

2016

**Scott Bell and Todd Bell, Plaintiffs, vs. Wesley Lewis and Jordan Construction, Inc., Defendants**

Utah Supreme Court

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**IN THE SUPREME COURT FOR THE STATE OF UTAH**

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SCOTT BELL and TODD BELL,

Plaintiffs,

vs.

WESLEY LEWIS and JORDAN  
CONSTRUCTION, INC.,

Defendants.

District Court Case No. 080104364

Appellate Case No: 20160474-SC

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AND RELATED THIRD-PARTY  
ACTION.

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**REPLY BRIEF OF APPELLANT**

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*Appeal from the Fourth District Court, Utah County, Judge Christine S. Johnson, from  
Order Denying Third-Party Plaintiff's Motion for Attorney's Fees, and Granting Third-  
Party Defendants' Motion for Entry of Final Judgment and Final Judgment*

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## ARGUMENT

Pursuant to Rule 24 of the Utah Rules of Appellate Procedure, this Reply Brief is limited in scope to matters raised by FNMA in its Appellate Brief. However, some of the arguments and facts set forth in Jordan Construction's principal Appellate Brief are relevant and lend context to the arguments contained herein. Therefore, Jordan Construction incorporates its principal Appellate Brief and the arguments made therein herein by reference.

### **I. FNMA COULD HAVE AND SHOULD HAVE OBJECTED TO THE WRIT OF EXECUTION.**

FNMA argues that the original Writ of Execution upon which Jordan Construction attempted to execute should not have been issued in the first place and that FNMA should not have been required to respond. However, all of that ignores the fact that FNMA was on notice of the proceedings and had the entire court record available to it at all relevant times. It could have and should have objected when the Writ of Execution was entered because at that point it had an interest in the property and was on notice that there was a mechanic's lien claim pending that affected title to the property.

FNMA argues that the Writ of Execution would have only allowed Jordan Construction to execute on its *in personam* judgment against Scott Bell, and that since Scott Bell no longer owned the property, Scott Bell had no further interest to foreclose. However, the Writ of Execution was intended to allow the foreclosure of the mechanic's lien from the very beginning. The property at issue was the very subject of the mechanic's lien foreclosure claim. Jordan Construction prevailed on its mechanic's lien

claim. The mechanic's lien appeared in the chain of title along with a *lis pendens*. These documents would not have appeared in the chain of title if the pending litigation did not directly affect title to the property.

Jordan Construction could not have executed on its *in personam* judgment against Scott Bell at that point in any event because Scott Bell had filed for bankruptcy and was protected by the automatic stay. As a lien holder, FNMA (or its predecessor) knew or should have known that Jordan Construction had obtained permission from the Bankruptcy Court to proceed against the property and foreclose its mechanic's lien. That permission was conveyed to the trial court in this case, and the foreclosure sale was noticed. The sale of the property was always about the mechanic's lien foreclosure, not the *in personam* damages awarded to Jordan Construction on Jordan Construction's other claims. This was not a simple execution of a money judgment and never was.

FNMA could have and should have objected to the Writ of Execution at the time it was issued and raised its concerns at that time. It knew or should have known that Jordan Construction asserted a mechanic's lien claim on the property. It knew or should have known that Jordan Construction sought to foreclose the mechanic's lien, and that Scott Bell had filed for bankruptcy. Finally, FNMA knew or should have known that the Writ of Execution was issued for purposes of facilitating a mechanic's lien foreclosure sale. It should have objected then, and asserted its rights. The trial court likely would have held a hearing at which point the rights of the parties with respect to the property could have been determined. Instead, FNMA did nothing, and waived its right to object. Even if

FNMA believed that Jordan Construction sought only to enforce its *in personam* money damages judgment, it nevertheless should have objected to preserve its property rights.

**II. THE LIS PENDENS NOTIFIED FNMA THAT ITS INTEREST IN THE PROPERTY MAY BE AFFECTED BY LITIGATION BETWEEN JORDAN CONSTRUCTION AND BELL. FNMA COULD HAVE AND SHOULD HAVE INTERVENED.**

FNMA does not dispute that a *lis pendens* was recorded in the chain of title to the Scott Bell home on December 15, 2008 (R. 2741), and that this same *lis pendens* appeared in the chain of title to the home throughout this case, including at the time FNMA purchased the home at the trustee's sale. Nevertheless, FNMA continues to argue that it is not bound by the judgment Jordan Construction obtained against Scott Bell in spite of the *lis pendens*. This argument ignores the fact that if FNMA had concerns about how Scott Bell was defending the case, it could have and should have intervened to protect its interest.

This Court has held that the purchaser of real property that is subject to a *lis pendens* acquires the property subject to the outcome of the litigation. "The recording of a *lis pendens* provides constructive notice to all persons that the rights and interests in the property at issue are controverted. One who purchases property subject to a *lis pendens* acquires only the grantor's interest therein, as determined by the outcome of the litigation." *Timm v. Dewsnup*, 921 P.2d 1381, 1392 (Utah 2006) (citing *Hidden Meadows Dev. Co. v. Mills*, 590 P.2d 1244 (Utah 1979)). If a purchaser does not feel that its interest is being adequately protected, it may intervene in accordance with Rule 24 of the Utah Rules of Civil Procedure. Rule 24(a) provides that "anyone shall be permitted to

intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. . .”

Further, “[t]he recording of a *lis pendens* serves as a warning to all persons that any rights or interests they may acquire . . . are subject to the judgment or decree. **One who acquires an interest in land that is the subject of the pending litigation . . . is charged with notice of the claimed contrary rights of others, and he is bound by the judgment rendered in the litigation.**” *Bagnall v. Suburbia Land Co.*, 579 P.2d 914 (Utah 1978). They either accept the results, or intervene because their interests are not being adequately protected.

Because a *lis pendens* appeared in the chain of title to the property at the time FNMA purchased it, FNMA is charged with notice of the pending litigation, and is bound by the judgment rendered in the litigation. *Id.* Any other result is contrary to the very purpose of a *lis pendens*. The trial court failed to properly recognize that FNMA is bound by the judgment against Scott Bell insofar as it applies to the property in question. (R. 3206). This Court should reverse the trial court and declare that FNMA is in fact bound by the judgment Jordan Construction obtained against Scott Bell and direct the lower court to enforce the judgment against FNMA allowing Jordan Construction to foreclose its mechanic’s lien.



### **III. SCOTT BELL AND FNMA WERE IN PRIVITY WITH EACH OTHER AT THE TIME OF THE JUDGMENT AGAINST SCOTT BELL**

FNMA argues that FNMA did not have the same interest in the property as Scott Bell, and that therefore there is no privity required for Res Judicata. However, FNMA ignores the fact that *after* FNMA purchased the property at the Trustee's Sale, it held the exact same right to the property that Scott Bell held before he ever executed the Trust Deed.

Mechanic's liens relate back to the date on which work was first commenced. Utah Code Ann. § 38-1-5 (2008). In this case that was October 15, 2006. Scott Bell had a full 100% unencumbered interest in the property until that time. After October 15, 2006, the mechanic's lien attached to the entire interest held by Scott Bell at that time, and Scott Bell held an interest encumbered only by the mechanic's lien. As of that date, the Trust Deed had not yet been recorded. The Trust Deed was recorded on February 1, 2008. At *that* point, Scott Bell granted certain property rights to his long-term financing lender (i.e., the right to sell the property to recover the balance of the loan in the event of nonpayment). Those rights were taken by the lender subject to and inferior to the already attached mechanic's lien. This is because the Mechanic's Lien had already previously attached as of the date work first commenced (October 15, 2006), even though it had not yet been recorded. At the Trust Deed foreclosure sale, the rights granted to the lender were reunited with the possessory rights Bell had continued to possess before the sale. Once again, all rights in the property were reunited, save Jordan Construction's mechanic's lien interest, just as they had been immediately before Bell had conveyed the

Trust Deed to his lender. Therefore, FNMA held the exact same interest that Scott Bell held at the time the mechanic's lien attached, but before executing the original Trust Deed. That is, a 100% interest encumbered only by the mechanic's lien.

This Court "has defined the word 'privity' as a 'mutual or successive relationship to the same right or property.'" *Tanner v. Bacon*, 136 P.2d 957, 960 (Utah 1943). "As applied to judgments or decrees of courts, the word means one whose interest has been legally represented at the time." *Id.* (citation omitted). As illustrated above, after the foreclosure sale, FNMA had the exact same rights in the property as Scott Bell had after the mechanic's lien had attached but before the Trust Deed was recorded. Thus, FNMA took the property subject to the outcome of the litigation between Jordan Construction and Scott Bell insofar as it related to the property, and the trial court should be reversed.

#### **IV. THE TRIAL COURT'S ORDER GRANTING JORDAN CONSTRUCTION'S MOTION FOR PARTIAL SUMMARY JUDGMENT WAS FINAL FOR RES JUDICATA PURPOSES.**

Utah courts have made clear that summary judgment, for *res judicata* purposes, satisfies the final judgment on the merits requirement. *See e.g. Am. Estate Mgmt. Corp. v. Int'l & Dev. Corp.*, 1999 UT App. 232, ¶ 16, 986 P.2d 765 ("Summary judgment on the Separation Agreement claims constituted a judgment on the merits which became final upon entry of the Final Order."). There is no requirement that the summary judgment order be certified pursuant to Rule 54 of the Utah Rules of Civil Procedure, which confirms judgments as final for purposes of appeal. The two concepts are not necessarily tied together.

It is true that all issues and all claims between Jordan Construction and Scott Bell had not been resolved with the trial court's order on summary judgment. However, that does not necessarily mean that the issues and claims disposed of by the summary judgment motion were not final for purposes of *Res Judicata*. Rule 54 certification and *Res Judicata* are two completely unrelated concepts. Rule 54 certification signals that all claims between parties have been resolved and that the case is ripe for appeal. *Res Judicata* does not require such a certification and can be applied absent any sort of Rule 54 finality.

In this case, the trial court decided all issues relating to the property between Jordan Construction and Scott Bell in Jordan Construction's favor in all respects, including on its mechanic's lien foreclosure claim. (R. 0529). This was final. The trial court subsequently entered a final modified Order regarding those issues on August 3, 2011, conclusively determining all issues contained therein. (R. 0888). The fact that there were still issues outstanding relating to Scott Bell's personal claims against Jordan Construction is irrelevant. Therefore, *res judicata* should have been applied to prevent re-litigation of the issues and the trial court should be reversed.

**V. THE 2 TON PLUMBING CASE CITED BY FNMA IS INAPPOSITE ON THE ISSUES OF INTEREST OR AMENDMENT.**

In its brief, FNMA cites *2 Ton Plumbing, LLC v. Thorgaard*, 2015 UT 29, 345 P.3d 675 in support of its position that Jordan Construction should not be permitted to recover interest on its mechanic's lien claim. FNMA appears to take the position that under *2 Ton Plumbing*, interest was not allowed to be awarded on mechanic's lien claims

At first blush, the *2 Ton Plumbing* case and this case appear to be remarkably similar factually. However, the facts of the *2 Ton Plumbing* case are distinguishable in critical ways, and the issues to be considered are not the same. In *2 Ton Plumbing*, the contractor asserting the mechanic's lien attempted to amend the lien to increase the principal amount of the lien in order to unilaterally add attorney fees and interest to its original lien amount. *Id.* The Utah Supreme Court held that these amendments were not permissible because interest and attorney fees are not proper components of the amount appearing on the face of the lien. *Id.* Jordan Construction takes no issue with that conclusion and has made no attempt to increase the amount on the face of its lien to include attorney fees and interest.

Critically, the Supreme Court did not opine as to whether interest was allowed at all on a mechanic's lien claim (as FNMA seems to assert), nor whether a mechanic's lien may be amended at all. That is not the situation in this case, and there is no Utah case that directly answers either question. In this case, the lien was amended to add principal amounts that were discovered after the original lien had been filed because the facts had been concealed by Scott Bell. Jordan Construction did not seek to add interest to the amount appearing on the face of the lien. Rather, Jordan Construction's interest claim has nothing to do with mechanic's lien law per se. Rather, it is based upon its forbearance of money and the calculable certainty of the amount of damages.

Interest is routinely awarded in Utah cases where damage amounts can be calculated, regardless of the type of case. This includes mechanic's lien cases. *See, e.g., Lignell v. Berg*, 593 P.2d 800 (Utah 1979). “[T]he interest issue is injected by law into

every action for the payment of past due money.” *Id.* at 809. In addition, prejudgment interest is appropriate “when the loss has been fixed as of a definite time and the amount of the loss can be calculated with mathematical accuracy in accordance with well-established rules of damages.” *Iron Head Constr., Inc. v. Gurney*, 2009 UT 25, ¶ 11, 207 P.3d 1231 (internal citation omitted). A mechanic’s lien claim is one that necessarily arises from contract and the payment of past due money, and fits squarely within the holding of *Lignell* and Utah Code Ann. 15-1-1. Prejudgment interest at the statutory rate should have been awarded by the trial court.

In 2012, the Utah Legislature codified the ruling in *Lignell*, and specifically applied the Section 15-1-1 interest rate to all mechanic’s lien claims. Utah Code Ann. § 38-1a-309. Simply because it was not previously codified does not mean that interest was not allowed at all. There were other sources of law on the matter that should have been applied. Therefore, Jordan Construction is entitled to recover pre-judgment interest at the rate of 10% per annum from the time the money was first due until judgment is awarded. The trial court’s ruling should be reversed and this Court should remand for a determination of the amount of interest to which Jordan Construction is entitled.

**VI. THE TRIAL COURT ERRED IN RULING THAT JORDAN CONSTRUCTION’S SECOND AMENDED MECHANIC’S LIEN WAS UNTIMELY**

The trial court erred in holding that Jordan Construction’s Second Amended Notice of Mechanic’s Lien was untimely and therefore invalid. It is clear and undisputed that the original notice of lien (and the first amendment thereto) was timely recorded under the provisions of the 2008 version of Utah’s mechanic’s lien statutes. The parties

have argued, however, over whether the second amendment to the mechanic's lien was timely.

There has likewise been some wrangling related to that issue over whether Jordan Construction should have been permitted to amend its response to a request for admission wherein it admitted that a certificate of occupancy had been issued in October 2008. That argument is adequately briefed in Jordan Construction's principal brief and is not belabored here. However, it would not be necessary for the Court to reach that question at all if the Court applies principles of equitable tolling.

FNMA argues that neither the equitable discovery rule nor the relation back doctrine should be applied to rescue Jordan Construction's arguably untimely second amended lien. Some underlying factual context is helpful to understanding why FNMA's argument on this point should be disregarded. The undisputed fact is that the Second Amended Lien that is at issue had already appeared in the chain of title to the property long before FNMA ever obtained the Trust Deed or purchased the property at the trustee's sale. The amendment did not catch FNMA by surprise, and did not prejudice FNMA in any way. Scott Bell, the party the timeliness of the filing affected most, and who was in the best position to assert the defense made no objection and did not raise the defense at all. By the time FNMA purchased the property, the original mechanic's lien and the two amendments had long appeared in the chain of title.

Both equitable discovery principles and the relation back doctrine should be applied in this case to further their exact purposes and to avoid an unjust result.

**A. The Principles Governing the Equitable Discovery Rule for Reviving Claims Should Apply Equally in this Case**

While the equitable discovery rule has traditionally been applied to revive claims made in litigation brought after the applicable statute of limitations has run, the rationale is the same and the same principles should govern. The fact is that Scott Bell through his fraud and deception hid the facts from Jordan Construction. Jordan Construction did everything it could possibly do to discover the full extent of the damages as quickly as it possibly could. This case does not present a situation in which FNMA believed it was free from any liability due to the passage of time. Both the original lien and the amended liens appeared in the chain of title before FNMA ever became involved. In fact, judgment had been awarded to Jordan Construction permitting Jordan Construction to recover on the second amended lien before FNMA ever became involved. Scott Bell did not object to the Second Amended Lien, and did not raise a defense on those grounds. FNMA is simply attempting to take advantage of an unfortunate situation caused by Scott Bell that was entirely out of Jordan Construction's control. This is the exact type of injustice that the equitable discovery rule was intended to alleviate. Even if the Second Amended Notice of Mechanic's Lien was brought outside the applicable limitations period, it should be revived by the Equitable Discovery Rule.

**B. The Relation Back Doctrine Should be Applied.**

Even if the trial court was correct in refusing to consider the actual certificate of occupancy and rely only on Jordan Construction's admission, the trial court should have applied the relation back doctrine to allow the amended lien to be enforced. Although an

amended notice of lien is not exactly the same as an amended pleading in litigation, the rationale in favor of applying the doctrine is the same and should be applied in this case to reach an equitable result.

“Utah’s relation back doctrine developed out of the common law under which a party could correct a clerical error without bringing a new action where the real parties were involved unofficially all along.” *Gary Porter Const. v. Fox Const., Inc.*, 2004 UT App 354, ¶ 32, 1010 P.3d 371. Rule 15(c) of the Utah Rules of Civil Procedure also addresses relation back of amendments. “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.” Utah R. Civ. P. 15(c). This includes amendments to increase the amount of damages sought, which is what Jordan Construction did in this case.

In this case, FNMA had actual notice of the amended notice of mechanic’s lien because the amended notice of mechanic’s lien appeared in the chain of title long before FNMA ever acquired the trust deed or the property itself. (R. 3947) (Addendum 3 – Second Amended Lien). FNMA cannot reasonably argue that it did not have notice of Jordan Construction’s claim. There is no compelling reason that the amendment should not be permitted in this case given the circumstances of this case. Additionally, the second amended notice of mechanic’s lien arose from the same transaction and set of facts as the original notice of lien. In arguing that the second amended notice of lien was untimely, FNMA simply took advantage of Scott Bell’s fraud and concealment.



**CONCLUSION**

For the foregoing reasons, the trial court's judgment should be reversed.

DATED this 20th day of December, 2016.

---

Jeffery J. Owens  
*Attorney for Jordan Construction, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 20th day of December, 2016, and pursuant to Rule 26(b) of the Utah Rules of Appellate Procedure, two copies of the foregoing *Appellant Brief* was served to the following via e-filing

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