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# Ward C. Holbrook v. Webster's, Inc et al : Brief of Respondents

Utah Supreme Court

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M. V. Backman; John Far Larson; John W. Lowe; Attorneys for Respondents;

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# IN THE SUPREME COURT

OF THE

## STATE OF UTAH

UNIVERSITY UTAH

WARD C. HOLBROOK, and  
MABEL F. HOLBROOK, his wife,  
*Plaintiffs and Respondents,*

vs.

WEBSTER'S, INC., a corporation,  
*Defendant and Appellant,*

ELVIN COON, et ux and et al.  
*Defendants,*

and

LEONARD A. TRIMBLE and  
ALICE TRIMBLE, his wife,  
*Defendants and Respondents.*

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Case No. 8724

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RESPONDENTS' BRIEF

Clerk, Supreme Court, Utah

M. V. BACKMAN  
JOHN FAR LARSON  
JOHN W. LOWE

*Attorneys for Respondents*

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## INDEX

Page	
2	LIEN NOT FILED WITHIN STATUTORY PERIOD....
2	ONE DEALING WITH OWNER IS ORIGINAL CON- TRACTOR .....
9	WAIVER AND RELEASE.....
9	(a) Parol Evidence .....
11	(b) Estoppel .....
12	(c) The legal effect of the lien waiver on summary judgment .....
14	CONCLUSION .....

## AUTHORITIES

Page	CASES:
4	Albuquerque Lbr. Co. v Tomei, 32 N.M. 5, 250 P. 21..
3	Ambrose Mfg. v Gapen, 22 Mo. Appl. 397.....
10	Andrus v Blazzard, 23 U.233, 63 P. 888, 54 LRA 354
4	Boyer v Keller, 258 Ill. 106, 101 NE 237, Ann. Cas. 1916 B, 628 .....
4	Builder's Supply Co. v Eggmann, 190 Ill. App. 572..
4	Colorado Iron Works v Rickenberg, 4 Idaho 262, 38 P. 651, 652 .....
3, 4	Freidenbloom v Pecos Valley Lbr. Co. 35 N.M. 154, 290 P. 797, 798.....
11	Fox Film Corp. v Ogden Theatre Co. 82 U, 279, 17 P2d 294, 90 ALR 1299.....
7	Grassi v Lovisa, 259 N.Y. 417, 182 NE 68, 83 ALR 1149 .....
3	Gray v NM. Pumice Stone Co., 15 NM 478, 110 P. 603
3	Hearne v Ry. Co. 53 Mo. 324.....
6	Hinckley v Fields Biscuit Co. 91 Cal. 136, 27 P. 594..
12	Hyde Park Inv. Co. v Hyde Park State Bank, 257 Ill. App. 539 .....
3	Jordan v Natrona Lbr. Co. (Wyo.) 75 P2d 378.....

*Page*

Kertscher v Oreon, 205 N.Y. 522, 99 NE 145, Ann. Cas. 1913 E, 561 .....	12
Last Chance Ranch Co. v Erickson, 82 U. 475, 27 P2d 952 .....	11
Matthews v Association (Tex. Supp.) 19 SW 150.....	5
Mitchell v McCutcheon, 33 N.M. 78, 260 P. 1086.....	4
Morris v Bessemer Lbr. Co. 217 Ala. 441, 116 So. 528	3
Morris v Carey-Lombard Co., 9 U. 70.....	8
Planing Mill Co. v Grams, 72 Wis. 275, 89 NW 531....	5
Stark-Davis Co. v Lansdon et al, (Ore.) 265 P. 792.....	3
Ulibarri v Christenson, 2 U 2d, 367, 275 P2d 170.....	13
Van Dyke Heating v Central Iowa Bldg. Co. 2000 Ia. 1003, 205 N.W. 650, 102 ALR 356.....	11

**CODE:**

UCA 1953, Sec. 38-1-2.....	2
UCA 1953, Sec. 38-1-7.....	8

**TEXT:**

Ann. Cas. 1913 E, page 561.....	12
20 Am. Jur. Sec. 1102, page 964.....	10
20 Am. Jur. Sec. 973.....	10
36 Am. Jur. (Mech. Liens) paragraph 51.....	5
36 Am. Jur. (Mech. Liens) Sec. 221.....	11
83 ALR, page 1149.....	7
90 ALR, page 1299.....	11
102 ALR, page 356.....	11
54 LRA, page 354.....	10
57 CJS, Sec. 57, page 547.....	6
Jones on Liens, Sec. 1283.....	5

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Case No. 8724

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### RESPONDENTS' BRIEF

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Respondents agree with the statement of facts as recited by appellant with the exception that Elvin Coon was owner wherein appellant refers to Coon as builder. Respondents Trimble, in open court, without objection by appellant, joined in Plaintiffs' motion for summary judgment, and counsel

for appellant orally stipulated that no objection would be raised to such joinder.

The motion for summary judgment was based upon two grounds: (1) The appellant failed to file its lien within the statutory period of eighty days, and (2) Appellant is estopped from asserting its lien, having signed a written waiver. It is the contention of respondents that each of said grounds supports the judgment.

## I

### LIEN NOT FILED WITHIN STATUTORY PERIOD

It is conceded that appellant's lien was not filed within 80 days after the furnishing of the last materials by this claimant, but the lien was filed 83 days after the last delivery. The fact that Coon who built the house was the fee owner who executed the notes and mortgages and contracted with the materialmen for the furnishing of materials is uncontraverted. The legislature of the State of Utah has defined Contractors and Subcontractors under Section 38-1-2 UCA 1953 as follows:

“Whosoever shall do work or furnish materials by contract, express or implied, with the owner, as in this chapter provided, shall be deemed an original contractor, and all other persons doing work or furnishing materials shall be deemed subcontractors.”

#### (a) ONE DEALING WITH OWNER IS ORIGINAL CONTRACTOR

Appellant in its lien recognized Coon as the owner by characterizing Coon as “Contractor *AND* Owner”. The

The statutory definition controls over the public concept of what a contractor is. The mere fact that a builder of houses is generally referred to as a “contractor” should have no effect to supersede the statutory definition of what is meant by “contractor” under the particular mechanics lien statute in Utah.

The following cases support this proposition.

Jordan vs. Natrona Lumber Company, .....  
 Wyo....., 75 Pac. (2d) 378, 385,  
 wherein the court said:

“In Ambrose Mfg. Co. v Gapen, 22 Mo. Appl. 397,  
 the Court said:

‘It is contended by appellants that the term original contractor, as used in the statute, has reference solely to those who may do service, by way of work, labor, or superintendence, upon the building.

‘The point is not well taken. It has been specially ruled by our Supreme Court, that a material man may be an original contractor, and that he is, in fact, such contractor, if he furnished the material on a contract with the owner. Hearne v Ry. Co. 53 Mo. 324.’

“Courts in other jurisdictions having similar words to construe have taken the same view as that announced by the foregoing decisions. See Morris v. Bessemer Lumber Co., 217 Ala. 441, 116 So. 528; Gray v. N.M. Pumice Stone Co., 15 N.M. 478, 110 P. 603. And in Freidenbloom v. Pecos Valley Lumber Co., 35 N.M. 154, 290 P. 797, 798, the court, discussing who may be regarded as ‘owner’ and ‘original contractor’ within the meaning of those words in the mechanics’ lien law of that state, said that the word ‘owner’ means the party in interest who is the source of authority for the

improvement. One who deals with such a party directly is contracting with the 'owner', and is not a subcontractor, but is an 'original contractor'. *Albuquerque Lumber Co. v. Tomei*, 32 N.M. 5, 250 P. 21; *Mitchell v. McCutcheon*, 33 N.M. 78, 260 P. 1086; *Boyer v. Keller*, 258 Ill. 106, 101, N.E. 237, Ann. Cas. 1916B, 628; *Builders' Supply & Coal Co. v. Eggmann*, 190 Ill. App. 572; *Colorado Iron Works v. Rickenberg*, 4 Idaho, 262, 38 P. 651; 18 R.C.L. 'Mechanics' Liens,' par. 39. There was no error in the ruling complained of.' "

*Freidenbloom vs Pecos Valley Lumber Company*,  
.....N.M....., 290 P. 797, 798

"It means the party in interest who is the source of authority for the improvement. One who deals with such a party directly is contracting with the 'owner', and is not a subcontractor, but is an 'original contractor'. *Albuquerque Lumber Co. v. Tomei*, 32 N.M. 5, 250 P. 21; *Mitchell v. McCutcheon*, 33 N.M. 78, 260 P. 1086; *Boyer v. Keller*, 258 Ill. 106, 101 N.E. 237, Ann. Cas. 1916B, 628; *Builders' Supply Co. v. Eggmann*, 190 Ill. App. 572; *Colorado Iron Works v. Rickenberg*, 5 Idaho, 262, 38 P. 651; 18 R.C.L. 'Mechanics' liens,' par. 39. There was no error in the ruling complained of."

*Colorado Iron Works vs. Rickenberg*, 4 Idaho 262, 38 P. 651, 652

"Under the statutes of Idaho, any person contracting directly and exclusively with the owner, and between whom and the contractor for the construction of the structure there is neither relation of interest nor privity of contract, is an original contractor, and as such has the 60 days provided in the statute for the filing of his notice of lien. In this construction we are in accord



with the courts of many states having a statute almost identical with ours. *Matthews v. Association* (Tex. Sup.) 19 S.W. 150; *Hearne v. Railway Co.*, 53 Mo. 325; *Bank v. Dashiell*, 25 Grat. 616; *Planing Mill Co. v. Grams*, 72 Wis. 275, 89 N.W. 531; *Phil. Mech. Liens*, Sec. 40-42; *Jones, Liens*, Sec. 1283."

*Stark-Davis Co. v. Lansdon et al.*,.....Ore.....,  
265 P. 792, the first Head Note of which is as follows:

"Materialman, installing furnace pursuant to negotiations with owner, HELD, as bearing on validity of lien subsequently filed, an original contractor, though owner had entered into a written contract with another for construction of dwelling and furnishing of all material therein."

36 Am. Jur. Mechanics' Liens, Par. 51, is in part as follows:

"CONTRACTORS AND SUBCONTRACTORS DISTINGUISHED. — The principal contractor is one standing in direct relation to the proprietor and responsible to him, permitted by the nature of his contract ordinarily to work out the plan thereof by subletting to others if he sees fit. He is the person who agrees with the owner to construct a building upon the owner's property. In order to constitute a lien claimant an original contractor, there must exist or have existed a contract, either express or implied, between such lien Claimant and the owner of the property. One who deals with the party in interest who is the source of authority for the improvement directly is contracting with the owner, and is not a subcontractor, but is an original contractor."

In 57 CJS Sec. 57 at page 547, Mechanics Liens we find the following:

“Under statutes so providing, the word ‘owner’ includes every person for whose immediate use or benefit the building, erection, or improvement is made. Some courts, construing such statutes in connection with other statutes deem an owner to be a person who owns an interest in the land and for whose immediate use and benefit the improvement is made.”

and at page 547 we find the following:

“It has been held that the purpose of the statute is to enlarge rather than limit the ordinary definition of the word ‘owner’. *Under the latter construction a person who owns both the building and the fee is an owner regardless of whether or not the improvement is made for his immediate benefit.*” (Italics added)

As to the term “Contractor” we find at page 602, section 90 of the same text it states that as used in mechanics’ lien statutes the term “contractor” has a restricted meaning. A contractor, or principal contractor or original contractor, within such statutes, is a person who contracts directly with the owner of the property to erect or construct a building or other structure or improvement or any main division or part thereof.

In *Hinckley v. Fields Biscuit & Cracker Co.*, 91 Cal. 136, 27 P. 594 it is said:

“One holding the legal title to land, who enters into a contract with the corporation to construct a factory thereon under his directions, in consideration of a transfer to him before the erection of the building of a

certain number of shares of its capital stock and agrees to convey the building after its completion, together with the land upon which it stood, to the company, is the 'owner' of the building and not a contractor within the meaning of Code or Civ. Proc. Sec. 1183, relating to mechanics' liens."

And in *Grassi v Lovisa*, 259 N.Y. 417, 182 NE 68, Annotated in 83 ALR 1149 the court held a vendor of land who has contracted for a consideration to convey the premises to the vendee and thereafter to erect a building thereon, is not a contractor for the improvement within the provisions of the Mechanics' Lien Law.

We find from said case the following facts: Sherman Square Studios Realty Corporation was the owner of premises in New York City. Sherman conveyed to a corporation the premises which thereupon began the construction of a building. Plaintiff Grassi furnished labor and materials for plastering. Defendant Lovisa furnished labor and material for marble installation. They and others filed liens. The court said:

"Sec. 2 of the New York Lien Laws says: 'The term' contractor when used in this chapter, means a person who enters into a contract with the owner of real property for the improvement thereof.'"

It is to be noted this wording is very similar to our Section 38-1-2.

In the above case the court further said in construing this Section:

"The contractor whom the lien law has in view is one who would be so characterized in the common

speech of men. He is one who, in the usual course of trade has undertaken to improve the property of another. On its face, the agreement between Sherman and the corporation was not a contract between general contractor and owner, for the corporation, when the contract was signed, did not then own the title to the premises, nor was it a vendee in possession under a contract for the purchase of such real property. On the contrary, the contract was one between vendor and purchaser whereby, in addition to conveying the property, the vendor agreed to make improvements thereupon for the benefit and at the expense of the vendee. *Thus when the contract was made Sherman was still the owner, and since it could not contract with itself, could not have been a general contractor for the improvement.*" (Italics added)

The above case is much stronger and goes much further than the Court is required to go in the instant case. It appears that Coon was the fee title owner until April 25th, 1956, the date of the deed from Coon to Trimble.

Fee title was vested in Coon during the whole of the period of construction of the improvements. Each of the lien claimants designated Coon as owner in their notices of liens.

Coon being the owner with whom appellant contracted, appellant was required to file its lien within 80 days from its last delivery of materials. Section 38-1-7 UCA 1953 is mandatory in this requirement.

The Courts of Utah have so construed the above provision in *Morris v Carey-Lombard Co.* 9 Utah p. 70 at page 76 in which case the court speaking through Mr. Justice

Bartch said of the provisions of the act approved March 12, 1890, Session Laws 1890, sections 10 and 11:

“Every person claiming a lien must file the statement as provided in this section. This is indispensable to preserve the lien provided for in the preceding sections, and section 11 provides that this statement shall be filed within 60 days in case of the principal contractor, and within 40 days in case of a sub-contractor in either degree after the time when the last work shall have been done or the last material shall have been furnished.”

and at page 80 of the same case the court further says:

“After the work is completed or the materials are furnished the lien may be lost by a failure to file the statement provided in section 10 within the time allowed in section 11, or by a failure to foreclose within the time as limited in this act.”

The above case is cited under our present Section 38-1-7 UCA 1953, subdivision 4 at page 752, and is the law today.

The only question on this point raised by appellant was that Coon was a contractor. The cases above cited show as a matter of law that Coon was not a contractor. There, therefore, is no genuine issue for trial as to this point.

## II

### WAIVER AND RELEASE

#### (a)—Parol Evidence:

Appellant executed a written release and lien waiver for a valuable consideration which provided in part that the

executing party "Waives, releases and discharges any lien or right to lien the undersigned has or may hereafter acquire against said real property." The instrument is unambiguous in all respects. Appellant is attempting to vary the terms thereof by parol evidence. It is elementary that this cannot be done. Appellant would not be in position to introduce evidence at a trial that appellant's intent was other and different from the unambiguous language of the written instrument.

20 Am. Jur. 964 under the title evidence, Section 1102 provides:

"The intention of the parties as evidenced by the legal import of the language of the written contract cannot be varied by parol proof of a different intention, in the absence of some equitable ground for intervention, such as mistake, fraud, or surprise. Parol evidence is not admissible to show the intention of a party as to the character of an instrument which is so plain and unambiguous that its meaning can be ascertained from reading it. Hence, testimony of a party to a contract as to how he understood it is inadmissible. Testimony as to what the witnesses understood from conversations with the parties, as to the contract between them, cannot be received to contradict the written contract."

There is a long list of cases cited in support of the above proposition including *Andrus v. Blazzard*, 23 U. 233, 63 P. 888, 54 L.R.A. 354.

20 Am. Jur. 973 provides:

"The admissibility of parol evidence in the case of a receipt has been conditioned on ambiguity; the view is that if the receipt is definitely descriptive of what is

intended to be affected by it, it cannot be assailed by parol testimony except on the ground of fraud.”

“In the absence of fraud or mistake, parol evidence is not admissible to contradict, vary, add to, or subtract from the terms of a valid written instrument. *Fox Film Corp. v. Ogden Theatre Co., Inc.*, 82 Utah 279, 17 P 2nd 294, 90 A.L.R. 1299; *Last Chance Ranch Co. V. Erickson*, 82 U. 475, 25 P 2nd 952.”

## (b) ESTOPPEL

In 36 Am. Jur. on Mechanic's Liens, Section 221 under the subject of Estoppel we find the following statement:

“Under the general principles of estoppel, the right to a mechanic's lien may be waived or lost by a course of conduct on the part of the lien holder which would render it inequitable for him to assert a lien.”

at section 230 it is said:

“A contractor, by agreeing with the owner to keep the property free from mechanics' liens, and, a fortiori, by agreeing to assert no lien, precludes himself from claiming a lien, and the right to a lien is not revived by the failure of the owner to make payment as agreed.”

In *Van Dyck Heating & Plumbing Co. v Central Iowa Bldg. Co.* 2000 Iowa, 1003, 205 N.W. 650, 102 ALR page 356, holding that a contractor was not entitled to assert a mechanic's lien, the court said:

“A mechanic's lien is a right or privilege given to a contractor to protect himself against loss for material and labor furnished. It is wholly a creature of statute. We know of no reason, and none has been urged, which would prevent the contractor from waiving such a lien.

In this instance where, by the contract, the contractor waived all liens and claims to liens to which he was entitled by statute by reason of work done or to be done. The waiver was perfectly clear and unambiguous in every respect."

The above case has been followed in numerous jurisdictions.

In *Hyde Park Inv. Co. v Hyde Park State Bank*, 257 Ill. App. 539 it was held that a contractor could not assert mechanic's liens where he had executed and delivered for a valuable consideration express waivers of liens "on account of labor or materials or both furnished or which may be furnished."

And in *Kertscher v Oreon* 205 NY 522, 99NE 146. Ann.Cas. 1913E 561 the court said:

"No good reason can be suggested why a contractor cannot for a valuable consideration, waive the provisions of the statute giving him the right to file a notice of lien."

### (c) THE LEGAL EFFECT OF THE LIEN WAIVER ON SUMMARY JUDGMENT

The legal effect of the lien waiver is a genuine issue in this case. It is not an issue of fact, however. The facts are clear. Appellant cannot seriously contend that parol evidence is admissible to vary the terms of this written instrument by showing that one party to the transaction intended that the instrument should not have the legal effect that is obvious upon its face. This issue is, therefore, an issue of law. The appellant, for a valuable consideration, agreed



to waive, release and discharge any lien or right to a lien which it had or which it might thereafter acquire. Appellant cannot now change the agreement by saying it intended it to have a different effect nor can appellant effectively claim that by doing so an issue of fact is created.

The case of *Ulibarri V. Christenson*, 2 Utah 2nd 367, 275 P 2nd 170, cited by appellant as authority for its position that a summary judgment should not be granted where there is a genuine issue of fact, correctly states the law with respect to this matter. In that case, motion for summary judgment based upon a release was granted even though the release was assailed on the grounds of (1) ambiguity, (2) failure of consideration, and (3) voidness because of fraud and duress, the Court holding there was no genuine issue of fact. In this case appellant was given every opportunity to show why the lien waiver was not, as respondents contend, a waiver of lien right which appellant might thereafter acquire. Appellant's only defense is that it intended that the agreement not be a release of lien rights which might be acquired in the future contrary to the unambiguous wording of the instrument. Assuming for the moment that defendants actually did so intend, it would not be sufficient to change the legal effect of the lien waiver. In sustaining the lower Court's order granting summary judgment in the *Ulibarri V. Christenson* case, *supra*, the Supreme Court at page 371 observed:

“The trial court having afforded the plaintiff a fair opportunity to make any representations she could which might overcome the release, and having determined as a matter of law that her claims, even if proved, would not meet the legal requisites necessary to do so,

he correctly granted the motion for summary judgment.”

The conclusion is inescapable. Appellant waived its right to acquire a future lien for services or materials furnished on this property. Appellant is estopped and summary judgment was properly granted against appellant.

### CONCLUSION

Coon was an owner-builder. The cases cited herein show that the law is clear that under our lien law such a person is an “owner” and not a “contractor”. Apparently notice of lien was not, therefore, filed in time.

Furthermore, if a notice of lien had been filed timely, appellant has no lien because appellant executed a release for a consideration whereby it “hereby waives, releases and discharges any lien or right to lien the undersigned has or may hereafter acquire against said real property”.

For both reasons herein stated, respondents should prevail.

Respectfully submitted,

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