

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. : Brief of Appellee

Utah Court of Appeals

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BRIEF

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DOCKET NO. 981615 IN THE UTAH COURT OF APPEALS

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

No. 981615

Argument Priority 15

Plaintiffs/Appellees,

vs.

JOHN J. THOMAS and PRP
DEVELOPMENT, L.C.,

Defendants/Appellants.

BRIEF OF APPELLEES

Appeal from the Fourth Judicial District Court
Utah County, State of Utah
Honorable Gary D. Stott, Presiding

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FILED

SEP 30 1999

LIST OF PARTIES

All parties are identified in the caption.

IN THE UTAH COURT OF APPEALS

LAWRENCE M. RUSSELL;
RUSSELL/PACKARD
DEVELOPMENT, INC.; SARATOGA
SPRINGS DEVELOPMENT, L.C.;
MERLIN SMITH, AND MARGIE
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TABLE OF CONTENTS

	<u>Page</u>
LIST OF PARTIES	2
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
JURISDICTION	1
STATEMENT OF ISSUE	2
GOVERNING LAW	2
STATEMENT OF THE CASE	3
A. <i>Nature of the Case, Course of Proceedings and Disposition Below</i>	3
B. <i>Statement of Facts</i>	4
SUMMARY OF ARGUMENT	8
ARGUMENT	9
I. NOTICES FILED UNDER § 57-9-4 ARE PLAINLY WITHIN THE SCOPE OF THE WRONGFUL LIEN STATUTE.	9
II. THE NOTICE OF CLAIM IS NOT PROPERLY FILED UNDER THE MARKETABLE RECORD TITLE ACT BECAUSE IT IS NOT AN INTEREST IN PROPERTY.	10
CONCLUSION	13
ADDENDUM	15

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Boothe v. Wyatt</i> , 54 Utah 550, 183 P. 323 (1919)	4
<i>Platts v. Helping</i> , 947 P.2d 658 (Utah 1997)	2
<i>St. Benedict's Dev. Co. v. St. Benedict's Hosp.</i> , 811 P.2d 194 (Utah 1991)	2
<i>Valcarce v. Fitzgerald</i> , 961 P.2d 305 (Utah 1998)	11
<u>Statutes</u>	
Utah Code Ann. §§ 38-9-1 <i>et seq.</i>	2
Utah Code Ann. § 38-9-1(2)	9
Utah Code Ann. § 38-9-1(6)	2, 4
Utah Code Ann. § 38-9-6(2)	4
Utah Code Ann. § 38-9-7	4
Utah Code Ann. § 57-1-1(3)	12
Utah Code Ann. §§ 57-3-101 <i>et seq.</i>	12
Utah Code Ann. §§ 57-9-1 <i>et seq.</i>	2
Utah Code Ann. § 57-9-1	3, 11
Utah Code Ann. § 57-9-2	11
Utah Code Ann. § 57-9-4	3
Utah Code Ann. § 57-9-8(6)	12
Utah Code Ann. § 78-2-2(3)(j)	1
Utah Code Ann. § 78-2-2(4)	1

Utah Code Ann. § 78-2a-3(2)(j)	1
Utah Code Ann. § 78-40-2	8

IN THE UTAH COURT OF APPEALS

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

No. 981615

Argument Priority 15

Plaintiffs/Appellees,

vs.

JOHN J. THOMAS and PRP
DEVELOPMENT, L.C.,

Defendants/Appellants.

BRIEF OF APPELLEES

JURISDICTION

PRP Development, L.L.C. ("PRP") and John J. Thomas ("Thomas") appeal a final order entered by the district court on August 14, 1998. The Utah Supreme Court had jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j). The Supreme Court has transferred this case to the Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4). This court's jurisdiction is based upon Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUE

1. Is an invalid Notice of Interest which is filed pursuant to the Utah Marketable Record Title Act, Utah Code Ann. §§ 57-9-1 *et seq.*, subject to the summary procedure of Utah Code Ann. §§ 38-9-1 *et seq.* for the removal of wrongful liens?

2. Is a claim for non-performance of a contract an “interest in land” providing a proper basis for filing of a Notice of Interest pursuant to the Marketable Record Title Act?

The facts were not disputed in the lower court and are not challenged on appeal. Thus, the issues presented are purely issues of statutory construction, which are reviewed for correctness. *St. Benedict’s Dev. Co. v. St. Benedict’s Hosp.*, 811 P.2d 194, 196 (Utah 1991). To the extent the issues may involve the lower court’s application of law to the facts, “[t]he trial court’s application of law to the facts is reviewed for abuse of discretion.” *Platts v. Helping*, 947 P.2d 658, 661 (Utah 1997).

GOVERNING LAW

Utah Code Ann. § 38-9-1(6) provides the definition of a “wrongful lien,” and governs appellants’ contention that the wrongful lien statute does not reach a document purportedly filed under the Marketable Record Title Act. That section states:

“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;

(b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or

(c) signed by or authorized pursuant to a document signed by the owner of the real property.

Utah Code Ann. § 57-9-1 is likewise determinative. It provides that the Marketable Record Title Act applies to conveyances and title transactions, as follows:

Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for forty years or more, shall be deemed to have a marketable record title to such interest as defined in Section 57-9-8, subject only to the matters stated in Section 57-9-2. A person shall be deemed to have such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in

(1) the person claiming such interest or

(2) some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest: with nothing appearing of record, in either case, purporting to divest such claimant of such purported interest.

Finally, Utah Code Ann. § 57-9-4(1) provides the mechanism by which a person claiming an “interest in land” may file a notice to preserve that claim against the operation of the 40 year bar of § 57-9-1:

(1) Any person claiming an interest in land may preserve and keep effective such interest by filing for record during the forty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim. . . .

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below.

On June 22, 1998, PRP filed of record a “Notice of Interest” claiming an interest in real property in which the petitioners hold an interest. (R. 3-12.) The petitioners filed a

Petition to Clear Title pursuant to Utah Code Ann. § 38-9-7, claiming that the Notice of Interest was wrongful because it did not fall under any of the exceptions set forth in § 38-9-1(6). (R. 1-2.)

Thomas and PRP argued that the Notice of Interest was not wrongful for two reasons: 1) it was not a “lien or encumbrance” upon real property;¹ and 2) it was authorized by Utah Code Ann. § 57-9-4(1) and thus falls within the exception of § 38-9-1(6)(a).

The district court ruled that the Notice of Interest filed by PRP was an encumbrance on the petitioners’ property. It further ruled that the Notice of Interest filed by PRP was not based upon a conveyance of any interest and was a wrongful lien, not within the exceptions of § 38-9-1(6). (R. 65-68.) The court therefore ordered the lien nullified. (R. 100-02.)

B. *Statement of Facts.*

The facts before the district court were based upon affidavits supplied by Appellees pursuant to Utah Code Ann. § 38-9-6(2). Appellants filed no counter-affidavits or other evidence, leaving the following facts without dispute for purposes of determining the wrongfulness of appellants’ filing.

1. Russell/Packard Development, Inc. (“Russell/Packard”), a company in which Mr. Russell has an ownership interest; and Premier Homes, L.C., a company owned and

¹ Thomas and PRP do not assert in their brief on appeal that the Notice of Interest is not a lien or encumbrance upon real property. Indeed, the claim that a notice of interest claiming an interest in the real property of another is not an encumbrance is wholly without merit. *See Boothe v. Wyatt*, 54 Utah 550, 183 P. 323, 324 (1919).

operated by Thomas, combined to form PRP on February 21, 1994. PRP was in the business of purchasing and developing residential property in the State of Utah. (R. 27-30, 38.)

2. In 1996, PRP contracted with Saratoga Springs Development, L.C. ("Saratoga") to purchase and develop 72 townhouse lots in the Saratoga Springs Phase I subdivision ("Saratoga Purchase Contract"). The purchase contract provided that individual lots would be closed according to an established schedule. (R. 22-25, 38.)

3. Disputes arose between Russell and Thomas which led them to discontinue their business relationship. Thus, on April 2, 1997, Russell/Packard and Premier Homes, as members of PRP, entered into a Purchase and Development Agreement (the "Agreement"). The Agreement provided that Russell/Packard would sell its share of PRP to Premier Homes for \$5,000. In exchange, Russell/Packard would acquire PRP's entire interest in the 72 townhouse lots listed in the Saratoga Purchase Contract. (R. 17-20, 38.)

4. The Agreement also provided that Russell/Packard pay PRP \$8,000 per lot each time it closed on one of the last 66 Saratoga Springs lots. Accordingly, Russell/Packard's first six sales of lots in the development could be made without making any payment to PRP. The total amount due under the Agreement following closing of all of the lots would be \$528,000. (R. 17-20, 38.)

5. The Agreement provides that "the amount due PRP shall be secured by a standard trust deed and trust deed note in favor of PRP to be recorded after the closing of the construction loan and/or an escrow arrangement at American Legal Title, acceptable to PRP,

which arrangement provides for the payment of \$8,000 to PRP upon the sale of each lot.”
(R. 17-20, 38.)

6. The Agreement contains no legal description of the property, does not include PRP’s mailing addresses, is not made under oath, and is not duly acknowledged. (R. 17-20.)

7. PRP has failed to meet several of its obligations for which Russell provided personal guarantees of payment. Pursuant to the terms of a Letter Agreement dated March 2, 1998 (R. 14-15), Russell agreed to pay these debts owed by PRP. John Thomas personally, and on behalf of PRP Development, acknowledged such debts, and agreed that \$110,173.45 would be deducted from the total amount to be paid to PRP under the terms of the Purchase and Development Agreement, and that no payments would be made to PRP until the \$110,173.45 plus interest had been fully set off against the amounts owed by Russell under the Purchase and Development Agreement. If divided into \$8,000 increments, this Letter Agreement thus provided that Russell is not obligated to make payments for the Saratoga Springs properties until an additional 13-14 properties in the development had been sold, depending upon the amount of interest accrued. In addition, the Letter Agreement provides that there is no waiver of possible additional claims to be made by Russell which could also require a set-off of additional amounts otherwise owing under the Purchase and Development Agreement. Accordingly, pursuant to the terms of the Purchase and Development Agreement and the Letter Agreement, no monies would be owed by Russell to PRP, and no payments were to be made to PRP, until after the first 19-20 lots had been finally sold to home buyers.

8. In addition, PRP has failed to pay additional debts and it appears additional valid setoffs exist which may exceed the amount of the purported obligation. (R. 46, 40-41.)

9. Neither Mr. Russell nor Russell/Packard ever executed any document purporting to convey to PRP an interest in any of the lots covered by the Notice of Interest. (R. 53.) None of the other owners of properties affected by the Notice—Saratoga, Merlin Smith and Margie Smith—has conveyed to PRP an interest in any of the lots covered by the Notice of Interest. (R. 49-54.)

10. Neither Thomas nor PRP produced any document to the trial court purporting to convey to PRP an interest in any of the lots covered by the Notice of Interest.

11. On June 22, 1998, PRP recorded a “Notice of Interest” as to all but 10 of the 72 lots, including lots which had not been closed by Russell/Packard, and other lots which had been sold to homeowners (see ¶ 9). This Notice of Interest stated that PRP claims an unspecified interest in these properties pursuant to the original purchase contract which had been fully conveyed to Russell, and pursuant to the Purchase and Development Agreement.

The “Notice of Interest” stated:

NOTICE OF INTEREST is hereby given that PRP Development, L.C., a Utah limited liability company, pursuant to an agreement dated April 2, 1997, and a Uniform Real Estate Contract dated November 5, 1996 and November 8, 1996, copies of each of which are attached hereto as Exhibit “A”, claims an interest in and to lots 1, 2, 3, 4, 5, 6, 8, 9, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 4\54 [sic], 56, 57, 58, 59, 60, 61, 62, 67, 69, 70, 71, of Saratoga Springs Plat A, Plat 4, Sheet 2, Planned Unit Development located in Utah County, State of Utah. (R. 3-12.)

SUMMARY OF ARGUMENT

Thomas and PRP argue that their Notice of Interest was expressly authorized by § 57-9-4, and thus is not wrongful under § 38-9-1(6)(a). Their claim, however, is a claim for breach of the Purchase and Development Agreement, and does not constitute an interest in real property.

A claimant under § 57-9-4 must have a claim to an “interest in land.” Thomas and PRP, however, have nothing more than a disputed executory contract right. The asserted “interest in land” was never created. Consequently, the Notice of Interest does not satisfy the requirements of § 57-9-4 and is, therefore, not authorized by that statute. Because it is not authorized by statute, it does not fall within the exception of § 38-9-1(6)(a) and is a wrongful lien.

Allowing PRP and Thomas to use a disputed contract claim as the basis for filing a notice of interest under § 57-9-4, and then holding that the wrongful lien procedure does not apply, would allow the claimant to destroy marketability of title on the basis of disputed claims, without appropriate remedy. On the other hand, if PRP has a valid claim for breach of an agreement to convey a specific interest in specific property, it should file suit on its claim and, if appropriate, file a *lis pendens* pursuant to § 78-40-2 that sets forth the nature of its disputed claim. This was the reasoning of the lower court. (R. 66.)

ARGUMENT

I. NOTICES FILED UNDER § 57-9-4 ARE PLAINLY WITHIN THE SCOPE OF THE WRONGFUL LIEN STATUTE.

PRP and Thomas first argue that the Notice of Interest they filed is not within the scope of the wrongful lien procedure because notices of interest are authorized by statute. They claim that, because their Notice of Interest was purportedly filed pursuant to § 57-9-4, it is authorized by statute regardless of the validity of the claim asserted.

Section 38-9-1(2), in defining who may be sued under the wrongful lien statute, directly refutes the argument that a notice of interest falls outside the scope of the wrongful lien statute:

“Lien claimant” means a person *claiming an interest in real property* who offers a document for recording or filing with any county recorder in the state asserting a lien *or other claim of interest* in certain real property.

Utah Code Ann. § 38-9-1(2) (emphasis added).

Moreover, only validly filed claims are exempted by § 38-9-1(6)(a):

“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;

(b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or

(c) signed by or authorized pursuant to a document signed by the owner of the real property.

Utah Code Ann. § 38-9-1(6). While a *valid* notice of interest would be authorized by statute and thus fall within the exception of § 38-9-1(6)(a), that section nevertheless permits the court to determine the validity, and thus wrongfulness, of a *purported* notice of interest.

The Marketable Record Title Act does not authorize the filing of contract claims disguised as claims to interests in property. If § 38-9-1(6)(a) were interpreted to exempt the *wrongful* filing of a claim of interest or other encumbrance simply because the filing purports to be authorized by statute, then the statute would be rendered meaningless. As will be demonstrated below, the Notice of Interest filed in this case was outside the scope of the Marketable Record Title Act because it was based upon an alleged contractual interest, not an interest in land. It was therefore not “expressly authorized by” the Marketable Record Title Act.

II. THE NOTICE OF CLAIM IS NOT PROPERLY FILED UNDER THE
MARKETABLE RECORD TITLE ACT BECAUSE IT IS NOT AN
INTEREST IN PROPERTY.

The Purchase and Sale Agreement cannot form the basis for an interest in land, and thus cannot form the basis for the purported Notice of Interest. The Agreement does not constitute or purport to create an interest in property. Rather, it provides for a transfer of PRP’s interests in the contract to purchase the property, and only provides for the creation of a trust deed under certain conditions. Plainly, the Agreement creates a contract right, not an interest in land.

In order to file a proper notice of interest under § 57-9-4, a claimant must have a claim to an “interest in land.” A contract right is not an “interest in land.” The requirement of an “interest in land” is an express requirement of the notice of interest statute:

Any person claiming an interest in land may preserve and keep effective such interest by filing for record during the forty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim. . . .

Utah Code Ann. § 57-9-4(1).

While the Marketable Record Title Act does not specifically define the phrase “interest in land,” the plain meaning of the term excludes claims for breach of contract. *See Valcarce v. Fitzgerald*, 961 P.2d 305, 318 (Utah 1998). Moreover, it is apparent from the statutory context, and from other uses of the term “interest in land” in Title 57, that the term does not include claims for breach of contract.

Contextually, the Marketable Record Title Act exists to cut off stale claims to interests in land. A person has marketable title if no “conveyance or other title transaction” appears of record within 40 years which purports to create an interest divesting the claimant or his predecessors of ownership. Utah Code Ann. § 57-9-1. The notice of interest provision exists to provide a mechanism for a person to preserve an otherwise valid interest in land which would be sufficient to overcome the “conveyance or other title transaction” in favor of the record owner. *See* § 57-9-2(2) (providing that marketable record title is subject to “interests preserved by” filing of notice). Plainly, in context, a disputed breach of contract claim does

not qualify as an “interest in property” and falls outside the scope of the Marketable Record Title Act.

Elsewhere in Title 57, the term “interest in land” is consistently used to denote a title or other ownership interest in real property created by conveyance. *See, e.g.*, Utah Code Ann. § 57-1-1(3) (“‘Real property’ or ‘real estate’ means any right, title, estate, or interest in land . . .”); § 57-9-8(6) (“‘title transaction’ mean[s] any transaction affecting title to any interest in land . . .”).

The transaction upon which Thomas and PRP rely to create their purported “interest in land” meets none of the requirements of a conveyance. If valid, the transaction would at most be a contractual right. It contains no legal description of the property, does not include PRP’s mailing addresses, is not made under oath and is not duly acknowledged. *See* Utah Code Ann. §§ 57-3-101 *et seq.* (setting forth requirements of conveyances).

The lower court determined that the Agreement is nothing more than a contract between PRP, Russell/Packard and Russell. It then correctly concluded that, based upon the facts, the Agreement did not create an interest in land in favor of PRP. The court ruled the Agreement was not, itself, a conveyance purporting to create an interest in the lots covered by the Notice of Interest. It was merely a contract imposing contractual rights and duties upon PRP, Russell/Packard and Russell and nothing more. The court declared that to properly enforce any rights it might have under the contract, Thomas and PRP were required to bring an action for breach of contract against Russell and Russell/ Packard and file a *lis pendens*.

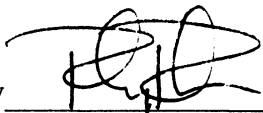
Because the Notice of Interest fails to meet the requirements of § 57-9-4, it is not authorized by that provision. Consequently, it does not fall within the exception of § 38-9-1(6)(a) and is, therefore, a wrongful lien. Based upon the facts before the court, these conclusions were not an abuse of discretion. The trial court's ruling should, therefore, be affirmed.

CONCLUSION

The lower court's decision should be affirmed because the Notice of Interest is improper under the Marketable Record Title Act and therefore does not fall within the exception of § 38-9-1(6)(a). Consequently, the petitioners respectfully request that the Court affirm the lower court's ruling.

DATED this 30 day of September, 1999.

SNOW, CHRISTENSEN & MARTINEAU

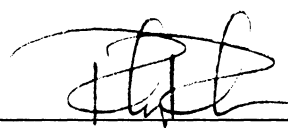
By  _____

Michael R. Carlston
Rodney R. Parker
Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of September, 1999, I caused two copies of the foregoing Brief of Appellants to be served by first class mail upon the following:

DAVID O BLACK
BLACK STITH & ARGYLE
5806 S 900 E
SALT LAKE CITY UT 84121-1644

A handwritten signature in black ink, appearing to read "D. Black", is written over a horizontal line.

ADDENDUM

The following addendum is submitted pursuant to the provisions of Rule 24(a)(11).

1. Notice of Interest (R. 3-12)
2. Findings of Fact and Conclusions of Law (R. 64-68)
3. Order Granting Petition to Clear Title (R. 69-72)
4. Amended Order Granting Petition to Clear Title (R. 99-102)

Mail TO:
David A Black
1245 Brickyard Rd #650
Salt Lake City, UT
84106

UT 68030 M 4677 M 2738
RANDALL A EDINGTON
UTAH COUNTY RECORDER
1998 Jun 22 5:00 PM FEE 30.00 BY NO
RECORDED FOR DAVID O BLACK

NOTICE OF INTEREST

NOTICE OF INTEREST is hereby given that PRP Development, L.C., a Utah limited liability company, pursuant to an agreement dated April 2, 1997, and a Uniform Real Estate Contract dated November 5, 1996 and November 8, 1996, copies of each of which are attached hereto as Exhibit "A", claims an interest in and to lots 1, 2, 3, 4, 5, 6, 8, 9, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 4154, 56, 57, 58, 59, 60, 61, 62, 67, 69, 70, 71, of Saratoga Springs Plat A, Plat 4, Sheet 2, Planned Unit Development located in Utah County, State of Utah.

DATED this 19th day of June, 1998.

PRP DEVELOPMENT, L.C.

By: _____

John Thomas

STATE OF UTAH)

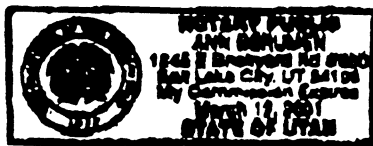
: ss.

COUNTY OF SALT LAKE)

On this 11th day of June, 1998, before me the undersigned, a Notary Public in and for said County and State, personally appeared John Thomas, known to me to be the Manager of PRP Development, L.C., and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year

first above written.



Ann Benjamin
Notary Public for Utah

BLACK, BYTH & ARGYLE

881 4243894

P. 82

Exhibit "A"

FHA / INDIAN / TEAM

COPY

EN 68030 N 4677 N 789

PURCHASE AND DEVELOPMENT AGREEMENT

This Purchase and Development Agreement ("Agreement") is made and entered into this 2nd day of April, 1997 by and between PRP Development, LC ("PRP"), a Utah Limited Liability Company, Russell-Packard Development, Inc. ("RP"), a California Corporation, Premier Homes Construction, LC ("Premier"), a Utah Corporation and Lawrence M. Russell ("Russell"). Premier Homes, LC and Premier Homes Construction, LC are two separate entities.

RECITALS

WHEREAS, Russell and Premier Homes, LC are the sole members of PRP, and

WHEREAS, Russell desires to sell all of his right, title and interest in PRP to Premier on the terms and conditions set forth herein, and

WHEREAS, Russell desires the right to acquire from PRP Lots 1 to 72 in the Saratoga Springs Subdivision, Phase I located in Utah County, Utah (said lots are hereinafter collectively referred to as the "Saratoga Property" and the individual lots are referred to as the "Lots") pursuant to the terms of a real estate purchase contract ("Contract") signed by PRP on November 5, 1996 and signed by CMT Investments as Seller on November 8, 1996 which Contract names PRP as Buyer, and

WHEREAS, Russell is willing to pay PRP to acquire said Property.

NOW, THEREFORE, in consideration of the covenants and promises set forth herein, the parties mutually agree as follows:

1. **Purchase of Interest in PRP.** Premier agrees to pay and Russell agrees to accept the sum of \$5,000 for Russell's remaining interest in PRP. Russell shall transfer its interest in PRP to Premier at the time of closing. Premier shall pay Russell the purchase price at the time of closing. The parties represent that the purchase price set forth herein represents a fair estimate of the value of Russell's remaining interest in PRP as of the date hereof.
2. **Saratoga Property.** PRP agrees to assign to Russell all of its right, title and interest in the Contract and its right to acquire the Saratoga Property at the time of closing. Russell agrees to pay PRP the sum of \$538,000 for PRP's interest in the Saratoga Property. Said sum shall be paid as follows:
 - a. Russell shall pay PRP the sum of \$8,000 for each Lot on 66 Lots of the Saratoga Property. In such an event, Russell shall be entitled to sell the first 6 lots without making any payment to PRP. On the last 66 lots, Russell shall pay PRP the sum of

BLACK, STITH & ARGYLE

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P. 05

DN 62030 K 4677 M 760

\$8,000 at the time of closing of the sale of each Lot. No interest shall accrue on the unpaid balance.

- b. In the event Russell sells, assigns or transfers the Saratoga Property other than through the sale of an individual Lot, the amounts due PRP shall become due and payable upon such in such event.
 - c. The amounts due PRP shall be secured by a standard trust deed and trust deed note in favor of PRP to be recorded after the closing of the construction loan and/or an escrow arrangement at American Legal Title, acceptable to PRP, which arrangement provides for the payment of \$8,000 to PRP upon the sale of each Lot.
 - d. Russell shall have until April 1, 1999 to pay the principal sum of \$528,000 at no interest. Interest shall accrue after April 1, 1999 at the rate of 8 percent per annum on the unpaid principal balance. After April 1, 2000, the principal sum, together with all accrued interest, shall become due and payable.
3. Disclaimer of Interest. As a material part of the consideration of this Agreement, Russell and RPI acknowledge and agree that upon the consummation of the transaction set forth in this Agreement, neither Russell nor RPI shall have any further interest in and to PRP or any of its assets, projects or properties.
 4. Notice. All demands and notices to be given hereunder, if any, shall be personally delivered or sent by registered mail addressed to the respective parties at their postal addresses as of the date of this Agreement or to such other address as each may hereafter designate in writing.
 5. Successors. Except as otherwise provided herein, this Agreement shall be binding upon and inure to the benefit of the respective parties hereto, their legal representatives, successors and assigns.
 6. Entire Agreement. This Agreement constitutes the entire agreement and understanding between the parties hereto and supersedes all prior agreements or understandings.
 7. Amendment. This Agreement may not be altered or amended except by a subsequent written agreement executed by all of the parties hereto.
 8. Attorney's Fees. In the event of any controversy or claim or dispute between the parties hereto arising out of or relating to this Agreement or any of the documents provided for herein, or the breach thereof, the prevailing party shall be entitled to recover from the losing party reasonable attorneys' fees, expenses and costs, whether incurred prior to, during or subsequent to trial including appeals.

BLACK, SMITH & ARGYLE

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DT 62030 K 4677 0761

9. Additional Documents. The parties hereto agree to execute such additional documents as may be necessary or desirable to carry out the intent of this Agreement.
10. Nonwaiver. The failure of any party to enforce the provisions of this Agreement shall not constitute a waiver unless specifically stated in writing, signed by the party whose rights are deemed waived, regardless of a party's knowledge of a breach hereunder.
11. Governing Law. The terms of the Agreement shall be governed by and construed in accordance with Utah law. The parties agree that any legal proceedings relating to the subject matter of this Agreement shall be brought exclusively in the State of Utah. The parties represent to each other that the Agreement to bring legal proceedings exclusively in the State of Utah will not place a serious inconvenience or be unfair or unreasonable to any of the parties hereto. Because the State of Utah has a substantial relationship to both the parties and this transaction, it is appropriate to select the Utah Courts to handle any and all legal proceedings relating hereto.
12. Severability. If any of the terms and conditions of this Agreement shall be declared invalid by a court, agency, commission or other tribunal or entity having jurisdiction thereof, the application of such provisions to parties or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby, and each of them not so declared invalid or unenforceable shall be valid and be enforced to the fullest extent permitted by law and the rights and obligations of the parties shall be reasonable terms consistent with the undertakings of the parties under this Agreement has been substituted in place of the invalid provision.
13. Paragraph Headings. Paragraph headings in this Agreement are for convenience only and shall not be deemed to modify, interpret or limit the provisions hereof.
14. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same instrument.
15. Time of the Essence. Time is of the essence in this Agreement.
16. Authorization. The individuals who have signed this Agreement represent and warrant that they are duly authorized to execute this Agreement, in either their individual or representative capacity as indicated, and that this Agreement is enforceable according to its terms.
17. Survival. The provisions, promises, warranties, representations, and covenants set forth herein shall survive any execution, settlement, delivery or recording of any instrument and shall not be merged therein.

DT 62030 R 4677 M 762

18. **Legal Counsel.** The parties hereto have engaged the law firm of Carman & Associates, P.C. to prepare this Agreement. All parties acknowledge that they have been advised to seek independent legal advice to represent their individual interests to the extent they deem it necessary.
19. **Costs.** Each of the parties shall pay their own costs and expenses incurred, or to be incurred, in negotiating and preparing this Agreement and in closing and carrying out the transactions contemplated by this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the day and year above written.

BLACK, STITH & ARBYLE 801 4642554


62030 X 4677 R 763

18. **Legal Counsel:** The parties hereto have engaged the law firm of Carman & Associates, P.C. to prepare this Agreement. All parties acknowledge that they have been advised to seek independent legal advice to represent their individual interests to the extent they deem it necessary.
19. **COSTS.** Each of the parties shall pay their own costs and expenses incurred, or to be incurred, in negotiating and preparing this Agreement and in closing and carrying out the transactions contemplated by this Agreement.


IN WITNESS WHEREOF, the Parties have executed this Agreement on the day and year above written.

PRP Development, LC

Premier Homes, L.C., Member



 Member BY John Tharite, Albi Alex.

Russell-Packer Development, Inc.


 President

Premier Homes Construction, LC


 Member


 Lawrence M. Russell

BLACK, STITH & REAYLE 801 4948094

P.02



THE BORROWER HEREBY CERTIFIES THAT THE INFORMATION CONTAINED HEREIN IS TRUE AND CORRECT TO THE BEST OF HIS KNOWLEDGE AND BELIEF AND THAT HE IS NOT PROVIDING ANY INFORMATION THAT IS FALSE OR MISLEADING.

1. NAME P.B. P. [unclear] ADDRESS [unclear] CITY [unclear] STATE [unclear] ZIP [unclear]

2. SUBJECT TITLE [unclear] PROPERTY ADDRESS [unclear] CITY [unclear] STATE [unclear] ZIP [unclear]

3. PROPERTY 72 Town Lane [unclear] Phase 1

4. PROPERTY TYPE [unclear] PROPERTY SIZE [unclear] PROPERTY VALUE [unclear]

5. PROPERTY DESCRIPTION [unclear]

6. PROPERTY HISTORY [unclear]

7. PROPERTY TAXES [unclear]

8. PROPERTY INSURANCE [unclear]

9. PROPERTY LIENS [unclear]

10. PROPERTY NOTES [unclear]

11. PROPERTY DISCLOSURE [unclear]

12. PROPERTY SIGNATURE [unclear]

13. PROPERTY DATE [unclear]

14. PROPERTY WITNESS [unclear]

15. PROPERTY NOTARIZATION [unclear]

16. PROPERTY RECORDING [unclear]

17. PROPERTY CLOSING [unclear]

18. PROPERTY SETTLEMENT [unclear]

19. PROPERTY DELIVERY [unclear]

20. PROPERTY RECORDING [unclear]

21. PROPERTY CLOSING [unclear]

22. PROPERTY SETTLEMENT [unclear]

23. PROPERTY DELIVERY [unclear]

24. PROPERTY RECORDING [unclear]

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ADDENDUM #1

REAL ESTATE PURCHASE CONTRACT

By reference, this is an ADDENDUM to the REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Release Date of August 14, 1996, including all addenda and counter offers, between P.R.P. Development, Inc., as Buyer and 1115 Litchfield, as Seller on property known as: "Sarmoga Springs No. 1" subdivision, Litchfield, VT. (72 fully improved town home building lots).

The following terms are hereby incorporated as part of the REPC, and to the extent these terms modify or conflict with any provisions of the REPC, these terms shall control. All other terms of the REPC not modified shall remain the same:

1. Buyer to close on any 9 lots within 30 days from time that a building permit can be obtained from Litchfield city and all improvements are installed including but not limited to pavement.
2. Buyer to close on any 9 lots every 30 days thereafter until all lots are closed.
3. At closing, Buyer will close 9 lots X \$30,000.00 = \$270,000.00. This will release nine (9) lots.
4. Seller's release of lots will be determined at Buyer and Seller's discretion, prior to closing.
5. No lot to be closed on prior to any and all improvements being installed, including pavement and a building permit being obtainable from Litchfield city.
6. All construction debris on all lots to be removed by Seller prior to closing on each lot.
7. Seller to approve Buyer's site plan, architectural plan, elevations and exterior materials. Buyer understands that he will be responsible for all costs related to any changes to site plan if changes are required to fit Buyer's home plans.
8. NOTE: Some principals, managers and/or employees of Buyer are licensed real estate agents or brokers with the State of Utah.

() Buyer (X) Seller shall have until 5:00 () or (X) PM Mountain Time, November 8, 1996 to accept these terms. Unless so extended, this offer shall lapse.

P.R.P. Development, L.L.C.

(X) Buyer () Seller Signature *General Manager*

11/15/96
Date

ACCEPTANCE / REJECTION / COUNTER OFFER

Check One

(X) Acceptance () Seller () Buyer hereby accepts these terms.

() Buyer () Seller Signature

Date

() Rejection () Seller () Buyer rejects these terms.

() Counter Offer () Seller () Buyer presents as a counter offer the terms set forth on the attached Counter Offer # _____.

() Counter Offer () Seller () Buyer presents as a counter offer the terms set forth on the attached Counter Offer # _____.

FILED
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
MBT Deputy
8/14/98

MICHAEL R. CARLSTON (A0577)
SCOTT KEITH WILSON (A7347)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Petitioners
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

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

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Petitioners,

Case No. 9804-04802

vs.

JOHN J. THOMAS and PRP
DEVELOPMENT, L.C.,

Judge Gary D. Stott

Respondents.

Petitioners Lawrence M. Russell, Russell/Packard Development, Inc., Saratoga Springs Development, L.C., and Merlin Smith and Margie Smith's Petition to Clear Title came on regularly for hearing before the Court on August 4, 1998. Petitioners were not present but were represented by their counsel, Michael R. Carlston, of Snow, Christensen and Martineau.

Respondent John J. Thomas was present and represented by counsel David O. Black of Black, Stith, and Argyle, P.C. The Court, after having reviewed the evidence presented by Petitioners in the form of affidavits, and having considered the arguments of counsel, hereby makes the following findings of fact:

1. Petitioners have an interest in real property located in Utah County, Utah.
2. With respect to the property in which Petitioners have an interest, PRP Development, L.C., and John Thomas filed a document styled as Notice of Interest with Utah County Recorder on June 22, 1998, claiming an interest in and to lots 1, 2, 3, 4, 5, 6, 8, 9, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 4/54, 56, 57, 58, 59, 60, 61, 62, 67, 69, 70, and 71 of Saratoga Springs Plat A, Plat 4, Sheet 2, Planned Unit Development located in Utah County, state of Utah.
3. None of the Petitioners has conveyed to PRP or Thomas any interest in the properties listed above, or signed or authorized the filing of a notice of interest with regard to those properties.
4. No order or judgment of a court of competent jurisdiction authorizing such an action is in existence.

WHEREFORE, the Court having made its findings of fact now makes and enters its conclusions of law.

1. The Notice of Interest filed by Respondents on June 22, 1998, constitutes a wrongful lien within the meaning of Utah Code Annotated § 38-9-1.

2. The Notice of Interest filed by Respondents is not authorized either by Utah Code Annotated Title 38 or by Utah Code Annotated § 57-9-4 or any other Utah or federal statute.

3. The Notice of Interest filed by Respondents was not authorized by an order or judgment of a court of competent jurisdiction.

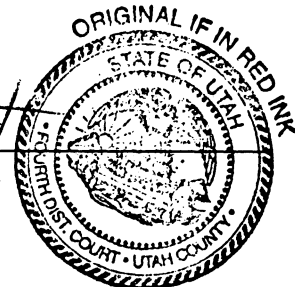
4. The Respondents have a means for contesting or making any claims they may have by virtue of initiating a legal action and filing a lis pendens. The Notice of Interest is not a lis pendens and is a wrongful lien. An order should be entered clearing the Respondent's Notice of Interest from the subject property.

5. Petitioners may submit an application for an award of costs and reasonable attorneys fees as provided by Utah Code Annotated § 38-9-7(5)(a).

DATED this 14 day of August, 1998.

By the Court:


Honorable Gary D. Stott



CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 1998, I caused a true and correct copy of the above document to be hand delivered to:

David O. Black
Black, Stith & Argyle
1245 Brickyard Rd. #650
Salt Lake City, UT 84106

Pam Thompson

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of _____, 1998, a conformed copy of the above document was mailed first class, postage prepaid, to:

David O. Black
Black, Stith & Argyle
1245 Brickyard Rd. #650
Salt Lake City, UT 84106

Michael R. Carlston
Scott Keith Wilson
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
Salt Lake City, UT 84111

N:\19598\6\FINDINGS.FCT

MICHAEL R. CARLSTON (A0577)
SCOTT KEITH WILSON (A7347)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Petitioners
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

FILED
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
MBT Deputy
8/14/98

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

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

Petitioners,

vs.

JOHN J. THOMAS and PRP
DEVELOPMENT, L.C.,

Respondents.

**ORDER GRANTING PETITION TO
CLEAR TITLE**

Case No. 9804-04802

Judge Gary D. Stott

Based upon the findings of fact and conclusions of law previously entered, the Court
hereby orders, adjudges, and decrees:

1. The Notice of Interest filed by Respondents on June 22, 1998, claiming an interest in real property located in Utah County, Utah, constitutes a wrongful lien within the meaning of Utah Code Annotated § 38-9-1.

2. The Notice of Interest is hereby declared to be void ab initia, and the properties subject to the Notice of Interest are hereby released from the Notice of Interest.

3. Pursuant to Utah Code Annotated § 38-9-7(5)(a), Petitioners are hereby awarded their costs and reasonable attorneys fees incurred in relation to this petition. Counsel for Petitioners are instructed to submit an affidavit pursuant to Rule 4-505.

The Respondents have a means for contesting or making any claims they may have by virtue of initiating a legal action and filing a lis pendens. The Notice of Interest is not a lis pendens and is a wrongful lien. An order should be entered clearing the Respondent's Notice of Interest from the subject property.

DATED this 14 day of August, 1998.

By the Court:

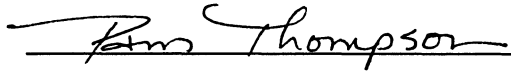

Honorable Gary D. Stott



CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 1998, I caused a true and correct copy of the above document to be hand delivered to.

David O. Black
Black, Stith & Argyle
1245 Brickyard Rd. #650
Salt Lake City, UT 84106



CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of _____, 1998, a conformed copy of the above order was mailed first class, postage prepaid, to:

David O. Black
Black, Stith & Argyle
1245 Brickyard Rd. #650
Salt Lake City, UT 84106

Michael R. Carlston
Scott Keith Wilson
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
Salt Lake City, UT 84111

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FILED
Fourth Judicial District Court
of Utah County, State of Utah
CARMA D. SMITH, Clerk
3-18-99 Deputy

MICHAEL R. CARLSTON (A0577)
HEATHER S. WHITE (A7674)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Petitioners
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

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

**AMENDED ORDER GRANTING
PETITION TO CLEAR TITLE**

Petitioners,

Case No. 9804-04802

vs.

JOHN J. THOMAS and PRP
DEVELOPMENT, L.C.,

Judge Gary D. Stott

Respondents.

Based upon the findings of fact and conclusions of law previously entered, the Court hereby orders, adjudges, and decrees:

1. Respondent filed a Notice of Interest on real property located in Utah County, Utah, more particularly described as: lots 1, 2, 3, 4, 5, 6, 8, 9, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41,

42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 4/54, 56, 57, 58, 59, 60, 61, 62, 67, 69, 70, and 71 of Saratoga Springs Plat A, Plat 4, Sheet 2, Planned Unit Development.

2. The Notice of Interest filed by Respondents on June 22, 1998, claiming an interest in the lots listed in Paragraph 1 above constitutes a wrongful lien within the meaning of Utah Code Annotated § 38-9-1.

3. The Notice of Interest is hereby declared to be void ab initia, and the properties subject to the Notice of Interest are hereby released from the Notice of Interest.

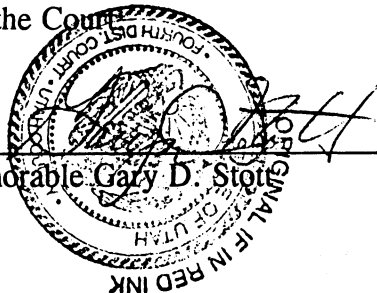
4. Pursuant to Utah Code Annotated § 38-9-7(5)(a), Petitioners are hereby awarded their costs and reasonable attorneys fees incurred in relation to this petition. Counsel for Petitioners are instructed to submit an affidavit pursuant to Rule 4-505.

The Respondents have a means for contesting or making any claims they may have by virtue of initiating a legal action and filing a lis pendens. The Notice of Interest is not a lis pendens and is a wrongful lien. An order should be entered clearing the Respondent's Notice of Interest from the lots listed in Paragraph 1 above.

DATED this 18 day of March, 1999.

By the Court

Honorable Gary D. Stone



CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March, 1999, I caused a true and correct copy of the above document to be mailed first class, postage prepaid to:

David O. Black
Black, Stith & Argyle
1245 Brickyard Rd. #650
Salt Lake City, UT 84106

Alison H. Hansen

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of March, 1999, a conformed copy of the above amended order was mailed first class, postage prepaid, to:

David O. Black
Black, Stith & Argyle
1245 Brickyard Rd. #650
Salt Lake City, UT 84106

Michael R. Carlston
Scott Keith Wilson
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
Salt Lake City, UT 84111
