2006

# Centennial Investment Company, L.L.C., a Utah Limited Liability Company v. Brook L. Nuttall and Vanessa Nuttall : Brief of Appellant

Utah Court of Appeals


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IN THE COURT OF APPEALS
STATE OF UTAH

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| CENTENNIAL INVESTMENT COMPANY, L.L.C., a Utah Limited Liability Company<br><br>Plaintiff, Appellant<br><br>BROOK L. NUTTALL and VANESSA NUTTALL;<br><br>Defendants, Appellees | **BRIEF OF APPELLANT**<br><br>Appellate No. 20060519-SC<br><br>Civil No. 050405325<br>Judge Robert Adkins |


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LIST OF PARTIES

THE CAPTION OF THE CASE CONTAINS THE NAMES OF ALL PARTIES

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## STATEMENT OF JURISDICTION

Jurisdiction is appropriate in this case pursuant to UCA §78-2-2 and UCA §78-2a-3(2)(j).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the trial Court erred in holding a Real Estate Purchase Contract fully executed by one party in joint tenancy, but not the other, fails to convey an interest in real property.

**Determinative law:**

Utah Code Annotated §57-1-5

Utah Code Annotated §78-25-16

Cannefax v. Clement, 786 P.2d 1377 (Utah App. 1990).

*E.A. Strout Western Realty Agency v. Broderick*, 522 P.2d 144 (Utah 1974).

*Eckard v. Smith*, 527 P.2d 660 (Utah 1974)

*Faulkner v. Farnsworth*, 665 P.2d 1292 (Utah 1983)

*Rainford v. Rytting*, 22 Utah 2d 242, 451 P.2d 769 (1969).

*Russell v. Thomas*, 999 P.2d 1244 (Utah App 2000).

***Standard of review:***

This is purely an issue of law. When reviewing an issue of law the Appellant Court accords the Trial Court's legal conclusions no deference and reviews them for correctness. *Nova Casualty Company v. Able Construction, Inc.*, 983 P 2d 575 (Utah 1999).

II. Whether the trial Court erred in holding that Brook Nuttall could not require Vanessa Nuttall to sell her interest in the property, in spite of express language in the parties divorce decree allowing him to do so.

**Determinative law:**

***Standard of review:***

This is purely an issue of law. When reviewing an issue of law the Appellant Court accords the Trial Court's legal conclusions no deference and reviews them for correctness. *Nova Casualty Company v. Able Construction, Inc.*, 983 P 2d 575 (Utah 1999).

III. Whether the trial Court erred in holding that notice to counsel is sufficient to constitute notice to the party required to be given pursuant to the wrongful lien statute UCA §38-9-4.

**Determinative law:**

UCA §38-9-4

*Blake v. Blake*, 17 Utah 2d. 369, 412 P.2d 454 (1966).

*Dept. of Environmental Quality v. Golden Gardens WaterCo.*, 27 P.3d 579 (Utah App. 2001).

***Standard of review:***

This is purely an issue of law. When reviewing an issue

of law the Appellant Court accords the Trial Court's legal conclusions no deference and reviews them for correctness. *Nova Casualty Company v. Able Construction, Inc.*, 983 P 2d 575 (Utah 1999).

IV. Whether the trial Court erred in awarding treble damages to Vanessa Nuttall under the wrongful lien statute.

**Determinative law:**

UCA §38-9-1

UCA §38-9-4

***Standard of review:***

When the trial court applies the facts of the case to the law then the question is a mixed question of fact and law, and the factual basis underpinning the decision is subject to a clearly erroneous standard. *Saleh v. Farmers Insurance Exchange*, 133 P.3d 428 (Utah 2006).

V. Whether the trial Court erred in awarding Vanessa Nuttall all her claimed attorney fees.

**Determinative law:**

UCA §38-9-4

*Foote v. Clarke*, 962 P.2d 52 (Utah 1998).

*Jensen v. Sawyer*, 130 P.3d 325 (Utah 2005).

*Paul De Groot Bldg. Servs., L.L.C. v. Gallacher*, 112 P.3d

490 (Utah 2005).

***Standard of review:***

When the trial court applies the facts of the case to the law then the question is a mixed question of fact and law, and the factual basis underpinning the decision is subject to a clearly erroneous standard. *Saleh v. Farmers Insurance Exchange*, 133 P.3d 428 (Utah 2006).

VI. Whether the trial court erred in granting summary judgment to Brook Nuttall on Plaintiff's first cause of action.

**Determinative law:**

Utah Code Annotated §57-1-5

Utah Code Annotated §78-25-16

Cannefax v. Clement, 786 P.2d 1377 (Utah App. 1990).

*E.A. Strout Western Realty Agency v. Broderick*, 522 P.2d 144 (Utah 1974).

*Eckard v. Smith*, 527 P.2d 660 (Utah 1974)

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*Rainford v. Rytting*, 22 Utah 2d 242, 451 P.2d 769 (1969).

*Russell v. Thomas*, 999 P.2d 1244 (Utah App 2000).

***Standard of review:***

In considering an appeal from a grant of summary judgment, the appellate court views the facts in a light most

> favorable to the losing party below. And in determining whether those facts require, as a matter of law, the entry of judgment for the prevailing party below, the appellate court gives no deference to the trial court's conclusions of law, which are reviewed for correctness.

*Blue Cross & Blue Shield v. State*, 779 P.2d 634 (Utah 1989).

## DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Copies of all determinative constitution provisions, statutes and rules are attached hereto as Addendum "B".

## STATEMENT OF THE CASE

This action was initiated by the Plaintiff with the filing of a Complaint on June 28, 2005. The named Defendants were Brook L. Nuttall and Vanessa Nuttall. Plaintiff alleged two causes of action 1) Breach of Contract and 2) Fraud.R.1.

On August 12, 2005 Vanessa Nuttall filed a motion to dismiss the complaint. R.38 On August 18, 2005 Brook Nuttall filed a motion to dismiss. R.56 On August 22, 2005 Vanessa Nuttall filed a "motion to nullify wrongful lien". R.82 Plaintiff filed opposition memoranda to the motions to dismiss and a motion to strike affidavits that had purportedly been submitted in support thereof. R.85-96, 107-114.

The matter came before the Court for hearing on September 6, 2005. At the hearing, the Court elected to treat the two Nuttall motions as Motions for Summary Judgment and accordingly continued the hearing for three days to allow Plaintiff to respond to the altered form of pleading. T.48-56. Plaintiff filed a memorandum in opposition to the motion's for summary judgment and the matter thereafter came

before the Court for oral argument on September 9, 2005. R.125. At the conclusion of the hearing the Court granted Vanessa Nuttall's motion for summary judgment and her motion to nullify wrongful lien. T. 9/9/06 74-76. The Court granted Brook Nuttall's motion for summary judgment as to the first cause of action, but denied the motion as to the second cause of action. T. 9/9/06 74. On September 23, 2005 Vanessa Nuttall filed a motion to assess damages under her wrongful lien claim. R.269. On November 15, 2005, the Court held a hearing on Vanessa Nuttall's claim for damages. On December 21, 2005 the Court entered an interlocutory judgment in favor of Vanessa Nuttall in the amount of $9,451.73. R.347. On May 17, 2006 the judgment was again modified and this time the judgment was certified a final order pursuant to Rule 54 of the Utah Rules of Civil Procedure. R.440. Thereafter this appeal was filed on May 30, 2006.R.449.

## STATEMENT OF RELEVANT FACTS

1. The Plaintiff, Centennial Investment Company, L.L.C. ("Centennial") is a Utah Limited Liability Company which had its chief offices in Davis County, State of Utah. R.137
2. The Defendants, Brook and Vanessa Nuttall were the owners of a parcel of real property located in Herriman Utah consisting of just over 5 acres. R.48
3. The Nuttalls were formerly husband and wife, but were in fact divorced at the time of all the actions that gave cause to this litigation. R.48
4. On May 5, 2005 Travis Bell, the manager of Centennial entered into negotiation with Brook Nuttall for purchase of the property. R.138
5. By Telephone, Mr. Nuttall agreed to a series of escalating prices for the property. First he agreed to sell for $265,000 then he called back and demanded $275,000, then after

Mr. Bell was on his way to Mr. Nuttall's home with the written agreement, Mr. Nuttall called again demanding $285,000. R.138

6. When Mr. Bell arrived at Mr. Nuttall's home Mr. Nuttall signed the contract. R.139

7. At the time the contract was signed Mr. Bell did not know the Nuttall's were divorced. R.139.

8. Mr. Nuttall told Mr. Bell he had authority to sell the property. R.139

9. In subsequent conversations with his advisors, Mr. Bell was told he should get the signature of Mrs. Nuttall as well. R.139

10. To that end he contacted Mr. Nuttall and first learned of the divorce. R.139

11. Mr. Bell obtained Mrs. Nuttall's contact information from Mr. Nuttall and called her to set up an appointment to have her sign the documents. R.139

12. Mrs. Nuttall, through her affidavit, admits that on the 10th of May she had agreed to meet with Mr. Bell where it was Mr. Bells understanding she would sign the contract. R.11.

13. Mrs. Nuttall called Mr. Bell and claimed she was "running behind schedule" and cancelled that appointment. R.11

14. Remarkably Mrs. Nuttall was able to find time to meet with Oakridge Development on that day and to sign a contract to sell the property to them for $290,000 plus a real estate commission of over $8,000.00. R..231

15. That real estate commission was going to a realtor who was Brook Nuttall's sister. R.231

16. In her affidavit Mrs. Nuttall goes on to say that it wasn't until she allegedly hadn't heard from the Plaintiff for nearly two weeks that she decided he didn't want the property. Yet she first signed the REPC making an offer to Oakridge the very day she cancelled her meeting with the Plaintiff. R.11, R.231.

17. The REPC states Brook Nuttall had authority to sign the REPC and sell the property. R.248-49.

18. Mrs. Nuttall indicated she was aware of the contract on the day that Brook Nuttall signed it and that she was to have met with the Plaintiff, where Plaintiff understood she would sign it. R.10

19. Mrs. Nuttall has further admitted it wasn't until much later that she told Plaintiff she was selling the property to someone else. At no time has she testified she ever told the Plaintiff Brook Nuttall did not have authority to sign on her behalf. R.12

20. The Nuttalls have pointed to their divorce decree to support their contention that Mr. Nuttall could not alienate either his interest or Vanessa's interest in the real property. The divorce decree states just the opposite. R.18

21. On the final page of the divorce decree, attached as Exhibit 1 to Vanessa Nuttall's affidavit, it states:

> Either party may at any time choose to buy out the other party. In order to buy out the other party, the purchasing party must obtain the necessary funds required to pay for all the obligations set forth in these terms and conditions. If either party chooses to buy out the other party, then the purchaser must pay the other party their portion of the equity at the time of the entry of the Decree of Divorce and any other amounts due according to the terms and conditions set forth herein....Whichever party obtains funds first shall have first opportunity to purchase the property. R.18

22. Accordingly, by judicial order, Brook Nuttall could have acquired the interest of Vanessa Nuttall in the property at any time, simply by following the conditions of the divorce decree. R.18

23. Brook Nuttall elected not to exercise his rights under the decree when he found a way to squeeze five thousand dollars more out of the property while at the same time awarding his sister an additional eight thousand dollars. R.52

24. On June 10, 2005 Centennial filed a Complaint against the Nuttall's to enforce its rights under the REPC. R.1

25. When Mr. Bell learned the Nuttalls were not going to sell the land to another party, Centennial filed a notice of interest pursuant to the fully executed REPC with the recorders office on August 10, 2005. R.75

26. On August 12, 2005 Vanessa Nuttall filed a motion to dismiss Centennial's Complaint. R.38

27. On August 18, 2005 counsel for Vanessa Nuttall sent a letter to counsel for Centennial demanding the release of the notice of interest. R.79

28. On August 22, 2005 a motion to Nullify the lien pursuant to UCA §38-9-1 et. seq. was filed by Vanessa Nuttall. R.81

29. A hearing was scheduled on the petition for September 6, 2006. At the hearing, the Court elected to continue the matter until September 9, 2006 at which time it would address the Nuttalls' Motion to Dismiss, which the Court elected to treat as Motions for Summary Judgment. T. 9/6/05 48-56

30. At the conclusion of the hearing the Court granted Vanessa Nuttalls' Petition to nullify the lien and her motion for summary judgment. T.74-76

31. With respect to Brook Nuttall the Court granted summary judgment on the breach of contract claim, but denied it with respect to the fraud claim. T.74

32. Subsequently the Court held a hearing on the issue of damages awardable to Vanessa Nuttall as a result of her Petition to nullify the lien. R.281

33. The result of the hearing was an interlocutory order awarding damages including attorney fees. R.347

34. Vanessa Nuttall then sought a writ of execution to pursue the collection of the judgment. R.353

35. Centennial objected on the basis that the order was interlocutory. R.358

36. The Court, after consideration, agreed the previous order was interlocutory, but decided to certify the order as final pursuant to Rule 54 of the Utah Rules of Civil Procedure. R.440. It is from that order that this appeal is taken. R.447

## SUMMARY OF THE ARGUMENT

Brook Nuttall entered into a fully executed, fully integrated, binding contract to sell the real property that is the subject matter of this litigation to Centennial. Under the terms of the contract Brook Nuttall was obligated to produce the clear and marketable title at the time of the closing of the property.

Instead of fulfilling his contract, Brook Nuttall conspired with his sister and ex-wife Vanessa Nuttall to break that contract so that the Nuttalls could obtain $5,000.00 additional dollars for themselves and $8,000.00 for the real estate agent Brook's sister. By virtue of the trial court's ruling, the Nuttalls have

achieved their goal.

The trial court ruled, that as a matter of law, a contract for the sale of real property that contains less than all of the signatures of all joint tenants is incomplete and therefore is unenforceable. This ruling effectively overturns hundreds of years of real property law precedent and invalidates thousands of option agreements entered into every day. There is no legal precedent for a rule that precludes anyone from contracting to sell real property to another whether they hold any ownership interest in the property let alone a requirement that all parties must sign. Entry into the contract however does not guaranty that the party offering to sell will be able to perform. Clearly, one joint tenant cannot sell another's interest in real property without that parties consent. They can however sell whatever interest in real property they hold with the potential simply being a claim for damages or recission if what can be delivered is less than what was bargained for.

Joint Tenancy is the most fragile of ownership status. Any number of factors can work to change a joint tenancy into one that is a tenancy in common. One of those conditions is the alienation of one joint tenants interest in the real property to a third party. That is what happened here. Brook Nuttall agreed to sell the property to Centennial. According to the terms of the contract he had to provide good title at closing. According to his divorce decree he had the ability to do so.

As part of this ongoing saga, Centennial filed a Notice of Interest stating that it had an interest in the real property by virtue of the executed real estate purchase contract. A real estate purchase contract conveys an interest in real property. *Cannefax v. Clement*, 786 P.2d 1377, 1379 (Utah App. 1990). Vanessa Nuttall had a letter sent to Centennial's counsel alleging the notice of interest was a wrongful lien and demanding its removal. As a result of its erroneous ruling on the enforceablity of the REPC the trial

court found the notice of interest to be a wrongful lien, it exacerbated the problem by holding the letter to Centennial's counsel to be the required notice under the wrongful lien statute, contrary to the express language of the statute, thereby allowing the award of excessive damages including attorney fees. Finally with respect to the attorney fees, the Court improperly awarded fees unrelated to the wrongful lien petition which constituted the sole basis for the award.

## ARGUMENT

### I. STANDARD OF REVIEW

The Standard of review in this case is a little complex. The problem is we are dealing with two separate proceedings in the same action and to some degree in the same hearing. The initial hearing was held on Vanessa Nuttall's motion to void the Plaintiff's Notice of Interest under the wrongful lien statute. This proceeding is an evidentiary hearing and evidence was submitted by proffered testimony and documentary evidence. The hearing on this matter was commenced on 9/6/05. At the conclusion of this hearing the Court deferred its ruling until after the hearing on the Defendants' Motions for Summary Judgment.

The Summary Judgment hearing was held on 9/9/05 and the Court heard argument and received evidence by way of affidavit. At the conclusion of the hearing the Court entered its rulings on the Motions and reserved the issue of claimed damages under the wrongful lien statute for another day.

### II. THE REPC GAVE CENTENNIAL AN INTEREST IN THE PROPERTY.

#### A. Standard of Review.

Summary Judgment is only available where there are no disputed issues of material fact and the party moving for summary judgment is entitled to judgment as a matter of law. *Snyder v. Merkley*, 693

P 2d. 64 (1984).

Only where it clearly appears that the party against whom the judgment would be granted can't possible establish a right to recover should summary judgment be granted, and any doubt should be resolved in favor of such a party when summary judgment against him is being considered. *Reliable Furniture Company v. Fidelity and Guarantee Insurance Underwriters*, 16 Utah 2d. 211, 398 P 2d. 685 (1965).

Where a party to a summary judgment supports their allegations with sworn testimony the party opposing the motion may not rely upon the unsworn allegations in his pleadings but must set forth specific facts showing that there is a genuine issue for trial. *Thornock v. Cook*, 604 P.2d 934 (Utah 1979).

Where, however, the party making the motion does not support his or her motion with competent sworn testimony or other admissible evidence, the party opposing the motion is entitled to rely on his contradictory pleadings. *Parrish v. Layton City Corp.*, 542 P.2d 1086 (Utah 1975).

In order for an affidavit to be of effective use in the determination of a motion for summary judgment, it must set forth such facts as would be admissible in evidence. *Norton v. Blackham*, 669 P.2d 857 (Utah 1983). Affidavits not made on personal knowledge, consisting of inadmissible parol evidence used for the purpose of varying terms of a written agreement, or those containing hearsay and opinion testimony cannot be used to support a motion for summary judgment. *See Treloggan v. Treloggan*, 699 P.2d 747 (Utah 1985) *See also Rainford v. Rytting,* 22 Utah 2d 252, 451 P.2d 769 (1969).

It only takes one sworn statement to dispute averments on the other side of a controversy and

create an issue of fact, precluding summary judgment. *Holbrook Company v. Adams*, 542 P 2d. 191 (1975).

As set forth in Plaintiff's Memorandum in Support of its Second Motion to Strike Affidavits, the only purportedly relevant portions of the affidavits submitted by the Defendants are inadmissible and consequently Plaintiff could rely solely on his pleadings to rebut the argument of Defendant's.[1]

The Memoranda filed by the Plaintiff in response to the motions to dismiss clearly demonstrated that the Plaintiff's pleadings adequately state colorable causes of action. Plaintiff however provided countervailing sworn testimony which made even that issue moot for purposes of the motions. When Defendants allegations are construed in light of these standards, it is readily apparent they failed and the Motions for Summary Judgment should have been denied.

**B. The REPC Is A Fully Integrated, Enforceable Agreement**

In its Complaint, Plaintiff established that it had entered into a contract with Brook Nuttall for the sale of the land that is the subject matter of this litigation.R.2.[2] Paragraph 6 of the contract states that the "Seller has, or shall have at Closing, fee title to the Property and agrees to convey such title to Buyer..."

Paragraph 14 of the contract states "**COMPLETE CONTRACT.** This instrument (together with its addenda, any exhibits, and Seller Disclosures) constitutes the entire **Contract** between the parties and supercedes all prior dealings between the parties. This **Contract** cannot be changed except

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[1] The Court erroneously failed to strike portions of the affidavits, but later ruled it did not consider the unstricken portions in making its ruling. Transcript 9/9/05 pp. 22, 27, 73-74.

[2]A Copy of the Contract can be found at R.143-146.

by written agreement of the parties."

Although Mr. Nuttall modified many sections of the Contract, nowhere in the contract does it reference a contingency for approval by Vanessa Nuttall. The plain unambiguous language of the contract requires Mr. Nuttall to provide marketable title at closing whatever the status of title may have been at the time he signed the contract.

The Complaint states that Mr. Nuttall represented he was fully authorized to execute the contract for the sale of the property. Complaint Para. 9. The representations are found in the contract in paragraphs 6 and 13. The Nuttalls are now claiming those representations are not true, or are even trying to go so far as to claim they weren't made at all.

To the extent the Nuttalls are trying to claim the representations were not made, they are part of the written integrated contract entered into between Brook Nuttall and the Plaintiff and any parole evidence being claimed to modify that contract is impermissible pursuant to UCA §78-25-16. See *Faulkner v. Farnsworth*, 665 P.2d 1292, 1293 (Utah 1983).

If you examine the facts in light of the parol evidence rule and in the manner most favorable to the Plaintiff, the contract was complete and integrated and the motions for summary judgment were required to be reviewed in that light.

**C. Vanessa Nuttall's Signature Was Not Necessary For The Contract To Be Enforceable**

The Nuttall's continue to mischaracterize Plaintiff's claims as a demand she sell her interest in the property irrespective of her failure to sign the REPC. With respect to the REPC it is Plaintiff's claim that the contract creates a legal interest in Brook Nuttall's interest in the property.

In the underlying case, Vanessa Nuttall cites to three Utah cases which stand for the proposition

that a joint tenant who is not a signatory to a contract for sale by one or more of her other joint tenants cannot be divested of her interest in property.[3] From this proposition, Nuttall tries to stretch the proposition to state without a written signature from both the registered owners of the property at issue the contract is void. The Trial Court, sua sponte, changed this argument to one whereby a contract involving real property held by joint tenants cannot come into existence unless all joint tenants enter into the contract, and it was on this basis that summary judgment was granted.

This is not what the cases say at all. While Mrs. Nuttall cannot be required to sell her interest in the property, if she did not give her authority to sell to her ex husband, that does not alleviate her ex husband from his obligation to sell and from being subject to damages for failing to deliver clear and marketable title to the whole parcel as opposed to only his one half interest in the whole. Indeed in the very case cited by Defendant the dissent pointed out this result:

> Apart from the arguments urged in the main opinion, and assuming arguendo, that Mrs. Smith should not be a subject to specific performance, there is no reason that Mr. Smith should be spared or why he should not be required to pay dearly in damages if, by concealing himself behind his wife's robes, he should force her and the Eckards to become perhaps unwilling co-owners.

*Eckard v. Smith,* 527 P.2d 660, 663 (Justice Henriod dissenting) (Utah 1974)

It is horn book law that the act of one joint tenant in severing his interest in the property by alienation severs the joint tenancy to that extent, so that if there were but two tenants, the joint tenancy is terminated. 20 Am. Jur. 2d §22. See also Backman, James H. & Thomas, David A. Thomas and Backman on Utah Real Property Law,§2.03(a)(3)(iv) (1999).

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[3]The three cases are *Eckard v. Smith*, 527 P.2d 660 (Utah 1974); *Bowen v. Jones*, 2000 WL 33244308 (UT App. 2000) and; *Frantz v. Holt*, 819 P.2d 352 (Utah 1991).

A real estate purchase contract conveys an interest in real property. *Cannefax v. Clement*, 786 P.2d 1377, 1379 (Utah App. 1990) *See also Russell v. Thomas*, 999 P.2d 1244, 1248 n. 10. (Utah App. 2000). By virtue of the Real Estate Purchase contract here, Brook Nuttall either had authority to sell his ex wife's interest, whereby a valid claim for specific performance as to the whole property exists or he at least agreed to transfer his own interest thereby severing the joint tenancy and obligating him to convey his portion while subjecting himself to a claim for damages for failing to deliver the property in its entirety.

This case differs from the ordinary case wherein only one spouse signs a contract in another important aspect. The Nuttalls have pointed to their divorce decree to further support their contention that Mr. Nuttall could not alienate either his or her interest in the real property. The decree holds just the opposite.

On the final page attached as Exhibit 1 to Vanessa Nuttall's affidavit it states:

> Either party may at any time choose to buy out the other party. In order to buy out the other party, the purchasing party must obtain the necessary funds required to pay for all the obligations set forth in these terms and conditions. If either party chooses to buy out the other party, then the purchaser must pay the other party their portion of the equity at the time of the entry of the Decree of Divorce and any other amounts due according to the terms and conditions set forth herein....Whichever party obtains funds first shall have first opportunity to purchase the property. R.18

According to the divorce decree Brook Nuttall could acquire Vanessa's interest in the property simply by giving notice and paying Vanessa her equity. This provision makes it clear that not only is the notice of lien authorized by the REPC but by virtue of an order of the Court as well.

Had Mr. Nuttall proceeded with the closing, he could have proffered the proceeds necessary to pay Vanessa's equity, at the closing and thereby caused the property to be transferred to Centennial.

## III. VANESSA NUTTALL IS NOT ENTITLED TO THE DAMAGES REQUESTED UNDER THE WRONGFUL LIEN STATUTE.

### A. Centennial's Notice of Interest Was Not A Wrongful Lien.

Under Utah Code Annotated §38-9-1 a lien is only wrongful where it is not authorized by statute, court order or a document signed by the owner of the real property. A real estate purchase contract conveys an interest in real property. *Cannefax v. Clement*, 786 P.2d 1377, 1379 (Utah App. 1990) *See also Russell v. Thomas*, 999 P.2d 1244, 1248 n. 10. (Utah App. 2000). As demonstrated in II.B and C above, the REPC created a valid interest at least in the portion of the property held by Brook Nuttall.

UCA §38-9-1 (6)(c) defines a wrongful lien (in pertinent part) as one not "signed by or authorized pursuant to a document signed by the owner of real property." UCA §38-9-1 (3) defines "Owner" as "a person who has a vested interest in certain real property." Clearly the plain language of the statute contemplates authorization by a person who has an interest that is less than complete in the property. Since the REPC was signed by an "owner" and as a matter of law the REPC conveyed an interest in the property, Centennial's notice of interest was not a wrongful lien as defined by statute.

### B. The Court Awarded Damages Under The Wrong Subsection.

The statutory scheme for civil damages for wrongful liens's is found in UCA §38-9-4. Under the scheme any finding of a wrongful lien entitles the injured party to recover actual damages proximately caused by the wrongful lien (UCA §38-9-4(1)). If however, the injured party gives notice to the person filing the wrongful lien, in accordance with the requirements of the statute, and that person fails to release the lien within 20 days the party is subject to paying $1,000.00 or treble the actual

damages (whichever is greater) and for reasonable attorney fees and costs UCA §38-9-4(2). Finally, if the person filing the lien knew at the time he filed it that the lien was wrongful, groundless or contained a material misstatement or a false claim then he is liable for the greater of treble damages or $3000.00. The Court here found Centennial liable under UCA §38-9-4(2).

UCA §38-9-4(2) provides:

> (2) If the person in violation of this Subsection (1) refuses to release or correct the wrongful lien within 20 days from the date of written request from a record interest holder of the real property *delivered personally or mailed to the last-known address of the lien claimant*, the person is liable to that record interest holder for $1,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs. (emphasis added)

A pre-requisite for the awarding of damages under subpart (2) is that the written request be delivered personally to the person in violation or mailed to lien claimants last known address. In the instant case the writing was faxed to Plaintiff's counsel August 18, 2005 and first seen on August 19, 2005. It was not delivered or mailed in accordance with the requirements of the statute.

The trial court excused Vanessa Nuttall's failure to follow the strictures of the statute, by going to Rule 5(b)(1) of the Utah Rules of Civil Procedure. This Rule provides, in pertinent part:

> Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service is ordered by the court...

The problem with using this Rule is that on its face it only applies to service being made under the Rules of Civil Procedure. The Rules of Civil Procedure do not modify or govern the statutes of the State of Utah. The plain language of the statute sets forth the only acceptable method of giving notice if the party giving notice wishes to receive the added benefits of the statute and that was not done here.

Furthermore, if the Rules of Civil Procedure did apply, then under URCP Rule 6 Centennial

was entitled to an additional three days in which to resolve the "wrongful lien". Within that twenty three day window the court made its ruling that the lien was void in ab initio. The Court further ordered counsel for Vanessa Nuttall to prepare the order. Any delay beyond the "twenty three" day window would have been as result of the actions of Vanessa Nuttall, and should not be attributed to Plaintiff. Accordingly if the Rules of Civil Procedure apply, they should apply not only to the method of service, but to the time of compliance and no damages would be awardable under subsection (2).

**C. Vanessa Nuttall Is Not Entitled To Her Claimed Attorney Fees**

This action consists of Plaintiff's claims against the Nuttalls, and Nuttall's separate petition under the wrongful lien statute. Vanessa Nuttall sought, and was awarded all of her fees incurred in this action.

"Attorney fees are awarded only when authorized by statute or by contract." *Paul DeGroot Bldg. Servs., L.L.C. v. Gallacher*, 112 P.3d 490 (Utah 2005). In the current case, the only awardable fees would be those relating to the Wrongful Lien under UCA §38-9-4(2). As demonstrated above the Lien was not wrongful and even if were, the failure of Vanessa Nuttall to follow the strictures of the statute preclude an award of fees in any case. If that were not so however, Plaintiffs request should still be denied because of its failure to adequately separate its fees. In *Jensen v. Sawyers*, 130 P.3d 325 (Utah 2005) the Utah Supreme Court upheld the denial of an award for attorney fees to a prevailing party where the party failed to adequately separate noncompensable and compensable claims. *Jensen* at 349. The Court cited with approval *Foote v. Clarke*, 962 P.2d 52,54 (Utah 1998) stating:

> Further, the party requesting the attorney fees must categorize the time and fees expended for (1) successful claims for which there may be an entitlement of attorney fees, (2) unsuccessful claims for which there may be an entitlement to attorney fees had the claims been successful,

and (3) claims for which there is no entitlement to attorney fees.

*Jensen* at 349.

Plaintiff's claims that all the claims are intertwined are insufficient because they fail to address the fact it did not prevail on all claims or as to any division between the parties. An examination of the initial affidavit in support of attorney fees shows that the bulk of the billed time was or work on the motion to dismiss and related matters. These items are completely separate from the Petition to Nullify the lien and are therefore not awardable. Furthermore they include charges for preparation of orders that were challenged by Centennial and rejected by the Court. Nuttall should not be entitled to fees on items where she did not prevail. Accordingly the award of attorney fees should be reversed.

## CONCLUSION

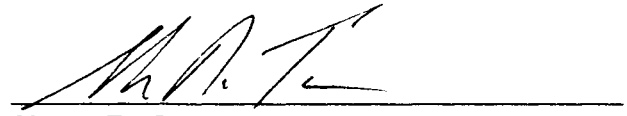
This action should in reality be quite simple. Brook Nuttall entered into a fully integrated, fully enforceable contract for the sale of the property that is the subject matter of this litigation. Vanessa Nuttall, Brook Nuttall and his sister conspired together to breach the contract for an additional thirteen thousand dollars.

If, under established real property law, the statute of frauds and the parol evidence rule the contract is deemed valid and enforceable, the court's grant of summary judgment must be reversed. Likewise, Vanessa Nuttall's claim of wrongful lien would fail.

In the event the court decides to reject hundreds of years of precedent, the damages awarded to Vanessa Nuttall are still inappropriate and this Court should either adjust the damages or remit the case with instruction to award only damages under subsection 1 of the wrongful lien statute.

DATED this 6th day of January, 2007

LARSON, TURNER, DALBY & ETHINGTON



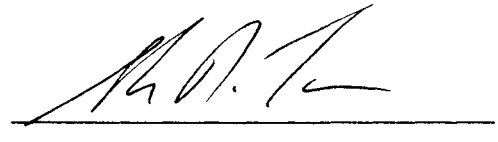
Shawn D. Turner

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January, 2007 a true and correct copy of **Brief of Appellant** was mailed, postage prepaid, to the following:

Jay L. Kessler
KESSLER LAW OFFICE
9117 West 2700 South, #A
Magna, Utah 84044

Steven C. Tycksen
Zoll & Tycksen, LC
5300 South 360 West Ste. 360
Murray, Utah 84123



# ADDENDUM "A"

THIRD JUDICIAL DISTRICT COURT
SALE LAKE COUNTY, STATE OF UTAH
West Jordan Department

| | | |
|---|---|---|
| CENTENNIAL INVESTMENT, COMPANY, L.L.C., a Utah Limited Liability Company, Plaintiff, | : | **MINUTE ENTRY AND ORDER** |
| vs. | : | Case No. 050405325 |
| BROOK L. NUTTALL and VANESSA NUTTALL, Defendants. | : | Judge ROBERT W. ADKINS |

This matter comes before the Court for decision on Centennial Investment Company, LLC's (hereinafter "Centennial Investments") objection to the proposed order and request to stay. Having reviewed the parties filings, it is clear there is a misunderstanding of the Ruling and Order entered by the Court on April 10, 2006. In the Ruling and Order, the Court neither granted Centennial Investment's motion to quash nor permitted Ms. Nuttall's writ to proceed. The Court recognized there was some ambiguity in the Court's Judgment and Order dated December 20, 2006. Although not well stated in the December 20, 2006 Judgment and Order, the Court intended for the Judgment and Order to be a final judgment pursuant to Utah Rules of Civil Procedure 54(b) because there was no just reason for delay. Since there was some ambiguity, the Court clarified this intent in the April 10, 2006 Ruling and Order. Under these circumstances, the Court concludes that both parties request for attorney's fees on their related filings are hereby DENIED.

Since the December 20, 2006 Judgment and Order is a final, appealable judgment as clarified by the Court's April 10, 2006 Ruling and Order, pursuant to Utah Rules of Civil Procedure 62, the Court GRANTS Centennial Investment's request for a ten day stay.

**ORDER**

The Court hereby ORDERS the bond amount to be set as provided in Rule 62(j)(2), namely, the amount of the judgment plus costs and attorney fees, plus three years of interest at the applicable interest rate.

So ORDERED this 16 day of May, 2006.

BY THE COURT:

ROBERT W. ADKIN
Third District Court Judge

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
WEST JORDAN DEPARTMENT

---

CENTENNIAL INVESTMENT COMPANY,

Plaintiff,

vs.

BROOK L. NUTTALL and
VANESSA NUTTALL,

Defendants.

**RULING AND ORDER**

Case No. 050405325

JUDGE ROBERT W. ADKINS

---

This matter comes before the Court for decision on the issue of whether a levy can be taken against Plaintiff when there is pending disputes among the other parties. The Court previously entered a Judgment and Order dismissing the Plaintiff's claim against Vanessa Nuttall with prejudice and awarded damages on Vanessa Nuttall's wrongful lien counterclaim. The litigation between the Plaintiff and remaining defendant continues and is not final.

A levy can be taken against a party for a judgment if there is an express determination by the court that there is no just reason for delay and there is an express direction for entry of final judgment pursuant to Rule 54(b). *See* Utah R. Civ. P. 54(b); *see also e.g., Rocky Mountain Thrift Stores Inc., et al., v. Salt Lake City Corporation, a municipal corporation of the State of Utah, et al.*, 887 P.2d 848; 253 Utah Adv. Rep. 36 (Utah 1994); *Elder v. The Triax Company*, 740 P.2d 1320; 61 Utah Adv. Rep. 3 (Utah 1987); *Pasquin v. John Pasquin,* 1999 UT App 245; 988 P.2d 1; 376 Utah Adv. Rep. 19 (Utah Ct. App. 1999); *Barber v. The Emporium Partnership, et al.,* 750 P.2d 202; 76 Utah Adv. Rep. 8 (Utah Ct. App. 1988).

The Court has not made an express determination that there is no just reason for delay and directed entry of final judgment pursuant to Rule 54(b). Since Vanessa Nuttall has a Judgment and Order dismissing the Plaintiff's claim against her with prejudice and for damages on her counterclaim for a wrongful lien, the Court concludes that there is no just reason for delay. Although there is continuing litigation between the Plaintiff and remaining defendant, such litigation has nothing to do with Vanessa Nuttall, who has prevailed against the Plaintiff. Accordingly, the Court concludes that entry of final judgment shall be taken against the Plaintiff.

**ORDER**

The Court ORDERS counsel for Vanessa Nuttall to file an Amended Judgment and Order reflecting this decision for the Court to sign. Thereafter, a levy may be taken against the Plaintiff. April 10, 2006.

By the Court:

ROBERT W. ADKINS
Third District Court Judge

Case No: 050405325

---

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050405325 by the method and on the date specified.

| METHOD | NAME |
|---|---|
| Mail | Shawn D Turner<br>Attorney for Plaintiff<br>LARSON, TURNER, DALBY & ETHINGTON, LC<br>PO Box 95921<br>1218 W South Jordan Parkway Suite B<br>South Jordan, Utah 84095 |
| | Jay L Kessler<br>Attorney for Defendant Brook L Nuttall<br>KESSLER LAW OFFICE<br>9117 West 2700 South #A<br>Magna, Utah 84044 |
| | Steve C Tycksen<br>Attorney for Defendant Vanessa Nuttall<br>ZOLL & TYCKSEN, LC<br>5300 South 360 West, Suite 360<br>Murray, Utah 84123 |

Dated this 10 day of April, 2006.

Deputy Court Clerk

IN THE THIRD JUDICIAL DISTRICT COURT

STATE OF UTAH

West Jordan Department

| | |
|---|---|
| | **MEMORANDUM DECISION** |
| Centennial Investment Company L.L.C., a Utah limited liability company,<br>Plaintiff,<br>vs.<br><br>Brook L. Nuttall and Vanessa Nuttall,<br>Defendants | Case No. 050405325<br><br>Judge ROBERT W. ADKINS |

Defendant Vanessa Nuttall's Motion to Assess Damages was heard by the Court on November 15, 2005, and taken under advisement.

In the Order Granting Vanessa Nuttall's Motion to Nullify Wrongful Lien and to Dismiss with Prejudice dated October 11, 2005, this Court found that the Notice of Interest of Real Property recorded by Plaintiff was a wrongful lien, and that Defendant Vanessa Nuttall's claims for damages and attorney's fees were reserved for a subsequent hearing. The Court understood that Vanessa Nuttall had several different claims and theories for an

award of attorney's fees and costs. The Court addresses the Motion under the provisions of Section 38-9-4(1) and (2), Utah Code Annotated. The issue for the Court is: Did Vanessa Nuttall sustain actual damages that were proximately caused by Plaintiffs' wrongful lien?

Vanessa Nuttall's Affidavit Regarding Damages dated September 22, 2005 alleges that the closing of the sale of the property to Oakridge Development was delayed 28 days, which delay was caused by the wrongful lien. Further, Vanessa Nuttall's Affidavit alleges that she became aware on Friday, September 16, 2005 that the wrongful lien (Notice of Interest) had been released, and she then immediately proceeded to have the sale to Oakridge Development closed on the following Monday, September 19, 2005. The Court understands that a buyer would not close on the property until the Notice of Interest had been removed. The fact that the sale was closed the next business day, after Vanessa Nuttall was notified that the Notice of Interest had been released, indicates to the Court that the seller was ready and able to close the sale and was only waiting for the release by Plaintiff. The Court finds that the 28 day delay in closing the sale to Oakridge Development was caused by the recording of the Notice of Interest. The Court finds that Vanessa Nuttall was damaged by the closing being delayed for 28 days, and that those actual damages amount to $805.41, as set out in detail in paragraph no. 5 of Vanessa Nuttall's Affidavit of September 22, 2005. Pursuant to Section 38-9-4(2) those actual damages are trebled and the amount of Vanessa Nuttall's treble damages are $2,416.23. Vanessa Nuttall is entitled to her reasonable attorney's fees and costs pursuant to Section 38-9-4.

Plaintiff argues that Vanessa Nuttall did not comply with the requirements of the statute, because the demand for release was sent to Plaintiff's Counsel, rather than to Plaintiff. Plaintiff filed this action on June 28, 2005. Vanessa Nuttall filed her responsive pleading to the complaint on August 12, 2005. On August 18, 2005, Counsel for Vanessa Nuttall served, by regular mail and facsimile, upon Plaintiff's attorney the letter demanding release of the Notice of Interest. Under these circumstances service upon counsel was service upon Plaintiff. Rule 5 of the Utah Rules of Civil Procedure and Blake v. Blake, 17 Utah2d 369, 412P.2d 454 (1966)

Mr. Shattucks' Affidavit of Attorney's Fees dated September 22, 2005, indicates that the cost of Ms. Nuttall's reasonable attorney's fees for this action through September 21, 2005, is $5,159.50. The Court finds the amount of $5,159.50 to be reasonable and necessary for removing the wrongful lien, and awards that amount as attorney's fees to Vanessa Nuttall. If there are additional attorney's fees after September 21, 2005, Vanessa Nuttall may augment those by Affidavit.

Because attorney's fees and costs have been awarded pursuant to Section 38-9-4(2), the Court is declining to consider any of the alternative theories for awarding attorney's fees, that are set forth in Vanessa Nuttall's pleadings in support of her Motion.

Counsel for Vanessa Nuttall is to prepare the Order.

Dated this 23 Day of November, 2005.

ROBERT W. ADKINS
Third District Court Judge

THIRD JUDICIAL DISTRICT COURT
SALE LAKE COUNTY, STATE OF UTAH
West Jordan Department

| | | |
|---|---|---|
| CENTENNIAL INVESTMENT, COMPANY, L.L.C., a Utah Limited Liability Company, Plaintiff, | : | **MINUTE ENTRY** |
| vs. | : | Case No. 050405325 |
| BROOK L. NUTTALL and VANESSA NUTTALL, Defendants. | : | Judge ROBERT W. ADKINS |

The matter before the Court is Plaintiff's Objection to Vanessa Nuttall's Proposed Order. The Court has reviewed the Objection, Plaintiff's proposed order, and Vanessa Nuttal's response to Plaintiff's objection. The Court has not received a request for a hearing on the Objection.

The Court granted Vanessa Nuttall's Motion to Dismiss and the Motion to Nullify Wrongful Lien. The Court did find and conclude that the Notice of Interest filed by the Plaintiff was a wrongful lien. The Court reserved for a later hearing the amount of damages and attorney's fees to be awarded. The Court has elected not to sign either proposed order and has prepared the attached Order, which includes parts of both, as the Court's Order on both Motions.

DATED this 11 day of October, 2005.

By the Court:

ROBERT W. ADKINS
Third District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
WEST JORDAN

THIRD JUDICIAL DISTRICT COURT
SALE LAKE COUNTY, STATE OF UTAH
West Jordan Department

| | | |
|---|---|---|
| CENTENNIAL INVESTMENT, COMPANY, L.L.C., a Utah Limited Liability Company, Plaintiff, | : | **ORDER GRANTING VANESSA NUTTALL'S MOTION TO NULLIFY WRONGFUL LIEN AND TO DISMISS WITH PREJUDICE** |
| vs. | : | Case No. 050405325 |
| BROOK L. NUTTALL and VANESSA NUTTALL, Defendants. | : | Judge ROBERT W. ADKINS |

This matter came before the Court on Defendant Vanessa Nuttall's Motion to Nullify Wrongful Lien and on Vanessa Nuttall's Motion to Dismiss with Prejudice.

The Court having taken evidence and having heard argument from respective counsel, the Court having verbally granted both motions hereby finds as follows:

## FINDINGS OF FACT

1. Brook L. Nuttall and Vanessa Nuttall were divorced on November 10, 2003.

2. Vanessa and Brook L. Nuttall are the record title owners of real property located in Salt Lake County, State of Utah with a property address of 7051 W. Majestic View Lane, Herriman, Utah, as more particularly described in the Exhibits attached to the Complaint ("the property").

3. On May 5, 2005, Brook L. Nuttall signed a Real Estate Purchase Contract to sell the property to Centennial Investment Company, LLC ("Plaintiff").

4. In the negotiations to sell the property, Plaintiff was represented by its managing member, Travis Bell.

5. On May 5, 2005, Travis Bell was aware that Vanessa Nuttall owned the property with Brook L. Nuttall.

6. Shortly after Brook L. Nuttall signed the Real Estate Purchase Contract, Travis Bell contacted Vanessa Nuttall and attempted to get her to sign the Real Estate Purchase Contract.

7. Vanessa Nuttall never signed the Real Estate Purchase Contract with Plaintiff.

8. Vanessa Nuttall never gave Brook L. Nuttall or anyone else authority to sell her interest in the property.

9. On August 10, 2005, Plaintiff filed a Notice of Interest of Real Property with the Salt Lake County Recorder.

## CONCLUSIONS OF LAW

1. Brook L. Nuttall and Vanessa Nuttall are owners of the Property in Joint Tenancy.

2. Vanessa Nuttall and Brook L. Nuttall both would have had to sign the Real Estate Purchase Contract to properly authorize the sale of the property, they owned as joint tenants, to Plaintiff.

3. Vanessa Nuttall never authorized Brook L. Nuttall to sign the Real Estate Purchase Contract for her.

4. Since the Real Estate Purchase Contract was not signed by both joint owners, the offer thereon did not ripen and never became a valid contract, and Plaintiff never had an interest in the real property.

5. Plaintiffs' Notice of Interest was not expressly authorized by State or Federal statute or court order.

6. The Notice of Interest filed by Plaintiff was not signed or authorized by the owner of the Property, because the Real Estate Purchase Contract never ripened into a contract that could have authorized such a Notice.

7. Because the Plaintiff had no interest in the property, the Notice of Interest placed thereon with the Salt Lake County Recorder, by Plaintiff, is a wrongful lien pursuant to Utah Code §§ 38-9-1 *et seq.*, as applied in *Russell v. Thomas*, 999 P.2d 1244 (Utah Ct. App. 2000).

**ORDER**

Based on the foregoing, it is hereby ordered adjudged and decreed:

1. Defendant Vanessa Nuttall's Motion to Nullify Wrongful Lien be, and the same hereby is, granted.

2. Plaintiff's Notice of Interest recorded against the property is nullified and declared to be void ab initio.

3. Defendant's Motion to Dismiss with Prejudice be, and the same hereby is, granted.

4. The Plaintiff's complaint against Defendant Vanessa Nuttall is dismissed with prejudice.

5. Defendant Vanessa Nuttall's claims for damages and attorney's fees are reserved for a subsequent hearing.

Dated this 11 day of October, 2005.

BY THE COURT:

ROBERT V. ADKINS
Third District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
WEST JORDAN

# ATTACHMENT "C"

SHAWN D. TURNER (5813)
LARSON, TURNER, DALBY & ETHINGTON, LC
P.O. Box 95921
1218 West South Jordan Parkway, Suite B
South Jordan, UT 84095
(801) 446-6464

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
WEST JORDAN DEPARTMENT, STATE OF UTAH

| | |
|---|---|
| CENTENNIAL INVESTMENT COMPANY, L.L.C., a Utah Limited Liability Company<br>Plaintiff,<br><br>v.<br><br>Brook L. Nuttall and Vanessa Nuttall<br><br>Defendants. | **NOTICE OF APPEAL**<br><br>Civil No. 050405325<br>Judge Robert Adkins |

Plaintiff, by and through its counsel does hereby Appeal that final Order and Judgment of the above entitled court entered May 16, 2006. Appeal is taken to the Utah Supreme Court Pursuant to Rule 3 of the Utah Rules of Appellate Procedure and pursuant to that Court's jurisdiction under UCA §78-2-2 subject to being poured over to the Utah Court of Appeals pursuant to UCA §78-2-2(4).

DATED this 30th day of May, 2006

LARSON, TURNER, DALBY & ETHINGTON L.C.

Shawn D. Turner

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed May 30, 2006 first class postage prepaid to the following:

Jay L. Kessler
KESSLER LAW OFFICE
9117 West 2700 South, #A
Magna, Utah 84044

Steven C. Tycksen
Zoll & Tycksen, LC
5300 South 360 West Ste. 360
Murray, Utah 84123

# ADDENDUM "B"

LEXSTAT

UTAH CODE ANNOTATED


*** STATUTES CURRENT THROUGH THE 2006 FIFTH SPECIAL SESSION. ***
*** ANNOTATIONS CURRENT THROUGH 2006 UT 64 (10/27/2006); 2006 UT APP 435 (10/19/2006) AND OCTOBER 1, 2006 (FEDERAL CASES). ***

TITLE 38. LIENS
CHAPTER 9. WRONGFUL LIENS AND WRONGFUL JUDGMENT LIENS

**GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Utah Code Ann. § 38-9-1 (2006)

§ 38-9-1. Definitions

As used in this chapter:

(1) "Interest holder" means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, title holder, mortgagee, trustee, or beneficial owner.

(2) "Lien claimant" means a person claiming an interest in real property who offers a document for recording or filing with any county recorder in the state asserting a lien or other claim of interest in certain real property.

(3) "Owner" means a person who has a vested ownership interest in certain real property.

(4) "Record interest holder" means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, titleholder, mortgagee, trustee, or beneficial owner, and whose name and interest in that real property appears in the county recorder's records for the county in which the property is located.

(5) "Record owner" means an owner whose name and ownership interest in certain real property is recorded or filed in the county recorder's records for the county in which the property is located.

(6) "Wrongful lien" means any document that purports to create a lien or encumbrance on an owner's interest in certain real property and at the time it is recorded or filed is not:

(a) expressly authorized by this chapter or another state or federal statute;

(b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or

(c) signed by or authorized pursuant to a document signed by the owner of the real property.

**HISTORY:** C. 1953, 38-9-1, enacted by L. 1997, ch. 125, § 2.

LEXSTAT

UTAH CODE ANNOTATED


*** STATUTES CURRENT THROUGH THE 2006 FIFTH SPECIAL SESSION. ***
*** ANNOTATIONS CURRENT THROUGH 2006 UT 64 (10/27/2006); 2006 UT APP 435 (10/19/2006) AND OCTOBER 1, 2006 (FEDERAL CASES). ***

TITLE 38. LIENS
CHAPTER 9. WRONGFUL LIENS AND WRONGFUL JUDGMENT LIENS

**GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Utah Code Ann. § 38-9-4 (2006)

§ 38-9-4. Civil liability for filing wrongful lien -- Damages

(1) A lien claimant who records or files or causes a wrongful lien as defined in Section 38-9-1 to be recorded or filed in the office of the county recorder against real property is liable to a record interest holder for any actual damages proximately caused by the wrongful lien.

(2) If the person in violation of this Subsection (1) refuses to release or correct the wrongful lien within ten days from the date of written request from a record interest holder of the real property delivered personally or mailed to the last-known address of the lien claimant, the person is liable to that record interest holder for $ 1,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs.

(3) A person is liable to the record owner of real property for $ 3,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs, who records or files or causes to be recorded or filed a wrongful lien as defined in Section 38-9-1 in the office of the county recorder against the real property, knowing or having reason to know that the document:

(a) is a wrongful lien;

(b) is groundless; or

(c) contains a material misstatement or false claim.

**HISTORY:** C. 1953, 38-9-4, enacted by L. 1997, ch. 125, § 5; 2006, ch. 297, § 11.

LEXSTAT

UTAH CODE ANNOTATED


*** STATUTES CURRENT THROUGH THE 2006 FIFTH SPECIAL SESSION. ***
*** ANNOTATIONS CURRENT THROUGH 2006 UT 64 (10/27/2006); 2006 UT APP 435 (10/19/2006) AND OCTOBER 1, 2006 (FEDERAL CASES). ***

TITLE 78. JUDICIAL CODE
PART III. PROCEDURE
CHAPTER 25. EVIDENCE

**GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Utah Code Ann. § 78-25-16 (2006)

§ 78-25-16. Parol evidence of contents of writings -- When admissible

There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

(1) when the original has been lost or destroyed, in which case proof of the loss or destruction must first be made;

(2) when the original is in the possession of the party against whom the evidence is offered and he fails to produce it after reasonable notice;

(3) when the original is a record or other document in the custody of a public officer;

(4) when the original has been recorded, and the record or a certified copy thereof is made evidence by this code or other statute;

(5) when the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

Provided, however, if any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law; and such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not, an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original.

In the cases mentioned in Subsections (3) and (4), a copy of the original, or of the record, must be produced; in those mentioned in Subsections (1) and (2), either a copy or oral evidence of the contents must be given.

**HISTORY:** L. 1951, ch. 58, § 1; C. 1943, Supp., 104-25-16; L. 1983, ch. 165, § 1; 1995, ch. 20, § 162.

1 of 100 DOCUMENTS



STATE RULES
UTAH RULES OF CIVIL PROCEDURE
PART II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

*URCP Rule 5* (2006)

Review Court Orders which may amend this Rule

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

(a) Service: When required.

(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(2) No service need be made on parties in default except that:

(A) a party in default shall be served as ordered by the court;

(B) a party in default for any reason other than for failure to appear shall be served with all pleadings and papers;

(C) a party in default for any reason shall be served with notice of any hearing necessary to determine the amount of damages to be entered against the defaulting party;

(D) a party in default for any reason shall be served with notice of entry of judgment under Rule 58A(d); and.

(E) pleadings asserting new or additional claims for relief against a party in default for any reason shall be served in the manner provided for service of summons in Rule 4.

(3) In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service: How made and by whom.

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

(A) Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at the person's office with a clerk or person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or, if consented to in writing by the person to be served, delivering a copy by electronic or other means.

(B) Service by mail is complete upon mailing. If the paper served is notice of a hearing and if the hearing is scheduled 5 days or less from the date of service, service shall be by delivery or other method of actual notice. Service by electronic means is complete on transmission if transmission is completed during normal business hours at the place receiving the service; otherwise, service is complete on the next business day.

(2) Unless otherwise directed by the court:

(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and.

(C) an order or judgment prepared by the court shall be served by the court.

(c) Service: Numerous defendants. In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. The papers shall be accompanied by a certificate of service showing the date and manner of service completed by the person effecting service. Rule 26(i) governs the filing of papers related to discovery.

(e) Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may accept the papers, note thereon the filing date and forthwith transmit them to the office of the clerk.

**HISTORY:** Amended effective September 4, 1985; January 1, 1987; November 1, 1997; April 1, 1999; April 1, 2001; November 1, 2002; November 1, 2003

**NOTES:**

Advisory Committee Note. -- Rule 5(d) is amended to give the trial court the option, either on an ad hoc basis or by local rule, of ordering that discovery papers, depositions, written interrogatories, document requests, requests for admission, and answers and responses need not be filed unless required for specific use in the case. The committee is of the view that a local rule of the district courts on the subject should be encouraged.

The 1999 amendment to subdivision (b)(1)(B) does not authorize the court to conduct a hearing with less than 5 days notice, but rather specifies the manner of service of the notice when the court otherwise has that authority.

2001 amendments.

Paragraph (b)(1)(A) has been changed to allow service by means other than U.S. Mail and hand delivery if consented to in writing by the person to be served, i.e. the attorney or the party. Electronic means include facsimile transmission, e-mail and other possible electronic means.

While it is not necessary to file the written consent with the court, it would be advisable to have the consent in the form of a stipulation suitable for filing and to file it with the court.

Paragraph (b)(1)(B) establishes when service by electronic means, if consented to in writing, is complete. The term "normal business hours" is intended to mean 8:00 a.m. to 5:00 p.m. Monday through Friday, excluding legal holidays. If a fax or e-mail is received after 5:00 p.m., the service is deemed complete on the next business day.

Amendment Notes.-- The 2002 amendment rewrote Subdivision (a)(2) and substituted the exception in the first sentence in Subdivision (d) for "Except where rules of judicial administration prohibit the filing of discovery requests and responses."

The 2003 amendment substituted "papers related to discovery" for "depositions and discovery requests and responses" in Subdivision (d) and made stylistic changes.

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UTAH COURT RULES ANNOTATED


* THIS DOCUMENT IS CURRENT THROUGH CHANGES RECEIVED AS OF NOVEMBER 1, 2006 *

STATE RULES
UTAH RULES OF CIVIL PROCEDURE
PART II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

*URCP Rule 6* (2006)

Review Court Orders which may amend this Rule

Rule 6. Time.

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed, without reference to any additional time provided under subsection (e), is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

(c) Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action that has been pending before it.

(d) Notice of hearings. Notice of a hearing shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.

(e) Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the end of the prescribed period as calculated under subsection (a). Saturdays, Sundays and legal holidays shall be included in the computation of any 3-day period under this subsection, except that if the last day of the 3-day period is a Saturday, a Sunday, or a legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or a legal holiday.

**HISTORY:** Amended effective November 1, 1997; April 1, 1999; April 1, 2000; November 1, 2001; November 1, 2003; April 1, 2004

**NOTES:**

# ADDENDUM "B"

LEXSTAT

UTAH CODE ANNOTATED


*** STATUTES CURRENT THROUGH THE 2006 FIFTH SPECIAL SESSION. ***
*** ANNOTATIONS CURRENT THROUGH 2006 UT 64 (10/27/2006); 2006 UT APP 435 (10/19/2006) AND OCTOBER 1, 2006 (FEDERAL CASES). ***

TITLE 38. LIENS
CHAPTER 9. WRONGFUL LIENS AND WRONGFUL JUDGMENT LIENS

**GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Utah Code Ann. § 38-9-1 (2006)

§ 38-9-1. Definitions

As used in this chapter:

(1) "Interest holder" means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, title holder, mortgagee, trustee, or beneficial owner.

(2) "Lien claimant" means a person claiming an interest in real property who offers a document for recording or filing with any county recorder in the state asserting a lien or other claim of interest in certain real property.

(3) "Owner" means a person who has a vested ownership interest in certain real property.

(4) "Record interest holder" means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, titleholder, mortgagee, trustee, or beneficial owner, and whose name and interest in that real property appears in the county recorder's records for the county in which the property is located.

(5) "Record owner" means an owner whose name and ownership interest in certain real property is recorded or filed in the county recorder's records for the county in which the property is located.

(6) "Wrongful lien" means any document that purports to create a lien or encumbrance on an owner's interest in certain real property and at the time it is recorded or filed is not:

(a) expressly authorized by this chapter or another state or federal statute;

(b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or

(c) signed by or authorized pursuant to a document signed by the owner of the real property.

**HISTORY:** C. 1953, 38-9-1, enacted by L. 1997, ch. 125, § 2.

LEXSTAT

UTAH CODE ANNOTATED


*** STATUTES CURRENT THROUGH THE 2006 FIFTH SPECIAL SESSION. ***
*** ANNOTATIONS CURRENT THROUGH 2006 UT 64 (10/27/2006); 2006 UT APP 435 (10/19/2006) AND OCTOBER 1, 2006 (FEDERAL CASES). ***

TITLE 38. LIENS
CHAPTER 9. WRONGFUL LIENS AND WRONGFUL JUDGMENT LIENS

**GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Utah Code Ann. § 38-9-4 (2006)

§ 38-9-4. Civil liability for filing wrongful lien -- Damages

(1) A lien claimant who records or files or causes a wrongful lien as defined in Section 38-9-1 to be recorded or filed in the office of the county recorder against real property is liable to a record interest holder for any actual damages proximately caused by the wrongful lien.

(2) If the person in violation of this Subsection (1) refuses to release or correct the wrongful lien within ten days from the date of written request from a record interest holder of the real property delivered personally or mailed to the last-known address of the lien claimant, the person is liable to that record interest holder for $ 1,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs.

(3) A person is liable to the record owner of real property for $ 3,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs, who records or files or causes to be recorded or filed a wrongful lien as defined in Section 38-9-1 in the office of the county recorder against the real property, knowing or having reason to know that the document:

(a) is a wrongful lien;

(b) is groundless; or

(c) contains a material misstatement or false claim.

**HISTORY:** C. 1953, 38-9-4, enacted by L. 1997, ch. 125, § 5; 2006, ch. 297, § 11.

LEXSTAT

UTAH CODE ANNOTATED


*** STATUTES CURRENT THROUGH THE 2006 FIFTH SPECIAL SESSION. ***
*** ANNOTATIONS CURRENT THROUGH 2006 UT 64 (10/27/2006); 2006 UT APP 435 (10/19/2006) AND OCTOBER 1, 2006 (FEDERAL CASES). ***

TITLE 78. JUDICIAL CODE
PART III. PROCEDURE
CHAPTER 25. EVIDENCE

**GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

Utah Code Ann. § 78-25-16 (2006)

§ 78-25-16. Parol evidence of contents of writings -- When admissible

There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

(1) when the original has been lost or destroyed, in which case proof of the loss or destruction must first be made;

(2) when the original is in the possession of the party against whom the evidence is offered and he fails to produce it after reasonable notice;

(3) when the original is a record or other document in the custody of a public officer;

(4) when the original has been recorded, and the record or a certified copy thereof is made evidence by this code or other statute;

(5) when the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

Provided, however, if any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law; and such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not, an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original.

In the cases mentioned in Subsections (3) and (4), a copy of the original, or of the record, must be produced; in those mentioned in Subsections (1) and (2), either a copy or oral evidence of the contents must be given.

**HISTORY:** L. 1951, ch. 58, § 1; C. 1943, Supp., 104-25-16; L. 1983, ch. 165, § 1; 1995, ch. 20, § 162.

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STATE RULES
UTAH RULES OF CIVIL PROCEDURE
PART II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

*URCP Rule 5* (2006)

Review Court Orders which may amend this Rule

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

(a) Service: When required.

(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(2) No service need be made on parties in default except that:

(A) a party in default shall be served as ordered by the court;

(B) a party in default for any reason other than for failure to appear shall be served with all pleadings and papers;

(C) a party in default for any reason shall be served with notice of any hearing necessary to determine the amount of damages to be entered against the defaulting party;

(D) a party in default for any reason shall be served with notice of entry of judgment under Rule 58A(d); and.

(E) pleadings asserting new or additional claims for relief against a party in default for any reason shall be served in the manner provided for service of summons in Rule 4.

(3) In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service: How made and by whom.

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

(A) Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at the person's office with a clerk or person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or, if consented to in writing by the person to be served, delivering a copy by electronic or other means.

(B) Service by mail is complete upon mailing. If the paper served is notice of a hearing and if the hearing is scheduled 5 days or less from the date of service, service shall be by delivery or other method of actual notice. Service by electronic means is complete on transmission if transmission is completed during normal business hours at the place receiving the service; otherwise, service is complete on the next business day.

(2) Unless otherwise directed by the court:

(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and.

(C) an order or judgment prepared by the court shall be served by the court.

(c) Service: Numerous defendants. In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. The papers shall be accompanied by a certificate of service showing the date and manner of service completed by the person effecting service. Rule 26(i) governs the filing of papers related to discovery.

(e) Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may accept the papers, note thereon the filing date and forthwith transmit them to the office of the clerk.

**HISTORY:** Amended effective September 4, 1985; January 1, 1987; November 1, 1997; April 1, 1999; April 1, 2001; November 1, 2002; November 1, 2003

**NOTES:**

Advisory Committee Note. -- Rule 5(d) is amended to give the trial court the option, either on an ad hoc basis or by local rule, of ordering that discovery papers, depositions, written interrogatories, document requests, requests for admission, and answers and responses need not be filed unless required for specific use in the case. The committee is of the view that a local rule of the district courts on the subject should be encouraged.

The 1999 amendment to subdivision (b)(1)(B) does not authorize the court to conduct a hearing with less than 5 days notice, but rather specifies the manner of service of the notice when the court otherwise has that authority.

2001 amendments.

Paragraph (b)(1)(A) has been changed to allow service by means other than U.S. Mail and hand delivery if consented to in writing by the person to be served, i.e. the attorney or the party. Electronic means include facsimile transmission, e-mail and other possible electronic means.

While it is not necessary to file the written consent with the court, it would be advisable to have the consent in the form of a stipulation suitable for filing and to file it with the court.

Paragraph (b)(1)(B) establishes when service by electronic means, if consented to in writing, is complete. The term "normal business hours" is intended to mean 8:00 a.m. to 5:00 p.m. Monday through Friday, excluding legal holidays. If a fax or e-mail is received after 5:00 p.m., the service is deemed complete on the next business day.

Amendment Notes.-- The 2002 amendment rewrote Subdivision (a)(2) and substituted the exception in the first sentence in Subdivision (d) for "Except where rules of judicial administration prohibit the filing of discovery requests and responses."

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STATE RULES
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PART II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

*URCP Rule 6* (2006)

Review Court Orders which may amend this Rule

Rule 6. Time.

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed, without reference to any additional time provided under subsection (e), is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

(c) Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action that has been pending before it.

(d) Notice of hearings. Notice of a hearing shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.

(e) Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the end of the prescribed period as calculated under subsection (a). Saturdays, Sundays and legal holidays shall be included in the computation of any 3-day period under this subsection, except that if the last day of the 3-day period is a Saturday, a Sunday, or a legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or a legal holiday.

**HISTORY:** Amended effective November 1, 1997; April 1, 1999; April 1, 2000; November 1, 2001; November 1, 2003; April 1, 2004

**NOTES:**