

2005

Joel Sill v. Bill Hart d/b/a Hart Construction: Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOEL SILL,

*

Plaintiff-Counterclaim
Defendant/Appellant,

*

*

Case No. 20050245-CA

v.

*

BILL HART d/b/a HART
CONSTRUCTION,

*

Defendant-Counterclaimant/
Appellee.

*

*

REPLY BRIEF OF APPELLANT

Appeal from a Final Judgment Entered by the Third Judicial District Court
For Summit County, State of Utah
The Honorable Bruce C. Lubeck and Deno G. Himonas, Presiding

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ORAL ARGUMENT REQUESTED BY APPELLANT

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October 24, 2005

Clerk of the Court
Utah Court of Appeals
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Re: *Sill v. Hart*, Case No. 20050245-CA

Dear Clerk:

There are several minor corrections I wish to make to the Reply Brief of Appellant filed in the above-referenced case. The omitted word in each of the corrected sentences appears in bold. First, on page 4, the second sentence of the second paragraph should read: Indeed, **in** every case Sill has been able to find that addresses the question, the court has concluded that the statutory term "complaint" includes a counterclaim.

Second, on page 14, the second full sentence from the top should read: Nowhere in any of the mechanic's lien statutes is there so much as **a** hint that "lien claimant" does not include an original, general contractor like Hart.

Finally, on page 17, the second sentence of the "Conclusion" should read: The Court also should reverse the trial court's awards of prejudgment interest **and** attorney fees to Hart, the only basis for which is the favorable judgment on the lien action.

I have included seven copies of this letter for attachment to the seven copies of the Reply Brief of Appellant that were filed. Thank you for distributing the copies of the letter accordingly.

Sincerely,


David B. Thompson

Enclosures
cc: P. Bruce Badger
Robert J. Dale
Bradley L. Tilt

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ORAL ARGUMENT REQUESTED BY APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION	1
ARGUMENT	1
The trial court incorrectly ruled that Subsection (4)(a) did not apply to Hart’s counterclaim complaint	1
A. The plain language of Subsection (4)(a) did not apply to Hart’s counterclaim complaint	1
B. The term “counterclaim complaint,” commonly used by the Courts, correctly describes a counterclaim	6
C. Hart fails to distinguish the <i>American Rural Cellular</i> decision in arguing that the term “action,” as used in Subsection (4)(a), has a distinctly different meaning than that term has in UTAH CODE ANN. § 38-1-18(1) (2001)	7
D. The authorities cited in Sill’s opening brief support the view that a counterclaim is a complaint.	11
E. Contrary to Hart’s contention, original or general contractors are not exempt from the requirements of Subsection (4)(a); nor is a lien claimant exempt from those requirements if the homeowner ultimately is unable to exercise rights under the Residence Lien Restriction and Lien Recovery Fund Act.	13
CONCLUSION	17

TABLE OF AUTHORITIES

Cases Cited

American Rural Cellular, Inc. v. Systems Communications Corp., 939 P.2d 185 (Utah Ct. App. 1997)	3, 7
Breech v. Hughes Tool Co., 41 Del. Ch. 128, 189 A.2d 428 (Del. 1963)	5
Brink’s Inc. v. City of New York, 533 F.Supp. 1122 (S.D.N.Y. 1982) . .	4, 10
Landmark Systems, Inc. v. Delmar Redevelopment Corp., 900 S.W.2d 258 (Mo. Ct. App. 1995)	15
Lebrecht v. Orefice, 105 N.Y.S.2d 318 (N.Y. 1951)	5
Liberty Chevrolet, Inc. v. Rainey, 791 N.E.2d 625 (Ill. App. 2003)	5
Local Union No. 38, Sheet Metal Workers Int’l v. Pelella, 350 F.3d 73 (2 nd Cir. 2003)	11
Quality Clothes Shop v. Keeney, 106 N.E. 541	5
Redwood Gym v. Salt Lake County Commission, 624 P.2d 1138 (Utah 1981)	15
Uncle Henry’s, Inc. v. Plaut Consulting, Inc., ___ F.Supp.2d ___, 2005 WL 1595288 (D. Maine 2005)	5, 8
Wilson v. Baldwin, 519 S.E.2d 251 (Ga. App. 1999)	4, 10

Statutory Provisions, Rules

Utah R. Civ. P. 7	17
UTAH CODE ANN. § 38-1-2 (2001).	14
UTAH CODE ANN. § 38-1-7 (2001).	14
UTAH CODE ANN. § 38-1-11 (2001).	1

UTAH CODE ANN. § 38-1-14 (2001).....	14
UTAH CODE ANN. § 38-1-18 (2001).....	7

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REPLY BRIEF OF APPELLANT

INTRODUCTION

In his responsive brief, Bill Hart presents a number of arguments in opposition to Joel Sill's contention that the trial court erred in ruling that UTAH CODE ANN. § 38-1-11(4)(a) (2001) did not apply to Hart when he served his counterclaim complaint on Sill. This brief will address Hart's arguments in the order in which he presents them.

ARGUMENT

The trial court incorrectly ruled that Subsection (4)(a) did not apply to Hart's counterclaim complaint.

A. The plain language of Subsection (4)(a) covers Hart's counterclaim complaint.

Hart first argues that Subsection (4)(a), on its face, does not apply to his counterclaim because Sill was "the plaintiff that filed the action and served the

complaint.” Aple.’s Br. 11. According to Hart, he “never served a complaint on Sill[;] [r]ather, Hart’s pleading was an answer that included a compulsory counterclaim to foreclose his mechanic’s lien.” *Id.* Therefore, the argument goes, the plain language of Subsection (4)(a) could not apply to his counterclaim.

Subsection (4)(a) applies to the filing of “an action to enforce a lien filed under [the mechanic’s lien statutes].” Hart does not dispute that he commenced such an action when he filed his counterclaim. Nor could he. *See Harman v. Yeager*, 103 Utah 208, 134 P.2d 695, 696 (1943) (“[a] counterclaim is viewed as an original action, instituted by the defendant against the plaintiff”). He, however, insists that the term “complaint” does not embrace a “counterclaim” and, thus, he never served the “complaint” referenced in Subsection (4)(a). He contends that this is plain because “[t]he Utah Legislature was very precise when it designated only one of the six pleadings allowed under Utah R. Civ. P. 7(a) (*i.e.*, a complaint) as being subject to the requirements of Subsection (4)(a).” Aple.’s Br. at 12. Implicit in that argument is that the term “complaint,” as used in Rule 7(a), does not embrace a “counterclaim.”

First, nothing in the plain language of Subsection (4)(a) suggests that the legislature either had Rule 7(a) in mind when it enacted (4)(a) or intended the narrow definition of “complaint” Hart contends is compelled by that rule (*i.e.*, a definition of “complaint” that does not include a counterclaim). Assuming Hart is correctly interpreting Rule 7(a), had the legislature intended such a narrow definition for “complaint” based on its like interpretation of that rule, it would have expressly

referenced Rule 7(a). Moreover, the legislature's use of the phrase "files an action to enforce a lien filed under this chapter" at the beginning of Subsection (4)(a) – a phrase nearly identical to that at the beginning of UTAH CODE ANN. § 38-1-18(1) (2001), which this Court construed, prior to the enactment of Subsection (4)(a), to include a counterclaim seeking enforcement of a mechanic's lien (*American Rural Cellular, Inc. v. Systems Communications Corp.*, 939 P.2d 185, 193 (Utah Ct. App. 1997) – leads one to the more reasonable conclusion that the legislature intended that "complaint" be given its commonly accepted meaning, which plainly includes a counterclaim.

Alternatively, even if the legislature did have Rule 7(a) in mind when it enacted Subsection (4)(a), as Hart suggests, it necessarily would have selected the term "complaint" from that rule to express its intent to include a counterclaim in (4)(a). Rule 7(a) provides:

Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served.

If the legislature were of the view that a counterclaim is a "pleading," as Hart appears to assert, *see* Aple.'s Br. at 12 & n.5, and then, in enacting Subsection (4)(a), went to Rule 7(a) to look for a term that covered both an initial complaint and a counterclaim, it necessarily would have chosen "complaint" from the list of "pleadings" contained in that rule.

That is so because “counterclaim” is not expressly set forth in Rule 7(a). The legislature, therefore, would have looked for a term in Rule 7(a)’s list that applied to a counterclaim. A counterclaim certainly is not an “answer,” a “reply to a counterclaim,” an “answer to a cross-claim,” a “third-party complaint,” or a “third-party answer” – five of the six “pleadings” listed in Rule 7(a). The legislature naturally would have rejected those pleadings as not descriptive of a counterclaim. Selection of the term “complaint” from Rule 7(a), however, would be entirely consistent with the prevailing view of courts and commentators that a counterclaim is a complaint – it just is one filed by a defendant against a plaintiff. Rule 7(a) therefore does not advance Hart’s contention that the legislature, by using the term “complaint” in Subsection (4)(a), must have intended a reference only to an initial complaint filed by a plaintiff.¹

As noted in Sill’s opening brief, other courts, when confronted with the issue of whether the undefined term “complaint” in a statute included a counterclaim, have correctly concluded that it did. Indeed, every case Sill has been able to find that addresses the question, the court has concluded that the statutory term “complaint” includes a counterclaim. In addition to the cases cited in Sill’s opening brief (*Wilson v. Baldwin*, 519 S.E.2d 251, 253 (Ga. App. 1999), and *Brink’s Inc. v. City of New York*,

¹ The trial court also cited Rule 7(a) in support of its conclusion that the term “complaint” in Subsection (4)(a) does not include a counterclaim. Decision at 3. The court described Rule 7(a) as “distinguishing a complaint from other pleadings.” The court failed to observe, however, that Rule 7(a) does not distinguish a “complaint” from a “counterclaim.”

533 F.Supp. 1122, 1123 ((S.D.N.Y. 1982)), Aplt.'s Br. at 19, the following decisions are representative: *Uncle Henry's, Inc. v. Plaut Consulting, Inc.*, ___ F.Supp.2d ___, 2005 WL 1595288 at *3 (D. Maine 2005) ("I conclude that the only reasonable way to read the statute is to interpret the word 'complaint' to mean the pleading asserting the claim in question, here Plaut Consulting's counterclaim."); *Breech v. Hughes Tool Co.*, 41 Del. Ch. 128, 189 A.2d 428, 429-30 (Del. 1963) (statute providing that if it appears in any "complaint" filed in chancery court that a defendant is a nonresident, court may order his appearance and may provide for seizure of his property, is not to be strictly construed to end that "complaint" exclude a counterclaim, but rather a counterclaim against a nonresident is within the purview of the statute). Significantly, Hart has not cited a single case where a court, confronted with that issue, has held that the statutory term "complaint" does not include a counterclaim.

What Hart cannot avoid is that the term "complaint," when used in the absence of limiting language, is commonly understood to include a counterclaim. *See, e.g., Liberty Chevrolet, Inc. v. Rainey*, 791 N.E.2d 625, 629 (Ill. App. 2003) ("[W]e agree with the trial court that, under the Agreement, a counterclaim is a 'complaint.'"); *Lebrecht v. Orefice*, 105 N.Y.S.2d 318, 320 (N.Y. 1951) ("In the absence of language indicating a legislative intent that Section 23 * * * shall be inapplicable to counterclaims, this court is of the opinion that Section 23 applies equally to complaints and counterclaims, since for all practical purposes the counterclaim is the same as a complaint."); *Quality Clothes Shop v. Keeney*, 106 N.E. 541, 542 (Ind. App. 1914)

(“It would seem, therefore, that, by the express language of the statute, a counterclaim is a complaint, and the courts have held repeatedly that a counterclaim is similar in character to a complaint, and is, in fact, in the nature of a complaint against the plaintiff.”). Nothing in the plain language of Subsection (4)(a) suggests the legislature intended that the word “complaint” be given anything but its common meaning. In short, Hart’s counterclaim is within the scope of Subsection (4)(a)’s plain language.

B. The term “counterclaim complaint,” commonly used by the courts, correctly describes a counterclaim.

Hart chastises Sill for using the term “counterclaim complaint,” which is widely used by courts to describe a counterclaim.² Indeed, Hart calls it a “made up term,” which he urges this Court to avoid, particularly in the mechanic’s lien context (though he offers no explanation why the term is inappropriate in mechanic’s liens cases even though it is used in other kinds of cases). Hart assails the use of the term as an improper invitation for this Court to ignore the “express language of Subsection (4)(a), and its direct and specific reference to a ‘complaint’ as the exclusive pleading with which various other forms must in certain cases be served on a homeowner.” Aple.’s Br. at 14.

This should not delay the Court long. Sill’s citation of numerous cases in which the court has used “counterclaim complaint” when talking about a counterclaim is

² Hart suggests that the use of the term “counterclaim complaint” is isolated. Aple.’s Br. at 14. That is not true. A Westlaw search for “counterclaim complaint” in the “allcases” database produces 57 cases where the term is used.

intended only to illustrate the prevailing view that a counterclaim is a complaint. That view, of course, supports the argument that when the legislature used the term “complaint” in Subsection (4)(a), without any limiting language, it intended that the term be given its commonly accepted meaning, which includes a counterclaim. That conclusion necessarily arises from a straightforward application of a basic rule of statutory construction: when construing a statute, a court examines its plain language and gives the operative terms their commonly understood meanings.

C. Hart fails to distinguish the *American Rural Cellular* decision in arguing that the term “action,” as used in Subsection (4)(a), has a distinctly different meaning than that term has in UTAH CODE ANN. § 38-1-18(1) (2001).

In an effort to validate the trial court’s conclusion that the language of UTAH CODE ANN. § 38-1-18 (2001), construed by this Court in *American Rural Cellular, Inc. v. Systems Communications Corp.*, 939 P.2d 185 (Utah Ct. App. 1997), is very different from the language in Subsection (4)(a), Hart argues that the word “any” in front of the word “action” in § 38-1-18 and the use of the term “complaint” after the term “action” in Subsection (4)(a) compel the conclusion that “an action” in Subsection (4)(a) does not include a counterclaim. As explained below, that the legislature intended such fine distinctions between the words used in § 38-1-18(1) and the nearly identical words used in Subsection (4)(a) simply is not apparent from either *American Rural Cellular* or the plain language of Subsection (4)(a).

Hart’s argument on this point is anchored in his contention that the legislature’s use in Subsection (4)(a) of the term “complaint,” which he insists must be interpreted

narrowly to refer only to an initial complaint filed by a plaintiff, reflects an intent to limit the scope of the phrase “action to enforce a lien” to an original action filed by a lien claimant as a plaintiff. That construction, however, is plausible only if one accepts Hart’s position that the undefined term “complaint” – standing alone in the absence of any limiting language – is not reasonably interpreted as including a counterclaim and necessarily means only an initial complaint filed by a plaintiff. As discussed above, that view is contrary to the prevailing, practical view that a counterclaim is a complaint and that when the term “complaint” is used in a statute with no qualifying language, it naturally includes a counterclaim. Hart offers no good reason for this Court to reject that prevailing view.

Thus, the only reasonable reading of Subsection (4)(a) is that the introductory phrase “action to enforce a lien” includes a counterclaim (just as this Court in *American Rural Cellular* said was the case for nearly identical language in § 38-1-18(1)), and that the unqualified term “complaint,” which follows that introductory phrase, has its commonly understood meaning, which includes a counterclaim. Contrary to what the trial court concluded and Hart now argues, the unqualified term “complaint” does not serve to modify and restrict the preceding phrase “action to enforce a lien” but, instead, simply refers to the vehicle by which the action to enforce the lien is brought (whether that be through an initial complaint filed by the lien claimant as a plaintiff or through a counterclaim filed by a lien claimant who is the defendant in an action brought by the homeowner). See *Uncle Henry’s, Inc. v. Plaut Consulting, Inc.*, ___ F.Supp.2d ___,

2005 WL 1595288 at *3 (D. Maine 2005) (“I conclude that the only reasonable way to read the statute is to interpret the word ‘complaint’ to mean the pleading asserting the claim in question, here Plaut Consulting’s counterclaim.”). In other words, given the structure of Subsection (4)(a), the phrase “action to enforce a lien,” rather than being modified and restricted by the subsequent term “complaint,” compels a broad interpretation of “complaint” – *i.e.*, one consistent with its commonly understood meaning, which includes a counterclaim.

Had the legislature intended the more restrictive reading of Subsection (4)(a) Hart proposes, the legislature – mindful of the construction this Court gave the phrase “action brought to enforce any lien” in *American Rural Cellular* and of the common understanding that the term “complaint” includes a counterclaim – certainly would have made explicit the limitation on Subsection (4)(a)’s reach to only an initial complaint filed by a lien claimant as a plaintiff. It is unreasonable to think, as Hart would have it, that the legislature put in Subsection (4)(a) “action” language nearly identical to that construed in *American Rural Cellular* with the notion that the reader of (4)(a) would be left with the task of divining a legislative intent to give the nearly identical “action” language a meaning different from that determined in *American Rural Cellular*. Rather, the legislature would have made that intention clear – for example: “If a lien claimant files an action, *as a plaintiff in an initial complaint and not as a counterclaimant*, to enforce a lien filed under this chapter * * *.” To think otherwise is

to ascribe to the legislature a hide-the-ball attitude in its enactment of Subsection (4)(a) that simply is not suggested in anything Hart cites to this Court.

Finally, Hart argues that *Wilson v. Baldwin*, 519 S.E.2d 251 (Ga. App. 1999), and *Brinks, Inc. v. City of New York*, 533 F.Supp. 1122 (S.D.N.Y. 1982), cited in Sill's opening brief, ultimately support the trial court's construction of Subsection (4)(a) rather than Sill's. Those cases, however, do support Sill's position. In *Wilson*, the statute at issue prohibited bringing "a complaint seeking to obtain a change of legal custody" of a child "[a]s a counterclaim." *Wilson*, 519 S.E.2d at 327. That statutory prohibition illustrates the common understanding that the term "complaint" includes a counterclaim. If that were not the commonly understood meaning of "complaint," there would be no need for an express prohibition against bringing a complaint in the form of a counterclaim. The absence of similar limiting language with respect to the term "complaint" in Subsection (4)(a) indicates a legislative intent that "complaint" be given its commonly understood meaning (*i.e.*, the term includes a counterclaim).

The *Brink's* court, in construing the term "complaint" in one statute to include a counterclaim, relied on the following language from another statute: "A cause of action contained in a counterclaim or a cross-claim shall be treated, as far as practicable, as if it were contained in a complaint." *Brink's Inc.*, 533 F.Supp. at 1123 n.3. Direct parallels to that provision exist in Utah law. As noted in Sill's opening brief, it is well-settled in this state that "[a] counterclaim is viewed as an original action, instituted by the defendant against the plaintiff and is tested by the same tests

and rules as a complaint.” *Harman v. Yeager*, 103 Utah 208, 134 P.2d 695, 696 (1943). Further, under Rule 8(a), Utah Rules of Civil Procedure, a counterclaim must meet precisely the same standards as a complaint: “A pleading which sets forth a claim for relief, whether an original claim, *counterclaim*, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled” (emphasis added). Those parallels lead one to the same conclusion that the *Brink*’s court reached: the term “complaint” includes a counterclaim.

D. The authorities cited in Sill’s opening brief support the view that a counterclaim is a complaint.

Hart’s various attacks on the authorities Sill cites in support of his proposed construction of Subsection (4)(a), Aple.’s Br. at 18-22, once again reduce to an argument that the term “complaint” does not include a counterclaim. Hart, however, offers just one case – *Local Union No. 38, Sheet Metal Workers Int’l v. Pelella*, 350 F.3d 73 (2nd Cir. 2003) – to support that view. The principal point from *Pelella* he asks this Court to consider is the majority’s conclusion that the term “action,” as used in section 101(a)(4) of the federal Labor-Management Reporting and Disclosure Act, does not embrace a counterclaim, because “action” is qualified by the phrase “to institute.” Hart argues by analogy that the term “action” in Subsection (4)(a), because it is qualified by the subsequent phrase “service of the complaint,” likewise does not embrace a counterclaim. For the following reasons, that analogy does not work.

The *Pelella* majority's construction of "action" was based on the view that "[a] defendant does not 'institute' an action when he asserts a counterclaim." 350 F.3d at 82. According to the majority, an action is only "instituted" when a plaintiff files a complaint, and "[i]n sharp contrast, a defendant asserts a counterclaim in response to a plaintiff's institution of an action." *Id.* Thus, the "sharp contrast" the majority found between a "complaint" and a "counterclaim" lay in the perception that one does not "institute an action" by filing a counterclaim. Hart asks this Court to adopt that view and apply it in construing the terms "action" and "complaint" in Subsection (4)(a). Aple.'s Br. at 21 ("[*Pelella*] also confirms that a 'complaint' is properly considered as something in 'sharp contrast' from a counterclaim. *Pelella* confirms, therefore, that Subsection (4)(a) simply does not apply to this case in which Hart did not file an 'action' nor serve a 'complaint.'").

The problem with Hart's invitation to adopt the *Pelella* majority's reasoning for the purpose of interpreting Subsection (4)(a) is that the majority's major premise – that one does not institute an action through a counterclaim – is directly contrary to Utah law. As previously noted, the Utah Supreme Court has made clear that "[a] counterclaim is viewed as an original action, instituted by the defendant against the plaintiff and is tested by the same tests and rules as a complaint." *Harman*, 134 P.2d at 696. While Hart suggests that the foregoing principle is no longer applicable because *Harman* "was decided prior to the 1951 adoption of the Utah Rules of Civil Procedure which distinguish between the various pleadings," Aple.'s Br. at 21, he offers no

analysis of either those rules or any post-1951 case law that even suggests *Harman* is not good law. At bottom, the *Harman* court, like many other courts and commentators have, correctly equated a counterclaim with a complaint. Hart cannot escape that. Nor can it be assumed the legislature was unaware of *Harman*, which expresses the clear majority view that a counterclaim is in substance a complaint, when it enacted Subsection (4)(a).

E. Contrary to Hart’s contention, original or general contractors are not exempt from the requirements of Subsection (4)(a); nor is a lien claimant exempt from those requirements if the homeowner ultimately is unable to exercise rights under the Residence Lien Restriction and Lien Recovery Fund Act.

In the span of nine pages, Hart presents a variety of arguments of why he believes that, even if Subsection (4)(a) applies to a contractor who counterclaims to enforce a mechanic’s lien, its requirements do not apply to an original, general contractor like himself. Aple.’s Br. at 22-30. The nub of those arguments is that because the Residence Lien Restriction and Lien Recovery Fund Act (hereafter “Residence Lien Act”) applies only to claims and liens of subcontractors, not those of original or general contractors, he is not subject to Subsection (4)(a)’s requirements to serve on the sued homeowner the referenced instructions and forms concerning the Residence Lien Act. As explained below, the plain language of Subsection (4)(a) defeats that argument.

Subsection (4)(a) unambiguously states that “[i]f a *lien claimant* files an action to enforce a lien filed under this chapter involving a residence, as defined in Section 38-

11-102, the *lien claimant* shall include with the service of the complaint on the owner of the residence [certain instructions and forms relating to the exercise of rights under the Residence Lien Act]” (emphasis added). Hart makes no argument that he is not a “lien claimant,” a term used throughout the mechanic’s lien statutes to refer to someone who has filed a lien under those statutes. *See* UTAH CODE ANN. § 38-1-7(2)(b) (2001) (where the term “lien claimant” first appears). Nowhere in any of the mechanic’s lien statutes is there so much as hint that “lien claimant” does not include an original, general contractor like Hart. Where the legislature intended to draw distinctions between an original or general contractor and a subcontractor, it used those specific terms to distinguish the two. *See, e.g.,* UTAH CODE ANN. §§ 38-1-2 (defining and distinguishing “original contractor” and “subcontractor”), -14 (separating “original contractors” and “subcontractors”), -17 (separating “contractor” and “subcontractor”) (2001).

Thus, on its face, Subsection (4)(a)’s requirement that the “lien claimant” serve certain instructions and forms on the sued homeowner applies to an original, general contractor who, like Hart, has filed a lien under the mechanic’s lien statutes. Had the legislature intended to limit the reach of Subsection (4)(a) to subcontractors, then it would have said just that – for example: “If a lien claimant *who is a subcontractor* files an action to enforce a lien * * *.”

Significantly, Hart complied with the requirement under UTAH CODE ANN. § 38-1-7(2)(h)(1) (2001) that his lien notice contain “a statement describing what steps an

owner, as defined in Section 38-11-102, may take to require a lien claimant to remove the lien in accordance with Section 38-11-107 [under the Residence Lien Act]” (copy of Hart’s Notice of Lien – Def.’s Ex. 2122 – is attached as an addendum to this brief). That requirement is similar to the one relating to the Residence Lien Act contained in Subsection (4)(a) and similarly applies to anyone filing a lien under the mechanic’s lien statutes (no exception for an original, general contractor).

Hart’s further contention that Subsection (4)(a) does not apply in the situation where the homeowner ultimately is unable to exercise rights under the Residence Lien Act fares no better. The statute does not limit the instructions/forms requirement to those situations where the owner of the residence actually is in a position to exercise rights under the Residence Lien Act. Nor does it exempt from that requirement a lien claimant who may believe that the owner has no such rights.

Hart’s view that serving the required instructions and forms on Sill (or other homeowners in Sill’s position) would be useless is of no import. The legislature has decided otherwise, and “[i]t is not the function of this Court to evaluate the wisdom or practical necessities of legislative enactments.” *Redwood Gym v. Salt Lake County Commission*, 624 P.2d 1138, 1143 (Utah 1981). In short, Hart cannot escape the mandatory requirements of Subsection (4)(a) simply because he thinks they are a bad idea under certain circumstances.

In *Landmark Systems, Inc. v. Delmar Redevelopment Corp.*, 900 S.W.2d 258 (Mo. Ct. App. 1995), the Missouri Court of Appeals correctly rejected a similar attack

on a notice requirement in that state's mechanic's lien statutes, where the lien claimant argued that its failure to comply with the requirement should not bar its lien because the lien property owner was "a large corporation sophisticated in the areas of real estate and construction" and "had knowledge of the mechanic's lien law":

It is true, as [the lien claimant] suggests, the purpose of § 429.012 is to warn inexperienced property owners of the danger to them which lurks in the mechanic's lien statute. However, this court is also aware the requirements of our statute are mandatory. The statute does not limit the necessity of this notice to those inexperienced with, or having lack of knowledge about, the mechanic's lien laws. The statute has no exceptions and this court will not accept the invitation to create an exception in this case. Additionally, * * * allowing a lien where there was not substantial compliance with the notice provision contained in § 429.012 would add another issue to each mechanic's lien case, namely the extent of the property owner's knowledge of the mechanic's lien laws. The fact such an exception was not incorporated into the statute indicates the legislature did not intend such a result.


900 S.W.2d at 261-62 (citations and internal quotation marks omitted). That analysis applies with equal force here in determining the reach of Subsection (4)(a). Whether the circumstances in any given case are such that a homeowner is or is not in a position to exercise rights under the Residence Lien Act may be an issue in many mechanic's lien cases when litigation is commenced. It is precisely for that reason that the legislature could have reasonably determined that Subsection (4)(a)'s requirements would apply to *all* lien claimants, thereby avoiding litigation on the question of whether a lien claimant in a particular case justifiably decided not to provide the homeowner with the instructions and forms.

In sum, Subsection (4)(a) plainly applies to all lien claimants, Hart included. The legislature did not carve out any exceptions to the instructions/forms requirement, and this Court should not create one.³

CONCLUSION

Based on the foregoing arguments and those contained in Sill's opening brief, this Court should reverse the trial court's judgment in favor of Hart on his mechanic's lien foreclosure action and dismiss that action. The Court also should reverse the trial court's awards of prejudgment interest attorney fees to Hart, the only basis for which is the favorable judgment on the lien action. The Court then should remand the case to the trial court with directions to award Sill his reasonable attorney fees and costs in defending against Hart's invalid lien action at trial and on appeal.

Dated this 31st day of August 2005.


DAVID B. THOMPSON
MILLER VANCE & THOMPSON PC
Attorneys for Plaintiff-Counterclaim
Defendant/Appellant

³ The legislative history Hart cites provides no assistance. It only confirms what the parties have acknowledged all along: The Residence Lien Act applies to claims and liens by subcontractors. That fact does not alter the analysis of what legislative intent the plain language of Subsection (4)(a) reflects, insofar as the notice requirements in that provision are concerned.

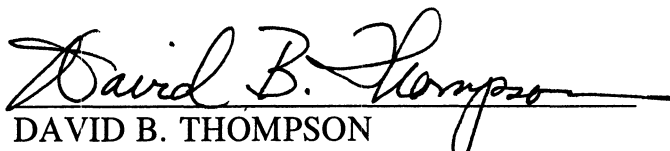
CERTIFICATE OF SERVICE

I certify that on August 31, 2005, I served the foregoing Reply Brief of Appellant on the attorneys for Defendant-Counterclaimant/Appellee by mailing two copies, with postage prepaid, in an envelope addressed to:

P. Bruce Badger
Robert J. Dale
FABIAN & CLENDENIN, P.C.
P.O. Box 510210
Salt Lake City, Utah 84151-0210

Additionally, I served this brief on the attorneys for Third-Party Defendant Kallie Sill by mailing one copy, with postage prepaid, in an envelope addressed to:

Jeffrey L. Silvestrini
David S. Dolowitz
Cohne, Rappaport & Segal, P.C.
P.O. Box 11008
Salt Lake City, Utah 84147-0008


DAVID B. THOMPSON
MILLER VANCE & THOMPSON PC
Attorneys for Plaintiff-Counterclaim
Defendant/Appellant

ADDENDUM

WHEN RECORDED RETURN TO:

Robert J. Dale, Esq.
McMurray, McMurray, Dale & Parkinson, P.C.
455 East 500 South, Suite 300
Salt Lake City, Utah 84111

00609900 Bk01432 Pg00511-00512

ALAN SPRIGGS, SUMMIT CO RECORDER
2002 JAN 31 10:40 AM FEE \$12.00 BY DMK
REQUEST: HART CONSTRUCTION

NOTICE OF LIEN

TO WHOM IT MAY CONCERN:

Notice is hereby given that the undersigned, William Hart, dba Hart Construction, 1391 Lucky John Dr., P.O. Box 166, Park City, Utah 84060, telephone: (435) 649-8763, hereby claims and intends to hold and claim a lien pursuant to §§ 38-1-1, *et. seq.*, Utah Code Annotated (as amended), upon land and premises owned and/or reputed to be owned by Joel Sill, which land and premises are located in Summit County, State of Utah, and are described as follows (the "Property"):

ALL OF HOMESTEAD NO. 15, THE COLONY AT WHITE PINE CANYON, PHASE I AMENDED FINAL SUBDIVISION, ACCORDING TO THE OFFICIAL PLAT THEREOF ON FILE AND OF RECORD IN THE OFFICE OF THE SUMMIT COUNTY RECORDER.

ALSO TOGETHER WITH AND SUBJECT TO ALL RIGHTS, BENEFITS, ENCUMBRANCES AND OBLIGATIONS SET FORTH IN THE GRANT OF EASEMENTS RECORDED SEPTEMBER 28, 1998 AS ENTRY NO. 518627 IN BOOK 1186 AT PAGE 28 OF THE OFFICIAL RECORDS.

Parcel #: CWPC-15-A21

to secure payment of all sums including accruing attorneys' fees, and costs, due and owing to the undersigned for service, labor, and/or materials furnished by the undersigned, as a contractor, that were used in the construction, alteration, or improvement of buildings, structures, and improvements on and for the benefit and improvement of the Property.

The undersigned was employed by, and furnished such service, labor, and materials to, Joel Sill, who was and is the reputed and the record owner of the Property, pursuant to an agreement. The undersigned performed and furnished the first service, labor, and/or materials on or about June 25, 1999, and performed and furnished the last service, labor, and/or materials on or about January 7, 2002, and on and between those dates did perform and furnish service, labor, and/or materials for which the undersigned holds and claims a lien by virtue of the provisions of §§ 38-1-1, *et. seq.*, Utah Code Annotated (as amended).

Notice is also provided that, pursuant to §38-11-107, Utah Code Annotated (as amended), to require a lien claimant to remove a lien from an owner-occupied residence, other than a

lien arising under an agreement directly with the owner, an owner can establish compliance with the following requirements found in §§ 38-11-204(3)(a) and (3)(b). Utah Code Annotated (as amended):

1. (i) the owner of the owner-occupied residence or the owner's agent entered into a written contract with an original contractor licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, for the performance of qualified services, to obtain the performance of qualified services by others, or for the supervision of the performance by others of qualified services in construction on that residence; (ii) the owner of the owner-occupied residence or the owner's agent entered into a written contract with a real estate developer for the purchase of an owner-occupied residence; or (iii) the owner of the owner-occupied residence or the owner's agent entered into a written contract with a factory built housing retailer for the purchase of an owner-occupied residence.
2. the owner has paid in full the original contractor, licensed or exempt from licensure under Title 58, Chapter, 55, Utah Construction Trades Licensing Act, real estate developer, or factory built housing retailer under paragraph 1. above, with whom the owner has a written contract in accordance with the written contract and any amendments to the contract.

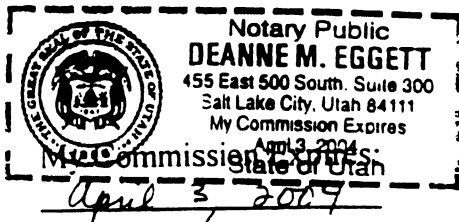
Dated this 30 day of January, 2002.

William Hart
William Hart, dba Hart Construction

STATE OF UTAH

COUNTY OF SALT LAKE

The foregoing instrument was acknowledged before me this 30th day of January, 2002, by William Hart, dba Hart Construction.



Deanne M. Eggett
NOTARY PUBLIC
Residing at: Centerville, UT 84014

THIS FIRM IS ATTEMPTING TO COLLECT A DEBT
AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.