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IN THE SUPREME COURT

OF THE STATE OF UTAH

INTERIORS CONTRACTING INCORPORATED, and ACTION FIRE SPRINKLER COMPANY A Utah Corporation, Plaintiffs and Respondents, vs. NAVALCO, a Utah Corporation aka NAVALCO OF UTAH, et al., Defendant and Appellant vs. GREEN ACRES OF AMERICA, INC., Defendant, Cross Claim Defendant and Respondent.	)	Case No. 17096

BRIEF OF PLAINTIFFS-RESPONDENTS

* * * * * * * * * * * *

Appeal from Judgment of the Third Judicial District Court
In and for Salt Lake County, Utah

Hon. Christine M. Durham, Judge. Hon. David K. Winder, Judge

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FILED

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IN THE SUPREME COURT

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Plaintiffs and Respondents,	)	
vs.	)	
NAVALCO, a Utah Corporation aka NAVALCO OF UTAH, et al.,	)	Case No. 17096
Defendant and Appellant	)	
vs.	)	
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Defendant, Cross Claim Defendant and Respondent.	)	

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IN THE SUPREME COURT

OF THE STATE OF UTAH

INTERIORS CONTRACTING INCORPORATED, and ACTION FIRE SPRINKLER COMPANY, A Utah Corporation, Plaintiffs and Respondents, vs. NAVALCO, a Utah Corporation aka NAVALCO OF UTAH, et al., Defendant and Appellant. vs. GREEN ACRES OF AMERICA, INC., Defendant, Cross Claim Defendant and Respondent.	)	Case No. 17096

BRIEF OF PLAINTIFFS-RESPONDENTS

* * * * * * * * * * * *

NATURE OF THE CASE

Plaintiffs furnished labor and materials to the building-premises <u>owned</u> by Navalco who Leased the premises to Green Acres who Subleased with written permission to Hungry Hawaiian, however, plaintiffs were not paid in full and timely recorded Liens and thereafter filed six Causes of Actions for money judgment, foreclosure and sale of the premises, and for deficiency judgments, if any. (See Complaint R 2 and Amended Complaint R 156.)

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4. The 19-page Lease (Ex. 2) and the 35-page Sublease (Ex. 3) provides, among other things, for making repairs and alterations on the building, and that "all fixtures installed by Lessee shall be new or completely reconditioned", and for the "control of common areas", and save harmless provisions, and default and re-enter provisions, and provisions of "common area maintenance", and attornment, and "maintenance and repair".

5. Plaintiffs' labor and materials went into the construction, alteration, additions to, repairs and improvements of the building-premises (R 67-68). Also see (plaintiffs Exhibits 17 through 35). Plaintiffs were not paid in full (R 65, R 70). (Also see Exhibits 11 & 12).

6. Plaintiffs commenced 6 Causes of Action which included, breach of contracts, failure to provide performance bond, foreclosure, unjust enrichment, open account, and guarantee by the Christensens (see Complaint R 2 and Amended Complaint R 156).

7. Simultaneously with the filing of the Complaint, plaintiffs filed the proper Notice of Pendency of Action (R 13) and Notice to Lien Claimants to Appear and Exhibit Proof of their Liens, Utah Code, Vol. 4B, Title 38, Ch. 1, (see R 10). Publication (R 62) was had regarding the Notice to Lien Claimants to appear in Court and Exhibit Proof of their Liens and the Notice specified December 18, 1978 for all persons or parties or lien claimants to exhibit then and there in Court, the proof of their said liens, (R 10). Neither Navalco nor Green Acres appeared at the Hearing to object to the claims and Liens and amounts being exhibited and filed with the Court. The Liens attached to the premises. (See Amended Judgment by Judge Taylor R 389). There was no appeal from this A[illegible]

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Res Judicata. (Note: Res Judicata applies both to issues which were raised and decided and also applies to those which could have been raised and adjudicated. Matthews v. Matthews, 102 Utah 428; 132 P2d 111).

8. Navalco filed a Motion for Summary Judgment which was "denied as to plaintiffs" (See Order at R 536). (It is to be noted that at the Hearing on Navalco's Motion for Summary Judgment against plaintiffs, Judge Durham Ordered that plaintiffs' witnesses, Jerry Cutshaw and Ed Smith, testify (R 1090-1118). Their testimony further established that there were genuine issues of material facts.)

9. Judge Winder tried this case on November 6-8, 1979 (R 1120-1254).

10. Mr. Hatch represented Navalco at all times and tried the case (R 1120); and he participated in, or had no objections to 33 exhibits being received in evidence on behalf of plaintiffs (R 1122 and R 1133, etc.); and he specifically cross-examined Mr. Sumsion (R 1151) the Store Manager of Green Acres; and Mr. Hatch also rested his case and left the Courtroom with Mr. Anderson (R 1231-1234); and thereafter Mr. Anderson and Mr. Hatch argued their case to Judge Winder (R 1235-1254) and they left the Courtroom again.

11. Judge Winder found that Navalco impliedly authorized plaintiffs to furnish to Navalco's premises the labor and materials they furnished based upon the Lease (Ex. 2) and Sub-lease (Ex. 3) and plaintiffs' Exhibit 16 which was received in evidence, and further premised on the work contracted for by the parties to these documents and which was done for them by

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plaintiffs. (See Judge Winder's Memorandum Decision R 741) and (Findings R 810). Also see the remaining exhibits that were received in evidence on plaintiffs' behalf (R 740).

12. A part of the Mechanics Lien Statute, Section 38-1-3 provides, among other things, for those entitled to Liens upon the premises when the labor is performed or materials furnished "whether at the instance of the owner or of any other person acting by this authority as agent, contractor or otherwise."

STATEMENT OF POINTS

I. IT WAS NOT ERROR FOR TRIAL JUDGE WINDER TO DECIDE AND ENTER JUDGMENT FOR PLAINTIFFS AGAINST NAVALCO.

II. TRIAL JUDGE WINDER DID NOT MISLEAD COUNSEL FOR DEFENDANT NAVALCO AND NAVALCO IS NOT ENTITLED TO A NEW TRIAL.

III. COMITY ALSO PROVIDED FOR LAW AND MOTION JUDGE DURHAM TO DENY NAVALCO A NEW TRIAL.

ARGUMENT

POINT I

I. IT WAS NOT ERROR FOR TRIAL JUDGE WINDER TO DECIDE AND ENTER JUDGMENT FOR PLAINTIFFS AGAINST NAVALCO.

1. Navalco was and is fee simple owner (plaintiff Ex. 1) and landlord (Plf. Ex. 2) of the building-premises in question. Navalco Leased to Green Acres (Plf. Ex. 2). Green Acres Subleased to Hungry Hawaiian (Plf. Ex. 3) with the written acceptance by Navalco (Plf. Ex. 16 in evidence and annexed). The Lease and Sublease mandate (1) making repairs and alterations on the building and (2) "all fixtures installed by Lessee

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shall be new or completely reconditioned" and (3) for the "control of common areas" and (4) save harmless provisions and (5) default and re-enter provisions and (6) "common area maintenance" and (7) attornment and (8) "maintenance and repair".

2. Navalco adopted, ratified, approved and accepted the subtenants proposals "to make the alterations shown on the attached plan", (Plf. Ex. 16).

3. The plan-specifications (Ex. 7 and 37) were also given to plaintiffs to use in the repairs and alterations of the building.

4. Plaintiffs furnished labor and materials to the building in March-April, 1978 (R 64 & R 68) and were not paid in full (Ex. 11,12) and timely recorded their Notices of Mechanics Liens and timely commenced their 6 Causes of Actions (R 2) citing Title 38 LIENS Ch. 1 Utah Code Sec. 38-1-1 etc.

5. Judge Taylor entered Judgment (R 389) on March 30, 1979 which established a Judgment Lien against the building-premises. There was no appeal. Therefore this Judgment Lien was and is res judicata. (See Matthews, Belliston cited herein.)

6. When Judge Winder tried the case on November 6-8, 1979 he observed the witnesses, examined the Exhibits and file, heard arguments and participated in the discussions, reviewed the law, took the case under advisement and entered his Memorandum Decision on December 13, 1979 (R 741) and Findings, Conclusions (R 810) and Judgment and Decree (R 819) and Order of Sale (R 817).

7. There is substantial, credible evidence here, together with reasonable inference to be drawn therefrom by which

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Judge Winder decided in favor of plaintiffs and against Navalco. This Court stated in OSUALA v. OLSEN 609 P2d 1325 at page 1326, "We would violate our own rules of appellate review if we substituted our judgment for that of the District Court. In Town & Country, Inc. v. Martin, Ut ah,563 P.2d 195, 197 (1977), we stated:

Under traditional rules of review as adopted by this Court, the findings and judgment of the trial court should not be upset on appeal if there exists any substantial evidence in the record supportive of the lower court's conclusions. In this regard, a clear statement of policy was made in the case of Jensen v. Eddy, 30 Utah 2d 154, 514 P.2d 1142, 1145 (1953), as follows:

"It is sufficient to say that under the traditional rules of review favoring the findings and judgment of the trial court if supported by any substantial evidence and reasonable inferences to be drawn therefrom, we are not persuaded that such findings should be disturbed."

We perceive no reason to modify this rule of review."

8. From State In Interest of K. K. H., Utah, 610 P2d 849 at page 851,

"Even though we may review the evidence, the proposition is well grounded in our law that due to the advantaged position of the trial court, we indulge considerable deference to his findings and do not interfere with them unless the evidence so clearly preponderates against them that this court is convinced that a manifest injustice has been done. (Citation omitted.) On the basis of what has been said above concerning the dispute in the evidence and the burdens of proof, we are

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not persuaded that the findings and judgment should be overturned."

* * *

"In any event, it was the function of the court below to evaluate the theories advanced by K. K. H. and to test them in the light of all of the evidence, and it is not within the prerogative of this Court to substitute its judgment for that of the trial court where, as here, it is substantially supported by the evidence."

9. "The purpose of the lien statutes is to protect those who have added directly to the value of property by performing labor or furnishing materials upon it". First of Denver Mortgage vs. Zundel (Utah) 600 P2d 521 (R 808). "The Mechanics Lien Law was made for the benefit of those who perform the labor and supply the materials". Totorica vs. Thomas, 16 U 2d 175, at page 178 (R 724). Navalco knew at all times that the work was being done upon its building (See McGee testimony R 1154). This Court states in Whyte vs. Christensen 550 P2d 1289 at p. 1290 "It is undisputed that the plaintiff performed the construction work on the defendant's home, there would normally arise at least an implied contract that they should receive reasonable compensation" (R 806). Judgment was entered foreclosing the liens and awarding attorneys fees and costs to plaintiff in Duggar vs. Cox (Utah) 564 P2d 300 (R 807).

10. Navalco's Motion (R 838) to Amend the Findings, Conclusions and Judgment and Decree by Judge Winder in favor of plaintiffs and against Navalco, was a motion directed at Green Acres to add certain language for Navalco against Green Acres. The Motion (R 838) did not attack the validity of the Findings,

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Conclusions and Judgment and Decree by Judge Winder in favor of plaintiffs. The doctrine of res judicata

> ***"renders a final judgment, on the merits*** conclusive upon the parties and is a bar to subsequent litigation of the same issues", Olsen v. Bd. of Ed. (Utah) 571 P2d 1336.

11. Navalco's Motion For New Trial is at (R 896). There was no irregularity at trial before Judge Winder, no accident or surprise, and sufficiency of evidence to justify his decision, and no error in law by him, therefore, his Judgment and Decree should be affirmed in favor of plaintiffs and against Navalco. Judge Durham properly denied the Motion. In Belliston v. Texaco, Inc. 521 P2d 379 at P. 380 this court stated,

> "In Wheadon v. Pearson this court stated that the doctrine of res judicata applied not only to points and issues which were actually raised and decided in a prior action but also as to those that could have been adjudicated, with the qualification that the claim, demand, or cause be the same in both cases. If the parties have had an opportunity to present their case and judgment is rendered thereon, it is binding both as to those issues that were tried and to those that were triable in that proceeding, and they are precluded from further litigating the matter."

12. In this case Navalco argues in its BRIEF OF APPELLANT (pages 11-12) about the Motions to Dismiss and Summary Judgments. Plaintiffs refer to and incorporate herein from their BRIEF OF APPELLANTS in Case No. 17105, pages 10-13, their argument about Motions to Dismiss and Motions for Summary Judgments.

13. A Missouri case appears to be on all fours here also as cited and argued to Judge Winder by plaintiffs (R 1243) and as cited by this court.

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14. Mr. Boyd McGee was property manager for Navalco (See his testimony R 1154) and he visited the building-premises to "inspect the building" (R 1155) and recalled "there were improvements going on at the building" and it was the "actual construction inside" and he saw workers and laborers and "there was some nailing going on" *** "nailing of sheet-rock and carpentry work" (R 1156) and "that entire north end of the building was being improved" *** "renovated**".

Navalco had actual knowledge that the labor and materials were being furnished to its building by plaintiffs as required by the Lease (Ex. 2) and Sublease (Ex. 3) and the Fire Protection System-specifications mandated in the Sublease. (Also see the specifications (Plf. Ex. 37) and plans (Plf. Ex. 7).

Judge Winder properly found implied authorization (R 742 Memo. Dec.).

POINT II

TRIAL JUDGE WINDER DID NOT MISLEAD COUNSEL FOR DEFENDANT NAVALCO AND NAVALCO IS NOT ENTITLED TO A NEW TRIAL.

1. When Judge Durham at Law and Motion granted Motions to Dismiss to Green Acres (R 399) and to Christensens (R 406) these Orders eliminated them from any contest at trial with plaintiffs. The Orders established no law of the case for trial on all the merits between plaintiffs and Navalco regarding the causes of actions alleged in the Complaint (R 2). Plaintiffs and Navalco had their full days in court at trial before Judge Winder (R 1120-1254). He could not decide the case until it was submitted to him and he took it under ad-

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visement. There is no merit to the argument that Navalco-Mr. Hatch was misled by Judge Winder. Trial Judges discuss the cases with counsel to receive more input. Just because Judge Winder did not follow Navalco's theories or reasoning or arguments in deciding the case is no ground to exclaim fault against Judge Winder. Surely Navalco was not looking for any favoritism at trial by Judge Winder or in his final decision. Judge Winder was bound by the preponderence of the evidence and the Mechanics Lien Statute Sec. 38-1-1 etc. and the appellate Decisions.

2. On December 17, 1979 Judge Winder filed Findings and Conclusions (R 810) and Judgment and Decree (R 819) in favor of plaintiffs and against Navalco and an Order of Sale (R 817) regarding the building-premises in question. On December 20, 1979 Navalco filed its Motion to Amend (R 838) these Findings, Conclusions and Judgment and Decree. This Motion clearly, distinctly and absolutely does not attack the validity of the Findings, Conclusions and Judgment in favor of plaintiffs. This Motion merely moves the Court

> (a) "To amend its Findings of Fact herein by adding a paragraph 13 as follows:
>
> 13. That Navalco *** "is entitled to reinbursement from Green Acres for the amount of principal, interest, costs and attorney's fees incurred.
>
> (b) "To the Conclusions of Law there should be added a paragraph 6 in the following words:"
>
> 6. "Defendant Navalco of Utah, should have judgment against Defendant, Green Acres of America, Inc., in the amounts provided in paragraph 1 hereinabove together with its costs of Court and such reasonable attorney's fees as are awarded against Navalco of Utah. In the event that said parties fail to settle the claims for attorney's fees by Navalco of Utah against Green Acres of

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of America, Inc. for its expense in defending this action, then a reasonable attorney's fee should be awarded and determined in accordance with paragraph 5 hereinabove."

(c)"The Judgment and Decree herein should be modified by adding a paragraph 10 thereto as follows:

(10) "Defendant, Navalco of Utah, is awarded Judgment against Defendant, Green Acres of America, Inc., in the amounts provided in paragraph 1 hereinabove together with its costs of Court and such reasonable attorney's fees as are awarded against Navalco of Utah."

Therefore the doctrine of res judicata applies between plaintiffs and Navalco. See Belliston, Matthews and Olsen cited herein.

POINT III

COMITY ALSO PROVIDED FOR LAW AND MOTION JUDGE DURHAM TO DENY NAVALCO A NEW TRIAL.

1. ***"in cases tried without a jury, a party litigant is entitled to a decision on the facts by a Judge who heard and saw the witnesses, and that a deprivation of that right is a denial of due process".*** 46 Am. Jur. 2d JUDGES, Sec. 37.

2. Judge Durham properly respected the Memorandum Decision, Findings, Conclusions, Judgment and Decree and Order of Sale by Judge Winder in favor of plaintiffs and against Navalco. Stevenson v. Four Winds Travel Inc. (5CA) 462 F2d 899. Johnson v. Johnson (Utah) 560 P2d 1132 and cases cited in footnote 3 at page 1134. ***"one district judge of concurrent jurisdiction cannot act as an appellate judge and reverse the ruling of another"** In Re Estate of Mecham (Utah) 537 P2d 312 at p. 314.

3. Judge Durham also heard plaintiffs Motion (R 856)

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for attorneys fees and costs and reviewed the affidavits (R 857) and received plaintiffs-Attorney Anderson's proffer all showing over 82 hours time requesting ($60.00 per hour) an amount of $4870.00. Judge Durham ruled from the Bench awarding $3500.00 as reasonable attorney fees, plus costs to plaintiffs of $251.40. (See Order and Judgment R 893).

4. It appears that Navalco's POINT II and POINT IV are directed to and against Green Acres.

CONCLUSION

1. The Judgment (R 389) by Judge Taylor established the judgment lien for plaintiffs against the building-premises owned by Navalco. There was no appeal by Navalco.

2. Trial Judge Winder by Judgment and Decree (R 819) awarded certain amounts due and owing to plaintiffs by Navalco, plus interest.

3. Judge Durham by Order and Judgment (R 893) awarded reasonable attorneys fees and costs to plaintiffs and against Navalco.

4. The Judgment by Judge Taylor and the Judgment and Decree by Judge Winder and the Order and Judgment by Judge Durham should be affirmed.

RESPECTFULLY SUBMITTED this 11 day of AUGUST, 1980.

Walker E. Anderson

Walker E. Anderson
Attorney for plaintiffs-respondents

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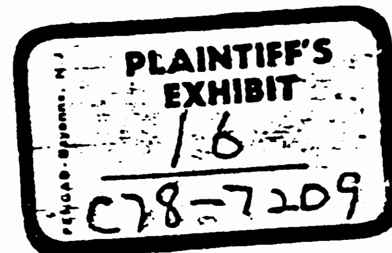
G [illegible] INC.
5850 South State Street
Murray, Utah 84107

January 17, 1978

Navalco
c/o Valley Bank & Trust
80 West Broadway
Salt Lake City, Utah



Re: Green Acres of America Lease
5850 South State Street
Murray, Utah

Gentlemen:

We propose to sublease a portion of the premises we are leasing from you to Hungry Hawaiian, Inc. for use as a restaurant. The subtenant proposes to make the alterations shown on the attached plan.

Pursuant to the lease we hereby request your approval of the subtenant and the alterations. A copy of the lease which we propose to use is delivered to you for your review.

You may indicate your acceptance of the tenant and the alterations by executing this letter in the space provided below.

Thank you for your cooperation in this matter.

Very truly yours,

Green Acres of America, Inc.

Roy E. Christensen
President

ACCEPTED this 31st day of January, 1978, on the condition that on ten days written demand after any default in the Lease between Green Acres of America, Inc. and Navalco of Utah will assign to Navalco the Sub Lease and, further this condition and acceptance shall not vary any provision or condition of the Lease between Green Acres of America, Inc. and Navalco.

NAVALCO OF UTAH

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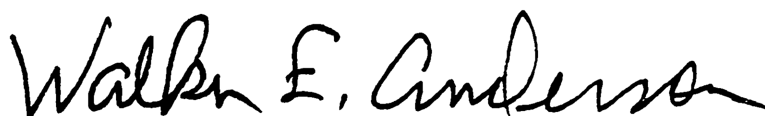
CERTIFICATE OF SERVICE

Two copies of the foregoing were mailed to Attorneys Daniel M. Allred and Barbara K. Polich, 79 South State Street, P. O. Box 11898, Salt Lake City, Utah 84147; Biele, Haslam and Hatch, Law Offices, 80 West Broadway, Suite 300, Salt Lake City, Utah 84101; Attorney Richard Dalebout, 60 East 100 South, Provo, Utah 84601.



August 11, 1980.

Walker E. Anderson

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