

1998

J.V. Hatch Construction, Inc. v. Michael Kampros : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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UTAH COURT OF APPEALS
BRIEF

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IN THE ~~UTAH~~ SUPREME COURT

980200-CA

J.V. HATCH CONSTRUCTION, INC.,)

Plaintiff and)
Appellant,)

vs.)

MICHAEL KAMPROS,)

Defendant and)
Appellee.)

98-0200-CA

No. 970604

950010438

Priority No. 15

BRIEF OF APPELLANT J.V. HATCH CONSTRUCTION, INC.

APPEAL FROM AN AMENDED JUDGMENT
THE THIRD JUDICIAL DISTRICT COURT, DIVISION II
OF SALT LAKE COUNTY, UTAH
HONORABLE ROBERT K. HILDER
DATE OF AMENDED JUDGMENT: NOVEMBER 18, 1997
Case No. 950010438

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IN THE UTAH SUPREME COURT

J.V. HATCH CONSTRUCTION, INC.,)	
)	
Plaintiff and)	
Appellant,)	
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vs.)	No. 970604
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PARTIES BELOW:

- A. J.V. HATCH CONSTRUCTION
- B. MICHAEL KAMPROS

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction over this appeal pursuant to Article VIII, Section 3, Constitution of Utah, Section 78-2-2(j), Utah Code Annotated 1953, as amended and Rules 3(a) and 4(a), Utah Rules of Appellate Procedure.

ISSUES PRESENTED FOR REVIEW

The following issues are presented for review:

1. Did the trial court error in granting defendant's Motion for Reconsideration.
2. Did the trial court error in denying plaintiff's Motion to Reopen Case for Limited Purpose?

STANDARD OF APPELLATE REVIEW

1. In reviewing the trial court's decision granting defendant's Motion for Reconsideration, the appellate court will accord no deference to the trial court's decision and review it for correctness since it was decided on an issue of law. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985) ("[W]e accord conclusions of law no particular deference but review them for correctness."); Handy v. Union Pacific Railroad, 841 P.2d 1210, 1215 (Utah App. 1992) (whether a party has failed to establish a prima facie case is a question of law); See also Sorenson v. Kennecott-Utah Copper Corp., 873 P.2d 1141, 1144 (Utah App. 1994).

2. In reviewing the trial court's decision denying

plaintiff's Motion to Reopen Case for Limited Purpose, the appellate court will grant deference to the trial court's decision. College Irrigation Company vs. Logan River & Blacksmith Fork Irrigation Company, 780 P.2d 1241 (Utah 1989).

ISSUES PRESERVED FOR APPEAL

The foregoing issues were preserved for appeal in plaintiff's Memorandum in Opposition to defendant's Motion for Reconsideration and plaintiff's Motion to Reopen Case for Limited Purpose (R. 261, 263).

STATEMENT OF CASE

J.V. Hatch Construction, Inc. ("Hatch Construction") filed a mechanic's lien against property owned by Michael Kampros ("Kampros") and subsequently filed a Complaint to foreclose on that mechanic's lien. Pursuant to Section 38-1-7(3) Utah Code Annotated, plaintiff also mailed by certified mail a copy of that mechanic's lien within 30 days of recording to Michael Kampros. A bench trial was held and plaintiff was the prevailing party. At trial, plaintiff introduced evidence of the mechanic's lien but did not introduce evidence of mailing a copy of the mechanic's lien to defendant. Defendant never denied receiving the mailing and never raised the issue at trial or in his pleadings. In written Findings of Fact and Conclusions of Law, the trial court awarded plaintiff its attorney's fees as the successful party pursuant to Section 38-1-18. The Court ruled

that evidence of failure to mail the mechanic's lien within 30 days of recording by certified mail as required by Section 38-1-7(3) was an affirmative defense that was never plead or alleged at trial by defendant.

After the Court's ruling, defendant filed a Motion for Reconsideration urging the Court to reverse its decision that the mailing requirement was an affirmative defense and hold that proof of mailing pursuant to Section 38-1-7(3) was part of plaintiff's prima facie case to recover attorney's fees under Section 38-1-18. The effect of such a ruling would be to eliminate an award of attorney's fees to plaintiff since although the mailing occurred, plaintiff did not present evidence thereof at trial. In addition to opposing that motion, plaintiff filed a Motion to Reopen Case for the Limited Purpose of demonstrating that the mechanic's lien mailing requirement had been complied with. The trial court granted defendant's Motion for Reconsideration, reversed its prior ruling and held that proof of mailing was part of plaintiff's prima facie case, which plaintiff failed to prove at trial and therefore plaintiff was not entitled to attorney's fees. The court also denied Plaintiff's Motion to Reopen Case for the Limited Purpose of demonstrating that the mailing requirement had been complied with. Plaintiff brought this appeal from both of those rulings.

FACTS

1. On August 31, 1995, J.V. Hatch Construction, Inc. filed a valid mechanic's lien on Michael Kampros' property. (R. 217.)

2. On August 31, 1995, a copy of the mechanic's lien was mailed to Michael Kampros by certified mail, as required by Section 38-1-7(3). (R. 274-76.)

3. On September 2, 1995, a Return Receipt for the certified letter was signed on behalf of Michael Kampros. (R. 274-76.)

4. On September 5, 1995, the Return Receipt was post marked for return mail to plaintiff's attorney. (R. 274-76.)

5. In his answer to the Complaint and the Amended Complaint, defendant did not aver that the mailing did not occur. (R. 5-10, 56-67.)

6. The matter was tried before Judge Hilder at a bench trial on August 12, 1996, September 11, 1996, November 8, 1996 and December 3, 1996. (R. 211.)

7. At trial, plaintiff did not introduce evidence that a copy of the mechanic's lien had been timely mailed to defendant, and the defendant did not introduce evidence that the mailing did not occur. (R. 217.)

8. On July 31, 1997, the trial court ruled in plaintiff's favor on the Amended Complaint and ordered foreclosure of the mechanic's lien in the amount of \$8,500. (R. 216-19.)

9. The Court also held that "compliance with the mailing requirement is not an element of plaintiff's claim. Any alleged non-compliance would constitute an affirmative defense, much like the statute of limitations or statute of frauds." (R. 217.)

10. The Court held that plaintiff had "met the essential requirements of Section 38-1-18, thus creating prima facie proof of entitlement to attorney's fees." (R. 217-18.)

11. Section 38-1-18 provides that the "successful party [in a mechanic's lien] action shall be entitled to recover a reasonable attorney's fee."

12. On August 18, 1997, defendant filed a Motion for Reconsideration of Award of Attorney's Fees and Costs, urging the Court to reverse its previous ruling that plaintiff had proven a prima facie case of entitlement to attorney's fees under Section 38-1-18. (R. 240.)

13. Defendant cited Section 38-1-7(3), which provides that "failure to deliver or mail the notice of lien" precludes an award of attorney's fees, and argued that a prima facie case for the award of attorney's fees under Section 38-1-18 includes proof of mailing pursuant to Section 38-1-7(3). (R. 242-43.)

14. Although plaintiff opposed that motion, plaintiff also filed a Motion to Reopen Plaintiff's Case for the Limited Purpose of proving that the mailing requirement had been complied with. (R. 268.)

15. A copy of the Return Receipt was attached to plaintiff's motion, together with an affidavit, affirming that a timely mailing had, in fact, occurred. (R. 274-76.)

16. On October 27, 1997, the trial court granted defendant's Motion for Reconsideration, holding that proof of mailing under Section 38-1-7(3) was part of plaintiff's prima facie case to establish entitlement to attorney's fees under Section 38-1-18, which had not been proven at trial and therefore plaintiff was not entitled to attorney's fees. (R. 297-99.)

17. On October 27, 1997, the trial court also denied plaintiff's Motion to Reopen Plaintiff's Case for Limited Purpose on the grounds that proof of the mailing was in plaintiff's possession at the time of trial. (R. 299-300.)

SUMMARY OF ARGUMENT

The trial court erred in holding that a prima facie case for attorney's fees under Section 38-1-18 includes proof of mailing under Section 38-1-7(3). The trial court also erred in denying plaintiff's Motion to Reopen Case for the Limited Purpose of demonstrating that the mailing requirement had been complied with.

I. THE TRIAL COURT ERRORED IN GRANTING DEFENDANT'S MOTION FOR RECONSIDERATION.

The trial court erred in granting defendant's Motion for Reconsideration on the grounds that A) plaintiff had established a prima facie case for attorney's fees under Section 38-1-18, B)

the Motion for Reconsideration were filed more than 10 days after the Findings of Fact and Conclusions of Law was entered, and C) the mailing did occur.

A. A Prima Facie Case for Attorney's Fees Under Section 38-1-18 Does Not Require Proof of Mailing Under Section 38-1-7(3).

In granting defendant's Motion for Reconsideration, the trial court held that plaintiff had failed to prove a prima facie case for attorney's fees under Section 38-1-18, inasmuch as plaintiff had failed to prove that a copy of the mechanic's lien had been mailed to defendant by certified mail within 30 days of recording as required by Section 38-1-7(3). Section 38-1-18 provides that attorney's fees "shall" be awarded to the "successful party" in mechanic's lien cases:

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.

Utah Code Ann. Section 38-1-18.

Plaintiff was the "successful party" in an action brought under "this chapter." Plaintiff filed a mechanic's lien, prevailed at trial, and the trial court entered a judgment foreclosing on the mechanic's lien in the amount of \$8,500.

A "prima facie case" is the minimum evidence sufficient to make a claim, until contradicted and overcome by other evidence.

See Binkowski v. Township of Shelby, 208 N.W.2d 243 (Mich. App. 1973), see also State vs. Real Property at 633 East 640 North, Orem, 942 P.2d 925 (Utah 1997). A "prima facie case" for an award of attorney's fees pursuant to Section 38-1-18 requires only that the plaintiff prove that it was the "successful party" in an action to enforce a mechanic's lien. The claim that plaintiff has failed to comply with Section 38-1-7(3) is an "avoidance or affirmative defense" that defendant can raise, but is not part of plaintiff's prima facie case.

Section 38-1-7(3) provides that within 30 days after filing a mechanic's lien, a copy of the mechanic's lien shall be mailed to the "reputed owner" or "record owner." Section 38-1-7(3) also provides that "failure to deliver or mail the notice of lien" to the "reputed owner" or "record owner" precludes an award of attorney's fees:

Within 30 days after filing the notice lien, the 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 addresses appearing on the last completed real property assessment rolls of the county where the affected property is located. **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.** (Emphasis Added)

Utah Code Ann. Section 38-1-7(3).

In granting defendant's Motion for Reconsideration, the trial court held that, as a matter of law, a "prima facie" case for attorney's fees under Section 38-1-18 also includes proof of compliance with the Section 38-1-7(3) mailing requirement.

As set forth below, a claim that Section 38-1-7(3) was not complied with is an "avoidance or affirmative defense" that may be raised by defendant, but is not an element of plaintiff's prima facie claim for attorney's fees under Section 38-1-18. There is no Utah case holding whether compliance with Section 38-1-7(3) is one of the "elements" that must be proven to recover attorney's fees pursuant to Section 38-1-18.

As a general rule, statutory defenses that negate a plaintiff's claim are defenses that may be raised by defendant, but are not part of plaintiff's prima facie case to establish a claim. For example, Section 25-5-4 Utah Code (statute of frauds) provides that certain "agreements are void unless the agreement... is in writing, signed by the party to be charged with the agreement." However, a prima facie case to recover on an agreement that falls within the statute of frauds does not include proving that the "agreement was in writing." Such a claim must be raised by way of affirmative defense. Phillips v. JCM Dev. Corp., 666 P.2d 876, 884 (Utah 1983) (the statute of frauds is an affirmative defense, not an element of the claim.)

Similarly, Section 78-12-1 Utah Code (statute of

limitations) provides that "civil actions may be commenced only within the periods prescribed in this chapter..." However, a prima facie case for a cause of action subject to that chapter does not including proving that the cause of action was commenced within the periods prescribed in Title 78, Chapter 12. Such a claim must be raised by way of affirmative defense. Staker v. Huntington Cleveland Irrigation Co., 664 P.2d 1188, 1190 (Utah 1983) (the statute of limitations is an affirmative defense, not an element of the claim.)

Again, Section 63-30-3 Utah Code (governmental immunity) provides that "all governmental entities are immune from suit" with certain exceptions. However, a prima facie case to recover against a governmental entity does not require proving that one of the exceptions apply. The defendant must raise governmental immunity as an affirmative defense. Nelson vs. Salt Lake City, 919 P.2d 568, 574 (Utah 1996) ("governmental immunity is an affirmative defense that must be proved by the defendant.")¹

In all of the above examples, a "prima facie case" does not include proving compliance with the cited statutes. Similarly, in this case, if plaintiff is "successful" on a claim filed under

¹Other examples could also be cited. For example, Section 57-14-3 limits landowner liability for recreational accidents. However, a prima facie case for negligence does not include proving that the limitations of that chapter do not apply. Golding v. Ashley Central Irrigation Co., 793 P.2d 897 (Utah 1990) (Section 57-14-1 et seq. is an affirmative defense, not an element of the claim.)

the mechanic's lien chapter, it has made a "prima facie case" for attorney's fees under Section 38-1-18. Defendant could have, but did not, raise failure to comply with Section 38-1-7(3) as an "avoidance or affirmative defense."

The wording of Section 38-1-7(3) further indicates that noncompliance with the mailing requirement is a defense, not part of the prima facie case to establish attorney's fees under Section 38-1-18. That section provides 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." Worded in the negative, the language of the statute suggests that a defendant seeking to avoid liability for attorney's fees must raise that "failure" as a defense. Had the legislature intended a Section 38-1-7(3) mailing to be part of the prima facie case for attorney's fees under Section 38-1-18, Section 38-1-18 or 38-1-7(3) would have stated that claimants must comply with Section 38-1-7(3) to recover attorney's fees under Section 38-1-18. Being worded in the negative, the statute provides a defense, but is not part of the prima facie case for attorney's fees under Section 38-1-18.

It is incumbent on the defendant to raise defenses "outside the scope of a [general denial] of plaintiff's prima facie case" that would prevent recovery. General Ins. Co. of America vs. Carnicero Dynasty Corp, 545 P.2d 502, 504 (Utah 1976). Rule 8 of

the Utah Rules of Civil Procedure provides the manner in which such an "avoidance or affirmative defense" may be raised. See Golding vs. Ashley Central Irrigation Co., 793 P.2d 897, 899 (Utah 1990) (discussing the procedure for raising an "avoidance or affirmative defense" under Rule 8). Plaintiff is not required to rebut such defenses to establish a prima facie case.

In this case, defendant did not claim in his pleadings or at trial that the mailing did not occur. Plaintiff's prima facie case for recovering attorney's fees under Section 38-1-18 did not include proving compliance with the Section 38-1-7(3) mailing requirement. Plaintiff was the "successful party" in a mechanic's lien case, which satisfied its prima facie case to recover attorney's fees under Section 38-1-18. The trial court erred in reversing its prior ruling and holding that plaintiff's prima facie case under Section 38-1-18 included proof of mailing under Section 38-1-7(3).

B. The Motion For Reconsideration Was Improper.

As a general rule, motions for reconsideration are not recognized in Utah. See Peay v. Peay, 607 P.2d 841 (Utah 1980); McKee v. Williams, 741 P.2d 978 (Utah 1981). There are two exceptions to this rule. First, where a trial court rules on less than all of the claims in a case, under Rule 54(b) of the Utah Rules of Civil Procedure the trial court may reconsider earlier rulings. See e.g., Timm vs. Dewsnap, 851 P.2d 1178 (Utah

1993). Second, where a motion for reconsideration is in substance a motion under Rule 59 of the Utah Rules of Civil Procedure, the motion to reconsider may be treated as a Rule 59 motion. See e.g., Watkiss & Campbell v. Foa & Son, 808 P.2d 1061 (Utah 1991). This case does not fall under either of those exceptions.

Consequently, the trial court erred in reconsidering its earlier ruling. See Drury v. Lunceford, 415 P.2d 662 (Utah 1966) (a trial court does not have authority to act "as a court of review upon [its own] ruling.") Therefore, the trial court erred in considering defendant's motion for reconsideration where there was no basis to do so under Rule 54(b) or Rule 59 of the Utah Rules of Civil Procedure.

C. The Mailing Did Occur.

The Section 38-1-7(3) mailing requirement was complied with. The trial court erred in granting defendant's Motion for Reconsideration without also granting plaintiff's Motion to Reopen Case for Limited Purpose, to allow plaintiff to demonstrate proof of mailing.

II. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S
MOTION TO REOPEN FOR LIMITED PURPOSE.

Inasmuch as the trial court granted defendant's Motion for Reconsideration, plaintiff should have been allowed to reopen its case for the limited purpose of demonstrating that, in fact, the mailing requirement was complied with. The trial court's

reversal of its prior ruling constituted a surprise to plaintiff. The trial court erred in denying plaintiff's Motion to Reopen for Limited Purposes on the grounds that A) plaintiff satisfied the Rule 59 grounds for reopening a case to take additional testimony, and B) the mailing did occur.

A. Plaintiff complied with the requirements of Rule 59 for reopening the case.

Plaintiff satisfied the grounds set forth in the Rule 59 of the Utah Rules of Civil Procedure to reopen this case for the limited purpose of demonstrating that the mailing requirement was complied with. Rule 59 of the Utah Rules of Civil Procedure provides that the Court may "take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions" for a number of reasons, including 1) "[a]ccident or surprise, which ordinary prudence could not have guarded against," and 2) "[i]nsufficiency of the evidence to justify the verdict or other decision:"

The court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment [for any of the following causes]:

...
(3) Accident or surprise, which ordinary prudence could not have guarded against.

...
(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

Rule 59(a), Utah Rules of Civil Procedure.

Both of these grounds were satisfied in this case. At trial, the trial judge and plaintiff's counsel were of the opinion that plaintiff had proven a prima facie case for attorney's fees. It was not until defendant filed his Motion for Reconsideration, and the trial court reversed its prior ruling, that this changed. This is sufficient "accident or surprise" to justify plaintiff's introduction of evidence demonstrating compliance with the mailing requirement. Where the trial judge believed at trial that a prima facie case had been proven, certainly plaintiff was "surprised" when the trial judge later reversed his decision. "Ordinary prudence" could not have guarded against the trial judge later reversing his decision.

Similarly, the trial court had awarded attorney's fees in its original Findings of Fact and Conclusions of Law. The trial court's later reversal created a "insufficiency of the evidence" to support its earlier award of attorney's fees. Since there was no evidence as to whether the mailing requirement had been complied with, the case should have been reopened under Rule 59(a)(6) to determine whether there was sufficient evidence (i.e. proof of mailing) to support the trial court's earlier award of attorney's fees.

B. The Mailing Did Occur.

The trial court reconsidered its ruling as to whether proof of mailing was part of plaintiff's prima facie case, but denied a

motion to introduce evidence to demonstrate the truth of the matter. Mr. Kampros cannot have it both ways. If the trial court reconsiders the issue of what constitutes the prima facie elements of a claim and adds a new element, it is an abuse of discretion not to reopen the case to determine whether the new element (the mailing requirement) has been complied with. In this case, it is not disputed that the mailing requirement was complied with. Defendant knows that the mailing requirement was complied with. The trial court knows the mailing requirement was complied with.

Once the trial court reversed its earlier ruling and added a new element, it was an abuse of discretion to deny plaintiff's Motion to Reopen for the Limited Purpose of demonstrating the truth of the matter--the mailing requirement was complied with.

III. PLAINTIFF SHOULD BE AWARDED ITS ATTORNEY'S FEES ON APPEAL.

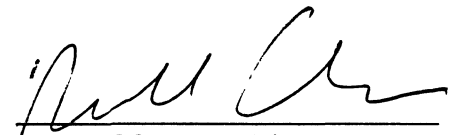
As the prevailing party below, plaintiff should also be awarded its attorney's fees on appeal. See R & R Energies vs. Mother Earth Industries, Inc., 936 P.2d 1068 (Utah 1997) (holding that where a party entitled to attorney's fees below prevails on appeal, an award of attorney's fees on appeal is proper).

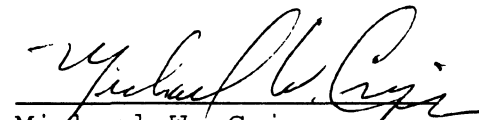
IV. CONCLUSION

For the reasons set forth above, this court should hold that proof of mailing under Section 38-1-7(3) is not part of plaintiff's prima facie case to establish a claim for attorney's fees under Section 38-1-18. Alternatively, this court should

hold that it was an abuse discretion for the trial court to grant defendant's Motion for Reconsideration but deny plaintiff's Motion to Reopen Case for the Limited Purpose of demonstrating that the mailing requirement had been complied with. This court should also award plaintiff its attorney's fees on appeal.

DATED this 27 day of March, 1998.

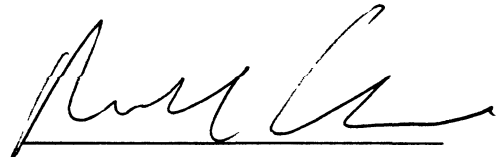

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MAILING CERTIFICATE

This is to certify that on this 27 day of March, 1998, two (2) true and correct copies of the foregoing Appellant's Brief were mailed first class postage prepaid to:

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APPENDICES

1. Utah Code Ann., Section 38-1-18.
2. Utah Code Ann., Section 38-1-7(3).
3. Utah Rules of Civil Procedure, Rule 59.
4. Amended Judgment

38-1-17. Costs — Apportionment — Costs and attorneys' fee to subcontractor.

Except as provided in Section 38-11-107, as between the owner and the contractor the court shall apportion the costs according to the right of the case, but in all cases each subcontractor exhibiting a lien shall have his costs awarded to him, including the costs of preparing and recording the notice of claim of lien and such reasonable attorneys' fee as may be incurred in preparing and recording said notice of claim of lien.

History: R.S. 1898 & C.L. 1907, § 1394; C.L. 1917, § 3744; R.S. 1933 & C. 1943, 52-1-17; L. 1961, ch. 76, § 1; 1995, ch. 172, § 3; 1996, ch. 79, § 56.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, added "Except as

provided in Section 38-11-107" at the beginning of the section.

The 1996 amendment, effective April 29, 1996, substituted "attorneys' fee" for "attorney's fee."

NOTES TO DECISIONS

Interest on judgment.

In action to foreclose mechanic's lien and to recover for services rendered under contract of

employment, it is not error to allow interest on sum awarded. *Sandberg v. Victor Gold & Silver Mining Co.*, 24 Utah 1, 66 P. 360 (1901).

COLLATERAL REFERENCES

Utah Law Review. — Attorney's Fees in Utah, 1984 Utah L. Rev. 553.

Am. Jur. 2d. — 53 Am. Jur. 2d Mechanics' Liens § 461.

38-1-18. Attorneys' fees.

Except as provided in Section 38-11-107, in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action.

History: R.S. 1898, § 1400; L. 1899, ch. 58, § 1; C.L. 1907, § 1400; C.L. 1917, § 3750; R.S. 1933 & C. 1943, 52-1-18; L. 1961, ch. 76, § 2; 1995, ch. 172, § 4.

Amendment Notes. — The 1995 amend-

ment, effective May 1, 1995, added "Except as provided in Section 38-11-107" at the beginning of the section.

Cross-References. — Attorneys' fee in suit for wages, § 34-27-1.

NOTES TO DECISIONS

ANALYSIS

Appeals.

Denial on excessive claim.

Effect.

Reduction by trial court.

Successful party.

Validity of lien.

Cited.

Appeals.

An appeal from a suit brought to enforce a lien qualifies as part of "an action" for the purposes of this section. *Richards v. Security Pac. Nat'l Bank*, 849 P.2d 606 (Utah Ct. App.),

cert. denied, 859 P.2d 585 (Utah 1993).

Denial on excessive claim.

Where it appears on trial that contractor has substantially performed his contract but that he attempts to overcharge the owner in setting the total amount due on a cost-plus-ten-percent contract, the court does not abuse its discretion in refusing to award the contractor attorney fees in suit to collect upon such contract. *Shupe v. Menlove*, 18 Utah 2d 130, 417 P.2d 246 (1966).

Effect.

This statute is mandatory, not discretionary.

materialman, and no such attachment, garnishment or levy upon any money due to a subcontractor or materialman from the contractor shall be valid as against any lien of a laborer employed by the day or piece.

History: R.S. 1898 & C.L. 1907, § 1380;
C.L. 1917, § 3730; R.S. 1933 & C. 1943, 52-1-6.

COLLATERAL REFERENCES

<p>Am. Jur. 2d. — 53 Am. Jur. 2d Mechanics' Liens § 265</p> <p>A.L.R. — Mechanic's lien based on contract with vendor pending executory contract for sale of property as affecting purchaser's interest, 50 A.L.R.3d 944</p>	<p>Garnishment of funds payable under building and construction contract, 16 A L R 5th 548.</p>
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38-1-7. Notice of claim — Contents — Recording — Service on owner of property.

(1) A person claiming benefits under this chapter shall file for record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien within 90 days from the date:

- (a) the person last performed labor or service or last furnished equipment or material on a project or improvement for a residence as defined in Section 38-11-102; or
- (b) of final completion of an original contract not involving a residence as defined in Section 38-11-102.

(2) This notice shall contain a statement setting forth:

- (a) the name of the reputed owner if known or, if not known, the name of the record owner;
- (b) the name of the person by whom he was employed or to whom he furnished the equipment or material;
- (c) the time when the first and last labor or service was performed or the first and last equipment or material was furnished;
- (d) a description of the property, sufficient for identification; and
- (e) the signature of the lien claimant or his authorized agent and an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents. No acknowledgment or certificate is required for any notice filed after April 29, 1985, and before April 24, 1989.

(3) Within 30 days after filing the notice of lien, the 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, using the names and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located. 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 attorneys' fees against the reputed owner or record owner in an action to enforce the lien.

collected through attachment proceeding. *Blake v. Farrell*, 31 Utah 110, 86 P. 805 (1906).

Vacation of satisfaction.

The recorded satisfaction of judgment signed by judgment creditor cannot be vacated without action and hearing in equity, and the lien

of an attorney against the proceeds of the judgment does not include his personal right to execute against the judgment debtor. *Utah C.V. Fed. Credit Union v. Jenkins*, 528 P.2d 1187 (Utah 1974).

COLLATERAL REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments § 1004 et seq.

C.J.S. — 49 C.J.S. Judgments §§ 574 to 584.

A.L.R. — Voluntary payment into court of

judgment against one joint tort-feasor as release of others, 40 A.L.R.3d 1181.

Key Numbers. — Judgment ⇌ 891 to 899.

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** 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 a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Compiler's Notes. — This rule is similar to Rule 59, F.R.C.P.

Cross-References. — Harmless error not ground for new trial, Rule 61.

Juror's competency as witness as to validity of verdict or indictment, Rules of Evidence, Rule 606.

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NOV 16 1996
Time 2:40 pm

IN THE THIRD CIRCUIT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,

J.V. HATCH CONSTRUCTION INC.

Plaintiff,

vs.

MICHAEL KAMPROS,

Defendant.

AMENDED JUDGMENT

CIVIL NO. 950010438

JUDGE: ROBERT K. HILDER

This matter having been tried on August 12, 1996, September 11, 1996, November 8, 1996 and December 3, 1996, and this Court having rendered it's Findings of Fact and Conclusions of Law, and having considered Defendant's Motion for Reconsideration of Award of Attorney's Fees and Costs and Plaintiff's Motion to Reopen Case, it is hereby ordered, adjudged and decreed that:

1. Judgment is granted against Michael Kampros and in favor

of J.V. Hatch Construction in the amount of \$8,500, said amount to bear interest at 10% per annum from August 31, 1995 to the date hereof and thereafter at the applicable post judgment rate.

2. J.V. Hatch Construction, Inc. is awarded judgment against Michael Kampros in the amount of \$445.00 in costs said amount to bear judgment at the applicable post interest rate.

3. Defendant's Motion for Reconsideration of Award of Attorney's Fees and Costs is granted.

4. Plaintiff's Motion to Reopen Case is denied.

5. It is hereby ordered that plaintiff's Mechanic's Lien filed on the property described on Exhibit A hereto shall be foreclosed and said property sold at sheriff's sale by the sheriff of Salt Lake County pursuant to Rule 69 of the Utah Rules of Civil Procedure to satisfy the foregoing debt.

DATED this 17th day of November, 1997.


By the Court

Approved as to Form:

Randy Ludlow

Exhibit A

BEG N 00-02'55" W 94.63 ft & S 89-53'55" W 1315.20 FT & S
00-00'44" E 268.82 FT FR E 1/4 COR OF SEC 1, T 3S, R 1W, S L
M; N 89-53'55" E 142 FT; S 00-06'05" E 320 FT; S 89-53' 55"
W 142.50 FT; N 00-00'44" W 320 FT TO BEG. 1.04 AC M OR L
5116-1275 5123-0998 6251-16, Salt Lake County, Utah.

VTDI 27-01-426-003-000 Dist 34C