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BRIEF

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IN THE UTAH COURT OF APPEALS

FIRST SECURITY BANK OF UTAH	)	
vs.	)	CASE NO. 880628 - CA
CHAS. E. BRYAN	)	
et. al.,	)	

APPELLANTS REPLY TO RESPONDENTS BRIEF
REAL WEST [redacted] CASES

Appeal from an order of Summary judgment
of the 5th. District Court of Iron County.
The Honorable Dean Condors, Presiding.

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DEPOSITED BY THE
STATE OF UTAH
AUG 17 1990

FILED
OCT 10 1989

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AMENDED

DIRECTORY

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1. A. APPELLANTS DID RAISE THE RELEVANT RULE URCP ISSUES IN THEIR INITIAL BRIEF - AND THIS COURT SHOULD NOT BE MISLED INTO RESOLVING THOSE ISSUES BY WEIGHING THE EVIDENCE.

At pages 16 and 17 of its brief, respondent asserts that appellant's have not contested certain findings of the trial court and therefore its rulings should not be disturbed. It is appellant's position that they have attached the basis of all of the rulings of the Trial Court which are adverse to them. All of the issues dealt with by the Trial Court in its Memorandum Decision (R - #9299, 2554 - 2586) were ruled on pursuant to motions for summary judgment filed by respondent and are thereby governed by rule 56 Utah Rules of Civil Procedure. Appellants, in their initial brief, determined that one all encompassing issue was ripe for appeal, towit: did the Trial Court err in granting summary judgment against them. In other words since rule 56 (e) authorizes granting of summary judgment, only if appropriate, appellants properly confined themselves to three rule 56 issues. However, respondents in its Reply Briefs would have their Court weigh the evidence and resolve issues on the merits. That such an approach is in err, see the authorities cited by appellants in Argument 1. B. at page 1 of their Auto West Reply Brief filed herewith. The ruling of the lower Court should be reversed.

1. B. APPELLANTS HAVE CORRECTED THEIR FAILURE TO CITE THEIR BRIEF TO THE PAGENATED RECORD BY FILING AN AMENDED ADDENDUM DIRECTORY INDEX.

Appellants hereby incorporate their Argument 1. A. at page 1 of their Auto West Reply Brief submitted herewith. Further, respondent has failed to provide the pagenated record citations for facts stated in its Brief at the following places: e.g., p. 1., para. (a) and (b),

p. 2. para. 2, p. 7, last sentence of para. 7, p. 8, first sentence of para. 8, footnote 3, the first two sentences of para. 9, para. 10, the first three sentences of para. 11, para. 13, p. 11, para. 21, p. 12, para. 24. Follow the Amica rationale, this court should only consider those facts properly cited to and supported by the record.

1. C. APPELLANTS DID PROVIDE AFFIDAVITS AND DEPOSITIONS TO THE TRIAL COURT CONTAINING EVIDENCE SUFFICIENT TO RAISE MATERIAL ISSUES OF FACT.

The Court is referred to Arguments 1. B. and C. of their Auto West Reply Brief beginning at page 13, wherein they have outlined arguments and authorities to support the proposition above, therefore the lower Court should be reversed.

1. D. THE TRIAL COURT IGNORED MATERIAL FACTS AND THEREFORE ERRED IN GRANTING RESPONDENT'S MOTIONS FOR SUMMARY JUDGMENT.

For arguments setting forth specific material facts sufficient to defeat respondents motions for summary judjment that were presented by appellants to the Court below. See all other arguments submitted in this and its companion Reply Brief submitted herewith, therefore the trial Court should be reversed.

II. A. REAL WEST, INC. HAS NOT SOUGHT TO HAVE THE ALLEDGED TRUSTEES SALE OF JANUARY 12, 1982, SET ASIDE AND THEREFORE THE COURT ERRED IN DISMISSING ITS CLAIM FOR MONEY DAMAGES.

The respondent mislead the trial court into believing that Real West, Inc. had asked the Court to rescind the alledged sale of its real property by way of the January 12, 1982 trustees sale (R - 2749 at 22, Ex. "4") and as a result the Trial Court's rulimg is based on that faulse premise submitted to it by respondent (R - #9299, 2571 - 2575). Rather, RW founded its claims against respondent in conversion, fraud and quiet title RW's

answer to Amended Complaint and Counterclaim, (R - #9489, 323 - 335), and Amended Counterclaim (R - #10782, 264 - 271). RW has consistantly taken the position that respondent never sold the so. helf of SW 1/4 Sec. 20, T33S, R8W, SLB & M (Iron County hereafter referred to as the 80 acres at said trustees sale. By the trustee's Notice of Sale (R - #9299, 2752, Ex. #8) published in a local newspaper, (R - #10782, at 456) trustee advertised the S 1/2 of the SW 1/4, Sec. 2, T33S, R8W for sale, thereby describing a totally different parcel of ground than the one advertised. Therefore, the trustee completely failed to advertise the 80 acres for sale. This is much more than a misdiscription or typographical error. By failing to describe the 80 acres in any manner in the Notice of Sale, the trustee failed to give either the trustor or the public notice that said real property was to be sold. This is a total denial fo due process to appellants. In other words the 80 acres and any water rights that may go with it were taken from RW without due process of law, contrary to the fourteenth amendment to the United States Constitution and Article I, Section 7 of the Utah Constitution. See Parry v. Bonneville Irr. Dist., 263 p. 751, (Utah 1928) and Naisbitt v. Herrick, 290 p. 950, (Utah 1930).

In respondents argument found at p. 18 of its Real West Brief, it relies heavily on Concepts, Inc., v. First Security Realty Service, 743 p. 2d 1158 (Utah 1987) for the proposition that there is a presumption in favor of the validity of a trustee's sale. However, respondent fails to discuss the facts of that case. Concepts, supra, is a case where the lender sought to set aside a trustee's sale to enable it to seek a deficiency judgment against trustors when the three month statute of limitations had expired. In light of the Utah Supreme Court's often repeated phrase

that the law does not favor forfietures, it is no wonder that the Court in Concepts would not give the lender a sevond bite at the apple.

Even though, appellants have never sought to have the trustee's sale of January 12, 1982, set aside, they must deal with it because respondent replys on the dicta of that opinion for the proposition that the trustee's failure to advertise (by notice of trustee's sale and publication of the same) the 80 acres, was a minor typographical error. That notice and publication of sale did describe other real property, some of which is owned by Real West, Inc., and it is appellants' position that respondent bought the real property advertised, (the appurtenant water rights issue will be discussed separately and later in this brief) and thereby satisfied the debt it claimed to be owed respondent by Real West and the alleged personal guarrantors.

However, back to Concepts, supra, at p. 1159 that notice of sale truly did contain a minor error, towit: the notice was published in 1983 advertising a sale date in 1982. Any reasonable person could easily reason that the sale would be on October 28, 1983, inasmuch as the notice was dated October 1, 1983. Likewise the nomconformity with the Trust Deed Acts in the cases relied upon in the Concepts opinion were minor and did not deprive the public of notice. University Sav. v. Springwood Shopping Ctr., 644 S.W. 2d 705 (Tex. 1983), Harwath v. Hudson, 654 S.W. 2d 851 (Tex. App. 5 Dist. 1983) and Houston First Amer. Sav. v. Musick, 650 S.W. 2d 764 (Tex. 1983).

In the instant case, where the trustee totally failed to advertise the 80 acres it is unreasonable to believe that buying public was made aware of the sale or that fair market value was obtained thereby.

For further development of this argument please see Plaintiff's Rebuttal Memorandum. (R- #10782. 250 - 252 and 262 - 263) and Plaintiff's Memorandum (R- #10782, 132 - 145). The trial Court did not understand the readings and should be reversed.

II. B. THE WATER RIGHT, IF APPURTENANT, WERE NOT APPURTENANT TO THE REAL PROPERTY SOLD AT THE TRUSTEE'S SALE.

All of the water rights respondent claims to have acquired from Real West, Inc., by way of the trustee's sale fo January 12, 1982, are described in deposition exhibits 7 through 11 (R- #10782, 2759, at 11) and said exhibits all describe water rights within the 80 acres. Therefore, if the trustee failed to advertise and sell the 80 acres, the question of appurtenant rights is moot. For a more detailed discussion of the appurtenant water rights issue see R - #10782, 247 - 261.

In any event appellant's raised material issues of fact as to that question when real West filed (June 9, 1985) its amended complaint, verified and sworn to by Chas. E. Bryan, (R- #10782, 264 - 270), Real West's answers to interrogatories filed April 15, 1985, (R- #10782, 159 - 182) affidavit of Chas. E. Bryan filed November 6, 1985, (R- #10782, 415 - 420) and affidavit of Chas. E. Bryan filed November 25, 1985, (R- #10782, 450 - 465).

Therefore, the Trial Court committed reversable error when it failed to recognize that appellants had timely raised material issues of fact relative to the questions of whether or not respondent purchased the 80 acres at the January 12, 1982, trustee's sale and whether or not respondent received any water rights at said sale based on the doctrine of appurtenant water rights. The trial Court should be reversed.

II. C. EVEN IF, ARGUENDO, NO ACTION LIES FOR CONVERSION OF REAL PROPERTY OR WATER RIGHTS, APPELLANTS HAVE PLED FACTS SUFFICIENT TO ENTITLE THEM TO AN AWARD OF MONEY DAMAGES.

Please see the other arguments of appellants in this and its conpanion Reply Brief. That Utah is a fact pleading state and that specific facts have been pled to entitle it to relief see Argument III. B. of its Auto West Reply Brief beginning at page 8.

II. D. APPELLANTS CLAIMS ARE NOT BARRED BY LACHES, WAIVER OR ESTOPPEL INASMUCH AS REAL WEST, INC., IS NOT ATTEMPTING TO SET ASIDE THE TRUSTEE'S SALE.

See Agrument II. A. herein. Once again respondent incorrectly in its Brief at Argument II. D. that Real West seeks to set aside the trustee's sale. Also see Argument III. B. in the companion Auto West Reply Brief.

However, so it is clear, appellants are not seeking to defeat rights of purchasers in good faith, therefore the trial Court should be reversed.

III. A. THE TRIAL COURT'S ORDER CONSILIDATING ALL EIGHT OF THESE CASES CURED ANY AND ALL CLAIMS OF RESPONDENT BASED ON CLAIM SPLITTING.

By December 13, 1985, the trial Court had issued its Special Pretrial Order confirming that it had consolidated all eight of these cases upon stipulation of the parties. (R- #10782, 1177 - 1178, found by appellants among loose papers in the back of book 3 of file #9299) Since the Trial Court consolidated all of the cases, the problem, if any, has veen cured. Appellant's claims are all before the Court in a single lawsuit. Bradshaw v. Kershaw, 627, p. 2d 528 (Utah 1981). The trial Court erred and should be reversed.

III. B. APPELLANTS BRYAN AND GRAFF HAVE STANDING TO BRING CLAIMS ARISING FROM RESPONDENT'S DEALINGS WITH REAL WEST, INC.

Real West, Inc., was involuntarily dissolved by the Utah Department of Business Regulations on September 30, 1980. (R- #9299, at 1865) Appellants

Utah Land and Cattle co., Inc, and Graff are stockholders in Real West, Inc. (R- #9299, 2779, 4 - 8) and appellant Bryan is a stockholder in Utah Land and Cattle Co., Inc., (R- #9299, 2779, at 5) Utah Land and Cattle Co., Inc., was involuntarily desolved by the Utah Department of Business Regulations on September 30, 1980, (R- #9299, at 1988).

Section 16-10-93, Utah Code Annotated, provides that when the court liquidates a corporation the assets remaining after the payment of certain expenses shall be distributed among the shareholders. Admittedly these corporations have not been liquidated by the Court, however, logic dictates that since a chose in action is an asset and shareholders stand in line to receive their share of the assets of a corporation upon liquidation shareholders should be entitled to sue upon such choses in action in their own names upon involumtary dissolution, albeit the court should award the alaims to the individuals in the trust for the corporate creditors and stockholders. The trial Court should be reversed.

III. C. BECAUSE OF LENGTH LIMITATION, APPELLANTS WILL RESPOND TO RESPONDENT'S ARGUMENTS III. C, D, E, F, AND G GENERALLY.

Respondent's III. C., has been discussed previously herein and its III. D. responded to in part, as to respondent's III. E., see II. A., herein. Regarding III. F., Real West has raised material issues of fact which preclude summary judgment dismissing its fraud claim, (e.g., Amended Complaint, sworn to by Chas. E. Bryan, R - #10782, 264 - 270) Respondent's III. g., has been dealt with at II. B., herein. Regarding respondent's IV., see Argument III. B., in appellants Auto West companion Reply Briefl

CONCLUSION

APPELLANTS PRAY THAT THIS COURT REVERSE ALL OF THE FINAL ORDERS AND JUDGMENTS OF THE TRIAL COURT WHICH WERE IN FAVOR OF FIRST SECUTITY BANK AND AGAINST APPELLANTS.

RESPECTFULLY SUBMITTED.

DATED THIS 4TH DAY OF OCT, 1989.

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CERTIFICATE OF MAILING

This is to certify that I mailed a true and exact copy of the above and foregoing brief postage prepaid, on this 4'th day of Oct., 1989 to:

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