

1991

J. Lamar Richards v. Debra L. Youngman, Deborah
Diamanti, Ameristar Financial Corporation, a
corporation, Associates Financial Services
Company, Inc., a corporation, Security Pacific
National Bank, First Boston Mortgage Securities
Corp., and John Does 1-3 : Brief in Opposition to
Certiorari

Utah Supreme Court

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Ralph R. Tate, Jr.; Attorney for Plaintiff/Appellee.

Sherman C. Young; Jerry L. Reynolds; Ivie & Young; Attorneys for Defendant/Appellant.

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930169

IN THE SUPREME COURT

STATE OF UTAH

J. LAMAR RICHARDS,

)

Plaintiff and Appellee,

:

vs.

)

DEBRA L. YOUNGMAN, DEBORAH

:

DIAMANTI, AMERISTAR FINANCIAL

CORPORATION, a corporation,

)

ASSOCIATES FINANCIAL SERVICES

COMPANY, INC., a corporation,

:

SECURITY PACIFIC NATIONAL BANK,

FIRST BOSTON MORTGAGE SECURITIES)

CORP., and JOHN DOES 1-3,

:

Defendants and Appellant.

Supreme Court No.
910547Court of Appeals No.
920679-CAAPPELLEE'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARIRALPH R. TATE, JR. (#3192)
4685 Highland Drive, Suite 202
Salt Lake City, UT 84117
Telephone: 278-4747
Attorney for Plaintiff/Appellee
J. LaMar RichardsSHERMAN C. YOUNG (#3891)
JERRY L. REYNOLDS (#2728)
IVIE & YOUNG
48 North University Avenue
P.O. Box 672
Provo, UT 84603
Telephone: 375-3000
Attorneys for Defendant/Appellant
Security Pacific National Bank

FILED

MAY 5 1993

CLERK SUPREME COURT,
UTAH

IN THE SUPREME COURT

STATE OF UTAH

J. LAMAR RICHARDS,)	
Plaintiff and Appellee,	:	
vs.)	
DEBRA L. YOUNGMAN, DEBORAH	:	
DIAMANTI, AMERISTAR FINANCIAL	:	
CORPORATION, a corporation,)	Supreme Court No.
ASSOCIATES FINANCIAL SERVICES	:	910547
COMPANY, INC., a corporation,	:	
<u>SECURITY PACIFIC NATIONAL BANK,</u>	:	
FIRST BOSTON MORTGAGE SECURITIES)	:	Court of Appeals No.
CORP., and JOHN DOES 1-3,	:	920679-CA
Defendants and Appellant.	:	

APPELLEE'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

RALPH R. TATE, JR. (#3192)
4685 Highland Drive, Suite 202
Salt Lake City, UT 84117
Telephone: 278-4747
Attorney for Plaintiff/Appellee
J. LaMar Richards

SHERMAN C. YOUNG (#3891)
JERRY L. REYNOLDS (#2728)
IVIE & YOUNG
48 North University Avenue
P.O. Box 672
Provo, UT 84603
Telephone: 375-3000
Attorneys for Defendant/Appellant
Security Pacific National Bank

LIST OF PARTIES TO PROCEEDINGS BELOW

Plaintiff

J. LaMar Richards

Defendants

Debra L. Youngman
Deborah Diamanti
Ameristar Financial
Corporation, a corporation
Security Pacific National Bank
First Boston Mortgage
Securities Corp.

TABLE OF CONTENTS

REPLY TO STATEMENT OF QUESTION PRESENTED FOR REVIEW	1
JURISDICTION	1
APPLICABLE STATUTE	2
STATEMENT OF THE CASE	2
Nature of the Case	2
Proceedings and Disposition Below	3
Response to Statement of Facts	4
APPELLEE'S STATEMENT OF ADDITIONAL FACTS	6
ARGUMENT	8
Introduction	8
Point I. The Application of Constructive and/or Actual Notice was Properly Interpreted by the Court of Appeals	9
Point II. Constructive Notice is Sufficient Notice to Protect Mechanic's Lien Rights	12
SUMMARY	14

TABLE OF AUTHORITIES

Cases Cited

<u>Badger Coal and Lumber v. Olsen</u> , 167 P. 680 (Utah 1917) . . .	10
<u>First of Denver Mortgage Investors v. C.N. Zundel and Associates</u> , 600 P.2d 521 (Utah 1979)	13
<u>George v. Butler</u> , 50 P. 1032 (Utah 1897)	10, 12
<u>Martin v. Hickenlooper</u> , 59 P.2d 1139 (Utah 1936)	8, 12
<u>Metropolitan Life Ins. Co. v. First Security Bank</u> , 491 P.2d 1261 (Idaho 1971)	11
<u>J. LaMar Richards v. Security Pacific National Bank</u> , Case No. 920679-CA, filed March 9, 1993, reported in 208 Utah Adv. Rep. 81	1
<u>Smith v. State Savings & Loan Assoc.</u> , 223 Cal. Rptr. 298, 301, 175 Cal.App.3d 1091 1099 (Cal.App. 1985)	11
<u>Teahen v. Nelson</u> , 6 Utah 363, 23 P. 764	13

Statutes Cited

Utah Code Annotated §38-1-5	2
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REPLY TO STATEMENT OF QUESTION PRESENTED FOR REVIEW

Both the trial court and the Court of Appeals found that "[b]ased upon the undisputed facts of record and equities between the parties, the court concludes the doctrine of equitable subrogation as claimed by defendant Security Pacific is not applicable in this case." (Opinion, page 2) The courts did not change existing law that equitable subrogation may be applicable in a proper fact situation. It is simply not applicable in the fact situation before the court.

The defendant had actual/or constructive notice of the painting and remodeling work that appellee was performing for at least nine days prior to the time the subject property was refinanced. The application of constructive notice is favored by law in cases interpreting mechanic's lien laws. Notice to the appellants was only one of many factual reasons in this case that would bar the application of the doctrine of equitable subrogation. However, knowledge (actual or constructive) by the appellant of the pending work would have been sufficient by itself to bar application of the doctrine of equitable subrogation in this particular fact situation.

JURISDICTION

Jurisdiction arises from the decision of the Utah Court of Appeals in the matter of J. LaMar Richards v. Security Pacific National Bank, Case No. 920679-CA filed March 9, 1993, as reported in 208 Utah Adv. Rep. 81 and is not disputed.

APPLICABLE STATUTE

Utah Code Annotated, 38-1-5:

Priority - Over other encumbrances.

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.

STATEMENT OF THE CASE

Nature of the Case

Appellee is a painting contractor who performed painting services beginning before June 29, 1988, which were described in his lien as "prepare, repair, prime and paint exterior of house and garage." When the painting and repair services were not paid for, a lien was filed and subsequently a foreclosure action was commenced. Security Pacific was named in the suit as the successor in interest to Ameristar Financial Corporation which had performed the original financing.

In July 1988, the month following commencement of appellee's painting work, the subject property was conveyed to Debra Youngman by Lafayette Properties (of which Youngman was an officer) by a deed signed by Youngman's business associate Deborah Diamanti. On the same day Ameristar Financial Corporation

consolidated several loans and encumbrances against the property and refinanced the property for \$320,000. During the refinancing, the bank paid to Lafayette Properties \$53,546.00. Lafayette's interest was unrecorded at the time the painting work commenced. The amount of the encumbrances against the property was increased over the combined amounts of several previously existing encumbrances. Prior to refinancing, the property was appraised by the financing institutions at over \$500,000. After the refinancing, defendant immediately defaulted on payments of the loan and foreclosure was commenced. Appellant acquired the property at the trust deed sale, receiving the benefits of appellee's materials and painting services for itself.

The appellant bank defended the mechanic's lien action, claiming that under the concept of equitable subrogation it should be placed in the position of the various individuals or entities whose loans it paid off when the house was refinanced after the commencement of the painting work. The trial court found that the facts and equities did not warrant application of the doctrine of equitable subrogation and ruled in plaintiff's favor. The Court of Appeals found that the doctrine of equitable subrogation should not be applied in this fact situation and affirmed the decision of the trial court.

Proceedings and Disposition Below

From cross motions for summary judgment, the Hon. Pat B. Brian, Judge of the Third Judicial District Court, found that the doctrine of equitable subrogation is not applicable to the facts

and equities of this case and ruled in plaintiff's favor. The court's order was entered on August 20, 1991. Security Pacific filed an appeal with the Court of Appeals which affirmed the trial court's decision on March 9, 1993.

Response to Statement of Facts

The following Statements of Fact in appellant's Petition are either inaccurate or misleading or not supported by the record.

Appellant's Statements of Fact #1 and #2 are misleading. The date when the property was purchased by Debra Youngman is uncertain. Although the Uniform Real Estate Contract was dated 1985, it was not recorded until after the commencement of appellee's painting work. It was notarized in 1988 by an agent of Youngman's corporation whose notary expired in 1992. It is uncertain from the record whether the actual contract to purchase the property from Youngman's corporation was executed prior to or after the commencement of the painting work. (Record, pages 112-121)

Appellant's Statement of Fact #10 is misleading because it suggests that defendant Youngman did not benefit from the loan proceeds. Youngman was an owner and executive officer of a corporation known as Lafayette Properties (Lafayette) which conveyed the property to Youngman after the commencement of appellee's work. Lafayette received \$53,546.00 from the closing. The details of how Lafayette distributed the money to Youngman was not an issue the trial court addressed. (Record, p. 145)

Appellant's Statement of Fact #16 is misleading. At the

time Mr. Richards began his work, the alleged contract whereby Lafayette sold the property to its owner/officer Debra Youngman was not recorded and therefore was not a senior encumbrance to Mr. Richards' lien. When the subject contract was actually signed is questionable. (Record, pp. 99, 101, 112, 121)

Appellant's Statement of Fact #18 leaves incorrect inferences. The boiler plate small print of the bank form states that borrower (Youngman) has not "...agreed to ... permit any lien upon the property to secure a debt or loan." However, at the time the document was filed no lien had been filed and the financing institutions were either actually or constructively aware of the painting work in progress. The record does not reveal whether the financing institution had actual knowledge. However, it is clear that its client Youngman had actual notice. (Record, pp. 214-215)

Appellant's Statements of Fact #19 and #20 describing Ameristar's expectations are disputed and not supported by the record. There is no evidence showing what the "expectation of Ameristar" may have been. Ameristar did not answer the Complaint and its default was entered. The affidavit filed alleging what Ameristar's expectations were was signed by a person who was not an employee of Ameristar when the subject loan transaction occurred and was not based on personal knowledge of the facts pertaining to this incident. (Record, pp. 172, 178, 205-209)

Appellant's Statement of Fact #21 is incomplete and leaves incorrect inferences in describing the assignments from Ameristar to appellant Security Pacific via another bank. The

assignments were not recorded for seven months after the purported dates of their execution. Richards' lien was recorded in November 1988, approximately six months before the assignments to the appellant bank were recorded. (Record, pp. 102-103, 201-202, 39-40)

Appellant's Statement of Fact #23 is misleading concerning the resale price of the subject property. The record does not show a price for which appellant purchased the property at the trust deed foreclosure or the price for which appellant re-sold the property. (Record, p. 248)

APPELLEE'S STATEMENT OF ADDITIONAL FACTS

1. The Real Estate Contract between Debra Youngman and Lafayette Properties was purportedly dated and notarized by defendant Youngman's business associate and defendant Diamanti. The notary seal indicated that the notary commission expired on March 14, 1992. (Record, p. 121) Presumably, the document was signed during the 4 years prior to the expiration of the notary seal. The actual date of execution of the contract is therefore not known, but the contract was not recorded until June 29, 1988, after the commencement of plaintiff's work. (Record, pp. 112, 99)

2. Richards commenced painting and remodeling work prior to June 29, 1988, and completed his work August 30, 1988. A lien was timely filed on November 16, 1988, for \$5,499.50. (Record pp. 36-40; 99, paragraph 6; 102; 302)

3. In July 1988 Youngman refinanced the subject real estate for \$320,000 and paid off several prior encumbrances. The

financing institutions relied on an appraisal of the property of over \$500,000. (Record, pp. 208, 216, 223) The underwriter at the time of closing identified the loan as one with "good ratios" and "very low loan value." (Record, p. 216)

4. When the refinancing loan closed, the encumbrances against the property were increased by \$16,453.05, most of which were paid to the financing institutions as fees for arranging the refinancing. (Record, p. 218)

5. From the loan proceeds, \$53,546.00 was paid to defendant Youngman's corporation Lafayette Properties. (Record, pp. 157, 174, 178) Borrower Youngman was an endorser with her business associate Diamanti on the \$53,546.00 check paid to Lafayette Properties.¹ (Record, pp. 157, 178, 63)

6. At the time of the loan closing, a deed from Lafayette Properties to Youngman was executed and recorded. Defendant Diamanti signed the deed on behalf of Lafayette Properties under authority of a purported power of attorney. The deed was recorded by U.S. Title Insurance Company at the very same time as the other refinancing documents were recorded (July 7, 12:12 p.m.) (Record, pp. 172, 187) The deed and the real estate contract between Lafayette and Youngman were both recorded after Richards commenced his lienable work. (Record, pp. 112, 99, 101, 39, 40)

¹Debra Youngman was vice president of Lafayette in 1985 and was an endorser of the bank's check to Lafayette. She had a joint personal business account with Diamanti as supported by the record. (Record, pp. 63, 136-137, 157-158)

7. The interest of Ameristar was assigned to First Boston Mortgage Securities Corp. and then from First Boston to Security Pacific National Bank. Both assignments are dated October 15, 1988, but were not recorded until May 10, 1989. (Record, pp. 201-202)

ARGUMENT

Introduction

The facts and equities in this case do not lend themselves to application of the doctrine of equitable subrogation. Appellee asserts there was no material misunderstanding by the lower courts and, in any event, the issues appellant disputes would have had no bearing on the decision of either the trial court or the Court of Appeals. All facts must be considered and equity be of overriding consideration before equity will relieve the clear operation of law. The Court of Appeals stated:

An individual's access to equitable subrogation as a "remedy depends upon the principles of justice, equity, and benevolence to be applied to the facts of the particular case." Hickenlooper, 59 P.2d at 1140.

The Court of Appeals found that in equitable subrogation cases, "[t]he equitable nature of the doctrine prevents articulation of an unwavering rule that applies in all cases." (Opinion, p. 4) A footnote to the opinion in the case at bar is very expressive on the fact sensitivity of this type of case.

Furthermore, this case illustrates the wasteful nature of litigation over the doctrine of equitable subrogation. Plaintiff's five thousand dollar lien has most recently been the subject of a judgment,

including costs and fees, of nearly ten thousand dollars. That does not include the costs or fees relating to this appeal, which plaintiff also recovers. The nature of situations in which equitable remedies are applicable are highly fact sensitive and will always require a significant amount of legal work to present. Thus, encouraging simple contractual solutions is sound public policy. (Opinion, p. 9)

The court also found that between commercially sophisticated lenders and mechanics' materialmen, the legislature favored the statutory protection given to mechanic's lien holders based on constructive or actual notice. The Court of Appeals found as the trial court did that "[b]ased on the undisputed facts of record and equities between the parties, the court concludes that the doctrine of equitable subrogation as claimed by defendant Security Pacific is not applicable in this case." (Opinion, pp. 2-3) The court held that Security Pacific's interest was inferior and subordinate to appellee's mechanic's lien.

Point I

The Application of Constructive and/or Actual Notice was Properly Interpreted by the Court of Appeals

In appropriate circumstances constructive notice will defeat application of equitable subrogation. The Court of Appeals is not enumerating an unwaverable rule of constructive notice. Equity cases by their very nature must be evaluated on their uniquely different fact situations. In this case the constructive notice of outside painting work beginning over 9 days prior to refinancing was found to be sufficient basis to sustain the trial

court's decision. The Court of Appeals therefore did not have to address in detail the numerous other equitable issues which supported the trial court decision.

The appellant correctly indicates that actual knowledge would be an absolute bar to equitable subrogation. Badger Coal and Lumber v. Olsen, 167 P. 680 (Utah 1917) In the case before the court, the trial court never had to address the issue of whether the bank (appellant's predecessor) had actual knowledge or only constructive knowledge. Defendant Youngman (the bank's client) knew that Richards had started his painting work sometime before June 29 and therefore she had actual knowledge. Bank loan documents were not signed until July 7. The Court of Appeals affirmed the trial court's decision which ruled both legally and equitably in favor of the painter (appellee). Both courts gave the appellant the benefit of the doubt that the bank may have had only constructive notice rather than actual notice.

Appellant relies on George v. Butler, 50 P. 1032 (Utah 1897) which is also a highly fact sensitive case based on a misidentification of a lot. The parties were ultimately placed into the equitably correct position based on actual facts. The case was decided on the issues of equity, not on the nature of constructive or actual notice.

In the case at bar, the Court of Appeals chose to consider constructive notice as a significant element (but not the only element) in balancing equities. The Court of Appeals concludes that in this fact situation constructive notice was a

sufficient basis to uphold the trial court's findings that the equity factors favored the mechanic's lien holder. Appellant interprets the opinion as making a universal rule on "constructive notice" rather than a rule applicable to this case. Either way, the opinion of the Court of Appeals would be correct. However, from reading the entire opinion, it appears that this ruling was intended to be applicable to facts in this particular case. The Court of Appeals recognized that equitable subrogation cases must be weighed upon all of the facts. This is apparent from statements in the opinion that "[t]he nature of situations in which equitable remedies are applicable are highly fact sensitive..." (Opinion, p. 9) and that "[t]he equitable nature of the doctrine prevents articulation of an unwavering rule that applies in all cases." (Opinion, p. 4)

The Court of Appeals used the constructive notice prong as a sufficient basis to uphold the trial court's determination that the doctrine of equitable subrogation was not applicable. Having determined there was a sufficient basis, the Court of Appeals did not need to address each of the equitable factors favoring the lien holder.

A number of courts have concluded that constructive notice under mechanic's lien statutes defeats application of equitable subrogation. See Metropolitan Life Ins. Co. v. First Security Bank, 491 P.2d 1261 (Idaho 1971); but see Smith v. State Savings & Loan Assoc., 223 Cal. Rptr. 298, 301, 175 Cal.App.3d 1091, 1099 (Cal.App. 1985) The two Utah cases relied on by

appellant, Martin v. Hickenlooper, 59 P.2d 1139 (Utah 1936) and George v. Butler, 50 P. 1032 (Utah 1897), allowed equitable relief on issues other than constructive notice. They determined constructive notice was immaterial to the particular decisions. The appellant seeks to create a negative interpretation from these cases that constructive notice should not be considered in equitable subrogation cases. The fact that in those cases the issue of constructive notice was not controlling does not negate it as an important consideration. The Court of Appeals readily acknowledged that the very nature of equitable subrogation prevents articulation of an unwaverable rule that would be universally applicable. The fact that in this case constructive notice was a sufficient basis to uphold the trial court's decision does not create an unwaverable rule in all cases. The very nature of equity allows for "waverling" rules when justice so requires. Justice did not require wavering the rules of law in this case.

Point II

Constructive Notice is Sufficient Notice to Protect Mechanic's Lien Rights

In mechanic's lien cases the legislature has specifically adopted the concept of "constructive notice" as controlling in establishing a "relation back" date for determining the priority of mechanic's liens over other encumbrances. The Court of Appeals held that "[t]he mechanics' lien statutes are an expression of legislative intent that should stay the hand of equity in this situation. If we held otherwise, we would violate the equitable

maxim that equity follows the law." (Opinion, p. 8) In finding that appellee commenced visible work on the property prior to the Ameristar refinancing, the court found that equitable subrogation was not available in this situation.

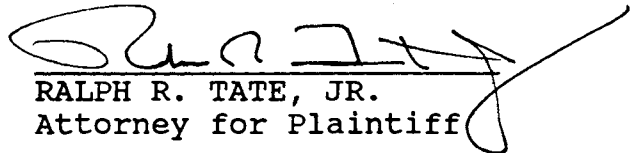
Utah mechanic's lien cases recognize the importance of constructive notice by requiring visible signs of construction so that the "relation back" doctrine makes subsequently filed liens effective as of the date of commencement of construction. "From the time the contractor begins to furnish materials, it is notice to anyone thereafter contracting with the owner that the property is burdened with a lien..." Teahen v. Nelson, 6 Utah 363, 23 P. 764; First of Denver Mortgage Investors v. C.N. Zundel and Associates, 600 P.2d 521 (Utah 1979) There is clear legislative intent to create a priority for a mechanic's lien claimant that is established by constructive notice whether or not there is actual notice. Whether a primary mortgage or a judgment lien or a conveyance has a priority over a mechanic's lien is generally determined on the basis of "constructive notice." Said liens are generally not filed until after work is completed and the lien claimant has not been timely paid. Therefore, those seeking an interest in the land must see what is there to be seen or be considered constructively so informed. It should be no different for an entity that seeks to alter, increase, consolidate, or modify existing encumbrances. The legislative intent to give this priority to mechanic's lien holders and expect equity to follow the law should not be disturbed.

SUMMARY

The combination of equity following the law, the statutory intent, and the constructive notice gives a right of protection to mechanic's lien holders which should not be muddled. The Supreme Court should let the legislative priority for lien claimants and the rulings of the Court of Appeals stand. Otherwise a Pandora's box could be opened of entities trying to leapfrog over prior established secured parties to establish preferred positions. The Court of Appeals ruling does not interfere with the application of equitable relief in appropriate situations. Equity cases should be decided on the equity facts at the trial court levels. The Supreme Court should decline appellee's request for certiorari.

DATED this 4th day of May 1993.

Respectfully submitted,


RALPH R. TATE, JR.
Attorney for Plaintiff