

2007

# Victor Plastering, Inc. v. Swanson Building Materials, Inc. : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

Brief of Appellee, *Victor Plastering, Inc. v. Swanson Building Materials, Inc.*, No. 20070486 (Utah Court of Appeals, 2007).  
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**IN THE UTAH COURT OF APPEALS**

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**VICTOR PLASTERING, INC.,**

**Appellant,**

**v.**

**SWANSON BUILDING MATERIALS,  
INC.,**

**Appellee.**

**Appellate Court No. 20070486-CA**

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**BRIEF OF APPELLEE**

---

**APPEAL FROM THE JUDGMENT OF THE FOURTH DISTRICT COURT,  
UTAH COUNTY, ENTERED JUNE 7, 2007 (Honorable Stephen L. Hansen)**

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**FILED**  
**UTAH APPELLATE COURT**  
**MAY 1 2007**

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## **I. TABLE OF AUTHORITIES**

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## **II. STATEMENT OF JURISDICTION**

This appeal is taken from the trial court's order and judgment of June 7, 2007. This Court lacks jurisdiction as Victor failed to timely file its lis pendens making Victor's lien void. Utah appellate courts have ruled that failure to timely file a lis pendens divests the court of jurisdiction. See Section D of Argument.

## **III. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS.**

The constitutional provisions, statutes, ordinances, rules and regulations which pertain to this appeal are identified in the Table of Authorities and are fully set forth in the body of this brief.

## **IV. STATEMENT OF RELEVANT FACTS**

1. Appellant, Victor Plastering, Inc. (hereinafter "Victor"), recorded its Notice of Claim of Lien on the subject property with the Utah County Recorder's Office on or about January 14, 2004. Victor recorded Amended Notices of Claim of Lien on April 13, 2004. (R.05 and 298).

2. Victor filed its Complaint on April 13, 2004. Such Complaint stated a claim for the foreclosure of a mechanic's lien. (R.06 and 298).

3. Swanson Building Materials, Inc. (hereinafter “Swanson”) was not named as a Defendant in Victor’s Complaint. (R.06 and 298).

4. On February 3, 2006, Victor moved the trial court to file an Amended Complaint. (R.69).

5. The trial court granted leave to Victor to amend its Complaint. (R.72).

6. Victor filed an Amended Complaint on or about February 10, 2006. (Appellant’s Br. Add. A and R.298).

7. Swanson was first named as a party defendant to the case on or about February 10, 2006 in Victor’s Amended Complaint. (Appellant’s Br. Add. A and R.298).

8. Victor’s Amended Complaint was filed almost two (2) years after Victor’s Notice of Claim of Lien. (Appellant’s Br. Add. A and R.298).

9. For the first time, by its Amended Complaint, Victor alleged that Swanson held “some claim of right, title or interest to the [subject] property.” (Appellant’s Br. Add. A, p. 3-4).

10. Victor’s prayer for relief contained in its Amended Complaint requested in part:

3. That the Court adjudge that Plaintiff’s Lien, attached hereto, is valid and that Plaintiff is entitled to the amount stated in said Lien, plus Court costs, reasonable attorney’s fees, and interest at the rate and in the amount allowed by contract and by law.

. . .

7. For an order of foreclosure of the mechanic's lien recorded by Plaintiff against the Property for the amount of \$16,250.00 plus attorney's fees, court costs, and accrued interest pursuant to statute.

(Appellant's Br. Add. A, p. 7-8).

11. At no time did Victor file a lis pendens with the Utah County Recorder's Office in connection with this litigation (R.191).

12. Swanson was served process in the underlying lawsuit on or about June 19, 2006. (R.79)

13. At no time prior to being served with the Summons and Amended Complaint did Swanson have actual knowledge of the existence of the lawsuit. (R.196 and R.298).

## **V. SUMMARY OF ARGUMENT**

Swanson had standing to contest the validity of Victor's lien simply as a party defendant. Swanson was not required to raise as an affirmative defense Victor's noncompliance with Utah Code Ann. § 38-1-11 because failure to comply with the statute is not subject to waiver as it is jurisdictional. Victor's lien is void due to Victor's failure to timely file its lis pendens. This Court therefore lacks subject matter jurisdiction and should dismiss the appeal.



## **VI. ARGUMENT**

### **A. INTRODUCTION**

On February 15, 2007, the Fourth Judicial District Court granted Swanson's Motion for Summary Judgment based on the following: (1) Victor did not name Swanson in its initial complaint and failed to do so until nearly two (2) years after recording notice of its claim of lien, and (2) Victor failed to meet its statutory burden to prove that Swanson had actual knowledge of the lawsuit during the relevant time frame. (R.299).

Victor filed a Motion for a New Trial against Swanson, wherein Victor alleged that: (1) Swanson was not an interested party and had no basis to file an Answer; (2) the trial court erred in concluding the lapse of Swanson's lien was immaterial to the trial court's granting of summary judgment; (3) the trial court erred in ruling that Swanson's failure to plead the alleged statute of limitations did not result in a waiver of such defense; (4) the trial court erred in ruling that Victor's failure to file a lis pendens within 180 days of the filing of its mechanic's lien was jurisdictional (as opposed to failure to file a legal action on the lien within 180 days), and (5) the Court erred in law in reversing the burden of proof in a summary judgment proceeding, wherein it required that Victor demonstrate Swanson had any actual notice of the commencement of the action. (R.315).

In the trial court's Memorandum Ruling, dated May 9, 2007, the trial court denied Victor's Motion for a New Trial against Swanson finding that: (1) Swanson had an interest in the matter if only because Victor had filed suit against Swanson; (2) the lapse of Swanson's lien was immaterial as Victor had filed suit against Swanson and therefore Swanson had standing to file a responsive pleading; (3) a party's failure to comply with U.C.A. § 38-1-11 cannot be waived as an affirmative defense; (4) under U.C.A. § 38-1-11 (2) - (4)(b) a party's failure to file a lis pendens within 180 days of recording its Notice of Lien divests a court from jurisdiction, and (5) under U.C.A. § 38-1-11(3)(b), "the burden of proof is upon the lien claimant and those claiming under the lien claimant to show actual knowledge under Subsection (3)(a)." (R.402).

As shall be demonstrated herein, the trial court did not err in granting summary judgment in favor of Swanson. The trial court's subsequent Order and Judgment, entered on June 7, 2007, (R.416) should be affirmed.

**B. THE TRIAL COURT PROPERLY RULED THAT SWANSON HAD STANDING TO CONTEST THE VALIDITY OF VICTOR'S LIEN.**

Victor filed suit against Swanson alleging that Swanson held an interest in the subject property. Victor further sought an award of attorney's fees and costs against Swanson. The prayer for relief contained in the Amended Complaint reads in part:

3. That the Court adjudge that Plaintiff's Lien, attached hereto, is valid and that Plaintiff is entitled to the amount stated in said Lien, plus Court costs, reasonable attorney's fees, and interest at the rate and in the amount allowed by contract and by law.

. . .

7. For an order of foreclosure of the mechanic's lien recorded by Plaintiff against the Property for the amount of \$16,250.00 plus attorney's fees, court costs, and accrued interest pursuant to statute.

(Appellant's Br. Add. A, p. 7-8). Swanson was entitled to file a response to Victor's Amended Complaint if only to clarify that Swanson was not liable to pay Victor's attorney's fees and costs associated with the prosecution of its mechanic's lien.

In response to Victor's subsequent Motion for a New Trial on Swanson's Motion for Summary Judgment, the trial court reaffirmed that Swanson had standing in this matter. The Court indicated that:

Under Baldwin v. Vantage Corp., 676 P.2d 413, 415 (Utah 1984), 'An admission of fact in a pleading is a judicial admission and is normally conclusive on the party making it.' This Court finds that Plaintiff [Victor] sued Swanson and Plaintiff [Victor] cannot claim now that Swanson has no interest and standing and cannot respond to the complaint. For the same reasons this Court finds it immaterial that Swanson's prior lien has lapsed.

(R.398).

Whether Swanson's prior lien had lapsed is immaterial as to whether Swanson was entitled to file a responsive pleading. It is unreasonable to assert that a party lacks standing to file a responsive pleading to a Complaint that prays for an award of

attorney's fees against such party. Swanson clearly had a stake in the outcome of this specific dispute. (See Jenkins v. Swan, 675 P.2d 1145, 1150 (Utah 1983)). The trial court correctly ruled that Swanson was properly entitled to file a responsive pleading and seek relief. (R.297). As such, this Court should affirm the trial court's award of summary judgment in favor of Swanson.

**C. SWANSON DID NOT WAIVE ITS RIGHT TO RAISE VICTOR'S UNTIMELY ACTION UNDER THE MECHANIC'S LIEN STATUTE.**

A party's failure to comply with Utah Code Ann. § 38-1-11 is not subject to waiver as it is jurisdictional. See Pearson v. Lamb, 121 P.3d 717, 722 (Utah Ct. App. 2005); Projects Unlimited, Inc. v. Copper State Thrift & Loan Co., 798 P.2d 738 (Utah 1990); Knight v. Post, 748 P.2d 1097, 1100 (Utah Ct. App. 1988). In Projects Unlimited, Inc., the Court indicates that "The commencement requirement of section 38-1-11 serves as a substantive restriction on the lien action and, unlike a true statute of limitation, is not waived if not pleaded." Id. at 751, citing AAA Fencing Co. v. Raintree Dev. & Energy, Co., 714 P.2d 289, 291 (Utah 1986).

Victor misapplies Projects Unlimited, Inc., by claiming that such decision stands for the proposition that a failure to file as required by Section 38-1-11 is not jurisdictional. However, there is a critical distinction between the facts of that case and the present matter. Swanson had no actual knowledge of the action. (R.196 and R.298).

**1. Swanson Had No Actual Knowledge of the Commencement of the Action.**

U.C.A. § 38-1-11(2)(b) expressly states that “the burden of proof shall be upon the lien claimant and those claiming under the lien claimant to show actual knowledge.” As amended, U.C.A. § 38-1-11(3)(b) provides “the burden of proof is upon the lien claimant and those claiming under the lien claimant to show actual knowledge under Subsection (3)(a)”. The trial court correctly ruled that Victor bore the burden of proof to demonstrate that Victor was entitled to the lien and that it had complied with the provisions of U.C.A. § 38-1-11.

Utah courts hold that constructive notice or inquiry notice cannot serve as a substitute for actual notice. See Interlake Distribs., Inc. v. Old Mill Towne, 954 P.2d 1295, 1297 (Utah Ct. App. 1998). Even assuming that a defendant had constructive or inquiry notice of pending litigation, such notice of litigation does not meet the requirement that a defendant receive actual notice of the lien. See Id. at 1298-1299. Victor failed to demonstrate that Swanson had actual knowledge of the commencement of the action as required by U.C.A. § 38-1-11(3)(b). (R.296-298). Indeed, Swanson submitted sworn testimony that Swanson had no actual knowledge of the commencement of the action until June of 2006, nearly two (2) years after Victor’s recording notice of its claim of lien. (R.196 and R.298).

The trial court granted summary judgment in favor of Swanson based on the fact that a lien claimant must file a lis pendens within 180 days from the date on which the lien claimant filed a notice of claim. (R.297). Failure to do so renders the lien void “except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action.” Id. The trial court concluded that Swanson was not subject to the lien, or lien foreclosure, because it is undisputed that the lis pendens was not timely filed, and Swanson had no knowledge of the lawsuit during the relevant time frame. Id.

Victor argues that Swanson waived its right to raise Victor’s void lien as a defense as it was not raised in its Answer. However, Victor’s noncompliance with U.C.A. § 38-1-11 resulted in the invalidation and voiding of its lien. There is no issue of claim preclusion as with a traditional statute of limitations. An invalid or void lien, unlike a true statute of limitations, is not waived if such invalidation is not pled. Pearson, 121 P.3d at 722. Accordingly, the trial court correctly ruled that Victor’s untimely action was not subject to waiver, but was jurisdictional. (R.297).

**D. THE APPELLATE COURT LACKS JURISDICTION AND SHOULD ACCORDINGLY DISMISS THIS APPEAL.**

A Complaint to foreclose a mechanic’s lien must be filed within 180 days from the date the Notice of Claim of Lien was recorded in the appropriate county recorder’s office. See Utah Code Ann. § 38-1-11(1). The statute indicates that:

Within the time period provided for filing in Subsection (1) [180 days after notice of claim of lien], the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to person who have been made parties to the action and persons having actual knowledge of the commencement of the action.

Utah Code Ann. § 38-1-11(2)(a).

A lien claimant must file notice of the pendency (lis pendens) of the action within 180 days from the date on which the lien claimant filed a notice of claim with the appropriate county recorder. U.C.A. § 38-1-11(1)-(2). Failure to do so renders the lien void “except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action.” U.C.A. § 38-1-11(2)(a). Thus, an interested party is not subject to a lien where a lis pendens is not timely filed and the party had no knowledge of the lawsuit during the relevant time frame. Projects Unlimited, Inc., 798 P.2d at 751.

A party’s failure to file a timely lis pendens cannot be remedied and is fatal to its case. Parties that were not timely named in the action and that lacked actual knowledge of the lien are not subject to the Court’s jurisdiction. See Pearson, 121 P.3d at 717. See also Projects Unlimited, Inc., 798 P.2d at 751. Once a lien is void, the court lacks

jurisdiction over the matter. See Pearson, 121 P.3d at 722. In Pearson, the Utah Court of Appeals addressed this issue and concluded that:

Utah courts have thus ruled that failure to timely commence a mechanic's lien foreclosure action and file a lis pendens, like failure to timely notify the state of a claim against it, divests the court of jurisdiction.

Id. citing Interlake Distribs., Inc., 954 P.2d at 1297-99 (holding that liens were void because plaintiffs failed to file a lis pendens); Diehl Lumber Transp. Inc. v. Mickelson, 802 P.2d 739, 742 (Utah Ct. App. 1990) (“Failure to commence a timely mechanics’ lien foreclosure action divests the court of jurisdiction.”); AAA Fencing Co., 714 P2d at 290-291 (holding that an untimely mechanics’ lien action is a jurisdictional issue and “forecloses [the parties’] rights”).

The Utah Court of Appeals recently addressed this issue in Foothill Park, LC v. Judston, Inc., 2008 UT App 113. In Foothill Park, LC, the Court confirmed that a trial court has no subject matter jurisdiction to adjudicate a lien “once the lien right is extinguished.” Id. at ¶ 6, citing Utah Code Ann. § 38-1-11(4)(b). The Court held that, because the plaintiff had failed to enforce its lien right within the time provided by the statute, the trial court was therefore divested of jurisdiction to adjudicate the lien. Id. at ¶ 10. In fact, the Court of Appeals dismissed the appeal based on this very issue. The Court concluded that:



Because Judston's lien right became void when it was not enforced within 180 days of the first notice, we lack jurisdiction to further adjudicate the liens pursuant to section 38-1-11(4)(b). Accordingly, we dismiss Judston's appeal on this issue.

Id. at ¶ 17. This recent case reaffirms the longstanding rule that “An untimely action under [Section 38-1-11] is jurisdictional and forecloses the parties' rights.” Id. at ¶ 13. See also Knight, 748 P.2d at 1100; Pearson, 121 P.3d at 722; Projects Unlimited, Inc., 798 P.2d at 738.

In accordance with said longstanding rule, the trial court appropriately granted summary judgment in favor of Swanson because a lien claimant must file a lis pendens within 180 days from the date on which the lien claimant filed a notice of claim. (R.297). Referring to Section 38-1-11(2)(a) of the Mechanics Liens Statute, the trial court noted that a failure to do so renders the lien void “except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action.” (R.297). The trial court concluded that Swanson was not subject to the lien, or lien foreclosure, because it is undisputed that the lis pendens was not timely filed and Swanson had no knowledge of the lawsuit during the relevant time frame. (R.297). Accordingly, this Court should either affirm the trial court's ruling or dismiss this appeal for lack of jurisdiction.

**E. SWANSON IS ENTITLED TO AN AWARD OF ITS ATTORNEY'S FEES AND COSTS PURSUANT TO UTAH CODE ANN. 31-1-18.**

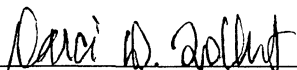
Pursuant to Utah Code Ann. § 38-1-18, a successful party may be entitled to recover its reasonable attorney's fee on an action brought to enforce any lien. See also Foothill Park, LC, 2008 UT App 113 at ¶ 21. Swanson has been forced to incur and continues to incur substantial attorney's fees. Accordingly, Swanson requests an award of attorney's fees and costs expended in the underlying action and this appeal.

**VII. CONCLUSION**

Based on the foregoing, this Court should dismiss the appeal based on a lack of jurisdiction. Should the Court review the case, the Court should affirm the trial court's final Order and Judgment entered in favor of Swanson on June 7, 2007. (R.416). Regardless, Swanson should be awarded its reasonable attorney's fees and costs pursuant to Utah Code Ann. § 38-1-18.

DATED this 16<sup>th</sup> day of May, 2008.

**RICHER & OVERHOLT, P.C.**

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Arnold Richer

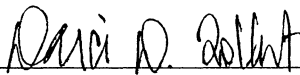
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Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 15<sup>th</sup> day of May, 2008, I caused a true and correct copy of the foregoing to be served upon the following by placing the same in the United States mail, postage prepaid and addressed as follows:

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