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Jerry Dugger, dba J & D Enterprises v. Paul J. Cox Corporation, Cox Corporationa, Salt Lake COunty Treasurer, Joseph A. Mollerup, McGhie Land Title Company, Clive M. Maxwell, Herb Towers Murray Plumbing Company: Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

OF THE STATE OF UTAH

ENTERPRISES,

Respondent - Plaintiff

vs.

PAUL J. COX, COX CORPORATION, a Utah Corporation, SALT LAKE COUNTY TREASURER, JOSEPH A. MOLLERUP, McGHIE LAND TITLE COMPANY, a Utah Corporation, CLIVE M. MAXWELL, dba C.M. MAXWELL ELECTRIC COMPANY, and HERB TOWERS MURRAY PLUMBING COMPANY, a Utah Corporation,

Appellants - Defendants

Case No. 14395

BRIEF OF RESPONDENT

Appeal from the Judgment of the District Court of Salt Lake County
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BRIEF OF RESPONDENT

NATURE OF THE CASE

Plaintiff and Respondent, Jerry Dugger, dba J. & D. Enterprises, (hereafter called "Dugger"), filed a mechanic's lien in the Salt Lake County Recorder's Office, State of Utah, on July 19, 1972 against a parcel of property owned by Cox Corporation, a Utah Corporation located at 1342-3146 South State Street, Salt Lake City, Utah 84115,(hereinafter called "State Street Property"), for work done by Dugger upon the property from between January 1, 1972 and June 30, 1972. The lien amount was $33,407.93.

On September 19, 1972 Dugger filed suit in lower court against Paul J. Cox individually, and also against Cox Corporation, (both hereinafter designated as "Cox"), to foreclose his lien. The other defendants herein named were also brought into the lawsuit for the purpose of having the court determine their various interests in and to the State Street Property.

Dugger claimed that his lien included the amounts claimed in other liens filed by two subcontractors, Clive M. Maxwell, dba C. M. Maxwell Electric, in the amount of $3,042.00, and Herb Towers Murray Plumbing, Inc. in the amount of $3,172.23.

Not only was Dugger seeking to have wages which he claimed were due him from Cox for supervising the State Street Property improvements included as part of the lien amount, but he was alternatively seeking a personal money judgment against Cox for the value of said wages alleged due.

Defendants Cox filed a Counterclaim against Dugger wherein Cox alleged he was damaged in the sum of $50,000.00 by reason of Dugger's unjustly and unlawfully encumbering the State Street Property with an invalid lien. The essence of the testimony elicited from Cox to substantiate this claim

for damages was that the Johnsons, who has a lease on the State Street Property under the name of "Dynatek", had failed to pay their rent, and as a result, Cox's friend, Joseph A. Mollerup, refused to extend loans to Cox to improve this and other properties which Cox allegedly owned. Cox claimed that Dugger compounded the problem of obtaining the improvement loans from Mollerup by filing an invalid lien. When Cox was unable to improve his properties, he claimed he suffered loss of rents on all of his properties in the sum of $50,000.00. The sum of $150,000.00 was claimed for punitive damages by Cox; however no testimony was obtained from Cox or anyone else which would support a claim for malicious intent on the part of Dugger in the filing of his lien on the State Street Property.

A separate suit was consolidated with this action bearing Civil No. 215,255, wherein Service Station Supply, (hereinafter called "Station"), claimed moneys due from Cox and Dugger in the sum of $678.98 for providing materials and labor on the State Street Property; however Sation did not file a lien against the State Street Property. Dugger claimed his lien included the Station claim.

Prior to trial in the lower court, all parties stipulated that the first mortgage on the State Street Property held by Mollerup, assigned to Beesley, then to Zions First National

Bank, and the tax lien held by Salt Lake County, were superior to any held by any of the other lien claimants. The parties stipulated that Zions First National Bank, the assignee of Mollerup, had a valid and existing first mortgage on the State Street Property in the amount of $40,000.00, and that Salt Lake County had a valid and subsisting tax lien for the tax years 1970 and 1971 on the State Street Property in the amount of $2,537.83. These two parties were then dismissed from the case.

It was further stipulated by and between the remaining parties that the mechanic's liens filed by Dugger, Maxwell and Towers were valid and proper in all respects. Cox's counsel, however, reserved the right to challenge the liens on the question of whether or not they attached as against Cox's interest in the State Street Property. (P. 8, lines 24-30, P. 9, lines 1-30, P. 10, lines 1-4).

DISPOSITION OF THE CASE IN LOWER COURT

The Court entered a judgment foreclosing the mechanic's liens filed by Dugger, Maxwell and Towers against any right, title or interest Cox had in and to the State Street Property. Dugger was awarded judgment against Cox in the sum of $25,635.44 together with interest thereon at the rate of 6% per annum from July 19, 1972 to the date of judgment, and for attorney fees in the sum of $3,000.00, and this judgment became a lien

on the State Street Property, and said property was ordered sold to satisfy said lien. Likewise, Maxwell was awarded judgment against Cox in the sum of $2,342.00, together with interest thereon at the rate of 6% per annum from May 10, 1972 to the date of judgment. Towers was awarded judgment on its lien in the sum of $3,172.23 together with interest thereon at the rate of 6% per annum from Juen 8, 1972 to the date of judgment, and attorney fees in the sum of $800.00. All liens were ordered foreclosed, and the State Street Property sold at sheriff's sale to satisfy said liens.

The court further awarded a personal money judgment against Cox and Dugger and in favor of Station for the sum of $678.98.

Judgment was entered November 10, 1975, effective November 24, 1975, and the State Street Property was sold at sheriff's sale December 30, 1975 for the sum of $6,500.00. Dugger then received a deficiency judgment on his judgment against Cox on January 6, 1976 in the sum of $27,911.28. The State Street Property was subsequently redeemed by Cox and a certificate of redemption was issued August 2, 1976.

STATEMENT OF FACTS

Dugger met Cox in early December of 1971 when Dugger

upon passing the State Street Property happened to see a "For Rent" sign. He inquired of Cox concerning the possibility of leasing the property. Cox told Dugger that the property had already been rented, but that he had some properties in both Richfield and in Nephi which he might be willing to lease to Dugger. A few days later Cox and Dugger traveled to Nephi and Richfield to inspect the properties, and they discussed drawing up a lease on them, though no lease was actually signed on those properties until May of 1972. It was also at that time that Cox and Dugger discussed the forming of a business relationship in view of the apparent benefits each could afford the other.

On or about December 18, 1971 Cox brought Dugger to the law office of Gerald Turner, the attorney who had represented Curtis Johnson and Dynatek with regard to its lease on the State Street Property. During the course of the conversation Cox stated in front of Gerald Turner that Dugger was Cox's contractor, and that he was doing all of Cox's building for him. (P. 148, lines 23-26).

Thereafter in January, 1972 Dugger negotiated the move of a house from the State Stree Property at Cox's direction. Dugger also began to hire labor and to order materials to imporve the State Street Property. (P. 169, lines 18-23), (P. 174, lines 11-16).

In March,1972 Dugger requested Cox to pay him for his supervisory services. Cox ignored this request. At various times, however, Cox would pay Dugger for services performed and for labor provided under Dugger's supervision on the State Street Property; however, when it became apparent to Dugger that Cox was not going to pay him for the vast majority of labor and material he had ordered on the job, Dugger filed his lien. Dugger included within his lien not only sums which he had personally paid out for materials and labor, but also claims made upon him by subcontractors, including Maxwell and Towers, and Service Station Supply, and claims made by his materialmen such as Amcor and Yeates, and a claim for his supervisory services computed at $1,000.00 per month for the period of time he was working on the job site.

Dugger claimed that he had entered into an oral contract with Cox wherein Dugger agreed to supply the labor and materials to improve the State Street Property. Dugger claimed Cox agreed to pay Dugger the sum of $1,000.00 per month for his supervisory services on the project. (P. 169, lines 18-23).

Dugger claimed that he did not disclose to suppliers and materialmen that he was working for Cox or that Cox was the owner of the property because Cox's credit rating was very poor, and suppliers and materialmen would refuse

to supply materials or provide labor if they knew Cox was the owner. (P. 296, lines 7-15), (P. 216, lines 28-29), (P. 222, lines 12-29).

Curtis Johnson, President of Dynatek Corporation, and lessee of the State Street property, testified that he never hired Dugger at any time to do any work on the State Street Property. He further testified that he had heard Cox say many times over a period of several months in 1972 that Dugger was doing work for Cox. Johnson stated that Cox and Dugger seemed to be inseparable during the first months of 1972. (P. 128, lines 9-26), (P. 129, lines 15-22), (P. 131, lines 7-21), (P. 132, lines 14-19).

Johnson further testified that he had agreed on behalf of Dynatek to pay Cox an extra percentage of the rents if Cox would improve the property. (P. 134, lines 17-25).

Woolas Macey testified that he was an installer of car wash systems for CPI Systems, and that he contacted Cox in an attempt to interest him in installing a car wash system on the State Street Property in late 1971. (P. 156, lines 3-15). He stated that sometime during the early part of 1972 he heard Cox say to him that Dugger was his contractor for the State Street Property improvements. (P. 160, lines 8-24), (P. 161, lines 12-16). He further stated that in the times he met with Cox that Dugger was usually with him.

Dugger testified that he ordered the materials, and requested the labor to be performed in improving the State Street Property, and that he did so at the instance and request of Cox. (P. 169, lines 18-23).

Cox stated in his deposition, and affirmed the same under oath at trial that he had co-negotiated several jobs with Dugger, including the State Street Property job. (P. 255, lines 21-30).

Of course Cox later claimed that he never at any time had hired Dugger to do the improvements on the State Street Property. (P. 263, lines 1-2). He also termed the testimony of Macey, Turner and Johnson as false, and called Turner and Johnson liars. (P. 265, lines 19-22).

ARGUMENT

POINT I

THE EVIDENCE FULLY SUPPORTS THE LOWER COURT'S FINDING THAT DUGGER WAS AGENT FOR COX AND WAS ENTITLED TO PLACE A LIEN ON THE STATE STREET PROPERTY.

A mechanic's lien may be broadly defined as a charge imposed upon real property in favor of one who furnishes labor or provides materials for the improvement of property. 10 Thompson, Real Property, § 5186, at 265 (repl. 1957). It is designed to give the security of a lien for the value

of work done or materials furnished. Under Utah's legislative scheme, a claimant must meet two requirements before he is entitled to the salutary effects of a mechanic's lien. First, he must show a valid contract, express or implied, with the owner. Second, he must show that he either furnished labor or supplied material, or both, resulting in the construction of an improvement upon the real property involved. Utah Code Ann., §38-1-3 (Repl. vol. 1966) The person who supplies materials or performs labor is entitled to the value of the improvements on real property if the person did so at the instance of the owner or any other person acting by the owner's authority, as agent, contractor, or otherwise. Ibid. Thus, not only could Dugger, but also Maxwell and Towers could seek to foreclose their lien if the improvements were made at the instance of Cox. So long as Cox and Dugger had an agreement of some sort regarding Dugger's improving the subject property for Cox, it will support a lien in favor of all other persons who have, either under express or implied contract with Dugger, rendered services, performed labor, or furnished materials. Sierra Nevada Lumber Co. v. Whitmore, 24 Utah 130, 66 Pac. 779 (1901).

It thus becomes immaterial whether or not Dugger was the agent of Cox or whether he was an independent contractor who entered into a contract with Cox for the improvement of

the State Street Property. All lien claimants' liens are valid if the improvements were requested of Dugger at the instance of Cox. Ample testimony exists in the record to support this conclusion reached by the trial court. It has been referred to above. Of course, there is conflicting testimony on the question of whether or not Cox requested Dugger to improve the State Street Property, but the lower court found as a factual matter that Cox did request Dugger to imrove the property. In making that determination, the lower court took into balance the testimony of the witnesses, their deportment and demeanor, and other evidence.

The weight and sufficiency of the evidence cannot ordinarily be reviewed. Sandall vs. Sandall, 57 Utah 150, 193 P. 1093, 15 ALR 620. The trial court's decision on questions of fact are conclusive upon the Supreme Court, and the only matters proper for review here are errors made by the lower court on questions of law. 5 Am Jur 2nd Appeal and Error, §820, page 261. It is thus clear that where evidence exists to support the lower court's finding that the Dugger, Maxwell and Towers liens were valid as against Cox, that such factual determination cannot be re-examined upon appeal.

POINT II

THE LOWER COURT ACTED PROPERLY WHEN IT GRANTED A PERSONAL JUDGMENT AGAINST COX AND IN FAVOR OF DUGGER

At the close of his case, Dugger moved to amend his complaint to conform with the evidence presented, and to include the claim of quantum meruit or unjust enrichment. (P. 224, lines 1-10). The trial court took the motion under advisement, and in its memorandum decision granted judgment to Dugger.

There is testimony that Cox did specifically ask Dugger to provide materials and labor to improve the State Street Property and that Dugger was not acting officiously. (P. 169, lines 18-23). The contract need not be express, but may be implied from the actions of the parties. A contract may be implied between the parties where the owner receives benefits from the improvements to the property. Where the owner tacitly assents to the imrovements by permitting them to be made, a contract may be implied by the court. Dugger's Complaint alleges that Dugger and Cox entered into an agreement whereby the Respondent would aid the Appellant in making certain improvements to the State Street Property. (See paragraph Three). Morrison, Merrill & Co. v. Clark, 20 Utah 432, 59 Pac. 235 (1899).

Since judgment was granted to Dugger under the lien foreclosure claim, it is safe to assume that the court found a contract existing between Dugger and Cox, or the court implied such a contract. Whether the court found in favor of Dugger on the theory of unjust enrichment is impossible to determine from the record. It is clear, however, that the court did find in favor of Dugger and against Cox on the lien foreclosure claim, and awarded Dugger a personal judgment against Cox presumably on the theory of breach of contract. The question of whether or not both the personal judgment and the lien foreclosure judgment may exist at the same time will be handled at a later point in this brief.

It is clear, however, that the lower court could properly have awarded a personal judgment against Cox based upon the pleadings, the motion to amend the pleadings to conform with the evidence at the end of Respondent's case in chief, and the evidence elicited from the witnesses.

POINT III

THE LOWER COURT DID NOTERR WHEN IT DECLARED DUGGER'S LIEN VALID, SINCE IT DETERMINED THAT THE SUMS DUE UNDER THE CLAIM FELL WITHIN THE AMBIT OF THE LIEN.

As has already been pointed up, the parties, prior to trial, stipulated that the liens were valid in all respects,

with the exception that Cox reserved the right to challenge whether or not the liens applied to his interests in the property. (P. 8, lines 24-30), (P. 9, lines 1-30), (P. 10, lines 1-4).

The Respondent put on testimony with regard to items it claimed were covered within the lien claim of $33,407.93. The respondent, in the alternative, claimed that if the Court found any items were not found within the lien, that he should be granted a personal money judgment. One specific item was the $7,000.00 the Respondent claimed was due him from Cox for his supervisory services. Respondent alleged there may have been other items to have been included within the lien claim in his complaint, but Respondent did not present testimony as to any additional items, nor did Respondent amend his complaint as to any additional items. The Appellant now argues that inasmuch as Respondent alleged there may have been additional items to be included within the lien, but not amended thereto, the original lien is somehow invalid. Such an argument is not even logical.

Respondent was not required to amend his lien for any additional items he may have claimed fell within the lien. Respondent did not present any testimony regarding any additional items other than those originally claimed within the lien. Respondent did not amend his lien as to any

additional items. Respondent was not bound as a matter of law to do so in order to prevail against the Appellant.

Appellant missates the pleadings when he asserts Respondent's Complaint states on its face that the lien covered property in excess of that which was intended. The complaint does allege that there "has been some other items completed by the Plaintiff herein in addition to those filed in the lien against the premises as heretofore described." These items could have been amended into the lien, but were not, and no evidence was ever taken as to those items.

POINT IV

THE LIENS OF OTHER JUDGMENT CREDITORS ARE VALID AND THE LOWER COURT DID NOT ERR IN DETERMINING THEY WERE FILED PURSUANT TO LAW

As has been pointed out above, the parties stipulated prior to trial that the liens of Dugger, Maxwell and Towers were proper in all respects and had been validly and timely filed, and they were thus admitted into evidence by the court. (P. 8, lines 15-30), (P. 9, lines 1-25), (P. 10, lines 2-4). The only reservations made by Cox's counsel were whether or not the liens would attach to Cox's interest in the State Street Property. Cox's counsel also reserved the right to dispute whether or not Cox and Dugger had entered into an oral contract. Thus by his stipulation, Cox is estopped to deny that said liens were valid.

The court found as a matter of fact that Dugger did improve the State Street Property at the instance and request of Cox, and that Dugger had hired Maxwell and Towers as subcontractors.

As to the Tower's lien, the lien on its face shows that it was filed against Cox Corporation pursuant to a request with Dynatek. Curtis Johnson of Dynatek testified that he had an agreement with Cox that Cox would pay for additional work, (P. 134, lines 17-25), including plumbing. There was thus sufficient testimony for the lower court to

have found that Towers did work at the instance of Cox through Johnson. As discussed above, the lien would then be valid against Cox's interest in the State Street Property.

As to the Maxwell lien, there is testimony from Dugger that he requested Maxwell to furnish materials and labor at Cox's instance and request. (P 186, lines 3-11). Since Maxwell was Dugger's subcontractor, the lien does not fail, since Maxwell's work was done at the instance and request of Cox's agent, contractor or other person acting for Cox.

As to Maxwell's listing of Dynatek as well as Dugger as the person with whom the contract was made to supply the materials and labor, it is clear that Cox agreed to have Johnson supply labor and materials for which Cox would be responsible. The same argument applies to Maxwell as it does to Towers in this regard.

The liens of Towers and Maxwell must be sustained since the trier of fact found the labor and material was performed at the instance and request of Cox either through Dugger or through Johnson, and the testimony supports this finding.

POINT V

THE COURT DID NOT ERR IN ITS AWARD OF ATTORNEY FEES TO DUGGER AND TOWERS

Section 38-1-18, Utah Code Annotated specifically provides:

> "In any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in the action." (Emphasis mine.)

On the Dugger claim for attorney fees, Dugger testified that he had been required to obtain the services of an attorney to foreclose his lien, and that $3,000.00 was a reasonable sum for his counsel's services. (P. 192, lines 8-14).

On the Towers claim for attorney fees, McGregor, Tower's agent, testified that Towers had contracted to pay a reasonable attorney's fee in the matter, and that $800.00 was a reasonable fee. (P. 37, lines24-28).

For the court to determine whether attorney fess are reasonable the use of expert witnesses is not reqired. Wildes v. Dappinian, 87 RI 131, 138 A. 2nd 823. An attorney who performed the services, or another expert on attorney fees, or another witness, or even the plaintiff himself may testify regarding the reasonableness of attorney fees and the amount thereof. 7 Am Jur 2nd, Attorneys at Law, §268, page 197.

The court is not required to look solely to the testimony

regarding the reasonableness of attorney fees; it may take into consideration the pleadings and other filings in the case, the time spent by the attorneys at trial, attending circumstances, and its own knowledge and experience regarding the character of such services in awarding attorney fees. 7 Am Jur 2nd, Attorneys at Law, §269, page 197.

Even if no testimony were taken regarding attorney fees, or the reasonableness thereof, the court is required to determine and tax as costs the attorney fees to be awarded the successful party under the statute cited above.

There is no question under Utah law that the foreclosure of a mechanic's lien under Section 38-1-18, Utah Code Annotated is an equitable proceeding. The Utah Supreme Court has held that it is the perogative of the trial judge to determine disputed questions of fact in equity matters, and that the trier of fact's duty with respect to determining attorney fees or other factual matters is only advisory to the court's determination thereof. Frehner v. Morton, 18 U 2nd 422, 424 P 2nd 446. Hence, in the instant case the court was not required to take testimony regarding attorney fees, and if it did so, such testimony was only advisory to the court's discretion in the determination of attorney fees to be awarded the successful party.

POINT VI

DUGGER'S LIEN WAS NOT EXCESSIVE AND THE COURT DID NOT ERR IN DECLARING THE LIEN VALID

Dugger's lien was filed July 19, 1972 for the sum of $33,407.93. Pursuant to the testimony, and the appendix annexed hereto, the lien was not excessive. The fact that the court chose not to award the entire amount claimed due under the lien does not make the lien any less valid. Shupe v. Menlove, 18 U 2nd 422, 424 P 2nd 446. (1966)

Counsel for Cox in his argument before the court brashly states, without any supporting evidence whatever in the record, that Dugger without cause or justification liened other properties of the Cox Corporation, which shows that Dugger was attempting to procure an advantage or benefit, prohibited by statute. There were no pleadings, no evidence, and no reason whatever to make such an extraneous argument. Such an argument does not even belong in this appeal, and there is not even a record upon which Respondent can respond.

In fact Dugger was successful in asserting his lien claim against Cox in the present action. If Dugger were successful, then he could not be found to be taking advantage of the Appellant by reason of asserting a fallacious lien.

POINT VII

THERE IS NO EVIDENCE THAT DUGGER CO-MINGLED NONLIENABLE ITEMS IN HIS LIEN CLAIM

Inasmuch as the court found that Dugger had supplied material and labor, or caused them to be supplied to the State Street Property at the instance and request of Cox, Dugger cannot be deemed to have been a mere volunteer with regard thereto.

The Appellant raises the issue of whether or not Dugger could assert a lien for labor and materials supplied by subcontractors or materialmen. The cases hold that one in Dugger's position may file a lien in behalf of his subcontractors and materialmen especially where Dugger is personally liable for the debt.

In §91, C.J.S., Mechanic's Liens, page 604, we find:

> "It is generally held that a contractor is entitled to a lien for labor furnished by him and actually performed by persons working under him; even though his workmen have taken out liens, the effect is only to diminish that lien pro tanto." (See Idaho Riggen v. Perkins, 246 P 62, 42 Ida 391).

In Parker V. Tilghman v.Morgan Inc., 183 A 224, 170 Md 7, and in Rice v. Baxter, 15 Pa. 198, 40 C.J. 140, note 14, the court held that a subcontractor could file a lien even though the contractor had previously filed a lien on the entire contract. By inverse reasoning, Dugger had a right to file a lien on the entire amount due even though other creditors subsequently filed

liens for the amounts due to them. The effect would be to reduce Dugger's lien pro tanto. Isbell v. Payne, 147 P 2nd 718, 158 Kan 298.

In Re Lightner (DC Cal), 184 F Supp 825, the court stated:

> "We can see no reason for allowing a corporation to claim a lien for the labor of its servants, and denying the right to an independent contractor who does the work through those servants. Holding as we do on this point, it becomes immaterial whether this claimant was or was not an independent contractor."

All of the testimony taken was with regard to items which Dugger claimed were part of the lien. The court chose to disallow the claim for Dugger's services for $1,000.00 per month. Dugger argued that those services for superintending were properly includable within the lien. In C.J.S., Mechanic's Liens, §37, we find: "In many jurisdictions a mechanic's lien may be acquired for services in superintending construction of a building or improvement." And in the absence of a special contract fixing the value of the services, a reasonable value is to be placed thereon by the trier of fact. Sierra Nevada Lumber Co. v. Whitmore, 24 U 130, 66 P. 779.

Dugger testified that all of the items referred to in the appendix were used in connection with the State Street property. Except for some items shipped by Amcor to Ogden and Richfield, all expenses incurred were for

labor and materials or for procuring labor and materials to improve the structures on the South State Street Property. These were never challenged by the Appellant. There is no evidence whatever in the record that any items whatever were purchased for resale, and which were shipped to Dynatek and sold by Dynatek.

Dugger claimed that he went to California for the purpose of obtaining materials to be used in the State Street Property improvements.(P. 180, lines 4-5). He incurred motel and travel expenses, and certainly it cannot be argued that these expenses become a part of the cost of the materials supplied in the project. They most certainly are then lienable. The bill to Dunn Oil for $197.34 was for the hoist. This certaily became a part of the building. (P.177, lines 25-26). There was testimony that some of the Amcor blocks went to Richfield and some went to Ogden, but these were not included in the final tabulation of amounts owing under the lien. The only sum requested for blocks under the lien was $171.13. There was no testimony in the record that the only blocks used were those salvaged from the North building. There was further no testimony whatever that the amount of pipe purchased was note totally used on the State Street Property. And Don Hall testified that he was looking to Jerry Dugger for payment of $2,400.00 for work he performed

on the State Street Property. (P. 296, lines 19-21), (P. 296, lines 27-28),(P.297, line 19). Hall did not need to give Dugger any authority whatever for Dugger to claim this item within his lien. Dugger had incurred the Hall charge for work which Hall did as a subcontractor at the request of Dugger on the State Street Property. As to the house moving, the Court apparently believed Dugger's testimony that the house was moved as a part of the improvement of the subject property, and awarded judgment accordingly for $1,200.00.

It is clear that the court found that all of the items which Dugger claimed was due him were in fact lienable items, and there was sufficient testimony and evidence in the record to substantiate such a finding. The court cannot now overturn such a finding, unless it finds the court abused its discretion in reaching such a finding with regard to the facts.

POINT VIII

THE COURT DID RULE WITH REGARD TO THE COX COUNTERCLAIM, AND THE RULES PROVIDE FOR THE PROPER PROCEDURE TO CURE THE RECORD ON APPEAL

While the Record does not disclose the ruling made by the lower court with regard to its ruling on Appellant's Counterclaim, the lower court nevertheless did rule on the Counterclaim when it heard Appellant's Motion to Redeem on July 27, 1976. The Court then ruled that it had intended at the time it issued its Memorandum Decision to hold that Plaintiff should be awarded judgment for "No Cause of Action" on Defendant's Counterclaim. Both Counsel for Dugger and Cox were present at the time the Court clarified its Memorandum Decision.

In the instance where the lower court had intended to rule with regard to a claim, but failed to specifically reflect its ruling on the record, the Utah Rules of Civil Procedure provide for an appropriate remedy without requiring the entire Counterclaim to be retried, or remanded for further hearing. In Rule 75(h), Utah Rules of Civil Procedure, we find:

> "...if anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the Supreme Court, or the Supreme Court, on proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk..."

It would be illogical to think that the lower court could have ruled in any other manner, since Appellant's claim was based upon the theory that Respondent's lien was illegal and unjustified, and that the Appellant thereby suffered damages. The lower court found, however, that Respondent's claim was in fact justified.

Inasmuch as the lower court has ruled on the Cox Counterclaim, but such ruling is not reflected in the record on appeal, the Supreme Court should direct that the transcript be corrected to reflect the lower court ruling, and the Court should direct the clerk of the district court to correct the record on appeal accordingly.

POINT IX

THE QUESTION OF WHETHER THE COURT ERRED WHEN IT AWARDED A PERSONAL JUDGMENT AND A JUDGMENT ON THE LIEN AT THE SAME TIME IS MOOT, AND THUS NOT GROUNDS FOR REVERSAL

On November 10, 1975 the lower court entered its amended Findings of Fact and Conclusions of Law, and Judgement in the above matter, effective, pursuant to court order, November 24, 1975, and Respondent immediately had an Order of Sale on the South State Street Property issued together with a Praecipe to the Sheriff of Salt Lake County, dated November 26,1975. Thereafter, the property was listed for sale, and the Sheriff's sale took place December 30, 1975, wherein the Respondent offered $6,500.00 of his judgment lien for the subject property. On or about January 6, 1976 the Clerk of Salt Lake County, Utah issued a deficiency judgment against the Appellant in the sum of $27,911.28. Said deficiency judgment was in the nature of a personal judgment against Cox. Thereafter executions on the deficiency judgment were issued and transcripts of the judgment were filed in various counties in Utah where the Appellant is known to own real property.

The State Street Property has subsequently been redeemed by the Appellant by a certificate of redemption issued by the Respondent's counsel on August 2, 1976 certifying that $6,500.00 of the judgment is deemed satisfied.

The question of whether or not there should have been only one lien judgment, rather than both a lien judgment and a personal judgment is now moot, inasmuch as all that now remains is a personal deficiency judgment. Certainly the Appellant could not have been harmed by the Personal Judgment and the Lien Judgment, since Respondent immediately took steps to levy against the judgment lien and to obtain as quickly thereafter a personal judgment for the deficiency not satisfied by the sale of the State Street Property. Where the Appellant is not prejudiced or harmed by such a judgment, error will not be grounds for reversal. Yazoo & M. Valley R. Co. v. Mullins, 249 US 531, 63 L ed 754, 39 S Ct 368. If the prejudicial effect is cured, then the court would not reverse such judgment. Weskalnies v. Hesterman, 288 Ill 199, 123 NE 314, 4 ALR 128.

When a question is presented on appeal which has been rendered moot, the reviewing court will generally not review the question. Sartin v. Barlow, 196 Miss 159, 16 So 2nd 372. The appeal was dismissed in this case because the court felt the resolution of the question on appeal would render no useful purpose since the question had become moot or academic. See also Coburn v. Thornton, 30 Ida 347, 164 P. 1012. Review also 5 Am Jur 2nd, Appeal and Error, §913, page 345.

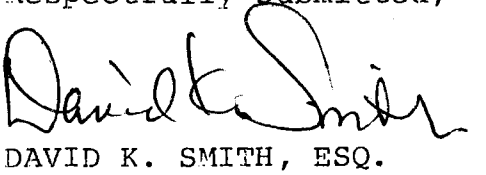
And in Hudspeth v. Commonwealth, 204 Ky 606, 265 SW 18, the court held that is was the universal rule that the courts will not consume their time in deciding abstract propositions of law or moot cases and have no jurisdiction to do so.

CONCLUSION

For the reasons stated above, Respondent Dugger respectfully requests that the Court affirm the lower court's rulings, that it find the lien on the State Street Property to be properly foreclosed, and that it affirm the lower court's judgment in all other respects.

DATED this 26th day of October, 1976.

Respectfully Submitted,



DAVID K. SMITH, ESQ.
Attorney for Respondent - Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Respondent's Brief, postage prepaid, to the following Counsel:

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DATED this 29th day of October, 1976.

DAVID K. SMITH

APPENDIX A

CLAIMS AGAINST COX INCLUDED WITHIN DUGGER'S LIEN:

Name:	Amount:	Reference: (Page- Line)
Herb Towers Murray Plumbing	$3,172.23	9-27
Service Station Supply	$ 672.98	12-17
Maxwell Electric	$3,042.00	75-23
Brimley Brothers	$1,619.26	92-14
Amcor $719.76 - $548.63	$ 171.13	104-23, 106-13
Erikson Brothers	$ 298.55	111-3
Yeates Pipe & Supply	$1,423.56	114-28
Eaton Metals	$4,010.45	123-7,14
Donald Hall	$2,400.00	297-19
Vard Wells House Moving	$1,200.00	174-14
LaMar Parry	$ 312.00	175-14
May Construction	$ 310.00	175-22
Gene Camp	$ 529.00	175-28
Clive Maxwell	$ 300.00	176-3
James Martin	$ 800.00	176-9
BUDCO	$ 100.00	176-14
W. O. Reid	$1,200.00	176-20
John Harrington	$ 200.00	177-4
Data Air Conditioning	$ 758.85	177-14
Dunn Oil Company	$ 197.34	177-26
Motel	$ 11.66	178-30
Motel	$ 11.66	179-4
Motel	$ 16.80	179-10
Motel	$ 18.00	179-14
Travel	$ 27.43	179-17
Air Line Ticket	$ 16.50	179-23
Travel	$ 10.45	179-27
Permit	$ 2.00	179-28
W. O. Reid	$ 700.00	181-26
Cliff Johnson Excavating	$ 48.75	182-16
Crane Supply Co.	$ 156.85	182-27
Pioneer Sand & Gravel	$ 69.97	183-28
Shurtleff Andrews Const. Co.	$ 106.96	183-28
White Industrial	$ 69.97	184-20
Anderson Lumber Co.	$ 31.68	185-8
B-Mart	$ 19.21	185-15
Clive Maxwell	$ 600.00	186-1
Attorney fees for Dugger	$3,000.00	192-8-14.
Dugger Services for Six Mos.	$6,000.00	169-23, 170-26
TOTAL CLAIMED UNDER LIEN:	$33,634.86	

The testimony was that $700.00 of the Maxwell Electric lien was paid subsequent to the filing of the Dugger lien, and the court refused to include within the Dugger lien the claim for $6,000.00 in services for superintending the job, thus the judgment was rendered by the court in the amount of $25,635.44, plus $3,000.00 attorney fees, which is actually $1,299.42 less than the above summary amount would suggest is due after discounts.

The summary shows that the Dugger lien was filed very close to the actual amount testified be due at trial.