

2006

# Boyd P. Anderson and Marilyn S. Anderson v. Allen E. Olsen : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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	:	
BOYD P. ANDERSON and MARILYN	:	
S. ANDERSON,	:	
	:	
Petitioners / Appellants	:	Appellate Case No.
	:	20060394-CA
v.	:	
	:	BRIEF OF APPELLANT
ALLEN E. OLSEN	:	
	:	
Respondent / Appellee	:	

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APPEAL FROM SIXTH DISTRICT COURT, SANPETE COUNTY, UTAH

JUDGE DAVID L. MOWER

---

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FILED  
UTAH APPELLATE COURTS

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IN THE UTAH COURT OF APPEALS

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BOYD P. ANDERSON and MARILYN :  
S. ANDERSON, :

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## TABLE OF AUTHORITIES

### Cases

*CECO Corp. v. Concrete Specialists, Inc.*, 772 P.2d 967, 969 -70 (Utah 1989)

*Knox v. First Sec. Bank of Utah*, 196 F.2d 112 (C.A.10 1952)

*Thompson v. Cheesman*, 15 Utah 43, 48 P. 477, 479 (Utah 1897)

*Wayment v. Clear Channel Borad., Inc.*, 2005 UT 25, ¶ 15, 116 P.3d 271 (Utah 2005)

### Statutes

Utah Code Ann. 78-2-2

Utah Code Ann. § 78-2a-3

### Rules

Utah R. Civ. P. 56(c)

## JURISDICTION

Jurisdiction is conferred upon this Court pursuant to Utah Code Annotated, §78-2-2, § 78-2a-3.

## ISSUES AND STANDARD OF REVIEW

The trial court made a conclusion of law that a deed of trust was not a valid agreement because no consideration passed between Defendant Allen Olsen and his son, Steven Olsen. However, under the law, it is not necessary that the consideration pass directly from the obligee to the obligor. A benefit to a third person may be sufficient consideration for a promise. Did the trial court err when it ruled that the

**deed of trust is not a valid agreement for failure of consideration?**

**The trial court made a conclusion of law that a deed of trust was not a valid agreement because no promissory note evidenced the debt. However, under the equitable rules of estoppel, a promise is enforceable where a party acts inconsistently with a later claim, the other party reasonably acts based on the first party's act, and injury to the second party would result. Did the trial court err when it declined to apply the estoppel doctrine to the facts of this case?**

***Standard of Review***

**A summary judgment determination is reviewed for correctness, with no deference granted to the district court's legal conclusions. *Wayment v. Clear Channel Borad, Inc.*, 2005 UT 25, ¶ 15, 116 P.3d 271 (Utah 2005).**

**Plaintiffs, the Andersons, made the argument that the benefit of the contract was for Mr. Olsen's son in the January 11, 2006 hearing on motions for summary judgment. Hearing Tr. p. 27, ll. 18-21. The Andersons made the argument in the hearing on motions for summary judgment that Mr. Olsen should be estopped from asserting that the deed of trust was invalid for lack of an underlying note. Hearing Tr. p. 26, l. 19 - p. 28, l. 4.**

**STATEMENT OF THE CASE**

**This appeal concerns a loan made by Plaintiffs Boyd and Marilyn Anderson to Steven Olsen, the son of Defendant Allen Olsen. Both parties moved for summary**

**judgment and on January 11, 2006, the trial court heard arguments. On March 22, 2006 the court issued its order granting summary judgment to Defendant Allen Olsen and denying summary judgment to Plaintiffs the Andersons.**

**In 1995 Allen Olsen and his son, Steven Olsen, entered into a real estate purchase contract under which Steven would purchase from Allen real estate used in Allen's insurance business. Supplemental Memorandum in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment, Exhibit "B." The real estate purchase did not occur at that time. Hearing tr. p. 21. ¶ 2 -p. 22, ¶ 4. In 1998 Defendant's son, Steven Olsen, who was married to Plaintiffs' daughter, asked to borrow money from the Plaintiffs, the Andersons, in order to purchase his father's insurance business. Hearing Tr. p. 2, Memorandum Decision on Motion for Summary Judgment, Undisputed Material Facts ¶¶ 1-3. The Andersons agreed to loan the money on the condition that Steve Olsen provide security for the loan. Hearing Tr. p. 22, ll. 1-8, Memorandum Decision on Motion for Summary Judgment, Undisputed Material Facts ¶¶ 2,3. Steven Olsen asked his father, Plaintiff Allen Olsen, to sign a deed of trust to secure the loan. Memorandum Decision on Motion for Summary Judgment., Undisputed Material Facts ¶ 4. Plaintiff Allen Olsen signed the deed of trust listing as beneficiaries Plaintiffs, the Andersons, and listing as security for the loan Allen Olsen's real property. Id. Undisputed Material Facts ¶ 5.**

Using the deed of trust as collateral, Steven Olsen obtained the loan he had discussed with the Andersons in the amount of \$151, 000.00. *Id.* Undisputed Material Facts ¶ 7. The Andersons subsequently recorded the deed of trust. *Id.* Unbeknownst to the Andersons, before borrowing the money from the Olsens using the deed of trust as collateral, Steven Olson had told his father that Steven did not intend to purchase his father's insurance business. *Id.* at ¶ 6. There never was any direct communication between Allen Olsen and the Andersons regarding the disbursement of the loan to Steven. *Id.* at ¶ 8. A promissory note was drawn up evidencing the debt but was not signed by Allen Olsen. *Id.* ¶ 5. Steven Olsen made payments on the loan until he defaulted in July of 2001. *Id.* at ¶ 10. Steven discharged the obligation to the Andersons in bankruptcy and the Andersons, unable therefore to pursue Steven, now seek to foreclose on the deed of trust. *Id.* at ¶ 11.

#### SUMMARY OF THE ARGUMENT

*I. The trial court erred when it made a conclusion of law that the deed of trust was not a valid agreement because no consideration passed between Defendant Allen Olsen and his son, Steven Olsen, as there existed consideration running from the Andersons to Allen Olsen's son, Steven.*

The trial court concluded that the deed of trust is not a valid agreement due to failure of consideration. According to the court, Allen Olsen's pledge of collateral for the debt of Steven Olsen was given solely in exchange for his son's promise to

buy the insurance business.

But the deed of trust executed by Allen Olsen was a promise to provide security to the Andersons for a loan the Andersons subsequently made to Allen Olsen's son, Steven. It is an agreement not between Allen Olsen and his son but between Allen Olsen and the Andersons. Consideration runs from the Andersons to the Olsen's son, Steven. It is not necessary that the consideration pass directly from the Andersons to Allen Olsen.

Steven Olsen asked his in-laws, the Andersons, for a loan. The Andersons were willing to lend Steven the money if he provided some security. A deed of trust was therefore executed between Allen Olsen and his wife, now deceased, as trustors, and the Andersons as beneficiaries. Allen Olsen thereby promised the Andersons to guarantee payment of a loan if the Andersons made the loan to Allen Olsen's son, Steven. Making the loan to Steven was consideration for Allen Olsen's promise. Therefore the trial court erred when it concluded that the deed of trust was not a valid agreement for failure of consideration.

*II. The trial court committed error when it made a conclusion of law that the deed of trust was not valid for lack of a promissory note as the doctrine of equitable estoppel ought to apply to the facts of this case*

The trial court concluded that the deed of trust was not valid because Allen Olsen never signed a promissory note to evidence the debt under the deed. But here the elements of equitable estoppel are met. There is an act by one party inconsistent

**with a claim later asserted, reasonable action by the other party taken on the basis of the first party's act, and injury to the second party that would result from allowing the first party to contradict or repudiate such act.**

**Steven Olsen approached the Andersons for a loan. The Andersons agreed to lend Steven the money if he provided them with security. A deed of trust was therefore executed between Allen Olsen and his wife, now deceased, as trustors, and the Andersons as beneficiaries. Allen Olsen thereby promised the Andersons to guarantee payment of a loan if the Andersons made the loan to Allen Olsen's son, Steven. Steven Olsen provided the Andersons with the deed of trust and, they being satisfied with the security, reasonably relied on it and loaned Steven the money. Now Allen Olsen asserts that, even though he agreed to secure the loan to his son, and even though the Andersons, in reliance on that security, loaned Steven the money, the deed of trust is not valid. Steven Olsen has discharged his debts in bankruptcy, and the deed of trust is the only recourse the Andersons have to recover any of what they loaned Allen Olsen's son. Allen Olsen should therefore be estopped from asserting that the lack of a written promissory note renders his promise to guarantee the loan, the deed of trust, invalid.**

## **ARGUMENT**

### **POINT I**

**The trial court erred when it made a conclusion of law that the deed of trust was not a valid agreement because no consideration passed between Defendant Allen E. Olsen and his son, Steven G. Olsen, as there existed consideration running from the Andersons to Allen Olsen's son, Steven.**

**The trial court concluded that the deed of trust is not a valid agreement due to failure of consideration. Order, Conclusions of Law, ¶ 3. According to the court, Allen Olsen’s pledge of collateral for the debt of Steven Olsen was given solely in exchange for his son’s promise to buy the insurance business. Id. Evidence supporting the court’s ruling includes the real estate purchase agreement under which Steven Olsen would purchase real property used in the real estate business from Allen Olsen, and the fact that no note was signed by Allen Olsen.**

**But the deed of trust executed by Allen Olsen is a promise to provide security to the Andersons for a loan the Andersons subsequently made to Allen Olsen’s son, Steven. It is an agreement not between Allen Olsen and his son but between Allen Olsen and the Andersons. While consideration does not run from the Andersons to Allen Olsen, it does run from the Andersons to the Olsen’s son, Steven. It is not necessary that the consideration pass directly from the Andersons to Allen Olsen. See, e.g., *Knox v. First Sec. Bank of Utah*, 196 F.2d 112, 118 (C.A.10 1952)(saying, “It is not necessary that the consideration pass directly from the obligee to the obligor. It is sufficient if there be detriment or disadvantage to the obligee and an element of benefit or advantage to the obligor, or to a third person at his request”); see also *Thompson v. Cheesman*, 15 Utah 43, 48 P. 477, 479 (Utah 1897).**

**Steven Olsen asked his in-laws, the Andersons, for a loan. Order, Findings of Fact, ¶¶ 2-3. The Andersons were willing to lend Steven the money if he provided some**

security. *Id.* A deed of trust was therefore executed between Allen Olsen and his wife, now deceased, as trustors, and the Andersons as beneficiaries. *Id.* at ¶ 3. Allen Olsen thereby promised the Andersons to guarantee payment of a loan if the Andersons made the loan to Allen Olsen's son, Steven. Making the loan to Steven was consideration for Allen Olsen's promise. Therefore the trial court erred when it concluded that the deed of trust was not a valid agreement for failure of consideration.

## POINT II

The trial court committed error when it made a conclusion of law that the deed of trust was not valid for lack of a promissory note as the doctrine of equitable estoppel ought to apply to the facts of this case

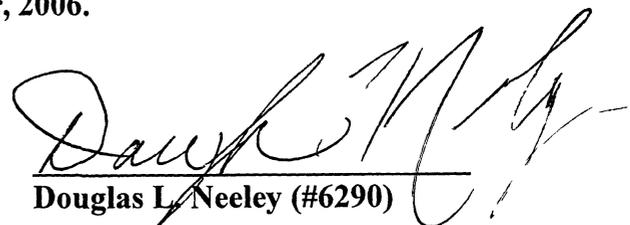
The trial court concluded that the deed of trust was not valid because Allen Olsen never signed a promissory note to evidence the debt under the deed. Order, Conclusions of Law, ¶ 4. While the Andersons through their attorney asserted a theory of estoppel before the court, Hearing Tr. p. 26, l. 19 - p. 28, l. 4, the court did not address in its order why it failed to apply the doctrine in this case. Equitable estoppel requires proof of three elements: (i) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (ii) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act, or failure to act; and (iii) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act. *CECO Corp. v. Concrete Specialists, Inc.*, 772 P.2d 967, 969 -70 (Utah 1989) (citations omitted).

Here, Steven Olsen approached the Andersons for a loan. Order, Findings of Fact, ¶¶ 2-3. The Andersons agreed to lend Steven the money if he provided them with security. Id. A deed of trust was therefore executed between Allen Olsen and his wife, now deceased, as trustors, and the Andersons as beneficiaries. Id. at ¶ 3. Allen Olsen thereby promised the Andersons to guarantee payment of a loan if the Andersons made the loan to Allen Olsen's son, Steven. Steven Olsen provided the Andersons with the deed of trust and, they being satisfied with the security, reasonably relied on it and loaned Steven the money. Now Allen Olsen asserts that, even though he agreed to secure the loan to his son, and even though the Andersons, in reliance on that security, loaned Steven the money, the deed of trust is not valid. Steven Olsen has discharged his debts in bankruptcy, id. at ¶ 11, and the deed of trust is the only recourse the Andersons have to recover any of what they loaned Allen Olsen's son. Allen Olsen should therefore be estopped from asserting that the lack of a written promissory note renders his promise to guarantee the loan, the deed of trust, invalid.

#### CONCLUSION

For the foregoing reasons, the court's grant in favor of Defendant's motion for summary judgment and denial of Plaintiffs' motion for summary judgment should be reversed. Plaintiffs, the Andersons ask for an award of attorneys fees incurred on appeal.

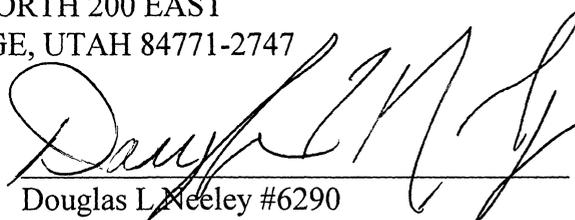
DATED this 29<sup>th</sup> day of September, 2006.

  
Douglas L. Neeley (#6290)

MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copy of the Appellant's Brief,  
postage prepaid thereon, this 29<sup>th</sup> day of September, 2006, to the following:

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