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IN THE UTAH COURT OF APPEALS

MARK KAPPOS and MALA KAPPOS, Petitioners/Appellants, vs. THE STATE OF UTAH, DEPARTMENT OF TRANSPORTATION, Respondents/Appellees.	Appellate Case No: 20100365

REPLY BRIEF OF APPELLANTS MARK KAPPOS AND MALA KAPPOS

APPEAL FROM THE DECISION AND ORDER OF THE SECOND JUDICIAL DISTRICT

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ORAL ARGUMENT REQUESTED

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SUMMARY OF ARGUMENT

The trial court erred in dismissing Appellants' claims for wrongful lien and slander of title because UDOT's Notice of Interest clearly encumbered the Kapposes' full use and enjoyment of their home and real property rights. Further, the Court should allow for the constitutional issues to be addressed fully on their merits. Finally, Rule 4 of the Utah Rules of Appellate Procedure automatically extends the time to appeal until the trial court made a decision on Appellants' Rule 59 Motion.

ARGUMENT

I. THE STATE'S NOTICE OF INTEREST ON THE KAPPOS PROPERTY WAS A WRONGFUL LIEN AND A SLANDER OF TITLE.

UDOT's main defense on the merits is that the trial court properly determined that UDOT's Notice of Interest recorded with regard to the Kappos residence was not a "lien" or "encumbrance". Such a conclusion is erroneous and nonsensical. Clearly, the UDOT Notice of Interest was a significant detriment on the Kapposes' use and enjoyment of the real property while the Notice of Interest was pending against their real property. In addition, it is undisputed that as a result of the Notice of Interest recorded on January 19, 2006, the Kapposes were unable to sell their property, and were unable to refinance the property including no ability to access any of the equity in their property. R.131-32, Affidavit of Mala Kappos ¶¶ 10-11. UDOT told Mala Kappos that it was seeking to evict the Kappos family from their home. R.131-33, Affidavit of Mala Kappos ¶¶ 12-17. UDOT has submitted no information disputing the foregoing evidence.

The Notice of Interest was completely groundless because the State had lost its right to the property by failing to first record its condemnation order prior to the recording of the Ed Green and Ed Green Construction conveyances. R.184-86. The significant passage of time and its own failure to record the condemnation order put UDOT on notice that its property rights had been lost. The recording of the Notice of Interest was therefore spiteful, not to mention wrongful. The trial court erred in determining that the Notice of Interest was not a wrongful lien and not a slander of title for which this Court should remand.

The State also has not opposed the information contained in the Affidavit of Mala Kappos which states that the first time that she knew anything about the States allegations concerning her residence was when a UDOT representative came to her home. R.131-33. Ms. Kappos further stated that UDOT threatened that the State would evict them from their home unless the Kapposes achieved a settlement with UDOT. R.131-33. The fact that UDOT had recorded a Notice of Interest and had threatened to evict the Kapposes from the property is sufficient to show that their Notice of Interest is a wrongful lien.

UDOT's Notice of Interest has clearly interrupted the use and enjoyment of Mark and Mala Kappos of the subject property. The Kapposes were wholly unable to sell the property and to refinance the property as a result of the Notice of Interest recorded by the State of Utah. R.144, R.769-70.

The District Court and UDOT have concluded that the Notice of Interest recorded against the Kappos property is not a lien or an encumbrance. The State asserts that an encumbrance "is defined as any interest in a third person consistent with a title in fee in

the grantee, if such outstanding interest injuriously effects the value of the property." Hancock v. Planned Dev. Corp. 791 P.2d 183, 186 (Utah 1990). Clearly, UDOT is asserting an ownership interest in the property equivalent to a fee title in the State pursuant to a condemnation award from many years ago. This is inconsistent with title in fee in the Kapposes and has injuriously affected the value of their property. The State should not be able to record such notices at its leisure.

An encumbrance has been defined by the Utah Supreme Court as: "any right a third party holds in land which constitutes a burden or limitation upon the rights of the fee title holder." See, Bergstrom v. Moore, 677 P.2d 1123, 1124 (Utah 1984). In addition, the recent case of Gardiner v. York, 233 P.3d 500 (Utah App. 2010) discusses and cites favorably the definition in Blacks Law Dictionary, 547(7th Ed. 1999) which states that an encumbrance is a "claim or liability that is attached to property or some other right that might lessen its value, such as a lien or mortgage". Id. at 508. See also, Vestin Mortgage, Inc. v. First Am. Title Ins. Co., 139 P.3d 1055, 1058 (Utah 2006). Under these definitions, UDOT's notice of interest on the Kappos property was a burden, limitation, and a claim that lessened the value of their property.

According to Utah Code Annotated § 38-9-1(6)(2005) "wrongful lien" means "any document that purports to create a lien or encumbrance on an owners 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."

Under the above-mentioned statute, UDOT's Notice of Interest constituted a wrongful lien because it was not expressly authorized by state or federal statute, was not authorized by an order of the court and was not authorized by the Kapposes. There is no order of any court allowing for the recording of UDOT's Notice of Interest, and UDOT had lost its interest obtained by way of the previous order of condemnation which was entered approximately 29 years earlier.

The State has since released its Notice of Interest which is further evidence that it never had a valid claim in and to the property. The claim of the State of Utah should never have been recorded as a Notice of Interest. UDOT also asserts that at the time it recorded the Notice of Interest there were competing claims to the property – claims that had not been resolved. However, UDOT has obtained no ruling from the court resolving the claim. UDOT has just recognized the error of its ways in recording the Notice of Interest and has thus released the Notice of Interest. The Notice of Interest itself was not authorized by the condemnation judgment and therefore, is a wrongful lien. The condemnation judgment itself had already been recorded and the attempt by UDOT to add an additional recorded document to the Kappos property was wrongful.

The State cites to Birch v. Myers (also titled In re Estate of Myers) for the proposition that a Notice of Interest does not constitute a wrongful lien when based on an existing property right even if that right is subject to total divestment. See, In re Estate of Myers, 214 P.3d 115 (Utah App. 2009). However the Birch v. Myers case is very different to the facts of this case. The main distinction with the Birch case is it discusses present and future interest in property. The Utah Court of Appeals determined that a

notice of interest recorded based upon a trust instrument granting a future interest which had the potential of total divestment was not a wrongful lien. But in the matter now before the Court, UDOT did not have a "present" or a "future" interest in the Kappos property by virtue of the condemnation judgment. Rather, UDOT had a "past" interest in the property. The UDOT interest expired when Ed Green Construction recorded its deeds on the property before UDOT recorded its condemnation judgment. At that point the burden shifted to UDOT to prove that Ed Green Construction and Ed Green were not bona fide purchasers for value with regard to the property. The presumption under Utah Code Annotated § 57-3-103[1] was that the property belonged to the Kapposes free and clear of any interest of any other party including the State of Utah. The State of Utah had the burden to prove that the Kapposes' predecessor in interest – Ed Green Construction – was not a bona fide purchaser for value. UDOT did not even attempt to prove that. Instead, UDOT recorded a Notice of Interest without attempting to determine those issues. If they were uncertain, the State of Utah should have filed an action against the Kapposes and asked the court for permission to record a document based upon the facts. UDOT did not have the authority to unilaterally decide for itself that it had an interest in the property when clearly that interest had expired by its own failure to record. UDOT's failure to record the condemnation judgment prior to the recording by Ed Green and Ed Green Construction is prima facie evidence that UDOT had lost its right to the property.

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1 Utah Code Annotated § 57-3-103: Each document not recorded as provided in this title is void as against any subsequent purchaser of the same real property, or any portion of it, if: (1) the subsequent purchaser purchased the property in good faith and for a valuable consideration; and (2) the subsequent purchaser's document is first duly recorded.

Of course, UDOT did not have superior rights because had the State had such superior rights the State would not have unilaterally released the Notice of Interest in 2008.

The State's analysis of Russell v. Thomas, 999 P.2d 1244 (Utah App. 2000) is incorrect. In the Russell case the Court determined that the Notice of Interest was wrongful because a contract right was not an interest in real property. The State asserts that UDOT did have an interest in the Kappos property but fails to define the nature and scope of that interest. In fact, UDOT did not have an interest in the Kapposes' property because they had lost it for failure to record in a timely manner. The alleged interest of UDOT was nonexistent in this case to the same level that it was nonexistent in the Russell v. Thomas matter. Therefore, the Notice of Interest recorded against the Kapposes' property is just as wrongful as the notice of interest in the Russell v. Thomas matter.

The withdrawal of the Notice of Interest in 2008 does not cure the State's problem. R.761. The State should never have recorded the Notice of Interest. During the time that the Notice of Interest had been recorded significant damages were caused to the Appellants. The Kapposes lost a sale of the property during the time when the market was at its highest. Now that the real estate market is much lower, the Kapposes cannot sell the property for nearly as high of value as they would have been able to do so pursuant to the contract which was signed in 2007 and which was lost as a result of the State's Notice of Interest. R.768-70. This resulted in a significant loss in equity. R.768-70.

Based upon all of the above, this Court should determine that the Notice of Interest by UDOT against the Kappos property was a wrongful lien and a slander of title and reinstate the claims based thereon. Plaintiffs have been severely damaged by the arbitrary conduct of the State of Utah in recording the Notice of Interest on their property defeating a sale thereof.

II. THE DISTRICT COURT ERRED IN DISMISSING APPELLANTS' CONSTITUTIONAL CLAIMS.

The State of Utah, Department of Transportation has not addressed in its brief the fact that the District Court abused its discretion in not entertaining Appellants' claims under the United States and the Utah constitutions for unconstitutional taking of their property. The United States Constitution and the Utah Constitution prohibit the taking of property by the government without paying just compensation. The Unites States Constitution, Amendment V states in part as follows, "...nor shall public property be taken for public use, without just compensation." The Constitution of Utah Article I Section 22 states, "Private property shall not be taken or damaged for public use without just compensation." The State of Utah wrongful took the Kapposes' property for the period of time that the Notice of Interest had been recorded on their property and deprived them of essential elements of the right, use, and enjoyment of real property for that extended period of time.

This is supported by Bagford v. Ephraim City, 904 P.2d 1095 (Utah 1995), which states that the takings provisions of the Utah Constitution protects all types of private property that are protected by the Fifth Amendment of the United States Constitution. Id.

at 1098. Moreover, the framers of the constitutional provision that private property shall not be taken or damages for public use without just compensation did not intend to give rights and then leave citizens powerless to enforce such rights.

The right to alienate property is a cognizable property interest. "Indeed, in Utah '[t]here is an important interest for property owners to possess unencumbered titles . . . [because] public policy [favors] certainty in title to real property, . . . to protect bona fide purchasers and to avoid conflicts of ownership, which may engender needless litigation." See, Alvey Development Corp. v. Mackelprang, 51 P.3d 45, 50 (Utah Ct. App. 2002). UDOT acted recklessly and carelessly when it recorded the Notice of Interest. UDOT recorded the Notice of Interest without notifying Plaintiffs that it had been recorded.

The constitutional claims were properly before the trial court and should never have been dismissed or at least should have been reinstated. This Court should order the trial court to hear these claims on their merits and determine the amount of damages suffered by the Kapposes as a result of the unconstitutional conduct of the State of Utah in regards thereto.

In summary, the Fifth Amendment of the United States Constitution as well as the Utah Constitution do not allow for takings of real property without just compensation. The trial court should have never dismissed the constitutional claims or should have at least reinstated them when requested. Therefore, this Court should remand the constitutional questions to the trial court for disposition and determination of damages.

III. UTAH RULES OF APPELLATE PROCEDURE, RULE 4(B) AUTOMATICALLY EXTENDED THE TIME TO APPEAL UNTIL THE TRIAL COURT MADE A DECISION ON APPELLANTS' RULE 59 MOTION.

UDOT has asked the Court to dismiss this appeal based upon the argument that this appeal is untimely. UDOT argues that the final order dismissing the last of Appellants' claims was entered on January 4, 2010 and that an appeal should have been filed within 30 days from the date of that order. This argument fails based upon U.R.A.P. 4(b).

Utah Rules of Appellate Procedure, Rule 4(b) specifically governs this situation:

> If a party timely files in the trial court any of the following motions, the time for all parties to appeal from the judgment runs from the entry of the order disposing of the motion:.... (b)(1)(C) a motion to alter or amend the judgment under Rule 59 of the Utah Rules of Civil Procedure;...

Thus, because Appellants filed their Rule 59 Motion on January 6, 2010, Appellants automatically enjoy the extension of the appeal time pursuant to Rule 4(b). Rule 4(b) is not limited to those motions which are successful. Rather, it is broad rule regarding appeals which allows for the filing of a notice of appeal after all matters in the case have been completed. Because the trial court had dismissed one of Appellants' claims without prejudice, there was not a final adjudication of all issues between the parties. Moreover, it was not only allowable for Appellants to ask the court to reinstate that claim, but prudent. Appellants were merely seeking to best serve judicial economy by not being required to pursue their constitutional claims in a separate case. The very purpose of requesting reinstatement of the claim which was dismissed without prejudice was to prevent separate lawsuits. Unfortunately the trial court determined not to handle the

constitutional claims within the context of this matter and basically forced that issue to a separate case. While it may have been within the court's discretion to make that ruling, it should not be held against Appellants for attempting to provide for judicial economy by filing their Rule 59(e) Motion. Plaintiffs relied specifically upon U.R.A.P. 4(b) when filing that motion and should be allowed the benefit of it. Rule 4(b) is an absolute right for a party to file a motion under Rule 59(e) to be allowed an automatic extension for the time to appeal. The Rule 59(e) Motion was disposed of by way of the trial court's order dated March 30, 2010. Therefore, the appeal time began to run on March 30, 2010. Appellants filed their Notice of Appeal on April 27, 2010 appealing from several substantive rulings entered in this case prior to the final order. The appeal was therefore timely filed.

The case law cited by UDOT with regard to its appellate brief does not mandate a ruling in UDOT's favor on this issue. In Nichols v. State, the Utah Supreme Court stated, "after an order of dismissal, the Plaintiff must move under Rules 59(e) or 60(b) to reopen the judgment." See, Nichols v. State, 554 P.2d 231, 232 (Utah 1976). That is exactly what Appellants did in this case--they invoked Rule 59 in a timely fashion asking the trial court to reinstate their constitutional claim which had been dismissed without prejudice. Because the assigned Judge was already familiar with all of the facts and procedure, he was in the best position to handle the constitutional issues. The requested result would have promoted judicial economy in that it was an attempt to keep the case as one rather than to have piecemeal cases and to have potential multiple appeals. Even though the trial court disagreed with Appellants on that issue, Appellants should not be penalized for

not filing an earlier appeal after relying upon Rule 4(b) Utah Rules of Appellate Procedure.

The State also cites to Steiner v. State, 495 P.2d 809 (Utah 1972). In that case, the trial court granted the defendant's motion to dismiss plaintiff's complaint. Without filing a Rule 59(e) motion the plaintiff then filed a second amended complaint and requested a re-hearing on the dismissal. That is not the procedure of the case before the Court. The Kapposes filed their motion to alter or amend two days after the dismissal order and asked the Court for permission to reinstate their previously dismissed claim which had been dismissed without prejudice. Thus, the Steiner case is not dispositive of the timeliness issue. The procedural facts are very different. The Steiner Court made a specific note that the plaintiffs in that case had no filed a motion to alter or amend. In this case, such a motion, a Rule 59(e) Motion was filed and therefore Plaintiffs properly preserved their rights. Similarly, the State also cites to Suarez v. Friel 2005 UT App. 396, 2005 WL 2303797 (an unreported opinion). Again, that court determined that the plaintiff must move under Rule 59(e) or 60(b) to reopen a judgment which is exactly the request made by the Kapposes to reinstate their previously dismissed cause of action.

The Rule 59(e) motion is entitled Motion to Amend/Reinstate Complaint to Include Constitutional Claims and that motion was specifically brought pursuant to Rule 59(e) of the Utah Rules of Civil Procedure requesting that the trial court alter or amend its previous ruling of dismissal of the constitutional claim. Appellants were asking the court to reinstate their constitutional claims which had previously been dismissed without prejudice. There was no final adjudication of this case until Appellants' timely Rule

59(e) motion was decided. The trial court denied that request, but it is a valid post-judgment motion sufficient to extend the time for appeal. The Rule 59 Motion was filed in a timely manner because it was filed within ten (10) days of entry of the judgment and requested that the trial court reinstate the constitutional takings claim had been dismissed, but not dismissed with prejudice. In fact, the trial court had recently entertained an argument by the Appellee to convert the dismissal from "without prejudice" to "with prejudice", but the court denied that request. Therefore, it was more than appropriate that Appellants should have been allowed the opportunity to reinstate their claim. The trial court gave consideration to the request for reinstatement but unfortunately denied it.

In this situation, Appellants actually had a constitutional claim pending which had been acknowledged by the trial court. However, the trial court had dismissed that cause of action without prejudice. Thus, the "without prejudice" ruling meant that the trial court determined that Appellants could restate that claim at another date. Appellants were merely attempting to reinstate that claim as soon as the other pending issues were resolved by the trial court and that did not occur until January 4, 2010. Thus, within the ten (10) days allowable under Rule 59 and invoking Rule 59, Appellants requested that the trial court reopen the judgment and reinstate that claim. Thus, having invoked Rule 59 for a legitimate reason consistent with the procedural posture of the case, this Court should find that UDOT's request to dismiss the appeal is without basis and that Appellants' time for appeal began on March 30, 2010.

The result of UDOT's procedural position would be to put parties in an irreconcilable predicament because of the possibility of filing a premature notice of

appeal which does not confer jurisdiction on appellate courts. See, Anderson v. Schwendiman, 764 P.2d 999 (Utah App. 1988). Had the trial court granted Appellants' Rule 59(e) Motion, then a notice of appeal filed prior to entry of the order disposing of that motion would have been moot and would not have conferred jurisdiction on the appellate courts.

In summary, UDOT's request to dismiss this appeal based upon the alleged untimeliness thereof is invalid and should be denied. Appellants had good reason for filing the motion which attempted to reinstate a claim that had been previously dismissed without prejudice, and Appellants were simply relying upon Rule 4(b) of the Utah Rules of Appellate Procedure which allow for extension of the time to appeal when said motions are filed in a timely manner.

CONCLUSION

UDOT's Opening Brief is limited in its scope and has requested the Court to not entertain this appeal based upon a timing issue. However, Rule 4 of the Utah Rules of Appellate Procedure automatically extend the time to appeal until the trial court made a decision on Appellants' Rule 59 Motion. With regard to the wrongful lien issue, the trial court should never have dismissed the claims for wrongful lien and slander of title because UDOT's Notice of Interest clearly encumbered the Kapposes full use and enjoyment of their home and real property rights. Finally, the Court should allow for the constitutional issues to be addressed fully on their merits.

RESPECTFULLY SUBMITTED this 9 day of February, 2011.

SMITH KNOWLES, P.C.

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Attorneys for Appellants Mark and Mala Kappos

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** were mailed by first-class mail with postage fully prepaid this 9th day of December, 2009, to each of the following:

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