

2007

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VICTOR PLASTERING, INC.,

Appellants,

vs.

SWANSON BUILDING MATERIALS,
INC.,

Appellee.

**Appellate Court No. 20070486-
CA**

BRIEF OF THE APPELLANT

**APPEAL FROM THE JUDGMENT OF THE FOURTH DISTRICT COURT,
UTAH COUNTY, ENTERED JUNE 7, 2007**

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III. JURISDICTIONAL STATEMENT

This appeal is taken from the trial court's final order and judgment of June 8, 2007. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. §78-2a-3(j).

IV. STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

1. Must the Appellee Swanson have an interest in the subject property to have standing to contest the validity of the Appellant Victor's lien?

STANDARD OF REVIEW: The question of whether a given individual or association has standing to request a particular relief is primarily a question of law, although there may be factual findings that bear on the issue, an appellate court will review a question of law for correctness. Kearns-Tribune Corp. v. Wilkinson, 946 P.2d 372, 373 (Utah 1997). An appellate court will review such factual determinations made by a trial court with deference. State v. Pena, 869 P.2d 932, 935-36 (Utah 1994). Because of the important policy considerations involved in granting or denying standing, an appellate court will closely review trial court determinations of whether a given set of facts fits the legal requirements for standing, granting minimal discretion to the trial court. Id. at 938, 939.

PRESERVATION BELOW: The Appellant Victor raised and argued the issue of Swanson's standing before the court below. R.227; R. 322. As well, unless a party

has standing a court lacks subject matter jurisdiction to adjudicate a dispute. A lack of subject matter jurisdiction may be raised at any time. *See* Barnard v. Wassermann, 855 P.2d 243, 248 (Utah 1983). "[S]tanding is a jurisdictional requirement that must be satisfied" before a court may entertain a controversy between two parties. Wash. County Water Conservancy Dist. v. Morgan, 2003 UT 58, P 6 n.2, 82 P.3d 1125; accord Harris v. Springville City, 712 P.2d 188, 190 (Utah 1986) ("[L]ack of standing is jurisdictional."); Jenkins v. Swan, 675 P.2d 1145, 1148 (Utah 1983) ("[T]he moving party must have standing to invoke the jurisdiction of the court."). Under the traditional test for standing, "the interests of the parties must be adverse" and "the parties seeking relief must have a legally protectible interest in the controversy." Jenkins, 675 P.2d at 1148.

2. Did the Appellee Swanson meet its burden of production in prosecuting its motion for summary judgment before the court below?

STANDARD OF REVIEW: Whether a trial court has properly granted summary judgment is a question of law which an appellate court will review for correctness, granting no deference to the trial court. Badger v. Brooklyn Canal Co., 922P. 2d 745 (Utah 1996).

PRESERVATION BELOW: The Appellant raised this issue and argued it before the court below in its written submissions (R.318) and at oral argument.

3. Do the procedural requirements of Utah Code Ann. § 38-1-11(2)(a) constitute a procedural bar, and if so, did the Appellee Swanson waive the benefits of that statute by failing to plead it as an affirmative defense?

STANDARD OF REVIEW: Whether a procedural requirement in a statute operates as a claim preclusion rule or as a jurisdictional limitation is question of statutory construction. Questions of statutory construction are questions of law which an appellate court reviews with no deference to the trial court's interpretation. Projects Unlimited v. Copper State Thrift & Loan Co., 798 P.2d 738, 743 (Utah 1990).

PRESERVATION BELOW: The Appellant raised this issue in its memorandum in support of its motion for summary judgment (R. 228), and in its memorandum in support of its motion for new trial (R.319).

IV. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

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

V. STATEMENT OF THE CASE

The Appellant Victor Plastering timely filed it lien action to enforce its lien for stucco work it had performed on the subject property, but did not file a lis pendens

in relation to that lien action. It then filed an amended complaint and with that amended complaint commenced an in rem proceeding to declare its lien superior to the Appellee Swanson's dead lien. Rather than letting Victor proceed in rem against Swanson's expired lien, Swanson answered on the merits and personally appeared to contest the lien priority alleged by Victor in its amended complaint.

However, in its answer Swanson did not allege that it had an interest in the subject property. It also did not allege in its answer that it never received actual knowledge of the commencement of Victor's lien action, nor did it invoke the provisions of Utah Code Ann. § 38-1-11(2). Swanson then brought a motion for summary judgment arguing that it did not have actual knowledge and that under §11(2) Victor's lien was void. Victor cross-applied for summary judgment asserting that because Swanson had no interest in the subject property it had no interest in the litigation and no standing to invoke the provisions of § 11(2). Indeed, in its summary judgment papers Swanson asserted "that it does not have a present lien interest in the Subject Property and that it does not have any interest in this litigation."

VI. STATEMENT OF FACTS

April 13, 2004 The Appellant Victor timely filed an action to enforce its mechanic's lien against property in Utah County. Victor had

stuccoed the house constructed on that property and had not been paid.

February 10, 2006 The trial court granted Victor leave to amend its complaint and include in the amended complaint its in rem claims against Swanson's lien.

July 3, 2006 Swanson answered Victor's amended complaint on the merits. R.46

Dec. 15, 2006 Swanson moved for summary judgment on its expired lien. R.179

January 18, 2007 Victor opposed that motion and cross-applied for summary judgment. R.230

January 24, 2007 Swanson opposed Victor's motion for summary judgment by admitting that it had no interest in the subject real property. R.236

February 15, 2007 The trial court issued a memorandum order granting Swanson's motion for summary judgment. That order is never entered on the trial court's docket.

March 7, 2007 Victor filed a motion for a new trial on Victor's motion for summary judgment against Swanson. Because the Court had never entered on its docket its order dated February 15, 2007 Victor's motion for a new trial operates as a motion for

reconsideration under rule 54(b). R.315

March 21, 2007 Swanson filed its opposition to that motion. R.347

April 3, 2007 Swanson filed its second memorandum in opposition to Victor's motion for reconsideration of its motion for summary judgment summary judgment. R.380

April 13, 2007 Victor filed its reply memorandum in support of its motion for reconsideration. R.388

April 16, 2007 Victor's motion is orally argued before the court.

May 9, 2007 The court issues a memorandum ruling denying Victor's motion for reconsideration and directing counsel for Swanson for prepare a formal judgment to be signed by the trial court. R.402

June 7, 2007 Judgment is entered in favor of Swanson. R.416

June 8, 2007 Victor filed its notice of appeal. R.418

VII. SUMMARY OF ARGUMENT

Because the Appellant Victor Plastering timely filed it lien action but did not file a lis pendens in relation to that action, its lien was not void ab initio but under Utah Code Ann. § 38-1-11(2) could be rendered void if a party with an interest in the subject property established that they did not have actual knowledge of the lien action within 180 days of its commencement. The Appellee Swanson's lien on the subject

property had expired long before it was made a party to the action and Victor named Swanson as a party defendant for the purpose of proceeding in rem against Swanson's dead lien by declaring it inferior to Victor's lien. That in rem relief was the sole relief that Victor sought in relation to Swanson.

In the proceeding below Swanson advised "that it does not have a present lien interest in the Subject Property and that it does not have any interest in this litigation," and in doing so acknowledged the in rem nature of Victor's claim to priority over Swanson's dead lien. By Swanson's own admission it could not incur any injury as a result of Victor's in rem lien proceeding and so lacked standing to contest the merits of Victor's claims to lien priority or to invoke the provisions of § 11(2) as a defense to Victor's lien claim. Because Swanson lacked standing to contest the merits of Victor's lien claim the trial court erred in granting Swanson summary judgment on the basis of its § 11(2) claim.

Swanson also failed to establish a prima facie case for summary judgment. It failed to show that it had any interest in the subject property, and in fact asserted that it had no interest in the property or the litigation. An interest in the subject property is an element of Swanson's prima facie case for summary judgment. Unless it establishes that element of its case, it had no grounds for summary judgment.

Swanson also failed to plead § 11(2) as an affirmative defense. Unlike Utah

Code Ann. § 38-1-11(1) which is a statute of repose and so an absolute jurisdictional bar to a lien claim that is untimely, § 11(2) by its own terms is not an absolute bar but only operates to void a lien where the defendant establishes that it lacked actual knowledge of the commencement of a lien action. Because controlling case authority defines a statute of repose as one which is an absolute bar to an action, § 11(2)'s allowance of a lien action even though a lis pendens is not filed, unless the defendant proves it lacked actual knowledge of the commencement of the lien action, means that § 11(2) operates as a procedural limitation and not as a statute of repose. As a statute of limitation § 11(2)'s provisions must be affirmatively pled in a defendant's answer (or asserted in a motion to dismiss filed prior to the defendant's pleading), or its provisions are waived. Swanson failed to plead § 11(2) and so waived its provisions. With that waiver Swanson had no basis for its summary judgment motion and Victor should have instead been granted summary judgment.

Swanson chose to contest the merits of Victor's claim to lien priority, without any basis in fact or law justifying that contest, which brings Swanson's defense within the provisions of Utah Code Ann. § 38-1-18 and Victor is entitled to its attorney fees before this Court and the court below.

VIII. **ARGUMENT**

A. The Appellee Swanson must have an interest in the subject property to have standing to contest the validity of the Appellant

Victor's lien.

Swanson's lack of standing to seek relief under Utah Code Ann. § 38-1-11(2) is exposed when the nature of the proceeding below is properly considered. Victor's complaint pleads an in rem request for a declaratory judgment finding that Swanson's interest in the subject property is inferior to Victor's. This in rem declaratory relief was Victor's sole purpose in naming Swanson as a party defendant. Because Swanson had no interest in the subject property and could not be adversely affected by Victor's claim to priority of its lien over Swanson's void lien, in responding to Victor's complaint Swanson had no standing to invoke the requirements of § 11(2). In fact, in the course of briefing its summary judgment motion before the court below, Swanson admitted it had no interest in the subject property and no interest in the litigation.¹ "One who is not adversely affected has no standing."²

Swanson's inability to prove any adverse effect from Victor's lien action is key to showing that under Utah law Swanson lacked standing to seek relief under § 11(2). Unlike the federal judiciary which is constrained by the Article III case or controversy clause, in determining whether a litigant has standing Utah courts focus on the

¹R.236.

²Jenkins v. Swan, 675 P.2d 1145, 1150 (Utah 1983).

separation of powers doctrine. Standing is a concept "rooted in the historical and constitutional role of the judiciary" as one of three separate and equal branches of government.³ Moreover, "the question of whether a given individual or association has standing to request a particular relief is primarily a question of law, although there may be factual findings that bear on the issue."⁴ Note that in this case there are no factual findings in issue because Swanson admitted it had no interest in the subject property. Under the traditional test for standing, a litigant must demonstrate a "particularized" injury, which in a lien action can only occur if the named defendant has an interest in the property.⁵

In Utah foreclosure proceedings are in rem⁶ and the question then arises of how it is that Swanson, which had no interest in the subject property, can demonstrate a particularized injury. Because this was an in rem proceeding, merely being named as a party did not threaten personal liability against Swanson. There was no requirement that Swanson appear and defend on the merits against Victor's claim. Only if Swanson, as an uninterested party, chose to appear and frivolously defend on the

³Id. at 1149.

⁴Kearns-Tribune Corp. v. Wilkinson, 946 P.2d 372, 373 (Utah 1997).

⁵Soc'y of Prof'l Journalists v. Bullock, 743 P.2d 1166, 1170 (Utah 1987).

⁶See P.I.E. Employees Fed. Credit Union v. Bass, 759 P.2d 1144, FN4 (Utah 1988) where the court ruled: "A proceeding to foreclose upon a mortgage is considered an action in rem or quasi in rem under Utah law. (citations omitted)."

merits against Victor's claim would Swanson be exposed to a claim for attorney fees. And even when Swanson chose to appear, it could have no proper interest in defending against Victor's lien claims, but only in advising the court that it had no interest in the subject property and that it was not contesting Victor's claims.

Because the attorney fee provision of the mechanic's lien act only applies to the successful party in a contested proceeding,⁷ where there is no contest a defendant who is named only for in rem relief against some property interest appearing on the face of the title, will not be subject to an adverse attorney fee award if it does not contest an in rem declaration that its lien is void. Restated, there can be no losing party against whom the provisions of §38-1-18(1) can operate if the holder of a dead lien does not contest the plaintiff's claim to priority. Utah's mechanic's lien jurisprudence "ensures that only parties that are genuinely 'successful' according to the trial court's common sense logic will be able to extract their attorney fees from their opponents."⁸

Originally, this was the procedural posture of Swanson before the court below. But then Swanson chose to convert an in rem declaratory proceeding to one that was also in personam by choosing to frivolously contest on the merits Victor's lien

⁷A.K.&R. Whipple Plumbing & Heating v. Guy, 2004 UT 47, ¶18.

⁸Id. at ¶25.

action. In doing so, Swanson chose to put itself at risk for attorney fees under § 38-1-18, but this frivolous defense by Swanson did not somehow magically provide it with the standing necessary to invoke relief under § 11(2).

Because Swanson admitted in its summary judgment papers that it had no interest in the property and no interest in the litigation, what then was Swanson defending? Certainly, it could not be defending its nonexistent lien, which Swanson admitted was void. How does one assert a defense on the merits in good faith knowing that there is nothing to defend?

To have standing under the traditional test Swanson must have shown that it incurred a "distinct and palpable injury" by alleging that it suffered or will "suffer[] some distinct and palpable injury that gives [it] a personal stake in the outcome of the legal dispute."⁹ The legal dispute between Victor and Swanson in this case concerns the provisions of Utah Code Ann. § 38-1-11(2). Not only did Swanson not plead the provisions of § 11(2) in its answer, thus failing to allege that it would suffer some distinct and palpable injury if the requirements of § 11(2) were not enforced against Victor, but Swanson in its summary judgment briefing admitted that it had no interest in the subject property, which conclusively foreclosed any claim of a distinct and palpable injury suffered by Swanson.

⁹Jenkins, 675 P.2d at 1148 (Utah 1983).

If further proof of the futility of Swanson's claim to standing under the traditional test is needed, examination of whether Swanson has suffered a distinct and palpable injury under the three-step inquiry used in Jenkins is conclusive.¹⁰ First, Swanson must allege that it has been or will be "adversely affected" by Victor's failure to file a lis pendens.¹¹ Leaving aside for the moment that in its answer Swanson never alleged harm under § 11(2), Swanson's admission that it has no interest in the subject property in any event disposes of any issue of whether it alleged it was harmed by Victor's failure to file a lis pendens.

Second, Swanson must allege a causal relationship between Victor's failure to file a lis pendens, Victor's in rem declaratory lien action and the harm Swanson would incur by a declaration that its dead lien is dead.¹² But unless Swanson has an interest in the subject property there can be no causal connection between Victor's failure to file a lis pendens, Victor's lien foreclosure action and the harm Swanson would incur by a declaration that any interest Swanson has in the subject property is inferior to Victor's. Swanson is simply a stranger to the property, and as a stranger is requesting relief to which it is not entitled.

Third, the relief requested must be "substantially likely" to redress Victor's

¹⁰See id. at 1150.

¹¹Id.

¹²Id.

failure to file a lis pendens.¹³ Again, not only did Swanson not claim in its pleadings any injury accruing pursuant to § 11(2), the voiding of Victor's lien because Swanson allegedly did not have actual notice could do nothing to revive Swanson's dead lien. Because Swanson could obtain nothing by the prosecution of a defense under § 11(2), it is impossible to provide it with redress by voiding Victor's lien.

"If the party can satisfy these three criteria, the party has standing to pursue its claims before the courts of this state."¹⁴ Not only has Swanson failed to satisfy all three of these criteria, thus failing to establish standing under the traditional test, Swanson cannot satisfy even one of these three criteria, which further establishes that its claims under § 11(2) are and were frivolous.¹⁵ The speciousness of Swanson's summary judgment motion is also confirmed by Swanson's failure to plead any factual allegations in its answer stating a colorable claim to standing under § 11(2), its failure to proffer any facts in support of its summary judgment motion establishing standing under § 11(2), and its admission in its summary judgment papers that it had

¹³Id. at 1149.

¹⁴Utah Chapter of the Sierra Club et al. v. Utah Air Quality Board et al., 2006 UT 74, ¶19.

¹⁵The remaining ground for standing available to Swanson is that this case presents a question of importance to the public and that there is no one else better situated than Swanson to vindicate that interest. Just stating the proposition exposes its fallacy. This dispute is purely private and there is nothing of importance to the general public to be vindicated by allowing Swanson to contest the validity of Victor's lien.

no interest in the subject property, which conclusively establishes its lack of standing under § 11(2). Clearly, it was Victor and not Swanson that was entitled to summary judgment and Victor requests that the Court so rule.

B. Swanson Failed To Meets Its Burden of Production on Summary Judgment.

The burden of production on summary judgment is different than the burden of proof at trial. At trial a plaintiff presents its case in chief and if at the close of that case it fails to present a prima facie case, the defendant is entitled to a directed verdict. But where a defendant is moving for summary judgment a case presents a fundamentally different procedural posture because it is the defendant, as the moving party, which must produce proof sufficient to negate the plaintiff's claims against the defendant. Regardless of whether a summary judgment motion is opposed, unless the party moving for summary judgment under Rule 56 presents a prima facie case supporting its claim to summary judgment, summary judgment is improper.¹⁶

¹⁶See Badger v. Brooklyn Canal Co., 922P. 2d 745 (Utah 1996). We find that the manner in which these affidavits were presented provided an insufficient factual basis for the district court's ruling. Ordinarily, the opponent to a summary judgment motion must "set forth specific facts showing that there is a genuine issue for trial." Utah R. Civ. P. 56(e). However, that burden is triggered only when "a motion for summary judgment is made and supported as provided in this rule." *Id.* (emphasis added). "Unless the moving party meets its initial burden to present evidence establishing that no genuine issue of material fact exists, 'the party opposing the motion is under no obligation to demonstrate that there is a genuine issue for trial.'" *Harline v. Barker*, 912 P.2d 433, 445 (Utah 1996) (quoting *K&T, Inc. v. Koroulis*, 888 P.2d 623, 628 (Utah 1994)). The Madsen affidavit failed to

In this case, a key elements of its summary judgment claim was never proven by Swanson because it failed to prove that it had an interest in the subject property. The fact that Swanson had no interest in the subject property was, so far as Swanson could be concerned, the whole point of Victor's amended complaint seeking in rem declaratory relief against Swanson's dead lien. If Swanson had no interest in the subject property, it had no case for opposing Victor's claim that its lien was entitled to priority over Swanson's dead lien.

Indeed, not only did Swanson not have an interest in the subject property, it admitted that it had no interest in the subject property.¹⁷ Because Swanson admitted that it had no interest in the subject property and in fact no interest in the litigation before the court below, the only party with a litigation interest regarding Swanson's lien was Victor. As explained above, it had an interest in rem to declare Swanson's

negate any disputed issue regarding the impact of the change in diversion points on the private wells. Whatever expertise Madsen had acquired as an irrigator, it was not plainly pertinent to the question of impact on water tables; nor did he provide any foundational facts supporting his opinion. See, e.g., *King v. Searle Pharmaceuticals, Inc.*, 832 P.2d 858, 864 n.2 (Utah 1992) ("Affidavits of experts are insufficient . . . unless foundational facts are set forth supporting their opinions and conclusions."). Rather, he simply asserted in conclusory fashion that movement of water upstream could not impact the water table near plaintiffs' wells.

¹⁷See R.236, where Swanson states: "Swanson admits that it does not have a present lien interest in the Subject Property and that it does not have any interest in this litigation."

lien inferior to Victor's.

The trial court in its May 9, 2007 ruling found that Victor had plead Swanson into court by alleging that Swanson “hold[s] some claim of right, title, or interest to the aforementioned property and PLAINTIFF alleges that all [Swanson’s] claims of right, title or interest . . . [is] subject to the prior claims and interests of PLAINTIFF . . .” First, the trial court’s interpretation of this text in Victor’s amended complaint incorrectly reads the word “claim” out of that pleading. Alleging that a defendant holds some right, title or interest in property is far different from alleging that a defendant claims that they hold some right, title or interest in property. The former is an admission that a defendant has some interest in property, whatever it might be, but the latter is nothing more than an allegation that a defendant claims an interest, but does not admit that a defendant actually has an interest. By implicitly omitting the word “claim” from its construction of Victor’s pleading, the trial court improperly restated that pleading to make an allegation it did not make. A finding that Victor conclusively admitted that Swanson had an interest in the subject property should be based on something more than such a dubious and speculative inference.

The intent of the pleading is clear. Victor is alleging that it has a valid lien and alleging that whatever Swanson has, be it something or nothing, Victor’s lien is a superior interest. The allegation that Victor’s lien is a superior interest holds true

regardless of whether Swanson has some interest in the property or no interest whatsoever. Even if it is not technically true that Swanson claimed some interest in the subject property, it is evident that Victor is making this allegation as a device for putting into issue expired liens recorded against the title to the property so that Victor's lien can be declared to be a superior interest. In any event, the critical distinction is that by using the word "claim" Victor made clear in its pleading that it was not alleging that the named defendants actually held an interest in the subject property.

Further, the Baldwin v. Vantage Corp.¹⁸ decision is one where the Utah Supreme Court refused to find a pleading admission conclusive because it was contradicted by another pleading allegation which stated just the opposite, because in subsequent discovery the admission was denied and because in subsequent litigation the parties conducted themselves as if there was no admission. Here, Swanson has negated any inference (however slight) that might be taken from Victor's pleading that Swanson claimed an interest in the property, by asserting in its motion for summary judgment that it had no interest in the property. By explicitly refuting any purported admission by Victor, Swanson brought this issue within the exception stated in Baldwin for pleading admissions on issues that are nevertheless

¹⁸676 P.2d 413, 415 (Utah 1984).

litigated by the parties as if there was no admission.

Most important, Utah Code Ann. § 38-1-11(1) is an absolute statutory bar to the trial court's finding that Victor somehow had in its pleading admitted that Swanson had an interest in the property and that this admission was conclusive. A party cannot by its pleading vest a court with subject matter jurisdiction.¹⁹ Victor's analysis in part A of its argument demonstrates that because Swanson's lien was absolutely void at the time it contested the merits of Victor's claim to priority, Swanson had no standing to invoke the provisions of § 11(2). Unless Swanson had standing to invoke that section, the trial court did not have subject matter jurisdiction,²⁰ or more properly, the trial court lacked jurisdiction to adjudicate that issue.²¹

¹⁹Sosna v. Iowa, 419 U.S. 393, 398, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975).

²⁰Utah Chapter of the Sierra Club v. Utah Air Quality Bd., 2006 UT 74, ¶13 (standing triggers the court's . . . subject matter jurisdiction).

²¹Although Victor for the sake of convenience refers to this lack of jurisdiction as a lack of subject matter jurisdiction, the better characterization may be that the court lacked jurisdiction to adjudicate the § 11(2) defense asserted by Swanson. The case of Palmer v. U.S., 168 F.3d 1310, 1313 (C.A. Fed 1999) is instructive on this issue:

The trial court politely but firmly explained to the Government the difference between a court's general power to adjudicate in specific areas of substantive law, on the one hand, and the question of whether in a specific case a court is able to exercise its general power with regard to the facts peculiar to the specific claim, on the other. The former is a question of a court's subject matter jurisdiction, and is

Proof that Swanson had an interest in the subject property was critical to Swanson mounting any semblance of a good faith challenge to Victor's in rem declaratory proceeding against the dead Swanson lien. Unless Swanson had standing, it could not make out a case for summary judgment. In particular, without the predicate showing of an interest in the property Swanson could not even get to the issue of whether Victor could show that Swanson had actual knowledge of Victor's lien action. Swanson admits that it did not have an interest in the subject property and without that interest, it had no case for summary judgment.

C. The procedural requirements of Utah Code Ann. § 38-1-11(2)(a) operate as a statute of limitation and the Appellee Swanson waived the benefits of that rule by failing to plead it as an affirmative defense.

i. A statute of repose is one which absolutely bars an action and the Supreme Court of Utah has ruled that Utah Code Ann. § 38-1-11(2)(a) does not absolutely bar an action.

In Projects Unlimited v. Copper State Thrift & Loan Co.²² the Supreme Court of Utah analyzed the two different functions served by subparagraphs 1 and 2 of Utah

properly raised by a Fed.R.Civ.P. 12(b)(1) motion; the latter is properly addressed as a question of whether the plaintiff has stated a claim upon which relief can be granted, and is raised by a Fed.R.Civ.P. 12(b)(6) motion (the Court of Federal Claims denominates this an RCFC 12(b)(4) motion).

By analogy, Swanson's invocation of § 11(2) in its summary judgment motion assert a defense over which the trial court could not exercise jurisdiction.

²²798 P.2d 738, (Utah 1990).

Code Ann. § 38-1-11. The first, which is § 11(1), recites the time within which a mechanic's lien action must be commenced.²³ In referring to § 11(1) the court held that the time for commencement of an action to enforce a mechanic's lien is a substantive restriction on the lien action, not merely a procedural bar to the action, and as such is a jurisdictional bar to a lien action which is not commenced within the time limited.

By finding that a failure to comply with subparagraph § 11(1) was a jurisdictional bar to further action on a lien claim, the Projects court applied the longstanding principle that a "statute of repose bars all actions after a specified period of time has run from the occurrence of some event other than the occurrence of an injury that gives rise to a cause of action."²⁴ It is undisputed that Victor timely commenced its mechanic's lien action and that § 11(1) is not at issue in this case.

The second part of that statute, which is § 11(2), requires that a lis pendens be filed:

Within the time period provided for filing in Subsection (1) 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 persons who have

²³Utah Code Ann. § 38-1-11(1) (2004). A lien claimant shall file an action to enforce the lien filed under this chapter within 180 days from the day on which the lien claimant filed a notice of claim under Section 38-1-7.

²⁴Berry v. Beech Aircraft Corp., 717 P.2d 670, (Utah 1985).

been made parties to the action and persons having actual knowledge of the commencement of the action.²⁵

But in analyzing subparagraphs (1) and (2) the Projects court noted that they served “two different purposes” and that although a failure to comply with subparagraph (1) absolutely renders the lien void, the same absolute bar to proceeding on the lien does not operate in relation to subparagraph (2):

“However, the limited effect of a failure to comply with this requirement is expressly set forth in [subparagraph (2)]. When a claimant fails to file the lis pendens within the twelve-month period, the lien itself is not invalidated, but rather it is rendered void as to everyone except those named in the action and those with actual knowledge of the action.”

Because a failure to comply with subparagraph (2) does not of itself categorically invalidate a lien, that subparagraph is not an absolute bar to the enforcement of a lien and so does not operate as a statute of repose but instead is a statute of limitation. The rule in Berry was reaffirmed and restated in Lee v. Gaufin²⁶ where the court ruled:

Unlike statutes of limitations, statutes of repose abolish a cause of action after a certain period, even if the action first accrues after the period has expired.

Applied to this case, although § 11(2) imposes a limitation on a lien claimant’s ability to bring a lien action, failure to comply with that limitation does not per se abolish the lien claimant’s cause of action, and so that limitation does not fall within the

²⁵Utah Code Ann. § 38-1-11(2) (2004).

²⁶867 P.2d 572, (Utah 1993).

definition of a statute of repose.

Instead, § 11(2) sets up, by the force of its terms, an exception to the jurisdictional time limit stated in subparagraph § 11(1). Although failure to comply with the 180 day time is a per se violation of § 11(1) which absolutely voids a lien, under § 11(2), a lien is void only if the person against whom the lien is asserted is not a party to the action or the person against whom the lien is asserted did not have actual notice of the commencement of the action. By conditioning the operation of § 11(2) on a showing of a lack of actual notice this subparagraph, rather than imposing an absolute bar to the jurisdiction of a trial court, instead sets up a rule which makes that bar contingent on the opposing party showing that it did not receive actual notice. Although the requirements of § 11(2) are mandatory and if properly raised will require that a lien action be dismissed, they are not framed within the terms of a statute of repose and so are not jurisdictional.²⁷

²⁷See Kiesel v. District Court, 96 Utah 156, 84 P.2d 782 (1938), where the court construed a statute requiring a plaintiff to file an undertaking, or bond, securing costs contemporaneously with the complaint. The court held that the statute's requirements, while mandatory, still did not create a jurisdictional prerequisite:

The language of [the statute], while positive and mandatory, when considered altogether makes the requirement only that the undertaking be filed contemporaneously with the complaint. This certainly is no stronger than the language of [other] statutes which require the bond to be filed before commencing action. But we think the legislature intended to make the requirement so positive and

ii. A statute can be mandatory without being jurisdictional. Utah Code Ann. § 38-1-11(2) is such a statute.

This Court reached a similar conclusion in Pearson v. Lamb²⁸ where it construed a parallel provision of the Mechanic's Lien Act, Utah Code Ann. § 38-1-11(4)(a), which requires that contemporaneous with the service of a complaint, as required by § 11(1), a "lien claimant shall include with the service of the complaint on the owner of a residence" instructions regarding the owner's rights under the Residence Lien Restriction and Recovery Fund Act. In Pearson this Court ruled that failure to serve the required instructions was not necessarily fatal to a lien claim and that this requirement in the Act, although mandatory, was not jurisdictional.

In analyzing the mandatory nature of § 11(4)(a) the Pearson decision states in dicta that failure to timely file a lis pendens is fatal to proceeding with an action on

unequivocal as to require the court to dismiss the suit if the bond was not filed at least contemporaneously with the complaint if [a] motion to dismiss was timely made. Otherwise, the court could continue to take jurisdiction.

²⁸2005 UT App 383.

a lien.²⁹ However, this dicta³⁰ was the result of a reference to the Interlake Distribs., Inc. v. Old Mill Towne³¹ decision, which is one where the parties asserting § 11(2) as a defense appear to have properly pleaded § 11(2) as an affirmative defense and to have had a valid actual interest in the land in issue, which provided them with standing invoke § 11(2) as a defense. The failure to plead facts establishing standing under § 11(2) or to assert the provisions of § 11(2) as an affirmative defense were never at issue in Interlake, and so this Court's dicta in Pearson assumes the existence of the very thing that does not exist in this case (i.e., Swanson never pled facts showing it had standing to invoke § 11(2), § 11(2) was never pled as an affirmative defense by Swanson, and Swanson admits it had no interest in the subject property).

The rationale of Pearson v. Lamb, which is that although the subparagraphs in § 38-1-11 other than § 11(1) are mandatory, it does not necessarily follow that they are jurisdictional; should, in light of the plain holding of the Projects decision, be

²⁹Pearson at ¶14: Utah courts have thus ruled that failure to timely commence a mechanics' 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. See, e.g., Interlake Distribs., Inc. v. Old Mill Towne, 954 P.2d 1295, 1297-99 (Utah Ct. App. 1998) (holding that liens were void because plaintiffs failed to file a lis pendens).

³⁰Pearson at ¶4: "The only issue before this court is whether Plaintiff's failure to comply with section 38-1-11(4)(a) of the Mechanics' Liens Act divested the trial court of jurisdiction . . ."

³¹954 P.2d 1295, 1297-99 (Utah Ct. App. 1998).

applied with equal force to find that § 11(2) is not jurisdictional. Finding that § 11(2) is not jurisdictional means that the failure to file a lis pendens is not necessarily fatal to a lien claim (a construction which accords with the express terms of the statute), so it falls upon the defendant asserting a lack of actual knowledge to plead in its answer that it did not have actual knowledge and that the lien is therefore void.

iii. Utah Code Ann. § 38-1-11(2) must be pled as an affirmative defense or it is waived.

“[A] rule 8(c) affirmative defense is a defense employed to defeat the plaintiff's claim by raising matters outside or extrinsic to the plaintiff's prima facie case.”³² That is exactly the manner in which § 11(2) operates in relation to a mechanic's lien claim. By raising matters extrinsic to the lien claimant's prima facie case it falls within the definition of a Rule 8(c) affirmative defense.

Further, Utah Rule of Civil Procedure 12(b) provides that any defense shall be asserted in a responsive pleading or by motion, but that any such motion must be made before pleading.³³ And rule 12(h) provides that a party “waives all defenses . . . not presented by motion or by answer or reply”³⁴ These are the very procedures that Swanson was required to follow if it wished to assert the

³²Prince v. Bear River Mut. Ins. Co., 2002 UT 68, 31, citing Jones, Waldo, Holbrook & McDonough, 923 P.2d at 1374.

³³Utah R. Civ. P. 12(b).

³⁴Utah R. Civ. P. 12(h).

requirements of § 11(2). It is undisputed that in this case Swanson did not plead the requirements of § 11(2), nor did it assert them by a timely motion to dismiss prior to pleading.

It has long been the rule in our courts that a party cannot assert in support of a motion for summary judgment an affirmative defense it has never pled in its answer.³⁵ Nor can it amend its answer by raising an affirmative defense for the first time in its summary judgment motion.³⁶ If an affirmative defense is not pled in an answer it is waived.³⁷ Under this authority, because Swanson did not raise § 11(2) as an affirmative defense it waived its benefits and it was error for the trial court to take cognizance of that defense in ruling in favor of Swanson's motion for summary judgment and in ruling against Victor's motion for summary judgment.

IX. CONCLUSION

Victor commenced a lien action in which it asserted that its lien had priority over the Swanson lien and that because of that priority sought a declaration that Swanson's interest in the subject property was inferior to Victor's. This in rem

³⁵Valley Bank & Trust Co. v. Wilken, 668 P.2d 493 (Utah 1983).

³⁶*See* Holmes Development, L.L.C. v. Cooke, 2002 UT 38, ¶15; *see also* Harper v. Evans, 2008 UT App 66.

³⁷*See* Summit Water Distrib. Co. v. Summit County, 2005 UT 73, ¶47; *see also* Creekview Apts. v. State Farm Ins. Co., 771 P.2d 693, 695 (Utah Ct. App. 1989).

declaration was the sole relief that Victor sought against Swanson, whose lien had already expired and was void as of the commencement of Victor's declaratory in rem proceeding. Because Swanson's lien had long been dead it could not be injured, harmed or adversely affected by Victor's claim of lien priority. Swanson had no standing to contest the merits of Victor's in rem proceeding to declare its lien superior to Swanson's in the subject property. Moreover, Swanson knew or should have known that because it had no interest in the subject property it had no standing to contest the merits of Victor's claim to lien priority.

But Swanson chose to appear and frivolously contest the merits of Victor's claim to lien priority, asserting that Victor had failed to state a claim against Swanson's lien upon which relief could be granted and specifically denying Victor's claim of lien priority by asserting Swanson lacked information to admit that claim and so denied it. Yet Swanson knew it had no interest in the subject property, so how could it deny on the basis of lack of information?

Swanson then failed to raise Utah Code Ann. § 38-1-11(2) as an affirmative defense and moved for summary judgment on the basis of an affidavit which did no more than conclude that Swanson did not have actual knowledge of the commencement of Victor's lien action, without proffering any facts in support of that conclusion.

Accordingly, Victor respectfully requests that the trial court's order granting

Swanson summary judgment be reversed and that Victor instead be granted summary judgment.

Appellant Victor Plastering, Inc. also requests that it be awarded its attorney fees before this Court and the court below. Utah Code Ann. § 38-1-18 specifically provides that such fees shall be awarded to the successful party and case authority is to the same effect.

DATED this 15th day of April, 2008.

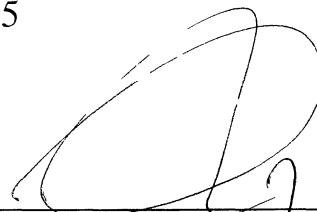


RONALD ADY, Attorney for the
Appellant Victor Plastering, Inc.

CERTIFICATE OF SERVICE

I certify that on the 16th day of April, 2008 I deposited a true copy of the foregoing Appellants' Brief in the United States mail, first-class postage pre-paid to:

Arnold Richer, Esq.
Richer Overholt, P.C.
901 West Baxter Drive
South Jordan, UT 84095



Secretary

ADDENDUM

A. Victor's amended complaint.

B. Swanson's answer.

C. The trial court's February 15, 2007 and May 9, 2007 memorandum ruling.

Tab A

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Salt Lake City, Utah 84101
Telephone: (801) 539-1900
Fax: (801) 322-1054

Attorney for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

VICTOR PLASTERING, INC.,

Plaintiff,

v.

CHRIS A. COLLINS, CHANNA COLLINS,
COBALT HOMES, INC. dba COBALT
HOMES STYLE BUILDER & COBALT
HOMES THE CEDARS L.L.C. dba
COBALT HOMES STYLE BUILDERS,
BRIAN K. BRADY, MASCO
CONTRACTORS SERVICES, DIRECT
MORTGAGE CORPORATION,
CONSTRUCTION PRODUCTS
COMPANY, SWANSON BUILDING
MATERIALS, INC., DAVE'S QUALITY
ROOFING, INC., CITIBANK FEDERAL
SAVINGS BANK and JOHN DOES 1
through 10.

Defendants.

AMENDED COMPLAINT

Civil No. 040401255

Judge Hansen

For complaint against Defendants, Plaintiff alleges as follows:

1. PLAINTIFF is a Utah corporation its principal place of business in Utah County, State of Utah.
2. PLAINTIFF is a stucco contractor duly licensed under the laws of the State of Utah.

3. Defendants Chris A. Collins and Channa Collins ("Homeowners"), own an interest in real property located in Utah, State of Utah, having a legal description as follows: LOT 15, PLAT J2, CEDARS AT CEDAR HILLS SUBDIVISION, CEDAR HILLS (the "Property"). The Homeowners are named as defendants in this action solely for the purposes of proceeding against the real property described above, and not to obtain any judgment or relief in personam against Homeowners.

4. Defendant COBALT HOMES INC. and/or the Defendant COBALT HOMES INC. dba COBALT HOMES STYLE BUILDERS is a Utah corporation doing business in Utah County, State of Utah and at all times relevant to PLAINTIFF's claims in this complaint, was licensed as a general contractor in the State of Utah.

5. That the above-referenced property is a single family dwelling and may have been an owner-occupied residence that is not offered for sale to the public within the meaning of the Residence Lien Restriction and Lien Recovery Fund Act, Title 38, Chapter 11 of the Utah Code (hereinafter the FUND) .

6. That the Defendant Homeowners formerly occupied that residence or may have occupied the residence, or that the residence was or, after completion of the construction on the residence, may have been occupied by the owner or the owner's tenant and lessee as a primary or secondary residence within 180 days from the date of the completion of the construction on the residence.

7. That the Defendant Homeowner may have entered into a contract with Defendant COBALT HOMES INC. (hereinafter referred to as the Defendant Contractor) for the construction of an owner-occupied residence upon the above-described real property.

8. That on or about September 19, 2005 the Defendant Homeowners filed a petition in bankruptcy under Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the Southern District of California as case number 05-08818. On Schedule A of their Voluntary Petition

in that bankruptcy they show the above-described real property with a current market value of \$208,000 and secured claims totaling \$256,824.00. On Schedule C of that Petition they claim \$18,675.00 of that real property as exempt. In paragraph 15 of the Statement of Financial Affairs attached to that petition, the Defendant Homeowners show that they last occupied the above-described real property on January 5, 2005. On Defendant Homeowners Statement of Intentions filed with that petition, they identify the above described real property as "Property to be Surrendered" and list Citibank and Citimortgage as the creditor's name relating to that property.

9. That the Defendant Contractor may have been a licensed contractor at all times when it was building the aforementioned owner-occupied residence.

10. PLAINTIFF and Defendant Contractor entered into a contract under which PLAINTIFF was to construct certain improvements to the Property on behalf of Defendant Homeowners.

11. PLAINTIFF first provided materials and labor for the Property on or about September 26, 2003.

12. On or about October 16, 2003, PLAINTIFF completed the contracted improvements to the Property.

13. PLAINTIFF has demanded payment from Cobalt and Collins, who have refused to make payment.

14. On January 14, 2004, PLAINTIFF recorded a mechanic's lien against the Property pursuant to UTAH CODE ANN. § 38-1-7 (1953, as amended) in the amount of \$16,250.00, notice of which was mailed via certified mail to Defendants.

15. That Defendants, CHRIS A. COLLINS and CHANNA M. COLLINS, MASCO CONTRACTORS SERVICES, DIRECT MORTGAGE CORPORATION, CONSTRUCTION PRODUCTS COMPANY, SWANSON BUILDING MATERIALS, INC., DAVE'S QUALITY

ROOFING, INC., CITIBANK FEDERAL SAVINGS BANK and JOHN DOES 1 through 10 all hold some claim of right, title, or interest to the aforementioned property and PLAINTIFF alleges that all of the claims of right, title or interest of each of these Defendants and all persons claiming by, through, or under them, are junior, inferior, and subject to the prior claims and interest of PLAINTIFF, or that the claims, if any, of any other person or entity (Doe Defendants) who may assert an interest in the properties should be litigated herein and priorities established.

CLAIM ONE: FORECLOSURE ON MECHANIC'S LIEN

16. PLAINTIFF incorporates by reference the allegations contained in the preceding paragraphs.

17. As a result of the Defendant Contractor's breach of contract, PLAINTIFF has been compelled to prepare and file Notice of Liens, a copy of which said Liens are herewith attached and incorporated as Exhibit "'A'".

18. That if the Defendant Homeowners can establish that he or she has complied with the FUND, he or she may become exempt from the Lien and Bond Statutes of the State of Utah. As required by §38-1-11 of the Utah Code, a form "'Homeowner's Application For Certificate of Compliance'" and Instructions are attached hereto as Exhibit "'B'" for the Defendant Homeowner's use.

19. That pursuant to §38-1-11(4) (d) of the Utah Code, this Court must stay proceedings as to the Defendant Homeowners until such time as the Defendant Homeowners have had a reasonable period of time to establish compliance with §38-11-204(4) (a) and (4) (b) of the Utah Code through an informal proceeding, as set forth in Title 63, Chapter 46b, Administrative Procedures Act, commenced within 30 days of the owner being served summons in the foreclosure action, at the Division of Occupational and Professional Licensing and obtain a certificate of compliance or denial

of certificate of compliance, as defined in §38-11-102 of the Utah Code.

20. That the Defendant Homeowners have had 30 days from the date of service of the Complaint upon them in this action to complete and file the Homeowners Application for Certificate of Compliance with the Division of Occupational and Professional Licensing for the State of Utah, as required by §38-1-11 of the Utah Code, in default of which the Defendant Homeowners lose the protection they otherwise may have under the FUND.

21. That if the Defendant Homeowners cannot establish that they have complied with the FUND, PLAINTIFF is entitled to a Decree of Foreclosure of PLAINTIFF's Mechanic's Lien and to an Order of Sale that the Sheriff conduct a sale and apply the proceeds from said sale first, to the cost of sale; second, to the satisfaction of PLAINTIFF's Lien, interest, Court costs, accrued interest pursuant to statute and attorney's fees; and third, that any surplus be given to the rightful claimants and owners.

CLAIM TWO: BREACH OF CONTRACT

22. PLAINTIFF incorporates by reference the allegations contained in the preceding paragraphs.

23. Cobalt has breached its contract with PLAINTIFF and PLAINTIFF is entitled to damages in the contract amount of \$16,250.00 or as may be proven at trial plus accrued interest pursuant to statute.

CLAIM THREE: UNJUST ENRICHMENT

24. PLAINTIFF incorporates by reference the allegations contained in the preceding paragraphs.

25. PLAINTIFF has provided materials and services to Defendant(s) equal to or in excess of the amount of \$16,250.00.

26. The materials and services provided by PLAINTIFF have increased the value of the properties where the materials were placed and/or the value of the Defendant Contractor's business.

27. Upon information and belief, PLAINTIFF alleges that Defendant, BRIAN K. BRADY, who is the controlling and operating shareholder behind the Defendant corporation, COBALT HOMES INC., has been unjustly enriched in the amount of \$16,250.00 or the Defendant, COBALT HOMES INC., has been unjustly enriched in the same amount.

28. PLAINTIFF is entitled to compensation from Defendants, COBALT HOMES INC., and/or BRIAN K. BRADY for the value of the services and material provided and for the amount by which Defendant has been unjustly enriched, which amount is \$16,250.00, plus interest through October 16, 2003 and continuing interest thereon from said date at the rate of 12% per annum until paid as provided by Section 58-55-603 of the Utah Code Annotated (1953), plus any costs of court and attorney's fees as allowed by Rule 73 of the Utah Rules of Civil Procedure.

29. Defendants have refused to make payment to PLAINTIFF for the material and services provided and to allow Defendants to retain the benefit of the materials and service provided by PLAINTIFFs will unjustly enrich Defendants.

30. Therefore PLAINTIFF should be allowed to recover from Defendants COBALT HOMES INC., and/or BRIAN K. BRADY the value of the materials and services rendered in the amount of \$16,250.00, plus interest through February 3, 2006 and continuing interest thereon from said date at the rate of 12% per annum until paid as provided by Section 58- 55-603 of the Utah Code Annotated (1953), plus any costs of court and attorney's fees in order to prevent unjust enrichment.

WHEREFORE, PLAINTIFF prays for relief against Defendants as follows:

1. For judgment against the Defendants, BRIAN K. BRADY, and COBALT HOMES INC.. for breach of contract in the amount of \$16,250.00, plus interest through October 16, 2003 and

continuing interest thereon from said date at the rate of 12% per annum until paid, plus attorney's fees in the amount of at least \$775.00, as allowed by Rule 73 of the Utah Rules of Civil Procedure, by contract and by UCA 38-1-18 et sec, plus all costs of Court.

2. For a declaration that but for the Defendant Homeowners chapter 7 bankruptcy, Plaintiff would be entitled to a judgment against the Defendant Homeowners, Chris A. Collins and Channa M. Collins, in the amount of \$16,250.00, plus interest through October 16, 2003 and continuing interest thereon from said date at the rate of 12% per annum until paid, plus Court costs, reasonable attorney's fees of at least \$775.00, as allowed by Rule 73 of the Utah Rules of Civil Procedure, by contract and by UCA 38-1-18 et sec, plus all costs of Court.

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.

4. For an Order that PLAINTIFF's Mechanic's Lien is prior to and superior to the interests of all Defendants herein.

5. For a Decree of Foreclosure of PLAINTIFF's Mechanics Lien and for an Order that the Sheriff of Utah County conduct a sale and apply the proceeds from said sale first to the cost of sale; second, to the satisfaction of PLAINTIFF's Lien, interest, Court costs and attorney's fees; and third, that any surplus be given to the rightful claimants and owners.

6. In the event that said sale is not sufficient to satisfy the entire amount of the lien, including all applicable interest, Court costs, and attorney's fees, as proscribed by law, PLAINTIFF prays for a Deficiency Judgment against the record owners of the property in the amount remaining due as to said property, as provided for by §38-1-16 of the Utah Code Annotated(1953).

7. For an order of foreclosure of the mechanic's lien recorded by PLAINTIFF against the

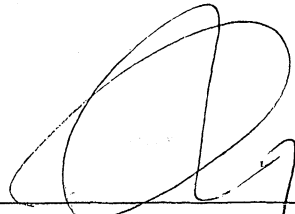
Property for the amount of \$16,250.00 plus attorney's fees, court costs, and accrued interest pursuant to statute;

8. For judgment against Defendants COBALT HOMES INC. for damages in the amount of \$16,250.00 and for a declaration that but for the Defendant Collins chapter 7 bankruptcy Plaintiff would be entitled to a judgment against Defendants Collins and COBALT HOMES INC., jointly and severally, for damages in the amount of \$16,250.00;

9. For pre-judgment interest pursuant to UTAH CODE ANN. § 15-1-1;

10. For such other relief as the Court deems reasonable in the premises.

Dated this 12th of April, 2004.



RONALD ADY
Attorney for Plaintiff

PLAINTIFF DEMANDS A JURY TRIAL

Tab B

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

2006 JUL -3 A 11: 50⁴

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Attorneys for Defendant
Swanson Building Materials, Inc.

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF UTAH
UTAH COUNTY, PROVO DEPARTMENT

VICTOR PLASTERING, INC.,

Plaintiff,

v.

CHRIS A. COLLINS, CHANNA
COLLINS, COBALT HOMES, INC.
d/b/a COBALT HOMES STYLE
BUILDER & COBALT HOMES THE
CEDARS, LLC d/b/a COBALT
HOMES STYLE BUILDERS, BRIAN
K. BRADY, MASCO
CONTRACTORS SERVICES,
DIRECT MORTGAGE
CORPORATION, CONSTRUCTION
PRODUCTS COMPANY,
SWANSON BUILDING MATERIALS,
INC., DAVE'S QUALITY ROOFING,
INC., CITIBANK FEDERAL
SAVINGS BANK and JOHN DOES
1-10

Defendants.

**DEFENDANT SWANSON
BUILDING MATERIALS, INC.'s
ANSWER TO PLAINTIFF'S
AMENDED COMPLAINT**

Civil No. 04P401255

Judge: Hansen

Defendant, Swanson Building Materials, Inc. (hereinafter "Defendant") by and through its counsel of record, the law firm of RICHER & OVERHOLT, P.C., hereby responds to Plaintiff's Amended Complaint as follows:

FIRST DEFENSE

Plaintiff's Amended Complaint fails to state a claim against Defendant upon which relief may be granted and it should, therefore, be dismissed with prejudice, with costs and fees being awarded to Defendant.

SECOND DEFENSE **(Answering Specific Numbered Allegations)**

1. Defendant is without sufficient information or belief as to the allegations contained in Paragraph 1 and therefore denies the same (hereinafter "Defendant denies for lack of information").

2. Defendant denies for lack of information.

3. Defendant denies for lack of information.

4. Defendant denies for lack of information.

5. Defendant denies for lack of information.

6. Defendant denies for lack of information.

7. Defendant denies for lack of information.

8. Defendant denies for lack of information. Defendant further denies Paragraph 8 on the basis that the averments set forth in Paragraph 8 are compound and that any and all documents referred to in Paragraph 8 speak for themselves.

9. Defendant denies for lack of information.

10. Defendant denies for lack of information.
11. Defendant denies for lack of information.
12. Defendant denies for lack of information.
13. Defendant denies for lack of information.
14. Defendant denies for lack of information.
15. Defendant denies for lack of information. Defendant further denies on the basis that the averments set forth in Paragraph 15 are compound.
16. Defendant incorporates by reference the defenses contained in the preceding paragraphs.
17. Defendant denies on the basis that the Liens speak for themselves. Defendant further denies for lack of information.
18. Defendant denies on the basis that the averments set forth in Paragraph 18 call for a legal conclusion. Defendant further denies for lack of information.
19. Defendant denies on the basis that the averments in Paragraph 19 are compound. Defendant further denies on the basis that the averments set forth in Paragraph 19 call for a legal conclusion. Defendant additionally denies for lack of information.
20. Defendant denies on the basis that the averments in Paragraph 20 are compound. Defendant further denies on the basis that the averments set forth in Paragraph 20 call for a legal conclusion. Defendant additionally denies for lack of information.

21. Defendant denies on the basis that the averments in Paragraph 21 are compound. Defendant further denies on the basis that the averments set forth in Paragraph 21 call for a legal conclusion. Defendant additionally denies for lack of information.

CLAIM TWO: BREACH OF CONTRACT

22. Defendant incorporates by reference the defenses contained in the preceding paragraphs.

23. Defendant denies for lack of information.

CLAIM THREE: UNJUST ENRICHMENT

24. Defendant incorporates by reference the defenses contained in the preceding paragraphs.

25. Defendant denies for lack of information.

26. Defendant denies for lack of information.

27. Defendant denies for lack of information.

28. Defendant denies on the basis that the averments in Paragraph 28 are compound. Defendant further denies on the basis that the averments set forth in Paragraph 28 call for a legal conclusion. Defendant additionally denies for lack of information.

29. Defendant denies for lack of information.

30. Defendant denies for lack of information.

31. Defendant denies each and every averment set forth in Plaintiff's Amended Complaint that Defendant has not expressly admitted.

THIRD DEFENSE

As an affirmative defense, Defendant alleges that the priority of the lien claims should be determined by the Court.

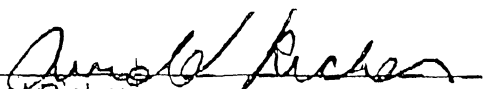
FOURTH DEFENSE

There are or may be other affirmative defenses which Defendant is unaware of at this time which may be applicable to this lawsuit. Defendant specifically reserves the right to amend its Answer to include those defenses once their applicability has been determined.

WHEREFORE, having fully answered Plaintiff's Amended Complaint, Defendant prays that Plaintiff's Amended Complaint be dismissed, that Defendant be awarded its costs incurred herein, and for such other and further relief as the Court deems just and equitable.

DATED this 30 day of June, 2006.

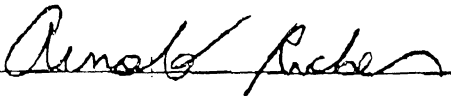
RICHER & OVERHOLT, P.C.


Arnold Richer
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 30 day of June, 2006, 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:

RONALD ADY
Attorney for Plaintiff
10 West 100 South, Suite 425
Salt Lake City, Utah 84101



Tab C

FILED

MAY 09 2007

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY +

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

<p>VICTOR PLASTERING, INC.,</p> <p>Plaintiff,</p> <p>v.</p> <p>CHRIS A. COLLINS, CHANNA COLLINS, COBALT HOMES, INC. Dba COBALT HOMES STYLE BUILDER & COBALT HOMES THE CEDARS L.L.C. dba COBALT HOMES STYLE BUILDERS, BRIAN K. BRADY, MASCO CONTRACTORS SERVICES, DIRECT MORTGAGE CORPORATION, CONSTRUCTION PRODUCTS COMPANY, SWANSON BUILDING MATERIALS, INC., DAVE'S QUALITY ROOFING, INC., CITIBANK FEDERAL SAVINGS BANK and JOHN DOES 1 through 10,</p> <p>Defendants.</p>	<p>MEMORANDUM RULING</p> <p>Date: May 9, 2007 Case No. 040401255 Judge Steven L. Hansen Division 2</p>
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This matter comes before the Court upon Plaintiff's *motion to strike the Affidavits of Wayne Flynn and Jim Beech*; Plaintiff's *motion for a new trial on Defendant Citibank and Citimortgage's motion for summary judgment*; and Plaintiff's *motion for a new trial on Defendant Swanson's motion for summary judgment*.

STATEMENT OF FACTS

1. On January 16, 2007, this Court issued a memorandum decision granting defendants CitiMortgage and Citibank Federal Savings Bank's unopposed *Motion for Summary Judgment*. This Court found that because Plaintiff's failed to file a lis pendens in this

matter and to name Defendants as parties to this lawsuit within 180 days of Plaintiff's notice of claim of lien, and because Defendants had no actual knowledge of the lawsuit prior to June 2006 (within the 180 day statutory period), the lien was void as to the Defendants CitiMortgage and Citibank.

2. On February 15, 2007, this Court granted defendant Swanson Building Material, Inc.'s *Motion for Summary Judgment* based on the fact that Plaintiff did not name Swanson in its initial complaint and failed to do so until nearly two years after recording notice of its claim of lien and also because that Plaintiff had failed to meet its statutory burden to prove that Swanson had actual knowledge of the lawsuit during the relevant time frame.

DISCUSSION

In regard to Plaintiff's motion for a new trial against Defendants CitiMortgage and Citibank ("Citi-Defendants"), Plaintiff argues that the Court erred in granting summary judgment because the Citi-Defendants provided defective affidavits that are inadmissible that would preclude summary judgment. Plaintiff did not oppose the affidavits or the summary judgment until the current motion, after summary judgment had already been awarded.

Plaintiff argues that in the affidavits of Wayne Flynn and Jim Beech, do not show how Beech or Flynn were qualified to aver that they knew that the officers and agents of their respective businesses had no knowledge of the current litigation.

Affidavits must meet the standards as set forth in Rule 56(e) of the Utah Rules of Civil Procedure. Rule 56(e) states that affidavits shall be made on personal knowledge, shall set forth

such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

In the affidavit of Jim Beech, he swears that he is the president of Direct Mortgage Corporation and that he first learned of the existence and pendency of the current litigation at the time Direct Mortgage Corporation was served process on June 14, 2006. He further swears, that neither he or any other officer or agent of Direct Mortgage Corporation had actual knowledge of the existence of the current litigation until June 14, 2006.

Plaintiff argues that in the case of K&T, Inc. v. Koroulis, 888 P. 2d 623 (Utah 1994), the Court found improper a Trial Court's consideration of an affidavit of a secretary on a summary judgment where he stated the affidavit in that case of a secretary who claimed that to the best of his knowledge neither he nor anyone at his company had actual knowledge of the Consent Agreement or the Stockholder's Agreement.

However, Citi-Defendants argue and this Court agrees that on a motion for summary judgment when an opposing party fails to move to strike defective affidavits, he is deemed to have waived his opposition to whatever evidentiary defects may exist. *See* Franklin Financial v. New Empire Development Company, 659 P.2d 1040 (Utah 1983). Because Plaintiff failed to move to strike defective affidavits on summary judgment they were waived by Plaintiff and were properly considered by the Court.

Rule 56(e) clearly states:

When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.

Because Plaintiff did not object to the affidavits any evidentiary defects are deemed waived and the Court takes the affidavits as undisputed fact. Under Rule 56(e) where there is no genuine issues of fact that any officer or agent of the Citi-Defendants had knowledge of this current litigation, this Court properly granted summary judgment to the Citi-Defendants.

Therefore, based on the reasons stated above, Plaintiff's *motion for a new trial on the Citi Defendants' motion for summary judgment* is denied. Because the Plaintiff did not move to strike the affidavits on motion for summary judgment, Plaintiff may not move to strike the affidavits post-judgment, so the Plaintiff's *motion to strike affidavits of Wayne Flynn and Jim Beech* is also denied.

In regard to Swanson, this Court finds that Swanson was not sent the ruling that was issued by the Court on February 15, 2007. This Court finds that Swanson made a good faith effort to see if a ruling had been issued when Plaintiff filed a *motion for a new trial against Defendant Swanson*, by checking the Court docket. Therefore under Rule 6(b) of the Utah Rules of Civil Procedure this Court allows and considers Swanson's second memorandum in opposition to Plaintiff's motion.

In Plaintiff's *motion for a new trial against Defendant Swanson*, Plaintiff argues 5 points:

1) There is no evidence to support the Court's finding that the defendant Swanson was an

interested party; 2) The Court erred in ruling that the lapse of the Defendant Swanson's lien was immaterial to the summary judgment issues before this Court; 3) The Court erred in ruling that Defendant Swanson's failure to plead the statute of limitation did not result in a waiver of that defense; 4) The Court erred in ruling that the Plaintiff's failure to file a lis pendens within 180 days of the filing of the mechanic's lien is 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 production in a summary judgment proceeding requiring the Plaintiff rather than Swanson to dispose of the material issue of fact as to whether Swanson had actual knowledge of the commencement of the within action.

On February 3, 2006, Plaintiff amended their complaint stating that all Defendants, "hold some claim of right, title, or interest to the aforementioned property and PLAINTIFF alleges that all of the claims of right, title or interest of each of theses Defendants and all persons claiming by, through, or under them, are junior, inferior, and subject to the prior claims and interest of PLAINTIFF, or that the claims, if any, of any other person or entity (Doe Defendants) who may assert an interest in the properties should be litigated herein and priorities established." Under Baldwin v. Vanatage 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 sued Swanson and Plaintiff 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.

Plaintiff also asserts that because Swanson did not assert the statute of limitations of the lien in its answer that Swanson waived its statute of limitations defense. However, this Court finds that the statute of limitations does not apply in this case.

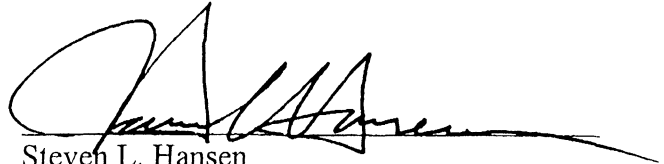
A party failing to comply with §38-1-11 of the mechanics' lien statute is not subject to waiver, but is jurisdictional. See Projects Unlimited, Inc. v. Copper State Thrift & Loan Co., 798 P.2d 738 (1990).

This Court stands by its two prior rulings. The burden of proof is on the Plaintiff to show that the Plaintiff is entitled to the lien and has complied with the lien statute §38-1-11. Both Citi-Defendants and Swanson filed motions for summary judgment based on the fact that they did not have actual knowledge of the current litigation or the lien and that the amended complaint naming the Defendants was filed 180 days after the lien was filed. Defendants Swanson and Citi-Defendants filed unopposed affidavits stating that no officers or agents at the respective businesses had any knowledge of the current litigation. Defendants did not have to prove that they had an interest in the property as Plaintiff brought the Defendants into the lawsuit creating an affirmative interest.

Plaintiff attempts to object to the affidavits post-judgment, but that right to objection has been waived. Based on the above facts the motion for a new trial with Defendant Swanson is denied.

Defendants to prepare an order consistent with this ruling.

DATED this 9th day of May, 2007.

A handwritten signature in black ink, appearing to read 'Steven L. Hansen', written over a horizontal line.

Steven L. Hansen
District Court Judge

Case No. 040401255

A certificate of mailing is on the following page.

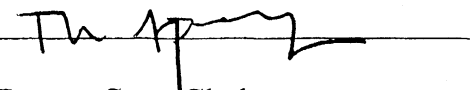
CERTIFICATE OF MAILING

I hereby certify that I served a true and exact copy of the foregoing by mail, postage prepaid, on the 9 day of May, 2007, to the following:

Attorney for Plaintiff
Ronald Ady
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Darci D. Tolbert
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South Jordan, Utah 84095

Attorneys for Defendant Citimortgage, Inc and Citibank Federal Savings Bank
Leslie Van Frank
Matthew G. Bagley
CHONE, RAPPAPORT & SEGAL P.C.
257 East 200 South, 7th floor
PO Box 11008


Deputy Court Clerk

FILED
Fourth Judicial District Court
of Utah County, State of Utah

[Signature]
2/15/07

IN THE FOURTH JUDICIAL DISTRICT COURT,
UTAH COUNTY, STATE OF UTAH

VICTOR PLASTERING, INC.,

Plaintiff,

vs.

CHRIS A. COLLINS, CHANNA
COLLINS, COBALT HOMES, INC. dba
COBALT HOMES STYLE BUILDER &
COBALT HOMES THE CEDARS,
L.L.C. dba COBALT HOMES STYLE
BUILDERS, BRIAN K. BRADY, MASCO
CONTRACTORS SERVICES, DIRECT
MORTGAGE CORPORATION,
CONSTRUCTION PRODUCTS
COMPANY, SWANSON BUILDING
MATERIALS, INC., DAVE'S QUALITY
ROOFING, INC., CITIBANK FEDERAL
SAVINGS BANK and JOHN DOES 1
through 10,

Defendants.

MEMORANDUM DECISION

Date: February 15, 2007

Case No. 040401255

Division II: Judge Steven L. Hansen

This matter comes before the court on Defendant Swanson Building Materials, Inc.'s ("Swanson") *Motion for Summary Judgment*. Having reviewed the file in this matter and for the reasons set forth below, Defendant's *Motion for Summary Judgment* is granted.

STATEMENT OF UNDISPUTED MATERIAL FACTS

- 1 Plaintiff is a stucco contractor with whom Defendant Cobalt Homes, Inc., entered into a contract under which Plaintiff was to construct certain improvements to real property owned by Defendants Chris and Channa Collins.
2. Plaintiff recorded its Notice of Claim of Lien on the subject property with the Utah County Recorder's Office on January 14, 2004. Plaintiff recorded Amended Notices of Lien on April 13, 2004.
- 3 Plaintiff filed its Complaint in this matter on April 13, 2004, in which Defendant Swanson was not named as a Defendant.
- 4 Plaintiff filed an Amended Complaint on February 10, 2006.
5. Defendant Swanson was first named as a Defendant in Plaintiff's Amended Complaint.
6. Defendant Swanson was not served process in this matter until June 22, 2006.
7. There is no evidence in the record indicating that Defendant had actual knowledge of the lawsuit pending in this matter until it was served process on June 22, 2006.

DISCUSSION

"A summary judgment is appropriate only where the favored party makes a showing which precludes, as a matter of law, the awarding of any relief to the losing party." *Tanner v. Utah Poultry & Farmers Co-op*, 359 P.2d 18, 19 (Utah 1961). Additionally, "the facts and all reasonable inferences drawn therefrom [are viewed] in the light most favorable to the nonmoving party. . . ." *Jackson v. Mateles*, 70 P.3d 78, 80 (Utah 2003).

A lien claimant must file notice of the pendency of action within 180 days from the date on which the claimant filed a notice of claim with the appropriate county recorder. UT Code Ann. § 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. UT Code Ann. § 38-1-11(2)(a). Thus, an interested party is not subject to lien where his pendency is not timely filed and the party had no knowledge of the lawsuit during the relevant time frame. *Projects Unlimited, Inc. v. Copper State Thrift & Loan Co.*, 798 P.2d 738, 751 (Utah 1990).

The Court finds irrelevant Plaintiff's claims that because Defendant may have had a lien against the subject property which it has not litigated and has since expired, that Defendant is a stranger to this action and has no standing to seek affirmative relief. The Court finds further unpersuasive Plaintiff's argument that Defendant waived an affirmative defense of untimely action by failing to plead it in its responsive pleading. On the contrary, the Court finds that an untimely action under the mechanics' lien statute is not subject to waiver, but is jurisdictional. *Projects Unlimited Inc.*, 798 P.2d at 290–291.

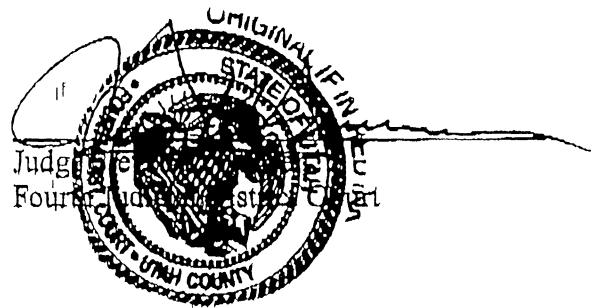
Even when viewing the facts in the light most favorable to Plaintiff, the Court concludes that Defendant is entitled to summary judgment as a matter of law. Although Plaintiff filed an action to enforce the lien (its Complaint) within 180 days of recording it, Plaintiff failed to name Swanson as a Defendant in its initial Complaint, and, in fact, failed to do so until nearly two years after recording notice of its claim of lien. Further, the Court finds that Plaintiff has failed

to meet its statutory burden to show that Defendant had actual knowledge of the lawsuit during the relevant time frame. Utah Code Ann. § 38-1-11(2)(b) Thus, the Court concludes that Plaintiff's lien is void as to Defendant Swanson.

CONCLUSION

For the reasons set forth above, Defendants' *Motion for Summary Judgment* is granted with reasonable attorney fees and costs pursuant to Utah Code Ann. § 38-1-18(1). Defendant is to prepare an order consistent with this decision.

Dated this 16 day of February, 2007



A certificate of mailing is on the following page. Case No. 040401255

CERTIFICATE OF SERVICE

I hereby certify that, on the 15th day of February, 2007, I caused a true and correct copy of the foregoing **RULING ON DEFENDANT'S MOTION FOR SUMMARY**

JUDGMENT to be delivered to the following parties:

Counsel for the Plaintiff:

Ronald Ady
8 East Broadway, Suite 710
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Counsel for the Defendants:

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Salt Lake City, UT 84101

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Matthew G Bagley
COHNE, RAPPAPORT & SEGAL, P.C
257 East 200 South, 7th Floor
Salt Lake City, UT 84147

Stephen C. Tingey
RAY, QUINNEY & NEBEKER, P.C
P.O Box 45385
Salt Lake City, UT 84145

Mailed this 15 day of February, 2007, postage pre-paid as noted above.


Court Clerk

