1984

Richard M. Johnston, Shauna M. Johnston, Thomas W. Mcdonald, and Lois S. Mcdonald v. Lloyd H. Austin, Virginia Ann Austin, Income Realty And Mortgage, Inc., A Utah Corporation, Boyd E. Nelson I Barbara L. Nelson, John Franks, David J. Isbell And Ruth Ann Isbell : Appellants' Reply Brief

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,	:	Case No. 19401
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.	:	

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APPELLANTS' REPLY 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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REPLY TO RESPONDENT NELSONS STATEMENT OF FACTS

Respondents Nelsons claim that Appellants acquiesced in the escrow agreement is incorrect. Even though Appellants accepted checks from the escrow company in payment of the sums due under the Uniform Real Estate Contract they continually looked to the Austins (the original purchasers) as the persons responsible to make payments called for under the Contract (R-171). With this exception, Appellants agree with Respondents' Statement of Facts.

ARGUMENT

POINT I

NOTICES OF DEFAULT RECEIVED BY AUSTINS WERE SUFFICIENT TO ENTITLE APPELLANTS TO EXERCISE THEIR OPTION UNDER PARAGRAPH 16C OF THE CONTRACT

The only Brief filed by Respondents in this matter has been filed by the Nelsons, who are not parties to the Uniform Real Estate Contract with the Appellants. Respondents Nelsons concede that notice of default need only be given to those with whom seller is in privity of contract. The uncontroverted evidence before this Court, as contained in the Affidavit of Richard M. Johnston, states that:

> . . . I have personally consulted with the Defendant Virginia Ann Austin in regard to why her June 15, 1982, payment had not been made on time. Two of these conversations were in my home, and at all times I informed her that, regardless of any extenuating circumstances with her escrow company, that we were not a party to any escrow agreement; that we were required to make our underlying mortgage payment; that we expected payment in full; and that any payments made outside the thirty-day grace period (as provided for in the Contract) would not be tolerated. (R-171)

The record indicates that the Austins admitted receiving such notice (R-155).

Over thirty-days elapsed after Austins had received the notice from the Appellants that they were in default before Appellants exercised their rights under Paragraph 16C of the Contract (R-222).

This Court has, on many occasions, reviewed the default provisions in real estate contracts. However, this Court has never held that written notice must be given to the defaulting party before the seller can exercise the remedies available under the Contract. It is only necessary that:

> . . . some affirmative act on the part of the seller is required to notify the buyer what he must do to bring the Contract current. First Security Bank of Utah v.

Maxwell, 659 P.2d 1078, 1081 (Utah, 1983) citing Grow v. Marwick Development, Inc., 621 P.2d 1249 (Utah, 1980).

In this case, there were five separate affirmative acts by the Sellers giving the Buyers notice of their default and what was necessary to cure it (R-222).

This Court has never concerned itself with the distinction between written notice or actual notice given in connection with a default of a contract purchaser. Rather the concern has been whether or not the purchasers knew what was expected of them. That concern is not present in this case. It is clear that the Austins did know exactly what was expected of them to bring the payments current. They were notified the amounts due and the months in which payments were not received.

Respondents' reliance on LaMont v. Evjen, 29 Ut.2d 266, 508 P.2d 532 (1973), is misplaced. In that case, the Court found that the seller had failed to properly notify the buyer of a payment which had been missed over a year before. Further, the sellers had failed to give notice of their election to treat the contract as a note and mortgage prior to buyers tendering the amounts due. In this case, the Buyers missed two consecutive payments and were notified five separate times by the Sellers of the defaults before sending written notice of Sellers' election to accelerate on July 19, 1982. In spite of that notice, no tender of any amount was made until twenty-eight days after Buyers had been given notice of the acceleration.

The Respondents also rely on Hansen v. Christensen, 545 P.2d 1152 (Utah, 1976), for the proposition that provisions of a real estate contract are not self-executing. The Respondents mistakenly read into the language in Hansen, supra, that written notice is the only affirmative act of seller that will satisfy the notice requirement. In Hansen, supra, this Court was concerned that a defaulting buyer would not know what to do unless it received notice of the seller's intentions. Such is not the case here. It is undisputed that the Austins were clearly told that the Appellants expected the payments be brought current within the thirty-day grace period (R-171). Furthermore, the tender of the back payments in Hansen, supra, was made prior to any exercise of sellers' options under the contract. Id. at 1154. That likewise is not the case here.

The Respondents' reliance on First Security Bank of Utah v. Maxwell, 659 P.2d 1078 (Utah, 1983); Grow v. Marwick Development Inc., 621 P.2d 1249 (Utah, 1980); Call v. Timber Lakes Corp., 567 P.2d 1108 (Utah, 1977); Fuhriman v. Bissegger, 13 Utah 2d 379, 375 P.2d 27 (1962); LaMont v. Evjen, 29 Utah 2d 266, 508 P.2d 532 (1973); and Leone v. Zuniga, 84 Utah 417, 34 P.2d 699 (1934) is likewise misplaced in that each of those cases deal with the forfeiture provisions of Paragraph 16A of the Contract. The case at hand deals with Paragraph 16C, the mortgage foreclosure provisions. Paragraph 16A of the Contract, by its terms, requires a five-day written notice to buyers to remedy a default before a forfeiture can be declared unlike Paragraph 16C which

gives the seller the right "at his option and upon written notice to the buyer" to declare the entire amount due and payable if the buyers' default is not cured within the thirty-day period provided by the contract. In this case, the notice of election to accelerate was given to the Buyers on July 19, 1982, and, consequently, Sellers have fulfilled all of their obligations to notify under the Contract.

The Appellants' actions were adequate and appropriate to notify the Austins of their default and Austins could have cured the default within the thirty-day period provided for in the Contract. By their failure to do so, the Appellants were justified in the exercise of their option under Paragraph 16C of the Contract by treating it as a mortgage and accelerating the balance due and owing.

POINT II

THERE IS NO REQUIREMENT THAT A PERIOD OF TIME BE ALLOWED FOR THE CURE OF DEFAULT ONCE THE UNIFORM REAL ESTATE CONTRACT IS DECLARED TO BE A MORTGAGE

The Respondents request this Court to impose a second period of time in which to allow defaulting buyers to cure defaults under a Uniform Real Estate Contract. Succinctly put, Respondents' urge the proposition that sellers must wait a reasonable time for buyers to cure a default after notice then wait a second period of time for buyers to remedy after sellers make an election to treat the Contract as a mortgage. The law in the State of Utah is clear that under a mortgage there is no requirement to

either notify or give a reasonable time to cure a default. In Thomas v. Foulger, 71 Utah 274, 264 P. 975 (1928), this Court stated in a mortgage foreclosure proceeding that:

> According to the great weight of authority, when a note contains a provision accelerating the date of maturity if the interest is not paid when due, the holder of such note is not required to give notice of an election to declare the note due as a condition precedent to bringing an action to its collection. Id. at 978.

This principle was affirmed in Hallstrom v. Buhler, 14 Ut.2d 111, 378 P.2d 355 (1963), where a third party guarantor claimed that the mortgagee should give him notice of the mortgagor's default prior to acceleration. This Court stated that, on the contrary, notice of default was not required to be given to the guarantor and that a foreclosure action was proper without giving further notice or right to cure. Id. at 357.

Citing Thomas, supra, with approval, this Court, in Commercial Security Bank v. Corporation Nine, 600 P.2d 1000 (Utah, 1979), determined what notice requirements were applicable under a mortgage note acceleration clause, and stated:

> A complaint for the unpaid balance of an installment note is a sufficient declaration by the payee for purposes of enforcing an acceleration clause of the kind under consideration, Thomas v. Foulger, 71 Utah 274, 264 P. 975 (1928). Id. at 1002.

Once the Appellants in this case validly accelerated the Contract and elected to treat it as a mortgage and notified the Austins accordingly, no additional time was available to the Austins to bring the back payments current. The Respondents are, in effect, asking that a second period of time be given

purchasers to cure their default after a proper acceleration has been made. This position is not supported by the law and if approved by this Court would place a hardship not only upon the Appellants but on all mortgagees and would impose a condition which was not agreed upon by the Appellants. The integrity of the Contract should be upheld and Appellants should be allowed to proceed with the foreclosure of the subject property. The Trial Court's summary judgment should be reversed.

CONCLUSION

The principle in this case, simply stated, involves nothing more than the form of notice of default that is required to be given under a Uniform Real Estate Contract. It is clear that the Appellants have taken the affirmative actions necessary to notify Respondents Austins that they were in default, the amount that was required to be paid to bring the Contract current, and that performance was expected within the thirty-day grace period provided for under the Contract. At no time have the Austins, the actual parties to the Contract, ever raised the issue that they were unaware of what was required by them to bring the Contract current.

Once buyers in default under a Contract have been given notice to remedy the default by the Sellers and they fail to do so within the time permitted under the Contract, the Sellers then have the right to treat the Contract as a note and mortgage by notifying the Buyers in writing of this election. Buyers attempt

to remedy the delinquencies after receipt of notice of Sellers election to accelerate is ineffectual to reinstate Buyers to the Contract position they held prior to their default. To hold otherwise unjustly infringes on the rights for which the Sellers contracted.

Consequently, the Trial Court's orders granting 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 an amount of attorney's fees for which the Appellants are entitled.

DATED this 30 day of January, 1984.

GUSTIN, ADAMS, KASTING & LIAPIS

FRANK J. GUSTIN

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing Appellants' Reply Brief were mailed, postage pre-paid, to:

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this 30 day of January, 1984.

I N D E X

AUTHORITIES CITED

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ISSUE ON APPEAL

Can plaintiffs avoid their contractual requirement to issue stock in a new corporation by an early repayment of a separate obligation.

STATEMENT OF THE CASE

The plaintiffs (Spors) below brought an action for recision and for a declaratory judgment relieving them of any responsibility under a pre-incorporation contract. Defendant (Crested Butte) counterclaimed for breach of contract and specific performance of the plaintiffs' obligation to issue shares in the new corporation to defendant. Defendant also implead as a third-party defendant Candelaria Metals, Inc. (Candelaria), to release mineral properties covered by the pre-incorporation contract which it had contracted to lease from plaintiffs.

DISPOSITION OF THE CASE

The lower court granted summary judgment in favor of plaintiffs and third-party defendant based upon an alleged accord and satisfaction.

RELIEF SOUGHT ON APPEAL

Defendant prays that the case be remanded for jury trial on the merits, and for its costs.

STATEMENT OF FACTS

In mid-1979, the Spors approached Crested Butte's chairman, John Larsen, explaining that the Spors held certain mining claims

which they wished to exploit, but were unable to do so themselves (Larsen depo. at 4-5; Chad Spor depo at 8-10). As stated by Daniel Svilar, Crested Butte's general counsel:

> "They were out of work and I don't think Paul had received a check for some time and they were in financial straits, and he [John Larsen] was trying to help them, you know, have a paycheck coming in and get them going and felt that initially if the money was advanced to them, that eventually Gold Spor could go public. . ." (Svilar depo. at 10).

After some negotiation, an "AGREEMENT TO INCORPORATE" (hereinafter "pre-incorporation contract") dated July 30, 1979 (R.177-182) was executed between Crested Butte and the Spors whereby a new corporation, Gold Spor Mining Company (Gold Spor), would be formed, in which the parties would share control (Chad Spor depo. at 14). The new corporation would accept contributions of property from both parties. Each party was to be issued one million shares of stock in Gold Spor (Depo. Exh. D-1 at 2-3), and the Board of Directors was to consist of Chad, Paul and Ray Spor and, as representatives of Crested Butte, Max Evans and Harold Herron.

In payment for the one million shares issues to them, respectively, the Spors were to transfer all of their mining claims and leaseholds and certain small mining equipment to the new corporaticn (Depo. Exh. D-1, Exh. "A" thereto - Articles of Incorporation), Crested Butte was to transfer and assign

to Gold Spor a certain flotation plant known as the "peanut mill" and to acquire for Gold Spor a heavy media sink-float plant (hereinafter "heavy media plant") (Id. at 2; Chad Spor depo. at 14).

In addition, and independent from the contribution of the peanut mill and heavy media plant, Crested Butte was obligated to loan to Gold Spor up to $150,000. The loan was to provide the Spor family with income and to pay for certain incidental operating expenses incurred by Gold Spor. It was to be evidenced by a promissory note and secured by Gold Spor pledging up to 200,000 shares of its stock on a pro-rata basis (Larsen depo. at 35).

The Spors visited the peanut mill just outside Crested Butte, Colorado in early August 1979 and found it to be suitable for processing fluorspar ore of the type found on the subject mining properties (Ray Spor depo. at 4-5). It was the expressed intention of the Spors to transfer the peanut mill to a site in Beaver County, Utah within 45 days of the July 30, 1979 agreement, due to the approach of winter (Id.). Crested Butte approved transfer of the mill to Gold Spor, but it was never taken to Utah for reasons which are in dispute (Ray Spor depo. at 25-26; Larsen depo. at 38-40).

Also in August 1979, both the Spors and Crested Butte began efforts to locate a suitable heavy media plant, even though

it is undisputed that the responsibility for locating and transporting the heavy media plant was the Spors', whereas Crested Butte's obligation was only to pay for it (Ray Spor depo. at 46-47). In September 1979 the Spors purchased a non-functioning "skeleton" of a fifty-tons per hour capacity heavy media plant in Bouse, Arizona (R.66; Depo. Exh. P-12; Chad Spor depo. at 71). This plant was transported to Delta, Utah, where the Spors would complete it, if a suitable heavy media plant could not be located (Ray Spor depo. at 11). From September 1980 through December 1980, the Spors reported to Crested Butte that they were searching for components to complete the heavy media plant (Depo. Exh. 6). For reasons which are likewise in dispute, a heavy media plant was never purchased, nor was the skeleton heavy media plant ever completed.

On February 19, 1980, without notifying Crested Butte or directors Evans and Herron, and without action by Gold Spor's board of directors, the Spors issued one million shares of stock to themselves and their relatives. No stock in Gold Spor was, or ever has been issued to Crested Butte (Chad Spor depo. at 31). Further, the Spors failed to execute a promissory note and failed to pledge stock as security for the $125,000.00 that Crested Butte had loaned to Gold Spor between July 1979 and March 1980 (Chad Spor depo. at 32).

Unknown to Crested Butte, in March of 1980, Paul Spor,

vice president and director of Gold Spor, was employed by Candelaria (R.312); and following his employ by Candelaria, Gold Spor began to sell off some of its properties to Candelaria. At some time between March and July of 1980, Paul Spor became vice president and general manager of Candelaria (R.307); and at the time of his deposition was also a director of Candelaria (Paul Spor depo. at 3-4). Only after the commencement of discovery in this action did Crested Butte learn of Paul Spor's positions with Candelaria.

On May 2, 1980, the Spors mailed an ineffectual notice of a special board meeting of Gold Spor's board of directors to Messrs. Evans and Herron of Crested Butte in Riverton, Wyoming, indicating that the meeting would be held in Salt Lake City on May 3, 1980, and that Gold Spor's board would consider a proposal to sell Gold Spor's properties in Esmarelda County, Nevada to Candelaria. (Discovery later revealed that the Spors had already (on April 22, 1980) received a $10,000 royalty payment from Candelaria, and that by October 15, 1982, the Spors had received $290,000 in royalties and $56,500 for equipment rental from Candelaria). [R.310]. The notice, undoubtedly as designed, was not received until the day of the meeting and, consequently, no representative of Crested Butte was present. See, Exhibit "A" attached. (R.76, No. 4).

At the May 3, 1980 board meeting, the Spors, purporting

to act as Gold Spor's board, adopted by-laws for the corporation and approved a letter of understanding with Candelaria, which was finally executed on May 26, 1980 (Depo. Exh. D-8). No notice of this action was given to Crested Butte or its representatives on the board of Gold Spor. Also, without the knowledge of or notice to Crested Butte, further negotiations were had between the Spors and Candelaria with regard to the leasing of all mining properties of Gold Spor (Paul Spor Depo. at 17-18).

On August 12, 1980 Crested Butte received mailed notice of a special board meeting of Gold Spor to be held on August 18, 1980 in Salt Lake City. The notice simply stated that the board would "transact any and all matters which may come before the meeting" (R.259). Crested Butte's representatives on Gold Spor's Board could not attend, since Max Evans was in the hospital and Harold Herron was out of town (Larsen depo. at 52; Evan depo. at 57). Consequently, John Larsen and Daniel Svilar, Crested Butte's general counsel, flew to Salt Lake City on August 18, 1980 to obtain information and to attempt to repair the now-evident rift between the Spors and Crested Butte (Larsen depo. at 51). The Spors barred Messrs. Larsen and Svilar from the board meeting and the contemporanious stockholders meeting (Larsen depo. at 54), even though Crested Butte had a legal right to 1,000,000 shares of stock, which had not been issued to it.

While the meetings were going on, Chad Spor and his counsel met with Mr. Larsen and Mr. Svilar (Svilar depo. at 28-30). Mr. Spor refused to relate what was happening or any of the details of the Spors' arrangement with Candelaria and stated that Crested Butte was to have no further role in Gold Spor (Id. at 28). He accused Crested Butte of breaching the pre-incorporation contract and stated the agreements between Crested Butte and the Spors were at an end (Id. at 29). Messrs. Svilar and Larsen denied any breach of the agreement by Crested Butte and demanded that the security stock be issued to Crested Butte, or that its loan to Gold Spor, then totalling $125,000, be repaid immediately as a pre-condition to any settlement by Crested Butte of its rights under the pre-incorporation contract (Larsen depo. at 77). This demand was refused by Mr. Spor (Svilar depo. at 31).

Upon returning to Riverton, Mr. Svilar confirmed the substance of the meeting by a letter of August 21, 1980 (Depo. Exh. 18), which denied any breach of the agreement by Crested Butte nor any waiver of Crested Butte's rights. Mr. Svilar went on to say:

> "We would appreciate receiving the promissory notes with the pledged stock forthwith as required under Section III of the Agreement to Incorporate. We are also awaiting a response regarding our final offer on the prepayment of the loan."

The Spors responded by a letter dated September 15, 1980 from Richard Lawrence, the Spors counsel, along with a check representing the accrued interest on the loan from Crested Butte to Gold Spor, and an offer to pay $5,000 per month to repay the entire loan by April 1, 1981 (Depo. Exh. 19). By letter of August 6, 1980 Max Evans responded to Mr. Lawrence's letter and the tender of the check stating that:

> "Please be advised that we reject this tender as not being in accordance with what was discussed in Salt Lake City on August 18, 1980. Unless full payment is made forthwith in accordance with the offer made to you on August 18, 1980 I would suggest that we make one more effort at resolving this matter amicably. . ." (Depo. Exh. 20).

Despite repeated statements by Crested Butte that the Spors were not in accordance with Crested Butte's offer calling for immediate repayment of the loan (Depo. Ex. P-20), the Spors continued sending installment checks to Crested Butte (Depo. Ex. P-21). The checks were held and not cashed. The final check was sent by the Spors on June 19, 1981 (Dep. Exh. P-31). Thereafter, on advice of its Wyoming counsel, Crested Butte cashed the checks received from the Spors. The Spors then filed the instant action for a declaratory judgment to release them from their obligations under the pre-incorporation contract

(R.1-6). Crested Butte counterclaimed for specific performance of the Spors' obligation to issue shares in Gold Spor to Crested Butte, and for a declaration of its rights under the contract (R.36-44). After discovery in this action revealed the unscrupulous methods employed by the Spors to oust Crested Butte in the affairs of Gold Spor, and of Paul Spor's duplicitous relationship with Candelaria, Crested Butte implead Candelaria to insure a complete ajudication of its rights under the pre-incorporation contract.

ARGUMENT

Crested Butte has faithfully performed all of its obligations under the pre-incorporation contract, whereas the Spors, themselves, have breached the contract by failing to issue the one million shares of stock of Gold Spor to Crested Butte, and in failing to move the peanut mill and in failing to complete the heavy media plant. Further, the Spors unlawfully frustrated the entire purpose of the pre-incorporation contract by entering into leases with Candelaria and by fraudulently concealing from Crested Butte the unprincipled relationship between themselves and Candelaria. By deceit and falsehood the Spors "froze out" Crested Butte from the corporate affairs of Gold Spor and then proceeded to engineer a unilateral "recision" of the contract, which was the basis of their motion for the summary judgment granted by the lower court. For the following

reasons, Crested Butte prays that said judgment be reversed and the case remanded for trial on the merits.

POINT I.

A QUESTION OF FACT EXISTS AS TO WHETHER CRESTED BUTTE'S ACCEPTANCE OF EARLY REPAYMENT OF THE LOAN CONSTITUTED A RECISION OR AN ACCORD AND SATISFACTION OF THE ENTIRE PRE-INCORPORATION CONTRACT.

In its memorandum decision, the trial court found, as a matter of law, that by retaining and eventually cashing the checks which constituted repayment of the loan from Crested Butte to Gold Spor, Crested Butte had accepted an "offer of recision." Appellant contends that there is a factual dispute as to whether or not an accord and satisfaction occurred between the parties rescinding the pre-incorporation contract and that the lower court erred in finding such as a matter of law.

Upon receipt of a notice of a meeting of the Board of Directors of Gold Spor, which was to be held on August 18, 1980, Crested Butte's representatives on Gold Spor's Board were indisposed and unable to attend the meeting. However, John Larsen, Crested Butte's chairman, and D. P. Svilar, its corporate counsel, flew to Salt Lake City to attend the August 18 board meeting only to be barred from the meeting and the shareholders' meeting which was held immediately thereafter. At that time, discussions were had between Messrs. Larsen and Svilar, representing Crested Butte, and Chad Spor and his counsel, Mr. Lawrence. The substance

of these discussions is in clear dispute. The evidence is conflicting as to whether an offer to rescind was ever made. The testimony of Daniel Svilar is that Crested Butte demanded immediate payment, not as a term of settlement, but as a precondition of settlement. (Deposition of Daniel Svilar at 31). The performance by the Spors would settle only the issue of the unsecured and unevidenced loan.

> "A. The final offer, as I recall, says that if Mr. Spor could get all of the money and pay Crested Butte off, that would resolve that part of the issue.
>
> Q. What part of the issue?
>
> A. The issue on the note and the security of the stock and I assumed that the whole thing could probably be resolved.
>
> Q. Including a possibility that if the amount was entirely repaid, that perhaps the entire agreement to incorporate could also be rescinded in connection with that?
>
> A. That possibility existed because -- of course, we didn't know what the terms of the agreement were at that time and it would have been rather difficult to go to the Board of Directors with an offer without knowing what was going on in the company." Id. at 47.

Subsequently, Mr. Lawrence sent a check with a cover letter of September 15, 1980 to Crested Butte, declaring the Spors intention to repay the $125,000.00 loan in full on or before April 1, 1981 (Exhibit P-19). On October 6, 1980, Mr. Evans wrote back to Mr. Lawrence stating that the tender was

rejected as not being in conformance with the discussions in Salt Lake City. However, Mr. Larsen did offer to meet with the Spors to work out the parties' differences (Exhibit P-20). Despite this, Mr. Lawrence wrote back stating that the Spors would continue to pay (Exhibit P-23).

Messrs. Larsen and Svilar were discussing the then very evident rift between Crested Butte and the Spors while standing in a vertual factual vacuum. They had been barred from the board meeting and the Spors would tell them nothing about the agreement with Candelaria. Crested Butte was in the position of having made an unsecured loan, not even evidenced by a promissory note, to a group of people its officers had trusted, but who now gave strong indication they had breached that trust. Crested Butte's primary concern at that point was the $125,000 it had loaned to Gold Spor. Had the contract been honored by the Spors, that amount would have been evidenced by a promissory note in that amount from Gold Spor and it would have been secured by 166,666 shares of Gold Spor stock as provided by Section III of the Agreement to Incorporate (R.179). As it was, Crested Butte had neither, to say nothing of its right to 1,000,000 shares of Gold Spor stock as provided by Section I(b) of the contract (R.178).

The Spors also contend that Crested Butte's eventual cashing of the repayment checks constituted an "accord and satis-

faction." This too must fail. Plaintiffs contend that Crested Butte should have returned the checks instead of retaining and eventually cashing them, lest Crested Butte waive its other rights under the contract. Yet, it was clear that the plaintiffs had already breached the contract by failing to evidence or secure the loan.

The loan was a "liquidated" obligation. The exact amount owing could be ascertained by merely computing the principal and interest due at any point in time. Crested Butte's acceptance of payment of the "liquidated" loan obligation did not work an accord and satisfaction of its separate "unliquidated" claim for a 50% interest in Gold Spor. No consideration was given to Crested Butte for its alleged abandonment of its interest in Gold Spor, since the Spors gave nothing in addition to repayment of the loan, which they were obligated to do irrespective of Crested Butte's other claim for a 50% interest in Gold Spor. As noted in Allen-Howe Specialities Corp. v. U.S. Construction, Inc., 611 P.2d 705 (Utah 1980):

> ". . . The payment of a part of a debt (in situations such as the one at hand), does not discharge it, even though the debtor exacts a promise that it will do so. The debtor, by making part payment is doing nothing more than he is legally obligated to do; and, therefore, he gives the creditor no consideration for the promise that part payment will be accepted to discharge the entire debt." Id. at 710.

In that case, the subcontractor plaintiff had accepted several progress payment checks which contained endorsements acknowledging payment in full for work performed to date. The court held that the contract showed that there was to be one consideration for the entire job and that progress payments were merely payment "on account." As in that case, a review of the contract in this case indicates that the repayment of the loan was only one of several respective obligations of the parties to the contract. Plaintiffs' satisfaction of one "liquidated" obligation under the contract is without consideration to satisfy any other obligations they may have under the contract, which can be determined only by a trial on the merits of such other issues.

The proposal made by Crested Butte at the August 18, 1980 meeting called for full and immediate repayment of the principal and interest due on the loan as a prerequisite to any further negotiation of Crested Butte's interest under the contract. Gold Spor did not comply. Instead, the Spors made repayments in small increments over many months, the final payment being made on June 19, 1981. As early as October 17, 1980, Max Evans had informed the Spors' attorney that their oral agreement had called for immediate repayment, that the Spors had not complied and that Crested Butte considered the pre-incorporation contract in force (Depo. Exh. 22). Any tender of payments by Gold Spor after that date were made at the Spors' peril.

It is interesting to note that nowhere in the correspondence in the record, cited at length by plaintiffs, is it stated by the Spors or their representatives that the tender of the checks is conditioned upon total recision of all aspects of the contract (Depo. Exhs. 18-31). Indeed, the endorsement on the back of the check of March 30, 1981[1/] in the amount of $50,339.49 has the following notation:

> "This check is the final installment representing payment in full of the principal and interest owing on the $125,000 loan by Crested Butte Silver Mining, Inc. to Gold Spor Mining Company under Section III of the Agreement to Incorporate between Crested Butte and Chad A. Spor, Ray Spor, Paul Spor, Spor Brothers Motor Company and Spors, Inc. dated July 30, 1978."

It says nothing more than that the loan has been repaid, not that the Agreement to Incorporate has been cancelled. In fact, it refers only to one part of the Agreement--Section III, which plaintiff Chad Spor testified most emphatically was an obligation entirely separate from the other provisions of the pre-incorporation agreement (Chad Spor Depo. at 26-27). A logical conclusion, and one which cannot be ruled out as a matter of law, is that the remaining portions of the agreement are still in effect, and no meeting of minds toward a contrary intent has been shown.

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1. At the time it was issued, Gold Spor considered this check to be the final repayment of the loan. However, it was later discovered that the first check sent to Crested Butte had been voided. Therefore, the check of June 19, 1981 was then issued and became the final repayment. (Dep. Exh. P-31).

Obviously, there is a factual dispute as to the terms of the oral agreement of August 18, 1980, if there was an agreement, and of the intent of the parties regarding the repayment of the loan. The burden of proof is on the plaintiffs to show so convincingly that reasonable minds could not differ that the parties at the time of the August 18, 1980 conversation intended to rescind the entire pre-incorporation contract.

> "[T]he party availing himself of a plea of accord and satisfaction must bear the burden of proof and must establish clearly that there was a meeting of the minds of the parties accompanied by a sufficient consideration." Walden v. Backus, 408 P.2d 712, 714 (Nev. 1965) (emphasis in original).

Construing all of the facts of record in the light most favorable to defendant, the plaintiffs have not shown that there was a "meeting of the minds" to cancel the pre-incorporation contract. If, as has been testified by Messrs. Evans and Larsen, the offer made by Crested Butte at the August 18, 1980 meeting was that repayment was a pre-condition to negotiations for ending the contract between the parties, then plaintiffs cannot change the substance of that agreement by later claiming that their understanding of it was different. If repayment of the loan was only to settle that separate and distinct obligation in the contract, and leave further negotiations open, then those further issues must be submitted to the finder of fact.

In Bennett v. Robinson's Medical Mart, Inc., 18 Utah 2d 18

417 P.2d 761 (1966), the plaintiff was hired as a salesman by defendant under an employment contract providing for payment of commissions and a covenant that plaintiff would not compete with defendant's business within six months of termination of plaintiff's employment. When the contract was terminated by defendant, plaintiff was paid his back salary, but defendant refused to pay for additional commissions for sales allegedly made by plaintiff prior to the termination. Subsequently, plaintiff was employed by one of defendant's competitors, contrary to the covenant not to compete. Plaintiff filed suit seeking the amount of unpaid commissions and the trial court entered judgment in plaintiff's favor.

On appeal, defendant argued that since plaintiff had, prior to filing the action, retained and cashed a check from defendant which contained a limited endorsement which stated "Payment in full of the account stated below--Endorsement of check by payee is sufficient receipt" effected an accord and satisfaction of all of plaintiff's claims. In affirming judgment for plaintiff, this Court stated:

> "We have no disagreement with the proposition generally that where there is a dispute about a claim and one party makes an offer of settlement which is accepted and performed by the other, that constitutes an accord and satisfaction of the claim. But that rule does not govern under the particular facts of this case. Plaintiff testified that upon receipt of the check he went to the defendants and discussed the matter,

> telling them that he did not regard it as payment in full and the dispute between the parties over the matter is what precipitated this lawsuit. He was unquestionably entitled to the money he did receive; and the dispute was as to whether he had more coming. The dispute negates any accord; and under the facts found by the trial court the plaintiff could not equitably be precluded from asserting his further claim." Id. at 764-65. (Emphasis added).

As in Bennett, supra, it is undisputed that Crested Butte was entitled to repayment of the $125,000 loan. The dispute is whether Crested Butte in receiving what it was clearly entitled to receive, agreed to give up its rights to the main purpose of the pre-incorporation contract, to-wit: the opportunity to share in the possible future profits of the Gold Spor corporation.

The existence and validity of an accord and satisfaction is a question of fact to be determined from all the evidence. French v. Southeby & Co., 470 P.2d 318 (Okla. 1970). In this case, it remains a material issue of fact whether or not the pre-incorporation contract was rescinded and whether an accord and satisfaction of the dispute between the parties was ever reached.

POINT II.

ANY ACCORD AND SATISFACTION BETWEEN THE PARTIES WAS VITIATED BY THE SPORS' FRAUD.

Even conceding arguendo that the pre-incorporation contract was rescinded, either expressly or by acquiescence, any such agreement or settlement was rendered unenforceable by fraud. Just as in the case of any other contract, an accord and satisfaction which is tainted by fraud is voidable.

> "It is well settled that an agreement in settlement of a dispute which is based upon fraud by one party does not operate as an accord and satisfaction." Studiengesellschaft Kohle mbH v. Novamont Corp., et al., 485 F.Supp. 471, 475 (S.D.N.Y. 1980).

Further,

> "It has been held that fraud vitiates whatever it touches including final judgments and final orders as well as contracts." Prather v. Colorado Oil & Gas Corp., 542 P.2d 297, 304 (Kan. 1975).

See also, Martin v. Alco-Deree Co., 216 F.Supp. 253 (D. Ill. 1963); 6 Corbin On Contracts, §1292 at 178 (1962 ed.).

A fraud may be committed by the suppression of the truth as well as by an affirmative, false statement. A duty to disclose the truth may arise from a relationship of trust or confidence, inequality of knowledge or other circumstances. Elder v. Clawson, 14 Utah 2d 379, 384 P.2d 802 (1963). See also, Sugarhouse Finance

v. Anderson, 610 P.2d 1369, 1373 (Utah 1980).

Fraud may be proved either by showing actual intent to mislead, or through the breach of a fiduciary duty.

> "Fraud is classified under two major headings, actual and constructive. The former is distinguished by the presence of an actual intent to deceive while the latter, . . . is characterized by a breach of a duty arising out of a fiduciary or confidential relationship." In Re Guardianship of C. Chandos, 504 P.2d 524, 526 (Ariz. App. 1972).

See also, In Re Purton's Estate, 441 P.2d 561 (Ariz. App. 1968). Thus,

> "Constructive fraud is a breach of a legal or equitable duty which, irrespective of the moral guilt, the law declares fraudulent because of its tendence to deceive others and violate a confidence and neither actual dishonesty of purpose or intent to deceive is necessary." Loucks v. McCormick, 424 P.2d 555, 559 (Kan. 1967).

Once the breach of a fiduciary duty has been shown, the burden shifts to the fiduciary to prove that full disclosure was made and that his conduct was in all particulars honest and in good faith. In Re Guardianship of Chandos, supra. A director of a corporation occupies a fiduciary relationship with the corporation and with the corporation's stockholders. Thus, his personal dealings involving the corporation will be voided, absent a showing of fairness and good faith. Branch v. Western Factors, Inc., 28 Utah 2d 361, 502 P.2d 570 (1972); Weatherby v. Weatherby Lumber Co., 492 P.2d 43 (Idaho 1972).

In the instant case, the Spors issued the stock in Gold Spor to themselves and to their relatives before they had performed their obligations under the pre-incorporation agreement to execute the promissory note and transfer Gold Spor shares to Crested Butte to secure its loan. This was done without notice to Crested Butte and without formal action by the board of directors of Gold Spor. The Spors later gave only ineffectual notice of a board meeting of Gold Spor to Crested Butte's representatives on the board, which made their attendance impossible. The Spors barred Messrs. Larsen and Svilar from the second board meeting and refused to relate the substance of their agreement with Candelaria (Larsen Depo. at 54-55). None of these facts, or the fact that at the time Paul Spor was a vice-president and director of Gold Spor, he was also a vice-president of Candelaria Metals (a clear conflict of interest) came to light until after discovery in the instant action was well under way.

The Spors revealed nothing to Crested Butte, which was legally entitled to 50% of the Gold Spor stock, regarding its negotiations with Candelaria for the sale of all of the assets of Gold Spor, a sale of its assets which the Spors must have considered not to be in the regular course of its business, as evidenced by the fact that the Spors attempted to comply with the requirements of Section 16-10-74, U.C.A., 1953, as amended, which in pertinent part states:

> "**Sale or mortgage of assets other than in regular course of business.** A sale, lease, exchange, mortgage, pledge, or other disposition of all, or substantially all, the property and assets, with or without the goodwill, of a corporation, if not made in the usual and regular course of its business, may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares of any other corporation, domestic or foreign, as may be authorized in the following manner:
>
> (a) The board of directors shall adopt a resolution recommending such sale, lease, exchange, mortgage, pledge, or other disposition and directing the submission thereof to a vote at a meeting of shareholders, which may be either an annual or special meeting. . . ." (Emphasis added).

The Spors, as officers and directors of Gold Spor, owed a fiduciary duty to Gold Spor, to its shareholders (Crested Butte being entitled to be a 50% shareholder), and to their fellow directors, Messrs. Evans and Herron, to fully reveal the details of the Candelaria contract and the details (including compensation) of Paul Spor's relationship with Candelaria. Later discovery has revealed that Paul Spor was being paid $3,000 per month and as of November 1982 had received a total of $73,09[illegible] from Candelaria (R.312-313); discovery has also revealed that Chad Spor was hired as a consultant by Candelaria from September 1980 to June 10, 1982 at a rate of $2,000 per month and has received a total of $42,661.93 from Candelaria (R.311).

The Spors have offered no justification for their bad-faith and deceitful conduct which would allow the lower court to determine, as a matter of law, that no fraud or misrepresentation occurred in the inducement of the alleged accord and satisfaction.

POINT III.

WHETHER THE ARGUENDO "RECISION" AND "ACCORD AND SATISFACTION" WERE INDUCED BY FRAUDULENT MISREPRESENTATIONS IS A QUESTION OF FACT IMPROPERLY RULED UPON AS A MATTER OF LAW BY THE LOWER COURT.

Whether a fiduciary relationship has been abused depends on the particular facts and circumstances of each case. In Re Estate of Ewers, 481 P.2d 970 (Kan. 1971). In this case, as shown above, whether there has been such an abuse is both a controverted and material question of fact.

Summary judgment can be granted only if the moving party carries his burden of showing "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), U.R.C.P. The burden of proof is upon the moving party to show that there is no genuine issue as to any material fact. This court has set forth the standard for a motion of this type, saying:

> "On a motion for summary judgment against a defendant, where some of the facts are in dispute, a judgment can properly be entered against a defendant only if, on the undisputed facts, the defendant has no valid defense; if then any material fact is asserted by the plaintiff is

> contradicted by the defendant, the facts as stated by the defendant must, on such motion, be taken as true." (Emphasis added). Disabled American Veterans v. Hendrixson, 9 Utah 2d 152, 340 P.2d 416, 417 (1959).

As to what is a "genuine issue", nothing more is required than that, viewing all reasonable doubts and inferences in a light most favorable to the non-moving party, there is a factual dispute between them as to a material issue. 10 Wright & Miller, Federal Practice & Procedure §2725 at 510. As to what satisfies the requirement of "any material fact," means only that as to the fact or facts in dispute, "their existence or non-existence might effect the result of the action. . ." Id., §2725 at 506-07 (emphasis supplied). Finally, the court is not called upon to decide credibility questions in a summary judgment proceeding. Any questions of credibility which may arise by reason of contradictory depositions, affidavits or evidence are issues for trial. Id., §2713 at 406.

This Court should apply the same standard as a trial court in determining whether the record presents a genuine issue of material fact. Durham v. Margetts, 571 P.2d 1332, 1334 (Utah 1977); Hunter v. Farmers Ins. Group, 554 P.2d 1239 (Wyo. 1976). On summary judgment, the sole inquiry is whether a material issue of fact exists, not to decide it. W. M. Barnes Co. v. Sohio Nat. Res. Co., 627 P.2d 56 (Utah 1981). A "material issue of fact" is one whose existence or non-existence

> ". . .affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth."

Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1306 (9th Cir. 1982). Larson v. Wycoff Co., 624 P.2d 1151 (Utah 1981). Only when it is evident that upon any view of the undisputed facts that the resisting party could not prevail, "is the court justified in refusing such a party the opportunity of presenting his evidence and attempting to persuade the trier of fact to his views." Holbrook Co. v. Adams, 542 P.2d 191, 193 (Utah 1975). In summary judgment proceedings, all questions of credibility are issues for trial. Burningham v. Ott, 525 P.2d 620 (Utah 1974). In the light of these standards, defendant respectfully contends that the lower court's judgment must be reversed and the case remanded for trial. In the instant case, there remain material issues of fact as to whether there was a meeting of the minds that repayment of the loan by Gold Spor would, in light of the circumstances, work an accord and satisfaction to release the Spors individually from the other provisions of the pre-incorporation contract having nothing to do with the loan. Further, even if, arguendo there was a recision of the contract, the Spors' deceitful conduct in failing to disclose the details of their relationship with Candelaria and their other breaches of fiduciary duty must be passed upon by the trier of fact to determine if these deceptions contributed to cause Crested Butte to accept the recision.

CONCLUSION

Appellant respectfully suggests that the lower court erred in ruling as a matter of law on the material facts in question without due consideration of the conflicting evidence as to the intent and conduct of the parties regarding the issues of recision, accord and satisfaction, and fraud. The court in effect erroneously held that because Crested Butte was aware of some of the misdeeds of the Spors at the time it cashed the checks in question, that it knew all the details and the full implications of such misdeeds, which it did not. The extent of the Spors' complicity came to light only during the discovery conducted in this action. Additionally, the lower court erred in failing to recognize the severability of Crested Butte's right to receive repayment of the liquidated loan vis-a-vis its right to a 50% interest in Gold Spor, whatever that might be.

In light of the record and authorities set forth above, appellant contends that the case should be remanded for trial on the merits with respect to the remaining issues regarding the rights and duties of the parties under the pre-incorporation contract.

RESPECTFULLY SUBMITTED this _____ day of November, 1983.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed, postage prepaid, two copies of the foregoing APPELLANT'S BRIEF to Earl Jay Peck, Esq., NIELSEN & SENIOR, P. O. Box 11808, Salt Lake City, Utah 84147, counsel for Plaintiffs-Respondents; and to Robert H. Wilde, Esq., 2641 South 3270 West, Salt Lake City, Utah 84119, Counsel for Third-Party Defendant-Respondent, this _____ day of November, 1983.

_____
Of Appellant's Counsel