

2003

John Holmes Construction, Inc. v. R.A. McKell Excavating, Inc., a Utah corporation and Rick McKell, an individual : Brief of Appellee

Utah Supreme Court

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BEFORE THE UTAH SUPREME COURT

JOHN HOLMES CONSTRUCTION,)
INC., a Utah corporation and)
COULTER & SMITH, LTD., a)
Nevada corporation)

Plaintiffs/Appellees,)

vs.)

Case No. 20030707-CA

R.A. McKell EXCAVATING, INC., a)
Utah corporation and RICK McKell,)
an individual,)

Defendants/Appellants.)

BRIEF OF APPELLEES

Appeal from Final Judgment entered August 5, 2003, Order Granting Motion for
Award of Attorney's Fees entered August 5, 2003 and Order Granting Plaintiff's
Motion for Partial Summary Judgment entered October 9, 2002

Third District Court, Salt Lake County, State of Utah

The Honorable William B. Bohling

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UTAH APPELLATE COURTS

APR 28 2004

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-21-3(2)(j).

ISSUES PRESENTED FOR REVIEW

Appellees disagree with Appellants' statement of the first issue for review which inaccurately reflects the Utah mechanic's lien statute, Utah Code Ann. § 38-1-7(1)(a)(b). Further, the issue should be split into three issues.

Issue No. 1 (part one): The first part of the issue properly stated is whether the district court erred in granting summary judgment nullifying Appellant's mechanic's lien when the district court determined that the lien was filed out of time based on Utah Code Ann. § 38-1-7(1)(a) which requires a written notice of lien to be filed within 90 days from the date the person last supplied labor, equipment or material on a project or improvement for a residence as defined in Utah Code Ann. § 38-11-102, where Appellant's Notice of Lien was filed 133 days after the Notice of Lien states that Appellant last supplied labor, equipment and material for the installation of a roadway and water, sewer and storm drains for a residential subdivision.

Issue No. 1 (part two): The second part of the issue properly stated is whether the district court erred in granting summary judgment nullifying Appellant's mechanic's lien when the district court determined that the mechanic's

lien was filed out of time based on Utah Code Ann. § 38-1-7(1)(b) which requires a written notice of lien to be filed within 90 days from the date of final completion of an original contract not involving a residence as defined in Utah Code Ann. § 38-11-102, where Appellant filed its Notice of Lien 947 days after completion of a 1997 Construction Agreement between Appellant and Husting Land & Development Company, a Chapter 11 debtor in possession.

Issue No. 1 (part three): The third part of the issue properly stated is whether the district court erred in granting summary judgment nullifying Appellant's mechanic's lien when Appellant failed to file an action to enforce its lien as required by Utah Code Ann. § 38-1-11 which requires an action to be filed within 180 days from the date the person last supplied labor, equipment or material on a project or improvement for a residence as defined in Utah Code Ann. §38-11-102, where the above entitled action was filed 291 days, and the answer and counterclaim was filed 315 days, after the Notice of Lien states that Appellant last supplied labor, equipment and material for the installation of a roadway and water, sewer and storm drains for a residential subdivision.

Standard of Review: Because this is an appeal from the district court's grant of summary judgment in Appellees' favor, the Court of Appeals views the facts and all reasonable inferences drawn therefrom in the light most favorable to Appellants. *Arnold Indus. v. Love*, 2002 UT 133, ¶ 11, 63 P.3d 721. Because the

determination of whether summary judgment is appropriate presents a question of law, the Court of Appeals accords no deference to the district court's decision and instead reviews it for correctness. *Hale v. Beckstead*, 2003 UT App 240, ¶ 8, 74 P.3d 628. The Court of Appeals reviews the district court's legal conclusions, including those of pure statutory interpretation, for correctness, giving no deference to the district court's legal conclusions. *Pixton v. State Farm Mut. Auto. Ins. Co.*, 809 P.2d 746, 748 (Utah Ct. App. 1991); *Lieber v. ITT Hartford Ins. Ctr., Inc.*, 2000 UT 90, ¶ 7, 15 P.3d 1030.

Issue No. 2: Appellees also disagree with Appellants' Second Issue for Review which should properly be stated as follows:

Did the district court err in granting summary judgment dismissing McKell's *quantum meruit* claim where McKell failed to exhaust its legal remedies and where, based on record, McKell failed to establish that it was entitled to equitable relief?

Standard of Review: Because this is an appeal from the district court's grant of summary judgment in Appellees' favor, the Court of Appeals views the facts and all reasonable inferences drawn therefrom in the light most favorable to Appellants. *Arnold Indus. v. Love*, 2002 UT 133, ¶ 11, 63 P.3d 721. Because the determination of whether summary judgment is appropriate presents a question of law, the Court of Appeals accords no deference to the district court's decision and

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Appellants preserved the issues in the trial court in the opposition to Appellees' motion for summary judgment. R. 256-317.

STATEMENT OF THE CASE

Nature of the Case

This lawsuit is about a mechanic's lien recorded by R.A. McKell Excavating, Inc. ("McKell"), on June 7, 2000 against residential property known as Parkway Estates, in Draper, Utah, that was previously owned by John Holmes Construction, Inc., Coulter & Smith, Ltd. (hereafter collectively "Holmes and Coulter") and its predecessor Mesa Development Company. McKell is a pipe contractor whose business is to install sewer lines, water lines and storm drains.

The Course of Proceedings

Holmes and Coulter filed their complaint against R.A. McKell Excavating, Inc. and its owner, Rick McKell, with three causes of action: (1) relief from McKell's mechanic's lien; (2) slander of title; and (3) tortious interference. McKell

filed its answer with a counterclaim asserting a claim to foreclose its mechanic's lien and a claim for *quantum meruit*.

Holmes and Coulter filed a Motion for Partial Summary Judgment on May 20, 2002 challenging both claims for relief in the counterclaim. McKell filed its opposing memorandum on June 5, 2002, and Holmes and Coulter filed their reply memorandum on June 21, 2002. The court heard oral argument on August 12, 2002 and ruled from the bench. Holmes' and Coulter's counsel prepared the appropriate order. McKell objected and submitted its own order. Holmes and Coulter objected to McKell's proposed Order and the district court thereafter entered the proposed Order that Holmes' and Coulter's counsel had submitted. The district court entered the Order Granting Motion for Partial Summary Judgment on October 9, 2002. McKell appeals this order.

On April 25, 2003, Holmes and Coulter submitted a Motion for Award of Attorney's Fees. McKell filed its opposition on May 20, 2003, and Holmes and Coulter filed their reply on May 28, 2003. The court held oral argument on July 14, 2003 and ruled from the bench. An Order Granting Motion for Award of Attorney's Fees was entered on August 5, 2003. McKell appeals this Order.

While the motion for an award of attorney's fees was pending, the parties stipulated on July 14, 2003 to allow Holmes and Coulter to dismiss their slander of title and tortious interference claims.

The court entered a Final Judgment on August 5, 2003. McKell appeals this Order.

Statement of Relevant Facts

The 1997 and 1999 Construction Agreements

1. Husting Land & Development, Inc. ("Husting"), was incorporated in 1994 for the purpose of developing a sixty-one acre, three-phase, sixty-nine lot residential subdivision in Draper, Utah, commonly known as Galena Hills.

Bankruptcy Court Memorandum Decision and Order, p. 2, R. 147.¹

2. Initially, Galena Hills was landlocked. Complaint, ¶ 10, R. 1; Answer, ¶ 10, R. 28.

3. Adjacent to Galena Hills was another subdivision development project, Parkway Estates, owned by Appellee John Holmes Construction, Inc. ("Holmes") and Mesa Development, Inc. ("Mesa"), the predecessor to Appellee Coulter & Smith, Ltd. (hereafter collectively "Holmes and Coulter"). Because Galena Hills was landlocked and required access through Parkway Estates property, and Galena Hills and Parkway Estates shared common areas and roadways, it was necessary to install certain improvements and utilities that would

¹ The Bankruptcy Court Memorandum Decision and Order is included in the Addendum at Tab "A".

benefit both subdivisions. Bankruptcy Court Memorandum Decision and Order at p. 3, R. 147.

4. Thus, Husting and Holmes and Mesa entered into an Adjoining Subdivisions Agreement (R. 121) in which Holmes and Mesa agreed to deed a strip of property for a dedicated road to Draper City (the “Roadway” or “Galena Park Boulevard”) that would unlock access to Galena Hills, and in exchange Husting agreed to complete certain improvements on Parkway Estates. Holmes and Mesa agreed to reimburse Husting on a pro rata basis for its construction expenses. The Adjoining Subdivisions Agreement provided that reimbursement funds would not be paid to Husting until twenty-four months after final inspection and approval of construction by various municipalities, and then only if certain other conditions were met. *Id.*

5. In connection with the development of Galena Hills, Husting was required by Draper City and the Salt Lake County Sewer Improvement District to post cash escrow bonds (the Escrow Accounts) in the aggregate amount of approximately \$612,000 to ensure payment to all persons supply labor, services, equipment, or material to the Galena Hills project. *Id.* at p. 2-3.

6. In February 1996, Husting entered into a Development Agreement with Construct Tech, in which Construct Tech agreed to provide excavation and

construction services for the Galena Hills project, including storm drains, sewer, curb and gutter, sidewalk and street improvements. *Id.*

7. From its inception, the relationship between Husting and Construct Tech was fraught with problems and disagreements. Construct Tech's work was incomplete, substandard and defective. Ultimately, in November of 1996, Husting terminated its contract with Construct Tech. *Id.* at p. 4.

8. As a result of difficulties encountered with Construct Tech, the Galena Hills project was seriously behind schedule and Husting was unable to meet payment obligations on its construction financing. On January 14, 1997, Husting, as debtor-in-possession, filed its voluntary petition for relief under Chapter 11. At the time of its Chapter 11 filing, Husting's intention for reorganization was to complete necessary subdivision improvements to Galena Hills and then sell the improved lots to pay secured and unsecured creditors. *Id.*

9. In February, 1997, Husting's sole shareholder and president, Leon Harward, and Rick McKell, President of R.A. McKell Excavating, Inc. ("McKell") visited the Galena Hills site to assess the work necessary to correct defects in the excavation and construction work and complete the project. Harward invited McKell to bid on the project. *Id.*

10. In April 1997, Husting and McKell entered into a post-petition agreement (1997 Construction Agreement)², whereby McKell agreed to correct the defective work performed pre-petition by Construct Tech and to complete the remaining work on Phase II of the Galena Hills and Parkway Estates projects on a time and materials basis. *Id.*

11. Prior to entering into the 1997 Construction Agreement, McKell was aware that Husting had filed for relief under Chapter 11 and understood that the only present sources of payment for its work was the approximate \$612,000 in the Escrow Accounts established pursuant to the bonds with Draper City and the Salt Lake County Sewer District. However, Harward also led McKell to believe that other sources of payment existed, including the Adjoining Subdivisions Agreement, and funds from Castle Homes, L.L.C., a third-party investor that purportedly intended to purchase and build homes on the lots once the underground and surface improvements had been completed by McKell, and to otherwise invest in Husting in some fashion. *Id.* at pp. 5-6; Affidavit of R.A. McKell ¶ 6, R. 128.

12. Husting did not obtain bankruptcy court approval for incurring post-petition unsecured debt under the terms of the 1997 Construction Agreement. Bankruptcy Court Memorandum Decision and Order at p. 6, R. 147.

² The 1997 Construction Agreement between Husting and McKell is included in the addendum at Tab “B”.

13. Husting was not the agent for Holmes and Coulter; rather Husting acted for itself in the performance of its obligations under the Adjoining Subdivisions Agreement. David George Affidavit ¶¶ 4-6, R. 248; Nathan Coulter Affidavit ¶¶ 5-7, R. 252.³

14. Holmes and Mesa were not parties to the 1997 Construction Agreement and McKell agreed to look solely to Husting and the escrowed funds for payment. R. 121.

15. Although the Adjoining Subdivisions Agreement required Holmes' and Mesa's prior approval of any contractor Husting hired, as well as their authorization of any work performed by the contractor, Holmes and Mesa never approved McKell as the contractor, nor did they ever authorize McKell's work. David George Aff. ¶¶ 4-6, R. 248; Nathan Coulter Aff. ¶¶ 5-7, R. 252.

16. Neither Holmes, Mesa, nor Coulter, ever requested any construction services from McKell, nor did they ever offer or agree to pay McKell. David George Aff. ¶ 8, R. 248; Nathan Coulter Aff. ¶ 9, R. 252.

17. Rick McKell asserted that he only met Nathan Coulter twice. Mr. Coulter is the president of Mesa Development and Coulter & Smith. The first meeting supposedly occurred when McKell was installing the sewer and water laterals within the scope of the 1997 Construction Agreement. Rick McKell

³ The two affidavits – David George and Nathan Coulter – are included in the Addendum at Tab “C”.

merely asked Mr. Coulter to identify the location of the laterals in the vicinity of Parkway Estates. Second Affidavit of Rick McKell, ¶ 3, R. 313.⁴ The second meeting apparently involved a conversation wherein Mr. Coulter asked McKell to provide a bid to complete a cul-de-sac off Galena Park Boulevard and to complete a subsequent phase of Parkway Estates. The bid, for work which was outside the scope of the 1997 Construction Agreement, was apparently never furnished to Mr. Coulter and the additional work was never performed. *Id.*

18. McKell also said that in October 1997, long after McKell had entered into the 1997 Construction Agreement, that an unidentified speaker corroborated statements made by Husting's president, Leon Harward, that Castle Homes was going to buy Husting's stock and would pay McKell's outstanding invoices. Affidavit of R.A. McKell ¶ 16, R. 128.

19. McKell provided labor and materials under the 1997 Construction Agreement from June 30, 1997 to November 1997. On November 4, 1997 McKell walked off the job, or as Rick McKell put it in his affidavit, "ceased work on the project". McKell's final invoice to Husting was dated December 15, 1997. *Id.*, ¶ 17.

⁴ Affidavit of R.A. McKell (without exhibits) and Second Affidavit of R.A. McKell are included in the Addendum at Tab "D".

20. McKell always directed its invoices to Husting and never made a single demand for payment to Holmes and Mesa. David George Aff. ¶ 9, R. 248; Nathan Coulter Aff. ¶ 10, R. 252.

21. On April 1998, three months after a trustee had been appointed in Husting's Chapter 11 bankruptcy case, McKell filed a Motion for Allowance of Administrative Expense in Husting's bankruptcy seeking payment for its work under the 1997 Construction Agreement. *See*, Bankruptcy Court Memorandum Decision and Order, R. 147.

22. Judge Boulden denied McKell's motion on November 22, 2000 on the basis that Husting's 1997 Construction Agreement with McKell was not in the ordinary course of Husting's business and that Husting should have obtained post petition approval before entering into the agreement. *Id.*

23. In September 1999, the trustee obtained a bankruptcy court order that authorized the trustee to enter into contracts for construction and development of the debtor's property, Galena Hills. The Order Approving Post-Petition Financing With Eagle Pointe Financial Group and Eagle Pointe Realty And Management, Inc., authorized the trustee to borrow money from Eagle Pointe Financial to complete the "Project", which was a defined term in the order meaning "the organized undertaking to develop the Debtor's (i.e., Husting's) Real Property." Eagle Point Financial's loan to the trustee was secured by the debtor's property

(i.e., Galena Hills) and Eagle Point Financial was to be repaid as the Galena Hills lots were sold. Parkway Estates was not part of the “Project” the trustee was authorized to complete. Order Approving Post-Petition Financing With Eagle Pointe Financial Group and Eagle Pointe Realty And Management, Inc., R. 169.

24. In September 1999, as soon as the bankruptcy court order was signed, the trustee retained Eagle Pointe Realty and Management, Inc. (“Eagle Pointe”) to develop Galena Hills. Eagle Pointe in turn entered into a new Construction Agreement with McKell, effective September 20, 1999 (the "1999 Construction Agreement"). R. 177.

25. McKell performed no construction work of any kind on either Parkway Estates, or Galena Hills, during the 22 month period from November 1997 to September 1999. David George Aff. ¶ 7, R. 248; Nathan Coulter Aff. ¶ 8, R. 252.

26. McKell’s work performed for Eagle Pointe under the 1999 Construction Agreement was to complete the “Project”, meaning “the organized undertaking to develop the Debtor’s (i.e., Husting’s) real property.” Order Approving Post-Petition Financing With Eagle Pointe Financial Group and Eagle Pointe Realty And Management, Inc., p. 2, R. 169.

27. In April 2000, the trustee's construction manager, Brian Lloyd, filed an affidavit in Husting's bankruptcy to facilitate payment to McKell for its work under the 1999 Construction Agreement. Lloyd confirmed that in September 1999, on behalf of the trustee, Lloyd had hired McKell to install the permanent roadway leading to Galena Hills. Lloyd further confirmed that McKell's water and sewer installations beneath Galena Park Boulevard were done prior to September 1999. In other words, any sewer and water work that McKell did along Galena Park Boulevard that would have benefited Parkway Estates was all done no later than November 1997 under the 1997 Construction Agreement. Brian Lloyd Affidavit, R. 197.

Husting's Breach of the Adjoining Subdivisions Agreement

28. On July 21, 1999, before McKell resumed any work and before the bankruptcy court approved any loans to the trustee from Eagle Point Financial, Holmes and Mesa filed a Motion for Relief from Stay in the Husting bankruptcy. The motion for relief from stay stated Holmes' and Mesa's position that Husting had failed to complete its performance and was in material breach of the Adjoining Subdivisions Agreement. Copies of the motion for relief were served upon McKell and McKell's attorney, so that McKell was fully aware that Holmes and Mesa did not want McKell to do any more work on Parkway Estates. R. 195.

29. On October 22, 1999 Holmes and Mesa mailed to McKell and McKell's attorney a second Motion for Relief from Stay which reiterated Holmes' and Mesa's position that a material breach of the Adjoining Subdivisions Agreement by Husting had terminated the agreement. The motion papers also informed McKell that Holmes and Mesa had expressly requested that the trustee not perform any work on Parkway Estates in connection with the trustee's efforts to construct the access road and infrastructure improvements along Galena Park Boulevard leading to Galena Hills. R. 225.

McKell's Claim of Notice of Lien

30. On or about June 7, 2000, McKell recorded a Notice of Claim of Lien ("Notice of Lien")⁵ against Parkway Estates in the amount of \$132,824.18 together with interest, costs and attorney fees. Notice of Lien, R. 193.

31. McKell's Notice of Lien claims a lien against Parkway Estates for work that McKell performed at the request of Husting Land & Development, Inc. (not the Trustee and not Eagle Pointe). *Id.*

32. Although the Notice of Lien inaccurately asserts that McKell's last work was supposedly performed on January 26, 2000, McKell's counsel admitted at the summary judgment hearing that McKell's mechanic's lien relates solely to work McKell performed on Parkway Estates before McKell walked off the job on

⁵ The Notice of Lien is included in the Addendum at Tab "E".

November 4, 1997. In other words, McKell's lien relates solely to work McKell performed under the 1997 Construction Agreement. Hearing Transcript, 8/12/02, at 11: 9-18, R. 452.

Sale of Parkway Estates

33. On or about August 1, 2000, Holmes and Coulter sold Parkway Estates to Draper City as undeveloped land. David George Aff. ¶ 10, R. 248.

SUMMARY OF ARGUMENT

It is undisputed that McKell's work was residential, not commercial or industrial, and, although McKell's Notice of Lien states that McKell's labor and materials were last provided on January 26, 2000, Rick McKell was adamant when he was trying to get paid from Husting's bankruptcy estate in 1999 that McKell ceased work on the project on November 4, 1997. Ultimately, McKell's counsel admitted at the summary judgment hearing before Judge Bohling that all of the work for which McKell claimed a lien against Parkway Estates was completed no later than November 1997.

Utah Code Ann. § 38-1-7(1)(a) requires a written notice of lien to be filed within 90 days from the date the person last supplied labor, equipment or material on a project or improvement for a "residence" as defined in Utah Code Ann. §38-11-102. Even if McKell is given the benefit of the erroneous last date of work in its Notice of Lien, McKell's lien was recorded on the 133rd day, 43 days too late.

If McKell's lien is not invalid because McKell failed to record its lien within 90 days of the date of its last work under section 38-1-7(1)(a), its lien is invalid under section 38-1-7(1)(b) because McKell failed to record its lien within 90 days of final completion of the original contract, which is the 1997 Construction Agreement between McKell and Husting, that was "finally completed" in November 1997 when McKell ceased work on the project.

McKell also failed to file an action to enforce its lien within 180 days from the date it last supplied labor and material on a project or improvement for a residence as defined in section 38-11-102, as required by section 38-1-11.

Next, the record does not support a claim for *quantum meruit* under either branch of the equitable doctrine. McKell performed its work under the 1997 Construction Agreement with Husting. Even though McKell may not have been paid, McKell has no equitable claim against Holmes and Coulter. McKell failed to exhaust its legal remedies and, even if McKell's work benefited Parkway Estates, Holmes and Coulter never made use of the benefit. Importantly, Holmes and Coulter never requested McKell's construction services and neither company ever agreed to pay McKell for its work.

Finally, the district court did not abuse its discretion in awarding attorney's fees under the mechanic's lien statute, Utah Code Ann. § 38-1-18. The record was

well documented and the district court made appropriate findings in making its award of fees.

ARGUMENT

I

MCKELL'S NOTICE OF LIEN WAS NOT TIMELY UNDER EITHER SUBPART OF THE MECHANIC'S LIEN STATUTE

McKell's mechanic's lien is invalid as a matter of law because McKell did not record its Notice of Lien, or sue to enforce its lien, within the time required by Utah law. The Utah statute governing mechanic's liens limits the time in which a person may record a mechanic's lien to no later than 90 days from either the date of last work performed in the case of a project or improvement for a residence, or 90 days from final completion of an original contract in a case not involving a residence. The relevant statute reads:

A person claiming benefits under this chapter shall file for record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien within 90 days from the date:

- (a) the person last performed labor or service or last furnished equipment or material on a project or improvement for a residence as defined in Section 38-11-102; or
- (b) of final completion of an original contract not involving a residence as defined in Section 38-11-102.

Utah Code Ann. § 38-1-7(1)(a), (b) (2000).

Whether the time for recording McKell's lien is measured under subpart (a) for a project or improvement for a "residence", or under subpart (b) for final completion of an original contract not involving a residence, McKell's lien was untimely.

A. This Was A Project or Improvement For A Residence

Because the labor, equipment and material that McKell provided was on a project or improvement for a residence as defined in section 38-11-102, the lien had to be recorded within 90 days from the last date of work. Even if McKell is given the benefit of the inaccurate statement in its Notice of Lien that its last work was performed on January 26, 2000, the lien had to be recorded by April 26, 2000. Instead, McKell recorded its lien on June 7, 2000. It was clearly out of time.

McKell argues that when section 38-1-7 is "read in conjunction with the Residence Lien Restriction and Lien Recovery Fund Act", Utah Code Ann. § 38-11-101, *et seq.*, it is apparent that subpart (1)(a) of section 38-1-7 is inapplicable to McKell's lien. Frankly, McKell's argument is difficult to understand and a close reading of Senate Bill 87 (included in McKell's Addendum) reveals that McKell's argument has no support.

When the Utah legislature enacted Senate Bill No. 87 titled "Mechanics' Lien and Bonding Amendments" during the 1994 legislative session, it made

amendments to the mechanic's lien statute, Utah Code Ann. § 38-1-1 *et. seq.*.

Specifically, section 38-1-7(1) was amended as follows:

Recording – Service on owner of property.

(1) ~~[Each contractor or other person who claims the benefit of]~~ A person claiming benefits under this chapter shall within ~~[80]~~ 90 days ~~[after substantial completion of the project or improvement shall]~~ from the date the person last performed labor or service or last furnished equipment or material on a project or improvement file for record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien.

In the same Senate Bill No. 87, the legislature enacted Chapter 11 of Title 38 naming it the “Residence Lien Restriction and Lien Recovery Fund Act” (the “Act”). The purpose of the Act we are told, is to protect homeowners who build “owner-occupied residences” from subcontractors’ mechanic’s liens when the homeowner has already paid his general contractor. The Act contains separate definitions for a “residence”⁶ and an “owner-occupied residence”⁷ and it is owner-occupied residences that are protected by the Act. When Senate Bill 87 was passed

⁶ “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. Utah Code Ann. § 38-11-102(18)(2000).

⁷ “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. Utah Code Ann. § 38-11-102(14)(2000).

there was no distinction made between, and no amendment to section 38-1-7 to account for, liens recorded against residential, owner-occupied residential and non-residential property. All mechanic's liens were given the same treatment and each had to be recorded within 90 days from the last date of work. While McKell places great emphasis in its brief on the legislative debate surrounding the 1994 enactment of the Act and its purposes, there was clearly no intention when the Act was passed to tie the time limits for recording mechanic's liens in section 38-1-7 with any purposes of the Act.

In 1995 the legislature again amended section 38-1-7, this time forming subsections (1)(a) and (1)(b), making a distinction between the filing periods for residential and non-residential liens. 1995 Utah Laws Ch. 172 (S.B. 115)(included in McKell's Addendum). In new section 38-1-7(1)(a), the legislature borrowed the definition of "residence" from the Residence Lien Restriction and Lien Recovery Fund Act that had passed the year before. If the legislature had intended to relate section 38-1-7(1)(a) to the purposes of the Act as McKell suggests, the legislature could just as easily have distinguished the two filing periods in subparts (1)(a) and (1)(b) according to whether the lien related to a project or improvement for an owner-occupied residence as defined in the Act, and the final completion of a contract not involving an owner-occupied residence as defined in the Act. The legislature chose not to do this and section 38-1-7(1)(a) means what it

unambiguously says: If the lien is for a project or improvement for a “residence” as defined in section 38-11-102, the lien must be recorded within 90 days from the last date of work.

The issue before the district court, and now before this court, is whether McKell’s work to install the infrastructure improvements for a residential subdivision is a “project or improvement for a residence.” We believe the question is answered by *First of Denver Mortgage Investors v. C.N. Zundel*, 600 P.2d 521 (Utah 1979), where the Court decided that the installation of the sewer and water system in a residential subdivision is lienable work because it improves the actual homes by making them habitable. The similar work McKell claimed for its lien was certainly a project or improvement for a residence.

B. The 1999 Construction Agreement With Eagle Pointe To Develop Only Galena Hills Is Not The Original Contract That Is The Basis For McKell’s Lien

If McKell’s lien is not invalid because McKell failed to record its lien within 90 days of its date of last work under section 38-1-7(1)(a), its lien is invalid because McKell failed to record its lien within 90 days of final completion of an original contract under section 38-1-7(1)(b).

The 1997 Construction Agreement was the “original contract” that was finally completed on November 4, 1997, when McKell “ceased work on the project”.

According to McKell's admission at the summary judgment hearing, all of the work McKell lienied was performed in 1997, obviously under the 1997 Construction Agreement. The separate 1999 Construction Agreement cannot make timely the June 2000 filing of the Notice of Lien for the work McKell performed in 1997.

For 22 months, from November 1997 until September 1999, no work occurred at Galena Hills. Husting's bankruptcy trustee was eventually authorized in September 1999 to borrow money from Eagle Pointe Financial to complete the "Project", which was a defined term in the bankruptcy court's order meaning "the organized undertaking to develop the Debtor's (i.e., Husting's) real property." Eagle Point Financial's loan was secured by Husting's real property and the loan was to be repaid as the Galena Hills lots were sold. Having secured the means to pay for the work, the trustee's agent then hired McKell to complete Galena Hills under the terms of the 1999 Construction Agreement. There was no mechanism in the bankruptcy court's authorization to recoup any expenses for any work on Parkway Estates and having previously experienced the power of the bankruptcy court to deny payment for work that was not authorized, McKell was hardly going to do any more work on Parkway Estates. McKell proceeded to put in the permanent roadway along Galena Park Boulevard to provide access to Galena Hills without installing a single curb cut leading to Parkway Estates. The fact that

McKell was paid with court approved financing for all of its work under its 1999 Construction Agreement with Eagle Point is a clear admission that McKell stuck to developing Galena Hills and nothing more.

To be valid, McKell's lien had to be filed no later than 90 days after "completion of an original contract". Utah Code Ann. § 38-1-7(1)(b).

Termination or a lengthy suspension of work under a contract is "completion" of the contract for purposes of determining the commencement of a time period under a mechanic's lien statute.

In *Roberts v. Hansen*, 25 Utah 2d 190, 279 P.2d 345 (1971), a property owner hired a contractor to build a home. The owner dismissed the contractor after a dispute arose. The dismissed contractor filed a mechanic's lien against the property. The issue before the court was what constituted "completion of an original contract" from which the period for commencing an action to enforce a mechanic's lien begins to run. The Utah Supreme Court held that the "completion of an original contract" that triggered the filing period occurred on the date the contractor was dismissed. 479 P.2d at 346-347. *See also Govert Copier Painting v. Van Leeuwen*, 801 P.2d 163, 173 (Utah Ct. App. 1990) (12 month period of § 38-1-11 for commencing action to enforce lien after completion of original contract ran from date contractor stopped work where contractor left work for others to complete).

Applying the rationale of *Roberts*, the completion of an original contract for the 1997 Construction Agreement occurred when McKell ceased work on the project on November 4, 1997, and any mechanic's lien had to be recorded within 90 days thereafter.

Furthermore, the section of the mechanic's lien statute that provides for the priority of a lien to relate back to earlier work on the same improvement (Utah Code Ann. § 38-1-5) only applies when the work has been performed "without material abandonment." *Calder Bros. Co. v. Anderson*, 652 P.2d 922, 924 (Utah 1982). There must be "a continuity of purpose such that a reasonable observer of the site would be on notice that work was underway for which a lien could be claimed." *Nu-trend Electric, Inc. v. Deseret Federal Savings and Loan Association, Inc.*, 786 P.2d 1369, 1371 (Utah Ct. App. 1990). "The question is primarily one of notice" *Id.* David George and Nathan Coulter both swore that there was no observable work during the 22 month period and their statements were uncontroverted. George Aff. ¶ 7, R. 248; Coulter Aff. ¶ 8, R. 252.

McKell's Notice of Lien admits that the 1999 Construction Agreement has no bearing on McKell's lien claim. The notice states that McKell was "employed by and did provide contracting services . . . at the request of Husting Land and Development, Inc.". Any opportunity Husting ever had to request McKell's

services occurred before the Chapter 11 trustee was appointed and well before the court authorized the 1999 Construction Agreement with Eagle Pointe.

C. McKell Never Filed An Action To Enforce Its Lien Within 180 Days

Even though McKell's failure to timely record its lien pursuant to Utah Code Ann. §38-1-7(1) is enough to doom the lien, McKell also failed to file an action to enforce its lien within the time limit set by the statute. According to Utah Code Ann. § 38-1-11(b), McKell had 180 days to sue after its last work was performed.

The statute reads:

A lien claimant shall file an action to enforce the lien filed under this chapter within:

....

(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.

Utah Code Ann. § 38-1-11(b).

McKell's Notice of Lien inaccurately states that McKell's services, labor or materials were last provided on January 26, 2000. We know from the admission of McKell's counsel that the last date of work was actually in November 1997, but even if McKell is given the benefit of last date of work in the Notice of Lien, McKell still failed to sue in time. Based on the statement in the Notice of Lien, McKell should have filed its action to enforce its lien within 180 days of January 26, 2000, or in other words by July 25, 2000. The complaint was filed on

November 13, 2000, and McKell filed its answer and counterclaim on December 7, 2000. Clearly, McKell failed to comply with the statute and it has lost the right to enforce its lien. *See, Roberts v. Hansen, supra; Govert Copier Painting, supra.*

II

MCKELL DID NOT ESTABLISH A *QUANTUM MERUIT* CLAIM

Although the district court dismissed McKell's *quantum meruit* claim on the grounds that McKell was not entitled to equitable relief against Holmes and Coulter because McKell had an express contract with Husting, *see e.g., Davies v. Olson*, 746 P.2d 264 (Utah Ct. App. 1987)(holding that recovery under *quantum meruit* presupposes that no enforceable written or oral contract exists), "[a] party to an appeal does not have a constitutional right to have a cause of action decided on a particular ground." *Bailey, supra* (citing *DeBry v. Noble*, 889 P.2d 428, 444 (Utah 1995)). This Court can affirm the district court's ruling granting summary judgment if "if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court." *Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158; *Dipoma v. McPhie*, 2001 UT 61, ¶ 18, 29 P.3d 1225 (quoting *Limb v. Federated Milk Producers Ass'n*, 23 Utah 2d 222, 225-26

n.2, 461 P.2d 290, 293 n.2 (1969); *see also Orton v. Carter*, 970 P.2d 1254, 1260 (Utah 1998) (applying Limb); 5 C.J.S. Appeal & Error § 714 (1993) ("Generally, the appellate court may affirm the judgment where it is correct on any legal ground or theory disclosed by the record, regardless of the ground, reason, or theory adopted by the trial court.").

A. McKell Failed To Exhaust His Legal Remedies. This Barred Any Claim For Quantum Meruit.

Before McKell was entitled to pursue a *quantum meruit* claim, McKell was required to first exhaust its legal remedies. *Knight v. Post*, 748 P.2d 1097, 1099 (Utah Ct. App. 1988). McKell's legal remedies included filing a mechanics lien. *Id.* However, McKell failed to perfect its mechanic's lien because it recorded the lien too late, and it failed to file an action to enforce the lien within the time allowed by law. This was a failure to exhaust McKell's legal remedies and it barred McKell from pursuing a *quantum meruit* claim. *Id.* This was precisely what occurred in *Knight v. Post* and it was dispositive of the *quantum meruit* claim.

B. Although A Failure To Exhaust Legal Remedies Is Dispositive, McKell Also Never Demonstrated The Necessary Elements For A Quantum Meruit Claim.

Although McKell's failure to exhaust its legal remedies is dispositive of its *quantum meruit* claim, McKell never met the requirements for a *quantum meruit* claim under Utah law and granting summary judgment was proper on that basis.

Utah courts recognize two branches of *quantum meruit*: “(1) contracts implied in law, also known as quasi-contract or unjust enrichment, which are not actions to enforce a contract but are actually actions to require restitution; and (2) contracts implied in fact, which are contracts established by conduct.” *Knight v. Post*, 748 P.2d at 1100.

1. McKell Did Not Establish the Elements of Unjust Enrichment

Both branches of *quantum meruit* are rooted in “justice”. *Davies*, 746 P.2d at 269. McKell found itself in the predicament of being owed for its work because it knowingly entered into a construction contract with a Chapter 11 debtor without seeking prior bankruptcy court approval. McKell never sent Holmes and Coulter a bill and there is no record that Holmes, Mesa or Coulter ever requested services from McKell or misled McKell.

A party seeking to recover under the quasi-contract or unjust enrichment branch of *quantum meruit* must establish three elements: (1) the defendant received a benefit; (2) an appreciation or knowledge by the defendant of the benefit; (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying for it." *Id.*; see also, *Davies v. Olson*, *supra*, 746 P.2d at 269.

Even if Holmes and Coulter received a benefit from McKell and used that benefit (although we point out below that this did not happen), McKell was

required to show that it was inequitable under the circumstances for Holmes and Coulter to retain the benefit. *Knight*, 748 P.2d at 1101. In *Commercial Fixtures and Furnishings, Inc. v. Adams*, 564 P.2d 773 (Utah 1977), the Utah Supreme Court defined inequitable circumstances as:

“[t]he mere fact that a third person benefits from a contract between two others does not make such third person liable in quasi-contract, unjust enrichment, or restitution. There must be some misleading act, request for services, or the like, to support such an action. Mere failure of performance by one of the contracting parties does not give rise to a right of restitution.”

564 P.2d at 774.

Holmes and Coulter never mislead McKell or requested its services. In fact, Rick McKell claimed to have spoken with Nathan Coulter only twice. The first instance was when McKell was already working for Husting and Mr. Coulter simply pointed out the locations for the sewer laterals in the vicinity of Parkway Estates. *Id.* The second instance apparently involved a conversation wherein Mr. Coulter asked McKell to provide a bid to complete a subsequent phase of Parkway Estates. The bid, for work which was outside the scope of McKell’s 1997 Construction Agreement with Husting, was apparently never furnished to Mr. Coulter and the additional work was never performed.

McKell also said that in October 1997, long after McKell had contracted with Husting, and just before McKell walked off the job, an unidentified speaker

supposedly corroborated statements made by Husting's president, Leon Harward, that Castle Homes was going to buy Husting's stock and would pay McKell's outstanding invoices. While McKell must have been disappointed when Castle Homes failed to materialize, McKell never stated that Holmes, Mesa and Coulter ever requested McKell's services, or that Holmes, Mesa and Coulter ever said that they would pay McKell's bills. In fact, the affidavits of David George and Nathan Coulter expressly deny that Holmes, Mesa and Coulter ever asked McKell to do any work or that McKell ever looked to any of these companies for payment.

In short, McKell never demonstrated that it would be inequitable for Holmes and Coulter to retain the benefit of McKell's work without payment of its value. *See, Knight*, 748 P.2d at 1101.

The benefit of an unjust enrichment or restitution claim is determined from the perspective of the party that supposedly benefited from the work, not the benefactor. *See e.g., Davies v. Olsen, supra*, 746 P.2d at 269. Although Judge Boulden found that McKell conferred a benefit on Parkway Estates, Holmes and Coulter never used the benefit. When Holmes and Mesa entered into the Adjoining Subdivisions Agreement they expected Husting to immediately install the Roadway and underlying improvements so that Holmes and Mesa could develop Parkway Estates. When Husting failed in its required performance, Holmes and Mesa (and later Coulter) abandoned their plans and sold Parkway

Estates to Draper City in 2000 as undeveloped property. The uncontroverted affidavits of David George and Nathan Coulter attest that Holmes and Coulter never used the benefit of McKell's work.

McKell's claim under the unjust enrichment doctrine of *quantum meruit* failed.

2. McKell Did Not Establish the Elements of a Contract Implied in Fact

McKell also never established a claim against Holmes and Coulter under the second branch of *quantum meruit*, contracts implied in fact. To prevail on an implied contract, McKell had to establish that: (1) Holmes and Coulter requested McKell to perform the work; (2) McKell expected Holmes and Coulter to compensate it; and (3) Holmes and Coulter knew or should have known that McKell expected compensation. *Knight, v. Post*, 748 P.2d at 1101, citing *Davies v. Olson*, 746 P.2d at 269. The undisputed facts are contrary to each of these three required elements.

There were only two parties to the 1997 Construction Agreement – McKell and Husting. There was no record that Holmes, Mesa or Coulter ever requested McKell to perform the work on Parkway Estates. In fact, McKell was resolute in the affidavit he filed with the bankruptcy court (R. 128) that he met with Husting's president and was hired by Husting. McKell never looked to anyone but Husting

to pay for the work. From the time McKell began work in 1997 until its lien was recorded in June 2000, McKell never sent Holmes, Mesa or Coulter a single bill.

Husting had agreed with Holmes and Mesa that in exchange for the dedication of the Roadway which unlocked the access to Husting's Galena Hills property, that Husting would be responsible for putting in the permanent road and underlying improvements. Husting, acting solely on its own behalf, attempted to perform its obligation by separately contracting with McKell. Husting hired McKell on a time and materials basis without any input from Holmes, Mesa or Coulter, which the Adjoining Subdivisions Agreement required. There were no statements in the record that Holmes, Mesa or Coulter ever told McKell that they would be responsible for payment. Husting was obligated under the Adjoining Subdivisions Agreement to install the permanent roadway and improvements and Holmes and Mesa had no obligation to reimburse Husting for at least 24 months. Husting contracted with McKell, and Holmes, Mesa and Coulter simply had no reason to suppose that McKell was looking to them for payment.

McKell did not satisfy any of the necessary elements for a claim under the contracts implied in fact branch of *quantum meruit*. Accordingly, summary judgment was appropriately granted dismissing the *quantum meruit* claim in McKell's counterclaim.

III

THE AWARD OF ATTORNEY'S FEES WAS NOT AN ABUSE OF DISCRETION

The district court awarded attorney's fees to Holmes and Coulter as the successful parties in this action to enforce a mechanic's lien under Utah Code Ann. § 38-1-1 *et. seq.*. Accordingly attorneys' fees were awarded pursuant to Utah Code Ann § 38-1-18 on the basis of a very well documented attorneys' fees affidavit (R. 372) and following an opportunity for hearing where counsel represented the following:

1. No attorneys' fees were sought for any time related to Holmes' and Coulter's claims for slander of title and tortious interference. In order to assure that only fees related to the mechanic's lien were included, none of the attorney's time spent drafting the complaint was included in the application for an award of attorney's fees, even though the complaint plainly related to the mechanic's lien. Hearing Transcript, 7/14/02, pp. 7-8, R. 453;

2. Only the time spent on matters pertaining to McKell's mechanic's lien, including discovery, initial disclosures and motions, was included in the application for an award of fees. *Id.* at pp. 8-9;

3. The preparation of the motion for partial summary judgment involved a lengthy fact statement and arguments that could have been obviated had McKell

made the concession that was eventually made at the summary judgment hearing that the work McKell liened was all performed in 1997. *Id.* at pp. 8-12.;

4. Research time was not reflected separately in the application, but extensive research was included within the attorney's time spent drafting the partial summary judgment motion and supporting papers. Counsel was prepared at the hearing to address no fewer than 22 relevant cases. *Id.* at p. 10;

5. Additional attorney's time was spent objecting to McKell's proposed order that was not adopted by the district court. *Id.*

The district court considered the respective motion papers in favor of and opposing an award of attorneys' fees, including the Joint Affidavit of P. Bruce Badger and Douglas J. Payne In Support Of Motion For Award Of Attorneys' Fees, and heard argument of counsel. The district court further reviewed the record in this case including plaintiffs' Motion for Partial Summary Judgment and related papers which, according to the district court, presented complex issues relating to McKell's mechanic's lien. The district court further found that Holmes' and Coulter's counsel were experienced lawyers and that their hourly rates were justified based on their years in practice, their reputations, and the customary rates in the community, but that there was some duplication of effort and inefficiency. *See, Order Granting Motion For Award of Attorneys Fees, R. 426.* Based on these findings and the amount at issue and the result obtained, the court found that

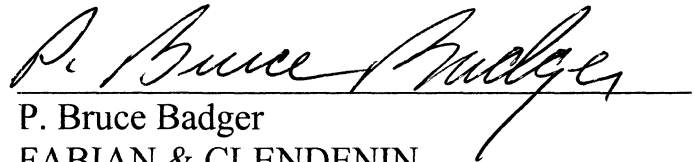
\$25,000 (not \$30,447.00 sought by Holmes and Coulter) was a reasonable attorney's fee. *Id.*

The district court was fully apprised. There was no abuse of discretion and the award should stand.

CONCLUSION

For the reasons set forth, all orders entered by the district court should be affirmed.

DATED this 28th day of April 2004.

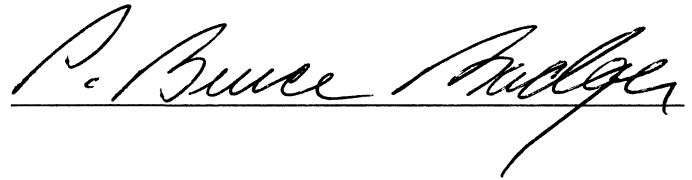
A handwritten signature in cursive script, reading "P. Bruce Badger", is written over a horizontal line.

P. Bruce Badger
FABIAN & CLENDENIN
a Professional corporation
Attorneys for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of April, 2004, I caused to be deposited in the United States Mail, postage prepaid, two (2) true and correct copies of **BRIEF OF APPELLEES** to the following counsel of record:

Jack W. Reed, (4651)
James L. Warlaumont (3386)
Mark S. Middlemas (9252)
PETERSON REED & WARLAUMONT, L.L.C.
800 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111

A handwritten signature in black ink, reading "P. Bruce Bridger", is written over a horizontal line.

Tab A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:

HUSTING LAND & DEVELOPMENT, INC.
Tax I.D. No. 87-0521289

Reorganized Debtor.

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Bankruptcy Case Number
97-20309 JAB

Chapter 11

MEMORANDUM DECISION AND ORDER

Steven F. Allred of Steven F. Allred, P.C., Orem, Utah, and Duane H. Gillman of McDowell & Gillman, P.C., Salt Lake City, Utah, for R. A. McKell Excavating, Inc., Applicant.

R. Kimball Mosier of Parsons Davies Kinghorn & Peters, Salt Lake City, Utah, for Wayne F. Elggren, Chapter 11 Trustee.

Adam S. Affleck of Jones, Waldo, Holbrook & McDonough, Salt Lake City, Utah, for the Webb Family Trust.

Daniel E. Garrison and Michael R. Johnson of Snell & Wilmer, Salt Lake City, Utah, for Construct Tech, Inc.

This is a contested matter arising from the application for allowance of administrative expense filed by R.A. McKell Excavating, Inc. (RAM) in the Chapter 11 case of Husting Land & Development, Inc. (Husting). The issue presented is whether or not the administrative expense claim of RAM is allowable as a post-petition debt incurred in the ordinary course of business

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pursuant to 11 U.S.C. § 364(a).¹ During a two-day evidentiary hearing, RAM presented evidence in support of its argument that the debt owed to it for infrastructure improvements made to Husting's real estate development was incurred in the ordinary course of business. In so doing, RAM offered, and the Court excluded, certain expert testimony on the basis that the failure to prove the reliability of the expert's methodology precluded the Court from considering his opinion as to whether the debt was incurred in the ordinary course of business. Upon careful consideration of the remaining evidence, the pleadings and arguments, and upon an independent analysis of applicable law, the Court concludes that, applying the creditor expectations/vertical dimension test, the debt incurred by Husting was not in the ordinary course of its business and, accordingly, RAM's claim cannot be allowed as an administrative expense of the estate under § 503(b)(1).

FACTS

Husting was incorporated in 1994 for the purpose of developing a sixty-one acre, three-phase, sixty-nine lot residential subdivision in Draper, Utah, commonly known as Galena Hills. The purchase price of the real estate, which was in excess of \$1,075,000, was subordinated by the seller to a \$1,500,000 development loan. In connection with the development of the Galena Hills project, Husting was required by Draper City and the Salt Lake County Sewer Improvement District to post cash escrow bonds (the Escrow Accounts) in the aggregate amount of approximately \$612,000 to ensure payment to all persons supplying labor, services,

¹ All future references are to Title 11 of the United States Code unless otherwise noted.

equipment, or material to the Galena Hills project. Husting could obtain incremental release of funds in the Escrow Accounts to pay for improvements once the municipalities had approved the installation of various phases of the infrastructure.

Adjacent to Galena Hills was another subdivision development project, Parkway Estates, owned by John Holmes Construction, Inc. and Holmes Mesa Construction, Inc. (Holmes Mesa). Because Galena Hills required access through the Parkway Estates property, and Galena Hills and Parkway Estates shared common areas and roadways, it was necessary to install certain improvements and utilities that would benefit both subdivisions. Thus, Husting and Holmes Mesa entered into an Adjoining Subdivisions Agreement in which Husting agreed to complete certain improvements on Parkway Estates, and Holmes Mesa agreed to reimburse Husting on a pro rata basis for its construction expenses. The Adjoining Subdivisions Agreement provided that reimbursement funds would not be paid to Husting until twenty-four months after final inspection and approval of construction by various municipalities, and then only if certain other conditions were met.

In February 1996, Husting entered into a Development Agreement with Construct Tech, in which Construct Tech agreed to provide excavation and construction services for the Galena Hills project, including storm drains, sewer, curb and gutter, sidewalk and street improvements. Construction on Galena Hills and the adjoining Parkway Estates subdivision was to begin in April of 1996. However, Construct Tech did not actually break ground on the project until June of that year. From its inception, the relationship between Husting and Construct Tech was

fraught with problems and disagreements. Husting's sole shareholder and president, Leon Harward (Harward), provided uncontroverted testimony that Construct Tech's work was incomplete, substandard and defective. Ultimately, in November of 1996, Hustings terminated its contract with Construct Tech.

As a result of difficulties encountered with Construct Tech, the Galena Hills project was seriously behind schedule and Husting was unable to meet payment obligations on its construction financing. On January 14, 1997, Husting, as debtor-in-possession, filed its voluntary petition for relief under Chapter 11. At the time of its Chapter 11 filing, Husting's intention for reorganization was to complete necessary subdivision improvements to Galena Hills and then sell the improved lots to pay secured and unsecured creditors.

In February 1997, Harward and Rick McKell (McKell), President of RAM, visited the Galena Hills site to assess the work necessary to correct defects in the excavation and construction work and complete the project. At the site, McKell observed open trenches, pipelines that were not backfilled, lidless manholes and a number of other deficiencies. After further discussion between the parties, Harward invited RAM to bid on the project. RAM's bid proposal, for work on sewer, water, storm drain, irrigation and site work, totaled \$258,191.40. In April 1997, Husting and RAM entered into a post-petition agreement (Construction Agreement), whereby RAM agreed to correct the defective work performed pre-petition by Construct Tech and to complete the remaining work on Phase II of the Galena Hills and Parkway Estates projects on a time and materials basis. The Construction Agreement provides as follows:

2. Contract Sum: The owner shall pay the Contractor in current funds for the Contractor's performance of the Contract, subject to additions and deductions as provided for herein, as follows:
 - A. During the process of correcting the other contractor's work to meet City and Sewer District requirements, R.A. McKell Excavation will invoice on a time and materials basis. Once deficiencies have been corrected progress can then proceed at agreed to unit price basis.
3. Progress Payments:
 - B. Based upon application for payment submitted to the Owner by the Contractor, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided herein. The period for payment shall be bi-weekly or as determined by the contractor but at no time will the billing period be less than bi-weekly. Owner agrees to make prompt application for payment from the escrow accounts presently established for the purpose of providing funds to pay the Contract Sum. . .

RAM Exhibit 11, Construction Agreement at ¶¶ 2 and 3.

Prior to entering into the Construction Agreement, RAM was aware that Husting had filed for relief under Chapter 11 and understood that the only present sources of payment for its work was the approximate \$612,000 in the Escrow Accounts established pursuant to the bonds with Draper City and the Salt Lake County Sewer District. However, Harward also led McKell to believe that other sources of payment existed, included the Adjoining Subdivisions Agreement, and funds from Castle Homes, L.L.C., a third-party investor that purportedly intended to purchase and build homes on the lots once the underground and surface improvements had been completed by RAM,² and to otherwise invest in Husting in some

² Harward's representations to McKell regarding Castle Homes' investment in the Galena Hills project was presumably based on the fact that Castle Homes had tendered earnest money to Husting for the purchase (continued .)

fashion.³ Hustung did not obtain Court approval for incurring post-petition unsecured debt under the terms of the Construction Agreement

Shortly after RAM began working on the Galena Hills and Parkway Estates projects, it became apparent that neither McKell nor Hustung had realized the scope of corrective work that would have to be done. Indeed, rather than simply correcting Construct Tech's deficiencies, most of the culinary and sanitary water lines and systems previously installed had to be completely removed and replaced. As a result, the invoices RAM submitted to Hustung over the next several months on a time and materials basis exceeded his original bid proposal and the amounts held in the Escrow Accounts. Finally, in November of 1997, RAM ceased performing under the Construction Agreement because Hustung and/or third parties had failed to pay past-due invoices and because further payment or funding from the Escrow Accounts, the Adjoining Subdivisions Agreement and third-party investors appeared unlikely to materialize in the near future. In the seven months between May and November of 1997, RAM invoiced \$969,633.08 to Hustung for materials and labor supplied for performing corrective work and making improvements to the Galena Hills and Parkway Estates projects. During the same period,

²(...continued)

of 36 lots. See RAM Exhibit 42. By letter dated January 29, 1997, Michael D. Alvey of Castle Homes informed Hustung of its "intent to honor purchase and lot take down agreement as represented by our earnest money." See RAM Exhibit 27

³ Amendments to Hustung's Statement of Affairs indicate that effective June 17, 1997, Harward's equity interest in Hustung was purchased by Castle Homes and Pro Built Co., and that Michael D. Alvey had become Hustung's president. No other evidence was presented that clarified how Castle Homes was to infuse funds into Hustung, and no § 364 motion related to Castle Homes was filed

Husting paid RAM \$371,640.57 with funds obtained through partial release of funds in the Escrow Accounts.

In April 1998, three months after the Trustee was appointed in the Husting Chapter 11 case upon Husting's own motion, RAM filed a Motion for Allowance of Administrative Expense (Motion) in which it claimed \$648,444.77 in principal and interest as of January 15, 1998. The Trustee and various creditors objected to RAM's Motion. Hearing on the Motion was continued several times at RAM's request. In the interim, a plan of reorganization proposed by the Trustee was confirmed under which the Court retained jurisdiction to resolve the issues raised in the Motion. An evidentiary hearing on the Motion was held and, after the close of RAM's evidence, the Trustee moved for a judgment on partial findings pursuant to Fed. R. Bankr. P. 7052(c) on the grounds that RAM had not met its initial burden of proving it was entitled to allowance of an administrative claim under § 364(a), whereupon the Court took the matter under advisement. As of September 1, 2000, the date the evidentiary hearing began, RAM asserts that its administrative expense claim totaled \$874,820.85 in principal and interest.

ISSUE

The parties agree that the primary issue is whether or not Husting's debt to RAM was incurred in the "ordinary course of business" under § 364(a), such that court approval was not required for the administrative claim to be allowed and paid under the confirmed plan.

DISCUSSION

A. Jurisdiction

This Court has jurisdiction over the parties and subject matter of this contested matter under 28 U.S.C. § 1334, Article XIV of the Plan of Reorganization Proposed by Trustee, and ¶ 16 of the Order Confirming Plan of Reorganization Proposed by Trustee. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B), and the Court has authority to enter a final order. Venue is proper in the Central Division of the District of Utah under 28 U.S.C. § 1409.

B. Burden of Proof

The party claiming entitlement to administrative expense priority has the burden of proof. *In re Amerex*, 853 F.2d 1526, 1530 (10th Cir. 1988); *In re Robinson*, 225 B.R. 228, 230 (Bankr. N.D. Okla. 1998). In order to fall within the ambit of § 503(b)(1), RAM must demonstrate that the post-petition unsecured credit extended to Husting was extended, and the debt was incurred, in the ordinary course of Husting's business.

C. Analysis of "Ordinary Course" under Section 364(a)

The ability of a trustee or a debtor-in-possession to incur unsecured debt allowed as an administrative expense under § 503(b)(1) is governed by §§ 364(a) and (b) of the Code. Under § 364(a), an unsecured debt incurred post-petition is allowable as an administrative expense only if incurred in the ordinary course of a debtor's business. Otherwise, § 364(b) requires court authorization after notice and a hearing in order for the debt to obtain treatment as an administrative expense. If the debt was not incurred in the ordinary course of business, or the court does not enter an order approving the post-petition debt incurred outside the ordinary

course of the debtor's business, then the creditor to whom the unsecured debt is owed must stand in line with all other prepetition unsecured creditors. *See Martino v. First National Bank in Harvey (Matter of Garofalo's Finer Foods, Inc.)*, 186 B.R. 414, 423 (N.D. Ill.1995).

While neither the Bankruptcy Code nor legislative history defines the phrase "ordinary course of business" as used in § 364(a), the language is presumably designed to give the debtor-in-possession or trustee operating the debtor's business the freedom to obtain unsecured credit and incur unsecured debt in the routine and normal course of business without the requirement of obtaining court approval after notice and a hearing. Indeed, "if a debtor had to seek court approval to pay for every expense incurred during the normal course of its affairs, the debtor would be in court more than in business." *Bagus v. Clark (In re Buyer's Club Markets, Inc.)* 5 F.3d 455, 458 (10th Cir. 1993). Thus, through a synthesis of case law, courts have developed a workable analytical framework for determining whether an activity is within the debtor's "ordinary course of business." *Committee v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986), *rev'd on other grounds*, 801 F.2d 60 (2nd Cir. 1986). The resulting legal standard has evolved into two identifiable tests. In *Armstrong World Industries v. James A. Phillips, Inc. (In re James A. Phillips, Inc.)*, 29 B.R. 391 (S.D.N.Y. 1983), the district court set forth what has become known as the "creditor expectation" test:

The touchstone of 'ordinariness' is . . . the interested parties' reasonable expectations of what transactions the debtor in possession is likely to enter in the course of its business. So long as the transactions conducted are consistent with these expectations, creditors have no right to notice and hearing, because their objections are likely to relate to the bankrupt's chapter 11 status, not the particular transactions themselves.

Id. at 394. *Accord In re Century Brass Prod.*, 107 B.R. 8, 11-12 (Bankr. D. Conn. 1989). The creditor expectation test “examines the debtor’s transactions from the vantage point of a hypothetical creditor and inquires whether the transaction subjects a creditor to economic risks of a different nature from those he accepted when he decided to extend credit.” *Johns-Manville*, 60 B.R. at 616. An element of the creditor expectation test, reformulated as the vertical dimension test, is that a creditor would not expect the debtor to be engaged in transactions that, by their “size, nature, or both are not with the day-to-day operations of a business and are therefore extraordinary.” *Waterfront*, 56 B.R. at 35 (reformulating the creditor expectation test as the vertical dimension test); *see also Buyer’s Club Markets*, F.3d at 458 (when debtor undertakes policy that transcends day-to-day affairs to the potential detriment of creditors, creditors are entitled to prior notice and opportunity to be heard); *Johns-Manville*, 60 B.R. at 617; *Northern Bank v. Metropolitan Cosmetic and Reconstructive Surgical Clinic, P.A. et al. (In re Metropolitan Cosmetic and Reconstructive Surgical Clinic, P.A.)*, 115 B.R. 185, 188 (Bankr. D. Minn. 1990) (“A good case can be made for the proposition that ordinary course includes only those payments of ordinary day-to-day operating expenses that, while necessary, are relatively insignificant”).

Under the “ordinary course” scenario described in the creditor expectation test, a creditor is well aware that the Code permits the debtor-in-possession to incur expenses in its normal business operations, and would therefore not expect to be given notice and an opportunity to be heard. If, on the other hand, the transaction is one that might be considered unusual,

controversial or questionable for the debtor to undertake during its Chapter 11 case, a creditor would expect to be notified and provided an opportunity to object. See *In re Media Central, Inc.*, 115 B.R. 119, 124 (Bankr. E.D. Tenn. 1990). Moreover, “[e]ven if the debtor-in-possession believes its contemplated action would be beneficial to the estate, and even if it later turns out the transaction was beneficial to the estate, if [it] is not in the ordinary course of business, creditors still have the right to notice and hearing before the transaction is entered into.” *Id.*

A second dimension of the “ordinary course of business” test is to compare the debtor's business with like businesses to determine whether the disputed transaction is ordinary for the particular type of business concerned. Under this approach, known as the “horizontal dimension test,” the court must:

[C]ompare this debtor's business to other businesses and based on the kind of business it is in, . . . decide whether a type of transaction is in the course of that debtor's business or in the course of some other business. Thus raising a crop would not be the ordinary course of business for a widget manufacturer because that is not a widget manufacturer's ordinary business.

Johnston v. First Street Cos (In re Waterfront Cos.), 56 B.R. 31, 35 (Bankr. D. Minn. 1985)

(rejecting the argument that anything, including an open-ended indemnity agreement which facilitated the debtor's real estate development business, would be in the ordinary course of business); see also *Burlington N.R.R. Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.)*, 853 F.2d 700 (9th Cir. 1988); *Johns-Manville*, 60 B.R. at 618.

Many courts have applied both tests. See e.g. *Media Central*, 115 B.R. at 124; *Dant & Russell*, 853 F.2d at 704 (describing and applying both the horizontal and vertical dimension analysis); *Johns-Manville*, 60 B.R. at 616-18 (same). However, the horizontal dimension test

has been criticized on statutory construction grounds as applicable only to the objective standard in the ordinary course of business defense to preference liability under § 547(c)(2)(C), as redundant of the creditor expectation test, and as difficult to apply. *Garofalo*, 186 B.R. at 428-30; accord *Rajala v. Langer (In re Lodge America)*, 239 B.R. 580, 585 (Bankr. D. Kan. 1999) (horizontal dimension test of ordinary course of business does not apply to § 364(a)). While *Garofalo's* criticism of the horizontal dimension test based upon the omission from § 364(a) of the "made according to ordinary business terms" language that is contained in § 547(c)(2)(C) may be challenged,⁴ its criticism based upon the redundant nature of the test and its difficulty of application is correct. A reasonable hypothetical creditor would not expect a debtor to incur debt inconsistent with the actions of similar businesses if, indeed similar businesses can be defined. This Court concludes, therefore, that the appropriate legal standard to apply in determining whether Husting's debt owed to RAM was incurred in the ordinary course of business is the creditor expectation/vertical dimension test.

⁴ *Garofalo's* statutory construction criticism of the horizontal dimension test is based on the fact that an "ordinary course" defense to preference liability requires that a transfer be "made according to ordinary business terms." § 547(c)(2)(C). This language requires an "objective standard to be shown by the custom in the industry in which the transferee and the debtor are engaged." *Garofalo*, 186 B.R. at 429. The court in *Garofalo* reasons that the horizontal dimension test is essentially the same as the "objective" standard in § 547(c)(2)(C) and, if Congress had wanted this standard applied to § 364(a), it "could have required that post-petition credit be obtained within the ordinary course of business terms; however, it chose not to do so." *Id.*

The difficulty with this analysis is that to constitute an "ordinary course" defense under § 547(c)(2), all three prongs of the § 547(c)(2) test must be met for a transfer to be deemed to fall within the meaning of "ordinary course of business." *Garofalo's* exclusion of a test that reflects "ordinary business terms" from the meaning of "ordinary course of business" in § 364(a) is no more correct than concluding that ordinary course in § 364(a) means only the subjective test of the transactions between the "debtor and transferee." § 547(c)(2)(B).

D. Application of the “Ordinary Course” Test to the Facts of this Case

RAM argues that, as a real estate development company, it was ordinary for Husting to incur debt to construct the infrastructure at Galena Hills because all developers must construct storm drains, sewer, curb and gutter, sidewalk and street improvements. The work performed by RAM was of the same nature and scope as any contractor would perform on a similarly-sized project and, RAM argues, the Construction Agreement, invoices, fees charged and services performed are similar to other such projects. Further, RAM produced evidence that all the work for which RAM billed Husting was ultimately approved by the appropriate municipal authorities. Thus, according to RAM, the debt incurred by Husting on account of work done by RAM falls squarely within the ordinary course of business. The Court disagrees.

The evidence is uncontroverted that real estate developers install infrastructure such as that constructed by RAM on projects similar to Galena Hills, and that RAM’s work was of sufficient quality to gain municipal approval. Also uncontroverted is the evidence that it was necessary to repair, or remove and replace, significant portions of Construct Tech’s work.

However, RAM attempted to prove its entitlement to administrative expense status by qualifying a real estate developer, Terry Diehl (Diehl), as an expert witness to opine that the debt owed to RAM was incurred by Husting in the ordinary course of its business. Diehl qualified as an expert pursuant to Fed. R. Evid. 702 through his substantial real estate development experience. The Court, however, in keeping with its gatekeeping responsibility, concludes that

RAM failed to establish by a preponderance of the evidence, *Bourjaily v. United States*, 483 U.S. 171 (1987), that Diehl's opinion regarding whether RAM's claim was incurred in the ordinary course of business was admissible because his methodology could not be proved under the test set forth in *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (ruling that the factors outlined in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) apply not only to scientific testimony, but to all expert testimony).⁵ The objective of the *Daubert* gatekeeping requirement is to "ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152. *See also Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1166 (10th Cir. 2000) (reviewing application of some of the factors listed in *Daubert* to a determination of market value). The *Daubert* reliability factors include, but are not limited to, whether a theory can or has been tested, whether it has been subjected to peer review, whether there are any known error rates, whether any standards or controls exist, and whether there is general acceptance of the theory in the scientific community. *Daubert*, 509 U.S. at 593-94.⁶ Some of these non-exclusive factors may be inapplicable to non-

⁵ An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) ("[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique.").

⁶ Recent amendments to Fed.R.Evid. 702 add the following language to the rule:

(continued...)

scientific testimony, or an expert witness relying solely or primarily on experience. However, under these circumstances, "the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Advisory Committee Notes, Amendments to Fed. R. Evid. 702 (effective December 1, 2000). The expert's testimony should also be grounded in an accepted body of learning or experience in the expert's field. *See, e.g., American College of Trial Lawyers, Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert*, 157 F.R.D. 571, 579 (1994)("[W] hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.").

Diehl, as a professional and competent real estate developer, is certainly capable of making experience-based observations about his industry in non-opinion form, and the Court allowed his testimony describing the practices in the real estate development business. *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, (10th Cir. 2000) (allowing that portion of expert's testimony that defined damages, but excluding quantification testimony because it did not meet reliability

⁶(...continued)

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, *if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*

Amendments to Fed. R. Evid. 702 (effective December 1, 2000)(emphasis added).

test). However, under *Daubert* and *Kuhmo*, he cannot qualify as an expert competent to testify about what constitutes the “ordinary course of business” for the purpose of evaluating an administrative claim in a Chapter 11 case. No evidence was presented that Diehl had any familiarity with either the creditor expectation/vertical dimension test or the horizontal dimension test courts employ to determine ordinary course, and therefore his opinion testimony was not focused on facts that would tend to prove whether either test was met. Moreover, even if his methodology had been reliable and his opinion regarding whether RAM’s debt was incurred in the ordinary course of business had been admitted, it would have spoken only to the horizontal dimension test for ordinary course of business, which the Court declines to employ for the reasons set forth above.⁷

Consideration of the remainder of the admissible evidence leads to a conclusion that under the creditor expectation or vertical dimension test, there are a number of circumstances in this case that would place the Husting/RAM transactions outside the ordinary course of business.

⁷ Even assuming, *arguendo*, that Diehl had focused his attention on the correct set of facts, his description of his methodology supports a conclusion that it was unreliable. Diehl testified that he arrived at his conclusion regarding whether RAM’s debt was incurred in the ordinary course of Husting’s business using the following methodology: He reviewed RAM’s invoices and compared the unit costs in relation to what Diehl customarily paid for similar goods and services, and he also compared the quantities used, finding they did not exceed the quantities customary for similar projects in the industry. Diehl reviewed RAM’s bid proposal and analyzed the Construction Agreement and found both similar to cost basis contracts he had seen previously, although he indicated that a cost basis contract was unusual as was a bi-monthly billing period. No evidence was presented that Diehl, or anyone else, had ever used such methodology before at arriving at an ordinary course determination, or that this method could or had been tested by anyone else, or that it enjoyed widespread acceptance. It was apparent that the methodology was developed solely for the purpose of this trial. *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (one factor is whether an expert is testifying about matters growing naturally from research they have conducted independent of the litigation, or whether it has been developed expressly for the purposes of testifying). At best, Diehl’s methodology was a subjective comparison of the Contract Agreement, invoices and fees charged in Husting with similar contracts and fees charged to his own company.

First, although the unsecured debt incurred by Husting is ordinary in the sense that developers almost always have to incur construction debt, the transaction in this case, in which nearly one million dollars of debt was incurred, represents a major event in the development process for Husting and is the single most significant transaction to have taken place in the case during the time that Husting was a debtor in possession. Moreover, entering into an all-encompassing development contract is something that should only happen once in the development process – it is neither routine nor ordinary in the sense of normal day-to-day operations. *See Waterfront*, 56 BR. at 35 (“Some transactions, either by their size, nature or both, are not within the day-to-day operations of a business and are therefore extraordinary.”).

Second, even if the magnitude and significance of RAM’s transaction with Husting did not, by itself, take the transaction outside the “ordinary course,” the fact that RAM was not hired solely to develop Husting’s property, but also to correct defective work done by another contractor, compels such a conclusion. At best, it is ordinary and foreseeable to creditors that a developer will contract once to improve raw ground. However, it is neither ordinary nor foreseeable that a developer will contract twice for development and be required to pay the second contractor to tear out and correct the defective work of the first before adding value to the project.

Third, the debt incurred on account of work done by RAM fails to qualify as “ordinary course” because a substantial part of RAM’s work was performed on property owned by Holmes Mesa to satisfy Husting’s obligations under the pre-petition Adjoining Subdivisions Agreement.

The Adjoining Subdivisions Agreement was entered into in 1996, and when Husting filed bankruptcy on January 14, 1997, the contract may have been executory (in that the development work had not been completed and what work had been performed by Construct Tech was defective) or it may have been breached and terminated for lack of performance. A reasonable hypothetical creditor would not expect that a real estate developer would enter into a construction contract without resolution of the legal obligations in the underlying contract. The “ordinary course” exception to obtaining court authority does not vitiate the requirement for court-approval of the assumption of executory contracts, nor does it allow the debtor-in-possession to incur post-petition debt to resolve or satisfy a pre-petition obligation. *See generally Cohen v. K.G. Financial Serve., Inc., (In re Miller Mining, Inc.)*, 219 BR. 219, 223 (Bank. N.D. Ohio 1998) (opining that hypothetical creditor would expect to get notice before a pre-petition claim of \$17,753.67 was paid; therefore, the transaction failed to meet “reasonable expectation” test and could not be within the “ordinary course”).

Fourth, at the time Husting and McKell entered into the Construction Agreement, neither had a clear understanding of what corrective work needed to be done. The Construction Agreement was a time and materials contract and, upon RAM’s cessation of work, the costs had substantially exceeded RAM’s original bid. An open-ended contract for an unknown amount of work is not a transaction that creditors would ordinarily expect to be entered into by a developer.

Finally, and perhaps most importantly, it is not ordinary for a real estate developer to enter into a contract without a source to pay the amount incurred. In effect, the Construction

Agreement was an open-ended arrangement between Husting and RAM in which the parties agreed that RAM would do whatever was necessary to correct deficiencies and complete the project, and Husting would, if necessary, pay RAM's invoices from speculative non-debtor sources if funds in the Escrow Accounts were exhausted. The Adjoining Subdivisions Agreement was not a viable source of funding because, by its terms, reimbursement would not occur for up to twenty-four months after final inspection and approval of construction by various municipalities, and then only if certain other conditions were met. The funding from Castle Homes was undefined, but apparently consisted of Castle Homes, as Husting's equity interest holder, purchasing lots from its related entity, the debtor. Castle Homes was also to contribute funds, in some other undisclosed manner, to pay RAM's claim. Reasonable creditors would not expect that a developer would incur close to one million dollars in debt without a more certain source of funds to repay that debt. As such, the transaction was extraordinary in both scope and nature. It is precisely the type of arrangement of which creditors would expect to be given notice to afford them an opportunity to object.

Because this case was submitted for a judgment on partial findings, the Court would be remiss if it did not consider whether there was an equitable reason why RAM's administrative claim should be allowed. No one in this case doubts that RAM performed professional and high quality work under the Construction Agreement. However, approval of RAM's claim in spite of the above ruling would be tantamount to retroactive notice and approval, which cannot be given unless the Court is confident that the debt would have been authorized if a timely application had

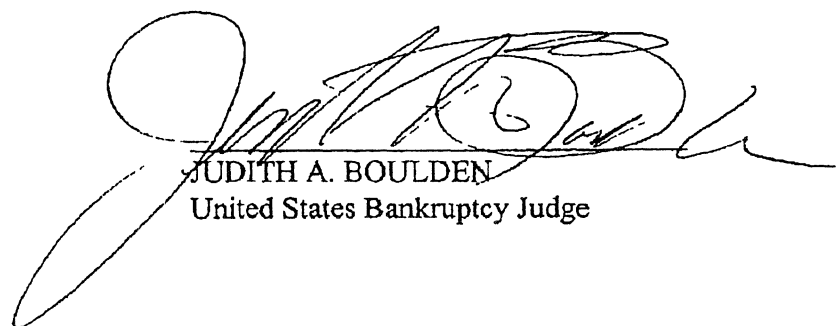
been made. *In re American Cooler Co.*, 125 F.2d 496, 497 (2nd Cir.1942); *In re Massetti*, 95 B.R. 360 (Bankr. E.D.Penn. 1989). For the reasons set forth above, it is highly unlikely that approval for Husting to incur the debt to RAM would have been given under the terms and conditions of the Construction Agreement. Nor has RAM been able to provide any reasons why approval was not sought in the first instance, given its knowledge that Husting was in a Chapter 11 proceeding at the time the contract was executed. *See In re Land*, 943 F.2d 1265, 1265 (10th Cir. 1991) (reflecting that *nunc pro tunc* approval is only appropriate in the most extraordinary circumstances, and is not justified by simple neglect).

CONCLUSION

For the foregoing reasons, the Court hereby finds that RAM has failed to carry its burden of proving that the debt incurred by Husting in favor of RAM was within the ordinary course of Husting's business as contemplated under § 364(a). Therefore, it is hereby

ORDERED, that the Trustee's motion for judgment on partial findings is granted and RAM's Motion for Allowance of Administrative Expense is denied.

DATED this 22nd day of November, 2000.



JUDITH A. BOULDEN
United States Bankruptcy Judge

___0000000___

I certify that I mailed a true and correct copy of the foregoing **Memorandum Decision and Order** to the following, postage prepaid, by United States mail on the 22nd day of November, 2000.

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Law Clerk to Hon. Judith A. Boulden

Tab B

CONSTRUCTION AGREEMENT

THIS CONSTRUCTION AGREEMENT entered into this 3rd day of April, 1997, by and between HUSTING LAND & DEVELOPMENT, 12004 South Bear Hills Drive, Draper, Utah ("Owner") and R.A. McKELL EXCAVATION, 947 East 80 North, P.O. Box 312, Orem, Utah 84059 ("Contractor") is made with reference to the following facts:

1. Owner is the owner and developer of a residential subdivision known as Galena Hills Subdivision located in Draper City, Utah (the "Project").
2. Owner has previously contracted with Constructech for the construction of subdivision and utility improvements for the Project. Owner has terminated its contract with Constructech.
3. Owner and Contractor desire to enter into an agreement under the terms of which the subdivision and utility improvement for the Project can be completed.

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

4. The Work: The Contractor shall execute the entire Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of other, or as follows:

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations hereunder.

2. Contract Sum: The Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract, subject to additions and deductions as provided for herein, as follows:

A. During the process of correcting other contractor's work to meet City and Sewer District requirements, R.A. McKell Excavation will invoice on a time and materials basis. Once deficiencies have been corrected progress can then proceed at agreed to unit price basis.

3. Progress Payments:

B. Based upon applications for payment submitted to the Owner by the Contractor, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided herein. The period covered by each application for payment shall be bi-weekly or as determined by the contractor but at no time will the billing period be less than bi-weekly. Owner agrees to make prompt application for payment from the escrow accounts presently established for the purpose of providing funds to pay the Contract Sum. These escrow accounts are held by West One Bank. All checks issued by the bank shall be two party ie: R.A. McKell Excavation/Husting Land & Development.

C. Payments due and unpaid under this Agreement shall bear interest from the date of payment at the rate of 14 per cent per annum until paid in full.

1. Final Payment: Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when the

Work has been substantially completed. All checks issued by the bank shall be two party ie: R.A. McKell Excavation/Husting Land & Development.

5. Contract Documents: The Contract Documents consist of this Agreement, drawings, specifications, addenda issued prior to the execution of this Agreement, other documents set forth below and modifications issued after execution of this Agreement. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complimentary, and what is required by one shall be as binding as if required by all; performance of the Contractor shall be required only to the extent consistent with the Contract Documents. Additional Contract Documents are:
6. Permits and Surveys: The Owner shall furnish surveys and a legal description of the site of the Project. The Owner shall secure and pay for the necessary approvals, easements, permits, assessments and charges required for the construction, use or occupancy of the Project.
7. Contractor's Obligations:
 - D. The Contractor shall supervise and direct the Work, using the Contractor's best skills and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work.
 - E. Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the

proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

F. Unless otherwise provided in the Contract Documents, the Contractor shall pay sales, use or other similar taxes which are legally enacted and applicable to the Work.

G. The Contractor shall review, approve and submit to the Owner or the Owner's representative, shop drawings, product data, samples and similar submittals required by the Contract Documents with reasonable promptness. The Work shall be in accordance with approved submittals.

8. Changes in the Work: The Owner may order changes in the Work consisting of additions, deletions or modifications, the Contract Sum and Contract Time being adjusted accordingly. The cost or credit to the Owner from a change in the Work shall be determined by mutual agreement. The Contractor shall not be required to undertake the change in the Work unless and until a written change order agreement is executed by both parties.

9. Time: If the Contractor is delayed at any time in progress of the Work by changes ordered in the Work, by labor disputes, unusual delay in deliveries, abnormal adverse weather conditions not reasonably anticipated, unavoidable casualties or any causes beyond the Contractor's control, then the Contract Time shall be extended by change order for such reasonable time as the parties may determine.

10. Insurance:

H. The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the State of Utah, insurance for protection from claims under workers' or workman's compensation acts or other employee benefit acts which

are applicable, claims for damages because of bodily injury, including death, and from claims for damages, other than to the Work itself, to property which may arise out of or result from the Contractor's operations under this Agreement.

- I. The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance. Optionally, the Owner may purchase and maintain other insurance for self protection against claims which may arise from operations under the Contract. The Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the State of Utah, property insurance upon the entire Work at the site to the full insurable value thereof. This insurance shall be on an all-risk policy form and shall include interests of the Owner, the Contractor and any subcontractors and shall insure against perils of fire and extended coverage and physical loss or damage including, without duplication of coverage, theft, vandalism and malicious mischief.
11. Correction of Work: The Contractor shall promptly correct Work failing to conform to the requirements of the Contract Documents and shall correct any Work found to be not in accordance with the requirements of the Contract Documents within a period of one year from the date of Substantial Completion. This warranty shall not extend to any of the Work that is already in place on the Property as of the date of the execution of this Agreement.
12. Termination of Contract: If the Owner fails to make payment upon an Application for Payment submitted in accordance with the Agreement for a period of 30 days from the date of submission of the Application for Payment, the Contractor may, upon 3 days additional written notice to the Owner, terminate this Agreement and recover from the Owner payment for the Work executed and for proven losses with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages applicable to the Project.

13. Miscellaneous Provisions:

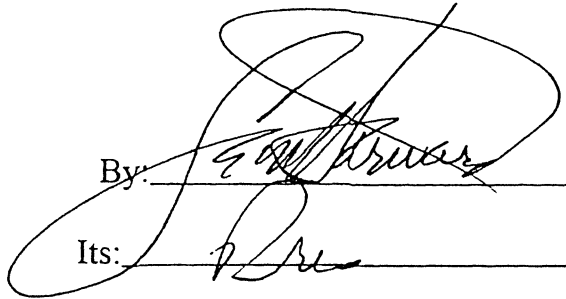
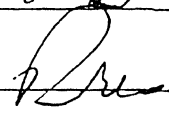
J. In the event of default, the defaulting party agrees to pay all costs of enforcing this Agreement, or any right arising out of a breach thereof, including a reasonable attorney's fee.

K. This Agreement shall be governed by the laws of the State of Utah.

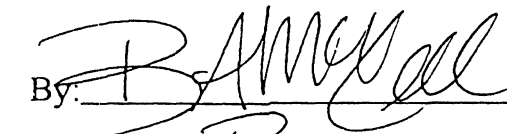
IN WITNESS WHEREOF, the parties have caused their duly authorized agents to execute this Agreement the date first above written.

OWNER:

HUSTING LAND & DEVELOPMENT

By:  _____
Its:  _____

R.A. McKELL EXCAVATING, INC.

By:  _____
Its: Pres. 4-3-97

EQUIPMENT RATES - GALENA HILLS

<u>EQUIPMENT</u>	<u>AMOUNT</u>
220 TRACKHOE	\$125.00
200 TRACKHOE	\$110.00
150 TRACKHOE	\$85.00
953 LOADER	\$110.00
544 LOADER	\$95.00
L90 LOADER	\$125.00
D65 DOZER	\$140.00
D5 DOZER	\$125.00
140H GRADER	\$100.00
SCRAPER	\$140.00
C142 COMPACTOR	\$60.00
WATER TRUCK	\$65.00
SUPERVISOR	\$35.00
PIPE LAYER	\$25.00
LABORER	\$22.00

Tab C

Douglas J. Payne, A4113
P. Bruce Badger, A4791
FABIAN & CLENDENIN,
A Professional Corporation
Twelfth Floor
215 South State Street
P.O. Box 510210
Salt Lake City, Utah 84151
Telephone: (801) 531-8900

Attorneys for Plaintiffs

IN THE THIRD DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

JOHN HOLMES CONSTRUCTION, INC.,
a Utah Corporation, and COULTER &
SMITH, LTD., a Nevada Corporation,

Plaintiffs,

vs.

R.A. MCKELL EXCAVATING, INC., a
Utah Corporation, RICK MCKELL, an
individual,

Defendants.

AFFIDAVIT OF DAVID GEORGE

Case No. 000909210

Judge William J. Bohling

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

David George, having been duly sworn, deposes and says:

1. I state the following facts upon my own knowledge and if called upon to testify
would be competent to do so.

2. In late 1992 or early 1993 I began my employment with Holmes & Roberts, Inc., as the office manager of the company. Holmes & Roberts, Inc., contracts with, among others, John Holmes Construction, Inc. ("Holmes") to provide all necessary supervisory functions in the development of residential property, including the construction and sale of homes.

3. I am personally familiar with the property that the Plaintiffs refer to in the above-entitled lawsuit as the "Holmes Property" located at approximately 600 West and 12300 South, Draper, Utah, and the "Roadway" which is a dedicated street that Holmes and Mesa Development, Inc. ("Mesa") deeded to Draper City so that Husting Land & Development ("Husting") would have access to its adjoining property.

4. I am also personally familiar with the *Adjoining Subdivisions Agreement*, dated on or about March 8, 1996, between Holmes, Mesa and Husting, in which Husting agreed to arrange for construction of the Roadway, including the placement of sewer and water lines under the dedicated street.

5. At no time did Holmes authorize the work that R.A. McKell Excavating, Inc. ("McKell") performed under its April 3, 1997 Construction Agreement with Husting as the Adjoining Subdivisions Agreement required.

6. At no time did Holmes or anyone with authority to act on its behalf authorize or approve McKell as a contractor as the Adjoining Subdivisions Agreement required.

7. Although I visited the Holmes Property during the period November 1997 to September 1999, I did not observe that McKell had performed any construction work of any kind on either the Roadway or the Holmes Property during this period.

8. Holmes did not hire McKell, it did not approve McKell to do work on the Holmes Property, it did not offer or agree to pay McKell, and it did not request any construction services whatsoever from McKell.

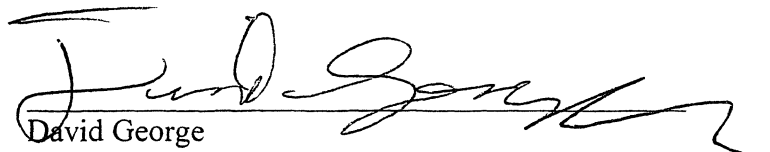
9. During the time McKell claims in its Notice of Claim of Lien to have initiated its work and the time that McKell filed its Notice of Claim of Lien, McKell never made any request for payment to Holmes.

10. On or about August 1, 2000, Holmes and Coulter sold the Holmes Property to Draper City as undeveloped land.

11. The sale of the Holmes Property contained several conditions in light of McKell's lien and required Homes and Coulter to set aside a portion of the sales proceeds to be held in escrow until McKell's lien is removed from the Holmes Property. The sale also provided that as between Draper City and Holmes and Coulter, Holmes and Coulter would bear financial responsibility for McKell's lien.

Further affiant sayeth not.

DATED this 14 day of May, 2002.


David George

SUBSCRIBED AND SWORN TO before me this 16th day of May, 2002.


Notary Public



CERTIFICATE OF SERVICE

On the 20th day of May, 2002, I hereby certify that I caused to be served a true and correct copy of the foregoing **AFFIDAVIT OF DAVID GEORGE** by depositing said document in the United States mail, postage prepaid, addressed as follows:

Jack W. Reed
Jerald V. Hale
PETERSON REED L.L.C.
321 Boston Building
9 Exchange Place
Salt Lake City, UT 84111

Annette E. Clark

Douglas J. Payne, A4113
P. Bruce Badger, A4791
FABIAN & CLENDENIN,
A Professional Corporation
Twelfth Floor
215 South State Street
P.O. Box 510210
Salt Lake City, Utah 84151
Telephone: (801) 531-8900

Attorneys for Plaintiffs

IN THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

JOHN HOLMES CONSTRUCTION, INC.,
a Utah Corporation, and COULTER &
SMITH, LTD., a Nevada Corporation,

Plaintiffs,

vs.

R.A. MCKELL EXCAVATING, INC., a
Utah Corporation, RICK MCKELL, an
individual,

Defendants.

AFFIDAVIT OF NATHAN COULTER

Case No. 000909210

Judge William J. Bohling

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

Nathan Coulter, having been duly sworn, deposes and says:

1. I state the following facts upon my own knowledge and if called upon to testify
would be competent to do so.

2. I am the president of Coulter & Smith, Ltd., a Nevada corporation ("Coulter and Smith"). I am also the president of Mesa Development, Inc., a Utah corporation ("Mesa").

3. I am personally familiar with the property that the Plaintiffs refer to in the above-entitled lawsuit as the "Holmes Property" located at approximately 600 West and 12300 South, Draper, Utah, and the "Roadway" which is a dedicated street that John Holmes Construction, Inc. and Mesa deeded to Draper City so that Husting Land & Development ("Husting") would have access to its adjoining property.

4. Coulter and Smith is the successor-in-interest to Mesa with respect to its ownership of the Holmes Property.

5. I am also personally familiar with the *Adjoining Subdivisions Agreement*, dated on or about March 8, 1996, between Holmes, Mesa and Husting, in which Husting agreed to arrange for construction of the Roadway, including the placement of sewer and water lines under the dedicated street.

6. At no time did Mesa or Coulter and Smith authorize the work that R.A. McKell Excavating, Inc. ("McKell") performed under its April 3, 1997 Construction Agreement with Husting as the Adjoining Subdivisions Agreement required.

7. At no time did Mesa or Coulter and Smith authorize or approve McKell as a contractor as the Adjoining Subdivisions Agreement required.

8. Although I visited the Holmes Property during the period November 1997 to September 1999, I have no knowledge that McKell performed any construction work of any kind on either the Roadway or the Holmes Property during this period.

9. Mesa and Coulter and Smith did not hire McKell to do work on the Holmes Property, they did not approve McKell to do work on the Holmes Property, they did not offer or agree to pay McKell and they did not request any construction services whatsoever from McKell.

10. During the time McKell claims in its Notice of Claim of Lien to have initiated its work and the time that McKell filed its Notice of Claim of Lien, McKell never made any request for payment to Mesa or Coulter and Smith.

11. On or about August 1, 2000, Holmes and Coulter and Smith sold the Holmes Property to Draper City as undeveloped land.

12. The sale of the Holmes Property contained several conditions in light of McKell's lien and required Holmes and Coulter and Smith to set aside a portion of the sales proceeds to be held in escrow until McKell's lien is removed from the Holmes Property. The sale also provided that as between Draper City and Holmes and Coulter and Smith, Holmes and Coulter and Smith would bear financial responsibility for McKell's lien.

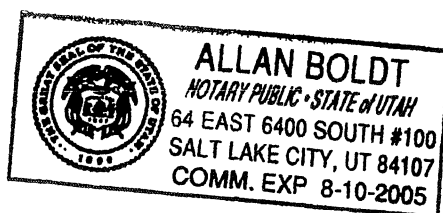
Further affiant sayeth not.

DATED this 30 day of April, 2002.

Nathan Coulter
Nathan Coulter

SUBSCRIBED AND SWORN TO before me this 30 day of April, 2002.

Allan Boldt
Notary Public



CERTIFICATE OF SERVICE

On the 22nd day of May, 2002, I hereby certify that I caused to be served a true and correct copy of the foregoing **AFFIDAVIT OF NATHAN COULTER** by depositing said document in the United States mail, postage prepaid, addressed as follows:

Jack W. Reed
Jerald V. Hale
PETERSON REED L.L.C.
321 Boston Building
9 Exchange Place
Salt Lake City, UT 84111

Annette E. Clark

Tab D

Steven F. Allred (Bar No. 5437)
LAW OFFICE OF STEVEN F. ALLRED, P.C.
Attorney for R.A. McKell Excavating
584 South State Street
Orem, UT 84058
Telephone: (801) 431-0718

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

In re)	Bankruptcy No. 97B-20309
)	
)	Chapter 11
HUSTING LAND & DEVELOPMENT,)	
INC.,)	AFFIDAVIT OF R.A. MCKELL
)	
Debtor.)	
)	

STATE OF UTAH)
 :ss
COUNTY OF UTAH)

RICK A. MCKELL, being first duly sworn upon his oath states
and deposes as follows:

1. I am of age and am competent to testify in a court of
law if necessary.

2. I am and have been the President, principal, and
majority shareholder in R.A. McKell Excavating, Inc.,
(hereinafter "McKell") a Utah corporation since its incorporation
in January, 1994.

3. McKell is a licensed general engineering contractor.

4. As president of McKell, my duties and responsibilities

include oversight over all bidding and actual excavation work of the company, including billing, accounting and record keeping.

5. About January, 1997, I was contacted by Leon Harward, (hereinafter "Harward") President of Husting Land and Development, Inc. (hereinafter "Husting"). Harward informed me that he was the owner/developer of a project known as Galena Hills located in Draper, Utah. (hereinafter "the Project")

6. Harward discussed with me the fact that the Project was in Chapter 11, and that the filing had been precipitated in part by the incompetence and delay of Construct Tech, (hereinafter "Tech.") an excavation contractor hired by Harward on the Project. Harward solicited a bid from me to remediate Tech's defective work and a price to complete the Project.

7. At Harward's invitation I met him at the Project to do a site inspection and to evaluate whether McKell wanted to be involved in the Project.

8. I discussed contract terms with Harward who informed me that the Project's funding sources were bonds with the Salt Lake County Sewerage Improvement District, (hereinafter "Salt Lake County") Draper City (hereinafter "Draper") and funds to be provided by John Holmes Construction, Inc. ("Holmes") and Mesa Development, Inc. ("Mesa")

9. I knew that Salt Lake County and Draper were bonded. I did not know that the parcel at the entrance of the Project

(hereinafter "the Parkway") was not bonded. However, Harward assured me that he had a binding written agreement with Holmes & Mesa to fund the improvements on the Parkway and that such funds were forthcoming from Holmes and Mesa.

10. My estimator (Ernie Thornton) and I prepared a "Bid Proposal" (hereinafter "Proposal") for the Project and a cover letter (hereinafter "Cover Letter") highlighting my concerns with correcting Tech's defective work and the manner in which the other work would be prosecuted. I personally hand delivered the Proposal and Cover Letter to Harward on or about February 4, 1997. Copies of the Proposal and Cover Letter are attached hereto as Exhibits "A" and "B."

11. Harward accepted my Proposal at a meeting in my office and McKell tentatively agreed to commence work on April 11, 1997.

12. McKell formally agreed to do the work on the Project by executing a Construction Agreement, (hereinafter "Agreement") a copy of which is attached as Exhibit "D" to McKell's Application.

13. McKell commenced work on the Project on April 11, 1997.

14. Pursuant to the Agreement, (Exhibit "D" to the Application) and a letter from Salt Lake County, (Exhibit "B" to the Application) McKell agreed to first remediate deficiencies in the sewer system before providing other services.

15. About July, 1997, I contacted Harward about payment of the balance owed McKell for services rendered on the Project. Harward informed me that he had contracted with Castle Homes to sell Husting's stock and that Castle Homes was taking over the Project and funds would be available to satisfy McKell's invoices.

16. On or about October 2, 1997, I personally met with Mike Alvey and Jerry Huish(hereinafter "Alvey" and "Huish") of Castle Homes. My secretary, Kathy Christiansen accompanied me. At that meeting Holmes & Mesa represented to us that the Project was going to be bought out and that Castle Homes would assume liability for payment of McKell's invoices, copies of which were given to and reviewed with Alvey.

17. McKell ceased work on the Project on November 4, 1997. Exhibit "C" attached hereto is an amended statement of all services completed during the construction period as of January 15, 1999.

18. Exhibit "C" is an amendment of Exhibit "A" attached to McKell's Application. (hereinafter "McKell's Original Statement") Invoice No. 11897, a copy of which is attached hereto as Exhibit "D" hereto was inadvertently left off of the Original Statement attached to McKell's Application because it had been paid in full on July 18, 1997, Check No. 027406437.

19. A statement of all amounts paid to and received by

McKell is attached hereto as Exhibit "E." According to Exhibit "E" hereto, McKell has been paid \$371,388.83

20. Attached hereto as Exhibit "F" is a copy of an amended statement showing principal, interest, check dates and numbers as of October 1, 1999.

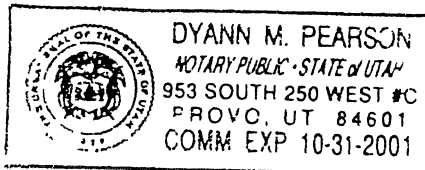
21. Exhibit "F" was prepared because McKell's Original Statement (Exhibit "A" to the Application") computed interest accrual at the rate of 17% as proposed by the Trustee when the Trustee and McKell negotiated a tentative agreement that McKell would complete the Project subject to bankruptcy court approval.

22. As of October 1, 1999, McKell is owed the principal amount of \$597,992.51 plus interest accrued at the contractual rate of 14% in the amount of \$169,027.62 for a total claim of \$767,020.13

DATED this 1st day of September, 1999.


R.A. McKell

SUBSCRIBED AND SWORN to before me this 1 of September, 1999.




Notary Public

DISTRICT COURT
02 JUN -5 PM 1:41
CLERK'S DEPARTMENT
BY _____

Jack W. Reed, Utah Bar No. 4651
Jerald V. Hale, Utah Bar No. 8466
PETERSON REED L.L.C.
321 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111
Telephone No. (801) 364-4040
Facsimile No. (801) 364-4060

Attorneys for R.A. McKell Excavating, Inc. and Rick McKell

IN THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

JOHN HOLMES CONSTRUCTION,
INC., a Utah corporation, and COULTER
& SMITH, LTD., a Nevada corporation,

Plaintiffs,

v.

R.A. MCKELL EXCAVATING, INC , a
Utah corporation, RICK MCKELL, an
individual,

Defendants.

**SECOND AFFIDAVIT OF
RICK MCKELL**

Civil No. 000909210

Judge William J. Bohling

STATE OF UTAH)
 :SS
COUNTY OF SALT LAKE)

I, Rick McKell, being sworn state I have personal knowledge of the facts set forth
in this Affidavit and if called as a witness in this matter I would and could competently
testify as set forth in this Affidavit.

1. I am the president of R.A. McKell Excavating, Inc.
2. On or about April 3, 1997, R.A. McKell Excavating, Inc. entered into a Construction Agreement with Husting Land Development, who was operating as debtor in possession having filed a Chapter 11 Bankruptcy case in January 1997. The agreement required McKell Excavating to repair the defective work of a prior contractor, Construct Tech, and then to install water, sewer, storm sewer, utilities, roads, and curb and gutter for the Galena Hills subdivision and Parkway Estates subdivision. Husting told me it had entered into an Adjoining Subdivisions Agreement with Homes Mesa which provided a mechanism for payment of work which McKell Excavating furnished to the Parkway Estates property.
3. After starting the work, I met with Nathan Coulter at least twice. The purpose of the meeting was for Coulter to indicate the location of water and sewer laterals on Parkway Estates' lots accessed by Galen Park Boulevard, and to make sure McKell Excavating stubbed in sewer and water mains to future streets in Parkway Estates. Coulter also asked for a bid to complete a cul-de-sac off Galena Park Boulevard and to complete a subsequent phase of Parkway Estates. McKell Excavating installed the water and sewer lines off Galena Park Boulevard and installed the sewer and water mains for future streets in Parkway Estates. All of this work was inspected and accepted by the Salt Lake County Sewer Improvement District and Draper City.
4. Ultimately, McKell Excavating was partially paid by the release of funds

from escrow accounts established pursuant to improvement bonds with Draper City and, the Salt Lake County Sewer District. McKell Excavating invoiced Husting a total of \$969,633.08 for work performed between May and November 1997. After application of the escrow funds, a balance of \$648,444.77 remained. The value of McKell Excavating's labor, material, and services furnished to the Parkway Estates property, and which remains unpaid, is \$132,824.18.

5. To the best of my knowledge, information and belief, Homes Mesa never reimbursed Husting for the improvements McKell Excavating furnished to the Parkway Estates property.

6. Thereafter, McKell Excavating worked aggressively with the bankruptcy court appointed trustee, F. Wayne Elggren, to complete the improvements for the project including the work required to be done on the Parkway Estates property. By February 1999, McKell Excavating had reached a tentative agreement with the Trustee, EaglePointe and Galena Hills under which the improvement would go forward and McKell would be paid. Unfortunately, some of Husting's creditors objected to the plan, and it was not approved by the bankruptcy court.

7. By September 3, 1999, the bankruptcy court had entered its Order Approving Post Petition Financing, in which EaglePointe on behalf of the trustee, agreed to complete phases, I, II, and III of the Galena Hills subdivision as well as additional improvements required under the Adjoining Subdivision's Agreement, including completing the improvements on the Parkway Estates property.

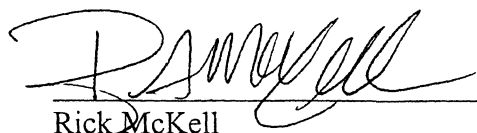
8. On September 20, 1999, McKell Excavating and EaglePointe entered into an contract in which McKell Excavating agreed to complete the improvements previously begun under the Construction Agreement with Husting.

9. McKell Excavating completed work for Phases I, II, of Galena Hills, as well as the related improvements to the Parkway Estate's property. Individuals have purchased lots in Galena Hills, and construction of numerous homes is underway.

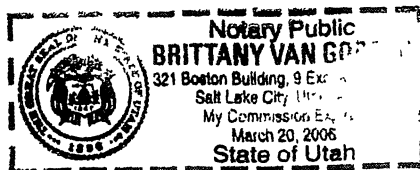
10. By June, 2002, McKell Excavating received authorization from EaglePointe to begin working on Phase III of Galena Hills. Until this work is completed, the work originally anticipated to be completed under the agreement with Husting will not be finally completed.

11. McKell Excavating's work performed on behalf of the trustee through EaglePointe is substantially the same as the work McKell Excavating agreed to perform under the Construction Agreement with Husting.

DATED this 5 day of June, 2002.


Rick McKell

SUBSCRIBED AND SWORN TO before me this 5th day of June, 2002.

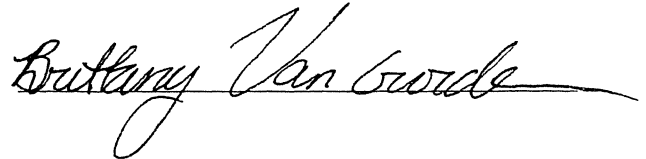



NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on this 5 day of June, 2002, I caused a true and correct copy of the foregoing SECOND AFFIDAVIT OF RICK MCKELL to be hand delivered to the following:

Douglas J. Payne
Fabian & Clendenin
215 South State Street, Suite 1200
Salt Lake City, Utah 84151

A handwritten signature in cursive script, reading "Brittany Van Gorder", written over a horizontal line.

Tab E

WHEN RECORDED RETURN TO:

R.A. McKell Excavating, Inc.
Rick McKell
P.O. Box 312
Orem, Utah 84059
(801) 225-7662

7654861
06/07/2000 01:37 PM 14.00
NANCY WORKMAN
RECORDER, SALT LAKE COUNTY, UTAH
INTERMOUNTAIN C.N.S. LLC
1314 S 500 E
PO BOX 6065
SLC UT 84152-6065
BY: RDJ, DEPUTY - WI 2 P.

NOTICE OF CLAIM OF LIEN
"Mechanic's Lien/Preliminary claim against Bond"

NOTICE IS HEREBY GIVEN by INTERMOUNTAIN C.N.S., L.L.C., the undersigned acting as the duly authorized limited agent of R.A. McKell EXCAVATING, INC., "Lien claimant". Said agent hereby gives notice of the intention of said claimant to hold and claim a mechanic's lien and right of claim against bond, by virtue and in accordance with the provisions of Sections 38-1-3 et. seq., and 14-2-1 et. seq. Utah Code Annotated 1953, as amended. That said lien is against the property and improvements thereon owned or reputed to be owned by JOHN HOLMES CONSTRUCTION, INC., etal. Said improvements are located at approximately 12400 South 550 West, Draper City, Salt Lake County, Utah.

Legal Description

Parcel #27-25-351-017, 024, 27-25-376-002

See Exhibit "A", being attached and made a part hereof.

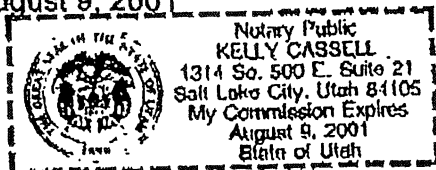
The lien claimant was employed by and did provide contracting services, labor, materials and equipment (street improvements and underground utilities) for the benefit and improvement of said real property at the request of HUSTINGS LAND AND DEVELOPMENT, INC., whose address is 12004 South Bear Hills Drive, Draper, Utah 84020. That first said services, labor or materials were provided on June 30, 1997 and last provided on January 26, 2000. That there is due and owing to said claimant the sum of One Hundred and Thirty-Two Thousand Eight Hundred and Twenty-Four dollars and Eighteen cents (\$132,824.18), together with interest, costs of \$125.00 and attorney fees, if applicable; all for which the lien claimant holds and claims this lien.

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

INTERMOUNTAIN C.N.S., L.L.C.
Limited agent for the lien claimant.
BY: Anthony L. Scarborough
Anthony L. Scarborough

On June 6, 2000, personally appeared before me Anthony L. Scarborough, manager of INTERMOUNTAIN C.N.S., L.L.C., the Company that executed the above and foregoing instrument as limited agent for the lien claimant, and that said instrument was signed in behalf of said Company and that said Anthony L. Scarborough acknowledged to me that said Company executed the same. IN WITNESS HEREOF, I have herein set my hand and affixed my seal.

My Commission Expires:
August 9, 2001



Kelly Cassell
Notary Public, residing in
Salt Lake City, UT

Order #06-037-B

INTERMOUNTAIN C.N.S., L.L.C., P.O. BOX 6065, S.L.C., UT 84152-6065
(801) 488-6672

BK8366PG6121

193

Exhibit "A"

Parkway Estates Phase 1
550 West 12400 South
Draper, Utah

Legal Description

Parcel #27-25-351-017, 024 & 27-25-376-002

PARCEL I

-014

Beginning 1542 feet west feet Southeast Corner Southwest Quarter Section 25, Township 3 South, Range 1 West, Salt Lake Base and Meridian; West 262.6 feet; North 1°51' West 1576 feet; East 262.6 feet; South 1°51' East 1576 feet to beginning except beginning North 89°49'08" East 848.632 feet and North 1°59'58" West 1312.247 feet from Southwest Corner Section 25, Township 3 South, Range 1 West, Salt Lake Base and Meridian; North 89°50'32" East 184.133 feet; North 4°32'39" West 125.563 feet; North 1°59'58" West 94.308 feet; North 47°54'20" West 20.98 feet; North 89°59'20" West 163.496 feet; South 1°59'58" East 234.163 feet to beginning less street 5.79 acres more or less.

PARCEL II

-024

Beginning West 1279.40 feet from Southeast corner of Southwest Quarter Section 25, Township 3 South, Range 1 West, Salt Lake Base and Meridian; West 262.6 feet; North 1°51' West 1245 feet; East 262.60 feet; South 1°51' East 1245.03 feet to beginning. 7.50 acres.

PARCEL III

Beginning North 89°49'08" East 1373.82 feet from Southwest corner section 25, Township 3 South, Range 1 West, Salt Lake Base and Meridian; North 1°59'58" West 1245.71 feet; North 89°50'57" East 5.36 feet; North 1°52'02" West 138.9 feet; South 89°59'20" East 191.72 feet; South 1°51'23" East 1383.87 feet; South 89°49'08" West 50.02 feet; South 1°51'23" East 390.21 feet; South 51°21'45" West 1443.42 feet; South 20°02'25" East 86.63 feet; South 51°33'35" West 543.03 feet; South 0°14'35" East 263.24 feet; North 20°10'52" West 35.19 feet; North 0°14'35" West 235.99 feet; North 51°33'35" East 212.97 feet; North 19°45' West 83.36 feet; Northeasterly along a 50 foot radius curve to L 20.14 feet; South 19°45' East 76.59 feet; North 51°33'35" East 306.12 feet; North 20°02'51" West 86.6 feet; North 51°21'45" East 1379.66 feet North 0°51' West 161.77 feet; North 79°26'02" West 154.53 feet; Northerly along a 50 foot radius curve to L 12.03 feet; South 79°26'02" East 151.89 feet; North 0°51' West 251.78 feet; South 89°49'08" West 78.76 feet to beginning. 7.46 acres.

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