

1995

# APS v. Garth E. Briggs : Brief of Appellee

Utah Court of Appeals

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BRIEF

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DOCKET NO. 950750-CA

IN THE UTAH COURT OF APPEALS

APS, a Utah General  
partnership, :

Plaintiff and  
Appellant, :

vs. :

Case No. 950756-CA  
Priority No. 15

GARTH E. BRIGGS, VAUGHN L.  
PULSIPHER, AUTUMN DEVELOPMENT  
AND CONSTRUCTION COMPANY :  
a Utah Corporation (aka Autumn:  
Development and Construction) :  
and AMERICAN REAL ESTATE :  
ASSOCIATES, a Utah :  
Corporation :

Defendants and  
Appellees, :

BRIEF OF APPELLEE VAUGHN PULSIPHER

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, STATE OF UTAH  
HONORABLE FRANK G. NOEL

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**FILED**

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APPEALS

IN THE UTAH COURT OF APPEALS

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APS, a Utah General partnership,	:	
	:	
Plaintiff and Appellant,	:	
	:	
vs.	:	
	:	Case No. 950756-CA
GARTH E. BRIGGS, VAUGHN L. PULSIPHER, AUTUMN DEVELOPMENT AND CONSTRUCTION COMPANY	:	Priority No. 15
a Utah Corporation (aka Autumn Development and Construction) and AMERICAN REAL ESTATE ASSOCIATES, a Utah Corporation	:	
	:	
Defendants and Appellees,	:	

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### CITATION TO THE RECORD

All citations to the record on appeal shall be as follows: "R." followed by the page number where the referenced portion of the record can be located.

### JURISDICTION

The Utah Court of Appeals has jurisdiction of this matter under Utah Code Ann. § 78-2-2(4) and Utah Code Ann. § 78-2a-3(2)(k).

### STATEMENT OF ISSUES

Whether the Utah Court of Appeals should uphold the order of the district court dismissing APS's claims against Vaughn Pulsipher, which order is based upon the court's ruling that when a co-obligator who provides real property as security for a loan files bankruptcy, the statute of limitations is not tolled as against co-obligors who are not trustors under the deed of trust; have provided no security as collateral for the loan and who are not parties to any bankruptcy during the statute of limitations period.

### STANDARD OF REVIEW

Mr. Pulsipher concedes that an appellate court need not defer to the legal conclusions of the trial court. See, e.g., Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989).

DETERMINATIVE STATUTES

Utah Code Ann. § 78-12-23(2):

Within six years:

. . . .

(2) An action upon any contract, obligation or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.

Utah Code Ann. § 78-37-1:

There can be one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate. . .

STATEMENT OF THE CASE

a. Nature of the Case

APS filed an action against Vaughn Pulsipher to collect on a promissory note which he signed as a "co-maker." The note was secured by a deed of trust executed by Autumn Development and Construction Company ("Autumn Development") who alone offered real property as collateral. Mr. Pulsipher offered no collateral for the note and did not sign the deed of trust.

APS claims no payments were ever made under the loan. The last payment due under the note was scheduled for June 18, 1987. More than six years after the last date payment was due, APS filed a lawsuit against Mr. Pulsipher and others. APS argues the combined effect of Autumn Development's bankruptcy and Utah's "one action rule" (Utah Code Ann. § 78-37-1) tolled the statute of limitations.

Mr. Pulsipher claims that because he was not a party to the bankruptcy; did not sign the deed of trust and did not offer any real property collateral for the loan, the combined effect of Autumn Development's bankruptcy and the "one action rule" did not stop the running of statute of limitations against him. Because APS filed its lawsuit more than six years after the last possible date a breach could have occurred under the note, the district court appropriately dismissed the case against Mr. Pulsipher.

b. Course of Proceedings

APS filed a complaint in district court on November 10, 1993. Vaughn Pulsipher filed a motion to dismiss the complaint because the statute of limitations had run on the claims against him for breach of written instrument.

c. Disposition

The Honorable Frank G. Noel granted Mr. Pulsipher's motion to dismiss. Judge Noel held Autumn Development's bankruptcy did not toll the statute of limitations as against Mr. Pulsipher. APS could have pursued its claim against Mr. Pulsipher during the relevant period.

APS filed a motion to reconsider reasserting its claim that the combined effect of Autumn Development's bankruptcy and the "one action rule" tolled the statute of limitations as against Vaughn Pulsipher. The lower court ruled APS presented no new material in its motion which justified reconsideration of the

ruling. Judge Noel reaffirmed his position that where a co-maker has not supplied collateral for a loan and is not within the jurisdiction of the bankruptcy court in a bankruptcy filed by another co-maker who has supplied collateral for the loan, the statute of limitations is not tolled as against the first co-maker.

The court eventually certified the order dismissing Mr. Pulsipher from the lawsuit as a final order so that APS could pursue this appeal.

#### STATEMENT OF THE FACTS

1. Vaughn Pulsipher, along with three others, signed a promissory note that was secured by a deed of trust. The final payment under the promissory note was June 18, 1987. R. at 5-6.

2. The note was secured by a deed of trust executed solely by Autumn Development as trustor. Vaughn Pulsipher offered no real property as collateral for the loan and did not sign the security instrument for the loan. R. at 70-75.

3. No payments were ever made under the loan. R. at 2.

4. Autumn Development, the only trustor under the deed of trust, eventually filed bankruptcy. R. at 49-50.

5. An entity having lien rights in the real property superior to the rights of APS moved to have the automatic stay lifted and foreclosed on the real property. R. at 51-55.

6. Once the security for the loan had been extinguished in the foreclosure, APS filed its complaint against Vaughn Pulsipher

and others for breach of the note. APS filed the complaint more than six years after the final payment was due under the note. R. at 1-4.

7. Vaughn Pulsipher filed a motion to dismiss, arguing the six year statute of limitations for breach of a written instrument had run against APS's claims against him. R. at 27-32. The court granted the motion to dismiss and denied a subsequent motion for reconsideration. R. at 81-85 and 119-123.

8. APS eventually filed a motion under Rule 54(b), Utah R. Civ. P. asking the court to certify the order of dismissal of Pulsipher as a final order. The court certified the order as a final order and APS filed its appeal on September 5, 1995. R. at 165-169.

#### SUMMARY OF ARGUMENT

There is a six year statute of limitations on written agreements. The complaint against Vaughn Pulsipher was filed more than six years after the last possible date a breach could have occurred under the subject promissory note. Although Vaughn Pulsipher signed the promissory note as a "co-maker," he was not a trustor under the trust deed securing the note; he offered no collateral as security for the loan and he was not a party to any bankruptcy during the statute of limitations period.

Because Mr. Pulsipher offered no collateral for the loan, he was not protected by the "one action rule." Additionally,

because Mr. Pulsipher was not a party to any bankruptcy, the statute of limitations continued to run against him.

#### ARGUMENT

Vaughn Pulsipher does not contest the general proposition that the "one action rule" requires a mortgagee look to the security before taking direct action against the mortgagor. Vaughn Pulsipher also agrees that if a debtor who provides collateral to secure a loan files bankruptcy, the automatic stay might prevent a creditor from taking action against the collateral. Additionally, under Utah Code Ann. § 78-12-41, a bankruptcy may toll the statute of limitations during the period the automatic stay is in effect. However, APS ignores the fact that application of these basic principles to the facts and circumstances of the present case support dismissal of the case against Vaughn Pulsipher.

In this case, Autumn Development, the sole trustor under the deed of trust securing the promissory note, filed bankruptcy. Autumn Development was the only obligor under the promissory note who pledged any security. Mr. Pulsipher provided no collateral to secure the note. Additionally, during the relevant time period, Vaughn Pulsipher was not a party to any bankruptcy and was not protected by an automatic stay.

Other than Utah Code Ann. § 78-12-41 and Utah Code Ann. § 78-37-1 which APS argues combine to toll the statute of limitations, APS offers no legal authority to support its position that

the statute of limitations was tolled. The case of Surety Life Ins. Co. v. Smith, 892 P.2d 1 (Utah 1995) cited by APS is distinguishable because it does not discuss the statutes whose application are at issue in this case. Additionally, that case does not involve a multi-obligor obligation where only one debtor has provided security and executed a trust deed. The parties have located no Utah case discussing the effect a bankruptcy of one of multiple parties to a promissory note has on a creditor's right to proceed against other parties who are not bankrupt and who have not pledged any security for the debt.

Antideficiency statutes (or the "one action rule") such as Utah Code Ann. § 78-37-1 are designed to protect obligors who give security as collateral. The Utah Supreme Court has held the "one action rule" applies "only to actions between mortgagors and mortgagees" Pillsbury Mills, Inc. v. Nephi Processing Plant, Inc., 323 P.2d 266, 268 (Utah 1958). The "one action rule" should not apply to someone who is not a mortgagor under a mortgage or similarly, a trustor under a deed of trust. In this case, Mr. Pulsipher was not a trustor under the deed of trust and was not subject to the obligations under the deed of trust. Therefore, he was not entitled to the protection of the "one action rule." In other words, APS was not required to pursue the real property collateral before pursuing Vaughn Pulsipher directly.

Vaughn Pulsipher submits that under the facts and circumstances of this case, the district court correctly interpreted

the effect of Utah statutory law and adopted a common sense approach by ruling the statute of limitations was not tolled as against him.

APS makes a big deal about a distinction between the labels "co-maker" and "guarantor." APS argues that Mr. Pulsipher was a "co-maker" rather than a "guarantor" and that somehow this strengthens its argument. Despite the fact Mr. Pulsipher argued in the court below that he was effectively a guarantor because he offered no collateral for the loan, Judge Noel's minute entries acknowledge Mr. Pulsipher was a "co-maker". The distinction was apparently unimportant to Judge Noel. The important factors for analyzing these issues are the undisputed facts that although Pulsipher signed a note, he was not a party to the security instrument securing the note; he gave no collateral and was not a party to a bankruptcy so as to receive protection through the automatic stay. Even ignoring the confusing categories and labels of "guarantor", "maker", "co-maker" and "surety", Mr. Pulsipher submits the clear interpretation and intent of Utah's "one action rule" supports the district court's ruling that the statute of limitations was not tolled as against Mr. Pulsipher.

Utah Code Ann. § 78-37-1 states:

There can be one action for the recovery of any debt where the enforcement of any right secured solely by mortgage upon real estate...

Autumn Development's debt was the only debt secured solely by the mortgage because Autumn Development was the sole owner of the property pledged as collateral. Mr. Pulsipher did not pledge any

collateral to secure the debt. Therefore, Pulsipher was not a trustor or mortgagor entitled to the protection of the one action rule.

CONCLUSION

Based upon the foregoing, appellee Vaughn Pulsipher respectfully requests the court to affirm the ruling of the district court.

DATED this 3 day of April, 1996.

WINDER & HASLAM, P.C.



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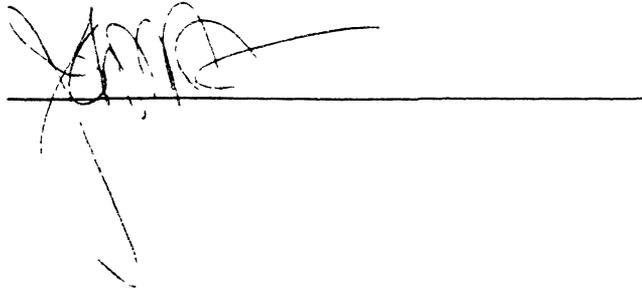
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing BRIEF OF APPELLEE VAUGHN PULSIPHER to be mailed, postage prepaid, this \_\_\_\_\_ day of April, 1996.

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