

2011

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

Utah Supreme Court

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IN THE UTAH SUPREME COURT

VCS, INC., a Utah Corporation,

Plaintiff and Appellant,

vs.

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 and Appellees.

Appellate Case No. 20110062-SC

Trial Court No. 080901677

BRIEF OF APPELLANT VCS, INC.

On Appeal from the Second District Court in and for the
County of Weber, State of Utah, Honorable Michael Direda

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FILED

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Defendants and Appellees.

Appellate Case No. 20110062-SC

Trial Court No. 080901677

BRIEF OF APPELLANT VCS, INC.

JURISDICTION

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

STATEMENT OF THE ISSUES

1. Did the trial court err in interpreting Utah Code Ann. § 38-1-11(3)?

Standard of Review: The proper interpretation and application of a statute is a question of law which is reviewed for correctness, affording no deference to the district court's legal conclusions. *Gutierrez v. Medley*, 975 P.2d 913 (Utah 1998).

Issue preserved in the record: The issue was preserved in the record at the following locations: R. at 301-10, 560-62, 564-66; Transcript of Hearing of 20 September 2010, R. at 711, pp. 6-9, 53, 66-77.

2. Did the trial err in voiding VCS, Inc.'s lien against Utah Community Bank and America West Bank despite VCS, Inc.'s substantial compliance with the provisions of Utah's mechanic's lien law?

Standard of Review: In reviewing a determination of summary judgment, an appellate court reviews the trial court's legal conclusions for correctness and gives no particular deference to that court's view of the law. *Ron Case Roofing & Asphalt Paving Inc. v. Blomquist*, 773 P.2d 1382 (Utah 1989). The proper interpretation and application of a statute is a question of law which is reviewed for correctness, affording no deference to the district court's legal conclusions. *Gutierrez v. Medley*, 975 P.2d 913 (Utah 1998).

Issue preserved in the record: The issue was preserved in the record at the following locations: R. at 564-65, 651-52; Transcript of Hearing of 20 September 2010, R. at 711, pp. 17-19, 24-25, 53, 82-83.

3. Did the trial court err in ruling that VCS, Inc.'s amended complaint did not relate back under Rule 15(a) for the purposes of the filing date?

Standard of Review: An appellate court reviews a district court's interpretation of a rule of procedure for correctness. *Edwards v. Powder Mt. Water & Sewer*, 2009 UT App. 185 (Utah 2009) In reviewing a determination of summary judgment, an appellate court reviews the trial court's legal conclusions for correctness and gives

no particular deference to that court's view of the law. *Ron Case Roofing & Asphalt Paving Inc. v. Blomquist*, 773 P.2d 1382 (Utah 1989).

Issue preserved in the record: The issue was preserved at the following locations: R. at 563-64, 650-51; Transcript of Hearing of 20 September 2010, R. at 711, pp. 6, 40, 43.

4. Did the trial court err in ruling that Utah Community Bank had not been unjustly enriched by VCS, Inc.?

Standard of Review: "Whether a claimant has been unjustly enriched is a mixed question of law and fact . . ." *Desert Miriah, Inc., v. B & L Auto, Inc.*, 12 P.3d 580, 582 (Utah 2000). As such, it will be reversed if clearly erroneous. *Id.*

Issue preserved in the record: The issue was preserved in the record at the following pages: R. at 311-12; 566-68, 652-53; Transcript of Hearing of 20 September 2010, R. at 711, pp. 5, 29-34, 45-49, 62-66, 83.

5. Did the trial court err in determining that VCS, Inc.'s service of process on La Salle was inadequate to sustain a default judgment?

Standard of Review: An appellate court reviews a district court's interpretation of a rule of procedure for correctness. *Edwards v. Powder Mt. Water & Sewer*, 2009 UT App. 185 (Utah 2009).

Issue preserved in the record: The issue was preserved in the record at the following pages: R. at 106-13; Transcript of Hearing of 16 April 2009, R. at 710, pp. 3-57.

Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central important to the appeal:

Utah Code Ann. § 38-1-7(2)(b) - "Substantial compliance with the requirements of this chapter is sufficient to hold and claim a lien." Utah Code Ann. § 38-1-7(2)(b) (2007).

Utah Code Ann. § 38-1-9 - "(1) The recorder must record the claim in an index maintained for that purpose. (2) From the time the claim is filed for record, all persons are considered to have notice of the claim." Utah Code Ann. § 38-1-9 (2011).

Utah Code Ann. § 38-1-11(1)(a) -

"(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 lien 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 lien claimant filed a notice of claim under Section 38-1-7; 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 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. (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).

(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).” Utah Code Ann. § 38-1-11(1-4) (2011).

STATEMENT OF THE CASE

Nature of the Case:

The underlying case is a claim by a general contractor to collect for services and materials provided to a subdivision development through lien, breach of contract, and unjust enrichment claims. General contractor Plaintiff/Appellants VCS, Inc. (hereinafter “VCS”), brought suit against developer Defendant/Appellee La Salle Development, LLC (hereinafter “La Salle”) and against two banks, Defendants/ Appellees Utah Community Bank and FDIC as receiver for America West Bank (hereinafter “UCB”, “FDIC” or collectively “the Banks”).

Course of the Proceedings Below:

VCS filed suit on 12 March 2008 in the Second Judicial District Court, Weber County, Ogden Department. The Honorable Judge Michael Direda was assigned to the case. VCS’ suit alleged four (4) causes of action: (1) breach of contract; (2) lien foreclosure; (3) declaratory relief regarding priority of interests to the real property; and

(4) quasi contract-unjust enrichment. (R. at 1-10; 177-208; 231-63.) The first cause of action for breach of contract was against La Salle alone. The second and third causes of action, namely to foreclose its lien and determine the priority of the lien claimants, i.e. the priority of the bank versus VCS' mechanics' lien, was against all three Defendants. The fourth cause of action for quasi contract-unjust enrichment was also against all three Defendants.

VCS initially filed suit only against La Salle and obtained a default judgment after serving the registered agent of La Salle. In a ruling on 27 April 2009 the Court set aside the judgment as void under Rule 60(c) because it found Plaintiff failed to serve La Salle (allegedly because the registered agent's secretary, who acknowledged in writing she could accept for the agent, was not La Salle's secretary, but that of the registered agent's personal business). After the default judgment was set aside, VCS amended its complaint and added the Banks as Defendants. On 30 March 2010 VCS brought a summary judgment motion seeking judgment on its causes of action against La Salle and the Banks under its various theories. (R. at 288-508.) On 15 April and 28 April 2010 the Banks brought cross motions for summary judgment. (R. at 509-552.) La Salle failed to respond to the Plaintiff's motions.

Disposition By Trial Court:

In a ruling dated 26 October 2010 the Trial Court declared VCS's lien void and granted the banks cross motions for summary judgment. (R. at 646.) It also denied Plaintiff's motion as to its claims against the Banks, but granted its motion with respect to Plaintiff's breach of contract and unjust enrichment claims against La Salle. (R. at 644-

55, 689-91.) On 14 December 2010 the Trial Court granted VCS's motion for summary judgment against La Salle for breach of contract and unjust enrichment in the amount of \$218,948.50, but failed to declare VCS's lien valid and order foreclosure of its lien. (R. at 689-91.) The Trial Court granted the Banks' motions for summary judgment against VCS and awarded the Banks attorney's fees. (R. at 644-55; 682-88.) The final judgment appealed from was entered on 14 December 2010. VCS filed a timely Notice of Appeal on 12 January 2011.

Statements of Fact:

FACTS RELATED TO LIEN LAW AND UNJUST ENRICHMENT

1. Tom Phelps is the owner and operator of VCS, Inc. ("VCS"), a Utah Corporation and at all times relevant herein Tom Phelps ("Phelps") was a licensed general contractor in the state of Utah. (R. at 317.)
2. In March 2006, Phelps was contacted by Kyle Lind ("Lind"), a principle and owner of Defendant La Salle Development, LLC ("La Salle"), who asked VCS to access and bid the completion of a subdivision called Northpark Meadows (aka North Park Meadows), located at approximately 600 E. 4th N. in Ogden, Utah. (R. at 317-18, 645.)
3. La Salle owned nineteen (19) vacant lots in the subdivision, comprising lots 5-8, 10-22 and lots 31 and 32 of North Park Meadows. (R. at 318, 344, 645.)

4. After obtaining the subcontractor bids, VCS submitted a complete bid to La Salle to complete the infrastructure and home construction for the nineteen lots, which bid was accepted. (R. at 318.)
5. VCS and La Salle entered into a written agreement, prepared by Don Hampton of La Salle, on 22 February 2007. The combined total expected compensation to VCS for the entire project was \$192,815.00. (R. at 347-51.)
6. By October 2006, VCS obtained approval from the city to begin work. (R. at 319.)
7. Approximately the first week of November 2006 work began on the project, including, but not limited to, construction and installation of storm drain, underground detention basin, concrete sidewalk, French drain, silt fence, etc. and all the improvements necessary to complete the infrastructure of the subdivision. (R. at 319, 645.)
8. On 12 January 2007 Defendant Utah Community Bank recorded a trust deed dated 9 January 2007 and La Salle received its first loan for the acquisition and development of the project. (R. at 645.)
9. VCS began home construction in 2007 on four lots, Lots 19-22, for which VCS had obtained building permits. (R. at 320, 354-55.)
10. A Notice of Commencement was filed with the Utah State Contractor Registry for the residence construction. (R. at 358-63.)
11. VCS, Inc. did not receive any payment from La Salle pursuant to their agreement. (R. at 320-21.)

12. In approximately April 2007 **VCS and Defendant Utah Community Bank entered in a written contract** that VCS would continue to act as the general contractor for the project **in the event** that La Salle failed its obligations to the bank. (R. at 321.) Utah Community Bank **failed to refute that there was a written contract in its response to VCS's Motion for Summary Judgment.** (R. at 512-535.) (Plaintiff's Statement of Fact No. 15 and Phelps Second Affidavit No. 19-20 was not refuted and is therefore deemed admitted pursuant to Rule 7 of the Rules of Civil Procedure).
13. In September 2007 VCS was orally terminated by La Salle, despite being on-budget and ahead of schedule. (R. at 320, 645.)
14. After La Salle received funding from UCB in January 2007, Utah Community Bank: (1) was aware that VCS was working on the project; (2) was aware the VCS was conferring a substantial benefit to La Salle and to the bank, who had a security interest in the property receiving improvements; (3) had insecurity about La Salle's ability to make payments and suspected it would have to foreclose on the property; (4) knew it would have to pay VCS for its work on the project; (5) knew that VCS expected payment; (6) knew that its loan proceeds were used to pay for ongoing improvements; (7) kept a Tracking Log of the loan line items and expenses/invoices/costs for the project; and (8) knew that VCS was intimately involved in the project and was submitting invoices and/or draws for work done by it or its subcontractors as the work was completed on the project. (R. at 319-21, 338, 341, 472-78, 649.)

15. VCS' last day of substantial work was September 15, 2007. (R. at 320, 646.)
16. America West Bank obtained interest in lots 31 and 32 on 24 October 2007. (R. at 493-99, 645.)
17. VCS filed a lien on 29 January 2008 for work performed on all nineteen (19) lots. The lien was for \$1,000.00 per lots 3-18 and 31 and 32, and \$17,987.25 per lot for lots 19-22, as well as fees, costs and other amounts due and owing, for a total of \$88,949.00. (R. at 334-35, 366-67, 645-46.)
18. VCS provided notice of the lien filed to La Salle and to La Salle's registered agent, Ted Madsen, via U.S. Mail. The notice was sent out February 1, 2008 by certified mail, and was returned with the signature of Ted Madsen, as registered agent, and signed by someone on behalf of La Salle. (R. at 321, 370-71.)
19. The Banks had record notice of the lien as of 29 January 2008 pursuant to U.C.A. § 38-1-9.
20. Plaintiff filed suit on 12 March 2008. (R. at 1-11, 645-46.) See also Online Docket, case no. 080901677. The suit contained the lien recovery fund application forms for application to the fund. (R. at 177, 231, 415-42.)
21. On 6 June 2008 Plaintiff obtained a default judgment for \$90,176.50. (R. at 321, 370-71.)
22. On 24 September 2008 VCS filed a Notice of Judgment Lien with the court and county recorder. (R. at 21-22.)
23. On 26 January 2009 Defendant La Salle filed a motion to set aside the judgment. (R. at 68-93.)

24. On 16 April 2008 the court heard oral argument and determined it would set aside the default judgment, which final order was signed on 27 April 2009. (R. at 210, 645.)
25. On 16 October 2008 VCS sent a letter to the UCB and FDIC (at the time, America West Bank) informing them of the judgment against La Salle and requesting that they stipulate to priority. (R. at 645.)
26. On 21 April 2009 VCS amended its complaint to correct the contract damages claim and add claims for declaratory relief and unjust enrichment, and simultaneously added party Defendants America West Bank and Utah Community Bank. (R. at 645.) VCS subsequently amended its complaint again on 18 December 2009. (R. at 177, 231.)
27. On 24 April 2009 VCS filed a lis pendens with the Weber County Recorder's office. (R. at 445-47, 645.)
28. On 30 December 2009 Utah Community Bank became the owner of Lots 5-8, and 10-22 pursuant to a foreclosure sale on a Trust Deed from La Salle. (R. at 450-52, 502-03, 645.)
29. UCB obtained ownership to these seventeen (17) lots directly from La Salle (who was a party to the lawsuit within 180 days from the date VCS filed its lien) and at a time when UCB had actual knowledge of the suit because it and La Salle were already parties to the action. (R. at 450-52, 502-03, 645.)
30. FDIC is not the owner of lots 31 and 32, but upon information and belief, continues to hold a Trust Deed to these lots. (see generally, R. at 645.)

31. On 14 December 2010 VCS obtained a judgment against La Salle in the amount of \$218,948.50 for unjust enrichment. (R. at 689-91.)

FACTS RELATED TO SERVICE OF PROCESS

32. La Salle's registered agent on March 19, 2008, was Ted A. Madsen. (R. at 209.)
33. On March 19, 2008, VCS served La Salle by leaving a copy of the Summons, Notice of Mechanic's Lien, Military Service Affidavit and Complaint with a receptionist of La Salle's registered agent, Ted Madsen. VCS's Process server, Rosemari Green, served receptionist Cailey Tonks, who acknowledged on the Summons in her own handwriting, "For Registered Agent Ted Madsen." (R. at 209, 12-13, 384-85, 388-89.)
34. Ms. Tonks was not associated with La Salle. (R. at 209-10.)
35. Process server, Rosemari Green, who had been in business for nineteen years at that time, had a processing policy and business practice when serving a summons and complaint upon a registered agent of a company to specifically ask for the registered agent whose name is on the summons. If he/she are not available to accept service of the same, she asks if the receptionist/secretary or person in charge if they are authorized to accept service on behalf of the registered agent. (R. at 384-85.)
36. Ms. Honks provided no affidavit. Counsel proffered "I don't remember". R. at 710, p. 11-12.

37. Registered agent Ted Madsen could not remember if he received the complaint and allegedly did not provide the complaint to La Salle. (R. at 210.) Mr. Madsen could not recall if he received the September 2008 lien sent to him by mail. *Id.*
38. La Salle alleged no knowledge of the suit until December 2008, upon receipt of a writ of execution by VCS. *Id.*
39. La Salle failed to answer the complaint follow service on its registered agent.
40. Kyle Lind is a non-party who, upon information and belief, has an interest in La Salle. Rick Sorensen is a Utah attorney who represents non-party Kyle Lind in several other suits pending in Utah courts and in which VCS, Inc. is also a party. (R. at 402.)
41. After service of the Summons and Complaint upon Defendant, La Salle Development, LLC, attorney for VCS, Inc., H. Thomas Stevenson, spoke with Rick Sorensen, attorney for Kyle Lind, and on two occasions asked if he represented La Salle Development. Rick Sorensen told H. Thomas Stevenson in both instances that he did not represent La Salle Development, LLC. At no time has Mr. Sorensen indicated to H. Thomas Stevenson that he represents La Salle Development, LLC. *Id.*
42. On two occasions, Tom Phelps, Terrence Neal, attorney Tom Stevenson, representing VCS, Inc., Kyle Lind, and Rick Sorensen, attorney for Kyle Lind, met at the offices of Stevenson & Smith. (R. at 405-07, 410-12.)
43. On one of these occasions, which occurred shortly after serving La Salle registered agent in March 2008, but before June 6, 2008, when VCS obtained its default

judgment, the parties discussed all the complaints that had been filed by VCS, Inc. and/or Tom Phelps against Kyle Lind and/or his associated entities. Id.

44. With regard to an action titled VCS v. Lind et al. (the Bearlake matter) which is in First District Court, Tom Stevenson, representing VCS, Inc., granted an open-ended extension to Kyle Lind and the associated entities who were Defendants in that action. Id.
45. With regard to the VCS, Inc. v. La Salle matter, Rick Sorensen and Kyle Lind acknowledged that they knew about the complaint, however, Rick Sorensen stated, "I do not represent La Salle Development at this time, however, I may in the future." Id.
46. Following this statement, Kyle Lind stated that his partner, Don Hampton, may "do something stupid like on the last one." Id.
47. This statement by Kyle Lind is in reference to the fact that Don Hampton had responded to a prior complaint by United Contractors without having talked to their attorneys. Id.
48. Kyle Lind knew about the complaint that was received and which had been served on his registered agent, but Kyle Lind's attorney, Rick Sorensen, indicated that he was not representing Defendant, La Salle Development, in the matter. Id.

SUMMARY OF ARGUMENTS

This appeal concerns whether the court erred: 1) in interpreting Utah Code Ann. § 38-1-11(3) in such a way as to make the exclusion apply to the 180-day period; 2) in

finding that VCS had not substantially complied with the Utah's mechanic's lien law; 3) in ruling that VCS, Inc.'s amended complaint did not relate back under Rule 15(a) to the filing date; 4) in ruling that the Banks had not been unjustly enriched by VCS's work on the property; and 5) in determining that VCS's service of process on La Salle was inadequate to sustain a default judgment.

The Trial Court found that the language of Utah Code Ann. §38-1-11, requiring that a lis pendens be filed within 180 days of the lien filing was ambiguous and unclear. As a result it looked to the courts for an interpretation of the statute. The Supreme Court has not passed upon the issue and the reasoning from two important Appellate Court decisions lead to different results. VCS's reading of the current statute, namely that the 180 day time period does not apply to the exceptions, i.e. to parties named in the suit or parties with actual knowledge of the suit, is a reasonable conclusion from reading the plain language of the statute. While the Defendant Banks have another interpretation of the statute, only VCS's view comports with the expressed intent of the statute to protect mechanics work.

Because of the definition of an owner, and the lien law directive that only an owner needs to receive notice of a lien, and the fact the Section 38-1-11 is silent on how to handle suits to determine priority among other interest holders after resolving the validity of a lien against the property owner, is it questionable whether this subsection to anyone but an owner of the property. In the alternative, the Court could follow the Butterfield court's reasoning, namely, that since the Banks acquired the property through La Salle, an entity who was timely added as an original party to the suit within the 180

day statutory period, the lien follows the sale and the Banks therefore did not take the property without notice. Butterfield Lumber Inc. v. Peterson Mortgage Corp., 815 P.2d 1330 (Utah Ct. App. 1987). Even the public policy arguments behind the statute--to protect materialmen and laborers, and the policy behind the lis pendens requirement--namely to prevent the creation of BFPs without notice—is still met by finding that VCS complied with the statute. The Defendant Banks are not prejudiced in the least in this case because they had knowledge of the suit ten (10) weeks after the 180 day period.

The purpose behind Section 38-1-11's lis pendens and 180 time period requirement is to prevent innocent buyers from buying property without notice of a pending action. Section 38-1-9 already provides that the notice of lien imputes notice to any potential buyer. To the extent 38-1-11 requires more than this, it only lets the potential buyer know there is also a suit, which information they could get simply by calling the lien claimant if there was a question. If a lis pendens is filed, innocent potential buyers will have notice of the pending litigation. However, in this case the lien was on title before the suit was filed, and the Banks never sold their interest in their property to anyone but themselves. Therefore, there is no bona fide purchaser problem, and no issue of notice when they themselves became the owner of the property. Further, there is a question about whether a non-owner has the right to challenge a procedurally or substantively defective lien because the statute is silent on this point. Under these circumstances the Trial Court erred in finding that the 180-day deadline is a bar to maintaining a lien.

If the Court interprets Section 38-1-11 to require a lis pendens be filed within the 180-day period regardless of who challenges the lien claimant, i.e. that it is inviolate, VCS still has a valid lien because of the doctrine of substantial compliance, declared by this Court and as codified under Utah Code Ann. §38-1-7. In 2006 the legislature amended this section to ensure the doctrine applied to then entire mechanics' lien chapter, not just to the subsection. The Court erroneously found that the lis pendens was not a mere technicality, but instead a jurisdictional requirement. There is no basis in the code or legislative history for this finding and it contradicts the law's intent to protect materialmen and labors. The Court further found that VCS's amended complaints did not relate back to the date of its original pleading, despite the identity of interest the Banks had with the property because of their Trust Deeds, and despite how early in the process the lawsuit was.

The Trial Court also erred in dismissing VCS's unjust enrichment claim on the grounds that its failure to perfect its lien against the Banks deprived the Court of jurisdiction over the issue, despite the fact that VCS had a valid lien against the owner, La Salle. There were substantial disputes facts regarding Utah Community Bank's knowledge of VCS's actions, including an undisputed fact regarding a written contract between the Bank to pay VCS to complete the subdivision if La Salle did not.

Finally, the Trial Court erred when it found that service was ineffective on LaSalle when its registered agent's assistant expressly agreed she had authority to accept service on his behalf. For these reasons VCS respectfully request that the Appellate Court reverse the court below.

ARGUMENT

- I. **The Trial Court Erred When It Interpreted Utah Code Annotated § 38-1-11(3) To Void VCS's Lien As Against The Banks For Failure To Timely File A Lis Pendens When The Banks Never Owned The Property Until After Being Named To The Suit And Where The Banks Obtained Their Ownership Through La Salle, Who Was Timely Made A Party To The Lawsuit.**
- A. **VCS is Entitled to Lien Foreclosure of Lots 5-8, 10-22 and 31 and 32 to Satisfy Its Mechanic's Lien.**

Under Utah Code Annotated § 38-1-3 contractors such as VCS are entitled to file a lien for improvements to property. U.C.A. § 38-1-3 (2009). The term improvement encompasses installation of infrastructure, such as sewer and water systems on property, as well as construction of residences. First of Denver Mtg. Investors v. C.N. Zundel & Assocs., 600 P.2d 521 (Utah 1979). The purpose of this statute "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). The law is intended for the benefit of those who perform labor and supply materials. Totorica v. Thomas, 397 P.2d 984, 986 (Utah 1965). In order to achieve this purpose, Utah courts construe the statute broadly. Interiors Contracting Inc. v. Navalco, 648 P.2d 1382, 1386 (Utah 1982). A valid mechanic's lien is created where, as here, a contract is repudiated after work has commenced or after materials have been furnished. U.C.A. § 38-1-11(1)(a)(2)(D); 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).

For VCS to establish that it has a valid lien it must show:

- (1) it filed a lien within 180 days of the “last date on which substantial work was performed under the original contract”. U.C.A. § 38-1-7(1)(a)(i)(A) and (ii)(D) (2009).
- (2) it filed an action to enforce the lien within 180 days from the day it filed a notice of claim under Section 38-1-7. U.C.A. § 38-1-11(2).
- (3) it did **one** of the following: a) filed a notice of the action with the county recorder within 180 days, b) included the owner of the property as a party to the action, or c) provided actual knowledge of the commencement of the action to the owner of the property. *Id.* at (3)(a).
- (4) that it delivered or mailed by certified mail a copy of the notice of lien to the reputed or record owner of the real property. *Id.* (3)(a) and (c).

Requirements 1, 2, and 4 above are easily dispensed with. The last substantial work completed by VCS was on September 15, 2007. VCS filed a lien on lots 3-22 and lots 31 and 32 on 29 January 2008, which was less than 180 days from the date of the last substantial work completed. The lien amount was for a total of \$88,949.00. This satisfies requirement No. 1 above. VCS filed suit against the property owner, Defendant La Salle, on 12 March 2008, which was less than 180 days from the date the lien was filed. This satisfies requirement No. 2 above. The lien was mailed to the property owner and to its registered agent by certified mail on February 1, 2008, which is well within 180 days from the date the lien was recorded, 29 January 2008. Therefore Plaintiff may be awarded his attorney’s fees and costs for enforcing its mechanic’s lien under the statute. There are a host of other requirements concerning the content of these notices, none of

which are disputed by any of the Defendants. The real dispute in this case concerns the third requirement above and the interpretation of the statutory language.

While a lis pendens of the proceeding was not filed until April 2009, the statute does not require VCS to provide this notice against a Defendant to the lawsuit. U.C.A. § 38-1-11(3); Projects Unlimited, Inc. v. Copper State Thrift & Loan Co., 1990, 798 P.2d 738 (only when mechanic's lienor fails to timely record lis pendens can a Defendant argue that it is not subject to mechanic's lien, and then only if such person was not named as party to foreclosure action and did not have actual knowledge of action). At the time of filing the lien and foreclosure suit, the owner of the property was Defendant La Salle, a party to the action. Therefore, No. 3 above is satisfied as to La Salle.

Not only was La Salle listed as a party, it also had actual knowledge of the suit. Under Rule 4 of the Utah Rules of Civil Procedure service of process is effective by delivering the summons and complaint to an “officer, a managing or general agent, or other agent authorized by appointment or by law”. Utah R. Civ. P., Rule 4(d)(1)(E) (2008). In this case the process server, Rose Green, served Defendant La Salle on 19 March 2008. Ms. Green had a business practice of first inquiring if the person is the registered agent and second, if they were not, requesting to know if the person could accept process for the Registered Agent. Ms. Cailey Tonks, the registered agent’s assistant, expressly stated she would accept service and even wrote the words, “FOR REGISTERED AGENT TED MADSEN” on the front sheet of the Summons below her signature.

Receptionists can have implied authority to accept service of process where that receptionist stated they could accept the summons. Kuhlik v. Atlantic Corp., 112 F.R.D. 146 (S.D.N.Y. 1986); Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc., 840 F.2d 685, 688-89 (9th Cir.1988) (finding service on receptionist effective where corporation was comparatively small and the role played by receptionist was proportionally large, and receptionist was the only one in the office when the process server arrived, indicating that she possessed more than minimal responsibility); Koninklijke Luchtvaart Maat-Schappij N.V. v. Curtiss-Wright Corp., 17 F.R.D. 49, 51 (S.D.N.Y.1955) (holding face-to-face encounter with corporate officer not required to effect service where the officer's receptionist accepted service, promised to deliver the papers to the proper person, and did in fact deliver the papers). All the current rule requires is that the person be "authorized" or a "general agent". Utah R. Civ. P., Rule 4(d)(1)(E) (2008). Ms. Tonks' written statement satisfies this Rule. Registered agents have a duty to "forward to the represented entity . . . any process, notice, or demand that is served on the agent." U.C.A. §16-17-302(1) (2008).

In addition, in a meeting between La Salle and VCS and their respective counsel, held between March 12, 2008, when the complaint was filed, and June 6, 2008, when the default was entered, La Salle acknowledged receipt and knowledge of the complaint during a meeting between officers of La Salle and VCS. The parties present were Kyle Lind, officer for La Salle, Rick Sorensen, La Salle's current attorney, Tom Stevenson, VCS' attorney, and Terrance Neal and Tom Phelps, officers of VCS. Kyle Lind

acknowledged in that meeting that he knew about the La Salle complaint prior to the default judgment on June 6, 2008.

The fact that 1) the receptionist had implied authority to accept service, 2) she accepted service, and 3) Kyle Lind acknowledged receipt of the Complaint prior to the judgment being entered, as proven by at least two affidavits, shows that Defendant La Salle received the complaint and summons. As noted above, making La Salle a Defendant in the pending action is enough to satisfy requirement No. 3, even absent this actual knowledge.¹

In December 2009 Defendant Utah Community Bank foreclosed on seventeen of La Salle's remaining lots. At that time, Utah Community Bank became the record owner, but took the property subject to any valid liens. See U.C.A. § 38-1-5. Prior to this time, on 21 April 2009 and 18 December 2009, Plaintiff amended its complaint to add Utah Community Bank and America West Bank as Defendants. While the lien statutes do not require Plaintiff to bring the lenders as party-defendants in order to establish that it has a valid lien against property owner La Salle, these entities were added as Defendants so that the court could make a determination concerning priority of the encumbrances, not because of some duty required by the lien statutes. The lien notice requirements do not apply to these Defendants, even though they had actual and record notice of the action well prior to becoming owners of the property.

The dispositive question for the Court concerns interpretation of Utah Code Annotated § 38-1-11(3) in relation to non property owners. Interpreting this section

¹ Service of process is the subject of Section V. *infra*.

raises numerous questions upon which the statute is silent and which are matters of first impression to the Utah Supreme Court.

First, who must a lien claimant sue? Utah Code Annotated § 38-1-7 requires that a lien must be filed against the “owner” of the property and that a notice of claim must be sent only to the reputed or record owner. It is silent as to whether the notice should or must be sent to equitable interest holders, such as lenders, or to other known lien claimants. However, § 38-1-9 expressly imputes record notice to other interest holders once the lien is filed with the county recorded. It states: “[f]rom the time the claim is filed for record, all persons are considered to have notice of the claim”. Utah Code Ann. § 38-1-9 (2011). Therefore, the Banks were imputed knowledge of the notice of claim before the suit was even instituted. Presumably, if notice must only go to the “owner”, it is logical that the suit for lien foreclosure should only be against that same “owner”. The term owner is defined in § 38-1-11 (and therefore by reference, § 38-1-102) to exclude lenders who are not actual property owners.

Second, the Court of Appeals found that, in relation to § 38-1-11(3), there are two competing interests--that of protecting materialmen and laborers, and that of protecting innocent third party purchasers without notice of a lien foreclosure action. Butterfield Lumber v. Peterson Mortgage Corporation, 815 P.2d 1330,1334 (Utah Ct. App. 1991). If there is no innocent third party purchaser without notice, but the Plaintiff failed to file a lis pendens, is the lis pendens requirement mandatory where, as here, the Banks are not prejudiced in any way by being made a party?

Third, how must a lien claimant determine priority of its interests versus other interest holders? Priority of liens and interest holders can be accomplished via a declaratory judgment action and Section 38-1-5 delineates how to determine priority among interest holders. However, Section 38-1-11 is silent about who to include in the action. Recording a notice of lien does not establish priority of the claim under this chapter. E.W. Allen & Assocs. v. FDIC, 776 F. Supp. 1504 (D. Utah 1991). Under § 38-1-5, visible commencement of work, not record notice, establishes priority. EDSA/CLOWARD, L.L.C. v. Klibanoff, 2005 UT App 367, 122 P.3d 646. Must the valid lien holder bring all interest holders in the original Section 38-1-11 suit, or may it amend the lien foreclosure suit against the owner to determine priority after having determined its lien was valid? Or can the lien claimant seek declaratory relief in a separate suit? Again, here the statute is silent.

Fourth, does the substantial compliance provision in Section 38-1-7, which was amended in 2006 to expressly apply to the entire Chapter for mechanics' liens (versus just that subsection), effect the case law predating that change? Does the language of that section stating that substantial compliance with the chapter is "sufficient to hold and claim a lien" effect the provisions of Section 38-1-11?

Fifth, is Section 38-1-11(3) jurisdictional or a statute of limitations that Plaintiff can overcome through relation back under Rule 15?

Sixth, do non-property owners with interests in real property have standing to challenge the procedural and/or substantive aspects of a lien foreclosure action?

Seventh, must a lis pendens be filed within 180 days of the lien filing whether the entity is made a party to the lawsuit before becoming the owner of the property?

Eighth, does the fact that a bank conducts a nonjudicial foreclosure sale on a trust deed held by a party timely added to the lawsuit (i.e. within the 180 days) mean that whomever bought the property, whether via credit bid or otherwise, is imparted notice of the suit, even if a lis pendens was not filed within the 180 day period? Because the statute is silent on these related issues, VCS asks that it be found void for vagueness.

The specific language in question is as follows:

2) A lien 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 lien claimant filed a notice of claim under Section 38-1-7; 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 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.** (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).

U.C.A. § 38-1-11(2) and (3) (2011) (emphasis added).

The Trial Court found the language in § 38-1-11(3) ambiguous and unclear and therefore found it necessary to look to controlling precedent, stating,

“[e]ach 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.”).

(R. at 647.) Ultimately, the Trial Court concluded that the Court of Appeals rulings in Butterfield and Interlake Distrib., Inc. v. Old Mill Towne, 954 P.2d 1295 (Utah Ct. App.1988) were dispositive of the issue and declared VCS’s lien void. That interpretation of the statute, namely, to require equitable interest holders be given actual notice or be named as parties to the action within 180 days, controverts the statute’s purpose of protecting lienholders by allowing equitable interest holders to procedurally and substantively use the statute as a shield. Furthermore, that result is inconsistent with those court’s findings.

The Butterfield court found that “where the holder of a valid mechanics’ lien has timely begun judicial lien foreclosure proceedings, and a party holding a property interest that is subject to the lien, aware of the pending foreclosure, disposes of the property to one who takes it free of the lien the lien attaches to the proceeds gained from the sale.” Butterfield Lumber v. Peterson Mortgage Corporation, 815 P.2d at 1335. In Butterfield the Peterson Mortgage was timely made a party to the action, and then it sold its interest to an innocent purchaser without notice of the cause of action. The Plaintiff failed to file a lis pendens. The court found that the Butterfield lien was enforceable against the third

party purchaser because *it obtained the property from Peterson*, who had timely actual knowledge of the lien action and was a party timely added before the deadline (which at that time was 12 months from the lien filing). *Id.*

The facts are the same here. Utah Community Bank obtained its interest in the property from La Salle, who had timely actual knowledge of the lien action and who was made a party within the 180 day period. The only difference is how that interest in the property was obtained. In Butterfield it was through a sale to the third party. In this case it is through a non-judicial foreclosure sale.

Interlake leads to the same conclusion. In that case the Plaintiff sued lender Deseret Pacific in October 1985, but never served them. The property owner, Old Mill Towne defaults and Deseret foreclosed. Old Mill Towne, Inc., a separate entity from Old Mill Towne, obtained the property in December 1989 and that entity requested to intervene in the suit in 1991, and was subsequently joined in the suit. The Plaintiff did not add Old Mill Towne, Inc. as a party and never filed a lis pendens. In that case, the court concluded that neither Defendant had knowledge of the case within the year statutory period and found that the lien was void. Interlake, 954 P.2d at 1296. However, the Interlake decision was in 1988 and Butterfield decision came afterwards in 1991. If the reasoning in Butterfield is used on the facts of Interlake, the court would have reached the opposite result. In Interlake, Defendant Old Mill Towne obtained the property from Deseret, who was a party to the original proceeding, which was filed timely. But Deseret was not served, a fact not present in the current case. Furthermore, both of these cases

predate the 2006 change to Utah lien law that made the principle of substantial compliance applicable to the entire chapter, as discussed in Section II., *Infra*.

The legislative history and prior versions of the statutes provide little insight as well. Utah lien law, first enacted in 1898, Utah Code Ann. § 1372 did not contain a *lis pendens* requirement as found in the current statute. But U.C.A. § 1391, also enacted at the same time, required that notice be published in the newspaper to allow other interest holders to make claims at the hearing on the lien. *Id.* In 1931 the legislature renumbered the section as U.C.A. Section 52-1-12/C.L.16 and added the current *lis pendens* requirement (but without the current exceptions for parties named and having actual knowledge), but still continued to require the notice publications. It is unclear when the publication requirement stopped or whether the *lis pendens* requirement first began.

VCS's reading of the current statute, namely that the 180 day time period does not apply to the exceptions, is a reasonable conclusion from reading the plain language of the statute. In the alternative, the Court can find that the subsection only applies to the reputed/record owner, not to equitable lien holders. Or, also in the alternative, the Court could follow the Butterfield court's reasoning, namely that since the Banks acquired the property through La Salle, who was timely added to the suit within the 180 days, the lien follows the sale and the Banks therefore did not take the property without notice. Notwithstanding all these options for allowing the lien to be valid, the public policy behind the statute (to protect materialmen and laborers) and the policy behind the *lis pendens* requirement (namely to prevent the creation of BFPs without notice) is still met by finding that VCS complied with the statute.

The purpose behind Section 38-1-11's lis pendens and 180-day time period requirement must be to prevent innocent buyers from buying property without notice of a pending action. Section 38-1-9 already provides that the notice of lien imputes notice to any potential buyer. To the extent 38-1-11 requires more than this, it only lets the potential buyer know there is also a suit, which information they could get simply by calling the lien claimant if there was a question. If a lis pendens is filed, innocent potential buyers will have notice of the pending litigation. However, in this case the lien was on title before the suit was filed, and the Banks never sold their interest in their property to anyone but themselves. Therefore, there is no bona fide purchaser problem, and no issue of notice when they became the owner of the property. Further, the statute is silent about whether a nonowner ever has the right to challenge a procedurally or substantively defective lien.

For the foregoing reasons, VCS urges the Court to reverse the Trial Court's finding that VCS lien is invalid, and Order that it has a valid lien in the amount of \$88,949.00 over lots 5-8, 10-22 and 31 and 32 of the Meadow's Park Subdivision. VCS requests an order of judicial foreclosure of said lots to pay Plaintiff VCS for the amount of this lien, its lien filing costs, court costs, and attorney's fees to-date in order to enforce this lien.

B. Plaintiff VCS Is Entitled To A Declaratory Judgment That It Has Priority Over All Other Lien Claimants.

Plaintiff seeks a court order that it has priority over other encumbrances. U.C.A. § 38-1-5 establishes priority of encumbrances and states:

The liens herein provided for shall relate back to, and take effect as of, the time of the commencement to do work or furnish materials on the ground for the structure or improvement, and shall have priority over any lien, mortgage or other encumbrance which may have attached subsequently to the time when the building, improvement or structure was commenced, work begun, or first material furnished on the ground: also over any lien, mortgage or other encumbrance of which the lien holder had no notice and which was unrecorded at the time the building, structure or improvement was commenced, work begun, or first material furnished on the ground.

U.C.A. § 38-1-5 (2009). The date a contractor first begins its work on or supplies materials to a project determines when the mechanic's lien arose. A lien for work on the overall site (i.e. entire project), as well as work on individual building units located on the site, all relate back to the date the initial work was done on the project. First of Denver Mtg. Investors, 600 P.2d 521 (Utah, 1979) (mechanics' liens arising from the furnishing of materials and labor-both on the 44-acre site as well as on individual condominium units in the development-related back to the initial work done on the project). Record notice does not establish priority. It is actual notice of the initiation of work or, at minimum, visible commencement of work that establishes priority. EDSA/CLOWARD L.L.C. v. Klibanoff, 2005 UT App. 367, 122 P.3d 646.

In this case Plaintiff began physical on-site infrastructure work on the project by the first week of November 2006, including, but not limited to, construction and installation of storm drain, underground detention basin, concrete sidewalk, French drain, silt fence, etc. and all the improvements necessary to complete the infrastructure of the subdivision.

Utah Community Bank did not make a loan to La Salle for the project until 9 January 2007, which was recorded on January 12, 2007. America West Bank's interest, as recorded by trust deed, occurred on 24 October 2007. Because the banks obtained their interest in the property after Plaintiff commenced work, Plaintiff's interest relates back to at least November 2006, well in advance of the bank party-Defendants' trust deeds and interest.

VCS seeks an order from the Court declaring that VCS's lien is valid and was prior to Utah Community Bank's and America West Bank's interests in the property, and that the Bank's interest, as well as that of their successor or assigns, is subordinate to the mechanic's lien of VCS pursuant to Section 38-1-5.

II. The Trial Court Erred When It Failed To Find That VCS Had Substantially Complied With The Utah Mechanics' Lien Statute.

In the alternative, VCS's substantial compliance with Utah's Mechanic's Lien law fulfilled the statutory intent of Utah Code Ann. §§ 38-1-7 and 38-1-11, and it is therefore entitled to foreclose on the property. With the exception of Section 38-1-11(3), that Trial Court found that VCS had "strictly" complied with all other requirements of the lien statute. (R. at 646.)

The Utah Mechanics' Lien statute is found in Chapter 1 of Title 38. Specifically, the 2006 amendment by ch. 297, effective May 1, 2006, substituted "this chapter" for "this Subsection (2)" in Subsection (2)(b) of Utah Code Annotated Section 38-1-7. 2006 Utah Laws 297. The specific language change, as reflected in the new session law, is

“Substantial compliance with the requirements of this [D> Subsection (2) <D] [A> CHAPTER <A] is sufficient to **hold** and claim a lien.” 2006 Utah Laws 297, 2006 Ut. ALS 297, 2 (emphasis added).

This important language change shows the Utah Legislature’s intent to allow lien claimants to substantially comply with any section or subsection within the entire mechanics’ lien Chapter. Because the legislature intended this principle of substantial compliance to apply to *all* of Chapter 1, substantial compliance with § 38-1-11 is expressly allowed by statute and is sufficient if a Utah court finds the lien claimant ‘substantially’ met the requirements of that section.

As noted supra, for VCS to establish that it has a valid lien it must show:

- (1) it filed a lien within 180 days of the “last date on which substantial work was performed under the original contract”. U.C.A. § 38-1-7(1)(a)(i)(A) and (ii)(D) (2009).
- (2) it filed an action to enforce the lien within 180 days from the day it filed a notice of claim under Section 38-1-7. U.C.A. § 38-1-11(2).
- (3) it did one of the following: a) filed a notice of the action with the county recorder within 180 days, b) included the owner of the property as a party to the action, or c) provided actual knowledge of the commencement of the action to the owner of the property. *Id.* at (3)(a).
- (4) that it delivered or mailed by certified mail a copy of the notice of lien to the reputed or record owner of the real property. *Id.* (3)(a) and (c).

VCS complied with these requirements, along with myriad other requirements incorporated into the first two requirements (dates, times, places, signatures, lien amounts, work completed, etc.). In addition, VCS did provide actual notice to the Banks on October 16, 2008, approximately 8 and a ½ months after filing its lien, it filed a lis pendens, it added the Banks as defendants to the case, etc. If the Court finds VCS did not comply with Section 38-1-11(3), that failure is a mere technicality.

The Utah Supreme Court addressed this point many years before the legislature did in Boise Cascade Corp., 660 P.2d 721 (Utah 1983). The Court stated, “[t]he doctrine of substantial compliance has validity and it has application in an appropriate case.” Id. at 722. The Court went on to suggest that the Court is “free to discount” hypertechnicalities. Id.

As has already been noted, Utah courts have indicated that Utah’s Mechanic’s Lien Law was implemented for the benefit of those persons that 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). Utah Code Ann. § 38-1-11 directs a lien claimant to file an action to enforce the lien within 180 days from the filing of the lien. During the statutory period designated for enforcement, Plaintiff not only filed an action to enforce its lien, but also received a default judgment recognizing the validity of Plaintiff’s lien.

In an effort to protect third party bona fide purchasers who acquire an interest in the property without knowledge of an existing encumbrance, § 38-1-11 also includes a requirement to file a lis pendens. Well in advance of Defendant UCB’s acquisition of an interest in the property, Plaintiff gave Defendant UCB actual notice of the pendency of its

lien foreclosure action, and named Defendant UCB as a party to the action. Despite the absence of a lis pendens filing, Defendant UCB had been given actual notice of Plaintiff's pending action, thus fulfilling the purpose of § 38-1-11's lis pendens requirement. Plaintiff's substantial compliance with the statute ensured that the policy considerations underlying the lis pendens requirement had all been addressed, and that Defendant UCB could not be unfairly prejudiced by the absence of the lis pendens filing.

Furthermore, at the conclusion of 180 day statutory period for enforcement, Plaintiff was in possession of a default judgment entitling Plaintiff to foreclose on the property in satisfaction of its lien. Plaintiff therefore had no reason to believe a lis pendens was necessary. At that time, upon information and belief, there was equity in the property and even if VCS's lien did not have first priority, it could foreclose on the property subject to any higher-priority interests. When this Court later set aside that default judgment, Plaintiff promptly gave Defendant UCB actual notice of its pending lien action, and subsequently named Defendant UCB as a party to the action and filed a lis pendens, all well in advance of UCB's later acquisition of an interest in the property. Thus, Defendant UCB should not be allowed to distort Utah's Mechanic's Lien law to its own advantage at the expense of those, like Plaintiff, for whom the law's protections were intended.

III. The Trial Court Erred When It Found That VCS's Amended Complaint Adding The Banks Did Not Relate Back To The Date Of The Original Pleading Under Rule 15.

Pursuant to Utah R. Civ. Proc. 15(c), Plaintiff's Amended Complaint adding Defendant UCB to the action relates back to date of the original pleading, since Defendant UCB, as an equitable owner of the property, had an identity of interest with Defendant La Salle. Although Rule 15 generally does not permit relation back to an amendment adding a party, an exception exists when the added party has an identity of interest with the original named party. Doxey-Layton Co. v. Clark, 548 P.2d 902, 906 (Utah 1976). A party added during an amendment has an identity of interest when it has been "sufficiently alerted to the proceedings, or were involved in them unofficially, from an early stage." *Id.* Involvement at an early stage includes the period of time before a scheduling order has been entered, before a trial date is set, and before discovery has taken place or is ongoing. See Nunez v. Albo, 2002 UT App 247, 53 P.3d 2, 10 (2002) (allowing a plaintiff's amended complaint adding a defendant to relate back under Rule 15). Relation back as to a party with this identity of interest is proper since the party's involvement negates any prejudice against it. At the time that Plaintiff amended its Complaint to add Defendant UCB, no scheduling order had been entered, no trial date had been set, and discovery had not yet started. The case was clearly at an early stage.

The rationale behind the identity of interest exception is to prevent a mechanical use of a statute of limitations to prevent adjudication of a claim. Doxey-Layton, 548 P.2d at 906. Defendant UCB, fully aware of Plaintiff's superior lien at the time it foreclosed on the property, did so in a mechanical effort to use a perceived statute of limitations to

prevent Plaintiff's adjudication of its claim. It was already a party to the suit at the time of foreclosure and took the property from La Salle, who was properly part of the lien suit. Thus, Defendant UCB has an identity of interest with Defendant La Salle, and relation back of Plaintiff's Amended Complaint adding Defendant UCB is proper.

IV. The Trial Court Erred When It Denied VCS's Unjust Enrichment Claim Against The Banks Where VCS Brought A Valid Lien Claim Against La Salle And Where There Is A Genuine Issues Of Material Fact Concerning Whether The Banks Were Unjustly Enriched By VCS's Work On The Property.

In approximately April 2007, Plaintiff's sole owner, Tom Phelps, met with Defendant Utah Community Bank. At that time, VCS and Utah Community Bank entered into a contract in which VCS would complete the construction of the homes if La Salle were somehow to fail in meeting their obligations to the Bank. *Id.* While VCS never had to fulfill this requirement because it was terminated by La Salle, Utah Community Bank's decision to make this agreement shows that Defendant Utah Community Bank: (1) was aware that VCS was working on the project; (2) was aware the VCS was conferring a substantial benefit to La Salle and to the bank, who had a security interest in the property receiving improvements; (3) had insecurity about La Salle's ability to make payments and suspected it would have to foreclose on the property¹; (4) knew it would have to pay VCS for that benefit; and (5) knew that VCS expected payment. In addition, Exhibit R shows Utah Community Bank's home construction loan

¹As they ultimately did on 30 December 2009.

line items for lots 19-22, that VCS was submitting invoices and/or draws as the work was completed on the project, and that the Bank knew of VCS involvement on the project.

Because of these facts, a quasi contract existed between Utah Community Bank and VCS. It would be inequitable for Utah Community Bank to retain the benefits of VCS' work without payment of its value. Therefore, Plaintiff urges that the Court find that Plaintiff is entitled to damages in the amount of \$88,949.00, which is the total work that Utah Community Bank benefitted from, plus interest, costs and attorney's fees, on the grounds of quantum meruit and/or unjust enrichment.

Plaintiff has not failed to exhaust its legal remedies in pursuing recovery, and therefore is entitled to summary judgment for unjust enrichment. Defendant UCB cites Knight v. Post for the proposition that failing to exhaust ones legal remedies bars a claim for unjust enrichment. 748 P.2d 1097 (Utah Ct. App. 1988). In Knight, the plaintiff failed to perfect its mechanic's lien, failed to bring an action to enforce the lien, and failed to pursue a claim in bankruptcy to recover. Id. at 1100. Because the Plaintiff was dilatory, and failed to seek recovery before these remedies had expired, the court refused to allow the plaintiff to bring a tardy claim for unjust enrichment. Id. Unlike the facts in Knight, in the present case, Plaintiff has not exhausted its legal remedies, but is actively seeking to enforce them. Plaintiff filed a timely notice of lien, and properly brought an action to enforce the lien. Under any scenario, the Court erroneously found that VCS's lien was void. (R. at 646-50.) And, as shown above, UCB knowledge of the lien and foreclosure action and its being named as a party prior to its ownership of the property comply with both the technical terms of the lien statute and its intent. The pendency of

this action is proof that Plaintiff's legal remedies are not exhausted, and a claim for unjust enrichment is not barred. Therefore, Defendant UCB was not entitled to summary judgment dismissing Plaintiff's unjust enrichment claim.

In addition, it is **uncontroverted that Defendant UCB entered into an agreement in 2007 with VCS for VCS to act as the general contractor to complete the construction in the event that La Salle was unable to complete the project and/or failed to meet its financial obligations.** (R. at 321.) Utah Community Bank failed to refute that there was a written contract in its response to VCS's Motion for Summary Judgment. (R. at 512-535.) (Memorandum in Support of Plaintiff's Motion for Summary Judgment, Plaintiff's Statement of Fact No. 15 and Phelps Second Affidavit No. 19-20). Therefore, this statement is deemed admitted pursuant to Rule 7(c)(3)(A) of the Rules of Civil Procedure.

In addition, there are questions of fact concerning whether Utah Community Bank was unjustly enriched because of the following facts. UCB: (1) was aware that VCS was working on the project; (2) was aware the VCS was conferring a substantial benefit to La Salle and to the bank, who had a security interest in the property receiving improvements; (3) had insecurity about La Salle's ability to make payments and suspected it would have to foreclose on the property; (4) knew it would have to pay VCS for its work on the project; (5) knew that VCS expected payment; (6) knew that its loan proceeds were used to pay for ongoing improvements; (7) kept a Tracking Log of the loan line items and expenses/invoices/costs for the project; and (8) knew that VCS was intimately involved in the project and was submitting invoices and/or draws for work done by it or its

subcontractors as the work was completed on the project. (R. at 319-21, 338, 341, 472-78, 649.) For these reasons alone the Trial Court erred in granting summary judgment for the UCB.

In 2007 UCB had knowledge of VCS's work on the project and intended for VCS to work on the project even if the then current owner, La Salle, were not able to continue to employ VCS. La Salle removed VCS as the general contractor long before La Salle lost the property, so UCB never required that VCS complete the project according to their agreement. Still, this shows that UCB unequivocally knew that VCS was working on property in which it had an equitable and, later, a legal interest, and intended to benefit from VCS's work if La Salle's interest in the property were foreclosed on—which is exactly what happened.

In addition, UCB made payments for VCS's work directly to subcontractors, for permitting, etc. and was intimately familiar with the work by VCS and its subcontractors on the project. There is no factual dispute that VCS conferred a benefit on UCB, that UCB retained that benefit, and that, under these circumstances, it would be unjust for UCB to retain the benefit of that work without paying for that benefit. Now, when the Bank sells the lot, it can get more money for it because of VCS's efforts.

V. The Trial Court Erred When It Set Aside VCS Default Judgment Against La Salle For Failure Of Service Where The Assistant For The Registered Agent Expressly Stated She Had Permission To Except Service For the Registered Agent.

The Trial Court found that leaving a copy of a summons and complaint with the secretary of the registered agent constituted improper service. (R. at 210-11.) As a result, the Trial Court set aside VCS's initial default judgment in 2008. While VCS eventually obtained a judgment against La Salle for breach of contract and unjust enrichment, VCS prefers to have the initial judgment stand because it allows VCS to have its judgment first in time over subsequent liens or interest holders.

In order to be relieved of a judgment under rule 60(b)(1) of the Utah Rules of Civil Procedure, a defendant must show: 1) that the judgment was entered against her because of mistake, inadvertence, surprise, or excusable neglect; 2) that she has a meritorious defense; and 3) that the motion was timely made. See Erickson v. Schenkers Int'l Forwarders, Inc., 882 P.2d 1147, 1148 (Utah 1994). Each of these requirements is analyzed below. Default judgments are set aside under Rule 55 using the same criteria in Utah. Calder Bros. Co. v. Anderson, 652 P.2d 922 (Utah 1982).

A. The Defendant's Inexcusable Neglect Is Shown By Its Failure To Act On Its Receipt of the Summons and Complaint.

Under Rule 4 of the Utah Rule of Civil Procedure service of process is effective by delivering the summons and complaint to an "officer, a managing or general agent, or other agent authorized by appointment or by law". Utah R. Civ. P., Rule 4(d)(1)(E) (2008). Utah courts have interpreted the prior version of this Rule as prohibiting service upon a person who is a mere employee. Beard v. White, Green & Addison Assocs., 336 P.2d 125,126 (Utah 1959) (person accepting service must be "must be in charge of some of its property, operations, business activities, office, place of business or in some manner

be responsible for or have control over its affairs.”). Not only was this ruling based in part on the prior version of the Rule, but the facts of that case are distinguishable.

In Beard, the officer who effected service claimed he served Bottomley, and alleged that Bottomley claimed he was a foreman. This was controverted by the testimony of “Bottomley, Miller and White that Bottomley was not a foreman, and that Miller was the foreman, and the uncontradicted testimony that Miller had been so held out and introduced to the sheriff and his deputy who made the service as such. . . .” Id. As a result, the Court found that the trial court’s decision that there was service was unreasonable and contrary to the evidence. Id.

In contrast to Beard, in this case the process server, Rose Green, had a business practice of first inquiring if the person is the registered agent and second, if they were not, requesting to know if the person could accept process for the Registered Agent. Green Aff.¶2-3. Here, Ms. Cailey Tonks expressly stated she would accept service and even wrote the words, “FOR REGISTERED AGENT TED MADSEN” on the from sheet of the Summons below her signature. Id.

Defendant attempts to support the idea that a Summons and Complaint cannot be left with just anyone at the business site misses the mark. Defendant first cites to Garcia v. Garcia, 712 P.2d 288 (Utah 1986). This is a case concerning the Court’s striking down of service on a prisoner officer for an inmate. This is distinguishable on the grounds that first, such service is controlled by statute, and secondly it is not a case concerning a registered agent for a corporation in the state controlled by Rule 4(d)(1)(E). Nor is it a case where an agent for the registered agent accepts service.

Equally unavailing is Defendant's reliance on In re Schwenke, 2004 UT 2004 UT 17, 89 P.3d 117. That case concerned a disbarred attorney's service of petition for reinstatement on common-area receptionist at the Utah Law and Justice Center. The Court found that the service did not constitute effective service of process on the Office of Professional Conduct (OPC), and was thus not sufficient to begin 60-day time limit for OPC to file its objection. In that case the receptionist was not supervised or employed by OPC, was not authorized to accept service on behalf of OPC, did not deliver documents to OPC, was not told that petition was intended for OPC, and the process server received no assurances that the petition would be delivered to OPC. *Id.* at ¶24-25. The same Court also stated "Courts have often found service to be effective where the employee who received service had a significant amount of authority or apparent authority within the organization; where the employee played an integrated role within the organization such that he or she would know what to do with papers; or where there were other assurances that the documents would reach the intended recipient." *Id.*

Courts outside of Utah have also found that receptionists can have implied authority to accept service of process where that receptionist stated they could accept the summons. Kuhlik v. Atlantic Corp., 112 F.R.D. 146 (S.D.N.Y. 1986); Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc., 840 F.2d 685, 688-89 (9th Cir.1988) (finding service on receptionist effective where corporation was comparatively small and the role played by receptionist was proportionally large, and receptionist was the only one in the office when the process server arrived, indicating that she possessed more than minimal responsibility); Koninklijke Luchtvaart Maat-Schappij N.V. v. Curtiss-Wright

Corp., 17 F.R.D. 49, 51 (S.D.N.Y.1955) (holding face-to-face encounter with corporate officer not required to effect service where the officer's receptionist accepted service, promised to deliver the papers to the proper person, and did in fact deliver the papers). See also Classic Cabinets v. All American Life Ins. Co., 1999 UT App. 88

This Court should find that Ms. Tonks' statement that she could accept service, and writing to that effect, show her implied authority to act as an agent for the registered agent, Ted Madsen. All the current rule requires is that the person be "authorized" or a "general agent". Utah R. Civ. P., Rule 4(d)(1)(E) (2008). In this case, the Court should find that Ms. Tonks satisfies the Rule.

It is unknown whether Ms. Tonks immediately gave the Summons and Complaint to Registered Agent Ted Madsen. What is known is that in a meeting held after the complaint was served and before the default judgment was entered between Kyle Lind, Rick Sorensen, Tom Stevenson and Tom Phelps, Kyle Lind knew about the La Salle complaint prior to the default judgment. Phelps Aff., ¶8. This is fairly easily proven by an affidavit from Ms. Tonks, but Defendants chose not to provide this. Instead, Defendant's support the proposition that Madsen never received the Summons and Complaint or Notice of Judgment Lien by Madsen's affidavit which states, "I do not recall ever receiving the Notice..." Madsen Declaration, ¶¶5-6.¹

¹ Defendant argues that it changed its Registered Agent on September 11, 2008, and therefore did not receive a copy of the Judgment on September 24, 2008. However, Rule 55 only requires an entity seeking default to prove that the "defendant has been personally served pursuant to Rule 4(d)(1). Utah Rules of Civil Procedure, Rule 55(b)(1)(C). The party in default need not be given notice of the entry of default. Central Bank & Trust Co. v. Jensen, 656 P.2d 1009 (Utah 1982). Defendant's

Registered agents have a duty to “forward to the represented entity . . . any process, notice, or demand that is served on the agent.” U.C.A. §16-17-302(1) (2008). The fact that 1) the receptionist had implied authority to accept service, 2) she accepted service, and 3) Kyle Lind acknowledged receipt of the Complaint prior to the judgment being entered, shows that Ted Madsen received the complaint and summons. The fact that he did “not recall ever receiving” it, in this case, is not credible. Once received, he had a duty to forward it to the La Salle, which must have occurred.

Further evidence of Defendant’s inexcusable neglect is the fact that Defendant did nothing after counsel for Plaintiff repeatedly inquired whether Rick Sorensen, who represented Kyle Lind on other suits with VCS, Inc., inquired whether Sorensen represented La Salle Development, LLC. The Defendant concedes the following pertinent facts:

“6. Sometime after March 26, 2008, VCS’s attorney Tom Stevenson (hereinafter “Attorney Stevenson”), contacted me and asked if I represent La Salle. I responded that L. Kyle Lind had not asked me to represent La Salle. Attorney Stevenson did not inform me that VCS had filed suit against La Salle or that VCS was seeking a default judgment against La Salle.

7. After the conversation with Attorney Stevenson, I contacted L. Kyle Lind and informed L. Kyle Lind of the conversation I had with VCS’s attorney about La Salle. L. Kyle Lind stated that he did not know why VCS’s attorney

argument on this point is unavailing. In addition, the termination of the registered agent “takes effect on the 31st day after the day on which it is filed.” U.C.A. §16-17-205(2) (2008). Therefore, on September 24, 2008, the change of Agent had not taken effect.

was asking about representation because as far as he knew, VCS had not sued La Salle.”

Sorensen Declaration, ¶¶6-7. The facts above indicate that in the meeting between the parties Lind acknowledged receipt of the Complaint, and even commented that he hoped his partner Don Hampton, did not answer it as he had in a prior case. But even if that were not true, after such an inquiry by attorney Stevenson about Sorensen’s representation of La Salle Development, LLC, it may be argued that a reasonable person would: 1) check with his registered agent to see if a suit was delivered, 2) do a simple case search to see if a complaint had been filed, or 3) inquire of attorney Stevenson if a suit was filed.

The Utah Supreme Court defines excusable neglect as “the exercise of ‘due diligence’ by a reasonably prudent person under similar circumstances.” Mini Spas, Inc. v. Industrial Comm’n of Utah, 733 P.2d 130, 132 (Utah 1987); Brunetti v. Mascaro, 854 P.2d 555 (Utah Ct. App. 1993) (permitting withdraws where there is a reasonable excuse for Defendant’s failure to respond). Even if the evidence was not overwhelming that the Defendant was served, the Court should find even on the basis of the Defendant’s statement of facts alone that Kyle Lind did not act as a reasonably prudent person and uphold the default judgment.

B. Defendant Did Not File the Motion to Set Aside Timely

Defendant would show the Court that pursuant to the Court’s docket, judgment was filed on 1 May 2008 and entered on 6 June 2008. Exhibit D. Defendants brought this motion on 23 January 2009. Pursuant to Rule 60, this motion was made more than

three (3) months after that judgment. Utah R. Civ. P., Rule 60 (2008). The Court should strike the Motion as untimely.

The trial court found that a receptionist must represent themselves as holding “a position of authority to accept service”. R. at 710, p. 7-8, 10. The Court also reasoned that Utah courts clearly “disfavor . . . default judgments”. Id. at 11. This ruling leads to an absurd result which other states have wrestled with and declined to conclude. Essentially, any time a registered agent in this state is both an individual and that individual has his own business that is separate from the entity for which he is the registered agent, if an assistant working for that registered agent’s business accepts service, no matter explicitly, the Defendant can defeat service merely by claiming his assistant never gave it to him.

Conclusion

For the foregoing reasons, VCS respectfully requests that the Supreme Court:

1. Reverse the Trial Court below;
2. Find that La Salle was served the complaint on March 19, 2008;
3. Find that VCS met its burden for summary judgment and has a valid and enforceable lien;
4. Find that FDIC and Utah Community Bank failed to meet their burden for purposes of their cross motions for summary judgment;
5. Order the judicial foreclosure of the nineteen lots liened by VCS within Northpark Meadows subdivision;

6. Order that VCS's lien and lis pendens be reinstated on all nineteen lots within the subdivision;
7. Order that VCS's lien has superior priority to the Trust Deeds held by Utah Community Bank and FDIC;
8. Reverse the award of attorney's fees to the Banks; and
9. Award VCS its attorney's fees, costs and interest pursuant to Utah Code Annotated §§ 38-1-18 and 15-1-1 (as previously requested, R. at 231-63, 312, 645) and remand to the Trial Court to determine the appropriate amount of fees.
10. In the alternative, find that the Utah Community Bank and FDIC have been unjustly enriched and award VCS its attorney's fees, costs and interest pursuant to Utah Code Annotated §§ 78B-5-825 and 15-1-1 (as previously requested, R. at 231-63, 312, 645) and remand to the Trial Court to determine the appropriate amount of fees.
11. Any other appropriate relief as determined by the Court.

Respectfully Submitted,

STEVENSON & SMITH, P.C.



David B. Stevenson, No. 12244
Attorney for Plaintiff/Appellant
VCS, Inc.

5/23/2011

Mailing Certificate

I hereby certify that I mailed a copy of the foregoing document by U.S. mail, postage prepaid, this 23rd day of May, 2011, to the following:

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ADDENDA

The following are exhibits provided for the ease of the court in referencing key documents related to this appeal:

1. Selected Statute and Regulations
2. Ruling Granting Motion to Set Aside Judgment, 27 April 2009 (R. at 209-214)
3. Ruling on Plaintiff's Motion for Summary Judgment and
Defendants' Cross Motions for Summary Judgment, 26 October, 2010
4. Return of Service 20 Day Summons

EXHIBIT 1

SELECTED STATUTE AND REGULATIONS

Utah Code Ann. § 38-1-5 - “The liens herein provided for shall relate back to, and take effect as of, the time of the commencement to do work or furnish materials on the ground for the structure or improvement, and shall have priority over any lien, mortgage or other encumbrance which may have attached subsequently to the time when the building, improvement or structure was commenced, work begun, or first material furnished on the ground: also over any lien, mortgage or other encumbrance of which the lien holder had no notice and which was unrecorded at the time the building, structure or improvement was commenced, work begun, or first material furnished on the ground.”

U.C.A. § 38-1-5 (2009).

Utah Code Ann. § 38-1-9 – “(1) The recorder must record the claim in an index maintained for that purpose. (2) From the time the claim is filed for record, all persons are considered to have notice of the claim.” Utah Code Ann. § 38-1-9 (2011).

Utah Code Ann. § 38-1-7(2)(b) - “Substantial compliance with the requirements of this chapter is sufficient to hold and claim a lien.” Utah Code Ann. § 38-1-7(2)(b) (2007).

Utah Code Ann. § 38-1-11(1)(a) –

“(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 lien 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 lien

claimant filed a notice of claim under Section 38-1-7; 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 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. (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).

(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)." Utah Code Ann. § 38-1-11(1-4) (2011).

Utah Code Ann. § 38-11-102 – "'Owner" means a person who: (a) contracts with a person who is licensed as a contractor or is exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, for the construction on an owner-occupied residence upon real property owned by that person; (b) contracts with a real estate developer to buy a residence upon completion of the construction on the owner-occupied residence; or (c) buys a residence from a real estate developer after completion of the

construction on the owner-occupied residence.” Utah Code Ann. § 38-11-102(17) (2011).

Utah Rules of Civil Procedure Utah Rule 4(d)(1)(E) – “Upon any corporation not herein otherwise provided for, upon a partnership or upon an unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and the complaint to an officer, a managing or general agent, or other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy of the summons and the complaint to the defendant. If no such officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, an office or place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of such office or place of business.” Utah R. Civ. P. 4(d)(1)(E) (2011).” Utah R. Civ. P. 4(d)(1)(E) (2011).

EXHIBIT 2

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

VCS, INC., a Utah Corporation.

Plaintiff,

vs.

LA SALLE DEVELOPMENT, INC.,

Defendant.

**RULING GRANTING
MOTION TO SET ASIDE
JUDGMENT**

Case No. 080901677

Judge Michael D. DiReda

On January 26, 2009, Defendant filed a motion to set aside the default judgment entered against it, pursuant to rule 60(b). Plaintiff submitted a memorandum in opposition, and Defendant filed a reply. The Court heard oral arguments on April 16, 2009, after which the Court took the motion under advisement. The Court now grants the motion.

Defendant La Salle Development, Inc., is a limited liability corporation, whose registered agent at the time this action was filed was Ted Madsen, an accountant with no other affiliation with Defendant. Rule 4(d)(1)(E) provides that a corporation shall be personally served "by delivering a copy of the summons and the complaint to an officer, a managing or general agent, or other agent authorized by appointment or by law to receive service of process...." Utah R. Civ. P. 4(d)(1)(E).

On March 19, 2008, Plaintiff served Defendant by leaving a copy of the summons and complaint with Cailey Tonks, a receptionist of Madsen & Associates, CPAs, who signed the receipt of service "For Registered Agent Ted Madsen." Ms. Tonks is in no way affiliated with

Defendant La Salle Development. Ted Madsen does not remember ever receiving the summons and complaint and did not provide them to Defendant.

On June 6, 2008, the Court entered default judgment against Defendant. In early September, La Salle Development changed its registered agent from Ted Madsen to L. Kyle Lind, who is affiliated with Defendant. In late September, Plaintiff mailed a notice of judgment lien to Madsen; however, Madsen does not recall receiving such notice. Defendant did not become aware of the default judgment until December 18, 2008, when Plaintiff served an application for writ of execution on L. Kyle Lind. Defendant filed its motion to set aside the judgment on January 26, 2009.

Rule 60(b)(4) allows the Court to relieve a party from a final judgment if “the judgment is void.” Utah R. Civ. P. 60(b)(4). Proper service under rule 4 is required for a court to acquire jurisdiction over a defendant. Jackson Constr. Co. v. Marrs, 100 P.3d 1211, 1214 (Utah 2004). In a case where a court fails to acquire jurisdiction due to improper service, any judgment rendered would be void. See id.

The Court finds that leaving a copy of the summons and complaint with Ms. Tonks was an improper means of serving Defendant La Salle Development under rule 4. In this case, the Defendant corporation had designated Ted Madsen as its registered agent for receiving service of process. But Mr. Madsen was not the only option for effectuating service on Defendant. In fact, rule 4(d)(1)(E) designates multiple options for serving process on a corporation, namely by serving “an officer, a managing or general agent, or other agent authorized by appointment or by

law.” Ms. Tonks, as a receptionist for the registered agent of the Defendant, does not fall within any of those designations.

While there is no controlling case law on this narrow issue of service on the receptionist of a registered agent, one case was particularly helpful in guiding the Court’s ruling. In the case of In re Schwenke, 89 P.3d 117 (Utah 2004), the Utah Supreme Court addressed the similar situation where a receptionist for the defendant corporation is served, holding that “[g]enerally, ‘proper service is not effected by serving the corporation’s receptionist.’” Id. at 123. The court did note exceptions to this general rule, in which a receptionist may accept service on behalf of a corporation.

It is important to note, however, that the facts in the present case are distinguishable from the scenarios contemplated in Schwenke. Here, Ms. Tonks is not a receptionist of Defendant La Salle Development, and is in no way affiliated with that corporation. Further, Mr. Madsen, who is also not affiliated with Defendant other than in his role as registered agent, is not the object of the service; rather, he is merely a designated proxy by which Defendant La Salle Development may be served. As receptionist of the registered agent’s accounting firm, Ms. Tonks is one step further removed from the general rule in Schwenke that “proper service is not effected by serving the corporation’s receptionist.” As serving a corporation’s receptionist is generally not effective in serving a corporation, certainly serving a receptionist of a registered agent of a corporation is not effective.

Evidence was presented by the Plaintiff that, despite the form of service, Defendant La Salle Development may have received notice of the lawsuit. However, the evidence presented by both sides leaves that factual issue, at best, uncertain. The Utah Supreme Court has stated that it is its “declared policy that in case of uncertainty, default judgments should be set aside to allow trial on the merits.” Locke v. Peterson, 285 P.2d 1111, 1113 (Utah 1955). Moreover, this Court is mindful that “[j]udgments by default are not favored by the courts,” and that “courts, in the interest of justice and fair play, favor, where possible, a full and complete opportunity for a hearing on the merits of every case.” Heathman v. Fabian & Clendenin, 377 P.2d 189, 190 (Utah 1962).

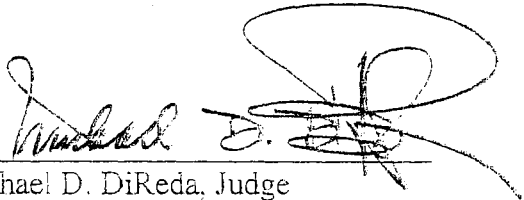
The Utah Supreme Court has held that “a movant is entitled to have a default judgment set aside under rule 60(b) if (1) the motion is timely; (2) there is a basis for granting relief under one of the subsections of 60(b); and (3) the movant has alleged a meritorious defense.” Menzies v. Galetka, 150 P.3d 480, 504 (Utah 2006). As the motion in this case was made under rule 60(b)(4), the motion need only be “made within a reasonable time.” Utah R. Civ. P. 60(b). The motion was made on January 26, 2009, which the court finds reasonable, given it was approximately one month after Defendant became aware of the judgment.

The Court also finds there is a basis for granting relief under rule 60(b). Based on the lack of proper service, the Court never obtained jurisdiction over the Defendant. As such, the default judgment entered by the Court is void, which is provided as a basis for relief under subsection (4) of rule 60(b).

Finally, the Court finds that the Defendant has sufficiently alleged a meritorious defense. "This requirement does not set an overly burdensome threshold: ... [W]here a party presents a clear and specific proffer of a defense that, if proven, would [warrant relief] by the claimant ... it has adequately shown a nonfrivolous and meritorious defense." Menzies v. Galetka, 150 P.3d 480, 517 (Utah 2006). In its memorandum in support of the motion, Defendant disputed that it owes the amounts alleged by Plaintiff in its complaint. This is sufficient to meet the low threshold of presenting a meritorious defense.

Accordingly, the Court grants Defendant's motion to set aside the default judgment. The Court's Judgment of June 6, 2008, is hereby set aside.

Dated this 27th day of April, 2009.


Michael D. DiReda, Judge

VCS v LaSalle
Civil No. 080901677
Page Six

CERTIFICATE OF MAILING

I hereby certify that on the 27 day of April, 2009, I sent a true and correct copy of the foregoing ruling to Plaintiff and Defendant as follows:

David B. Stephenson, Esq.
Attorney for Plaintiff
3986 Washington Blvd.
Ogden, Utah 84403

Rick L. Sorensen, Esq.
Attorney for Defendant
5710 South Green Street
Murray, Utah 84123

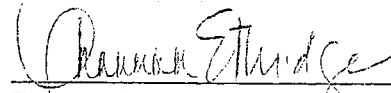

Deputy Court Clerk

EXHIBIT 3

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).

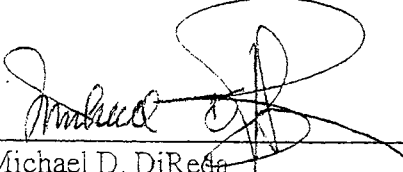
5. CONCLUSION

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 27 day of October, 2010, I mailed a true and correct copy of the foregoing ruling as follows:

Larry G. Moore, Esq.
Ray Quinney & Nebeker P.C.
36 South State Street, Suite 1400
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Salt Lake City, Utah 84111



Deputy Court Clerk

EXHIBIT 4

ORIGINAL
Murray
F. C. Madsen

050901677
For registered agent
Ted Madsen

H. Thomas Stevenson, No. 6803
STEVENSON & SMITH, P.C.
3986 Washington Blvd.
Ogden, Utah 84403
Telephone: (801) 399-9910

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

VCS, INC., a Utah Corporation,

SUMMONS (20 DAY)

Plaintiff,

CIVIL NO. 050901677

vs.

JUDGE: FARLEY K. BROWN

LA SALLE DEVELOPMENT, LLC,

Defendant.

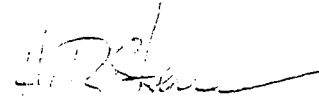
THE STATE OF UTAH TO THE ABOVE NAMED DEFENDANT(S):

LaSalle Development, LLC
Ted A. Madsen, Registered Agent
684 E. Vine Street, #3
Murray, UT 84107 49005 - 01105

You are hereby summoned and required to file with the clerk of the above Court at Second District Court, 2525 Grant Avenue, Ogden, UT 84401, a written Answer to the attached Complaint, and to serve upon or mail to H. Thomas Stevenson, of Stevenson & Smith, P.C., 3986 Washington Blvd., Ogden, Utah 84403, Plaintiff's attorney, a copy of your Answer within twenty (20) days after service of this summons upon you.

If you fail to so answer, judgment by default will be taken against you for the relief demanded in the Complaint which has been filed with the clerk of the above Court and a copy of which is attached and herewith served upon you.

DATED this 16 day of March, 2008



H. Thomas Stevenson
Attorney for Plaintiff

into not (100) on
Murray, Utah 84107
Telephone: (801) 399-9910
Attorneys At Law
A Professional Corporation

RETURN OF SERVICE

Judge Baldwin

STATE OF UTAH

ISS

COUNTY OF WEBER

1. I am a duly qualified and acting Peace Officer, or I am a person over the age of 21 years and am not a party to the action.

2. I served _____ petitioner (), respondent (), witness (), third party (), or other _____

3. Date received: _____ Date served: _____

4. Type of process:

- | | |
|---------------------------------------------------------|-----------------------------------------------|
| <input checked="" type="checkbox"/> Summons & Complaint | <input type="checkbox"/> Order of Restitution |
| <input type="checkbox"/> Supplemental Order | <input type="checkbox"/> Writ of Execution |
| <input type="checkbox"/> Order to Show Cause | <input type="checkbox"/> Bench Warrant |
| <input type="checkbox"/> Affidavit & Order | <input type="checkbox"/> Subpoena |
| Other: _____ | |

5. Delivering said copy to said individual personally at:

By leaving said copy with: _____ a person of suitable age and discretion at the usual place of abode.

☒ Serving a company or corporation: US Salt Development, LLC c/o Agent Ted Madison

By leaving with: Secretary for Ted Madison

I certify that I mailed a copy of said document to the _____ by placing said document in a US Mail receptacle.

6. Upon serving the same, I endorsed the date and place of service and my name on said service.

7. I was unable to serve: _____ at _____

_____ Utah
petitioner (), respondent (), witness (), third party () other: _____

for reason that: _____

I HEREBY CERTIFY THAT FOREGOING IS TRUE AND CORRECT AND THAT THIS CERTIFICATE IS EXECUTED ON THE DAY OF: 3-10-08

SIGNED: _____

SUBSCRIBED AND SWORN TO before me this 19 day of March 2008

NOTARY PUBLIC _____
Residing in the State of Utah

Service fee \$ _____

Mileage fee \$ _____

Mileage fee \$ _____

No. of trips _____

Total due \$ FEES

