

1999

Lawrence M. Russell; Russell/Packard
Development, Inc.; Saratoga Springs Development,
L. C.; Merlin Smith and Margie Smith v. John J.
Thomas and PRP Development, Inc. : Reply Brief

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

LAWRENCE M. RUSSELL;)
RUSSELL/PACKARD DEVELOPMENT,)
INC.; SARATOGA SPRINGS)
DEVELOPMENT, L.C.; MERLIN SMITH)
and MARGIE SMITH,)

Plaintiffs/Appellees,)

vs.)

JOHN J. THOMAS and PRP)
DEVELOPMENT, INC.,)

Defendants/Appellants.)

Case No. 981615

Argument Priority 15

REPLY BRIEF OF APPELLANTS

Appeal from the District Court of the Fourth Judicial
District, Provo Dept., State of Utah
the Honorable Gary D. Stott, District Court Judge

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Clerk of the Court

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LIST OF PARTIES

All parties are identified in the caption.

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INTRODUCTION

The Plaintiffs argue in their principal brief that §38-9-1, the wrongful lien statute should be applied to a notice of interest filed pursuant to § 57-9-4 Utah Code Annotated.

The Plaintiffs argument is twofold. First, even though §57-9-4 authorizes a notice of interest may, the notice may be summarily dissolved pursuant to the provisions of §38-9-1 et seq. (wrongful lien statute). Second, the defendants, in any event, were not entitled to file a notice of interest pursuant to §57-9-4 of the Utah Code Annotated.

ARGUMENT

I.

§38-9-1 et seq. is a summary process which, on its face, is not applicable to Notices of Interest filed pursuant to §57-9-4, Utah Code Annotated.

The argument that the wrongful lien statute (§38-9-1, et seq.) applies to notices of interest filed under a separate statute requires a giant circular leap of judgment. §38-9-1 (6) (a) provides as follows:

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

- (a) expressly authorized by this chapter or another state or federal statute.

A notice of interest is expressly authorized by a state statute (§57-9-4). On the face of the statute then the wrongful lien statute cannot apply to any notice of interest filed pursuant to

§57-9-4. Plaintiff's argument that a Court is entitled to determine whether or not a notice of interest is valid under the wrongful lien statute is without merit and, in any event, not previously asserted by the plaintiff below.

The case is one of first impression - as to the applicability of the wrongful lien statute to a notice of interest. The essence of the plaintiff's argument and the Court's decision is, and always has been, that plaintiff could file a lis pendens to protect its interest and therefore, notice of interest could not be filed. Because the wrongful lien statute is a summary process, it clearly was not designed to apply a notice of interest specifically authorized by the legislature.

II.

Defendant is entitled to a Notice of Interest on the property in question.

The Court below cannot use the summary process designed by §38-9-1 *et seq.* to determine the validity of a notice of interest. Even if such an analysis was permitted by the statute defendant's notice of interest is proper.

The essence of plaintiff's argument that defendant was not entitled to a notice of interest is that defendant had a bare contract right and not an interest in land, which plaintiff argues is required to file a notice of interest. The defendant was granted by the plaintiff's a right to a trust deed, which the plaintiff failed to provide. Therefore, the defendant's remedy was to file a notice of interest that defendant is entitled to a trust deed pursuant to the parties' agreement. Whether or not the defendant's right to a trust deed arises to an interest in land has already been decided by the Court below when it concluded that

the defendant's interest was an interest in land, based upon its findings that defendants could have filed a lis pendens to protect their interest. A lis pendens represents a notice to the world that a person or entity claims an interest in land. §78-40-2 provides as follows:

“In any action affecting the title to, or the right of possession of, real property the plaintiff at the time of filing the complaint or thereafter, and the defendant at the time of filing his answer when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchase or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action . . .”

Clearly the Court's finding of fact that defendant's remedy was to file an action and a lis pendens is controlling as to the facts on appeal.

III.

The notice of interest statute (§57-9-4) in plain language permits the filing of a notice when a person claims an interest in land. The purpose for the creation of the notice of interest statute is for those situations (such as that before the Court) where a person or entity claims an interest in land, but does not have a recordable document. On its face, the wrongful lien statute excludes from its summary adjudication provisions the notice of interest filed by the defendants.

The Court cannot use the summary process to invalidate properly recorded notice of interest.

The logical extension plaintiff's argument would permit the wrongful lien statute to apply to a mechanic's lien and have it summarily dismissed which, on its face, the statute did not intend to do.

The statute on its face is to provide a summary disposition of those wrongful liens which otherwise are not authorized by statutes. Where a statute authorizes the recordation as does §57-9-4, there is a mechanism for the orderly disposition, such as mechanics liens, and notices of interest.

There are no Utah cases which provide direction for the Court in this area of the law. It has long been held in other jurisdictions, that an executory contract, the effect of which is to convey or transfer an equitable title, is a conveyance or transfer within recording laws. Keese v. Bardley, 190 Cal. 213 P.500.

The plaintiff's remedy to deal with the notice of interest is to either or both file an action for quiet title or slander of title.

CONCLUSION

For the reasons set forth above the Court's decision below should be reversed.

RESPECTFULLY SUBMITTED this day of November, 1999.

BLACK, STITH & ARGYLE, P.C.

A handwritten signature in dark ink, appearing to be 'D. Black', written over a horizontal line.

David O. Black, Attorney for Defendants
and Appellants

CERTIFICATE OF MAILING

I hereby certify that on November 15, 1999, a copy of the foregoing Appellants' Reply Brief was mailed, first class postage prepaid, in an envelope addressed to the following named person(s):

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