

2008

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VICTOR PLASTERING, INC.,

Appellants,

vs.

CITIBANK FEDERAL SAVINGS BANK
and CITIMORTGAGE, INC.,

Appellee.

Appellate Court No. 20080017-CA

REPLY BRIEF OF THE APPELLANT

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

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III. ARGUMENT

A. DEFENDANTS DID NOT MEET THEIR BURDEN OF PRODUCTION ON THE ISSUE OF ACTUAL KNOWLEDGE

i. The Citi Appellees mis-state the legal standard for summary

judgment. The Citi Appellees' opposition to Victor's case rests entirely on a series of ipse dixits, factual mis-statements or mis-constructions of the law. In particular, they allege:

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.¹

First, the Citi-Appellee incorrectly state the legal standard on summary judgment.

Although at trial Victor would bear the burden of proof on whether the Citi Appellees received actual knowledge of Victor's lien action within 180 days, at the summary judgment stage of the proceeding it is the Citi-Appellees that must make an affirmative factual showing that Victor is not entitled to the benefit of the actual knowledge exception stated in Utah Code Ann. § 38-1-11(3)(a).

The summary judgment standard asserted by the Citi Appellees was

¹ Aple. Br. p. 27.

explicitly rejected in *Orvis v. Johnson*, 2008 UT 2, which clearly distinguishes summary judgment practice in Utah from the rule stated in *Celotex v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In construing the summary judgment procedure under Fed. R. Civ. P. 56, *Celotex* held that when the burden of proof at trial will be on the non-moving party, the moving party will be awarded summary judgment if it simply identifies:

“‘those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ that it believes demonstrate the absence of a genuine issue of material fact.’ *Id.* (quoting *Fed. R. Civ. P. 56(c)*). The burden then shifts to the nonmoving party to show, by ‘rebuttal affidavits, or other specified kinds of materials,’ that there is a genuine issue of material fact. *Id.* at 324.”²

Thus, under *Celotex* proof that the non-moving party has not provided evidence that it can carry its burden of proof at trial is sufficient to grant the moving party summary judgment.

Implicitly relying on the *Celotex* standard, the Citi Appellees incorrectly argue that at the summary judgment stage Victor “bore the burden of introducing the exceptions.” If *Celotex* was controlling, this might well be dispositive of their summary judgment claims. But under the very definite and specific holding of *Orvis*, the *Celotex* standard has been rejected. *Orvis* holds that *Waddoups v.*

² *Orvis* at ¶ 15, citing *Celotex v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Amalgamated Sugar Co., 2002 UT 69, 54 P.3d 1054. (the case relied upon by those arguing that the *Celotex* standard controlled in Utah) cannot be interpreted to:

“mean that a movant can satisfy her burden on summary judgment by "challeng[ing] an element of the nonmoving party's case"--in effect, by pointing out that the nonmoving party lacks sufficient evidence to support his claim. This interpretation overlooks the movant's affirmative obligation to first *demonstrate* that there exists no genuine issue of material fact.”³ (citations omitted)

Orvis expands on this rule by being even more explicit:

A summary judgment movant, on an issue where the nonmoving party will bear the burden of proof at trial, may satisfy its burden on summary judgment by showing, by reference to "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that there is no genuine issue of material fact. Upon such a showing, whether or not supported by *additional affirmative factual evidence*, the burden then shifts to the *nonmoving* party, who "may not rest upon the mere allegations or denials of the pleadings," but "must set forth specific facts showing that there is a genuine issue for trial." *Id. (e)*. This is the correct application of *Harline*, and any subsequent cases applying *Harline* differently are incorrect.⁴[underlined emphasis added, other emphasis in the original]

Note that the court unmistakably requires that the moving party employ affirmative factual evidence to put into issue the non-moving party's ability to prove at trial a matter for which the non-moving party bears the burden of proof.

³ *Orvis* at ¶ 17.

⁴ *Orvis* at ¶ 18.

In so ruling, *Orvis* explicitly re-affirms as controlling the holding in *Harline v. Barker*, 912 P.2d 433, 445 (Utah 1996) that:

"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.'"⁵

This re-affirmation of the holding in *Harline* refutes the Citi Appellees attempt at page 25 of their brief to distinguish *Harline* from this case.

ii. The Beech and Flynn affidavits do not state any facts showing a lack of actual knowledge. Second, the affidavits of Beech and Flynn do no more than assert the legal conclusion that each of their corporations did not have actual knowledge of Victor's lien action within 180 days of its filing. For example, Mr. Beech avers that he "first learned of the existence and pendency of the above-captioned litigation att he time Direct Mortgage Corporation was served process on June 14, 2006." (R. 141) But he says nothing about when Direct Mortgage Corporation learned of the filing of Victor's lien action. Instead, he merely recites that no one at Direct Mortgage Corporation had "actual knowledge" of Victor's lien action prior to June 14, 2006. (R. 141).

All of the cases relied upon by the Citi Appellees regarding the waiving of defects in affidavits address situations where there were factual averments in the

⁵ *Harline v. Barker*, 912 P.2d 433, 445 (Utah 1996) (quoting *K&T, Inc. v. Koroulis*, 888 P.2d 623, 628 (Utah 1994)).

affidavits – albeit evidentiarily defective ones – supporting a claim for summary judgment. Admittedly, if the Beech affidavit had contained unambiguous factual allegations regarding when Direct Mortgage Corporation “first learned” of the Victor lien action, regardless of whether the factual averments were evidentiarily defective, they may well have put Direct Mortgage Corporation’s actual knowledge into issue. But the Beech affidavit does not contain unambiguous factual averments, and by instead doing no more than reciting the legal standard of actual knowledge imposed by Utah Code Ann. § 38-1-11(3)(a), that affidavit put nothing before the trial court from which it could conclude that Direct Mortgage Corporation lacked actual knowledge.⁶

This is an important distinction. Mr. Beech’s statement as to his personal knowledge in the first sentence of paragraph 3 of his affidavit contrasts starkly with his next sentence where,⁷ in speaking of the corporation, he can do no more than draw a legal conclusion by reciting the legal standard of actual knowledge,

⁶ See Appl. Br @ pp.20 - 29 where it is argued that a likely inference from the Beech affidavit’s conclusory allegation regarding a lack of actual knowledge is that Direct Mortgage Corporation had no way of knowing when it first learned of Victor’s lien action, and assumed that lack of reporting systems meant it did not know of Victor’s lien action until served.

⁷ When Mr. Beech is talking about his own personal knowledge he is testifying affirmatively about matters which he saw, observed or participated in. Indeed, he affirmatively states that he “first learned” of Victor’s lien action when Direct Mortgage Corporation was served with process. His affirmative use of a non-legal term is clearly factual and not simply a conclusion of law. (R. 137).

something he is not qualified to do. Whether or not Direct Mortgage Corporation had actual knowledge is a legal question and his recitation of the applicable legal standard is not supported by any facts supporting this denial.⁸ Restated, although evidentiary defects may be waived by a non-moving party's failure to oppose an affidavit, under the holding in *Badger v. Brooklyn Canal*, 922 P. 2d 745 (Utah 1996) the affidavit must still recite factual allegations to support a claim for summary judgment.

In *Badger* the court held:

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

⁸ See *Capital Assets Financial Servs. v. Lindsay*, 956 P.2d 1090, 1094 (Utah Ct. App. 1998) (trial court must disregard legal conclusions in affidavits).

simply asserted in conclusory fashion that movement of water upstream could not impact the water table near plaintiffs' wells.”⁹

The conclusory statement at issue in *Badger* begged the question of what the affiant actually knew or whether his conclusion was the result of mere assumption. That is exactly the case with the Beech affidavit’s conclusory allegations regarding actual knowledge.

Goodnow v. Sullivan, 2002 UT 21, addresses the closely related issue of whether competing inferences resulting from conclusory fact allegations presented to a trial court prevent the entry of summary judgment in reliance on those allegations. *Goodnow* holds that summary judgment cannot be granted where competing inferences are in issue.¹⁰ Applying *Goodnow* to Victor’s case produces the same result. Because there are a number of competing inferences which accrue from the conclusory allegation of actual knowledge in the Beech affidavit, the trial court could only resolve those inferences by weighing the evidence, which it cannot do on summary judgment.

Note also, that in *Badger* the affidavit in support of summary judgment was unopposed, which is also Victor’s case. *Badger* was reaffirmed in the context of a lay person’s affidavit by *Dixon v. Pro Image, Inc.*, 1999 UT 89, ¶ 38, FN7, where

⁹ *Badger* @ 752.

¹⁰ *Goodnow* at 13.

the court found that the party moving for summary judgment similarly failed to meet his initial burden of production to challenge the existence of an element of the non-moving party's cause of action.

Moreover, under the authority of these cases, whether the Beech and Flynn¹¹ affidavits support a claim to summary judgment is determined under a correction of error standard, not an abuse of discretion standard.¹²

In sum, although objections to the admissibility of the Beech and Flynn affidavits may have been waived, those affidavits must each still recite unambiguous facts supporting the Citi Appellees' summary judgment claims based on a lack of actual knowledge. Because they do not recite those facts, the Citi Appellees failed to meet their burden of production on this issue and so did not challenge or dispose of of an element of Victor's cause of action; that is, the issue of whether the Citi Appellees had actual knowledge.

iii. At Summary Judgment the Citi Appellees Failed to Adduce Any Evidence That They Had an Interest in the Subject Property. In a belated

¹¹ Excepting for its omissions of any averment as to when Mr. Flynn first learned of the filing of Victor's lien action, the Flynn affidavit does not materially differ from the Beech affidavit.

¹² *See Stephens v. Bonneville Travel, Inc.*, 935 P.2d 518, 519 (Utah 1997)(on appeal from the district court's ruling on summary judgment, an appellate court applies a correction of error standard, affording the trial court's rulings no deference).

attempt to bolster their case for summary judgment, at page 20 of their brief the Citi Appellees erroneously contend that the allegations in each of their answers that they had an interest in the property which was the subject of Victor's lien action, supports their motion for summary judgment. But Victor's complaint alleges that they have no interest or an interest which is inferior to Victor's.¹³ Utah cases repeatedly hold that a moving party can only meet its initial burden by affirmatively producing dispositive evidence in support of its summary judgment motion.¹⁴

Not only do the cases require the moving party to produce affirmative evidence, it is obvious that if the non-moving party cannot rely on its pleadings, the moving party cannot rely on its pleadings¹⁵ in support of its motion for summary judgment, otherwise a summary judgment would be no more than a motion to dismiss, and the factual allegations of the Plaintiff Victor's complaint regarding Direct Mortgage Corporation's inferior interest in the subject property must be taken as true.¹⁶

¹³ See Addendum A, ¶ 15.

¹⁴ *Orvis* at ¶ 18 citing *Harline*.

¹⁵ Appellant refers to pleadings in the strict sense used in Ut. R. Civ. P. 7(a).

¹⁶ See *Russell v. Standard Corp.*, 898 P.2d 263, 264 (Utah 1995); cf. *Bluffdale City v. Smith*, 2007 UT App 25; 156 P.3d 175 (Ut. App. 2007) (failure of non-moving party to specify in its opposing memorandum the evidentiary grounds for disputing the moving party's statement of undisputed material facts warranted

At page 20 of their brief the Citi Appellees also contend that their uncontested motion to substitute in CitiMortgage for Direct Mortgage Corporation was somehow dispositive of the issue of whether it had an interest in the subject property. But Rule 7(c)(3)(A) specifically provides that “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.” By specifically limiting this rule to summary judgment memoranda, this Rule necessarily excludes factual assertions from other types of motions from its benefit.¹⁷ Moreover, the rule requires that those factual allegations be supported by evidence adduced through affidavits or discovery materials. Because CitiMortgage’s motion to substitute in as a party defendant in this case had nothing to do with a summary judgment motion, the factual assertions in that motion to substitute are without evidentiary effect.

This conclusion is further supported by the trial court’s order granting the Citi Appellee’s unopposed motion to substitute CitiMortgage for Direct Mortgage Corporation as a party Defendant. That order specifically finds that CitiMortgage

summary judgment). *A fortiori* if the moving party relies on its answer and fails to adduce affirmative evidence in support of its summary judgment claims, those claims must fail.

¹⁷ See *Field v. Boyer Co.*, 952 P.2d 1078, 1086-87 (Utah 1998); 2A Norman J. Singer, *Statutes and Statutory Construction* 47:23-25 (2000).

should be substituted as a party for Direct Mortgage Corporation because CitiMortgage's motion was unopposed, but makes no findings regarding the unauthenticated and unverified Statement of Facts recited in the memorandum in support of the motion to substitute CitiMortgage as a party. (R. 125) Accordingly, the trial court's order allowing CitiMortgage to be substituted in for Direct Mortgage Corporation made no determination as to whether Direct Mortgage Corporation then had or previously had any interest in the subject property.

Indeed, the issue of whether Direct Mortgage Corporation had an interest in the subject property at the time Victor's lien action was commenced was never raised in any way in the Citi Appellees' summary judgment papers. Arguments not briefed are waived.¹⁸ When they responded to Victor's Rule 59 memorandum, the Citi Appellees made no reference to the factual allegations in their memorandum in support of their motion to substitute in CitiMortgage as a party defendant, but instead erroneously claimed that Victor had admitted in its complaint that Direct Mortgage Corporation had an interest in the subject property.¹⁹ (R. 269) By

¹⁸ *See Semeco Industries v. State Tax Com'n*, 849 P.2d 1167 (Utah 1993) where the court held that arguments not briefed are waived.

¹⁹ Further, the Citi Appellees' argument was without merit. Victor merely pled that Direct Mortgage Corporation "hold[s] some claim of right, title, or interest to the aforementioned property and PLAINTIFF alleges that all [Direct Mortgage Corporation's] claims of right, title or interest . . . [is] subject to the prior claims and interests of PLAINTIFF . . ." Victor did not allege that Direct Mortgage Corporation holds some right, title or interest in the subject property,

failing to argue this assertion on this appeal to this Court, the Citi Appellees have waived it.²⁰ See Addendum A, ¶ 15.

Moreover, if the Citi Appellees had raised the issue of Direct Mortgage Corporation's interest in the subject property at the time of the commencement of Victor's lien action, Victor would have put before the trial court a letter from legal counsel advising that it had no interest in the subject property and was willing to disclaim any interest in the subject property.²¹ This letter, which is an admission against interest,²² and so would have been admissible into evidence, belies the unproven assertion of CitiMortgage that Direct Mortgage Corporation transferred an interest in the subject property to it.

but merely that it *claims* that it holds some right, title or interest in property. The former is an admission that a defendant has some interest in property, whatever it might be, but the latter is nothing more than an allegation that a defendant hold a claim to an interest, but does not admit that a defendant actually has an interest.

²⁰ *Id.*

²¹ See Addendum B.

²² Rule 801(d)(2)(c) of the Utah Rules of Evidence makes “a statement by a person authorized by the party to make a statement concerning the subject”, an admission by a party-opponent admissible in evidence. Under common law a statement by an agent can only be used against the principal if the agent is employed for the purpose of making the statement on behalf of the principal. Rule 801(d)(2)(D) of the Utah Rules of Evidence goes even further and makes a statement by a party's agent made within the scope of that agency admissible. See *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984) where a statement made by an attorney on behalf of his client was admissible under the federal version of both of these rules.

As to the affidavit of Miriam Harper, the Citi Appellees never recited any undisputed material fact alleging that they had an interest in the subject property and the exhibits to the Harper affidavit do not prove that Direct Mortgage Corporation had an interest in the subject property when Victor filed its lien action, nor do those exhibits show that the CitiMortgage is the successor in interest to Direct Mortgage Corporation. (R. 158).

As well, an allegation that the Citi Appellees have an interest in the subject property is to be found nowhere in their memorandum in support of their motion for summary judgment. Rule 7(c)(3)(A) is explicit in requiring that a moving party must assert in its statement of undisputed material facts a dispositive fact relied upon in its motion for summary judgment. Victor cannot be expected to guess which factual allegations (especially unverified factual allegations) stated elsewhere in other papers the Citi Appellees filed with the trial court will be relied upon in their motion for summary judgment. The failure to make that factual recitation in their statement of material undisputed facts greatly prejudiced Victor because it was denied the opportunity to produce the letter from legal counsel for Direct Mortgage Corporation admitting it had no interest in the subject property, and was denied an opportunity to bring a Rule 56(f) motion to conduct discovery on that issue.

In bringing their motion for summary judgment, the Citi Appellees failed to

assert that they had an interest in the subject property and without that interest, they could incur no harm as a result of Victor's lien action and so had no standing to invoke the provisions of Utah Code Ann. § 38-1-11(3)(a).

B. THERE IS NO ISSUE OF INADEQUATE BRIEFING BY THE APPELLANT

A Rule 59 motion tolls the time for filing of a notice of appeal.²³ Victor's notice of appeal recites that it is appealing from the "entire judgment of the trial court," which demonstrates that Victor is not merely appealing the trial court's denial of Victor's Rule 59 motion. Further, both the January 16, 2007 order granting the Citi Appellees summary judgment and the trial court's order denying Victor a new trial covered the same ground: the merits of the Beech and Flynn affidavits and the Citi Appellees' memorandum in support of their motion for summary judgment. Accordingly, the trial court's order denying Victor's motion for a new trial necessarily re-affirmed its January 16, 2007 order granting the Citi Appellees summary judgment, meaning that both those orders are in issue on this appeal.

Accordingly, this is not a case like *Jensen v. Intermountain Power Agency*, 1999 UT 10, ¶7, where some claims were decided on partial summary judgment and some were later decided by a jury, and in the notice of appeal only the jury

²³ *Moon Lake Electric Assoc., Inc. v. Ultrasystenas Western Constructors, Inc.*, 767 P.2d 125 (Utah Ct. App. 1988).

judgment was identified. There, the claims were distinct, which meant that the notice of appeal did not put the appellee on notice that the matters decided on summary judgment were in issue on the appeal, and thus deprived the appellee of an opportunity to file a cross appeal. Because in the case sub judice the Rule 59 proceeding reviewed in full the prior summary judgment proceeding and because the trial court ruled in favor of the Appellee on all matters in issue, there is no issue of prejudice and no question of whether the appeal includes all of the matters dealt with by the trial court's January 16, 2007 order granting the Citi Appellees summary judgment.

Instead, Victor's Notice of Appeal comes within the rule stated in *Scudder v. Kennecott Copper Corp.*, 886 P.2d 48, (Utah 1994), where the court in reviewing Ut. R. App. P. Rule 3(d) and the appellant's failure to identify in its Notice of Appeal the intermediate orders which were to be raised as issues in the appeal, held that the Notice of Appeal was sufficient to put those intermediate orders in issue when a final judgment was identified as the subject of the appeal.

The same rationale applies to Victor's Notice of Appeal. In identifying the trial court's order denying a new trial and its final judgment of November 16, 2007 (mistakenly dated as December 16, 2007) denying Victor a new trial, and then stating that the appeal is taken from the entire judgment, the Notice of Appeal put into issue the Citi Appellees entire case for summary judgment, meaning that the

trial court's order of January 16, 2007, which is subject to a correction of error standard, is properly before this Court.

Victor in its opening brief at page 3 properly recited the correction of error standard for summary judgment rulings and then proceeded to brief for some 22 pages why the district court was wrong in law in granting the Citi Appellees summary judgment. This briefing negates the Citi Appellees claim that there has been no showing that the district court committed reversible error.

C. **THE CITI APPELLEES LACK STANDING TO CONTEST VICTOR'S CLAIMS**

As was shown in Victor's opening brief²⁴, this was an in rem action and unless the Citi Appellees had an interest in the subject property, they lacked standing to contest Victor's lien. At a summary judgment hearing the Citi Appellees, as defendants, must have some interest in the subject property before they have standing to contest Victor's lien.²⁵ This is especially so where Utah Code Ann. § 38-1-11(3)(a) limits the right to the notice provided by the filing of a lis pendens to persons with an interest in the subject property.²⁶ In *Estate of Haro*

²⁴ App. Br. pp. 12 -15.

²⁵ *Cf. State v. Taylor*, 818 P.2d 561, 567 (Ut. Ct. App. 1991)(defendant must be something more than a temporary visitor to a cabin to prosecute a 4th Amendment objection to a search of the cabin); *see also State v. Ross*, 2007 UT 89, ¶ 25 (defendant not sentenced to death lacked standing to prosecute an 8th Amendment challenge to Utah's death penalty statute).

²⁶ App. Br. pp. 9 - 12.

v. Haro, 887 P.2d 878 (Utah Ct. App. 1994) this Court held that where a statute specifically limited the persons eligible to bring a wrongful death action to the decedent's heir or personal representative, then an action commenced by any person other than those designated by statute would be a nullity because they lacked capacity to sue.²⁷

The fact that the Citi Appellees failed to make any showing that they had an interest in the subject property, which was the predicate to their being entitled to the statutory notice provided by the filing of a lis pendens, means that like the Estate of Haro they lacked the statutory capacity to invoke a particular statute's entitlements. In this context, the concepts of standing and capacity to litigate are essentially indistinguishable. Without that capacity, they could not be prejudiced by Victor's lien action²⁸ and so had no standing to contest Victor's lien action.

The requirement that a litigant have an interest in the res which is the subject of the litigation has been frequently applied by the appellate courts of this State to both Plaintiffs and Defendants. The cases cited in footnote 25 above are representative of numerous criminal cases denying defendants standing to launch constitutional challenges to particular criminal statutes, and those cases closely parallel cases like *Wash. County Water Conservancy Dist. v. Morgan*, 2003 UT

²⁷ Haro at 880-81.

²⁸ *State v. Taylor*, 818 P.2d at 567.

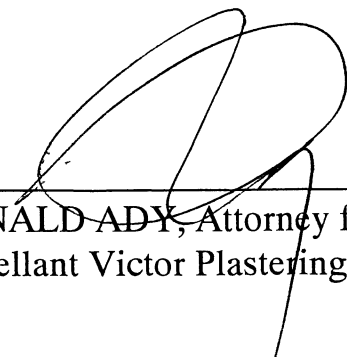
58, P 6 n.2, 82 P.3d 1125 (Utah 2003) in requiring litigants to have an interest in the subject matter of the dispute before they have standing.

In that light, it would seem – with respect – that this Court’s decision in *Victor Plastering, Inc. v. Swanson Building Materials, Inc.*, 2008 UT App 474, represents a marked departure from a long line of cases which hold that where the terms of a statute exclude a litigant from its entitlements, the excluded litigant does not have standing to litigate the requirements of that statute, and on that basis this Court’s decision in *Victor Plastering* should be reconsidered.

IV. CONCLUSION

The Citi Appellees failed to proffer any evidence in support of their claim that they did not within 180 days have actual knowledge of the commencement of Victor’s lien action. Absent that showing, the actual knowledge exception to the lis pendens requirements in Utah Code Ann. § 38-1-11(3)(a) remains in issue and Victor is entitled to a reversal of the trial court’s grant of summary judgment in favor of the Citi Appellees.

DATED this 15th day of January, 2009.



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

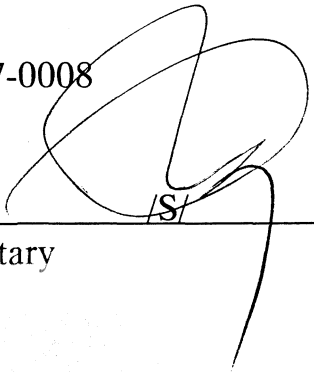
ADDENDUM:

- A. Amended Complaint of Victor Plastering, Inc.
- B. July 3, 2006 letter from Direct Mortgage Corporation.

CERTIFICATE OF SERVICE

I certify that on the 16th day of January, 2009 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, 7th Flr.
P.O. Box 11008
Salt Lake City UT 84147-0008



Secretary

Tab A

RONALD ADY (3694)
10 West 100 South, Suite 425
Salt Lake City, Utah 84101
Telephone: (801) 539-1900
Fax: (801) 322-1054

Attorney for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

VICTOR PLASTERING, INC.,

Plaintiff,

v.

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

Defendants.

AMENDED COMPLAINT

Civil No. 040401255

Judge Hansen

For complaint against Defendants, Plaintiff alleges as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAIM ONE: FORECLOSURE ON MECHANIC'S LIEN

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

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

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

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

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

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

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

CLAIM TWO: BREACH OF CONTRACT

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

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

CLAIM THREE: UNJUST ENRICHMENT

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

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

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

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

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

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

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

WHEREFORE, PLAINTIFF prays for relief against Defendants as follows:

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

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

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

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

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

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

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

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

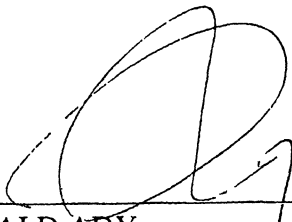
Property for the amount of \$16,250.00 plus attorney's fees, court costs, and accrued interest pursuant to statute;

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

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

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

Dated this 12th of April, 2004.



RONALD ADY
Attorney for Plaintiff

PLAINTIFF DEMANDS A JURY TRIAL

Tab B

RAY QUINNEY & NEBEKER

July 3, 2006

HAND-DELIVERED

Ronald W. Ady, Esq.
10 W. 100 South, #425
Salt Lake City, UT 84101

Re: Victor Plastering, Inc. v. Collins, et al.
Civil No. 040401255

Stephen C. Tingey
ATTORNEY AT LAW

PO Box 45385
Salt Lake City, Utah
34145-0385

36 South State Street
Suite 1400
Salt Lake City, Utah
34111

801 532-1500 FIRM
801 323-3360 DIRECT
801 532-7543 FAX
stingey@rqn.com
www.rqn.com

Dear Ron:

I represent Direct Mortgage Corporation ("DMC"). You have named DMC as a party defendant in your recent Amended Complaint. My reading of the Amended Complaint is that the claim against DMC is solely to foreclose DMC's interest in the property. DMC no longer holds any interest in the property. DMC would be willing to execute a disclaimer of interest in the property, with the understanding that with that disclaimer, you will voluntarily dismiss the Amended Complaint as to DMC. Please let me know if that approach is acceptable to you. Thank you for your courtesy.

Very truly yours,

RAY QUINNEY & NEBEKER, P.C.


Stephen C. Tingey

SCT:LL

cc: Direct Mortgage Corp.
880609/SCT