

1994

Alvan Strasrypka and Karen B. Strasrypka v. Bryon
J. Wilson, Clella F. Glazier, CFG Investment Co.,
Westport Funding Co., and John Does One
Through Five : Reply Brief

Utah Court of Appeals

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Nolan J. Olsen; Martin N. Olsen; Olsen & Olsen; Attorneys for Plaintiff/Appellant.

Leslie Van Frank; Cohne, Rappaport & Segal, P.C.; Attorney for Defendant/Cross Appellant.

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940414 CA

IN THE SUPREME COURT OF THE STATE OF UTAH

ALVAN STRASRYPKA and KAREN	:	
B. STRASRYPKA,	:	
	:	APPELLANT'S REPLY BRIEF
Plaintiff/Appellant,	:	
	:	
vs.	:	
	:	
BYRON J. WILSON, CLELLA F.	:	Appeal No. 940414CA
GLAZIER, CFG INVESTMENT CO.,	:	
WESTPORT FUNDING CO., and	:	
JOHN DOES ONE THROUGH FIVE	:	
	:	
Defendants/Appellees.	:	Priority ⁵ / ₁₆

APPEAL AND CROSS APPEAL FROM A FINAL JUDGMENT OF THE THIRD DISTRICT COURT, SALT LAKE COUNTY, JUDGE GLENN K. IWASAKI PRESIDING

NOLAN J. OLSEN (2464)
MARTIN N. OLSEN (6015)
OLSEN & OLSEN
Attorneys for Plaintiff/Appellant
8138 South State Street
Midvale, Utah 84047
(801) 255-7176

LESLIE VAN FRANK (4913)
COHNE, RAPPAPORT & SEGAL, P.C.
Attorney for Defendant/Cross Appellant
525 East First South, Fifth Floor
Salt Lake City, Utah 84147-0008
(801) 532-2666

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Clerk of the Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ALVAN STRASRYPKA and KAREN :
B. STRASRYPKA, :
 : **APPELLANT'S REPLY BRIEF**
Plaintiff/Appellant, :
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BYRON J. WILSON, CLELLA F. : Appeal No. 940414CA
GLAZIER, CFG INVESTMENT CO., :
WESTPORT FUNDING CO., and :
JOHN DOES ONE THROUGH FIVE :
 :
 :
Defendants/Appellees. : Priority 16

APPEAL AND CROSS APPEAL FROM A FINAL JUDGMENT OF THE THIRD DISTRICT
COURT, SALT LAKE COUNTY, JUDGE GLENN K. IWASAKI PRESIDING

NOLAN J. OLSEN (2464)
MARTIN N. OLSEN (6015)
OLSEN & OLSEN
Attorneys for Plaintiff/Appellant
8138 South State Street
Midvale, Utah 84047
(801) 255-7176

LESLIE VAN FRANK (4913)
COHNE, RAPPAPORT & SEGAL, P.C.
Attorney for Defendant/Cross Appellant
525 East First South, Fifth Floor
Salt Lake City, Utah 84147-0008
(801) 532-2666

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COMES NOW the PLAINTIFFS/APPELLANTS hereinafter "Plaintiffs"
and submit the following REPLY BRIEF in the above captioned case:

ARGUMENT

I. THE TRIAL COURT IMPROPERLY RULED THAT DEFENDANT
HAD BREACHED THE UNIFORM REAL ESTATE CONTRACT
AND THAT PLAINTIFF WAS ENTITLED TO ATTORNEY
FEES THEREBY.

A. Pursuant to the uniform real estate
contract between the parties, the
Plaintiffs had an absolute right to declare
acceleration of the contract.

Defendant, Westport Funding Co. continues to maintain
that Plaintiffs breached the uniform real estate contract by
declaring acceleration of said contract, citing Home Owner Loan
Corp. v. Washington, 161 P.2d 355, 358 (Utah 1945). However,
notwithstanding the purported applicability of that case, the
express language of the contract expressly prescribed the actions

ultimately taken by the Plaintiffs. Specifically, the contract explicitly provides that:

16. In the event of 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 (3) days thereafter, the Seller, at his option shall have the following alternative remedies:

C. The 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 fees; and the Seller may have a judgment for any deficiency which may remain. In the case of foreclosure, the Seller hereunder, upon the filing of a complaint, shall be immediately entitled to the appointment of a receiver to take possession of said mortgaged property and collect the rents, issue any profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to the order of the court; and the Seller, upon entry of judgment of foreclosure, shall be entitled to the possession of the said premises during the period of redemption.

In the instant case, it is uncontroverted that the Plaintiffs did not receive the January 1991 payment until after February 15, thus constituting a default under the contract. In fact, the court even noted:

Now, I have indicated even though in the best light to the defendant, if tender were as I have indicated is my holding, if the payments were tendered, they were still late. But does that constitute a breach under these circumstances where acceleration could then be justified pursuant to the uniform real estate contract as evidenced by P-1? Mr Wilson, as he correctly stated many times, that forfeiture then becomes a question of equity. And it is my opinion that equity would forbid me from allowing the acceleration of this contract based upon questionable \$95 missed payments. Even though they were, as I indicated tendered, but late, they were late only on the February payment-- excuse me, on the January payment. They were late only by one or two days.

Transcript of Ruling 10-11.

Inasmuch as the Plaintiffs complied with the express terms of the agreement between the parties with respect to acceleration, they could not possibly have breached the agreement. Accordingly, the District Court erred in concluding that their declaration of acceleration and attempted foreclosure was a breach of the contract.

II. THERE WAS COMPETENT EVIDENCE AT TRIAL TO SUPPORT THE DISTRICT COURT'S FINDING THAT THE JANUARY 1, 1991 CHECK WAS FOR THE PAYMENT THAT WAS DUE DECEMBER 15, 1990.

Defendant, Westport Funding, cross appeals, claiming the trial court erred in finding that the January 1, 1991 check was for the payment that was due on December 15, 1990. In so arguing, Defendant smugly claims that it has marshalled all the evidence in support of the finding and that such evidence is insufficient to

support the finding, citing Cove View Excavating & Const. s. Flynn, 758 P.2d 474, 477 (Utah App. 1988). However, certain evidence is conspicuously absent in the Defendant's marshalling effort. Particularly, the Defendant fails to note certain testimony evidence of Mr. Strasrypka which would, in and of itself, be sufficient to support the trial court's finding. Specifically, Mr. Strasrypka testified that he had personal knowledge that the payments from Clella Glazier were consistently late. His testimony was as follows:

Q. [By Ms. Van Frank]: It is my understanding that it is your position that Mrs. Glazier has been late from the very first payment she ever made to your father, is that correct?

A. That's correct

Q. Your father had the dealing with Mrs. Glazier when she took over the property; is that correct?

A. Yes, I believe so.

Q. You didn't have dealings with Mrs. Glazier, is that correct?

A. No.

Q. And your knowledge of your father's dealings with Mrs. Glazier came directly from your father; is that correct?

A. That is correct.

Q. You weren't there when the property was is that correct?

A. That is correct.

Q. And so your alleyway source of getting information about whether or not she was late or early or otherwise in her payments was your father, right?

A. Yes

. . .

Q. The basis of your personal knowledge as to whether or not [Mrs. Glazier] was early or late, is your records, that's what you testified to earlier; isn't that correct?

. . .

Q. On page 2 on page 32 [of Mr. Strasrypka's deposition] excuse me. At line 2 on page 32 I have asked you the question, "Have you found any bank records of your own to reconstruct payment dates from Mrs. Glazier?" and your response was, no, you hadn't found any payments or any records of your own. And then I asked you if you found any bank records of your father's, and your answer was, no, these checks were cashed immediately.

A. Yes.

Q. You have no records-- you have no records. You have only the checks that you recall receiving on the first of the month for more than ten years; isn't that correct?

A. Yes.

R. 39-41.

Following, such testimony, Ms. Van Frank moved the court to strike Mr. Strasrypka's evidence based on the same objection she raises before this court on appeal. However, the court denied such motion, ruling:

[By the court]: Generally--well, the motion to strike is denied. As the fact finding, I'm able to distinguish as to what those events which he has personal knowledge of, those that he is basing it on objective testimony. the motion to strike is overruled. I will be able to decide how to reconcile any apparent conflict.

R. 42.

Based on the foregoing, it is abundantly clear that the Plaintiff, Mr. Strasrypka, had personal knowledge, independent of any records or other documentation, that Ms. Glazier was consistently late in making her payments. The court explicitly recognized the apparent inconsistency between the Plaintiff's trial testimony and his deposition testimony and afforded Mr. Strasrypka's testimony that he had independent knowledge that the payments were invariably late the appropriate deference. Because, the Plaintiff's testimony was sufficient to support the court's ultimate finding that the January 1, 1991 check was for the payment that was due on December 15, 1990, such finding is not clearly erroneous.

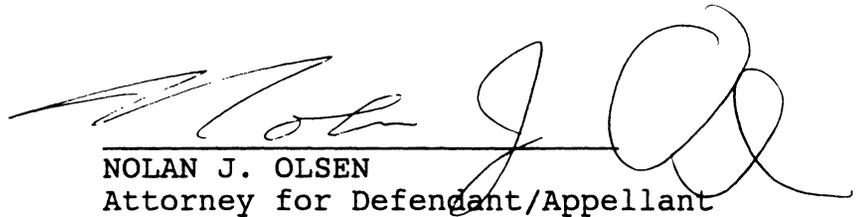
Additionally, the district court had before it the checks written by Mrs. Glazier (Exhibit 29) and the amortization schedule (Exhibit 2) upon which the court could reconstruct the payment schedule and thereby reconcile any dispute as to when Mrs. Glazier made her payments under the contract. Such evidence would likewise be sufficient to support the court's finding that the

January 1, 191 check was for the payment that was due on December 15, 1990. Accordingly, inasmuch as the Defendant failed to marshal all of the evidence in support of the court's finding, this court need not consider the Defendant's challenge to such finding. Moreover, if this court elects to consider such challenge, there was certainly sufficient evidence before the district court to support the finding.

CONCLUSION

Based on the foregoing, this Court should reverse the district court's ruling that the Plaintiffs defaulted under the uniform real estate contract so as to entitle the Defendant to the award of attorney fees.

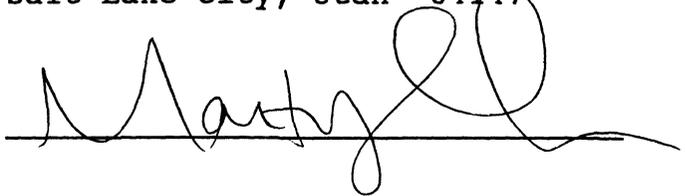
DATED this 9 day of August, 1994.


NOLAN J. OLSEN
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 10 day of Aug,
1994, I mailed a true and correct copy of the foregoing
APPELLANT'S REPLY BRIEF, postage prepaid thereon to:

Leslie Van Frank
COHNE, RAPPAPORT & SEGAL
525 East First South, Fifth Floor
P.O. Box 11008
Salt Lake City, Utah 84147

A handwritten signature in black ink, appearing to read "Leslie Van Frank", is written over a horizontal line. The signature is stylized and cursive.