

1998

J.V. Hatch Construction, Inc., Plaintiff and Appellant, v. Michael Kampros, Defendant and Appellee : Brief of Appellee

Utah Court of Appeals

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980200-CA

IN THE UTAH COURT OF APPEALS

J.V. HATCH CONSTRUCTION, INC.,

Plaintiff and Appellant,

v.

MICHAEL KAMPROS,

Defendant and Appellee.

Case No. 980200-CA

Priority No. 15

BRIEF OF APPELLEE, MICHAEL KAMPROS

APPEAL FROM A JUDGMENT OF
THE THIRD JUDICIAL DISTRICT COURT, DIVISION II
OF SALT LAKE COUNTY, UTAH
HONORABLE ROBERT K. HILDER
DATE OF JUDGMENT: NOVEMBER 18, 1997
CASE NO. 950010438

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JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction over this Appeal pursuant to Utah Code Ann. § 78-2-2(j) (as amended).

ISSUES PRESENTED FOR REVIEW

1. Did the trial court commit a clear abuse of discretion in denying Plaintiff's Motion to re-open the case to introduce additional evidence?
2. Did the trial court err in determining that the statutorily required mailing of a notice of lien was a pre-requisite to an award of fees under the Utah Mechanics Lien Statute?

STANDARD OF REVIEW

1. **Plaintiff's Motion to Reopen:** Plaintiff did not file an affidavit in support of its motion to reopen identifying the basis under which the relief was sought. Under the circumstances the trial court had no discretion. The trial court had no alternative but to deny the motion. Tangaro v. Marrero, 373 P.2d 390, 391 (Utah 1962). Thus, this court has no alternative but to deny the appeal as the motion was not properly before the trial court. Even if Plaintiff had filed an appropriate affidavit, a motion to reopen is addressed to the discretion of the trial court which is accorded great deference and the decision of the trial court will be reviewed only for clear abuse of discretion. Gardner v. Christensen, 622 P.2d 782 (Utah 1980); Jensen v. Thomas, 570 P.2d 695 (Utah 1977); and Smith v. Shreeve, 551 P.2d 1261 (Utah 1976).
2. **Defendant's Motion for Reconsideration:** Defendant's Motion for Reconsideration was granted by the trial court as a matter of law and is therefore subject to review for correctness by this Court. Barber v. Farmers Ins. Exch., 751 P.2d 248 (Utah App. 1980).

ISSUES PRESERVED FOR APPEAL

Defendant agrees that the foregoing issues were properly preserved for appeal.

STATEMENT OF THE CASE

Plaintiff commenced the present action against Michael Kampros seeking recovery for services allegedly rendered pursuant to contract and seeking foreclosure of a Mechanic's Lien against the property on which the services were rendered in the amount of \$15,000.00. (Add. at 8.) Subsequently, on July 10, 1996, Plaintiff attempted to transfer the case to District court because alleged damages were going to exceed \$20,000.00. (Add. at p. 2.; entry of 7/10/96; and pp. 79-82.) In a four day trial Defendant successfully defended the action reducing the Plaintiff's alleged damages to the sum of \$8,500.00 which was awarded to the Plaintiff. However, attorney's fees and costs were also awarded to Plaintiff by Minute Entry of Judge Hilder of the Third Judicial District Court in an amount to be limited to those incurred solely related to the foreclosure action. (Add. at p. 24.) No order was ever entered on this Minute Entry.

Plaintiff filed an affidavit of fees and costs claiming total expenditures of \$25,539.20 of which \$19,420.45 was allegedly attributable to the cause of action for foreclosure of the mechanic's lien. (Add at pp. 83-98.) Utah Code Ann., § 38-1-7(3) (1953 as amended), requires mailing of notice of the lien by the lien claimant to the property owner as a prerequisite to an award of fees in a mechanic's lien foreclosure action. The Plaintiff's Complaint did not allege that said mailing occurred and during the four day trial the Plaintiff never introduced any evidence that said mailing occurred. (Add. at p. 30.)

The original Minute Entry of the court included a direction to Plaintiff to prepare a judgment awarding to Plaintiff its attorney's fees in the belief that the statutory prerequisite was an affirmative defense to be raised by Defendant. (Add. at p. 30.) However, following a Motion for Reconsideration by the Defendant, the trial court denied an attorney's fee award to the Plaintiff and ruled that the Plaintiff's compliance with the mechanic's lien statute creating the entitlement to attorney's fees was a prerequisite to an award of those fees and was an element of the Plaintiff's case. (Add.at p. 73.)

Subsequently, eight months after the conclusion of the trial and a full year after resting its case, Plaintiff filed a Motion to Reopen for the purpose of reintroducing additional evidence. (Add. at p. 58.) However, the Plaintiff's Motion and Memorandum contained no explanation as to why the evidence was not available and could not have been introduced at the time of trial. No supporting affidavit was filed offering any explanation why the alleged evidence was not introduced at trial. Plaintiff's Motion to Reopen was denied. (Add. at p. 74.)

OBJECTION TO PLAINTIFF'S STATEMENT OF FACTS

Defendant objects to Plaintiff's Statement of Facts numbers 2, 3, 4, and 15 as containing misleading inferences as to the content of the record in this case. Through the use of overly broad language, the Plaintiff is trying to leave this Court with the inference that it is an undisputed fact that appropriate notice in accordance with the statutes was sent and received. This is absolutely unsupported by the record. The only facts in the record are that Plaintiff has in his possession a receipt for certified mail signed by an unknown person which Plaintiff's counsel alleges is related to and evidences a mailing of the statutorily required notice. Plaintiff fails

completely to mention that even this green card receipt is not a matter "in evidence." It was never produced, offered, or accepted into evidence. It only became a part of the lower court record as a result of it being filed through the affidavit of counsel eight months after the conclusion of trial, a full year after Plaintiff rested his case, and after the post-judgment motions relative to reconsideration of the Court's award of attorney's fees had been filed. Defendant does not agree that the underlying record, if available, would reflect anything to the contrary.

STATEMENT OF FACTS

After the Record in this case was used by the Plaintiff in preparation of Plaintiff's brief it was, according to the Affidavits of the Plaintiff's counsel, returned to the District Court. The Court was in the process of moving to the new Scott M. Matheson Courthouse at approximately the same time. The Record has never been located since. Therefore, all references to the record appearing in Defendant's brief are references to the Addendum submitted herewith.

1. The underlying action was commenced by the filing of Plaintiff's Complaint on August 31, 1995. (Add. at pp. 2 and 8.)

2. Defendant propounded its first set of interrogatories and requests for production of documents to Plaintiff on December 5, 1995. (Add. at p. 2; entry of 12/5/95; and Add. at pp. 14-23.)

3. Defendant's request for production of documents included the following:

Request No. 5. As to each element of your alleged damages, provide receipts or other documentation to support them.

Request No. 7. Provide copies of all exhibits which you will attempt to admit at the time of trial herein.

(Add. pp. 22.)

4. On May 14, 1996 the court set a discovery cut-off date of July 19, 1996. (Add. p. 2; entry of 5/14/96.)

5. Plaintiff rested its case at trial on August 12, 1996. (Add. at p. 4; entry of 8/12/96.)

6. The four day trial concluded on December 3, 1996. (Add. p. 5; entry of 12/3/96.)

7. On July 30, 1997, the Honorable Robert K. Hilder issued his Minute Entry setting forth his original findings of fact and conclusions of law. (Add. p. 24.)

8. Included in the court's Minute Entry of July 30, 1997 was the court's conclusion that the Plaintiff failed to introduce evidence of compliance with the mailing requirements of Utah Code Ann. § 38-1-7(3). (Add. p. 30.)

9. Despite this finding, the court concluded that the Plaintiff was entitled to an award of attorney's fees. (Add. pp. 30-31.)

10. The District Court's original Minute Entry also directed counsel for the Plaintiff to submit an appropriate order based upon those findings and conclusions. (Add. pp. 31-32.)

11. Before a proposed order was submitted by Plaintiff, on August 18, 1997 Defendant filed a Motion for Reconsideration of the Award of Attorney's Fees. (Add. p. 5; entry of 8/18/97; and Add. pp. 33-44.)

12. The issue regarding the propriety of a fee award in light of the absence of any evidence regarding the prerequisite mailing was fully briefed by the parties between August 18, 1997 and September 8, 1997. (Add. pp. 33 -54.)

13. Only on August 21, 1997, nearly eight months after the conclusion of trial, and in conjunction with the Plaintiff's Motion to Reopen, did the Plaintiff first produce alleged documentary evidence that the prerequisite mailing had occurred. This was done through the Affidavit of Plaintiff's counsel. (Add. p. 55-57.)

14. Plaintiff's Motion to Reopen was filed August 21, 1997 and briefing by the parties was complete on September 10, 1997. (Add. pp. 55-70.)

15. By Minute Entry dated October 20, 1997, the District Court granted Defendant's Motion for Reconsideration and thereby denied fees to Plaintiff. Pursuant to the same Minute Entry Plaintiff's Motion to Reopen was denied. (Add. p. 71-74.)

16. The first and only judgment entered in this case was entered on November 17, 1997. (Add. p. 76.)

17. The judgment entered was paid in full and a Satisfaction of Judgment was filed on February 25, 1998. (Add. p. 6; entry of 2/25/98.)

SUMMARY OF ARGUMENTS

At the time the Plaintiff filed its motion to reopen, they filed no supporting affidavit identifying the basis of the motion. None of the categories set forth under Rule 59, Utah Rules of Civil Procedure were identified. Under the circumstances, the trial court had no discretion but to deny the motion. Even if an appropriate affidavit had been filed, it would not have been an abuse of the trial court's broad discretion to deny the motion which was entirely inadequately supported. This is particularly true in light of the fact that Plaintiff desired to belatedly introduce

documentary evidence of mailing which evidence had not been introduced in a timely fashion nor produced pursuant to valid discovery requests propounded by the Defendant in the case.

The trial court correctly ruled that the Plaintiff's failure to introduce evidence of compliance with a statutory prerequisite to an award of attorney's fees in a statutorily created cause of action, in derogation of common law, is fatal to that party's request for fees.

ARGUMENT

I

THE TRIAL COURT DID NOT COMMIT AN ABUSE OF DISCRETION IN DENYING PLAINTIFF'S MOTION TO REOPEN CASE

A. The Trial Court had no Alternative but to Deny Plaintiff's Motion to Reopen.

Standards governing a motion to reopen a case are set forth in Rule 59, Utah Rules of Civil Procedure, which provides the following seven alternatives:

(1) Irregularity in the proceedings of the court, jury, or adverse party . . . (2) misconduct of the jury; . . . (3) accident or surprise, which ordinary prudence could not have guarded against; (4) newly discovered evidence, . . . (5) excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice. (6) insufficiency of the evidence . . . (7) error in law.

In the present case, the Plaintiff's motion to reopen does not state the alternative under which it was brought. It merely refers the parties to the Plaintiff's supporting memorandum. "The grounds therefore are more fully set forth in the accompanying memorandum." (Add. at p. 58.)

Plaintiff filed a supporting memorandum containing only one paragraph. (Add. at p. 60.) Likewise, it identifies no basis recognized under Rule 59. However, Plaintiff now argues through his brief that the Plaintiff was proceeding under subparagraph (3) alleging accident or surprise.

This is highly relevant. Subparagraph (c) of Rule 59, using mandatory language, requires affidavits in support of a Rule 59 motion.

When the application for a new trial is made under subdivision (a)(1), (2), (3), or (4), it **shall** be supported by affidavit. Whenever a motion for new trial is based upon affidavits, they **shall** be served with the motion. [Emphasis added.]

No affidavit was filed by the Plaintiff establishing that Plaintiff was the victim of some accident or surprise which ordinary prudence could not have guarded against. The absence of an affidavit is fatal to Plaintiff's motion and present appeal.

Under these circumstances, not only is the trial court granted broad discretion to deny a motion to reopen, it has no discretion **to grant** such a motion.

It is elementary that the trial court has no discretion to grant a new trial absent a showing of one of the grounds specified in Rule 59 of the Utah Rules of Civil Procedure.

Tangaro v. Marrero, 373 P.2d 390, 391 (Utah 1962).

Highly instructive is the case of Moon Lake Elec. Assn., Inc. v. Ultrasystems Western Constructors, Inc., 767 P.2d 125 (Utah App. 1988). In Moon Lake the moving party filed a motion to reopen. It was supported by affidavit. However, the affidavit merely contained conclusory allegations that justice, judicial economy and efficiency would be advanced by allowing the motion. Such allegations were found insufficient.

None of these reasons constitute a "showing" of any of the circumstances specified by Rule 59(a) . . . since there was no ground cognizable under Rule 59. . . to grant a new trial, the trial court, in accordance with Tangaro, properly denied Moon Lake's motion.

Id. at 127. In the present case, Plaintiff never filed an affidavit. Therefore, the trial court appropriately recognized that it had no alternative whatsoever but to deny the motion.

B. It Cannot Be Said the Trial Court Abused its Broad Discretion in Denying the Plaintiff's Motion to Reopen.

A trial court normally has broad discretion to deny a motion to reopen which discretion will only be reviewed for clear abuse. Gardner v. Christensen, 622 P.2d 782 (Utah 1980). No such "clear abuse" occurred in this case.

In its brief the Plaintiff argues for the first time that the case should have been reopened due to insufficiency of the evidence to justify the verdict. Again, this basis was not identified in the pleadings filed by the Plaintiff before the trial court. This position is likewise unsupported by any affidavits. Therefore, the judge did not abuse his broad discretion in denying the motion. However, this Court should also consider the simple inapplicability of subparagraph (6) of Rule 59.

The findings of fact of the trial court which is relevant is the conclusion that Plaintiff did not introduce evidence of mailing of the Notice of Lien in compliance with Utah Mechanic's Lien statutes. It is uncontested that this conclusion is correct and was never changed by the trial court. There is nothing to suggest that this ruling was unsupported by the evidence. The Plaintiff does not, even at the present time, bring to the attention of this Court any portion of the record or trial transcript which would suggest that evidence of mailing was introduced during the trial phase. That is because such evidence was simply not produced. Therefore, it is not necessary for the Court of Appeals to weigh conflicting evidence and make a judgment regarding its sufficiency. There is nothing to indicate that evidence was introduced on this point and therefore there is

nothing to weigh. The factual finding of the trial court that evidence of mailing was not introduced is undisputedly correct.

Finally, the nature of Plaintiff's request to reopen should be considered when deciding if Judge Hilder committed a clear abuse of discretion by refusing. The trial lasted four days and the Plaintiff had countless opportunities to seek to introduce such. Plaintiff moved the court to reopen a year after having rested its case. Plaintiff wanted to introduce evidence never before produced and which Plaintiff admits was in its possession the whole time.

Further, it seems Plaintiff is trying to persuade this Court that a reopened trial would entail a mere acceptance into evidence of a single document; an almost ministerial act. This is not the case. Plaintiff has belatedly placed a certified receipt in the record through the affidavit of counsel. However, there is nothing on its face to link it to a notice of lien. Testimony would be required. Foundation would have to be laid.

The receipt is not signed by the Defendant. The identity of the signor would have to be determined. Additional discovery would be necessary.

The receipt is not properly addressed. The relevant statute, Utah Code Ann. § 38-1-7 (1953, as amended), requires mailing to the property owner's current address.¹ The receipt which Plaintiff claims evidences proper mailing was allegedly mailed to the construction site where, if it was mailed, anyone may have signed for it. This was not the Defendant's "current address."

¹ "[t]he lien claimant shall deliver or mail by certified mail to either the reputed owner or record owner of the real property a copy of the notice of lien. If the record owner's current address is not readily available, the copy of the claim may be mailed to the last-known address of the record owner . . ." Utah Code Ann. § 38-1-7(3) (1953, as amended).

The sufficiency and propriety of the mailing becomes an issue. Therefore, not only are new multiple evidentiary issues raised at this late date, but new legal issues are introduced into the case. All of this is after a four day trial in an \$8,500.00 case. Judge Hilder's discretion was very sound indeed when he concluded the Plaintiff had had his day in court, in fact four of them, and enough was enough.

C. Plaintiff's Alleged Evidence of Mailing Would Not Have Been Admissible Even If Proffered at Trial.

The evidence which Plaintiff desired to introduce if the case was reopened is a receipt for certified mail allegedly evidencing mailing of notice. However, this was first produced and introduced into the record through an affidavit of Plaintiff's counsel filed on August 22, 1997. (Add. at pp. 55-57.) This was eight months after the conclusion of the trial, and a year after conclusion of Plaintiff's case. (Add. at p. 5 entry of 8/22/97.) This is far too late for the Plaintiff to be producing additional evidence.

On November 30, 1995, Defendant propounded to Plaintiff discovery requests which included the two following requests for production of documents:

Request No. 5. As to each element of your alleged damages, provide receipts or other documentation to support them.

Request No. 6. Provide copies of all exhibits which you will attempt to admit at the time of trial herein.

Clearly, if Plaintiff was claiming attorney's fees as a damage, Plaintiff had a duty to provide documentation required to support its claim. If Plaintiff intended to introduce documentary evidence of mailing of the prerequisite notice, it would have been necessary for the Plaintiff to produce the same to defendant prior to the discovery cut-off date of July 19, 1996. It would have

been inappropriate for Judge Hilder to permit introduction of this evidence at trial even if it had been timely offered as it had not been previously produced to Defendant during discovery. It is certainly inappropriate to reopen the case to admit evidence first produced eight months after the conclusion of trial. To do so would be to defeat the very purpose of the discovery process.

A party to an action has the right to have the benefits of discovery procedure promptly not only that he may have ample time to prepare his case, but also in order to bring to light the facts which may entitled him to summary judgment or induce settlement prior to trial. The rules were designed to secure “the just, speedy, and inexpensive determination of every action.”

W.W. & W.B. Gardner, Inc. v. Parkwest Village, Inc., 568 P.2d 734, 738 (Utah 1977).

The Plaintiff cannot ignore the requirements of the discovery process and withhold relevant evidence from the Defendant until trial. The Defendant had the right to prepare his case and make his decisions relevant to trial or settlement based upon the evidence which had been produced. Therefore, and on this separate basis, the ruling of Judge Hilder denying Plaintiffs motion to reopen was appropriate. The evidence belatedly produced by the Plaintiff would not have been admissible under any circumstances.

II

IT WAS NOT ERROR FOR THE LOWER COURT TO RECONSIDER ITS CONCLUSIONS OF LAW

A. Reconsideration Is Appropriate Any Time Prior to Entry of Judgment.

Plaintiff points out to the Court that Utah Rules do not expressly authorize a motion specifically entitled “motion for reconsideration.” However, this argument elevates form over substance. It is clear that under Utah law a Court is free to reassess its conclusions at any time prior to the entry of a final appealable order.

The trial court found that the Plaintiff did not provide evidence of mailing and then concluded as a matter of law that Plaintiff was entitled to its attorney's fees in the court Minute Entry of July 30, 1997. However, the Minute Entry was not a final order or judgment. The document itself concludes with the statement that the Plaintiff was to submit a proposed judgment based upon those findings and conclusions for review by opposing counsel prior to being submitted to the court. Thus, it was clearly contemplated that the Minute Entry itself was not a final judgment. The fact that such a Minute Entry does not constitute a final order of the court has already been addressed by the Utah Supreme Court in the case of Swenson Associates Architects, P.C. v. State by and through Div. of Facilities Const., 889 P.2d 415 (Utah 1994). In Swenson, the Utah Supreme Court ruled that:

It must be clear that "which is offered as the record of a judgment is really such and not an order for a judgment or a mere memorandum from which the judgment was to be drawn."

Id. at 417. In the present case, the last line of Judge Hilder's Findings of Fact and Conclusions of Law (Add. at p. 31) makes it obvious that this was a memorandum from which a judgment was to prepared. (See also Utah State Bldg. Bd. v. Welsh Plumbing Co., 399 P.2d 141 (Utah 1965), "it seems obvious that neither the parties nor the court so regarded it [as a final judgment], otherwise there would have been no purpose in entering the final judgment which was entered on April 2, 1964, and from which the appeal was taken on time.") Id. at 144.)

There being no final order in place it was appropriate for Defendant to move the trial court to reconsider an apparently inaccurate conclusion of law. The conclusion that Plaintiff was entitled to an award of fees did not properly flow from the court's finding that the Appellant failed

to comply or introduce any evidence of compliance with the prerequisite of mailing notice. This reconsideration was entirely appropriate. “Any judge is free to change his or her mind on the outcome of a case until a decision is formally rendered.” Bennion v. Hansen, 699 P.2d 757, 760 (Utah 1985).

This holding was recently reaffirmed in the case of Ron Sheppard Ins., Inc. v. Shields, 882 P.2d 650 (Utah 1994), in which this Court stated:

It is well settled law that a trial court is free to reassess its decision at any point prior to the entry of a final order or judgment. [Citation omitted.] In the present case, because no final order awarding defendant summary judgment was signed and entered, the matter was still pending when plaintiff’s motion for reconsideration was filed in Judge Lewis’ court. She had every right to reassess the matter . . .

Id. at 654.

In the present case, no judgment was signed or entered based upon the trial court’s first Minute Entry of July 30, 1997. Judgment was not entered until after the Motion for Reconsideration was fully briefed by the parties, heard by the court, and a second Minute Entry entered on October 20, 1997. Thereafter, Appellant’s counsel submitted a proposed order which was signed by the court on November 17, 1997. The court’s reconsideration of the conclusions of law flowing from its findings was entirely appropriate.

B. The Trial Court Correctly Ruled That the Mailing of Notice Is a Statutory Requirement and Prerequisite to an Award of Attorney’s Fees.

Utah statutes, specifically Utah Code Ann. § 38-1-7(3), (1953, as amended) provide that “Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorney’s fees against the reputed owner or record owner in an action to enforce the lien.” The trial court concluded in its original

Findings of Fact and Conclusions of Law that the Plaintiff had failed to introduce evidence of compliance with the mailing requirement of § 38-1-7(3). This conclusion was reiterated in the court's Minute Entry of October 20, 1997 which addressed the Defendant's Motion for Reconsideration on this issue. However, in its subsequent Minute Entry the trial court stated the following:

That is a correct statement, but the Court's further finding that "compliance with the mailing requirement is not an element of Plaintiff's claim. And the alleged non-compliance would constitute an affirmative defense, much like the statute of limitations or the statute of frauds," is in error.

This subsequent conclusion of the trial court that proof of mailing is an element of Plaintiff's claim is clearly correct and should not be disturbed.

i. The Party Alleging the Affirmative of a Fact Always Carries the Burden of Proof.

One of the most general rules of evidence is that the burden of proof of any given fact lies initially with the party who is asserting the affirmative of that fact (as did Plaintiff in this case). This rule was adopted by the Supreme Court of the State of Alaska in the case of Sloan v. Jefferson, 758 P.2d 81 (Alaska 1988), for the obvious reason that the party alleging the affirmative of a fact generally controls the evidence which bears on that fact. The same conclusion was reached by the Supreme Court of Arizona in Yeazell v. Copins, 402 P.2d 541 (Ariz. 1965). Likewise this is the position of the Supreme Courts of Colorado, Kansas, and New Mexico. (See Atlantic & Pacific Ins. Co. v. Barnes, 666 P.2d 163 (Colo. App. 1983); Wooderson v. Ortho Pharm. Corp., 681 P.2d 1038 (Kan. 1984); and Newcum v. Lawson, 684 P.2d 534 (N.M. App. 1984).

The same rule has been adopted in the State of Oregon where the Supreme Court has specifically stated that in the absence of any evidence introduced on an issue the party who would be relying on the affirmative of the fact will be unsuccessful. Compensation of Harris v. SAIF Corp., 642 P.2d 1147 (Or. 1982).

Finally, the same result has been reached in the State of Wyoming in the case of Hancock v. Stockmen's Bank & Trust Co., 739 P.2d 760 (Wyo.1987). Utah follows its sister states in this conclusion. The Utah Supreme Court has ruled that it is the duty of a plaintiff to press at trial all claims asserted in his complaint. Durfey v. Bd. of Ed. of Wayne Co. School Dist., 604 P.2d 480 (Utah 1979). (See also People's Fin. & Thrift Co. v. Landes, 503 P.2d 444 (Utah 1972).) The rationale behind such rulings should be obvious. It is difficult, if not impossible, to prove the negative of any fact. A party does not even know what to rebut until evidence is introduced. In the particular circumstances of this case, the Defendant is not in a position to disprove delivery of notice unless or until some evidence of delivery or notice and the manner of that delivery is introduced into evidence. Therefore, during the trial phase of this case, the Defendant had nothing to rebut.

In the absence of any evidence of the statutory prerequisite delivery of the notice of lien, fees and costs may not be awarded.

ii. The Burden of Proof in Mechanic's Lien Cases is Always on the Lien Claimant.

In mechanic's lien cases, like all statutorily created causes of action which exist in derogation of the common law, the burden of proof on every element of the claim is on the lien claimant. A plaintiff must strictly comply with the statutory requirements before he can obtain

relief under a statutorily created cause of action. Such is the position of the courts of Arizona and Kansas.

The burden is on the plaintiff at the time of trial to either allege his compliance with the essential requirements of the statute, and if his compliance is denied, prove it by competent evidence or show that there was a legal excuse for having failed to do so.

Williams v. A. J. Bayless Markets, Inc., 476 P.2d 869, 874 (Ariz. App. 1970). (See also Kopp's Rug Co., Inc. v. Talbot, 620 P.2d 1167 (Kan. App. 1980).) The State of Washington has ruled similarly in Northlake Concrete Products, Inc. v. Wylie, 663 P.2d 1380 (Wash. App. 1983), "rights arising as a part of a materialman's lien are created by statute and are to be strictly construed . . . the burden of establishing a right to a lien rests on the person claiming it." Id. at 1382.

An excellent case on point is Daniel v. M.J. Development, Inc., 603 P.2d 947 (Colo. App. 1979), wherein the Colorado Court of Appeals had before it a mechanic's lien claim. The issue before the court was the provision of statutorily required notice. The lower court believed that the provision of notice or lack thereof, was an affirmative defense. "[T]he trial court ruled that the owner's waived 'their claim of inadequate notice' by not raising the same as either an affirmative defense in their pleadings . . . or as an affirmative defense in their pretrial statement." Id. at 949. On this point, the Colorado Court of Appeals overruled. "We conclude that the trial court's ruling was error." Id. The Appellate Court went on to state "a lien claimant has the burden of proving his right to a lien under the statute and that this burden includes the requirement of giving statutory notice." Id. Finally, the Colorado Court of Appeals stated:

Hence, the owners' failure specifically to raise the defense of lack of notice is not material. For the same reason, the owners' need not establish prejudice resulting from a lack of notice.

Id.

Additional guidance on this point comes from the State of Oregon which has a fee provision in its mechanic's lien statute which is worded comparably in effect to the Utah statute. Relevant parts of the Oregon statute provide:

No costs, disbursements, or attorney's fees otherwise allowable as provided by ORS 87.060 shall be allowed to any party failing to comply with the provisions of this section.

Or. Rev. Stat. 87.057(3).

This is comparable to the Utah statute which uses the same mandatory language.

Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorney's fees.

Utah Code Ann. § 38-1-11(3), (1953 as amended).

The State of Oregon has interpreted the above-cited language to require pleading and proof of notice on the part of the claimant. "To entitle a lien claimant to costs and attorney's fees, compliance with the notice requirements must be pleaded and approved." Morse Bros. Contractors Inc. v. C.J.H. Construction Co., 675 P.2d 1122, 1123 (Or. App. 1984).

In fact, the defendant in a mechanic's lien case has no obligation to even introduce evidence until the lien claimant has introduced evidence on all issues in question. In the case of Martindale v. Adams, 777 P.2d 514 (Utah App. 1989), one of the defendants (Marinos, the property owner) failed to appear at trial other than through counsel. The issue before the court in the Martindale case was the existence of a contract between the lien claimant and defendant

Marinos. No evidence was introduced on this point by the lien claimant. As stated earlier, Mr. Marinos did not appear or put on any testimony. Despite this fact, the Utah Court of Appeals found that judgment against him was inappropriate because when there is no evidence in the record of a fact relevant to the lien claimant's right to recovery, judgment must be granted in favor of the defendant since it is the lien claimant's burden of proof.

Martindale, as the lien claimant, has the burden of proving entitlement to the lien, which includes proving an appropriate basis under section 38-1-3 for imposing the lien on Marinos' ownership interest in the home. See Hathaway v. United Tintic Mines Co., 42 Utah 520, 132 P. 388, 389 (1913), (lien claimant has burden of proving **all elements** necessary to establish entitlement to mechanic's lien(s). [Emphasis added]

Id. at 516. On this basis, the court of appeals also denied attorney's fees to the lien claimant.

Id.

While the case cited by the court of appeals in Martindale is well aged law, it still appears to be the law of the State of Utah.

Plaintiff argues that compliance with the statute is an affirmative defense which must be alleged and proved by the Defendant. In support of this position, Plaintiff refers the Court to three cases. The first is Phillips v. JCM Dev. Corp., 666 P.2d 876 (Utah 1983). Plaintiff cites this for the proposition that the statute of frauds is an affirmative defense and not an element of plaintiff's claim. However, it should be noted that Phillips does not deal with a statutory cause of action in derogation of common law. It is a tort claim for injuries.

Similarly, the other cases cited by the Plaintiff are cases brought on common law theories and not statutorily created causes of action.

Staker v. Huntington Cleveland Irrigation Co., 664 P.2d 1188 (Utah 1983), concludes that the statute of limitations is an affirmative defense. However, Staker was a common law collection case. Likewise, the final case cited by the Appellant, Nelson v. Salt Lake City, 919 P.2d 568 (Utah 1996), which held that governmental immunity is an affirmative defense to be raised by the defendant is again, a common law tort injury case. The distinction between common law cases and statutory causes of action which are in derogation of common law, is critical.

Defendant's research reveals two occasions on which both the Utah Supreme Court and the Utah Court of Appeals have addressed precisely this issue. In the case of AAA Fencing Co. v. Raintree Dev. & Energy Co., 714 P.2d 289 (Utah 1986), this issue was addressed by the Utah Supreme Court. In AAA, it was undisputed that the lien claimant had failed to commence its lien foreclosure action within the one year provided by § 38-1-11, Utah Code Ann. (1953 as amended). The issue was whether compliance with the one year statute of limitations is an element of a lien claimant's case or an affirmative defense to be raised by the defendant.

Plaintiffs conceded that they filed their complaint late, but argue that Ross has waived his rights to the statutory bar as he failed to plead it as an affirmative defense.

Id. at 290. In resolving this issue, the Utah Supreme Court reiterated the rule that mechanic's liens are statutory creatures unknown to common law and that "compliance with the statute is required before a party is entitled to the benefits created by the statute." Id. at 291. Thus, even though no "affirmative defense" was raised on the lien claimant's failure to comply with the statutes, the judgment in favor of the lien claimant was overturned.

It is particularly interesting to compare this case to the Staker case cited by the Plaintiff. The holding of Staker was that the statute of limitations is an affirmative defense and not an element of plaintiff's claim. The ruling of AAA is the opposite. The difference, as argued earlier, is that a mechanic's lien claim is a statutorily created claim and this distinction is critical. To enjoy the benefits of the statute, one must comply with the statute. The same conclusion was reached by the Utah Court of Appeals in Govert Copier Painting v. Van Leeuwen, 801 P.2d 163 (Utah App. 1990). Like the AAA case the issue in Govert was the applicability of the one year statute of limitations in the mechanic's lien statute. Though the application of the statute of limitations is generally considered an affirmative defense, it is not in the context of a mechanic's lien statute where the burden of proving all elements set forth in the statutes are on the lien claimant.

Utah's mechanics' lien statute, [citation omitted] provides, in pertinent part: "Actions to enforce the liens herein provided for must be begun within 12 months after the completion of the original contract" . . . The burden of proof is on Copier Painting [the lien claimant] to prove that it is entitled to the lien and that it has complied with the statute.

Id at 172.

The law of this State as set forth by the Supreme Court and the Court of Appeals clearly supports the Minute Entry made by, and the rationale of, the Honorable Robert K. Hilder in granting the Defendant's Motion for Reconsideration and reversing the award of fees. The conclusion reached by the Judge Hilder is well stated:

The court's error was in suggesting that the award of attorney's fees was somehow separate from establishing entitlement to the lien, and that failure to provide notice of lien (or at least prove such notice was given) is not an element of plaintiff's claim for fees but rather an affirmative defense.

The court now believes that the same rules apply to the attorney's fee award, as apply to foreclosure of the lien itself. That is, as is well established, attorney's fees are generally not awardable in Utah unless provided for by either statute or contract. In the case of the mechanic's lien statute, both the availability of the lien process and the award of fees, are completely creatures of statute unknown to the common law. To avail itself of the benefits conferred by the statute, the plaintiff must comply with all of the statutory requirements, and proof of each requirement is an element of plaintiff's case.

See, Add. 72, 73.)

Based upon the available case law, it cannot be concluded, as a matter of law, that Judge Hilder erred in this respect. On the contrary, the Plaintiff has shown the Court no cases which arise in the context of a statutorily created cause of action for foreclosure of a mechanic's lien in which a plaintiff prevailed in obtaining any remedy under the statute without first complying with the requirements of the statute. All relevant authority is to the contrary and the Plaintiff's reliance on cases arising in the context of common law causes of action is misplaced. Such cases are unavailing.

CONCLUSION

Plaintiff appeals to this Court asking it to overrule the trial court's conclusion of law that an element of a mechanic's lien holder's case, if he intends to request attorney's fees, is proof of mailing in accordance with the provisions of the statute. Plaintiff is thus requesting relief that would overturn this conclusion of law and remand the case back to the District Court for the determination of the reasonableness of Plaintiff's fee request which was never resolved before the District Court issued its ruling denying attorney's fees. However, Plaintiff's appeal is misplaced. The law is clear that if a mechanic lien holder wishes to request attorney's fees pursuant to statute that an element of his case is proof of compliance of all requirements of the

statute, including proof of mailing in accordance with the statute. It is undisputed that the Plaintiff failed to introduce any evidence in its case, or at any time during the trial, regarding mailing of the notice of lien. Further, Plaintiff's belated attempts to cure this problem were appropriately denied by the trial court.

The Plaintiff's Motion to Reopen the case was filed a full year after Plaintiff rested its case. The Motion was not supported by any affidavit whatsoever. The moving papers contained no cogent argument whatsoever. The moving papers contained no reference to any subsection of Rule 59, pursuant to which the Plaintiff was moving the court or any factual circumstances which would have supported any basis which exists under Rule 59. The evidence which the Plaintiff wanted to introduce, if the case was reopened, was inadmissible anyway. The trial court properly denied the Motion and should be affirmed.

The Defendant's Motion for Reconsideration was properly before the court and was properly granted. A trial court is free to correct itself with regard to any errant conclusion of law made, at any time prior to the entry of a judgment. The trial court properly concluded that a Plaintiff seeking benefits under Utah's mechanic's lien statute must first comply with the statute. The lower court should be affirmed.

Finally, Defendant should be awarded its attorney's fees incurred in the present appeal. The attorney's fee provision on which the Plaintiff has been relying, Utah Code Ann. § 38-1-18 (1953 as amended), is reciprocal in nature. It provides for fees to "...the successful party" While Plaintiff's failure to mail the prerequisite notice may preclude the Plaintiff from a recovery of fees, there is no such prerequisite to an award of fees to the Defendant. All that is necessary

is that the Defendant be "successful." The present appeal was brought after Defendant succeeded at trial on the attorney's fee issue. Upon denial of the Plaintiff's appeal, Defendant should be entitled to its appellate fees. Otherwise, the statutory scheme behind the reciprocal fee provision is defeated. The Plaintiff would have been in a position where it could appeal without any risk of being compelled to pay the Defendant's attorney's fees upon losing, while the Defendant runs the risk of paying Plaintiff's fees if Plaintiff prevails. This is obviously not what is contemplated by the legislature in creating a reciprocal fee provision.

On this basis, Defendant respectfully requests this Court to deny Plaintiff's appeal, to uphold the decisions of the trial court, and to award Defendant his attorney's fees in connection with this appeal.

RESPECTFULLY submitted this 13 day of August, 1998.

RICHER, SWAN & OVERHOLT, P.C.

By 

David W. Overholt
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 13 day of August, 1998, I caused 2 true and correct copies of the foregoing to be served upon the following by placing the same in the United States mail, postage prepaid, and addressed as follows:

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