

2008

General Construction & Development, INC ET AL; v. Peterson Plumbing Supply : Brief of Appellee

Utah Supreme Court

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Recommended Citation

Brief of Appellee, *General Construction & Development, INC ET AL; v. Peterson Plumbing Supply*, No. 20080998.00 (Utah Supreme Court, 2008).

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IN THE UTAH SUPREME COURT

GENERAL CONSTRUCTION &
DEVELOPMENT, INC. ET AL.;

Petitioners and Appellees,

vs.

PETERSON PLUMBING SUPPLY;

Respondent and Appellant.

Appellate Case No. 20080998-SC

BRIEF OF APPELLEES

APPEAL FROM THE DECISION AND ORDER
OF THE HONORABLE SAMUEL D. MCVEY OF THE FOURTH JUDICIAL
DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH

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FILED
UTAH APPELLATE COURTS
APR 05 2010

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PARTIES TO THE PROCEEDINGS

Pursuant to Rule 24(a)(1) of the Utah Rules of Appellate Procedure, the following is a complete list of all parties to the proceedings below that are involved in this Appeal:

General Construction & Development, Inc., Petitioner below, Appellee

Brandon D. Wilson, Petitioner below, Appellee

Justin A. Hutchins, Petitioner below, Appellee

Shanon Hutchins, Petitioner below, Appellee

Blake Walker, Petitioner below, Appellee

Brackus Luke Ray, Petitioner below, Appellee

Mary L. Doyle, Petitioner below, Appellee

Cliff Stradling, Petitioner below, Appellee

Lisa Stradling, Petitioner below, Appellee

James Harvey, Petitioner below, Appellee

Wendi Harvey, Petitioner below, Appellee

Julie Gray, Petitioner below, Appellee

Scott E. Wilson, Petitioner below, Appellee

Brittany Wilson, Petitioner below, Appellee

Andrew W. Young, Petitioner below, Appellee

Krista W. Young, Petitioner below, Appellee

James Purcell, Petitioner below, Appellee

Margaret Purcell, Petitioner below, Appellee

Nicholas S. Bernard, Petitioner below, Appellee

Ryan J. Bernard, Petitioner below, Appellee

Donald R. Rogers, Petitioner below, Appellee

Wendy Rogers, Petitioner below, Appellee

Pleasant Grove Property, LLC, Petitioner below, Appellee

Andrew Rammell, Petitioner below, Appellee

Robert M. Berry, Petitioner below, Appellee

Lyle E. Petersen, Petitioner below, Appellee

Scott Goodman, Petitioner below, Appellee

William Tipton, Petitioner below, Appellee

Chelsey Tipton, Petitioner below, Appellee

Peterson Plumbing Supply, Respondents below, Appellant

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BRIEF OF APPELLEES

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction to review this matter pursuant to Utah Code §78A-3-102(3)(j). *See* Utah Code Ann. § 78A-3-102(3)(j) (2009).

CONTROLLING STATUTORY PROVISIONS

All controlling statutory provisions are set forth in the Addenda.

STATEMENT OF RELEVANT FACTS

Appellee General Construction & Development, Inc. (hereinafter GCD), developed and built Rockwell Condominiums in Pleasant Grove City, Utah, and is also the owner of several of the condominium units in question (R. 72). GCD contracted with Lonnie Pace of Pace Plumbing to do the plumbing work for Rockwell Condominiums

and Pace Plumbing performed the plumbing work on each of the condominium units in question (R. 70).

Unbeknownst to GDC, Pace Plumbing sub-contracted with Appellant Peterson Plumbing Supply to provide materials to the units (R. 70). GCD paid Pace Plumbing in full for all the work and materials that were provided (R. 70). GCD required Pace Plumbing to sign a Conditional Waiver and Release of Claims where Pace released any lien rights it had and warranted that all subcontractors and material men had been paid in full (R. 69). GCD believed that Pace Plumbing had paid all material men in full (R. 67). However, Pace Plumbing failed to pay Peterson Plumbing Supply for the materials they provided (R. 66-67). GCD was not aware that Peterson Plumbing Supply had not been paid or that they had even provided materials (R. 66-67). Peterson Plumbing did not provide materials or labor to the buildings after December 17, 2008 because the certificates of occupancy were issued between October 11, 2007 and December 17, 2007 (R. 4-49).

On July 1, 2008 Peterson Plumbing Supply filed its first mechanics' lien notices on Building X of Rockwell Condominiums (R. 69, 19-13). Then on August 6, 2008 and August 21, 2008 Peterson Plumbing Supply filed the remaining mechanics' lien notices (R. 66-69, 4-49). Each one of these mechanics' lien notices was filed more than 180 days after the final completion of the original contract as established by the certificates of occupancy (R. 93-94, 22-320).

Shortly after becoming aware of the first mechanics' liens that had been recorded on building X, GCD called the Lien Recovery Fund to inquire if they could have the

mechanics' liens removed because GCD had a written contract and had paid the contract in full (R. 151). GCD learned that they did not qualify for the Lien Recovery Fund because the buildings were fourplexes and sixplexes and only single family residences or duplexes qualified (R. 151). *See* Utah Code Ann. § 38-11-102. While speaking with the Lien Recovery Fund GCD discovered that a notice of completion could be filed with the State Construction Registry to reduce the time period for filing a mechanics' lien notice (R. 104-105, 151). On July 29, 2008 and August 8, 2008 GCD voluntarily filed notices of completion on all the properties so that the State Construction Registry would know that the buildings were finished (R. 104-105, 151). The notices of completion were filed after the mechanics' liens were recorded on Building X and Building N but before the mechanics' liens were recorded on the remaining buildings (R. 69, 291).

Peterson Plumbing Supply filed a total of twenty-two (22) mechanics' lien notices against Rockwell Condominiums that are related to this appeal (R. 66-69). Notably, Peterson Plumbing does not dispute that it provided false information on 20 of the 22 mechanics' lien notices regarding the date the last work or materials were provided (R. 66-69, 4-49). The last date materials were provided, as falsely claimed by Peterson Plumbing, was after the date the Certificate of Occupancy had been issued on the property and no work or materials were provided to the condominium units after the Certificate of Occupancy had been issued (R. 66-69, 4-49).

Peterson Plumbing never contacted GCD to inform them that they had not been paid by Pace Plumbing for the materials they provided (R. 1-2, 65-66). If fact, Peterson

Plumbing continued to supply materials to Pace Plumbing even though Pace Plumbing failed to pay Peterson Plumbing for over six months (R. 1-2, 65-66).

On August 13, 2008, after receiving notice of the mechanics' liens, GCD sent Peterson Plumbing a written request to remove the wrongful liens because they were filed in an untimely manner (R. 1-2). However, Peterson Plumbing refused to remove the liens (R. 1-2). After the written request to remove the mechanics' liens went unheeded, GCD filed a Petition to Nullify the mechanics' liens on September 17, 2008 (R. 1-73).

The remaining Appellees are the owners of individual condominium units located in Rockwell Condominiums (R. 70-72). When these homeowners purchased their homes, no mechanics' liens were recorded on the property (R. 102, 318, 317). In addition, when this case was filed, Appellees owned their homes for at least eight months to a year (R. 102, 318, 317). Appellees paid in full for their homes and did not owe any money to Peterson Plumbing or Pace Plumbing (R. 317).

SUMMARY OF ARGUMENT

Utah Code Ann. § 38-1-7 (2008) states that a mechanics' lien notice must be filed with 90 days of a notice of completion, if one is filed, or within 180 days of final completion of the original contract. The intent of a notice of completion is to shorten the time period for filing a mechanics' lien and not to extend that time period past the 180 day. Peterson Plumbing asserts that their mechanics' lien notices were filed timely, even though they were filed more than 180 days after the completion of the original contract, because they contend that the notices of completion filed by GCD resurrected their lien

rights. Peterson Plumbing's reading of the statute would make parts of the statute superfluous and make the statute virtually inoperable.

Peterson Plumbing further asserts that even if the mechanics' lien notices were recorded belatedly, they do not constitute a wrongful lien pursuant to Utah's Wrongful Lien Act because mechanics' liens are "expressly authorized" by statute. Further, Peterson Plumbing asserts that Peterson Plumbing supply was "entitled to a lien under Section 38-1-3" of Utah's Mechanics' Lien Act and therefore the lien cannot be wrongful by law. Utah case law is clear that if a lien is not timely filed, then the lien right perishes inchoate and all the rights and remedies under the mechanics lien statute are immediately extinguished. The failure to timely file a mechanics' lien is fatal and cannot be remedied. If a mechanics' lien notice is filed past the time period to file a lien, the notice of lien is invalid from the beginning because the lien right has already perished. If no lien rights exist at the time of filing the lien, the lien claimant cannot be "entitled to a lien" nor can the lien be filed "pursuant to Title 38, Chapter 1, Mechanics Liens". Because Peterson Plumbing clearly failed to timely file their mechanics' lien notices, the mechanics' lien notices were wrongful pursuant to the Wrongful Lien Act.

Ultimately, the trial court was correct in finding that Peterson Plumbing's mechanics' lien notices were untimely and therefore void ab initio. The trial court held that because Peterson Plumbing's lien rights had expired, Peterson Plumbing was not "entitled" to file a mechanics lien and therefore the liens were wrongful. For the reasons stated hereafter, the trial court's decision should be affirmed and Appellees should be awarded their attorneys fees pursuant to statute.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT PETERSON PLUMBING'S MECHANICS' LIEN NOTICES WERE UNTIMELY AND THEREFORE VOID AB INITIO.

The first issue before this Court is the interpretation of Utah Code Ann. § 38-1-7 (2008) which states in the pertinent part:

(1) (a) (i) Except as modified in Section 38-1-27, 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:

(A) **180 days after the day on which occurs final completion of the original contract if no notice of completion is filed under Section 38-1-33; or**
(B) **90 days after the day on which a notice of completion is filed under Section 38-1-33.**

Utah Code Ann. § 38-1-7(1)(a)(i) (2008) (emphasis added). The trial court correctly interpreted Utah Code Ann. § 38-1-7 (2008) when it held that the intent of the legislature was that a Notice of Completion could only shorten the time period from 180 days to 90 days to file a mechanics' lien notice and could not extend the time period past 180 days (R. 279, 108-109).

Peterson Plumbing asserts that the filing of a Notice of Completion, even if years or decades have passed since the 180 day deadline expired, would resurrect the lien rights and allow a lien claimant to file a mechanics' lien notice within the next 90 days after the Notice of Completion is filed¹. *See* Brief of Appellant pg. 11-14. This interpretation is

¹ The facts in this case are not in dispute but a clarification of the facts is necessary. Peterson Plumbing claims that it "filed a mechanics' lien notice within 90 days of the filing of a notice of completion" with respect to each condominium. *See* Brief of Appellant pg. 11. This is not correct. Peterson Plumbing actually filed mechanics' lien notices on the four units in Building N and the six units in Building X before a notice of

clearly erroneous and was not the intent of the legislature as evidenced by the statutory history of the Mechanics' Lien Statute and the Senate floor debates. Further, Peterson Plumbing's interpretation creates an absurd, unreasonable or inoperable result which would render portions of the statute superfluous.

A. The statutory history of Utah Code Ann. § 38-1-7 and the Senate floor debates show that the 2009 changes to Utah Code Ann. § 38-1-7 was a clarification and not a substantial change in the law.

Peterson Plumbing asserts that the language in Utah Code Ann. § 38-1-7 (2008) is not ambiguous and that a plain reading of the statute allows for a mechanics' lien to be filed after the 180 day deadline if a notice of completion is filed after that same 180 day deadline. *See* Brief of Appellant pg. 11-15. This argument is mistaken. A plain reading of the statute, without looking to the legislative history, reveals that the statute is ambiguous because it can conceivably be interpreted to mean: 1) that a filing of a notice of completion could extend the deadline past 180 days of completion, and 2) that a filing of a notice of completion cannot extend the deadline past 180 days. If the statutory language is ambiguous, the court may look beyond the statute to legislative history and public policy to ascertain the statute's intent. *See Utah Pub. Employees Ass'n v. State*, 2006 UT 9, ¶ 59, 131 P.3d 208.

The statutory history of the Utah Mechanics' Lien Act shows that the legislature did not intend for a Notice of Completion to allow an undeterminable amount of time to

completion had been filed with the State Construction Registry and not "within 90 days of the filing of a notice of completion". (R. 69, 291). It is not disputed that all of the mechanics' lien notices were filed more than 180 days after final completion of the original contract. *See* Brief of Appellant pg. 11.

file a mechanics' lien notice. Utah first enacted a mechanics' lien statute while a Territory even before it's admission to Statehood. *See Cast v. Cast*, 1 Utah 112, 121 (UT Terr. 1873). After Utah became a State the territorial statute was re-codified in 1898 as Mechanics' Lien Act Chapter 1 Title 39. *See Park City Meat Co. v. Comstock Silver Mining Co.*, 36 Utah 145, 103 P. 254, 258-259 (Utah 1909). The pertinent sections of the 1884, 1898, 1953, 2006, 2008 and 2009 versions of Utah Code Ann. § 38-1-7 are printed below.

The 1884 version states in the pertinent part:

Every original contractor, within sixty days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this Chapter, must within thirty days after the completion of any building...file for record with the county recorder of the county in which such property or some part thereof is situated, a claim...

Laws of the Territory of Utah, Title IV, Chapter I, Sec. 1062.

The 1898 version states in the pertinent part:

Every original contractor within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this chapter, must within forty days after furnishing the last material or performing the last labor for any building, improvement, or structure... file for record with the county recorder of the county in which the property or some part thereof is situated, a claim in writing containing a notice of intention to hold and claim a lien...

Section 1386, Chapter 1, Title 39 (Rev. St. 1898) also *see Eccles Lumber Co. v. Martin*, 31 Utah 241, 87 P. 713, 715-716 (Utah 1906).

The 1953 version states in the pertinent part:

Every original contractor within eighty days after the completion of his contract, and except as hereafter provided, every person other than the original contractor claiming the benefit of this chapter within sixty days after furnishing the last

material or performing the last labor for any land, building... must file for record with the county recorder of the county in which the property, or some party thereof, is situated a claim in writing, containing a notice of intention to hold and claim a lien....

Utah Code Ann. § 38-1-7 (1953).

The 2006 version states in the pertinent part:

(1) (a) (i) Except as modified in Section 38-1-27, 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 after the date of final completion of the original contract under which the claimant claims a lien under this chapter.

Utah Code Ann. § 38-1-7(1)(a)(i) (2006).

The 2008 version states in the pertinent part:

(1) (a) (i) Except as modified in Section 38-1-27, 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:

(A) 180 days after the day on which occurs final completion of the original contract if no notice of completion is filed under Section 38-1-33; or

(B) 90 days after the day on which a notice of completion is filed under Section 38-1-33.

Utah Code Ann. § 38-1-7(1)(a)(i) (2008).

The 2009 version states in the pertinent part:

(1) (a) (i) Except as modified in Section 38-1-27, 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 no later than:

(A) 180 days after the day on which occurs final completion of the original contract if no notice of completion is filed under Section 38-1-33; or

(B) 90 days after the day on which a notice of completion is filed under Section 38-1-33 but not later than the time frame established in Subsection (1)(a)(i)(A).

Utah Code Ann. § 38-1-7(1)(a)(i) (2009).

Every prior version of the Utah Mechanics' Lien Statute has had a specific and easily definable time period in which to file a mechanics' lien notice. No version had a time frame longer than 180 days to file a mechanics lien. The 2008 version was the first version that included a separate time frame to file a mechanics' lien notice if a notice of completion was filed. *See* Utah Code Ann. § 38-1-7(1)(a)(i) (2008).

Given this history, Peterson Plumbing's interpretation of this statute is a drastic departure from all prior and subsequent versions inasmuch as this is the only version, according to Peterson Plumbing, that has an infinite time period to file a mechanics' lien notice.

Appellees' Petition to Nullify the wrongful liens was heard before the District Court was on October 8, 2008, just before the 2009 amendment (R. 323). The trial court correctly interpreted Utah Code Ann. § 38-1-7 (2008) by holding that "the notice of completion statute is intended to allow someone to give notice to all of the suppliers and subcontractors and shorten the time from 180 days to 90 days to record a lien. So it's supposed to be issued within that 180-day period early on in order to shorten that. That's what the intent of that statute is, not to resurrect voided lien rights." (R. 279). That the trial court correctly interpreted the 2008 statute is shown by the legislature clarifying this statute in 2009, to make it read just as the trial court held. *See* Utah Code Ann. § 38-1-7 (2009).

However, Peterson Plumbing asserts that the "2009 amendment to Utah Code Annotated § 38-1-7 is a substantive change and not a mere clarification of the law". *See*

Brief of Appellant pg. 14. In support of this assertion, Peterson Plumbing cites to *Hutter v. Dig-It, Inc.*, 2009 UT 69, 219 P.3d 918. In *Hutter*, this Court stated:

While it is true that an amendment to an ambiguous statute may indicate a legislative purpose to clarify the ambiguities in the statute rather than to change the law, this is not the general rule, and this view of an amendment should be taken only where there is a strong indication that clarification was, in fact, the legislative intent.

Hutter, 2009 UT 69, ¶ 16 (internal quotations omitted).

In the *Hutter* case, however, this Court found that there was no specific evidence in that case that the legislature's intent was to clarify the statute. 2009 UT 69, ¶ 16.

Moreover, this is a general rule, subject to clear instances of legislative intent otherwise. *See Id.*

For example, in *State v. Bryant*, 965 P.2d 539 (Utah App. 1998), the Court of Appeals considered instances where a subsequent change to a statute was a clarification rather than a substantive change. In *Bryant*, the Court of Appeals stated:

[T]he propriety of the trial court's interpretation is confirmed by a subsequent amendment to section 76-5-405(1)(b). After the trial in this case, the Legislature rewrote the phrase, 'threatens the victim *by* use of a dangerous weapon,' to read, 'threatens the victim *with* use of a dangerous weapon.' An amendment which, in effect, construes and clarifies a prior statute will be accepted as the legislative declaration of the original act. Thus, when a statute is ambiguous, amendment of the statute may indicate a legislative purpose to clarify the ambiguities in the statute rather than to change the law. Such an amendment may intimate that the Legislature has become aware that the earlier language could be misconstrued as defendants have done."

Bryant, 965 P.2d at 546 (citations omitted and internal quotation marks omitted).

Like *Bryant*, and unlike *Hutter*, there exists direct and specific evidence in this case that a clarification was intended by the 2009 amendment and not a substantive

change of the law. This is supported not only by statutory history of the Mechanics' Lien Act as shown above, but also by the Senate Floor Debate regarding House Bill 154 that amended Utah Code Ann. § 38-1-7 (2008). Senator Jenkins stated in the floor debate,

On line 42, 90 days after the date of the notice completed, but no later than the, it's the 180 days that's on line 40. So it can be no later than the 180 days on line 40. So, it's just a clarification.²

When speaking specifically about the exact phrase that was interpreted by the trial Court, Senator Jenkins stated that it was a clarification and not a substantive change. This is very strong evidence that the legislature realized that Utah Code Ann. § 38-1-7(1)(a)(i) (2008) was ambiguous and could be misconstrued. Accordingly, the legislature decided to clarify the 2008 statute with the new amendment.

Taking into account the statutory history and the Senator Jenkins' statements regarding § 38-1-7, it is clear that the changes to the 2008 version was a clarification of what the legislature originally intended and not a substantive change in the law. Thus, the trial court's interpretation of Utah Code Ann. § 38-1-7 (2008) is supported by these facts and should be affirmed.

B. Peterson Plumbing's interpretation creates an absurd, unreasonable and inoperable result, rendering the 180 day time limit superfluous.

Where an interpretation "creates an absurd, unreasonable, or inoperable result, we assume the legislature did not intend that result [and] endeavor to discover the underlying legislative intent and interpret the statute accordingly." *See State v. Jeffries*, 2009 UT 57,

² Senate Floor Debate, H.B. 154, 58th Leg., Gen. Sess. (February 27, 2009) (statements of Senator Jenkins).

¶ 8, 217 P.3d 265. “One of the cardinal principles of statutory construction is that [we] will look to the reason, spirit, and sense of the legislation, as indicated by the entire context and subject matter of the statute dealing with the subject.” *In re Marriage of Gonzalez*, 2000 UT 28, ¶ 23, 1 P.3d 1074.

Under Peterson Plumbing’s interpretation of the statute, a mechanics’ lien notice could theoretically be filed years, decades or even centuries after the completion of the final contract and then resurrect the right to file a mechanics’ lien notice for an additional 90 days. *See* Brief of Appellant pg. 12. However, as shown above, the mechanics’ lien statute has always provided a definite and determinable time period to file a mechanics’ lien notice. However, Peterson Plumbing argues that the 2008 version does not have any determinable time frame in which a mechanics’ lien can be filed. This interpretation creates an absurd, unreasonable and inoperable result and this Court should assume that the legislature did not intend such a result.

The absurdity of this argument is demonstrated when you consider that there are numerous individuals and entities that can file a Notice of Completion with the State Construction Registry pursuant to Utah Code Ann. § 38-1-33. For example, an owner, original contractor, lender, surety or a title company all have the statutory authority to file a Notice of Completion. *See* Utah Code Ann. § 38-1-33(1)(a)(i). Thus, it is possible that any one of these individuals or entities could file a Notice of Completion long after the 180 day time limit, thus allowing (under Peterson Plumbing’s interpretation) all potential lien holders to resurrect their lien claims that had long since expired.

Hypothetically, an individual could build a home and then sell the home to another individual. That individual could pay in full for the home and sell it to another individual. Then 20 years later, or even longer, a bank, a title company or some other entity could file a notice of completion and all the potential lien claimants from many years ago, whose lien rights had long since expired, could now file a mechanics' lien notice on the home. Under Peterson Plumbing's interpretation, there would never be a determinable time frame to when a mechanics' lien right would expire.

This result is absurd and was surely not the intent of the legislature, especially considering that the mechanics' lien statute has always provided a determinable and set time frame limiting when a mechanics' lien could be filed. The legislature surely did not intend to create a situation where mechanics' liens could be filed indefinitely.

Given that statutes are to be interpreted to give meaning to all parts, and avoid rendering portions of the statute superfluous, Peterson Plumbing's interpretation of Utah Code Ann. § 38-1-7 (2008) is not correct since it renders portions of the statute superfluous. *See Labelle v. McKay Dee Hosp. Ctr.*, 2004 UT 15, ¶ 16, 89 P.3d 113. Utah Code Ann. § 38-1-7 (2008) states that a mechanics' lien notice must be filed within "180 days after the day on which occurs final completion of the original contract **if no notice of completion is filed under Section 38-1-33**". Utah Code Ann. § 38-1-7 (2008) (emphasis added). If Peterson Plumbing's interpretation were correct, there would be no reason to have the 180 day limitation language in the Statute. The legislature could have simply said that a mechanics' lien notice must be filed within 90 days after the filing of

the notice of completion. The 180 day language is rendered superfluous under Peterson Plumbing's interpretation.

Accordingly, the trial court correctly interpreted Utah Code Ann. § 38-1-7 (2008) by holding that the filing of a notice of completion could only shorten the time frame to file a mechanics' lien from 180 days to 90 days, but could not lengthen the time past the 180 days. Therefore, Peterson Plumbing's mechanics' lien notices were filed untimely and were void ab initio.

II. THE DISTRICT COURT CORRECTLY RULED THAT PETERSON PLUMBING'S MECHANICS' LIENS WERE WRONGFUL LIENS

Peterson Plumbing contends that their mechanics' lien notices were expressly authorized by statute and that they were entitled to a lien under Utah Code Ann § 38-1-3. *See* Brief of Appellant pg. 15-27. Peterson Plumbing's argument is mistaken and has failed to consider all portions of the relevant statutes. The trial court correctly ruled that Peterson Plumbing's mechanics' lien notices were not expressly authorized by statute and were therefore wrongful (R. 280-278).

A. Peterson Plumbing's mechanics' lien notices were not expressly authorized by statute.

Peterson Plumbing quotes extensively from the *Hutter v. Dig-It, Inc.*, 2009 UT 69, to support its assertion that its mechanics' lien notices were "expressly authorized by...statute," and therefore not wrongful liens. *See* Brief of Appellant pg. 16-19. The *Hutter* case did hold that Dig-It's mechanics' lien was "expressly authorized by statute" in that case and therefore not a wrongful lien. *Hutter*, 2009 UT 69, ¶ 52. However, this does not mean that any document created or filed purporting to be a mechanics' lien is

expressly authorized by statute. The *Hutter* case is distinguishable because it did not involve the vital element of timely filing a mechanics' lien notice.

The Court of Appeals addressed this specific issue when it stated, “The wrongful lien statute declares: This chapter does not apply to a person *entitled to a lien* under Section 38-1-3 who files a lien pursuant to Title 38, Chapter 1, Mechanics' Liens. Thus, **the statute is not so broad as to exempt any filing that purports to arise under the mechanics' lien statute.** Instead, *section 38-9-2(3)* only excludes persons ‘entitled’ to a mechanics' lien.” *Foothill Park, LC v. Judston, Inc.*, 2008 UT App. 113, ¶ 19, 182 P.3d 924 (internal quotations and citations omitted; emphasis added).

Furthermore, the Utah Wrongful Lien Act also provides that a wrongful lien is determined at the time it is recorded or filed. For example, Utah Code Ann. § 38-9-1(6) (2008) provides:

“Wrongful lien” means any document that purports to create a lien, notice of interest, or encumbrance on an owner's interest in certain real property and **at the time it is recorded or filed** is not: (a) expressly authorized by this chapter or another state or federal statute; (b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or (c) signed by or authorized pursuant to a document signed by the owner of the real property.

Utah Code Ann. § 38-9-1(6) (2008) (emphasis added).

In *Foothill*, the Court of Appeals further stated that whether a person is “entitled to a lien” is determined at the time the notice is filed. *Foothill Park, LC*, 2008 UT App. 113, ¶ 20. Peterson Plumbing concedes that the *Foothill* case holds that an untimely mechanics' lien is in fact a wrongful lien pursuant to the Wrongful Lien Statute. See Brief of Appellant pg. 20.

This Court recently interpreted Utah Code Ann. § 38-9-1(6) (2008) and stated:

This legislative history makes clear that the legislature intended that the definition of “wrongful lien” should encompass only common law liens. Therefore, we conclude that the phrase “not expressly authorized by ... statute” in the Wrongful Lien Act does not include statutorily created liens **that ultimately prove unenforceable**. Because Dig-It filed a mechanic's lien, which is expressly authorized by statute, the lien, though unenforceable for the reasons stated above, is not wrongful...

Hutter, 2009 UT 69, ¶ 52 (emphasis added). Upon first glance, the *Foothill* and *Hutter* cases seem to be incompatible. However, the cases are distinguishable.

In *Foothill*, the Court dealt with a timeliness issue. *Foothill Park, LC*, 2008 UT App. 113, ¶¶ 6-11. “Compliance with the statute is required before a party is entitled to the benefits created by the statute. If a party does not comply with the statutory deadline for enforcement, the lien right perishes inchoate and all of a party’s rights and remedies under the mechanics’ lien statute are extinguished.” *Foothill Park, LC v. Judston, Inc.*, 2008 UT App. 113, ¶6 (punctuation and citations omitted).

In *Hutter*, however, this Court dealt with a mechanics’ lien that was determined to be invalid because no preliminary notice was filed by the lien claimant; not a timelines of the filing of the mechanics’ lien notice. *Hutter*, 2009 UT 69, ¶ 2. This Court stated in *Hutter* that, “the Wrongful Lien Act does not include statutorily created liens **that ultimately prove unenforceable**.” *Id.* ¶52 (emphasis added). Therefore, pursuant to *Hutter*, an untimely mechanics’ lien is still a wrongful lien because there is no statutory right to file a belated mechanics’ lien.

The importance of the timeliness of filing a lien is demonstrated in two Utah Court of Appeals cases regarding the filing of a lis pendens. A lis pendens is a statutory created

lien that allows a party to record a lien on real property on an “action affecting the title to, or the right to possession of, real property.” Utah Code Ann. § 78B-6-1303. A lis pendens is a statutory lien and not a common law lien.

Even though a lis pendens is a statutory lien and specifically authorized in the Wrongful Lien Statute at Utah Code Ann. § 38-9-2(2) (2008), the Utah Court of Appeals has held that it still can be a wrongful lien pursuant to the Wrongful Lien Statute if it is not timely filed. In *Doug Jessop Const., Inc. v. Anderton*, 2008 UT APP 348, ¶ 19, 195 P.3d 493, the Court of Appeals held that a lis pendens was a wrongful lien because it preceded the filing of the counterclaim and was therefore not timely filed.

Also, in *Eldridge v. Farnsworth*, 2007 UT App 243, ¶¶ 46-50, 166 P.3d 639, the Court of Appeals again considered if an invalid lis pendens could be a wrongful lien. In *Farnsworth* the Court of Appeals stated that “Section 38-9-1 requires a court to determine whether a lien is wrongful by evaluating it ‘at the time it is recorded or filed’.” *Id.* ¶ 50. In *Farnsworth*, the lien was deemed to not be a wrongful lien because the lis pendens was filed timely and therefore expressly authorized by the statute.

These two lis pendens cases perfectly demonstrate the importance of a lien being timely filed. If a lien is not timely filed it can be a wrongful lien under the Wrongful Lien Statute. In the current case Peterson Plumbing did not timely file its notice of mechanics’ lien (R. 93-94, 320-22). The lien was filed more than 180 days after completion of the final contract (R. 93-94, 320-22). Therefore, at the time of the filing of the lien, Peterson Plumbing was not “expressly authorized by ...statute” to file the

mechanics lien notices. Accordingly, once the 180th day passed, Peterson Plumbing had no statutory right to file a lien, period. Thus, its lien notices were wrongful.

B. Peterson Plumbing was not entitled to a lien under Section 38-1-3.

Utah Code Ann. § 38-9-2(3) (2008) states, “This chapter does not apply to a person **entitled to a lien under Section 38-1-3 who files a lien pursuant to Title 38, Chapter 1, Mechanics’ Liens.**” (emphasis added). Peterson Plumbing asserts that the Court of Appeals in *Foothill* misinterpreted the above statute. *See* Brief of Appellant pg. 20. Peterson Plumbing claims that the Court of Appeals inappropriately “isolated the phrase ‘entitled to a lien’ from the phrase ‘entitled to a lien under section 38-1-3’”. *See* Brief of Appellant pg. 20. Peterson Plumbing then contends, “As a result, the Court of Appeals defined entitlement to a mechanics’ lien generally in the overall context of lien validity under the entire Mechanics’ Lien Act, including the filing provisions set forth in Utah Code § 38-1-7 and 38-1-11, rather than by reference to ‘section 38-1-3’.” *See* Brief of Appellant pg. 20-21. Peterson Plumbing then claims that the Court of Appeals interpretation renders the phrase “under section 38-1-3” superfluous and inoperative.

This argument is erroneous. The Court of Appeals decision in *Foothill* does not render the phrase “under section 38-1-3” superfluous and inoperative. In fact, it is Peterson Plumbing’s own interpretation that renders the remaining portion of Utah Code Ann. § 38-9-2(3) superfluous.

Peterson Plumbing completely ignores the remaining portion of Utah Code Ann. § 38-9-2(3) that states, “who files a lien pursuant to Title 38, Chapter 1 Mechanics’ Liens.” The statute has two prongs, the first of which requires the lien claimant to be “entitled to

a lien under section 38-1-3” and the second prong requires the lien claimant to file a lien “pursuant to Title 38, Chapter 1 Mechanics’ Liens.” Peterson plumbing does not consider the second prong of this statute. A lien must be timely filed to be filed “pursuant to Title 38, Chapter 1 Mechanics’ Liens.” *See Foothill Park, LC*, 2008 UT App. 113, ¶¶ 6-11. Since Peterson Plumbing’s mechanics’ lien notices were not filed pursuant to Title 38, Chapter 1 Mechanics’ Liens, they are not exempt from the wrongful lien statute.

Peterson Plumbing further asserts that the proper interpretation “leads to a three-prong test for determining whether a lien claimant is ‘entitled’ to a mechanics’ lien. (1) the lien claimant must be identifiable as a contractor, subcontractor, licensed architect, or as belonging to one of the other groups identified in Utah Code § 38-1-3; (2) the lien claimant must have ‘rendered service, performed labor, or furnished or rented materials or equipment’ upon the property; and (3) the work performed must have been performed ‘at the instance of the owner or of any other person acting by his authority as agent, contractor, or otherwise.’” *See* Brief of Appellant pg. 22. Peterson Plumbing states that if these three prongs are met then the lien claimant is entitled to a lien, regardless if the lien is timely or not.

Appellees agree with the Peterson Plumbing’s three-prong test but the test should include an additional fourth prong that a mechanics’ lien notice must be timely filed. This interpretation would be consistent with the *Foothill* case, the *Anderton* case, with Utah Code Ann. § 38-9-2(3) (2008), and with Utah Code Ann. § 38-9-1 (2008). This additional prong would almost certainly be the easiest and quickest to determine of all the prongs. If a notice of completion was filed with the State Construction Registry then the

mechanics' lien would have to be filed within 90 calendar days of the notice of completion but no more than 180 days of completion of the original contract. If no notice of completion was filed with the State Construction Registry then the lien claimant would have 180 calendar days from final completion of the original contract. Final completion of the original contract will almost always be determined by the certificate of occupancy filed on the property. *See* Utah Code Ann. § 38-1-7. To determine if the fourth-prong is met would require a simple procedure of counting the calendar days after the completion of the original contract or after the notice of completion was filed. The other prongs would certainly not be so easy to determine. If there was a dispute on whether or not a lien claimant actually worked on the property or if he did so at the instance of the owner it would most likely require a fact finding hearing with testimony and numerous witnesses. The easiest prong to determine would be the timeliness of the filing.

Lastly, if Peterson Plumbing's three-prong test was accepted without the fourth-prong, innocent homeowners could face severe consequences. Under Peterson Plumbing's interpretation, a contractor who did work on the property at the instance of the owner could theoretically file a mechanics' lien notice at any time without any danger of it being a wrongful lien, even if the contractor filed the lien for purely malicious purposes. A contractor could wait 10 years or more and file a mechanics' lien out of spite right before a home owner was going to sell the home or refinance. The home owner would have no speedy remedy to remove the mechanics' lien from the property without the option of the Wrongful Lien Statute. The lien claimant has 180 days to file suit to foreclose on the mechanics' lien. *See* Utah Code Ann. § 38-1-11. Without the

Wrongful Lien Remedies, the home owner would be forced to wait the 180 days to see if the lien claimant files suit. During that 180 day period the sale of the home would most likely fail or the homeowner could fail to refinance. The homeowner could possibly sue the contractor for damages but the conclusion of that would take many months and the harm caused by the wrongful lien would have already taken place.

CONCLUSION AND PRECISE RELIEF SOUGHT

For the reasons stated above, Appellees respectfully request this Court to affirm the trial court's holding that Utah Code Ann. § 38-7-1 does not indefinitely extend the right to file a mechanics' lien notice. In addition, Appellees respectfully request this Court to award attorney's fees and costs pursuant to Utah Code Ann. § 38-9-4(2), which provides for attorney's fees and costs if a wrongful lien is not removed, and Utah Code Ann. § 38-1-18, which provides that a party who successfully defends against a mechanics' lien is entitled to reasonable attorney's fees. Appellees further ask that this matter be remanded to the Fourth District Court for a determination of damages pursuant to Utah Code Ann. § 38-9-4.

RESPECTFULLY SUBMITTED this 5 day of April, 2010.

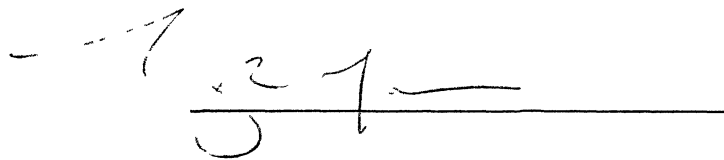


Paul D. Dodd
Counsel for Petitioners/Appellees

CERTIFICATE OF MAILING

I hereby certify that I mailed, first class US mail, postage pre-paid, a true and correct copy of the foregoing on this 5 day of April, 2010 to the following:

Dana T. Farmer
Smith and Knowles, P.C.
4723 Harrison Blve. #200
Ogden, Utah 84403

A handwritten signature in black ink, appearing to read "Dana T. Farmer", is written over a horizontal line.

CERTIFICATE OF MAILING

I hereby certify that I mailed, first class US mail, postage pre-paid, a true and correct copy of the foregoing on this ____ day of April, 2010 to the following:

Dana T. Farmer
Smith and Knowles, P.C.
4723 Harrison Blve. #200
Ogden, Utah 84403

ADDENDA

ADDENDUM “A”

UTAH CODE ANN. § 38-1-3 (2008).

UTAH CODE ANN. § 38-1-3 (2008).

Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor, or otherwise except as the lien is barred under Section 38-11-107 of the Residence Lien Restriction and Lien Recovery Fund Act. This lien shall attach only to such interest as the owner may have in the property.

ADDENDUM “B”

UTAH CODE ANN. § 38-1-7 (2007).

UTAH CODE ANN. § 38-1-7 (2007).

(1)(a)(i) Except as modified in Section 38-1-27, 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 after the date of final completion of the original contract under which the claimant claims a lien under the chapter. (ii) For purposes of this Subsection (1), final completion of the original contract means: (A) if as a result of work performed under the original contract a permanent certificate of occupancy is required for the work, the date of issuance of a permanent certificate of occupancy by the local government entity having jurisdiction over the construction project; (B) if no certificate of occupancy is required by the local government entity having jurisdiction over the construction project, but as a result of the work performed under the original contract an inspection is required as per state-adopted building codes for the work, the date of the final inspection for the work by the local government entity having jurisdiction over the construction project; or (C) if with regard to work performed under the original contract no certificate of occupancy and no final inspection are required as per state-adopted building codes by the local government entity having jurisdiction over the construction project, the date on which there remains no substantial work to be completed to finish the work on the original contract.

(b) Notwithstanding Section 38-1-2, where a subcontractor performs substantial work after the applicable dates established by Subsections (1)(a)(ii)(A) and (B), that subcontractor's subcontract shall be considered an original contract for the sole purpose of determining: (i) the subcontractor's time frame to file a notice of intent to hold and claim a lien under this Subsection (1); and (ii) the original contractor's time frame to file a notice of intent to hold and claim a lien under Subsection (1) for that subcontractor's work.

(c) For purposes of this section, the term "substantial work" does not include: (i) repair work; or (ii) warranty work.

(d) Notwithstanding Subsection (1)(a)(ii), final completion of the original contract does not occur if work remains to be completed for which the owner is holding payment to ensure completion of that work.

(2)(a) The notice required by Subsection (1) shall contain a statement setting forth: (i) the name of the reputed owner if known or, if not known, the name of the record owner; (ii) the name of the person: (A) by whom the lien claimant was employed; or (B) to whom the lien claimant furnished the equipment or material; (iii) the time when: (A) the first and last labor or service was performed; or (B) the first and last equipment or material was furnished; (iv) a description of the property, sufficient for identification; (v) the name, current address, and current phone number of the lien claimant; (vi) the amount of

the lien claim; (vii) the signature of the lien claimant or the lien claimant's authorized agent; (viii) an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents; and (ix) if the lien is on an owner-occupied residence, as defined in Section 38-11-102, a statement describing what steps an owner, as defined in Section 38-11-102, may take to require a lien claimant to remove the lien in accordance with Section 38-11-107.

(b) Substantial compliance with the requirements of this chapter is sufficient to hold and claim a lien.

(3)(a) Within 30 days after filing the notice of lien, the lien claimant shall deliver or mail by certified mail a copy of the notice of lien to: (i) the reputed owner of the real property; or (ii) the record owner of the real property.

(b) If the record owner's current address is not readily available to the lien claimant, the copy of the claim may be mailed to the last-known address of the record owner, using the names and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located.

(c) Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys' fees against the reputed owner or record owner in an action to enforce the lien.

(4) The Division of Occupational and Professional Licensing shall make rules governing the form of the statement required under Subsection (2)(a)(ix).

ADDENDUM “C”

UTAH CODE ANN. § 38-1-7 (2008).

UTAH CODE ANN. § 38-1-7 (2008).

(1)(a)(i) Except as modified in Section 38-1-27, 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: (A) 180 days after the day on which occurs final completion of the original contract if no notice of completion is filed under Section 38-1-33; or (B) 90 days after the day on which a notice of completion is filed under Section 38-1-33. (ii) For purposes of this Subsection (1), final completion of the original contract, and for purposes of Section 38-1-33, final completion of the project, means: (A) if as a result of work performed under the original contract a permanent certificate of occupancy is required for the work, the date of issuance of a permanent certificate of occupancy by the local government entity having jurisdiction over the construction project; (B) if no certificate of occupancy is required by the local government entity having jurisdiction over the construction project, but as a result of the work performed under the original contract an inspection is required as per state-adopted building codes for the work, the date of the final inspection for the work by the local government entity having jurisdiction over the construction project; or (C) if with regard to work performed under the original contract no certificate of occupancy and no final inspection are required as per state-adopted building codes by the local government entity having jurisdiction over the construction project, the date on which there remains no substantial work to be completed to finish the work on the original contract.

(b) Notwithstanding Section 38-1-2, where a subcontractor performs substantial work after the applicable dates established by Subsections (1)(a)(ii)(A) and (B), that subcontractor's subcontract shall be considered an original contract for the sole purpose of determining: (i) the subcontractor's time frame to file a notice of intent to hold and claim a lien under this Subsection (1); and (ii) the original contractor's time frame to file a notice of intent to hold and claim a lien under this Subsection (1) for that subcontractor's work.

(c) For purposes of this chapter, the term "substantial work" does not include: (i) repair work; or (ii) warranty work.

(d) Notwithstanding Subsection (1)(a)(ii), final completion of the original contract does not occur if work remains to be completed for which the owner is holding payment to ensure completion of that work.

(2)(a) The notice required by Subsection (1) shall contain a statement setting forth: (i) the name of the reputed owner if known or, if not known, the name of the record owner; (ii) the name of the person: (A) by whom the lien claimant was employed; or (B) to whom the lien claimant furnished the equipment or material; (iii) the time when: (A) the first and last labor or service was performed; or (B) the first and last equipment or material

was furnished; (iv) a description of the property, sufficient for identification; (v) the name, current address, and current phone number of the lien claimant; (vi) the amount of the lien claim; (vii) the signature of the lien claimant or the lien claimant's authorized agent; (viii) an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents; and (ix) if the lien is on an owner-occupied residence, as defined in Section 38-11-102, a statement describing what steps an owner, as defined in Section 38-11-102, may take to require a lien claimant to remove the lien in accordance with Section 38-11-107.

(b) Substantial compliance with the requirements of this chapter is sufficient to hold and claim a lien.

(3)(a) Within 30 days after filing the notice of lien, the lien claimant shall deliver or mail by certified mail a copy of the notice of lien to: (i) the reputed owner of the real property; or (ii) the record owner of the real property.

(b) If the record owner's current address is not readily available to the lien claimant, the copy of the claim may be mailed to the last-known address of the record owner, using the names and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located.

(c) Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys' fees against the reputed owner or record owner in an action to enforce the lien.

(4) The Division of Occupational and Professional Licensing shall make rules governing the form of the statement required under Subsection (2)(a)(ix).

ADDENDUM “D”

UTAH CODE ANN. § 38-1-7 (2009).

UTAH CODE ANN. § 38-1-7 (2009).

(1)(a)(i) Except as modified in Section 38-1-27, 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 no later than: (A) 180 days after the day on which occurs final completion of the original contract if no notice of completion is filed under Section 38-1-33; or (B) 90 days after the day on which a notice of completion is filed under Section 38-1-33 but not later than the time frame established in Subsection (1)(a)(i)(A). (ii) For purposes of this Subsection (1), final completion of the original contract, and for purposes of Section 38-1-33, final completion of the project, means: (A) if as a result of work performed under the original contract a permanent certificate of occupancy is required for the work, the date of issuance of a permanent certificate of occupancy by the local government entity having jurisdiction over the construction project; (B) if no certificate of occupancy is required by the local government entity having jurisdiction over the construction project, but as a result of the work performed under the original contract an inspection is required as per state-adopted building codes for the work, the date of the final inspection for the work by the local government entity having jurisdiction over the construction project; (C) if with regard to work performed under the original contract no certificate of occupancy and no final inspection are required as per state-adopted building codes by the local government entity having jurisdiction over the construction project, the date on which there remains no substantial work to be completed to finish the work on the original contract; or (D) if as a result of termination of the original contract prior to the completion of the work defined by the original contract, the compliance agency does not issue a certificate of occupancy or final inspection, the last date on which substantial work was performed under the original contract.

(b) Notwithstanding Section 38-1-2, where a subcontractor performs substantial work after the applicable dates established by Subsections (1)(a)(ii)(A) and (B), that subcontractor's subcontract shall be considered an original contract for the sole purpose of determining: (i) the subcontractor's time frame to file a notice of intent to hold and claim a lien under this Subsection (1); and (ii) the original contractor's time frame to file a notice of intent to hold and claim a lien under this Subsection (1) for that subcontractor's work.

(c) For purposes of this chapter, the term "substantial work" does not include: (i) repair work; or (ii) warranty work.

(d) Notwithstanding Subsection (1)(a)(ii)(C), final completion of the original contract does not occur if work remains to be completed for which the owner is holding payment to ensure completion of that work

(2)(a) The notice required by Subsection (1) shall contain a statement setting forth: (i) the

name of the reputed owner if known or, if not known, the name of the record owner; (ii) the name of the person: (A) by whom the lien claimant was employed; or (B) to whom the lien claimant furnished the equipment or material; (iii) the time when: (A) the first and last labor or service was performed; or (B) the first and last equipment or material was furnished; (iv) a description of the property, sufficient for identification (v) the name, current address, and current phone number of the lien claimant; (vi) the amount of the lien claim; (vii) the signature of the lien claimant or the lien claimant's authorized agent; (viii) an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents; and (ix) if the lien is on an owner-occupied residence, as defined in Section 38-11-102, a statement describing what steps an owner, as defined in Section 38-11-102, may take to require a lien claimant to remove the lien in accordance with Section 38-11-107.

(b) Substantial compliance with the requirements of this chapter is sufficient to hold and claim a lien.

(3)(a) Within 30 days after filing the notice of lien, the lien claimant shall deliver or mail by certified mail a copy of the notice of lien to: (i) the reputed owner of the real property; or (ii) the record owner of the real property.

(b) If the record owner's current address is not readily available to the lien claimant, the copy of the claim may be mailed to the last-known address of the record owner, using the names and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located.

(c) Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys' fees against the reputed owner or record owner in an action to enforce the lien.

(4) The Division of Occupational and Professional Licensing shall make rules governing the form of the statement required under Subsection (2)(a)(ix).

ADDENDUM “E”

UTAH CODE ANN. § 38-1-33 (2008)

UTAH CODE ANN. § 38-1-33 (2008).

(1) (a) Upon final completion of a construction project:

(i) an owner of a construction project or an original contractor may file a notice of completion with the database; and

(ii) a lender that has provided financing for the construction project, a surety that has provided bonding for the construction project, or a title company issuing a title insurance policy on the construction project, may file a notice of completion.

(b) Notwithstanding Section 38-1-2, if a subcontractor performs substantial work after the applicable dates established by Subsections (1)(a)(i) and (ii), that subcontractor's subcontract is considered an original contract for the sole purpose of determining:

(i) the subcontractor's time frame to file a notice to hold and claim a lien under Subsection 38-1-7(1); and

(ii) the original contractor's time frame to file a notice to hold and claim a lien under Subsection 38-1-7(1) for that subcontractor's work.

(c) A notice of completion shall include:

(i) the building permit number for the project, or the number assigned to the project by the designated agent;

(ii) the name, address, and telephone number of the person filing the notice of completion;

(iii) the name of the original contractor for the project;

(iv) the address of the project or a description of the location of the project;

(v) the date on which final completion is alleged to have occurred; and

(vi) the method used to determine final completion.

(d) For purposes of this section, final completion of the original contract does not occur if work remains to be completed for which the owner is holding payment to ensure completion of the work.

(e) (i) Unless a person indicates to the division or designated agent that the person does not wish to receive a notice under this section, electronic notification of the filing of a notice of completion or alternate notice as prescribed in Subsection (1)(a), shall be provided to:

(A) each person that filed a notice of commencement for the project;

(B) each person that filed preliminary notice for the project; and

(C) all interested persons who have requested notices concerning the project.

(ii) A person to whom notice is required under this Subsection (1) (e) is responsible for:

(A) providing an e-mail address, mailing address, or telefax number to which a notice required by this Subsection (1)(e) is to be sent; and

(B) the accuracy of any e-mail address, mailing address, or telefax number to which notice is to be sent.

(iii) The designated agent fulfills the notice requirement of Subsection (1) (e)(i) when it sends the notice to the e-mail address, mailing address, or telefax number provided to the designated agent, whether or not the notice is actually received.

(iv) Upon the filing of a notice of completion, the time periods for filing preliminary notices stated in Section 38-1-27 are modified such that all preliminary notices shall be filed subsequent to the notice of completion and within ten days from the day on which the notice of completion is filed.

(f) A subcontract that is considered an original contract for purposes of this section does not create a requirement for an additional preliminary notice if a preliminary notice has already been given for the labor, service, equipment, and material furnished to the subcontractor who performs substantial work.

(2) (a) If a construction project owner, original contractor, subcontractor, or other interested person believes that a notice of completion has been filed erroneously, that owner, original contractor, subcontractor, or other interested person can request from the person who filed the notice of completion evidence establishing the validity of the notice of completion.

(b) Within ten days after the request described in Subsection (2)(a), the person who filed the notice of completion shall provide the requesting person proof that the notice of completion is valid.

(c) If the person that filed the notice of completion does not provide proof of the validity of the notice of completion, that person shall immediately cancel the notice of completion from the database in any manner prescribed by the division pursuant to rule.

(3) A person filing a notice of completion by alternate filing is responsible for verifying and changing any incorrect information in the notice of completion before the expiration of the time period during which the notice is required to be filed.

ADDENDUM “F”

UTAH CODE ANN. § 38-9-1 (2008).

UTAH CODE ANN. § 38-9-1 (2008).

As used in this chapter:

- (1) "Interest holder" means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, title holder, mortgagee, trustee, or beneficial owner.
- (2) "Lien claimant" means a person claiming an interest in real property who offers a document for recording or filing with any county recorder in the state asserting a lien, or notice of interest, or other claim of interest in certain real property.
- (3) "Owner" means a person who has a vested ownership interest in certain real property.
- (4) "Record interest holder" means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, titleholder, mortgagee, trustee, or beneficial owner, and whose name and interest in that real property appears in the county recorder's records for the county in which the property is located.
- (5) "Record owner" means an owner whose name and ownership interest in certain real property is recorded or filed in the county recorder's records for the county in which the property is located.
- (6) "Wrongful lien" means any document that purports to create a lien, notice of interest, or encumbrance on an owner's interest in certain real property and at the time it is recorded or filed is not: (a) expressly authorized by this chapter or another state or federal statute; (b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or (c) signed by or authorized pursuant to a document signed by the owner of the real property.

ADDENDUM “G”

UTAH CODE ANN. § 38-9-2 (2008).

UTAH CODE ANN. § 38-9-2 (2008).

(1)(a) The provisions of Sections 38-9-1, 38-9-3, 38-9-4, and 38-9-6 apply to any recording or filing or any rejected recording or filing of a lien pursuant to this chapter on or after May 5, 1997. (b) The provisions of Sections 38-9-1 and 38-9-7 apply to all liens of record regardless of the date the lien was recorded or filed. (c) Notwithstanding Subsections (1)(a) and (b), the provisions of this chapter applicable to the filing of a notice of interest do not apply to a notice of interest filed before May 5, 2008.

(2) The provisions of this chapter shall not prevent a person from filing a lis pendens in accordance with Section 78B-6-1303 or seeking any other relief permitted by law.

(3) This chapter does not apply to a person entitled to a lien under Section 38-1-3 who files a lien pursuant to Title 38, Chapter 1, Mechanics' Liens.

ADDENDUM “H”

UTAH CODE ANN. § 38-1-7 (1953)

UTAH CODE ANNOTATED 1953

CONTAINING THE GENERAL AND PERMANENT LAWS OF THE
STATE IN FORCE AT THE CLOSE OF THE THIRTY-SIXTH
LEGISLATURE, REGULAR AND FIRST
SPECIAL SESSIONS, 1965 AND 1966

TEN VOLUMES

COMPILED, ANNOTATED AND PUBLISHED UNDER
AUTHORITY OF CHAPTER 116, LAWS OF UTAH, 1951

Edited by

ALBERT A. ZIMMERMAN, LL.B.
AND THE PUBLISHER'S EDITORIAL STAFF

REPLACEMENT

VOLUME 4

Insurance to Liens

THE ALLEN SMITH COMPANY
Publishers
Indianapolis, Indiana

are concurrent as to one fund, 36 A. L. R. 663.

Time when contractor commenced work

or time when labor or material for which lien is claimed was furnished as date of mechanic's lien, 83 A. L. R. 925.

DECISIONS UNDER FORMER LAW

1. Commencement and duration of lien.

Under former statute, lien of subcontractor attached on date of subcontractor's commencing to do work or to furnish ma-

terials. *Morrison v. Inter-Mountain Salt Co.*, 14 U. 201, 46 P. 1104, following *Morrison v. Carey-Lombard Co.*, 9 U. 70, 33 P. 238.

38-1-6. Priority over claims of creditors of original contractor or subcontractor.—No attachment, garnishment or levy under an execution upon any money due to an original contractor from the owner of any property subject to lien under this chapter shall be valid as against any lien of a subcontractor or materialman, and no such attachment, garnishment or levy upon any money due to a subcontractor or materialman from the contractor shall be valid as against any lien of a laborer employed by the day or piece.

History: R. S. 1898 & C. L. 1907, § 1380; C. L. 1917, § 3730; R. S. 1933 & C. 1943, 52-1-6.

Comparable Provision.

Iowa Code Ann., § 572.19 (mechanics' liens take priority of all garnishments of owner for contract debts, whether made prior or subsequent to commencement of furnishing of material or performance of labor, without regard to date of filing claim for such lien).

Collateral References.

Mechanics' Liens 198.

57 C.J.S. *Mechanics' Liens* § 197.

Character of service contemplated by statutes giving a lien or preference, in event of insolvency, to servants, employees, laborers, etc., 142 A. L. R. 362.

Constitutionality of statute giving to lien for alteration of property, pursuant to public requirement, preference over pre-existing mechanic's lien or similar lien, 121 A. L. R. 616, 141 A. L. R. 66.

Lien for labor or material furnished under contract with vendor pending execu-

tory contract for sale of property as affecting purchaser's interest, 47 A. L. R. 263.

Priority as between artisan's lien and chattel mortgage, 36 A. L. R. 2d 229.

Priority as between lien for repairs and right of seller under conditional sales contract, 36 A. L. R. 2d 198.

Priority as between mechanic's lien and purchase-money mortgage, 72 A. L. R. 1516, 73 A. L. R. 2d 1407.

Priority as between mortgage for future advances and mechanics' liens, 80 A. L. R. 2d 179.

Remedy available to holder of mechanic's lien which has priority over antecedent mortgage or vendor's title or lien as regards improvement, but not as regards land, where it is impossible or impractical to remove the improvement, 107 A. L. R. 1012.

Right or interest subject to, and priority of, statutory lien for labor or material in developing property for oil and gas, 122 A. L. R. 1182.

Rule as to marshaling assets where liens are concurrent as to one fund, 36 A. L. R. 663.

38-1-7. Notice of claim—Contents—Recording.—Every original contractor within eighty days after the completion of his contract, and except as hereafter provided, every person other than the original contractor claiming the benefit of this chapter within sixty days after furnishing the last material or performing the last labor for or on any land, building, improvement or structure, or for any alteration, addition to or repair thereof, or performance of any labor in, or furnishing any materials for, any mine or mining claim, must file for record with the county recorder of the county in which the property, or some part thereof, is situated a claim in writing, containing a notice of intention to hold and claim a lien, and a statement of his demand after deducting all just credits and offsets,

with the name of the owner, if known, and also the name of the person by whom he was employed or to whom he furnished the material, with a statement of the terms, time given and conditions of his contract, specifying the time when the first and last labor was performed, or the first and last material was furnished, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person.

When a subcontractor or any person furnishes labor or material as stated above at the instance and request of an original contractor, then such subcontractor's or person's lien rights, as set forth herein, are extended so as to make the final date for the filing of a notice of intention to hold and claim a lien sixty days after completion of the original contract of the original contractor.

History: R. S. 1898 & C. L. 1907, § 1386; C. L. 1917, § 3736; L. 1931, ch. 6, § 1; R. S. 1933 & C. 1943, 52-1-7; L. 1949, ch. 63, § 1.

Compiler's Note.

The 1949 amendment added the last paragraph.

Comparable Provisions.

California Civ. Proc. Code, § 1193.1, subd. (c) (must file notice of completion of work for record; if filed, original contractor has sixty days in which to file claim, all others, thirty days; if not filed, claim must be filed ninety days after completion of work).

Idaho Code Ann., § 45-507 (substantially the same, except that original contractor must file "within ninety days").

Iowa Code Ann., §§ 572.8, 572.9 (similar; principal contractor must file within ninety days; subcontractor, within sixty days).

Montana Rev. Codes 1947, § 45-502 (every person must file "within ninety days").

1. In general.

Cited in *Holbrook v. Webster's Inc.*, 7 U. (2d) 148, 320 P. 2d 661.

2. "Person" defined.

The word "person" in this section includes a corporation. *Doane v. Clinton*, 2 U. 417.

3. Operation and effect of section.

This section gives the subcontractor a lien, and it also gives a lien to the person who performs labor on the building, or furnishes material under a contract with such subcontractor. *Teahen v. Nelson*, 6 U. 363, 23 P. 764.

4. Compliance with section.

Nothing more than compliance with the provisions of this section can be required of claimant in order for him to secure

his right to lien. *Brubaker v. Bennett*, 19 U. 401, 57 P. 170.

5. Perfection of lien in general.

Lien is not created until contractor files for record the statement and notice required by law. *Elwell v. Morrow*, 28 U. 278, 78 P. 605.

6. Sufficiency of notice.

Essential averments, omitted in notice of lien, were incapable of being supplied by averments in complaint or by extrinsic evidence. *Morrison, Merrill & Co. v. Willard*, 17 U. 306, 53 P. 832, 70 Am. St. Rep. 784.

Any notice which conforms to provisions of this section is sufficient. *Brubaker v. Bennett*, 19 U. 401, 57 P. 170.

Notice of intention to claim lien for materials furnished for erection of two buildings was not insufficient on ground that amount due on each one of buildings was not separately stated. *Eccles Lumber Co. v. Martin*, 31 U. 241, 87 P. 713.

For purpose of acquiring mechanic's lien against mining claims where operated as mine, necessary appurtenances, including easement in adjoining land, were not required to be mentioned in notice of intention to claim lien. *Park City Meat Co. v. Comstock Silver King Min. Co.*, 36 U. 145, 103 P. 254.

Necessary appurtenances, including easement which extended outside of boundaries of land upon which building was erected, were not required to be mentioned in notice of intention to claim lien. *Park City Meat Co. v. Comstock Silver King Min. Co.*, 36 U. 145, 103 P. 254.

A notice of lien by materialman, which clearly showed that building materials were furnished owner, and used on and about house on land fully and legally described by lot and subdivision, and which recited that owner agreed to pay cash, was sufficient to substantially comply with

this section. *Chase v. Dawson*, 117 U. 295, 215 P. 2d 390.

Where the basic requirements of creating a lien are met it is not essential that the names of others whose interests might be affected be listed on the notices of the lien. *Buehner Block Co. v. Glezos*, 6 U. (2d) 226, 310 P. 2d 517.

Where labor is performed or materials furnished upon several buildings owned by the same person or persons, a claimant may include in one claim all amounts due, and the claim will not be defective if the amount due on each separate building is not designated. *Utah Savings & Loan Assn. v. Mechem*, 12 U. (2d) 335, 366 P. 2d 598.

If a claimant files a lien against more than one piece of property belonging to the same owner without designating the amount due on each building or improvement, he may enforce the lien against the owner; however, if there are other lien claimants of the same class, his claim is subordinate to theirs if the claims of the latter are against only one of the buildings or if they complied with 38-1-8. *Utah Savings & Loan Assn. v. Mechem*, 12 U. (2d) 335, 366 P. 2d 598.

7. —subcontractor's notice.

Subcontractor's notice of claim of lien held insufficient as against owner of property on which lien was claimed. *Morrison, Merrill & Co. v. Willard*, 17 U. 306, 53 P. 832, 70 Am. St. Rep. 784.

Subcontractor is not required to state, in his notice, any of terms or conditions of contract between owner and original contractor. *Brubaker v. Bennett*, 19 U. 401, 57 P. 170.

8. —time of filing.

Mechanic's lien filed within time specified by this section takes effect as of date of commencement of work and furnishing of materials, and is prior to intervening equities. *Sanford v. Kunkel*, 30 U. 379, 85 P. 363, 85 P. 1012.

Under this section, where an owner exercised his contract right to change contractors, a mechanic's lien notice is in time when filed over sixty days after the first contractor quit, but within sixty days after delivering material to the second contractor, for the contract is continuing. *Langton Lime & Cement Co. v. Peery*, 48 U. 112, 159 P. 49.

Plaintiff, who contended that project was not finally completed until in November, 1962, although defendant asserted that all work done by plaintiff was completed during the spring of 1962, had the burden of demonstrating that his lien was filed within the eighty-day period on appeal to the Supreme Court where the

trial court resolved the controversy against the plaintiff, ruling that his claim of lien was invalid. *Nagle v. Club Fontainebleau*, 17 U. (2d) 125, 405 P. 2d 346.

9. —time of filing—extension.

Under this section it is important to determine when contract was "completed," and when the "last material" was furnished, or the "last labor" performed, for until such is the case the time has not begun to run as prescribed hereunder, but time to file notice is extended until such is the case. See *Wilcox v. Cloward*, 88 U. 503, 56 P. 2d 1.

The element of work done at the owner's request has had considerable weight in working an extension of time. Where materials are furnished or labor performed at owner's request to remedy defects, the question of bad faith on part of lien claimant is eliminated. *Wilcox v. Cloward*, 88 U. 503, 56 P. 2d 1.

A leaky roof needing a hundred shingles to repair it, and a plumbing contract where the range boiler still needed to be connected up, are not "trivial imperfections" but constitute work within purview of claimant's contract so as to extend the time for filing the notice of lien. Such as this constitutes work done satisfactorily to complete a contract, and without which the owner would not be required to accept the job. *Wilcox v. Cloward*, 88 U. 503, 56 P. 2d 1.

Time to complete small jobs incidental to completion of contracted obligations was sufficient to extend time to file notice of lien under this section providing such small jobs were necessary and not invented to merely extend the statutory period. *Totorica v. Thomas*, 16 U. (2d) 175, 397 P. 2d 984.

10. Statement of demand.

It is evident that the filing of the statement does not create the lien, but simply holds it or keeps it in force for the period of twelve months as provided in 38-1-11, so as to give the claimant an opportunity to enforce the same by process of law. *Morrison v. Carey-Lombard Co.*, 9 U. 70, 33 P. 238.

Lien claimant must substantially comply with all of requirements of statute in statement of his claim for lien, and in all essential particulars such statement must be true. *Morrison, Merrill & Co. v. Willard*, 17 U. 306, 53 P. 832, 70 Am. St. Rep. 784.

11. Scope and extent of lien.

Owner, in his dealings with contractor, is charged with notice that subcontractor is entitled, under his subcontract, to lien within limits of original contract price.

ADDENDUM “I”

Laws of the Territory of Utah, Title IV, Chapter I, Sec. 1062

L A W S
OF THE
TERRITORY OF UTAH,

PASSED AT THE
TWENTY-SIXTH SESSION OF THE LEGISLATIVE ASSEMBLY.

HELD AT
The City of Salt Lake, the Capital of said Territory,
Commencing January 14, A. D. 1884, and
Ending March 12, A. D. 1884.

PUBLISHED BY AUTHORITY.

SALT LAKE CITY:
THE TRIBUNE PRINTING AND PUBLISHING COMPANY
1884.

TITLE IV.

CHAPTER I.

Enforcement of Liens.

DEFINITION OF LIENS.

Lien defined.

SEC. 1056. A lien is a charge imposed upon specific property, by which it is made security for the performance of an act.

LIENS OF MECHANICS AND OTHERS UPON REAL PROPERTY.

What laborers, contractors, etc. may have liens upon

SEC. 1057. Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent, but the aggregate amount of such liens must not exceed the amount which the owner would be otherwise liable to pay.

Notice by sub-contractor, etc., and lien for an amount due contractor.

SEC. 1058. Any sub-contractor, material man, laborer, or other person performing labor or furnishing materials for a contractor who is entitled to a lien under the provisions of the last section, may, at any time within five days after commencing to perform the labor or furnish the materials serve upon the owner or his agent, or the person employing the contractor, written notice of the amount due him for such labor or materials, and such sub-contractor, material man, laborer, or other person may have a

lien for such amount. And any person furnishing materials, or performing labor for a contractor, like notice to the contractor, be subrogated to the right of such sub-contractor.

SEC. 1059. Any person, who at the request of the owner of any lot in any incorporated city or town, fills in, or otherwise improves the same, or the front of, or adjoining the same, has a lien upon the same for his work done and materials furnished.

SEC. 1060. The land upon which any building, improvement or structure is constructed, together with the vacant space about the same, or so much as is required for the convenient use and occupation thereof, is also subject to the liens, if, at the time the work was commenced or the materials for the same had commenced to be furnished, the land belonged to the person who caused the building, improvement or structure to be constructed, altered or repaired; but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien.

SEC. 1061. The liens provided for in this chapter are preferred to any lien, mortgage or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, or materials were commenced to be furnished, to any lien, mortgage, or other incumbrance of which the lienholder had no notice and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished.

SEC. 1062. Every original contractor, within ten days after the completion of his contract, and every subcontractor, claiming the benefit of the provisions of this chapter, must within thirty days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the completion of any labor in a mining claim, file for record in the county recorder of the county in which such building, or some part thereof is situated, a claim containing a statement of his demand, after deducting all just credits, with the name of the owner or reputed owner, known, and also the name of the person by whom the work was employed or to whom the materials were furnished, a statement of the terms, time given, and conditions of the contract, and also a description of the property charged with the lien, sufficient for identification.

TITLE IV.

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1056. A lien is a charge imposed upon specific property by which it is made security for the performance of a contract.

OF MECHANICS AND OTHERS UPON REAL PROPERTY.

1057. Every person performing labor upon, or furnishing materials to be used in the construction, alteration, repair of any mining claim, building, wharf, ditch, flume, tunnel, fence, machinery, railroad, canal, aqueduct to create hydraulic power, or any other improvement, or who performs labor in any mining claim, has a lien upon the same for the work or labor done and materials furnished by each respectively, whether done at the instance of the owner of the building, improvement, or his agent, but the aggregate of such liens must not exceed the amount which the contractor would be otherwise liable to pay.

1058. Any sub-contractor, material man, or other person performing labor or furnishing materials for a contractor who is entitled to a lien under the provisions of the last section, may, at any time within thirty days after commencing to perform the labor or furnishing materials, serve upon the owner or his agent, or the person employing the contractor, written notice of the amount due for such labor or materials, and such sub-contractor, material man, laborer, or other person may have a

lien for such amount. And any person furnishing materials, or performing labor for a contractor, may, by giving notice to the contractor, be subrogated to the rights of such sub-contractor.

SEC. 1059. Any person, who at the request of the owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the street in front of, or adjoining the same, has a lien upon such lot for his work done and materials furnished. Lien for grading, filling lots and streets

SEC. 1060. The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, is also subject to the liens, if, at the time the work was commenced or the materials for the same had commenced to be furnished, the land belonged to the person who caused said building, improvement or structure to be constructed, altered or repaired; but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien. What interest in the land subject to the lien

SEC. 1061. The liens provided for in this Chapter are preferred to any lien, mortgage or other incumbrance, which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also, to any lien, mortgage, or other incumbrance of which the lienholder had no notice and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished. Effect of liens

SEC. 1062. Every original contractor, within sixty days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this Chapter, must within thirty days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record with the county recorder of the county in which such property or some part thereof is situated, a claim containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the material, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which Claim of lien to be filed in recorder's office

claim must be verified by the oath of himself or some other person.

Liens upon two or more pieces of property

Amount due from each to be designated

Claim to be recorded

Time of recording

Time of continuance of lien

Sub-contractors, where and when paid out of proceeds of sale

Measure of recovery by contractor, protection of owner's rights

SEC. 1063. In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must at the same time designate the amount due to him on each of such buildings, mining claims or other improvements, otherwise the lien of such claim is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens, by judgment, mortgage, or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated.

SEC. 1064. The recorder must record the claim in a book kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds and other instruments.

SEC. 1065. No lien provided for in this Chapter binds any building, mining claim, improvement or structure for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same, or, if a credit be given, then ninety days after the expiration of such credit, but no lien continues in force for a longer time than two years from the time work is completed, by any agreement to give credit.

SEC. 1066. All persons entitled to liens on the structure or improvement, except those who contracted with the owner thereof, are sub-contractors, and the court in the judgment must direct the amount due sub-contractors to be paid out of the proceeds of sales, before any part of such proceeds are paid to the contractor.

SEC. 1067. The contractor shall be entitled to recover upon a lien filed by him, only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished, as aforesaid; and in all cases where a lien shall be filed, under this Chapter, for work done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the amount of money for which the lien is filed; and in case of judgment against the owner or his property, upon the lien, the said owner shall be entitled to

deduct from any amount due, or to become due by the contractor, the amount of such judgment and interest.

SEC. 1068. In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien, or class of liens, which shall be in the following order, viz: First—Persons other than the original contractors and subcontractors; Second—The sub-contractors; Third—The original contractors. And the proceeds of the sale of the property must be applied to each lien, or class of liens, in the order of its rank, and whenever, on the sale of the property subject to the lien, there is a deficiency of proceeds, judgment may be docketed for the deficiency in the same manner and with like effect as in actions for the foreclosure of mortgages.

SEC. 1069. Any number of persons claiming liens may join or intervene in the same actions, and whenever separate actions are commenced, the court may consolidate them. The court may also allow, as part of the costs, the moneys paid for filing and recording the lien.

SEC. 1070. Nothing contained in this Chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done, or materials furnished, to maintain a personal action to recover the debt against the person liable therefor.

SEC. 1071. Except as otherwise provided in this Chapter, the provisions of this Code relating to pleadings, new trials and appeals, are applicable to, and govern, the rules of practice in the proceedings mentioned in this Chapter.

TITLE V.

OF CONTEMPT.

SEC. 1076. The following acts or omissions in respect to a court of justice or proceedings thereof are contempts of authority of the court:

verified by the oath of himself or some other

33. In every case in which one claim is filed on more buildings, mining claims, or other improvements owned by the same person, the person filing must at the same time designate the amount due on each of such buildings, mining claims or other improvements, otherwise the lien of such claim is postponed. The lien of such claimant does not extend to the amount designated, as against other liens, by judgment, mortgage, or otherwise on such buildings or other improvements, and upon which the same are situated.

34. The recorder must record the claim in a form for that purpose, which record must be made, and other conveyances are required by law, and for which he may receive the same provided by law for recording deeds and other

35. No lien provided for in this Chapter on building, mining claim, improvement or structure shall extend for a longer period than ninety days after the same has commenced proceedings be commenced in a proper time to enforce the same, or, if a credit is given for ninety days after the expiration of such time continues in force for a longer time than the time work is completed, by any agreement.

36. All persons entitled to liens on the structure, except those who contracted with the contractor, and the court in the proceedings shall direct the amount due sub-contractors to be paid out of the proceeds of sales, before any part of such proceeds is paid to the contractor.

37. The contractor shall be entitled to recover the amount filed by him, only such amount as may be due him according to the terms of his contract, after payment to him of other parties for work done and received, as afore-said; and in all cases where a contractor, under this Chapter, for work done or to be done, or to any contractor, he shall defend any action brought upon at his own expense; and during such action, the owner may withhold from the contractor the amount of money for which the lien is a lien of judgment against the owner or his estate, and if the lien, the said owner shall be entitled to

deduct from any amount due, or to become due by him to the contractor, the amount of such judgment and costs.

SEC. 1068. In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien, or class of liens, which shall be in the following order, viz: First—All persons other than the original contractors and sub-contractors; Second—The sub-contractors; Third—The original contractors. And the proceeds of the sale of the property must be applied to each lien, or class of liens, in the order of its rank, and whenever, on the sale of the property subject to the lien, there is a deficiency of proceeds, judgment may be docketed for the deficiency in like manner and with like effect as in actions for the foreclosure of mortgages.

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TITLE V.

OF CONTEMPT.

SEC. 1076. The following acts or omissions, in respect to a court of justice or proceedings therein, are contempts of authority of the court:

Court to declare rank of liens

Separate actions may be consolidated
Costs

Lien not to impair right to personal action

Provisions applicable to proceedings under this Chapter

What acts or omissions are contempt.

ADDENDUM “J”

Eccles Lumber Co. v. Martin, 31 Utah 241, 87 P. 713, 715-716 (Utah 1906).

Supreme Court of Utah.
ECCLES LUMBER CO.

v.
MARTIN et al.
Nov. 14, 1906.

Appeal from District Court, Weber County; J. A. Howell, Judge.

Action by the Eccles Lumber Company against Ann H. Martin, executrix of James E. Horrocks, deceased, and others. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

*714 T. D. Skeen, for appellant.

T. N. Kimball, for respondents.

FRICK, J.

This action was commenced to foreclose a mechanic's lien; judgment of dismissal being entered upon a demurrer to the complaint. With the hope of assisting to a better understanding of the views herein after expressed, we will, in our own way, make a somewhat extended statement of the facts contained in the complaint, which, after stating the corporate existence of the appellant, is, in substance, as follows:

That James E. Horrocks, during his lifetime, and at all times mentioned in the complaint, was the owner in fee of certain real estate in Ogden City, Utah, described as follows: Part of lot twenty-seven (27), block four (4), of South Ogden survey addition to Ogden City, Weber county, Utah, to wit, beginning at the northwest corner of said lot twenty-seven (27); thence east 162 feet; thence south 132 feet; thence west 30 feet; thence north 66 feet; thence west 132 feet; thence north 66 feet to the place of beginning. That on or about the 1st day of September, 1904, said Horrocks entered into a written contract with respondent Peterson, whereby said Peterson agreed to build for said Horrocks two frame dwelling houses upon the real estate above described, and to furnish and provide all of the lumber, building material, and labor necessary

to complete said houses, and to complete the same on or before the 1st day of November, 1904, all for *715 the sum of \$2,750, to be paid by said Horrocks to said Peterson; payment to be made in installments as the work on said houses progressed, and the last payment of \$500 was to be made when said houses were fully completed. That thereafter, on the 6th day of September, 1904, said Peterson, by a written contract, sublet the construction of said houses, together with the furnishing of certain specified material, to the respondent Fred. Howard. Said Howard agreed to complete said houses within 36 working days from said date, and to receive the sum of \$1,575 for what he agreed to do, payments to be made from time to time, the last payment of \$775 to be made when said houses were completed. That thereafter, on the 19th day of September, 1904, said Howard entered into a contract with appellant, whereby appellant agreed to furnish said Howard with lumber and other specified material necessary to complete said houses. That in pursuance of said agreement, and with the assent and approval of said Peterson, the original contractor, and said Horrocks, the owner of the premises above described, appellant, between the 19th day of September and the 25th day of October, 1904, sold, furnished, and delivered said building material to said Howard upon said premises to be and which was actually used in the construction of said houses, amounting in all, according to the prices agreed upon, and after deducting all credits, to the sum of \$710.48. That said contracts were entire, and appellant is unable to state the amount due or the sum paid on each of said houses separately. That the appellant furnished all the lumber and building material required to complete said houses. That the same was to be paid for on the 1st day of the month succeeding the date of delivery. That no payments were made for the construction work of said houses before the first material was actually furnished by the appellant, except the sum of \$600. That within 40 days from the date of delivery of the last material, the appellant filed with the county recorder of Weber county, and caused to be recorded, a notice of intention to claim, and did claim, a mechanic's lien upon the real estate above described. The notice so filed and recorded was duly verified, and in detail complied with the requirements of section 1386, Rev. St. 1898, all of which is stated in the complaint. That said Horrocks died on the 20th day of March, 1905, leaving

a last will, wherein the respondent Ann H. Martin was named as executrix, which will was thereafter on the 29th day of June, 1905, duly admitted to probate, and that letters testamentary were duly issued to said Ann H. Martin, and that she is the duly qualified executrix of the last will of said James E. Horrocks, deceased. That the appellant duly presented its claim for the amount claimed, with interest and costs, to said executrix for allowance against said estate. That the same was disallowed and rejected by her, and she refused to pay the same or any part thereof. A copy of the notice of intention to claim a lien is attached to said complaint, and made a part thereof. The notice sets forth in detail all matters required by section 1386, Rev. St. 1898, but fails to state the amount due to the claimant on each building separately.

Upon substantially the foregoing facts, the appellant prayed judgment for the amount of its claim, to foreclose said lien, for the sale of the property, and for general relief. To this complaint the respondent Ann H. Martin, as executrix of the said last will, interposed a general demurrer upon the sole ground that said complaint does not state facts sufficient to constitute a cause of action either against her or the estate of the deceased, and that the facts stated are insufficient to entitle appellant to the relief prayed for. The trial court sustained this demurrer, and the appellant, refusing to further amend the complaint, but electing to stand thereon, judgment dismissing the action and for costs was directed to be rendered against the appellant, from which judgment this appeal is prosecuted.

The only question presented by this record therefore is, did the court err in sustaining said demurrer and in entering judgment dismissing the action as above stated? The trial court held that the notice of intention to claim a lien was insufficient, for the reason that the amount due on each one of the two houses was not separately stated, and that therefore there was no lien, and hence the judgment dismissing the action. In order to determine the correctness of the court's ruling, it becomes necessary to analyze and construe sections 1386 and 1387, c. 1, tit. 39, Rev. St. 1898, entitled "Mechanics' Liens." This chapter is composed of 28 sections consecutively numbered from 1373 to 1400. In those sections is contained an entire system or scheme respecting the creation of mechanics' liens in favor of persons who furnish any material, or perform any labor, or render any skill or service for any improvements on land. By the various amendments to

the original law from time to time, and as the same has been construed by this and other courts under similar statutes, a mechanic's lien attaches to the land, and, unless the person against whom the claim for a mechanic's lien is made has some interest or estate in the land upon which the improvement is made, no lien attaches to the improvement as such; further, that a contract express or implied must have been made with the owner of the land or his authorized agent in order to successfully initiate a lien. Morrison, Merrill & Co. v. Clark, 20 Utah, 432, 59 Pac. 235, 77 Am. St. Rep. 924; Early v. Burt, 68 Iowa, 716, 28 N. W. 35; Huff v. Jolly, 41 Kan. 537, 21 Pac. 646; Fetter v. Wilson, 51 Ky. 90; Wagar v. Briscoe, 38 Mich. 587-595. The case of *716 Sanford v. Kunkel (Utah) 85 Pac. 363, in no way departs from the doctrine that in order to acquire a lien an interest in the real estate upon which the improvements are made is necessary. That case is based upon the sound equitable doctrine that where the law has given a right to one person it cannot be destroyed by the wrongful act of another.

Having thus reached the conclusion that under our present statute a mechanic's lien can only be acquired on land, and that the buildings or improvements are to be taken as appurtenant merely, we will proceed to an examination of our statutes to determine whether the lien in question is void or valid. Section 1386, in which are contained the matters which must be stated in a notice of intention to claim a lien, reads as follows: "Every original contractor, within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this chapter, must, within forty days after furnishing the last material or performing the last labor for any building, improvement, or structure, or for any alteration, addition to, or repair thereof, or performance of any labor in or furnishing any materials for any mining claim, file for record with the county recorder of the county in which the property or some part thereof is situated, a claim in writing containing a notice of intention to hold and claim a lien, and a statement of his demand, after deducting all just credits and offsets, with the name of the owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the material, with a statement of the terms, time given, and conditions of his contract, specifying the time when the first and last labor was performed, or the first and last material furnished, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other

person.” This is followed by section 1387, which is as follows: “Liens against two or more buildings, mining claims, or other improvements owned by the same person or persons may be included in one claim; but in such case the person filing the claim must designate therein the amount claimed to be due to him on each of such buildings, mining claims, or other improvements.” These sections must be construed in connection with each other, and the two together must be construed in connection with other provisions contained in the whole of chapter 1 aforesaid. In order to arrive at the true legislative intent, courts cannot segregate a section or a part of an entire chapter upon a given subject, and from such part alone determine the true meaning or intent of the whole. Moreover, the object or purpose of the law as a whole must be considered. If often occurs that, in a series of sections relating to one subject, provisions are found in one or more sections that are in seeming conflict with other sections or parts of the same act. It also occurs that in an act like chapter 1, aforesaid, where rights are created, the methods to secure them are prescribed, and the procedure provided for to enforce such rights as against the property, the owner, and among other claimants, certain provisions may be intended to affect some and not others. Some of these provisions may be, and frequently are, intended for the benefit of some who may stand in a particular relation, and not to others standing in a different relation to either the owner or the property. This is the case with respect to our mechanic's lien law, as we shall attempt to show. Moreover, as is well stated in Boisot on Mechanics' Liens, § 4: “The doctrine upon which the lien is founded is the consideration of natural justice, that a party who has enhanced the value of property by incorporating therein his labor or materials shall have a preferred claim on such property for the value of his labor or materials.” But the respondent contends, and the contention is sound, that a mechanic's lien is purely statutory, not contractual, and none can be acquired unless the claimant has complied with the several provisions of the statute creating the lien. We yield full assent to this doctrine, and likewise assent that, where the statute fails, courts cannot create rights, and should not do so by unnatural and forced construction. But, while all this is sound doctrine, courts should not withhold the benefits intended by a series of sections on one subject by a too literal or strict construction of one section, or part of the whole series, so as to destroy intended effects of other parts.

It is the true intent and spirit contained in all the sec-

tions upon a given subject that constitutes the law upon that subject, not what may be contained in only one of them. The rule that in our judgment should govern, is, we think, correctly stated in 20 Am. & Eng. Ency. Law, on page 276, where the author says: “A lien once acquired by labor performed on a building with the consent of the owner should not, however, be defeated by technicalities, when no rights of others are infringed, and no express command of the statute is disregarded.” With these rules and principles in mind, we are prepared to proceed to an analysis of sections 1386 and 1387. Such an analysis becomes necessary, for the reason that this court has in no case that we are aware of, either done so or attempted to do so. True, the question was raised in the case of Garner v. Van Patten, 20 Utah, 342, 58 Pac. 684, but, as the court in that case sustained the lien, although, as appears from the case, the claimant had not strictly complied with the provisions of section 1387, the question here presented, if decided at all, was adverse to the respondent in this case. The question in this case *717 is, can a claimant obtain a valid lien as against an owner of property upon which the lien is claimed without including the statement required by section 1387? We think he can, for the following reasons:

It will be observed that by the provisions of section 1386, wherein are prescribed the necessary acts to be done by the claimant to acquire a lien, it is provided among other things that the claimant shall make “a statement of his demand after deducting all just credits and offsets.” The owner is thus fairly informed of the amount claimed against his property. If the amount is correct, he will have this amount to pay-no more, no less-to discharge the lien. If it is incorrect, he is fully apprised of the fact, and can make his defense. He therefore is not concerned in case the lien is claimed on more than one building erected upon one parcel of land, what amount is due on one or the other of the buildings. The lien is an entirety against the whole parcel of land and the improvements appurtenant thereto. As we read the mechanic's lien law, it was not intended that the provisions contained in section 1387 were intended either as an essential in acquiring a lien, or made for the benefit of the owner. The lien is complete by complying with section 1386. The statement of the amount due on buildings separately, as provided in section 1387, would be but a restatement of the amount of the claim as required by section 1386, in another form. As we view it, this restatement was not intended as an essential part in acquiring the lien. It could subserve no purpose to attain that end. It

could in no way affect the amount claimed against the entire property. It, however, subserves a purpose in respect to different lien claimants claiming liens against several houses or improvements erected on different parcels of land included in one lien. To determine the equities as between lien claimants of the same class where the law requires them to prorate, it is important to determine the exact amount due to each claimant upon each of the several buildings or improvements erected on different parcels of land in order to prevent one from getting more than his share in case the proceeds of a sale of the property are insufficient to satisfy all the claimants in full. This, however, does not affect nor concern the owner of the property, nor does it affect the validity of the lien as such, as against him or the property. But it is argued that effect must be given to all the requirements of the statute respecting the things to be done to acquire a lien. This is true, but, as we have attempted to show, a discrimination must be made between the things that are necessary to acquire a lien and those that are merely intended to protect the interests of the lien claimants between or among themselves. The statements in section 1387, as we view it, clearly belong to the latter class. The statements of the claimant provided for in section 1386 are made sufficient to acquire a lien and to protect the owner of the property. To hold that a restatement of the amount of the claim in another form is likewise necessary to acquire a lien, unless the statute requires this to be done in terms, is adding, by construction, an essential not required by the statute. The construction we place upon the sections quoted gives the language contained therein full force and effect. The statement required in section 1386 of the amount claimed is thus to acquire a lien, and the statement in section 1387 is for the purpose above indicated.

But it is further argued-and the argument at first blush seems plausible-that while the effect of the two sections construed together was, as we claim it to be, as originally enacted, such is not the case now, because section 1387 has been amended, and thereby its effect changed. The section corresponding to the present section 1387 is found in 2 Comp. Laws 1888, and is there designated as section 3812, and reads as follows: "In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must at the same time designate the amount due him on each of such buildings, mining claims or other improvements, *otherwise the lien of such claims*

is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens, by judgment, mortgage, or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated." The law was recast and amended in 1890 (chapter 30, p. 24, Sess. Laws 1890), wherein section 3812 is omitted. It was again amended in 1894 (Sess. Laws 1894, p. 44, c. 41), where it was re-enacted in its present form. It is conceded, in fact no one can dispute on reasonable grounds, that, with the italicized portion added, the failure to state the amount due on each of several buildings or improvements could not invalidate the lien as against the property or the owner thereof, but its effect would only be to postpone the lien to others in the same class. The logic of this admission is a concession that the statement of the amount due on each building separately, as required by section 1387, was not an essential part of the lien as such. It is urged that, since the Legislature eliminated the provision of what the effect should be in case of a failure to make the statement required in said section 1387, it was thereby intended to make the statement an essential part of the lien itself. We cannot yield assent to this deduction. If the Legislature intended that a failure to make such a statement should invalidate the lien theretofore valid without it, we think it would have said so in plain terms. We think that the amendment should not, by mere construction, be given that effect unless no other construction is reasonable. It frequently occurs*718 that statutes are enacted declaratory of some rule of law or equity. Our own statutes teem with such instances. The mere fact, therefore, that it is enacted into a statute does not create the right or remedy, as the case may be. Both would exist without the statute. The statute in such cases merely states the right without having recourse to the original rule. The fact, therefore, of the omission of the equitable rule contained in the italicized portion of the original section of which section 1387 is an amendment in our judgment would not affect the court in working out equity between lien claimants. The purpose of the omitted portion was to fix the penalty for the failure to state separately the amount due on each building. Is it reasonable to suppose that the Legislature, by removing the mild penalty, thereby intended to create a far more drastic one without saying so in terms? We do not think so. We think the effect of an omission to state the amount claimed on each building with and without the omitted portion of the section above quoted amounts to this: While that portion of the original section was in force, the courts

were compelled to enforce the penalty in every case where the statement required by section 1387 was omitted, whether the equities required it or not, while, under the present form of that section, the court is at liberty to enforce it or not as justice and equity demand in each particular case. The mere fact that section 1387 is mandatory in form does not necessarily make it so in its effects. It is an elementary rule of construction that the mere form of the statute does not control in this respect. *Sutherland on Stat Const* §§ 446, 447.

In view of the somewhat singular conditions arising by both the terms as well as the conditions of our mechanic's lien law, in view of the amendments and changes and omissions therein, we have been unable to find authorities directly in point upon the matters discussed herein. The following cases, however, in some degree at least, support all the views herein expressed. These decisions are based upon statutes similar in many respects to our own. *Willamette Co. v. Shea* (Or.) 32 Pac 759, *Lyon v. Logan*, 68 Tex 521, 5 S W 72, 2 Am St Rep 511, *Phillips v. Gilbert*, 101 U S 725, 25 L Ed 833, *Wall v. Robinson*, 115 Mass 429, *Lax v. Peterson*, 42 Minn 221, 44 N W 3, *Wheeler v. Ralph* (Wash.) 30 Pac 709. There are cases which hold that provisions substantially like those contained in section 1387 are essentials in acquiring a lien. Whether such provisions are part of the section wherein are contained the essentials to acquire a lien or not, we cannot determine without recourse to the statute creating the lien, and, not having access to them, we cannot examine them. It is manifest, however, that the courts that have so held have construed the mechanic's lien law with undue strictness. *Wilcox v. Woodruff*, 61 Conn 578, 24 Atl 521, 1056, 17 L R A 314, 29 Am St Rep 222, is a fair type of the cases holding adversely to the views that we entertain. In that case, however, there are two able dissenting opinions which, to our minds, state the rule of construction respecting mechanic's lien statutes correctly. The cases of *Crawford v. Anderson*, 129 Ind 117, 28 N E 314, *Culver v. Elwell*, 73 Ill 536, and some others, perhaps, are of the same class. None of these cases, however, in our judgment, reflect the true spirit of our mechanic's lien law, and therefore we decline to follow them. But there is room for contention that the demurrer was erroneously sustained upon another ground. As appears from the complaint, the contracts, and from the description of the property, the whole matter was treated as an entirety by all parties in interest. This being so, the two buildings were not,

within the purview of our statutes, to be treated as separate buildings. This for the reason that all liens of any class would prorate upon the whole, regardless as to whether the labor was performed on one or the other of the buildings, or the material was used in the one or the other. The very purpose of section 1387 being thus eliminated from the claim in this case, a non-compliance with it cannot affect any rights. This statement must, of necessity, be taken in the light of our construction of the several sections of our lien law and their effect in relation to each other as explained in this opinion. We desire to affirm again that, where a statute requires certain things to be done to acquire a right, nothing short of a substantial compliance with the statute will answer, but where a statute requires things to be done in case certain conditions exist, then, before the statute can be operative, it must appear that the conditions are in fact present. If we are right, therefore, that in this case the lien and the buildings are to be treated as an entirety, then the conditions provided for in section 1387 did not exist and the section is not applicable. These views, as we think, are sustained by the following California and other cases, which are based on statutes very similar to our own. *Booth v. Pendola*, 88 Cal 36, 23 Pac 200, 25 Pac 1101, *Warren v. Hopkins*, 110 Cal 506, 42 Pac 986, *Post v. Fleming* (N M) 62 Pac 1087, *Idaho M. & M Co. v. Davis*, 123 Fed 396, 59 C C A 200.

The judgment is therefore reversed, and the cause remanded with instructions to the district court to vacate the judgment, reinstate the case, overrule the demurrer, and permit the respondent to answer if she is so advised, and proceed with the case in accordance with this opinion. Costs of this appeal to be taxed against respondent.

McCARTY, C J, and STRAUP, J, concur.

Utah 1906
Eccles Lumber Co. v. Martin
31 Utah 241, 87 P 713

END OF DOCUMENT

ADDENDUM “K”

Appellees’ August 13, 2008 Wrongful Lien Letter



ATTORNEYS	ATTORNEYS	ASSOCIATES	OFFICE STAFF
Scott P. Card	Barnard N. Madsen	Amber R. Hall	Christina Johnson
William L. Fillmore	Richard W. Sheffield	Don D. T. Hall	Christina Johnson
Jennifer K. Gowans	Randall K. Spencer	David M. T. Hall	Christina Johnson
Matthew R. Howell	Mark D. Stubbs	David M. T. Hall	Christina Johnson

August 13, 2008

Peterson Plumbing Supply
Attn. Don Peterson
90 N. 600 E.
Richfield, Utah 84701

Re: Notice of Wrongful Liens

Dear Mr. Peterson:

I appreciate your cordial conversation on the phone this afternoon. As you are aware, our office represents General Construction and Development (GCD), Inc. and the other owners of the property who were served with Notice of Liens regarding the liens you have filed on Building O, Building S, Building X, Building N, Building V and Building W. I am aware of 30 liens being filed so far. As I informed you today, these liens are wrongful and must be removed within 10 days. These liens have caused irreparable harm and damages to my client, GCD, Inc. Dozens of owners have received the Notice of Lien and have contacted my client. Because of the owners' lack of understanding of lien laws they believe that GCD, Inc. has done something wrong and has not paid their bills. Many of the owners now believe that GCD, Inc. is insolvent and about to declare bankruptcy and these rumors have been spreading to other owners and the general public. As you are aware, GCD, Inc. still has many condominiums for sale. My clients sell their homes by word of mouth and right now your wrongful liens have caused the general public to lose faith in the stability of my client, GCD, Inc.

Utah Code Ann. §38-1-7 specifically states that the Notice of Lien must be filed within 180 days of the time the Certificate of Occupancy is given. There is no ambiguity in this statutory requirement and I have litigated this issue before. Your liens were filed after the 180 days elapsed and they are therefore not authorized pursuant to the statute. Utah Code Ann. §38-9-1 states that if the lien is not authorized by statute then it is a wrongful lien. Mr. Peterson, you are aware that General Construction and Development has paid Pace Plumbing, Inc. the full price of all the work and materials that were provided to the job. You were aware that over 180 days had elapsed since the Certificate of Occupancy was given on these liens. Further, you never once called GCD, Inc. and informed them that you had not been paid by Pace Plumbing. If General Construction and Development would have known that you were not being paid, they would have stopped paying Pace Plumbing and would have paid you directly. Your own actions have caused you not to receive payment for those materials because you were aware that Pace Plumbing was not paying and you failed to provide this knowledge to my clients and failed to protect yourself against further losses. It is because of your failures that you are now in this predicament. GCD, Inc. has not done

FILLMORE SPENCER LLP ATTORNEYS AT LAW

1000 North Main Street, Suite 1000, Salt Lake City, Utah 84102
at Jamestown Square
WASHINGTON • ARIZONA • CALIFORNIA • IDAHO • OREGON
SACRAMENTO • CALIFORNIA ONLY

anything wrong and they have always paid all their bills on time and continue to do so, they should not be responsible for your own failures and those of Pace Plumbing.

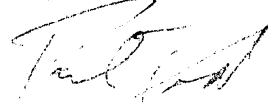
Not only are the Notice of Liens filed untimely, but many of the liens contain material misstatements or false claims. Many of the Notices of Lien have the last day of the materials being provided well after the date the Certificate of Occupancies were given and after the buildings were completely finished. It goes without saying that Peterson Plumbing Supply could not have provided plumbing materials to a building that was completely finished and Certificates of Occupancy issued.

You are hereby given notice, pursuant to U.C.A. § 38-9-1 et al., that these liens are wrongful and you have ten days to release these wrongful liens or you will be liable to my client in the amount of \$10,000.00 per wrongful lien or for treble the actual damages, whichever is greater. Since 30 liens have been recorded, that is a total of \$300,000 you will have to pay my clients if the liens are not removed. Further, your actions in filing these wrongful liens constitute a Class B misdemeanor pursuant to U.C.A. § 38-1-25.

Please be aware that my clients will pursue this matter immediately in court if the liens are not removed. In Court they will seek the full amount of damages plus their attorney fees. Even if you remove the liens, the damage your actions have caused has already taken place and most likely cannot be repaired. Your willful disregard to my client's reputation and good name is disheartening. You could have communicated with General Construction and Development many months ago and avoided all of these issues. Further, you could have informed them that you were planning to file liens before you actually filed them so that my clients could have had some time to discuss the issue with you and hopefully they could have convinced you not to file the liens. Even if you did decide to file the liens, at least my clients would have had some time to speak with the various owners and prepare them for what was happening so they would not become so worried.

My clients hope that they will not have to pursue litigation against you and that you will quickly remove the liens. However, if this does not happen within 10 days of today my clients will have no other option. Please feel free to call me at my office to discuss these issues.

Respectfully,



Paul D. Dodd
Attorney for GCD, Inc.

ADDENDUM “L”

Order on Petition to Nullify Liens dated November 14, 2008

FILED

STATE OF UTAH
UTAH COUNTY

Paul D. Dodd (10675)
FILLMORE SPENCER, LLC
Counsel for Petitioners
3301 North University Avenue
Provo, Utah 84604
Telephone: (801) 426-8200
Facsimile: (801) 426-8208

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

**GENERAL CONSTRUCTION &
DEVELOPMENT, INC.**, a Utah
Corporation; **BRANDON D. WILSON;**
JUSTIN A. & SHANON HUTCHINS;
BLAKE WALKER; BRACKUS LUKE
RAY; MARY L. DOYL, CLIFF & LISA
STRADLING; JAMES & WENDI
HARVEY; JULIE GRAY; SCOTT E. &
BRITTANY WILSON; ANDREW W. &
KRISTA W. YOUNG; JAMES &
MARGARET PURCELL; NICHOLAS
S. & RYAN J. BERNARD; DONALD R.
& WENDY ROGERS; PLEASANT
GOVE PROPERTY, LLC; ANDREW
RAMMELL; ROBERTM. BERRY;
LYLE F. PETERSEN; SCOTT
GOODMAN and WILLIAM &
CHELSEY TIPTON. individuals.

Petitioners,

v.

PETERSON PLUMBING SUPPLY, a
Utah Corporation.

Respondent.

**ORDER ON PETITION TO
NULLIFY LIENS**

Civil No. 080402976

Judge Samuel D. McVey

000139

THIS MATTER comes before the Court pursuant to Petitioners' Petition to Nullify Liens. A hearing was held on this Petition on October 8, 2008 before the honorable Judge Samuel D. McVey. Petitioners were present represented by Counsel Paul D. Dodd and Respondent was present represented by Counsel Dana T. Farmer. The Court having reviewed all applicable pleadings and heard oral arguments on the case and for good cause appearing does hereby now ORDER, ADJUDGE, and DECREE as follows:

1. Respondent filed its Notice of Lien's after 180 days from the date of final completion and therefore the Notice of Liens were untimely.
2. Respondents inchoate lien rights expired before its Notice of Liens were recorded. At that point their lien rights were void and could not be resurrected by a filing of a Notice of Completion.
3. Therefore, the Court finds that all the liens involved in this Petition on Building N, V, W, X, and Y are wrongful liens and are void ab initio.
4. The properties are hereby released from the lien and a legal description of these properties is attached to this Order as Exhibit "A".
5. Petitioner can record a certified copy of this Order with the County Recorders.
6. The issue of attorney's fees, costs, damages or statutory penalties is reserved for another hearing.

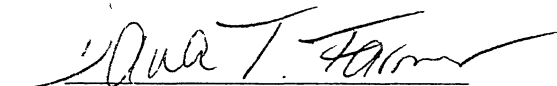
DATED this 1st day of Nov 2008.

BY THE COURT:


JUDGE SAMUEL D. MCVEY

000198

Approved as to Form:




Dana Farmer
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I mailed, first class US mail, postage pre-paid, a true and correct copy of the foregoing on this 30 day of October, 2008 to the following:

Dana T. Farmer
Smith and Knowles, P.C.
4723 Harrison Blve. #200
Ogden, Utah 84403



ADDENDUM “M”

Partial Transcript of Trial Court’s Oral Decision

FILED

Fourth Judicial District Court
of Utah County, State of Utah

1-609 Blevins

Deputy

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

GENERAL CONSTRUCTION &
DEVELOPMENT, INC., et al

Plaintiff,

vs.

PETERSON PLUMBING SUPPLY,

Defendant.

ORIGINAL

Case No. 080402976

Hearing
Electronically Recorded on
October 8, 2008

BEFORE: THE HONORABLE SAMUEL D. MCVEY
Fourth District Court Judge

APPEARANCES

For the Plaintiff:

Paul Dodd
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1 and void, and released from the property.

2 THE COURT: Thank you. I will ask you to prepare the
3 order in this case, Mr. Dodd. The liens -- notices of liens
4 on the -- and therefore the underlying lien on buildings, or
5 units -- whatever they are -- N, V, W, X and Y are declared
6 wrongful liens, and will be expunged -- released.

7 I think that Mr. Farmer is spot on when he says what
8 the statute meant and what the legislature says it meant.
9 Having been somewhat involved with looking at that statute and
10 evaluating it while on the construction section of the bar, I
11 think he is precisely right. But my opinion on that doesn't
12 matter because the Court of Appeal has said something else.

13 The Court of Appeal has said in deciding whether
14 a person is entitled to a lien that -- they said this in
15 Foothill -- that in this case that I'm referring to paragraph
16 20 of the Foothill case. "In this case, whether or not Judston
17 was, quote, 'entitled to a lien,' unquote, is determined at the
18 time Judston filed its disputed third notice of interest July 14,
19 2006."

20 Now in reading that under probably what the legislature
21 intended and what Mr. Farmer would say, you would stop there and
22 say, "Well, yeah, were they a licensed subcontractor at that
23 time?" Then Foothill goes past that and says, "No, you look at
24 whether their lien is timely." That's what Foothill says. So
25 Foothill substantially expands the statute, and the Court has to

1 follow that.

2 In this case the inchoate lien rights expired before the
3 notices of lien were recorded. They became void 180 days after
4 the certificate of occupancy was issued, indicating substantial
5 completion on these projects. Accordingly, at that point they
6 were void and they disappeared and could not be resurrected by
7 the subsequent recording or filing with the State of the notice
8 of completion.

9 Further, the notices of completion -- I think the sta --
10 the notice of completion statute is intended to allow someone
11 to give notice to all of the suppliers and subcontractors and
12 shorten the time from 180 days to 90 days to record a lien. So
13 it's supposed to be issued within that 180-day period early on
14 in order to shorten that. That's what the intent of that statute
15 is, not to resurrect voided inchoate lien rights.

16 So I -- you know, I was quite frankly surprised when I
17 saw how the Court came out in Foothill, like Mr. Farmer was. I
18 believe today that he's correct in this view of what the statute
19 means and what the legislature said, but nonetheless, the Court
20 has to abide by his ruling, and look at whether -- and rather
21 than say entitled to a lien means a statutory definition, saying
22 entitled to a lien means you look and see whether they had a
23 lien right that they could still record on at the time that they
24 recorded the notice of lien. It's kind of surprising to me, but
25 that's what the Court of Appeal has said, and so I have to do

what they say

3 So based on that, the notice of liens will be released
4 ly -- either by order of the Court or by other means that Counsel
5 agree upon, and we'll take it from there, and then we'll -- once
6 you've been able to conduct your discovery on these other issues,
7 we'll look at that.

8 I don't know if you'd be anticipating filing a
9 lawsuit against the general contractor or whomever you were in --
10 whomever Peterson Plumbing was contracting with, but you might
11 want to look at -- if you do -- well, I don't know if it would
12 be advisable to consolidate those things or not. It seems like
13 there would be some similar facts, but maybe not. Maybe they're
14 sufficiently different that the cases shouldn't be consolidated.

15 So I'll you prepare that order, Mr. Dodd, serve that on
16 Mr. Farmer in due course, and then submit it. We'll -- you know,
17 we'll look at it if there are no -- we'll sign it if there are no
18 objections, okay?

19 MR. DODD. Thank you, your Honor.

20 MR. FARMER: Thank you, your Honor.

21 THE COURT Thank you, Counsel

(Hearing concluded)