

1969

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

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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,
a Utah corporation,

*Third-Party Defendant-
Appellant, and*

ARTCOL CORPORATION,

Third-Party Defendant.

APPELLANT'S BRIEF

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

ZION FIRST NATIONAL BANK,
Plaintiff,

— vs. —

HAROLD A. CARLSON and
M. E. HARRIS, JR.,
Defendants.

M. E. HARRIS, JR.,
*Third-Party Plaintiff-
Respondent,*

Case
No. 11,636

vs.

ZIONS SECURITIES CORPORATION,
a Utah corporation,
*Third-Party Defendant-
Appellant, and*

ARTCOL CORPORATION,
Third Party Defendant.

APPELLANT'S BRIEF

NATURE OF THE CASE

M. E. Harris, Jr., one of two defendants in an action brought by plaintiff bank on four promissory notes, filed a third party complaint against Zions Securities Corporation and Artcol Corporation to foreclose an alleged mechanic's lien for architectural services. Zions Securities Corporation defended separately from Artcol Corporation.

DISPOSITION IN THE LOWER COURT

M. E. Harris, Jr., third party plaintiff, obtained summary judgment against Artcol Corporation, one of third party defendants, October 5, 1966, for \$212,350.00 for architectural services, and a decree of foreclosure of all right, title and interest of Artcol Corporation. (R. 66-68).

On the issues of fact and of law between M. E. Harris, Jr., and Zions Securities Corporation, the other third party defendant, a pre-trial conference and a trial were conducted by the Honorable Allen B. Sorensen, District Judge, on December 12, 1968. Findings of fact, conclusions of law, and foreclosure decree and judgment dated April 7, 1969, were entered on April 23, 1969, in favor of M. E. Harris, Jr. against Zions Securities Corporation. (R. 131-139). By such foreclosure decree and judgment appealed from, Zions Securities Corporation was adjudged to be indebted to M. E. Harris, Jr. in the principal sum of \$159,262.50 plus \$31,852.40 interest, plus \$19,000.00 attorney fees, or a total of \$210,114.90; said amount was adjudged to be secured by Harris' mechanic's lien upon described lands; Zions Securities was thereby foreclosed of all right and title to said lands; "said mortgaged property" was ordered sold by the Sheriff of Salt Lake County, with judgment to be entered for any deficiency. (R. 137-139).

RELIEF SOUGHT BY APPEAL

Appellant Zions Securities Corporation seeks (a) reversal of the foreclosure decree and judgment in its entirety; (b) an adjudication that Zions Securities never became indebted to M. E. Harris, Jr. in any sum or amount, and that the "Notice of Lien" filed by M. E. Harris, Jr. was and is null and void as to Zions Securities; and (c) that appellant have judgment against M. E. Harris, Jr. of "no cause of action," and for recovery of appellant's costs.

STATEMENT OF THE FACTS

Since about 1960 Zions Securities Corporation has been the owner in fee of land on the east side of "A" Street between South Temple Street and First Avenue in Salt Lake City. (R. 205). There was a home on that land which had a rental value of about \$100.00 per month. (R. 205-206, 221).

Under date of June 26, 1963, Zions Securities Corporation, as fee owner, designated as "landlord," and Artcol Corporation, designated as "Tenant," executed a "Ground Lease" covering the real estate, Exhibit 21, for a term of 85 years, subject to terms and conditions, including payment of rent. For the first 45 years the rental was to be based on 6% of the appraisal or reappraisal of the land only. By paragraph 7 of the Ground Lease it was provided that "ARTCOL, at its own cost and expense, may at its option, erect and construct a building or buildings, structure or structures, or other improvements," etc. By paragraph 16 it was provided that whenever Artcol was not in arrears of rent nor in default "ARTCOL, or its assignee or sublessor, may mortgage its or their estate or its or their interest therein to secure a bona fide loan or loans of money," etc. By paragraph 26 it was provided:

" * * * the TENANT is authorized to obtain a loan, the repayment of which is to be insured by the Federal Housing Commissioner and secured by a mortgage on this leasehold estate. TENANT is further authorized to execute a mortgage on this leasehold and otherwise to comply with the requirements of the Federal Housing Commissioner for obtaining such an insured mortgage loan; provided, however, that the LANDLORD shall not be required to mortgage the real property."

By paragraph 30 it was specified: "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," etc. There were restrictive covenants in the lease. Substantial portions of the lengthy Ground Lease are set forth in Appendix "A."

M. E. Harris, Jr., third party plaintiff, testified at the trial that he has been licensed in Utah to practice as an architect since 1946; that he was associated with Harold A. Carlson of Los Angeles in "a partnership or a joint venture" for a proposed apartment building to be built on the land; that Artcol Corporation commissioned them to draw plans and specifications and to do the other architectural work for a proposed building to be known as "Plaza Terrace Apartment Building." (R. 177-179). The written contract, Exhibit 2, designated, "A STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT," dated August 6, 1963, was executed by Artcol Corporation as "Owner" and by M. E. Harris, Jr. and Harold A. Carlson as "Architect." Said Exhibit 2 provided for a total fee of \$212,350.00. Said contract defined the "BASIC SERVICES OF THE ARCHITECT," under headings of Schematic Design Phase, Design Development Phase, Construction Documents Phase, and Construction Phase including general supervision of construction. Artcol was to make payments as follows:

"Seventy-five percent (75%) of the fee shall be paid to the Architect when plans have been approved by F.H.A. and loan recorded for construction. The remaining twenty-five percent (25%) balance shall be paid proportionately with each contractors draw during the construction phase."

It was stipulated at the trial that "no loan was ever recorded for construction." (R. 177). At the pretrial conference it was "stipulated that no building was constructed on the premises as a result of the third party plaintiff's architectural services." (R. 173). At the trial it was stipulated that "There

has been no building on this property” and that the “lot is presently vacant. (R. 221).

To finance their architectural work, between February and October 1964 the architects jointly borrowed \$95,000.00 from Zions First National Bank and signed notes to cover the loans. Those are the notes which plaintiff bank brought suit on in this case. (R. 1-7). To secure payment of those notes, by Exhibit 3 dated February 13, 1964, Carlson and Harris assigned to the bank as collateral security their contract with Artcol Corporation dated August 6, 1963, Exhibit 2. (R. 179-180). Artcol Corporation had to sign every check which was issued. Zions Securities did not sign any of the notes, was not a party to the loan transactions, and never received any of the money. (R. 179-180, 201).

Harold A. Carlson, partner of third party plaintiff M. E. Harris, Jr., or his joint adventurer, did a substantial part of the architectural work. He was involved principally in preparation of the specifications, Exhibit 11. (R. 169-171, 198). Carlson did part of his work in California. He was in Salt Lake City part of the time. His name was on the office door along with that of Harris. They discussed many things about the project. (R. 202-203).

M. E. Harris, Jr. testified that Zions Securities did not ask him to prepare any drawings. He answered “No” to the question: “Did Zions Securities Corporation at any time enter into a contract with you?” (R. 198-199).

Harris identified various exhibits. He said he requested that soil tests be made. Exhibit 13 is a report of soil analysis made by a firm of consulting engineers, dated March 3, 1964. A drill rig took core samples in depth ranging from 30 to 80 feet. (R. 191-192). Harris testified that Artcol Corporation paid for that work. (R. 200).

Exhibit 14 shows location of structures off the property. Exhibit 15 is a topographic survey showing location of 2-story

brick and stone house, with walks, fronting on First Avenue. Exhibit 16 is a topographic survey showing contours and elevations. The survey plats show they were made for Artcol Corporation by D. H. Brammer & Co., Engineers. Harris testified that he requested those surveys, and that Artcol Corporation paid for them. (R. 192-193, 200).

Harris testified that he suggested that structures on the land be demolished. He recommended to Artcol Corporation names of specialty contractors who could do that work. He said that Artcol Corporation paid for the demolition. (R. 200-201). The demolition occurred in mid 1964. (R. 193). Graham H. Doxey, manager of Zions Securities, saw the house on the leased land being torn down. He never objected nor gave permission to Artcol Corporation for such demolition. (R. 217). It was stipulated that if called as a witness, Taylor Merrill would testify that the reasonable rental value of that house was \$100.00 per month (which was demolished in 1964). (R. 221).

Harris testified that it was necessary to file a request for variance and for a hearing with the board of adjustment because the design of the proposed building did not meet the existing zoning requirements. Harris said he prepared Exhibit 5, a notice of zoning appeal and obtained Doxey's signature on it. Harris told Doxey it was necessary for Doxey to sign it because of the city requirement for the property owner to sign the application for variance. (R. 185-187, 196-197). The first hearing was in September 1963. (R. 187). Exhibit 6 is the decision on appeal dated November 4, 1963, granting the variance on condition that construction start in six months. The minutes incorporated into the decision recite that "Mr. Jorgensen explained that the appeal is in the name of Zions Securities because they are the owners of the property, but it has been leased to Artcol Corporation, who are building the building."

The variance lapsed and a second hearing was held in January 1965. Harris said he prepared the application and asked Doxey to sign it. By that time the working plans and specifications were essentially completed, Exhibits 10 and 11. (R. 187-191). Exhibit 22 is a letter signed by Graham H. Doxey for Zions Securities to the board of adjustment, January 5, 1965, stating: "the developers to whom we have leased the property have been working through their architect, Mr. M. E. Harris, to complete the plans and also to work out the building and development program."

In September 1965 there was a later hearing. Harris said it was detected by the zoning staff that on one corner of the proposed building there would be a wall too high for the setback and some balconies projecting into the side and rear yards in violation of the ordinance. He prepared an application for the proposed variance and had Doxey sign it. Exhibit 8 is a copy of the decision on appeal dated September 7, 1965. The request for variance for balconies on "A" Street was denied, but the other variance was granted. The minutes in the decision show no one present from Zions Securities; but that "Mr. M. E. Harris, Jr., architect, and Weston S. Taylor, representing Artcol Corporation, were present. Mr. Taylor presented a letter of authorization from C. E. LaBrae, President of Artcol Corporation, who are building the structure."

In August 1963 at the suggestion of Artcol Corporation, Harris said he showed to the manager of Zions Securities, Exhibit 4, the preliminary design drawings. Harris was not sure of the exact words, but Doxey said, "This looks like a good way to handle the site situation. It's a good place for parking." Harris said, "He approved of that with thought, I felt." (R. 183-184). Doxey never signed any approval. (R. 195-196) Harris said he did not leave Exhibit 4 with Doxey. Harris testified that he never delivered any plans or specifications to any one at Zions Securities Corporation. (R. 201).

The name-plate on each sheet of the working plans, Exhibit 10 states: "APARTMENT BUILDING FOR ARTCOL CORPORATION," and names "Harold A. Carlson, A.I.A., Los Angeles," and "M. E. Harris, Jr., A.I.A., Salt Lake City," as "Architects." The specifications, Exhibit 11 designates Artcol Corporation as "Owner." There is a place for signatures approving the specifications, but no place for the signature of Zions Securities. Exhibits 10 and 11 were essentially completed by January 1965. (R. 190-191).

Artcol Corporation filled application for F. H. A. commitment for an insured mortgage for \$3,506,000, August 18, 1964. (R. 174-177). The F. H. A. commitment was issued to Zions First National Bank on June 23, 1965. (R. 174-175). The commitment expired after four short extensions. The local F. H. A. office on April 22, 1966, received a memo from Washington stating that the "commitment in this case which expired on April 17, 1966, may not be re-opened." (R. 175). Zions Securities had no dealings with F.H.A. (R. 216-217).

Harris testified that he was not paid any money by Artcol Corporation on the contract, Exhibit 2. He said he had not been paid by any one for the plans and specifications. (R. 203-204). He testified that he never delivered any plans and specifications to any one at Zions Securities Corporation. (R. 201).

Exhibit 19 is the "Notice of Lien," bearing the signature of M. E. Harris, Jr. (R. 194). He acknowledged his signature November 16, 1965. It was not verified under oath. A copy of Exhibit 19 is attached to the third party complaint. (R. 12-13). Zions Securities first filed motions to dismiss. By answer a number of defenses were asserted, including "failure to state a claim for relief." (R. 25-43). By paragraph 21 of the answer it is alleged: "Said notice of lien dated November 16, 1965, was null and void, and the same was not subject to recordation under the law." (R. 40). There was no assignment

of any kind from Carlson to Harris at the time Exhibit 19 was filed, nor until more than two years after Harris filed his third party complaint. Exhibit 1 is the assignment from Carlson dated July 1, 1968. It was obtained "with the help of Mr. LaBrae of Artcol Corporation." (R. 199-200).

Counsel for Harris stated: "As to Mr. Carlson, we will stipulate that he may claim an interest in the proceeds; that the partnership has never been wound up, though long ago dissolved." (R. 200).

In the pre-trial order dictated December 12, 1968, it was stated:

"It is agreed by the third party plaintiff that he is not proceeding under the theory of an implied contract, but rather under the theory that the services were performed 'at the instance and request' on the part of the third party defendant, as those terms are used in the statute."

"It is stipulated that no building was constructed on the premises as a result of the third party plaintiff's architectural services." (R. 127, 172-173).

ARGUMENT

POINT I

THE "FORECLOSURE DECREE AND JUDGMENT" AGAINST ZIONS SECURITIES, THE LANDLORD AND FEE OWNER, IS CONTRARY TO THE EVIDENCE AND WITHOUT AUTHORITY OF LAW, FOR ZIONS SECURITIES CORPORATION AS "LANDLORD" NEITHER REQUESTED ANY SERVICES OF THE ARCHITECTS NOR GRANTED ARTCOL CORPORATION AS "TENANT" AUTHORITY TO SUBJECT THE FEE TITLE OF LANDLORD TO ANY MECHANIC'S LIEN FOR ARCHITECTURAL SERVICES.

It was undisputed that (a) the architects entered into written contract for architectural services only with the Ten-

ant, Exhibit 2; (b) the architects never furnished the Landlord any plans and specifications; (c) the Tenant never consummated any construction loan nor awarded any contract for construction of a new building; and (d) no building nor other improvement was ever constructed upon the land covered by the Ground Lease, Exhibit 21.

Two of the factual and legal issues in the case were:

(1) Inasmuch as third party plaintiff M. E. Harris, Jr., and his partner Harold A. Carlson executed Exhibit 2 for architectural services solely with the Tenant, Artcol Corporation, whether Zions Securities Corporation by the terms of the "Ground Lease, Exhibit 21, or otherwise, authorized the Tenant to subject the fee title of the Landlord to any lien for architectural services.

(2) Whether the architects performed services at the "instance and request of Zions Securities Corporation" so as to create an indebtedness which could be secured by a lien against the fee title of the Landlord.

Sec. 38-1-3, U. C. A. 1953, specifies:

"Contractors, subcontractors and all persons performing labor *upon*, or furnishing materials to be used in, the construction or alteration of, or addition to, or repair of, any building, structure or improvement *upon* land; * * * and *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, for the value of the service rendered, labor performed or materials furnished by each respectively, whether *at the instance of the owner or of any other person acting by his authority as agent, contractor or otherwise*. Such liens shall attach only to such interest as the owner may have in the property, * * *." (Emphasis added).

As pointed out in *Buehner Block Co. v. Nick Glezos*, 6 Utah 2d 226, 310 P. 2d 517 at 520, the *lessees* who ordered the building materials were *owners* within the meaning of the statute:

“As to defendants’ contention that the mechanics’ liens could not be foreclosed against his interest, it is well settled that a lessee is an owner within the meaning of the mechanics’ liens statutes, and his interest is subject to a lien for improvements made under contract with him. This lien may attach to and be enforced against his leasehold estate for labor or materials furnished under an express or implied contract with the lessee.”

In his third party complaint, M. E. Harris, Jr. alleged;

“2. That on or about the 6th day of August, 1963, *at the special instance and request of Zions Securities Corporation*, Artcol Corporation employed third party plaintiff M. E. Harris, Jr., to perform professional architectural services and prepare plans, drawings and specifications with respect to a proposed apartment building.” (R. 9. Emphasis added).

It was specified in the pre-trial order dictated December 12, 1968:

“It is agreed by the Third Party Plaintiff that *he is not proceeding under the theory of an implied contract*, but rather under the theory that the services were performed “at the instance and request’ on the part of the Third Party Defendant [Zions Securities Corporation], as those terms are used in the statute.” (R. 127, 172-193. Emphasis added).

By Harris’ unverified “Notice of Lien,” Exhibit 19, he made no claim that any architectural services had been performed at the “instance and request” of Zions Securities, but he represented that the services were “furnished to the owners and *to the premises*” described “pursuant to a *contract with Artcol Corporation*,” which was the Tenant. Said contract was Exhibit 2. The prejudicial error of admitting Ex-

hibit 19 in evidence because it is void on its face for it never was verified as required by law, is discussed under Point VI.

M. E. Harris, Jr. answered "No" to the question: "Did Zions Securities Corporation at any time enter into a contract with you?" (R. 199). Harris admitted that Zions Securities did not ask him to prepare any drawings. (R. 198-199). He did not testify that Zions Securities ever asked him to perform any services, or ever promised to pay him anything. Harris testified that he never delivered any plans and specifications to any one at Zions Securities Corporation. (R. 201). At the pre-trial it was "stipulated that no building was constructed on the premises as a result of the third party plaintiff's architectural services." (R. 127, 173). At the trial it was stipulated that no building has been built and that the land is vacant. (R. 221).

There was an utter lack of proof (a) that Zions Securities, the Landlord, by the "Ground Lease," Exhibit 21, or otherwise, requested Artcol Corporation, the Tenant, to employ Harris and Carlson (or either of them) as architects, or (b) that any architectural services were performed by Harris and Carlson (or by either of them) "at the instance and request" of Zions Securities. There was no evidence that Artcol, the Tenant, ever was made the agent of the Landlord with authority to subject the fee title of the Landlord to any liens for any indebtedness incurred by the Tenant.

Notwithstanding the express disclaimer of any theory of "implied contract" at the pre-trial, and the complete failure of proof on the part of Harris of the claims asserted at the pre-trial, among other prejudicial errors the trial court made finding of fact No. 10. Not only is such finding unsupported by the evidence, but it is an unwarranted conclusion of law which misconstrues and even contradicts the express language of the exhibits to which is refers, which were introduced in evidence by Harris himself:

"10. That the third party defendant *impliedly authorized* said architectural services and subsequently *ratified* same and *gave the lessee implied authority* to bind lessor's interest with respect to said services, and subsequently *ratified* lessee's acts by:

"(a) The provisions of the option to lease and lease (Exhibits 20 & 21);

"(b) Approval of the preliminary sketches (Exhibit 4);

"(c) Execution of zoning variance applications and appearances and participation in zoning hearings (Exhibits 5, 6, 7 & 8);

"(d) Approval of said architectural services (Exhibit 22)." (R. 133.) Emphasis added.

None of the exhibits referred to can be construed rationally to have "impliedly authorized said architectural services" if such finding means that Zions Securities requested Artcol as Tenant to employ said architects or agreed to pay them for their services. Nor could said exhibits be construed reasonably to show that the Landlord ratified and assumed any obligations of the Tenant. Nor did any of those exhibits give the Tenant "implied authority to bind lessor's interest with respect to said services." Even if there had been an issue of "implied contract instead of an express disclaimer, there was no evidence of "implied contract."

As to "(a) The provisions of the option to lease and lease (Exhibits 20 & 21)": There was no language in either the "Option to Ground Lease," Exhibit 20, or in the "Ground Lease," Exhibit 21, which gave Artcol Corporation even any "implied authority" to bind the interests of Zions Securities for any costs or expenses of architectural services contracted by Artcol under Exhibit 2 or otherwise. The "Option to Ground Lease" dated January 3, 1963, expired June 15, 1963. There was no evidence that any activities of any kind took

place on the land during the option period. Exhibit 20 incorporated by reference the "Ground Lease attached hereto and made a part of this option," but the attachment is missing. Consequently, the terms of the GROUND LEASE dated June 26, 1963, Exhibit 21, executed by Zions Securities Corporation as "Landlord" and by Artcol Corporation as "Tenant," must be scrutinized.

This Ground Lease, Exhibit 21, was for a maximum term of 85 years. By paragraph 1 the annual rental was to be \$18,000 per year for the first 29 years, such minimum annual rental to continue to the 45th year, or "6% of the value of the land *only*" as appraised or reappraised in subsequent years. The Ground Lease did not require Artcol to build any building nor any other structure nor to make any improvement at any time or in any amount. Paragraph 7 specified that "*ARTCOL, at its own cost and expense, may at its option, erect and construct a building or building, structure or structures,*" etc. Artcol had no obligation to make any improvement. Paragraph 16 provided that "ARTCOL, or its assignees or sublessees, may mortgage its or their estate or its or their interest therein to secure a bona fide loan or loans of money then actually made or then actually about to be made to ARTCOL." Exhibit 21 will be searched in vain for any language which could be construed to grant Artcol authority to subject the title of the Landlord to any mortgage or other lien. Such a concept was expressly negated. By paragraph 26 the Tenant was "authorized to execute a mortgage on this leasehold and otherwise to comply with the requirements of the Federal Housing Commissioner for obtaining such an insured mortgage loan," but "*the LANDLORD shall not be required to mortgage the real property.*" By the express terms of the Ground Lease the Tenant could subject only its own leasehold interests to lien, but not the interest of the Landlord. Substantial portions of the Ground Lease are quoted verbatim in Appendix "A."

The rule is that where the fee owner gives consent to the lessee to make improvements to the land on condition that lessee shall pay for all labor and materials, the lessee does not thereby become the agent of the landlord so as to subject the title of the fee owner to a mechanic's lien.

In an early Washington case, *Stetson-Post Mill Co. v. Brown*, 59 P. 507, it was held that the lessee did not become the agent of the landlord to subject the land to a lien for improvements by the lessee, where the lease gave lessee the privilege of building a brick building which would conform with the requirements of a city ordinance, although at the end of the lease the building would become the property of the lessor without indemnification.

In *Miles v. Bunn*, (Wash.) 22 P. 2d 985, it was held that where the lessee was not obligated to construct a building, but had the privilege of doing so, the lessee was not the lessor's agent, so as to entitle laborers and materialmen to liens on the lessor's property rights. To the same effect are the following cases:

Sewell, etc. v. Nu Markets, Inc. 353 Mich. 553, 91 N. W. 2d 861.

Perkins Fuel & Supply Co. v. Rosenberg, (Iowa), 282 N. W. 371.

Thorson v. Maxwell Hardware Co., (S. D.), 146 N. W. 2d 739.

Fullerton Lumber Co. v. Korth, Executrix, 37 Wis. 2d 531, 155 N. W. 2d 662. (50-50 share cropper).

Backsteader v. Berry Hill Bldg. Corp., 228 N. Y. S. 2d 850. (Distinguishes between mere consent to improve and a contractual duty which legally obligates the lessee to improve).

Lorenz v. Pilsener Brewing Co., (Or.) 81 P. 2d 104.

In *Deka Development Co. v. Fox*, (Okl.), 39 P. 2d 143,

it was held that the interest of the lessor is not subjected to liens for improvements made by the lessee unless the owner is obligated by the terms of the lease to reimburse the tenant for those improvements.

The rule as to nonliability of the fee owner for improvements made by the lessee, is analogous to the rule of nonliability of the vendor of real estate for improvements made by the purchaser under an executory contract of sale. In Utah the interest of the vendor is not subject to any lien resulting from improvements made by the vendee, unless liens on the estate of vendor are authorized by the vendor. As stated in *Burton-Walker Lumber Co. v. Howard*, 92 Utah 92, 66 P. 2d 134:

“Appellant cites the case of *Belnap v. Condon*, 34 Utah 213, 97 P. 111, 23 L. R. A. (N.S.) 601, as authority for the proposition that the interest of the vendor cannot be subjected to mechanic’s liens unless the vendor consents either through ratification or by giving the vendee implied or express authority to bind him. There is no question about this principle.”

In *Belnap v. Condon*, 34 Utah 213, 97 P. 111, the Court made some observations which are applicable to the ground lease in this case, Exhibit 21:

“ * * * The mere expectation by the owner and vendor of the land that the purchaser will make improvements upon it and in that way enhance its value is not sufficient to establish the relation of principal and agent between the vendor and vendee. Nor do we think that mere permission by the vendor to the vendee to make improvements would be sufficient, and certainly mere knowledge or acquiescence on the part of the owner is not sufficient under statute. * * * .

“ * * * No doubt, when one purchases land of any kind, he has at least the implied power to improve it in his own way. If he does so upon his own responsibility, it is not easy to perceive how, in the absence of an ex-

press statute, he thereby binds the owner of the title for the value of the improvements. Nor do we think it changes the rule if the owner either expresses his assent to the making of the improvements or permits them to be made without objection. In either case the necessary authority required by our statute in the vendee from the vendor to bind the vendor's interest in the property is lacking. * * *."

The balance of Finding of Fact No. 10 also is unsupported by the evidence. The purported "(b) Approval of the preliminary sketches (Exhibit 4)," was the unwarranted conclusion of Harris. Harris testified that in August 1963, at the suggestion of Artcol Corporation, he took the preliminary design drawings to Graham H. Doxey, manager of Zions Securities, Exhibit 4. Harris was not sure of the exact words, but Doxey said, "This looks like a good way to handle the site situation. It's a good place for parking." It was Harris' *conclusion* that Doxey "approved of that with *thought*, I felt." (R. 183-184). Harris testified that he did not leave the preliminary drawings with Doxey. He said they showed no detail whatsoever and that they could not be used to construct a building. (R. 182, 201). Doxey testified that he never was asked to approve any plans and never did approve any plans nor ask Artcol Corporation for the right to approve any of the plans. (R. 218). We note that 9 of the sheets were dated November 1963. The alleged "approval" was supposed to have occurred in August 1963. How could Zions Securities "approve" Exhibit 4 in August 1963, when most of the sheets did not come into existence until the following November? Harris admitted that Doxey never signed any "approval." (R. 195-196).

Harris admitted that he never delivered any plans or specifications to any one at Zions Securities Corporation. (R. 201). There was no place on the working plans, Exhibit 10, or on the specifications for any approval by Zions Securities. The plate in the lower right-hand corner of Exhibit 4 (the

preliminary sketches), and on each sheet of Exhibit 10, the working drawings, shows that the architects prepared the plans for Artcol Corporation. The name-plate states: "APARTMENT BUILDING FOR ARTCOL CORPORATION," and names "Harold A. Carlson, A.I.A., Los Angeles," and "M. E. Harris, Jr., A.I.A., Salt Lake City," as "Architects." Zions Securities Corporation was not even mentioned on Exhibit 2, or Exhibits 4, 10 and 11. The caption sheet on the specifications, Exhibit 11, states:

"PLAZA TOWER APARTMENT BUILDING

**"Federal Housing Administration Project Number
105-00032**

"Project Address: 210 First Avenue, Salt Lake City

"ARCHITECTS	HAROLD A. CARLSON, A.I.A., Los Angeles, Calif. M. E. HARRIS, JR., A.I.A., Salt Lake City, Utah
"OWNER	ARTCOL CORPORATION
"MORTGAGEE	ZIONS FIRST NATIONAL BANK
"MORTGAGE INSURER	FEDERAL HOUSING AD- MINISTRATION."

Within those specifications, Exhibit 11, there are places for signatures evidencing approval by all persons named therein. There is no place for approval by Zions Securities Corporation. The plans and specifications clearly show that the architects knew they had contracted to perform services only to Artcol, the Tenant. Zions Securities was not even mentioned as would have been the case if its approval had been required.

Harris made no claim that Zions Securities ever approved the working drawings, Exhibit 10, or the specifications, Exhibit 11. Zions Securities was not even furnished copies of

such documents. The fact is that Zions Securities as Landlord did not reserve any right to choose the architects or to control the activities of the architects, or to approve or reject the plans and specifications or any other work products, in the event the Tenant, Artcol Corporation, decided to erect a building or to make any other improvement on the land covered by the Ground Lease, Exhibit 21. Zions Securities did not hire and it could not fire the architects. The architects did not acknowledge any duties to Zions Securities.

There was no competent evidence to support the unwarranted conclusion in finding No. 10 that "(c) Execution of zoning variance applications and appearance and participation in zoning hearings (Exhibits 5, 6, 7 & 8)," "impliedly authorized" or "ratified" the architectural services of Harris. Harris never pretended that Zions Securities ever requested either of the architects to perform any services. Quite the opposite. Harris requested Zions Securities to sign several applications for zoning variance and zoning appeal. He testified that the design of the proposed building for Artcol did not meet existing zoning requirements. In order to get approval of the plans by the zoning commission, it would be necessary to obtain a zoning variance. Harris said he discussed proposed variances with Doxey. (R. 185-186). Harris admitted that he told Doxey it was necessary to file application for zoning variance in the name of Zions Securities because the city required the property owner to sign the application. (R. 187, 196-197). Harris prepared Exhibit 5, the notice of zoning appeal, and he asked Doxey to sign it. Zions Securities did not ask Harris or his partner to do anything.

Exhibit 6 is the copy of the decision on zoning appeal dated November 4, 1963. It includes a copy of the minutes of the hearing. Those minutes recite that "Mr. Jorgensen explained that the appeal is in the name of Zions Securities Corporation because they are the owners of the property, but it has been leased to Artcol Corporation, who are build-

ing the building." Exhibit 7 includes minutes of a hearing and a decision January 25, 1965, for a six months' extension after the variance had expired because construction had not started within six months as required.

Exhibit 8 is a copy of the decision on appeal dated September 7, 1965. The minutes included in the exhibit recite that "Mr. M. E. Harris, Jr., architect, and Weston S. Taylor, representing Artcol Corporation, were present. Mr. Taylor presented a letter of authorization from C. E. LaBree, President of Artcol Corporation, who are building the structure." No one was present from Zions Securities according to the minutes. The request for variance for balconies on "A" Street was denied, but the other variance requested was granted. (R. 189, 197-198). Obviously, the need for variance was failure of the architects to prepare plans for Artcol Corporation which conformed with the zoning regulations.

The finding of "(d) Approval of said architectural services (Exhibit 22)," contradicts the express language of Exhibit 22 which was a letter from Zions Securities to the Board of Adjustment, January 5, 1965:

"We were granted a variance order No. 4798 to erect an apartment house on the Northeast corner of East South Temple and A Streets. Since that time, the developers to whom we have leased the property, have been working through their architect, Mr. M. E. Harris, to complete the plans and also to work out the building and development program.

"We are informed that arrangements are now substantially completed to undertake this construction, and we respectfully request that you grant an extension of this variance order."

Zions Securities neither approved nor disapproved the "architectural services" by Exhibit 22. It simply made it clear to the Board of Adjustment that Artcol Corporation was the lessee of the property, and was the party undertaking con-

struction, and that M. E. Harris, Jr. was architect for Artcol Corporation.

Zions Securities, the Landlord, never asked Harris to do anything. Harris asked Zions Securities to sign applications for variance which he had prepared to avoid rejection of the architect's plans by the Zoning Commission. Those documents were signed at the instance and request of Harris, to accommodate him and Artcol Corporation. He admitted that he had no contract with Zions Securities. (R. 199). The Exhibits referred to in finding No. 10 cannot be tortured into an "implied contract" to pay for the architects' services to Artcol, nor to impose on Zions Securities some theoretical or fictitious indebtedness in any amount.

POINT II.

THE ARCHITECTS CONTRACTED SOLELY WITH THE TENANT, AND NO SERVICES WERE PERFORMED AT THE "INSTANCE AND REQUEST" OF THE LANDLORD TO CREATE ANY INDEBTEDNESS AGAINST THE LANDLORD OR TO SUBJECT ITS LAND TO A LIEN.

Finding of Fact No. 2 correctly recites that "third party plaintiff and Harold A. Carlson, as joint venturers, on or about the 6th day of August, 1963, contracted to perform architectural services with one Artcol Corporation, which was the lessee of the real property herein involved * * *." (R. 132). Such correct finding is inconsistent with the representation contained in the "Notice of Lien," Exhibit 19, which infers that the contract was made with Harris alone and that he did all of the architectural work including supervision of construction, although it was stipulated that no building was ever built and that the land is vacant. (R. 221).

Exhibit 2, designated "A STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT,"

dated August 6, 1963, was executed by Artcol Corporation as "Owner," and by M. E. Harris, Jr., and Harold A. Carlson as "Architect." Zions Securities Corporation was not a party to that agreement, and was not even mentioned therein. Such contract provided for a total fee of \$212,350.00 to be paid by Artcol for all architectural and engineering services, including supervision of construction. The contract made those fees payable by Artcol upon conditions precedent which never occurred:

"Seventy-five percent (75%) of the fee shall be paid to the Architect *when plans have been approved by F. H. A. and loan recorded for construction.* The remaining twenty-five percent (25%) balance shall be paid *proportionately* with each contractors draw *during the construction phase.*" (Emphasis added).

Since it was "stipulated that no building was constructed on the premises" (R 127, 173), and that the land is "presently vacant" (R. 221), the "construction phase" never occurred. It also was stipulated that "no loan ever was recorded for construction." (R. 177). The contract, Exhibit 2, made no provision for payment of any part of the fees by Artcol to the architects except when two things occurred: (a) "plans have been approved by F. H. A." and (b) "loan recorded for construction." The provisions were not in the disjunctive, but conjunctive. Both had to occur. Inasmuch as it was stipulated that there never was any loan recorded for construction to fulfil condition (b), testimony as to condition (a) was immaterial.

Such immaterial testimony was to the effect that on August 18, 1964, Artcol Corporation filed application for an F. H. A. commitment for an insured mortgage for \$3,506,000 (R. 174-177); that such commitment was issued on June 23, 1965, to Zions First National Bank, the intended mortgagee; that the commitment expired after four short extension; and

that on April 22, 1966, the local F. H. A. office received a memo from Washington stating that the "commitment in this case which expired on April 17, 1966, may not be re-opened." (R. 175). Inferentially, the mortgage loan out of which Harris and Carlson were to be paid 75% of their fees by Artcol, never was consummated. Harris explained that the project was "abandoned" by Artcol in the fall of 1965 after the death of Mr. Murphy — an officer of Artcol Corporation who had been the "driving force." (R. 204).

Third party plaintiff M. E. Harris, Jr., on October 4, 1966, obtained summary judgment against Artcol Corporation, one of third party defendants, for the sum of \$212,350.00, being the full amount of all architectural fees provided for in Exhibit 2, including supervision of construction of a building which never was built. By such summary judgment the court ordered foreclosure of all right, title and interest of Artcol Corporation in the land. (R. 66-68). Whether such judgment against Artcol was predicated on some theory of breach of the contract, Exhibit 2, or wrongful abandonment, or on some other theory, such judgment does not bind Zions Securities for it was not a party to such judgment. No claim was ever made by third party plaintiff to the effect that Zions Securities interfered with or wrongfully prevented consummation and recordation of a loan for construction.

In his unverified "Notice of Lien," Exhibit 19, Harris declared that "The labor and services were furnished to the owners and *to the premises* above set forth *pursuant to a contract with Artcol Corporation.*" Harris made no claim then that he had any agreement with Zions Securities. At the trial Harris admitted he never made any contract with Zions Securities. (R. 199)

The architects knew they had no contract with Zions Securities, express or implied. They did not furnish Zions Securities even any copies of the plans and specifications,

and they thereby manifested that they did not acknowledge any duties or obligations to Zions Securities, the Landlord. In *Murray v. Zemon*, 402 Pa. 354, 167 A. 2d 253, the landlord did not sign the contract for repair of the leased building. Only the tenant signed. The language of the court in that case is applicable to the instant case:

“ * * * By its express terms it was manifested that the person agreeing to pay the bill was Zemon. No contractual relationship ever existed between the contractor and the owners whereby the latter agreed to pay the cost of repairs or any portion thereof.

“ * * * The right to the lien arises not from the act of furnishing labor and materials, but rather from the debt arising therefrom. *Horn & Brannen Mfg. Co. v. Steelman*, 1906, 215 Pa. 187, 64 A. 409. The right to file a mechanics' lien must have a contract as its basis.”

The architects never had any contract with Zions Securities, express or implied, and Zions Securities never became indebted to them or either of them. As aptly stated in *Horn & Brannen Mfg. Co. v. Steelman*, 215 Pa. 187, 64 A. 409:

“The claims of workmen and materialmen do not become liens on a house from the mere fact that the work was done or the materials furnished for its erection, for they must be founded on a contract, express or implied, direct or indirect, with the owner of the estate sought to be charged.”

POINT III.

SINCE NO BUILDING WAS EVER CONSTRUCTED, NO MECHANIC'S LIEN COULD HAVE ATTACHED TO THE FEE TITLE OF THE LANDLORD.

Sec. 38-1-4, U. C. A. 1953, specifies:

"The liens granted by this chapter shall extend to and cover so much of the land whereon *such building, structure or improvement shall be made*, as may be necessary for the convenient use and occupation thereof, * * *." (Emphasis added).

In the pre-trial order dictated December 12, 1968, it was specified:

"It is stipulated that no building was constructed on the premises as a result of the Third Party Plaintiff's architectural services. * * *." (R. 127, 173).

During the trial it was stipulated that "There has been no building on this property," and that "The lot is presently vacant." (R. 221). Consequently, no building nor other structure was constructed upon Zions Securities land to which a lienright could possibly attach.

This Honorable Court has held repeatedly that the purpose of the lien statutes is to prevent the land owner from being unjustly enriched from placing improvements upon the land which enhance the value of the land by such improvements. As explained in *King Bros., Inc. v. Utah Dry Kiln Co.*, 13 Utah 2d 339, 374 P. 2d 254:

"The mechanics lien statutes were designed to prevent the land owner from taking the benefit of improvements placed on his property without paying for the labor and materials that went into it. * * *."

"* * * In order to qualify under these statutes it is necessary that there be an annexation to the land, or to some permanent structure upon it, so that the materials in question can properly be regarded as having become a party of the realty, or a fixture appurtenant to it; and this must have been done with the intention of making it a permanent part thereof. * * *."

To the same effect is *Frehner v. Morton, et al.*, 18 Utah 2d 422, 424 P. 2d 446 at 447, citing *Stanton Transportation Co. v. Davis*, 9 Utah 2d 184, 341 P. 2d 207.

No improvement was made to the land to which a lien could attach, and nothing by way of improvement was done to enhance the value of the land. In fact, the rent-producing building which was on the land at the time the ground lease was executed June 26, 1963, Exhibit 21, was destroyed, and no other building was erected in its place. (R. 193). Instead of the property being enhanced in value it was disimproved and depreciated in value.

Under statutes similar to the Utah statute 38-1-4, U. C. A. 1953, where no building has been erected, it has been held that no lien can attach to the land for architectural services. The reasons is, for a lien to attach it must attach to the *building or improvement* and to "so much of the land *whereon* such building, structure or improvement shall be made, as may be necessary for the convenient use and occupation thereof." As explained in *Lipscomb v. Exchange National Bank*, 80 Wash. 296, 141 P. 686 at 687:

" * * * It is not the rule that an architect who prepares plans and specifications for a building which is not erected may claim a lien for such services upon the land on which it was contemplated erecting the building. The law contemplates that the lien is to attach to the building and upon so much of the land as may be necessary for its use and occupation. In other words, the lien attaches to the property which the service has aided in producing. Where, therefore, the building contemplated has not been erected, no lien for the architect's services in drawing plans can attach to specific property. * * *"

In *Foster v. Tierney*, 91 Iowa 253, 59 N. W. 56, the court said:

" * * * It is then a question whether or not an architect who prepares plans and specifications for a building that is not erected, or an improvement that is not made, has a lien therefor. Take the case of a building for which such plans are made, and it is not erected, and there is

nothing to which the lien can attach but the naked land. Can it be said that work has been done upon the building? The law contemplates that the lien is to attach to the building and the land upon which it is situated. * * *."

In the instant case Zions Securities did not enter into any contract with any one to have plans and specifications prepared. However, in *Clark v. Smith*, 234 Wis. 138, 290 N. W. 592, 127 A. L. R. 406, the landowner actually contracted with the architect to prepare plans and specifications; but the plans were not used. The court held that under the facts shown the owner was legally liable to the architect for such services as contracted, but the court denied the validity of the notice of lien:

"As to the lien filed by defendants, no construction of the house having been begun, no lien could attach."

The text statement in 60 A. L. R. 1270 is:

"The greater number of the decisions dealing with the right of an architect to a lien for plans drawn are to the effect that there can be no lien for the services rendered by an architect in drawing plans and specifications which were never used in the construction of an intended building or other structure." (Citing cases).

Finding of fact No. 7 states that "the first work by third party plaintiff with respect o said plans and specifications was furnished on the 13th of April 1963," etc. (R. 133). It does not state, of course, that Zions Securities was furnished anything by either of the architects. Finding of fact No. 8 infers, contrary to the facts, that the architects' plans and specifications were put into execution on the land and that construction in accordance with plans and specifications was "commenced":

"8. That work on the land was commenced by the clearing of the ground and digging of soil test holes, but no further construction was undertaken, and the project later was abandoned."

Said finding contradicts the stipulation "that no building was constructed on the premises as a result of the third party plaintiff's architectural service" (R. 127, 173). No contract was ever awarded for construction of a new building to execute the plans and specifications. There was no proof of "clearing of the land," but what was done on the land could not constitute "commencement of construction" of the designed building, as either of the activities performed could occur without ever building a new building or making any improvement upon the land.

The testimony was that Artcol Corporation, the Tenant, paid a third party for demolition of an old building which had a rental value of \$100 per month. Harris made no claim that he or his partner did the work or paid for it. He testified that he suggested to Artcol Corporation the names of specialty contractors, and that Artcol paid for the demolition. (R. 200-201, 221). Destruction of the income-producing building certainly was not an "improvement to the land," but a dis-improvement. Harris testified that Exhibit 13 is a report of soil analysis. (R. 191-192). He said he requested soil tests, but that Artcol Corporation paid for that work. (R. 200) Exhibit 13 is a "Foundation Investigation for Artcol Corporation Apartment Building," prepared by the engineering firm of Furhiman, Rollins and Co., dated March 3, 1964. Artcol Corporation was designated therein as the "Client." The report was addressed to W. K. Murphy of Artcol Corporation. Exhibit 13 clearly shows that the soil tests were made under an independent contract between the Tenant, Artcol Corporation, and a third-party firm of engineers. Such contract for engineering services was not a part of the contract for architectural services, Exhibit 2.

Sec. 38-1-3, U.C.A. 1953, does not make lienable either soil tests or demolition of a building. In *Sound Transfer Co. v. Phinney Realty & Invest. Co.*, 71 Wash. 473, 128 P. 1047, it

was held that wrecking a building is not lienable under the general lien statute which permits liens for "alteration, construction or repair of any building." In a later case, *Bon Marche Realty Co. v. Southern Surety Co.*, 152 Wash. 604, 278 P. 679, 63 A. L. R. 1246, the court again held that demolition of an existing building "is not lienable" under the general lien statute relating to alteration, construction or repair of any building, etc. The court also held that demolition of a building is not even lienable under the Washington statute which grants a lien to a person who by authority of the owner "clears, grades, fills in or otherwise improves" land. The court said:

"The contractor was not 'clearing, grading or filling in' the property, as these acts can only be performed on land not actually occupied by buildings. * * *."

Suppose Utah had a statute which granted a lien for soil tests and also for demolition of a building. The lien could only be granted as security for the unpaid debt. Harris himself admitted that both the soils engineers and the demolition contractor had been paid by Artcol, so they could not have had a lien. However, by finding of fact No. 8 and by conclusion of law No. 1 the trial court attempted to give Harris a lien for the work performed by independent third parties who were paid in full by Artcol, the Tenant, and which had no relationship to or connection with the plans and specifications. Conclusion of law No. 1 contradicts the stipulations and the undisputed evidence, and is contrary to law:

"1. That the interest in the real property of the third party defendant Zions Securities Corporation, became lienable under the provisions of 38-1-3, Utah Code Annotated, 1953, by reason of its conduct during the times architectural services were performed, and work having been commenced within the meaning of the statute by the clearing of the ground and the digging of soil test

holes, the lien attached and was not defeated by later abandonment of the work.”

Sec. 38-1-5, U. C. A. 1953, referred to by conclusion of law No. 1 does not authorize the court to grant liens against a party not liable, nor for contemplated improvements of a lessee never made. That statute was designed to establish priority with respect to actual improvements made to the land:

“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; * * *.”

In construing such statute this Honorable Court stated in *Western Mortgage Loan Corp. v. Cottonwood Construction Co.*, 18 Utah 2d 409, 424 P. 2d 437:

“ * * * We are inclined to the view that the legislature intended the language ‘commencement to do work or furnish materials on the ground’ to be limited to relate to the home or other structure which was being or about to be built upon the land. To tack the liens for labor or materials that went into the house to the liens that may have arisen for labor and materials furnished in off-site improvements in connection with the laying out and construction of facilities used in connection with the subdivision as a whole would be going beyond the intent of the statute. * * *.”

Under a similar statute, “commencement of construction” has been defined to mean actual operations on the ground for erection of a building, done with the intention to continue the work until the building is completed. *Security Stove & Mfg. Co. v. Sellards*, 133 Kan. 747, 3 P. 2d 481 at 482, 76 A. L. R. 1397.

Unlike the present case, in *Headlund v. Daniels*, 50 Utah 381, 167 P. 1170, it was the fee owner who employed the architect and agreed to pay his fee. The architect not only furnished the fee owner who employed him plans and specifications, but also supervision in the remodeling of a theater building. After paying part of the fee the owner declined to pay the balance. In defending a suit for foreclosure of architect's lien, the fee owner claimed that the actual costs of remodeling greatly exceeded the maximum cost represented by the architect through the negligence of the architect.

In contrast, the land of Zions Securities never was improved as a result of the alleged architectural services of Harris and Carlson who were employed solely by the Tenant under written contract, Exhibit 2, in which the Tenant was designated as "Owner." Zions Securities received no more benefit from the plans and specifications prepared for the Tenant than if those documents had been sent to some stranger in Hong Kong. No mortgage loan was ever consummated by the Tenant, and no contract for construction was ever awarded. No building was ever built to which a lienright could attach; but if a building had been built in accordance with the architects' plans and specification, the lien could have attached only against the leasehold interests of the Tenant, Artcol Corporation.

The entire judgment is unsupported by the evidence and is contrary to law.

POINT IV

NO INDEBTEDNESS AROSE UNDER ANY THEORY OF UNJUST ENRICHMENT.

A mechanic's lien must be predicted upon an unpaid debt for materials or services furnished which result in and

produce an improvement to the land. In *Metropolitan Water Co. v. Hild*, (Okl.), 415 P. 2d 970, the court said:

“A mechanic’s lien secures the payment of a debt and if there is no debt created by the contract to which the lien can attach there can be no lien. The rule is expressed in Phillips, *Mechanics’ Liens*, Section 112 (2d ed.) as follows:

“The creation of the lien, though arising by virtue of express legislative enactment, is essentially dependent upon the existence of contract, express or implied, and the obligation of debt arising out of its stipulations by the mechanic. * * * As the lien security is an incident that follows the legal liability to pay, whenever that obligation does not arise, or ceases, this security does not exist. * * * ”

Any indebtedness of the landlord to give rise to a lien would have had to be created either:

- (1) By express contract;
- (2) By implied contract—that is, a contract implied in fact by the landlord’s acts; or
- (3) By a quasi-contract: One implied at law resulting from unjust enrichment.

We have shown under points I and II that there was no express contract nor contract implied in fact between either or both of the architects and the landlord, Zions. Furthermore, we have also already noted that the architect’s attorney stipulated at the pretrial that the architect was not proceeding under the theory of an implied contract (R. 127, 172.) It is our contention that there could be no contract implied at law because there was no enrichment of the Landlord, unjustly or otherwise. No evidence was offered to show that the Landlord received anything from the architect. It did not even receive the plans.

By finding of fact No. 5 the trial court attempted to give the architects credit for services performed for Artcol Cor-

poration by third parties, Exhibits 13 to 16, (R. 132). There was no proof of "site preparation." Such finding contradicts the testimony of Harris himself, that the soil tests, surveys and topographic studies were performed by third parties, and the work was paid for by Artcol. (R. 191-193, 200). No indebtedness could have existed, and since those services of third parties were paid for in full, there could be no lien arising as security for a service paid for in full.

Finding of fact No. 11 about Artcol paying rent and taxes, is immaterial and irrelevant, as well as partially unsupported by the evidence since there was no proof that Artcol paid any taxes. (R. 133). However, the payment by Artcol of the ground rentals required to be paid under the terms of the Ground Lease, Exhibit 21, could not possibly create any implied promise on the part of Zions Securities to pay for any services of the architects hired by Artcol.

There was no express finding that Zions Securities became indebted to the architects or to either of them; but by conclusion of law No. 6 and by the "Foreclosure Decree and Judgment" appealed from, without any competent evidence and contrary to law the trial court prejudicially adjudged Zions Securities Corporation to be "indebted" to Harris (one of the architects) in the sum of \$210,114.90, and that Harris had a valid lien to secure that "debt," foreclosed Zions Securities of title to its lands, and ordered a sale of the "mortgaged property" to satisfy said "indebtedness" (which never came into existence). (R. 135, 136, 138-139).

The court's adjudication was error.

POINT V

THE ASSIGNMENT FROM CARLSON TO HARRIS, NOT HAVING BEEN EXECUTED AND DELIVERED UNTIL TWO YEARS AFTER A LIENRIGHT ON A PARTNERSHIP CLAIM

WOULD HAVE EXPIRED, COULD NOT RETRO-
ACTIVELY TRANSFORM A FATALLY DEFEC-
TIVE "NOTICE OF LIEN" FOR A NON-EXIST-
ING INDIVIDUAL CLAIM INTO A VALID LIEN
ON A PARTNERSHIP CLAIM.

Two of the issues stated at the pre-trial were:

"(2) Can the third party plaintiff Harris assert a lien in this action under his own name only on the facts of this case?

"(3) Does the fact that the claim of lien arose under a joint venture between Harris and Carlson, and that the notice of claim of lien was filed in Harris' name only void the notice of claim of lien?" (R. 126, 172).

M. E. Harris, Jr. knew that the only contract for architectural services was Exhibit 2, which was between Artcol Corporation as "Owner" and Harris and Carlson as "Architect," admittedly partners or joint venturers. Any cause of action arising on such contract would have been a cause of action owned by the two architects as partners or as joint venturers, not any individual right of action for Harris alone. A partnership cause of action is entirely different. Under the Uniform Partnership Act, Sec. 48-1-22, U. C. A. 1953, the rights of partners in property are joint: "A partner is co-owner with his partners of specific partnership property holding as tenants in partnership."

In *Bates v. Simpson*, 121 Utah 165, 239 P. 2d 749, this Court said:

"We have frequently announced in this court that joint adventure is in the nature of a partnership', *Wassatch Livestock Loan Co. v. Lewis & Sharp*, 84 Utah 347, 35 P. 2d 835."

To the same effect are *Forbes v. Butler*, 66 Utah 373, 242 P. 950, and *Lane v. Peterson*, 68 Utah 585, 251 P. 374.

See also 30 *Am. Jur.*, Joint Adventures, Sec. 4. In 40 *Am. Jur.*, Partnership, Sec. 432, the rule is stated:

“Since partnership obligations in contracts are joint, and not joint and several, it is necessary, under common law practice, and in most jurisdictions, under modern practice provisions, that all partners join as parties plaintiff in an action on a partnership obligation.”

The rights of Harris and Carlson for architectural services under their contract with Artcol Corporation, Exhibit 2, dated August 6, 1963, were partnership or joint venture rights. Inasmuch as the designing was done as a partnership, if any lienright arose against someone for architectural services such lienright would have been a joint right of both Harris and Carlson, and not an individual right of Harris alone, for at the time Exhibit 19 was filed by Harris for himself without even recognizing the existence of his partner Harris, there was no assignment from Carlson to Harris. *No notice of lien was ever filed by or in the name of the partnership either within the time limited by law or even after the time expired.*

Independent of the invalidity of Exhibit 19 for lack of verification, discussed under Point VI, said “Notice of Lien” was based on a non-existing individual claim of Harris alone which at least inferentially denied that any architectural services had been performed by any one except Harris, and negated the theory of any partnership or joint venture claim. Said Exhibit 19 so misrepresented the facts that Harris likely would not have been willing to risk swearing to the truth of such a claim:

(1) Harris represented that the architectural services were performed “pursuant to a contract with Artcol Corporation”. He refrained from mentioning that the contract between Artcol Corporation as “Owner” was not with Harris alone, but with Harris and Carlson, as “Architect.” (2) Harris falsely represented that he (not he and Carlson) had

“bestowed” services in “the sum of \$212,350.00” pursuant to said contract with Artcol, when he knew that Carlson had performed a substantial part of the services (R. 198), and that under Exhibit 2 the full contract fee included supervision of construction which never occurred. (3) Harris falsely represented that “All credits and offsets have been deducted from the amounts remaining owing”, when he knew that 25% of the fee was for supervision which was not performed because no building was ever constructed. (4) Harris represented that by the contract with Artcol Corporation “it agreed to pay for same seventy-five percent upon the completion and acceptance of the working drawings and specifications”, when he knew that Exhibit 2 expressly stated: “Seventy-five percent (75%) of the fee shall be paid to the Architect when plans have been approved by F. H. A. *and loan recorded for construction.*” By the express declarations of the contract the first money was not payable by Artcol *until* there was a “loan recorded for construction.” It was stipulated that “no loan was ever recorded for construction.” (R. 177). (5) Harris also falsely represented that his services had been “bestowed” *upon* “the property” and “furnished” to “the premises”, and inferentially that the land had been improved by executing the plans and specifications into a new building. Harris well knew that no building ever was constructed to put the plans into operation on the land. Harris knew that the land was not “improved”, but dis-improved by the demolition of some rental property. (R. 200-201, 221).

Among the prejudicial errors in conclusion of law No. 4 the trial court declared that “the lien attached upon commencement of work”, although it was undisputed and even stipulated that the plans and specifications were not used in the construction of a building. The court further contradicted the language of Exhibit 19 and the evidence and stipulations by declaring that “there was no dispute that

any of the allegations within the notice were other than as found by the court at the trial, and the notice of lien is therefore valid." (R. 135). We see nothing in the findings of fact which show that the court pronounced the false representations of Harris in Exhibit 19 to be truthful, but in the light of the stipulations and admissions made at the pre-trial and trial, any such findings, if they had been made would simply be further prejudicial error.

Third party plaintiff utterly failed to prove that he had a valid lien. Conclusion of law No. 5, therefore, was prejudicial error. Independent of failure to verify on oath, Harris' "Notice of Lien" was not only invalid and unprovable because it was predicted on a non-existing individual claim, but it was unenforceable because of serious misstatements of fact which were unverifiable on oath. It has been held that any wilful misstatement of material facts in a lien claim, such as an excessive monetary claim, will defeat foreclosure, for a lien claimant is required to state the true facts under oath. *Friedman v. Stein*, 71 A. 2d 346.

No partnership lien claim was ever filed at any time. However, if a partnership lien claim had been filed, since there was no pretense of any assignment from one partner to the other during the period of limitations for filing lien foreclosure action, both partners would have been necessary parties. In *Ruzicka v. Rager*, 305 N. Y. 191, 111 N. E. 2d 878, 39 A. L. R. 2d 288, it was held that "a member of a partnership may not recover upon a partnership obligation individually." The court declared that partners sue in a different capacity from their capacities as individuals. The rule is that one partner may not maintain an action on a partnership claim without a prior assignment of all rights of the other partners:

Purcel et al. v. Cecil G. Wells, et al., 236 F. 2d 469.

Grant County Deposit Bank v. McCampbell, 194 F. 2d 469.

Hildebrand et al. v. Stonecrest Corp., (Cal. App.) 344 P. 2d 378 at 386.

Peck et al. v. Better Business Standards, 44 Wash. 2d 604, 271 P. 2d 697.

Seltzer v. Chadwick, 26 Wash. 2d 297, 173 P. 2d 991.

Karp v. Coolview of Wisconsin, Inc., 25 Wis. 2d 299, 130 N. W. 2d 790.

By its answer Zions Securities took the position that it had no contract with either of the architects, and that the only contract the architects ever entered into was with Artcol Corporation, the Tenant. By the Ninth Defense, Zions Securities alleged that by the terms of Exhibit 2 all compensation was payable jointly by Artcol to Harold A. Carlson and M. E. Harris, Jr. upon fulfillment of the terms and conditions of said contract; that Carlson never assigned nor relinquished his interest under said contract, and that "Harold A. Carlson is an indispensable party to this action" as a partner of Harris and by reason of having performed a substantial part of the architectural services allegedly performed under said contract with Artcol Corporation. (R. 41-42).

Apparently in an effort to avoid said Ninth Defense, if possible, Harris obtained from Harold A. Carlson an assignment dated July 1, 1968, Exhibit 1. Harris then filed his supplemental third party complaint July 10, 1968, to which was attached a photo copy of Exhibit 1 (R. 104-106). Said supplemental third party complaint did not change the action from an attempted foreclosure on a void non-existing individual claim into a foreclosure of a partnership lien claim for no partnership lien claim was ever filed, and the time for commencement of foreclosure of a partnership lien claim, if one had been filed, would have expired under the one year limitation of Sec. 38-1-11, U. C. A. 1953. Furthermore, there

was no allegation that Zions Securities was a party to Exhibit 2, which was the contract between Artcol Corporation as "Owner" and Harris and Carlson as "Architect." An examination of Exhibit 2 clearly shows that Zions Securities was not a party.

Said assignment was not even executed until July 1, 1968, or more than two years after the foreclosure proceeding was commenced on Exhibit 19. Contrary to law and the undisputed evidence the court prejudicially entered as a conclusion of law that

"2. The notice of lien was valid though only claimed by third party plaintiff in view of the assignment from Harold A. Carlson to third party plaintiff." (R. 135).

The trial court disregarded the fact that no assignment had been made at the time Exhibit 19 was executed as an individual lien claim in November 1965, nor at any time prior to commencement of foreclosure. Harris' unverified "Notice of Lien" filed November 22, 1965, was based on a non-existing individual claim. Notwithstanding its invalidity the trial court attempted to validate it by an assignment executed July 1, 1968—nearly 21 months after Harris recovered summary judgment against Artcol Corporation on Exhibit 19. Carlson did not attempt to make his assignment retroactive, but by conclusion of law No. 2 the trial court treated said assignment as if it had been executed and delivered in November 1963 prior to the filing of Harris' "Notice of Lien." In effect, by implication the court *amended* Exhibit 1 without authority of law to infer that it became effective 31 months before it was executed and delivered. An assignment can become operative to transfer some existing right only as of date of delivery, certainly never prior to date of execution. Such belated assignment could not retroactively change Exhibit 19 from an invalid individual claim of Harris into a valid partnership lienright, particularly when no partnership lien claim was ever filed. By said Exhibit 1 it is declared:

“ * * * Harold A. Carlson, does hereby assign, transfer and set over unto M. E. Harris, Jr. all right, title and interest in and to that certain contract by and between the parties hereto and Artcol Corporation dated August 6, 1963, with respect to architectural services for a proposed apartment commercial building * * *. The undersigned does further assign to M. E. Harris, Jr. all right, title and interest to any and all claims by M. E. Harris, Jr. and the undersigned as architects against Zions Securities Corporation, including all right, title and interest in and to all claims and demands by reason of that certain mechanic's lien dated November 16, 1965, and filed in the office of the Salt Lake County Recorder November 22, 1965, * * *.”

At the trial it was disclosed that Exhibit 1, the assignment from Carlson to Harris, dated July 1, 1968, was procured “with the help of Mr. LaBrae of Artcol Corporation.” (R. 199). Further inquiry indicated that notwithstanding execution of Exhibit 1 long after commencement of foreclosure on Exhibit 19, Carlson as a partner of Harris would claim an interest in any proceeds of the litigation. Counsel for Harris said, “As to Mr. Carlson, we will stipulate that he may claim an interest in the proceeds; that the partnership has never been wound up, though long ago dissolved.” (R. 200).

Carlson did not appear at the trial. The assignment from Carlson could not change the foreclosure action from one based on a void individual claim of Harris alone, into a foreclosure on a partnership lien claim which never was filed. Whatever might have been the transaction entered into between Harris and Carlson to have Carlson execute the assignment July 1, 1968, the assignment could not amend the fatally defective non-partnership “Notice of Lien” filed by Harris. There was no valid lien filed which could be foreclosed against Zions Securities. The judgment against Zions Securities was prejudicial error in its entirety.

POINT VI

THE "NOTICE OF LIEN" WAS VOID ON ITS FACE, FOR IT NEVER WAS VERIFIED TO COMPLY WITH THE STATUTE.

(A) *The decree adjudging Exhibit 19 to be a valid lien against the title of the landlord is contrary to law.*

At the pre-trial counsel for Zions Securities objected to the introduction in evidence of Exhibit 19, the "Notice of Lien", because it was void on its face. It never was verified on the oath of either the lien claimant or of some other person, to satisfy one of the indispensable requirements of the lien statutes. Independent of all other prejudicial errors which precluded entry of any valid judgment that the Landlord was indebted to the architects or to either of them in any sum or amount, there was no valid lien which lawfully could be foreclosed. The decree of foreclosure based on a non-existing indebtedness amounted to confiscation of the dis-improved land, and in effect amounted to the making of a gift of \$210,114.90 to one of the architects who had done exactly nothing for the Landlord, and who admitted that he never made any contract with the Landlord.

Mechanics' liens are creatures of statute. Sec. 38-1-7, U. C. A. 1953, expressly imposes on every lien claimant an indispensable requirement that the

"claim must be verified by the oath of himself or of some other person."

M. E. Harris, Jr., third party plaintiff, merely acknowledged his signature. He did not verify the lien claim on oath as required by Sec. 38-1-7. Nor was Exhibit 19 verified by the oath of any other person. It is elementary that a mere acknowledgment does not constitute an oath.

The pre-trial order dictated December 12, 1968, stated one of the issues to be:

“(4) Is the notice of claim of lien void by reason of its not being verified?” (R. 126, 172).

We have found no prior Utah case involving an unverified claim of lien. Decisions of the highest courts of some other states having statutes similar to the Utah statute, hold that a claim of lien which is merely acknowledged, but not verified, is null and void and unenforceable.

In *D. J. Fair Lumber Co. v. Karlin*, 199 Kan. 366, 430 P. 2d 222, in holding that a lien claim which was acknowledged, but not verified, was null and void, the court said:

“* * * Here the lien statement was not verified at all. It was merely acknowledged. It is obvious that an acknowledgment does not constitute a verification nor even an attempted one. An acknowledgment shows, merely *prima facie*, that an instrument was duly executed whereas a verification is an affidavit attached to a statement as to the truth of the matters therein set forth. * * *”

“In Phillips, *Mechanics’ Liens* (3rd ed.) p. 637 § 366, it was said:

“‘Where a statute declares that the notice to create a lien ‘shall be verified’ before filing, it is essential to the creation of the lien that it should be sworn to in the manner prescribed. The want of verification, or of a sufficient verification, is a defect which goes to the whole claim, and cannot be amended. * * * .’”

“The plaintiff’s lien statement, lacking verification, created no lien. The acknowledgment added nothing to its validity. * * *”

“In view of the foregoing, we hold that the acknowledgment of plaintiff’s mechanic’s lien statement was not a verification or an attempted verification as required by K.S.A. 60-1102 and 60-1103, and since the same was not corrected within the statutory period for obtaining a valid lien, the lien statement was vitally defective when filed, and it cannot now be amended to permit its verification. The district court did not err in dismissing the plaintiff’s action.”

In *Ekstrom United Supply Co. v. Ash Grove Lime & P. C. Co.*, 194 Kan. 634, 400 P. 2d 707 at 709, the court held that the attempted verification was fatally defective:

"The validity of a lien created solely by statute depends upon the terms of the statute, and parties may not by estoppel enact or enlarge a statute. * * * A lien claimant must secure a lien under the statute or not at all.

* * * The verification prescribed in the statute is one of the necessary steps. Without such verification the lien claimant obtains nothing."

In the dissenting opinion, Justice Fontron claimed that there was a sufficient verification in that case, and distinguished it from an acknowledgment:

"* * * In *Reeves v. Kansas Coop. Wheat Mk't. Assn.*, 136 Kan. 306, 15 P. 2d 446, on which the court seems chiefly to rely, the statement was not verified at all; it was acknowledged. The distinction between a verification and an acknowledgment is too well recognized and understood to require extensive comment. It is enough to say that the two are not equivalent; an acknowledgment serves a quite different purpose than does a verification."

In *Reeves v. Kansas Coop. Wheat Mk't. Ass'n.* 136 Kan. 306, 309, 15 P. 2d 446, 448, where there was an acknowledgment, but no verification of the lien claim, the court said:

"The verification prescribed in the statute means that the statement filed shall be sworn to by the claimant before an officer having authority by law to administer and certify oaths and affirmations. It was evidently intended to require truth and accuracy in the statement, but whatever the purpose may have been, it is an essential element of a valid lien. Plaintiff offered to show and did testify that when the acknowledgment was made he was sworn to the statement, but the statement filed to constitute a lien must be complete in itself and *must show on its face* all the matters which the statute

requires to be shown to create and fix the lien. The statute is mandatory and the lack of verification in the statement filed, and which is to serve as a notice to the public, necessarily defeats the lien. * * *."

In *Home Plumbing and Contracting Co. v. Pruitt*, 70 N. M. 182, 372 P. 2d 378, in holding invalid and unenforceable the lien claim for lack of verification, the New Mexico Supreme Court said:

"Our statute (§ 61-2-6, N.M.S.A. 1953) requires that a claim of lien 'must be verified by the oath of' the person claiming the benefit of the lien statute 'or of some other person.' Accordingly, we must determine if the two claims here in issue are verified by oath."

The court pointed out that one lien claim was verified as required by statute, while the other one merely was *acknowledged*, but *not verified*:

"However, as to the Home Plumbing and Contracting Company claim, we fail to find any words whatsoever which by intendment, plain, or otherwise, 'were designed to operate as a verification.' Neither do we find where the statement of claim was in any manner sworn to.

"In Black's Law Dictionary, 'verification' is defined as: 'Confirmation of correctness, truth, or authenticity by affidavit, oath or deposition.' See 44 Words and Phrases for other definitions.

"While reiterating our adherence to the rule of liberal construction, we are convinced that with a total absence of any words confirming correctness, truth or authenticity by affidavit, oath, deposition or otherwise, to conclude that the acknowledgement to the instant claim of lien was a sufficient compliance with the requirements of a verification would be stretching the rule of liberal construction beyond recognition, and would approach judicial repeal of the legislative mandate that claims should be verified by oath. Compare *Ross v. Marberry & Company*, 66 N.M. 404, 349 P. 2d 123. Accord-

ingly, the court erred in its conclusion that the claim of lien of Home Plumbing and Contracting Company was enforceable.”

As illustrated under Point V, Exhibit 19 filed by Harris contained such serious misstatements of fact in attempting to assert a claim of lien for Harris alone, that he could not be expected to risk swearing to such statements. Since there was no individual lienright for Harris alone, and no valid partnership lien claim was ever executed, Harris failed to establish a valid lien.

Exhibit 19 not having been verified was not entitled to recordation, but even if recordation could conceivably impart any constructive notice, it could only be such notice as the document itself set forth including the fact that it was not verified as required by statute and the further fact that Harris made no claim that he had any contract with Zions Securities Corporation or that he did any work at the instance and request of Zions Securities. Recordation could not remedy any inherent defect.

Conclusion of law No. 5 “That the lien of third party plaintiff is a first and valid lien upon the interest of third party defendant” (R. 135), and the judgment and all portions thereof, constituted prejudicial error.

(B) *The court erred in holding that invalidity of the lien was waived.*

Inasmuch as the statute requires verification, there could not be valid execution of a notice of lien without verifying under oath. By conclusion of law No. 4 the court declared:

“The fact that the notice of claim of lien was acknowledged but not verified was not raised by the pleadings and was waived by third party defendant,” etc. (R. 125).

The trial court thereby recognized the lack of verification. However, "The fact that the notice of claim of lien was acknowledged but not verified", *was* raised by the pleadings. First of all, it was raised by third party plaintiff M. E. Harris, Jr. himself, by attaching to his third party complaint a photo copy of said "Notice of Lien", marked Exhibit "A" and incorporated into such pleading by reference. (R. 8-13). Harris demonstrated by his own pleading that he had failed to comply with an indispensable requirement of the lien statute, Sec. 38-1-7, U. C. A. 1953, and that for lack of such compliance his "Notice of Lien" was null and void and could not be foreclosed. Zions Securities Corporation challenged the sufficiency of such pleading by a timely motion to dismiss, which included a defense permitted under Rule 12(b)(6), Utah Rules of Civil Procedure, to-wit: "failure to state a claim upon which relief can be granted" against Zions Securities Corporation. (R. 22-23). Such rule does not require a party making such motion to furnish his adversary a bill of particulars.

A reasonable and prudent person reading Sec. 38-1-7 of the copy of "Notice of Lien" thereto attached and incorporated therein by reference, could not escape discovery of the obvious failure to comply with the statutory requirement to verify a lien claim on oath; that the lien claim was void on its face for want of substance; and consequently, that the third party complaint failed to state a claim for relief, which was incurable, and that said pleading should be dismissed.

After denial of its motion to dismiss for failure of Harris to state a claim upon which relief could be granted, Zions Securities filed its answer. (R. 25-43). The First Defense in that answer asserts that the third party complaint does not

state facts constituting a claim for relief against Zions Securities Corporation. (R. 25). Rule 12 (i), U. R. C. P. specifies:

“The filing of a responsive pleading after denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.”

Rule 8 (c) on “Affirmative Defenses” does not require a defendant to plead as an affirmative defense the failure of a complaining party to state a cause of action. Surely, a defendant is not required to plead a defense which is clearly set forth in the complainant’s own pleading.

Rule 12 (h) expressly states that a party does not waive “the defense of failure to state a claim upon which relief can be granted” nor “the defense of failure to join an indispensable party,” and that either of such defense may be made by “motion for judgment on the pleadings or at the trial on the merits.”

The allegations of paragraph 6 of third party complaint “That said lien is a first and valid lien upon the interest of both third party defendants in the premises described therein (R. 10), were expressly denied by paragraph 6 of the answer, (R. 37), so that the validity of the lien was put in issue in another way. Zions Securities never has admitted the validity of said obviously void notice of lien, Exhibit 19, in whole or in part. On the contrary, by paragraph 21 of its answer, Zions Securities alleged that

“Said notice of lien dated November 16, 1965, was null and void, and the same was not subject to recordation under the law.” (R. 40).

After Harris filed his supplemental third party complaint on July 9, 1968 (R. 104-106), Zions Securities filed an amended answer to meet the allegations and implications of the supplemental third party complaint. By the First Defense, Second Defense and Third Defense, the defense of “failure

to state a claim upon which relief can be granted" against Zions Securities, again was asserted. (R. 107).

Exhibit 19 was the unilateral act of M. E. Harris, Jr. Zions Securities had nothing to do with the preparation of such invalid lien claim. The fatal defect of lack of verification is chargeable solely to Harris. Contrary to the conclusion of the trial court, the issue of lack of verification *was* raised by the pleadings (a) by the third party complaint itself, (b) by motion to dismiss, (c) by the defense stated in the original answer, and (d) by the amended answer. Furthermore, one of the issues stated in the pre-trial order was:

"(4) Is the notice of claim of lien void by reason of its not being verified?" (R. 126, 172).

Contrary to the conclusion of the trial court, there was no "waiver" by Zions Securities of the failure of lien claimant to comply with the statutory requirement to verify his claim under oath. There was no allegation in either the third party complaint (R. 8-13), nor in the supplemental third party complaint (R. 104-106) which could have raised any issue of "waiver" of the notorious failure of Harris to verify the lien claim under oath. Nor was there any issue of "waiver" stated in the pre-trial order (R. 125-127). If there had been any issue of "waiver," no evidence was offered at the trial to prove any possible "waiver" chargeable to Zions Securities Corporation. Harris created that fatal defect himself. He alleged nothing in his pleadings which would excuse his noncompliance with the statute, nor which could be construed to constitute a "waiver" of any of the rights of Zions Securities Corporation.

In *American Savings & Loan Assoc. v. Blomquist*, 21 Utah 2d 289, 445 P. 2d 1, 3, this Court stated the rule that "waiver" is the intentional relinquishment of a known right with knowledge of its existence; that there must be an intention to relinquish the right. To the same effect is *Waterway*

Terminals Co. v. P. S. Lord Mechanical Contractors, 242 Or. 1, 406 P. 2d 556, 557, 13 ALR 3rd 1. The court also stated that a party cannot be estopped by silence unless he has a legal duty to speak. There never was any issue of "waiver" by pleading or pre-trial order, nor any proof. One of the issues stated in the pre-trial order was whether the "Notice of Lien" was "void by reason of its not being verified." (R. 126, 172).

In *Valentine Lumber & Supply Co. v. Thibeaut*, (Mass.), 130 N. E. 2d 868, the statute required the statement of lien to be sworn to, and the master made a finding that such was done, but the copy referred to in the pleading indicated that it was not sworn to under oath. At page 872 the court said:

" * * * This was not the sworn statement required by the statute. *Cook Borden & Co., Inc. v. Commonwealth*, 293 Mass. 174, 177, 179-181, 199 N. E. 551. Compare *Jackman v. Gloucester*, 143 Mass. 390, 9 N. E. 740. *Valentine* is bound by the allegations of its bill, including its allegation as to the form of the statement of the account. * * * The result is that as the record stands, no lien is established."

Zions repeatedly urged the defense of "failure to state a claim upon which relief can be granted." Under Rule 12 (h) a party does not waive such defense, and such defense may be asserted "at the trial on the merits." The defect of failure to verify was one of substance and was incurable. It was prejudicial error for the trial court to attempt to excuse the admitted failure of Harris to comply with a basic requirement of the statute. It was prejudicial error to adjudge Harris to have a "valid lien" when the "Notice of Lien" was void on its face, and to refuse to dismiss the third party complaint for the incurable failure of Harris to state a claim for judicial relief. The trial court compounded the prejudicial error by foreclosing Zions Securities of all of its title and rights in the lands which never were improved nor enhanced in value.

CONCLUSION

The lien statutes were enacted to prevent unjust enrichment of a landowner whose land is benefited and improved as a result of materials and services furnished at his request or by direction of his authorized agents. Those statutes never were designed to enrich architects or any other persons unjustly, who furnished the landowner nothing and whose land is not improved. In this case no building nor other improvement was ever constructed upon the land of Zions Securities. Instead, the land was dis-improved by the ground-lessee, Artcol Corporation, on recommendation of the architect.

The architects contracted exclusively with the ground-lessee. They never entered into any contract with Zions Securities. They never acknowledged any obligations to the Landlord, Zions Securities. They furnished the Landlord nothing — not even copies of plans and specifications. They made no claim that Zions Securities promised to pay them anything. Zions Securities Corporation never became indebted to the architects jointly nor to Harris individually in any sum or amount.

The “Foreclosure Decree and Judgment” against Zions Securities should be reversed in its entirety, for it is unsupported by the evidence and is contrary to law. Zions Securities should be adjudged not to have become indebted to the architects or to either of them in any sum or amount. The unverified “Notice of Lien” filed by Harris alone on a non-existing individual claim should be adjudged to be null and void, and a judgment in favor of appellant against respondent Harris, of “no cause of action” should be entered together with appellant’s costs.

Respectfully submitted,
McKAY and BURTON
and

PAUL E. REIMANN
Attorneys for Zions Securities Corporation,
Third-Party Defendant-Appellant.

APPENDIX "A"

(Excerpts from Exhibits 21, dated June 26, 1963)

GROUND LEASE

"NOW, THEREFORE, in consideration of the premises, and of the mutual promises and agreements of the parties hereinafter set forth, and for and in consideration of the rents, covenants, and agreements, by ARTCOL to be paid, kept, and performed, ZIONS does by these presents grant, lease, demise and let unto ARTCOL the above described tracts and parcels of land, —

"TO HAVE AND TO HOLD the said premises, together with the appurtenances to ARTCOL for a term of eighty-five (85) years, commencing on the 16th day of June, 1963, and ending on the 15th day of June, 2048, at the hours of midnight of said date.

"This Agreement of Lease is made strictly upon the covenants, promises, stipulations, terms and conditions hereinafter set forth, and to that end for such purpose it is agreed as follows:

"1. ARTCOL shall pay to ZIONS as annual rental for said premises the following sums:

(a) For each of the first through the twenty-fifth years, \$18,000.00.

(b) For each of the twenty-sixth through the fortieth years, the lesser of \$30,000.00 or 6% of the value of the land only, as appraised in A.D. 1988 (which rental shall in no event be less than \$18,000.00).

(c) For each of the forty-first through the fifty-fifth years, the lesser of \$36,000.00 or 6% of the value of the land only as reappraised in A.D. 2003 (which rental shall in no event be less than \$18,000.00).

(d) For each of the fifty-sixth through the sixty-fifth years, 6% of the value of the land and building as reappraised in A. D. 2018, or \$18,000.00, whichever is greater.

(e) For each of the sixty-sixth through the seventy-fifth years, 6% of the value of the land and building, as reappraised in A. D. 2028, or \$18,000.00, whichever is greater.

(f) For each of the seventy-sixth through the eighty-fifth years, 6% of the value of the land and building, as reappraised in A. D. 2028, or \$18,000.00, whichever is greater.

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"4. The demised premises shall not be used contrary to

the ordinances of Salt Lake City, State of Utah, to the laws of the State of Utah or of the United States of America, or to the valid regulations of any duly constituted regulatory or administrative body. No part of the premises which is open to the general public shall be used for the consumption of beer or intoxicating liquors. ARTCOL shall keep and maintain the premises in a clean and presentable condition and shall not commit any nuisance thereon nor permit any nuisance to be committed or to exist thereon.

“7. ARTCOL, at its own cost and expense, may at its option, erect and construct a building or buildings, structure or structures, or other improvements on the demised premises which shall conform with all rules, regulations and ordinances of Salt Lake County, State of Utah. Such construction shall be substantial and shall meet reasonable standard architectural and fire underwriters’ requirements. All alterations and improvements to the building or buildings, structure or structures, erected on the demised premises shall be made at the expense of ARTCOL and shall be and become the property of ZIONS at the expiration or termination of this agreement of lease or any extension thereof. The foregoing provisions shall apply to any assignee or assignees, sublessee or sublessees of ARTCOL under this agreement.

“8. ARTCOL shall not permit any lien to be filed against the demised premises for any work performed for ARTCOL or material furnished ARTCOL to remain unreleased for a period exceeding sixty (60) days; provided, however, nothing herein contained shall prevent ARTCOL in good faith from contesting in the courts the claim or claims of any person or persons, partnerships or corporation, growing out of the erection, alteration, or modification of any buildings or buildings, structure or structures, or improvements on the demised premises, and the postponement of payment of such claim or claims until such contest shall finally be decided by the courts shall not be a violation of this Agreement of Lease or any covenant thereof.

“9. ARTCOL shall pay all real estate taxes, special improvement assessments, license fees and all other governmental charges which may be levied or assessed against the demised premises and improvements thereon and against the business conducted on the demised premises during the term

of the Agreement of Lease and any extension thereof, if any. Said taxes, special assessments and license fees shall be paid prior to the date of delinquency thereof, so that no tax sale nor special improvement assessment sale shall occur; provided, however, nothing herein contained shall prevent ARTCOL in good faith from contesting in the courts the validity of any such taxes, assessments, or license fees, and the postponement of payment of such taxes, special assessments, and license fees until such contest shall be finally decided by the courts shall not be a violation of this Agreement of Lease or any covenant thereof. * * *

* * *

"15. Upon default in the payment of rent reserved to ZIONS hereunder for a period of thirty (30) days after due date thereof, the rent and charges due ZIONS shall become a lien upon the furniture, fixtures, and personal property of ARTCOL brought upon or used in connection with the demised premises, and said furniture, fixtures and personal property shall not be removed from said demised premises until such rent and charges are paid in full.

"16. Whenever ARTCOL shall not be in arrears of rent nor in default in the performance or observance of any of the covenants, provisions, or conditions of this Agreement of Lease, ARTCOL, or its assignees or sublessees, may mortgage its or their estate or its or their interest therein to secure a bona fide loan or loans of money then actually made or then actually about to be made to ARTCOL, or to its assignees or sublessees, or to extend or renew any mortgage so obtained; provided, however, that no mortgagee nor anyone who claims by, through, or under such mortgage shall by virtue of such mortgage acquire any greater or more extended rights than ARTCOL has under this Agreement of Lease; and provided further, that any such mortgage and the rights and interests of the mortgagee and all persons who claim by, through or under such mortgage shall be in every respect subject, subservant, and subordinate to all the conditions, provisions, stipulations, requirements, covenants, and obligations of this Agreement of Lease, and the rights, powers, and privileges of ZIONS thereunder as well as in respect of any building or buildings, structure or structures, from time to time upon said demised premises; and provided further, that each and every person acquiring title under said

mortgage to the leasehold or interest created by this Agreement of Lease in said demised premises shall be deemed expressly to have accepted all of the terms, covenants, conditions, and agreements in this Agreement of Lease contained to be kept and performed by ARTCOL. ARTCOL covenants and agrees that excepting as aforesaid, and under the conditions aforesaid, and excepting for the purpose aforesaid, it, or its assignees or sublessees, will not mortgage or encumber this lease or their interest acquired hereunder. ZIONS agrees that if the leasehold estate hereby demised shall be mortgaged by ARTCOL, or its assignees or sublessees, as herein provided, and if ZIONS shall be notified in writing of such mortgage or mortgages, and the name and address of the mortgagee or mortgagees, then notice of default in the performance of the covenants in this Agreement of Lease contained of the same kind and in the same manner and for the same length of time as are hereby required to be given to ARTCOL shall also be given such mortgagee or mortgagees. If ARTCOL does not give notice to ZIONS of such mortgage or mortgages, and the name and address of the mortgagee or mortgagees, there shall be no obligation upon ZIONS to give notice of default to said mortgagee or mortgagees.

“17. The holder of any mortgage encumbering this lease, or the holder of any mortgage encumbering any sublease, and any sublessee or assignee from ARTCOL shall have the right in case ARTCOL shall make any default under this lease, to make good such default, whether the same consists of the failure to pay rent or the failure to perform any other matter or thing which ARTCOL is herein required expressly or by implication to do or perform, and ZIONS shall accept such performance on the part of the holder of any such mortgage or such sublessee or assignee as though the same had been done or performed by ARTCOL itself, but this provision shall not be deemed to give the holder of any such mortgage, sublease or assignment of lease any right or power to remedy or cure any default under this lease which ARTCOL would not have had under its provisions.

“18. ZIONS agrees that in the event of a sale of this lease through foreclosure proceedings, the purchaser at such foreclosure sale, or any subsequent holder of this lease through such purchaser, shall have the same rights in and under this lease as ARTCOL has.

* * *

"26. Notwithstanding any other provisions of this lease, if and so long as this leasehold is subject to a mortgage insured, reinsured, or held by the Federal Housing Commissioner or given to the Commissioner in connection with a resale, or the demised premises are acquired and held by him because of a default under said mortgage, the TENANT is authorized to obtain a loan, the repayment of which is to be insured by the Federal Housing Commissioner and secured by a mortgage on this leasehold estate. TENANT is further authorized to execute a mortgage on this leasehold and otherwise to comply with the requirements of the Federal Housing Commissioner for obtaining such an insured mortgage loan; provided, however, that the LANDLORD shall not be required to mortgage the real property.

* * *

"30. 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.

"32. Upon any default under this Lease which authorizes the cancellation thereof by the LANDLORD, LANDLORD shall give notice to the mortgagee and the Federal Housing Commissioner, and the Mortgagee and the Federal Housing Commissioner, their successors and assigns, shall have the right within any time within six (6) months from the date of such notice to correct the default and reinstate the lease unless LANDLORD has first terminated the Lease as provided herein."