

1993

Larry M. Chaffin and Greta M. Chaffin v. Mark R. Cromar and Geneve D. Cromar : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 930539

IN THE UTAH COURT OF APPEALS

LARRY M. CHAFFIN and
GRETA M. CHAFFIN,

Plaintiffs,

vs.

MARK R. CROMAR and
GENEVE D. CROMAR,

Defendants, Third-party
Plaintiffs and Appellants,

vs.

DONALD DWYER,

Third-party Defendant,
Fourth-party Plaintiff,
and Appellee,

vs.

GREG L. WINGET, BRENT E. WINGET,
JEN S. WINGET, RIVERVIEW PLAZA
ASSOCIATES LTD., and MERRILL TITLE
COMPANY,

Fourth-party Defendants.

Civil No. 930539-CA

Priority No. 15

Utah Ct.

NOV 08

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APPEAL FROM A SUMMARY JUDGMENT OF
THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH, HONORABLE KENNETH RIGTRUP, JUDGE

BRIEF OF APPELLEE

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PARTIES TO THE PROCEEDINGS BELOW

LARRY M. CHAFFIN and
GRETA M. CHAFFIN,

Plaintiffs

vs.

MARK R. CROMAR and
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JURISDICTION

1

Cromars. Judge Rigtrup refused, however, to award the Cromars attorneys' fees against Dwyer. It is from that refusal that this appeal follows. This court has jurisdiction pursuant to §78-2a-3(2)(k), Utah Code Annotated.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court correctly interpret the Agreement Surviving Real Estate Closing between the parties in refusing to award attorneys fees for the enforcement of the Agreement itself.

2. May the appellant raise for the first time on appeal issues not presented to the Court below, (See App. Brief p.2, Issues Presented for Review #2).

These issues present matters of law to be determined by the court under a correctness standard. *Gate City Fed. Sav. & Loan v. Dalton*, 808 P2d 1117 (Utah App. 1991); *Olson v. Park-Craig-Olson, Inc.*, 815 P2d 1356 (Utah App. 1991).

DETERMINATIVE PROVISIONS OF LAW

This case raises an issue of the correct interpretation of a contract.

STATEMENT OF THE CASE

This is an action by Mark and Geneve Cromar to enforce the terms of an indemnity agreement against Donald Dwyer. The trial court entered summary judgment in favor of the Cromars and against Dwyer on the principal amount, plus interest and the attorney's fees awarded to Larry and Greta Chaffin against the Cromars. The court refused to award to the Cromars the additional

attorney's fees they had incurred. The Cromars appeal from that adverse ruling.

STATEMENT OF FACTS

Donald Dwyer accepts the statement of facts as set forth in the Appellant's Brief.

SUMMARY OF THE ARGUMENT

THE TRIAL COURT'S REFUSAL TO AWARD ATTORNEY'S FEES TO THE CROMARS WAS CORRECT.

1. An indemnity agreement is a contract. In order to recover attorney's fees on a contract action there must either be a statute or an express provision in the contract authorizing such an award.

2. In this case, the agreement limited Dwyer's liability to those obligations contained in the trust deed and note.

3. There was no provision in the Agreement for an award of attorney's fees incurred in enforcing the terms of the Agreement.

4. The overwhelming case law authority, and the law in Utah, precludes an award of attorney's fees for enforcing an indemnification agreement unless the agreement so provides.

5. Appellant is attempting to raise new issues on this appeal.

ARGUMENT

I

APPELLANT IS ATTEMPTING TO RAISE ARGUMENTS FOR THE FIRST TIME ON APPEAL

It has long been established that this Court will not consider arguments on appeal which were not raised before the trial court. *Olson v. Park-Craig-Olson, Inc.*, 815 P2d 1356 (Utah App. 1991). Appellant, however, presents two arguments on appeal which were not presented to the court below, i.e., (1) the Promissory Note executed by Chaffins and Cromars was incorporated by reference into the Agreement Surviving Real Estate Closing (hereinafter "the Agreement"), and that, as a result, Dwyer's primary obligation to pay the attorney's fees incurred by the Chaffins in collecting the note was created by the attorney's fee language in the note itself (App. Brief pp. 6, 7, 12) and (2) that the Cromars are entitled to recover attorney's fees reasonably and necessarily incurred in defending against the principal claims covered by the Agreement, (Point II, App. Brief, p. 19-21). Even though Appellant should be precluded from raising these issues on appeal, since they were not argued below, Dwyer believes that the issues are not well taken.

A. Dwyer Had no Duty to the Cromars Directly Under the Promissory Note. Dwyer was sued by the Cromars for breach of "his promise to assume the note and to hold the Cromars harmless." (R. 30). Indeed, the Cromars acknowledge in their Brief that "summary judgment based upon the Agreement Surviving Real Estate Closing was

entered in favor of the Cromars and against Dwyer on November 20, 1992." (App. Brief p.10). It is clear, therefore, that the Cromars' claim below and the judgment entered against Dwyer was based upon the Agreement and not upon the Promissory Note. The Cromars never contended in the court below that Dwyer had a duty to pay attorney's fees directly to them under the terms of the note. In any event, the subject note provides for the payment of attorney's fees to be paid by the maker to the holder¹ of the note. The note neither contemplates nor requires the payment of attorney's fees to a party other than the holder. The language of the note provides:

"if this note is collected by an attorney after default on the payment of principal or interest, either with or without suit, the undersigned (the Cromars) jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee." (Emphasis added).

Thus, the note required the Cromars to pay Chaffins' attorney's fees in the event of suit. Pursuant to the Agreement, Dwyer agreed to pay the attorney's fees assessed against the Cromars on behalf of Chaffins. Those fees are included in the Cromars' judgment against Dwyer. There is nothing in the note, however, requiring Dwyer to pay attorney's fees to the maker of the note, the Cromars. Since the Cromars were not holders of the note, the note's

¹ Section 70A-1-201(20) U.C.A. defines a holder as the person in possession of an instrument if it is payable to bearer or to the order of the person in possession.

provisions for payment, interest, or attorney's fees are of no benefit to them².

B. The Cromars are Not Entitled to Attorney's Fees, if any, Incurred to Defend Against the Chaffin's Action. In requesting attorney's fees, the attorney for the Cromars presented an affidavit which lumped together all of the attorney's fees incurred. (R. 303-306). There is no way to tell from the Affidavit whether any attorney's fees were actually incurred on behalf of the Cromars in defending against the Chaffins' claim; indeed, in attempting to establish the amount of attorney's fees, Mr. Durham stated in his Affidavit that they were for,

"factual investigation; preparation of documents, affidavits, pleadings, research and correspondence with respect to the defense of the action for summary judgment by Chaffins, and the prosecution of the Motion for Summary Judgment against Dwyer, including preparation of judgment, conferences with client, and opposing counsel regarding the same." (R. 304-305).

Counsel's Affidavit does not state whether the "research and correspondence" relating to the defense of the Chaffin action was directed to Chaffins' attorney or was part of the demand made upon Mr. Dwyer. In addition, since the Affidavit presents a total lump sum figure, there is no way to determine, from the record, the amount, if any, for which the Cromars believe they are entitled to compensation for defending against the Chaffins' claim. The Cromars, at no time, asked the trial court for an award of

² The holder of an instrument may enforce payment, §70A-3-301 U.C.A.

attorney's fees relating to their alleged defense of the Chaffins' claim. (R. 286-291). Indeed, after the ruling of the court which is the basis of this appeal, the Cromars made no attempt to request a rehearing or to point out to the court that a portion of the attorney's fees were allegedly incurred in defending against the Chaffins' claim; rather, the Cromars remained silent although they had ample opportunity to present the matter to the trial court. Having failed to do so, they should be precluded from now raising the issue.

II

AS SCRIVENER, THE DOCUMENT MUST BE CONSTRUED AGAINST THE CROMARS

The Agreement was drafted by the Cromars' agent. As a result, any ambiguity in the document must be construed against the Cromars and in favor of Dwyer. *Hoffman v. Life Ins. Co. of North America*, 669 P2d 410, (Utah 1983); *Parks Enterprises Inc. v. New Century Realty Inc.*, 652 P2d 918 (Utah 1982). Dwyer believes that the document is clear. He agreed to indemnify the Cromars from the obligations contained in the Second Trust Deed and Note. To the extent, however, that this Court believes that the language is ambiguous, it must be construed in favor of Dwyer.

A. The Court's Interpretation of the Document is Correct. The court in its Minute Entry determined that the Agreement "holds the Seller (Cromars) harmless, including reasonable attorney's fees, from any and all obligations contained in that certain first Trust Deed . . . and related note . . . and from any and all obligations in that certain Second Trust Deed . .

and related notes." The court went on to state "it is clear that Donald Dwyer only agreed to hold harmless the Cromars for all obligations contained in the two trust deeds and notes, including reasonable attorney's fees." (Emphasis added). (R. 319). Nothing is contained in the Agreement authorizing the payment of attorney's fees for its enforcement. It has long been the law in Utah that an award of attorney's fees is proper only if it is supported by statute or by contract. *B&R Supply Company v. Bringhurst*, 28 Ut2d 442, 503 P2d 1216 (Utah 1972). In the instant case there was no contractual requirement that Dwyer pay the attorney's fees incurred by the Cromars to enforce the Agreement. The Cromars' claim against Dwyer is based solely upon paragraph d of the Agreement which reads as follows,

"Buyer hereby holds seller harmless, *including reasonable attorney's fees*, from any and all obligations contained in that certain first Trust Deed (including the "due-on-sale" clause, in any) and related Note dated September 20, 1974, in favor of Utah Mortgage Loan Association Corporation in the original amount of \$75,000, copies of which are attached hereto and incorporated herein, and from any and all obligations in that certain Second Trust Deed (including the "do-on-sale" clause, if any) and related notes dated November 6, 1979, in favor of Don L. Buehner, Univest Corporation, Larry M. Chaffin and Greta M. Chaffin, husband and wife, in the original amount of \$185,000, copies of which are attached hereto and incorporated herein." (Emphasis added). (R. 33-34).

Dwyer's agreement to hold the Cromar's harmless related to two separate encumbrances, the first Trust Deed in favor of Utah Mortgage and Loan Corporation, and the Second Trust Deed in favor of Don L. Buehner, Univest Corporation, Larry M. Chaffin and Greta

Chaffin. The first Trust Deed was foreclosed and no action was commenced on that debt. The instant case relates only to the Second Trust Deed and Note. As the court correctly noted, under the terms of the Agreement, Dwyer agreed to hold Cromars harmless "from any and all obligations in that certain Trust Deed . . . and related notes. Dwyer's obligation to the Cromars, therefore, is limited to obligations "(contained) in" the Second Trust Deed and in the related note³.

Since there is nothing in either the Second Trust Deed or the Chaffin note which would allow the Cromars to obtain an award of attorney's fees against Dwyer, the ruling of the trial court must stand.

B. The Agreement Does Not Provide for an Award of Attorney's Fees for Enforcement. Since Dwyer's obligation to hold Cromars harmless is clearly limited to those obligations continued in the Second Trust Deed and related notes, if Dwyer is to be held responsible for the attorney's fees incurred by the Cromars in enforcing the Agreement, the Agreement must contain a provision awarding attorney's fees "incurred in enforcing the terms of this agreement." The Agreement contains no such provision; therefore,

³ Paragraph 19 of the Second Trust Deed provides that:

"Upon the occurrence of any default hereunder, beneficiary, (Chaffin), shall have the option to declare all sums secured hereby immediately due and payable and foreclose on this Deed of Trust in the manner provided by law for the foreclosure of mortgages on real property and beneficiary shall be able to recover in such proceedings all costs and expenses incident thereto, including a reasonable attorney's fee in such manner as shall be fixed by the court."

the trial court correctly refused to assess against Dwyer the attorney's fees that were incurred by the Cromars in enforcing the Agreement against Dwyer. Both the Second Trust Deed and the Chaffin note provide for an award of attorney's fees only between the direct parties to those documents. In the instant case attorney's fees were awarded to the Chaffins which are included in the Cromars' judgment against Dwyer. There is, however, no provision in the Agreement for an award of attorney's fees to the Cromars for attempting to enforce the Agreement against Dwyer, although including such language would have been a simple matter⁴.

C. The Agreement is Redundant. Cromars argue that their interpretation of the Agreement is the only correct one since any other interpretation would create a redundancy in the Agreement. The Agreement, however, is clearly redundant. The Agreement provides for the buyer (Dwyer) to hold the seller (Cromar) harmless from "any and all obligations³" contained in the First and Second Trust Deeds. The scrivener, however, added "including the 'due-on-sale' clause, if any" in reference to both the First and Second Trust Deed obligations. The term "any and all obligations" is all encompassing⁵ and clearly includes any damages relating to any due-

⁴ "In the event of default of the terms of this agreement, the party not in default may recover its costs, including reasonable attorney's fees incurred in enforcing the terms . . . , or "if either party fails to do as agreed, he shall pay all expenses of enforcing this agreement, including reasonable attorney's fees," are two simple examples which would have obligated Dwyer to pay the Cromar's attorney's fees.

⁵ "All" means (1) the whole of; (2) the greatest possible; (3) every one of. "Any" when used as a pronoun means (1) any one or ones; (2) any amount. *The Merriam-Webster Dictionary*, 1974.

on-sale clause contained in either of the Trust Deeds. Therefore, the specific mention of the due-on-sale clauses in reference to "any and all obligations" is clearly redundant. The language used by the scrivener relating to reasonable attorney's fees is similar and is also redundant⁶. Since Dwyer agreed to pay "any and all obligations" contained in the Second Trust Deed, those would necessarily include both attorneys fees and due-on-sale damages pursuant to the terms of the Trust Deed and Note, thus the specific reference to attorney's fees and due on sale damages is redundant⁷.

III

ABSENT STATUTORY AUTHORIZATION, AN INDEMNITY
CAN NOT RECOVER ATTORNEY'S FEES IN A SUIT TO
ENFORCE THE INDEMNITY CONTRACT UNLESS THE
TERMS OF THE CONTRACT SO PROVIDE

An indemnification agreement is nothing more than a contract. In spite of appellant's contentions to the contrary, it is the well-established general rule that in the absence of express statutory language, attorney's fees can not be recovered in a suit to enforce an indemnity contract unless the terms of the contract so provide. The cases so holding are numerous. Prominent among them is the Tenth Circuit case of *Vallejos v. C.E. Glass Co.*, 583 F2d 507 (10th Cir. 1978). That case involved a suit between a contractor and a glass door fabricator and installer for indemnity.

⁶ Both the due-on sale clauses and the attorney's fee provision are proceeded by the word "including." Thus the term "any and all obligations" is to include both attorneys fees and due on sale damages as contained in the trust deed or note.

⁷ Dwyer submits that the term "any and all" is also redundant.

The court, citing a long line of cases, held that attorney's fees incurred in establishing the right of indemnity were not recoverable. In *Rupp v. American Crystal Sugar Co.*, 465 NW2d 614 (N.D. 1991), Plaintiff filed an indemnification action against a contractor for damages it paid resulting from the death of an employee. There was a written indemnification clause in the contract between the parties covering "any and all claims for loss, injury or damage." The court held that,

"It is well established that an indemnitee may not recover attorney's fees and expenses incurred to establish the existence of an obligation to indemnify unless the agreement explicitly says otherwise."

Similar holdings can be found in *D'Albora v. Tulane University*, 274 So.2d 825 (La. App. 1973), (fees attributable to enforcing right [to indemnification] not recoverable since contract did not provide for counsel fees in case of breach); *Frankel v. Burke's Excavating, Inc.*, 269 F.Supp. 1007 (E.D. Penn. 1967), (no recovery of attorney's fees in connection with assertion of indemnification demand); *Tidewater Construction Corp. v. Southern Materials Co.*, 269 F.Supp. 1000 (E.D.Va. 1967), (right to indemnification for attorney's fees . . . does not include services rendered in prosecuting the claim for indemnity).

Such is also the law of this State. Although *Hanover Ltd. v. Cessna Aircraft Co.*, 758 P2d 443 (Utah App. 1988), dealt with an implied right of indemnity under a strict liability theory in tort and is thus factually far removed from the instant case,

this Court held that an indemnitee is not entitled to attorney's fees incurred in establishing its right to indemnity. Id. at 450.

IV

APPELLANTS AUTHORITIES ARE INAPPOSITE HERE

In attempting to persuade this court to go contrary to the great weight of authority, the Cromars argue that "two courts have recently allowed an award of attorney's fees in litigation to enforce indemnity rights." (App. Brief 15). The Cromars cite the cases of *Chetopa State Bancshares, Inc. v. Fox*, 628 P2d 249 (Kan. App.1981) and *Wuertz v. Tobias*, 512 So.2d 1200 (La.App.5th Cir 1987). Dwyer has no argument with the holdings of those cases but they are clearly distinguishable from the facts present here. In *Chetopa*, the Kansas court clearly recognized the general rule that no attorney's fees would be awarded absent express contractual language authorizing such award. The Kansas court, however, held that the language of the particular indemnity contract did provide for an award of attorney's fees⁸. In *Wuertz* the Louisiana Court similarly recognized the general rule denying attorney's fees but held that the contract language specifically provided for an award of fees incurred in establishing the right of indemnity⁹. As a

⁸ The precise contract language was: "Sellers agree to indemnify and hold Stuckey harmless from and against any loss, damage, deficiency or expense (including reasonable attorney's fees) suffered or incurred by Stuckey at any time after the date hereof, arising from, or as a result or in respect of, the breach of any warranty, representation or covenant made by Seller" @257.

⁹ The contractual language provided that "Lessee also agrees to pay all reasonable expenses and attorney's fees incurred by Lessor in connection with the provisions of this paragraph. @1212.

result, both the *Chetopa* and *Wuertz* cases are clearly distinguishable from the instant case since in the instant case there is no contractual language allowing the award of fees incurred in establishing the right to indemnification. Appellants also cite *Manson-Osberg Co. v. State*, 552 P2d 654 (Alaska 1976) and argue that "public policy" requires an award of fees. In *Manson-Osberg Co.*, the decision by the Alaska court was predicated upon a state workman's compensation statute and upon a public policy determination that costs of enforcing an indemnity contract under those terms were recoverable in Alaska¹⁰. Obviously, in Utah there is no such statute nor is there a long articulated public policy, as there was in Alaska, awarding attorney's fees. In fact, the opposite is true. See *Hanover Ltd. v. Cessna Aircraft Co.*, 758 P2d 443 (Utah App. 1988). Although Chaffin's cases are of interest, they relate to different facts and different contractual language, applied in different states with different statutes than Utah. As a result, they are not persuasive.

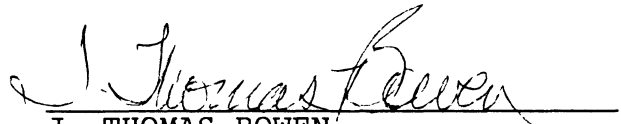
CONCLUSION

Dwyer's liability to the Cromars is limited by the express terms of the Agreement. The Agreement obligated Dwyer to hold the Cromars harmless from any and all obligations in the Second Trust Deed and related notes. There is no provision in the

¹⁰ In Alaska, attorney's fees are not an item of damages. *Alaska R. Civ. P.* §82. The Alaska court recognized the general rule but decided to go the other way. The court grounded its ruling on the case of *Ransom v. Haner*, 362 P2d 282 (Alaska 1961). That case is a workman's compensation case, not an indemnification case, and it is most difficult to glean from it the underpinnings for the articulated "public policy."

Agreement for Dwyer to pay the attorney's fees incurred by the Cromars in an attempt to enforce the terms of the Agreement against Dwyer. In Utah, there is no statute and no public policy requiring the payment of such attorney's fees. In fact, the opposite is true. It has long been held that absent a statute or express contract language, attorneys fees are not awarded in a contract dispute. The general and overwhelming rule relating to indemnity agreements is that absent statutory authorization an indemnitee can not recover attorney's fees in a suit to enforce an indemnity contract unless the terms of the contract so provide. In the instant case, it did not. The court should also reject the arguments and issues raised by Cromars for the first time on this appeal and should affirm the Order of Judge Rigtrup in its entirety.

Dated this 8th day of November, 1993.


J. THOMAS BOWEN
Attorney for Appellee

CERTIFICATE OF SERVICE

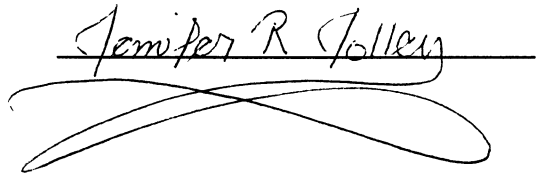
I hereby certify that on the 8th day of November, 1993,
I caused two true and correct copies of the foregoing BRIEF OF
APPELLEE to be served upon the following by hand delivery or by
depositing copies thereof in the United States mail, postage paid,
addressed as follows:

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With courtesy copies to:

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Murray, Utah 84107

A handwritten signature in cursive script, reading "Jennifer R. Jolley", is written over a horizontal line. Below the line is a large, stylized flourish consisting of two overlapping loops.

NOV 09 1993

Handwritten signature
Clerk of Court

IN THE UTAH COURT OF APPEALS

LARRY M. CHAFFIN and
GRETA M. CHAFFIN,

Plaintiffs,

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Fourth-party Defendants.

ADDENDUM TO
BRIEF OF APPELLEE

Civil No. 930539-CA

Priority No. 15

WHEREAS:

1. DONALD DWYER, (hereinafter referred to as "Buyer"), is about to purchase from MARK R. CROMAR and GENEVE D. CROMAR, (hereinafter collectively referred to as "Seller"), the real property known as 2119 South Regent Street, 28 East 2100 South Salt Lake City, County of Salt Lake, State of Utah;

2. Buyer and Seller desire that certain promises survive the closing of said real property and the delivery of the final deed of reconveyance;

NOW THEREFORE, in consideration of Buyer paying the purchase price of said real property and in consideration of Seller conveying said real property to Buyer, Buyer and Seller hereby agree to the following:

- a. Buyer and Seller understand that PARAMOUNT TITLE CORPORATION cannot guarantee or verify the figures pertaining to the first Trust Deed and Note in favor of UTAH MORTGAGE LOAN CORPORATION and the Second Trust Deed and Notes in favor of DON L. BUEHNER, UNIVEST CORPORATION, LARRY M. CHAFFIN and GRETA M. CHAFFIN, his wife. If the figures used in the related settlement statements are inaccurate, Buyer and Seller mutually agree to make appropriate adjustments.
- b. Seller guarantees that the note secured by said first Trust Deed is current to and including the monthly payment due May 1, 1983.
- c. Seller guarantees that the notes secured by said second Trust Deed are current to and including the monthly payments due June 1, 1983.
- d. Buyer hereby holds Seller harmless, including reasonable attorney's fees, from any and all obligations contained in that certain first Trust Deed (including the "due-on-sale" clause, if any), and related Note dated September 20, 1974, in favor of UTAH MORTGAGE LOAN CORPORATION, in the original amount of \$475,000.00, copies of which are attached hereto and incorporated herein, and from any and all obligations in that certain Second Trust Deed (including the "due-on-sale" clause, if any) and related Notes dated November 6, 1979, in favor of DON L. BUEHNER, UNIVEST CORPORATION, LARRY M. CHAFFIN and GRETA M. CHAFFIN, husband and wife in the original amount of

(continued..)

\$185,000.00, copies of which are attached hereto
and incorporated herein.

- e. The matters set forth herein shall survive the closing of the
transaction, ~~and the reconveyance of the purchase money deed of~~ **

DATED this _____ day of June, 1983.

Sellers:

Mark R. Cromar July 14, 1983
MARK R. CROMAR

Geneve D. Cromar GC July 14, 1983
GENEVE D. CROMAR

Buyer:

Donald Dwyer by J. Thane Bowker, atty.
DONALD DWYER Donald Dwyer

~~**trust in favor of Seller executed at closing.~~

NOV 20 1992

SALT LAKE COUNTY

By Deputy Clerk

Paul M. Durham (0939)
DURHAM & EVANS
Attorneys for Defendants
and Third-Party Plaintiffs
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 538-2424

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

2180194

1-14-93-300 pm.

LARRY M. CHAFFIN and GRETA M. CHAFFIN,

Plaintiffs,

vs.

MARK R. CROMAR and GENEVE D. CROMAR,

Defendants and
Third-Party Plaintiffs,

vs.

DONALD DWYER,

Third-Party Defendant
and Fourth-Party
Plaintiff,

vs.

GREG L. WINGET, BRENT E. WINGET, JEN S. WINGET,
RIVERVIEW PLAZA ASSOCIATES,
LTD., and MERRILL TITLE
COMPANY,

Fourth-Party Defendants.

JUDGMENT

Civil No. 900906903CN

Judge Kenneth Rigtrup

000315

The Court having granted the motion for summary judgment of third party plaintiffs Mark R. Cromar and Geneve D. Cromar against third party defendant Donald Dwyer,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that third party plaintiffs Mark R. Cromar and Geneve D. Cromar ("the Cromars") be awarded judgment against third party defendant Donald Dwyer as follows:


1. For damages in the sum of \$83,108.87 plus 12% per annum interest from and after December 13, 1991, until paid;

2. For ~~attorneys' fees in the amount of \$7,259.75 and for~~^{KR.}
~~costs of \$95.00. Furthermore, the Court finds that it is~~^{KR.}
~~reasonably anticipated there may be considerable work to collect~~
~~the judgment to be awarded in this action, including possible costs~~
~~and legal fees.~~ This judgment shall also cover such additional
~~costs and legal fees~~^{KR.} incurred in pursuit of the collection of this
judgment. The Cromars are entitled to supplement the foregoing
~~sums by affidavit filed with the Court for additional attorneys'~~^{KR. for}
~~fees and costs which may arise in the future.~~

3. Plaintiff is also entitled to interest on the judgment at the legal rate for judgments until this judgment has been satisfied.

DATED this 20th day of November, 1992.

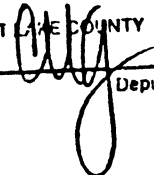
BY THE COURT:


Judge Kenneth Rupp
District Judge

000316

FILED DISTRICT COURT
Third Judicial District

NOV 20 1992

SALT LAKE COUNTY
By  Deputy Clerk

Paul M. Dursam (0939)
DURHAM & EVANS
Attorneys for Defendants
and Third-Party Plaintiffs
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 538-2424

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

LARRY M. CHAFFIN and GRETA M.)
CHAFFIN,)
)
Plaintiffs,)
)
vs.)
)
MARK R. CROMAR and GENEVE D.)
CROMAR,)
)
Defendants and)
Third-Party Plaintiffs,)
)
vs.)
)
DONALD DWYER,)
)
Third-Party Defendant)
and Fourth-Party)
Plaintiff,)
)
vs.)
)
GREG L. WINGET, BRENT E.)
WINGET, JEN S. WINGET,)
RIVERVIEW PLAZA ASSOCIATES,)
LTD., and MERRILL TITLE)
COMPANY,)
)
Fourth-Party Defendants.)

ORDER

Civil No. 900906903CN

Judge Kenneth Rigtrup

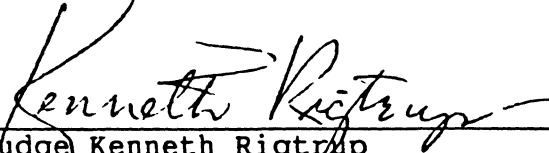
000327

Having considered memoranda of both counsel regarding the objection of third party defendant Donald Dwyer to an award of attorneys' fees to third party plaintiffs Mark R. Cromar and Geneve D. Cromar,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that third party defendant Donald Dwyer's objection is ~~DENIED~~. *Granted 100.*

DATED this 20th day of ~~September~~ *November*, 1992.

BY THE COURT:

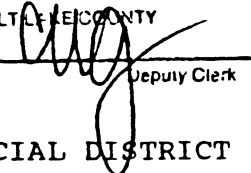


Judge Kenneth Rigtrup
District Judge

NOV 20 1992

ADDENDUM D

SALT LAKE COUNTY

By  Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LARRY M. CHAFFIN and GRETA M. CHAFFIN,	:	MINUTE ENTRY - RULE 4-501
	:	RULING
Plaintiffs,	:	
vs.	:	CIVIL NO. 900906903
	:	
MARK R. CROMAR and GENEVE D. CROMAR,	:	
	:	
Defendants and Third Party Plaintiffs,	:	
vs.	:	
	:	
DONALD DWYER,	:	
	:	
Third Party Defendant and Fourth Party Plaintiff,	:	
vs.	:	
	:	
GREG L. WINGET, et al.,	:	
	:	
Fourth Party Defendants.	:	

The Court has reviewed third party plaintiff's Memorandum in Support of Attorney's Fees in Proposed Judgment, the third party defendants' Reply to Third Party Party Plaintiff's Memorandum in Support of Award of Attorney's Fees and third party defendant Donald Dwyer's Notice of Objection to Proposed Judgment.

000313


A careful reading of the Agreement Surviving Real Estate Closing entered between the Cromars and Donald Dwyer on or about July 14, 1983 discloses that Buyer Dwyer:

hereby holds Seller (Cromars) harmless, including reasonable attorney's fees, from any and all obligations contained in that certain first Trust Deed. . . and related Note. . . and from any and all obligations in that certain Second Trust Deed. . . and related Notes. . . . (Emphasis added.)

It is clear that Donald Dwyer only agreed to hold harmless the Cromars for all obligations contained in the two trust deeds and notes, "including reasonable attorney's fees." Nothing is contained in the Agreement Surviving Real Estate Closing about the payment of attorney's fees for enforcing said agreement. The Court concludes that third party defendant Donald Dwyer's Notice of Objection to Proposed Judgment is well taken.

The Court's Minute Entry of August 11, 1992 is corrected to strike the award of attorney's fees. The submitted Order and Judgment have been modified by interlineation to reflect the rulings herein contained. Said Order and Judgment have been signed and entered, as modified, this 20th day of November, 1992. Copies of said Order and Judgment are returned herewith.

Dated this 20th day of November, 1992.


KENNETH RIGTRUP
DISTRICT COURT JUDGE

000310