IN THE UTAH COURT OF APPEALS

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Boyd P. Anderson and Marilyn S. Anderson, Plaintiffs and Appellants, v. Allen E. Olsen, Defendant and Appellee.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20060394-CA F I L E D (March 15, 2007) 2007 UT App 90

Sixth District, Manti Department, 030600172
The Honorable David Mower

Attorneys: Douglas L. Neeley, Manti, for Appellants
Curtis M. Jensen, Lewis P. Reece, and Duane L. Ostler, St. George, for Appellee

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Before Judges Billings, Davis, and Thorne.

DAVIS, Judge:

Plaintiffs Boyd P. and Marilyn S. Anderson appeal the trial court's order denying their motion for summary judgment and granting summary judgment in favor of Defendant Allen E. Olsen. We affirm.

The trial court concluded in its order: "The Deed of Trust is not a valid agreement due to failure of consideration. . . . The Deed of Trust is also not valid because [Defendant] never signed a promissory note to evidence the debt under the Deed of Trust." Plaintiffs contend that there was no failure of consideration because there was a loan of $151,000 given to Defendant's son in return for the deed of trust. We do not address Plaintiffs' consideration argument because we determine that even if they are correct regarding this issue, the trial court was correct in its other basis for granting summary judgment in favor of Defendant, i.e., that the deed of trust was

not valid because there was no corresponding promissory note signed by Defendant.[1]

Although under some circumstances the nonexistence of the promissory note referenced by the deed of trust does not invalidate the deed, those situations require a certain specificity within the deed itself.

> When the mortgage describes the debt as evidenced by a note or bond, and there is actually no such obligation in existence, the view has been taken that the mortgage may nevertheless stand as security for the amount really due from the mortgagor to the mortgagee, if it recites that a debt in fact exists independently of the note, or professes to secure the debt itself and not merely the note. However, where the mortgage purports to secure only the note or bond

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[1]Plaintiffs argue that this second basis for summary judgment was also in error because "the doctrine of equitable estoppel ought to apply to the facts of this case." But "[a]s a general rule, claims not raised before the trial court may not be raised on appeal. A party cannot circumvent that rule by merely mentioning an issue without introducing supporting evidence or relevant legal authority; such a mere mention does not preserve that issue for appeal." State v. Cruz, 2005 UT 45,¶33, 122 P.3d 543 (alterations, quotations, and citations omitted).

The only portion of the record to which Plaintiffs refer as preserving their equitable estoppel argument is a very small section of the hearing transcript wherein the judge and Plaintiffs' counsel each mention estoppel only once. The elements of equitable estoppel are never discussed, nor is there discourse regarding how the facts of this case would fit those requirements. Such minimal mention of a legal theory is insufficient to preserve for appeal an argument based on that theory. See, e.g., James v. Preston, 746 P.2d 799, 802 (Utah Ct. App. 1987) ("[The plaintiff] supplied no legal authority dealing with equitable mortgages nor any showing of the relevance of the facts to an equitable mortgage theory during the course of the trial. The trial court made no ruling as to the existence of an equitable mortgage, and [the plaintiff] made no objection to this omission. Although [the plaintiff's] attorney did mention the term 'mortgage' on two occasions in the lower proceedings, such an oblique, subtle reference to a legal doctrine is insufficient to have raised the issue in the lower court proceedings.").

> evidencing the debt, it is invalid if no note or bond is in existence.

59 C.J.S. Mortgages § 101(d) (1998) (footnotes omitted); see also Putnam v. Ferguson, 502 S.E.2d 386, 388 (N.C. Ct. App. 1998).[2] Moreover, while the description of the debt secured by the deed of trust need not be perfectly accurate, the general rule is that "[a] deed of trust must be sufficient to apprise third parties of the nature and substance of the rights claimed." 59 C.J.S. Mortgages § 93 (1998).

We determine that under the facts of this case, the lack of a promissory note is fatal to Plaintiffs' claim. The deed of trust states on its face that the deed is to secure "payment of the indebtedness evidenced by a promissory note of even date hereof in the principal sum of $140,000, made by [Defendant], payable to the order of [Plaintiffs] at the times, in the manner and with interest as therein set forth." There is no reference to a debt existing independently of the promissory note, nor are the terms of the debt included within the deed of trust itself. Instead, the deed states that the debt and its specific terms are set forth in a concurrent promissory note. Also problematic is the fact that there is no reference whatsoever in the deed to Defendant's son, but rather, Defendant himself is identified as owing on the note. See Putnam, 502 S.E.2d at 388 (determining that the deed of trust was invalid because the deed "did not properly identify the obligation secured" where the deed identified the defendant as the debtor, yet the promissory note of the specified date and amount was signed by third parties (quotations and citation omitted)); cf. Utah Code Ann. § 57-1-19 (2000) (defining that a deed of trust is "to secure the performance of an obligation of the trustor or other person named in the deed to a beneficiary" (emphasis added)).

Thus, under these specific facts, "the nature and substance of the rights claimed" is not clear without the corresponding promissory note, 59 C.J.S. Mortgages § 93 (1998), and the deed of trust is not valid. Were the result otherwise, Defendant--or his son or another third party for that matter--could substitute any debt near the appropriate dollar amount in place of that debt

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[2]We recognize the differences between mortgages and deeds of trust, and do not purport herein to equate them. However, regarding the narrow issue we address today, analysis respecting both mortgages and deeds of trust is helpful. Cf. 59 C.J.S. Mortgages § 5 (1998) (recognizing that in some situations a deed of trust is "essentially a mortgage" and is "construed and enforced as such").

referenced in the deed of trust. See In re Spears, 39 B.R. 91, 97 (Bankr. E.D. Tenn. 1984) ("[W]hile literal accuracy of description is not required, it is essential that the debt be defined with such reasonable certainty as to preclude the parties from substituting other debts . . . ." (alteration in original) (quotations and citation omitted)).

Affirmed.

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James Z. Davis, Judge

WE CONCUR:

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Judith M. Billings, Judge

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William A. Thorne Jr., Judge