3-29-1977

Burrell Registration Co. v. McKelvey

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 27292

BURRELL REGISTRATION COMPANY, et al,

Plaintiffs-Appellants,

vs.

EDWIN L. MCKELVEY, et al,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT IN AND FOR THE COUNTY OF LA PLATA

THE HONORABLE FREDERIC B. EMIGH
District Judge

BRIEF OF APPELLEES except McKelvey

William L. Watts, Attorney, P.C.
P.O. Box 1117
Durango, Colorado 81301
303-247-2752

Attorney for Defendants-Appellees, except McKelvey

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STATEMENT OF ISSUES

I. Did the foreclosure procedure followed in this case under applicable statutes and C.R.C.P. Rule 120 afford procedural due process to Plaintiffs?

II. Were Plaintiffs properly protected in regards to their right to cure if they had availed themselves of the remedies existing under the statute and C.R.C.P. Rule 120?

III. Did the Trial Court err in excluding Plaintiffs' testimony concerning a prior Rule 120 proceeding in an unrelated case (applies only to Mr. Burrell individually, not to Mrs. Burrell or Burrell Registration Company)?

IV. Did Trial Court err in failing to award damages to Plaintiffs?

V. Did Trial Court err in failing to allow interest to Defendants from August 30, 1973, and attorney's fees of $10,400.00?

VI. What is the effect of Withdrawal of Supersedeas bond?

STATEMENT OF THE CASE

A. Proceedings Below:

To Appellants' statement, the Appellees add the facts that Burrell Registration Company, as Plaintiff on original Complaint in October 1974, never sought an ex parte hearing or order and never tried to get a hearing on its Complaint and Motion filed the same date, and thus never determined what, if any, bond might be required.

The Appellate Court entered a Stay of Execution pending appeal on condition that a supersedeas bond (in lesser amount and with lesser security than ordered by Trial Court) was filed. A bond was filed pursuant to Appellate Court supersedeas order. This bond was withdrawn. See Exhibit A to this Brief which is the withdrawal of the bond and a Trial Court Order concerning the same which were not made a part of the record because the Clerk's record was filed with Appellate Court in summer of 1976.

Appellants have rendered the entire controversy or their rights to restoration of property moot by filing Withdrawal of Supersedeas bond in January 1977, thus permitting the Judgement to take effect (except for the problem of cloud on title created by lis pendens pending an appeal).

B. Proceedings Below:

In its Judgement, the Trial Court found that Plaintiffs should have been given a lower "cure figure" and at Folio 190, in Order Amending Judgement, Trial Court gave Plaintiffs additional thirty (30) days from March 23, 1976, within which to cure default of September 1, 1974, by paying about $22,000.00. Plaintiffs never availed themselves of this opportunity but sought Stay of Execution which was denied by Trial Court by order on April 27, 1976, Folio 209.

APPLICABLE STATUTES AND COURT RULES

This foreclosure was conducted under a Power of Sale contained in a Deed of Trust to the Public Trustee and the applicable statutes and rules were C.R.C.P. Rule 120 and 1963 C.R.S. Chapter 118 Article 3 and 118-9-18, concerning debtor's right to cure default before sale, all of such rules existed from September 1, 1974, the date of default through October 23, 1974, the date of Public Trustee's sale.

SUMMARY OF ARGUMENT

I. PLAINTIFFS WERE AFFORDED DUE PROCESS IN THIS FORECLOSURE UNDER THE RULE 120 AND STATUATORY PROCEDURES FOLLOWED.

II. NEITHER CREDITOR NOR PUBLIC TRUSTEE PREVENTED DEBTOR FROM CURING DEFAULT. DEBTOR, IN FACT, WAS UNABLE TO CURE.

III. PRIOR RULE 120 PROCEEDINGS BETWEEN DIFFERENT PARTIES HAVE NO BEARING ON THIS CASE.

IV. PLAINTIFFS WERE NOT ENTITLED TO DAMAGES.

V. DEFENDANTS SHOULD HAVE BEEN ALLOWED INTEREST ON NOTE BALANCE FROM AUGUST 30, 1973, PURSUANT TO CONTRACT TERMS AND ATTORNEY'S FEES OF $10,400.00.

VI. BY WITHDRAWING SUPERSEDEAS BOND, PLAINTIFFS HAVE LOST RIGHT TO HAVE JUDGEMENT STAYED AND ANY CLAIMS BY PLAINTIFFS TO BE RESTORED TO POSSESSION OR GIVEN FURTHER RIGHT TO CURE OR REDEEM ARE LOST.

ARGUMENT

I. PLAINTIFFS WERE AFFORDED DUE PROCESS IN THIS FORECLOSURE UNDER THE RULE 120 AND STATUATORY PROCEDURES FOLLOWED.

The constitutional issues of this case were decided in Princeville Corporation v. Brooks 188 Colo. 37, 533 P. 2d 916 (1975) when Justice Day in commenting on the Federal Soldiers and Sailors Civil Relief Act and C.R.C.P. Rule 120 stated:

> "The broad purpose of the Act was to avoid prejudice to the civil rights of persons in military service. However, merely because compliance with the Act was the original impetus for the rule does not forever chisel its construction into stone. Times have changed and with them an evergrowing awareness of what is required to conform to due process by a court. The rule is broad enough to comport with the modern trend to restrict ex parte taking of property without a hearing. Upon reading through the Rules of Civil Procedure, we find there is no comparable protection afforded others as that allegedly given only to the military under Rule 120."

The Court then concluded that Rule 120 could be used to determine issues related to the foreclosure and stated:

> "Therefore we hold that a Rule 120 hearing may be used to determine if the circumstances warrant, whether there are factors in addition to military status which require the court to retain a supervising jurisdiction. No opportunity exists in foreclosure proceedings by the public trustee for defining those possible factors. Thus it would seem to be far safer and more prudent to enlist judicial supervision of the process from the beginning, rather than to untangle a knotted summary decree at some later date."

All of the U.S. Supreme Court cases cited by Appellants were before this Court when Princeville was decided and are specifically noted in the footnotes of that case.

Princeville was announced as the law of Colorado by modified opinion of April 14, 1975, but logically it must be recognized that Justice Day merely articulated the rule of law which was in effect at the time the Trial Court held its hearings in the Princeville case. This date does not appear in the decision but it seems apparent that the law recognizing the the broadened scope of Rule 120 was in effect between September 17 and October 23, 1974, the period from giving of notice to cure default through date of Public Trustee's sale and the period when Civil Action C-1321 in the District Court of La Plata County, the Rule 120 case concerning this sale, was conducted (see Reporter's Transcript

with Stipulation and Folio 300 to 326 added when it was discovered that this part of the record had been omitted by the Reporter).

The Complaint, Folio 1, with only Burrell Registration Company as Plaintiffs was filed October 21, 1974, but no ex parte relief was sought even though Plaintiffs knew that service and notice of a Motion for Preliminary Injunction could not be had on Defendants prior to the sale scheduled October 23, 1974, Folio 9.

Plaintiffs object at Page 2 of their Brief to the Trial Court Order of August 28, 1974, Folio 133-136, finding that 1963 C.R.S. Chapter 38, was not in violation of U.S. Constitution, Fourteenth Amendment nor Colorado Constitution Article II Section 25. Princeville, supra, was the law of Colorado when this was was made and the law is correct.

In Argument about state action, Plaintiffs equate Colorado real estate foreclosures to replevin actions under the rule of Fuentes v. Shevin 407 U.S. 67, 92S Ct. 1983, 32 L. Ed. 2d 556 (1972). Distinction must be made because, contrary to a replevin case, when property is taken before trial, in Colorado real estate foreclosure through Public Trustee, there is no divesting of title until after completion of Rule 120 proceedings and Public Trustee's sale with issuance of Certificate of Purchase and finally issuance of Public Trustee's Deed at end of redemption period. Until that date, the debtor can remain in possession and could even sell the property - subject to obligation to then redeem - unless by a court action a receiver were appointed and given authority to take possession of the property and in fact did so.

At Plaintiffs' Brief, Page 4, they state that prior to August 19, 1976, (when revised Rule 120 was adopted) the sole intrinsic purpose of Rule 120 was to comply with Soldiers and Sailors Civil Relief Act. How can this statement be true in light of the holding in Princeville, supra?

At Page 5 and 6 of their Brief, Plaintiffs argue that they had no opportunity to be heard or to contest allegations of default. In the Rule 120 proceeding, Motion for Order Authorizing Sale, Reporter's Transcript, Folio 301, the allegation is made that a default exists. The Notice, Folio 312,

served as shown in Clerk's certificate, Folio 320-321, advised Plaintiffs that a Court Order had been sought authorizing sale of property in which Defendants claimed an interest. In the Order Authorizing Sale (after notice) at Folio 322, the Trial Court "finds that the matters stated in the Motion for Order Authorizing Sale herein are true". (i.e. default exists).

At Page 6 of Plaintiffs' Brief, they claim that a notice is insufficient as it does not notify a person of the opportunity to be heard. See Notice in Rule 120 proceeding at Folio 315 of Reporter's Transcript stating "when and where the above persons may appear if they so desire". This coupled with the right under Rule 120 to file Affidavits controverting the allegations of the Motion and considering the rule set forth in Princeville, supra, should be sufficient notice of an opportunity to be heard. IF THIS IS NOT SUFFICIENT NOTICE, THEN EVERY PUBLIC TRUSTEE FORECLOSURE ACCOMPANIED BY A RULE 120 PROCEEDING WHICH HAS OCCURRED WITHIN THE PERIOD OF THE STATUTE OF LIMITATION IS INVALID FOR LACK OF NOTICE. Imagine the impact on all lenders and the disruption to the security of title if all defaulting borrowers were to discover that every foreclosure in the past six years is subject to being reopened.

In the preparation of this brief, we are not unmindful of the ruling of the Colorado Supreme Court in Valley Development at Vail v. Warder, Judge, No. 27324, decided December 27, 1976, 6 Colo Lawyer 416, but believe that the case must be distinguished because there the debtor was given notice and did appear at what seems to have been a Rule 120 hearing before the amendment and upon appearance was denied the right to be heard whereas in the present case the debtor had the same notice but none of the parties liable on the note chose to appear at the Rule 120 hearing. WE MUST NOT SPECULATE AS TO WHAT JUDGE EMIGH WOULD HAVE RULED if any persons other than the creditor had appeared at the Rule 120 hearing.

The Colorado foreclosure statutes merely provide a framework within which the parties may operate and contract. It must be borne in mind that the trust deed which was foreclosed was a contractual relationship, the obligations of

which were specifically assumed by all Plaintiffs. In the case of Armenta v. Nussbaum, 2-27-75, Texas Court Civil Appeal 13th District, 43 LW 2380 of 3-18-75, the Court determined that the Texas statute outlining procedures for foreclosure under Public Trustee deeds did not constitute a violation of constitutional due process. It also referred to the self-help provisions of the Uniform Commercial Code 9-506 and pointed out that those self-help provision which were sanctioned by the Code and arose contractually between the parties did not constitute state action, and that the self-help or nonjudiciary sale under trust deeds likewise did not constitute state action.

One of the issues raised in the Supreme Court cases is whether or not a defendant debtor in a self-help proceeding subject to losing his property thru the self-help remedy is deprived of constitutional due process if, to obtain a hearing or regain possession of the property he must post a bond. A similar issue, of course, might apply as to whether or not a bond is required in the instant case had Plaintiffs followed thru with their proposed injunctive relief. The Colorado Supreme Court has covered this question in the case of The Commodity Option Company, Inc. v. Bernhardt, 187 Colo 89, 528 P.2d 919, in which it held that the Colorado statutes on garnishment are constitutional and the opportunity available to a defendant to have property released by posting his own bond affords adequate procedural safeguardes.

II. NEITHER CREDITOR NOR PUBLIC TRUSTEE PREVENTED DEBTOR FROM CURING DEFAULT. DEBTOR, IN FACT, WAS UNABLE TO CURE.

In its holding in Judgement Page 6 Folio 152-157, the Court erred. There was no provision in the cure statute, 1963 C.R.S. 118-9-18 requiring that a cure figure be furnished prior to the date such was done in the present case. Any statement that the default was not curable could be nothing more than an expression of the creditor's attorney and certainly since the debtor was represented by counsel, the same should have been evaluated in this context. Neither creditor nor Public Trustee can finally determine if default is curable. The Trial Court ruled, Transcript Folio

186, that the statute was followed in so far as giving of timely notice.

The reason a statement was made that the default was not curable had nothing to do with the payment of money as such but is controlled by the wording of Exhibit A, Paragraph 5 Page 3, last sentence, requiring that release payments (payment to get partial release of Trust Deed) must be made immediately upon sale of any lot. Since the base contract and Promissory Note did not bear interest until the sale of a lot, the creditors only protection and only right to interest on the sale price arose through the requirement that as soon as a lot was sold, the Lawlers would be given the release payment and a request would be made to them to release the specific land. The failure to request the release (or make immediate payment on August 30, 1973, when one of Plaintiffs conveyed property as shown by Exhibit V) was the default which was not curable merely by the payment of money.

Burrell has admitted in his deposition (made a part of the record by Stipulation) on Page 13, Line 21 through Page 14, Line 8, that at no time from September 17, 1974, the date of Notice of Intention to Cure Default, Exhibit K, to the date of Public Trustee's sale, on October 23, 1974, would he have access to funds to pay even the delinquent taxes and the $15,000.00 principal due September 1, 1974, let alone interest of whatever amount upon delinquency or attorney's fees for whatever amount.

III. PRIOR RULE 120 PROCEEDING BETWEEN DIFFERENT PARTIES HAVE NO BEARING ON THIS CASE.

At Page 15 of Plaintiffs' Brief, claim is made that the state of mind of Mr. Burrell should be considered as to non-appearance on October 17, 1974, at the Rule 120 hearings in this case where all of the Plaintiffs herein had a right to appear and receive notice of hearing. The Court's ruling on state of mine, Transcript Folio 133-142, was correct. The prior case involved a different creditor (Weeby) represented by a different attorney (Kirkpatrick) and there is no testimony that the Plaintiffs, i.e. Burrell

Registration Company and William Burrell and Evangeline Burrell were all parties to the prior suit.) No proper offer of proof was made as to state of mind. The state of mind of one out of three Plaintiffs under prior and different circumstances should not be here considered.

At Page 15 of Brief, Plaintiffs cite Davis v. Bonebroke, 135 Colo 506, 313 P.2d 982 (1957), and Alexander Film Company v. Industrial Commission of Colorado, 136 Colo 486, 319 P.2d 1074. Colorado recognizes as an exception to the heresay rule, that statement of intention or evidence of state of mind may be admissible if there is no suspicion that they are made to create evidence to be used in a trial. Here, the state of mind of one of three Plaintiffs is being offered as a self-serving declaration made during trial itself. The cited cases do not apply.

IV. PLAINTIFFS WERE NOT ENTITLED TO DAMAGES.

There is nc basis for awarding damages to Plaintiffs. To recover damages, they must show an improper taking of property and then present competent evidence of damages.

No such competent evidence exists. The only evidence is Burrell's statement that the equity was $32,300.00, Transcript Folio 164, based upon the purchase price in April 1973, and principal balance due on note at foreclosure. There is not one scintilla of evidence of value at date Plaintiffs were divested of title (when Public Trustee's Deed issued) nor is there evidence of value even on date of Public Trustee's sale. Defendants bid at Public Trustee's sale is in evidence but this was a forced sale and the bid included what Defendants felt was necessary to cover principal, interest, taxes, and attorney's fees. It does not represent a price agreed upon at arms length between a Seller who is not forced to sell and a Buyer who is not forced to purchase, both of whom are equally aware of the facts concerning the property and the sale.

If the Trial Court is reversed, Plaintiffs are not entitled to damages because they may be restored to possession and we have no evidence of

damages suffered by being out of possession. On the other hand, if the Trial Court is sustained, the Defendants' possession was lawfully taken from them and they have no right to damages.

V. DEFENDANTS SHOULD HAVE BEEN ALLOWED INTEREST ON NOTE BALANCE FROM AUGUST 30, 1973, PURSUANT TO CONTRACT TERMS AND ATTORNEY'S FEES OF $10,400.00.

A. INTEREST: The foreclosure is based on Exhibit C, a Promissory Note payable to Defendants (or their predecessors) dated August 19, 1970, for $120,400.00 and secured by Deed of Trust, Exhibit D.

The Note states:

> "This Note is given pursuant to the terms and provisions of Agreement between the parties dated May 8, 1969, as amended by that certain Amendment to Agreement entered into as of August 19, 1970, and is subject to the terms and provisions of said Agreement as to pre-payment, payment and satisfaction."

The Agreement of May 8, 1979, is Exhibit A.

The Amendment of August 19, 1970, is Exhibit B.

By Exhibit E, a further amendment of September 28, 1972, the release price per acre is further amended to $2,600.00 (Paragraph 2, Page 1) which modifies Paragraph 4, Page 7 of Exhibit A and provides that the Trust Deed executed pursuant thereto shall be determined as amended.

We are involved with Tract 2, the second tract sold to Western Construction under Exhibit A. The base contract provided (Exhibit A, Page 2 Paragraph 5) that the other terms regarding Tract 1 shall apply to Tract 2. The land involved in this case was Tract 2 under the Agreement. The base Agreement of May 8, 1960, Exhibit A, Pages 2 and 3, Paragraph 5 provided the owners (Sellers or Defendants here) agree to a Partial Release of Trust Deed upon payment of a certain sum per acre. The sum was changed as above noted. The Contract at Page 3, Paragraph 5, last sentence, states "such release payments shall be made immediately upon the sale of any lot."

The same Agreement at Page 9, Paragraph 3 provides that if the Buyer is delinquent on any payment due thereunder, Buyer shall pay in addition to

such payments, a sum equal to six percent (6%) interest on the unpaid balance of the Contract (Note) during such time of delinquency.

By Exhibit F of April 3, 1973, Western Construction sold the property to the Burrells. Western had bought the tract and had subdivided after purchase. The Contract and Trust Deed recognized this right. At Page 4 Paragraph 7 of Exhibit F, Burrells, as Buyers, "accept such rights and assume such duties as Seller (Western) has in regard to Tract 2 by Agreement of May 8, 1969, Amendment of August 19, 1970 and Amendment of September 28, 1972."

By Exhibit U, on August 25, 1973, Burrells conveyed to Burrell Registration Company the property they had purchased from Western Construction.

By Exhibit V, on August 30, 1973, Burrell Registration Company conveyed Lot 8 to James Robert Burrell and agreed to obtain releases of liens. The $2,600.00 release fee for Lot 8 was not paid to Defendants. Instead, after delinquency, on September 1, 1973, and about September 20, 1973, Burrell Registration Company paid the remaining $2,300.00 principal due September 1, 1973, but did not pay the remaining $300.00 required by the Contract on the lot sale.

By the terms of the Contract, Plaintiffs were in default on August 30, 1973, and the Contract became interest bearing after that date and until foreclosure at six percent (6%) per annum.

Notice of Default, Exhibit I, was sent to Burrells on September 5, 1974, noting the specific default of failing to obtain the release on the sale of Lot 8, among other defaults.

The Court erred in determining that six percent (6%) interest from August 30, 1973, as included in the cure figure set forth in Exhibit N in amount of $6,710.84 and as incorporated in Exhibit O, was not a proper charge to be paid by Defendants to cure default (Burrell understood that $2,600.00 was to be paid immediately on sale of Lot - Burrell deposition, Page 40, Line 22 to Page 41, Line 4).

B. ATTORNEY'S FEES: The sum of $10,400.00 was claimed as attorney's fees quoted by Defendants and Public Trustee (Judgement, Folio 44) Colorado

Law, 1973 C.R.S. 38-38-106 allows attorney's fees of not over ten percent (10%) of amount due on foreclosure. Excluding attorney's fees, there was due on foreclosure, as shown on Exhibit O and Judgement, Folio 144:

Principal	$ 97,900.00
Public Trustee costs	269.61
Interest, taxes, title chain, Rule 120 docket	8,470.34
TOTAL	$ 106,639.95

This figure plus $10,400.00 was the amount paid in at foreclosure sale.

The attorney's fee was less than ten percent (10%) allowed by law. As further evidence for allowance of attorney's fees, Burrel on a different foreclosure where he did cure default, paid a $3,600.00 attorney fee on a foreclosure involving $37,000.00 to $38,000.00. Burrell deposition, Page 57, Line 7 through Page 58, Line 10 (under question from Mr. Anesi, attorney for Public Trustee).

Lawler and Defendants were billed $10,400.00 attorney's fees and costs Transcript Folio 72-73 and per Lawler deposition, Page 15, Lines 15-24, the the clients did not and have not objected to fee as unreasonable. Up to time of trial, only part of fee on foreclosure was paid. There was no other evidence as to attorney's fees or as to time spent on case and Defendants submit that Plaintiffs failed to sustain the burden of proof that $10,400.00 attorney's fees were unreasonable. We recognize that the burden of proof would have been on creditors to show reasonableness of fees if this issue had been raised at the Rule 120 proceeding.

Apparently, without evidence, the Court limited attorney's fees to ten percent (10%) of amount due on foreclosure in Rowe v. Tucker, No. 75-891 Colo. App. January 20, 1977, 6 Colorado Lawyer 526, but did not undertake to set a fee less than that allowed by statute. We submit that this is the only viable alternative under the facts in that case and in this case.

VI. BY WITHDRAWING SUPERSEDEAS BOND, PLAINTIFFS HAVE LOST RIGHT TO HAVE JUDGEMENT STAYED AND ANY CLAIMS BY PLAINTIFFS TO BE RESTORED TO POSSESSION OR GIVEN FURTHER RIGHT TO CURE OR REDEEM ARE LOST.

The Judgement Folio 137-162 as amended Folio 184-190 is self-executing, Judgement Folio 161-162. The Supersedeas Bond Folio 235-253 was posted to stay the Judgement of the Trial Court. On June 2, 1976, the Court of Appeals entered an order for Stay of Execution prior to transfer to Supreme Court. The bond was filed pursuant to this order.

A stay pending appeal is granted only pursuant to C.A.R. Rule 8. Such stay would not have been effective if the bond had not been filed. Such stay was automatically terminated when Plaintiffs voluntarily withdrew the bond as shown in Exhibit A attached hereto.

If the Judgement is no longer stayed, title is vested and quieted in Defendants and Plaintiffs' rights of redemption are lost and the appeal becomes moot.

CONCLUSION:

If the Colorado statutes and Rule 120 in effect at the time of foreclosure are constitutional and afforded these debtors due process, as applied in this case, no further action is necessary and no damage can be allowed to Plaintiffs. The Public Trustee and the Defendants, through their attorney, did not deprive debtors of a right to cure default and debtors failure to appear at the Rule 120 hearing is debtors' responsibility since this Court cannot speculate on what action the Trial Court would have taken if debtors had appeared. If debtors were so concerned about the procedure followed, why did they not appear even after sale in the Rule 120 case or seek some relief between October 21, 1973, when the original Complaint was filed and January 1974, when Amended Complaint was served.

Plaintiffs have proved no damages. The Trial Court erred in not allowing Defendants to include interest at six percent (6%) and $10,400.00 attorney's fees as claimed in the statement to Public Trustee.

Since Plaintiffs have withdrawn the Supersedeas Bond, the Stay of Execution is terminated and the Judgement is self-executing and title is quieted in Defendants.

A determination of unconstitutionality would have to be coupled with a viable remedy. Damages for this remedy are not proven. Plaintiffs have voluntarily given up their right to redeem. Title is vested in Defendants and Plaintiffs have not asked for judicial relief vesting title in them.

Plaintiffs suggestion that they be given a reasonable opportunity to cure any default by use of the property to pay the cure figure set by the Trial Court is a unique concept, especially since they made only one lot sale in eighteen months of ownership. The obligation to pay the debt due September 1, 1974, existed regardless of who had possession of the property and Plaintiffs continued with such right of possession until a Public Trustee Deed issued in the spring of 1975.

If the procedure was constitutional and Plaintiffs are not awarded a remedy, the Defendants are interested in knowing if the Trial Court erred as to interest and attorney's fees but recognize that such issue may likewise become moot.

Respectfully submitted,

WILLIAM L. WATTS, ATTORNEY, P.C.

By _____ No. 1082

P.O. Box 1117
Durango, Colorado 81301
303-247-2572
Attorney for Defendants
except McKelvey

EXHIBIT A

IN THE DISTRICT COURT WITHIN AND FOR THE COUNTY OF LA PLATA

STATE OF COLORADO

C-1336

BURRELL REGISTRATION COMPANY,

Plaintiff-Appellant,

vs.

EDWIN L. MCKELVEY, et al.,

Defendants-Appellees.

WITHDRAWAL OF SUPERSEDEAS BOND

Burrell Registration Company, William E. Burrell and Evangeline G. Burrell, principals and sureties individually and as general partners, on that certain Supersedeas Bond filed with Clerk of the District Court on June 8, 1976, do hereby recall, cancel and revoke said bond and hereby declare it null and void.

The principals and sureties understand that cancellation of this bond rescinds the satisfaction of one of the conditions precedent to stay the judgment of the District Court entered in Civil Action No. C-1336.

Dated: January 5, 1977.

BURRELL REGISTRATION COMPANY

By _____
Plaintiff-Appellant, principal and surety

_____
William E. Burrell, individually and as general partner, principal and surety

_____
Evangeline G. Burrell, individually and as general partner, principal and surety

STATE OF COLORADO)
) ss.
County of La Plata)

On this 5th day of January, 1977, before me personally appeared William E. Burrell and Evangeline G. Burrell, to me known to be the persons described in and who executed the foregoing Withdrawal of Supersedeas Bond, and acknowledge that they executed the same as their free act and deed.

Witness my hand and official seal.

Notary Public

My Commission expires:

December 10, 1977

IN THE DISTRICT COURT WITHIN AND FOR THE COUNTY OF LA PLATA

STATE OF COLORADO

Civil Action No. C-1336

BURRELL REGISTRATION COMPANY, et al,

Plaintiff-Appellant,

vs.

EDWIN L. McKELVEY, et al,

Defendants-Appellees.

ORDER
CONCERNING WITHDRAWAL OF
SUPERSEDEAS BOND

Plaintiffs herein filed instrument titled Withdrawal of Supersedeas Bond in this case on January 7, 1977. Certificate of the filing of the instrument was made by the Clerk of the District Court and recorded under Reception Number 406219 of the La Plata County records. The instrument filed by plaintiffs was without Order of the Court, without hearing before the Court and without notice to adverse parties of any hearing.

The Court interprets the provisions of the Supersedeas Bond and the Surety Mortgage securing it, which was recorded on June 8, 1976, at Reception No. 400751, to be for the protection of defendants from any damages from delay caused by plaintiffs' appeal. Any instrument purporting to withdraw a supersedeas bond without Order of the Court is ineffective to remove the protection afforded defendants during appeal and does not release any security for the bond, nor discharge the Surety Mortgage above referred to.

By filing such Withdrawal of Supersedeas Bond, the Court accepts the judicial admission, by the parties signing such document, that the Stay of Judgement is no longer in effect.

Dated: January 13, 1977.

BY THE COURT:

Frederick B. Enzi
District Judge

Reviewed, stipulated and approved:

Michael E. Wallace
Attorney for Plaintiff-Appellant
Stipulate to and approve the first two paragraphs above, but not the third.

William L. Matt
Attorney for Defendants-Appellees, except McKelvey