

1960

# Utah Savings & Loan Association v. Robert B. Mecham et al : Reply Brief of Appellant

Utah Supreme Court

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IN THE  
**SUPREME COURT**

OF THE **FILED**  
**STATE OF UTAH** 11 - 1960

UTAH SAVINGS & LOAN  
ASSOCIATION,  
*Plaintiff and Respondent,*

vs.

ROBERT B. MECHAM et al.  
LUDLOW PLUMBING SUPPLY CO.  
*Defendant and Appellant,*

Clerk, Supreme Court, Utah

Case No. 9159

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REPLY BRIEF OF APPELLANT LUDLOW PLUMBING  
SUPPLY CO.

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In Respondent's statement (page 4) it contends that Appellant did not in the original pleading nor in the two amended pleadings of each of the three cases pray for the foreclosure of its whole lien by a sale of all the property covered by its lien, and to which it claimed to have furnished materials, and the "bond law" wasn't mentioned. We do not agree with this statement. In paragraph 3 of its prayer in the Second Amended Answer and Counterclaim, Appellant

prays for judgment that the lien of Appellant be decreed superior to that of Respondent and for a sale of the property, and in paragraph 4 of the prayer Appellant prays for judgment against Mecham, and against plaintiff and Cross-defendants for any deficiency. In paragraph 4 of the Third Defense in each case Appellant alleges that plaintiff had not required a bond from defendant, Robert B. Mecham, as required by Title 14-2-2, UCA 1953, and again in paragraph 6 of the Third Defense Appellant alleges that upon Cross-Defendant D. Spencer Grow learning of his and plaintiff's together with the other Cross-Defendants liability created by Section 14-2-2, UCA 1953, Cross-defendant, D. Spencer Grow, changed his proposal, and proposed to Robert B. Mecham that Mecham secure a tract of land for construction of proposed subdivisions, etc. Of course Appellant could not ask the court in these actions to order a sale of that property which was not brought before the court by the foreclosure actions of Respondent when Appellant was brought into the action as a defendant by Respondent.

It is surprising that Respondent represents that Appellant did not bring before the court cross-defendant D. Spencer Grow and the other cross-defendants named in the title of Appellant's answer and cross-complaint. All of the cross-defendants named filed their pleading to the cross-complaint in the form of a reply and at no time during the trial of the case did Respondent contend that these parties were not before the court.

Respondent sets out at pages 5 and 6 of its brief certain findings of the court (a) and (b) referring to Key-ridge properties and (d) referring to a parcel of land in Provo, Utah. None of these properties were in issue in any

of the three actions, it having been pointed out by Appellant in its original brief that Appellant seeks to foreclose its lien as to the Keyridge properties covered by Appellant's lien in another action now pending in the district court.

At page 7 of Respondent's brief Respondent contends that because Appellant is not seeking to foreclose its lien as against all the property described in the Notice of Lien but because Appellant is claiming the total amount of its lien as against the 34 properties its lien is invalid. Appellant devoted much of its original brief pointing out the fact that while the lien as filed is in the total amount against each property liened still Appellant must rely on the apportionable rule in the foreclosure of its lien and the sale of the property. Respondent throughout the trial of the case and in its brief, and even now appears to be confused in the matter of the filing of a lien and proceedings for the foreclosure of the lien and sale of the property.

Again at page 15 Respondent reiterates the fact that because, as Respondent contends, Appellant is not seeking the foreclosure of its lien against 101 properties covered by its lien, the lien is unenforceable. It seems that Respondent assumes that a lien cannot be foreclosed in more than one action. Appellant is seeking and will seek the enforcement of its lien as it affects other properties not involved in these actions and not affected by those mortgages herein sued on by Respondent in another action now pending and in other actions to be filed when the building has been completed.

Appellant takes no issue with those authorities cited by Respondent which hold that a single mechanic's lien may not be enforced against less than the whole of the property liened, that does not mean that the lien may not be enforced

in more than one action and especially is this true where as in this case a foreclosure of mortgages is filed against a part of the property covered by the lien which requires the lien claimant to defend as against such foreclosure. Appellant is not seeking foreclosure of the whole its lien against only a portion of the property lien.

In Rockel on Mechanic's Lien, Sec. 237 page 572 it is said:

“If all of the tract of land that is subject to a lien is not described in the complaint and the building itself covered all, a decree for the entire tract may be had. As a general rule however, only the part of the land described in the petition can be held and decreed subject to the lien.”

In the Sarginson vs. Turner case, 124 P. 379 quoted from by Respondent at page 17, it appears the case was decided against the lien claimant because the controlling issue was whether the lien claimant contracted with the agent for the owner or not and the court found that the claimant did not contract with the agent for the owner. There is no contention in the instant case by Respondent that Mecham was not the agent for the owner of some Schauerhamer properties or that Mecham was the owner-builder of some of the Schauerhamer properties and of the Rowley and LaMesa properties.

Reference is also made by Respondent to the Brannan vs. Santa Fe Land Co. case found in 332 P (2d) 892 relied on by Appellant and it is argued by Respondent that the court attributed the lien to a portion of the property because it was easily ascertained. It is to be noted however that the court and not the lien claimant apportioned the lien

and this even though the lien claimant had filed his lien for the total amount of its claim against a portion of the property on which work and materials were furnished.

Under Respondent's Point II Respondent again misconstrues the contentions of Appellant in its pointing out that Appellant by the three cases now before the court seeks the foreclosure of its lien on but 34 properties, however as heretofore stated while this is true because of the manner in which Appellant was brought into the foreclosure actions as a defendant, still appellant looks to the other properties on which its materials were furnished and on which it filed its lien for satisfaction of its lien as it affects those properties through other actions. This is the reason Appellant seeks to have the apportionment rule applied by the court.

At pages 20 and 21 of Respondent's brief Respondent sets out some of the findings of the trial court by which the court found that Mecham paid a cash consideration to Rowley for the four Rowley lots and that Mecham paid \$20,000 of a \$30,000 consideration to Rowleys for the purchase of the LaMesa properties. The court should have found that these monies were furnished by Respondent and that Mecham had no monies with which to purchase either of said properties.

The other findings set forth on pages 22 and 23 show that Mecham treated his venture as one project, working in all four areas at one and the same time, and therefore Appellant's lien was prior in time to the mortgages on Schauerhamer, Rowley and LaMesa areas because of the furnishing of materials on the Keyridge area much earlier than the mortgages were filed on the three mentioned areas. Should the Honorable Court not agree with this position of Appellant then most certainly the priority of Appellant's lien is



established as of the first delivery to Schauerhamer which would give priority over the Rowley and LaMesa mortgages.

Even if Appellant conceded for the purpose of argument that Mecham was the owner of all the properties as Respondent contends, and neither Grow, or Grow's companies or Respondent were the owners of the properties affected by the three actions and of the properties mortgaged by Mecham and foreclosed on by Respondent which properties are located in the Schauerhamer, Rowley, and LaMesa areas, then we have an Owner-Contractor relationship with the Lien Claimants who would be original contractors and not sub-contractors as was held by this Honorable Court in the case of *Holbrook vs. Webster's Inc., et al.* 320 P2d 661 Mecham having admitted that he had but one contract with Appellant and one account, then the lien attached as contended for by Appellant. It is unimportant that the properties were not contiguous.

In *Rockell on Mechanic's Liens*, Sec. 135, p. 359 the Virginia Code is quoted and considered as follows:

“Under Virginia Code, 1873, c 115, Sec. 3, which provides that ‘persons performing labor or furnishing materials for the construction, repair or improvement of any building or other property shall have a lien upon such property’, a subcontractor who furnishes materials for the construction of two houses erected under a single contract on lots on opposite sides of a street has a joint lien on both houses and lots for the entire amount of materials furnished for both houses.”

The Virginia Code is similar to Sec. 38-1-3, UCA 1953.

It is evident from the law as stated by Rockell that the property lien need not be contiguous and if it can be separated by a street then under the same rule of law it can be one block, one mile or two miles apart so long as it is treated as one project by the contractor in dealing with the materialman. The test is, was the building under one contract. Mecham admits that it was.

Rockell further says at page 361:

“The fact that at one time the land upon which the building is erected was in two tracts will not prevent it from being considered as one, so far as the lien is concerned if treated as such by the owner.”

As to the court's having found that Mecham was engaged in other building for others, this is unimportant especially as to the rights of this Appellant for the reason that it does not appear from the evidence that any of the materials furnished by Appellant went into other properties than those liened.

Referring to Point III raised by Respondent, as heretofore pointed out, the bond law was an issue in the case at all times and never was abandoned by Appellant. The apportionment rule may be applied under this rule the same as under the foreclosure of the lien. There is an abundance of evidence, other than that pointed out by Appellant in it's brief, showing that all the materials furnished by Appellant and used on the four areas were delivered to either the Keyridge or LaMesa points of delivery and taken from those two points by Mecham's men and used in each house in each area as needed.

Under Respondent's Point IV it states that there is no evidence in the record showing that Mecham was instructed

by Grow as agent of Respondent to take title in his (Mecham's) name and that Respondent would furnish the money, and that Respondent was the real party in interest. While those exact words may not have been used by the witnesses the meaning was most certainly there as is evident from the following portion of the record taken from Mr. Bullock's cross examination of Mr. Mecham, page 397. The following is the answer given by Mr. Mecham to a question propounded by Mr. Bullock:

A The time we started the last seven houses in Schauerhamer, we had discovered that we were getting ourselves out on a limb, ready to be sawed off. And it was necessary to obtain new building, new work, and new money as fast as we could to pay the bills on Keyridge, and also the other houses being built for Mr. Grow on contract in the Schauerhamer division. Therefore we kept—we cut our crew down on Keyridge, also on the other two houses designated as lots 10 and 11, in the Schauerhamer division, thereby making it possible to build faster on the new construction, to pull more money back in to pay old bills on Keyridge, and bills that were accumulating on the houses we had contracts for.

(page 403)

Q What I want to know is what did you tell Mr. Grow with reference to the deal which you had with the Rowleys with respect to these four lots?

A In general I told him I had gone ahead with the plan of obtaining ground and we were held up for the time being by Orem City, so we could get permits on LaMesa. This ground was obtainable and it would keep the crew busy while

the other ground was being prepared for permits.

Q Did you tell Mr. Grow that you needed the money to pay for the land?

A I imagine I did.

Q Do you remember whether you did or not?

A I don't remember in that many words. He definitely knew I needed it.

Q Why did he know that you needed the money?

A He knew that that was the reason I was going on to new ground, was to build more houses and acquire—get a hold of more money so I could pay the bills.

Q Is it your testimony that the transfer of title to the Rowley property took place after the transfer of title to the LaMesa?

A No, that is not my testimony. My testimony is that the original deal between myself and the Rowleys, with Mr. Grow's consent, was made for LaMesa prior to the deal for the Rowley lots.

Q What arrangements did you have for payment on the LaMesa ground?

A I had previously arranged, with the consent of Mr. Grow, to have the property deeded to me, and in turn, give the Rowleys a second mortgage on the property. Then payment was to come to Rowleys from money drawn on those particular lots.

Q From Utah Savings?

A Yes.

Respondent states under Point V that Appellant refused to consider apportioning its lien at the pre-trial and at the trial of the case. Such is not the case. Upon inquiry being made of counsel for Appellant, at both the pre-trial and at the trial, if Appellant was claiming the whole of its lien against all of the property and each of the tracts and counsel stated that it was, which is correct. Counsel stated that it would not be possible to show the amount of material charged to each property, but at no time did Appellant represent that it would not rely on the equitable equal apportionable rule.

The 52 lot figure was determined from the evidence, the fact that Appellant's materials went into 52 of the properties improved, all of which are covered by Appellant's lien, the descriptions of which were taken from information furnished to Appellant by Respondent in the Lien Waiver requested by Respondent from Appellant.

At page 30 of Respondent's brief Respondent states that there is no evidence as to the value of materials furnished by Appellant "to be used" in or upon or actually used in or upon any one or group of the 34 properties involved in the three actions and that there is no evidence that Appellant furnished any materials "to be used" in the Schauerhamer or Rowley areas. Mr. Mecham testified to the fact that materials furnished under his order by Appellant were used in each of the areas and upon each one of the properties and that testimony is undisputed and uncontradicted even by Mr. Grow. It is evident that the same plans were used in each area with a few exterior changes or by the placing of the building either long wise or side wise on the lot, and while the Schauerhamer, Rowley, and LaMesa houses contained a little more square foot area, still the houses were sub-

stantially the same. There is no contradiction of this evidence.

As to Point VI Respondent states that Appellant's witness Knudsen admitted he knew of the existence of mortgages on the properties. The evidence is substantially to the effect that from his experience in the business he had knowledge of the fact that building projects were financed through mortgage money. He had no actual knowledge of the particular mortgages as against a particular property. The fact is that in the LaMesa area the mortgages do not describe the property on which the improvement was made.

On page 33 Respondent states that Mrs. Mecham called the Notary Public who took Mrs. Mecham's acknowledgment over the telephone. We submit that this is not the evidence. The evidence is to the effect that Mrs. Mecham talked with an employee who testified that she was in the office with the Notary and the employee advised the Notary that Mrs. Mecham had acknowledged the signing of the instrument to her.

Respondent relies on the Utah case of Northcrest Inc. vs. Walker Bank & Trust Co. 248 P2d 692 in support of its argument that Appellant failed to overcome the presumption of the regularity of the acknowledgment on the mortgages affecting the LaMesa properties. It is Appellant's contention that this presumption was overthrown and that it was the duty of Respondent to then prove which mortgages it contended were valid.

As to Point VII regarding the question of estoppel, it is the contention of Appellant and Appellant urges that Respondent should be estopped from questioning the validity of Appellant's lien because of its actions and the part taken by



Respondent in dealing with lien claimants through Robert Mecham. Mecham has not questioned the lien and in all fairness, and equity dictates that Respondent should be estopped from questioning the validity of this lien. Mr. Grow, as agent for Respondent, knew that Mecham was broke and that Mecham could not even finish the houses started for Grow and his companies in the Keyridge area and still Respondent was willing to finance Mecham in these other areas having full knowledge of the fact that Mecham was in debt some \$150,000. Respondent had full knowledge of the fact that monies were being taken from the LeMesa mortgages before, as Respondent contends, one stick of lumber had been used in LaMesa and before any work had been done in this area, and used to pay old bills on Keyridge and to acquire land in the LaMesa and Rowley areas. Respondent made it possible for Mecham to continue to pile up obligations with materialmen who were furnishing materials for the properties. If Mecham had drawn on the Keyridge area, monies in excess of the contract price as Respondent contends on pages 38 and 39 of it's brief, it was the obligation of Respondent to put a stop to such action on the part of Mecham and to not encourage the continuance of such actions to the detriment of others, as it does appear it was to the detriment of those dealing with Mecham. Respondent controlled the payment of monies realized from the mortgages at all times. Mecham did not even know which accounts the draws were being charged against.

Respondent states at page 40 of it's brief that in twenty days of trial and in over thirty depositions not a single lien claimant, including any witness for Appellant, could or did point to any representation made by Respondent, Cross-

defendants, or any of them, whereby any lien claimant was misled into extending credit to Mecham, or respecting the ownership of any of the properties. We submit that the record is filled with statements and particularly acts and conduct on the part of Respondent which misled lien claimants and which induced them to continue to furnish their materials to the properties and to extend credit to Mecham.

Respondent argues that because of the incompetence and mis-management of Mecham all parties including Respondent have suffered a great loss. In this Appellant agrees, but Respondent was in a position to have put a stop to such action at any time, which it failed and refused to do.

Under Respondent's Point VIII it would have the court treat the transaction between Mecham and Appellant as though Mecham had operated a plumbing business from the two points of warehousing of materials, but the evidence will not bear out such contention. The evidence is uncontradicted to the effect that all the materials charged for by Appellant and for which its lien was filed were received and used by Mecham upon the properties liened. From the authorities cited by Respondent under its Point VIII, Respondent would have this Honorable Court reverse the decision handed down by this Honorable Court in the Sierra Nevada Lbr. Co. vs. Whitmore case. As an example of those cases on which Respondent relies, in the Tabet vs. Davenport case cited at page 44 it appears from the facts in that case that a large portion of the materials delivered were delivered to a plumbing company warehouse which was not even on the property liened, and even placed in bins with like materials. Therefore this Honorable Court should not be persuaded by such decisions.



The judgment of the trial court should therefore be reversed.

Respectfully submitted,

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