

1995

# APS v. Garth E. Briggs, Vaughn L. Pulsipher, Autumn Development and Construction Company : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 950756-CA

IN THE UTAH COURT OF APPEALS

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APS, a Utah general partnership,	:	
	:	
Plaintiff and Appellant,	:	
	:	
v.	:	Case No. 950756-CA
	:	
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,	:	Priority No. 15
	:	
Defendants and Appellees,	:	

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REPLY BRIEF OF APPELLANT

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT,  
HONORABLE FRANK G. NOEL

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IN THE UTAH COURT OF APPEALS

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## ARGUMENT

### A. THE ONE-ACTION RULE PROTECTS ANY OBLIGOR OF AN OBLIGATION SECURED BY A TRUST DEED

Pulsipher's position rests entirely on the erroneous argument that the one-action rule did not prevent action against him because he did not provide the real estate collateral.

Pulsipher argues:

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.

Appellee's Brief at p.7.

Pulsipher cannot cite any authority for this position. Indeed, this position is contrary to the law. The "one-action rule" statute should be read to protect obligors of real estate secured debts, without regard to whether the obligor supplied the collateral.

Utah Code Ann. § 78-37-1 reads:

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

This statute refers to action on the "debt," rather than action against the trustor. The most succinct description of the effect of the statute was made by the Utah Supreme Court in 1978:

"The underlying purpose of the single-action statute is to preclude the creditor from waiving the security and suing directly on the contract to pay money and hold the debtor rather than the security primarily liable." Bank of Ephraim v. Davis, 581 P.2d 1001, 1003 (Utah 1978). See also Bawden & Assoc. v. Smith, 646 P.2d 711 (Utah 1982) and Utah Mortgage & Loan Co. v. Black, 618 P.2d 43, 45 (Utah 1980).

In this case, the "contract to pay money" is the Note, and Pulsipher is a co-maker of the Note. The one-action rule, by its terms, prevented APS from suing Pulsipher on the Note until after foreclosure of the real estate collateral. Pulsipher's strained argument is that "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." Appellee's Brief at p.8. This argument is unsound. Pulsipher refers to "Autumn Development's debt" as though there were two debts owed in this case. However, there is only one debt, as evidenced by the Trust Deed Note made by Pulsipher, Autumn Development, and others. It is pure fiction to say that Autumn Development owed a debt secured by the real property, but Pulsipher owed a debt not secured by the real property. The debt, owed by both, is the Trust Deed Note, secured by the real property collateral (until foreclosure by a prior lienholder).

The focus of the one-action rule is on the actions of the creditor seeking to collect a real estate secured debt, not the status of those owing the debt.

The rule applies to creditors secured by liens on real property and essentially dictates the procedure by which a creditor may collect a debt in the case of a debtor's default. Madsen, Equitable Considerations of Mortgage Foreclosure and Redemption in Utah: A Need for Remedial Legislation, 2 Utah L. Rev. 327, 337 (1976). First, the creditor must proceed "in accordance with the provisions of this chapter," i.e., the chapter describing mortgages. A creditor must foreclose and have a deficiency determined by the court before proceeding against the debtor personally. Utah Mortgage & Loan Co. v. Black, 618 P.2d 43, 45 (Utah 1980).

City Consumer Services v. Peters, 815 P.2d 234, 235 (Utah 1991).

In this case, APS held a debt that was secured by a trust deed on real property. The one-action rule required APS to foreclose on the real estate collateral (or be foreclosed out by a prior lienholder) prior to suing to collect the secured note. It is irrelevant under the one-action rule if the maker of the real estate secured note provided the real estate collateral. It is only relevant that such a trust deed lien interest was granted as security for payment of the note.



B. PULSIPHER HAS NOT DISPUTED THE REMAINING ARGUMENTS OF APS

Pulsipher's argument is based entirely on the premise that APS was free to sue Pulsipher directly, in spite of the one-action rule and the bankruptcy of Autumn Development. Pulsipher has not disputed the remaining arguments made by APS. Rather, Pulsipher apparently concedes that, if the one-action rule prevented action against Pulsipher prior to foreclosure of the Trust Deed, then the stay of that foreclosure by the Autumn Development bankruptcy operates as a stay of the running of the statute of limitations under Utah Code Sec. 78-12-41. This conclusion naturally follows. Because the one-action rule prevented suit against Pulsipher without first foreclosing the real estate collateral, APS was forced to pursue foreclosure of the trust deed. That foreclosure was stayed by the effect of 11 U.S.C. § 362(a), which operated as a stay of any action "to enforce any lien against property" of the Autumn Development bankruptcy estate. See 11 U.S.C. § 362(a). This is precisely the kind of "statutory prohibition" that tolls the running of the statute of limitations according to Utah Code § 78-12-41. See also Citicorp Mortgage Inc. v. Hardy, 834 P.2d 554 (Utah Ct. App. 1992).

The foundation of Pulsipher's argument, and the basis for the trial court's ruling, is an erroneous application of the

one-action rule. The correct application of that rule leads to the conclusion that the statute of limitations was stayed during the time that the Autumn Development bankruptcy prevented foreclosure of the trust deed (which foreclosure was a precondition to initiation of this suit against Pulsipher).

CONCLUSION

APS respectfully requests that this court reverse the Order Dismissing Defendant Pulsipher.

DATED this 6<sup>t</sup> day of May, 1996.

RAY, QUINNEY & NEBEKER



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is one of the attorneys for the appellant herein, and that he caused two copies of the foregoing REPLY BRIEF OF APPELLANT to be mailed, postage pre-paid in the United States mail on May 6<sup>th</sup>, 1996 addressed to the following:

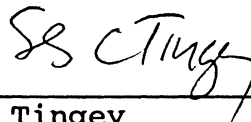
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and

Garth E. Briggs  
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DATED this 6<sup>th</sup> day of May, 1996.

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