

2011

VCS, INC v. La Salle Development, LLC, America West Bank, Utah Community Bank and Does 1-10 : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

VCS, INC, a Utah corporation,

Plaintiff/Appellant,

v.

LA SALLE DEVELOPMENT, LLC, a
Utah limited liability company; AMERICA
WEST BANK, a Utah limited liability
company; UTAH COMMUNITY BANK, a
Utah corporation; and DOES 1-10,

Defendants/Appellees.

**BRIEF OF APPELLEE
UTAH COMMUNITY BANK**

Appellate Case No. 20110062-SC

**APPEAL FROM A SUMMARY JUDGMENT OF THE
SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY
HONORABLE MICHAEL DiREDA, DISTRICT COURT JUDGE**

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Oral Argument Requested

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LIST OF PARTIES

Appellant and plaintiff:

VCS, Inc.

Appellees and defendants:

Utah Community Bank; Federal Deposit Insurance Corporation, as receiver for
America West Bank; and La Salle Development, LLC.

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STATEMENT OF JURISDICTION

The Utah Supreme Court has appellate jurisdiction over this matter pursuant to Utah Code Ann. § 78A-3-102(3)(j).

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court correctly determined that VCS, Inc.'s ("VCS") alleged mechanic's lien became void as to Utah Community Bank ("UCB") pursuant to section 38-1-11(3)(a) of the Utah Code when, within 180 days of recording its mechanic's lien notice, VCS failed to record a *lis pendens* or make UCB a party to its foreclosure suit, and when there was no evidence that UCB had actual knowledge of VCS' foreclosure suit?

A district court's interpretation of a statute is reviewed for correctness. *See O'Dea v. Olea*, 2009 UT 46, ¶ 15, 217 P.3d 704 (citation omitted). "'Correctness' means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." *State v. Pena*, 869 P.2d 932, 936 (Utah 1994) (citations omitted). This issue was raised below. *See* Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment, at pp. 7-9 [R. 518-20]; Ruling on Plaintiff's Motion for Summary Judgment and Defendants' Cross Motions for Summary Judgment (the "Ruling"), a copy of which is included in the Addendum hereto as Tab "A," at pp. 3-7 [R. 646-50].

2. Whether the District Court correctly determined that VCS did not substantially comply with the mechanic's lien statute when it failed to timely record the *lis pendens* mandated by section 38-1-11(3) of the Utah Code?

A district court's interpretation of a statute is reviewed for correctness. *See O'Dea v. Olea*, 2009 UT 46, ¶ 15, 217 P.3d 704 (citation omitted). "'Correctness' means the appellate court decides the matter for itself and does not defer in any degree to the trial

judge's determination of law." *State v. Pena*, 869 P.2d 932, 936 (Utah 1994) (citations omitted). This issue was raised below. See Reply Memorandum in Support of Cross-Motion for Summary Judgment, at p. 5 [R. 610]; Ruling, at pp. 8-9 [R. 651-52].

3. Whether the District Court correctly determined that VCS' amended complaint could not relate back to its original complaint for purposes of reviving VCS' void mechanic's lien as against UCB?

A district court's grant of summary judgment is reviewed for correctness. See *Harvey v. Cedar Hills City*, 2010 UT 12, ¶ 10, 127 P.3d 256 (citation omitted). This issue was raised below. See Reply Memorandum in Support of Cross-Motion for Summary Judgment, at pp. 4-5 [R. 609-10]; Ruling, at pp. 7-8 [R. 650-51].

4. Whether the District Court correctly determined that VCS may not maintain an unjust enrichment claim against UCB having failed to first exhaust its legal remedies by perfecting a mechanic's lien claim against UCB?

A district court's grant of summary judgment is reviewed for correctness. See *Harvey v. Cedar Hills City*, 2010 UT 12, ¶ 10, 127 P.3d 256 (citation omitted). This issue was raised below. See Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment, at pp. 11-12 [R. 522-23]; Ruling, at pp. 9-10 [R. 652-53].

5. Whether the District Court correctly awarded attorneys' fees to UCB pursuant to section 38-1-18 of the Utah Code?

A district court's interpretation of a statute is reviewed for correctness. See *O'Dea v. Olea*, 2009 UT 46, ¶ 15, 217 P.3d 704 (citation omitted). "'Correctness' means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." *State v. Pena*, 869 P.2d 932, 936 (Utah 1994) (citations

omitted). This issue was raised below. *See* Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment, at p. 11 [R. 522]; Ruling, at p. 11 [R. 654].

6. Whether the District Court correctly granted UCB's cross-motion for summary judgment by determining that VCS' alleged mechanic's lien was void as against UCB?

A district court's grant of summary judgment is reviewed for correctness. *See Harvey v. Cedar Hills City*, 2010 UT 12, ¶ 10, 127 P.3d 256 (citation omitted). This issue was raised below. *See* Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment, at pp. 7-9 [R. 518-20]; Ruling, at pp. 3-9 [R. 646-52].

DETERMINATIVE STATUTES

The following provisions are determinative of the above-captioned appeal:

Utah Code Ann. § 38-1-11 (2010)¹

- (2) A lien claimant shall file an action to enforce the lien filed under this chapter within 180 days from the day on which the lien claimant filed a notice of claim under Section 38-1-7.
- (3) (a) Within the time period provided for filing in Subsection (2) the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action.

¹ Subsections (2) and (3) have both been in effect at all times material to this action. Subsection (2) has not been amended for at least a decade. Subsection (3) became effective on May 1, 2006, and has been unchanged since that time.

(b) The burden of proof is upon the lien claimant and those claiming under the lien claimant to show actual knowledge under Subsection (3)(a).

A copy of section 38-1-11 of the Utah Code is included in the Addendum hereto at Tab “B.”

Utah Code Ann. § 38-1-18(1)

Except as provided in Section 38-11-107 and in Subsection (2), in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys’ fee, to be fixed by the court, which shall be taxed as costs in the action.

A copy of section 38-1-18 of the Utah Code is included in the Addendum hereto at Tab “C.”

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an appeal arising out of a mechanic’s lien foreclosure action concerning a number of lots located in a residential subdivision in Ogden, Utah, known as North Park Meadows (the “Property”). Appellant VCS, a general contractor, contracted with the owner of the Property, appellee La Salle Development, LLC (“La Salle”), to supervise the construction of homes on the Property. Appellee UCB extended a construction loan to La Salle, which loan was secured by a deed of trust recorded against the Property.

VCS contends that it is entitled to a mechanic’s lien having priority over UCB’s deed of trust. VCS bases its contention on the fact that it complied with the foreclosure provisions of Utah’s mechanic’s lien statute as against La Salle. Indeed, VCS recorded a mechanic’s lien notice and commenced a foreclosure suit against La Salle within the 180-day statutory period for doing so.

VCS did not, however, perfect its mechanic's lien claim as against UCB. VCS failed to record a *lis pendens* against the Property within the 180-day statutory period. Moreover, VCS did not make UCB a party to its foreclosure suit within 180 days of recording its mechanic's lien notice, and there was no evidence that UCB had actual knowledge of VCS' lien foreclosure suit within that period.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

VCS sued La Salle in the Second Judicial District Court in and for Weber County on March 12, 2008.² *See* Complaint [R. 1-10]. La Salle defaulted and judgment by default was entered against it on June 6, 2008. *See* Default Judgment [R. 19-20]. La Salle's later motion to set the default judgment aside was granted on April 27, 2009. *See* Ruling Granting Motion to Set Aside Judgment [R. 209-14]. Shortly before then, on April 21, 2009, VCS filed an amended complaint in which, for the first time, it asserted claims against UCB. *See* Amended Complaint [R. 177-208]. Specifically, VCS asserted claims for mechanic's lien foreclosure, declaratory judgment, and quantum meruit. *See id.* VCS later filed a second amended complaint on December 18, 2009, which differed from the prior version only in the amount of damages sought. *See* Second Amended Complaint [R. 231-63].

VCS moved for summary judgment against UCB on April 30, 2010. *See* Motion for Summary Judgment [R. 288-89]. Among other things, VCS sought a determination

² In its Statement of the Case, VCS claims to have asserted four claims against not just La Salle, but also UCB. *See* Brief of Appellant VCS, Inc. ("Brief of Appellant"), at pp. 5-6. VCS' claim is inaccurate. In fact, in 2008, VCS originally sued only La Salle and asserted only three claims for relief. *See* Complaint [R. 1-10].

that it owned a mechanic's lien against the Property having priority over UCB's deed of trust, and that such mechanic's lien be foreclosed. *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment [R. 290-312]. UCB opposed VCS' motion and filed a cross-motion for summary judgment seeking a determination that VCS' alleged mechanic's lien was void and unenforceable as against UCB, a determination that VCS' unjust enrichment claim was barred by its failure to exhaust its legal remedies, and an award of costs and attorney's fees pursuant to section 38-1-18 of the Utah Code. *See* Utah Community Bank's Cross-Motion for Summary Judgment [R. 509-11].

After full briefing and oral argument, the District Court denied VCS' motion for summary judgment and granted UCB's cross-motion for summary judgment. *See* Ruling [R. 644-55]. The District Court entered an order awarding UCB attorney's fees. *See* Order Denying VCS, Inc.'s Motion for Summary Judgment and Granting Utah Community Bank's Cross-Motion for Summary Judgment [R. 685-88]. VCS appealed. *See* Notice of Appeal [R. 692-93].

III. STATEMENT OF FACTS

La Salle hired VCS to "supervise and facilitate" the construction of a number of single family residences and twin homes on the Property. *See* Second Affidavit of Tom Phelps, ¶ 7 [R. 318]. VCS claims to have begun construction work on the Property in or about early November 2006. *See id.*, ¶ 10 [R. 319]; Brief of Appellant, at p. 8. VCS' Construction Contract Agreement with La Salle was not executed until February 22, 2007, however, and the first Notice of Commencement with respect to VCS' alleged work on the Property was not filed in the State Construction Registry until April 17,

2007. *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment, Exhibits D and F [R. 346-51, 357-63]; Brief of Appellant, at p. 8.

UCB extended a construction loan to La Salle on or about January 9, 2007. *See* Declaration of Julie Ann Hirschi, ¶ 4 [R. 527]. UCB's loan to La Salle was secured by a deed of trust recorded against the Property on or about January 12, 2007. *See id.*; *see also* Memorandum in Support of Plaintiff's Motion for Summary Judgment, at pp. 4-5 [R.293-94]; Brief of Appellant, at p. 8.

La Salle terminated VCS' Construction Contract Agreement in or about September 2007. *See* Second Affidavit of Tom Phelps, ¶ 15 [R. 320]; Brief of Appellant, at p. 9. VCS recorded a Notice of Mechanic's Lien against the Property on January 29, 2008. *See* Second Affidavit of Tom Phelps, ¶ 16 [R. 320]; Brief of Appellant, at p. 10. July 26, 2008 was 180 days after January 29, 2008. VCS filed suit against La Salle on March 12, 2008. *See* Complaint [R. 1-10]. VCS' complaint included three causes of action styled "Breach of Contract," "Foreclosure of Mechanics [*sic*] Lien," and "Contract Implied in Fact." *See id.* La Salle did not respond to VCS' complaint and the District Court entered judgment by default against La Salle on June 6, 2008. *See* Default Judgment [R. 19-20]. VCS did not record a *lis pendens* either on or before July 26, 2008, *i.e.*, within 180 days of recording its Notice of Mechanic's Lien.

On or about October 16, 2008, VCS mailed a letter to UCB informing UCB of the existence of VCS' default judgment against La Salle. *See* Declaration of Julie Ann Hirschi, ¶ 5 [R. 527]; Ruling, at p. 2 [R. 645]. This letter was the earliest evidence before the District Court to show that UCB had actual knowledge of the commencement of

VCS' action against La Salle. *See* Ruling, at p. 6 [R. 649]. The District Court later set VCS' default judgment against La Salle aside. *See* Ruling Granting Motion to Set Aside Judgment [R. 209-14].

On April 21, 2009, VCS amended its complaint to assert claims for mechanic's lien foreclosure, declaratory judgment (regarding lien priority), and unjust enrichment against UCB and AWB. *See* Amended Complaint [R. 177-208]. VCS served UCB with a summons and copy of its Amended Complaint on May 5, 2009. *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment, Exhibit "I" [R. 380]. VCS amended its complaint again on or about December 18, 2009. *See* Second Amended Complaint [R. 231-63]. VCS' Second Amended Complaint included the same claims for relief as the preceding complaint, but increased the amount of damages sought by VCS. *See id.*

VCS recorded a *lis pendens* against the Property for the first time on April 24, 2009. *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment, Exhibit P [R. 444-47]; Brief of Appellant, at p. 11. April 24, 2009 was 452 days after January 29, 2008, the day on which VCS recorded its Notice of Mechanic's Lien against the Property. *See* Second Affidavit of Tom Phelps, ¶ 16 [R. 320]; Brief of Appellant, at p. 10. In or about December 2009, the successor trustee under UCB's deed of trust with respect to the property conducted a foreclosure sale of the Property. *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment, Exhibit Q [R. 453-55, 459-61, 465-67]. UCB was the successful bidder at the trustee's sale and the trustee conveyed the Property to UCB by Trustee's Deeds dated December 30, 2009. *See id.*

IV. RESPONSE TO VCS' STATEMENT OF FACTS

Several of VCS' "facts" are unsupported by any evidence found in the record. For example, VCS states that it "did not receive any payment from La Salle pursuant to their agreement." *See* Brief of Appellant, at p. 8. The only evidence in the record relating to payments to VCS, however, is that VCS received no payment in January 2007 when La Salle obtained construction funding. *See* Second Affidavit of Tom Phelps, ¶¶ 12-13 [R. 320]. There is no evidence in the record supporting VCS' contention that it did not receive payments at other times.³

There is also no evidence to support VCS' contentions about UCB's supposed awareness of VCS' "conferring a substantial benefit to La Salle and to the bank," UCB's knowledge that "it would have to pay VCS for its work," and other allegations intended to support VCS' unjust enrichment claim. *See* Brief of Appellant, at p. 9. Indeed, the only evidence VCS cites in support of these claims is two paragraphs of affidavit testimony and an unauthenticated spreadsheet that VCS claims is UCB's "Loan Tracking for Lots 19-22." *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment, at p. 6 [R. 295] (citing Second Affidavit of Tom Phelps, ¶¶ 19-20, and Utah Community Bank Loan Tracking for Lots 19-22). The affidavit testimony VCS relies upon indicates only that UCB asked Tom Phelps to act as general contractor in the event that La Salle became unable to pay VCS, and that Mr. Phelps agreed to do so. *See*

³ Having determined that VCS' alleged mechanic's lien was void as against UCB the District Court did not reach the question of the value of the alleged lien. *See* Ruling, at p. 3 ("Because the Court finds the lien is void, the Court makes no findings regarding whether the value of the lien is proper.") [R. 646].

Second Affidavit of Tom Phelps, ¶ 19 [R. 321]. Mr. Phelps offered no testimony about “substantial benefit[s]” to UCB or about UCB’s obligation to pay anyone for anything. Mr. Phelps testimony about the “tracking sheet” attached to his affidavit is also unhelpful. *See id.*, ¶ 20 [R. 321]. Mr. Phelps made no effort to authenticate the sheet by explaining who created it, when it was created, why it was created, or how he came to have a copy. In any event, even if the tracking sheet were authentic, it shows at most only that UCB was aware of construction on a portion of the Property. This circumstance is hardly remarkable given that UCB had extended a construction loan to La Salle. In no sense does the fact that UCB monitored its loan to La Salle support VCS’ conclusions that UCB was either aware that VCS was “conferring a substantial benefit to La Salle and to the bank,” or that UCB knew that “it would have to pay VCS for its work.”

Finally, VCS’ claim that “UCB obtained ownership of [the Property] directly from La Salle (who was a party to the lawsuit within 180 days from the date VCS filed its lien)” is both wholly unsupported by admissible record evidence and false. *See* Brief of Appellant, at p. 11. The pages of the record to which VCS points in support of its claim about UCB’s ownership of the Property consist of abstracts of title, copies of trustee’s deeds, and an unrecorded Notice of Trustee’s Sale. *See* Memorandum in Support of Plaintiff’s Motion for Summary Judgment, Exhibits Q and U [R. 449-69, 501-03]. VCS made no effort to authenticate any of these documents. *See* Memorandum in Opposition to Plaintiff VCS, Inc.’s Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment, at p. 4 [R. 515]. Even if such documents were admissible and thus properly before the District Court, they show that UCB actually obtained fee title to

the Property from the successor trustee under its deed of trust by purchasing the Property at a trustee's sale. *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment, Exhibit Q [R. 449-69]. In no sense did UCB obtain ownership from La Salle.⁴

SUMMARY OF ARGUMENTS

The District Court correctly determined that VCS' alleged mechanic's lien is void as against UCB because VCS failed to comply with the statutory requirement that it record a *lis pendens*. Utah's mechanic's lien statute dictates that a lien claimant record a *lis pendens* within 180 days of recording a lien notice or the lien is "void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action." Utah Code Ann. § 38-1-11(3)(a). The *lis pendens* requirement exists because the mechanic's lien statute balances the competing interests of (1) those who enhance the value of real property in being paid for their work, with (2) those with an interest in the real property in the clarity of title to the property. By requiring that a mechanic's lien claimant record a *lis pendens*, the statute ensures that those with an interest, or contemplating acquiring an interest, in the subject property have sufficient knowledge of the status of the mechanic's lien to be able to protect themselves.

⁴Whether UCB acquired title to the Property from La Salle or otherwise is irrelevant. VCS contends that UCB acquired ownership from La Salle in an effort to show that UCB had an identity of interests with La Salle such that VCS' amended complaint against UCB related back to its original complaint against La Salle for purposes of Rule 15 of the *Utah Rules of Civil Procedure*. As explained below, the District Court correctly determined that Rule 15 cannot be used to revive an expired lien. *See* Ruling, at pp. 7-8 [R. 650-51]. Thus, whether UCB's interests were ever aligned with La Salle's interests is immaterial.

The *lis pendens* requirement is thus an important part of the statutory scheme that mechanic's lien claimants ignore at their peril.

VCS failed to record a *lis pendens* within the statutory period for doing so. UCB thus lacked constructive notice of VCS' foreclosure lawsuit. VCS also failed to make UCB a party to its foreclosure suit within 180 days, and there is no evidence that UCB had actual knowledge of the lawsuit during that period. As a result, VCS' alleged mechanic's lien became void as against UCB. As there is no statutory basis upon which a once-voided mechanic's lien can be revived, VCS is forever precluded from foreclosing its alleged mechanic's lien against UCB's interest in the Property.

VCS' substantial compliance with most aspects of the mechanic's lien statute does not excuse its failure to record a *lis pendens*. The *lis pendens* requirement is an express command of the statute, not a "mere technicality." VCS' explanation for its failure to record a *lis pendens* – that having sued the owner of the Property, La Salle, it did not believe a *lis pendens* was necessary – is no excuse. Nothing in the mechanic's lien statute suggests that recording a *lis pendens* is optional, and the statute does not allow courts to overlook a lien claimant's failure to comply with the statute.

VCS could not revive its voided mechanic's lien claim against UCB by amending its complaint pursuant to Rule 15(c) of the *Utah Rules of Civil Procedure*. Claims against new parties can only relate back under Rule 15 if the new party has an "identity of interest" with the original defendant. An identity of interest exists between the original and new defendants when they are so closely related that notice of the action to one is the functional equivalent of notice to the other. A merely contractual relationship

between the old and new parties is an insufficient basis for a determination that the parties share an “identity of interest” for purposes of Rule 15(c). The only evidence before the District Court of a relationship between UCB and VCS showed that the former was a creditor of the latter. Their purely contractual arrangement was not an identity of interest. In any event, the Utah Court of Appeals ruled more than two decades ago in *Diehl Lumber Transportation, Inc. v. Mickelson*, 802 P.2d 739 (Utah Ct. App. 1990), that a void mechanic’s lien cannot be revived by Rule 15(c).

The District Court correctly determined that VCS cannot pursue an unjust enrichment claim against UCB having failed to exhaust its legal remedies. While VCS may well have exhausted its legal remedies against La Salle, before a party can pursue an equitable remedy against any party, it must first exhaust its legal remedies as against all parties. By failing to perfect its lien claim against UCB by suing UCB or recording a *lis pendens* within 180 days of recording its mechanic’s lien notice, VCS failed to take advantage of its statutory remedy as against UCB and thus failed to exhaust its legal remedies.

Even if VCS had exhausted its legal remedies such that it could qualify for equitable relief, VCS failed to demonstrate that it could carry its burden of proving that UCB was unjustly enriched. First, while the evidence could be construed to show that La Salle was enriched by whatever work VCS did, no evidence showed that UCB was enriched. Second, even if VCS has offered evidence showing that UCB were enriched, the fact that the proceeds of UCB’s loan to La Salle were used to pay for improvements to the Property precludes a determination that UCB was unjustly enriched.

Finally, given that VCS' alleged mechanic's lien is void as against UCB, UCB is entitled to an award of attorney's fees as the successful party for purposes of section 38-1-18 of the Utah Code.

ARGUMENT

The fundamental question raised by this appeal is whether a mechanic's lien claimant is excused from the statutory requirement of recording a *lis pendens* by initiating a foreclosure action against the owner of the subject property within 180 days of recording a notice. Nothing in the mechanic's lien statute itself suggests that giving notice of a foreclosure suit is optional, and VCS has not cited any case holding that suing the property owner is alone sufficient to preserve a mechanic's lien as against others with an interest in the property. VCS' alleged mechanic's lien is void as against UCB because VCS failed to record a *lis pendens* or otherwise give UCB notice of its lien foreclosure lawsuit within 180 days of recording its mechanic's lien notice as the governing statute requires. Whether VCS intentionally declined to record a timely *lis pendens* under the mistaken belief that doing so was unnecessary (because VCS sued La Salle within 180 days of recording its mechanic's lien notice), or simply neglected to do so is of no consequence. In either case, it is undisputed that UCB had no notice or knowledge of VCS' foreclosure suit within the statutory 180-day period for VCS to give such notice. As a result of its failure to timely record a *lis pendens*, VCS' alleged mechanic's lien became void as against UCB. The District Court was correct to so conclude.

I. THE NOTICE PROVISIONS OF THE MECHANIC'S LIEN STATUTE ARE AN IMPORTANT PART OF THE STATUTORY SCHEME

The language and structure of Utah's mechanic's lien statute make it clear that giving notice of a lien foreclosure action is an important responsibility lien claimants bear. The mechanic's lien statute balances significant, competing public interests in, first, ensuring that those who work to enhance the value of real property receive payment for their work and, second, maintaining the alienability of real property, given that land is a scarce resource of finite quantity. *See Projects Unlimited, Inc. v. Copper State Thrift & Loan Co.*, 798 P.2d 738, 743 (Utah 1990). The statute protects mechanics by providing security for the value of their work. *See* Utah Code Ann. § 38-1-3. At the same time, the statute protects those interested in the underlying property by requiring the prompt and public assertion and prosecution of mechanic's lien claims. *See id.*, §§ 38-1-7(1) (mechanic's lien claimant must record "written notice to hold and claim a lien" within 180 days of completion) & 38-1-11(2) (mechanic's lien claimant must file action to foreclose lien within 180 days of recording notice of lien). The statute balances these interests by giving mechanics a remedy they would otherwise lack, and by demanding that they take advantage of that remedy swiftly and with notice to all involved so as not to unreasonably cloud title to the subject property.

A mechanic's lien claimant's giving notice of a lien claim is critical because such liens are non-consensual and often affect the rights of individuals and entities other than the owner of the subject property. For example, the existence and status of mechanic's liens against a particular property are a concern for prospective lenders contemplating

accepting a deed of trust as security for a loan, prospective title insurers, and prospective buyers. Accordingly, the mechanic's lien statute contains a number of provisions requiring mechanic's lien claimants to give public notice of their lien claims. First, a mechanic's lien claimant must record a written notice of the claim in the recorder's office for the county embracing the subject property within 180 days of the completion of construction on such property. *See* Utah Code Ann. § 38-1-7(1). Such notices obviously cloud title to the targeted real property and, in many instances, prompt payment to the lien claimant without further action by the lien claimant. In such cases, the lien claimant may elect to allow the lien to expire simply by taking no further action. Alternatively, if the lien claimant remains unpaid and wishes to pursue a statutory remedy, the lien claimant must file an action to foreclose the alleged lien within 180 days of recording the notice. *See id.*, § 38-1-11(2). Failure to file a timely foreclosure suit renders the alleged lien "automatically and immediately void." *See id.*, § 38-1-11(4)(a). Within the same 180-day period the lien claimant must also record a *lis pendens*. *See id.*, § 38-1-11(3)(a). The lien claimant's doing so gives notice to the world that the alleged mechanic's lien retains its vitality pending judicial adjudication. The lien claimant's failure to timely record a *lis pendens* renders the alleged lien void "except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action." *Id.*

By enacting these notice provisions the Legislature clearly indicated that mechanic's liens cannot bind those who lack either actual knowledge of a foreclosure action or a ready way to ascertain the existence of a foreclosure action by consulting the

county recorder. These provisions promote the alienability of real property by both ensuring that all interested parties have an opportunity to assert their interests in and clear title to real property by participating in a foreclosure action, and by enabling a potential lender or purchaser to quickly and easily evaluate the condition of title to property against which a mechanic's lien has been asserted. If, for example, a mechanic's lien notice were recorded against a particular property on January 1, and a *lis pendens* were recorded within 180 days thereafter, on July 1 prospective lenders or buyers would readily know that any interest in the property they may thereafter acquire will be subject to the mechanic's lien and any determination made in the foreclosure action.⁵ The prospective lender or buyer could then act appropriately by, for example, demanding additional security or a lower price. Conversely, if no *lis pendens* were recorded by July 1, a

⁵ Conversely, an individual or entity with a record interest in the subject property prior to the time a *lis pendens* is recorded, but lacking knowledge of the foreclosure suit, can only be bound by the determination of the foreclosure suit if the person or entity is made a party to the suit. See, e.g., *Elwell v. Morrow*, 78 P. 605, 607 (Utah 1904) (observing that foreclosing mechanic's lien claimant should have made additional lien holder a party to his foreclosure suit because "[t]he court in that event would have had jurisdiction to adjudicate and determine his rights, in connection with those of other lienholders properly before it."); *Portland Mortgage Co. v. Creditors Protective Ass'n*, 262 P.2d 918, 922 (Ore. 1953) (noting that a junior lien holder not made a party to a foreclosure suit by the senior foreclosing lien holder "is in the same position as if no foreclosure had ever taken place, and he has the same rights, no more and no less, which he had before the foreclosure suit was commenced."); *Currie v. Wright*, 119 N.W. 74, 75-76 (Iowa 1909) ("[A]s neither Mary C. Wright nor plaintiff's assignor was made party to the proceeding to foreclose the mechanic's lien, the judgment in that foreclosure is not binding upon either of them."); *Fleming v. Prudential Ins. Co. of America*, 73 P. 752, 752-53 (Colo. Ct. App. 1903) (holding that beneficiary of trust deed was not bound by foreclosure of allegedly superior mechanic's lien when not made party to mechanic's lien foreclosure suit).

prospective lender or buyer could safely proceed to acquire an interest in the property knowing that their interest therein would not be encumbered by the mechanic's lien.

The mechanic's lien statute offers those who enhance the value of land a fast, convenient way to secure and pursue payment for their work in the event that the party with whom they contracted proves unable or unwilling to pay. The Legislature demands that those resorting to mechanic's liens take advantage of their remedy promptly and publicly. A mechanic's lien claimant's failure to timely give the necessary notice of a foreclosure action thus invalidates the alleged lien as against all those who are ignorant of the action.⁶

II. VCS' FAILURE TO RECORD A *LIS PENDENS* RENDERED ITS ALLEGED MECHANIC'S LIEN VOID AS AGAINST UCB

"[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." *Eccles Lumber Co. v. Martin*, 87 P. 713, 716 (Utah 1906). VCS failed to comply with the *lis pendens* requirement of the mechanic's lien statute and its alleged mechanic's lien consequently became void as against UCB.

⁶ VCS' request that the mechanic's lien statute "be found void for vagueness" is strange. Brief of Appellant, at p. 25. First, if the Court were to grant VCS' request and void the statute, the remedy VCS seeks in this action – foreclosure of a mechanic's lien – would cease to exist. Second, the void-for-vagueness doctrine typically applies to penal statutes, not civil statutes. See *State v. Green*, 2004 UT 76, ¶ 43, 99 P.3d 820 ("The constitution tolerates a greater degree of vagueness in civil statutes than in criminal statutes."). Finally, VCS has made no effort to provide legal support for its claim that the mechanic's lien statute is so vague as to be void. The Court should thus disregard VCS' vagueness argument. See *Carol L. Lowry Irrevocable Trust v. G & L Enterprises, LLC*, 2011 UT App 94, ¶ 17, 250 P.3d 1026 (refusing to address argument lacking legal support).

The mechanic's lien statute expressly provides that a person claiming a lien under the statute must record a *lis pendens* within 180 days of recording a mechanic's lien notice "or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action." Utah Code Ann. § 38-1-11(3)(a) (emphasis added). Obviously, the Legislature's use of the phrase "shall be void" means that courts lack discretion to grant or foreclose a mechanic's lien against a person not a party to the foreclosure suit and lacking knowledge of the suit when the claimant has failed to record a *lis pendens*. Less obvious, but equally important is the fact that a lien claimant's failure to record a timely *lis pendens* may not be cured by adding a party to or giving actual notice of the foreclosure suit more than 180 days after recording a mechanic's lien notice. In other words, as the District Court concluded, "the exceptions to filing a *lis pendens*, namely, naming a party in an action or showing actual knowledge of the action, must occur within the statutory timeframe, i.e., within 180 days from the filing of the lien." Ruling, at p. 6 [R. 649]. This conclusion is confirmed by both the language of the statute itself and by the Utah Court of Appeals' decision in *Interlake Distribs., Inc. v. Old Mill Towne, Inc.*, 954 P.2d 1295 (Utah Ct. App. 1998). The District Court's decision should thus be affirmed.

As indicated, a lien claimant's failure to record a *lis pendens* within 180 days of recording a mechanic's lien notice voids the lien "except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action." Utah Code Ann. § 38-1-11(3)(a). The phrase "have been made" must refer to the 180-day period for filing a *lis pendens*. Were it otherwise, i.e., if "have been"

meant “at any time” as VCS contends, the words “have been” would be superfluous. Indeed, if the words “have been” were removed from the statute a lien claimant could disregard the *lis pendens* requirement altogether and either make a person a party to the foreclosure suit or give actual notice of the suit at any time before or after the 180 days expire without consequence. Having expressly required that lien notices and foreclosure actions be filed promptly, and having provided for mechanic’s liens to become void under certain circumstances in the absence of a *lis pendens*, the Legislature cannot have intended to allow mechanic’s lien claimants to breathe life back into void liens by amending their pleadings after the 180-day deadline has passed. Indeed, nothing in the mechanic’s lien statute provides for the revivification of a void lien. VCS has certainly identified no such provision. The Court cannot adopt an interpretation of section 38-1-11(3)(a) that would have the effect of eliminating the words “have been.” See *Aris Vision Inst., Inc. v. Wasatch Prop. Mgmt.*, 2006 UT 45, ¶ 13, 143 P.3d 278 (quoting *Labelle v. McKay Dee Hosp. Ctr.*, 2004 UT 15, ¶ 16, 89 P.3d 113) (“We will avoid an interpretation which renders portions of, or words in, a statute superfluous or inoperative.”). Rather, the statute’s text and structure show that “have been” must refer to the 180-day period for filing a foreclosure action after recording a mechanic’s lien notice.

As noted above, this conclusion is confirmed by *Interlake Distributors, Inc. v. Old Mill Towne, Inc.*, 954 P.2d 1295 (Utah Ct. App. 1998). In that case, as in this case, a construction lender sought and was granted summary judgment voiding a mechanic’s lien against it because the lien claimant failed to record a *lis pendens* within the statutory

period for doing so. The version of the mechanic's lien statute at issue in the *Interlake* case provided a one-year period after the completion of work for initiating a foreclosure suit and recording a *lis pendens*. See *Interlake Distribs.*, 954 P.2d at 1297 (quoting Utah Code Ann. § 38-1-11 (1974)). The court observed that “under the plain language of the statute, appellants’ [mechanic’s] liens are void against Deseret Pacific and Old Mill unless within twelve months from the time appellants completed their work, Deseret Pacific and Old Mill were either made parties to or had actual knowledge of the lawsuit.” See *id.* (emphasis added). The court went on to note that neither Deseret Pacific nor Old Mill were made parties to the foreclosure suit within one year and determined that there was no genuine issue of fact as to whether either entity had actual knowledge of the suit within that period. See *id.*, at 1297-99. Accordingly, the Court of Appeals affirmed the trial court’s grant of summary judgment in favor of both Deseret Pacific and Old Mill. See *id.*, at 1298-99. The Court of Appeals thus interpreted the mechanic’s lien statute to apply what is now a 180-day deadline to either record a *lis pendens*, make a person party to the foreclosure lawsuit, or give the person actual knowledge of the suit.⁷ As the structure and language of the mechanic’s lien statute compelled that result, this Court should interpret the statute the same way.

The undisputed facts before the District Court showed that VCS failed to follow the statutory procedures necessary to preserve a mechanic’s lien against UCB. First, VCS waited 452 days after recording its mechanic’s lien notice on January 29, 2008

⁷ Although the statutory period at issue in *Interlake* was twice as long as the period at issue in this case, the same principles apply. See *Uhrhahn Constr. & Design, Inc. v. Hopkins*, 2008 UT App 41, ¶ 33 n.12, 179 P.3d 808.

before recording a *lis pendens* on April 24, 2009. *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment, at pp. 7, 12 [R. 296, 301]. The undisputed facts also showed that UCB was not made a party to VCS' mechanic's lien foreclosure suit within 180 days of January 29, 2008. Indeed, VCS did not make UCB a party to its foreclosure suit until on or about May 5, 2009. *See id.*, at p. 11 & Exhibit "I" [R. 300, 380]; Amended Complaint [R. 177-208]. Finally, although VCS bore the burden of proving that UCB had actual knowledge of its foreclosure suit within 180 days of January 29, 2008, *see* Utah Code Ann. § 38-1-11(3)(b), the undisputed facts showed that UCB had knowledge of VCS' lawsuit no earlier than October 16, 2008, over two months after 180 days had elapsed since January 29, 2008. *See* Declaration of Julie Ann Hirschi, ¶ 5 [R. 527]; Ruling, at p. 6 [R. 649].

Given that VCS undisputedly failed to carry its burden to prove that UCB had the requisite notice of its foreclosure action within the statutory 180-day period, VCS' alleged mechanic's lien became void as against UCB when that 180-day period expired on or about July 27, 2008. The District Court thus correctly granted summary judgment in UCB's favor with respect to VCS' lien foreclosure and declaratory judgment claims for relief.

VCS' reliance on *Butterfield Lumber, Inc. v. Peterson Mortgage Corp.*, 815 P.2d 1330 (Utah Ct. App. 1991), is wholly misplaced. The plaintiff in that case sued to foreclose a mechanic's lien and named all parties with an interest in the subject property as defendants, including a mortgagee. *See id.*, at 1331-32. The mechanic's lien claimant failed to record a *lis pendens*. *See id.*, at 1332. During the pendency of the mechanic's

lien foreclosure action the mortgagee foreclosed its interest in the property nonjudicially and the property was eventually sold to a third-party with no notice of the mechanic's lien foreclosure action. *See id.* The court held that because the mortgagee was a party to the mechanic's lien foreclosure action, the plaintiff's mechanic's lien attached to the proceeds of the nonjudicial foreclosure sale despite the fact that no *lis pendens* was recorded. *See id.*, at 1335.

VCS misstates the holding of the *Butterfield Lumber* case. According to VCS, “[t]he court found that the [mechanic’s] lien was enforceable against the third party purchaser because *it obtained the property from [the mortgagee]*, who had timely actual knowledge of the lien action and was a party.” Brief of Appellant, at pp. 26-27 (emphasis in original). That was not the holding of the case. The court did not determine that the plaintiff’s mechanic’s lien was enforceable against the third-party purchaser. Rather, as indicated above, the court held that the lien was enforceable against the proceeds of the mortgagee’s nonjudicial foreclosure sale of the subject property, which proceeds were owned by the mortgagee. *See Butterfield Lumber*, 815 P.2d at 1335. The key fact was not that the third-party purchaser acquired the property from the mortgagee (and thus somehow had imputed knowledge of the mechanic’s lien foreclosure action in the absence of a *lis pendens*), but that the mortgagee was a party to the mechanic’s lien foreclosure suit from the very beginning and could not defeat the mechanic’s lien by selling the property to a bona fide purchaser. *See id.*, at 1334-35. As the District Court recognized, *Butterfield Lumber* is no help to VCS. *See Ruling*, at pp. 5-6 [R. 648-49].

In sum, VCS failed to perfect its alleged mechanic's lien against UCB by failing to record a *lis pendens* or to sue UCB within 180 days. As there is no evidence that UCB knew anything about VCS' foreclosure lawsuit until well after 180 days had expired, VCS' lien became void as against UCB. The District Court thus correctly denied VCS' motion for summary judgment and granted UCB's cross-motion for summary judgment.

III. VCS DID NOT SUBSTANTIALLY COMPLY WITH THE MECHANIC'S LIEN STATUTE

VCS' failure to record a *lis pendens* was not a "mere technicality" that can or should be excused by its substantial compliance with other provisions of the mechanic's lien statute. *See* Brief of Appellant, at p. 33. First, VCS has failed to cite any authority for the proposition that recording a *lis pendens* is the kind of technicality that can be overlooked if the lien claimant has otherwise substantially complied with the governing statute. Like VCS, UCB has also been unable to find any support for the notion that performing an act expressly required by the mechanic's lien statute – recording a *lis pendens* – is a mere technicality. To the contrary, the kind of trivial, technical missteps that substantial compliance will excuse include omitting the notary public's address and commission expiration date from the jurat on the lien claimant's mechanic's lien notice. *See Projects Unlimited, Inc. v. Copper State Thrift & Loan Co.*, 798 P.2d 738, 745-46 (Utah 1990). Failing to record an expressly mandated document is obviously a far more substantial deviation from the statutory requirements than is omitting a notary public's address or commission expiration date. A recorded lien notice, even if improperly notarized, nonetheless gives notice of a lien, while the absence of a *lis pendens* amounts

to a total failure to give notice. Second, this Court has held that while mechanic's liens generally ought not be defeated by technicalities, that rule applies only when "no express command of the statute is disregarded." *Projects Unlimited*, 798 P.2d at 744 (quoting *Eccles Lumber Co. v. Martin*, 87 P. 713, 716 (Utah 1906)). In this case, of course, VCS disregarded the express statutory command that it record a *lis pendens*. Whether VCS substantially complied with other provisions of the mechanic's lien statute is thus immaterial.

VCS purports to justify its disregard for the statutory *lis pendens* requirement by explaining that it had already obtained a default judgment against La Salle by the time the 180-day period for filing a foreclosure suit and recording a *lis pendens* expired. *See* Brief of Appellant, at p. 34. VCS claims that under those circumstances, it "had no reason to believe a *lis pendens* was necessary" because it believed there was sufficient equity in the Property to satisfy its lien claim regardless of the relative priority of such lien. *Id.* In other words, VCS gambled that it could obtain a quick default judgment against La Salle, foreclose on the Property, and get paid without going to the trouble of suing all interested parties. By the time VCS realized that its gamble would not pay off, however, the 180-day deadline had passed and VCS' alleged lien had become void as against UCB.⁸

Nothing in the mechanic's lien statute either excuses VCS' mistaken belief in the likelihood of a quick foreclosure sale or permits a second bite at the apple. Knowing that

⁸ VCS' claim to have recorded its *lis pendens* "well in advance of UCB's later acquisition of an interest in the [P]roperty" is wrong. *See* Brief of Appellant, at p. 34. UCB recorded its deed of trust against the Property on January 12, 2007, more than two years before VCS eventually recorded a *lis pendens* in April 2009. *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment, at pp. 4, 12 [R. 293, 301].

it was gambling, VCS should have taken the simple, prudent, and inexpensive precaution of recording a *lis pendens*. Having failed to do so, VCS' substantial compliance with other provisions of the statute cannot reverse the voiding of its alleged mechanic's lien as against UCB.

IV. VCS' VOID MECHANIC'S LIEN WAS NOT REVIVED BY THE DOCTRINE OF RELATION BACK

The District Court correctly determined that VCS could not revive its voided mechanic's lien claim against UCB by amending its complaint pursuant to Rule 15(c) of the *Utah Rules of Civil Procedure*. Rule 15(c) provides that when a claim sought to be added by amendment arose out of the same transaction set forth in the original complaint, the amendment relates back to the date of the original complaint. *See Utah R. Civ. P. 15(c)*. A claim asserted against a new party will not relate back under Rule 15, however, unless the new party has an "identity of interest" with the original defendant. *See Doxey-Layton Co. v. Clark*, 548 P.2d 902, 906 (Utah 1976). An identity of interest exists between the original and new defendants when "the parties are so closely related in their business operations that notice of the action against one serves to provide notice of the action to the other." *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 217 (Utah 1984). Importantly, a merely contractual relationship between the old and new parties is an insufficient basis for a determination that the parties share an "identity of interest" for purposes of Rule 15(c). *See id.*

UCB had no identity of interest with La Salle such that La Salle's participation in VCS' lawsuit could or should have given UCB notice of the action. There was no

evidence before the District Court of a close relationship between the business operations of UCB and La Salle. *See Perry*, 681 P.2d at 217 (identity of interest may be found where old and new parties are “closely related in their business operations”) (emphasis added). Rather, the only evidence of a relationship between UCB and La Salle before the District Court was that UCB made a construction loan to La Salle. *See* Memorandum in Support of Plaintiff’s Motion for Summary Judgment, at p. 4 [R. 293]. This purely contractual arrangement was not an identity of interest. *See Perry*, 681 P.2d at 217. Indeed, given their relationship as creditor and debtor, UCB’s interests were in many ways adverse to La Salle’s interests.

VCS’ contention that UCB and La Salle shared an identity of interest because UCB was made a party to the case before discovery commenced is, as the District Court opined, “unconvinc[ing].” *See* Ruling, at p. 7 [R. 650]. First, VCS misquotes the *Doxey-Layton* case. According to VCS, the *Doxey-Layton* Court stated that an identity of interest exists between existing and new parties when the new party “has been ‘sufficiently alerted to the proceedings, or [was] involved in them unofficially, from an early stage.’” *See* Brief of Appellant, at p. 35 (quoting *Doxey-Layton Co. v. Clark*, 548 P.2d 902, 906 (Utah 1976)). The Court actually said that early awareness of a lawsuit is one of the rationales for the identity of interest rule. *See Doxey-Layton*, 548 P.2d at 906. The Court did not say that early involvement equates to an identity of interest. Second, in any event, it was undisputed that UCB was not aware of VCS’ lawsuit until well over six months after the case was commenced, and that UCB was not involved in the case until more than one year after it was filed. VCS ignores these facts, but suggests that the case

remained in an “early stage” at the time UCB became a party simply because no discovery had occurred. *See* Brief of Appellant, at p. 35. That no discovery had occurred was, of course, a function of VCS’ effort to avoid having to litigate its claims altogether by obtaining a hasty default judgment against La Salle on the basis of what the District Court determined to be improper service of process. *See* Brief of Appellant, at p. 6. Had VCS properly served La Salle, the discovery process would have undoubtedly been well underway long before UCB was eventually named as a defendant. It would be inequitable to rule that VCS’ mechanic’s lien claim against UCB relates back to the original complaint merely because no discovery was undertaken when VCS’ own failure to properly effect service upon La Salle was the sole reason for the lack of discovery.

Even if there were a basis for a determination that UCB and La Salle shared an identity of interest, VCS has no answer for the fact that the Utah Court of Appeals ruled more than two decades ago that a void mechanic’s lien cannot be revived by Rule 15(c). *The Diehl Lumber Transportation, Inc. v. Mickelson*, 802 P.2d 739 (Utah Ct. App. 1990), court held that the untimeliness of a mechanic’s lien foreclosure action could not be cured by relation back under Rule 15(c). *See id.*, at 744. This was so, the court said, because the statutory deadlines for mechanic’s liens are jurisdictional. *See id.* (quoting *AAA Fencing Co. v. Raintree Dev. & Energy Co.*, 714 P.2d 289 (Utah 1986)). In other words, once an alleged mechanic’s lien is void due to the lien claimant’s failure to comply with the statutory deadlines, both the right to a lien and the associated remedy are lost and “the court is without jurisdiction to decree a foreclosure.” *Id.* Lacking such jurisdiction, courts lack “authority to revive the lien by permitting amendment under Rule 15(c).” *Id.*

In sum, the District Court correctly ruled that VCS' failure to timely record a *lis pendens* could not be cured by an amended pleading under Rule 15(c). UCB and La Salle shared no identity of interest such that La Salle's status as a party to VCS' lawsuit either could have or did protect UCB's interests. Even if UCB and La Salle's interest had been shown to be aligned, however, it has long been the law of Utah that Rule 15(c) cannot operate to revivify a void mechanic's lien. The Court should, therefore, affirm the District Court's decision.

V. UCB WAS NOT UNJUSTLY ENRICHED

The District Court granted summary judgment in UCB's favor with respect to VCS' unjust enrichment claim because VCS failed to exhaust its legal remedies by failing to perfect a mechanic's lien claim against UCB. *See* Ruling, at pp. 9-10 [R. 652-53]. On appeal, VCS makes two arguments with respect to this ruling. First, VCS contends that it perfected its mechanic's lien claim by filing a foreclosure action against La Salle and later adding UCB as a defendant. *See* Brief of Appellant, at pp. 37-38. Second, VCS argues that summary judgment was improper because whether UCB was unjustly enriched was a disputed issue of material fact. *See id.*, at pp. 38-39. Neither of VCS' arguments withstands scrutiny.

VCS' claim to have exhausted its legal remedies (or, rather, to be in process of exhausting its legal remedies) by filing a foreclosure suit against La Salle and later adding UCB is based exclusively on an attempt to distinguish *Knight v. Post*, 748 P.2d 1097 (Utah 1988). The court held in that case that the plaintiff could not recover the value of his work on an oil well site on the basis of the equitable doctrine of *quantum*

meruit because he had failed to exhaust his legal remedies, including a mechanic's lien. *See id.*, at 1099-1100. Specifically, although the plaintiff recorded a mechanic's lien notice, his notice described the wrong property and he neglected to file a timely lien foreclosure action. *See id.*

VCS contends that unlike the plaintiff in *Knight v. Post*, it did file a timely action to foreclose its alleged mechanic's lien and, therefore, it has not failed to exhaust its legal remedies. *See* Brief of Appellant, at p. 37. VCS' claim is true only insofar as it applies to La Salle, however. Before a party can pursue an equitable remedy against any party, it must first exhaust its legal remedies as against all parties. *See UTCO Assocs., Ltd. v. Zimmerman*, 2001 UT App 117, ¶¶ 18-29, 27 P.3d 177 (plaintiff's failure to pursue legal claim against one defendant barred pursuit of equitable claim against other defendants). It is undisputed that VCS did not timely make UCB a party to its foreclosure suit, did not give UCB notice of its foreclosure suit, and did not record a *lis pendens* despite the fact that VCS could have done any or all of them (given that UCB's deed of trust was recorded against the Property more than one year before VCS sued La Salle). Having failed to pursue its mechanic's lien remedy against UCB, VCS' alleged lien became void with respect to UCB even if the lien remained valid as against La Salle's interest in the Property.⁹ VCS thus failed to take advantage of its statutory remedy as against UCB and cannot be said to have genuinely exhausted its legal remedies.

⁹ La Salle's interest in the Property, and VCS' lien claim against that interest, were eliminated by the December 2009 trustee's sale at which UCB acquired title to the Property. *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment, Exhibit Q [R. 449-69].

VCS also argues that summary judgment was improper because “there are questions of fact concerning whether [UCB] was unjustly enriched.” Brief of Appellant, at pp. 38-39. VCS lists eight purportedly disputed facts. *See id.* Only the first five of those eight “facts” were before the District Court. *See* Memorandum in Support of Plaintiff’s Motion for Summary Judgment, at p. 6 [R. 295]. UCB actually disputed just two of those “facts,” namely that UCB “was aware the VCS [*sic*] was conferring a substantial benefit to La Salle and to the bank,” and that UCB “knew it would have to pay VCS for that benefit.” *See* Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment, at pp. 3-4 [R. 514-15]. UCB did so solely because VCS offered precisely no evidence in support of either “fact” in direct violation of Rule 7(c)(3)(A) of the *Utah Rules of Civil Procedure*. *See id.* Thus, no genuine, properly supported facts were actually disputed.

In any event, the District Court properly granted UCB’s cross-motion for summary judgment with respect to VCS’ unjust enrichment claim because VCS is incapable of carrying its burden with respect to any of the elements of its claim.

To prove the existence of a contract implied in law, a plaintiff must establish the following: “(1) the defendant received a benefit; (2) an appreciation or knowledge by the defendant of the benefit; (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying for it.”

Emergency Physicians Integrated Care v. Salt Lake County, 2007 UT 72, ¶ 11, 167 P.3d 1080 (quoting *Davies v. Olson*, 746 P.2d 264, 269 (Utah Ct. App. 1987)). With respect to the first and second elements, to the extent VCS’ alleged work on the Property benefitted anyone, it was La Salle. La Salle owned the Property La Salle contracted with

VCS, and it was, presumably, La Salle that ordered VCS to begin work on the Property two months before UCB acquired an interest in the Property (according to VCS). While La Salle may thus have benefitted from VCS' work, there was no evidence before the District Court to show that UCB also benefitted. At most, the value of the security for UCB's loan to La Salle may have increased, but VCS offered no evidence to support such a proposition.

Even if VCS could prove that UCB knowingly received a benefit, VCS cannot show that it would be unjust for UCB to retain such benefit for two reasons. First, "[t]he mere fact that a third person benefits from a contract between two others does not make such third person liable in quasi-contract, unjust enrichment, or restitution. There must be some misleading act, request for services, or the like, to support such an action."

Commercial Fixtures & Furnishings, Inc. v. Adams, 564 P.2d 773, 774 (Utah 1977)

(citation omitted). Assuming again that UCB benefitted from the VCS' alleged work for La Salle, VCS offered no evidence of any misleading act, request for services, or other like conduct by UCB that might support a conclusion that UCB would be unjustly enriched absent payment to VCS. At most, VCS suggested that UCB agreed to hire VCS to continue working on the Property at some unspecified time in the future in the event that La Salle defaulted. *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment, at p. 5 [R. 294]. In other words, VCS contends that UCB requested potential future services, not the services VCS alleges it actually performed pursuant to its agreement with La Salle and for which it seeks payment in this action.

Second, VCS concedes that UCB paid for the work allegedly performed upon the Property. Indeed, it is undisputed that UCB extended a construction loan to La Salle and that the “loan proceeds were used to pay for ongoing improvements” to the Property. *See* Brief of Appellant, at p. 38; Memorandum in Support of Plaintiff’s Motion for Summary Judgment, at p. 4 [R. 293] (asserting that after obtaining its construction loan from UCB, “La Salle paid the subs for their work, including Parsons Concrete and Wasatch Valley Excavation.”). Having thus once paid for VCS’ alleged work, UCB could not be unjustly enriched by retaining the benefit of such work.

In sum, the District Court correctly determined that VCS’ unjust enrichment claim is barred by its failure to exhaust its mechanic’s lien remedy as against UCB. Summary judgment was also appropriate with respect to VCS’ unjust enrichment claim because VCS cannot prove either that it would be unjust for UCB to retain any benefit it did not pay for or that UCB did not already pay for VCS’ alleged work.

VI. THE DISTRICT COURT’S AWARD OF ATTORNEYS’ FEES SHOULD BE AFFIRMED

Section 38-1-18 of the Utah Code provides that the “successful party” in any mechanic’s lien foreclosure proceeding “shall be entitled to recover a reasonable attorneys’ fee.” Having granted UCB’s cross-motion for summary judgment, the District Court awarded attorneys’ fees to UCB as the successful party. *See* Ruling, at p. 11 [R. 654]. Inasmuch as the District Court’s decision should be affirmed for the reasons set forth above, UCB is still the “successful party” and remains entitled to an award of attorneys’ fees. Moreover, UCB is entitled to recover not just the attorneys’ fees incurred

in the District Court, but also those fees incurred on appeal. *See Govert Copier Painting v. Van Leeuwen*, 801 P.2d 163, 174 (Utah Ct. App. 1990). This Court should consequently affirm the District Court's award of attorneys' fees and augment such award by the amount of attorneys' fees incurred by UCB in connection with the instant appeal.

CONCLUSION

For all of the foregoing reasons, UCB respectfully requests that this Court affirm both the District Court's grant of summary judgment in its favor and denial of VCS' motion for summary judgment. In the event that the Court vacates or reverses the District Court's decision in any respect, this action should be remanded to the District Court with instructions to consider, at a minimum, the unresolved question of the value of VCS' alleged work on the Property.

DATED this 27th day of July, 2011.

PARR BROWN GEE & LOVELESS, P.C.

By: _____

Ronald G. Russell

Matthew J. Ball

Attorneys for Appellee Utah Community
Bank

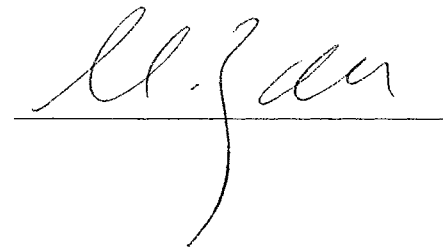
CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2011, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEE UTAH COMMUNITY BANK** to be served via U.S. Mail, first-class postage prepaid, on the following:

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A handwritten signature in cursive script, appearing to read "L. G. Moore", is written over a horizontal line.

ADDENDUM “A”

(Ruling on Plaintiff’s Motion for Summary Judgment and Defendants’ Cross Motions for Summary Judgment)

()

**IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH
WEBER COUNTY, OGDEN DEPARTMENT**

VCS, INC., a Utah company,

Plaintiff,

vs.

LA SALLE DEVELOPMENT, LLC;
AMERICA WEST BANK; UTAH
COMMUNITY BANK; and DOES 1-10,

Defendant(s).

**RULING ON PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT AND
DEFENDANTS' CROSS MOTIONS
FOR SUMMARY JUDGMENT**

Case No. 080901677

Judge Michael D. DiReda

FILED

OCT 26 2010

**SECOND
DISTRICT COURT**

On March 31, 2010, Plaintiff VCS, Inc. ("VCS") filed a motion for summary judgment to enforce its mechanic's lien against Defendants La Salle Development, LLC ("La Salle"), Utah Community Bank ("UCB"), and America West Bank ("FDIC") and to sue for unjust enrichment.

Both UCB and FDIC filed oppositions to the motion along with cross-motions for summary judgment, arguing that the lien is void and the unjust enrichment claim is not valid as to each bank, respectively. The Court heard oral arguments on September 20, 2010. After considering the motions and the oral arguments, the Court grants both UCB's and FDIC's cross-motions for summary judgment. The Court notes that La Salle has not yet responded to Plaintiff's original motion for summary judgment.

The Utah Rules of Civil Procedure dictate that summary judgment is appropriate when there is no genuine issue as to any material fact and where the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). The Court may consider in its determination "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any." *Id.* The Court views the evidence in the light most favorable to the non-moving party.

The material facts in this case are not in dispute. In March 2006, Plaintiff VCS entered into a contract with La Salle to develop lots located in North Park Meadows. Actual construction work commenced in November of that year. On January 12, 2007, UCB recorded a trust deed on the property, which it secured by a loan to La Salle. La Salle then orally terminated VCS in September 2007, and VCS ceased all work on the lots. On October 24, 2007, FDIC then recorded a trust deed on lots 31 and 32, which it too secured by a loan to La Salle. VCS filed a mechanic's lien on lots 3-22 and 31-32 on January 29, 2008; however, VCS did not record a *lis pendens* at this time. On March 12, 2008, VCS filed suit against La Salle but did not name UCB or FDIC as parties. La Salle failed to represent itself, and the Court ordered a default judgment for VCS on June 6, 2008. VCS informed UCB or FDIC of this action on October 16, 2008, when VCS sent letters informing both banks of the judgment against La Salle. Because of issues regarding whether La Salle was properly served in the action, the Court then set aside the default judgment in April 2009. Shortly thereafter, VCS amended its complaint, added UCB and FDIC as parties to the action, and filed a *lis pendens*. On December 30, 2009, UCB then became owner of lots 5-8 and 10-22 pursuant to a foreclosure sale.

Plaintiff VCS has brought this action to enforce its mechanic's lien against La Salle, UCB, and FDIC and also to recover from each party in quantum meruit for unjust enrichment. Each bank argues that the lien is void and that there is no valid unjust enrichment claim. Alternatively, UCB and FDIC argue that the Plaintiff has failed to establish the value of its alleged mechanic's lien. Depending upon the Court's analysis of the law, Plaintiff VCS has requested more time under rule 56(f) of the Utah Rules of Civil Procedure for further discovery. Finally, VCS, UCB, and FDIC all request attorneys' fees pursuant to § 38-1-18.

The Court agrees with both UCB and FDIC and finds that the lien is void as to both parties and that there is no valid unjust enrichment claim. Because the Court finds the lien is void, the Court makes no findings regarding whether the value of the lien is proper. Furthermore, the Court denies Plaintiff's request for more time under rule 56(f). Finally, the Court awards attorneys' fees to both UCB and FDIC pursuant to § 38-1-18. The Court's reasoning is set out below.

I. VALIDITY OF MECHANIC'S LIEN

A mechanic's lien will be enforced if the claimant of the lien complies with the requirements as set forth in the Utah Code. Section 38-1-7(a)(i), (ii) requires that the lien claimant file a notice of a lien claim within 180 days "after the day on which occurs final completion of the original contract" or "the last date on which substantial work was performed under the original contract." Plaintiff strictly complied with this requirement, filing a notice of its lien in January 2008, only four months after substantial work was completed on the original contract with La Salle in September 2007.

After filing a notice of the lien, a lien claimant must then file an action to enforce the lien within 180 days. Utah Code Ann. § 38-1-11(2)(a). Again, Plaintiff strictly complied with this requirement by filing an action in March 2008 and naming La Salle as a defendant. However, Plaintiff failed to name UCB and FDIC as defendants. Within that same time period of 180 days, the statute also requires that the "lien claimant shall file for record . . . a notice of the pendency of the action . . . or the lien shall be void, *except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action.*" § 38-1-11(3)(a) (emphasis added). Plaintiff did not provide UCB or FDIC with actual notice of the action until at least October 16, 2008—over eight months after the initial filing of the lien. Furthermore, Plaintiff did not name UCB or FDIC as parties to the action until April 2009—over a year after the initial

filing of the lien. Because Plaintiff failed to timely record a *lis pendens* within 180 days of the commencement of the action, the question before the Court is whether the lien is void as to UCB and FDIC because neither bank was added as a party to the foreclosure action nor was provided with actual knowledge of the action within the 180 days allowed for filing a *lis pendens*.

Plaintiff VCS argues that the lien remains valid as to UCB and FDIC for three reasons:

1) the statute should be read to only require that UCB and FDIC be added to the foreclosure action or have actual knowledge of the action before either bank purchases the property at the foreclosure sale—not within 180 days of the filing of the action; 2) Plaintiff's amended complaint naming UCB and FDIC as parties relates back to the date of the original pleading; and 3) Plaintiff substantially complied with the statute.

1. THE MEANING OF U.C.A. § 38-1-11(3)(a).

First, Plaintiff argues that its lien is valid against UCB and FDIC because it strictly complied with the requirements of the lien statute. When evaluating statutes, the Court looks at the plain meaning and seeks to “avoid interpretations that will render portions of the statute superfluous or inoperative.” *Hall v. State Dep't of Corr.*, 2001 UT 34. Each party has interpreted § 38-1-11(3)(a) based upon the statute's plain meaning and reached different results: Plaintiff argues that the exceptions to a void lien—namely, naming a party in a foreclosure action or proving actual knowledge of the action—are not subject to the 180 day requirement while both UCB and FDIC argue that the exceptions are subject to the time requirement. Because the Court finds that the language of the statute by itself is unclear as to whether or not the 180 day requirement applies to the exceptions, the Court must look at controlling precedent for an interpretation of the statute.

In order to justify its interpretation of § 38-1-11(3)(a), Plaintiff relies on the facts and holding of *Butterfield Lumber, Inc. v. Peterson Mortgage Corp.*, 815 P.2d 1330 (Utah Ct. App. 1991). In *Butterfield*, the contractor, Butterfield, filed a mechanic's lien on a property after Peterson Mortgage recorded a trust deed but before the time frame required by § 38-1-7 expired. The owner of the property defaulted, and Butterfield then filed an action to enforce its lien, naming Peterson Mortgage as a party to the action within the time frame required by § 38-1-11. Butterfield did not record a *lis pendens*, however. Peterson Mortgage then foreclosed on the property and sold the property to a third party who had no knowledge of Butterfield's mechanic's lien. The question for the appellate court was whether the mechanic's lien attached to the proceeds of the sale of the property between Peterson Mortgage and the third party when the contractor failed to record a *lis pendens*. The Court held that the lien did attach to the proceeds, relying on the exceptions to filing a *lis pendens* listed in § 38-1-11 of the Utah Code and explaining that "the section 38-1-11 protection of third party purchasers without notice of a mechanics' lien foreclosure does not extend to those who acquire ownership with such notice [i.e., Peterson Mortgage]." *Butterfield Lumber*, 815 P.2d at 1334.

Plaintiff VCS relies on the above language in *Butterfield* to justify enforcing its lien against UCB because UCB acquired ownership of the property over a year after it received knowledge of Plaintiff's suit. In this Court's view, *Butterfield* is distinguishable from the present case in one important respect: "[B]ecause Butterfield properly named and served Peterson Mortgage as a party to the lien foreclosure, it met the statutory requirements for preserving its lien against Peterson Mortgage's interest in the property in question." *Butterfield Lumber*, 815 P.2d at 1334. Butterfield completed work on the original contract on April 10, 1987, and filed suit naming Peterson Mortgage as a party on April 6, 1988, within the (then) twelve-month statutory timeframe outlined by § 38-1-11

(1988). Thus, unlike Plaintiff in the instant case, Butterfield perfected its lien against Peterson Mortgage within the proscribed statutory period. This critical fact makes *Butterfield* of little help in advancing Plaintiff's argument.

When interpreting the statute, the Court is more persuaded by the facts and holding of *Interlake Distributors, Inc. v. Old Mill Towne*, 954 P.2d 1295 (Utah Ct. App. 1998). In *Interlake*, the appellants—several contractors—sought to enforce their mechanics' liens against the construction lender, Deseret Pacific, and the current owner of the property, Old Mill. Because the appellants failed to record a *lis pendens* within the timeframe required by Utah Code Ann. § 38-1-11(1974) (amended 1994), the Court concluded that “under the plain language of the statute, appellants’ liens are void against Deseret Pacific and Old Mill unless *within twelve months from the time appellants completed their work*, Deseret Pacific and Old Mill were either made parties to or had actual knowledge of the lawsuit.” *Interlake*, 954 P.2d at 1297 (emphasis added). The Court also reasoned that “[t]he fact that appellants knew of the lawsuits after the statutorily required period does not support the inference that they knew of the lawsuit during the required period.” *Id.* at 1298. Thus, this Court is persuaded that the exceptions to filing a *lis pendens*, namely, naming a party in an action or showing actual knowledge of the action, must occur within the statutory timeframe; i.e., within 180 days from the filing of the lien.

Plaintiff has failed to show that UCB or FDIC had knowledge of its action against La Salle during the time allowed to file a *lis pendens*. The earliest evidence of any actual knowledge to which Plaintiff can point is letters the defendants received from Plaintiff on October 16, 2008—over two months after the 180 day deadline. Plaintiff argues that UCB was involved enough in the original contract between Plaintiff and La Salle that it should have known of the litigation; however, “the

statute does not permit constructive notice or inquiry notice to qualify as a substitute for a *lis pendens*, but only *actual* notice.” *Interlake*, 954 P.2d at 1298. Accordingly, the Court finds that Plaintiff did not comply with the statute in terms of UCB and FDIC and the lien is void as to both parties.

2. AMENDED COMPLAINT

Second, Plaintiff VCS argues that its amended complaint filed in April 2009 naming both UCB and FDIC as parties relates back to the time of the original filing of the action in March 2008. Rule 15(c) of the Utah Rules of Civil Procedure provides that “whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.” When new defendants are added as parties in an amended complaint, they must have an identity of interest with the original defendant. *Nunez v. Albo*, 2002 UT App 247. An identity of interest exists when parties have been “sufficiently alerted to the proceedings, or were involved in them unofficially, from an early stage.” *Doxey-Laton Co. v. Clark*, 548 P.2d 902, 906 (Utah 1976).

Plaintiff contends that because UCB and FDIC were added as parties before a trial date was set or any discovery had commenced in the action that they had an identity of interest with La Salle. The Court is unconvinced by this argument. First of all, as was already discussed, Plaintiff has offered no evidence that either UCB or FDIC knew about the foreclosure action before the 180 day time frame established by statute and, therefore, they could not have been “sufficiently alerted to the proceedings.” *Id.* Furthermore, the purpose behind the relation back doctrine is to “prevent a mechanical use of a statute of limitations . . . to prevent adjudication of a claim.” *Id.* The Utah

Supreme Court in *AAA Fencing Co. v. Raintree Dev. & Energy Co.* specifically analyzed the mechanic's lien timeframe as a substantive restriction on an action and not as a statute of limitations. 714 P.2d 289, 291 (Utah 1986). Relying on this reasoning, the Utah Court of Appeals in *Diehl Lumber Transportation Inc. v. Mickelson* held: "Viewing the statutory time limit as strictly jurisdictional, it follows that once the time had expired, the court lacked authority to revive the lien by permitting amendment under Rule 15(c)." 802 P.2d 739, 744 (Utah Ct. App 1990). Accordingly, the relation back doctrine cannot be used to revive a voided mechanic's lien. Furthermore, were the Court to allow an amended complaint to relate back to the time of the original filing, the Court would be rendering the requirement to file a *lis pendens* completely useless, as a claimant would have no reason to file a *lis pendens* within the statutory timeframe knowing that the complaint can be amended to add parties later without it.

3. SUBSTANTIAL COMPLIANCE

Finally, Plaintiff VCS argues that despite the fact that it did not strictly comply with the requirements of § 38-1-11(3)(a), the lien should be enforced against UCB and FDIC because Plaintiff substantially complied with the mechanic's lien statute by filing its lien and commencing its action to enforce it against La Salle within the statutory timeframe. Furthermore, Plaintiff argues that although it failed to file a *lis pendens*, it did add both UCB and FDIC as parties to the action before UCB purchased the property at the foreclosure sale, thus complying with the policy behind the *lis pendens*. Finally, Plaintiff argues that it had no reason to file a *lis pendens* because it was already in possession of a default judgment against La Salle before the statutory deadline.

In support of its argument, Plaintiff relies on the purpose of the mechanic's lien statute, which is "to provide protection to those who enhance the value of a property by supplying labor or

materials.” *AAA Fencing Co. v. Raintree Dev. And Energy Co.*, 714 P.2d 289, 291 (Utah 1986). Because of this overarching policy, Utah courts “have recognized that substantial compliance with [the mechanic’s lien] provisions is all that is required.” *Projects Unlimited, Inc. v. Copper State Thrift & Loan Co.*, 798 P.2d 738 (Utah 1990). While it is true that “[a] lien once acquired by labor performed on a building . . . should not . . . be defeated by technicalities . . . when no rights of others are infringed,” the Utah Supreme Court has only allowed such a broad reading of the statute when “no express command of the statute is disregarded.” *Id.* at 744. Plaintiff did not comply with the express commands of § 38-1-11(3)(a) to preserve the validity of its lien against UCB and FDIC. By not filing a lis pendens and by not adding either defendant as a party to the original action within the 180-day timeframe, Plaintiff disregarded more than mere technicalities. Furthermore, Plaintiff’s contention that it had no reason to believe a lis pendens was necessary also fails. Both FDIC and UCB recorded trust deeds on the property well before Plaintiff brought its action against La Salle. Plaintiff should have been aware, then, that both parties had a competing interest in the property. Therefore, Plaintiff’s void mechanic’s lien is not revived by mere substantial compliance with the statute.

Accordingly, because there are no material issues of genuine fact regarding whether Plaintiff perfected its lien against UCB and FDIC, the Court grants the defendants’ cross-motions for summary judgment in regard to the invalidity of the lien.

4. UNJUST ENRICHMENT

Plaintiff VCS also seeks summary judgment with respect to its claims against UCB and FDIC for unjust enrichment. Generally, “one must first exhaust his legal remedies before he may

recover on the basis of the equitable doctrine of *quantum meruit*.” *Knight v. Post*, 748 P.2d 1097 (Utah Ct. App. 1988). Although Plaintiff may have successfully perfected its lien against La Salle, Plaintiff failed to adequately perfect its lien against both UCB and FDIC because it did not comply with § 38-1-11. Therefore, Plaintiff did not exhaust its legal remedies and cannot recover on the basis of quantum meruit. *Knight*, 748 P.2d at 1100.

Therefore, as a matter of law, the Court grants both defendants’ cross-motions for summary judgment in regard to the dismissal of the unjust enrichment claim.

4. RULE 56(f) OF THE UTAH RULES OF CIVIL PROCEDURE

Plaintiff VCS has requested more time under rule 56(f) for discovery. The Court considers various factors when determining when a rule 56(f) continuance is warranted, including, “an examination of the party’s rule 56(f) affidavit to determine whether the discovery sought will uncover disputed material facts that will prevent the grant of summary judgment or if the party requesting discovery is simply on a ‘fishing expedition,’” and “whether the party opposing the summary judgment motion has had adequate time to conduct discovery and has been conscientious in pursuing such discovery.” *Overstock.com, Inc. v. Smartbargains, Inc.*, 192 P.3d 858 (Utah 2008) (citing *Callioux v. Progressive Insurance Co.*, 745 P.2d 838 (Utah Ct. App. 1987)). Furthermore, the Court will find a requesting party dilatory unless the party explains why the evidence could not be previously obtained and that the evidence sought is not in the requesting party’s exclusive control. *Jones v. Johnson*, 2006 UT App 146.

Although the Court recognizes that the requirement to file an affidavit “should be applied liberally,” the Court is “unwilling to ‘spare litigants from their own lack of diligence.’” *Callioux*, 745 P.2d at 841 (quoting *Hebert v. Wicklund*, 744 F.2d 218, 222 (1st Cir. 1984)). In its reply

memorandum, Plaintiff VCS requested discovery time to determine when Defendant UCB gained actual knowledge of the mechanic's lien. The Court recognizes that this fact is material and relevant; however, VCS failed to file an affidavit and did not explain why this information could not be obtained previously. Furthermore, evidence of whether Plaintiff gave Defendants actual knowledge of the lawsuit before October 2008 is partially within Plaintiff's control. Therefore, the Court denies the request for a continuance under rule 56(f).

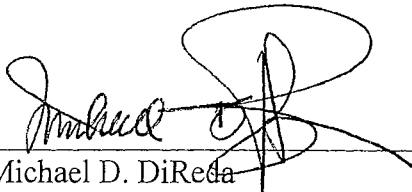
5. CONCLUSION

For the foregoing reasons, the Court concludes that there are no issues of genuine fact and that Defendants UCB and FDIC are entitled to judgment as a matter of law. Accordingly, the Court denies Plaintiff's motion for summary judgment and grants UCB's and FDIC's cross-motions for summary judgment.

6. ATTORNEY FEES

Pursuant to § 38-1-18, Defendants are awarded reasonable attorneys' fees. Both UCB and FDIC shall submit affidavits in accordance with rule 73 of the Utah Rules of Civil Procedure regarding each parties' attorneys' fees, respectively.

Dated this 26th day of October, 2010.



Michael D. DiReda
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of October, 2010, I mailed a true and correct copy of the foregoing ruling as follows:

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Deputy Court Clerk

ADDENDUM “B”

(Utah Code Ann. § 38-1-11)

Utah Code Ann. § 38-1-11

UTAH CODE ANNOTATED

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*** STATUTES CURRENT THROUGH THE 2011 1ST SPECIAL SESSION. ***
*** ANNOTATIONS CURRENT THROUGH 2011 UT 25 (05/15/2011); 2011 UT App 169
(05/15/2011) AND MAY 1, 2011 (FEDERAL CASES). ***

TITLE 38. LIENS
CHAPTER 1. MECHANICS' LIENS

Go to the Utah Code Archive Directory

Utah Code Ann. § 38-1-11 (2011)

§ 38-1-11. Enforcement -- Time for -- Lis pendens -- Action for debt not affected --
Instructions and form affidavit and motion

(1) As used in this section:

(a) "Owner" is as defined in Section 38-11-102.

(b) "Residence" is as defined in Section 38-11-102.

(2) A claimant shall file an action to enforce the lien filed under this chapter:

(a) except as provided in Subsection (2)(b), within 180 days after the day on which the claimant files:

(i) a notice of preconstruction service lien under Section 38-1-6.7, for a preconstruction service lien; or

(ii) a notice of claim under Section 38-1-7, for a construction service lien; or

(b) if an owner files for protection under the bankruptcy laws of the United States before the expiration of the 180-day period under Subsection (2)(a), within 90 days after the automatic stay under the bankruptcy proceeding is lifted or expires.

(3) (a) Within the time period provided for filing in Subsection (2) the claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action.

(b) The burden of proof is upon the claimant and those claiming under the claimant to show actual knowledge under Subsection (3)(a).

(4) (a) A lien filed under this chapter is automatically and immediately void if an action to enforce the lien is not filed within the time required by this section.

(b) Notwithstanding Section 78B-2-111, a court has no subject matter jurisdiction to adjudicate a lien that becomes void under Subsection (4)(a).

(5) This section may not be interpreted to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the debt.

(6) (a) If a claimant files an action to enforce a lien filed under this chapter involving a residence, the lien claimant shall include with the service of the complaint on the owner of the residence:

(i) instructions to the owner of the residence relating to the owner's rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act; and

(ii) a form to enable the owner of the residence to specify the grounds upon which the owner may exercise available rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act.

(b) The instructions and form required by Subsection (6)(a) shall meet the requirements established by rule by the Division of Occupational and Professional Licensing in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(c) If a claimant fails to provide to the owner of the residence the instructions and form required by Subsection (6)(a), the claimant is barred from maintaining or enforcing the lien upon the residence.

(d) Judicial determination of the rights and liabilities of the owner of the residence under this chapter and Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act, and Title 14, Chapter 2, Private Contracts, shall be stayed until after the owner is given a reasonable period of time to establish compliance with Subsections 38-11-204(4)(a) and (4)(b) through an informal proceeding, as set forth in Title 63G, Chapter 4, Administrative Procedures Act, commenced within 30 days of the owner being served summons in the foreclosure action, at the Division of Occupational and Professional Licensing and obtain a certificate of compliance or denial of certificate of compliance, as defined in Section 38-11-102.

(e) An owner applying for a certificate of compliance under Subsection (6)(d) shall send by certified mail to all lien claimants:

(i) a copy of the application for a certificate of compliance; and

(ii) all materials filed in connection with the application.

(f) The Division of Occupational and Professional Licensing shall notify all claimants listed in an owner's application for a certificate of compliance under Subsection (6)(d) of the issuance or denial of a certificate of compliance.

(7) The written notice requirement applies to liens filed on or after July 1, 2004.

HISTORY: R.S. 1898 & C.L. 1907, §§ 1390, 1395; C.L. 1917, §§ 3740, 3745; L. 1931, ch. 5, § 1; R.S. 1933 & C. 1943, 52-1-11; 1994, ch. 308, § 5; 1995, ch. 172, § 2; 2001, ch. 198, § 1; 2004, ch. 42, § 1; 2004, ch. 85, § 2; 2004, ch. 188, § 1; 2005, ch. 64, § 4; 2006, ch. 297, § 3; 2007, ch. 332, § 2; 2008, ch. 3, § 82; 2008, ch. 382, § 502; 2010, ch. 31, § 1; 2011, ch. 339, § 11.

NOTES: AMENDMENT NOTES. --The 2006 amendment, effective May 1, 2006, added Subsection (3) and made related designation and reference changes.

The 2007 amendment, effective April 30, 2007, added Subsection (1), redesignating the following subsections accordingly; deleted "as defined in Section 38-11-102" after "residence" in Subsection (6)(a); deleted "affidavit" after "form" three times in Subsection (6); in

Subsection (6)(d), substituted "under this chapter and Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act and Title 14, Chapter 2, Private Contracts" for "under Title 38, Chapters 1 and 11 and Title 14, Chapter 2"; and made related and stylistic changes throughout the section.

The 2008 amendment by ch. 3, effective February 7, 2008, substituted "Section 78B-2-111" for "Section 78-12-40" in (4)(b).

The 2008 amendment by ch. 382, effective May 5, 2008, updated references to conform to the recodification of Title 63.

The 2010 amendment, effective May 11, 2010, added "except as provided in Subsection (2)(b)" in (2)(a); added (2)(b); and made related and stylistic changes.

The 2011 amendment, effective May 10, 2011, deleted "lien" before "claimant" or variants throughout (2), (3), (6)(a), (6)(c), and (6)(f); added (2)(a)(i); added the (2)(a)(ii) designation; added "for a construction service lien" in (2)(a)(ii); and made stylistic changes.

Bankruptcy, Title 11, U.S. Code.

Division of Occupational and Professional Licensing, § 58-1-101 et seq.
Lis pendens generally, § 78B-6-1303.

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Mechanic & Contractor Liens

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✦ ANOTHER ACTION PENDING.

Action in equity to foreclose mechanic's lien is not barred by prior suit at law to recover for materials sold and delivered. *State ex rel. Dorsett v. Morse*, 36 Utah 362, 103 P. 969 (1909).

✦ BURDEN OF PROOF.

Burden of proof is on claimant to show that he is entitled to the lien and has complied with the statute. *Hathaway v. United Tintic Mines Co.*, 42 Utah 520, 132 P. 388 (1913); *Greenhalgh v. United Tintic Mines Co.*, 42 Utah 524, 132 P. 390 (1913).

✦ EFFECT OF UNTIMELY ACTION.

An untimely action under this section is jurisdictional and forecloses the rights of the parties. It is not subject to waiver and estoppel as are procedural statutes of limitations. *AAA Fencing Co. v. Raintree Dev. & Energy Co.*, 714 P.2d 289 (Utah 1986).

The penalty for not commencing an action to enforce a mechanic's lien within the 12-month period provided in this section is invalidation of the lien rather than preclusion of the claim as with a traditional statute of limitation and, unlike a true statute of limitation, is not waived if not pleaded. *Projects Unlimited, Inc. v. Copper State Thrift & Loan Co.*, 798 P.2d 738 (Utah 1990).

Where lien claimants failed to file notice of the pendency of the action and failed to present evidence supporting a reasonable inference that the construction lender and the current owner of the property knew of the lawsuit within twelve months after completion of the work, summary judgment in favor of the latter parties was proper. *Interlake Distribs., Inc. v. Old Mill Towne*, 954 P.2d 1295 (Utah Ct. App. 1998).

Claimant's failure to file an action to enforce its lien within 180 days of filing its first notice of claim extinguished its lien, notwithstanding its two subsequent notices. *Foothill Park, LC v. Judston, Inc.*, 2008 UT App 113, 182 P.3d 924.

✦ EXECUTION.

Lien waiver obtained from unauthorized employee of subcontractor was valid where testimony showed that contractor had a standing practice of obtaining lien waivers from that employee for the purpose of obtaining payments on other jobs, and in turn making payments to subcontractor. *LeGrand Johnson Constr. Co. v. Kennedy*, 541 P.2d 1038 (Utah 1975).

✦ EXTENSION OF TIME FOR FILING NOTICE.

Resumption of work by contractor to complete small jobs incidental to completion of contracted obligations is sufficient to extend time to file notice of lien under this section providing such small jobs are necessary and not invented to merely extend the statutory period. *Totorica v. Thomas*, 16 Utah 2d 175, 397 P.2d 984 (1965).

The statutory period for a mechanics' lien foreclosure action was not extended by supplying materials after the majority of the contract was performed, when the contractor had no plan to return to finish the job because he and the builder had agreed that the builder would finish the job. Thus, the filing of the foreclosure action was untimely as it was not filed within twelve months of the completion of the original contract. *Govert Copier Painting v. Van Leeuwen*, 801 P.2d 163 (Utah Ct. App. 1990).

✦ FINDINGS AND CONCLUSIONS OF LAW.

The findings of trial court were supported by substantial, competent evidence, that suit to foreclose mechanic's lien is brought in time, will not be disturbed on appeal. *Wilcox v. Cloward*, 88 Utah 503, 56 P.2d 1 (1936).

✦ LIS PENDENS.

Where plaintiff contractor installed a water line which was an improvement upon two lots but recorded a lis pendens on only one lot, the lien was not void where the defendant was present and represented by counsel at trial and the president of the defendant company had actual knowledge of the proceeding. *Harris-Dudley Plumbing Co. v. Professional United World Travel Ass'n*, 592 P.2d 586 (Utah 1979).

✦ NATURE OF PROCEEDING.

An action to enforce a mechanic's lien is an equity case; therefore, Supreme Court presumes trial court considered only proper evidence in making its findings. *Langton Lime & Cement Co. v. Peery*, 48 Utah 112, 159 P. 49 (1916).

✦ ORIGINAL CONTRACT.

"Original contract," as used in this section, refers to a contract with the owner, and an "original contractor," for purposes of § 38-1-2, is one who has such a contract. All other lien claimants are subcontractors. *For-Shor Co. v. Early*, 828 P.2d 1080 (Utah Ct. App. 1992).

✦ PARTIES.

Any person claiming an interest in premises, as by virtue of mortgage or other lien thereon, may be made a party and his right or claim may be litigated in action to foreclose mechanic's lien in equity. *Badger Coal & Lumber Co. v. Olsen*, 50 Utah 307, 167 P. 680 (1917).

Purchasers of realty under contract are "owners" of property for purposes of mechanic's lien statutes; builder who has contracted to construct house on that property is an "original contractor" within § 38-1-2 and not a subcontractor, so limitation period set forth in this section is applicable. *Roberts v. Hansen*, 25 Utah 2d 190, 479 P.2d 345 (1971).

✦ PLEADINGS AND PROCEEDINGS.

Complaint filed by subcontractor to enforce his lien should allege amount of contract with owner, less any payment for labor performed and materials made before the subcontractor begins work or commences to furnish materials. *Teahen v. Nelson*, 6 Utah 363, 23 P. 764 (1890).

Where nothing in the record indicated that the court considered a motion for leave to file a third-party complaint foreclosing a mechanic's lien before the date on which filing a foreclosure action expired, the nunc pro tunc order lacked validity and so the third-party complaint was not filed within the statutory time. *Diehl Lumber Transp. v. Mickelson*, 802 P.2d 739 (Utah Ct. App. 1990).

In a foreclosure action, the lienholder's failure to comply with this section did not divest the trial court of jurisdiction to foreclose on the mechanic's lien; the requirements of Subsection (4) (a) are directory, and therefore not jurisdictional, as they merely concern the proper, orderly, and prompt conduct of the business, and the defendant suffered no prejudice. *Pearson v. Lamb*, 2005 UT App 383, 121 P.3d 717.

✦ RELATION BACK OF AMENDMENTS.

Once the time for filing a lien foreclosure action had expired, the court lacked authority to revive the lien by permitting amendment under U.R.C.P. 15(c). *Diehl Lumber Transp. v.*

Mickelson, 802 P.2d 739 (Utah Ct. App. 1990).

✦ SUBCONTRACTORS.

A subcontractor has the same choice as the "original contractor" under whom he serves and may commence an action to foreclose his lien within twelve months after completion of the "original contract," i.e., the contract between the original contractor and the owner, or within twelve months after there has been a suspension of work "thereunder," i.e., under the original contract, for a period of thirty days. *For-Shor Co. v. Early*, 828 P.2d 1080 (Utah Ct. App. 1992).

✦ WAIVER AND ESTOPPEL.

Lien claimant may be estopped to enforce his lien, or it may be lost by waiver. *West v. Pinkston*, 44 Utah 123, 138 P. 1152, Ann. Cas. 1916D, 1065 (1914).

Any lien claimant may waive his right to a lien. He may do so by not filing a notice of his intention to claim a lien within time required by statute, or by informing or advising owner of the premises that he has received payment from the original contractor, or that he will not insist on his right to file a lien. In such case the courts will not permit lien to be enforced. *West v. Pinkston*, 44 Utah 123, 138 P. 1152, Ann. Cas. 1916D, 1065 (1914).

Subcontractor, by giving contractor receipt in full so that he can obtain contract money from owner, is thereafter estopped from enforcing his lien. *West v. Pinkston*, 44 Utah 123, 138 P. 1152, Ann. Cas. 1916D, 1065 (1914).

Foreclosure of lien was properly denied where evidence disclosed existing practice of dealing between contractor and subcontractor, whereby subcontractor executed blank lien waivers and releases to contractor and gave contractor authority to complete the instruments; lien waiver executed according to such procedure was valid. *LeGrand Johnson Constr. Co. v. Kennedy*, 541 P.2d 1038 (Utah 1975).

✦ WHAT LAW GOVERNS.

It is the law in force at the time the work is completed that governs with respect to its enforcement. *Garland v. Bear Lake & River Waterworks & Irrigation Co.*, 9 Utah 350, 34 P. 368 (1893), *aff'd*, 164 U.S. 1, 17 S. Ct. 7, 41 L. Ed. 327 (1896).

✦ WHO IS SUBJECT TO LIEN.

Commencing an action preserves a mechanic's lien, while recording a *lis pendens* imparts constructive notice of the lien enforcement action to anyone interested in the lien property. Only when the claimant fails timely to record the *lis pendens* can an interested person argue that it is not subject to the lien, and then only if that person was named as a party and did not have actual knowledge of the action. *Projects Unlimited, Inc. v. Copper State Thrift & Loan Co.*, 798 P.2d 738 (Utah 1990).

✦ CITED in *Knight v. Post*, 748 P.2d 1097 (Utah Ct. App. 1988); *Butterfield Lumber, Inc. v. Peterson Mtg. Corp.*, 815 P.2d 1330 (Utah Ct. App. 1991); *Neiderhauser Bldrs. & Dev. Corp. v. Campbell*, 824 P.2d 1193 (Utah Ct. App. 1992).

COLLATERAL REFERENCES

UTAH LAW REVIEW. --Recent Case Law Developments: Final Completion: Utah's Triggering Event for the Statute of Repose for Mechanic's Lien Foreclosure Actions, 2005 Utah L. Rev. 308.

AM. JUR. 2D. --53 Am. Jur. 2d Mechanics' Liens § 331 et seq.

A.L.R. --Abandonment of construction or of contract as affecting time for filing mechanics' liens or time for giving notice to owner, 52 A.L.R.3d 797.

Lis pendens: grounds for cancellation prior to termination of underlying action, absent claim of delay, 49 A.L.R.4th 242.

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ADDENDUM “C”

(Utah Code Ann. § 38-1-18)

Utah Code Ann. § 38-1-18

UTAH CODE ANNOTATED

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*** STATUTES CURRENT THROUGH THE 2011 1ST SPECIAL SESSION. ***
*** ANNOTATIONS CURRENT THROUGH 2011 UT 25 (05/15/2011); 2011 UT App 169
(05/15/2011) AND MAY 1, 2011 (FEDERAL CASES). ***

TITLE 38. LIENS
CHAPTER 1. MECHANICS' LIENS

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Utah Code Ann. § 38-1-18 (2011)

§ 38-1-18. Attorneys' fees -- Offer of judgment

(1) Except as provided in Section 38-11-107 and in Subsection (2), in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action.

(2) A person who files a wrongful lien as provided in Section 38-1-25 is not entitled to recover attorneys' fees under Subsection (1).

(3) A party against whom any action is brought to enforce a lien under this chapter may make an offer of judgment pursuant to Rule 68 of the Utah Rules of Civil Procedure. If the offer is not accepted and the judgment finally obtained by the offeree is not more favorable than the offer, the offeree shall pay the costs and attorneys' fees incurred by the offeror after the offer was made.

HISTORY: R.S. 1898, § 1400; L. 1899, ch. 58, § 1; C.L. 1907, § 1400; C.L. 1917, § 3750; R.S. 1933 & C. 1943, 52-1-18; L. 1961, ch. 76, § 2; 1995, ch. 172, § 4; 2001, ch. 257, § 1.

NOTES: Attorneys' fee in suit for wages, § 34-27-1.

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⚡ APPEALS.

An appeal from a suit brought to enforce a lien qualifies as part of "an action" for the purposes of this section. *Richards v. Security Pac. Nat'l Bank*, 849 P.2d 606 (Utah Ct. App.), cert. denied, 859 P.2d 585 (Utah 1993).

⚡ APPLICABILITY.

In a dispute between a contractor and a homeowner, resolved by arbitration that did not include attorney fee awards, contractor's attempt to be designated the successful party and to be awarded attorney fees under this section had a reasonable basis in law and the court refused to find bad faith on the part of the contractor. *Paul deGroot Bldg. Servs., L.L.C. v. Gallacher*, 2005 UT 20, 112 P.3d 490.

Landowner was entitled to attorney fees for successfully defeating an action to enforce a lien, but it was not entitled to fees for its independent claim of wrongful lien, because the lien was not wrongful. *Foothill Park, LC v. Judston, Inc.*, 2008 UT App 113, 182 P.3d 924.

⚡ DENIAL ON EXCESSIVE CLAIM.

Where it appears on trial that contractor has substantially performed his contract but that he attempts to overcharge the owner in setting the total amount due on a cost-plus-ten-per-cent contract, the court does not abuse its discretion in refusing to award the contractor attorney fees in suit to collect upon such contract. *Shupe v. Menlove*, 18 Utah 2d 130, 417 P.2d 246 (1966).

⚡ DISMISSAL OF CLAIM.

Even if the claims upon which a party prevails at trial do not independently permit an award of attorney fees, attorney fees may properly be awarded where a portion of those otherwise noncompensable claims overlap the mechanics' lien action on which the party prevails as the successful party causing the action to be dismissed prior to trial. *Kurth v. Wiarda*, 1999 UT App 335, 991 P.2d 1113.

✦ EFFECT.

This statute is mandatory, not discretionary. *Reeves v. Steinfeldt*, 915 P.2d 1073 (Utah Ct. App. 1996); *Interlake Distribs., Inc. v. Old Mill Towne*, 954 P.2d 1295 (Utah Ct. App. 1998).

✦ OFFER OF JUDGMENT.

Subsection (3) is procedural and so could be applied retroactively to homeowners seeking attorney fees and costs from plaintiff contractor, who rejected homeowners' offer of judgment and was later awarded much less by a jury. *J. Pochynok Co. v. Smedsrud*, 2003 UT App 375, 486 Utah Adv. Rep. 27, 80 P.3d 563.

The phrase "judgment finally obtained" in Subsection (3) includes an award of attorney fees to the successful party under Subsection (1); if an offer of judgment explicitly includes attorney fees, and turns out to be greater than the offeree's jury verdict plus any attorney fees awarded to the offeree as the successful party under Subsection (1), then Subsection (3) requires the offeree to pay the offeror's costs and attorney fees incurred after the offer was made. *J. Pochynok Co. v. Smedsrud*, 2005 UT 39, 116 P.3d 353.

✦ PROOF.

A prevailing party in a mechanics' lien foreclosure action can establish at any time during the trial phase the proof required to recover attorney's fees, so a trial court erred in ruling that proof of mailing of a notice of lien as a prerequisite to an award of attorney's fees must be proven at trial on the principal issues. *J.V. Hatch Constr., Inc. v. Kampros*, 971 P.2d 8 (Utah Ct. App. 1998).

✦ PURPOSE.

The purpose of Subsections (2) and (3) is to discourage outrageous mechanics' lien claims and to encourage the settlement of lawsuits which are of minor financial value. *J. Pochynok Co. v. Smedsrud*, 2003 UT App 375, 486 Utah Adv. Rep. 27, 80 P.3d 563.

✦ REDUCTION BY TRIAL COURT.

Lower court can properly reduce award of attorney's fees to party successful in foreclosing mechanic's lien by one-half of jury's award since under statute award of jury is advisory only. *Frehner v. Morton*, 18 Utah 2d 422, 424 P.2d 446 (1967).

The trial court erred when, although it explained its reason for reducing an attorney fee award, it did not consider the factors established by appellate courts as relevant to a reduction in fees. *Govert Copier Painting v. Van Leeuwen*, 801 P.2d 163 (Utah Ct. App. 1990).

✦ SUCCESSFUL PARTY.

The term "successful party" as used in this section is synonymous with the term "prevailing party." *A.K. & R. Whipple Plumbing & Heating v. Guy*, 2002 UT App 73, 47 P.3d 92.

In action by contractor against homeowners seeking over \$80,000 for breach of a construction contract and foreclosure of a mechanics' lien, in which the homeowners counterclaimed for defective workmanship and made an offer of judgment for \$40,000 and the jury rendered a verdict for the contractor in the sum of \$7,077, the trial court correctly awarded attorney fees to the homeowners as the successful party. *J. Pochynok Co. v. Smedsrud*, 2003 UT App 375, 486 Utah Adv. Rep. 27, 80 P.3d 563.

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✦ APPLICATION OF NET RECOVERY RULE.

The "net recovery rule" is essentially a starting point and need not be applied strictly under all circumstances. Thus, where trial court denied contractor's claim for foreclosure of its \$30,647.20 mechanics' lien claim and entered a net judgment against the contractor in the amount of \$527.00, the trial court properly determined there was no prevailing party and

declined to award the construction company attorney fees. *A.K. & R. Whipple Plumbing & Heating v. Guy*, 2002 UT App 73, 47 P.3d 92.

It was appropriate for the trial court to determine that neither party was the "successful party"; the trial court correctly considered common sense factors in addition to the net judgment. It was apparent from the trial court's reasoning that it believed the contractor's net recovery of only two percent of its counterclaim was insufficient to make it the "successful party." *A.K. & R. Whipple Plumbing & Heating v. Guy*, 2004 UT 47, 501 Utah Adv. Rep. 12, 94 P.3d 270.

For purposes of awarding attorney fees in a landscaper's suit against property owners, the landscaper was the successful party, notwithstanding that its damages award was offset by \$7000 due to the owners' breach of contract counterclaim, because the net judgment of \$4796 was in its favor. (Unpublished decision.) *Stonecreek Landscaping, Llc v. Bell*, 2008 UT App 144.

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✦ DEFENSE AGAINST LIEN CLAIM.

Award of attorney's fees is available to person defending against lien since this section confers that benefit not only on one who asserts lien but upon "the successful party." *Palombi v. D & C Bldrs.*, 22 Utah 2d 297, 452 P.2d 325 (1969); *Bailey-Allen Co. v. Kurzet*, 876 P.2d 421 (Utah Ct. App. 1994); *Kurth v. Wiarda*, 1999 UT App 335, 991 P.2d 1113.

Plaintiff was entitled to attorney fees for successfully defending against defendant's counterclaim seeking to foreclose a mechanic's lien. *Petty Inv. Co. v. Miller*, 576 P.2d 883 (Utah 1978).

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✦ DETERMINATION.

After appellate court reversed trial court on a substantive issue affecting plaintiff's right to recover for unlicensed air conditioning work, remand for determination of the correct prevailing party and the possible opportunity for presentation of evidence of attorney fees was necessary. *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 1999 UT App 87, 977 P.2d 518.

The term "successful party" as used in this section is synonymous with the term "prevailing party" as construed in non-mechanic's lien cases, and neither the language nor the purpose of this section precludes application of a flexible and reasoned approach to determining which, if any, party is entitled to an award of attorney fees in mechanic's lien cases. *A.K. & R. Whipple Plumbing & Heating v. Guy*, 2004 UT 47, 501 Utah Adv. Rep. 12, 94 P.3d 270.

In claim and counterclaim between contractor and homeowners, because the jury's verdict, awarding contractor much less than amount claimed, did not indicate specific awards and offsets, the record did not provide the information necessary to affirm the trial court's conclusion that the homeowners were the successful party. *J. Pochynok Co. v. Smedsrud*, 2005 UT 39, 116 P.3d 353.

In a dispute between a contractor and clients, where the jury awarded damages to the contractor, it was not error on remand when the trial court determined that the clients were the successful party entitled to costs and attorney fees, because the contractor recovered only a small fraction of its original claim, which was reduced by a factor even greater than the dollar amount of the clients' claimed offsets. *J. Pochynok Co. v. Smedsrud*, 2007 UT App 88, 157 P.3d 822.

✦ VALIDITY OF LIEN.

Where claims of materialman for mechanics' liens are valid, he is entitled to a reasonable attorney's fee under this section where penalty provided by § 38-1-24 for alleged failure of materialman to release liens is sought by builder who contends that the liens are invalid. *Brimwood Homes, Inc. v. Knudsen Bldrs. Supply Co.*, 14 Utah 2d 419, 385 P.2d 982 (1963).

Materialman is not entitled to attorney's fee in proceedings to foreclose mechanic's lien where the original notice of lien was deficient and attempted amendment to correct deficiencies was not filed until after the time for filing has expired. *Roberts Inv. Co. v. Gibbons & Reed Concrete Prods. Co.*, 22 Utah 2d 105, 449 P.2d 116 (1969).

✶CITED in AAA Fencing Co. v. Raintree Dev. & Energy Co., 714 P.2d 289 (Utah 1986); Rotta v. Hawk, 756 P.2d 713 (Utah Ct. App. 1988); Graco Fishing & Rental Tools, Inc. v. Ironwood Exploration, Inc., 766 P.2d 1074 (Utah 1988); Bailey v. Call, 767 P.2d 138 (Utah Ct. App. 1989); Martindale v. Adams, 777 P.2d 514 (Utah Ct. App. 1989); Nu-Trend Elec., Inc. v. Deseret Fed. Sav. & Loan Ass'n, 786 P.2d 1369 (Utah Ct. App. 1990); Diehl Lumber Transp. v. Mickelson, 802 P.2d 739 (Utah Ct. App. 1990); First Gen. Servs. v. Perkins, 918 P.2d 480 (Utah Ct. App. 1996); American Rural Cellular, Inc. v. Systems Communication Corp., 939 P.2d 185 (Utah Ct. App. 1997); R.A. McKell Excavating, Inc. v. Wells Fargo Bank, N.A., 2004 UT 48, 502 Utah Adv. Rep. 9, 100 P.3d 1159; Pearson v. Lamb, 2005 UT App 383, 121 P.3d 717.

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