

SUMMARY OF SEARS MORTGAGE CORP. V. ROSE

607 A.2d 1327, 257 N.J.Super. 33 (1992)

by

Knud E. Hermansen

Knud is a licensed professional land surveyor, professional engineer, and attorney at law. He teaches at the University of Maine in the surveying engineering technology program and has a consulting practice specializing in boundary disputes, title, land development, liability, and easements. <http://www.umaine.edu/set/svt/articles/>

Note: The principles discussed may not apply to all states. The reader is encouraged to research the law in their own state.

Sometimes seemingly unrelated cases can provide some interesting insight into surveyor liability. *Sears Mortgage Corp. v. Rose* is a case on point. In the case, a buyer purchased property and in the process obtained title insurance. The title insurance company excepted an existing mortgage. The buyer gave the closing attorney funds from a prior sale to pay off the existing mortgage. The attorney deceitfully took the money and used it for his own purposes. (The attorney was later caught and disciplined.) The buyer refused to pay on the existing mortgage causing the mortgagee to begin foreclosure proceedings against the property. Eventually the buyer, title insurance company, and mortgagee began litigation to determine who should bear the loss for the attorney's deception. Two points were made by the appellate court that may be interesting to a surveyor. First, the court noted that an attorney may in fact be representing multiple parties at a closing. *"The fact is that at a ... closing, [the] ... attorney usually wears three hats. He represents the buyer, of course. But he also represents the mortgagee, if there is one, by disbursing the mortgage funds under conditions imposed by the mortgagee and attending to execution and recording of the mortgage documents. And, in addition, the attorney also represents the title insurance company by doing all those things which, ... the company would have to do for itself."* (p. 42) This multiple representation is worth noting because some surveyors have the impression that survey information sought by the bank is strictly for the bank's internal use (e.g. where the surveyor performs a "mortgage survey"). Second, when faced with allocating damages among innocent parties, someone has to bear the loss regardless of the fact that there may be little or no guilt or negligence. The court states *"where a loss must fall on one or more of a number of innocent parties, the loss should fall on the one or ones among them who, by his or her conduct, created the circumstances that led to the perpetrator causing the loss."* (p. 46) In other words, the loss is allocated to the less innocent party. In this case the loss was allocated to the buyer. The buyer was the one who selected the attorney for the closing.

