

1989

John Wagner Associates v. Hercules, Inc. : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

890017-CA

* * * * *

JOHN WAGNER ASSOCIATES,
d/b/a GRABBER UTAH,

Plaintiff-Appellant,

vs.

HERCULES, INC.,

Defendant-Respondent.

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CASE NO. 890017-CA

Category No. 14b

* * * * *

BRIEF OF APPELLANT

* * * * *

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
Honorable Frank G. Noel, District Judge

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ATTORNEYS FOR RESPONDENT

STATEMENT OF PARTIES TO THIS ACTION

The parties to this action are Plaintiff-Appellant John Wagner Associates dba Grabber Utah, Defendant-Appellee Hercules, Inc., and Defendant Modulaire Industries. A settlement between Plaintiff-Appellant and Defendant Modulaire Industries was effectuated prior to the trial of the case and, therefore, Defendant Modulaire is not involved in this appeal.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to an Order of transfer dated January 10, 1989 from the Utah Supreme Court under Utah Code Annotated § 78-2-2(4) and Rule 4A of the Rules of the Utah Supreme Court. The Utah Supreme Court had Jurisdiction of this matter pursuant to Utah Code Annotated § 78-2-2(3)(j).

STATEMENT OF NATURE OF PROCEEDINGS

This case is an appeal from an Order based upon a Motion for Summary Judgment filed by Defendant-Appellee Hercules under which Plaintiff-Appellant's mechanic's lien cause of action was dismissed and an appeal from a final Judgement following trial under which Plaintiff-Appellant's cause of action for failure to obtain a payment bond was dismissed. The Order and final Judgment were both issued by the Third Judicial District Court in and for Salt Lake County, State of Utah.

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issues presented by this appeal are stated as follows:

- a. Whether the trial court committed an error of law when it ruled that the alienability of an interest in real property affects the validity or enforceability of a mechanic's lien filed against that interest pursuant to Utah Code Annotated § 38-1-1 et seq. (1953 as amended); and
- b. Whether the trial court incorrectly ruled that modular office complexes of the configuration and magnitude of those which were constructed for Defendant Hercules do not require the project owner to obtain a payment bond in connection with the work

pursuant to Utah Code Annotated § 14-2-1 (1953 as amended prior to 1986).

DETERMINATIVE STATUTORY PROVISIONS

There are three statutes set forth in the Addendum hereto. First, is Utah Code Annotated § 14-2-1 et seq. (1953 as amended in 1985); Second, is Utah Code Annotated § 14-2-1 et seq. (1953 as amended in 1987); and Third, is Utah Code Annotated § 38-1-3 (1953 as amended in 1985).

STATEMENT OF THE CASE

This action arises out of the Plaintiff-Appellant supplying construction materials for the construction of approximately 25,000 square feet of office space in two complexes for Defendant-Appellee Hercules. Plaintiff-Appellant filed a Notice of Lien against the subject property with the Salt Lake County Recorder pursuant to Utah Code Annotated § 38-1-1 et seq. (1953 as amended). Subsequently, Plaintiff filed this action for breach of a joint-check agreement against Defendant Modulaire, for failure to obtain a payment bond as required by Utah Code Annotated § 14-2-1 et seq. (1953 as amended prior to 1986) against Defendant-Appellee Hercules, and for foreclosure of the mechanic's lien.

The parties submitted various motions for summary judgment and memorandums in support thereof. The court below ruled that there were material issues of fact preventing the granting of summary judgment on all motions for summary judgment except on Plaintiff-Appellant's and Defendant-Appellee Hercules' motions

relating to Plaintiff-Appellant's mechanic's lien foreclosure cause of action.

Following hearings on the motions for summary judgment, the trial court dismissed Plaintiff-Appellant's mechanic's lien cause of action. The trial court ruled that the interest of Defendant-Appellee Hercules in the subject property was not alienable and, therefore, Plaintiff-Appellant's mechanic's lien could not attach thereto.

Prior to trial, Plaintiff-Appellant and Defendant Modulaire entered into a settlement agreement resolving all causes of action between Plaintiff and Defendant Modulaire. Thus, the only cause of action remaining at trial was for failure to obtain a payment bond against Defendant-Appellee Hercules pursuant to Utah Code Annotated § 14-2-1 et seq. (1953 as amended prior to 1986).

At the end of trial, the trial judge ruled from the bench and dismissed Plaintiff-Appellant's failure to obtain a payment bond cause of action based upon the court's legal conclusion that the office complexes were not affixed to the subject property. Defendant-Appellee Hercules prepared findings of fact and conclusions of law and a final judgment. Plaintiff-Appellee filed objections based, in part, upon the exclusion of undisputed facts which should have been and were in fact part of the factual analysis upon which the trial court based its legal conclusions. Despite these objections by Plaintiff-Appellant to the findings of fact and conclusions of law and to the final judgment, the court signed and entered the findings of fact and conclusions of law and

the final judgment in substantially the same form as prepared by Defendant-Appellee Hercules.

STATEMENT OF FACTS

1. This action arises out of the Plaintiff-Appellant supplying construction materials for the construction of approximately 25,000 square feet of office space in two complexes for Defendant-Appellee Hercules. Trial Transcript -- R. at 640, pp. 50 & 51.

2. The office space was constructed with 30 modular office units, 14 feet by 60 feet each. One complex contains 19 units, Annex 15, and the other complex contains 11 units, Annex 16. Affidavit of Chilton Leach, Exhibit 3 -- R. at 217.

3. The complexes were constructed on land situated in western Salt Lake County which is used by Defendant-Appellee Hercules under an agreement between Defendant-Appellee Hercules and the United States Navy. Trial Exhibit 68D.

4. The subject property comprises part of Defendant-Appellee Hercules' Bacchus Works operation. Affidavit of Ryder Christian Waring, Exhibit 2 -- R. at 247.

5. Defendant-Appellee Hercules contracted with Defendant Modulaire for the construction and supply of the modular office units. R. at 217 and Trial Transcript at p. 7.

6. Space Building Systems contracted with Defendant Modulaire to perform the interior finish and other work on the project. R. at 226 and Trial Transcript at p. 7.

7. Space Building Systems has since been granted protection under the Unites States Bankruptcy laws.

8. Plaintiff-Appellant supplied drywall and other interior finish materials to the project pursuant to a contract between Plaintiff-Appellant and Space Building Systems. Trial Transcript at p. 7.

9. Plaintiff-Appellant was not paid by Space Building Systems in full for the materials it furnished to the project. Trial Transcript at pp. 11-13.

10. Plaintiff-Appellant made demand for payment from Defendants and upon refusal of the Defendants to make payment for the materials, Plaintiff filed a Notice of Lien against the subject property with the Salt Lake County Recorder pursuant to Utah Code Annotated § 38-1-1 et seq. (1953 as amended). Notice of Lien Attached to Complaint -- R. at 15.

12. On or about June 7, 1985, Defendant-Appellee Hercules entered into a contract with Defendant Modulaire for the construction of certain office complexes on property located approximately at 4100 South 8400 West. Affidavit of Ryder Christian Waring, Exhibit 2 -- R. at 247.

13. On or about July 3, 1985, Modulaire entered a subcontract with Space Building Systems wherein Space Building Systems was to provide labor and materials in the construction and improvement of the office complexes and more particularly to "complete interior rough & finish walls & ceiling complete."

Affidavit of Chilton Leach, Exhibit 4, Cover Sheet and Article 1.
1 -- R. at 226.

14. From July 8, 1985, through September 26, 1985, John Wagner Associates d/b/a Grabber Utah (hereinafter "Grabber Utah") sold certain supplies and materials to Space Building Systems, which were installed, integrated and incorporated into the office complexes. Trial Transcript, Testimony of Robert Spencer, Ben Gabladon and Larry Bills.

15. On October 10, 1985, Space Building Systems filed for relief under Chapter 11 of the United States Bankruptcy Code.

16. The amount owing Grabber Utah for supplies and materials sold to Space Building Systems and incorporated into the Offices is \$14,300.03, together with interest, costs and attorney's fees, less application of an undetermined principal payment which was part of a settlement between Plaintiff/Appellant and Defendant Modulaire. Trial Transcript at p. 13.

17. On December 5, 1985, Plaintiff recorded a Notice of Lien with the Salt Lake County Recorder's Office as Entry No. 4172790, Book 5715, Page 1421. Notice of Lien Attached to Complaint, Exhibit B -- R. at 15.

18. The construction contract between Space Building and Modulaire is an Associated General Contractors of America Standard Subcontract Agreement for Building Construction (hereinafter "subcontract"), with Modulaire's name and logo attached to the title page, signed as subcontractor and contractor, respectively.

Affidavit of Chilton Leach, Exhibit 4, Subcontract Cover Sheet and pp. 1, 7 -- R. at 226.

19. The subcontract encompassed complete "electrical rough & finish interior." Affidavit of Chilton Leach, Exhibit 4, section 1.1 -- R. at 226.

20. The subcontract entitled Modulaire to lien waivers from Space Building, allowed deduction of payments to Space Building from Modulaire due to any claim of lien, required Space Building to keep the building reasonably clean from debris, permitted Modulaire to require a performance bond and labor and material payment bond, and stated that any disputes arising from the subcontract shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. Affidavit of Chilton Leach, Exhibit 4, articles 2.1, 2.4, 2.5, 3.6, 6 and 10.1 (Emphasis Supplied) -- R. at 226.

21. The Purchase Order between Modulaire and Hercules for procurement of the office complexes refers to them as "complexes" and "office complexes." Affidavit of Chilton Leach, Exhibit 3, pp. 1, 4 -- R. at 217.

22. The Purchase Order states that Hercules is "responsible for site preparation, sewer, water and electrical service hook-ups." Id. at 2.

23. The Purchase Order states that Modulaire is responsible for any repair or maintenance in the "shell of the office complex." Id. at 4.

24. The tenor of Specification No. 9106 is that of the construction of a building or structure rather than a mobile unit. Affidavit of Ryder Christian Waring, Exhibit 1 -- R. at 240.

25. Modulaire' s Manufacturer's Statement of Origin to a Motor Vehicle refers to the Offices as a building: "The Corporation certifies that this was the first transfer of such new Modular building. . . ." Affidavit of Chilton Leach, Exhibit 1 (Emphasis Supplied) -- R. at 172.

26. The Purchase Order, which specifies the lease terms, contains a recapture provision wherein Hercules is allowed to buy the Office complex with 50% of previously made lease payments going toward the purchase price. Affidavit of Chilton Leach, Exhibit 3, pp. 3-4 -- 217.

27. The Purchase Order provides Hercules with an option to extend the leases beyond the initial two year period with the extended lease rate in no case to be higher than the present monthly rates. Affidavit of Chilton Leach, Exhibit 3, pp. 1, 3-- R. at 217.

28. The Purchase Order provides for a certain dismantling cost if and when necessary. Affidavit of Chilton Leach, Exhibit 3, p. 1 (Emphasis Supplied) -- R. at 217.

29. Complete water, sewer, telephone and electrical lines have been constructed and affixed to the office complexes; the wheels and hitches are removed; concrete sidewalks and stairs with steel railings lead to the office complexes; grading was performed in preparation for the office complexes; significant amounts of

asphalt were placed to create extensive parking areas with the asphalt fitting snugly within the serrated skirting and extending halfway up the skirting in certain areas; several units are joined to form expansive office complexes; Annex 15 is "L" shaped, joined by an enclosed, suspended walkway; Annex 16 is terraced and joined by interior stairwells; rain gutters and air conditioning units are attached; the interior is completely finished with carpet and drywall overlapping the joints of the connected, prefabricated shells; the office complexes, costing nearly one half million dollars, rest on a permanent foundation of cinder block; and the proposal for expansion of the parking lot for Annex 16 refers to the annex as "Building." Affidavit of Kurt C. Faux; Exhibit "1"-- R. at 405.

30. The subcontract refers to Hercules as the Owner. Affidavit of Chilton Leach, Exhibit 4, subcontract Cover Sheet-- R. at 226.

31. Hercules states that it manages the property pursuant to an agreement with the United States Navy. Affidavit of Ryder Christian Waring, para. 6 (Emphasis Supplied) -- R. at 168.

32. Hercules states that it uses the property pursuant to a contract with the Government of the United States. Hercules' Answer to Complaint, para. 7 -- R. at 23.

33. The contract with the United States Government grants Hercules wide-ranging use and control of all the "facilities" (the term "facilities" under said contract means "all property provided under the contract"). The property is occupied with the

Government's permission, and Hercules' interest is subordinate to the Government's interest. Affidavit of Ryder Christian Waring, Exhibit 2, General Provisions For Facilities Use Contracts, Clause Numbers 1, 2, 6, 8, 10, 13, 14, 15 and 29 -- R. at 247.

34. Hercules initially spent approximately one half million dollars for the office complexes.

SUMMARY OF THE ARGUMENT

With regard to the dismissal of Plaintiff-Appellant's mechanic's lien cause of action on summary judgment, the trial court erred in two respects in ruling that Plaintiff-Appellant's mechanic's lien could not attach to the interest of Defendant-Appellee Hercules in and to the subject property. First, there is nothing in the Facilities Use Agreement between Defendant-Appellee Hercules and the United States Government which is an absolute bar to the alienability of Hercules interest in the property. In fact, the Facilities Use Agreement contemplates the possibility of such liens. Second, there is nothing in the mechanic's lien statute which requires that an interest in real property must be alienable in order for a mechanic's lien to attach.

With respect to the dismissal of Plaintiff-Appellant's failure to obtain a payment bond cause of action, the trial court erred in ruling that the office complexes were personal property which were not affixed to the subject real property. Based upon the full facts and circumstance presented to the trial court, the correct legal conclusion is that the office complexes do

constitute "construction, addition to, alteration or repair of any building, structure or improvement."

ARGUMENT

I. INTRODUCTION

This argument addresses two primary issues. First, the alienability of Defendant-Appellee Hercules' interest in and to the subject property does not affect whether a mechanic's lien can attach to such interest. And second, the facts presented to the trial court do not support the legal conclusion that the office complexes are personal property which has not become affixed to the real property. In the alternative, such facts show that the traditional test of fixtures v. personal property cannot apply in the case at bar and still give effect to the clear legislative intent with regard to mechanic's lien and payment bond claims.

Since the mechanic's lien and payment bond statutes are in para materia and since this appeal involves both mechanic's lien and payment bond matters, the issues will be discussed in terms of both statutes. Adjudications of payment bond statutes are helpful in determining mechanic's lien issues and adjudications of mechanic's lien statutes are helpful in determining payment bond issues liens. King Bros., Inc. v. Utah Dry Kiln Co., 440 P.2d 17, 19, (Utah 1968).

Utah Code Annotated § 14-2-1 (1953 as amended in 1985) states, in pertinent part:

The owner of any interest in land entering into a contract, involving \$2,000 or more, for the construction, addition to, alteration, or

repair of any building, structure or improvement upon land shall, before any such work is commenced, , obtain from the contractor a bond in a sum equal to the contract price, with good and sufficient sureties, conditioned upon the faithful performance of the contract and prompt payment for material furnished, equipment and materials rented, and labor performed under the contract.

Utah Code Annotated § 38-1-3 (1953 as amended in 1981)

states, in pertinent part:

Contractors, Subcontractors and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building, structure or improvement to any premises in any manner . . . shall have a lien upon the property upon or concerning which the they have rendered service, performed labor or furnished or rented materials or equipment for the value of the service rendered, labor performed or material or equipment furnished or rented by each respectively Such liens shall attach to only such interest as the owner may have in the property. . . .

II. THE ALIENABILITY OF AN INTEREST IN REAL PROPERTY DOES NOT AFFECT THE ATTACHMENT OF A MECHANIC'S LIEN TO THAT INTEREST

1. There is Nothing in the Utah Mechanic's Lien Statutes or in the Cases Interpreting such Statutes Which Require Alienability of an Interest in Real Property as a Precondition to Attachment of a Mechanic's Lien.

Since Plaintiff-Appellant's mechanic's lien cause of action was dismissed on a motion for summary judgment, the standard of review is that all facts and reasonable inferences of proof are to be decided in a light most favorable to Plaintiff-Appellant. Gadd v. Olson, 685 P.2d 1041 (Utah 1984); King Bros., Inc. v. Utah Dry Kiln Company, 374 P.2d 254 (Utah 1962).

The court below ruled that Defendant-Appellee Hercules' interest in the property is not alienable and held that in such a situation, a mechanic's lien could not attach to that interest. The ruling that Defendant-Appellee Hercules interest is not alienable is not supported by the evidence presented to the trial court at the motion for summary judgment. For example, the agreement between Defendant-Appellee Hercules contains a promise by Hercules to keep the property free from all liens, thus, anticipating to possibility of encumbrances. See Affidavit of Ryder Christian Waring, Exhibit 2, General Provisions for Facilities Use Contract, Paragraph 8 -- R. at 275. Also as an example, Defendant-Appellee Hercules is not only allowed to use to subject property without payment therefor in the performance of government contracting work, it is also authorized to use the property for any other purpose and as long as Defendant-Appellee Hercules pays the appropriate monetary rental therefor. See Affidavit of Ryder Christian Waring, Exhibit 2, General Provisions for Facilities Use Contract, Paragraph 2 -- R. at 270.

From a reading of the entire Facilities Use Agreement, it is clear that there is no absolute bar to alienability of Hercules' interest. Defendant-Appellee Hercules asserted, and apparently the trial court believed, that a transfer of the property would result in an automatic termination of the Facilities Use Agreement. However, it appears to be within the discretion of the United States Government whether to terminate the Agreement upon such an occurrence.

Furthermore, to allow the trial court's "alienability" ruling to stand would contravene the clear purpose of the mechanic's lien and payment bond statutes and encourage owners of property to structure their dealings in such a way as to avoid the applicability of the mechanic's lien and payment bond statutes.

The purpose of Utah mechanic's lien statute is to provide protection to those who enhance the value of property by supplying labor or materials. Interiors Contracting, Inc. v. Navalco, 648 P.2d 1382, 1386 (Utah 1982). The statute is liberally and broadly construed to effect this desired objective. Id.; AAA Fencing Co. v. Raintree Development, 714 P.2d 289, 291 (Utah 1986).

In its memoranda and at the hearing on the motion for summary judgment, Defendant-Appellee Hercules argued that it has no legal interest in the real property, although it did admit that a Facilities Use Agreement exists between Defendant-Appellee Hercules and the United States Navy. The trial court found that Hercules did have some interest in the property but ruled that such interest was not alienable.

And, while Defendant-Appellee Hercules nor the trial court do not term Hercules interest in the subject land as a lease under the Facilities Use Agreement, the law clearly does. A valid lease exists when there is (1) a binding contract in compliance with the statute of frauds; (2) possession by the tenant; (3) legal title in the landlord; and (4) a leasehold that is capable of being granted. Summary of Utah Real Property Law, Vol. II at 565-66 (1978). All of these elements for a lease are satisfied in the

present case. If Hercules interest is indeed a lease, a mechanic's lien can attach thereto.

Utah law permits a mechanic's lien to attach to interests less than fee simple, such as an equitable interest, a leasehold estate, and a building separate from the soil upon which it was erected. King Bros., Inc. v. Utah Dry Kiln Co., 440 P.2d 17, 19 (Utah 1968); Interiors Contracting, Inc. v. Navalco, 648 P.2d 1382 (Utah 1982); See also Basic Refractories, Inc. v. Bright, 298 P.2d 810 (Nev. 1956) (mechanic's lien valid though United State became lessor upon completion of construction). Accordingly, Defendant-Appellee Hercules enjoys sufficient leasehold, or other, interest in the property to permit attachment of a mechanic's lien.

Furthermore, the alienability of such interest does not, as a matter of law, affect the attachment of Plaintiff-Appellant's mechanic's lien. The mechanic's lien statute simply states that "Such liens shall attach only to such interest as the owner may have in the property" There is no requirement that such interest be alienable. Therefore, the decision of the trial court with regard to dismissal of Plaintiff-Appellant's mechanic's lien cause of action on the ground that Defendant-Appellee's interest in the property is not alienable should be reversed.

2. Defendant-Appellee Hercules is an Owner of the Subject Property for the Purposes of the Utah Payment Bond Statutes, Utah Code Annotated § 14-2-1 et seq. (1953 as amended in 1985).

Although the court below held that the interest of Defendant-Appellee Hercules is not alienable and therefore not attachable by a mechanic's lien, it also ruled that Defendant-Appellee Hercules'

interest in the subject property was sufficient to qualify it as an owner for the purposes of the payment bond statutes. Since the purpose of the mechanic's lien and payment bond statutes is the same, the ownership requirements should also be the same.

Throughout the case, Defendant-Appellee Hercules has argued that it was not required to obtain a payment bond under Utah Code Annotated §§ 14-2-1 (1953 as amended in 1985) or 14-2-1 (1953 as amended in 1965). This contention has been based upon at least two theories. First, it was contended that Defendant-Appellee Hercules is not an owner for purposes of the payment bond statute. Second, it was contended that the material supplied by Plaintiff-Appellant was not in connection with "the construction, addition to, alteration or repair of any building, structure or improvement." The first contention is discussed immediately hereafter and the second is discussed in Section III. below.

Case law does not support Defendant-Appellee Hercules' proposition that it is not an owner for purposes of the payment bond statute. The duty of obtaining a payment bond is upon "[t]he owner of any interest in land' who enters into a contract to construct an improvement thereon." King Bros., Inc. v. Utah Dry Kiln Co., 440 P.2d 17, 19 (Utah 1968) (Emphasis in Original) (Ownership of building in which installation was made was sufficient for Utah's bond statute to apply). The word land is a generic term which includes not only the soil, but everything attached to it by the course of nature, or by the hand of man, such as buildings, fixtures, and fences. Id. "This is

particularly true with respect to these lien [and bond] statutes which should be liberally construed to effect their purposes." Id. The defendant in King Bros., Id., claimed that the payment bond statute did not apply since it claimed an interest only in the building and not in the underlying land. The Utah Supreme Court disagreed however by stating:

The difficulty with the Defendant's position seems to be in the misapprehension that in order for the statute to be applicable the owner-builder must have an interest in the freehold itself, that is the "soil" which underlies the building, as distinguished from the broader concept of the "realty" which is improved. This is not an indispensable requirement. Id.

The Utah Supreme Court has also allowed mechanic's liens to attach to interests less than fee simple, such as equitable interests, leasehold interests and a building separate from the soil upon which it was erected:

[A] building placed [on realty] should properly be regarded as part of the realty, and it therefore follows that the defendant of necessity must own some 'interest in the land.' Id.

See also Buehner Block Company v. Glezos, 6 Utah 2d 226, 310 P.2d 517 (1957); Interiors Contracting, Inc. v. Navalco, 648 P.2d 1382 (Utah 1982); and Zions First National Bank v. Carlson, 23 Utah 2d 395, 464 P.2d 386 (1970).

Thus, any interest in the property subjects the person authorizing the work to the provisions of the Utah mechanic's lien and payment bond statutes. Because Hercules has an interest in the property pursuant to the Facilities Use Agreement between

itself and the United States Navy, Utah's payment bond and mechanic's lien statutes apply and, therefore, Defendant-Appellee Hercules should be held personally liable for the debt incurred for the materials supplied by Plaintiff-Appellant to the office complexes.

Furthermore, Utah law does not permit suppliers to be bound to the terms of lease agreements which work to avoid the bonding statute and to which they were not parties and of whose contents they had no knowledge. Metals Manufacturing Co. v. Bank of Commerce, 395 P.2d 914 (Utah 1964) (Leaseholder of building subject to Utah's bond statute). Thus, Plaintiff-Appellant should not be restricted in its remedies as a result of an agreement between Defendant-Appellee Hercules and the United States Government to which Plaintiff-Appellant was not a party nor of which it had any knowledge. Allowing otherwise could result in easy circumvention of the statutes whose purpose clearly is to protect suppliers. Id. at 915.

Plaintiff-Appellant, as a supplier of materials and supplier to Space Building Systems, had no way of knowing the arrangements between Space Building Systems, Modulaire, Hercules and the United States Government. Furthermore, it does not depart from good sense to assume that one who is paying thousands of dollars, even hundreds of thousands, for improvements to property had some interest in the property upon which the structure was situated. King Bros., 440 P.2d at 18.

In recent years, it is even more apparent that the Utah legislature intends that the ownership requirement be read broadly. In 1987, the Utah legislature amended Utah Code Annotated § 14-2-1 to include the definition of an "owner." Subsection (1)(b) reads, "'Owner' means any person contracting for construction, alteration, or repair of any building, structure or improvement upon land."

Thus, the trial court's ruling that Defendant-Appellee Hercules is an owner for the purposes of the payment bond statute should be upheld and the mechanic's lien of Plaintiff-Appellant should be held to have attached to the interest of Hercules in and to the subject property.

III. THE FACTS PRESENTED TO THE TRIAL COURT DO NOT SUPPORT THE LEGAL CONCLUSION THAT THE OFFICE COMPLEXES ARE PERSONAL PROPERTY WHICH HAS NOT BECOME AFFIXED TO THE PROPERTY; THE OFFICE COMPLEXES CONSTRUCTED BY MODULAIRE FOR HERCULES ARE AFFIXED TO THE SUBJECT REAL PROPERTY DUE TO THE TYPE AND MAGNITUDE OF THE COMPLEXES

The purpose of Utah mechanic's lien statute is to provide protection to those who enhance the value of property by supplying labor or materials. Interiors Contracting, Inc. v. Navalco, 648 P.2d 1382, 1386 (Utah 1982). The statute is liberally and broadly construed to effect this desired objective. Id.; AAA Fencing Co. v. Raintree Development, 714 P.2d 289, 291 (Utah 1986). Defendant-Appellee Hercules' contentions and the trial court's rulings are not in harmony with this principle.

The heart of Defendant-Appellee's argument, and the basis for the trial court's decision regarding whether the work on the office complexes is covered by the Utah payment bond statute, Utah

Code Annotated § 14-2-1 et seq. (1953 as amended in 1985), is that pursuant to Mueller v. Cache Valley Dairy Ass'n., 657 P.2d 1279 (Utah 1982), the office complexes are not fixtures to real property and therefore not covered by the bonding statute. In Mueller, Cache Valley Dairy contracted with Maxum Corporation to install a whey drying system on Cache's premises. Maxum subcontracted with Mueller and Dahle to install portions of the system. Cache paid a separate contractor to erect a prefabricated metal building on Cache's premises to house the system. Maxum was paid in full by Cache for the system and declared bankruptcy leaving Mueller unpaid. Mueller filed a mechanic's lien and sued to foreclose. The Utah Supreme Court held against Mueller stating that the building was constructed to house the system much in the same way many buildings are constructed to house farm machinery; further, the machinery had nothing to do with servicing the building such as furnace and duct work. Id. at 1284. In reaching this decision, a tripartite test was applied to distinguish between real and personal property for mechanic's lien purposes: (1) the manner in which the item is attached or annexed to realty; (2) whether the item is adaptable to the particular use of the realty; and (3) the intention of the annexor to make the item a permanent part of the realty.

Before discussing each element of the test, it must be noted that the Mueller case is distinguishable from the present case. Rather than equating the whey drying equipment to the office complexes, the more appropriate analogy is with the prefabricated

metal building assembled to house the equipment. The prefabricated metal structure was chosen by Cache specifically because of its "versatility." Mueller at 1284. "It's a construction which is bolted together, it's very easily unbolted, and it provides maximum flexibility" Id. at 1284-85. Such flexibility would also allow the prefabricated building to be transferred from property to property; yet, there was no mention that the prefabricated building was not lienable. However, even though the prefabricated building was easily removable, the Court found that the manlift and walkway attached to the building were fixtures. at 1283, 1285. Thus, the prefabricated building had to qualify as lienable work in order for the manlift and walkway to be lienable as fixtures attached to the prefabricated building. Plaintiff-Appellant's supplies and materials are likewise incorporated into Defendant-Appellee Hercules' office complexes.

Further, in the case at bar, the office complexes are attached to sewer, water, electrical and telephone lines; the wheels and hitches are removed; there is approximately 25,000 square feet of office space in the complexes; the office complexes, costing nearly one half million dollars, are situated on the property supported by cinder blocks resting on concrete or wooden pads and have been so situated for nearly four years; site preparation such as grading and trenching was performed to accommodate the office complexes; large paved parking lots either adjoin and/or abut and conform to the office complexes' skirting as if molded to the skirting and extends halfway up the skirting

in certain areas; concrete sidewalks and stairways with steel railings are erected to service the office complexes; the office complexes are joined together by heavy metal, bolts, wiring, and finish work, forming lengthy corridors; an enclosed, suspended walkway was constructed promoting access to an otherwise separate office building, enlarging the already lengthy corridors; and interior stairwells promote access to terraced offices units. See Trial Exhibits 1 through 63 and 80 through 117. See also Affidavit of Kurt C. Faux and Exhibit 1 thereto -- R. at 405.

Pursuant to the purpose and broad interpretation of the mechanic's lien statute, the only legal conclusion one can properly draw is that these office complexes are fixtures for the purposes of the payment bond and mechanic's lien statutes. Any other conclusion based upon these facts is in error. Thus, Plaintiff-Appellant is entitled to judgment against Defendant-Appellee Hercules for failure to obtain a bond.

It is ironic that under Defendant-Appellee Hercules' argument, and under the logic adopted by the trial court, those installing the underground utilities for the office complexes (i.e., sewer, water, power) and those installing the concrete walkways and asphalt parking surface would likely have failure to obtain a bond and mechanic's lien claims, but those who did the primary work, including Plaintiff-Appellant, upon which all the other work depended would have no such rights. See First of Denver Mortgage Investors v. C.N. Zundel & Assoc., 600 P.2d 521 (Utah 1979).

Defendant-Appellee should not be allowed to circumvent the clear purpose of the payment bond and mechanic's lien statutes, which purpose is to protect those who perform work and supply material, such as Plaintiff-Appellant, by arguing the possibility that the Offices will be removed or are taxed as personal property. Removability and taxability do not deter the effectiveness of a mechanic's lien. Sanford v. Kunkel, 85 P. 363 (Utah 1906) (mechanic's lien effective though house moved from one lot to another); Thorp Finance Corp. v. F.M. Wright, 399 P.2d 206, 207-08 (Utah 1965) (house trailer type structures not motor vehicles though taxed as such); In re Wiley, 120 Vt. 359, 140 A.2d 11 (1958) (mobile home fixed to real property though taxed as personal property). With modern equipment and ingenuity even brick buildings are moveable. Heath v. Parker, 604 P.2d 818 (N.M. 1980). "To stretch a dwelling, wheel-less and motorless into a 'motor vehicle' would be akin to saying that moving a furnished four or five-room house over the roads of Utah would make it a 'motor vehicle.'" Thorp Finance Corp. v. F.M. Wright, 399 P.2d 206, 207-08 (Utah 1965).

Case law and commentaries support Plaintiff-Appellant's position that the office complexes are covered by the payment bond statute and are subject to mechanic's liens. Concerning whether a mobile home is a building, the Court in Commonwealth v. DePriest, 77 Montg. 11 (Pa. C.P. 1959) held that a mobile home 46 feet by eight feet with wheels removed, resting on cinder block piers, and connected to electric, water and telephone service lines was a

"building" and permitted its use as a single family detached dwelling. Because a building on land is generally considered to be part of the realty, the burden of proof is upon the party who claims that the building is personal property to show that it retains that character. 35 Am.Jur.2d, Fixtures, § 78 (1974).

To be considered part of the realty, a building need not be physically anchored to the land. The force of gravity alone or skids suffice. Rinaldi v. Goller, 48 Cal. 2d 276, 309 P.2d 451 (1957); 35 Am.Jur.2d, Fixtures § 78 (1974). Frame buildings resting on blocks or stones, or partly on the ground and partly on posts or blocks are fixtures. 35 Am.Jur.2d, Fixtures § 35 (1974). In re Wiley, supra, held that a mobile home mounted on cinder blocks and two by four timbers, connected with the city sewer and water lines, and being used as and containing all the attributes of a dwelling was fixed to the real property.

Determining that mobile homes are permanently attached to the land, the court in Coyle Assessment, 17 Pa. D&C 2d 149 (1958), upheld, for real property taxation purposes, an assessment against three mobile homes which had been jacked up, wheels removed, and set upon concrete blocks and pieces of timber. They each had water, sewage, and electrical connections and abutted upon concrete floors or patios. In distinguishing permanence from transitoriness, it is not necessary to identify it with perpetuality. Rinaldi v. Goller, 48 Cal. 2d 276, 309 P.2d 451, 453-54 (1957).

To state that the office complexes are not affixed to the land is to fictionalize reality. The above facts and case law evidence that the office complexes were intended to be and are affixed to the realty. Because the office complexes are on cinder block columns resting on concrete or wooden pads does not alter their affixed nature; prior case law has made that decision. Surely the Defendants did not place office complexes costing nearly one half million dollars on such a foundation believing such to be insufficient. Indeed, the office complexes have been on such a foundation for nearly four years. These office complexes contain all the modern office conveniences such as electricity, sewer, telephone and water hook-ups; a large asphalt parking area; concrete sidewalks; interior stairways; and a lease permitting indefinite use, even purchase, should Defendant-Appellant Hercules desire. The possibility that Hercules may choose to "un-affix" the office complexes at some point in the future is irrelevant in determining the current status of the office complexes.

Construing the payment bond and mechanic's lien statutes liberally to protect suppliers as required by Utah law, the facts of this case require a legal conclusion that the office complexes are fixtures and are, therefore, covered by the payment bond and mechanic's lien statutes.

While Plaintiff-Appellant does not believe that the tripartite test of Mueller should apply to large structures such as these office complexes, and urges the Court to so hold, the

Mueller test, discussed below, reinforces Plaintiff-Appellant's position. The Mueller test involves 1) annexation, 2) adaptation, and 3) intention of permanency.

1. Annexation.

Defendants argue that because the office complexes are removable, they, like the equipment in Mueller, are not affixed to real property. Removing equipment from the prefabricated metal building in Mueller is much different than removing the prefabricated metal building from the real property. As mentioned previously, the prefabricated, versatile building is far more like the office complexes than the whey drying equipment. Where the issue is annexation of large buildings or structures, the tripartite Mueller test should not apply. Removability of such buildings or structures should not alter the validity of payment bond claims or mechanic's liens resulting from the improvement of the property by the erection of the building or structure. The materials and supplies incorporated by Defendants into the Offices are analogous to the manlift and walkways in Mueller which were considered fixtures and which gave rise to a mechanic's lien in favor of those who supplied and installed them.

The cost to dismantle and remove the offices complexes, if the Defendant-Appellee Hercules ever does this, is approximately \$21,600. Affidavit of Chilton Leach, Exhibit 3, p. 2 -- R. at 218; Trial Exhibit 64, p. 2. Accordingly, the ease of removability seems highly exaggerated. The office complexes are hooked together, by bolts, metal beams, drywall, carpet, ceiling

tile and track, and, in some locations, interior partition walls. Exterior siding, interior stairways, a suspended walkway and finish work overlapping Office connections must be destroyed to allow removal. Electrical, sewer, telephone and other power lines extending from unit to unit or from complex to complex require removal and would be useless without the presence of the office complexes.

In addition to the costs stated above, following possible removal, if any, the real property will be damaged in that actual underground utility improvements are on the land and connected to the office complexes, a massive asphalt parking lot with asphalt extending nearly halfway up the skirting in certain areas will be left behind, concrete sidewalks with steel railings will remain and the property will retain the grading improvements made specifically for the trailers. (Affidavit of Kurt C. Faux, Exhibit 1). All of these improvements will be left behind upon removal, if any, and will also require removal if the land is to be used other than for the office complexes. Furthermore, the absence of the office complexes will leave large unpaved holes in the asphalt of the parking lot and the utility stub-outs will remain. See photographs marked as Trial Exhibits showing effect of removal of another office complex, Annex 9.

2. Adaptation.

At the motions for summary judgment and at the trial of the case, Defendant-Appellee Hercules argued that there was no adaptation because the property was vacant and adaptable to

various uses. Apparently, Defendant-Appellee Hercules is referring to the property's status before the office complexes became affixed. "Adaption occurs when personal property is integrated into real property in furtherance of a specific purpose to which the real property has been devoted. . . ." Mueller. at 1283-84. The specific purpose of the property in the instant case was and is to support Defendant-Appellee Hercules in the production of certain goods for the United States Government, such as to accommodate the office complexes at issue herein. (Affidavit of Chilton Leach, Exhibit 3) See State Road Commission v. Pauanikolas, 427 P.2d 749, 751 (Utah 1967). The site was prepared specifically for the office complexes, grading and trenching were performed, concrete sidewalks and stairs with steel railings were installed and the various utilities described above were prepared. (Affidavit of Chilton Leach, Exhibit 3, p. 4). Under Defendant-Appellee Hercules' unrealistic argument, no office building would ever be adapted if constructed on a previously vacant lot.

3. Intent.

The intention of the real property owner is the most important factor of the tripartite test for traditional personal property. Mueller. at 1284. While the stated intent of Defendant-Appellee Hercules is that these were intended to be temporary, the facts belie that assertion. The office complexes were obtained for an initial period of two years. However, this had nothing to do with the expected duration of these office complexes, but was determined by an internal policy of Defendant-

Appellee Hercules. Trial Transcript, pp. 58 & 59. The office complexes have been retained by Defendant-Appellee Hercules under the extension provisions of the purchase order through at least the time of briefing.

The intent stated by Defendant-Appellee Hercules is not persuasive because the documentary evidence presented by Defendants is a far better indication of the parties' intent than the self-serving, after-the-fact statements made in the affidavits of Chilton Leach and Ryder Christian Waring and the testimony of Ryder Christian Waring at the trial. In the present case, the Purchase Order between Defendant-Appellee Hercules and Defendant Modulaire allows for purchase options and lease extension terms beyond the initial period.

Furthermore, even if there is a finding that the parties to the purchase order did have some serious notion about the removal of the office complexes, that does not govern. The intent of the parties is only one factor in the analysis. Certainly, where there are office complexes of the size and magnitude involved in this case, the presumption should be toward a finding that the buildings or structures are affixed. This coupled with the previous analysis that the office complexes were annexed and adapted to the property weigh in favor of a finding that the office complexes are fixtures or improvements to the land.

The office complexes have been on the land for nearly four years. The purchase order, which Defendant-Appellee Hercules contends evidences the intent to make the office complexes a non-

permanent part of the real property, is entitled "Purchase Order," contains a "buy option," and provides an option for Hercules to extend the lease for, apparently, an indefinite period of time with rental payments not to exceed those originally in effect. Affidavit of Chilton Leach, Exhibit 3 -- R. at 217.

As a matter of policy, to place too much emphasis on the issue of intent for purposes of determining whether property becomes a fixture invites abuse and after-the-fact protectionism by owners declaring that the property was intended to be temporary from the outset. Under Defendant-Appellee's urged reading of the Mueller test, a person would be able to defeat the bond and lien rights of those working on traditional construction projects. All the owner would have to do is to declare that the building was intended to be temporary.

Such a result would not be proper in that situation and it is not proper in the present case.

CONCLUSION

Utah's mechanic's lien and bond laws are liberally construed to protect those who provide labor, materials and equipment for projects such as the office complexes built for Defendant-Appellee Hercules. Defendant-Appellee Hercules holds an interest in and to the subject property which is sufficient for Plaintiff-Appellant's mechanic's lien to attach. Thus, Plaintiff-Appellant respectfully requests that this Court reverse the decision of the trial court at summary judgment by reinstating Plaintiff-Appellant's mechanic's lien cause of action against the subject

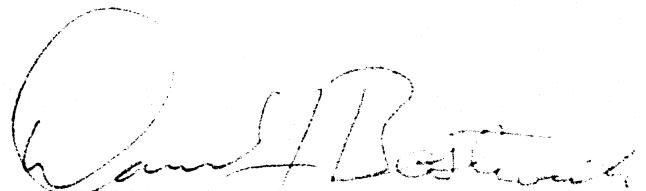
property and remand for further proceedings in the foreclosure of that mechanic's lien.

Further, based upon the policy underlying the mechanic's lien and payment bond statutes, and based upon the facts and circumstances presented at the motions for summary judgement and at the trial of the case, the office complexes became affixed to the subject real property. This is the only legal conclusion which can be properly drawn from the facts presented. Therefore, Plaintiff-Appellant respectfully requests that this Court reverse the decision of the trial court following the trial of the case by reinstating Plaintiff-Appellant's failure to obtain a bond cause of action and remand the case for a determination as to the amount of the judgment.

DATED this 17th day of April, 1989.

WALSTAD & BABCOCK, P.C.

By:

A handwritten signature in dark ink, appearing to read "Darrel J. Bostwick", written over a horizontal line.

Darrel J. Bostwick
Attorneys for Plaintiff-
Appellant

ADDENDUM

Utah Code Annotated § 14-2-1 et seq. (1953 as amended in 1985)

14-2-1. Bond to protect mechanics and materialmen.

The owner of any interest in land entering into a contract, involving \$2,000 or more, for the construction, addition to, alteration, or repair of any building, structure, or improvement upon land shall, before any such work is commenced, obtain from the contractor a bond in a sum equal to the contract price, with good and sufficient sureties, conditioned for the faithful performance of the contract and prompt payment for material furnished, equipment and materials rented, and labor performed under the contract. This bond runs to the owner and to all other persons as their interest may appear. Any person who has furnished or rented any equipment or materials, or performed labor for or upon any such building, structure, or improvement, for which payment has not been made, has a direct right of action against the sureties upon such bond for the reasonable value of the rented materials or equipment furnished, for the reasonable value of the materials furnished, or for labor performed, not exceeding the prices agreed upon. This right of action accrues 40 days after the completion, abandonment, or default in the performance of the work provided for in the contract.

This bond shall be exhibited to any person interested, upon request.

14-2-2. Failure to require bond - Direct liability - Limitation of actions.

Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond, or to exhibit the same, as herein required, shall be personally liable to all persons who have furnished materials or performed labor under the contract for the reasonable value of such materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon. Actions to recover on such liability shall be commenced within one year from the last date the last materials were furnished or the labor performed.

14-2-3. Action on bond to protect mechanics and materialmen - Attorney's fee.

In any action brought upon the bond provided for 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.

14-2-4. Exceptions - Mortgagees, beneficiaries, trustees.

Nothing in this chapter requires a mortgagee under a mortgage or a beneficiary or trustee under a deed of trust to obtain the bond described in § 41-2-1, or imposes any liability upon a mortgagee, beneficiary, or trustee who has not obtained such a bond.

Utah Code Annotated § 14-2-1 (1953 as amended in 1987)

14-2-1. Definitions - Payment bond required - Right of Action-Notice.

(1) For purposes of this chapter:

(a) "Contractor" means any person who is or may be awarded a contract for the construction, alteration, or repair of any building, structure, or improvement upon land.

(b) "Owner" means any person contracting for construction, alteration or repair of any building, structure, or improvement upon land.

(2) Before any contract, exceeding \$2,000 in amount, for the construction, alteration, or repair of any building, structure, or improvement upon land is awarded to any contractor, the owner shall obtain from the contractor a payment bond complying with Subsection (3), which shall become binding upon the award of the contract to the contractor.

(3) The payment bond shall be with a surety or sureties satisfactory to the owner for the protection of all persons supplying labor and material in the prosecution of the work provided for in the contract in a sum equal to the contract price.

(4) (a) Any person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this chapter, and who has not been paid in full therefor within 90 days after the day on which the last of the labor was performed by him or material was supplied by him for which the claim is made, may sue on the payment bond for any amount unpaid at the time the suit is filed and may prosecute the action for the amount due him. Any person having a contract with a subcontractor of the contractor, but no express or implied contract with the contractor furnishing the payment bond, has a right of action upon the payment bond upon giving written notice to the contractor within 90 days from the date on which such person performed the last of the labor or supplied the last of the material for which the claim is made.

The person shall state in the notice the amount claimed and the name of the party for whom the labor was performed or to whom the material was supplied. The notice shall be served by registered or certified mail, postage prepaid, on the contractor at any place the contractor maintains an office of conducts business.

(b) Any suit instituted under this section shall be brought in the district court of any county in which the contract was to be performed, and not elsewhere. No such suit may be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by the person. The obligee named in the bond need not be joined as a party in the suit.

(5) The payment bond shall be exhibited to any interested person upon request.

14-2-2. Failure of owner to obtain payment bond - Liability.

Any owner who fails to obtain a payment bond is liable to all persons who have performed labor or have supplied materials under the contract for the reasonable value of the labor performed or materials furnished. No action to recover on such liability may be commenced after the expiration of one year after the day on which the last of the labor was performed or the material was supplied by such person.

Utah Code Annotated § 38-1-3 (1953 as amended in 1981)

38-1-3. Those entitled to lien - What may be attached - Lien on ores mined.

Contractors, subcontractors and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner; all persons who shall do work or furnish materials for the prospecting, development, preservation or working of any mining claim, mine, quarry, oil or gas well, or deposit; and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor or furnished or rented materials or equipment for the value of the service rendered, labor performed or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as an agent, contractor or otherwise. Such liens shall

attach only to such interest as the owner may have in the property, but the interest of a lessee of a mining claim, mine or deposit, whether working under bond or otherwise, shall for the purposes of this chapter include products mined and excavated while the same remain upon the premises included within the lease.

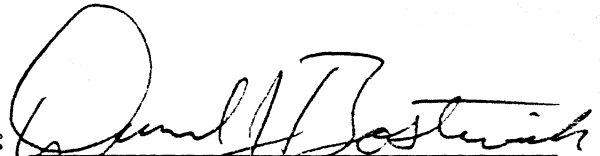
CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand-delivered a true and correct copy of the foregoing Appellant's Brief on this 17th day of April, 1989 to the following:

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By:



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