

2014

**Pentalon Construction, Inc. And Granite Construction Company v.
Rymark Properties, LLC and Federal Deposit Insurance
Corporation, Etc : Reply Brief of Appellants Pentalon Construction,
Inc. And Granite Construction Company**

Utah Court of Appeals

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IN THE
UTAH COURT OF APPEALS

PENTALON CONSTRUCTION, INC. AND
GRANITE CONSTRUCTION COMPANY,
Plaintiffs and Appellants,

v.

RYMARK PROPERTIES, LLC AND
FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.,
Defendants and Appellee.

REPLY BRIEF OF APPELLANTS PENTALON CONSTRUCTION, INC.
AND GRANITE CONSTRUCTION COMPANY

On appeal from the Second Judicial District Court, Weber County,
Honorable Ernie W. Jones, District Court No. 090902634 and
Consolidated Action Nos. 090906697 and 090907256

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Oral Argument Requested

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Introduction

In the district court and the opening brief, the dispositive issue was whether the near completion of the excavation of a foundation—coupled with the delivery and installation of geotextile fabric and engineered base material for a building’s foundation—constitutes “commencement” of construction work under the Utah Mechanics’ Lien Statute. As demonstrated in the opening brief, the case law is uniform in holding that such excavation and material delivery is commencement. There is *not a single case* in any jurisdiction holding otherwise.

Finding no legal support for the district court’s ruling, the FDIC tries to change the subject. The FDIC does not address the district court’s ruling until the end of its response brief, and cites no case holding what the district court ruled here—that near complete excavation does not constitute commencement *as a matter of law*. Instead, the FDIC asserts that various cases “suggest” a rule supporting its position and that the cases cited in the opening brief contain dicta or “suggestions.” The FDIC’s assertions are a distraction. A court’s application of a rule that “excavation equals commencement” to the facts of a particular case is not dicta. Moreover, labeling such language as “dicta” does not change the fact that no case supports the FDIC’s position—even *in dicta*.

In fact, the cases are so overwhelmingly in favor of Pentalon’s position that it is worth pausing to examine the FDIC’s argument. The FDIC asserts that—as a matter of law—a prudent lender inspecting a construction site cannot be on notice that lienable work is underway until excavation is complete. [Resp.Br. at

29-35.] Apart from making no sense given the visible nature of excavation work, the FDIC's position that the "last spade" of work must have been completed is contrary to the case law. The case law tethers the so-called "first spade rule" to the *first* – not the *last* – spade of dirt removed in excavating a building's foundation. *H.B. Deal Constr. Co. v. Labor Disc. Ctr.*, 418 S.W.2d 940, 951 (Mo. 1967). It is difficult to understand how the "first spade rule" can be construed to suggest that the last spade of work must be complete before a prudent lender would have notice that lienable work has begun. The FDIC never explains.

This is perhaps why the FDIC changes the subject by discussing alternative grounds to affirm. In discussing its alternative grounds, the FDIC mentions that it did not raise its arguments in "precisely these terms" in the district court. [Resp.Br. at 2.] But the FDIC fails to mention that (i) it expressly stayed further briefing of the arguments in the district court, (ii) Pentalon therefore did not fully address any of those legal arguments, (iii) Pentalon therefore did not create a factual record to address the arguments, and (iv) the district court never had an opportunity to rule on those arguments. A party should not be permitted to stay briefing of an argument in the district court, thereby inducing the other party not to address the argument (legally and factually), and then raise the argument as an alternative ground to affirm that is "apparent from the record." Regardless, even on the underdeveloped record, all of the FDIC's alternative arguments fail.

Although all of the FDIC's arguments are off the mark, the FDIC, unfortunately, will still be successful on appeal. As it did in the district court, the FDIC will have succeeded in delaying the district court's consideration of the ultimate merits, even if this court reverses. As the response brief makes clear, the ultimate merits will turn not on this court's interpretation of "commencement" under section 38-1-5 of the Utah Code but on the ambiguities surrounding the various contracts and guaranties among Pentalon, Rymark, and the lender. The longer that determination is delayed, the better for the FDIC.

But more important, the FDIC has succeeded in raising the stakes of the litigation to the detriment of Pentalon. An attorney fees award to the prevailing party is in play in this case, and while the FDIC could afford to pay Pentalon's attorney fees at the end of this case, given the extensive attorney fees the FDIC has incurred pursuing the "commencement" issue, at some point any chance of Pentalon's having to pay those fees will make the financial risk in vindicating its rights simply too great. Institutional parties—such as the FDIC and title insurers—can easily bear the delay and risk.

Contractors and subcontractors working on the ground are far less able to bear the same delay and risk. To the extent this court agrees that the FDIC's legal arguments are so lacking in merit that they have been advanced only for the purpose of delay, this court should award Pentalon the attorney fees on appeal under rule 33(a) of the Utah Rules of Appellate Procedure.

Response to the FDIC's Course of Proceedings

In light of the "alternative grounds" argument the FDIC raises, it is worth clarifying the course of the proceedings to clarify which arguments were fully briefed and submitted to the district court. At the August 2011 hearing, only those raised in Granite's motion for partial summary judgment concerning commencement were briefed and argued. [R. R.349-408 (Granite's motion and memorandum); R.1110-1197 (FDIC's opposition memorandum to Granite's motion); R.1393-1595 (Granite's reply memorandum); R.1390 (notice to submit); R.1661 (notice of hearing); R.3733:3 ("[T]he only motion before the Court today is Granite's motion for partial summary judgment."), attached as Addendum A.]

In the opening brief, Pentalon referred to all plaintiffs as "Pentalon," and thus referred to the single motion adjudicated during the August 2011 hearing as "Pentalon's" summary judgment motion. [Op.Br. at 1, 6, 9, 10, 24, 29.] In light of the FDIC's response, Pentalon clarifies that the only motion briefed and decided at the August 2011 hearing was the motion filed by Pentalon's co-plaintiff, Granite. [*Id.*] This reply refers to that motion as "Granite's," but otherwise continues to refer to the plaintiffs collectively as "Pentalon."

Even though Granite's motion was the only motion decided at the hearing, *five* other summary judgment motions had been filed. [R.654-68 (Rymark Properties, LLC's motion on Diversified Flooring, Inc.'s claims);68-127(Pentalon's motion on lien priority);1198-1389(FDIC's motion on the Guaranty issue);1625-1637(FDIC's motion on Pentalon's interest claim);1698-1818(Pentalon's cross-

motion on interest claim).] But none of those motions were fully briefed and submitted for decision. In fact, they were all stayed by agreement of the parties pending further discovery. [R.3733:3-4;24.]

This is important because, in the response brief, the FDIC raises arguments and cites to evidence included in motions that were stayed and never fully briefed. [See, e.g., Resp.Br. at 2-8,18,19,22,27-28 (material filed in support of FDIC's motion, R. 1198-1389; materials filed in opposition to Pentalon's motion, R.192-290;294-318;920-1109;1613-34.)] Indeed, the fact section of the response brief is based almost entirely on facts included in the FDIC's motion for summary judgment and the FDIC's opposition memoranda to Pentalon's motion for partial summary judgment, neither of which was fully briefed and decided by the district court. [Resp.Br. at 2-8.]

In support of its "alternative grounds" arguments, the FDIC asserts that the arguments presented in the FDIC's motion for summary judgment were "preserved" for appeal. [Resp.Br. at 2.] What the FDIC fails to mention, however, is that its motion was stayed, never fully briefed, and never submitted for decision. To ask an appellate court to affirm on grounds that were never fully developed and to which the other parties did not respond is improper, at best.

After Granite's motion was denied, the FDIC filed another summary judgment motion. But the FDIC's subsequent motion neither renewed the promissory estoppel arguments raised in the FDIC's stayed motion for summary

judgment nor referenced any of the materials relied upon by the FDIC on appeal. [R.2047-62.] The FDIC's abandonment of those arguments in its subsequent motion – which was fully briefed and decided – denied Pentalon an opportunity to put facts in the record to counter the FDIC's arguments.

This court should keep the procedural posture of the record cites in the response brief in mind when resolving the question of whether the alternate grounds raised by the FDIC can be considered “apparent in the record,” as that phrase is used in the case law describing alternative grounds.

Argument

I. The FDIC's Arguments that the Evidence Presented Was Insufficient as a Matter of Law to Establish Commencement Are Meritless

In the opening brief, Pentalon demonstrated that the liens of Pentalon, Granite, and Wimmer related back, as a matter of law, to the time those companies began their work on the excavation of the foundation and took delivery of the materials for the site to be used in the foundation. Under Utah law, such liens relate back to the time at which activities on the property would put a reasonable lender on notice that lienable work was underway. Here, both the excavation activities and the delivery of materials were sufficient to put a reasonable lender on notice that lienable work was underway. [Op.Br. at 10-21.]

Pentalon also demonstrated that, at the very least, there are disputed issues of material fact concerning whether the nearly complete excavation and delivery of materials constituted commencement. [Op.Br. at 21-23.] Whether the

district court was incorrect at a matter of law, or incorrect because there exists disputed issues of material fact, this court should reverse.

In support of its arguments, Pentalon provided uniform case law from numerous jurisdictions demonstrating that the district court was incorrect in ruling that the near completion of excavation is not commencement. In response, the FDIC recognizes the overwhelming case law and buries its analysis of the commencement issue at the end of its brief. The FDIC asks this court to chart a new course based upon what it calls a “suggestive” reading of a few cases and its labeling as “dicta” the rule announced in a number of cases – i.e., excavation equals commencement.

This reply first outlines the FDIC’s arguments and then responds to each of them. In short, nothing has changed since the opening brief. There still are no cases to support the district court’s ruling that nearly complete excavation is not commencement *as a matter of law*. In fact, the opposite is true – nearly complete excavation is commencement *as a matter of law*.

A. Pentalon’s Work Was Sufficient to Establish Commencement as a Matter of Law

The FDIC invites this court to hold that no prudent lender making a reasonable examination of property could believe that work has *commenced* unless the excavation of a foundation is completely *finished*. [Resp.Br. at 32-33.] The FDIC’s approach is not supported by case law, misperceives the thrust of the commencement standard under Utah law, and is contrary to common sense.

None of the cases cited by the FDIC support its argument that everything short of completed excavation of the foundation fails to establish commencement as a matter of law. [Resp.Br. at 31-33.]

- In *Duckett v. Olsen*, the Utah Supreme Court noted that construction “commenced August 4, 1980, by G & C Construction Company, which excavated the basement and graded and filled the lot.” 699 P.2d 734 (Utah 1985). The Utah Supreme Court did not indicate that the excavation was completed on that day, as implied by the FDIC.
- In *H.B. Deal*, the Missouri Supreme Court observed that ongoing work on the excavation of a foundation was sufficient to impart notice to the world. 418 S.W.2d at 954 (noting if a bank’s “officials had merely visually observed” such work was *underway* they would have notice of commencement).
- In *Rupp v. Earl H. Cline & Sons, Inc.*, the Maryland Court of Appeals observed that “what the law means by the commencement of the building is some work or labor on the ground, such as *beginning to dig the foundation*.” 188 A.2d 146, 149 (Md. 1963) (quotations omitted; emphasis added).
- And in *Drilling Serv. Co. v. Baebler*, the Missouri Supreme Court noted that work “commenced in May 1963” when the “excavation for all the buildings” was begun, and that this work entitled mechanics’ liens to

priority over a mortgage recorded on September 13, 1963, even though the excavation may not have been completed until October 1963. 484 S.W.2d 1, 8, 9 (Mo. 1972).

Further, although the Minnesota and Kansas cases cited by the FDIC had fact patterns in which a mortgage was recorded after the excavation was completed, the cases make clear that commencement is measured from the beginning – not the end – of this excavation work.

- In *Carr-Cullen Co. v. Deming*, the Minnesota Supreme Court noted that “the work of excavation *begun* by Anderson on September 7 was the first actual and visible beginning of improvements.” 222 N.W. 507, 507 (Minn. 1928)) (emphasis added).¹
- Similarly, in *Kansas Mortg. Co. v. Weyerhaeuser*, the Kansas Supreme Court noted that commencement “is some work or labor on the ground, such as *beginning* to dig the foundation, which everyone can readily see and recognize.” 29 P. 153, 156 (Kan. 1892) (emphasis added).
- And in *Leidigh & Havens Lumber Co. v. Wyatt*, the Kansas Supreme Court affirmed the priority of a mechanics’ lien where the lien claimant “commenced the excavation of a basement” on October 13, 1938 but

¹ *Carr-Cullen* was cited in *Brettschneider v. Wellman*, 41 N.W.2d 255, 260 (Minn. 1950), a case relied upon by the FDIC. [Resp.Br. at 33.]

mortgage was not executed until several days later. 109 P.2d 87, 91 (Kan. 1941).²

In light of the above, the FDIC's assertions that the opening brief cites "dicta" are curious. [Resp.Br. at 33-35.] The FDIC is inviting the court to set a course where no court has ever gone — *even in dicta*. [Id.] In contrast, the fact that Pentalon's argument is supported by the actual holdings of some cases, the rule applied in other cases, and dicta in other cases, should provide the court comfort, not undermine its confidence. [Op.Br. at 11-18 & n.2].]

Even if the case law were ambiguous on this point — which it is not — the FDIC ignores the fact that the phrase "commencement to do work" is "construed in favor of lien claimants." [Op.Br. at 11 (quoting *Calder Bros. Co. v. Anderson*, 652 P.2d 922, 924 (Utah 1982).] According to the dictionary, the term "commence" means "to have or make a beginning; start." *In re Anderson*, 275 B.R. 922, 926 (B.A.P. 10th Cir. 2002) (quoting Merriam Webster's Collegiate Dictionary 230 (10th ed. 1993)). For this reason, the "commencement" of work standard is referred to as the "first spade rule" and tethered to "an actual beginning of improvement on the ground." *Bob DeGeorge Assocs. v. Hawthorn Bank*, 377 S.W.3d 592, 599 (Mo. 2012); *E.W. Allen & Assocs. v. FDIC*, 776 F. Supp. 1504, 1509 (D. Utah 1991). The FDIC's attempt to recast this standard as the "last spade rule" falls

² *Weyerhaeuser and Leidigh* were cited in *Davis-Wellcome Mortgage Co. v. Long-Bell Lumber Co.*, 336 P.2d 463, 466 (Kan. 1959), a case relied upon by the FDIC. [Resp.Br. at 33.]

short of construing the term “commencement” in favor of Pentalon, as required under Utah law.

The FDIC also ignores the fact that the lien statutes are remedial and construed to protect laborers and materialmen. *See, e.g., Ketchum, Konkel, Barrett, Nickel & Austin v. Heritage Mountain Dev. Co.*, 784 P.2d 1217, 1220 (Utah Ct. App. 1989). In *Calder*, the Utah Supreme Court emphasized that “[t]he purpose of the mechanics’ lien act is remedial in nature and seeks to provide protection to laborers and materialmen who have added directly to the value of the property of another by their materials or labor.” *Calder Bros.*, 652 P.2d at 924. The analysis turns on whether there is “visible evidence of work performed,” not whether any component of the work performed is complete. *Id.* at 924 n.1. Under the FDIC’s erroneous theory, a lender could obtain *summary judgment* against a contractor or material supplier, notwithstanding evidence of visible work, as long as the lender could provide some evidence that the excavation of the foundation was *not quite complete* at the time the lender recorded its deed.

The FDIC also fails to acknowledge the type of examination a “prudent lender” must make prior to recording a trust deed. The FDIC asserts that a reasonable lender would have difficulty in distinguishing between (i) general excavation and the precision excavation of a foundation, (ii) native soils and foreign engineered structural base material, and (iii) “silt fences” used in landscaping and geotextile fabrics used in foundations. [Resp.Br. at 32-33;35-36.]

Apart from lacking any support, the FDIC's assertions rest upon the incorrect assumption that a commercial lender acts with the requisite "pruden[ce]" based upon a layperson's cursory assessment of whether foreign materials are on site or whether "excavation" is ongoing. [*Id.* at 32-33.] But the "prudent lender" standard is not the "prudent neighbor" standard, as it requires lenders to examine the premises reasonably and diligently for signs that lienable work is underway. *EDSA/Cloward, L.L.C. v. Klibanoff*, 2005 UT App 367, ¶ 22, 122 P.3d 646; *Calder*, 652 P.2d at 924 ("inspection of the premises," not a cursory glance).

Relatedly, the FDIC fails to explain why a reasonable lender would be any better off determining the exact moment when the excavation of a foundation was *complete*.³ If lender uncertainty attaches to any part of the process, this court should follow the legion of cases holding that excavation work is sufficient to establish commencement as a matter of law. [Op.Br. at 13-14.]

Finally, even if the undisputed evidence that excavation was well underway were insufficient to establish commencement as a matter of law, there is a factual dispute that requires reversal. At a minimum, Pentalon is entitled to a trial on the factual issue of whether the work here was sufficient to put a reasonable lender on notice that lienable work was underway. It is difficult to

³ Even if this court accepts this argument, reversal is required. The evidence reveals that much of the excavation was complete when the FDIC recorded its deed and work on vertical construction had begun. [Op.Br. at 4,19-20&n.5.] If the reasonable examiner knows how to draw the line between excavation work and vertical construction, as asserted by the FDIC, then the FDIC had notice that lienable work was underway here.

understand how the FDIC can assert that there is no factual dispute as to what a prudent lender conducting a reasonable examination would notice in light of the substantial work done here. [Resp.Br. at 31.] This court should reverse.

Before turning to the delivery of materials as an independent basis for reversal, it is worth noting how the FDIC's argument on appeal is undermined by its argument in the district court. In the district court, the FDIC emphasized that an issue of fact remained for trial even though the photographic evidence of excavation was undisputed. [R.3733:28 ("[T]here is a factual dispute about what a reasonable observer would conclude. And at that point, I think it is no longer a question of law . . . I think the FDIC is entitled to have a determination on the facts of what a reasonable person would think.").]

The FDIC highlighted the testimony of Pentalon's president that Pentalon "had not commenced construction of any structure" at the time the FDIC recorded its deed, and asserted that this testimony "create[d] a significant factual issue" that could only be resolved at trial. [R.3733:23.] The FDIC also argued this testimony created a factual dispute. [R.3733:25-26(" [I]t becomes a factual issue when the president of the general contractor says — in his view, it wasn't construction. . . . I don't think he's saying that as a matter of law. . . . He's saying that as a matter of fact as a fact witness.").]⁴

⁴ On appeal, the FDIC now argues the opposite, and attempts to discredit Pentalon's attempt to offer the exact type of testimony the FDIC considered relevant in the district court. [Resp.Br. at 40.]

On appeal, the FDIC asserts instead that determining what a reasonable lender might notice when examining the site is difficult because construction materials often look fairly similar. [Resp.Br. 31-33;35-36.] But any difficulty for a reasonable lender on those issues—which are a mirage, as demonstrated above—only created a disputed issue of material fact as to whether a reasonable lender viewing the site here would have observed lienable work. This fact question should be resolved by a jury, not at the summary judgment stage. This court should reverse based only upon the extensive excavation of the foundation that had occurred prior to the FDIC’s recording its deed.

B. Pentalon’s Delivery of Materials to the Project Site Was Sufficient to Establish Commencement as a Matter of Law

In addition to excavation, the delivery of materials to the site constituted commencement. [Op.Br. 18-21.] In response to this point, the FDIC asserts that the delivery of materials is “rarely . . . sufficient to signal the commencement of lienable work” but does not provide any case law that supports this sweeping proposition. [Resp.Br. at 35.]

The FDIC’s assertion ignores the plain language of the mechanics’ lien statute, which provides that liens relate back to the actual “work” or the “furnishing of materials on the ground.” Utah Code § 38-1-5.⁵ Based on this plain

⁵ Not all mechanics lien statutes feature this disjunctive test. For example, the Ohio statute in force in 1929 and at issue in *Becker v. Wilson*, a case relied by the FDIC, required both commencement of work *and* subsequent delivery of materials in order for a materialmen’s lien to attach. [Resp.Br. at 36 (citing *Becker v. Wilson*, 165 N.E. 108, 109 (Ohio Ct. App. 1929) (requiring evidence of “a

language, Utah cases recognize that commencement can be established *either* by “visible evidence of work performed” *or* “the presence of building materials upon the land.” *Tripp v. Vaughn*, 747 P.2d 1051, 1055 (Utah Ct. App. 1987) (quoting *Calder*, 652 P.2d at 924 n.1). In fact, the case relied upon by the FDIC states that delivery of materials, standing alone, can give rise to a mechanics’ lien. [Resp.Br. at 35 n.12 (citing *Sierra Nevada Lumber Co. v. Whitmore*, 66 P. 779 (Utah 1901) (affirming validity of a materialman’s lien, even though lumber delivered to the property was “never actually used” to erect a building)).]

Thus, in addition to the excavation work Pentalon completed prior to the date the FDIC recorded its deed, the delivery of materials creates an issue of fact as to notice. Again, the cases cited by the FDIC support this proposition. In *First Federal Savings & Loan v. Stewart Title Co.*, 732 S.W.2d 98, 101-02 (Tex. App. 1987), the Texas Court of Appeals *reversed* summary judgment in favor of the lender because evidence of the delivery of materials to the site created a question of fact as to commencement. [Resp.Br. at 36.] The FDIC’s arguments that some foreign materials are “indistinguishable” from native materials, and that some materials are “indistinguishable” from those used for preparatory site work only underscores why a factfinder typically decides whether a reasonable lender would have had notice that lienable work was underway. [Resp.Br. at 35-36.]

commencement of construction, excavation, and improvement upon the premises at the time of the initial deliveries of material”)).] Of course, *Becker* is also distinguishable for the reasons noted in Pentalon’s opening brief – none of which the FDIC confronts in its brief. [Op.Br. at 16-17.]

The FDIC's ability to imagine scenarios in which there may be some confusion does not demonstrate that it is entitled to summary judgment. This is especially true under the facts of this case, where the delivery of materials — coupled with the excavation work and vertical construction — was substantial and obvious enough to put a prudent lender on notice. Therefore, the mechanics' liens filed by Pentalon, the subcontractors, and the material suppliers to relate back as a matter of law. [Op.Br. at 18-21.] This court should reverse.

II. The District Court Erred in Striking Pentalon's Summary Judgment and Reconsideration Motions

In its opening brief, Pentalon also argued that the district court erred in striking the factual materials that accompanied its opposition to the FDIC's motion for summary judgment and in striking Pentalon's motion for reconsideration. [Op.Br. at 23-29.]⁶ Pentalon raised these arguments on appeal only because they would be relevant to any determination of the amount of an attorney fee award on remand. [Op.Br. at 23.]

⁶ Contrary to the response brief, Pentalon has not argued that the district court abused its discretion in resolving its first motion for reconsideration. [Resp.Br. at 38-39.] Had the district court maintained its ruling that there was "a genuine issue of material fact as to whether construction commenced," the parties would have been spared this appeal. [Op.Br. at 6 (citing R.1934-35).] Although the FDIC asserts the district court did not "obvious[ly] misread[]" *H.B. Deal*, the FDIC does not illuminate how that case could be read to support the FDIC's position that commencement is impossible as a matter of law until excavation work is completed. [Resp.Br. at 39; *H.B. Deal*, 418 S.W.2d at 954 (noting if a bank's "officials had merely visually observed" such excavation work was underway they would have had notice that lienable work was underway).]

The FDIC's attempt to defend the district court's decision to strike admissible evidence Pentalon filed alongside its opposition to the FDIC's motion for summary judgment is exceedingly short. [Resp.Br. at 41 n.15.] In a footnote, the FDIC defends the district court's decision to strike this evidence because it had already been presented in the objection Pentalon filed to the FDIC proposed order under rule 7(f)(2) of the Utah Rules of Civil Procedure. [Resp.Br. at 41n.15.] But this is a concession, not a defense.

The rule 7(f)(2) process is designed to allow the parties to bring a proposed order in "conformity with the court's decision." Utah R. Civ. P. 7(f)(2). Pentalon presented evidence alongside its rule 7(f)(2) objection because the FDIC's proposed order went much further than the district court's denial of Granite's motion for summary judgment on the basis that there was a "genuine issue of material fact as to whether construction commenced." [R.1934-35.] The FDIC instead inserted into an order a ruling that Pentalon's argument failed as a matter of law. [R.2041.] The district court ultimately disagreed with Pentalon's position and entered the order prepared by the FDIC. [R.2036-43.] Because the rule 7(f)(2) process does not provide parties with an opportunity to present new evidence, Pentalon had little choice but to present this evidence alongside its opposition to the FDIC's motion for summary judgment to make it part of the record. The district court's decision to strike this undisputedly admissible evidence was in error.

In addition, the district court's decision to strike Pentalon's motion for reconsideration was also erroneous. First, this court's denial of Pentalon's motion for summary reversal did not "decide[]" the question of whether the FDIC's legal position is "clearly erroneous" for purposes of *Mid-America Pipeline Co. v. Four-Four, Inc.*, 2009 UT 43, ¶ 14, 216 P.3d 352. [Resp.Br. at 39.] To the contrary, this court's order explicitly "deferred" the issues raised in Pentalon's motion. [See Summary Disposition Order, attached as Addendum B.] Further, as set forth above, the merits arguments advanced at the end of the FDIC's brief are completely lacking in merit. [See *supra* Part I.] To the extent this court agrees that the FDIC's legal arguments lack merit and have served only the purpose of delay, this court should award Pentalon the attorney fees it has incurred responding to the FDIC's frivolous arguments. Utah R. App. P. 33(a).

Second, reconsideration was required under the "new evidence" prong. The expert report and evidence included with the motion did not improperly usurp the court's role, as the FDIC asserts. [Resp.Br. at 40.] As a case cited by the FDIC makes clear, "[a]lthough an expert's opinion may embrace[] an ultimate issue to be decided by the trier of fact, the issue embraced must be a factual one." *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994) (cited on page 40 of the FDIC's brief). In its brief, the FDIC concedes that the question of what a reasonable examiner would have been on notice of is a "question of fact."

[Resp.Br. at 29.]⁷ Pentalon's expert evidence therefore was both new and relevant.

The evidence of the materials Pentalon delivered to the site was equally new and relevant, and should have been considered, not stricken, by the district court. As noted above, the fact that some of the evidence was included in an objection filed pursuant to rule 7(f)(2) does not mean it was already in the record as evidence. And the fact that the evidence of various materials could have been culled from a photograph attached to the complaint or other deposition testimony does not defeat the district court's obligation to consider the evidence when ruling on both the parties' cross motions for summary judgment and Pentalon's subsequent motion for reconsideration.

III. This Court Should Not Address the FDIC's Proposed Alternate Grounds to Affirm

Perhaps in light of the lack of legal support for the district court's commencement ruling, the FDIC changes the subject to what it calls alternative grounds to affirm. But the FDIC misapprehends the limited nature of the alternate grounds doctrine and ignores its burden on summary judgment to

⁷ The FDIC did not object to Pentalon's testimony on this basis below. To the contrary, the FDIC invited the district court to conclude that such opinion testimony was highly relevant to the fact question of what a reasonable examiner would have noticed. [R.3733:23(noting that the testimony of Pentalon's president "create[d] a significant factual issue" that could only be resolved at trial);3733:25-26(emphasizing the propriety of relying of such testimony).]

construe evidence in the light most favorable to Pentalon. As set forth below, neither of the alternate grounds advanced by the FDIC succeed.

A. The FDIC Misapprehends the Scope of the Alternate Grounds for Affirmance Doctrine

The alternate grounds doctrine applies only in “limited circumstance[s]” and allows an appellate court to affirm “where the alternate ground is apparent on the record.” *Bailey v. Bayles*, 2002 UT 58, ¶ 20, 52 P.3d 1158. To be apparent on the record requires “more than mere assumption or absence of evidence contrary to the ‘new’ ground or theory.” *Francis v. State, Utah Div. of Wildlife Res.*, 2010 UT 62, ¶ 19, 248 P.3d 44. Rather, an appellate court can affirm on an alternate ground only if the record “contain[s] sufficient and uncontroverted evidence supporting the ground or theory to place a person of ordinary intelligence on notice that the prevailing party may rely thereon on appeal.” *Id.* The doctrine is limited in this manner for the precise purpose of preventing a prevailing party from “selectively focus[ing] on issues below” while reserving for appeal other issues “that the opposition had neither notice of nor an opportunity to address.” *Id.*

The alternate grounds doctrine is of particularly limited application where the appellee is asking an appellate court to affirm a grant of summary judgment on a factually intensive ground that the appellant never had the opportunity to confront below. *See, e.g., Johnson v. Sawyer*, 120 F.3d 1307, 1316 (5th Cir. 1997) (in the summary judgment context, alternate grounds offered on appeal “must at least have been proposed or asserted in [the district court] by the movant”);

Andersen v. Chrysler Corp., 99 F.3d 846, 855 n.5 (7th Cir. 1996) (“The only prerequisite to our affirming [summary judgment] on such an alternative ground is that the non-moving party had an opportunity in the district court to submit affidavits or other evidence and to contest the issue.”).

In the summary judgment context, an appellee seeking to rely on an alternate ground must therefore show both that the ground is “apparent in the record” and that the record is “materially the same” as the “one that would have been developed had the prevailing party raised the alternative basis for affirmance below.” *Outdoor Media Dimensions Inc. v. State*, 20 P.3d 180, 195-96 (Or. 2001) (“[E]ven if the record contains evidence sufficient to support an alternative basis for affirmance, if the losing party might have created a *different* record below had the prevailing party raised that issue, and that record could affect the disposition of the issue, then we will not consider the alternative basis for affirmance.”). Neither of the FDIC’s alternative grounds satisfy this standard.

B. The FDIC’s New “At the Instance of the Owner” Argument Cannot Serve as an Alternate Ground for Affirming the District Court’s Judgment

The FDIC concedes that it never argued below that Pentalon’s work was not performed “at the instance of the owner” as required under Utah Code section 38-1-3. [Resp.Br. at 2,21-22.] Had the FDIC presented this argument, Pentalon would have developed a record that included all of the evidence to support the proposition that it began (and nearly finished) excavating the

foundation of the project “at the instance of the owner” in May 2008. This court should reject FDIC’s “instance of the owner” argument on this ground alone.

The FDIC’s argument fails on the merits as well, even on the incomplete record. Pentalon’s work in May 2008 was “at the instance of the owner” as required by Utah Code section 38-1-3. The evidence is that Rymark directed Pentalon to expedite the commencement of project and that Pentalon agreed to accommodate this request. [R.998(“The owners were very anxious to get this project started and were pushing us to start at the earliest possible date we could.”);*id.*(“They gave us the direction to proceed”);1412 (noting Pentalon expedited the project to accommodate Rymark).] This evidence is sufficient to foreclose summary judgment in favor of the FDIC on this new theory.

The FDIC next asserts that the above evidence can be disregarded as a matter of law based on the language of the contract between Pentalon and Rymark. [Resp.Br. 18-19;23-25;1223.] Even if there were authority for this assertion, it is contrary to both Utah law on oral modifications and the summary judgment standard. Under Utah law, parties may “modify a written agreement *through verbal negotiations* subsequent to entering into the initial written agreement, *even if the agreement being modified unambiguously indicates that any modifications must be in writing.*” *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶ 13 n.4, 40 P.3d 1119 (emphasis added) (citing cases).

It “is the well-recognized rule that notwithstanding recitals in a prior contract restricting changes or modification in its terms, the parties are as free in appropriate circumstances to renegotiate new terms or to make separate supplemental agreements as they were to make the contract in the first place.” *Prince v. R. C. Tolman Constr. Co.*, 610 P.2d 1267, 1269 (Utah 1980); *see also Createrra, Inc. v. Sundial, LC*, 2013 UT App 141, ¶ 12, 304 P.3d 104. In this regard, Utah law comports with the common law, which allows parties to alter their agreements “[e]ven where the contract specifically states that no non-written modification will be recognized.” *R.T. Nielson*, 2002 UT 11, ¶ 13 n.4 (citing 2 Corbin on Contracts § 7.14 at 404 (1995)). The FDIC’s assertion that it is “inescapable” that Pentalon breached its contract with the owner as a matter of law by agreeing to accelerate commencement is simply not supported by Utah law. [Resp.Br. at 19.]

A number of other factual issues also foreclose this court from affirming the district court’s grant of summary judgment on the FDIC’s newly proffered alternate ground. First, the issue of whether an oral agreement exists presents an issue of fact. *See, e.g., Cabaness v. Thomas*, 2010 UT 23, ¶ 56, 232 P.3d 486; *O’Hara v. Hall*, 628 P.2d 1289, 1291 (Utah 1981). Second, whether a particular breach is material presents an issue of fact. *Wilson v. Johnson*, 2010 UT App 137, ¶ 25, 234 P.3d 1156. Third, whether a contract is abandoned, or whether strict compliance with a particular term has been waived, presents a question of fact, or at

minimum, a mixed question of fact and law which requires a district court to make factual findings. *Watkins v. Ford*, 2013 UT 31, ¶ 20, 304 P.3d 841; *U.S. Realty 86 Assocs. v. Security Inv., Ltd.*, 2002 UT 14, ¶ 11, 40 P.3d 586.

The FDIC asks this court to resolve all of the above issues in its favor as a matter of law. But this court's role is not to make such findings, especially on an incomplete record such as the present. *See, e.g., Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979) (“[I]t is not the function of an appellate court to make findings of fact.”).

The FDIC's heavy reliance on *In re Corbin Park, L.P.*, 470 B.R. 573 (B.A.P. 10th Cir. 2012) is misplaced for the same reason. [Resp.Br. at 19-20; 23-24.] Unlike the present case, *Corbin* was not resolved on a motion for summary judgment. The bankruptcy judge in *Corbin* held a five-day evidentiary hearing and examined thousands of pages of evidence before making a factual finding that the lien claimant had not performed lienable work during the period before the lender recorded the mortgage. *Corbin*, 470 B.R. at 582-86. The bankruptcy judge in *Corbin* also had the opportunity to judge the credibility of the lien claimant's assertion that he had been given a “verbal notice to proceed” by the owner before determining that the evidence weighed in favor of a finding that no such verbal authorization had been given. *Id.* at 585-86.⁸

⁸ A trial was necessary in *Corbin* to resolve this issue because Kansas law — like Utah law — allows the terms of a written contract to be modified by “words acts, or conduct” even if the contract contains a provision that requires modifications to be in writing. *Saddlewood Downs, L.L.C. v. Holland Corp.*, 99 P.3d

On post-trial appeal, the Bankruptcy Appellate Panel in *Corbin* was presented with the question of whether any of the bankruptcy judge's post-trial findings were "clearly erroneous," not whether the lender was entitled to judgment as a matter of law. *Id.* at 579-80. The Panel upheld each of the bankruptcy judge's findings, emphasizing that "the important and frequently decisive role of fact finding is committed to the trial court, not this Court." *Corbin*, 470 B.R. at 593. The FDIC's assertion that *Corbin* presented "virtually the same question the Court faces here" is therefore simply not true. [Resp.Br. at 19.] If anything, *Corbin* stands for the proposition that this court may not reach out and decide the many factual issues raised by the FDIC's never-before articulated alternate ground for affirmance. 470 B.R. at 593.

Finally, the FDIC's implication that Pentalon violated Ogden City code by commencing its work prior to obtaining a building permit is not supported by the record. [Resp.Br. at 18.] As the FDIC knows, Pentalon obtained authorization from South Ogden City to begin working on the excavation of the project's foundations prior to the issuance of the building permit. [R.1001; R.1420; 1482; 1572-73.] And Pentalon also informed Rymark that this work was authorized by South Ogden City. [R.1002]⁹ This evidence—especially when construed in the

640, 646 (Kan. Ct. App. 2004). And like Utah, under Kansas law, "whether a term of a written contract has been modified or waived by a subsequent agreement is a question of fact for the trial court." *Id.*

⁹ The FDIC's argument rests on an incorrect assumption that "commencement" under South Ogden City Code section 9-1-2 is the same as "commencement" under Utah Code section 38-1-5. For building code purposes, a

light most favorable to Pentalon — further augurs in favor of a finding that Pentalon's work in May 2008 was "at the instance of the owner" as required by Utah Code section 38-1-3.¹⁰ The FDIC's request that this court grant summary judgment on this issue is inappropriate because even the incomplete record

project is not commenced until concrete is poured, presumably because the excavation needs to be inspected by the City before it is covered in concrete. [R.1016;1573.] For mechanics' lien purposes, by contrast, a project is commenced as soon as a reasonable examiner has notice that it is underway. [Op.Br. at 10-21.]

¹⁰ Even if the FDIC had evidence that Pentalon violated the South Ogden City Code, that evidence would be irrelevant to the "instance of the owner" question and commencement question presented on appeal. *See, e.g., Kessler v. Mandel*, 40 A.2d 926, 927 (Pa. Super. Ct. 1945). *Kessler* notes that even if "appellant did violate the city ordinance by proceeding with the alterations or repair work for which the mechanic's lien was filed, without a permit, that did not invalidate the mechanic's lien or give the association any right to question its priority or validity." *Id.*; *see also Mani Elec. Contractors v. Kioutas*, 611 N.E.2d 1167, 1170 (Ill. App. Ct. 1993); *Gellis v. B.L.I. Constr. Co.*, 251 S.E.2d 800, 812 (Ga. Ct. App. 1978).

The FDIC's reliance on *In re Renaissance Hosp. Grand Prairie Inc.*, 713 F.3d 285 (5th Cir. 2013), is misplaced. [FDIC Br at 18.] The lien claimant there *stipulated* that it had not provided materials or labor before the date at issue. *Renaissance*, 713 F.3d at 295. In light of this stipulation, the Fifth Circuit conducted only a limited review of whether other evidence was sufficient to overcome "the strong presumption created by its stipulation," and held that it could not, in part because no building permit had been obtained. *Id.* at 297. In addition, and unlike here, the undisputed evidence in *Renaissance* revealed that a permit *was* required to perform the work at issue. *Id.*

The FDIC's other case, *Hopper Res., Inc. v. Webster*, 878 N.E.2d 418 (Ind. Ct. App. 2007), is similarly inapposite. [Resp.Br. at 18.] *Hopper* was an appeal from a trial in which the parties presented evidence that a building permit was required. 878 N.E.2d at 421, 422-23. The building permit evidence was relevant because the lien claimant had procured the building permit fraudulently. *Id.* Against this backdrop, the appellate court refused to vacate a finding that this wrongdoing barred the lien claimant from foreclosing its lien. *Id.* Unlike *Hopper*, there are no findings here, and there is no evidence that Pentalon engaged in fraud in the work it performed on behalf of Rymark. Rather, the evidence in this case is that South Ogden City specifically authorized Pentalon to proceed with excavation work without a permit. [R.1001;1420;1482;1572-73.]

For all of the above reasons, the district court correctly observed that the permit issue raised by the FDIC below was irrelevant in this case. [R.3733:39.]

raises genuine disputes of material fact as to whether Pentalon's work was performed "at the instance of" Rymark.

C. The FDIC's Promissory Estoppel Argument Similarly Cannot Serve as an Alternate Ground for Affirmance

The FDIC does not claim that its promissory estoppel argument is "apparent in the record." [Resp.Br. at 25-29.] Presumably, this is because it believes the issue as "preserved." [Resp.Br. at 2.] But to preserve an issue for appeal, a party must present it "to the trial court in such a way that the trial court has an opportunity to rule on that issue." *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801. To be sure, the FDIC filed a motion for summary judgment below, raising an "equitable estoppel" argument. [Resp.Br. at 2 (citing R.1216-17).] But the district court never had any "opportunity to rule" on this motion because it was never submitted to the court for decision. [R.3733:2-4.]

Indeed, because discovery relevant to this motion was still in progress at the time of the district court's hearing on the commencement issue now on appeal, Pentalon has not even had the opportunity to file an opposition brief to the arguments FDIC now claims are "preserved" for this court's review. [R.3733:3-4;24.] It is difficult to imagine an alternate ground could be "apparent" on such an incomplete record, and the FDIC's promissory estoppel argument can be rejected on this ground alone.

The FDIC's argument also fails when the facts that are in the record are viewed in the light most favorable to Pentalon. The FDIC does not cite any cases

that support the proposition that it is entitled to *summary judgment* on its promissory estoppel defense. [Resp.Br. at 25-29 (citing *Peterson Mech., Inc. v. Nereson*, 466 N.W.2d 568, 571 (N.D. 1991) (reviewing whether the district court's findings of fact as to estoppel were clearly erroneous on appeal from a bench trial); *Hopper Res., Inc. v. Webster*, 878 N.E.2d at 422-23 (same); *In re S. Bay Expressway, L.P.*, Bankr. Nos. 10-04516-A11, 10-04518, 2010 WL 4688213 (S.D. Cal. Nov. 10, 2010) (resolving the issue of equitable estoppel after taking three days' worth of testimony)).]

After all, the crux of an estoppel claim is reasonable reliance, a matter generally left to the finder of fact. *See, e.g., Anderson v. Larry H. Miller Commc'ns Corp.*, 2012 UT App 196, ¶ 20-21, 284 P.3d 674; *Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28, ¶ 38, 158 P.3d 1088. Further, under Utah law, "a party claiming an estoppel cannot rely on representations or acts if they are contrary to his knowledge of the truth or if he had the means by which with reasonable diligence he could ascertain the truth." *Youngblood*, 2007 UT 28, ¶ 33.

The key issues of the FDIC's reasonable reliance and reasonable diligence cannot be resolved by this court as a matter of law on the present record. First, the FDIC cannot demonstrate that it relied on promises made in the Construction Contract as a matter of law because the record reveals the FDIC had actual or constructive knowledge of the Notice of Commencement Pentalon undisputedly filed on May 5, 2008. [R.923.]

Second, there are also disputes of material fact regarding each of the “broken promises” the FDIC alleges on appeal. [Resp.Br. at 27-28.] There is evidence that the time frames set forth in the Construction Contract were modified by the parties. [R.998;1412.] As to the Guaranty, the full phrase quoted by the FDIC reads: “except for Related Documents, the Project will be constructed and completed free and clear of all liens and encumbrances.” [R.1312.] The “Related Documents,” in turn, make clear that mechanics’ and materialmen’s liens were “permitted,” and provided a mechanism for the lender to obtain releases of such liens. [R.1308(defining “Permitted Liens” as including “liens of materialmen, mechanics, warehousemen, or carriers, or other like liens arising in the ordinary course of business”);1301(providing a mechanism for the lender to waive its priority).] And contrary to the FDIC’s assertion, the record also demonstrates that a lender does not always take a “first-lien place.” [Resp.Br. at 27-28;R.1289(noting that finance companies do not always insist on “first-lien place”);1300(noting that the FDIC’s desire to have a “valid perfected first lien” was subject to exceptions).

Third, the FDIC’s cavalier assertion that Pentalon’s hands “lack the requisite cleanliness” as a matter of law to be entitled to be paid for its work is not supported by the evidence. [Resp.Br. at 29.] The limited record on appeal reveals that Pentalon began work on the project in May 2008 at the repeated behest of Rymark, filed a notice of commencement before it began excavation,

obtained South Ogden City approval to work on the excavation prior to obtaining a building permit, informed Rymark of the City's authorization to commence work, and worked openly and diligently on the project (and in full view of Rymark, which also ran a business on the adjacent parcel). Although Pentalon's hands may have been dirty from digging foundations for Rymark in May 2008, its hands were certainly not unclean in any legal sense. The FDIC's attempt to invoke this equitable doctrine as an alternate ground for affirming *summary judgment* should be squarely rejected.¹¹

As set forth above, both of the FDIC's alternate grounds are procedurally improper and completely lacking in merit, even on the incomplete record before this court. To the extent this court agrees that the FDIC's alternate grounds arguments serve only the purpose of delay and raising the stakes of this litigation, this court should award Pentalon the attorney fees it has incurred responding to the FDIC's frivolous arguments on appeal. Utah R. App. P. 33(a).

Conclusion

Based on the foregoing, this court should reverse the district court's denial of Granite's motion for summary judgment.

¹¹ Both of the FDIC's alternative grounds only apply to Pentalon. They do not apply to the other subcontractors, such as Granite and Wimmer, who were not parties to the contracts at issue. *See* Utah Code § 38-1-29 (lien claimant's lien rights may only be waived if the lien claimant gives written consent).

DATED this 1st day of July, 2014.

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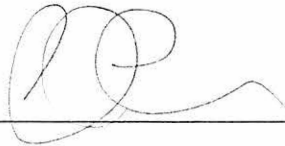
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I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 6,970 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Book Antiqua.

DATED this 1st day of July, 2014.



Certificate of Service

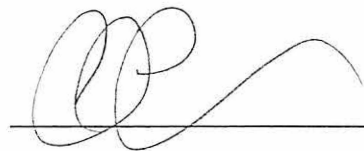
This is to certify that on the 1st day of July, 2014, I caused two true and correct copies of the Reply Brief of Appellants Pentalon Construction, Inc. and Granite Construction Company to be served on the following via first class mail, postage prepaid:

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Tab A

IN THE SECOND JUDICIAL DISTRICT COURT - OGDEN

IN AND FOR WEBER COUNTY, STATE OF UTAH

PENTALON CONSTRUCTION, INC., : Case No. 090902634

et al., :

Plaintiffs, :

Appellate Court Case No. 20130973

v :

RYMARK PROPERTIES, INC., et al., :

Defendants :

With Keyword Index

ORAL ARGUMENT AUGUST 24, 2011

BEFORE

THE HONORABLE ERNIE W. JONES

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
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000733

APPEARANCES

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* * *

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ORAL ARGUMENT

Mr. Degraffenried
Mr. Schofield

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RULING

36

1 Schofield for Barnes Bank.

2 THE COURT: Okay. All right. I did have a chance
3 to read the briefs, and, Mr. Degraffenried, I appreciate the
4 courtesy copies that you sent to us. That always helps.

5 Let me - before we get started and to make sure
6 I've got - I know what we are dealing with, rather than what
7 we're not dealing with, and I think I know the answers, but I
8 just want to - one of the things that was so confusing or
9 hard for me to deal with was when I got the files, there are
10 all kinds of motions in there, and a lot of them haven't done
11 a notice to submit. So I don't know if they just died on the
12 vine or if we're just waiting for other things to happen on
13 the case, but let me just take just a second and go through
14 what I have in here. I have defendant Rymark's motion for
15 summary judgment against Diversified Flooring, which was
16 filed back in December of '09. There's been no reply, no
17 notice to submit, and I know you parties aren't involved in
18 that, but it's in the file. I've also got Pentalon's motion
19 for partial summary judgment. It was filed in November of
20 '09, and there was an opposition filed by FDIC on November
21 20th. Then there was the supplemental memorandum filed by
22 Pentalon in June of 2011, but no notice to submit. Then I've
23 got FDIC's motion for partial summary judgment, which was
24 filed on April 28th, but I don't have any response to that
25 and no notice to submit yet. Then I've got plaintiff

1 Pentalon and Granite Construction's cross motion for partial
2 summary judgment dealing with the interest and the mechanics
3 lien claim that was filed on August the 4th, 2011, but no
4 response, no notice to submit. I don't know if you know
5 anything about any of those or...

6 MR. ROBINSON: Your Honor, the only motion before
7 the Court today is Granite's motion for partial summary
8 judgment. The one that's been -

9 THE COURT: Okay.

10 MR. ROBINSON: - submitted for decision.

11 THE COURT: All right.

12 MR. DEGRAFFENRIED: And maybe I can clarify for the
13 Court?

14 THE COURT: Sure.

15 MR. DEGRAFFENRIED: There was - there are some
16 motions that plaintiffs made, both in Pentalon and Granite,
17 back in 2009. Then when the FDIC took over the bank -

18 THE COURT: Okay.

19 MR. DEGRAFFENRIED: - we had a long period of a
20 stay. And then after the stay, we talked to counsel and
21 decided that we had actually done a 56(f) opposition in our
22 original opposition before the FDIC took over and we -

23 THE COURT: Okay.

24 MR. DEGRAFFENRIED: - we determined there was some
25 additional discovery that we needed to conduct. We have now

1 - on our end, we have re - we are - we have fully briefed our
2 motion for summary judgment. We are waiting for their
3 opposition to our cross motion -

4 THE COURT: Okay.

5 MR. DEGRAFFENRIED: - against Pentalon, and we're
6 finishing some discovery. We've been cooperating on some
7 discovery and some other issues that they're going to finish
8 in order to get their final opposition and final reply, and
9 then we'll do up a final reply, and I think that's about
10 where we'll be at that point -

11 MR. SCHOFIELD: And I would agree.

12 MR. DEGRAFFENRIED: - in determining those other
13 motions.

14 THE COURT: Okay. Well, - and I'm not being
15 critical, but it was just - what made it hard is I knew there
16 was a motion out there. But initially, it was like, well,
17 which motion are we dealing with? And I thought I'd better
18 make sure which ones are up, and, you know, sometimes motions
19 get lost in the shuffle. And if I don't get a notice to
20 submit, it doesn't trigger anything. So -

21 MR. DEGRAFFENRIED: I think this is -

22 THE COURT: - that's why the courtesy copies always
23 help too, because the - everything - just the originals just
24 go in the file, and we don't know about them. And then I
25 just - one of your greatest fears is that you didn't address

1 an issue or a motion that was in the file. So -

2 MR. DEGRAFFENRIED: Yeah. I think at this point,
3 it's accurate to say. The only ones submitted to the court
4 thus far is this particular motion -

5 THE COURT: Okay. So -

6 MR. DEGRAFFENRIED: - for partial summary judgment.

7 THE COURT: - we're just dealing with Granite
8 Construction's motion for partial summary judgment, right?

9 MR. ROBINSON: That's correct.

10 THE COURT: Okay. All right. Well, I appreciate
11 the clarification, and then, like I say, I got your courtesy
12 copies, and that was helpful too.

13 I have also - I've had a chance to read all the
14 briefs on this. So I feel like I understand what the issue
15 is, but, I guess where it's Granite Construction's motion,
16 Mr. Degraffenried, if you want to make an argument, I'd be
17 glad to hear the -

18 MR. DEGRAFFENRIED: Thank you, Your Honor.

19 THE COURT: - argument.

20 MR. DEGRAFFENRIED: Again, thank you, Your Honor.
21 And as I'm sure you're aware, the issue before the Court as
22 to this motion is whether the mechanics lien that Granite
23 Construction filed enjoys priority over the subject trust
24 deed. Now, the operative date in this matter is May 28th of
25 2008. That's the date the trust deed was recorded in the

1 it's a particularly simple case. I think the decision - and,
2 frankly, the legislature finally has changed the statute,
3 just not in time to help the Court in this matter. I think
4 the decision is a complex decision. What really had
5 happened? How much was site work? At what point did site
6 work become construction of a structure? I think that's a
7 difficult question. When the plain - when the - Pentalon,
8 the general contractor's own president says, "We hadn't
9 commenced construction of a structure," I think that says,
10 Your Honor, there's a significant factual dispute that merits
11 this matter being presented at trial.

12 We ask the Court to deny the motion. Let us
13 conclude all the discovery, which is outstanding, and
14 ultimately we'll be back here either with more motions if
15 they - if the discovery warrants or for trial on these
16 issues. That would be our request, Your Honor.

17 THE COURT: Mr. Schofield, can I ask you, though -
18 as you look at this motion, is there a dispute of facts? I
19 mean, -

20 MR. SCHOFIELD: Well, -

21 THE COURT: - that's really the key to motions for
22 summary judgment, but I - is - what is the dispute of fact if
23 there is any?

24 MR. SCHOFIELD: Well, I think the disputed fact is
25 not what was done on what date, because I think counsel has

Tab B

FILED
UTAH APPELLATE COURTS

DEC - 6 2013

FILED
DEC 11 2013

BY _____

IN THE UTAH COURT OF APPEALS

—ooOoo—

Pentalon Construction, Inc., et al,

Plaintiffs and Appellants,

v.

Rymark Properties, LLC, *Federal Deposit*
Insurance Co., et al,

Respondent and Appellee.

ORDER

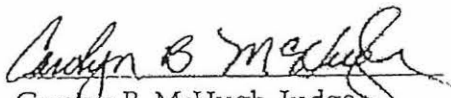
Case No. 20130973-CA

This matter is before the court on Pentalon Construction, Inc. And Granite Construction Company's motion for summary reversal.

IT IS HEREBY ORDERED that the motion for summary disposition is denied, and a ruling on the issues raised therein is deferred pending plenary presentation and consideration of the appeal. *See* Utah R. App. P. 10(f). The appeal shall proceed to the next procedural stage.

DATED this 10th day of December, 2013.

FOR THE COURT:


Carolyn B. McHugh, Judge