

2008

Joseph and Rene Naso v. Younzong "Frank" Fu : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Naso v. Fu*, No. 20080465 (Utah Court of Appeals, 2008).
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IN THE UTAH COURT OF APPEALS

JOSEPH NASO AND RENE (NASO)
EVANS,

Plaintiffs/Appellees,

vs.

YOUNZONG "FRANK" FU,

Defendant/Appellant.

REPLY BRIEF OF THE APPELLANT

Appellant Case No. 20080465

(District Court No. 080905490)

Appeal from the Third Judicial District Court, Salt Lake County, State of Utah
The Honorable Deno Himonas

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FILED
UTAH APPELLATE COURTS

JUN 08 2009

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ARGUMENT

Frank Fu's (Fu) Notice of Interest is not a wrongful lien because he established that his interest is one that is "expressly authorized by this chapter or another state or federal statute;" or the Notice of Interest is "signed or authorized pursuant to a document signed by the owner of real property." *See Utah Code Ann.*, § 38-9-1(6)(a) and (b). Alternatively, there is a *de facto* contract and the Statute of Frauds has been satisfied.

Where a party authorizes its agent to sell its real property, the agent sells the property, and the buyer pays the purchase price, the buyer may file a notice of interest to give any other potential buyers notice that he owns or has an interest in the property.

A. Requirement of Expressly Authorized by This Chapter or Another State or Federal Statute Has Been Satisfied.

Fu establishes in his Appeal Brief that he obtained an interest in the real property via the doctrine of Substantial Partial Performance. *See* Brief of Appellant at pp. 9-17 and *See Spears v. Warr*, 44 P.3d 742, 751 (Utah 2002). And, there is no question that Joseph Naso used and authorized his

agent Clyde Rhodes to sell his interest in his property to Fu and that Fu paid the sum of \$105,000.00 for an interest in the Tolin property and 5 others.¹ See Brief of Appellant at pp.11-17.

With this interest, Fu had the statutory right to file his notice of interest pursuant to Marketable Record Title Act at *Utah Code Ann.*, § 57-9-1, et seq. The Marketable Record Title Act at 57-9-4 states that “Any person claiming an interest in land may preserve and keep effective such interest by filing for record . . . a notice in writing” Frank Fu’s notice of interest is allowed by statute, satisfies the requirement in *Utah Code Ann.*, § 38-9-1(6)(a) and is not a wrongful lien.

B. There was a De Facto Contract and Statute of Frauds Should Be Found to Have Been Satisfied.

With very few exceptions, the transfer of real property is governed by *Utah Code Ann.*, § 25-5-1 which states in pertinent part as follows:

¹ It should be of interest to this Court that even though Naso is vigorously defending this appeal on the basis that Fu did not have an interest in Tolin and his Notice of Interest is a wrongful lien, in the ongoing case at Civil 080916174, Naso asserts that in fact he gave the Tolin Property to Fu for his \$105,000.00 investment. A copy of the pertinent portion of the discovery responses filed with counsel’s office alleging the same is attached hereto as Addendum “A.” See Addendum at a pp.4-6.

“[n]o estate or interest in real property . . . shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.”

In this case, the statute of frauds should be deemed to have been satisfied, by “operation of law.” As noted above, Naso sold his property to Frank Fu through his agent and the purchase price was paid. A contract was formed by “operation of law” by the doctrine of Substantial Partial Performance. The statute of frauds being satisfied and Fu’s filing of the Notice of Interest is not a wrongful lien, because it met the requirements of being “expressly authorized by this chapter or another state or federal statute;” or the Notice of Interest is “signed or authorized pursuant to a document signed by the owner of real property.” *See Utah Code Ann.*, § 38-9-1(6)(a) and (b).

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C. Where Substantial Doubt Has Been Raised as to Whether Property Has Been Transferred, Summary Proceedings on Wrongful Lien are Not Appropriate Because it Violates Due Process.

Where substantial doubt has been raised as to whether property has been sold or transferred, expedited wrongful lien hearing under *Utah Code Ann.*, 38-9-7(3)(b) is not appropriate because it denies parties due process of law.

Fu raised substantial doubt as to whether he had an interest in the real property; rather it is clear that he had an interest in the real property. Joseph Naso admitted under oath that he intended to sell his interest in Tolin and knew that his agent was trying to do so and there was apparent express and apparent authority for his agent to sell Tolin. Had discovery been allowed, Fu would have most likely discovered signed writing to prove his case *de jure*.

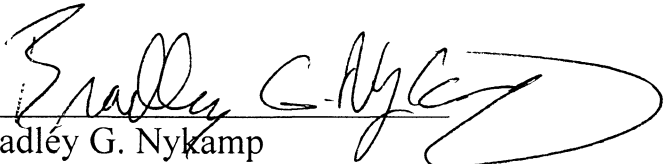
Summary proceedings provide very quick, effective and strong relief to protect those that have been the victim of a wrongful lien; however, it should not be used as a sword to create another victim that is entitled to a

lien. In this case, the expedited, summary proceedings denied Frank Fu his due process rights provided for by the Utah Constitution at Art. I., § 7. In a case such as this, where the weight of evidence suggests that the non-moving party will likely prevail in the normal course of litigation, a summary proceeding effectively denies a party his right to due process and the summary proceeding should not cut-off a parties' rights to be fairly heard. As such, the trial court should not have dismissed Fu's counterclaims.

CONCLUSION

This case should be remanded to the trial court so that it can consider the doctrine of substantial performance or find that the statute of frauds has been met or to allow for additional discovery to be completed. Fu should be awarded his attorney fees and costs associated with this appeal.

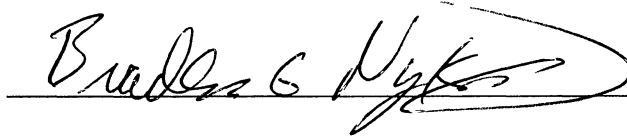
DATED this 5th day of June 2009.


Bradley G. Nykamp
Attorney for Appellant Frank Fu

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing REPLY BRIEF OF THE APPELLANT was mailed by first class mail this 5th day of June 2009 to the following:

Randy Birch
BOSTWIC & PRICE
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A handwritten signature in black ink, appearing to read "Braden G. Nyk", is written over a horizontal line.

ADDENDUM “A”

ADDENDUM “A”

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THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

SALT LAKE COUNTY

YUANZONG FU aka FRANK FU,

PLAINTIFF,

DEFENDANTS' RESPONSES TO
PLAINTIFF'S FIRST SET OF
INTERROGATORIES AND
REQUEST FOR PRODUCTION
OF DOCUMENTS

VS.

CLYDE RHODES, JOSEPH NASO,
RENE (NASO) EVANS, and S.
PARKER SMITH and JOHN DOES
I-V,

CASE No. 080916174

DEFENDANTS.

Judge

Defendants, hereby respond to the Plaintiff's First Set of Interrogatories and
Request for Production of Documents, as follows:

INTERROGATORY NO. 1: State every factual allegation or assertion that you will or may assert at any time in this case for your denying the allegations of Plaintiff's complaint paragraphs 2, 3, 4, 5, 6, 7, 9, 10, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 22, 24, 25, 26, 27, 29, 30, 31, 32, 34, 35, 37, 38, 39 40, 41, 42, 43, 44, 46, 47, 48, 50, 51, 52, 54, 55, 56, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68.

Response to Interrogatory No. 1:

Clyde Rhodes, president of P. G. I. Management, Incorporated (hereafter PGI), and PGI are residents of Salt Lake County, State of Utah, and have participated in the purchase, lease, and/or sale of approximately seventy residential properties since March 2002. In July 2007, six real properties and three notes were jointly owned and managed by PGI, Rene (Naso) Evans, and Joseph Naso.

Regarding the Loans of \$25,000, \$12,652, and \$20,000.

These loans have been paid in full. Regular, on-time payments were made beginning in March 2006 and continued until October 2007. When it became evident that PGI's cash-flow would no longer provide for timely payments, PGI transferred ownership of 3222 W Mark Avenue to Frank Fu.

Here are the details concerning the property at the time of the transfer on, or about, November 21, 2007:

3222 W Mark Ave, West Valley City, UT 84119

APN: 15-29-479-015 (Salt Lake County)

Value: \$202,365 Debt: \$125,000 Equity: \$75,000

At the time of the transfer, the tenant was several months late in rent payments and an eviction notice had already been served. The tenant and PGI were negotiating a compromise repayment plan when Frank Fu visited the tenant and instructed the tenant to stop all payments to PGI. (Frank Fu contacted and harassed many of PGI's tenants and associates; this significantly interfered with PGI's operations.)

In addition to the real property identified above, PGI also transferred to Frank Fu a promissory note with a current balance due that exceeded \$39,000. PGI explained the history of the note and acknowledged that it would be difficult to collect in full.

The balance of the loans that PGI owed to Frank Fu; including principal, interest, and penalties; was \$22,716. The combined potential equity in the property and the note was \$116,365. Rhodes explained to Frank Fu that the practical value conservatively exceeded \$60,000 (after brokerage fees and other settlement costs) and

required only that Frank Fu acknowledge that the three loans were paid in full and that he release the lien on 13575 South 1300 East, Draper, UT 84020.

These were very generous settlement terms done in part because of sympathy for Frank Fu, partly because of his persistent harassment, and partly because PGI was still "Equity Rich", or so it was believed in the fall of 2007.

These loans are fully satisfied and paid in full.

Regarding the Investment of \$105,000.

Generally, properties that were candidates for PGI's acquisition:

- 1) Could be purchased with at least \$40,000 equity; and
- 2) Had a qualified tenant already identified and committed.

Such was the situation with all of the real properties (as of July 2007) offered to

Yuanzong "Frank" Fu:

2411 W 1125 S, Syracuse, UT 84075

APN: 12-523-0207 (Davis County)

Value: \$380k Debt: \$310k Equity: \$70k

1144 W Brandonwood, Murray, UT 84123

APN: 21-14-132-007 (Salt Lake County)

Value: \$220,000 Debt: \$170,117 Equity: \$49,883

2292 W 13400 S, Riverton, UT 84065

APN: 27-33-478-007 (Salt Lake County)

Value: \$200,000k Debt: \$149,830 Equity: \$50,170

1217 W Pacific Ave, Salt Lake City, UT 84104

APN: 15-02-308-006 (Salt Lake County)

Value: \$116,417 Debt: \$77,686 Equity: \$78,371

991 S 900 W Heber City, UT 84032

APN: 00-0020-2270 (Wasatch County)

Value: \$337,768 Debt: \$283,823 Equity: \$53,945

3135 S Tolin St, West Valley City, UT 84120

APN: 14-25-427-003 (Salt Lake County)

Value: \$105,141 Debt: \$162,855 Equity: \$32,296

Total equity of these six properties was conservatively estimated to be \$295,023.

In addition to the real properties listed above, there were three notes offered to

Frank Fu.

2217 S 3600 E, Heber, UT 84032

APN: 00-0009-3596 (Wasatch County)

\$44,000 @ 10% Interest

3209 S Lamayrun, Magna, UT 84044

APN: 14-30-430-013 (Salt Lake County)

\$15,300 @ 12% Interest

2899 S Fetzer Dr, Magna, UT 84044

APN: 14-28-203-019 (Salt Lake County)

\$12,000 @ 16% Interest

These notes had a face value of \$71,300 and a projected value of \$84,893.

Total equity in the six properties and three notes was conservatively estimated to be valued at \$379,116. Frank Fu was (and is) a 50% owner of these properties and notes, so his portion was estimated to be worth \$189,558.

PGI provided Frank Fu with complete property descriptions and the details of the underlying debts. In every case, PGI also provided Frank Fu with conservative estimates of property values so as not to overstate profit potential or to understate the risks. Then PGI escorted Frank Fu to inspect each of the properties and to meet the tenants whenever practical. Frank Fu presented himself as a full-time, experienced, real estate investment professional.

Frank Fu and PGI agreed that the ownership of these properties and notes would be transferred to a newly formed company, to be known as L2O Homes. Frank Fu would purchase a 50% interest in L2O Homes for \$120,000.

At the time, we all believed that Frank Fu was purchasing \$189,558 of equity for \$120,000. Plus we were anticipating a modest appreciation and we expected that L2O Homes would pay Frank Fu an additional 16% on his investment. There was no deceit or misrepresentation. We were all investing (in hindsight, we might say speculating) in a strong real estate market.