

2008

Mark D. Bergman v. Debbie A. Burke, Dorene R. Basug, First American Title : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Mark D. Bergman; Pro Se.

Mr. Michael E. Bostwick; Attorneys for Appellee.

Recommended Citation

Reply Brief, *Bergman v. Burke*, No. 20080323 (Utah Court of Appeals, 2008).
https://digitalcommons.law.byu.edu/byu_ca3/844

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH APPELLATE COURT

COPY

MARK D. BERGMAN
Plaintiff
Appellant and Cross-appellee
v.

DEBBIE A. BURKE, DORENE R. BASUG,
and FIRST AMERICAN TITLE
Defendants,
Appellee and Cross-appellant

REPLY BRIEF

DOCKET No. 20080323-CA

REPLY BRIEF OF THE PLAINTIFF

Mark D Bergman -- Pro Se
bergmanmdl@aol.com
545 East 1100 North
Ogden, Utah 84404
T: 801-782-8086
F: 801-782-0667
Plaintiff -- Appellant &
Cross Appellee

Michael E. Bostwick (7037)
6776 South 1300 East
Salt Lake City, UT. 84151
T: 801-676-8777
F: 801-352-9339
Atty. for the Defendant – Appellee &
Cross Appellant – Debbie A. Burke



IN THE UTAH APPELLATE COURT

MARK D. BERGMAN
Plaintiff
Appellant and Cross-appellee
v.

DEBBIE A. BURKE, DORENE R. BASUG,
and FIRST AMERICAN TITLE
Defendants,
Appellee and Cross-appellant

)
)
)
) **REPLY BRIEF**
)
)
)
)
)
)

)
) DOCKET No. 20080323-CA
)
)
)

REPLY BRIEF OF THE PLAINTIFF

Mark D Bergman -- Pro Se
bergmanmdl@aol.com
545 East 1100 North
Ogden, Utah 84404
T: 801-782-8086
F: 801-782-0667
Plaintiff -- Appellant &
Cross Appellee

Michael E. Bostwick (7037)
6776 South 1300 East
Salt Lake City, UT. 84151
T: 801-676-8777
F: 801-352-9339
Atty. for the Defendant – Appellee &
Cross Appellant – Debbie A. Burke

Table of Contents

	Page
Issues Presented for Review by the Defendant.....	3
Procedural History - Argument	4
Conclusion and Statement of Relief Sought	7

Table of Authorities

<u>Packer v. Cline</u> , 2004 UT App 311	5,6
<u>State v. Amoroso</u> , 975 P.2d 505, 507 (Utah Ct. App. 1999)	7

Issues Presented for Review by the Defendant

a.

Whether the trial court erred in determining that summary judgment was not appropriate under the facts of this case, which require Ms. Burke to continue defending the case on Mr. Bergman's invalid lien, rather than having the case dismissed because of Mr. Bergman's failure to comply with the statutory requirements for recording and perfecting a Utah mechanic's lien.

b.

Whether the trial court erred in determining that the Mr. Bergman substantially complied with the requirements for filing a notice of lien pursuant to the Utah Mechanic's Lien statute.

c.

Whether the trial court erred in denying the Appellant's motion for attorneys' fees in a single cause of action foreclosing a mechanics' lien, when Ms. Burke is the prevailing party.

Procedural History

On or about August 4 2005, the Defendant moved the court for summary judgment. Once pleadings were complete and the trial court heard oral arguments on the motion, the trial court found that Plaintiff's lien substantially complied with the applicable requirements, and that defendant failed to show how anything with which Plaintiff's lien did not comply had prejudiced her. The trial court issued a memorandum decision in conformity with its findings, whereby it denied Defendant's *Motion for Summary Judgment*.

Argument

In responding to the Defendant's argument concerning the Plaintiff's issues on appeal, Defendant has failed show that if the plaintiff had marshaled the evidence, such evidence would support the trial courts findings of fact. Hence, a reply argument on these points seems unnecessary. Therefore, the plaintiff will only address the defendant's issues on appeal...

Defendant now requests a review of three (3) issues. However, Defendant's first issue assumes that Plaintiff's lien was invalid. Defendant's second issue then asks the court to find whether the lien was invalid based upon whether the lien substantially complied with such requirements. The assumptions contained within Defendant's issues create obscurity. Therefore, Plaintiff will now attempt to clarify Defendant's appeal.

The trial court did not find that Plaintiff's lien was invalid. Therefore, Defendant's first issue is not ripe for adjudication. A court must first find that Plaintiff's lien is invalid,

before the defendant can suffer a prejudice by having to defend against an invalid claim. Thus, Defendant's first issue relies upon the outcome of her second issue.

The court may now direct its attention to Defendant's second issue.

“Whether the trial court erred in determining that... Mr. Bergman substantially complied with the requirements for filing a notice of lien pursuant to the Utah Mechanic's Lien statute.”

The Defendant's argument, concerning the issue of substantial compliance, relies upon the case of Packer v. Cline, 2004 UT App 311 (see BRIEF OF APPELLEE page 39, 40). The Defendant's position is that the plaintiff did not substantially comply with lien filing requirements and that such noncompliance invalidates Plaintiff's mechanics lien. Defendant interprets Packer v. Cline as one holding that a mechanics' lien which does not substantially comply with filing requirements, shall not affect security upon the subject real property.

Like the case at issue, Packer v. Cline dealt with mechanics' liens. However, in Packer, the Court found that the lien claimant failed to show that he performed any work to the real property or residence thereon, or that he had furnished any equipment or materials for improvements to the same. Therefore, the claimant failed to show how he was legally entitled to the interest of which he sought to secure. In essence, the lien was securing a fictitious interest in the real property. Thus, the lien was wrongful. Although the Court's ruling in Packer v. Cline briefly touches on the issue of substantial compliance, it mainly focuses on and explains wrongful liens. The Court in Packer v. Cline arrived at their

decision based on their determination that the lien claimant filed a mechanics' lien *wrongfully*.

The factual differences between the case at issue and the Packer v. Cline case are material. The Packer v. Cline case dealt with wrongful liens recorded on real property by individuals who completely lacked any legal interest for which they sought to secure. Whereas, the Plaintiff in the case at issue, performed work and/or furnished materials for the improvements to the real property and the residence thereon. Therefore, it would be improper, with these set of facts, to seek guidance from the Packer ruling to make determinations regarding substantial compliance.

Defendant has failed to offer applicable authority that could undermine the lien's validity or guide the court's review regarding the legal effect of the language, "substantial compliance." Therefore, this Court should decline to review Defendant's second issue on appeal. Absent a finding that Plaintiff's lien is invalid, Defendant's first issue on appeal is moot.

Plaintiff now addresses Defendant's third and final issue on appeal.

"Whether the trial court erred in denying the Appellant's motion for attorneys' fees in a single cause of action foreclosing a mechanics' lien, when Ms. Burke is the prevailing party."

On or about January 16 2007, the trial court signed and entered its findings of fact, conclusions of law, and final order. Wherein, the trial court ordered:

“Each parties shall bear their own attorney’s fees and costs.”


The Defendant failed to object or oppose this issue with the trial court. Due to Defendant’s failure to preserve this issue for appeal, the appellate court should decline to review such issue. As established, “... appellate courts will not consider an issue raised for the first time on appeal. See Ong Int’l (U.S.A.), Inc. v. 11th Ave. Corp., 850 P.2d 447, 455 (Utah 1993).” (Quoting from State v. Amoroso, 975 P.2d 505, 507 (Utah Ct. App. 1999).

Furthermore, Defendant’s contention that she was the prevailing party is unintelligible, because such contention contradicts logic and reason. The Court entered judgment in favor of Plaintiff, and against Defendant, Debbie Burke. Plaintiff prevailed on its claims and was, in fact, the prevailing party. Defendant did not prevail on or successfully defend against any claims.

Conclusion and Statement of Relief Sought

Wherefore, based on the foregoing and for good cause showing, Plaintiff renews its previously filed *Motion to Dismiss*. In addition, Plaintiff incorporates and requests any and all relief previously sought within all other Plaintiff’s pleadings, and any other relief this court deems appropriate.

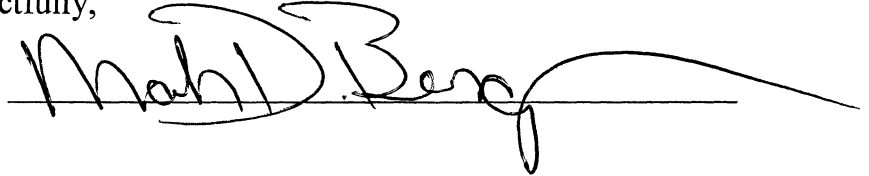
Respectively submitted,

 Dated March 6, 2009

CERTIFICATE OF SERVICE

I CERTIFY THAT ON THE 6 DAY OF March, 2009 THE FOREGOING
REPLY BRIEF WAS SERVED ON THE DEFENDANT/ Appellee BY MAILING A
TRUE AND CORRECT COPY VIA FIRST-CLASS U.S. MAIL, POSTAGE PREPAID
TO THE FOLLOWING ADDRESS;

Respectfully,

A handwritten signature in black ink, appearing to read "Michael E. Bostwick", written over a horizontal line.

Atty. For the Defendant/ Appellee

Michael E. Bostwick

6776 South 1300 East

Salt Lake City, UT. 84151