

## PRIORITY OF MECHANIC'S LIENS V. OTHER ENCUMBRANCES

### I. Statutory Language: U.C.A. § 38-1-5

“The liens herein provided for shall relate back to, and take effect as of, the time of the commencement to do work or furnish materials on the ground for the structure or improvement, and shall have priority over any lien, mortgage or other encumbrance which may have attached subsequently to the time when the building, improvement or structure was commenced, work begun, or first material furnished on the ground; also over any lien, mortgage or other encumbrance of which the lien holder had no notice and which was unrecorded at the time the building, structure or improvement was commenced, work begun, or first material furnished on the ground.”

### II. Introduction to Priority: Mortgage v. Mechanic's Lien

*Calder Bros, Co., v. Anderson*, 652 P.2d 922 (Utah 1982).

#### **Facts:**

Calder Bros. conveyed real property to, and obtained a purchase money mortgage from, Anderson on June 14, 1978. Calder Bros. recorded the mortgage on June 27, 1978. After the conveyance and execution of the mortgage, but before Calder Bros. recorded the mortgage, Anderson hired laborers and a painter to weed, cut down trees, grout cracks, and paint the building on the property. After the mortgage was recorded, Anderson hired subcontractors to perform other substantial improvements on the property. These subcontractors appealed the district court's holding that their liens were subsequent in priority to the mortgage.

#### **Holding & Analysis:**

The Utah Supreme Court stated that the purpose of the mechanic's lien statute was to protect materialmen and laborers who have added in value to the property of another. For priority purposes under U.C.A. § 38-1-5, mechanics' liens resulting from labor or materials provided attach and relate back to the date of the commencement of the first work or improvement. For one person's lien to relate back to the work commenced by another person, both persons' work must have been performed in connection with essentially the same project.

The court did not allow the subcontractors to tack their work to the maintenance work done before the mortgage was recorded. The court reasoned that later lienholders may not use ordinary maintenance as basis for tacking because ordinary maintenance does not improve the property to a degree that would notify others that work was being performed. Thus, the court concluded that the liens arising from the subcontractor's work did not relate back to the maintenance work performed before the mortgage was recorded and the mechanics' liens did not have priority.

#### **Key Takeaways:**

- Mechanic's liens resulting from materials furnished or labor performed relate back and attach as of the date of commencement of first work or improvement.

- For one contractor's work to relate back to commencement of work by another contractor, both contractors' work must be:
  - Part of essentially the same project,
  - Performed under a common plan,
  - With reasonable promptness, and
  - Without material abandonment.
- Ordinary maintenance or cleanup work is not a sufficient basis for "tacking" so as to establish an earlier lien date.

### **III. Commencement of Work**

*Ketchum, Konkel, Barrett, Nickel & Austin v. Heritage Mtn. Devlpmt. Co.*, 784 P.2d 1217 (Utah App. 1989).

#### **Facts:**

In *Ketchum, Konkel, Barrett, Nickel & Austin v. Heritage Mtn. Devlpmt. Co.*, a group of architects performed architectural, engineering, consulting, surveying, and planning services for a ski resort development. This work began in early 1981 and continued through summer of 1982. Prior to that, Heritage, the developer, made visible improvements to the property. On November 17, 1982, a prior mortgage lender obtained a Judgment and Decree of Foreclosure on the property. On June 19, 1983, Heritage repurchased the property to continue the development. To finance the project, Heritage obtained a predevelopment loan from Guaranty Savings and Loan ("Guaranty"). Guaranty executed a trust deed to secure the obligation and recorded the deed on September 15, 1983. Heritage abandoned the project and the architects sought foreclosure on their mechanic's liens. Guaranty opposed the foreclosure action and claimed that its trust deed held priority over all mechanics' liens. The district court held that visible, on-site work is required for attachment of the lien, and thus the mechanics' liens did not have priority.

#### **Holding & Analysis**

On appeal, the Utah Court of Appeals cited a string of cases that required visible work to trigger the "commencement of work" requirement of § 38-1-5. The court reasoned that the reason for the visible work requirement is notice to the world that liens may have attached. The court also stated that surveying work, soil testing, and staking did not qualify as commencement of work. Thus, the court ruled that mechanics' liens only attach when visible work or materials are present on the construction site.

The Court of Appeals also stated that pursuant to § 78-37-3, the November 17, 1982 foreclosure action extinguished any prior unrecorded liens that would have attached due to Heritage's visible improvements on the property.

#### **Key Takeaways:**

- Only visible on site work constitutes “commencement of work” as required to establish priority under § 38-1-5.
- Mere fact that work was a proper subject of a lien under Utah law does not establish priority where there is no notice of commencement of work.

#### **IV. Type of Notice Required**

*EDSA/Cloward v. Klibanoff*, 2005 UT App 367, 122 P.3d 646.

##### **Facts:**

In *EDSA v. Klibanoff*, EDSA, a construction company, provided services and materials to a development project. These services and materials began in October 2000 and continued through June 2002 at a cost of over \$500,000. The project’s developers arranged for a loan from Zions Bank, secured by a trust deed which was closed and recorded on June 15, 2001 (Zions later assigned the deed to Klibanoff). EDSA never recorded its Notice of Mechanic’s lien. However, Jack Johnson, Co., a subcontractor on the project, recorded its own notice on June 12, 2002. Between October 2000 and February of 2001, the construction site showed evidence of work including a backhoe, visible construction of pipes, drilling rigs, orange plastic fencing, survey stakes, heavy equipment and other visible work. EDSA brought an action to foreclose its mechanics’ lien and Klibanoff counterclaimed to quiet title and assert his priority of interest in the property through the trust deed.

##### **Holding & Analysis**

The Utah Court of Appeals rejected EDSA’s contention that the equal footing provision of U.C.A. § 38-1-10(2001) established EDSA’s priority because of Jack Johnson, Co’s recorded notice. The court reasoned that because the priority section (§ 38-1-5) did not mention record notice, there was no evidence that the legislature intended record notice to affect priority. Thus, record notice did not establish priority.

Because record notice did not establish priority, EDSA had to show visible commencement of the work before the trust deed was recorded as per § 38-1-5. The court stated that whether the materials and work provided adequate notice depended upon whether a reasonable person looking at the land would know that lienable work was underway. The court concluded that the various indications of work showed there was a material issue as to whether work had commenced.

##### **Key Takeaways:**

- Recording a mechanic’s lien does not establish priority; it merely perfects the lien against the owner.
- Only visible commencement of work establishes priority.
- Standard for commencement of work: Whether a reasonable person would know by looking at the land that lienable work is underway.
- Even though surveying, staking, and soil testing don’t constitute commencement of work, when considering all work together they may contribute to establishing priority.

## V. Continuity Requirement

*Nu-Trend Electric, Inc., v. Deseret Federal Savings & Loan Ass'n, Inc.*, 786 P.2d 1369 (Utah App. 1990).

### **Facts:**

Deseret Federal secured a loan to a Maple Hills Development project with a trust deed which was recorded on March 4, 1981. Nu-Trend installed electrical wiring in two units on the project from September 1981 through May of 1982. On June 28, 1982, Nu-Trend recorded a notice of mechanic's lien and commenced a suit to foreclose the lien on September 28, 1982. Deseret Federal filed a notice of default on November 5, 1982 and eventually bought the two units in which Nu-Trend did electrical work in a foreclosure sale. After the default, work ceased for three years with the exception of some maintenance work on the exterior of the units which began in 1984. Nu-Trend resumed work on the interior in June 1985. Nu-Trend and other subcontractors filed a notice of lien on the new work in 1987. Deseret Federal filed a foreclosure on the trust deed in June 1985. On appeal, Nu-Trend argued that because of the work it performed in 1981, or alternatively, the exterior work that resumed in 1984, its lien related back to earlier than the 1985 trust deed.

### **Holding & Analysis:**

The Utah Court of Appeals stated that the lien did not relate back to the 1981 work. The court reasoned that for a mechanic's lien to relate back to the commencement of work, the work must be performed without "material abandonment". The court stated that material abandonment occurs when a reasonable observer of the site would notice that the persons who performed the work do not intend to continue. Thus, the court held that Nu-Trend failed to show any intention contrary to abandonment when it stopped work in 1982.

Regarding Nu-Trends claim that its work related back to the 1984 exterior work, the district court found that the exterior work was not part of the same project. The court of appeals stated that for priority to relate back to the beginning of work, the work must all be part of the same project. This means that the work must have a continuity of purpose such that a reasonable observer would notice that work was underway. The court concluded that Nu-Trends did not show enough evidence to disturb the district court's findings.

### **Key Takeaways:**

- For priority to relate back to commencement of work, work must be performed without material abandonment.
  - Material abandonment means a reasonable observer of the site would perceive that those who performed work did not intend to continue it.
- For later work to relate back to beginning of commencement of work, work must be part of the same project.

- Same project means that there is a continuity of purpose such that a reasonable observer would notice that work was underway.