

2003

John Homes Construction, Inc. a Utah corporation, and Coulter & Smith, Ltd., a Nevada corporation v. R.A. McKell Excavating Inc., a Utah corporation and Rick McKell, an individual : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN HOLMES CONSTRUCTION, INC., a
Utah corporation. and COULTER & SMITH,
LTD., a Nevada corporation,

Appellees,

v.

R.A. McKELL EXCAVATING, INC., a Utah
corporation, and RICK McKELL, an
individual,

Appellants.

Case No. 20030707-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FINAL JUDGMENT ENTERED ON AUGUST 5, 2003, ORDER
GRANTING MOTION FOR AWARD OF ATTORNEY'S FEES ENTERED ON AUGUST 5,
2003 AND THE ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY
JUDGMENT ENTERED ON OCTOBER 9, 2002 BY THE
THIRD DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, UTAH,
THE HONORABLE WILLIAM B. BOHLING

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ARGUMENT

- I. McKell’s work was not “for a residence.” McKell was not required to record its lien within the time established by section 38-1-7(1)(a), and was not required to file its foreclosure action within the time established by section 38-1-11(1)(b).**

The tortured interpretation of the phrase “for a residence” advocated by Holmes runs contrary to well-established principles of statutory interpretation and should be rejected by this court.

We review questions of statutory interpretation for correctness, giving no deference to the district court’s interpretation. Our aim in construing a statute is to give effect to the legislature’s intent in light of the purpose the statute was meant to achieve....Pursuant to our rules of statutory construction, we look first to the statute’s plain language to determine its meaning. “We read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters.” *Miller v. Weaver*, 2003 UT 12, ¶ 17, 66 P.3d 592; *see also Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996) (“[S]tatutory enactments are to be so construed as to render all parts thereof relevant and meaningful.” (citation and quotation omitted)); *Bus. Aviation of S.D., Inc. v. Medivest, Inc.*, 882 P.2d 662, 665 (Utah 1994) (“[T]erms of a statute are to be interpreted as a comprehensive whole and not in a piecemeal fashion.” (citation and quotation omitted)); *Jerz v. Salt Lake County*, 822 P.2d 770, 773 (Utah 1991) (“It is our duty to construe each act of the legislature so as to give it full force and effect. When a construction of an act will bring it into serious conflict with another act, our duty is to construe the acts to be in harmony and avoid conflicts.”). In addition, “[i]t is axiomatic that a statute should be given a reasonable and sensible construction and that the legislature did not intend an absurd or unreasonable result.” *State ex rel. Div. of Consumer Prot. v. GAF Corp.*, 760 P.2d 310, 313 (Utah 1988) (citations omitted).

Board of Educ. of Jordan School Dist. v. Sandy City Corp., 2004 WL 943432, *2 (Utah 2004) (citations omitted). “[S]tatutes are considered to be in pari materia and thus must be construed together when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object.” *Hansen v. Eyre*, 74 P.3d 1182, 1185 (Utah Ct. App. 2003), *cert. granted*, 80 P.3d 152 (Utah 2003), quoting *Utah County v. Orem City*, 699 P.2d 707, 709

(Utah 1985). Consequently, the amendments to sections 38-1-7 and 38-1-11 must be read and reasonably and sensibly interpreted in conjunction with enactment of the Residence Lien Restriction and Lien Recovery Fund Act. The intent and purpose of the Residence Lien Restriction and Lien Recovery Fund Act is to protect individual homeowners, not developers like Holmes, from mechanic's liens. This conclusion is clear from the plain language of the statute and the record of the Utah State Senate floor debate.

There is no ambiguity in the wording of sections 38-1-7 & 11 which requires the court to look beyond the plain language of the statute to determine its meaning, or precludes the court from consulting a dictionary for assistance in finding the plain meaning of the statutory language. Sections 38-1-7 & 11 require a claimant to record a mechanic's lien within 90 days and to file a lien foreclosure action within 180 days after last furnishing labor, services, equipment, or materials "for a residence." As used in this phrase, the word "a" operates "as a function word with nouns to form adverbial phrases of quantity, amount or degree," *Webster's Ninth New Collegiate Dictionary* 43 (1984), and should be given its literal meaning. In *Totorica v. Thomas*, 397 P.2d 984 (Utah 1965), the Utah Supreme Court rejected the owner's contention that the builder's foreclosure action was untimely because it was not filed within twelve months of a 30-day suspension of work on the project. The court interpreted the then existing mechanic's lien statute literally to give the builder the option to file a foreclosure action either within "twelve months after completion of the original contract, or the suspension of work thereunder for a period of thirty days." (Emphasis added). In support of its holding, the court looked to the dictionary definition of "or" and the purpose of Utah's mechanic's lien statute, and upheld the literal meaning of the statute. The court wrote:

As stated in Webster's Unabridged New International Dictionary, 2d ed., the conjunctive 'or' is a '* * * co-ordinating particle that marks an

alternative * * * that is, you may do one of the things at your pleasure, but not both * * *.' The Mechanic's Lien Law was made for the benefit of those who perform the labor and supply the materials. To place appellant's interpretation on the meaning of this section would be to minimize a lien claimant's remedy without a clear mandate from the legislature requiring such an effect ... Were we to sustain appellant's contention we would emasculate the rights granted a lien claimant under the provisions of Section 38-1-7, U.C.A.1953 ...

Totorica at 986. Using this approach, sections 38-1-7(1)(a) & 11(1)(b) apply to contractors who have furnished work for an individual residence. Contractors who have furnished work for an entire subdivision, particularly infrastructure improvements furnished before construction on individual residences can even begin - as McKell did in this case - must record their lien within 90 days and file their foreclosure action within twelve months after final completion of their contract. Utah Code Ann. §§ 38-1-7(1)(b) & 11(1)(a).

Holmes' contrary interpretation is both legally flawed and impractical. Holmes urges the court to look to the ultimate end use of the subdivision-wide improvements in order to categorize the improvements as residential or non-residential, citing *First of Denver Mortgage Investors v. C.N. Zundel & Assocs.*, 600 P.2d 521 (Utah 1979). McKell respectfully submits *First of Denver* does not stand for the proposition cited by Holmes, but more to the point, Holmes' approach ignores the legislature's command to look to the definition of "residence" in section 38-11-102(20) in order to determine if the claimant has furnished work "for a residence" and therefore must comply with the shorter time period within which to record and foreclose its mechanic's lien. In any event, Holmes' approach fails where, as here, a residence is never constructed in the subdivision, notwithstanding the installation of sewer, water, storm sewer, utilities, roads, and curb and gutter. Further, had the legislature not amended sections 38-1-7 and 38-1-11 in the

most recent legislative session,¹ Holmes' approach would likely result in more mechanic's liens being recorded and more foreclosure actions being filed, because contractors providing subdivision-wide improvements would prudently record a lien every time they concluded their work had benefited an individual lot within the subdivision.

Judge Bohling incorrectly analyzed the timeliness of McKell's mechanic's lien under section 38-1-7(1)(a) rather than section 38-1-7(1)(b) and his decision should be reversed and remanded. Judge Bohling's order did not address the timeliness of McKell's lien foreclosure action, but for the reasons set forth above, Holmes' contention that McKell was required to file a foreclosure action within 180 days after last furnishing work "for a residence" must be rejected.

II. "Final completion" as used in sections 38-1-7 & 11 should be given its plain meaning; there is a meaningful difference between "completion" and "final completion."

Holmes' objection to a literal reading of "final completion" is contrary to well-established principles of statutory interpretation and should be rejected. "When interpreting a statute, it is axiomatic that this court's primary goal 'is to give effect to the legislature's intent in light of the purpose that the statute was meant to achieve' ... This court looks first to the plain language of a statute when deciding questions of statutory interpretation and assumes that each term was used advisedly by the legislature ... Similarly, statutory construction presumes that the expression of one should be interpreted as the exclusion of another ... Therefore, omissions in

¹ The 2004 Legislature enacted 2004 Utah Laws Ch. 85 (H.B. 32) amending section 38-1-7 to require lien claimants to record their lien no later than 90 days "from the date of final completion of the original contract under which the claimant claims a lien under this chapter." Section 38-1-11 was amended to require lien claimants to file a lien foreclosure action within "180 days from the day on which the lien claimant filed a notice of claim under Section 38-1-7." The distinction between residential and non-residential work was eliminated.

statutory language should ‘be taken note of and given effect.’ ” *Biddle v. Washington Terrace City*, 993 P.2d 875, 879 (Utah 1999) (citations omitted).

Using this approach to interpreting section 38-1-7(1)(b), the plain language of the statute requires mechanic’s lien claimants to record their mechanic’s lien no later than 90 days after final completion of an original contract not involving a residence. The plain meaning of “final completion” is that a contract is not finally complete until everything required to be done under the contract is complete. Because there is no dispute McKell’s contract with Husting was not finally complete in November 1997, and that the McKell - Eagle Pointe - Husting contract was not finally complete at the time McKell recorded its lien, McKell timely recorded its lien, and timely filed this foreclosure action. Judge Bohling’s contrary ruling should be reversed.

The distinction between “final completion” and “completion” is as significant as the distinction between “final completion” and “substantial completion.” Case law interpreting “completion” in the context of Utah’s mechanic’s lien statute established a two-part test for determining whether an original contractor’s work was complete for purposes of recording a mechanic’s lien: first, whether the project was substantially complete; and second, whether the project was accepted by the owner. *Interiors Contracting, Inc. v. Smith, Halander & Smith Assocs.*, 827 P.2d 963, 965 (Utah Ct. App. 1992) (interpreting version of statute requiring the original contractor to record mechanic’s lien within 100 days after completing contract). However, the legislature specifically amended the statute to require all claimants on non-residential projects to record their mechanic’s lien within 90 days after final completion of the original contract not involving a residence. 1995 Utah Laws Ch. 172 (S.B. 115) (codified as amended at Utah Code Ann. §§ 38-1-11). Presumably, the legislature was aware of Utah cases

interpreting “completion” and deliberately elected to use “final completion” as the triggering event for recording a lien and filing the foreclosure action.

III. Utah’s mechanic’s lien statute has not used cessation or abandonment of work as an event to trigger the recording of a lien. The legislature rejected the concepts of cessation or abandonment of work as events to trigger the filing of a lien foreclosure action.

A review of Utah’s mechanic’s lien statutes in effect for the last fifteen years² shows that cessation or abandonment of work was not treated as an event triggering the requirement to record a lien. Between 1989 and 1994, claimants were required to record their lien “within 80 days after substantial completion of the project or improvement.” Effective May 2, 1994, claimants were required to record their lien within 90 days after last furnishing labor, equipment, materials or services to a project or improvement. Between May 1, 1995 and May 2, 2004,³ claimants were required to record a lien within 90 days after last furnishing labor, equipment, materials or services “for a residence,” or within 90 days after “final completion of an original contract not involving a residence...” Utah Code Ann. § 38-1-7(1). Consequently, to the extent Judge Bohling’s ruling may have been predicated upon the belief that cessation or abandonment of work triggered the requirement to record a lien, his ruling should be reversed and remanded.

When Utah’s legislature amended the mechanic’s lien statute in the 1994 General Session, it rejected the position advocated by Holmes and apparently adopted by Judge Bohling. The mechanic’s lien statute in effect prior to those amendments allowed mechanic’s lien claimants to file their foreclosure actions within twelve months after suspension of work on the project for a period of thirty days. Utah Code Ann. § 38-1-11. “In some states, the mechanic’s

² See, Addendum to Brief of Appellant at *c – g*.

³ The effective date of H.B. 32 was May 3, 2004.

lien statutes meet the problem of abandonment of construction or of the contract by measuring the time for filing claims from the cessation of work rather than from actual completion of work or of a building or improvement.” Maurice T. Brunner, LL.B., Annotation, *Abandonment of Construction or of Contract as Affecting Time for Filing Mechanics’ Liens or Time for Giving Notice to Owner*, 52 A.L.R. 3d 797, 817 (1973) (emphasis added). In the 1994 General Session, Utah’s elected representatives amended section 38-1-11, deleting the reference to the thirty-day suspension of work as a triggering event for filing a lien foreclosure action and instead, requiring lien foreclosure actions to be filed within “twelve months from the date the lien claimant last performed labor and services or last furnished equipment or material on an original contract not involving a residence.” 1994 Utah Laws Ch. 308 (S.B. 87) (codified as amended at Utah Code Ann. § 38-1-11).

To adopt Holmes’ position would be to take two steps backwards, to revert to a version of the statute specifically amended by the legislature a decade ago. Subsequent to the 1994 amendments, the 1995 General Session amended the mechanic’s lien statute again to require lien claimants to file their foreclosure actions within twelve months after final completion of an original contract not involving a residence. 1995 Utah Laws Ch. 172 (S.B. 115) (codified as amended at Utah Code Ann. §§ 38-1-11). The legislature did not then and has not subsequently reintroduced the concepts of cessation or abandonment of work as events triggering the timing of a lien foreclosure action.⁴ Because the legislature omitted the period of a thirty day suspension of work as a triggering event to file a lien foreclosure action in the 1994 amendment, this court can conclude that the legislature did not intend for a suspension of work, or cessation or

⁴ To the contrary, in the 2004 amendments to the mechanic’s lien statute, the legislature retained the concept of “final completion” of an original contract as the triggering event for recording a lien.

abandonment of work, to trigger the time for lien claimants to file a foreclosure action. *Biddle v. Washington Terrace City*, supra.

For this court to adopt a rule reinstating a provision of the statute explicitly deleted by the legislature would run contrary to the legislative intent expressed in the 1994 amendment and deprive McKell of a remedy expressly provided by the mechanic's lien statute. "When faced with a question of statutory construction, 'we seek to give effect to the intent of the legislature in light of the purpose the act was meant to achieve.' *Wilcox v. CSX Corp.*, 70 P.3d 85, 90 (Utah 2003); quoting *State v. Ostler*, 31 P.3d 528, 530 (quoting *Gutierrez v. Medley*, 972 P.2d 913, 915 (Utah 1998)). The public policy behind the right to a mechanics' lien is to provide protection for those who enhance the value of property by supplying labor and materials. *Projects Unlimited v. Copper State Thrift & Loan Co.*, 798 P.2d 738, 743 (Utah 1990); *AAA Fencing Co. v. Raintree Dev. & Energy Co.*, 714 P.2d 289 (Utah 1986); *FOR-SHOR Co. v. Early*, 828 P.2d 1080 (Utah Ct. App. 1992); *Interiors Contracting, Inc. v. Smith, Halander & Smith Assocs.*, 827 P.2d. 963 (Utah Ct. App. 1992). Once statutory provisions have been satisfied, Utah's judicial policy is to broadly construe the mechanic's lien statute to protect those who add value to another's property. *J.V. Hatch Constr., Inc. v. Kampros*, 971 P.2d 8, 13-14 (Utah Ct. App. 1998); *Interiors Contracting, Inc.*, 827 P.2d. at 965. The modern trend is to dispense with arbitrary rules which have no demonstrable value in a particular fact situation. *Projects Unlimited*, 798 P.2d at 744. A "lien once acquired by labor performed on a building with the consent of the owner should not ... be defeated by technicalities, when no rights of others are infringed, and no express command of the statute is disregarded." *Id.* (emphasis added) quoting *Eccles Lumber Co. v. Martin*, 87 P. 713, 716 (Utah 1906). Judge Bohling should not be allowed to undo what the legislature

achieved in the 1994 amendment. The court should reverse and remand this case for further proceedings.

Judge Bohling committed reversible error when he ruled McKell abandoned or ceased work in November 1997, and that abandonment and cessation are tantamount to “final completion” under Utah Code Ann. § 38-1-7(1)(b). First, in considering Holmes’ motion, McKell was entitled to have the facts and all reasonable inferences from those facts construed in McKell’s favor. *Ahlstrom v. Salt Lake City Corp.*, 73 P.2d 315 (Utah 2003); *Arnold Indus., Inc. v. Love*, 63 P.2d 721 (Utah 2002). But, Judge Bohling improperly inferred that McKell had ceased or abandoned the work in November 1997. Second, no Utah case, and no case cited by Holmes, holds that abandonment or cessation of work is synonymous with final completion of the work. Holmes cites *Govert Copier Painting v. Van Leeuwen*, 801 P.2d 163 (Utah Ct. App. 1990) for the proposition that the court should use the date listed on the notice of lien to determine the date from which the statute of repose should run where the date of final completion cannot be determined. But, *Govert* stands for the proposition that the owner’s use of claimant’s materials left at the job site (with the express understanding the owner would use the materials to complete the claimant’s work) could not be used to extend the time within which the claimant could file suit to foreclose its mechanic’s lien. In *Govert*, there was no dispute that the lien claimant’s last labor occurred as set forth on its lien, because the lien claimant had no intention of returning to the site, having reached agreement with the owner that the owner would complete the claimants’ work using materials left by the claimant. There is no evidence of such an agreement or arrangement between McKell and Husting. See, discussion of termination of 1997 Agreement, infra at 11.

IV. The legislature rejected using the last day of claimant's work as an event to trigger the filing of a lien foreclosure action.

Utah's legislature rejected the position advocated by Holmes when it amended Utah's mechanic's lien statute in the 1995 General Session. Before the 1995 General Session, lien claimants were required to record their lien "within 90 days from the date the person last performed labor or service or last furnished equipment or material on a project or improvement" and to foreclose the lien within "twelve months from the date the lien claimant last performed labor and services or last furnished equipment or material on an original contract not involving a residence ..." Utah Code Ann. §§ 38-1-7 & 11. In the 1995 General Session, the legislature changed the triggering event for recording and foreclosing a mechanic's lien on a non-residential project. Effective May 1, 1995, lien claimants were required to record their lien within "90 days from the date...of final completion of an original contract not involving a residence..." and to foreclose the lien within "twelve months from the date of final completion of the original contract not involving a residence..." 1995 Utah Laws Ch. 172 (S.B. 115) (codified as amended at Utah Code Ann. §§ 38-1-7 & 11. Because the legislature deleted the requirement for lien claimants to file their foreclosure action within twelve months after last furnishing labor, materials, equipment or services to a project in the 1995 amendment, this court can conclude that the legislature did not intend for the repose period to run from the last furnishing of labor, materials, equipment or services to a project. *Biddle v. Washington Terrace City*, supra. This conclusion is supported by the fact that the 2004 amendment to section 38-1-7 changed the requirement to record a lien for work furnished for a residence from 90 days after last furnishing the work to 90 days after final completion of the original contract. The argument that the last day McKell furnished labor to the project (as listed on the mechanic's lien form) is the same as final completion of McKell's contract is entirely contrary to the legislature's intent as reflected in

the amended language, and if left intact, could result in more mechanic's liens filed on projects, unnecessarily clouding title to real property. This court should reverse and remand.

Holmes' argument is also contrary to Utah case law. The last day of work listed on the mechanic's lien form is not dispositive on the issue of final completion. Listing the last day of work is a requirement of Utah's mechanic's lien statute, Utah Code Ann. § 38-1-7, but means nothing more than that. The last day of work on the lien form is the last day the claimant provided labor, equipment, materials or services for the project at the time the lien was recorded, not the day the claimant's contract or work was necessarily finally complete. In *Roberts v. Hansen*, 479 P.2d 345 (Utah 1971), the court held that completion occurred for purposes of filing a lien foreclosure action when the owner terminated the builder, not on the earlier date of last work listed on the builder's lien. See also, *J.V. Hatch Constr., Inc. v. Kampros*, 971 P.2d 8 (Utah Ct. App. 1998) (builders' contract completed upon owner's termination of contract).

There is no evidence the 1997 Agreement was ever terminated. McKell may have been entitled to terminate the contract, *see*, 1997 Agreement at ¶12 (Record at 125), but there is no evidence it did so. Rather, when the facts are construed in the light most favorable to McKell, a fact finder could reasonably conclude that the parties actively worked to ensure the viability and continuity of the Project under the supervision of the bankruptcy court. As a result, the bankruptcy court entered its Order Approving Post Petition Financing, the parties executed the 1999 Agreement, and work continued on the Project as originally envisioned in the 1997 Agreement and the Adjoining Subdivision Agreement. For example, the Adjoining Subdivision Agreement anticipated the development of Husting's property in conjunction with Holmes'

property to the mutual benefit of both properties and developers.⁵ The agreement states “There are aspects of the development of each subdivision that are common to and shared by both...These common characteristics include contribution and development of common areas, installation of utilities to the benefit of both subdivisions, and development of common roadways.” Record at 301, Recitals, ¶ D. The agreement specifically addresses development of and division of costs for sewer lines, the entrance at the intersection of Galena Park Boulevard and 123 South Street, common areas, Galena Park Boulevard itself, and improvements to 123 South State Street. Record at 302-303, ¶¶ 2(a)(i) – 2(b)(iv). This is the same work to be performed under the 1999 Agreement, with work on Parkway Estates and the 123 South Entrance explicitly identified in exhibits to the 1999 Agreement. Record at 191 – 192. These facts, when viewed in the light most favorable to McKell, support the conclusion that the 1997 Agreement was not terminated, work on the Project was not abandoned, and work anticipated under the Adjoining Subdivision Agreement started in 1997 and continued in 1999 – 2000 under the supervision of the bankruptcy court and trustee as set forth in the 1999 Agreement.

V. Even if abandonment and cessation are the functional equivalents of final completion, Judge Bohling’s decision should still be reversed because the determination of whether a project was abandoned is a material question of fact.

Judge Bohling’s ruling should be reversed because, in Utah, “[t]he determination of what constitutes material abandonment is a factual issue.” *Ketchum, Konkel, Barrett, Nickel & Austin v. Heritage Mountain Dev. Co.*, 784 P.2d 1217, 1225 (Utah Ct. App. 1989). “Abandonment of work will not be presumed where the right to a mechanic’s lien is in question, but must be

⁵ The adjoining subdivisions are depicted at page 212 of the Record. North is “up,” 123 South Street runs east and west at the top of the page, Galena Park Boulevard proceeds south from the intersection with 123 South Street along the eastern portion of the subdivisions.

established by the evidence, and is ordinarily a question of fact.” Brunner, supra. at 803. Even if this court were to adopt the rule that abandonment or cessation of the work is the functional equivalent of final completion of the original contract, “the rule cannot be invoked unless it is shown when the abandonment occurred.” *Id.* at 812.

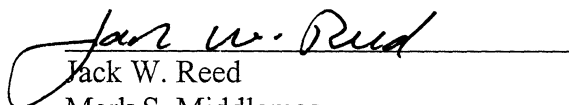
McKell respectfully suggests that determining when the alleged abandonment of the contract occurred is a genuine issue of material fact which should have precluded Judge Bohling from granting Holmes’ motion for summary judgment. See, discussion of termination of 1997 Agreement, supra at 11. In reaching his conclusion, Judge Bohling ignored the jurisprudence on summary judgment motions and viewed the facts and the inferences from those facts in a light most favorable to Holmes, not McKell. *Ahlstrom v. Salt Lake City Corp.*, supra.; *Arnold Indus., Inc. v. Love*, supra. Consequently, this court should reverse and remand for further proceedings.

CONCLUSION

McKell respectfully requests the court to reverse Judge Bohling and remand the case for further proceedings.

DATED this 15 day of June 2004.

PETERSON REED & WARLAUMONT L.L.C.

A handwritten signature in cursive script, appearing to read "Jack W. Reed", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June 2004, I mailed two true and correct copies of the foregoing Reply Brief of Appellant, postage prepaid to:

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