthorized person does not discharge the obligation; the debtor takes the risk the payment will be applied by a third person on the debt. Id. at 659.

The Contract in question requires that payment be made by the Austins directly to the Appellants. It does not authorize or even contemplate that payment be made to any third person, including Escrow Services, Inc. Therefore, when the Austins unilaterally chose to use a third person through whom to make the Contract payments, they likewise assumed all risks connected with the third party not making the required payments. This principle has been used by this Court even in cases where it seems that there are two innocent parties.

In G. Eugene England Foundation v. Smith's Food King #6, 542 P.2d 753 (Utah, 1975), this Court stated that where one of two innocent parties must suffer a loss because of the misconduct of a third party, the law generally leans towards placing the loss upon the one who made the choice and created the circumstance out of which the loss came about. See also Valley Bank & Trust Co. v Gerber, 526 P.2d 1121 (Utah, 1974); Hanson v. Beehive Security Company, 14 Ut.2d 157, 380 P.2d 66 (1963); and Oklahoma Publishing Co. v. Video Independent Theaters, Inc., 522 P.2d 1029 (Okla.,1974).

The present case involves a contractual situation where the Austins were to make payments directly to the Appellants. The Austins took it upon themselves to use the services of Escrow Services, Inc., to remit payment to Appellants. Escrow Services, Inc., thereafter, did not remit the funds to the Appellants and, consequently, placed the Austins in a position of default. Appellants had no control over the actions of Escrow Services, Inc.

In summary, the Trial Court erred in its ruling that payment by Austins to Escrow Services, Inc., constituted payment to Appellants under the terms of the Contract and in so doing it unjustly violated the contractual rights of the Appellants as created by the written words of the Contract.

POINT IV

THE APPELLANTS ARE ENTITLED TO FORECLOSE THE RESPONDENTS' INTEREST IN THE SUBJECT PROPERTY AS A MATTER OF LAW

The following relevant facts are undisputed:

(1) The Austins did not timely make the June and July, 1982, payments;

(2) Appellants gave notices of these defaults to the Austins at least five times;

(3) The Austins' default was not remedied within the thirty day time period provided under the Contract;

(4) Consequently, Appellants accelerated the balance due under the Contract; and

(5) The accelerated balance has not been paid. Appellants are therefore entitled to foreclose the Austins' interest in the property as a matter of law.

This Court, on numerous occasions, has defined certain principles which are applicable to the situation when a vendor chooses to exercise the foreclosure option under a Uniform Real Estate Contract. Foreclosure was upheld as an appropriate remedy in American Savings and Loan Association v. Blonquist, 21 Ut.2d 289, 445 P.2d 1 (1968). In Park Valley Corporation v. Bagley, 635 P.2d 65 (Utah, 1981), this Court stated that it was not up to the Court to rewrite a contract despite the effects of a poor bargain. The remedy outlined in paragraph 16(C) of the Uniform Real Estate Contract provides a valid remedy which the parties contracted for and which Appellants should not be denied.

Furthermore, the law is clear that a tender of arrearages is not sufficient once the entire balance has been accelerated. In 55 Am.Jur.2d, Mortgage, §390, it states that: ". . . the exercise of an option to accelerate a mortgage is not affected by subsequent tender of arrears, even if such tender is made before actual foreclosure of the mortgage". Id. at 434.

It is also well settled in this jurisdiction that acceleration clauses can be enforced in contractual relationships. In KIXX, Inc. v. Stallion Music, Inc., 610 P.2d 1385 (Utah, 1980), this Court stated that:

> The acceleration clauses in a negotiable instrument and other contracts will be enforced in accordance with the agreement of the parties . . . an exercise of an option

within the terms of the contract cuts off the payor's right to remedy the default. Id. at 1388.

The Austins have failed to fulfill their obligations under the Contract and are now in default to the Appellants. The Appellants properly exercised their option under the Contract to accelerate the entire amount due and owing and to treat the Contract as a note and mortgage.

CONCLUSION

The Trial Court erred in denying Appellants Motion for Summary Judgment. A Uniform Real Estate Contract does not require that written notice of default and demand for cure is required before an acceleration of the balance can occur. Further, notice of default must only be given to the original purchaser, not each and every person who may have or claim to have an interest in the property. Finally, checks which were dishonored given by the Austins' escrow agent did not constitute payment by the Austins under the Contract. The Trial Court's orders granting the Respondents' Motion for Summary Judgment should be reversed and Appellants' Motion for Summary Judgment to foreclose the property should be granted and this matter should be remanded for entry of a Decree of Foreclosure and a determination of the amount of attorney's fees which the Appellants are entitled.

RESPECTFULLY SUBMITTED this 22 day of November, 1983.

GUSTIN, ADAMS, KASTING & LIAPIS

FRANK J. GUSTIN

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing Appellants' Brief will be mailed, postage pre-paid, on November 29, 1983, to:

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