

2008

# Victor Plastering, Inc. v. Citibank Federal Savings Bank and Citimortgage, Inc.: Brief of Appellant

Utah Court of Appeals

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Ronald Ady; Ronald Ady, PLLC; Attorney for Appellants.

Leslie Van Frank; Bradley M. Strassberg; Cohne, Rappaport and Segal, P.C.; Attorneys for Appellees.

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RONALD ADY, PLLC (USB 3694)  
8 E. Broadway, Ste. 710  
Salt Lake City, UT 84111  
(801) 530-3122  
(801) 746-3501 fax

Attorney for Appellants

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**IN THE UTAH COURT OF APPEALS**

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VICTOR PLASTERING, INC.,

Appellants,

vs.

CITIBANK FEDERAL SAVINGS BANK  
and CITIMORTGAGE, INC.,

Appellee.

**Appellate Court No. 20080017-CA**

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**BRIEF OF THE APPELLANT**

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

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RONALD ADY  
RONALD ADY, PLLC  
8 E. Broadway, Ste. 710  
Salt Lake City UT 84111  
ATTORNEY FOR APPELLANTS

LESLIE VAN FRANK  
COHNE, RAPPAPORT & SEGAL, P.C.  
257 East 200 South, 7<sup>th</sup> Flr.  
P.O. Box 11008  
Salt Lake City UT 84147-0008  
ATTORNEY FOR APPELLEES

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RONALD ADY, PLLC (USB 3694)  
8 E. Broadway, Ste. 710  
Salt Lake City, UT 84111  
(801) 530-3122  
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LESLIE VAN FRANK  
COHNE, RAPPAPORT & SEGAL, P.C.  
257 East 200 South, 7<sup>th</sup> Flr.  
P.O. Box 11008  
Salt Lake City UT 84147-0008  
ATTORNEY FOR APPELLEES

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### III. JURISDICTIONAL STATEMENT

This appeal is taken from the trial court's memorandum ruling of May 9, 2007 and final order and judgment of June 7, 2007. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. §78A-4-103(2)(j).

### IV. STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

**1. Must the Citi Appellees have an interest in the lien 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.<sup>1</sup> An appellate court will review such factual determinations made by a trial court with deference.<sup>2</sup> 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 the Citi Appellees's standing before the court below. R.256, 257. As well, unless

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<sup>1</sup> *Kearns-Tribune Corp. v. Wilkinson*, 946 P.2d 372, 373 (Utah 1997).

<sup>2</sup> *State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994).

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.<sup>3</sup> "[S]tanding is a jurisdictional requirement that must be satisfied" before a court may entertain a controversy between two parties.<sup>4</sup> "[T]he moving party must have standing to invoke the jurisdiction of the court."<sup>5</sup> 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."<sup>6</sup>

**2. Did the Citi Appellees proffer competent evidence that they did not have timely actual knowledge of the commencement of Victor's lien action?**

STANDARD OF REVIEW: Whether an affidavit proffers facts establishing the elements necessary to prove a claim or defense is a matter of law which an appellate court reviews with no deference to the trial court's interpretation.<sup>7</sup>

PRESERVATION BELOW: The Appellant raised this issue in its memorandum in support of its motion for new trial (R. 218-220, 258-264).

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<sup>3</sup> See *Barnard v. Wassermann*, 855 P.2d 243, 248 (Utah 1983).

<sup>4</sup> *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.");

<sup>5</sup> *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983)

<sup>6</sup> *Id.* at 1148.

<sup>7</sup> See *Goodnow v. Sullivan*, 2002 UT 21, ¶¶7, 8.

**3. Did the Citi Appellees meet their burden of production on their summary judgment claims?**

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.<sup>8</sup>

PRESERVATION BELOW: The Appellant raised this issue in its Rule 59 motion ( R. 256-264) and at oral argument.

**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 or in the addendum to the 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 Citi Appellees's alleged mortgage on the lien property. The Citi Appellees answered, obtained a substitution of Citi Federal Savings Bank for Direct

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<sup>8</sup> See *Badger v. Brooklyn Canal Co.*, 922P. 2d 745 (Utah 1996).

Mortgage Corporation as a defendant and then moved for summary judgment against Victor.

However, the Citi Appellees summary judgment papers were totally devoid of any claim that they had an interest in the lien property. The affidavits filed in support of that motion for summary judgment failed to allege any such interest and the Citi Defendants failed to argue that had any interest in the lien property. The supporting affidavits also failed to provide any factual foundation for their conclusion that the Citi Appellees were never provided with timely actual knowledge of the commencement of Victor's lien action. Victor moved to strike those affidavits but on the same day that Victor filed that motion the trial court granted the Citi Appellees summary judgment.

Victor then moved for a new trial and after further briefing and argument on that motion the trial court denied that motion.

## **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. R. 6.

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. R. 72

August 21, 2006 The Appellee Citibank Federal Savings Bank answered Victor's amended complaint. R. 98

Sept. 28, 2006 Citi Federal Savings Bank was substituted in as a defendant for Direct Mortgage Corporation. R. 125

October 25, 2006 The Appellee Citimortgage, Inc. answered Victor's amended complaint. R. 132

Nov. 17, 2006 The Citi Appellees moved for summary judgment but failed to allege they had any interest in the lien property. R.135, 170-173.

Nov. 17, 2006 The affidavits of Jim Beech (R. 142) and Wayne Flynn (R. 138) are filed. Neither affidavit provides any factual foundation for the legal conclusion their corporations did not have actual knowledge.

January 16, 2007 Victor moved to strike the affidavits of Beech and Flynn (although this motion to strike was entered on the trial court's docket on January 18, 2007, it was filed on January 16, 2007). R.221

January 16, 2007 The trial court granted the Citi Appellees motion for summary judgment. R.213

March 7, 2007 Victor filed a motion for a new trial on the Citi Appellees motion for summary judgment, alleging that the court erred in granting summary judgment to the Citi Appellees because they had failed to allege an interest in the lien property, had failed to prove a lack of actual knowledge and had failed to meet their burden of production on summary judgment. R. 253, 266.

April 16, 2007 Victor's motion is orally argued before the court. R. 394

May 9, 2007 The court issued a memorandum ruling denying Victor's motion for new trial. R.402

June 7, 2007 Judgment is entered in favor of the Citi Appellees. R.416

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

## **VII. SUMMARY OF ARGUMENT**

Regardless of whether any opposition is filed to a summary judgment motion, unless that motion “is made and supported as provided for by” by Rule 56 Ut. R. Civ. P. summary judgment cannot be entered against the non-moving party. At summary judgment the Citi Appellees failed to prove or argue they had an interest in the lien property. Victor’s lien action was in rem against the Citi Appellees and unless they

had an interest in the lien property they could not show a distinct and palpable injury that gave them an interest in contesting Victor's claim to lien priority. Having a right to appear in an in rem action is different than a right to defend on the merits and unless the Citi Appellees had something at stake in the in rem lien action they had no standing to contest Victor's lien claims. Because the Citi Appellees failed to make any showing of an interest in the lien property the trial court erred in granting them summary judgment.

As well, the provisions of Utah Code Ann. § 38-1-11(2) only benefit persons with an interest in the lien property. Unless a person has an interest in the lien property, they have no standing to invoke the lis pendens requirements of § 38-1-11(2). The Citi Appellees failed to show they had an interest in the lien property and thus excluded themselves from asserting the requirements of § 38-1-11(2) against Victor.

Finally, regardless of whether the Citi Appellees could put the issue of timely actual knowledge of the commencement of Victor's lien action into issue at summary judgment, they failed to proffer competent evidence on the issue of timely actual knowledge. Although at trial Victor bears the burden of proof on the issue of actual knowledge, at summary judgment the Citi Appellees bear the initial burden of producing evidence showing they did not have timely actual knowledge. The Beech

and Flynn affidavits are conclusory in the extreme and provide no supporting factual foundation for their legal conclusion that the Citi Appellees did not have timely actual knowledge of the commencement of Victor's lien action. Without that factual foundation it is impossible for a trier of fact to determine whether the evidence is competent; that is, relevant, material and otherwise admissible. And by reciting only that they did not have "actual knowledge" the Citi Appellees legal conclusion tells the reader nothing about what the affiants mean by "actual knowledge." At summary judgment a trial court is not capable of weighing conflicting inferences on material issues of fact, and the trial court erred in finding that the Beech and Flynn affidavits provided competent evidence.

Because the Citi Appellees lacked standing to contest Victor's in rem lien claims on the merits, lacked standing to invoke the lis pendens requirements of § 38-1-11(2) and failed to proffer competent evidence on the issue of timely actual knowledge, the trial court erred in granting the Citi Appellees summary judgment and Victor is entitled to a reversal of that judgment, and an award of its attorney fees before this Court and the court below.

## VIII. ARGUMENT

### A. **The Citi Appellees must have an interest in the lien property to have standing to contest the validity of the Appellant Victor's lien.**

In their summary judgment motion the Citi Appellees's entirely failed to make



any assertion that they had a legal or equitable interest in the property which was the subject of Victor's lien action. R. 135, 137, 141, 157, 160–173. Unless they have an interest in the subject property they have no standing to contest the priority of Victor's lien.

i. Unless They Have An Interest In The Liened Property The Citi Appellees Cannot Invoke The Actual Knowledge Requirement of § 38-1-11(2).

The Citi Appellees cannot look to Utah Code Ann. § 38-1-11(2) for statutory standing, because it only requires the recording of “a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property . . .”<sup>9</sup> Unless the Citi Appellees had an interest in the subject property which could affect “the title or right to possession of [that] real property,” the Citi Appellees were not within the class of persons the lis pendens requirement of § 38-1-11(2) was intended to benefit, which means that by failing to prove they had an interest in the subject property the Citi Appellees failed to show that they had standing to claim the benefit of that lis pendens requirement.

In *Projects Unlimited v. Copper State Thrift & Loan Co.*<sup>10</sup> the Utah Supreme Court specifically found that § 38-1-11(2) was only intended to give notice to persons

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<sup>9</sup> Utah Code Ann. § 38-1-11(2).

<sup>10</sup> 798 P.2d 738 (Utah 1990).

with an interest in the lien property:

By contrast, it follows logically, timely recordation of the lis pendens imparts constructive notice to all persons concerned with the property of the action to enforce the lien, see *Utah Code Ann. § 78-40-2*(1989), regardless of whether they were named as parties or had actual knowledge of the action. [emphasis added]

Thus, unless the Citi Appellees are within the class of persons which can invoke the lis pendens requirements of § 38-1-11(2), whether or not they had actual knowledge of Victor's lien action is irrelevant to whether Victor could proceed with its lien action against the Citi Appellees.

The *Projects* court's specific reference to Utah Code Ann. § 78-40-2,<sup>11</sup> which provides for the filing of a lis pendens, confirms that at the time that Victor served the Citi Appellees they could not invoke the lis pendens requirements of § 38-11-1(2) unless they had an interest in the lien property. Section 78-40-2 states, in part, that "a purchaser or encumbrancer of the property affected thereby shall be deemed to have constructive notice of the pendency of the action," confirming that its provisions are intended to benefit only persons with an interest in the property against which the lis pendens is filed.

Admittedly, where it is established that a person has an interest in the subject property and that person challenges Victor's lien, § 38-1-11(3) imposes the burden

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<sup>11</sup> Amended and re-codified as Utah Code Ann. § 78B-6-1303.

of proof upon Victor at trial to show actual knowledge. But if, as the Citi Appellees urge, the scope of § 38-1-11(2) is broadened to include persons without an interest in the subject property, a lien claimant's action would be subject to intervention by any stranger to the property who cared to intervene and challenge the action.

For example, suppose a case where a mechanic's lien action is timely commenced but without the filing of a lis pendens. In that case, can a stranger with no interest in the real property at issue intervene in the action pursuant to § 38-1-13 by asserting that the lien holder did not file a lis pendens and that the stranger never had actual knowledge on a timely basis of the mechanic's lien action? According to the Citi Appellees's construction of § 38-1-11(2), because that stranger never had actual knowledge, they would have statutory standing to intervene in the mechanic's lien to have it declared void as to them.

Of course, the first question that occurs is whether § 38-1-11(2) was intended to benefit persons with no interest in the subject property, thus providing the world with standing to challenge a mechanic's lien that has not been perfected by filing a lis pendens. Only if the Citi Appellees's construction of § 38-1-11(2) is adopted does the stranger in the above example have standing under § 38-1-13 to intervene.

The glaring problem with such a construction is that it makes nugatory the requirement that a lis pendens be recorded so that notice is provided to persons with

an interest affecting the title or right to possession of that real property. Instead, the *lis pendens* requirement is read down to requiring only the recording of a notice of a pendency of the action. Under the Citi Appellees's reading as soon as any person that did not have an interest in the real property (typically all persons in the State of Utah excepting those few persons with liens or other interests in a particular residential property) learned of an unperfected lien action, they could intervene and move to void the unperfected lien as against them. Even if the lien holder immediately conceded that the lien was void as against the stranger, the lien holder would still be liable for the successful intervenor's attorney fees incurred to file the motion to intervene. Unless it was the intent of the legislature to open the court's doors to intermeddlers and vexatious claims, the Citi Appellees's construction cannot be the construction applied to § 38-1-11(2).

ii. Without An Interest In The Liened Property the Citi Appellees Lacked Standing To Contest On The Merits Victor's Lien Claims.

The Citi Appellees's inability to prove any adverse effect from Victor's lien action is key to showing that under Utah law Citi Appellees 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 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.<sup>12</sup> 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."<sup>13</sup> 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.<sup>14</sup>

In Utah foreclosure proceedings are in rem<sup>15</sup> and the question then arises of how it is that Citi Appellees, which had no interest in the subject property, can demonstrate a particularized injury. As to in rem proceedings, the Utah Supreme Court has approved the classification employed by the U.S. Supreme Court in addressing in rem jurisdiction:

As explained in n. 17 of *Shaffer*, the Supreme Court there chose to use the term "in rem" to describe both in rem and quasi in rem jurisdictions. In quoting *Hanson v. Denckla*, 357 U.S. 235, 246, 2 L. Ed. 2d 1283, 78 S. Ct. 1228, n. 12 (1958), the *Shaffer* Court did acknowledge the distinctions in these types of jurisdiction. That quote from *Hanson*

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<sup>12</sup> *Jenkins v. Swan*, 675 P.2d at 1149.

<sup>13</sup> *Kearns-Tribune Corp. v. Wilkinson*, 946 P.2d 372, 373 (Utah 1997).

<sup>14</sup> *Soc'y of Prof'l Journalists v. Bullock*, 743 P.2d 1166, 1170 (Utah 1987).

<sup>15</sup> See *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)."

stated:

A judgment in rem affects the interests of all persons in designated property. A judgment quasi in rem affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him. Restatement, Judgments, 5-9."<sup>16</sup>

Victor's action against other persons that had or might have an interest in the subject property was of the first type of quasi in rem proceeding identified in the passage from *Hanson v. Denckla*<sup>17</sup> just quoted.

Because the proceeding below was in rem Victor merely sought the adjudication of the rights (if any) of particular persons in the subject property and did not claim any personal relief against any of the possible lien holding defendants. Because this was an in rem proceeding, merely being named as a party defendant did not provide the Citi Appellees with standing to contest Victor's lien claims on the merits.<sup>18</sup> There was no requirement that Citi Appellees appear and defend on the

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<sup>16</sup> *Rhoades v. Wright*, 622 P.2d 343, 345 (Utah 1980).

<sup>17</sup> 357 U.S. 235, 246 (1958).

<sup>18</sup> *Cf. United States v. 148,840.00 in United States Currency*, 521 F.3d 1268, 1273 (10<sup>th</sup> Cir. 2008) where the court ruled that at the summary judgment stage of an in rem proceeding a party making claim to the property in issue must "prove by a preponderance of the evidence that he has a facially colorable interest in the res such that he would be injured if" deprived of his property interest. Of course, the Citi-Appellees have entirely failed to prove they have an interest in the lien property.

merits against Victor's claim. And even when the Citi Appellees chose to appear, because they had no interest in the subject property they could have no proper interest in defending against Victor's lien claims, but only in advising the court that they had no interest in the subject property and that they were was not contesting Victor's claims.

To have standing under the traditional test Citi Appellees must have shown that they incurred a "distinct and palpable injury" by alleging that they suffered or will "suffer[] some distinct and palpable injury that gives [it] a personal stake in the outcome of the legal dispute."<sup>19</sup> The legal dispute between Victor and the Citi Appellees in this case concerns the provisions of Utah Code Ann. § 38-1-11(2). The Citi Appellees entirely failed to prove or argue in their summary judgment papers that they would suffer some distinct and palpable injury if the requirements of § 11(2) were not enforced against Victor. Moreover, the Citi Appellees in their summary judgment papers entirely failed to prove or argue that they had an interest in the lien property, which conclusively foreclosed any finding by the trial court that the Citi Appellees suffered a distinct and palpable injury because of a lack of timely actual knowledge of the commencement of Victor's lien action.

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<sup>19</sup> *Jenkins*, 675 P.2d at 1148 (Utah 1983).

**B. The Affidavits of Flynn and Beech Fail to Prove the Citi Appellees Did Not Have Timely Actual Knowledge of Victor's Lien Action.**

Before the trial court the Citi Appellees's proffered the affidavits of Wayne Flynn<sup>20</sup> and Jim Beech<sup>21</sup> in support of their claim that the Citi Appellees did not have timely actual knowledge. But neither of those affidavits provide the proof required by law. Both affidavits are in a conclusory form and under prevailing case law do not meet the requirements of Rule 56(e).<sup>22</sup> But even if, for the sake of argument, those affidavits are deemed admissible as evidence, neither of them disposes of the issue of actual knowledge.

**i. The Conclusory Affidavits of Beech and Flynn Are Devoid of Factual Foundation And Create Conflicting Inferences On Material Facts.**

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<sup>20</sup> R. 138.

<sup>21</sup> R. 142.

<sup>22</sup> See *Murdock v. Springville Mun. Corp. (In Re General Determination of Water Rights)*, 1999 UT 39, ¶26, where the court reviewed the requirement of Rule 56(e) and Utah law on this issue:

Supporting and opposing 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. Utah R. Civ. P. 56(e). These requirements mirror those that apply to all evidence, and our case law on excluding affidavit evidence supports this. See, e.g., *Treloggan v. Treloggan*, 699 P.2d 747, 748 (Utah 1985) (affidavit based on unsubstantiated belief insufficient); *Norton v. Blackham*, 669 P.2d 857, 859 (Utah 1983) (conclusory affidavits are invalid); *GNS Partnership v. Fullmer*, 873 P.2d 1157, 1164-65 (Utah Ct. App. 1994) (affidavits not based on personal knowledge were properly stricken).



As to actual knowledge of persons at Direct Mortgage Corporation Mr. Beech first avers that he did not have actual knowledge and then finishes with the entirely conclusory statement that:

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. R. 137, ¶ 3.

After reading the Beech affidavit the reader knows no more about whether Direct Mortgage Corporation had timely actual knowledge than if Mr. Beech had stated “I deny that Direct Mortgage Corporation had actual knowledge of Victor’s lien litigation prior to Direct Mortgage Corporation being served with process in Victor’s lien action.”

Mr. Beech’s affidavit is insufficient as proof of a lack of actual knowledge because it:

i. fails to disclose when Mr. Beech attained his status as an officer of the Direct Mortgage Corporation (DMC). Did he become President of DMC after April 13, 2004? After June 14, 2006? Although while an officer of DMC he is deemed to have personal knowledge of DMC’s operations within the scope of his duties, the reader has no way of knowing whether Mr. Beech was an officer of DMC during the first 180 days after April 13, 2004. Mr. Beech’s failure to disclose these foundational facts leaves the reader to reasonably infer one of these conflicting assumptions, either of

which is reasonable.

ii. fails to advise the reader whether the officers and agents referred to include those employed prior to June 14, 2006. Is Mr. Beech speaking only of officers and agents while he has been President? Of officers and agents only presently employed by DMC? He doesn't say, which leaves the reader to infer one of these conflicting alternatives, any one of which is reasonable.

iii. fails to advise the reader of DMC's operations, functions and transactions giving rise to an interest in the lien property or of Mr. Beech's duties or functions within DMC. Is DMC a mere holding company for a subsidiary which in fact conducted all the operations and transactions relating to the lien property? If so, this would probably preclude Mr. Beech and DMC's officers and agents from, in the normal course, acquiring actual knowledge of the commencement of Victor's lien action. Instead, it would be the officers and agents of the subsidiary that would have the capacity to acquire actual knowledge. Is any such subsidiary an agent of DMC? Because Mr. Beech does not describe DMC's operations and transactions in relation to the lien property, we have no way of knowing. Did DMC even have an interest in the lien property when Victor filed its lien action? Mr. Beech does not say. If not, had DMC sold its interest and was the person that the DMC mortgage had been sold to tracking legal actions in relation to the lien property? From the fact that Mr.

Beech fails to aver that DMC had an interest in the lien property, fails to describe DMC's operations and transactions which gave rise to an interest in the lien property, and fails to describe his job duties; the reader could reasonably infer that DMC was a stranger to the lien property and so did not qualify for notice of Victor's pending lien action.

iv. fails to advise the reader whether the officers and agents of DMC routinely reported such lien action information to Mr. Beech, or whether Mr. Beech's knowledge is based on some other DMC information system. Is Mr. Beech assuming that because no officer or agent of DMC reported the Victor lien action to Mr. Beech, none of them had actual knowledge? If DMC does not maintain information systems to capture this type of lawsuit data, was there some reporting system in place so that any officer or agent that learned of Victor's lien action would report such information to Mr. Beech? If not, was inquiry made of the officers and agents of DMC? Did they respond to that inquiry by affirmatively stating that they were never advised of the commencement of Victor's lien action or did they merely say they couldn't remember? Mr. Beech's conclusory affidavit compels the reader to choose among these conflicting inferences on the issue of actual knowledge.

v. fails to advise the reader whether on or after April 13, 2004 DMC had information systems in place to capture information relating to the commencement

of lawsuits naming DMC as a party defendant. Because Mr. Beech makes no mention of such systems, the reader can reasonably infer that DMC did not have such systems in place and that Mr. Beech, in effect, is simply asserting that he does not have any information showing that DMC acquired actual knowledge. This is far different from a particularized assertion that actual knowledge was never acquired.

vi. fails to advise the reader whether prior to June 14, 2006 the DMC information systems did in fact capture information regarding Victor's lien action. It is entirely possible that a clerical employee, who was not an agent or officer of DMC, routinely entered such information into DMC's data processing system and that the responsible officer or agent failed to take proper notice of that information. The reader is left to speculate whether this was or was not the case.

vii. fails to explain what the term actual knowledge means. Actual knowledge is a legal term and there is no evidence Mr. Beech is an attorney versed in the requirements of § 38-1-11(2). Does Mr. Beech mean that DMC must have written notice? Does he mean that a lack of actual knowledge refers to fact that there is no data entry on DMC's information systems showing that within 180 days of April 13, 2004 DMC knew that Victor's lien action had been commenced? Does he mean that he inquired of the persons at DMC responsible for lien actions in which DMC has an interest and that none of them could remember? Again, Mr. Beech's failure to lay any

factual foundation for his conclusory statement as to actual knowledge invites numerous conflicting inferences.

Although Wayne Flynn is employed by Citibank, an entity separate from DMC, Mr. Flynn's cursory statement on actual knowledge is, excepting for the substitution of Citibank and a different date, identical to that of Mr. Beech:

Neither Affiant nor any other officer or agent of Citibank had actual knowledge of the existence of the above-captioned litigation prior to June 16, 2006. R. 141, ¶ 3.

Accordingly, the Flynn affidavit suffers from the same defects as the Beech affidavit.

Although the general rule is that corporate officers are presumed to have personal knowledge of the facts to which they attest,<sup>23</sup> this only means that a corporate officer need not testify regarding the sources and means of his knowledge. But he must still testify as to what it is that he knows. At summary judgment a corporate officer must nevertheless testify with sufficient particularity to remove ambiguity regarding what it is that he is saying.

For example, suppose a case of a fraudulent use of an appraisal to over-finance a property. Although the summary judgment affidavit of a corporate officer responsible for a mortgage company's real estate financing transactions would not need to specify the sources and means (i.e., the particular documents and employees

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<sup>23</sup> See *Utah Farm Prod. Credit Ass'n v. Watts*, 737 P.2d 154 (Utah 1987) quoting 3 Am. Jur. 2d Affidavits § 5 (1986); cf. Rule 602 URE.

providing him with information) by which he acquired knowledge of that fraudulent transaction, he must still particularize the facts supporting fraud.<sup>24</sup> It would not be enough for him to aver only that: “Ace appraisal colluded with putrid purchaser and salacious seller to overstate the appraisal, which resulted in the mortgage company over-financing the property by 30%. The appraiser, the purchase and the seller then split the excess loan proceeds three ways.” Such a conclusory averment provides no facts disposing of the issues this conclusory statement raises.

Restated, a corporate officer’s presumption of personal knowledge cannot dispose of the requirement that he specifically aver to the facts establishing the occurrence of the actual transaction in issue.<sup>25</sup> Clearly, the presumption of personal knowledge does not remove the requirement that a corporate officer attest to facts sufficient to establish the relevance<sup>26</sup> and admissibility of the corporate officer’s evidence.<sup>27</sup>

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<sup>24</sup> *Cf. Butterfield v. Okubo*, 831 P.2d 97, 104 (Utah 1992) (ruling that even an expert's affidavit must include not only the expert's opinion, but also specific facts logically supporting the expert's conclusion).

<sup>25</sup> In criminal law, this would be proof of the commission of the actus reus.

<sup>26</sup> *See* URE 401 which states: “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

<sup>27</sup> 3 Am. Jur 2d § 5, FN3 (2003); *see also* URE 402 which states in part: “Evidence which is not relevant is not admissible.”

Further, the presumption of personal knowledge cannot operate where “conflicting inferences material to the outcome of the case can be drawn from the facts,”<sup>28</sup> because at summary judgment there is no way for a trial court to weigh the evidence and determine which of those conflicting inferences is entitled to the presumption of personal knowledge. In *Goodnow v. Sullivan*<sup>29</sup> the Utah Supreme Court considered the inferences drawn by a trial court in relation to a letter in which the settlor of a trust stated that she did not want the defendant to ““have control over my property after my death.”” After observing that:

“As a successor trustee, defendant would not have full control over her mother's property. The ‘control’ would be shared with plaintiff,”<sup>30</sup>

the Court then dealt with the unresolved fact questions this generic use of the word “control” raised:

“The question then arises regarding what Mrs. Morrison meant by ‘control.’ Was it full control or only partial control? Again, actual questions of fact are presented.”<sup>31</sup>

After finding that this generic usage raised questions of fact, the Court then held that:

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<sup>28</sup> *Goodnow v. Sullivan*, 2002 UT 21, ¶13.

<sup>29</sup> 2002 UT at ¶12.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* (citation omitted)

Various conflicting inferences material to the outcome of the case can be drawn from the facts. The judge "may not on a motion of summary judgment, draw fact inferences as to [the moving party's] purpose or intention. . . . Such inferences may only be drawn at trial."<sup>32</sup>

Applied to the case sub judice, it is evident that the Beech and Flynn affidavits leave unresolved numerous conflicting inferences material to the outcome of this case.

A primary question the Beech and Flynn affidavits leave unresolved is what do they mean by "actual knowledge." Because they are not lawyers versed in Utah law, they are not competent to testify whether their respective corporations, in the legal sense, had actual knowledge.<sup>33</sup> Instead, they must testify to those specific events or transactions which provided their respective corporations with knowledge that they had not acquired or been informed of the commencement of Victor's lien action.<sup>34</sup> Again, although their personal knowledge is presumed so that they do not need state the sources and means by which they acquired knowledge of those events or transactions, they must still testify as to particular corporate actions which provided

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<sup>32</sup> 2002 UT 21, ¶13.

<sup>33</sup> See *Harper v. Summit County*, 963 P.2d 768, 774 (Utah Ct. App. 1998) where this Court rejected as insufficient a legal conclusion in an affidavit:

"However, this affidavit merely states the legal conclusion that the facility is an accessory use, and as such was exempt from the Development Code's building permit requirements. It does not set forth specific facts to support this bare legal conclusion and, therefore, fails to show that there is a genuine issue for trial."

<sup>34</sup> *Id.*



their respective corporations with knowledge they had never acquired or received information regarding the commencement of Victor's lien action.

If a court is to assess the admissibility of a witness's testimony, that witness must state sufficient facts to allow a court to assess and weigh the probative value of the evidence (i.e. its relevance). Unless the affidavit of a corporate officer at least facially provides some relevant evidence, there is no evidence on which to found summary judgment. A bare conclusion by a purported witness unsupported by reference to any facts to support that conclusion, is by definition entirely irrelevant and cannot dispose of a material fact in issue.<sup>35</sup>

ii. There Is No Evidence The Citi Appellees Had Any Way Of Knowing Whether They Timely Acquired Actual Knowledge Of The Lien Action.

In *K & T, Inc. v. Koroulis* the Utah Supreme Court overturned summary judgment because the conclusory affidavit of the moving party's officer was found to be insufficient to dispose of the issue of actual knowledge.<sup>36</sup> At issue was a provision of the Utah Code which provides that "[a] restriction on transfer of a security imposed by the issuer" is ineffective against any person **without actual**

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<sup>35</sup> See *Albrecht v. Uranium Services, Inc.*, 596 P.2d 1025, 1026 (Utah 1979); see also *Bank of Ephraim v. Davis*, 581 P.2d 1001, 1004 (Utah 1978).

<sup>36</sup> 888 P.2d 623 (Utah 1994).

**knowledge** unless the restriction is conspicuously noted on the security.<sup>37</sup>

The party moving for summary judgment in *Koroulis*, Montana Brand, failed to meet its summary judgment burden of establishing it did not have actual knowledge. Its corporate secretary, Maxfield, averred in his affidavit that “[no one] at Montana Brand was informed of the existence of the Consent Agreement or the Stockholders' Agreement by personnel from First Security [Bank].” In construing this “carefully tailored affidavit” the court found its did not support summary judgment because, even though it was coupled with the admission by the non-moving party Koroulis “that he had never informed Montana Brand about the restriction” it did not “foreclose the possibility that Montana Brand acquired actual knowledge of the restrictions from some other source.”<sup>38</sup>

In denying summary judgment, the court explicitly ruled that unless Montana Brand, as the moving party, met its initial burden of showing that there were no disputed issues of material fact, “the party opposing the motion is under no obligation to demonstrate that there is a genuine issue for trial.”<sup>39</sup> The moving party’s failure to meet its initial burden meant that the non-moving parties “were under no obligation

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<sup>37</sup> Utah Code Ann. § 70A-8-204.

<sup>38</sup> *Koroulis* at 628.

<sup>39</sup> *Id.*

to come forward with specific facts showing that there was a genuine issue for trial.”<sup>40</sup>

In addressing the very issue disputed in this case, which is actual knowledge of the party moving for summary judgment, *Koroulis* represents a specific finding that the party moving for summary judgment failed to prove it did not have actual knowledge; that is, it failed to prove a negative. In reality, such issues do not really require proof of a negative, but require affirmative proof of regular procedures to acquire or receive information.

Professor Wigmore provides considerable instruction on how such proof is to be provided. The Citi Appellees must describe those events or transactions which provided them with sufficient opportunity to capture information regarding the commencement of Victor’s lien action within the first 180 days of its commencement.<sup>41</sup> Unless the Citi Appellees have testified to facts showing that they would have captured this information had it been provided to them,<sup>42</sup> they have not disposed of the issue of actual knowledge.

Professor Wigmore states that the admissibility of this negative fact evidence turns on whether the witness had sufficient exposure to events so “that in the *ordinary*

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<sup>40</sup> *Id.*

<sup>41</sup> 2 Wigmore, Evidence § 653 (Chadbourn rev. 1979).

<sup>42</sup> 2 Wigmore, Evidence § 664 (Chadbourn rev. 1979).

*course of events he would have heard* or seen the fact had it occurred.”<sup>43</sup> Consistent with this rule, our courts require that the witness lay adequate foundation to show what the ordinary course of events were for that witness.<sup>44</sup> In the real estate mortgage context, this would necessarily require disclosure of the nature of the corporation’s mortgage and recording transactions, its record keeping systems employed to capture or acquire information, whether those information systems were operating during the time in question and whether they were designed to capture the type of information in issue.

Although there are no Utah cases directly on point, *Curtis v. Harmon Electronics, Inc.*<sup>45</sup> quotes *Hudson v. Union Pacific R.R.*<sup>46</sup> for the rule that:

All that need appear is that the witness was so situated in relation to the train at the time it is claimed the warnings were given that said warnings would have awakened her attention to them. [The witness] was in a position where it is likely that she would have heard the whistle, or at least the bell, and as there is no evidence that her attention was so absorbed in other matters that she would not have heard, a jury question is presented.

Applied to this case, at summary judgment this rule requires that the Citi Appellees

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<sup>43</sup> *Id.*

<sup>44</sup> *See Glencore Ltd. v. Ince*, 972 P.2d 376, 381 (Utah 1998) (where the court held that to provide evidence of what constituted the ordinary course of business, a party must provide evidence of its business practices).

<sup>45</sup> 575 P.2d 1044, 1047 (Utah 1978).

<sup>46</sup> 233 P.2d 357, 360 (Utah 1951).

show that during the first 180 days after April 13, 2004 their record keeping systems would have captured any information received regarding the commencement of Victor's lien action against other encumbrancers on the lien property, that those record keeping systems were properly functioning during that time, and that within the first 180 days after April 13, 2004 those record keeping systems did not capture any information regarding the commencement of Victor's lien action.

As it stands now, the conclusory statements of actual knowledge in the Beech and Flynn affidavits are just as consistent with the inference that the Citi Appellees do not have any way of knowing whether the Citi Appellees acquired information within the first 180 days regarding the commencement of Victor's lien action, as they are with the inference that the Citi Appellees had systems in place which would have within the first 180 days acquired that lien action information had it been provided to them, but that their systems did not acquire any such information. The first inference is, in effect, that the Citi Appellees do not know whether they timely acquired information on Victor's lien action. The second inference is that the Citi Appellees know for a fact that timely information regarding the commencement of Victor's lien action was not provided to them.

Because these two inferences conflict, because both are material to the outcome of this case, and because both inferences can be drawn from the conclusory averments of Beech and Flynn, there was no evidence before the trial court at summary

judgment from which it could properly infer a lack of actual knowledge by the Citi Appellees. The trial court could only find that the affidavits of Beech and Flynn were sufficient by selecting one conflicting inference over the other, which requires weighing the evidence. Under the holding stated in *Goodnow*,<sup>47</sup> at summary judgment it was error for the trial court to make these adverse inferences against Victor.

**C. The Citi Appellees Did Not Meet Their Burden Of Production for Summary Judgment Against Victor's Lien Claims.**

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 if 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 first 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.<sup>48</sup>

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<sup>47</sup> 2002 UT at ¶13.

<sup>48</sup> See *Badger v. Brooklyn Canal Co.*, 922P. 2d 745 (Utah 1996) where the court ruled: "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

In this case, a key element of the Citi Appellees summary judgment claim was never proven by the Citi Appellees because they failed to prove that they had an interest in the lien property. R. 135, 137, 141, 157, 160–173. If the Citi Appellees had no interest in the subject property, they had no case for opposing Victor's claim that its lien was entitled to priority over the Citi Appellees's alleged encumbrance on the property.

Because the Citi Appellees had no interest in the lien property the only party with a litigation interest regarding Citi Appellees's alleged encumbrance was Victor. As explained above, it had an interest in rem to declare Citi Appellees's lien inferior to Victor's.

Proof that the Citi Appellees had an interest in the lien property was critical to their case for summary judgment. In particular, without the predicate showing of

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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 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.

an interest in the property Citi Appellees could not even get to the issue of whether Victor could show that Citi Appellees had actual knowledge of Victor's lien action. As has already been shown, unless they had an interest in the lien property they had no standing to pursue relief under § 38-1-11(2), and any failure by Victor to file a lis pendens was not something which provided the trial court with jurisdiction to grant summary judgment to the Citi Appellees.

Moreover, as has been shown above the Citi Appellees failed to prove that they did not have timely actual knowledge of Victor's lien action. R.137, 141. The fact that § 38-1-11(3) imposes the burden of proof upon Victor to prove at trial that Swanson had actual knowledge does not change the nature of a summary judgment proceeding which requires, by rule, that the moving party "show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law."<sup>49</sup>

Recently, the Supreme Court of Utah affirmed the longstanding rule that where a non-moving party bears the burden of proof at trial, the party moving for summary judgment must nevertheless present evidence to challenge the non-moving party's claims and only when the moving party has presented evidence showing that no material issue of fact exists on the non-moving party's claims are they then required to proffer evidence establishing a material issue of fact:

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<sup>49</sup> See Rule 56(c) Ut. R. Civ. P.



“In this case, Kay had the burden of establishing each element of her claim that Ray lacked the authority to gift and her claim that Ray breached his fiduciary duty. In moving for summary judgment on these claims, the stepchildren had ‘the burden of presenting evidence to demonstrate that no genuine issue of material facts exists and that judgment as a matter of law is proper.’”<sup>50</sup>

Note that in the *Eager* case even though the Plaintiff Kay had the burden of proof on her claim that the gift to the stepchildren was made without authority and in breach of a fiduciary duty, in moving for summary judgment the defendant stepchildren had the burden of producing evidence which, prima facie entirely negated Kay’s claim; that is, demonstrating that no genuine issue of material fact existed. Accordingly, even though at trial Victor has the burden of proof under § 38-1-11(3), this does not relieve the Citi Appellees from their summary judgment burden of proffering sufficient evidence to prove they had an interest in the lien property and that they lacked timely actual knowledge.

This Court set the same standard for summary judgment in *Kleinert v. Kimball Elevator Co.* where it held that the party defending a summary judgment motion “need not prove his or her case before the case may be submitted to the jury.”<sup>51</sup> The Citi Appellees failure to present any evidence showing they had an interest in the subject property and their failure to proffer competent evidence to show they lacked

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<sup>50</sup> *Eager v. Burrows*, 2008 UT 42, ¶15.

<sup>51</sup> 854 P.2d 1025, 1028 (Utah Ct. App. 1993).

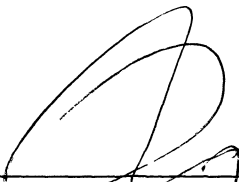
actual knowledge left Victor's pleadings uncontroverted, meaning that at summary judgment Victor was never required to submit evidence sufficient to raise a genuine issue of fact.

## **IX. CONCLUSION**

The actual knowledge requirement of Utah Code Ann. § 38-1-11(2) can only be invoked by a person with an interest in the lien property. The Citi Appellees in their summary judgment papers entirely defaulted in proving or arguing that they had any interest in the subject property. Accordingly, the Citi Appellees had no statutory standing to invoke the actual knowledge requirements of § 38-1-11(2). And regardless of whether the Citi Appellees has an interest in the subject property, they failed to proffer competent evidence showing that they did not have timely actual knowledge of the commencement of Victor's lien action. At summary judgment the initial burden was on the Citi Appellees to prove they had an interest in the lien property and to prove they did not have timely actual knowledge of the commencement of the lien action. They failed to carry that burden on both counts. Consequently, it was never incumbent upon Victor to proffer evidence opposing the Citi Appellees summary judgment motion and the trial court erred in granting the Citi Appellees summary judgment. Utah Code Ann. § 38-1-18 provides for an award of attorney fees to the successful party in a contested lien action and Victor requests an award of attorney fees for its enforcement of its lien against the Citi Appellees, both

before this Court and the court below.

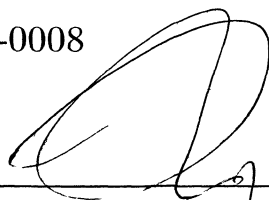
DATED this 25<sup>th</sup> day of July, 2008.

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

**CERTIFICATE OF SERVICE**

I certify that on the 25th day of July, 2008 I deposited a true copy of the foregoing Appellants' Brief in the United States mail, first-class postage pre-paid to:

LESLIE VAN FRANK  
COHNE, RAPPAPORT & SEGAL, P.C.  
257 East 200 South, 7<sup>th</sup> Flr.  
P.O. Box 11008  
Salt Lake City UT 84147-0008

  
\_\_\_\_\_  
Secretary

**ADDENDUM**

A. Utah Code Ann. 38-1-11

B. The trial court's May 9, 2007 memorandum ruling.

Tab A

**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.

(e) An owner applying for a certificate of compliance under Subsection (4)(d) shall send by certified mail to all lien claimants:

(i) a copy of the application for a certificate of compliance; and

(ii) all materials filed in connection with the application.

(f) The Division of Occupational and Professional Licensing shall notify all lien claimants listed in an owner's application for a certificate of compliance under Subsection (4)(d) of the issuance or denial of a certificate of compliance.

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

Tab B

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 &amp; 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.

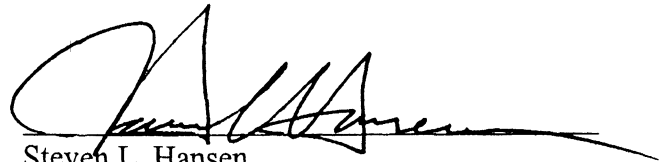
A party failing to comply with §38-1-11 of the mechanics' lien statute is not subject to waiver, but is jurisdictional. See Projects Unlimited, Inc. v. Copper State Thrift & Loan Co., 798 P.2d 738 (1990).

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 9<sup>th</sup> 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.**

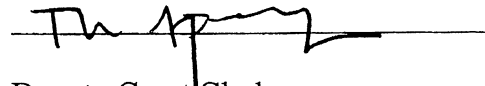
## **CERTIFICATE OF MAILING**

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  
8 East Broadway, Ste. 710  
Salt Lake City, Utah 84111

Attorneys for Defendant Swanson  
Arnold Richer  
Darci D. Tolbert  
Robert W. Harrow  
RICHER & OVERHOLT P.C.  
901 West Baker Drive  
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, 7<sup>th</sup> floor  
PO Box 11008

  
Deputy Court Clerk

FILED

MAY 09 2007

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY *tr*

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 &amp; 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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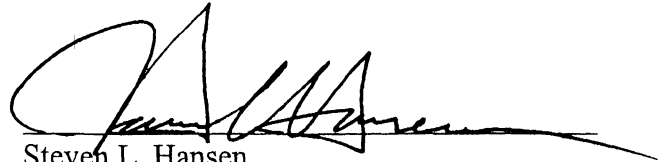
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DATED this 9<sup>th</sup> day of May, 2007.

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Steven L. Hansen  
District Court Judge

Case No. 040401255

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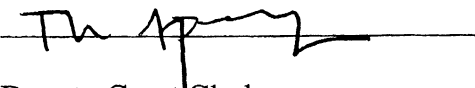
## **CERTIFICATE OF MAILING**

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Attorney for Plaintiff  
Ronald Ady  
8 East Broadway, Ste. 710  
Salt Lake City, Utah 84111

Attorneys for Defendant Swanson  
Arnold Richer  
Darci D. Tolbert  
Robert W. Harrow  
RICHER & OVERHOLT P.C.  
901 West Baker Drive  
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, 7<sup>th</sup> floor  
PO Box 11008

  
Deputy Court Clerk