1969

Zions First National Bank and M. E. Harris, Jr. v. Harold A. Carlson and M. E. Harris, Jr. : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

ZIONS FIRST NATIONAL BANK,
Plaintiff,
vs.
HAROLD A. CARLSON AND M. E. HARRIS, JR.,
Defendants.

M. E. HARRIS, JR.,
Third-Party Plaintiff-Respondent,
vs.
ZIONS SECURITIES CORPORATION,
Third-Party Defendant-Appellant, and
ARTCOL CORPORATION,
Third-Party Defendant.

Case No. 11,636

RESPONDENT'S BRIEF

Appeal from a Judgment of the District Court of Salt Lake County, State of Utah
Honorable Allen B. Sorensen, District Judge, Presiding

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NATURE OF CASE

The only action before the court is a suit by M. E. Harris, Jr., a professional architect to foreclose a mechanic's lien for architectural services as to the landowner, Zions Securities Corporation.

DISPOSITION IN LOWER COURT

After pre-trial and trial before the Honorable Allen B. Sorensen, District Judge, a judgment and decree was entered in favor of M. E. Harris, Jr., against Zions Securities Corporation foreclosing Harris' mechanic's lien.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the findings, conclusions and decree entered by the trial court.

STATEMENT OF FACTS

Appellant's statement of facts is unsatisfactory because it is neither complete nor entirely accurate.

Respondent, M. E. Harris, Jr., was and is a licensed architect in the State of Utah, qualified to render professional architectural services in the state. (R. 177) Harris and one Harold Carlson, a licensed California architect, were commissioned as joint venturers by Artcol Corporation to prepare complete plans and specifications for the construction of a multi-storied apartment building on the block bounded by South Temple, First Avenue and "A" Streets in Salt Lake City, Utah. (R. 178 and 179) The contract called for payment of a flat fee of $212,350.00, but in the event work should be stopped, for 75% of that sum after the plans and specifications had been prepared. (Pl. Ex. 2) It was stipulated at the trial that if Harris should prevail, he is entitled to judgment in the sum of 75% of $212,350.00, or $159,262.50, together with interest thereon and reasonable attorney's fees in the sum of 10% of said principal and interest. (R. 220 and 221)

All of the work performed was under the supervision of Harris. (R. 202) Carlson assigned to Harris all of his right, title and interest in the contract and mechanic's lien, subsequently filed. (Pl. Ex. 1) To pay for the cost of preparing the plans and specifications, Harris and Carlson borrowed $90,000.00 from Zions First National Bank, which entire sum was expended for employees, draftsmen, engineers, and materials and which obligation was secured by an assignment of the Artcol contract to Zions Bank. (Pl. Ex. 3) Over a period of many months, Harris and Carlson prepared preliminary sketches, plans, specifications, engineering studies,

topographic studies, renderings, surveys, material lists, FHA applications, zoning applications, soil tests, site clearing and all of the things necessary to complete the plans and specifications for the apartment building. (Pl. Exs. 4 through 16) The FHA approved construction of the apartment building and issued an FHA insured commitment on the construction loan. (R. 174)

Prior to Harris' employment, Zions Securities had given Artcol an option to lease the property in question for the purpose of building the apartment. (Pl. Ex. 20) Zions Securities purchased the property with the thought in mind that it would be used for a mission home or type of building that would be useful to the church, but thereafter abandoned that plan and gave Artcol an option to later obtain a lease for the purpose of developing the property with an apartment building. (R. 207, 208 and 218) Zions Securities had owned the property for approximately eight years prior to the lease to Artcol and during said period it had remained vacant, except for a home thereon which produced $100.00 a month rental. (R. 221)

Artcol exercised the option and Zions Securities leased the property to Artcol with the intention that the building would be constructed. (Pl. Ex. 21) (R. 208) Mr. Doxey, the Manager of Zion Securities, testified,

> "As I say, there was no question but what the intent was that they were proposing and planning to build a building. That was the only interest they had in it." (R. 208)

The lease is entirely predicated upon the building of the apartment. It is interesting to note that Appellant attaches as an appendix to its brief excerpts from Exhibit 21, the lease, and omits portions which support Respondent's position. For example, Appellant omits paragraph 2 of the lease that requires joint appraisals of the land and building, each year, by Zions and Artcol for the purposes of determining rentals. Paragraph 5 is omitted and provides that the building shall become and remain the property of Zions. Paragraph 6 is omitted which gives Zions the building in the event of termination of the lease and requires Artcol to deliver the building "in as good as condition as when such building or buildings . . . are completed, reasonable wear and tear . . . excepted." Paragarph 11 requiring Artcol to keep the buildings insured against fire and other loss for the benefit of Zions Securities is omitted.

The lease calls for a minimum of $18,000.00 a year, increasing to $36,000.00 a year or sums in excess thereof, based upon the appraised value of the land and the apartment after completion. Zions received $1,000.00 at the time of entering into the option, $54,000.00 at the time of entering into the lease, and in excess of $18,000.00 for rental during the period of the preparation of the plans and specifications, together with real property taxes during said period in the sum of $3,464.00 (Pl. Ex. 24) (R. 210-212) The lease further regulates the use of the premises, such as prohibiting the consumption of beer or intoxicating liquors (p. 3), requires the construction to meet architectural standards

(p. 4), requires that the improvement should revert to Zions at the expiration of the lease (p. 4), requires the building to be insured for the benefit of the lessor (p. 6), requires Artcol's covenant that it will not permit liens to be filed with respect to said building, but allows Artcol to test the validity of liens filed (p. 8), gives Zions a lien upon all the personal property within the building (p. 10), authorizes Artcol to finance the building with FHA insured money (p. 13), sets up an elaborate formula among lessor, lessee and FHA in the event of condemnation (p. 13) and provides:

> "The LANDLORD agrees that, within ten (10) days after receipt of written request from TENANT, it will join in any and all applications for permits, licenses or other authorizations required by any governmental or other body claiming jurisdiction in connection with any work which the TENANT may do hereunder, and will also join in any grants for easements for electric, telephone, gas, water, sewer and such other public utilities and facilities as may be reasonably necessary in the operation of the demised premises or of any improvements that may be erected thereon; and if, at the expiration of such ten (10) days' period, the LANDLORD shall not have joined in any such application, or grants for easements, the TENANT shall have the right to execute such application and grants in the name of the LANDLORD, and, for that purpose, the *LANDLORD hereby irrevocably appoints the TENANT as its Attorney-in-fact to execute such papers on behalf of the LANDLORD.*" (emphasis added)

After Harris had substantially completed the preliminary sketches, he met with the manager of Zions Securities, Mr. Doxey, at the request of Artcol and discussed the preliminary sketches with him in detail and received his approval of same. (R. 183, 184) Mr. Doxey of Zions Securities executed all applications for zoning variances and either he or Mr. Merrill of Zions Securities, appeared with Mr. Harris at zoning hearings and enthusiastically urged the approval of Harris' plans presented to the zoning board and the construction of the building. (Pl. Exs. 5 to 8) Mr. Doxey, at one zoning hearing testified in substance as follows:

> "Mr. Doxey explained his interest is secondary. This property is not easy to develop with its slopes and position in relation to First Avenue and South Temple. They are happy with this proposal, because it makes it possible for an expensive piece of land to be put into an economic use. The fact they have added fifty percent more off-street parking than is required is evidence of excellent planning. He felt this project would be a great contribution to the community. Zions Securities Corporation is very much in favor of this development on the basis as proposed. They feel the very small request of change in recognizing the sidewalk instead of the property line in this instance on a one-way street, a street of little traffic, would not be difficult to grant from the standpoint of variance because of the particular facts that surrounded this situation. When asked the terms of the lease, Mr. Doxey explained it is for fifty-five years."
>
> "Mr. Doxey pointed out that there has to be

some development on this corner if the city is going to grow, and the corner cannot be developed with its cost unless some substantial building is built on it, and a substantial building is going to increase the parking. To him it seemed unlikely that A Street with its contours will ever be changed to any other than a one-way street. So the requested variance on A Street would seem equitable. Height is something the Board has wrestled with for a long time and it is such a problem in the modern development of Salt Lake City that changes have been made in the ordinance. The request came well within the change that will be made before long. He noted that the parking inside the building would be an asset and also that the parking far exceeds that which is required. When the chairman asked if this is a definite lease, Mr. Doxey stated: 'The lease is a firm lease and the money has been paid'." (R. 214, 215)

Mr. Doxey reaffirmed this position in letters to the Zoning Board. (Pl. Ex. 22 and 23)

Soil tests were made on the property and the existing building was demolished and removed therefrom, all as part of the program, and with the knowledge and implied consent of Zions Securities. (R. 217)

The construction loan was never obtained and the project was abandoned, primarily by reason of the death of the principal officer of Artcol Corporation. (R. 204) Harris was paid nothing for his services in preparing the complete plans and specifications for the building. (R. 204) Harris thereupon caused to be filed with the County Recorder, his notice of intention to claim a lien,

(Pl. Ex. 19) and thereafter when Zions First National Bank commenced action upon the $90,000.00 notes, Harris, by a third party complaint, sought to foreclose his lien against Zions Securities Corporation, and was granted judgment on his third party complaint, from which judgment this appeal has been taken by Zions Securities.

ARGUMENT

POINT I

UNDER THE FACTS AND CIRCUMSTANCES HERIN, THE LIEN OF THE ARCHITECT HARRIS ATTACHED TO THE INTEREST OF THE LESSOR, ZIONS SECURITIES CORPORATION.

Points 1, 2 and 4 of Appellant's brief all effectively deal with the issue of whether or not the lien, attached to the interest of the lessor, Zions Securities Corporation. Respondent, therefore, will answer all three of Appellant's points hereunder.

Utah Code Annotated, 1953, Title 38-1-3, expressly gives a lien to "licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service or bestowed labor."

The statute further provides that the architect "shall have a lien upon the property upon or concerning

which they have rendered service * * * whether at the instance of the owner or of any other person acting by his authority as agent, contractor or otherwise."

There is no question but that an architect is entitled to a mechanic's lien, see *Headlund v. Daniels,* 50 Utah 381, 167 Pac. 1170, (1917), and that the lien extends to his services in furnishing plats, plans, maps, etc. *Frehner v. Morton,* 18 U.2d 422, 424 P.2d 446 (1967).

Early Utah cases suggested that a lessor's interest was not subject to a lien with respect to improvements contracted for by the tenant unless the relation of principal and agent existed between the lessor and lessee. See *Morrow v. Merritt,* 16 Utah 412, 52 Pac. 667 (1898); *Belnap v. Condon,* 34 Utah 219, 97 Pac. 111 (1908). Even under the early cases, however, it was clear that the agency could be express or implied, or by subsequent ratification. These cases, however, construed an earlier Utah mechanic's lien statute which contained a provision that the lien should attach only to such interest as the owner or "lessee" may have in the real estate. The words "or lessee" have been deleted from the present statute.

A later case under the old statute suggests that where the lease agreement requires that the lessee make stipulated improvements, an agency will arise for the purposes of making those improvements. See *Gorman v. Birrell,* 41 Utah 274, 125 Pac. 685 (1912). Although the lease per se does not require the construction of the

apartment building, the whole purpose and intention of the lease was in contemplation of the building of the apartment house. The lease requires architectural standards to be conformed to in the building of the apartment house. The rental ultimately is based upon the value of the improvement built. The apartment house reverts to the lessor at the end of the lease. The lease contains restrictive provisions with respect to the use of the apartment house. The lease requires insurance upon the apartment building for the benefit of the lessor. The lease contemplates the filing of liens and requires the tenant to save the landlord harmless therefrom. The lease gives the landlord a lien upon the furniture and fixtures to be placed in the apartment building. And, finally, by the lease, the landlord agrees to join in all necessary applications for building permits, licenses, et cetera, and "for that purpose, the landlord hereby irrevocably appoints the tenants as its attorney-in-fact to execute such papers on behalf of the landlord."

In fact, it is generally accepted law in most jurisdictions that where the lease contemplates the construction of a building which will enhance the value of the fee to the benefit of the lessor, the lessee must be deemed the agent of the lessor for the purpose of the construction. See annotation 87 A.L.R. 1290. See *Myers v. Joseph A. Strowbridge Company,* 82 Ore. 29, 160 Pac. 135; *Oregon Lumber Company v. Nolan,* 75 Ore. 69, 143 Pac. 935; *Denniston Company v. Brown,* 183 Iowa 398, 167 N.W. 190; *Loeff v. Myer,* 284 Ill. 114, 119 N.E. 908; *Long-Bell Lumber Company v. McCray*

Bank Company, 89 Kan. 788, 132 Pac. 992; *English v. Olympic Auditorium,* 20 P.2d 946; *Ott Hardware Company v. Yost,* 69 Cal. App. 2d 593, 159 P.2d 663.

Further, the parties to the lease cannot circumvent liens by provision of the lease. See *Metals Manufacturer Company v. The Bank of Commerce,* 16 U.2d 74, 395 P.2d 914, wherein this court construing the bonding statute to protect materialmen (U.C.A., 1953, 14-2-1 and 2), a comparable statute to the mechanic's lien statute, allowed a material supplier to recover against the leasee even though the terms of an agreement between the lessee and the lessor stated that the improvements made to the building would remain personal property and could be removed by the lessee at the end of the lease. This court stated:

> "It would seem to be unrealistic and unreasonable to conclude that such parties by agreement among themselves could bind third party suppliers of materials to the terms of an agreement to which such suppliers were not privies and the terms of which they do not know. Such conclusion could result in easy circumvention of the statute whose purpose clearly is to protect suppliers, if what they supply falls within the clear import of the statute."

In *Robert L. Weed Architect Inc. v. Horning,* 33 So. 2nd 648 (Fla. 1948), facts remarkably similar to the instant case, the architect executed a contract with the lessee under a lease which contemplated improvements and which contained an identical provision to the lease

herein, whereby the lessee agreed not to allow any mechanic's liens to be placed upon the land and the land owner contended this defeated the lien. The Florida Court stated:

> "To rebut the latter contention, it is sufficient to say that the original lease provided for the improvements on the lease-hold from which Appellant's lien accrued, both parties knew they were essential to execute the purpose of the lease and both parties knew that they were the very gist of the lease. When the lease is read in sum one can draw no other conclusion than that both parties contemplated and knew that a contract for the improvements would be made. Appellant was not a party to the lease and since the statute gives him a lien, it would be ridiculous to hold that the parties to the lease can contract to defeat the law."

The Indiana Court in *American Islam Society vs. Bob Ulrich Decorating,* 132 N.E. 2d. 620 (Ind. 1956) stated:

> "Something more than mere inactive consent is necessary in order that a lien may be acquired against the owner of the property. *But where the vendor has been active and instrumental in having the improvements made, the lien will attach to the real estate where the vendee failed to carry out his contract of purchase.* * * * The lien may attach if the owner of the real estate has been active and instrumental in having the improvements made. If there is such evidence then under the well-recognized rules, this court will not weigh the evidence and reverse the finding of the trial court upon a disputed question of fact. * * *

> "The lessor's interest * * * may be subject to a mechanic's lien by reason of the lessee's contract where the lease contemplates the making of improvements by the lessee, especially where such improvements are a substantial benefit to the lessor, as well as where the lessee obligates himself to make improvements at his own expense. * * *
>
> "It is the general rule that where a lease contains a provision authorizing the lessee to make improvements 'by deducting the costs thereof from the rent, or where part of the consideration of the lease is the making by the lessee of improvements which became a part of the realty, or that the improvements made by the lessee shall revert to the lessor, a mechanic's lien may attach to the property for work done or materials furnished, pursuant to a contract with the lessee'."

A number of the cases cited by Zions are from strict construction states, such as Iowa. The most that can be said for these cases, as well as the Utah Case of *Belnap v. Condon,* supra, is that something more than mere consent is required to subject the title of the fee owner to the lien.

As aptly stated by the Supreme Court of Missouri:

> "While the lease should, if such connection exists, sufficiently disclose the lessor's finger prints on same, it is not upon this instrument alone, however, but to all the facts connected with the transaction that we may look in determining whether a connection in the nature of agency exists between the parties and as a consequence the right of the respondents to the liens."

Allen Estate Association v. Boeke, 300 Mo. 575, 254 S.W. 858 (1923).

In addition to the fingerprints of the lessor on the lease herein, the singular evidence is that the lessor actively participated in the development and improvement of its real property and impliedly authorized and ratified the employment of Harris, and subjected itself to Harris' architect's lien. Under the circumstances surrounding the development of Zions property, it had adequate means to protect itself from claims of unpaid laborers and materialmen. It sought to protect itself by requiring Artcol to covenant that no liens would be filed against the property, but all Zions had to do was to require Artcol to obtain a bond, saving Zions harmless from lien claims.

> "The aim and purpose of the Utah Mechanic's Lien Law (38-1-1 — 38-1-26, U.C.A., 1953) manifestly has been to protect, at all hazards, those who perform the labor and furnish the materials which enter into the construction of a building or other improvement. The owner of the premises is most likely to suffer." ***Rio Grande Lumber Co. v. Darke,*** 50 Utah 114, 167 Pac. 241.

POINT II

HARRIS' LIEN IS VALID THOUGH THE APARTMENT WAS NOT CONSTRUCTED.

U.C.A., 1953 38-1-3, expressly provides that:

> " * * * Licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence or who have rendered other like professional service or bestowed labor shall have a lien upon the property upon or concerning which they have rendered service, performed labor or furnished materials."

The statute does not require that a building must be constructed before such a lien attaches. And this court has held that the lien attaches when work or material has commenced on a structure, *or preparatory thereto. Western Mortgage Loan Corp. v. Cottonwood Construction Co.,* 18 U.2d 409, 424 P.2d 437.

The Utah cases cited by Zions purporting to require the erection of a building, deal with cases where materials are supplied but not actually used at the building site. The legislature, has expressly concluded that an architect's services benefit the property, and the fact of the matter is that Harris has prepared a quarter of a million dollars worth of plans, specifications, engineering studies, soil studies, et cetera, which are tailor-made to the property in question and which would cost an equal amount to reproduce for this property. In preparing these plans, Harris has expended $90,000.00 of his own money, and while the plans were being prepared Zions received in excess of $73,000.00 in rentals.

Third party defendant cites an Iowa case which purports to hold that an architect had no lien when the building was not erected. See *Foster v. Tierney,* 59

N.W. 56. The Iowa statute is entirely different, however, than the Utah statute in that first, an architect is not expressly given a lien, and secondly, the liens granted do not extend to the property upon or concerning which the service was rendered. More nearly in point is *Lamoreaux v. Andersch,* 150 N.W. 908 (Minn.), where the court held that the architect constructively contributes improvements to the land and is entitled to enforce his lien for plans and specifications prepared. This was so even though the Minnesota statute was the same as the Iowa statute. The court discusses the *Foster* case and points out that it is based upon a strict construction of the Iowa statute, Iowa being a strict construction state. Even in the *Lamoreaux* case, the statute did not expressly give an architect a lien. The *Lamoreaux* case also refers to *Freeman v. Rinaker,* 56 N.E. 1055 (Ill.), where the Illinois court upholds a lien to one who performs services as an architect and validates the lien even though the building is not constructed.

POINT III

THE NOTICE OF INTENTION TO CLAIM A LIEN IS VALID WITHOUT REFERENCE TO HAROLD CARLSON.

The court will recall that the architectural services were rendered by the joint venture of Harris and Carlson and that Carlson assigned all of his interest in the claim and the lien to Harris. U.C.A., 1953, Title 38-1-26, expressly provides that all liens under the mechanic's

lien statute shall be assignable as other choses in action. *Smoot v. Checketts,* 44 Utah 211, 125 Pac. 412, held that the right to perfect a lien is also assignable.

The fact that Carlson is not named in the notice of lien itself is indistinguishable from *Buchner Block v. Glezos,* 6 U.2d 226, 310 P.2d 517, where the owner charged with the lien was not named therein and the court held this omission was immaterial.

POINT IV.

THE NOTICE OF LIEN IS VALID DESPITE TECHNICAL OBJECTIONS.

The challenge to the lien's validity by reason of a purported lack of verification occurred for the first time on the morning of trial. Respondent vigorously objected to Zion's raising this issue belatedly. The answer to the third party complaint filed a year and a half prior to the trial not only failed to affirmately plead this purported defense, but, in fact, admitted that the lien was prepared and filed by Harris, denying only that Zions was indebted to Harris by reason of any professional services rendered to Zions. When Harris filed a supplemental complaint alleging the assignment from Carlson, Zions again filed its answer admitting the preparation and filing of the notice of claim of lien by Harris and in no way affirmatively alleging the invalidity of said notice by reason of lack of verification. By affirmative defense, Zions alleged that the notice of lien was null and void

only because (a) Carlson was not a party to same, and (b) Zions Securities had not authorized the filing of same, and (c) no benefit had been conferred upon Zions Securities.

The notice of lien in question was dated November 16, 1965, and signed by Harris personally and acknowledged before a notary public who duly affixed his signature and seal and thereupon was recorded in the office of the Salt Lake County Recorder. Suit was commenced upon the lien in June, 1966. Zions took the deposition of Harris in August of 1966, the deposition taking several days, and at which deposition Harris, under oath, testified as to all of the essential elements of his lien and this cause of action. The deposition was followed by the deposition of various personnel of Zions Securities. Zions Securities thereafter filed a motion for summary judgment, at no time raising the issue of a purported lack of verification. The motion was denied. Thereafter, the matter came on for pre-trial hearing twice before the Third District Court, and at no time was the alleged defense of lack of verification raised.

Zions Securities has waived any purported defense of technical insufficiency of the lien by failing to raise same until the morning of trial. A failure to plead an affirmative defense results in a waiver of that defense and is excluded in the case, 1A, *Barron & Holtzoff, Federal Practice and Procedure*, Sec. 279, p. 166. (Construing Rule 8 (c), Federal Rules of Civil Procedure which is identical to the Utah rule.) Rule 8 (c), U.R.-

C.P. provides that a pleading shall set forth affirmatively any matter constituting an avoidance or affirmative defense. A general denial will not permit proof of such matters not affirmatively alleged. The rule enumerates nineteen affirmative defenses most commonly invoked but is not limited to them. Other matters which have been held by the courts to constitute affirmative defenses which must be specially pleaded, for example, include insufficiency of a claim for a tax refund. *Northwestern National Bank v. U.S.*, 46 F. Supp. 390 (D.C. Minn., '42), affirmed 137 F.2d 761. Clearly, the claim that the notice of lien is insufficient constitutes an avoidance requiring special affirmative pleading.

A litigant waives any objection to want of or defects in verification by failing to plead same. 41 *Am. Jur., Pleading,* Sec. 391, p. 562, Footnote 6; 71 *CJS, Pleading,* Sec. 556, p. 1120.

The Supreme Court of Utah has repeatedly held that the notice of intention to claim a lien filed under the statute is no more nor less than simply that: A notice. See *Buehner Block vs. Glezos,* supra, wherein the court states:

> "The purpose of the recordation of the notice of lien is to give notice thereof to all persons who may be affected thereby. * * * A further assault upon the lien by Mr. Hong that it was not effective against him nor his interest in the property because his name was not listed on the notice of lien is without merit."

The purpose of recording this document is to provide notice to those persons who may be interested in said real property of the fact that the claimant thereunder asserts a claim against that real property. The notice filed herein complies not only substantially but exactly with the statutory requirements specifying the property, the owner, the claimant, the amount, the dates and all else required to adequately and fully apprise the world of the nature of Harris' claim. The one thing lacking, which Zions now claims renders this notice ineffective is a traditional verification. A traditional verification in no way amplifies nor clarifies the information contained in the body of the notice. The body of the notice is sufficient to apprise any interested person of the nature of Harris' claim with or without the verification.

Black's Law Dictionary, 3rd Edition, p. 31, states that to "acknowledge" is:

> " * * * to own, *avow* or admit; to confess; to recognize one's acts and assume the responsibility therefor."

Indeed, the requirement of verification is really nothing more than an archaic link with a highly formalized approach of the past and has been rejected in almost all legal procedure generally. The lien statute specifying the contents of the notice of claim practically in its present form, was enacted in 1888, eight years before statehood. As stated in 1A, *Barron & Holtzoff,* ibid, § 333, p. 270, the trend of enlightened opinion is away from the all too barren formality of an oath to pleadings. As the

court is aware, the need for a verification in formal pleadings filed in a court of law, which go well beyond merely the notice filed by Harris, has been abolished.

In *Tangren v. Snyder*, 13 U.2d 95, 368 P.2d 711, this court in construing the statute regarding filing of claims in probate proceedings, U.C.A., 1953, 75-9-5, stated:

> "Respondent contends that the court was correct in dismissing the action with prejudice because courts in states having similar statutes have held the requirements in the affidavit to be mandatory and have strictly construed them so that an omission or failure to comply exactly with the literal wording of the statute was fatal to the presentment and upon rejection could not be the basis of a complaint thereon. (footnotes omitted)
>
> "We are not in accord. We are of the opinion that the statutory requirements of the contents of the claim and affidavit in support thereof should be liberally construed and that such statutes were, as aptly stated in *United States Fidelity & Guaranty Co. v. Keck*, 75 Cal. App. 2d 828, 171 P.2d 731, 'not intended to make it easier to avoid payment of a just claim, but were intended to make a claimant set forth his claim with such particularity that the executor or administrator in passing upon it would be fully advised as to just what was claimed. * * *'"

Zions, in its memorandum, cites authority from Kansas and New Mexico purporting to make mandatory the verification of a lien notice. Kansas, however, construes mechanic lien statutes as in derogation of the

common law and hence strictly. *D. J. Fair Lumber Co. v. Carlin,* 430 P.2d 222 (Kan.).

New Mexico, faced with three different "verification-acknowledgments" affixed to notice of liens declared one of them to be invalid and two of them valid. See *Lyons v. Howard,* 117 Pac. 842 (N.M.), where the court stated:

> "The courts of New Mexico are committed to the doctrine that the mechanics lien law is remedial in its nature and equitable in its enforcement and is to be construed liberally. * * * It also follows in the absence of any statutory requirement as to the form of the verification; that a substantial compliance therewith is all that is required. No particular form of verification is required by our statute nor is it specifically required thereby that the verification shall be true as to the knowledge of the affiant, nor is it necessary that there should be an affidavit to the claim of lien. * * * The verification of a claim of lien is not for the purpose of proving the lien. The statement of the lien verified as required by law and recorded is a mere notice that the claimant intends to avail himself of his right to a lien."

See also *Hot Springs Plumbing Co. v. Wallace,* 27 P.2d 984 (N.M.), where the "verification" reads as follows:

> "On this 6th day of August, 1930, before me personally appeared J. E. Love, Manager and one of the partners of said Love Lumber Company, to me known to be the person who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed;

> that the name of the owner, the name of the claimant, the description of the property upon which the lien is claimed and the itemized statement hereto attached are correct."

The New Mexico court held the notice of lien to be sufficient, and that any other interpretation would require a rule of strict construction. The New Mexico court in *Home Plumbing Co. v. Pruitt,* 372 P.2d 378 (N.M.), does not overrule the *Hot Springs Plumbing* case, but, in fact, refers to it as "the law as thus announced."

Other jurisdictions faced with this problem liberally construe the mechanic lien statutes and have upheld liens with a variety of technical insufficiencies. See *Georgia Lumber v. Harrison Construction Co.,* 136 S.E. 399 (W.Va.) where the notary failed to affix his official seal to the jurat which was amended in that respect after the expiration of the time within which the notice was required to be given. See also *Curry v. Morgan,* 321 P. 2d 973 (Okla.), where the notary's acknowledgment was defective and the court held that the defendants were not unable to determine the lien had been filed and the nature of the lien by reason of the defect and that there was substantial complance in the filing of the lien. See *Peterman-Donnelly Corp. v. First National Bank,* 408 P.2d 841, (Ariz.), where the lien notice failed to satisfy the statutory requirement of a "copy of the contract," and the court validating same held the purpose of the statute is to give the property owner an opportunity to protect himself and time to investigate the claim and determine whether it is a proper charge. See

also *Drake Lumber v. Lindquist,* 170 P.2d 712 (Ore.), where the lien was ambiguous as to whether the claim was by Drake Lumber Company or C. V. Drake as an individual, and the court held the mechanic's and materailmen's lien law is remedial in nature and should be liberally construed so as to afford laborers and materialmen the greatest protection compatible with justice and equity. See *Stevenson v. Kilcheken Spruce Mills, Inc.,* 412 P.2d 496 (Alaska), where the verification was typed in the classic manner but not signed by the claimant, and the Alaska Court held the lack of the claimant's signature on the lien following the formal oath did not invalidate the lien and that construing the statute as remedial and liberally, the claim of lien is not ineffective by reason of any insufficiency in the requirement for verification.

In *Rust v. Kelley Brothers Lumber Co.,* 21 S.W. 2d, 973 (Ark.), an itemized account attached to the lien under the Arkansas statute required verification and the court stated:

> "Although the itemized account attached to the complaint was not sworn to, the amount of materials furnished and the dates thereof were established by the evidence of appellee, and were not attempted to be contradicted. The record also shows that suit was commenced by appellee to establish its lien within 90 days after the materials were furnished, but it is insisted that appellee was not entitled to a lien, because it failed to verify its account as required by section 6922 of Crawford & Moses' Digest. This does not

make any difference. This court has uniformly held that, in an issue between mechanics or materialmen and the owner of the property, a substantial compliance with the statute is all that is necessary. The result is that the bringing of a suit by the lien claimant against the owner gives the latter all the notice that could be required as to the claim for a lien against his property. The neglect to comply fully with the requirement of the statute was intended for the protection of third persons, who might acquire rights in or liens upon the same property. *Murray v. Rapley,* 30 Ark. 568; *Anderson v. Seamans,* 49 Ark. 475, 5 S.W. 799; *McFadden v. Stark,* 58 Ark. 7, 22 S.W. 884; *Standard Lumber Co. v. Wilson,* 173 Ark. 1024, 296 S.W. 27. In the last case the court said that the statute was wholly remedial in its nature, and that, when the controversy is between the holder of the lien and the owner of the land, an exact compliance with the statute at all points is not indispensable."

See also, *Robertson Lumber Co. v. Swenson,* 138 N.W. 684 (No. Da.) where the lien was not verifed and the court held that it did not affect its validity, and *Patten and Davies Lumber Co. v. Hayden,* 298 Pac. 129 (Cal.) wherein the court held that failure to verify the lien did not forfeit the lien in absence of notice of the defect or demand for verification.

The Utah Supreme Court, when faced with various insufficiencies of mechanic's lien notices, has consistently held the notices to be adequate. At the time of the first enactment of the territorial statute, the United States Supreme Court concluded that the Utah statute is to be

liberally construed. See *Flagstaff Silver Mining Co. v. Cullins,* 104 U.S. 704, 26 L.ed 704 (1881). See *Culmer v. Clift,* 14 Utah 286, 47 Pac. 85, where the description of the property sought to be charged was erroneous. See *Park City Meat Co. v. Comstock Mining Co.,* 36 Utah 145, 103 Pac. 254, involving an erroneous description of the property where the court states that the lien will not be defeated by mere technicalities or nice distinction. See *Brubaker v. Bennett,* 19 Utah 401, 57 Pac. 170, dealing with an erroneous statement of the terms of the employment contract. See *Garner v. Van Patten,* 20 Utah 342, 58 Pac. 684, dealing with errors and inconsistencies in the statement of the amount due. And see *Eccles Lumber Co. v. Martin,* 31 Utah 241, 87 Pac. 713, dealing with a failure to apportion the amounts due with respect to two contracts. See also *Buehner Block v. Glezos,* supra, where the name of property owner was omitted.

CONCLUSION

Despite a myriad of technical objections raised by Zions Securities, it effectively authorized and ratified the architectural services rendered by Harris, which services actually and constructively benefited Zions' real property and subjected same to Harris' lien, which lien has been established in open court to be valid and proper in all respects, and which entitles Harris to a judgment

of foreclosure with respect to the admitted indebtedness the lien secures.

Respectfully Submitted,

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