

1995

Valley Colour, Inc. v. Beuchert Builders, Inc. : Order of Dismissal

Utah Court of Appeals

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FILED
Fourth Judicial District Court
of Utah County, State of Utah
BARMA B. SMITH, Clerk
2-14-96 Dan

BENSON L. HATHAWAY, JR. (Bar No. 4219)
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IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

VALLEY COLOUR, INC., a Utah	:	
corporation,	:	ORDER OF DISMISSAL
	:	
Plaintiff,	:	
	:	
v.	:	
	:	Civil No. 950400580 CV
BEUCHERT BUILDERS, INC., a Utah	:	Judge Howard H. Maetani
corporation,	:	
	:	
Defendant.	:	

Defendant Beuchert Builders, Inc.'s Motion to Dismiss and Motion for Enlargement of Time came before the Court at a hearing on Monday, January 22, 1996, at 10:00 a.m. The Plaintiff was represented by counsel Martin K. Banks, and the Defendant was present and represented by counsel Benson L. Hathaway, Jr. The Court heard the arguments of counsel, reviewed the pleadings and paper on file, and entered a Memorandum Decision dated January 29, 1996. Having fully considered the Plaintiff's Complaint and Utah Code Ann. § 78-12-25.5 (1991) as more completely set forth in the Court's January 29, 1996 Memorandum Decision, and for good cause appearing, the Court hereby enters the following:

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant's Motion to Dismiss pursuant to Utah Rule of Civil Procedure 12(b)(6) is hereby granted.
2. Each one of Plaintiff's seven claims for relief included in its Complaint are dismissed as a matter of law as time barred by the statute of limitations found in Utah Code Ann. § 78-12-25.5 (1991).
3. Plaintiff's Complaint is therefore dismissed as a matter of law with prejudice.
4. Defendant's Motion for Enlargement of Time is now moot subject to the Court's granting of Defendant's 12(b)(6) Motion to Dismiss.

DATED this 14 day of February, 1996.

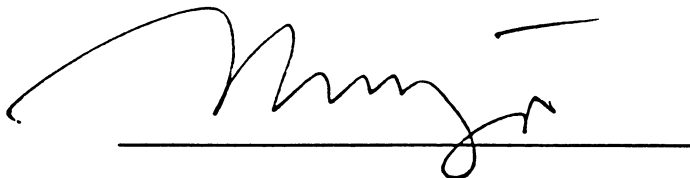
BY THE COURT

By: Howard H. Maetani
Honorable Howard H. Maetani
Fourth District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 1 day of February, 1996, I caused to be mailed, postage prepaid, a true and correct copy of ORDER ON DEFENDANT BEUCHERT BUILDER, INC.'S MOTION TO DISMISS, to the following:

Martin K. Banks
STOEL RIVES
Attorney for Plaintiff
201 South Main Street, Suite 1100
Salt Lake City, UT 84111-4904

A handwritten signature in black ink, appearing to read "Martin K. Banks", is written over a horizontal line.

JAN 31 1996

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

RECEIVED

VALLEY COLOUR, INC., a Utah corporation, Plaintiff, vs. BEUCHERT BUILDERS, INC., a Utah corporation, Defendant.	MEMORANDUM DECISION CASE NO. 950400580 DATE: January 29, 1996 JUDGE: HOWARD H. MAETANI
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This matter came before the Court on Defendant, Beuchert Builder's 12(b)(6) Motion To Dismiss filed on or about December 13, 1995. Benson L. Hathaway, Jr. represents Defendant, Beuchert Builders. Plaintiff, Valley Colour, is represented by Martin K. Banks.

I

STATEMENT OF FACTS

On or about July 20, 1991 the parties entered into an agreement whereby Beuchert Builders agreed to perform remodeling construction work at a residential property owned by Valley Colour located at 10415 North, Oak Circle, Highland, Utah. *See Complaint* ¶ 5.

On or about July 27, 1991 Beuchert Builders, Inc., started construction pursuant to the agreement. *See Complaint* ¶ 8.

From August, 1991 to December 1991, Plaintiff, Valley Colour made payments to Defendant pursuant to the agreement totalling \$41,137.85. *See Complaint* ¶ 11.

On or about December 2, 1991 Defendant, Beuchert Builders, abandoned the project

even though the work was not complete. *See Complaint* ¶ 12.

On or about February 27, 1992, Defendant Beuchert placed a lien on the property in the amount of \$19,600. *See Complaint* ¶ 13.

From February of 1992 until June of 1992, Plaintiff, Valley Colour, attempted to obtain financing to complete the construction. They were unsuccessful in obtaining financing on the property. *See Complaint* ¶ 14.

From approximately June of 1992 until approximately June of 1993, Plaintiff attempted to sell the property on an "as is" basis. *See Complaint* ¶ 15.

On or about June of 1993, Central Bank foreclosed on the Property. *See Complaint* ¶ 20.

On or about October of 1993, Central Bank sold the Property. *See Complaint* ¶ 18.

On or about September 25, 1995 Plaintiff filed a Complaint with this Court, alleging the following causes of action: Breach of Contract; Repudiation of Contract; Misrepresentation; Unjust Enrichment; Breach of Covenant of Good Faith and Fair Dealing; Tortious Interference; and Slander of Title. *See Complaint* ¶¶ 21, 18, 34, 40, 45, 50 and 59.

Based on these causes of action, Plaintiff prayed for compensatory damages in an amount not less than \$175,000 plus interest, and costs. *See Complaint* p. 12.

On or about December 13, 1995 Defendant filed *Defendant Beuchert Builder's 12(b)(6) Motion To Dismiss* with an accompanying *Memorandum in Support of Defendant Beuchert Builder's 12(b)(6) Motion to Dismiss*.

On or about December 22, Defendant filed with the Court, *Defendant Beuchert Builder's, Inc., Ex Parte Motion For Enlargement Of Time*. Defendant requested an order

enlarging the time in which to respond to Plaintiff's *First Set of Interrogatories and Requests for Production of Documents*. Plaintiff's interrogatories and requests for production were served on Defendant on or about November 30, 1995. Timely responses would have been due on December 22, 1995.

On or about December 27, 1995, Plaintiff, Valley Colour, filed its *Memorandum In Opposition To Defendant's Ex Parte Motion For Enlargement Of Time*.

On or about December 27, 1995, Plaintiff also filed its *Memorandum In Opposition To Defendant's Motion To Dismiss*.

On or about January 9, 1996 Beuchert Builders filed *Defendant's Reply Memorandum In Support Of Its Motion To Dismiss and Ex Parte Motion For Leave To File Overlength Memorandum*.

Oral Arguments were held on January 22, 1996 on Defendant's Motion to Dismiss based upon URCP 12(b)(6), failure to state a claim upon which relief can be granted.

II

STANDARD FOR RULE 12(b)(6) MOTION

In considering a Rule 12(b)(6) Motion to Dismiss, the Court must "accept the factual allegations in the complaint as true and consider them and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff." Colman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990); Lowe v. Sorenson Research Co., 779 P.2d 668, 669 (Utah 1989). A Rule 12(b)(6) motion to dismiss admits the facts alleged in the complaint but challenges the Plaintiff's right to relief based on those facts. St. Benedict's Dev. Co. v. Benedict's Hosp., 811 P.2d 194, 196 (Utah 1991). Accordingly, all of the allegations in

Valley Colour's complaint are assumed to be true, and are to be construed "in a light most favorable to the party against whom the Rule 12(b)(6) motion was brought." *See State v. Verde*, 770 P.2d 116, 117 (Utah 1989).

III

ISSUES

It is the contention of the Defendant that the Plaintiff's action is time-barred by the applicable statute of limitations, leaving no claim before this Court upon which relief can be granted. Defendant claims that Utah Code Ann. § 78-12-25.5 (1991) contains the applicable statute of limitations. Section 78-12-25.5(3) addresses limitation of actions dealing with improvements to real property and states: "An action against a provider shall be commenced within two years . . ." *See U.C.A § 78-12.25.5(3) (1991)*. Defendant contends that all of Plaintiff's claims arise as a result of the agreement entered into regarding the remodeling of a residence owned by Plaintiff. Defendant argues therefore, that Utah Code Ann. § 78-12-25.5 applies to all seven causes of action listed in Plaintiff's *Complaint*.

Further, Defendant claims that the applicable statute of limitation for all seven causes of action is found in § 78-12-25.5(3). Defendant argues that the statute of limitations began to run in this instance at the time that Defendant allegedly abandoned the remodeling project in December of 1991. To be timely under the statute, an action should have been filed within two years. The case at bar was filed on or about September 25, 1995. Defendant contends that if the applicable statute of limitations is found to be §78-12-25.5(3), then Plaintiff's action is time-barred since more than two years elapsed between the date of accrual of the action (December 1991) and filing of the action (September 1995).

Plaintiff claims that §78-12-25.5(3) does not contain the applicable statute of limitations for all causes of action in this matter. Specifically, Plaintiff claims that:

(1) the breach of contract claims do not fall under the two year limitation of § 78-12-25.5(3), but rather should be considered timely under the language of §78-12-25.5(4) "no action for breach of contract or warranty may be commenced against a provider more than six years after completion of the improvement or abandonment of construction." *See* U.C.A. § 78-12-25.5(4). Plaintiff argues that while it is clear that certain, enumerated actions are subject to the two year limitation, an action for breach of contract may be commenced up to six years after completion or abandonment of the improvement.

(2) Plaintiff argues that the claims of Slander of Title and Tortious Interference are claims arising from Defendant's placement of a mechanics lien on the property, not from the performance of construction work and are, therefore, not subject to the two-year statute of limitations in §78-12-25.5(3), but rather are subject to the three year statute of limitations found in Utah Code Ann. § 78-12-26(1) regarding tortious injury to property.

(3) Plaintiff claims that even if the two-year limitation of §78-12-25.5(3) applies, the action is still timely because the two-year period did not start to run until Central Bank sold the property in October of 1993, cutting off Plaintiff's right of redemption and establishing Plaintiff's damages, as the last event necessary to begin accrual of the cause of action.

(4) Plaintiff claims that the two year limit found in § 78-12-25.5(3) violates the Uniform Operation of Laws and the Private Laws Forbidden sections of the Utah Constitution rendering § 78-12-25.5(3) unconstitutional, and therefore the claims are subject to either the six year statute of limitations found in §78-12-23 for actions founded upon an instrument in

writing or the four year statute of limitations found in §78-12-25 for a contract not founded upon an instrument in writing.

(5) Plaintiff argues that, historically, claims founded on contract principles against builders for defective construction were not subject to §78-12-25.5, but rather, are subject to the longer statute of limitations found in § 78-12-23 or alternatively §78-12-25.

IV

ANALYSIS

The Applicable Statute of Limitations

Utah 's policy has been that statutes of limitation are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. To further that policy, the general rule has been that a cause of action accrues upon the happening of the last event necessary to complete the cause of action. *See Becton Dickinson and Co., v. Reese*, 668 P.2d 1254 (Utah 1983) and cases cited therein. The case at bar requires a two part analysis. The Court must first determine whether the two year statute of limitations found in §78-12-25.5(3) applies to all claims involved in this action. Second, the Court must determine which act is defined as the last act necessary to trigger the running of the statute of limitations under the statute.

The first issue to be considered is whether Utah Code Ann. §78-12-25.5 (1991) applies to all the causes of action claimed by the Plaintiff. The section is entitled "Actions Related to Improvements in Real Property."

Subsection (1) defines the terms as used in this section . An "action" is defined as

"any claim for judicial, arbitral, or administrative relief for acts, errors, omissions, or breach of duty that causes injury to persons or property, whether based in tort, contract, warranty, strict liability, indemnity, contribution, or other source of law." *See* U.C.A. §78-12-25.5(1)(a).

The term "provider" is defined as "any person contributing to, providing, or performing studies, plans, specifications, drawings, designs, value engineering, costs or quantity estimates, topographic surveys, staking, construction, and the review, observation, administration, management, supervision, inspections, and tests of construction for or in relation to an improvement." *See* U.C.A. §78-12-25.5(1)(e).

The term "improvement" is also defined in the statute as "any building, structure, infrastructure, road, utility, or other similar man-made change, addition, modification, or alteration to real property." *See* U.C.A. §78-12-25.5(1)(c).

In this case, Plaintiff alleges that it entered into an agreement whereby Beuchert Builders agreed to perform remodeling construction work at a residential property owned by Valley Colour. *See* Plaintiff's *Complaint* ¶ 5. Plaintiff describes the work contemplated as, "tile work in the master bath, shower and main bath; electrical work; hardwood floors; roofs; skylight; kitchen light; carpentry and sheetrock; kitchen counter tops; appliances; kitchen sink and faucet; basement bar; and kitchen cabinets." *See* Plaintiff's *Complaint* ¶ 6.

The Court finds that this action is governed by U.C.A. §78-12-25.5. The title of this section describes the causes of action contemplated by the legislature in drafting this statute as "actions relating to improvements to real property." Using Plaintiff's own description of what the agreement between Valley Colour and Beuchert Builders encompassed, as cited above, that description plainly illustrates that the agreement dealt with improvements to real

property.

When construing statutes, the general rule is that a statute is to be construed according to its plain language. *See Brinkerhoff v. Forsyth*, 779 P.2d 685, 686 (Utah 1989). Further, "a statute should be applied according to its literal wording unless it is unreasonably confused or inoperable. We must assume that each term in the statute was used advisedly by the Legislature and that each should be interpreted and applied according to its usually accepted meaning." *Ferro v. Utah Dept. of Commerce*, 828 P.2d 507 (Utah App. 1992). The Court finds that the language of this statute is clear and unambiguous, the wording is neither confusing, nor inoperable. The Court will therefore apply it according to its plain language.

Using the definition of an action as provided in §78-12-25.5(1)(a) an "action" is any claim for judicial, arbitral, or administrative relief for acts, errors, omissions, or breach of duty that causes injury to persons or property, whether based in tort, contract, warranty, strict liability, or other source of law." [emphasis added] U.C.A. §78-12-25.5(1)(a).

The claims asserted against Defendant are breach of contract, repudiation of the contract, misrepresentation, unjust enrichment, breach of covenant of good faith and fair dealing, tortious interference, and slander of title. The Court finds that all of these actions are encompassed within the definition of "action" pursuant to the above cited statute. All of these claims arise from the agreement made between Valley Colour and Beuchert Builders for remodelling work; Valley Colour is making a judicial claim for relief; all of the causes of action arise out of an injury to property; all claims can be classified as based either in tort, contract or other source of law pursuant to the statute. The Court finds that Utah Code Ann. § 78-12-25.5 (1991) applies by its own express definition to all of the claims in Plaintiffs

Complaint.

Next to be considered is the statute of limitations set out in §78-12-25.5(3). In relevant part it provides that:

An action against a provider shall be commenced within two years from the date of discovery of the act, error, omission, or breach of duty or the date upon which the act, error, omission, or breach of duty should have been discovered through reasonable diligence. If the act, error, omission, or breach of duty is discovered or discoverable before completion of the improvement or abandonment of construction, the two year period begins to run upon completion or abandonment.

Plaintiff argues that those causes of action based upon breach of contract are not subject to the two year limitation of § 78-12-25.5(3), but rather should be allowed a six year limitation as mentioned in § 78-12-25.5(4). However, a plain reading of subsection (4) shows that Plaintiff's argument fails. Subsection (4) provides:

"Subject to Subsection (3), no action for breach of contract or warranty may be commenced against a provider more than six years after completion of the improvement or abandonment of construction." [emphasis added] U.C.A. §78-12-25.5(4) (1991).

It is clear that the actions discussed in Subsection (4) are to be subject to the time limitations of Subsection (3). The legislature created a two year from discovery statute of limitations provided it will never exceed six years for claims based in contract, with the added caveat that if a claim based on contract or warranty is not discovered until the sixth year, the period is extended two more years. *See* § 78-12-25.5(4).

The Court finds that the Plaintiff's argument that a breach of contract action under § 78-12-25.5 is subject to the six year limitation mentioned in §78-12-25.5(4) to be erroneous. First, subsection (3) clearly specifies that if the act or error is discovered or discoverable

before completion of the improvement, then the two year period begins to run upon completion or abandonment. Plaintiff's own *Complaint* states that abandonment occurred in December of 1991.

Second, the Utah Supreme Court has held that statutes should be read so as to "avoid making any of their provisions surplusage and meaningless." *See Downey State Bank v. Major-Blakeney Corp.*, 578 P.2d 1286, 1288 (Utah 1978). If the Court were to apply the six year limitation found in subsection (4), it would be contrary to legislative intent and defeat the purpose of Subsection (3) entirely. Plaintiffs with a claim would always allege a breach of contract theory in order to take advantage of the longer statute of limitations, rendering Subsection (3) a nullity. Subsection (3)'s language is very specific and Plaintiff's cause of action falls within its purview. To allow Plaintiff in this case to take advantage of Subsection (4) 's six year statute of limitation would make Subsection (3) meaningless.

Lastly, in construing a statute, courts are to view it as a comprehensive whole rather than unrelated collection of provisions. *See Hales Sand & Gravel, Inc. v. Audit Div. of State Tax Com'n of Utah*, 842 P.2d 887 (Utah 1992); *Sentry Investigations, Inc., v. Davis*, 841 P.2d 732 (Utah App. 1992); *See also, Bagshaw v. Bagshaw*, 788 P.2d 1057, 1060 (Utah App. 1990)(applying general rather than specific provision would effectively repeal the specific provision).

The Court must consider the provisions in subsections (3), and (4), as a whole. Indeed, the Court must look at §78-12-25.5 as a comprehensive whole, and construe each subsection in light of the whole and not in a piecemeal fashion. *See Sentry Investigations, Inc. v. Davis*, 841 P.2d 732 (Utah App. 1992).

Section §78-12-25.5 was enacted by the legislature to regulate causes of action involving "providers" in the construction industry and the general public. See §78-12-25.5(2). The purposes of the statute are clearly set out in §78-12-25.5(2) and the Court must consider those purposes in construing the several provisions of the statute. The legislature has balanced the competing interests and provided for a "tiered" approach to limitations of actions involving construction providers and the public. See §78-12-25.5(2) thru (9).

Subsection(4) is a general provision and to apply that general provision over the more specific subsection (3) would effectively repeal the specific provision.

Further, in this case the Plaintiff had notice of the act, error, omission or breach of duty when the Defendant abandoned the project in December of 1991. At that time Plaintiff knew he had a cause of action arising from the agreement between the parties. The statute specifically provides that if the act is discovered or discoverable before completion of the improvement, that the two year period begins to run upon abandonment of construction. See U.C.A. §78-12-25.5(3). The Plaintiff had actual notice of his claim due to Defendant's abandonment of the project. To attempt to pick and choose between subsections in order to extend the time for filing an action would be disingenuous and contrary to the legislature's intent.

The Court finds that Plaintiff's claims founded on contract principles are subject to the two year statute of limitations as set forth in §78-12-25.5(3). The Court finds that the event triggering the running of the statute of limitations was the Defendant's abandonment of the project in December of 1991. Since Plaintiff did not file an action on that "contract" until September of 1995, Plaintiff's claims based upon contract principles are barred as being

untimely pursuant to the statute.

With regard to Plaintiff's claims that historically, claims founded upon contract principles against builders for defective construction were subject to U.C.A. §78-12-23 or §78-12-25 rather than U.C.A. §78-12-25.5, the Court finds that these historical arguments were abrogated when the legislature enacted the new 1991 version of U.C.A. § 78-12-25.5. It is a general rule of statutory construction that, "where two statutes treat the same subject matter, an one statute is general while the other is specific, the specific provision controls." *See Floyd v. Western Surgical Assoc. Inc.*, 773 P.2d 401, 404 (Utah App. 1989); *accord Williams v. Public Serv. Comm'n*, 754 P.2d 41, 48 (Utah 1988); *Bagshaw v. Bagshaw*, 788 P.2d 1057, 1060 (Utah App. 1990).

Sections 78-12-23 and 78-12-25 are general in nature, §78-12-25.5 is specific to actions dealing with improvements to real property, and as such is controlling. Therefore, the Court finds Plaintiff's claims founded upon contract principles are subject to U.C.A. §78-12-25.5 and not the more general sections of §78-12-25 or §78-12-23 .

Slander of Title Claim

To prove slander of title, a claimant must prove that (1) there was a publication of a slanderous statement disparaging claimant's title, (2) the statement was false, (3) the statement was made with malice, and (4) the statement caused actual or special damages. *Bass v. Planned Management Servs., Inc.*, 761 P.2d 566, 568 (Utah 1988) and cases cited therein. "A slanderous statement is one that is derogatory or injurious to the legal validity of an owner's title or to his or her right to sell or hypothecate the property." *Id.*

Plaintiff argues correctly that the special damages rule requires the plaintiff to establish

pecuniary loss that has been realized or liquidated, as in the case of specific lost sales. First Security Bank of Utah, N.A., v. Banberry Crossing, 780 P.2d 1253 (Utah 1989). However, case law provides no clear rule as to the exact point at which special damages are ascertainable. The Utah Supreme Court stated in Bass that special damages are ordinarily proved in a slander of title action by evidence of a lost sale or the loss of some other pecuniary advantage. [emphasis added] See Bass v. Planned Management Services, Inc., 761 P.2d 566, 568 (Utah 1988). In Bass, the Utah Supreme Court held that attorney fees may be recoverable as special damages if incurred to clear title or to undo any harm created by whatever slander of title occurred. Id. at 569.

Plaintiff cites to Gillmor v. Cummings, 904 P.2d 703 (Utah App. 1995) and Becton v. Reese, 668 P.2d 1254 (Utah 1993) arguing that these cases stand for the proposition that special damages must be shown to complete the cause of action for slander of tile. Plaintiff argues that the necessary special damages cannot be ascertained until the property is sold and the statutory right of redemption is lost. See *Plaintiff's Memorandum In Opposition To Defendant's Motion To Dismiss* at 5. However, these cases do not support Plaintiff's position. The Court has been unable to discover any Utah case law holding that the right of redemption or foreclosure sale would be the last event necessary to establish special damages for the slander of title claim. In Dowse v. Doris Trust Co., 208 P.2d 956 (Utah 1949) the Utah Supreme Court acknowledged that a claim for slander of title necessitated a pecuniary loss, however, the Court went on to cite to the *Restatement of Torts* to define what qualifies as a loss. "That pecuniary loss which directly and immediately results from the impairment of the vendibility of the thing in question caused by publication of the disparaging matter, and

the expense of litigation reasonably necessary to remove the doubt cast by the disparaging upon the property." Id. at 959.

Defendant placed a mechanic's lien upon the property in February of 1992. A lien is understood to denote a legal claim or charge, collectible out of property as security for the payment of some debt or obligation. The mechanic's lien filed on the residential property in question was for \$19,600.00. At the time of filing in February of 1992 Plaintiff's were put on notice that they had suffered specific damages. The accrual of the cause of action began at that point. Relying upon Bass and Dowse, the court finds that at the very least, Plaintiff's could have filed a claim for slander of title to clear title to the property when they had notice of the imposition of the lien in February of 1992, and that attorney fees generated by the necessity to litigate clearing the title would have been considered a special damage.

Additionally, Plaintiff's admit that in the Summer of 1992 they tried to obtain financing and were turned down allegedly because of the \$19,600.00 lien. Even if the Court were to consider Plaintiff's argument that some specific amount of damages must be shown in order to complete the cause of action for Slander of Title, when Plaintiff's were unable to obtain financing because of the lien, specific damages in the amount of at least \$19,600.00 could be shown since plaintiff alleges that because of the lien refinancing was denied. Had the title been clear of that obligation, Plaintiff ostensibly could have obtained financing and completed the remodeling project. Plaintiff's still did not pursue any action on the claim until the filing of the Complaint in September of 1995.

The Plaintiff could have filed a claim to clear title to the property and remove the lien any time after notice of the filing of the lien, and particularly after refinancing was

denied. All of the elements necessary for the filing of an action for Slander of Title were in place, at the latest by June of 1992. There was no need to wait until a foreclosure sale was held to establish special damages sufficient to complete a cause of action for slander of title. Plaintiff's argument that the date of the foreclosure sale and/or the date that Plaintiff's right of redemption was cut off was the last event necessary fail.¹

Plaintiff has not provided any extenuating circumstances justifying the delay in filing the action. Therefore, this Court finds that the special damages needed to complete the cause of action for Slander of Title in this case occurred when the mechanic's lien was filed on the property in February of 1992. The Court finds that Plaintiff's claim for Slander of Title was subject to the two year statute of limitation found in §78-12-25.5(3) and since filing of the claim did not occur until September 25, 1995, the Court finds that claim barred as being untimely pursuant to the statute.

The Court notes that even if the Court were to consider Plaintiff's argument that the Slander of Title and Tortious Interference claims were subject to the three year limitation found in U.C.A. §78-12-26(1) as a tortious injuries to property, Plaintiff's claims would still be untimely. Damages were established at the latest in June of 1992 when Plaintiff could not negotiate refinancing due to the imposition of the mechanic's lien. To be timely, a claim would have had to have been filed by June of 1995. Plaintiff did not file until September of 1995.

¹The Court notes that if it were to accept Plaintiff's argument that special damages do not accrue until Plaintiff's right of redemption is cut off, in cases of judicial foreclosure, that date would be extended another six months until the statutory right of redemption was finally cut off.

CONSTITUTIONALITY OF THE STATUTE

It is important to note at the outset that it is a well settled proposition that all statutes are presumed to be constitutional and the party challenging a statute bears the burden of proving its invalidity. *See City of West Jordan v. Retirement Bd.*, 767 P.2d 530, 537 (Utah 1988); *Baker v. Matheson*, 607 P.2d 233, 236 (Utah 1979).

When scrutinizing a legislative measure the Court must determine whether the classification is reasonable, whether the objectives of the legislative action are legitimate, and whether there is a reasonable relationship between the classification and the legislative purposes. *See Mountain Fuel Supply v. Salt Lake City Corp.*, 752 P.2d 884, 890 (Utah 1988).

The statute in question singles out all those involved in the construction of improvements to real property by providing a limitation period shorter for claims arising from the construction of improvements than for other types of claims.

As held in *Malan v. Lewis*, 693 P.2d 661, 670 (Utah 1984), there must be a reasonable basis to classify this group differently. The legislature clearly has a valid interest in limiting the time within which a legal action may be commenced once it arises. In general, statutes of limitation are intended to compel the exercise of a right of action within a reasonable time and to suppress stale and fraudulent claims so that claims are advanced while evidence to rebut them is still fresh. *See Burnett v. New York Central R.R.*, 380 U.S. 424, 428 (1965) as cited in *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989).

The legislature has stated its reasons for classifying this group differently and set out its purposes in §78-12-25.5(2). The Court finds that the tiered approach of the amended 1991

statute regarding limitations on actions commenced under its auspices is reasonable and provides adequate protection for both contractors and for the public. *See* U.C.A. § 78-12-25.5(2) (1991). The tiered approach provides a benefit for the public by allowing some claims to be brought later than two years and a benefit for providers by protecting them from indefinite liability. The Court finds that the statute in question is constitutional and the Plaintiff is subject to the time limitations contained in that statute.

The Court finds that the statute is presumed constitutional and Plaintiff has not offered any substantive proof that it is not. Plaintiff has not met its burden to show that the legislature's methods of accomplishing its purpose are not reasonably related to that desired purpose. Because the U.C.A. §78-12-25.5 is constitutional on its face, it bars Plaintiff's claims that it violates the Uniform Operation of Laws Provisions of the Utah Constitution. Therefore, Plaintiff's arguments that its claims should be considered under the statute of limitations found in either U.C.A. § 78-12-23 or U.C.A. § 78-12-25 fail because U.C.A. §78-12-25.5 (1991) is constitutional.

IV

DECISION

Having considered the facts and law, and being advised on all premises of the case, the Court concludes as follows:

1. By definition and application of the rules of statutory construction, U.C.A. §78-12-25.5(1991) applies to all seven of Plaintiff's causes of action listed in the *Complaint*.
2. The two-year statute of limitations for actions arising under §78-12-25.5 found in Subsection (3) is applicable to all seven of Plaintiff's causes of action listed in the *Complaint*.

3. The statute of limitations began to run for Plaintiff's claims of Breach of Contract, Repudiation of Contract; Misrepresentation, Unjust Enrichment, and Breach of Covenant of Good Faith and Fair Dealing when Defendant abandoned the remodeling project in December of 1991. These claims were not filed within the two-year time limit and are now time-barred.

4. The statute of limitations for Plaintiff's claims of Slander of Title and Tortious Interference began to run in February of 1992 when the mechanic's lien was placed on the property for \$19, 600. These claims were not filed within the two-year limit and are now time-barred.

5. U.C.A. §78-12-25.5 (1991) is constitutional.

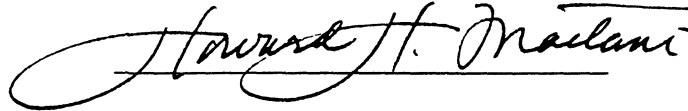
6. Even accepting all of Plaintiff's factual allegations to be true, and making all reasonable inferences in a light most favorable to the Plaintiff, the Court finds that as a matter of law, Plaintiff's claims are barred in whole by the statute of limitations found in U.C.A. § 78-12-25.5 (1991), leaving no claim before this Court upon which relief can be granted.

7. Therefore, the Court GRANTS Defendant Beuchert Builder Inc.'s Rule 12 (b)(6) Motion To Dismiss.

8. Defendant's Motion For Enlargement of Time is now MOOT subject to the Court's granting of Defendant's Rule 12(b)(6) Motion To Dismiss.

9. Counsel for Defendant, Benson L. Hathaway, Jr., is instructed to prepare an Order consistent with this Decision.

DATED at Provo, Utah this 29 day of January, 1996.

A handwritten signature in black ink, reading "Howard H. Maetani". The signature is written in a cursive style with a large, sweeping initial "H" and a long horizontal line extending from the end of the name.

HOWARD H. MAETANI
Fourth District Court Judge

cc: Benson L. Hathaway, Jr., Esq.
Marty K. Banks, Esq.