

2004

# George Carroll Parr and Carlena Sue Parr v. Clifford Stubbs : Brief of Appellant

Utah Court of Appeals

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Clifford Lee Stubbs; Sui Juris.

Judy Jorgensen; Lundberg & Associates; Attorney for Appellee.

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 20040090-CA

IN THE UTAH COURT OF APPEALS

GEORGE CARROLL PARR AND  
CARLENA SUE PAAR

Appellee(s)/Petitioner(s),

vs.

CLIFFORD L STUBBS

Appellant/Respondent.

Case No. 20040090-CA

BRIEF OF APPELLANT

-----

AN APPEAL FROM AN ORDER TO REMOVE WRONGFUL LIEN, UNDER  
UTAH CODE ANN. § 38-9-7 IN THE FOURTH JUDICIAL DISTRICT COURT,  
PROVO DEPARTMENT, UTAH COUNTY, STATE OF UTAH, THE  
HONORABLE JUDGE GARY D. STOTT

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**IN THE UTAH COURT OF APPEALS**

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CLIFFORD L STUBBS

Appellant/Respondent.

---

Case No. 20040090-CA

**BRIEF OF APPELLANT**

-----

**JURISDICTIONAL STATEMENT**

Defendant appeals from an Order To Remove Wrongful Lien under Utah Code Ann. § 38-9-7. The Utah Court Of Appeals has jurisdiction in this matter pursuant to § 78-2a-3(2)(j), Utah Code Ann. 1953, as amended.

**PARTIES**

CLIFFORD L STUBBS, Appellant/Respondent, vs GEORGE CARROLL  
PARR and CARLENA SUE PAAR, Appellee(s)/Petitioner(s)

## STATEMENT OF ISSUE

1. The issue: insufficient service of process of PETITION FOR REMOVAL OF WRONGFUL LIEN (Index # 17) wherein the law is clear in U.C.A. § 38-9-7(3)(c), which plainly states:

“The record interest holder shall serve a copy of the petition on the lien claimant ... pursuant to Rules of Civil Procedure, Rule 4, Process.” (emphasis added)

- a. Petitioner did **not** serve Respondent in accordance of U.R.C.P., Rule 4 with the “petition” as the matter is filed before the Fourth Judicial District Court, Provo Department on the 1st day of August, 2003, wherein the Court states that notice is given, when in fact NO notice is given and even the Court’s record attests of no proof of service.
  - 1.) The docket record of said Provo Court as filed by Petitioners counsel does NOT provide any proof of service and/or Certificate of Mailing by Petitioner on Respondent of said petition. By no service in accordance of U.R.C.P., Rule 4, Process and Rule 5, the law requires that Respondent must receive service of all pleading(s). The Respondent is given no clue as to what the Petitioners are claiming under service of an Order For Hearing as signed by the Honorable Judge Gary D. Stott for the 24th day of October, 2003.
  - 2.) In all courts of limited jurisdiction, the record of the case, including

pleadings, must support any claim of subject-matter jurisdiction. Without the required service from the Petitioner of the subject-matter pleading(s) upon the Respondent, any claim by Petitioner is moot. If there is no service of subject-matter pleading(s) on the Respondent the presiding judge acts without subject-matter jurisdiction and his orders are void, having no legal force or effect and simply without service of above said petition (Petition For Removal Of Wrongful Lien) the Court as held on said date is without jurisdiction in accordance of law. Without Defendant's knowledge of the petition or attachment(s) as [affidavit?] the Court lacks subject matter jurisdiction.

- b. Nor did Petitioner serve Respondent with "MOTION FOR HEARING" (Index #18) as the record show as filed on the 11th day of September, 2003.
- c. In Court on the 24th day of October, 2003, Petitioners counsel refers to an Affidavit of GEORGE CARROLL PAAR of which there is no service on Respondent.
- d. Respondent is yet to receive said PETITION FOR REMOVAL OF WRONGFUL LIEN, MOTION FOR HEARING or the questionable Affidavit of GEORGE CARROLL PARR that counsel relies on for release of wrongful lien as questioned before the Court as asked "are you relying on the affidavit only?" to which the answer is affirmative.
- e. The first entry of Certificate of Mailing is reflected in the docket record of said Court begins with the entry of a filed Order For Hearing, dated the 22nd day of September, 2003.

1. The docket record shows a Certificate of Mailing, dated the 23rd day of September, 2003, Order For Hearing (Index # 20) as was served on Respondent.
  2. The only attachment is Order For Hearing, not petition, motion or Affidavit.
- 
2. U.C.A. § 38-9-7(3)(b) provides that if the Court finds the petition sufficient, the Court shall schedule a hearing within ten (10) days to determine whether the document is a wrongful lien.
    - a. Said PETITION FOR REMOVAL OF WRONGFUL LIEN is filed with the Fourth Judicial District Court under Case No. 030403543 on the 1st day of August, 2003 (Index # 17). The Court on the 8th day of September, 2003 set a removal of lien hearing for the 30th day of September, 2003, which was by correct of calendar reset for the 24th day of October, 2003, and thus making said hearing within some eighty five (85) days.

### **CONSTITUTIONAL PROVISIONS AND RULES**

Utah Code Annotated §§ 38-9-7(3)(c) and 38-9-7(3)(b)  
Utah Rules of Civil Proc., Rule 4  
Utah Rules of Civil Proc., Rule 5  
Rule 60(b)(3)  
Rule 60(b)(4)  
Rule 60(a)  
Utah Const. Art. I. § 11  
U. S. Constitution, Article 1, § 10, cls. 1



### STATEMENT OF THE CASE

3. On the 24th day of October, 2003, Petitioner's counsel represents before the Court that "This matter is being handled under Section 38-9-1 etc., dealing with wrongful liens it is a ??? petition only and service is not required, because of the way the procedure is set up in this section" of which the Court agrees with Petitioner's counsel.
  - a. The law clearly requires the Petitioner (record interest holder) of serving a copy of the petition on lien claimant and nowhere in U.C.A. § 38-9-1 et.seq. does the law provide that service is not required, because as quoted above the law specifies otherwise.
  - b. without making service on Respondent of said PETITION FOR REMOVAL OF WRONGFUL LIEN, Petitioner's counsel should be barred from proceeding into the case without having made service of the above said document(s) that are on file and in the record of the Court.
  - c. Because of Petitioners insufficiency of process on Respondent, especially in the fact that Respondent does not know any detail of said Petition, Motion For Hearing and the content of the Affidavit Of GEORGE CARROLL PARR, thereby the scheduled Hearing is fatally flawed without merit.

## **STATEMENT OF PROCEEDING**

Pursuant Of Utah Rules Of Appellate Procedure, Rule 11(g) Respondent provides the best available means and recollection of Order For Hearing, the 24th day of October, 2003:

- A. Court begins: the statute [38-9-7] provides a process for an initial hearing to address the question as to whether or not there is a wrongful lien.
- B. Respondent by and through Agent, petition's the Court for dismissal for lack of service of Petition For Removal Of Wrongful Lien and Motion. Without service on the Respondent, the Court lacks subject matter jurisdiction.
- C. Petitioner's counsel asserts that "This matter is being handled under Section 38-9-1 etc., dealing with wrongful liens it is a current petition only and service is not required, because of the way the procedure is set up in this section,"
  - a. Court response: right.
- D. Court continues: dealing with U.C.A. § 38-9-7 the petition has been filed and noticed and parties who have interest with respect to the real property are present here; the procedure is outlined in that section; Respondent raises the point that Petitioners are not present, but almost immediately the Court states it does not know who is present and will find out who is here, which never transpired.
- E. The Court refers to an affidavit by Petitioner (Respondent does not have a clue where this affidavit came from, what, when or where) that the Court has read it and asks Petitioner's counsel, is that all that the Plaintiff is relying on, which

Petitioner 's counsel affirms.

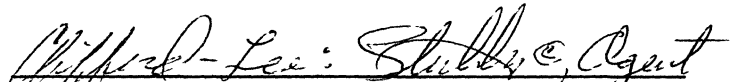
On the 12th day of April, 2004, Respondent under filing a "Statement Of Proceedings Pursuant Of Utah Rules Of Appellate Procedure, Rule 11(g) For The Record On Appeal" (Index # 108) with the Fourth Judicial District Court per direction of The Utah Court Of Appeals and by Certificate of Service to Petitioners counsel of which said Rule 11(g) provides Petitioner the opportunity for objection within ten (10) days after service. Petitioner files Plaintiff's Objection To Defendant's Statement Of Proceedings on the 13th day of May, 2004 (Index # 112), a total of seventeen (17) days overdue of the Respondent's filing of said Objection. Therefore, Petitioner's Objection is untimely.

### CONCLUSION

Based on the foregoing the Respondent/Appellant respectfully requests the Court affirm Appellants Appeal of insufficient service of process.

Dated: this 12<sup>th</sup> day of August, 2004

Respectfully,

  
Clifford-Lee :Stubbs©, Sui Juris Secured  
Party and Agent for  
CLIFFORD L STUBBS™

™ Utah, 1950

© Utah, 1968

### **CERTIFICATE OF SERVICE**

I, Clifford-Lee :Stubbs, certify that on the 12<sup>th</sup> day of August, 2004, I served two (2) copies of the attached BRIEF OF APPELLANT upon Judy Jorgensen, the counsel for the appellee in this matter, by mailing it to her by first class mail with sufficient postage prepaid to the following address:

Judy Jorgensen (USB No. 6909)  
LUNDBERG & ASSOCIATES  
Attorneys for Plaintiff  
3269 South Main Street, Suite 100  
Salt Lake City, Utah 84115

*Clifford-Lee :Stubbs<sup>®</sup>, Agent*

## **ADDENDUM 1**

### **CONSTITUTIONAL PROVISIONS AND RULES**

## UTAH CODE ANNOTATED

### **Rule 4. Process.**

(a) Signing of summons.

(b) **Time of service.**

In an action commenced under Rule 3(a)(1), the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause shown. If the summons and complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative. In any action brought against two or more defendants on which service has been obtained upon one of them within the 120 days or such longer period as may be allowed by the court, the other or others may be served or appear at any time prior to trial.

### **Rule 5. Service and filing of pleadings and other papers.**

(a) Service: When required.

- (1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.
- (2) No service need be made on parties in default for failure to appear except as provided in Rule 55(a)(2)(default proceedings). Pleadings asserting new or additional claims for relief against a party in default shall be served in the manner provided for service of summons in Rule 4.
- (3) In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service: How made and by whom.

- (1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy or by mailing a copy to the last known address or, if no address is known, by leaving it with the clerk of the court.
  - (A) Delivery of a copy within this rule means:

Handing it to the attorney or to the party; or leaving it at the person's office with a clerk or person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.
  - (B) Service by mail is complete upon mailing. If the paper served is notice of a hearing and if the hearing is scheduled 5 days or less from the date of service, service shall be by delivery or other method of actual notice.
- (2) Unless otherwise directed by the court:
  - (A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;
  - (B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and
  - (C) an order or judgment prepared by the court shall be served by the court.

**38-9-7. Petition to nullify lien -- Notice to lien claimant -- Summary relief --  
Finding of wrongful lien -- Wrongful lien is void.**

- (1) Any record interest holder of real property against which a wrongful lien as defined in Section **38-9-1** has been recorded may petition the district court in the county in which the document was recorded for summary relief to nullify the lien.
- (2) The petition shall state with specificity the claim that the lien is a wrongful lien and shall be supported by a sworn affidavit of the record interest holder.
- (3) (a) If the court finds the petition insufficient, it may dismiss the petition without a hearing.  
(b) If the court **finds the petition is sufficient, the court shall schedule a hearing within ten days** to determine whether the document is a wrongful lien.  
(c) **The record interest holder shall serve a copy of the petition on the lien claimant and a notice of the hearing pursuant to Rules of Civil Procedure, Rule 4, Process.**  
(d) The lien claimant is entitled to attend and contest the petition.
- (4) A summary proceeding under this section is only to determine whether or not a document is a wrongful lien. The proceeding shall not determine any other property or legal rights of the parties nor restrict other legal remedies of any party.
- (5) (a) Following a hearing on the matter, if the court determines that the document is a wrongful lien, the court shall issue an order declaring the wrongful lien void ab initio, releasing the property from the lien, and awarding costs and reasonable attorney's fees to the petitioner.  
(b) (i) The record interest holder may record a certified copy of the order with the county recorder.  
(ii) The order shall contain a legal description of the real property.  
(c) If the court determines that the claim of lien is valid, the court shall dismiss the petition and may award costs and reasonable attorney's fees to the lien claimant. The dismissal order shall contain a legal description of the real property. The prevailing lien claimant may record a certified copy of the dismissal order.
- (6) If the district court determines that the lien is a wrongful lien as defined in Section **38-9-1**, the wrongful lien is void ab initio and provides no notice of claim or interest.
- (7) If the petition contains a claim for damages, the damage proceedings may not be expedited under this section.

Enacted by Chapter 125, 1997 General Session

## UTAH RULES OF CIVIL PROCEDURE

### **Rule 60. Relief from judgment or order.**

(a) Clerical mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.



## **UNITED STATES CONSTITUTION**

### **The Constitution Article I, Section 10.**

1. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or **Law impairing the Obligation of Contracts**, or grant any Title of Nobility.

## **UTAH STATE CONSTITUTION**

### **Sec. 11. [Courts open - Redress of injuries.]**

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

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