

2008

Joseph Naso and Rene (Naso) Evans v. Younzong "Frank" Fu : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOSEPH NASO AND RENE (NASO)
EVANS,

Plaintiffs/Appellees,

vs.

YOUNZONG "FRANK" FU,

Defendant/Appellant.

BRIEF OF 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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JURISDICTIONAL STATEMENT

Jurisdiction rests with this Court pursuant to *Utah Code Ann.*, 78-2a-3(2)(j).

STATEMENT OF THE ISSUES

Issue 1: The trial court erred in failing to apply the doctrine of substantial partial performance and in only applying the statute of frauds analysis.

Standard of Review: De novo. “Questions of statutory interpretation are . . . questions of law that are reviewed ‘for correctness’ giving no deference to the [trial] court’s interpretation.” *Centennial Inv. Co., LLC, v. Nuttall*, 171 P.2d 458 (Utah Ct. App. 2007) (*citations omitted*). A review of summary proceedings under *Utah Code Ann.*, § 38-9-7 calls for statutory interpretation and presents a question of law; there is no deference given to the trial court’s legal conclusion. *Russell v. Thomas*, 999 P.2d 1244, 1246 (Utah Ct. App. 2000).

Preservation for Appeal: Record at pages 50-54.

Issue 2: The trial court erred in failing to deem the statute of frauds was satisfied where grantor admits that agent has authority to act on his behalf

and agent signs document conveying interest in real property.

Standard of Review: De novo. “Questions of statutory interpretation are . . . questions of law that are reviewed ‘for correctness’ giving no deference to the [trial] court’s interpretation.” *Centennial Investment Company, LLC, v. Nuttall*, 2007 UT App. 321, 171 P.2d 458 (Utah Ct. App. 2007) (*citations omitted*). A review of summary proceedings under *Utah Code Ann.*, § 38-9-7 calls for statutory interpretation and presents a question of law; there is no deference given to the trial court’s legal conclusion. *Russell v. Thomas*, 999 P.2d 1244, 1246 (Utah Ct. App. 2000).

Preservation for Appeal: Record at pages 50-54.

Issue 3: The District Court erred in dismissing Frank Fu’s counter-claim and cross-claim at the conclusion of the of the wrongful lien hearing, i.e. does a counter-claim survive the final order where the initial lawsuit is for a wrongful lien?

Standard of Review: De novo. “Questions of statutory interpretation are . . . questions of law that are reviewed ‘for correctness’ giving no deference to the [trial] court’s interpretation.” *Centennial Investment Company, LLC, v. Nuttall*, 2007 UT App. 321, 171 P.2d 458 (Utah Ct. App. 2007). A review of summary proceedings under *Utah Code Ann.*, § 38-9-7 calls for statutory interpretation and presents a question of law; there is no deference given to the trial court’s legal conclusion. *Russell v. Thomas*, 999 P.2d 1244, 1246 (Utah Ct. App. 2000).

Preservation for Appeal: Frank Fu argued that the counter-claims and cross-claims should not be dismissed.

CONSTITUTIONAL OR STATUTORY PROVISIONS OR RULES

Constitution Provisions: The due process clause at *Art. I, § 7* of the Utah Constitution which states “No person shall be deprived of life, liberty, or property, without due process of law.”

Statutory Provisions:

- 1) *Utah Code Ann.*, § 38-9-1, et seq. Wrongful Liens and Wrongful Judgment Liens. *See* Addendum “A” at the end of brief.
- 2) *Utah Code Ann.*, § 57-9-1. *See* Addendum “B” at the end of brief.
- 3) *Utah Code Ann.*, § 25-5-1. *See* Addendum “C” at the end of brief.

Rules:

Rule 13(b) of the Utah Rule of Civil Procedure: “A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction of occurrence that is the subject-matter of the opposing party’s claim.”

STATEMENT OF THE CASE

Nature of the Case & Procedural History

The issue in this case is whether Frank Fu's notice of interest on Tolin is proper or wrongful. Joseph Naso and Rene (Naso) Evans filed a complaint against Frank Fu on April 1, 2008, alleging that his notice of interest filed on two pieces of real property, Brandonwood and Tolin, constituted a wrongful lien. Frank Fu filed counter-claims and third-party claims alleging breach of contract, foreclosure, fraudulent transfer, common law fraud and negligent misrepresentation. These claims were filed because Frank Fu believes that Clyde Rhodes and Joseph Naso, among others, conspired together to cheat him out of the \$105,000.00 he paid for an interest in real property in this case, plus other money he loaned totaling about \$50,000.00.

Judge Deno Himonas started an expedited hearing on Joseph Naso and Rene (Naso) Evans' wrongful lien claim, pursuant to *Utah Code Ann.*, § 39-9-7, late in the afternoon on June 15th and finished it on the 16th.

At the conclusion of the hearing Judge Himonas ruled that Frank Fu's notice of interest on Brandonwood was proper but as to Tolin it was wrongful. Judge Himonas reasoned that while Rene (Naso) Evans had signed a warranty

deed conveying her interest in Tolin, Joseph Naso had not signed the warranty deed or any document conveying his interest and thus the applicable statute of frauds was not satisfied. Judge Himonas ruled as he did even though Frank Fu paid \$105,000.000 which was supposed to include an interest in both Brandonwood and Tolin.

The Order finding the wrongful lien was signed by Judge Deno Himonas on May 12, 2008. Judge Himonas also dismissed Frank Fu's counter-claims and third-party claim. Frank Fu appeals those decisions.

Statement of Facts

The facts relevant to the issues on appeal are as follows: Joseph and Rene Evans (Naso) knew that an interest in two pieces of property, Brandonwood and Tolin, were being offered by Clyde Rhodes to Frank Fu. (*See R. at page 51-52.*) There is no issue as to whether Rene Naso transferred her interest to Frank Fu through her agent Clyde Rhodes, *see R. at p. 59:25, and 60:1-14*, the only issue is whether Joseph Naso did because he did not sign the warranty deed.

Joseph Naso testified under oath that he “knew [Clyde Rhodes] was acting for us,” *see* R. at pp. 55:25 and 56:1-4, i.e. on behalf of Joseph and Rene Naso. Joseph Naso also testified that he intended Tolin to be part of a buyout that was being brokered by Clyde Rhodes, *see* Court Transcript at 55:25 and 56:1-2, and knew that Frank Fu was relying on Tolin being part of the buyout. (*See* Court Transcript at pp. 55:4-9, 53, 52, 52:10-16 and R. at p. 74-75, 66, 51:7-8, 52:8-9.) And, as part of that buyout, Frank Fu paid the sum of \$105,000.00 to Clyde Rhodes, via his dba L2O Homes, LLC and PGI Management, Inc., and Frank Fu was supposed to receive an interest in both Brandonwood and Tolin. *See* R. at pp 51-52, 77, and 84. Because Clyde Rhodes, Joseph Naso and Rene Evans refused to acknowledge Frank Fu’s interest in Tolin he filed a notice of interest on the same.

SUMMARY OF ARGUMENT

In this case, Joseph Naso intended to convey his interest in real property to Frank Fu through his agent Clyde Rhodes. His agent Clyde Rhodes signed a document conveying that interest and Frank Fu paid \$105,000.00 for the

interest. The only missing piece in the case is a document Joseph Naso signed giving his agent authority to convey his interest in the property. However this missing piece should be deemed satisfied since Joseph Naso testified under oath that Clyde Rhodes is his agent, he intended to convey his interest in Tolin to Frank Fu and new that Frank Fu was relying on Tolin being part of the deal.

The facts of this case satisfy the doctrine of substantial performance and should also be deemed to have complied with the statute of frauds.

ARGUMENT

The trial court's decision that Frank Fu's notice of interest on Tolin is a wrongful lien is not correct. The actions by the parties in this case satisfy the doctrine of "sufficient partial performance" or the requisite statute of frauds and therefore Frank Fu obtained an interest in Tolin. The trial court did not consider the doctrine of sufficient partial performance and should have. And, under the principles of general agency law the statute of frauds should also be deemed to be met. Additionally, the trial court's dismissal of Frank Fu's

counter-claims and third-party claims is in error, as such claims are specifically allowed pursuant to *Utah R. Civ. P.* 13(b) even in a wrongful lien action.

I. JOSEPH NASO’S INTEREST IN TOLIN WAS TRANSFERRED TO FRANK FU UNDER THE DOCTRINE OF “SUFFICIENT PARTIAL PERFORMANCE.”

In Utah an interest in real property may be transferred orally outside the statute of frauds under the equitable doctrine of “sufficient partial performance.” The Utah Supreme Court set forth the elements for Sufficient Partial Performance in *Spears v. Warr*, 44 P.3d 742, 751 (Utah 2002), as follows:

[1] the oral contract must be clear and definite; [2] the acts done in performance of the contract must be equally clear and definite; and [3] the act must be in reliance on the contract. Such acts in reliance must be such that they would not have been performed had the contract not existed, and (b) the failure to perform on the part of the promisor would result in fraud on the performer who relied since damages would be inadequate.

The word “oral” also includes acts. *Id.*

This case meets every required element for Sufficient Partial Performance set forth in *Warr* and the trial court should have found the transfer of property valid.

A. The terms of the oral contract are clear.

The terms of the contract between Frank Fu and Joseph Naso are clear and are as follows: Frank Fu was to pay the sum of \$105,000.00 to Clyde Rhodes, the actual and apparent agent¹ of Joseph Naso and in exchange Frank Fu was to receive an interest in property including Tolin. There can be no reasonable dispute that these are the terms and information set forth below establishes the same.

After various negotiations, Clyde Rhodes sent an email to Frank Fu on July 18, 2007, which contained the Tolin property and stated that “Joey and

¹ It cannot be reasonably disputed that Clyde Rhodes is the agent of Joseph Naso in this transaction. Joseph Naso admitted that Clyde Rhodes had authority to offer Tolin in the package deal and intended that it be offered. *See* Court Transcript at pp. 50-53 and R. at pp. 66, 74-75. And Joseph Naso testified that “I knew he was acting for us” *See* Court Transcript at pp. 55:25 and 56:1-4.

Rene are committed. No turning back” and that he needed “\$110,000.00² before Monday evening” because Joey Naso is going out of town. R. at p. 74-75.

At the hearing it was pointed out to Mr. Naso that the email stated “Joey and Rene are committed, no turning back,” *see* Court Transcript at p. 55:4, Joseph responded with “Yes, that sounds right.” *See* Court Transcript at p. 55:6. And again he was asked, “so you were committed and there was no turning back?” he responded with “Yes.” *See* Court Transcript at p. 55:6-9.

Frank Fu was also given a spreadsheet from Clyde Rhodes that was captioned “FRANK FU – BUY-OUT – JOEY NASO AND RENE EVANS” and this spreadsheet included the Tolin property. *See* R. at p. 66. Joseph Naso admits that he saw this spreadsheet but would not confirm when he saw it. *See* R. at p. 66.

Joseph Naso also testified at the hearing when referring to the deal “At one point I told Clyde, sounds good, sounds okay”³ And when Joseph

² There is no dispute that the amount was later reduced to \$105,000.00 as this is the most money the bank would loan Frank Fu at the time.

Naso was asked “Did you know that Tolin Street was part of a potential buyout?” by Frank Fu he answered “I did. I knew it was part of it.” *See R.* at p 51:7-8. Under additional questioning Mr. Naso was asked if he “knew that Tolin Street was part of the buyout . . .” he responded “Yes, I did.” *See R.* at p 52:8-9.

He was also asked “Did you know that Mr. Fu was relying on Tolin Street being part of the deal?” and he answered “Yes, I knew that, Yes, I knew that.” *See Court Transcript* at p. 53. And when Joseph Naso was asked “. . . you did intend Tolin Street – you knew Tolin Street was going to be part of the deal?” he responded “Yes.” *See Court Transcript* at p. 52.) And again when asked if he “intended it to be part of the deal?” he responded “That’s correct.” *Id.*

³ Joseph qualifies this statement by adding that when he got the paperwork he did not sign it claiming he got “cold feet.” *See Court Transcript* p. 54:22-25 and p. 55:1-4. However, there is no indication ever that this message was conveyed to Frank Fu who actually paid the money.

Additionally, it is clear that the purchase price Mr. Fu was to pay for the interest in Tolin, and other property, was \$105,000.00⁴. *See* Court Transcript at p. 52:10-16.

Based on the foregoing it is clear that Joseph Naso intended to sell his interest in Tolin to Frank Fu, that Clyde Rhodes had authority to broker the deal, that Joseph Naso intended it to be part of the deal, and knew full well that Frank Fu was relying on it to be part of the deal. And finally, that the price that was to be paid for an interest in Tolin and other property was \$105,000.00 and that the sum was to be paid to Clyde Rhodes. *See* Record at p. 52:11-12.

B. The acts done in performance are also clear and definite.

⁴ Mr. Naso testified that of the \$105,000.00 paid to Clyde Rhodes, he and Rene were to get \$60,000.00 which they would then split. *See* Record at p. 52:11-12.

The next question is what was done in performance that was also clear and definite. All of the points set forth in section "A." immediately above apply, i.e. the emails, the spread-sheets, the expectations and reliance by the parties and based on the communications, the spreadsheets, the expectations and reliance on these and other representations, Frank Fu obtained a loan from Washington Mutual Bank for \$105,000.00. *See R.* at p. 72. Further, Clyde Rhodes signed a Promissory Note for the \$105,000.00, the amount Frank Fu paid and the Note had as its security an interest in all of the assets of L2O⁵ which includes Tolin. *See R.* at pp. 72 and 84. And, Frank Fu paid the \$105,000.00 to Clyde Rhodes. While Joseph Naso testified that he never received the \$60,000.00 of the \$105,000.00 that he was supposed to receive from Clyde Rhodes, this was never contemplated to be part of the contract and no one has ever asserted that it was; that agreement was strictly between

⁵ Clyde Rhodes conducted this transaction through a couple different names, PGI Management, Inc. and L2O Homes, LLC. L2O Homes, LLC was never created, *see R.* at p. 14:6-8, and therefore the check for the \$105,000.00 was paid to PGI, Inc. *See R.* Court Transcript at p.72. Additionally Frank Fu was to be 50% owner in L2O Homes, LLC and is at least a partner with Clyde Rhodes for purposes of receiving an interest in Tolin. A recent review of the Department of Corporations reveals that PGI, Inc. may not have been formally created either.

Joseph Naso and his agent Clyde Rhodes. *See* Court Transcript 52:8-19. The facts remains that the price for an interest in the package of property which included Tolin was \$105,000.00 and the same was to be paid to Clyde Rhodes aka PGI Management, Inc., and it was in fact paid. *See* Court Transcript p. 52:11-16 and R. at p. 66, 74-75, 77, 72.

C. Frank Fu would not have paid the \$105,000.00 if there was no contract and the failure to perform on the part of Joseph Naso results in fraud on Frank Fu.

The only reason that Frank Fu paid the \$105,000.00 was for an interest in real property which included Tolin and Frank Fu has never been refunded any of the money he paid. As set forth above, Joseph Naso intended Tolin to be part of the contract, knew it was part of the contract, and knew that Frank Fu was relying on it being part of the contract. Unless this court deems Frank Fu's notice of interest is valid and the trial court's decision is reversed, a fraud will result on Frank Fu who relied upon the actions and inactions of Joseph Naso and the representations and actions of his agent Clyde Rhodes.

D. Summary of Substantial Partial Performance.

The trial court did not consider substantial partial performance when analyzing Frank Fu's Notice of Interest. It relied merely on the fact that Joseph Naso did not sign the warranty deed transferring his interest. Frank Fu argued that the Joseph Naso should be estopped in claiming it did not transfer his interest, *see* Court Transcript at p. 61, he also argued that the court would be sanctioning a fraud, *see* Court Transcript at pp. 43:25 and 44:1-10, if it failed to find his Notice of Interest was valid. All of the elements of the elements of substantial partial performance are met and this matter should be remanded to the trial court so that the trial court's decision can be corrected.

II. ALTERNATIVELY, FRANK FU'S NOTICE OF INTEREST IS NOT A WRONGFUL LIEN BECAUSE HE HAD AN ARGUABLE BASIS FOR FILING THE SAME AND HIS ARGUMENTS ARE SUPPORTED BY CREDIBLE EVIDENCE.

Alternatively, Frank Fu's notice of interest is a lien allowed by statute and not in violation of wrongful lien act. A lien is not wrongful if at the time it is recorded it is expressly authorized by statute. *See Utah Code Ann.*, § 38-

9-1(6)(a). The Marketable Record Title Act at *Utah Code Ann.*, § 57-9-1 states:

Any person claiming an interest in land may preserve and keep effective such interest by filing for recording during the forty-year period immediately rolling the effective date of the root title of the person whose record title would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim.

In this case, Frank Fu obtained an interest in Tolin under the doctrine of substantial partial performance as argued above. Being thus qualified, Frank Fu is permitted to file his notice of interest pursuant to the Marketable Record Title Act which exempts it as a wrongful lien. *See Utah Code Ann.*, 38-9-1(6)(a). The trial court erred when it failed to recognize Frank Fu's interest as a statutorily lawful claim.

Joseph Naso may argue that Frank Fu did not have an interest in Tolin because while Rene Evans (Naso) had signed the warranty deed, Joseph Naso did not and this exact scenario was already litigated and decided in *Centennial Inv. Co., LLC v. Nuttal*, 171 P.3d 458, 462 (Utah Ct. App. 2007). If the facts stopped there, they would be correct; however, the facts do not stop there.

This case is different from *Centennial* in that equitable doctrines set forth above give Frank Fu an interest in Tolin. Joseph Naso's nefarious use of the law to perpetrate the fraud should not be condoned.

**III. THE STATUTE OF FRAUDS SHOULD BE
DEEMED TO BE SATISFIED WHERE A
PARTY ADMITS UNDER OATH THAT
THEIR AGENT HAD AUTHORITY TO
CONVEY LAND AND THE AGENT SIGNED
A WRITING CONVEYING AN INTEREST IN
LAND.**

Frank Fu believes that the arguments above are sufficient to prove his notice of interest is valid and that it is not a wrongful lien. However, Frank Fu also offers this additional argument to prove his case.

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:

“[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,” *id.*, because Clyde Rhodes, acting as Joseph Naso’s agent, offered Tolin for sale to Frank Fu, Frank Fu accepted the offer and paid \$105,000.00 for an interest in Tolin and Clyde Rhodes signed a document transferring the interest. The only missing element is the signed writing between Joseph Naso and Clyde Rhodes giving Clyde Rhodes the authority to convey the interest in Tolin. However, this element should be deemed satisfied because in this case, Joseph Naso testified that Clyde Rhodes had the authority and this should supplant or satisfy the writing element, i.e. Joseph Naso should be estopped from claiming that Clyde Rhodes signature is his signature.

The problem with summary proceedings such as one conducted under *Utah Code Ann.*, 38-9-7(3)(b) is that the non-moving party has no time to conduct discovery. In a case like this, discovery is crucial. 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. Additionally, there was a signed writing

by the agent selling or assigning the interest to Frank Fu. *See* R. at pp. 74-75, 77 and 84. With discovery, Frank Fu, with an almost certainty, would have discovered a signed writing to satisfy the statute of frauds requirement. Given Frank Fu's counter-claims and cross claims, *see* R. at pp. 18-33, the court should have at a minimum allowed the case to proceed and should not have decided the case under the summary proceedings so that Frank Fu could have conducted discovery.

While the summary proceeding section provides a great protection to shield those that have been the victim of a wrongful lien, it should not be used as a sword to create another victim that is entitled to a lien. The summary proceeding in this case has denied Frank Fu of his due process rights provided for by the Utah Constitution at Art. I., § 7. In this case there is almost no doubt if Frank Fu was allowed to conduct discovery he would have been able to marshal evidence to support his claim.


In a case such as this case, 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 Mr. Fu of his right to due process.

This matter should be remanded to the trial court with the instruction that the matter proceed under the normal course of litigation so that discovery may be conducted.

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.

DATED this 14th day of October 2008.

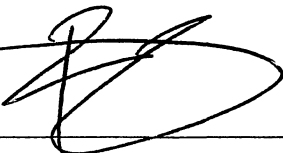


Bradley G. Nykamp
Attorney for Appellant Frank Fu

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Docketing Statement was mailed by first class mail this 14th day of October 2008 to the following:

Randy Birch
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ADDENDUM “A”

CHAPTER 9

WRONGFUL LIENS AND WRONGFUL JUDGMENT LIENS

Section

- 38-9-1 Definitions.
- 38-9-2. Scope.
- 38-9-3. County recorder may reject wrongful lien within scope of employment—Good faith requirement.
- 38-9-4. Civil liability for filing wrongful lien—Damages.
- 38-9-5. Criminal liability for filing a wrongful lien—Penalties.
- 38-9-6. Petition to file lien—Notice to record interest holders—Summary relief—Contested petition.
- 38-9-7. Petition to nullify lien—Notice to lien claimant—Summary relief—Finding of wrongful lien—Wrongful lien is void.

§ 38-9-1. Definitions

As used in this chapter

(1) “Interest holder” means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, title holder, mortgagee, trustee, or beneficial owner.

(2) “Lien claimant” means a person claiming an interest in real property who offers a document for recording or filing with any county recorder in the state asserting a lien or other claim of interest in certain real property.

(3) “Owner” means a person who has a vested ownership interest in certain real property.

(4) “Record interest holder” means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, titleholder, mortgagee, trustee, or beneficial owner, and whose name and interest in that real property appears in the county recorder’s records for the county in which the property is located.

(5) “Record owner” means an owner whose name and ownership interest in certain real property is recorded or filed in the county recorder’s records for the county in which the property is located.

(6) “Wrongful lien” means any document that purports to create a lien or encumbrance on an owner’s interest in certain real property and at the time it recorded or filed is not:

- (a) expressly authorized by this chapter or another state or federal statute;
- (b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or
- (c) signed by or authorized pursuant to a document signed by the owner of the real property.

ws 1997, c. 125, § 2, eff. May 5, 1997.

History and Statutory Notes

Former § 38-9-1, derived from Laws 1985 c 182, related to liability of person filing wrongful lien

Cross References

Recording of judgment in registry of judgments, see § 78-22-1.5

Research References

ALR Library

61 ALR 4th 464, What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other Than Immediate Client

Treatises and Practice Aids

Punitive Damages State-by-State Guide § 8.54, Utah

Notes of Decisions

Liabilities to third persons 2
Wrongful lien 1

1. Wrongful lien

The statutory 'notice of interest' recorded against real property was a "lien" or "encumbrance," within meaning of statute defining a 'wrongful lien' in part as a lien or encumbrance UCA 1953, 38-9-1(6) Russell v Thomas, 2000, 999 P 2d 1244, 391 Utah Adv Rep 19, 2000 UT App 82 Liens ⇨ 16

Purchaser's notice of interest in entire 38-acre tract of land could be considered "groundless," under statute authorizing damages award against party who groundlessly claims such an interest in document filed in office of county recorder and who willfully refuses to correct record, where purchaser had contract for purchase of only 16 acres, and evidence was presented that purchaser had received requested survey from vendors but refused to designate the 16 acres which were subject of parties' agreement or to release its notice of interest against other 22 acres UCA 1953, 38-9-1 Commercial Inv Corp v Siggard, 1997, 936 P 2d 1105, 314 Utah Adv Rep 41, certiorari denied 945 P 2d 1118 Libel And Slander ⇨ 134

Notice of interest in real property will be considered "groundless," for purposes of statute authorizing treble damages award against party who groundlessly claims such an interest in document filed in office of county recorder and

who willfully refuses to correct record, if party did not have arguable basis for filing notice or if party's reasons for filing notice were not supported by any credible evidence UCA 1953, 38-9-1 Commercial Inv Corp v Siggard, 1997, 936 P 2d 1105, 314 Utah Adv Rep 41 certiorari denied 945 P 2d 1118 Libel And Slander ⇨ 134

2. Liabilities to third persons

Ex-husband's wrongful lien claim against ex-wife's former attorney, for filing his pendens against husband's property, was not mooted when court, in post-dissolution enforcement proceedings directed removal of his pendens and substitution of restraining order, as ex-husband's ability to pursue statutory wrongful lien claim was not barred upon removal of encumbrance UCA 1953, 38-9-1 Winters v Schulman, 1999, 977 P 2d 1218, 367 Utah Adv Rep 19, 1999 UT App 119, certiorari denied 994 P 2d 1271 Attorney And Client ⇨ 26

Out-of-state attorney had reason to know that her filing of his pendens was groundless absent pending action affecting title or possession of property, and thus was liable for filing wrongful lien, as attorney should have reviewed Utah law before filing his pendens in state, and should have determined that his pendens was not viable had she done so UCA 1953, 38-9-1, 78-40-2 Winters v Schulman, 1999, 977 P 2d 1218, 367 Utah Adv Rep 19, 1999 UT App 119, certiorari denied 994 P 2d 1271 Attorney And Client ⇨ 26

§ 38-9-2. Scope

(1)(a) The provisions of Sections 38-9-1, 38-9-3, 38-9-4, 38-9-5, and 38-9-6 apply to any recording or filing or any rejected recording or filing of a lien pursuant to this chapter on or after May 5, 1997.

(b) The provisions of Sections 38-9-1 and 38-9-7 apply to all liens of record regardless of the date the lien was recorded or filed

(2) The provisions of this chapter shall not prevent a person from filing a lis pendens in accordance with Section 78-40-2 or seeking any other relief permitted by law.

(3) This chapter does not apply to a person entitled to a lien under Section 38-1-3 who files a lien pursuant to Title 38, Chapter 1, Mechanics' Liens. Laws 1997, c. 125, § 3, eff. May 5, 1997; Laws 1999, c. 122, § 1, eff. May 3, 1999.

Historical and Statutory Notes

Former § 38-9-2, derived from Laws 1985, c. 182, related to the invalidity of documents pur-
 porting to claim a lien not authorized by statute, judgment, or other specific legal authority.

§ 38-9-3. County recorder may reject wrongful lien within scope of employment—Good faith requirement

(1) A county recorder may reject recording of a lien if the county recorder determines the lien is a wrongful lien as defined in Section 38-9-1. If the county recorder rejects the document, the county recorder shall immediately return the original document together with a notice that the document was rejected pursuant to this section to the person attempting to record or file the document or to the address provided on the document.

(2) A county recorder who, within the scope of the county recorder's employment, rejects or accepts a document for recording or filing in good faith under this section may not be liable for damages except as otherwise provided by law.

(3) If a rejected document is later found to be recordable pursuant to a court order, it shall have no retroactive recording priority.

(4) Nothing in this chapter shall preclude any person from pursuing any remedy pursuant to Utah Rules of Civil Procedure, Rule 65A, Injunctions. Laws 1997, c. 125, § 4, eff. May 5, 1997.

Historical and Statutory Notes

Former § 38-9-3, derived from Laws 1985, c. 182, related to liability of person refusing to correct document containing wrongful lien.

Cross References

County recorder, powers and duties, see § 17-21-1.

Library References

Records ⇌ 3, 6 to 8. C.J.S. Records §§ 4 to 18.
 Westlaw Key Number Searches: 326k3;
 326k6 to 326k8.

Research References

Treatises and Practice Aids

Punitive Damages State-by-State Guide
 § 8.54, Utah.

§ 38-9-4. Civil liability for filing wrongful lien—Damages

(1) A lien claimant who records or files or causes a wrongful lien as defined in Section 38-9-1 to be recorded or filed in the office of the county recorder against real property is liable to a record interest holder for any actual damages proximately caused by the wrongful lien.

(2) If the person in violation of this Subsection (i) refuses to release or correct the wrongful lien within 20 days from the date of written request from a record interest holder of the real property delivered personally or mailed to the last-known address of the lien claimant, the person is liable to that record interest holder for \$1,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs.

(3) A person is liable to the record owner of real property for \$3,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs, who records or files or causes to be recorded or filed a wrongful lien as defined in Section 38-9-1 in the office of the county recorder against the real property, knowing or having reason to know that the document:

- (a) is a wrongful lien;
- (b) is groundless; or
- (c) contains a material misstatement or false claim.

Laws 1997, c. 125, § 5, eff. May 5, 1997.

Historical and Statutory Notes

Former § 38-9-4, derived from Laws 1985, c. 182, related to actions to clear title and to costs and attorney fees.

Library References

Attorney and Client ☞26	C.J.S. Attorney and Client § 140.
Libel and Slander ☞130 to 139.	C.J.S. Libel and Slander; Injurious Falsehood
Lis Pendens ☞20.	§§ 204 to 216.
Westlaw Key Number Searches: 237k130 to 237k139; 45k26; 242k20.	C.J.S. Lis Pendens §§ 14, 24 to 30, 42.

Research References

Treatises and Practice Aids

Trial Handbook for Utah Lawyers § 32:25,
Wrongful liens, damages.

Notes of Decisions

Persons liable for damages 1

1. Persons liable for damages

Trust beneficiary did not willfully refuse to release lis pendens placed on trust property that was the subject of beneficiary's litigation with trustee, and thus beneficiary was not liable for

damages to trustee under statute requiring lien claimant who does not comply with notice requirements and willfully refuses to release lien to pay damages U.C.A.1953, 38-9-4, 38-12-102, 38-12-103. In re Estate of Flake. 2003, 71 P 3d 589, 472 Utah Adv. Rep. 18. 2003 UT 17, rehearing denied. Lis Pendens ☞ 20

§ 38-9-5. Criminal liability for filing a wrongful lien—Penalties

(1) A person who intentionally records or files or causes to be recorded or filed a wrongful lien with a county recorder is guilty of a class B misdemeanor. Under this Subsection (1), it is an affirmative defense to this offense that the person recorded or filed a release of the claim or lien within 20 days from the date of written request from a record interest holder that the wrongful lien be released. The accused person shall prove this affirmative defense by a preponderance of the evidence.

(2) A person who intentionally records or files or causes to be recorded or filed a wrongful lien with the county recorder is guilty of a third degree felony if, at the time of recording or filing, the person knowingly had no present, lawful property interest in the real property and no reasonable basis to believe he had a present, lawful property interest in the real property.

(3) Nothing in this section shall bar a prosecution for any act in violation of Section 76-8-414.

Laws 1997, c. 125, § 6, eff. May 5, 1997.

Cross References

Attempt, elements and classification, see §§ 76-4-101 and 76-4-102.
 Conspiracy and solicitation, elements and penalties, see § 76-4-201 et seq.
 Fines upon conviction of misdemeanor or felony, see § 76-3-301.
 Inchoate offenses, limitations on sentencing, see §§ 76-4-301 and 76-4-302.
 Penalties for felonies, see § 76-3-203.
 Penalties for misdemeanors, see § 76-3-204.
 Right to trial by jury, see Const. Art. 1, § 10

Library References

Libel and Slander ⇐141.	C.J.S. Libel and Slander; Injurious Falsehood
Lis Pendens ⇐20.	§ 7.
Westlaw Key Number Searches: 242k20; 237k141.	C.J.S. Lis Pendens §§ 14, 24 to 30, 42.

§ 38-9-6. Petition to file lien—Notice to record interest holders—Summary relief—Contested petition

(1) A lien claimant whose document is rejected pursuant to Section 38-9-3 may petition the district court in the county in which the document was rejected for an expedited determination that the lien may be recorded or filed.

(2)(a) The petition shall be filed with the district court within ten days of the date notice is received of the rejection and shall state with specificity the grounds why the document should lawfully be recorded or filed.

(b) The petition shall be supported by a sworn affidavit of the lien claimant.

(c) If the court finds the petition is insufficient, it may dismiss the petition without a hearing.

(d) If the court grants a hearing, the petitioner shall serve a copy of the petition, notice of hearing, and a copy of the court's order granting an expedited hearing on all record interest holders of the property sufficiently in

advance of the hearing to enable any record interest holder to attend the hearing and service shall be accomplished by certified or registered mail.

(e) Any record interest holder of the property has the right to attend and contest the petition.

(3) Following a hearing on the matter, if the court finds that the document may lawfully be recorded, it shall issue an order directing the county recorder to accept the document for recording. If the petition is contested, the court may award costs and reasonable attorney's fees to the prevailing party.

(4) A summary proceeding under this section is only to determine whether or not a contested document, on its face, shall be recorded by the county recorder. The proceeding may not determine the truth of the content of the document nor the property or legal rights of the parties beyond the necessary determination of whether or not the document shall be recorded. The court's grant or denial of the petition under this section may not restrict any other legal remedies of any party, including any right to injunctive relief pursuant to Rules of Civil Procedure, Rule 65A, Injunctions.

(5) If the petition contains a claim for damages, the damage proceedings may not be expedited under this section.

Laws 1997, c. 125, § 7, eff. May 5, 1997.

Cross References

Costs awarded upon judgment, see Rules Civ. Proc., Rule 54.

Library References

Lis Pendens Ⓒ12.

Records Ⓒ3 to 7.

Westlaw Key Number Searches: 326k3 to 326k7, 242k12.

C.J.S. Lis Pendens §§ 11, 14, 24 to 30, 42.

C.J.S. Records §§ 4 to 14, 17 to 20.

§ 38-9-7. Petition to nullify lien—Notice to lien claimant—Summary relief—Finding of wrongful lien—Wrongful lien is void

(1) Any record interest holder of real property against which a wrongful lien as defined in Section 38-9-1 has been recorded may petition the district court in the county in which the document was recorded for summary relief to nullify the lien.

(2) The petition shall state with specificity the claim that the lien is a wrongful lien and shall be supported by a sworn affidavit of the record interest holder.

(3)(a) If the court finds the petition insufficient, it may dismiss the petition without a hearing.

(b) If the court finds the petition is sufficient, the court shall schedule a hearing within ten days to determine whether the document is a wrongful lien.

(c) The record interest holder shall serve a copy of the petition on the lien claimant and a notice of the hearing pursuant to Rules of Civil Procedure, Rule 4, Process.

(d) The lien claimant is entitled to attend and contest the petition.

(4) A summary proceeding under this section is only to determine whether or not a document is a wrongful lien. The proceeding shall not determine any other property or legal rights of the parties nor restrict other legal remedies of any party.

(5)(a) Following a hearing on the matter, if the court determines that the document is a wrongful lien, the court shall issue an order declaring the wrongful lien void ab initio, releasing the property from the lien, and awarding costs and reasonable attorney's fees to the petitioner.

(b)(i) The record interest holder may record a certified copy of the order with the county recorder.

(ii) The order shall contain a legal description of the real property.

(c) If the court determines that the claim of lien is valid, the court shall dismiss the petition and may award costs and reasonable attorney's fees to the lien claimant. The dismissal order shall contain a legal description of the real property. The prevailing lien claimant may record a certified copy of the dismissal order.

(6) If the district court determines that the lien is a wrongful lien as defined in Section 38-9-1, the wrongful lien is void ab initio and provides no notice of claim or interest.

(7) If the petition contains a claim for damages, the damage proceedings may not be expedited under this section.

Laws 1997, c. 125, § 8, eff. May 5, 1997.

Cross References

Costs awarded upon judgment, see Rules Civ Proc, Rule 54

Library References

Libel and Slander ⇨139	C.J.S. Libel and Slander, Injurious Falsehood
Liens ⇨16	§§ 212 to 216
Lis Pendens ⇨20	C.J.S. Liens §§ 19 to 28
Westlaw Key Number Searches 242k20; 239k16, 237k139	C.J.S. Lis Pendens §§ 14, 24 to 30, 42

Notes of Decisions

Interest in real property 2

Notice of discharge 1

Thomas, 2000, 999 P 2d 1244, 391 Utah Adv. Rep. 19, 2000 UT App 82 Liens ⇨ 16

2. Interest in real property

1. Notice of discharge

The statutory 'notice of interest' recorded against real property was a "lien" or "encumbrance," within meaning of statute defining a 'wrongful lien' in part as a lien or encumbrance U C A 1953, 38-9-1(6) Russell v

Whether the interest retained by vendors was an interest in land or a contractual right was governed by the purchase and development agreement executed by vendors and purchasers Russell v Thomas, 2000, 999 P 2d 1244, 391 Utah Adv Rep 19, 2000 UT App 82 Vendor And Purchaser ⇨ 204

ADDENDUM “B”

CHAPTER 9

MARKETABLE RECORD TITLE

Section

- 57-9-1. What constitutes marketable record title.
- 57-9-2. Rights and interests to which marketable record title is subject.
- 57-9-3. Marketable record title held free and clear of interests, claims, and charges.
- 57-9-4. Filing of notice of claim of interest authorized—Effect of possession of land by record owner of possessory interest.
- 57-9-5. Notice of claim of interest—Contents—Filing for record.
- 57-9-6. Applicability of provisions.
- 57-9-7. Existing statutes of limitations and recording statutes not affected.
- 57-9-8. Definitions.
- 57-9-9. Legislative purpose and construction.
- 57-9-10. Extension of limitation period.

§ 57-9-1. What constitutes marketable record title

Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for forty years or more, shall be deemed to have a marketable record title to such interest as defined in section 57-9-8, subject only to the matters stated in section 57-9-2. A person shall be deemed to have such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in

(1) the person claiming such interest or

(2) some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest: with nothing appearing of record, in either case, purporting to divest such claimant of such purported interest.

Laws 1963, c. 109, § 1.

Library References

Vendor and Purchaser ¶130(2).
Westlaw Key Number Search: 400k130(2).
C.J.S. Vendor and Purchaser § 326.

Research References

Treatises and Practice Aids

3 Patton and Palomar on Land Titles § 563.
Bar of Encumbrance by Laches, Statutes of
Limitation, & Marketable Title Acts.

ADDENDUM “C”

CHAPTER 5

STATUTE OF FRAUDS

Section

- 25-5-1 Estate or interest in real property
- 25-5-2 Wills and implied trusts excepted
- 25-5-3 Leases and contracts for interest in lands
- 25-5-4 Certain agreements void unless written and signed
- 25-5-5 Representation as to credit of third person
- 25-5-6 Promise to answer for obligation of another—When not required to be in writing
- 25-5-7 Contracts by telegraph deemed written
- 25-5-8 Right to specific performance not affected
- 25-5-9 Agent may sign for principal

§ 25-5-1. Estate or interest in real property

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, 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.

Codifications R S 1898, §§ 1974, 2461, C L 1907, §§ 1974, 24612, C L 1917, §§ 4874, 5811, R S 1933, § 33-5-1, C 1943, 33-5-1

Cross References

Contract formation, statute of frauds, see § 70A-2-201
 Insurance rehabilitation, statute of frauds defense, see § 31A-27-314
 Investment securities, statute of frauds inapplicable, see § 70A-8-112
 Leases, statute of frauds, see § 70A-2a-201 et seq
 Personal property, statute of frauds, see § 70A-1-206

Library References

Frauds, Statute of §§ 55 to 71
 Westlaw Key Number Searches 185k55 to 185k71

Research References

ALR Library

6 A L R 2nd 1053, Performance as Taking Contract Not to be Performed Within a Year Out of the Statute of Frauds

Forms

23 Am Jur Pl & Pr Forms Statute of Frauds § 2, Statutory References
 24 Am Jur Pl & Pr Forms Trusts § 3, Statutory References
 24 Am Jur Pl & Pr Forms Trusts § 6, Statutory References
 24 Am Jur Pl & Pr Forms Trusts § 43, Statutory References

24 Am Jur Pl & Pr Forms Trusts § 44
 Statutory References-Statutes of Fraud

Treatises and Practice Aids

179 BNA Daily Report for Executives K-11, 1999, Real Property Tax Facts
 179 BNA Daily Tax Report K-11, 1999, Real Property Tax Facts

Treatises and Practice Aids

Bogert - The Law of Trusts and Trustees § 62, American Re-Enactments of the English Statute