

2002

LKL Associates, Inc. v. Janet Heidt, et al. : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *LKL Associates v. Heidt*, No. 20020626.00 (Utah Supreme Court, 2002).

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IN THE SUPREME COURT OF THE STATE OF UTAH

LKL ASSOCIATES, INC.,

Plaintiff,

vs.

JANET HEIDT, et al.,

Defendants.

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Case No. 20020626-SC

Case No. 010500202

Third District Court, Summit County

BRIEF OF APPELLANT CRACAR CONSTRUCTION COMPANY

Appeal from a Final Order and Judgment of the Third Judicial District Court,
in and for Summit County, Judge Robert K. Hilder

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Oral Argument and Published Decision
Requested

IN THE SUPREME COURT OF THE STATE OF UTAH

LKL ASSOCIATES, INC.,

Plaintiff,

vs.

JANET HEIDT, et al.,

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Oral Argument and Published Decision
Requested

PARTIES TO THE PROCEEDING
(Appellant and Appellees in bold)

Plaintiff: LKL ASSOCIATES, INC.

Defendants: **JANET HEIDT**; JAMES E. CARUSO; WILLIAM JACKSON;
JILLIAN ANDERSON; **ANN M. FARLEY**; **GUY G. BERRYESSA**;
FLAGSTAR BANK, FSB; APPROVED FINANCIAL CORP.;
WELLS FARGO HOME MORTGAGE, INC.; ADVANCE
MORTGAGE CORPORATION; SUPERIOR INSULATION CO.;
WESTERN WHOLESALE FLOORING; ANDERSON LUMBER
COMPANY; SUPERIOR PLUMBING AND HEATING, INC.; JM
MECHANICAL/SERVICE EXPERTS; AQUA BALANCE, INC.;
ROB CHLARSON, DENNIS SKIBY, AND JOHN DOES 1
THROUGH 20

Cross-Claim
Plaintiffs: SUPERIOR PLUMBING AND HEATING, INC.
SUPERIOR INSULATION CO., INC.

Cross-Claim
Defendants: **JANET HEIDT**; JAMES E. CARUSO; WILLIAM JACKSON;
JILLIAN ANDERSON; **ANN M. FARLEY**; **GUY G. BERRYESSA**;
FLAGSTAR BANK, FSB; APPROVED FINANCIAL CORP.;
WELLS FARGO HOME MORTGAGE, INC.; ADVANCE
MORTGAGE CORPORATION; WESTERN WHOLESALE
FLOORING; ANDERSON LUMBER COMPANY; SUPERIOR
PLUMBING AND HEATING, INC.; JM MECHANICAL/SERVICE

Third-Party
Claimants: SUPERIOR PLUMBING AND HEATING, INC.

Third-Party
Defendants: **CRACAR CONSTRUCTION COMPANY**, a Utah corporation;
BEAR HOLLOW VILLAGE, LLC, a Utah limited liability company;
M S THRIFTY, LLC, a Utah limited liability company; M.S. THIRTY,
LLC; JOHN S. LEWIS; JOHN SCOTT LEWIS; LAURENCE
FRANCOISE; ANDREW MANILLA, individuals; and JOHN DOES 1
TO X; PETER VAN VELDHUIZEN; CHARLENE VAN
VELDHUIZEN; **CURT G. HOOD**; **JENNIFER C. SMITH**;
KIMCEE MCANALLY; RICHARD SILLIMAN; SHELLY A.
SILLIMAN; STEPHEN J. JOHANSON; JANYCE L. JOHANSON;
JAMES WELZIEN; ROBERT G. STANLEY; JOHN F. GUERTIN;

HARRY R. BRUESTLE; SUSAN BRUESTLE; JAMES G. SUMNER;
ANN E. SUMNER; CHARLES H. SEEBOCK and JOY C. SEEBOCK,
Trustees of the Seebock Family trust; CAREY C. LOGSDON; CRAIG
R. HELLMERS; DARREL E. WHITE; BETH ELLEN WHITE;
DOUGLAS ROBINSON; CONSTANCE ROBINSON; HOWARD E.
BUTT; PATRICIA M. BUTT; TED YARBOROUGH; and DOES 21
through 240

Counterclaim SUPERIOR INSULATION CO., INC.
Plaintiff:

Counterclaim LKL ASSOCIATES, INC.
Defendant:

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STATEMENT OF JURISDICTION

The Supreme Court of Utah has jurisdiction over this case pursuant to UTAH CODE ANNOTATED § 78-2-2(3)(j).

STATEMENT OF ISSUES PRESENTED

1. **Issue:** Whether the district court erred in concluding that an individual unit in a ten-unit condominium building constitutes a “residence” as that term is defined in UTAH CODE ANN. § 38-11-102(20).

 a. **Standard of Review:** Questions of statutory interpretation are reviewed for correctness. *Bearden v. Croft*, 2001 UT 76, ¶ 5, 31 P.3d 537.

 b. **Record Citation:** This issue was raised in Superior Insulation Co., Inc.’s Objection to the Findings of Fact and Conclusions of Law and Proposed Judgment and Order on Defendants Janet Heidt, Guy G. Berryessa, Curt G. Hood, and Jennifer C. Smith’s Motions for Summary Judgment (Record on Appeal [hereafter “R.”] 429-30), Superior Insulation Co., Inc.’s memoranda in opposition to the unit owners’ motions for summary judgment (R. 478-79, 511-12), and at oral argument on the unit owners’ Motion for Summary Judgment. (Transcript of Hearing on Motions, February 4, 2002 [hereafter “Tr.”] 675-76, 690-92.)

2. **Issue:** Whether the district court erred in concluding that the provisions of the Condominium Ownership Act mandate that a unit in a ten-unit condominium building be considered a “residence” under UTAH CODE ANN. § 38-11-102(20).

a. **Standard of Review:** Questions of statutory interpretation are reviewed for correctness. *Bearden*, 2001 UT 76 at ¶ 5.

b. **Record Citation:** This issue was raised at oral argument on the unit owners’ Motions for Summary Judgment. (Tr. 675-76, 690-92.)

DETERMINATIVE LEGAL PROVISIONS

The relevant issues are governed by UTAH CODE ANN. § 38-11-102(20), a section contained in the Utah Lien Restriction and Lien Recovery Fund Act, and UTAH CODE ANN. § 57-8-19(1), § 57-8-27, and § 57-8-35, sections contained in the Utah Condominium Ownership Act. These statutory provisions are set forth in full in the Addendum (hereafter, “Add.”) at 26.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

CraCar Construction Company (“CraCar”) was hired by Bear Hollow Village, LLC to act as the general contractor for the Bear Hollow Village Subdivision project (the “Project”) in Park City, Utah. CraCar hired various subcontractors to work on the Project. Bear Hollow Village, LLC failed to pay CraCar for a substantial portion of the

work performed on the Project, and, as a result, CraCar was unable to pay its subcontractors for the work they performed. CraCar and its subcontractors recorded mechanic's liens against the Project. Despite its failure to pay CraCar, Bear Hollow Village, LLC sold a number of condominium units to individual purchasers.

II. COURSE OF PROCEEDINGS

LKL Associates, Inc. ("LKL") filed an action which included a claim to foreclose mechanic's liens against certain condominium lots within the Project. LKL named as defendants the individual owners of the condominium units and other contractors who had recorded mechanic's liens against the units. Two defendants, Superior Plumbing and Heating, Inc. and Superior Insulation Co., Inc., filed counterclaims, cross-claims, and third party complaints against unit owners and other lien claimants. Superior Plumbing and Superior Insulation, who were CraCar's subcontractors on the Project, named CraCar as a defendant in their third-party complaints.

Each of the owners of the condominium units (Janet Heidt, Guy G. Berryessa, Curt G. Hood, Jennifer C. Smith, and Ann M. Farley [hereafter, "Unit Owners"]) submitted a completed Answer, Affidavit, and Motion for Summary Judgment form which UTAH CODE ANN. § 38-1-11(4)(a) requires mechanic's lien claimants to serve along with the summons and complaint in a mechanic's lien foreclosure action. The Unit Owners sought summary judgment based upon the defenses provided by the Residence Lien Restriction and Lien Recovery Fund Act (the "Lien Restriction Act"). Several

contractor parties objected to the motions for summary judgment because each condominium unit in question was part of a ten-unit condominium building. The Lien Restriction Act applies only if a property is a “residence” which the Lien Restriction Act defines as a “detached single-family dwelling or multifamily dwelling up to two units” UTAH CODE ANN. § 38-11-102(20). The owners did not dispute that their condominium units were housed in a building containing ten attached units.

III. DISPOSITION IN THE COURT BELOW

After a hearing on the owners’ motions for summary judgment, the trial court ruled that each condominium unit constituted a “residence” under the Lien Restriction Act and that the lien claimant parties were required to remove their mechanic’s liens and dismiss their claims against the owners. The court further directed that the judgments be entered as final judgments pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. CraCar appeals the trial court’s ruling.

IV. STATEMENT OF FACTS

CraCar entered into a contract with a developer, Bear Hollow Village, LLC, to act as the general contractor for the Project. CraCar retained subcontractors to provide work on certain condominium units in the Project. (R. 102, 193.) Without paying CraCar for its work, Bear Hollow Village, LLC sold a number of the condominium units in the Project to the Unit Owners. (Findings of Fact and Conclusions of Law on Home Owners’ Motions for Summary Judgment [hereafter, “First Findings”], Addendum

[“Add.”] 2-4; Findings of Fact and Conclusions of Law on Ann M. Farley’s Motion for Summary Judgment [hereafter, “Second Findings”], Add. 10-12 .) CraCar and its subcontractors filed mechanic’s liens against the Project to secure payment for the work they had performed. (R. 104-07, 198-200.) Some of CraCar’s subcontractors initiated a lien foreclosure action against the Unit Owners and named CraCar as a party to the action. (R. at 104-07, 198-200.). The Unit Owners filed motions for summary judgment based upon the Lien Restriction Act. (R. 131,163, 203, 227 & 400.) CraCar and its subcontractors objected to the motions on the basis that the protections of the Lien Restriction Act are only extended to owners of “residences” and that the Lien Restriction Act defines a “residence” as “a primary or secondary detached single-family dwelling or multifamily dwelling up to two units.” (R. 429-30, 478-79, 511-12; Tr. 675-76, 690-92.) Because the Unit Owners owned condominium units housed in buildings containing ten attached units, CraCar and its subcontractors argued that the Lien Restriction Act’s protections were not available to the Unit Owners. (Tr. 675-76, 690-92.)

After oral argument on the Unit Owners’ motions for summary judgment, the trial court granted the Unit Owners’ motions for summary judgment. (Add. 1-27.) In support of its ruling, the trial court concluded that: (1) “so long as an owner of a residential unit in a condominium building does not own more than two units, that owner qualifies for the protection afforded by the [Act]”; (2) “the conclusion that each of the condominium units described in the foregoing Findings of Fact qualifies as a ‘residence’ is mandated

by the provisions of the Condominium Ownership Act, Utah Code Ann. § 57-8-1, et seq.”; and (3) “[i]f the definition of residence were to be construed as excluding condominium units, the statute may be unconstitutional under the equal protection provision of the Utah Constitution, Article I, § 24.” (First Findings, Add. 4-6, Second Findings, Add. 16-19.)

Because one of the Unit Owners (Ann M. Farley) was inadvertently omitted from the first Findings of Facts and Conclusions of Law and the first Judgment and Order, an additional Findings of Fact and Conclusions of Law and an additional Judgment and Order were entered by the trial court to extend the relief granted to the other Unit Owners to Ms. Farley. (Second Findings, Add. 14-21; Add. 22-27.) The Findings, Judgment, and Order pertaining to Ms. Farley were identical to those entered for the other Unit Owners. Although CraCar filed a separate Notice of Appeal relating to the Findings, Judgment, and Order pertaining to Ms. Farley, the legal issues are the same as those relating to the Findings, Judgment, and Order pertaining to the other Unit Owners. CraCar requests that the appeal of the Findings, Judgment, and Order relating to Ms. Farley be consolidated with the appeal of the Findings, Judgment, and Order relating to the other Unit Owners.

CraCar now appeals the trial court’s Findings of Fact and Conclusions of Law and the Judgments and Orders pertaining to the Unit Owners.

SUMMARY OF ARGUMENT

The Lien Restriction Act provides certain owners of residences protection from mechanic's liens. The term "residence" is defined by the Lien Restriction Act as a "detached single-family dwelling or multifamily dwelling up to two units" Because each of the Unit Owners in the present case own a unit in a condominium building housing ten units, the plain language of the statute indicates that the Unit Owners are not entitled to the protections of the Lien Restriction Act.

The provisions of Utah's Condominium Ownership Act do not alter the Lien Restriction Act's definition of "residence." Because there is no conflict between the Utah Condominium Ownership Act and the Lien Restriction Act, the two enactments coexist without one prevailing over the other.

Although the trial court stated in dicta that the Lien Restriction Act "may" be unconstitutional, the constitutional argument was never properly presented to the trial court, and the trial court did not rely on this argument in entering its ruling.

ARGUMENT

I. OWNERS OF UNITS IN MULTIFAMILY DWELLINGS HOUSING MORE THAN TWO UNITS ARE NOT ENTITLED TO THE PROTECTIONS OF THE LIEN RESTRICTION ACT

A. The Lien Restriction Act Applies to “Residences” Only

The trial court’s ruling defied the plain language of the Lien Restriction Act. The Lien Restriction Act explicitly provides that its protections against mechanic’s liens are limited to owners of “residences”:

A person qualified to file a lien upon an owner-occupied *residence* and the real property associated with that *residence* . . . ***shall be barred . . . from maintaining a lien upon that residence*** and real property or recovering a judgment in any civil action against the owner or the owner-occupied *residence* to recover monies owed for qualified services provided by that person if [certain enumerated conditions are met].

UTAH CODE ANN. § 38-11-107(1) (emphasis added). The Lien Restriction Act does not purport to bar mechanic’s liens against improvements which are not “residences.” Only those who are deemed “owners” under the Lien Restriction Act and who comply with the necessary provisions may compel the removal of the mechanic’s lien:

A lien claimant who files a mechanics’ lien or foreclosure action upon an owner-occupied residence is not liable for costs and attorneys’ fees under Sections 38-1-17 and 38-1-18 or for any damages arising from a civil action related to the lien filing or foreclosure action if the lien claimant removes the lien ***within ten days from the date the owner establishes compliance***, through written findings of fact from a court of competent jurisdiction or, in cases where a bankruptcy has been filed, from the director, with the requirements of Subsections 38-11-204(3)(a) and (3)(b).

UTAH CODE ANN. § 38-11-107(3). The Lien Restriction Act defines an “owner” as one who contracts with a real estate developer or a licensed contractor to purchase a “residence” upon completion of construction or one who buys a completed “residence” from a real estate developer. UTAH CODE ANN. § 38-11-102(15). Clearly, the relief awarded by the trial court to the Unit Owners can only be awarded under the Lien Restriction Act to owners of “residences.”

B. The Lien Restriction Act Defines “Residence” as Dwellings With No More Than Two Units

The Lien Restriction Act defines “residence” as follows:

“Residence” means an improvement to real property used or occupied, to be used or occupied as, or in conjunction with, a primary or secondary detached single-family dwelling or multifamily dwelling up to two units, including factory built housing.

UTAH CODE ANN. § 38-11-102(20). There are several elements to this definition. First, a residence must be some type of improvement to real property. Second, the improvement must be intended for use or occupation as (or in conjunction with) a primary or secondary dwelling. Third, the dwelling must be either a “detached single-family dwelling” or a “multifamily dwelling up to two units.” This third element — whether the dwelling is either a detached single-family dwelling or a multifamily dwelling with no more than two units — is the critical issue presented in this appeal.

C. A Condominium Unit in a Building Containing Ten Units Does Not Constitute a “Residence”

The Unit Owners in the present case reside in units in the Calgary Condominium complex within the Project. The Calgary Condominium complex consists of two buildings, each of which contains ten separate condominium units. (First Findings, Add. 4; Second Findings, Add. 16.) Because the units owned by the Unit Owners are contained within multifamily dwellings with more than two units, the Unit Owners are not entitled to the protections of the Lien Restriction Act. Any contrary conclusion defies the plain language of the Lien Restriction Act.

The trial court concluded that the definition of residence “focuses on the character of the ownership of the residence” and that “so long as an owner of a residential unit in a condominium building does not own more than two units, that owner qualifies for the protection afforded by the statute.” (First Findings, Add. 4; Second Findings, Add. 16.) These conclusions are entirely unsupported by the text of the Lien Restriction Act. Section 38-11-102(2) does not contain the words “own,” “owner,” or “ownership.” It is difficult to understand how the trial court could conclude that this provision “focuses on the character of ownership of the residence.” It is equally puzzling that the trial court construed the words “a . . . multifamily dwelling up to two units” to mean “a dwelling with any number of units so long as the homeowner in question owns no more than two units within that dwelling.”

The rules promulgated for the implementation of the Lien Restriction Act require the creation of a form for use by homeowners which “shall be an answer, affidavit, and motion for summary judgment that is clearly written and easy to understand.” UTAH ADMIN. CODE R156-38-109. Lien claimants are required by statute to serve a blank copy of the form upon each homeowner along with the summons and complaint. UTAH CODE ANN. § 38-1-11(4). The answer, affidavit, and motion for summary judgment form created by the Lien Recovery Fund, which was completed and filed by each of the Unit Owners, includes the following sentence to be filled in by the homeowner:

() I am the owner of a residence, which has an address of _____, located in the city or county of _____, Utah, which is *a single family or duplex residence*.

(R. 131,163, 203, 227 (emphasis added.)) It is interesting to note that the form does not request whether the affiant owns more than one unit in the dwelling in question. The language of the form indicates that the Lien Recovery Fund considers any multifamily dwelling larger than a duplex to be ineligible for the protections of the Lien Restriction Act.

II. THE CONDOMINIUM OWNERSHIP ACT DOES NOT TRANSFORM LARGE MULTIFAMILY BUILDINGS INTO “RESIDENCES”

The trial court also ruled that the Utah Condominium Ownership Act mandates the conclusion that “each of the condominium units [at issue] qualifies as a ‘residence’” (First Findings, Add. 5; Second Findings, Add. 17.) Specifically, the

trial court relied upon three sections of the Condominium Ownership Act in reaching this conclusion: Section 57-8-19(1) regarding liens against condominium units; Section 57-8-27 regarding separate taxation of condominium units; and Section 57-8-35 regarding the integration of other laws with the Condominium Ownership Act. (First Findings, Add. 4; Second Findings, Add. 16.) Because none of these sections provides a basis for altering the plain language of the Lien Restriction Act, the trial court erred in applying the Lien Restriction Act’s protections to units in a ten-unit condominium.

A. Section 57-18-19(1) Does Not Alter the Lien Restriction Act’s Definition of “Residence”

The Condominium Ownership Act provides that liens may be created against condominium units in the same manner that liens are created against other real property:

[W]hile the property remains subject to this act, . . . liens or encumbrances shall arise or be created only against each unit and the percentage of undivided interest in the common areas and facilities appurtenant to such unit in the same manner and under the same conditions in every respect as liens or encumbrances may arise or be created upon or against any other separate parcel of real property subject to individual ownership.

UTAH CODE ANN. § 57-8-19(1). The trial court apparently concluded that this provision served to transform condominium units into “separate parcel[s] of real property” which are considered detached for purposes of the Lien Restriction Act. To the contrary, this provision simply clarifies that condominium units are susceptible to the same liens and encumbrances which arise against non-condominium properties. Nothing in this section states that condominium units are “separate parcel[s] of real property” — the section

simply states that the procedures for creating a lien against separate parcels of real property are valid to create liens against condominium units.

B. Section 57-8-27 Does Not Convert Condominium Units Into Detached Dwellings

The Condominium Ownership Act provides that each condominium unit is subject to separate taxation:

Each unit and its percentage of undivided interest in the common areas and facilities shall be considered to be a parcel and shall be subject to separate assessment and taxation by each assessing unit and special district for all types of taxes authorized by law, including ad valorem levies and special assessments. Neither the building or buildings, the property, nor any of the common areas and facilities may be considered a parcel.

UTAH CODE ANN. § 57-8-27(1). However, nothing in this section suggests that a ten-unit condominium building should be deemed a “detached single-family dwelling” or a “multifamily dwelling up to two units” for purposes of the Lien Restriction Act.

C. The Application of the Condominium Ownership Act Does Not Conflict With the Lien Restriction Act

The Condominium Ownership Act contains provisions regarding the relationship between its provisions and other laws:

The provisions of this chapter shall be in addition to and supplemental to all other provisions of law, statutory or judicially declared, provided that wherever the application of the provisions of this chapter conflict with the application of such other provisions, this chapter shall prevail: provided further, for purposes of Sections 10-9-805, 10-9-811, and 17-27-804 and provisions of similar import and any law or ordinance adopted pursuant thereto, a condominium project shall be considered to be a subdivision, and a record of survey map or supplement thereto prepared pursuant to this

chapter shall be considered to be a subdivision map or plat, only with respect to:

(a) such real property or improvements, if any, as are intended to be dedicated to the use of the public in connection with the creation of the condominium project or portion thereof concerned; and

(b) those units, if any, included in the condominium project or portion thereof concerned which are not contained in existing or proposed buildings.

UTAH CODE ANN. § 57-8-35(1). In short, if the Condominium Ownership Act conflicts with other provisions of law, the Condominium Ownership Act prevails. If there is no conflict, the Condominium Ownership act is “in addition to and supplemental to all other provisions of law.” The trial court apparently concluded that there was a conflict between the Condominium Ownership Act and the Lien Restriction Act and that the former prevailed. In fact, there is no conflict between the Condominium Ownership Act and the Lien Restriction Act.

The trial court did not specify any provision of the Condominium Ownership Act which allegedly conflicted with the Lien Restriction Act. In fact, the Condominium Ownership Act explicitly states that condominium units are not treated differently for purposes of the creation of liens: “liens or encumbrances. . . shall . . . be created . . . against each unit . . . *in the same manner and under the same conditions in every respect* as liens . . . upon any other separate parcel of real property” UTAH CODE ANN. § 57-8-19(1) (emphasis added). No fictions or artificial devices must be

entertained to create liens against condominium units. There is no need to call a ten-plex a duplex. Instead, the provisions of the Condominium Ownership Act are “in addition to and supplemental to” the Lien Restriction Act and create no conflict. The plain language of the Lien Restriction Act applies against condominium units and non-condominium units alike.

D. The Condominium Ownership Act’s Provisions Regarding Subdivisions and Subdivision Plats Do Not Alter the Lien Restriction Act’s Definition of “Residence”

In support of its conclusions, the trial court noted that “a condominium project is treated as a subdivision” (First Findings, Add. 5; Second Findings, Add. 17.) This statement is true, subject to certain conditions. Under the Condominium Ownership Act, a condominium project “shall be considered to be a subdivision, and a record of survey map or supplement thereto . . . shall be considered a subdivision map or plat,” but only “for purposes of Sections 10-9-805, 10-9-811, and 17-27-804 and provisions of similar import and any law or ordinance adopted pursuant thereto.” Section 10-9-805 relates to the subdivision approval procedure, and Section 10-9-811 relates to prohibited transfers of land in an as-yet unapproved subdivision. Section 17-27-804 enumerates the requirements that a subdivision plat map be submitted and approved.

Apparently, the trial court reasoned that if a condominium project is considered a subdivision, a condominium unit should be considered a detached dwelling or a multifamily dwelling up to two units. However, neither the Condominium Ownership

Act nor any other statutory or case law supports this reasoning. A condominium project is considered a subdivision only for the limited purpose of approving subdivisions and subdivision plat maps. Moreover, even if condominium projects were considered subdivisions in other contexts, there is nothing magical about a subdivision which mandates that its component parcels become “detached single-family dwellings” or a “multifamily dwellings up to two units.” Regular (i.e., non-condominium) subdivisions may contain duplexes or twin homes which would qualify for protection under the Lien Restriction Act. Regular subdivisions may also contain tri-plexes and four-plexes which do not qualify for those protections. The mere fact that a property is part of a subdivision does not necessarily mean that the property qualifies as a “residence” under the Lien Restriction Act.

III. THE UNIT OWNERS’ ARGUMENT THAT THE LIEN RESTRICTION ACT IS UNCONSTITUTIONAL IS NOT BEFORE THIS COURT

In its Conclusions of Law, the trial court included the following dicta:

If the definition of “residence” were to be construed as excluding condominium units, the [Lien Restriction Act] may be unconstitutional under the equal protection provision of the Utah Constitution, Article I, § 24. The construction adopted by the court avoids this constitutional problem.

(First Findings, Add. 6; Second Findings, Add. 17-18.) The constitutional argument was not properly raised before the trial court and has not been properly presented to this Court.

The Unit Owners' claim that the Lien Restriction Act's definition of "residence" might be unconstitutional was not raised in any of the memoranda filed prior to the hearing held on February 4, 2002. The first mention of this argument came during the middle of the February 4, 2002 hearing. (Tr. 16-18.) Neither CraCar nor the other lien claimants had an opportunity to brief the issue or prepare in advance any responsive oral argument. (Tr. 18.)

The Utah Judicial Code requires parties who are challenging the constitutionality of a statute to serve a copy of the proceeding on the attorney general: "[I]f a statute . . . is alleged to be invalid the attorney general shall be served with a copy of the proceeding and be entitled to be heard." UTAH CODE ANN. § 78-33-11. The Unit Owners did not comply with this provision because no written documents relating to constitutional arguments were served upon the parties or upon the attorney general. These procedural irregularities precluded the trial court from ruling on the constitutional issues at the February 4, 2002 hearing.

In any event, the trial court did not determine that any portion of the Lien Restriction Fund was unconstitutional. The trial court simply indicated that "if" it adopted a certain construction (which it did not), the Lien Restriction Act "may" be unconstitutional. Because the trial court ruled on other grounds, its comments regarding the constitutionality of the Lien Restriction Act were simply dicta and do not provide a basis for upholding the trial court's ruling.

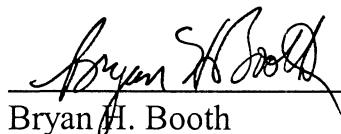
CONCLUSION

In light of the foregoing, CraCar requests that this Court do the following:

(1) overturn the trial court's Conclusions of Law stating that the units owned by the Unit Owners are "residences" under the Lien Restriction Act; (2) reverse the Order and Judgment entered by the trial court requiring that mechanic's lien claimants remove their mechanic's liens from the Unit Owners' units; and (3) declare that an owner of a unit in a condominium building housing ten units is not an owner of a "residence" as that term is defined in the Lien Restriction Act.

DATED this 27th day of January, 2003.

KIRTON & McCONKIE



Bryan H. Booth

Clark B. Fetzer

*Attorneys for Appellant CraCar Construction
Company*

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2003, I caused two true and correct copies of the foregoing **BRIEF OF APPELLANT CRACAR CONSTRUCTION COMPANY** to be mailed by United States mail, postage prepaid, to the following:

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for Ann M. Farley, Janet Heidt, Guy G. Berryessa, Curt G. Hood, Jennifer C. Smith



Tab A

ADDENDUM

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THIRD DISTRICT COURT-SUMMIT
2002 JUN 24 AM 11:17
FILED BY JS

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IN THE THIRD JUDICIAL DISTRICT COURT FOR SUMMIT COUNTY

STATE OF UTAH, PARK CITY DEPARTMENT

LKL ASSOCIATES, INC.,)
)
Plaintiff,)
)
vs.)
)
JANET HEIDT; JAMES E. CARUSO;)
WILLIAM JACKSON; JILLIAN)
ANDERSON; ANN M. FARLEY; GUY G.)
BERRYESSA; FLAGSTAR BANK, FSB;)
APPROVED FINANCIAL CORP.; WELLS)
FARGO HOME MORTGAGE, INC.;)
ADVANCE MORTGAGE)
CORPORATION; SUPERIOR)
INSULATION CO.; WESTERN)
WHOLESALE FLOORING; ANDERSON)
LUMBER COMPANY; SUPERIOR)
PLUMBING AND HEATING, INC.; JM)
MECHANICAL/SERVICE EXPERTS; AQUA)
BALANCE, INC.; ROB CHLARSON;)
DENNIS SKIBY; and JOHN DOES 1-20;)
)
Defendants.)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
HOME OWNERS' MOTIONS
FOR SUMMARY JUDGMENT

Civil No. 010500202
Judge Robert K. Hilder

This matter came before the court on motions for summary judgment filed by defendants Janet Heidt, Guy G. Berryessa, Curt G Hood, and Jennifer C. Smith ("Home Owners"). The court heard initial arguments on the motion on September 24, 2001 and permitted additional briefing. The motions were heard again on oral argument on February 4, 2002.

The court, having reviewed the Home Owners' motions for summary judgment, affidavits, and supporting documentation as well as all opposing materials, having reviewed exhibits, having heard oral argument, having reviewed the relevant facts and law, and otherwise being fully advised in the premises, does hereby make and enter the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Defendant Janet Heidt is the owner of the condominium unit more particularly described as 5441 Bobsled Boulevard, No. 200, Park City, Utah.
2. Janet Heidt entered into a written contract with Bear Hollow Village, L.L.C. to purchase her condominium unit and occupied the unit within 180 days after completion of construction thereof.
3. Bear Hollow Village, L.L.C. was a real estate developer within the meaning of 38-11-102(19) and 38-11-204(3)(a)(ii) Utah Code Annotated.
4. Janet Heidt paid Bear Hollow Village, L.L.C. in full in accordance with the terms of the written contract.

5. Defendant Guy G. Berryessa is the owner of the condominium unit more particularly described as 5441 Bobsled Boulevard, No. 204, Park City, Utah.

6. Guy G. Berryessa entered into a written contract with Bear Hollow Village, L.L.C. to purchase his condominium unit and occupied the unit within 180 days after completion of construction thereof.

7. Bear Hollow Village, L.L.C. was a real estate developer within the meaning of 38-11-102(19) and 38-11-204(3)(a)(ii) Utah Code Annotated.

8. Guy G. Berryessa paid Bear Hollow Village, L.L.C. in full in accordance with the terms of the written contract.

9. Defendant Curt G. Hood is the owner of of the condominium unit more particularly described as 5441 Bobsled Boulevard, No. 101, Park City, Utah.

10. Curt G. Hood entered into a written contract with Bear Hollow Village, L.L.C. to purchase his unit and occupied the unit within 180 days after completion of construction thereof.

11. Bear Hollow Village, L.L.C. was a real estate developer within the meaning of 38-11-102(19) and 38-11-204(3)(a)(ii) Utah Code Annotated.

12. Curt G. Hood paid Bear Hollow Village, L.L.C. in full in accordance with the terms of the written contract.

13. Defendant Jennifer C. Smith is the owner of the condominium unit more particularly described as 5441 Bobsled Boulevard, No. 103, Park City, Utah.

Add - 3

14. Jennifer C. Smith entered into a written contract with Bear Hollow Village, L.L.C. to purchase her unit and occupied the unit within 180 days after completion thereof.

15. Bear Hollow Village, L.L.C. was a real estate developer within the meaning of 38-11-102(19) and 38-11-204(3)(a)(ii) Utah Code Annotated.

16. Jennifer C. Smith paid Bear Hollow Village, L.L.C. in full accordance with the terms of the written contract.

17. Each of the residences listed above is a separate unit located within the Calgary Condominium project. The Calgary Condominium project consists of two buildings. Each building contains ten separate condominium units.

Having entered the foregoing Findings of Fact, the court now makes and enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. Under Utah Code Ann. § 38-11-102(20), "residence" is defined as "an improvement to real property used or occupied, to be used or occupied as, or in conjunction with, a primary or secondary detached single-family dwelling or multifamily dwelling up to two units, including factory build housing."

2. This definition focuses on the character of the ownership of the residence. The court concludes that so long as an owner of a residential unit in a condominium building does not own more than two units, that owner qualifies for the protection afforded by the statute. Consequently, the Court concludes that each of the residential units

described in the foregoing Findings of Fact qualifies as a "residence" under Utah Code Ann. § 38-11-102 (20).

3. The court's conclusion that the each of the condominium units described in the foregoing Findings of Fact qualifies as a "residence" is mandated by the provisions of the Condominium Ownership Act, Utah Code Ann. § 57-8-1, et. seq., which provides, among other things, that

(a) liens may be created against each separate condominium unit only in the manner applicable to "any other separate parcel of real property subject to individual ownership. . . ." Utah Code Ann. § 57-8-19(1);

(b) A condominium project is treated as a subdivision and the individual units are treated as separate tax parcels for taxation purposes. Id. §§ 57-8-27 and -35; and

(c) The Condominium Ownership Act controls over any conflict with other statutory provisions. Id. § 57-8-35.

4. The court further concludes that interpreting the definition of "residence" in Utah Code Ann. § 38-11-102(20) to include a condominium unit occupied as a single family residence as stated above is consistent with the purpose and policy of the Residence Lien Restriction and Lien Recovery Fund Act to protect innocent home owners who have paid the full purchase price for their homes from mechanic's liens. This policy applies

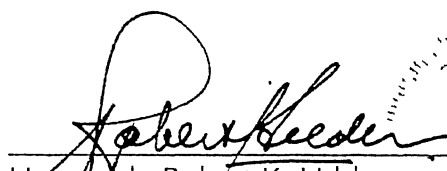
equally to the purchaser of a single family home in a typical subdivision as it does to the purchaser of a single family home in a condominium project.

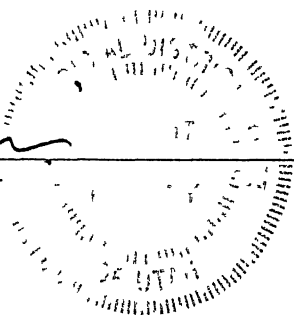
5. The court further concludes that such construction of the statutory definition of "residence" comports with the rule of construction that where two possible interpretations of a statute can be made, the constitutional construction should be adopted. Mountain States Telephone & Telegraph v. Payne, 782 P.2d 464 (Utah 1989). If the definition of "residence" were to be construed as excluding condominium units, the statute may be unconstitutional under the equal protection provision of the Utah Constitution, Article I, § 24. The construction adopted by the court avoids this constitutional problem.

6. The Home Owner Defendants are entitled to the entry of judgment (a) ordering all parties in this action who have filed mechanic's liens against the residences of said Defendants to remove said liens within 10 days after receiving notice of the entry of judgment and awarding said defendants their costs and attorney's fees as against those parties who fail to so remove their liens consistent with Utah Code Ann. § 38-11-107(3), and (b) dismissing with prejudice all claims filed in this action as against said defendants.

DATED this 24th day of June, 2002.

BY THE COURT:


Honorable Robert K. Hilder
District Court Judge



Add - 6

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2002 a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW ON HOME OWNERS' MOTIONS FOR SUMMARY JUDGMENT was mailed, postage prepaid, to:

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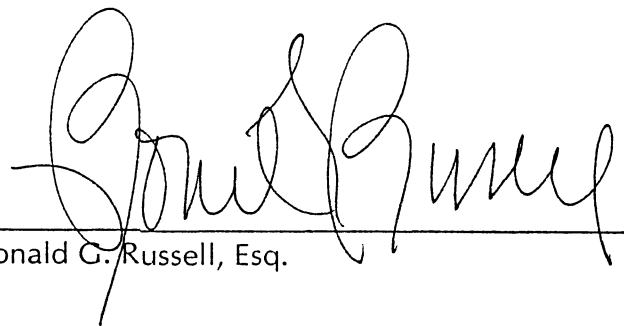
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THIRD DISTRICT COURT-SUMMIT

2002 JUN 24 AM 11:17

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IN THE THIRD JUDICIAL DISTRICT COURT FOR SUMMIT COUNTY

STATE OF UTAH, PARK CITY DEPARTMENT

LKL ASSOCIATES, INC.,

Plaintiff,

vs.

JANET HEIDT; JAMES E. CARUSO;
WILLIAM JACKSON; JILLIAN
ANDERSON; ANN M. FARLEY; GUY G.
BERRYESSA; FLAGSTAR BANK, FSB;
APPROVED FINANCIAL CORP.; WELLS
FARGO HOME MORTGAGE, INC.;
ADVANCE MORTGAGE
CORPORATION; SUPERIOR
INSULATION CO.; WESTERN
WHOLESALE FLOORING; ANDERSON
LUMBER COMPANY; SUPERIOR
PLUMBING AND HEATING, INC.; JM
MECHANICAL/SERVICE EXPERTS; AQUA
BALANCE, INC.; ROB CHLARSON;
DENNIS SKIBY; and JOHN DOES 1-20;

Defendants.

ORDER AND JUDGMENT

Civil No. 010500202
Judge Robert K. Hilder

Add - 5

0620

The court having entered its Findings of Fact and Conclusions of Law on Home Owners' Motions for Summary Judgment and for good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. That the motions for summary judgment filed by defendants Janet Heidt, Guy G. Berryessa, Curt G. Hood, and Jennifer C. Smith are granted and judgment is hereby entered in favor of said defendants dismissing, with prejudice, all claims and causes of action asserted herein as against them.

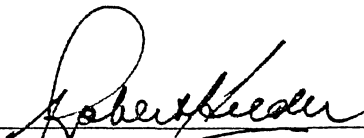
2. That all parties to this action who have filed mechanic's liens against Unit 200, Unit 204, Unit 101, and/or Unit 103 of the Calgary Condominiums located in Park City, Summit County, Utah are required to remove said liens within 10 days of receiving notice of the entry of this Judgment and Order.

3. Defendants Janet Heidt, Guy G. Berryessa, Curt G. Hood, and Jennifer C. Smith shall be awarded their costs and attorney's fees as against those parties who fail to remove their liens as required by the foregoing paragraph 2, as may be established by affidavit.

4. The court hereby determines that there is no just reason for delay in that this judgment adjudicates all claims against defendants Janet Heidt, Guy G. Berryessa, Curt G. Hood, and Jennifer C. Smith and directs that this judgment be entered as a final judgment pursuant to Rule 54(b) of the Utah Rules of Civil Procedure.

DATED this 24th day of June, 2002.

BY THE COURT:



Honorable Robert K. Hilder
District Court Judge

Add - 1

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2002 a true and correct copy of the foregoing ORDER AND JUDGMENT was mailed, postage prepaid, to:

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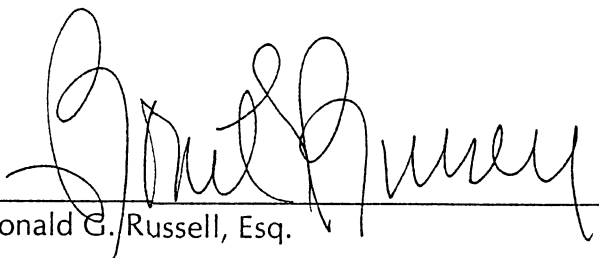
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Ronald G. Russell, Esq.

By Deputy Clerk, Summit County

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IN THE THIRD JUDICIAL DISTRICT COURT FOR SUMMIT COUNTY

STATE OF UTAH, PARK CITY DEPARTMENT

LKL ASSOCIATES, INC.,

Plaintiff,

vs.

JANET HEIDT; JAMES E. CARUSO;
WILLIAM JACKSON; JILLIAN
ANDERSON; ANN M. FARLEY; GUY G.
BERRYESSA; FLAGSTAR BANK, FSB;
APPROVED FINANCIAL CORP.; WELLS
FARGO HOME MORTGAGE, INC.;
ADVANCE MORTGAGE
CORPORATION; SUPERIOR
INSULATION CO.; WESTERN
WHOLESALE FLOORING; ANDERSON
LUMBER COMPANY; SUPERIOR
PLUMBING AND HEATING, INC.; JM
MECHANICAL/SERVICE EXPERTS; AQUA
BALANCE, INC.; ROB CHLARSON;
DENNIS SKIBY; and JOHN DOES 1-20;

Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
ANN M. FARLEY'S MOTION
FOR SUMMARY JUDGMENT

Civil No. 010500202
Judge Robert K. Hilder

Add - 14

This matter came before the court on the motions for summary judgment filed by certain Home Owner defendants including Ann M. Farley. The court heard initial arguments on the motions on September 24, 2001 and permitted additional briefing. The motions were heard again on oral argument on February 4, 2002.

The court, having reviewed the motions for summary judgment, affidavits, and supporting documentation as well as all opposing materials, having reviewed exhibits, having heard oral argument, having reviewed the relevant facts and law, and otherwise being fully advised in the premises, does hereby make and enter the following Findings of Fact and Conclusions of Law with respect to Home Owner Ann M. Farley:

FINDINGS OF FACT

1. Defendant Ann M. Farley is the owner of the condominium unit more particularly described as 5441 Bobsled Boulevard, No. 203, Park City, Utah.
2. Ann M. Farley entered into a written contract with Bear Hollow Village, L.L.C. to purchase her condominium unit and occupied the unit within 180 days after completion of construction thereof.
3. Bear Hollow Village, L.L.C. was a real estate developer within the meaning of 38-11-102(19) and 38-11-204(3)(a)(ii) Utah Code Annotated.
4. Ann M. Farley paid Bear Hollow Village, L.L.C. in full in accordance with the terms of the written contract.

5. The residence owned by Ann M. Farley is a separate unit located within the Calgary Condominium project. The Calgary Condominium project consists of two buildings. Each building contains ten separate condominium units.

Having entered the foregoing Findings of Fact, the court now makes and enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. Under Utah Code Ann. § 38-11-102(20), "residence" is defined as "an improvement to real property used or occupied, to be used or occupied as, or in conjunction with, a primary or secondary detached single-family dwelling or multifamily dwelling up to two units, including factory build housing."

2. This definition focuses on the character of the ownership of the residence. The court concludes that so long as an owner of a residential unit in a condominium building does not own more than two units, that owner qualifies for the protection afforded by the statute. Consequently, the court concludes that the residential unit described in the foregoing Findings of Fact qualifies as a "residence" under Utah Code. Ann. § 38-11-102(20).

3. The court's conclusion that the condominium unit described in the foregoing Findings of Fact qualifies as a "residence" is mandated by the provisions of the Condominium Ownership Act, Utah Code Ann. § 57-8-1, et. seq., which provides, among other things, that

Add - 1

(a) Liens may be created against each separate condominium unit only in the manner applicable to "any other separate parcel of real property subject to individual ownership. . . ." Utah Code Ann. § 57-8-19(1);

(b) A condominium project is treated as a subdivision and the individual units are treated as separate tax parcels for taxation purposes. Id. §§ 57-8-27 and -35; and

(c) The Condominium Ownership Act controls over any conflict with other statutory provisions. Id. § 57-8-35.

4. The court further concludes that interpreting the definition of "residence" in Utah Code Ann. § 38-11-102(20) to include a condominium unit occupied as a single family residence as stated above is consistent with the purpose and policy of the Residence Lien Restriction and Lien Recovery Fund Act to protect innocent home owners who have paid the full purchase price for their homes from mechanic's liens. This policy applies equally to the purchaser of a single family home in a typical subdivision as it does to the purchaser of a single family home in a condominium project.

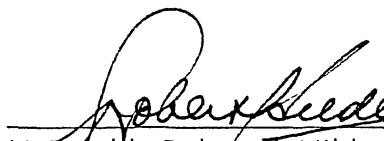
5. The court further concludes that such construction of the statutory definition of "residence" comports with the rule of construction that where two possible interpretations of a statute can be made, the constitutional construction should be adopted. Mountain States Telephone & Telegraph v. Payne, 782 P.2d 464 (Utah 1989). If the definition of

"residence" were to be construed as excluding condominium units, the statute may be unconstitutional under the equal protection provision of the Utah Constitution, Article I, § 24. The construction adopted by the court avoids this constitutional problem.

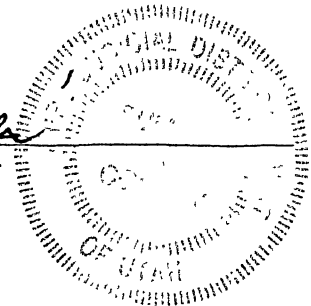
6. Defendant Ann M. Farley is entitled to the entry of judgment (a) ordering all parties in this action who have filed mechanic's liens against the residence of said defendant to remove said liens within 10 days after receiving notice of the entry of judgment and awarding said defendant her costs and attorney's fees as against those parties who fail to so remove their liens consistent with Utah Code Ann. § 38-11-107(3), and (b) dismissing with prejudice all claims filed in this action as against said defendant.

DATED this 2nd day of August, 2002.

BY THE COURT:



Honorable Robert K. Hilder
District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2002 a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW ON HOME OWNERS' MOTIONS FOR SUMMARY JUDGMENT was mailed, postage prepaid, to:

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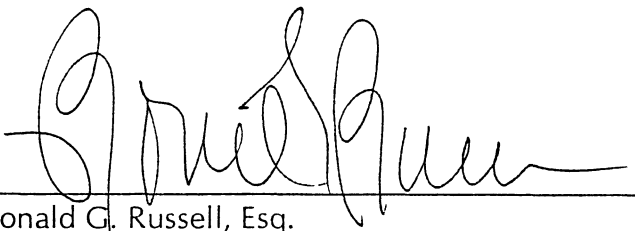
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Ronald G. Russell, Esq.



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IN THE THIRD JUDICIAL DISTRICT COURT FOR SUMMIT COUNTY
STATE OF UTAH, PARK CITY DEPARTMENT

LKL ASSOCIATES, INC.,

Plaintiff,

vs.

JANET HEIDT; JAMES E. CARUSO;
WILLIAM JACKSON; JILLIAN
ANDERSON; ANN M. FARLEY; GUY G.
BERRYESSA; FLAGSTAR BANK, FSB;
APPROVED FINANCIAL CORP.; WELLS
FARGO HOME MORTGAGE, INC.;
ADVANCE MORTGAGE
CORPORATION; SUPERIOR
INSULATION CO.; WESTERN
WHOLESALE FLOORING; ANDERSON
LUMBER COMPANY; SUPERIOR
PLUMBING AND HEATING, INC.; JM
MECHANICAL/SERVICE EXPERTS; AQUA
BALANCE, INC.; ROB CHLARSON;
DENNIS SKIBY; and JOHN DOES 1-20;

Defendants.

ORDER AND JUDGMENT

Civil No. 010500202
Judge Robert K. Hilder

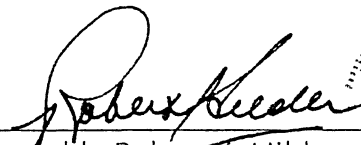
The court having entered its Findings of Fact and Conclusions of Law on Ann M. Farley's Motion for Summary Judgment and for good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

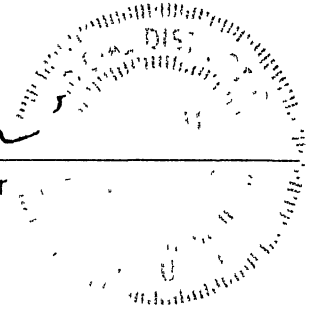
1. That the motion for summary judgment filed by defendant Ann M. Farley is granted and judgment is hereby entered in favor of said defendant dismissing, with prejudice, all claims and causes of action asserted herein as against her.
2. That all parties to this action who have filed mechanic's liens against Unit 203 of the Calgary Condominiums located in Park City, Summit County, Utah are required to remove said liens within 10 days of receiving notice of the entry of this Order and Judgment.
3. Defendant Ann M. Farley shall be awarded her costs and attorney's fees as against those parties who fail to remove their liens as required by the foregoing paragraph 2, as may be established by affidavit.
4. The court hereby determines that there is no just reason for delay in that this judgment adjudicates all claims against defendant Ann M. Farley and directs that this judgment be entered as a final judgment pursuant to Rule 54(b) of the Utah Rules of Civil Procedure.

DATED this 2nd day of August, 2002.

BY THE COURT:



Honorable Robert K. Hilder
District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2002 a true and correct copy of the foregoing ORDER AND JUDGMENT was mailed, postage prepaid, to:

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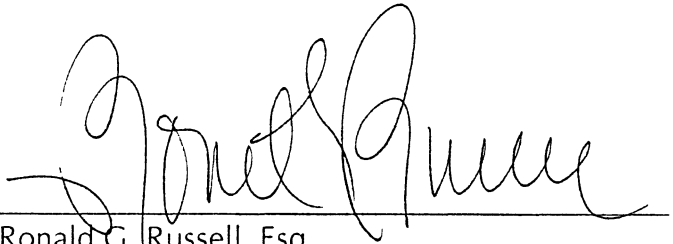
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Determinative Legal Provisions

Utah Code

38-1-11. Enforcement - Time for - Lis pendens - Action for debt not affected - Instructions and form affidavit and motion.

- (1) A lien claimant shall file an action to enforce the lien filed under this chapter within:
 - (a) 12 months from the date of final completion of the original contract not involving a residence as defined in Section 38-11-102; or
 - (b) 180 days from the date the lien claimant last performed labor and services or last furnished equipment or material for a residence, as defined in Section 38-11-102.
- (2)
 - (a) Within the time period provided for filing in Subsection (1) the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action.
 - (b) The burden of proof shall be upon the lien claimant and those claiming under him to show actual knowledge.
- (3) This section may not be interpreted to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the same.
- (4)
 - (a) If a lien claimant files an action to enforce a lien filed under this chapter involving a residence, as defined in Section 38-11-102, the lien claimant shall include with the service of the complaint on the owner of the residence:
 - (i) instructions to the owner of the residence relating to the owner's rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act; and
 - (ii) a form affidavit and motion for summary judgment to enable the owner of the residence to specify the grounds upon which the owner

may exercise available rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act.

- (b) The lien claimant may file a notice to submit for decision on the motion for summary judgment. The motion may be ruled upon after the service of the summons and complaint upon the nonpaying party, as defined in Section 38-11-102, and the time for the nonpaying party to respond, as provided in the Utah Rules of Civil Procedure, has elapsed.
- (c) The instructions and form affidavit and motion required by Subsection (4)(a) shall meet the requirements established by rule by the Division of Occupational and Professional Licensing in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.
- (d) If the nonpaying party, as defined by Section 38-11-102, files for bankruptcy protection and there is a bankruptcy stay in effect, the motion for summary judgment and the action to enforce the lien shall be stayed until resolution of the related claim under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act.
- (e) If a lien claimant fails to provide to the owner of the residence the instructions and form affidavit required by Subsection (4)(a), the lien claimant shall be barred from maintaining or enforcing the lien upon the residence.

History: R.S. 1898 & C.L. 1907, §§§§ 1390, 1395; C.L. 1917, §§§§ 3740, 3745; L. 1931, ch. 5, §§ 1; R.S. 1933 & C. 1943, 52-1-11; 1994, ch. 308, §§ 5; 1995, ch. 172, §§ 2; 2001, ch. 198, §§ 1.

38-11-102. Definitions.

- (1) “Board” means the Residence Lien Recovery Fund Advisory Board established under Section 38-11-104.
- (2) “Construction on an owner-occupied residence” means designing, engineering, constructing, altering, remodeling, improving, repairing, or maintaining a new or existing residence.
- (3) “Department” means the Department of Commerce.
- (4) “Director” means the director of the Division of Occupational and Professional Licensing.

- (5) “Division” means the Division of Occupational and Professional Licensing.
- (6) “Encumbered fund balance” means the aggregate amount of all outstanding claims against the fund. The remainder of monies in the fund are unencumbered funds.
- (7) “Executive director” means the executive director of the Department of Commerce.
- (8) “Factory built housing” is as defined in Section 58-56-3.
- (9) “Factory built housing retailer” means a person that sells factory built housing to consumers.
- (10) “Fund” means the Residence Lien Recovery Fund established under Section 38-11-201.
- (11) “Laborer” means a person who provides services at the site of the construction on an owner-occupied residence as an employee of an original contractor or other qualified beneficiary performing qualified services on the residence.
- (12) “Licensee” means any holder of a license issued under Title 58, Chapters 3a, 22, 53, and 55.
- (13) “Nonpaying party” means the original contractor, subcontractor, or real estate developer who has failed to pay the qualified beneficiary making a claim against the fund.
- (14) “Original contractor” means a person who contracts with the owner of real property or the owner's agent to provide services, labor, or material for the construction of an owner-occupied residence.
- (15) “Owner” means a person who:
 - (a) contracts with a person who is licensed as a contractor or is exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, for the construction on an owner-occupied residence upon real property owned by that person;
 - (b) contracts with a real estate developer to buy a residence upon completion of the construction on the owner-occupied residence; or

- (c) buys a residence from a real estate developer after completion of the construction on the owner-occupied residence.
- (16) “Owner-occupied residence” means a residence that is, or after completion of the construction on the residence will be, occupied by the owner or the owner's tenant or lessee as a primary or secondary residence within 180 days from the date of the completion of the construction on the residence.
- (17) “Qualified beneficiary” means a person who:
 - (a) provides qualified services;
 - (b) pays all necessary fees or assessment required under this chapter; and
 - (c) registers with the division:
 - (i) as a licensed contractor under Subsection 38-11-301(1) or (2) if that person seeks recovery from the fund as a licensed contractor; or
 - (ii) as a person providing qualified services other than as a licensed contractor under Subsection 38-11-301(3) if the person seeks recovery from the fund in a capacity other than as a licensed contractor.
- (18) (a) “Qualified services” means the following performed in construction on an owner-occupied residence:
 - (i) contractor services provided by a contractor licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act;
 - (ii) architectural services provided by an architect licensed under Title 58, Chapter 3a;
 - (iii) engineering and land surveying services provided by a professional engineer or land surveyor licensed or exempt from licensure under Title 58, Chapter 22;
 - (iv) landscape architectural services by a landscape architect licensed or exempt from licensure under Title 58, Chapter 53;
 - (v) design and specification services of mechanical or other systems;

- (vi) other services related to the design, drawing, surveying, specification, cost estimation, or other like professional services;
 - (vii) providing materials, supplies, components, or similar products;
 - (viii) renting equipment or materials;
 - (ix) labor at the site of the construction on the owner-occupied residence; and
 - (x) site preparation, set up, and installation of factory built housing.
- (b) “Qualified services” do not include the construction of factory built housing in the factory.
- (19) “Real estate developer” means a person having an ownership interest in real property who contracts for the construction of a residence that is offered for sale to the public.
- (20) “Residence” means an improvement to real property used or occupied, to be used or occupied as, or in conjunction with, a primary or secondary detached single-family dwelling or multifamily dwelling up to two units, including factory built housing.
- (21) “Subsequent owner” means a person who purchases a residence from an owner within 180 days from the date of the completion of the construction on the residence.

History: C. 1953, 38-11-102, enacted by L. 1994, ch. 308, §§ 7; 1995, ch. 172, §§ 5; 1998, ch. 13, §§ 45; 1999, ch. 193, §§ 1; 2001, ch. 198, §§ 2.

38-11-107. Restrictions upon maintaining a lien against residence or owner's interest in the residence.

- (1) A person qualified to file a lien upon an owner-occupied residence and the real property associated with that residence under the provisions of Title 38, Chapter 1, Mechanics' Liens, who provides qualified services under an agreement effective on or after January 1, 1995, other than directly with the owner, shall be barred after January 1, 1995, from maintaining a lien upon that residence and real property or recovering a judgment in any civil action against the owner or the owner-occupied residence to recover monies owed for qualified services provided by that person if:

- (a) the conditions described in Subsections 38-11-204(3)(a) and (3)(b) are met;
or
- (b)
 - (i) a subsequent owner purchases a residence from an owner;
 - (ii) the subsequent owner who purchased the residence under Subsection (1)(b)(i) occupies the residence as a primary or secondary residence within 180 days from the date of transfer or the residence is occupied by the subsequent owner's tenant or lessee as a primary or secondary residence within 180 days from the date of transfer; and
 - (iii) the owner from whom the subsequent owner purchased the residence met the conditions described in Subsections 38-11-204(3)(a) and (3)(b).
- (2) If a residence is constructed under conditions that do not meet all of the provisions of Subsection (1), that residence and the real property associated with that residence as defined in Section 38-1-4, shall be subject to any mechanics' lien as provided in Section 38-1-3.
- (3) A lien claimant who files a mechanics' lien or foreclosure action upon an owner-occupied residence is not liable for costs and attorneys' fees under Sections 38-1-17 and 38-1-18 or for any damages arising from a civil action related to the lien filing or foreclosure action if the lien claimant removes the lien within ten days from the date the owner establishes compliance, through written findings of fact from a court of competent jurisdiction or, in cases where a bankruptcy has been filed, from the director, with the requirements of Subsections 38-11-204(3)(a) and (3)(b).

History: C. 1953, 38-11-107, enacted by L. 1994, ch. 308, §§ 12; 1995, ch. 172, §§ 8; 1996, ch. 146, § 1; 1998, ch. 49, §§ 2; 2001, ch. 198, § 3.

57-8-19. Liens against units - Removal from lien - Effect of part payment.

- (1) Subsequent to recording the declaration as provided in this act, and while the property remains subject to this act, no lien shall thereafter arise or be effective against the property. During such period liens or encumbrances shall arise or be created only against each unit and the percentage of undivided interest in the common areas and facilities appurtenant to such unit in the same manner and under the same conditions in every respect as liens or encumbrances may arise or

be created upon or against any other separate parcel of real property subject to individual ownership; provided that no labor performed or materials furnished with the consent or at the request of a unit owner or his agent or his contractor or subcontractor shall be the basis for the filing of a lien pursuant to the lien law against the unit of any other unit owner not expressly consenting to or requesting the same, except that such express consent shall be deemed to be given by the owner of any unit in the case of emergency repairs. Labor performed or materials furnished for the common areas and facilities, if authorized by the unit owners, the manager or management committee in accordance with this act, the declaration or bylaws or the house rules, shall be deemed to be performed or furnished with the express consent of each unit owner and shall be the basis for the filing of a lien pursuant to the lien law against each of the units.

- (2) In the event a lien against two or more units becomes effective, the unit owners of the separate units may remove their units and the percentage of undivided interest in the common areas and facilities appurtenant to such units from the lien by payment of the fractional or proportional amount attributable to each of the units affected. Such individual payment shall be computed by reference to the percentages appearing in the declaration. Subsequent to any payment, discharge or other satisfaction, the unit and the percentage of undivided interest in the common areas and facilities appurtenant thereto shall be free and clear of the lien so paid, satisfied or discharged. Partial payment, satisfaction or discharge shall not prevent the lienor from proceeding to enforce his rights against any unit and the percentage of undivided interest in the common areas and facilities appurtenant thereto not so paid, satisfied or discharged.

History: L. 1963, ch. 111, §§ 19.

57-8-27. Separate taxation.

- (1) Each unit and its percentage of undivided interest in the common areas and facilities shall be considered to be a parcel and shall be subject to separate assessment and taxation by each assessing unit and special district for all types of taxes authorized by law, including ad valorem levies and special assessments. Neither the building or buildings, the property, nor any of the common areas and facilities may be considered a parcel.
- (2) In the event any of the interests in real property made subject to this chapter by the declaration are leasehold interests, if the lease creating these interests is of record in the office of the county recorder, if the balance of the term remaining under the lease is at least 40 years at the time the leasehold interest is made subject to this chapter, if units are situated or are to be situated on or within the real property

covered by the lease, and if the lease provides that the lessee shall pay all taxes and assessments imposed by governmental authority, then until ten years prior to the date that the leasehold is to expire or until the lease is terminated, whichever first occurs, all taxes and assessments on the real property covered by the lease shall be levied against the owner of the lessee's interest. If the owner of the reversion under the lease has executed the declaration and record of survey map, until ten years prior to the date that the leasehold is to expire, or until the lease is terminated, whichever first occurs, all taxes and assessments on the real property covered by the lease shall be separately levied against the unit owners having an interest in the lease, with each unit owner for taxation purposes being considered the owner of a parcel consisting of his undivided condominium interest in the fee of the real property affected by the lease.

- (3) No forfeiture or sale of the improvements or the property as a whole for delinquent real estate taxes, special assessments, or charges shall divest or in anywise affect the title to an individual unit if the real estate taxes or duly levied share of the assessments and charges on the individual unit are currently paid.
- (4) Any exemption from taxes that may exist on real property or the ownership of the property may not be denied by virtue of the submission of the property to this chapter.
- (5) Timeshare interests and timeshare estates, as defined in Subsection 57-19-2(17), may not be separately taxed but shall be valued, assessed, and taxed at the unit level. The value of timeshare interests and timeshare estates, for purposes of ad valorem taxation, shall be determined by valuing the real property interest associated with the timeshare interest or timeshare estate, exclusive of the value of any intangible property and rights associated with the acquisition, operation, ownership, and use of the timeshare interest or timeshare estate, including the fees and costs associated with the sale of timeshare interests and timeshare estates that exceed those fees and costs normally incurred in the sale of other similar properties, the fees and costs associated with the operation, ownership, and use of timeshare interests and timeshare estates, vacation exchange rights, vacation conveniences and services, club memberships, and any other intangible rights and benefits available to a timeshare unit owner. Nothing in this section shall be construed as requiring the assessment of any real property interest associated with a timeshare interest or timeshare estate at less than its fair market value. Notice of assessment, delinquency, sale, or any other purpose required by law is considered sufficient for all purposes if the notice is given to the management committee.

History: L. 1963, ch. 111, §§ 27; 1975, ch. 173, §§ 16; 1986, ch. 92, §§ 4; 1987, ch. 73, §§ 2; 1999, ch. 84, §§ 1.

57-8-35. Effect of other laws - Compliance with ordinances and codes - Approval of projects by municipality or county.

- (1) The provisions of this chapter shall be in addition and supplemental to all other provisions of law, statutory or judicially declared, provided that wherever the application of the provisions of this chapter conflict with the application of such other provisions, this chapter shall prevail: provided further, for purposes of Sections 10-9-805, 10-9-811, and 17-27-804 and provisions of similar import and any law or ordinance adopted pursuant thereto, a condominium project shall be considered to be a subdivision, and a record of survey map or supplement thereto prepared pursuant to this chapter shall be considered to be a subdivision map or plat, only with respect to:
 - (a) such real property or improvements, if any, as are intended to be dedicated to the use of the public in connection with the creation of the condominium project or portion thereof concerned; and
 - (b) those units, if any, included in the condominium project or portion thereof concerned which are not contained in existing or proposed buildings.
- (2) Nothing in this chapter shall be interpreted to state or imply that a condominium project, unit, association or unit owners, or management committee is exempt by this chapter from compliance with the zoning ordinance, building and sanitary codes, and similar development regulations which have been adopted by a municipality or county. No condominium project or any use within said project or any unit or parcel or parcel of land indicated as a separate unit or any structure within said project shall be permitted which is not in compliance with said ordinances and codes.
- (3) From and after the time a municipality or county shall have established a planning commission, no condominium project or any record of survey map, declaration, or other material as required for recordation under this chapter shall be recorded in the office of the county recorder unless and until the following mentioned attributes of said condominium project shall have been approved by the municipality or county in which it is located. In order to more fully avail itself of this power, the legislative body of a municipality or county may provide by ordinance for the approval of condominium projects proposed within its limits. This ordinance may include and shall be limited to a procedure for approval of condominium projects, the standards and the criteria for the geographical layout of a condominium project, facilities for utility lines and roads which shall be constructed, the percentage of the project which must be devoted to common or recreational use, and the content of the declaration with respect to the standards

which must be adhered to concerning maintenance, upkeep, and operation of any roads, utility facilities, recreational areas, and open spaces included in the project.

- (4) Any ordinance adopted by the legislative body of a municipality or county which outlines the procedures for approval of a condominium project shall provide for:
 - (a) a preliminary approval, which, among other things, will then authorize the developer of the condominium project to proceed with the project; and
 - (b) a final approval which will certify that all of the requirements set forth in the preliminary approval either have been accomplished or have been assured of accomplishment by bond or other appropriate means. No declaration or record of survey map shall be recorded in the office of the county recorder until a final approval has been granted.

History: L. 1963, ch. 111, §§ 35; 1975, ch. 173, §§ 18; 1995, ch. 20, §§ 97; 1997, ch. 142, §§ 4.

78-2-2. Supreme Court jurisdiction.

- (1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.
- (2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.
- (3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:
 - (a) a judgment of the Court of Appeals;
 - (b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;
 - (c) discipline of lawyers;
 - (d) final orders of the Judicial Conduct Commission;
 - (e) final orders and decrees in formal adjudicative proceedings originating with:

- (i) the Public Service Commission;
- (ii) the State Tax Commission;
- (iii) the School and Institutional Trust Lands Board of Trustees;
- (iv) the Board of Oil, Gas, and Mining;
- (v) the state engineer; or
- (vi) the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire and State Lands;
- (f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (3)(e);
- (g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;
- (h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;
- (i) appeals from the district court involving a conviction or charge of a first degree felony or capital felony;
- (j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and
- (k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.
- (4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:
 - (a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;
 - (b) election and voting contests;
 - (c) reapportionment of election districts;
 - (d) retention or removal of public officers;

- (e) matters involving legislative subpoenas; and
 - (f) those matters described in Subsections (3)(a) through (d).
- (5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).
- (6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2-2, enacted by L. 1986, ch. 47, §§ 41; 1987, ch. 161, §§ 303; 1988, ch. 248, §§ 5; 1989, ch. 67, §§ 1; 1992, ch. 127, §§ 11; 1994, ch. 191, §§ 2; 1995, ch. 267, §§ 5; 1995, ch. 299, §§ 46; 1996, ch. 159, §§ 18; 2001, ch. 302, §§ 1.

78-33-11. Parties.

When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal or county ordinance or franchise such municipality or county shall be made a party, and shall be entitled to be heard, and if a statute or state franchise or permit is alleged to be invalid the attorney general shall be served with a copy of the proceeding and be entitled to be heard.

History: L. 1941, ch. 58, §§ 1; C. 1943, Supp., 104-33-11.