

2008

Victor Plastering, Inc. v. Citibank Federal Savings Bank, Citimortgage, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

<p>VICTOR PLASTERING, INC.,</p> <p>Plaintiff and Appellant,</p> <p>vs.</p> <p>CITIBANK FEDERAL SAVINGS BANK and CITIMORTGAGE, INC.,</p> <p>Defendants and Appellees.</p>	<p>APPELLEES' BRIEF</p> <p>Appellate Case No. 20080017</p> <p>District Court No. 040401255</p>
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IN THE UTAH COURT OF APPEALS

VICTOR PLASTERING, INC.,

Plaintiff and Appellant,

vs.

CITIBANK FEDERAL SAVINGS
BANK and CITIMORTGAGE, INC.,

Defendants and Appellees.

APPELLEES' BRIEF

Appellate Case No. 20080017

District Court No. 040401255

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Pursuant to Utah Rule of Appellate Procedure 24, Appellees submit the following brief in response to the arguments set forth by Appellant.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Utah Code section 78-2(a)-3(j), as this case was poured over from the Utah Supreme Court. *See* Utah Code Ann. § 78-2(a)-3(j).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

Appellees do not believe that Appellant's statement of the issues and standards of review accurately assess the nature of this appeal. *See* Brief of Appellant, pp. 1-2.

Therefore, Appellees provide the following statement of issues and standards of review:

1. Should this appeal be dismissed for inadequate briefing?

While there is no "standard of review," per se, for this issue, the questions for the Court are (i) whether Appellant has adequately complied with Utah Rule of Appellate Procedure 24(a)(9); (ii) whether Appellant has "impermissibly shifted the burden of analysis to the reviewing court in this case," *Smith v. Smith*, 1999 UT App 370, ¶ 9, 995 P.2d 14; and (iii) whether Appellant's brief enables the Court "to understand . . . what particular errors were allegedly made, where in the record those errors can be found, and why, under applicable authorities, those errors are material ones necessitating reversal or other relief." *State v. Lucero*, 2002 UT App 135, ¶ 13, 47 P.3d 107 (quotations and citation omitted).

2. Did the district court abuse its discretion when it denied Appellant's Motion for New Trial?

“We review the trial court's decision to deny [a] motion for a new trial under an abuse of discretion standard.” *Hart v. Salt Lake County Com'n*, 945 P.2d 125, 135 (Utah Ct. App. 1997) (citing *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 804 (Utah 1991) (“Under our rule 59, it is well settled that, as a general matter, the trial court has broad discretion to grant or deny a motion for a new trial.”)). “Under this standard of review, we will reverse only if there is no reasonable basis for the decision.” *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 25, 82 P.3d 1064 (quotations and citation omitted). Specifically, “[w]here the trial court has denied a motion for a new trial under Utah R.Civ.P. 59(a)(6)... [t]he trial court decision will be sustained on appeal if there was an evidentiary basis for the decision.” *Egbert & Jaynes v. R.C. Tolman Const. Co., Inc.*, 680 P.2d 746, 747 (Utah 1984).

To the extent Appellant invokes Rule 60(b) in some manner, the standard of review is the same: “We review the trial court's denial of a motion to reconsider summary judgment under rule 60(b) of the Utah Rules of Civil Procedure for abuse of discretion.” *Lund v. Hall*, 938 P.2d 285, 287 (Utah 1997).

3. Did the district court err by granting Appellees' unopposed Motion for Summary Judgment?

In reviewing a trial court's grant of summary judgment, this Court affords no deference to the lower court's legal conclusions and reviews them for correctness. *See*

Blackner v. State Dep't of Transp., 2002 UT 44, ¶ 8, 48 P.3d 949. The granting of summary judgment is appropriate only in the absence of any genuine issue of material fact and where the moving party is entitled to judgment as a matter of law. *See* Utah R. Civ. P. 56(c). Thus, in reviewing a trial court's grant of summary judgment, this Court reviews the facts and all reasonable inferences in the light most favorable to the nonmoving party. *See Surety Underwriters v. E & C Trucking, Inc.*, 2000 UT 71, ¶ 15, 10 P.3d 338.

STATEMENT OF THE CASE

Appellant's "Statement of Facts," at pp. 4-6 of the Brief of Appellant, does not provide the substantive facts relating to the underlying matter. Appellant's statement also objectionably sets out certain incorrect dates and contains legal argument. Accordingly, Appellee provides the relevant substantive and procedural facts as follows:

1. Substantive Facts.

Appellees' Memorandum in Support of Motion for Summary Judgment contains a Statement of Undisputed Material Facts. *See* R. 171-72. Appellant did not contest those facts. Accordingly, these facts are undisputed pursuant to Utah Rules of Civil Procedure 7(c)(3)(A) ("Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party") and are set forth verbatim herein as the substantive statement of this case:

1. Plaintiff recorded its notice of claim of lien on the subject property with the Utah County Recorder on January 14, 2004. Plaintiff recorded amended notices of lien on April 13, 2004.

2. In its lien notices, Plaintiff identified the last date of work on the subject property as October 16, 2003.

3. The subject property is residential property.

4. Plaintiff filed its Complaint in this matter on April 13, 2004.

5. Plaintiff's Complaint stated a claim for mechanic's lien foreclosure.

6. Neither Citibank nor CitiMortgage's predecessor-in-interest was identified as a Defendant in the Complaint.

7. Plaintiff filed an Amended Complaint in this matter on or about February 10, 2006.

8. Plaintiff's Amended Complaint restated a claim for mechanic's lien foreclosure, and for the first time identified Citibank and CitiMortgage's predecessor-in-interest (Direct Mortgage Corporation) as part of the class of foreclosure Defendants holding a claim of right, title or interest to the real property that is at issue in this action.

9. At no time prior to or during the pendency of this case has Plaintiff recorded a lis pendens with the Utah County Recorder's office in connection with the above-captioned litigation.

10. Citibank was served process in this matter on June 6, 2006.

11 CitiMortgage's predecessor-in-interest (Direct Mortgage Corporation) was served process in this matter on June 14, 2006

12 At no time prior to June 6, 2006, did Citibank or CitiMortgage's predecessor-in-interest have actual knowledge of the lawsuit pending in this matter R-171-72

2. Relevant Procedural Facts.

1 Plaintiff filed an Amended Complaint in this matter on or about February 10, 2006 (R 59-65) Plaintiff's Amended Complaint states a claim for mechanic's lien foreclosure, naming Citibank and CitiMortgage's predecessor-in-interest, Direct Mortgage Corporation, as part of the class of foreclosure Defendants holding a claim of right, title or interest to the real property that is at issue in this action (See *id*)

2 Citibank Federal Savings filed an Answer, admitting that it claimed an interest in the subject property and denying that its interests were inferior to the interests of Appellant (R 96)

3 On September 1, 2006, Appellees moved the district court to substitute CitiMortgage, Inc for another named Defendant, Direct Mortgage Corp, as the real party in interest (R 101-03) In its Memorandum in Support of Motion to Substitute, Appellees alleged that CitiMortgage was the beneficiary of the Trust Deed recorded against the subject property, "which interest Plaintiff seeks to foreclose in this action " (R 117) The unopposed motion was granted on September 28, 2006 (R 123-25)

4 CitiMortgage then filed an answer to the Amended Complaint, admitting it claimed an interest in the subject property (R 130)

5. Appellees filed their Motion for Summary Judgment on November 15, 2006, along with their memorandum and affidavits filed in support thereof. (R.133-73.)
6. Appellant did not file a response to Appellees' Motion for Summary Judgment within the time proscribed by Rule 7 of the Utah Rules of Civil Procedure.
7. Having received no response to their motion, Appellees filed a notice to submit the motion for decision on December 11, 2006. (R. 174-76.)
8. The district court issued its Memorandum Decision granting the unopposed Motion on January 16, 2007. (R. 210-13.)
9. On the same date (January 16, 2007), Appellant filed a Motion to Strike Appellees' affidavits. (R. 217-21.) Two weeks later, on February 2, 2007, Appellant also filed its Motion for New Trial. (R. 251-53.)
10. The district court heard oral argument on Appellant's motions on April 16, 2007 (R. 393-94), and issued a Memorandum Decision denying each motion on May 9, 2007. (R. 395-402.)
11. The district court entered its Order relating to the denial of these motions on June 4, 2007. (R. 409-11.) The district court subsequently entered its Order and Judgment in favor of Appellees on November 16, 2007. (R. 635-38.)
12. Appellant filed a Notice of Appeal from the June 4, 2007 Order on June 7, 2007. (R. 417-18.) Appellant filed another Notice of Appeal, from the Order and Judgment, on December 12, 2007. (R. 639-40.)

SUMMARY OF ARGUMENTS

Appellant fails to show any reversible error made by the district court.

First, although Appellant ostensibly appeals from the district court's denial of Appellant's Motion for New Trial, Appellant sets forth no argument regarding why this determination constitutes an abuse of discretion. For this reason, this appeal should be dismissed on the basis of inadequate briefing for failure to comply with Utah Rule of Appellate Procedure 24(a)(9). Appellant fails to mention Rule 59 or 60, does not cite to any particular ground on which a new trial should have been granted, and makes no effort to describe any error made by the district court in its ruling on the Motion for New Trial.

Second, assuming that Appellant's argument is based upon Utah Rule of Civil Procedure 59(a)(6), that Rule provides no basis for reversal. Appellant asserts that the affidavits submitted in support of Appellees' Motion for Summary Judgment contained certain evidentiary flaws and that Appellees failed to assert an interest in the subject property. These arguments are without merit. Appellant never challenged Appellees' motion or supporting affidavits in the first instance; thus, any objections relating to the affidavits submitted in support of that motion are deemed waived. Further, the record is replete with Appellees' assertions of an interest in the subject property.

Last, Appellant makes no showing that the district court erred when it granted summary judgment in favor of Appellees.

Appellant simply fails to show that the district court erred when it granted summary judgment, or when it denied Appellant's Motion for New Trial. Accordingly, this Court should affirm.

ARGUMENT

I. APPELLANT MAKES NO SHOWING THE DISTRICT COURT COMMITTED REVERSIBLE ERROR.

A. Appellant Has Inadequately Briefed the Issue of Whether the District Court Erred When it Denied Appellant's Motion for New Trial, and Otherwise Provides No Basis for a New Trial.

Appellant's Motion for New Trial, denied by the district court, was ostensibly based on Utah Rules of Civil Procedure 59 or 60. Appellant makes no mention of Rule 59 or Rule 60 in its brief, nor does it mention why denial of this motion was in error. Thus, whether the district court abused its discretion by denying Appellant's Motion for new trial – the issue at the heart of this appeal – has been insufficiently briefed.

"It is well established that a reviewing court will not address arguments that are not adequately briefed." *State v. Thomas*, 961 P.2d 299, 304 (Utah 1998). Utah Rule of Appellate Procedure 24(a)(9) states that the argument in the appellant's brief

shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on.

Utah R. App. P. 24(a)(9). Compliance with this rule "is mandatory, and failure to conform to these requirements may carry serious consequences." *Beehive Tel. Co. v. Public Serv. Comm'n*, 2004 UT 18 ¶ 12, 89 P.3d 131. "For example, 'briefs which are

not in compliance may be disregarded or stricken, on motion or sua sponte by the court ””
Id , ¶ 12 (quoting Utah R. App. P. 24(j))

A central issue on appeal is whether the district court abused its discretion when it denied Appellant’s Motion for New Trial. Appellant’s motion was based on Rules 59 and 60. (See R. 252-53.) Rule 59 recites certain grounds on which a new trial may be granted. See Utah Rule Civ. P. 59(a)(1)-(7). “The general rule governing the grant of a new trial is that the trial court must find at least one of the seven grounds listed in rule 59 to be met.” *Crookston*, 817 P.2d at 803. Indeed, “[a] trial court has no discretion to grant a new trial absent a showing of at least one of the circumstances specified in Utah R. Civ. P. 59(a).” *Moon Lake Electric Assoc., Inc. v. Ultrasystems Western Constructors, Inc.*, 767 P.2d 125, 128 (Utah Ct. App. 1988) (citation omitted).

Similarly, Rule 60(b) contains six specific grounds on which a court may set aside a judgment, one of which must apply. See Utah R. Civ. P. 60(b), *Menzies v. Galetka*, 2006 UT 81, ¶ 70, 150 P.3d 480.

There is no reference to either Rule 59 or Rule 60 in Appellant’s Brief. See Brief of Appellant. The district court’s ruling on the Motion for New Trial is not even mentioned, and Appellant does not analyze why the district court erred in making that ruling. See *id*. This is insufficient under Rule 24(a)(9). “To permit meaningful appellate review, briefs must comply with the briefing requirements sufficiently to enable [the Court] to understand what particular errors were allegedly made, where in the record those errors can be found, and why, under applicable authorities, those errors are material ones

necessitating reversal or other relief.’’ *State v. Lucero*, 2002 UT App 135, ¶ 13, 47 P.3d 107 (quotations and citation omitted).

Appellant’s brief makes no attempt to conform to these standards. For this reason alone, this Court may affirm. *See Valcarce v. Fitzgerald*, 961 P.2d 305, 313 (Utah 1998) (declining to address appellant's claim on appeal due to inadequate analysis).

In any event, Appellant has failed to set forth a particular basis that justifies a new trial under Rule 59(a) or Rule 60(b). Because the district court “has no discretion to grant a new trial absent a showing of at least one of the circumstances specified in Utah R.Civ.P. 59(a),” *Moon Lake Electric Assoc., Inc.*, 767 P.2d at 128, or one of the circumstances specified in Rule 60(b), *see Menzies*, 2006 UT 81, ¶ 70, Appellant makes no showing that the district court abused its discretion.

B. Appellant’s Substantive Arguments are Without Merit.

As set forth above, Appellant fails to explain the basis for its belief that the district court erred when it denied Appellant’s Motion for New Trial. Proper appellate analysis of Appellant’s arguments is therefore difficult, as it is unclear whether Appellant actually challenges the ruling on its Motion for New Trial or whether the appeal is from the decision on Appellees’ unopposed Motion for Summary Judgment. In either case, Appellant has failed to present any reason for reversal.

One can only surmise¹ that the basis for Appellant's argument is Rule 59(a)(6), which states "[i]nsufficiency of the evidence to justify the verdict or other decision, or that it is against law." Utah R. Civ. P. 59(a)(6). Assuming that this is the basis for Appellant's arguments, "[t]he trial court decision will be sustained on appeal if there was an evidentiary basis for the decision." *Egbert & Jaynes v. R.C. Tolman Const. Co., Inc.*, 680 P.2d 746, 747 (Utah 1984).

Appellant's arguments are as follows:

1. The unopposed affidavits Appellants submitted to the district court were inadequate to allow for a grant of summary judgment, *see* Brief of Appellant, pp. 16-30;
2. Appellees did not prove to the district court they had an interest in the subject property, *see id.*, pp. 8-15; and
3. Based on arguments (1) and (2) above, the district court should not have granted summary judgment. *See id.*, pp. 30-34.

Each of these arguments should have been made in an opposition to Appellees' Motion for Summary Judgment, but were not. The first time these arguments were presented was in Appellant's Motion for New Trial. In any event, these arguments are without basis and are insufficient to reverse the district court's determination.

¹ This is one of the reasons why Utah Appellate Courts reject briefs on the basis of insufficiency. A party should not be allowed to "shift the burden of research and argument to the reviewing court." *Smith v. Smith*, 1999 UT App 370, ¶ 8, 995 P.2d 14.

1. Appellant Waived Any Objection to the Affidavits.

Appellant argues that its Motion for New Trial should have been granted because the affidavits filed in support of Appellees' Motion for Summary Judgment contained evidentiary insufficiencies. Specifically, Appellant argues that the affidavits were conclusory or otherwise lacked foundation. *See* Brief of Appellant, pp. 16-29. Appellant waived these arguments when it failed to raise them in opposition to Appellant's Motion for Summary Judgment.

A party's failure to object to the evidentiary sufficiency of an affidavit results in the party waiving the right to object to the admitted evidence on appeal. *See D & L Supply v. Saurini*, 775 P.2d 420, 421 (Utah 1989); *Hobelman Motors, Inc. v. Allred*, 685 P.2d 544, 546 (Utah 1984); *Franklin Fin. v. New Empire Dev. Co.*, 659 P.2d 1040, 1044 (Utah 1983). In this case, Appellees' Motion for Summary Judgment, and its memorandum and affidavits filed in support thereof, were filed on November 15, 2006. (R. 133-73.) Appellant filed nothing in response thereto. Accordingly, Appellees filed a notice to submit the Motion for decision on December 11, 2006. (R.175-76.) The district court issued its Memorandum Decision granting the unopposed Motion on January 16, 2007. (R. 210-13.) On this same date, Appellant filed a Motion to Strike Appellees' affidavits. (R. 217-21.) On February 2, 2007, Appellant also filed its Motion for New Trial. (R. 251-53.) The district court heard oral argument on these motions, and issued a Memorandum Decision denying the same on May 9, 2007, ruling in relevant part:

. . . [Appellees] 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 Co.*, 659 P.2d 1040 (Utah 1983). Because [Appellant] failed to move to strike defective affidavits on summary judgment they were waived by [Appellant] and were properly considered by the Court.

(R. 400.)

Appellant fails to show that this ruling constitutes an abuse of discretion. To the contrary, the district court's ruling is entirely consistent with Utah case law. In *Hoberlman Motors, Inc. v. Allred*, 685 P.2d 544 (Utah 1984), plaintiff noted that an affidavit submitted by the defendant in support of a motion for summary judgment was not notarized as required by Utah Rule of Civil Procedure 56(e). However, because this issue was not properly pointed out in opposition to that motion, it was deemed waived:

[I]f the opposing party does not move in a timely fashion to object to affidavits or strike them and hence they are admitted, then that party waives the right to show that they do not comply with Rule 56(e) of the Utah Rules of Civil Procedure. It appears from the record that plaintiff took no action with respect to the affidavit in question and has therefore waived any right to contest its admission.

Id. at 546 (citations and quotations omitted).

Similarly, in *D & L Supply v. Saurini*, 775 P.2d 420 (Utah 1989), defendant argued on appeal that the affidavits submitted in support of a summary judgment motion contained inadmissible hearsay. The Utah Supreme Court agreed, but noted that, since the matter had not been addressed at the time the motion was filed, the matter had been waived:

It is true that inadmissible evidence cannot be considered in ruling on a motion for summary judgment. *Norton v. Blackham*, 669 P.2d 857, 859 (Utah 1983). It is also true that there are evidentiary problems on the face of the Leftwich affidavit and in the recitation of supposedly uncontested facts in D & L's memorandum of points and authorities submitted in support of the motion. Saurini, however, waived these errors when he failed to object at the trial court. See *Hobelman Motors, Inc. v. Allred*, 685 P.2d 544, 546 (Utah 1984) (affidavit in opposition to motion for summary judgment not properly notarized, but objection waived where not timely made); *Franklin Fin. v. New Empire Dev. Co.*, 659 P.2d 1040, 1044 (Utah 1983) (even if affidavits in support of summary judgment were defective, party opposing summary judgment motion failed to move to strike and was deemed to have waived his opposition to evidentiary defects).

Id. at 421.

Here, Appellant did not file a timely response in opposition to Appellees' Motion for Summary Judgment. See Utah R. Civ. P. 7(c)(1) ("Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition."). Instead, well after the motion had been submitted for decision, Appellant filed an untimely motion to strike Appellees' affidavits and a Motion for New Trial. Appellant alleged, as it alleges on appeal, that the affidavits were conclusory and lacked foundation. See Motion to Strike the Affidavits of Wayne Flynn and Jim Beech, pp. 2-4 (R. 218-20). By that time, Appellant had missed by several weeks the opportunity to make those arguments, and the district court had already granted Appellees' Motion for Summary Judgment.

The district court was well within its broad discretion to determine that Appellant's objections had been waived. The Utah Supreme Court has made clear that waiver of evidentiary objections applies to arguments regarding foundation:

Appellants assert that Franklin's supporting affidavits were defective because they were not based on personal knowledge, they contained inadmissible conclusions of law, and they referred to documents that were not attached.... [I]f, on a motion for summary judgment, an opposing party fails to move to strike defective affidavits, he is deemed to have waived his opposition to whatever evidentiary defects may exist.

Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1043-44 (Utah 1983); *see also Fox v. Allstate Ins. Co.*, 453 P.2d 701, 702-03 (Utah 1969) ("By failing to move to strike the affidavit of Lamborne, the plaintiff waived the right to show whether the affiant knew first handed that about which he deposed.").

Accordingly, the district court did not abuse its discretion when it held that Appellant waived any evidentiary objections to the affidavits.

2. Appellant's Argument That Appellees Failed to Show They Had an Interest in the Subject Property is Without Merit.

Appellant also argues that summary judgment was improper because Appellees failed to show they had an interest in the subject property. This argument has no merit.

Rule 56(c) provides in relevant part, "[t]he judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c).

Appellant's Amended Complaint, par. 15, alleges in relevant part: "Defendants . . . Direct Mortgage Corporation. . . [and] Citibank Federal Savings Bank. . . all hold some claim of right, title, or interest to the aforementioned property. . . ." Am. Compl., ¶ 15 (R. 63.)

Based on this ownership interest alleged by Appellant, Appellant alleges that it was entitled to a Decree of Foreclosure of its mechanic's lien and an Order of Sale. *Id.*, ¶ 21 (R. 62-63.)

Citibank Federal Savings' Answer responds as follows: "In response to paragraph 15 of the Amended Complaint, Defendant admits that it claims an interest in the property and denies that its interests [sic] is inferior to the interests of Plaintiff." *See* Citibank Federal Savings' Answer to Am. Compl., ¶ 7 (R. 96) and Ninth Affirmative Defense ("Defendant's interests are prior and superior to any interest Plaintiff may have in the subject property."). (R. 94.)

In addition, the Appellees moved the district court to substitute CitiMortgage, Inc. for another named Defendant, Direct Mortgage Corp, as the real party in interest. (R. 101-03.) In its Memorandum in Support of Motion to Substitute, Appellees alleged that CitiMortgage was the beneficiary of the Trust Deed recorded against the subject property, "which interest Plaintiff seeks to foreclose in this action." (R. 117.) The district court granted this motion on September 28, 2006; the motion was unopposed. (R. 123-25.) CitiMortgage then filed its own Answer, also admitting (at paragraph 7) it had an interest in the subject property. (R. 130.)

In its summary judgment materials, Appellees included the Affidavit of Miriam Harper, which had attached as Exhibit “A” an abstract of the subject property that she had downloaded from the Utah County recorder’s website. Appellees’ interests in the real property are evidenced on the very first page of the abstract of title, Citimortgage with an assignment of an interest (“AS”) on 3/06/06, and Citibank Federal Savings with a trust deed (“D TR”) on 11/18/2004. (R. 143, Ex.A).

Accordingly, the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” contain information that shows Appellees asserted an interest in the subject property. Appellant’s argument that no such information is of record is incorrect.

3. Appellant’s Argument Regarding the “Burden of Production” is Without Merit.

Appellant’s final argument appears to combine its prior argument relating to purported evidentiary deficiencies in the affidavits with the issue of proving an “interest” in the subject property. This argument, once again, fails to reference Rule 59 or the district court’s ruling on Appellant’s Motion for New Trial. Appellee therefore assumes that Appellant directly attacks the district court’s order granting Appellees’ Motion for Summary Judgment. In any event, combining two bad arguments does not make for a convincing one.

At its heart, this argument alleges that Appellees failed to show sufficient evidence to warrant summary judgment. Such an argument requires at a minimum analysis of the

district court's January 16, 2007 Memorandum Decision regarding summary judgment.

The Brief of Appellant provides no such analysis. Appellees cannot even find mention of the January 16, 2007 Memorandum Decision in section C of the Brief of Appellant.

In its January 16, 2007 Memorandum Decision, the district court ruled as follows:

UT Code Ann. § 38-1-11(1) requires that a mechanic's lien claimant file a foreclosure action within 180 days from the date on which the claimant filed a notice of claim...[section] 38-1-11(2)(a) further provides that if the lien claimant fails to file for record with the county recorder, then the lien is void except as to persons made parties to the action and persons with actual knowledge of commencement of the action...

Even when viewing the facts in the light most favorable to Plaintiff, because Plaintiff 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...the lien is void as to Defendants CitiMortgage and Citibank.

(R. 211-12.)

This decision was grounded in the statement of facts set out in Appellees's memorandum supporting its Motion for Summary Judgment. (R. 171-72). Those facts established the date the lien was recorded; the fact that no lis pendens was ever recorded; the dates Appellees were named and served as part of the class of foreclosure Defendants holding a claim of right, title or interest to the real property, dates which were well outside the 180 day period required by the statute; and the fact that until they were served, neither Appellee had actual knowledge of the lawsuit. *Id.* On the basis of these undisputed facts, the law entitled Appellees to summary judgment:

“The penalty for not commencing an action to enforce a mechanic[s'] lien within the twelve-month period provided in section 38-1-11 is invalidation of the lien 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.”

Robert Pearson dba Robert Pearson Construction v. Lamb, 2005 UT App 383, ¶ 13, 121 P.3d 717 (quoting *Projects Unlimited, Inc. v. Copper State Thrift & Loan Co.*, 798 P.2d 738, 751 n.13, 752 (Utah 1990));

On appeal, Appellant claims that Appellants did not submit sufficient evidence to demonstrate that they held interests in the subject property or that they lacked knowledge of the lawsuit until they were served. Yet in the exhibit attached to the Affidavit of Miriam Harper, Citibank’s and CitiMortgage’s interests in the real property are shown on the very first page of the abstract of title. (R. 143, Ex.A). The remaining two affidavits establish that, at no time prior to June 6, 2006, did Citibank or CitiMortgage’s predecessor-in-interest have actual knowledge of the lawsuit pending in this matter. The Affidavit of Wayne Flynn states:

1. Affiant is a vice president of [Citibank], and as such, has personal knowledge of the facts set forth herein.
2. Citibank was first served process in connection with the above-captioned litigation on June 6, 2006.
3. Neither Affiant nor any other officer or agent of Citibank had actual knowledge of the existence of the above-captioned litigation prior to June 6, 2006.

Affidavit of Wayne Flynn, p.2 (R. 137). Similarly, Jim Beech avers:

1. Affiant is the president of Direct Mortgage Corporation...
2. Direct Mortgage Corporation was first served process in connection with the above-captioned litigation on June 14, 2006.
3. Affiant first learned of the existence and pendency of the above-captioned litigation at the time Direct Mortgage Corporation was served process on June 14, 2006. Neither Affiant nor any other officer or agent of Direct Mortgage Corporation had actual knowledge of the existence of the above-captioned litigation prior to June 14, 2006.

Affidavit of Jim Beech, p.2 (R. 141).

To controvert those facts set out in Appellees's memorandum, Appellant was required to file a memorandum restating those facts verbatim, noting which facts were disputed and citing relevant record materials for the dispute. U.R.Civ.P. 7(c)(3)(B). Appellant filed nothing in response to Appellees' memorandum. As explained *supra*, Appellant thereby waived whatever defects in the evidence it now claims on appeal. Appellant also thereby allowed the facts in Appellees' memorandum to be deemed admitted for purposes of the summary judgment. U.R.Civ.P. 7(c)(3)(A); *Bluffdale City v. Smith*, 2007 UT App 25, ¶12, 156 P.3d 175. Those facts provided a sound basis for the district court's grant of summary judgment against Appellant.

The cases to which Appellant cites do not mandate a different result. Indeed, *King v. Searle Pharmaceuticals, Inc.*, 832 P.2d 858, 864 n.2 (Utah 1992), cited at p. 31, fn 48 of the Brief of Appellant, in footnote 48, specifically allowed summary judgment consideration of an affidavit that lacked foundation because no motion to strike had been made. In *Badger v. Brooklyn Canal Co.*, 922 P.2d 745, 752-53 (Utah 1996), the moving

party submitted conclusory affidavits that lacked foundation, but the Court rejected them based on the fact that they did not address the specific question that was at issue on summary judgment. As the Court noted, “none of the affidavits stated any facts describing how merely changing the point of diversion, apart from changing the nature of the irrigation, would affect the water table feeding the private wells.” Similarly, in *Harline v. Barker*, 912 P.2d 433, 445 (Utah 1996), the Court held that it could not determine as a matter of law whether the bankruptcy court order that the moving party had submitted would relieve them of liability to the non-moving party. The issue was not whether the evidence that had been submitted was defective. Here again, the facts presented were simply insufficient to support the grant of summary judgment. *Id.* Finally, in *K&T, Inc. v. Koroulis*, 888 P.2d 623, 628 (Utah 1994), the Court only held that the evidence submitted by the moving party did not negate other possible bases on which the moving party could be held liable. *Id.* These cases are not helpful to Appellant in light of its waiver of any alleged defects in Appellees’ affidavits and the effect of U.R.Civ.P. 7(c)(3)(A), which established the facts in Appellees’ memorandum as true for purposes of the summary judgment motion.

Even if the affidavits Appellees submitted regarding their lack of knowledge were to be deemed insufficient, all Appellees had to establish to merit summary judgment under the statute was that there was no dispute that a *lis pendens* was never filed – absent a timely *lis pendens*, the law dictates that the lien is void:

Within [180 days after recording the 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....*

Utah Code Ann. §38-1-11(2)(a). (Emphasis added). Thus, in order to maintain a lien, a lien claimant must prove that it timely recorded a lis pendens.

The statute goes on to provide exceptions to that statutory bar to enforcement – despite the lack of a lis pendens, the lien is not void against persons who have been made parties and or who have actual knowledge. *Id.* Therefore, to overcome his failure to record a timely lis pendens, a lien claimant must demonstrate that the persons against whom he seeks to enforce his lien were timely joined in the suit or had timely actual knowledge of the suit. *Id.* “The burden of proof is upon the *lien claimant* and those claiming under the lien claimant to show actual knowledge under Subsection (3)(a).” Utah Code Ann. § 38-1-11(3)(b) (emphasis added).

Appellees proved their prima facie case, i.e., a lack of a lis pendens, with the Affidavit of Miriam Harper. R.143-58). Once that undisputed fact was proven, it followed as a matter of law that the lien was void. At that point, to avoid summary judgment, the burden shifted to Appellant to demonstrate that Ms. Harper’s affidavit was disputed, or that one or the other of the statutory exceptions applied, i.e., (1) that Appellees had been timely made parties to the lawsuit, or (2) that Appellees had actual knowledge of the lawsuit within the statutory time period. The additional steps Appellees took to show that they were not timely served and that they did not have actual

knowledge of the underlying action were not necessary to prove the lien void – the lien was prima facie void because of the absence of the lis pendens. Appellees bore the burden of introducing evidence of the exceptions. Appellant never met that burden, below or on appeal.

The two cases Appellant cites regarding burdens of proof on summary judgment fail to assist its position. *See* Brief of Appellant, pp. 32-33. Indeed, *Eager v. Burrows*, 2008 UT 42, 191 P.3d 9, is more helpful to Appellees:

[O]nce the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact.

Id., ¶ 15 (citation omitted). Similarly, in *Kleinert v. Kimball Elevator Co.*, 854 P.2d 1025 (Utah Ct. App. 1993), the appellate court had no difficulty in sustaining the trial court's grant of summary judgment when the plaintiff failed to assert facts concerning the statutory elements of her case. *Id.* at 1027.

Here, Appellees established their prima facie case to the district court. Appellant set forth no evidence whatsoever that a question of fact existed as to any element thereof. Pursuant to the cases cited by Appellant, this renders summary judgment proper. Accordingly, Appellant has provided this Court no reason to disturb the district court's determinations.

REQUEST FOR ATTORNEY FEES

Appellees were awarded attorney fees below pursuant to Utah Code section 38-1-18(1). *See* January 16, 2007 Memorandum Decision, p. 3 (R. 211); *see also* Order and Judgment, p.3 (R. 636). Appellees are therefore entitled to attorney fees on appeal. *See Pack v. Case*, 2001 UT App 232, ¶ 39, 30 P.3d 436 (“When a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal.” (Internal quotations and citation omitted.)).

Appellees request their attorney fees incurred on appeal, and request remand to the district court for a determination of such fees.

CONCLUSION

Appellant fails to set forth any reason to disturb the district court’s decision in this matter. Accordingly, the district court’s determination should be affirmed and Appellees awarded their attorney fees incurred on appeal.

DATED this 16th day of November, 2008

COHNE, RAPPAPORT & SEGAL, P.C.

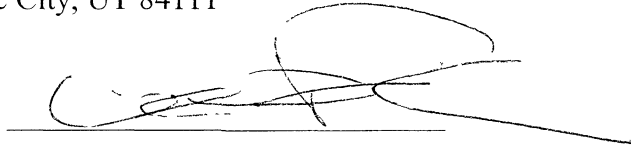


Leslie Van Frank
Bradley M. Strassberg
Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of November, 2008, I caused to be served two true and correct copies of the foregoing Appellees' Brief via First Class Mail, postage fully pre-paid, to the following:

Ronald Ady
Ronald Ady, PLLC
8 East Broadway, #710
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "Ronald Ady", is written over a horizontal line.

APPENDIX 1

1217 certiorari denied 795 P 2d 1138 Mechanics Liens ⇨ 173

Where work of all other lien claimants of construction project was completed prior to date on which one claimant released its lien in exchange for cash and property and other claimants' rights had already attached such other claimants who were not parties to relief and did not consent to its terms were not affected by relief and such other lien claimants were entitled to same priority date as that originally accorded to releasing claimant UCA 1953 38-1-3 38-1-10 First of Denver Mortgage Investors v C N Zundel and Associates 1979 600 P 2d 521 Mechanics Liens ⇨ 166

2 Priority of liens

Architect's subcontractors recorded notice of lien did not establish date of priority for architect's lien under Utah's mechanics lien law inasmuch as commencement of work rather than record notice determined priority UCA 1953 38-1-3 38-1-5 E W Allen & Associates Inc v Federal Deposit Ins Corp 1991 776 F Supp 1504 Mechanics Liens ⇨ 198

Under commencement to do work standard for determining priority date of mechanics liens under Utah law actual visible on site improvements must be present improvements must be of such nature that they represent actual beginning of improvement on ground and must be visible to extent that person using reasonable diligence in examining premises would be able to see it and be on notice that lienable work was underway UCA 1953 38-1-5 E W Allen & Associates Inc v Federal Deposit Ins Corp 1991 776 F Supp 1504 Mechanics Liens ⇨ 198

Commencement to do work under Utah law for purposes of determining mechanic lien priority does not occur by placing stakes to define streets and cutting and filling of levels by drilling of test holes by clearing land grading land and general excavation on land by cutting brush for lines or by erecting protective fence prior to beginning of work UCA 1953 38-1-5 E W Allen & Associates Inc v Federal Deposit Ins Corp 1991 776 F Supp 1504 Mechanics Liens ⇨ 198

Purposes of determining commencement of work in order to determine priority of mechanics liens actual excavation for foundation of building is commencement as is laying of foundation sufficient work must be present to dem-

onstrate commitment to undertaking projects through completion UCA 1953 38-1-5 E W Allen & Associates Inc v Federal Deposit Ins Corp 1991 776 F Supp 1504 Mechanics Liens ⇨ 198

For purposes of determining when commencement to do work for purposes of establishing priority of mechanics lien under Utah law had occurred drilling of test well which after completion left no visible sign other than wooden stake was not commencement nor was excavation and stockpiling of top soil around future building sites since excavation was not digging for basement of foundation but was merely leveling and grading style work removing only several inches of soil bleeding of access road was little more than grading of land and was therefore not commencement nor was selective felling of trees UCA 1953 38-1-5 E W Allen & Associates Inc v Federal Deposit Ins Corp 1991 776 F Supp 1504 Mechanics Liens ⇨ 198

Under Utah law general statement of test of commencement for purposes of determining priority date of mechanics lien vis a vis lender is whether work performed gives notice to reasonable lender that construction project has actually gotten underway E W Allen & Associates Inc v Federal Deposit Ins Corp 1991 776 F Supp 1504 Mechanics Liens ⇨ 198

Mere fact that work was a proper subject of a lien cannot establish priority where it does not give notice of commencement of work UCA 1953 38-1-5 Ketchum Konkell Barrett Nickel & Austin v Heritage Mountain Development Co 1989 784 P 2d 1217 certiorari denied 795 P 2d 1138 Mechanics Liens ⇨ 198

3 Review

Absence of evidence on whether there was material abandonment of construction project for purposes of determining whether contractors' liens obtained after foreclosure could relate back to commencement of work or supplying of materials by another contractor necessitated remand for hearing and entry of findings on whether there was a material abandonment such as to prevent relation back of liens on leased and permit properties Ketchum Konkell Barrett Nickel & Austin v Heritage Mountain Development Co 1989 784 P 2d 1217 certiorari denied 795 P 2d 1138 Mechanics Liens ⇨ 309

§ 38-1-11. Enforcement—Time for—Lis pendens—Action for debt not affected—Instructions and form affidavit and motion

(1) 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

(2)(a) 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 been made parties to the action and persons having actual knowledge of the commencement of the action.

(b) The burden of proof shall be upon the lien claimant and those claiming under the lien claimant to show actual knowledge.

(3) This section may not be interpreted to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the same.

(4)(a) If a lien claimant files an action to enforce a lien filed under this chapter involving a residence, as defined in Section 38-11-102, the lien claimant shall include with the service of the complaint on the owner of the residence:

(i) instructions to the owner of the residence relating to the owner's rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act; and

(ii) a form affidavit to enable the owner of the residence to specify the grounds upon which the owner may exercise available rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act.

(b) The instructions and form affidavit required by Subsection (4)(a) shall meet the requirements established by rule by the Division of Occupational and Professional Licensing in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(c) If a lien claimant fails to provide to the owner of the residence the instructions and form affidavit required by Subsection (4)(a), the lien claimant shall be barred from maintaining or enforcing the lien upon the residence.

(d) Judicial determination of the rights and liabilities of the owner of the residence under Title 38, Chapters 1 and 11, and Title 14, Chapter 2, shall be stayed until after the owner has been given a reasonable period of time to establish compliance with Subsections 38-11-204(4)(a) and (4)(b) 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 Section 38-11-102.

(5) The written notice requirement applies to liens filed on or after July 1, 2004.

Laws 1931, c. 5, § 1, Laws 1994, c. 308, § 5, Laws 1995, c. 172, § 2, eff. May 1, 1995; Laws 2001, c. 198, § 1, eff. April 30, 2001; Laws 2004, c. 42, § 1, eff. May 3, 2004; Laws 2004, c. 85, § 2, eff. May 3, 2004, Laws 2004, c. 188, § 1, eff. May 3, 2004.

Codifications R S 1898, §§ 1390, 1395, C L 1907, §§ 1390, 1395, C L 1917, §§ 3740, 3745; R S 1933, § 52-1-11, C 1943, § 52-1-11

Historical and Statutory Notes

Composite section by the Office of Legislative Research and General Counsel of Laws 2004, c 42, § 1, eff May 3, 2004, Laws 2004, c 85, § 2, eff May 3, 2004 and Laws 2004, c 188, § 1, eff May 3, 2004

Laws 2004, c 42, Laws 2004, c 85 and Laws 2004, c 188 collectively rewrote this section that formerly provided

“(1) A lien claimant shall file an action to enforce the lien filed under this chapter within

“(a) 12 months from the date of final completion of the original contract not involving a residence as defined in Section 38-11-102, or

“(b) 180 days from the date the lien claimant last performed labor and services or last furnished equipment or material for a residence, as defined in Section 38-11-102

“(2) (a) 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 been made parties to the action and persons having actual knowledge of the commencement of the action

“(b) The burden of proof shall be upon the lien claimant and those claiming under him to show actual knowledge

“(3) This section may not be interpreted to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the same

“(4)(a) If a lien claimant files an action to enforce a lien filed under this chapter involving a residence, as defined in Section 38-11-102, the

lien claimant shall include with the service of the complaint on the owner of the residence

“(i) instructions to the owner of the residence relating to the owner's rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act, and

“(ii) a form affidavit and motion for summary judgment to enable the owner of the residence to specify the grounds upon which the owner may exercise available rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act

“(b) The lien claimant may file a notice to submit for decision on the motion for summary judgment. The motion may be ruled upon after the service of the summons and complaint upon the nonpaying party, as defined in Section 38-11-102, and the time for the nonpaying party to respond, as provided in the Utah Rules of Civil Procedure, has elapsed

“(c) The instructions and form affidavit and motion required by Subsection (4)(a) shall meet the requirements established by rule by the Division of Occupational and Professional Licensing in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act

“(d) If the nonpaying party, as defined by Section 38-11-102, files for bankruptcy protection and there is a bankruptcy stay in effect, the motion for summary judgment and the action to enforce the lien shall be stayed until resolution of the related claim under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act

“(e) If a lien claimant fails to provide to the owner of the residence the instructions and form affidavit required by Subsection (4)(a), the lien claimant shall be barred from maintaining or enforcing the lien upon the residence.”

Cross References

Lis pendens, see § 78-40-2

Library References

Mechanics' Liens ¶245 to 292

Westlaw Key Number Searches 257k245 to 257k292

C J S Mechanics' Liens §§ 307 to 411, 416 to 420

Research References**Forms**

Am Jur Pl & Pr Forms Lis Pendens § 3, Statutory References

Am Jur Pl & Pr Forms Mechanics' Liens § 97, Statutory References

United States Code Annotated

Lien enforcement, defendants absent from state, see 28 U S C A § 1655

Real property actions involving property upon which United States has lien, see 28 U S C A § 2410

APPENDIX 2

FILED
CLERK OF DISTRICT COURT
SALT LAKE COUNTY
JUL 17 2007

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IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR 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,
CITIMORTGAGE, INC., CONSTRUCTION
PRODUCTS COMPANY, SWANSON
BUILDING MATERIALS, INC., DAVE'S
QUALITY ROOFING, INC., CITIBANK
FEDERAL SAVINGS BANK and JOHN DOES
1 through 10,

Defendants

**MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT AS
TO DEFENDANTS
CITIMORTGAGE, INC. AND
CITIBANK FEDERAL
SAVINGS BANK**

Civil No. 040401255

Judge Stephen L. Hansen

Pursuant to Utah R. Civ. P. 7©, Defendants CitiMortgage, Inc. (“CitiMortgage”) and Citibank Federal Savings Bank (“Citibank”) herewith submit this Memorandum in support of their Motion for Summary Judgment as to Defendants CitiMortgage, Inc. and Citibank Federal Savings Bank.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiff recorded its notice of claim of lien on the subject property with the Utah County Recorder on January 14, 2004. Plaintiff recorded amended notices of lien on April 13, 2004. (Copies of lien notices attached hereto as Exhibit “A.”)
2. In its lien notices, Plaintiff identified the last date of work on the subject property as October 16, 2003. (Exhibit “A.”)
3. The subject property is residential property. (Exhibit “A”; Amended Complaint, ¶¶ 3, 5-6.)
4. Plaintiff filed its Complaint in this matter on April 13, 2004. (Court docket.)
5. Plaintiff’s Complaint stated a claim for mechanic’s lien foreclosure. (Complaint, ¶¶ 11-12.)
6. Neither Citibank nor CitiMortgage’s predecessor-in-interest was identified as a Defendant in the Complaint. (Court docket.)
7. Plaintiff filed an Amended Complaint in this matter on or about February 10, 2006. (Court docket.)

8. Plaintiff's Amended Complaint restated a claim for mechanic's lien foreclosure, and for the first time identified Citibank and CitiMortgage's predecessor-in-interest (Direct Mortgage Corporation) as part of the class of foreclosure Defendants holding a claim of right, title or interest to the real property that is at issue in this action. (Amended Complaint, ¶ 15, ¶¶ 16-21.)

9. At no time during prior to or during the pendency of this case has Plaintiff filed a lis pendens with the Utah County Recorder's office in connection with the above-captioned litigation. (Affidavit of Miriam Harper, ¶¶ 2-3.)

10. Citibank was served process in this matter on June 6, 2006. (Affidavit of Wayne Flynn, ¶ 2.)

11. CitiMortgage's predecessor-in-interest (Direct Mortgage Corporation) was served process in this matter on June 14, 2006. (Affidavit of Jim Beech, ¶ 2.)

12. At no time prior to June 6, 2006, did Citibank or CitiMortgage's predecessor-in-interest have actual knowledge of the lawsuit pending in this matter. (Affidavit of Wayne Flynn, ¶ 3; Affidavit of Jim Beech, ¶ 3.)

ARGUMENT

Utah Code Ann. § 38-1-11(1) requires that a mechanic's lien claimant file a foreclosure action within 180 days from the date on which the claimant filed a notice of claim with the relevant county recorder.¹ Utah Code Ann. § 38-1-11(2)(a) further provides:

¹ The current version of Utah Code Ann. § 38-1-11 became operative in 2004. The prior version of the statute provided that an action and lis pendens had to be filed within one year

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

See also Projects Unlimited, Inc. v. Copper State Thrift & Loan Co., 798 P.2d 738, 751 (Utah 1990)

(interested party is not subject to lien where lis pendens is not timely filed and party had no actual knowledge of lawsuit during relevant time frame); Pearson v. Lamb, 2005 UT App 383, ¶ 13, 121 P.3d 717 (a party's failure to timely file a lis pendens "is fatal and cannot be remedied," is void as to parties not named in action and without actual knowledge, and divests the court of jurisdiction over such parties).

In other words, given that Plaintiff has failed to file a lis pendens in this matter, unless Citibank or CitiMortgage were made parties to or had actual knowledge of this lawsuit within 130 days of Plaintiff's notice of claim of lien, there is no jurisdiction over either party in this lawsuit. Interlake Distribs., Inc. v. Old Mill Towne, 954 P.2d 1295, 1297 (Utah Ct. App. 1998). One becomes a party to a lawsuit for purposes of Utah Code Ann. § 38-1-11(2) only when that party is both named in the lawsuit and served. Interlake Distribs., 954 P.2d at 1297-98. Constructive notice or inquiry notice will not substitute for the lis pendens requirement of § 38-1-11(2); only actual

"from the date of final completion" of a non-residential project, and 180 days from the date of final completion of a residential project. The changes made in the 2004 version of the statute do not affect the relief sought in or change the outcome of this Motion.

notice can Id. at 1298. Actual knowledge of a lien is distinct from actual knowledge of pending litigation, and actual knowledge of a lien does not give rise to an inference of actual knowledge of litigation. Id. at 1299.

In this instance, any lien that Plaintiff may claim in the subject property is void as to Citibank and CitiMortgage. First, it is undisputed that no lis pendens has been filed in connection with this case, let alone within 180 days of the lien recording date. As such, there is no constructive notice that can be imputed to individuals or entities that were not timely made parties to this action. Projects Unlimited, 798 P.2d at 752.

Second, neither Citibank nor CitiMortgage was made a party to this suit during the requisite statutory time period. Citibank and CitiMortgage's predecessor-in-interest were not properly made parties to this proceeding until the dates they were served process in this matter in June 2006. Even granting Plaintiff the most generous measure of time—180 days from its amended notice of lien, or until October 8, 2004—it is undisputed that both Citibank and CitiMortgage were made parties to this suit well after that date.²

Third, neither Citibank nor CitiMortgage's predecessor-in-interest had actual knowledge of this lawsuit prior to June 2006. Again, this is a point in time well beyond the statutory deadline contained in § 38-1-11.

² Assuming the prior version of § 38-1-11 applied, Plaintiff would have had until 180 days from its last date of work—or until April 14, 2004—to name Citibank or CitiMortgage as parties to the action in order to preserve its lien rights against them.

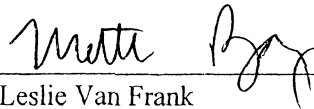
Therefore, because: (1) Plaintiff failed to file a lis pendens at any time within 180 days of recording its notice of lien; (2) neither Citibank nor CitiMortgage's predecessor-in-interest were named as parties or served process within that time frame; and (3) neither Citibank nor CitiMortgage's predecessor-in-interest had actual knowledge of this lawsuit during that time frame, then any lien rights Plaintiff may be claiming in the subject property are void as to Citibank and CitiMortgage. As such, this Court has no jurisdiction in this foreclosure action over either of those Defendants.

CONCLUSION

For all the foregoing reasons, this Court should grant summary judgment in favor of Movant Defendants Citibank Federal Savings Bank and CitiMortgage, Inc. and against Plaintiff Victor Plastering, Inc., and should dismiss the Complaint as to the Movant Defendants. Furthermore, Movant Defendants should be granted their reasonable attorneys fees and costs pursuant to Utah Code Ann. § 38-1-18(1).

DATED this 14th day of November, 2006.

COHNE, RAPPAPORT & SEGAL, P.C.

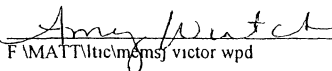


Leslie Van Frank
Matthew G. Bagley
Attorneys for Moving Defendants

CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method indicated below a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANTS CITIMORTGAGE, INC. AND CITIBANK FEDERAL SAVINGS BANK**, in Civil No. 040401255, postage prepaid, this 15th day of November, 2006 to:

____ FEDERAL EXPRESS
____ ☒ U.S. MAIL
____ HAND DELIVERY
____ TELEFAX TRANSMISSION


F:\MATT\luc\momsj victor wpd

Ronald Ady
10 West 100 South, Suite 425
Salt Lake City, UT 84101

Alan F. Mecham
68 South Main Street, Suite 800
Salt Lake City, UT 84101

Arnold Richer
Robert W. Harrow
RICHER & OVERHOLT, P.C.
901 West Baxter Drive
South Jordan, UT 84095

Stephen C. Tingey
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, UT 84145-0385

APPENDIX 3

Leslie Van Frank (Bar No. 4913)
Matthew G. Bagley (Bar No. 6820)
COHNE, RAPPAPORT & SEGAL P.C.
257 East 200 South, 7th Floor
P.O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone (801) 532-2666
Facsimile (801) 355-1813

Attorneys for Defendant CitiMortgage, Inc. as the real party in interest for
Defendant Direct Mortgage Corporation, and Defendant Citibank Federal Savings

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR 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.

AFFIDAVIT OF MIRIAM HARPER

Civil No. 040401255

Judge Stephen L. Hansen

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

Miriam Harper, being first duly sworn, deposes and states as follows:

1. I am employed as a paralegal by the firm of Cohne, Rappaport & Segal (“CRS”). CRS represents Defendant CitiMortgage, Inc. as the real party in interest for Defendant Direct Mortgage Corporation, and Defendant Citibank Federal Savings in this action.

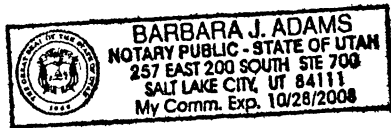
2. I was asked by Matthew Bagley, an associate at CRS, to determine whether at any time prior to or during the pendency of this case the Plaintiff filed a lis pendens with the Utah County Recorder's office with respect to property located in Utah County, parcel no. 36:965:0015 (the "subject property").

3. On Tuesday, November 14, 2006, I downloaded an abstract for the subject property from the Utah County Recorder's website, www.co.utah.ut.us. Based upon my review of the abstract, at no time prior to or during the pendency of this case has plaintiff filed a lis pendens with the Utah County Recorder's office in connection with the above-captioned litigation. A copy of the abstract is attached hereto as **Exhibit "A."**

DATED this 14th day of November, 2006.

Miriam Harper

On the 14th day of November, 2006, personally appeared before me Miriam Harper, who being first duly sworn upon her oath or affirmation signed the foregoing, declaring its contents to be true and correct to the best of her knowledge.



Barbara J. Adams
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method indicated below a true and correct copy of the foregoing **ORDER**, in Civil No. 040401255, postage prepaid, this 15th day of November, 2006 to:

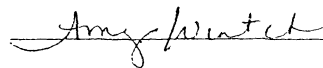
☐ FEDERAL EXPRESS
☒ U.S. MAIL
☐ HAND DELIVERY
☐ TELEFAX TRANSMISSION

Ronald Ady
10 West 100 South, Suite 425
Salt Lake City, UT 84101

Alan F. Mecham
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Salt Lake City, UT 84145-0385





ABSTRACT INFORMATION FOR SERIAL # 36:965:0015

36:965:0015;2007

Beginning Sept 3, 1985 Manual abstracting was discontinued

Grantor .. Grantee Comments	Entry No Book Page Kind of Inst	Inst Date Rec Date Rec Time	Consideration Satisfaction Tie Entry No
LONE PEAK LINKS LLC .. WHOM OF INTEREST	<u>026837:2006</u> DECLCOV	10/10/2005 03/07/2006 02:21	
MORTGAGE ELECTRONIC REGISTRATION SY .. CITIMORTGAGE INC	<u>026173:2006</u> AS	03/02/2006 03/06/2006 02:19	A 193620 2003
HALLIDAY, PAUL M JR SUCTEE .. COLLINS, CHRIS A & CHANNA M	<u>026172:2006</u> ND	03/06/2006 03/06/2006 02:19	X 193620 2003
CITIMORTGAGE INC .. HALLIDAY, PAUL M JR SUCTEE	<u>026171:2006</u> SUB TEE	03/06/2006 03/06/2006 02:19	X 193620 2003
COLLINS, CHRIS A & CHANNA M .. INTERMOUNTAIN C N S LLLC	<u>015823:2005</u> N LN	02/15/2005 02/15/2005 01:03	\$1,306.30
COLLINS, CHRIS A & CHANNA M .. CITIBANK FEDERAL SAVINGS BANK **ERROR IN DESC (I.N.)**	<u>130831:2004</u> D TR	00/00/0000 11/19/2004 11:33	\$23,500.00
BANK OF AMERICAN FORK TEE .. BFK LLC	<u>087861:2004</u> REC	07/30/2004 08/02/2004 12:21	R 023907 2002*
BANK OFAMERICAN FORK TEE	<u>079339:2004</u>	06/24/2004	153

.. BFK LLC

07/12/2004 X 023907 2002*

P REC

10:20

MERIDIAN TITLE COMPANY TEE

045483:2004

04/07/2004

.. COLLINS, CHRIS A & CHANNA M

04/21/2004

R 080046 2003

REC

12:55

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ABSTRACT INFORMATION FOR SERIAL # 36:965:0015

36:965:0015;2007

Beginning Sept 3, 1985 Manual abstracting was discontinued

Grantor .. Grantee Comments	Entry No Book Page Kind of Inst	Inst Date Rec Date Rec Time	Consideration Satisfaction Tie Entry No
COLLINS, CHRIS A & CHANNA M .. VICTOR PLASTERING INC	<u>041691:2004</u> A N L N	04/13/2004 04/13/2004 04:11	\$16,000.00 X 004626 2004
COLLINS, CHRIS A & CHANNA M .. VICTOR PLASTERING INC	<u>041690:2004</u> A N L N	04/13/2004 04/13/2004 04:11	\$16,000.00 X 004626 2004
COLLINS, CHRIS A & CHANNA M .. VICTOR PLASTERING INC	<u>041689:2004</u> A N L N	04/13/2004 04/13/2004 04:10	\$16,000.00 X 004626 2004
LIEN COUNSEL INC .. COLLINS, CHRIS A & CHANNA M	<u>030894:2004</u> R L N	03/18/2004 03/19/2004 09:57	R 190570 2003
COBALT HOMES .. OSTLER, S JARED ET AL	<u>025330:2004</u> N L N	03/04/2004 03/05/2004 09:45	\$2,800.00
COLLINS, CHRIS A & CHANNA M .. CONSTRUCTION PRODUCTS COMPA ET AL	<u>011227:2004</u> N L N	01/30/2004 02/02/2004 09:29	
COLLINS, CHRIS A & CHANNA M .. VICTOR PLASTERING INC ET AL	<u>004626:2004</u> N L N	01/13/2004 01/14/2004 08:41	\$16,250.00
COLLINS, CHRIS A & CHANNA M .. INTERMOUNTAIN CNS LLC BY ET AL	<u>004625:2004</u>	01/13/2004 01/14/2004	\$4,651.96

N LN

08:41

D CHRISTENSEN CONSTRUCTION LLC

201642:2003

12/11/2003

... WHOM OF INTEREST

12/29/2003

R 192520 2003

R LN

04:05

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ABSTRACT INFORMATION FOR SERIAL # 36:965:0015

36:965:0015;2007

Beginning Sept 3, 1985 Manual abstracting was discontinued

Grantor .. Grantee Comments	Entry No Book Page Kind of Inst	Inst Date Rec Date Rec Time	Consideration Satisfaction Tie Entry No
A QUALITY PLUMBING & HEATING INC .. WHOM OF INTEREST	<u>201641:2003</u> R LN	12/10/2003 12/29/2003 04:05	R 191541 2003
BMC WEST CORP .. WHOM OF INTEREST	<u>201640:2003</u> R LN	12/10/2003 12/29/2003 04:05	R 190570 2003
MATTHEW PEARSON DBA ET AL .. WHOM OF INTEREST	<u>201639:2003</u> R LN	12/11/2003 12/29/2003 04:05	R 180049 2003
DAVID HARRIS CONSTRUCTION .. WHOM OF INTEREST	<u>201638:2003</u> R LN	12/10/2003 12/29/2003 04:05	R 177343 2003
BLAINE THOMAS CONSTRUCTION COMPANY .. WHOM OF INTEREST	<u>201637:2003</u> R LN	12/10/2003 12/29/2003 04:05	R 176776 2003
DAVENPORT CONSTRUCTION INC .. WHOM OF INTEREST	<u>201636:2003</u> R LN	12/10/2003 12/29/2003 04:05	R 168568 2003
MCCULLOUGH CONSTRUCTION INC .. WHOM OF INTEREST	<u>201635:2003</u> R LN	12/10/2003 12/29/2003 04:05	R 165513 2003
WASATCH CONCRETE PUMPING INC .. WHOM OF INTEREST	<u>201634:2003</u>	12/11/2003 12/29/2003	R 161597 2003

R LN

04:05

ALTAVIEW CONCRETE INC
.. WHOM OF INTEREST

201633:2003

12/11/2003

12/29/2003 R 161596 2003

R LN

04:05

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36:965:0015;2007

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ICE BLOCK OF UTAH INC .. WHOM OF INTEREST	<u>201632:2003</u> R LN	12/10/2003 12/29/2003 04:05	R 152718 2003
WHOM OF INTEREST .. MASCO CONTRACTOR SERVICES C ET AL	<u>198676:2003</u> N LN	12/16/2003 12/19/2003 11:18	\$4,565.00
COLLINS, CHRIS A & CHANNA M .. DIRECT MORTGAGE CORPORATION	<u>193620:2003</u> D TR	12/05/2003 12/09/2003 10:16	\$240,000.00 A 026173 2006
COLLINS, CHRIS A & CHANNA M .. D CHRISTENSEN CONSTRUCTION ET AL	<u>192520:2003</u> N LN	12/03/2003 12/05/2003 04:12	\$775.00 R 201642 2003
COLLINS, CHRIS A & CHANNAM .. A QUALITY PLUMBING & HEATING INC	<u>191541:2003</u> N LN	12/02/2003 12/04/2003 01:36	R 201641 2003
COLLINS, CHRIS A & CHANNA M .. LIEN COUNSEL INC	<u>190570:2003</u> N LN	12/03/2003 12/03/2003 12:11	R 201640 2003
COLLINS, CHRIS A & CHANNA M .. ASPEN COUNTER TOPS BY ET AL	<u>180049:2003</u> N LN	11/12/2003 11/13/2003 09:59	R 201639 2003
BRADY, BRIAN ET AL	<u>177343:2003</u>	11/05/2003	\$1,456.00

.. HARRIS, DAVID ET AL

N LN

11/05/2003 R 201638 2003
04:57

COLLINS, CHRIS

176776:2003

11/04/2003

.. BLAINE THOMAS CONSTRUCTION

N LN

11/05/2003 R 201637 2003
09:46

36:965:0015;2007



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COLLINS, CHRIS A & CHANNA M .. DAVENPORT CONSTRUCTION INC	<u>168568:2003</u> N LN	10/20/2003 10/20/2003 03:03	R 201636 2003
COLLINS, CHRIS A & CHANNA M .. MC CULLOUGH CONSTRUCTION INC	<u>165513:2003</u> N LN	10/13/2003 10/14/2003 02:10	R 201635 2003
COLLINS, CHRIS & CHANNA .. WASATCH CONCRETE PUMPING	<u>161597:2003</u> N LN	10/01/2003 10/06/2003 12:01	R 201634 2003
COLLINS, CHRIS & CHANNA .. ALTAVIEW CONCRETE INC	<u>161596:2003</u> N LN	10/01/2003 10/06/2003 12:00	R 201633 2003
COLLINS, CHRIS A & CHANNA M .. ICE BLOCK OF UTAH INC	<u>152718:2003</u> N LN	09/15/2003 09/18/2003 11:23	R 201632 2003
BFK LLC .. COLLINS, CHRIS A & CHANNA M	<u>080515:2003</u> WD	10/16/2002 05/29/2003 01:03	\$10.00
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CRAGHEAD BUILDING COMPANY ET AL .. BFK LLC	<u>005203:2003</u> R LN	01/06/2003 01/13/2003	R 148845 2002

09:54

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. CRAGHEAD BUILDING COMPANY ET		12/06/2002	R 005203 2003
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Utah County Government

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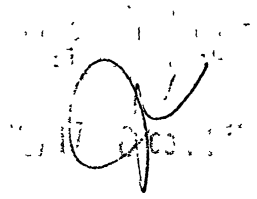
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B F K LLC .. CEDARS AT CEDAR HILLS THE PRD PLAT **** From 11:056:0031	<u>067843:2002</u> M 9564 - 108 <u>P PLAT</u>	09/07/2000 06/14/2002 01:22	
36:965:0015;2007			

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APPENDIX 4



Leslie Van Frank (Bar No. 4913)
Matthew G. Bagley (Bar No. 6820)
COHNE, RAPPAPORT & SEGAL P.C.
257 East 200 South, 7th Floor
P.O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone (801) 532-2666
Facsimile (801) 355-1813

Attorneys for Defendants CitiMortgage, Inc. and Citibank Federal Savings Bank

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

VICTOR PLASTERING, INC.

Plaintiff,

v.

AFFIDAVIT OF JIM BEECH

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,
CITIMORTGAGE, INC., CONSTRUCTION
PRODUCTS COMPANY, SWANSON
BUILDING MATERIALS, INC., DAVE'S
QUALITY ROOFING, INC., CITIBANK
FEDERAL SAVINGS BANK and JOHN DOES
1 through 10,

Civil No. 040401255

Judge Stephen L. Hansen

Defendants.

STATE OF UTAH)
 :ss
COUNTY OF SALT LAKE)

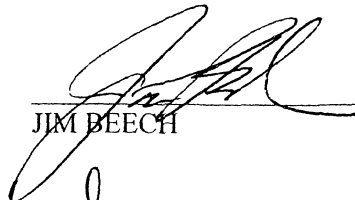
Jim Beech, being first duly sworn, deposes and states as follows:

1. Affiant is the president of Direct Mortgage Corporation (formerly named as a Defendant in this case but since substituted) and, as such, has personal knowledge of the facts set forth herein.

2. Direct Mortgage Corporation was first served process in connection with the above-captioned litigation on June 14, 2006.

3. Affiant first learned of the existence and pendency of the above-captioned litigation at the time Direct Mortgage Corporation was served process on June 14, 2006. Neither Affiant nor any other officer or agent of Direct Mortgage Corporation had actual knowledge of the existence of the above-captioned litigation prior to June 14, 2006.

DATED this 2 day of October 2006


JIM BEECH

Subscribed and sworn before me this 2nd day of October 2006


NOTARY PUBLIC



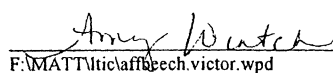
TEO L MOORE
NOTARY PUBLIC STATE OF UTAH
576 SOUTH STATE ST
OREM UTAH 84453
COMM EXPIRES 3/6/07

Residing at Salt Lake City
My Commission Expires 3/6/07

CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method indicated below a true and correct copy of the foregoing **AFFIDAVIT OF JIM BEECH**, in Civil No. 040401255, postage prepaid, this 15th day of November, 2006 to:

☐ FEDERAL EXPRESS
☒ U.S. MAIL
☐ HAND DELIVERY
☐ TELEFAX TRANSMISSION


F:\MATT\litic\affid\beech.victor.wpd

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Arnold Richer
Robert W. Harrow
RICHER & OVERHOLT, P.C.
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Stephen C. Tingey
RAY QUINNEY & NEBEKER P.C.
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P.O. Box 45385
Salt Lake City, UT 84145-0385

APPENDIX 5

1151
117 200 10

Leslie Van Frank (Bar No. 4913)
Matthew G. Bagley (Bar No. 6820)
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Salt Lake City, Utah 84147-0008
Telephone (801) 532-2666
Facsimile (801) 355-1813

Attorneys for Defendants CitiMortgage, Inc. and Citibank Federal Savings Bank

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR 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,
CITIMORTGAGE, INC., CONSTRUCTION
PRODUCTS COMPANY, SWANSON
BUILDING MATERIALS, INC., DAVE'S
QUALITY ROOFING, INC., CITIBANK
FEDERAL SAVINGS BANK and JOHN DOES
1 through 10,

Defendants.

**AFFIDAVIT OF WAYNE
FLYNN**

Civil No. 040401255

Judge Stephen L. Hansen

Missouri
STATE OF ~~UTAH~~ *St. Louis*)
COUNTY OF ~~SALT LAKE~~)

Wayne Flynn, being first duly sworn, deposes and states as follows:

1. Affiant is a vice president of Citibank Federal Savings Bank ("Citibank"), and as such, has personal knowledge of the facts set forth herein.

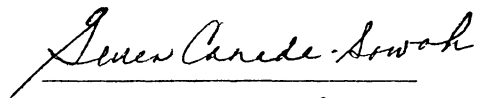
2. Citibank was first served process in connection with the above-captioned litigation on June 6, 2006.

3. Neither Affiant nor any other officer or agent of Citibank had actual knowledge of the existence of the above-captioned litigation prior to June 6, 2006.

DATED this 13th ^{*November*} day of ~~October~~ 2006.

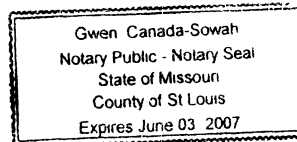

WAYNE FLYNN

Subscribed and sworn before me this 13th ^{*November*} day of ~~October~~ 2006.



Residing at 7619 Lynn Ave 63130

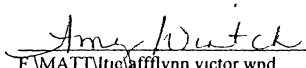
My Commission Expires 6/3/2006



CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered by the method indicated below a true and correct copy of the foregoing **AFFIDAVIT OF WAYNE FLYNN**, in Civil No. 040401255, postage prepaid, this 15th day of November, 2006 to:

☐ FEDERAL EXPRESS
☒ U.S. MAIL
☐ HAND DELIVERY
☐ TELEFAX TRANSMISSION


F:\MATT\luc\afflynn victor wpd

Ronald Ady
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Salt Lake City, UT 84101

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Salt Lake City, UT 84101

Arnold Richer
Robert W. Harrow
RICHER & OVERHOLT, P.C.
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Salt Lake City, UT 84145-0385