

APPEAL NO. ED 87412

**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

GEORGE WEIS COMPANY

Plaintiff-Appellant,

v.

**STRATUM DESIGN-BUILD, INC., TITLE INSURERS AGENCY, INC.,
HURLBUT INVESTMENTS, LLC and SOUTHWEST BANK OF ST. LOUIS**

Defendants-Respondents.

Appeal from Case No. 05-CC-002983, Division 13
In the Circuit Court of St. Louis County, Missouri

The Honorable Barbara Wallace, Circuit Judge Presiding

BRIEF AND APPENDIX OF APPELLANT

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STATEMENT OF JURISDICTION

This is an appeal from a judgment of the Circuit Court of St. Louis County, Missouri in favor of Defendants, Stratum Design-Build, Inc., Title Insurers Agency, Inc., Hurlbut Investments, LLC and Southwest Bank of St. Louis. The trial court entered judgment in favor of all Defendants on the grounds that the trial court lacked subject matter jurisdiction to hear the petition. The trial court determined that the mechanic's lien statute, RSMo. § 429.300, requires that all claims by suppliers and subcontractors for breach of contract be included in a mechanic's lien suit concerning the same project, or they are barred. See the order/judgment of November 29, 2005. (L.F. 20-22; A-2).

George Weis Company was a subcontractor of Stratum Design-Build, Inc., the general contractor, which had entered into a construction contract with the owner, Hurlbut Investments, LLC. Hurlbut Investments, LLC, Stratum Design-Build, Inc., Title Insurers Agency, Inc. (which distributed the construction funds under an escrow agreement) and Southwest Bank of St. Louis (the lender) were all parties to the construction escrow agreement attached to the petition as Exhibit A. (L.F. 83, 92; A-5; A-14).

Count I of the petition alleged breach of the subcontract agreement between Plaintiff and Stratum Design-Build, Inc. and violation of the Prompt Payment Act by Stratum Design-Build, Inc. (L.F. 83-85; A-5-7). Count II alleged that Title Insurers Agency, Inc. breached its fiduciary duties to the Plaintiff in the administration of the construction escrow fund. (L.F. 85-88; A-7-10). Count III alleged breach of the construction escrow agreement by Defendant Hurlbut Investments, LLC (the owner), and

that Plaintiff was a third-party beneficiary of that agreement. (L.F. 88-89; A-10-11).

Count IV alleged that Southwest Bank of St. Louis (the lender) breached the construction escrow agreement and that Plaintiff was a third-party beneficiary of that agreement. (L.F. 89-91; A-11-13). The construction escrow agreement was attached to the petition as Exhibit A. (L.F. 92-98; A-14-20).

Plaintiff filed its timely notice of appeal on December 20, 2005. (L.F. 5).

This appeal arises from the Circuit Court of St. Louis County, Missouri, which is within the geographic jurisdiction of this Court.

This appeal is within the general appellate jurisdiction of this Court under Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

The petition was filed on July 21, 2005. (L.F. 83; A-5). Plaintiff-Appellant, George Weis Company was the drywall subcontractor of Stratum Design-Build, Inc. (the general contractor) for the Hurlbut Auto Spa in Ellisville, Missouri. (L.F. 84; A-6). Stratum Design-Build, Inc., as general contractor, entered into a construction contract with the owner, Hurlbut Investments, LLC. (L.F. 84; A-6). George Weis Company performed all of its work by August 22, 2003. The subcontract plus change orders total \$54,861.43. George Weis Company submitted its invoices to Stratum Design-Build, Inc., which in turn billed the owner, Hurlbut Investments, LLC, and was paid ninety percent (\$42,412.50) of the amount due George Weis Company. The owner withheld ten percent as retainage. Stratum Design-Build, Inc., however, refused to pay George Weis Company any amount. (L.F. 84-85; A-6-7). Stratum Design-Build, Inc. was duly served with summons and the petition on August 1, 2005 (L.F. 76, 81), but failed to appear, and was found in default on October 27, 2005. (L.F. 27, 47). The trial court subsequently determined that it did not have subject matter jurisdiction to hear the petition against Stratum Design-Build, Inc. (L.F. 7, 8-10; A-1-4).

Count II of the petition alleged that Defendant, Title Insurers Agency, Inc., breached its fiduciary duties to Plaintiff under the construction escrow agreement executed by Title Insurers, Inc., Hurlbut Investments, LLC, Stratum Design-Build, Inc. and Southwest Bank of St. Louis. (L.F. 85-88; A-7-10). Title Insurers Agency, Inc. entered its appearance on August 22, 2005, attaching an order appointing a receiver for it

in an unrelated case (L.F. 67, 70-73) and filed its answer on November 10, 2005. (L.F. 23-25). It did not file a motion to dismiss.

Count III and IV of the petition, respectively, are against the owner, Hurlbut Investments, LLC (Count III), and the lender, Southwest Bank of St. Louis (Count IV), alleging breach of the construction escrow agreement, while claiming that Plaintiff, George Weis Company, is a third-party beneficiary of that agreement. (L.F. 88-91; A-10-13).

Hurlbut Investments, LLC and Southwest Bank filed a joint motion to dismiss on October 6, 2005, claiming that the court lacked subject matter jurisdiction because an equitable mechanic's lien action (involving more than one claimant) with respect to the same project had previously been filed and settled, arguing that all claims arising out of a construction project, whether attempting to enforce a mechanic's lien against the real estate, or not, must be filed in any mechanic's lien action, and are barred once any mechanic's lien action concerning the same project is concluded. (L.F. 51-58). Hurlbut Investments, LLC and Southwest Bank also argued that Counts III and IV do not allege a cause of action on which Plaintiff could recover as a third-party beneficiary of the construction escrow agreement. (L.F. 54-57).

George Weis Company responded with its brief in opposition to the motion to dismiss Counts III and IV, on October 21, 2005 (L.F. 30-46) arguing that the court did not lack subject matter jurisdiction simply because there had been a prior mechanic's lien action involving the same project, because Plaintiff was not seeking to enforce a mechanic's lien, but was simply suing for breach of contract and breach of a fiduciary

duty, and that, with respect to Counts II through IV of the petition, Plaintiff alleged facts establishing it as a third-party beneficiary of the construction escrow agreement. (L.F. 30-45). In its memorandum of law, George Weis Company stated that it did not file a mechanic's lien notice or claim, and that it was not a party to any prior equitable mechanic's lien lawsuit, and that it was not seeking to enforce a mechanic's lien or other encumbrance or mortgage against the real estate, while acknowledging that it had previously filed a petition (not a mechanic's lien suit) against Stratum Design-Build, Inc., its two owners, and Title Insurers Agency, Inc. for fraud (against Stratum Design-Build, Inc. and its two owners) and for negligence, against Title Insurers Agency, Inc. That suit had been filed on June 17, 2004. None of the Defendants in that case contended that it should be consolidated with any pending equitable mechanic's lien suit. On July 8, 2005, George Weis Company moved the circuit court of St. Louis County, in the prior case filed by it, to file a first amended petition, and to add Southwest Bank of St. Louis and Hurlbut Investments, LLC as additional Defendants. On July 18, 2005, the circuit court (Division 15) denied that motion in the prior case filed by George Weis Company. George Weis Company then dismissed its prior case, without prejudice, on July 21, 2005, and shortly thereafter, on the same date, filed the current petition. (L.F. 36-37).

After the motion to dismiss was argued on November 2, 2005, the trial court entered an order and judgment on November 29, 2005, concluding that the petition is barred by the Missouri Mechanic's Lien Act, RSMo. § 429.300, while recognizing that there is a conflict in prior appellate decisions in the Eastern District of Missouri and the Western District of Missouri on the same issue. The Court also found that the Plaintiff

was aware of the prior equitable mechanic's lien action, but failed to intervene or move to consolidate, although there was nothing in the petition or Plaintiff's memorandum of law that supported that finding. (L.F. 9; A-3). There was no evidentiary hearing and no one filed affidavits or other evidence which supported that, or any other, factual findings by the Court.

On the following day, November 30, 2005, the Court entered an amended judgment dismissing all counts of the petition with prejudice. (L.F. 7; A-1).

Plaintiff, George Weis Company, filed its timely notice of appeal on December 20, 2005. (L.F. 5).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DISMISSING THE PETITION, ON THE GROUNDS IT LACKED SUBJECT MATTER JURISDICTION UNDER THE MISSOURI MECHANIC’S LIEN STATUTE, 429.300, BECAUSE THE PETITION ALLEGES A CLAIM AGAINST STRATUM DESIGN-BUILD, INC. FOR BREACH OF CONTRACT AND FOR VIOLATING THE PROMPT PAYMENT ACT, AND AGAINST THE OTHER DEFENDANTS FOR BREACH OF FIDUCIARY DUTY (TITLE INSURERS AGENCY, INC.) AND BREACH OF THE CONSTRUCTION ESCROW AGREEMENT (HURLBUT INVESTMENTS AND SOUTHWEST BANK OF ST. LOUIS), AND DOES NOT SEEK TO ENFORCE A MECHANIC’S LIEN AGAINST THE REAL ESTATE ON WHICH THE CONSTRUCTION PROJECT WAS LOCATED.

Mabin Construction Company, Inc. v Historic Constructors, Inc., 851 S.W. 2d 98 (Mo. App. W.D. 1993).....19, 21, 22, 23, 24

Dunn Industrial Group, Inc. v City of Sugar Creek, 112 S.W. 3d 421 (Mo. banc 2003).....22, 23, 24

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II. THE TRIAL COURT ERRED BY DISMISSING THE PETITION, WITHOUT A HEARING ON THE MERITS, ON THE GROUNDS THAT THE MECHANIC’S LIEN STATUTE REQUIRES JOINER OF ALL NON-MECHANIC’S LIEN CLAIMS IN ONE LAWSUIT, OR THEY ARE

BARRED, AND THEREBY DENIED PLAINTIFF DUE PROCESS OF LAW UNDER THE MISSOURI AND UNITED STATES CONSTITUTIONS BECAUSE PLAINTIFF WAS NOT PROVIDED WITH NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE ITS CLAIMS WERE BARRED.

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III. THE TRIAL COURT ERRED IN DISMISSING THE PETITION BECAUSE IT STATES A CAUSE OF ACTION (1) AGAINST STRATUM DESIGN-BUILD, INC. FOR BREACH OF CONTRACT AND FOR VIOLATION OF THE PROMPT PAYMENT ACT (2) AGAINST TITLE INSURERS AGENCY, INC. FOR BREACH OF ITS FIDUCIARY DUTY IN THE ADMINISTRATION OF THE CONSTRUCTION ESCROW AGREEMENT AND (3) AGAINST HURLBUT INVESTMENTS, LLC AND SOUTHWEST BANK FOR BREACH OF THE CONSTRUCTION ESCROW AGREEMENT, IN THAT PLAINTIFF IS A THIRD-PARTY BENEFICIARY OF THAT AGREEMENT.

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ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING THE PETITION, ON THE GROUNDS IT LACKED SUBJECT MATTER JURISDICTION UNDER THE MISSOURI MECHANIC'S LIEN STATUTE, 429.300 BECAUSE THE PETITION ALLEGES A CLAIM AGAINST STRATUM DESIGN-BUILD, INC. FOR BREACH OF CONTRACT AND FOR VIOLATING THE PROMPT PAYMENT ACT, AND AGAINST THE OTHER DEFENDANTS FOR BREACH OF FIDUCIARY DUTY (TITLE INSURERS AGENCY, INC.) AND BREACH OF THE CONSTRUCTION ESCROW AGREEMENT (HURLBUT INVESTMENTS AND SOUTHWEST BANK OF ST. LOUIS), AND DOES NOT SEEK TO ENFORCE A MECHANIC'S LIEN AGAINST THE REAL ESTATE ON WHICH THE CONSTRUCTION PROJECT WAS LOCATED.

The standard of review is *de novo*. Review of the trial court's ruling on a motion to dismiss is generally limited to the sufficiency of the pleadings on their face. However, where matters outside the pleadings are presented and not excluded, the motion is treated as one for summary judgment. Here there were references to matters outside the scope of the petition, in the briefs of the parties, but those matters were not supported by affidavit or other evidence. Cridlebaugh v Putnam County State Bank of Milan, 192 S.W. 3d 540, 542-43 (Mo. App. W.D. 2006). Even if a summary judgment standard of review is applied, the moving parties (Hurlbut Investments, LLC and Southwest Bank) has the burden of establishing a right to judgment as a matter of law and that no genuine issue of material fact exists. A & L Holding v Southern Pacific Bank, 34 S.W. 3d 415, 417 (Mo.

App. W.D. 2000); Kansas Ass'n of Private Investigators v Mulvihill, 35 S.W. 3d 425, 428 (Mo. App. W.D. 2000); ITT Commercial Finance Corp v Mid-America Marine Supply Corp., 854 S.W. 2d 371 (Mo. banc 1993). The ultimate issue decided by the trial court was one of jurisdiction. Defendant, Stratum Design-Build, Inc., did not enter an appearance, and was found in default. Defendant, Title Insurers Agency, Inc. filed an entry of appearance and an answer, but did not move to dismiss.

Whether the trial court had subject matter jurisdiction to hear the petition is determined by the Court's interpretation and application of Section 429.300 of the Mechanic's Lien Act. (A-2). The standard of review for an appeal challenging the interpretation and/or application of a Missouri statute is *de novo*. Johnson v BFI Waste Systems of North America, Inc., 162 S.W. 3d 127, 129 (Mo. App. E. D. 2005); Psychiatric Healthcare Corp. of Mo. v Dep't of Soc. Servs., 100 S.W. 3d 891, 899 (Mo. App. W.D. 2003). The standard of review for issues of law is *de novo*. Delta Air Lines, Inc. v Dir. of Revenue, 908 S.W.2d 353, 355 (Mo. banc 1995).

The trial court relied on RSMo. § 4429.300 (A-2) in concluding that the Mechanic's Lien Act bars claims for breach of contract (even though no mechanic's lien, or other claim against the real estate, is asserted) if there was a prior mechanic's lien action concerning the same construction project, and the current breach of contract Plaintiff failed to join that prior action. (A-3). The Court concluded that George Weis Company was aware of the prior mechanic's lien action (A-3) although there was no evidence to support that finding, either in the petition or the brief of George Weis

Company. The motion to dismiss filed by Southwest Bank and Hurlbut Investments, LLC (but not the other two Defendants) was not supported by affidavit or other evidence.

RSMo. § 429.290 provides that an equitable mechanic's lien action "shall be exclusive of other remedies **for the enforcement of mechanic's liens*****". RSMo. § 429.300 provides that "all other suits that may have been brought **on any mechanic's lien claim or demand** shall be stayed and no (sic) further prosecuted***".

The clear language of the statute provides that all claims to enforce a mechanic's lien, with respect to the same real estate and the same project, must be joined in a single mechanic's lien action. The statute does not state that all claims for breach of contract or breach of a fiduciary duty or for misrepresentation, etc., which do not seek to enforce a mechanic's lien, but arise out of the same construction project, must be joined in the single equitable mechanic's lien action.

Only two appellate cases have dealt with this precise issue. Drywall Interior Systems Construction, Inc. v Ladue Building & Excavating Corp., 857 S.W. 2d 523, 524 (Mo. App. E.D. 1993) held that a non-mechanic's lien claim was barred because the Plaintiff had not intervened in a prior equitable mechanic's lien action, which had previously been settled and dismissed. The Plaintiff did not file an application for rehearing or an application to transfer to the Missouri Supreme Court. Drywall Interior Systems makes no reference to Mabin Construction Co. v Historic Constructors, decided by the Western District three months earlier.

Mabin Construction Company, Inc. v Historic Constructors, Inc., 851 S.W. 2d 98, 100-102 (Mo. App. W.D. 1993), decided three months earlier, holds just the opposite.

The original source of confusion on this issue apparently stems from State ex rel. Clayton Green's Nursing Center, Inc. v Marsh, 634 S.W. 2d 462, 465 (Mo. Banc 1982); and State ex rel. Great Lakes Steel Corporation v Sartorius, 249 S.W. 2d 853, 854 (Mo. Banc 1952). The trial court relied on those cases. (A-2-3). They are factually distinguishable.

The trial court's reliance on State ex rel. Clayton Greens Nursing Center, Inc. v Marsh, 634 S.W. 2d 462, 465 (Mo. banc 1982) is misplaced. There, the plumbing, heating and cooling subcontractor filed suit for breach of contract against the general contractor in Jackson County (Kansas City), Missouri and obtained a default judgment. At the same time, the plumbing, heating and cooling subcontractor **was also a party to an equitable mechanic's lien action in St. Louis County**, where the general contractor was also a party. The project was also located in St. Louis County. The Court concluded, at 634 S.W. 2d 462, 465:

“The parties to the contract action in Jackson County have the very interests and relations requiring the uniform treatment provided by the mandatory equitable mechanic's lien statute. Section 429.270 to .300, RSMo 1978. They are all parties to the lien action. Their rights, interest, and liens must be there determined, established and enforced to the exclusion of all other actions. Section 429.290, RSMo 1978. Consolidation also obviates races to the courthouse for the purpose of obtaining priorities which the equitable mechanic's lien statute is intended to prevent.

Three Justices dissented, 634 S.W. 2d 462 at 465 as follows:

“The equitable mechanic’s lien proceeding is designed for the purpose of enforcing multiple mechanic’s lien claims filed against the same real estate, together with an adjudication of the rights claimed under all conflicting liens, encumbrances or other interests in the property. § 429.270, RSMo 1978; Dierks and Sons Lumber Co. v McSorley, 289 S.W. 164, 168 (Mo.App.1956). Once such an equitable suit is commenced it pre-empts the field of remedies for enforcement of mechanics’ liens on the real estate.”

The Jackson County, Missouri subcontractor-plaintiff was not denied the right to proceed with its claims against the general contractor. The Court merely required the subcontractor to assert those claims in the equitable mechanic’s lien action in St. Louis County, where the subcontractor and the general contractor were already parties. The default judgment in the Jackson County, Missouri action was set aside.

State ex rel. Great Lakes Steel Corp. v Sartorius, 249 S.W.2d 853, 855-56 (Mo. Banc 1952), held that a breach of contract suit, filed after an equitable mechanic’s lien suit, could not be maintained where the causes arose out of the same construction project. In Sartorius, the Claimant-Plaintiff had filed a notice of lien prior to the institution of the equitable mechanic’s lien suit and was named as a party in the equitable mechanic’s lien suit. See Mabin Construction Company, Inc. v Historic Constructors, Inc., 851 S.W. 2d 98, 100 (Mo. App. W.D. 1993) where the Court distinguished both State ex rel. Great Lakes Steel Corp. v Sartorius, and State ex rel Kirkwood Excavating, Inc. v Stussie, 689 S.W. 2d 131 (Mo. App. E.D. 1985). The Stussie court made a writ of mandamus

absolute, requiring that the Claimants be allowed to consolidate their contract action into a settled, but not yet dismissed, equitable mechanic's lien suit. The concurring opinion (Judge Gerald Smith) in Stussie acknowledged the precise intent behind the mechanic's lien statute, at p. 135, stating:

“There is a basis for assuring that interests against the same real estate be adjudicated in one action thereby avoiding inconsistent judgments or promoting a race to foreclose. **It is difficult for me to see a comparable value in forcing claimants who assert no claim to an interest in the real estate into the lawsuit.**”

The Missouri Supreme Court addressed related issues in Dunn Industrial Group, Inc. v City of Sugar Creek, 112 S.W. 3d 421, 430 (Mo. banc 2003), holding:

“Sections 429.270 to 429.340 govern the enforcement and adjudication of the rights of multiple lien holders in an equitable action. McCarney, 866 S.W.2d at 891-892. **The purpose of an equitable mechanics' lien action is to enforce multiple mechanics' lien claims filed against the same real estate and to adjudicate the rights claimed under all conflicting liens, encumbrances, or other interests in the property.** Mabin Const. Co., v Historic Constructors, Inc., 851 S.W.2d 98, 100 (Mo.App.1993). An equitable mechanic's lien action may only be brought when more than one mechanic's lien is filed against the property. Section 429.330. **When an equitable action is commenced, it shall be exclusive of other remedies for the enforcement of mechanic's liens. Section 429.290.**

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Thus, once an equitable mechanic's lien action is brought, it is **the exclusive method of litigating liens and other claims pertaining to particular property.**

Meiners Co. v Clayton Greens Nursing Ctr., 645 S. W. 2d 722, 724 (Mo.App. 1982). The equitable mechanic's lien action does not, however, preclude the enforcement of the parties' arbitration agreement to resolve the underlying disputes."

Dunn Industrial Group, Inc. v City of Sugar Creek, 112 S.W. 3d 421, 430 (Mo. banc 2003) cites Mabin Construction Company, Inc. v Historic Constructors, Inc., 851 S.W. 2d 98, 101 (Mo. App. W.D. 1993) with approval. It does not mention State ex rel. Kirkwood Excavating, Inc. v Stussie, 689 S.W. 2d 131 (Mo. App. E.D. 1985) or Drywall Interior Systems Construction, Inc. v Ladue Building and Engineering Corp., 857 S.W. 2d 523, 524 (Mo. App. E.D. 1993).

In a case related to State ex rel. Clayton Greens Nursing Center, Inc. v Marsh; Meiners Company v Clayton Greens Nursing Center, Inc., 645 S.W.2d 722, 724 (Mo.App. E.D. 1983), a subcontractor was permitted to obtain a judgment for breach of contract, in St. Louis County, even though the subcontractor-plaintiff was also a party to the equitable mechanic's lien action, where it was, apparently, asserting a mechanic's lien claim for the same amount claimed in the breach of contract action. The Court ruled that the defendant, Clayton Greens Nursing Center, Inc., had failed to prove that a separate claim was pending by the same plaintiff in the equitable mechanic's lien action. The Supreme Court denied the motion to transfer.

In Dunn Industrial Group, Inc. v City of Sugar Creek, 112 S.W.3d 421, 430 (Mo. banc 2003) the Supreme Court cited Meiners Company v Clayton Greens Nursing Center, Inc., 645 S.W. 2d 722 (Mo.App. E.D. 1983) but not State ex rel Clayton Greens Nursing Center, Inc., 634 S.W. 2d 462 (Mo. banc 1982).

Meiners Company v Clayton Greens Nursing Center, Inc. and State ex rel. Clayton Greens Nursing Center, Inc. v. Marsh concerned the same project located in St. Louis County.

Mabin Construction Company, Inc. v Historic Constructors, Inc., 851 S.W. 2n 98, 100 (Mo. App. W.D. 1993) describes the holding in State ex rel. Power Process Piping, Inc. v Dalton as follows:

“State ex rel. Power Process Piping, Inc. v Dalton, 681 S.W.2d 514, 517 (Mo.App.1984). In Dalton the court rejected counsel’s argument that the equitable mechanic’s lien statute preempts non-lien suits once a mechanic’s lien suit is filed by any claimant under the mechanic’s lien statute. *Id.* at 516. The court stated:

‘We do not accept the view that the legislature intended by enactment of the mechanic’s lien statute to abrogate common law contract actions on construction contracts where a claimant, not a party to the contract, brings a mechanic’s lien suit asserting a claim with regard to the same construction project. We do not believe that the [equitable mechanic’s lien suit] was intended by the legislature to become a shield for the property owner against other laborers, materialmen, or contractors on the construction project who elected not to avail themselves of the mechanic’s lien statute...

Had the legislature intended such a radical result they would have expressly so provided.’

Id. at 517. [FN5] The Dalton court’s statement which is consistent with the plain language and intent of the mechanic’s lien statute, indicates that it is proper for a claimant who has elected not to avail himself of the mechanic’s lien statute to bring a contract claim on the same construction project that is the subject of a separate equitable mechanic’s lien suit.”

George Weis Company did not file a mechanic’s lien notice or claim, and has not filed an action to enforce a mechanic’s lien, or any other claim against the real estate on which the Hurlbut Auto Spa project is located. RSMo. §§ 429.290 and 429.300 do not deny the trial court subject matter jurisdiction to hear the claims of George Weis Company for breach of contract, breach of a fiduciary duty and his claims that he is a third-party beneficiary of the construction escrow agreement.

II. THE TRIAL COURT ERRED BY DISMISSING THE PETITION, WITHOUT A HEARING ON THE MERITS, ON THE GROUNDS THAT THE MECHANIC’S LIEN STATUTE REQUIRES JOINER OF ALL NON-MECHANIC’S LIEN CLAIMS IN ONE LAWSUIT, OR THEY ARE BARRED, AND THEREBY DENIED PLAINTIFF DUE PROCESS OF LAW UNDER THE MISSOURI AND UNITED STATES CONSTITUTIONS BECAUSE PLAINTIFF WAS NOT PROVIDED WITH NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE ITS CLAIMS WERE BARRED.

The standard of review is *de novo*. Point II involves an issue of law, the denial of Plaintiff's constitutional right of due process under the Missouri and United States Constitutions. Plaintiff raised this issue with the trial court in his response to the motion to dismiss, asserting that he would be denied due process of law if the Court ruled that his claims were barred by the Missouri Mechanic's Lien Statute where (1) he is not asserting a claim for a mechanic's lien or any claim against the real estate/real property and (2) where no party asserting a claim, in any prior litigation, had provided George Weis Company with notice of a claim that George Weis Company's claims should be joined with those in another suit, or be barred. (L.F. 38). George Weis Company raised this constitutional issue in its response to the motion to dismiss because of the concurring opinion by former appellate judge Gerald Smith in State ex rel. Kirkwood Excavating, Inc. v Stussie, 689 S.W. 2d 131 at 134-136. (Mo. App. E.D. 185).

George Weis company was not provided with notice by any of the current Defendants, or by any non-party, that its non-mechanic's lien claims would be barred unless asserted in a prior, alleged, equitable mechanic's lien suit, until the October 6, 2005 motion of Hurlbut Investments and Southwest Investments to dismiss which, apparently, was filed after the prior, alleged, equitable mechanic's lien suit was settled and dismissed. On information and belief all four current Defendants were parties to the, alleged, prior equitable mechanic's lien suit. George Weis was not a party to that lawsuit.

Judge Smith's (concurring opinion in State Ex Rel. Kirkwood Excavating, Inc. v Stussie, 689 S.W. 2d 131, 134 and 135 (Mo. App. E.D. 1985) provides:

(at 134)

“This concurring opinion is filed to point out that our intervention by mandamus is necessary because of a disturbing trend in the Missouri case law which appears to allow the destruction of a legitimate contract claim without notice or due process***

(at 135)

Minimal due process should require that before the equitable lien suit can serve as a bar to a non-lien claimant, he should be joined as a party and notified of the existence of the suit and its impact on him. Griffin v Griffin, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 635 (1946); Milliken v Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1944); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).”

See also the United States Constitution, Fourteenth Amendment and the United States Constitution, Fifth Amendment, which provide that no person shall be deprived of life, liberty or property without due process of law. The Fourteenth Amendment extends those principles to state actions. Article I, Section 10 of the Missouri Constitution also provides that no person shall be deprived of life, liberty or property without due process of law. See also Nelson v Adams, USA, Inc., 529 U.S. 460, 466-67, 120 S.Ct. 1579, 1584-85, 146 L.Ed. 2d 530 (2000) where the United Supreme Court held that a sole shareholder of a corporation was denied due process of law when he was added, individually, to ongoing litigation after judgment had been entered against the company he owned, because the trial court was concerned that the corporation might have

insufficient assets to pay the judgment against it. The trial court then proceeded to enter judgment against the individual, sole shareholder, without an additional hearing. The United States Supreme Court reversed, ruling that due process required that the individual shareholder was entitled to notice and a hearing before judgment could be entered against him, reversing the federal circuit opinion reported at 175 F.3d 1343 (Fed. Cir. 1999).

Denial of George Weis Company's non-mechanic's lien claims under these circumstances, based upon the trial court's interpretation of RSMo. § 429.300, violates George Weis Company's constitution right of due process of law under the United States Constitution and under the Missouri Constitution.

III. THE TRIAL COURT ERRED IN DISMISSING THE PETITION BECAUSE IT STATES A CAUSE OF ACTION (1) AGAINST STRATUM DESIGN-BUILD, INC. FOR BREACH OF CONTRACT AND FOR VIOLATION OF THE PROMPT PAYMENT ACT (2) AGAINST TITLE INSURERS AGENCY, INC. FOR BREACH OF ITS FIDUCIARY DUTY IN THE ADMINISTRATION OF THE CONSTRUCTION ESCROW AGREEMENT AND (3) AGAINST HURLBUT INVESTMENTS, LLC AND SOUTHWEST BANK FOR BREACH OF THE CONSTRUCTION ESCROW AGREEMENT, IN THAT PLAINTIFF IS A THIRD-PARTY BENEFICIARY OF THAT AGREEMENT.

The standard of review is whether the petition alleges facts entitling Plaintiff to relief against the respective Defendants under Counts I, II, III and IV. Cridlebaugh v Putnam County State Bank of Milan, 192 S.W. 3d 540, 542-43 (Mo. App. W.D. 2006).

The trial court did not reach the motion of Defendants Hurlbut Investments, LLC and Southwest Bank to dismiss for failure to state a cause of action, because it dismissed the entire petition, against all Defendants, on the grounds that it lacked subject matter jurisdiction. See Points I and II above.

Stratum Design-Build, Inc. did not enter its appearance, though it was duly served, and is in default. Title Insurers Agency, Inc. entered its appearance and filed an answer, but did not file a motion to dismiss.

Defendants, Hurlbut Investments, LLC and Southwest Bank, argued, alternatively, that the petition fails to state a cause of action against them (Counts III and IV), in the event the Court found that it had subject matter jurisdiction, contending that Plaintiff did not allege facts establishing a claim that it is a third-party beneficiary of the construction escrow agreement. The trial court did not reach these issues. Nevertheless, judicial economy warrants a ruling by this court to avoid the possibility of multiple appeals from the same motion to dismiss.

The construction escrow agreement requires Title Insurers Agency, Inc. (“TIA”) to disburse \$1,810,369.83 to pay for the construction improvements on the project in question, and provides that such disbursements shall be made in accordance with the terms of the escrow agreement. The escrow agreement is attached to the petition as Exhibit A. (A-14-20). Stratum Design-Build, Inc., Hurlbut Investments, LLC, TIA and Southwest Bank all signed the construction escrow agreement. (A-19-20). See the first three unnumbered paragraphs of the construction escrow agreement. (A-14). Paragraph 1 (A-14) provides that prior to the first disbursement, TIA **shall** be furnished with a

sworn statement **from the owner** (Hurlbut) and the general contractor, disclosing the contracts and setting forth the names and addresses of the contractors, subcontractors and material suppliers, stating the amounts that have been paid, or are to be paid, together with the amounts due, along with a sworn statement prepared by the general contractor setting forth, in detail, all work and material (broken down by trade categories) necessary to complete construction, together with estimates as to costs and a list of all known subcontractors and material suppliers with copies of the executed contracts or bids.

Paragraph 2 (A-15) requires that prior to each disbursement, TIA **must** be furnished with lien waivers for all sums disbursed (prior to each disbursement) setting forth “the amounts to be received from said disbursement”, along with statements (i.e. invoices), waivers, affidavits, supporting waivers and releases relating to mechanic’s liens, which are reasonable and satisfactory to TIA. Paragraph 4 (A-15) provides that TIA shall, if all the conditions of the escrow agreement have been complied with, **disburse proceeds received from the lender** (Southwest Bank) by delivering to the “persons and/or entities shown in the request for disbursement” its **voucher executed by the owner** (Hurlbut), general contractor and countersigned by TIA in the amount so requested. See ¶ 4 of the construction escrow agreement.

An escrow agent is charged with performance of the express trust governed by the escrow agreement with duties to perform for each of the parties. The escrow agent is “absolutely bound by the terms and conditions of the deposit and charged with strict execution of the duties voluntarily assumed.” H.B.I. Corporation v Jimenez, 803 S.W. 2d 100, 103 (Mo. App. 1990). An escrow agent owes a fiduciary duty to those parties for

whom he holds property. The fiduciary duty is created by the escrow agreement. The breach of such duty constitutes a tort. An escrow agent's failure to strictly follow the terms of the escrow agreement is a breach of his fiduciary duty. A fiduciary must act scrupulously and honestly in carrying out his duties. Eastern Atlantic Transportation and Mechanical Engineering, Inc. v Harry L. Dingman, 727 S.W. 2d 418, 422-23 (Mo. App. 1987). See also Southern Cross Lumber & Millwork Co. v Becker, 761 S.W. 2d 269, 270, 272 (Mo. App. 1988) where an escrow agent was held liable to a supplier which was not a party to the escrow agreement. Under the terms of the escrow agreement, the supplier was to submit signed lien waivers, a statement and a proposed voucher to the escrow agent, which would then return a signed voucher, if funds were available. The supplier could then negotiate the signed voucher as a check. The escrow agent received the final executed lien waiver, statement and voucher, but failed to return a signed voucher/check to the supplier. The Court held that the escrow agent was charged with strict performance of the escrow agreement in favor of the supplier (a non-party to the escrow agreement) and that the escrow agreement established a fiduciary relationship between the escrow agent and the supplier, the breach of which constituted a tort. The Court held that the escrow agent breached its fiduciary duty to the supplier when he did not comply with the terms of the escrow agreement by releasing the signed lien waivers, to the owners/developer without paying the supplier. Although not stated by the opinion, it appears that the supplier was a third-party beneficiary of the escrow agreement, since the supplier was not identified in the opinion as a party to the escrow agreement. The

escrow agreement was between the developer, Guthrel Development Co., the lender, and the escrow agency, James Becker d/b/a Beck Escrow Services.

George Weis Company is a third-party beneficiary of the construction escrow agreement, which requires TIA to disburse \$1,810,369.83 to pay for the construction improvements on the project in question, and provides that such disbursements shall be made in accordance with the terms of the escrow agreement. Third party beneficiary rights depend on, and are measured by, the terms of the contract between the promissor and the promisee. Although it is not necessary that the third-party beneficiary be named in the contract, the terms of the contract must express directly and clearly an intent to benefit an identifiable person or class. It is not necessary for the parties to the contract to have as their primary object the goal of benefiting the third parties, but only that the third parties be primary beneficiaries. L.A.C. v Ward Parkway Shopping Center, Co., 75 S.W. 3d 247, 260 (Mo. Banc. 2002). In L.A.C. v Ward Parkway Shopping Center, Co., the Missouri Supreme Court held that a minor patron of a shopping mall was a third-party beneficiary of a security contract between the mall operators and a security company and that the security company therefore had a duty to take reasonable measures to protect the patron.

Earlier cases have applied third-party beneficiary status to parties on construction projects. Kansas City N.O. Nelson Co. v Mid-Western Construction Company of MO, Inc., 782 S.W. 2d 672, 677 (Mo. App. 1989) held that a subcontractor's supplier was a third-party beneficiary of the subcontract with the general contractor, and was entitled to recover from the general contractor under the terms of the subcontract agreement. See

also J. Louis Crum Corp. v Alfred Lindgren, Inc., 564 S.W. 2d 544, 548 --549 (Mo. App. 1978) where the Court held that one prime contractor was a third-party beneficiary of the contract between another prime contractor and the owner, where both contracts contained a mutual obligation to coordinate the work of the various prime contractors.

Dave Kolb Grading, Inc. v Lieberman Corporation, et al., 837 S.W. 2d 924, 939-941 (Mo. App. 1992) is distinguishable. There the escrow agreement permitted the escrow agent to disburse escrow funds only to the owner of the project, and not to the contractors or suppliers, and the escrow agreement was established to comply with the St. Louis County Building Code requirements for construction of public improvements in relation to a subdivision development. The subdivision developer could either complete the public land improvements, or post a bond, or enter into an escrow agreement to guarantee completion of the public improvement. In contrast, here the escrow agreement was established for the specific purpose of insuring that the construction fund was used to pay for construction costs, and the escrow agent was not to disburse any escrow funds until it received sworn statements listing all the suppliers and subcontractors and a breakdown of all construction costs and statements/invoices before making each specific disbursement. George Weis Company is a creditor third-party beneficiary of the construction escrow agreement in that performance of the promises of the construction escrow agreement will satisfy an actual or supposed or asserted duty of one of the promisees (Stratum Design-Build). Alternatively, George Weis Company is a donee beneficiary of the construction escrow agreement. Kansas City N.O. Nelson Co. v Mid-Western Construction Company of MO, Inc., 782 S.W. 2d 672, 677 (Mo. App. 1989).

TIA breached the terms of the construction escrow agreement by disbursing more than \$1,440,000.00 without first obtaining a sworn statement from the owner and the general contractor disclosing the contracts, subcontracts and setting forth the names and addresses of the contractors and subcontractors and material suppliers and without first obtaining a sworn statement from the general contractor setting forth in detail all work and material necessary to complete construction of the project, and without first obtaining a sworn list of all known subcontractors (which would include George Weis Company) and material suppliers and copies of their executed contracts or bids and by disbursing said funds without first obtaining statements (i.e. invoices) waivers and affidavits relating to the amounts claimed and the amounts paid to the subcontractors and material suppliers. See ¶¶ 17 and 18 of the petition. (A-8-9).

Hurlbut breached the construction escrow agreement by failing to provide TIA with a sworn statement disclosing the contracts and setting forth the names and addresses of the contractors, subcontractors (which includes George Weis Company) and material suppliers that have been paid or are to be paid, together with the amounts paid and the amounts due, and by providing vouchers to TIA signed by Hurlbut, with knowledge that the terms of the construction escrow agreement had not been met, and by disbursing, by permitting to be disbursed, about \$1,400,000.00 from the escrow agreement with knowledge that the terms of the escrow agreement had not been met, and by failing to disburse the full \$1,810,369.83 for the project under the terms of the escrow agreement. See ¶¶ 25-27 (A-10-11) of the petition. TIA, the Bank, and Hurlbut actually approved and issued vouchers for payment, and paid Stratum Design-Build ninety percent of the

amount due for the work performed by George Weis Company, under its subcontract. Stratum Design-Build failed to pay George Weis Company the amount it had received for George Weis Company's work, then went out of business. The construction escrow agreement was established specifically to avoid those circumstances by requiring the names of all suppliers and subcontractors, statements of the amounts claimed and the amounts due, and lien waivers.

Southwest Bank of St. Louis breached the construction escrow agreement by honoring vouchers executed by TIA and Hurlbut and Stratum Design-Build, Inc., with knowledge that TIA and Hurlbut and Stratum Design-Build, Inc. had not complied with the terms of the construction escrow agreement. Under ¶ 4 (A-15) of the construction escrow agreement, Southwest Bank, as lender, is not to pay TIA the principal amount of requested advances until and unless all the terms and conditions of the construction escrow agreement have been complied with to the satisfaction of Southwest Bank. See ¶¶ 35-37 (A-12) of the petition. Southwest Bank also breached the construction escrow agreement by failing to pay the balance of the \$1,810,369.83 construction fund in accordance with and under the terms of the construction agreement. George Weis Company completed all of its subcontract work, but was not paid any amount for that work.

Counts II, III and IV of the petition allege facts establishing a cause of action for breach of a fiduciary duty, and for breach of the construction escrow agreement, and establishing that Plaintiff is a third-party beneficiary of the construction escrow

agreement, against, respectively, Title Insurers Agency, Inc. and Hurlbut Investments, LLC and Southwest Bank of St. Louis.

Count I also states a cause of action against Stratum Design-Build, Inc. for breach of the subcontract agreement between Plaintiff and Stratum Design-Build, Inc. and for violation of the Prompt Payment Act. Stratum Design-Build, Inc. was paid ninety percent of the money it owes Plaintiff under the subcontract agreement, by the owner (through the lender), but failed to pay any amount to Plaintiff. (A-6, ¶¶ 5-7).

CONCLUSION

FOR THE FOREGOING REASONS, Plaintiff-Appellant, George Weis Company, respectfully submits that the judgment, and amended judgment, entered by the trial court, dismissing the petition with prejudice, should be reversed and this case remanded for trial on the merits on all four counts of the petition.



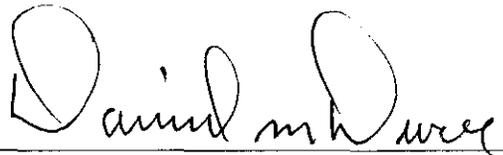
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Attorneys for Plaintiff-Appellant,
George Weis Company

**CERTIFICATION OF COMPLIANCE WITH
SUPREME COURT RULE 84.06(C)**

I certify, to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06, in that it contains less than 15,500 words;
3. Contains 8,172 words, according to Microsoft Word 2000, which is the word processing system used to prepare this brief;
5. That Norton Anti-virus software was used to scan the disks sent to Defendants' attorneys for viruses and certifies disks are virus free; and
6. In lieu of preparing a floppy disk for the court, an **electronic email message**, as provided for under Rule 84.06(g), **with the brief attached**, was **sent to the Clerk** at moapped@courts.mo.gov.



David M. Duree

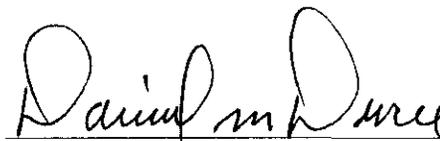
PROOF OF SERVICE

The undersigned hereby certifies that on the 14th day of July, 2006, one copy of Appellant's brief and one copy of a computer disk (in Word format) containing the brief, have been served upon each of the Defendants by placing the same in the United States Mail, first class, postage prepaid, addressed as follows:

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Herren, Dare & Streett
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Attorneys for Receiver for Title Insurers Agency, Inc.



David M. Duree

APPENDIX

In the
CIRCUIT COURT
of St. Louis County, Missouri



For File Stamp Only
FILED
NOV 30 2005
JOAN M. GILMER
CIRCUIT CLERK ST. LOUIS COUNTY

George Weis Co.
Plaintiff(s)
vs.
Stratum Design-Build, Inc., et al
Defendant(s)

11/30/05
Date
05CC-2983
Case Number
13
Division

AMENDED JUDGMENT

Judgment entered on 11/29/05 is amended to dismiss all counts of Plaintiff's Petition with prejudice at Plaintiff's costs. All other aspects of original Judgment remain unchanged.

cc: David Duree
R.C. Wuestling
Eric Krauss
Robert Jones

SO ORDERED

Andrew M. McLean
Judge

ENTERED: 11/30/05
(Date)

Attorney Bar No.

Address

Phone No. Fax No.

Attorney Bar No.

000007

FILED

NOV 29 2005

JOAN M. GILMER
CIRCUIT CLERK OF ST. LOUIS COUNTY

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

GEORGE WEIS COMPANY,)	
)	
Plaintiff,)	
vs.)	Case No. 05-CC-002983
)	
STRATUM DESIGN-BUILD, INC.,)	Division 13
TITLE INSURERS AGENCY, INC.,)	
HURLBUT INVESTMENTS, LLC, and)	
SOUTHWEST BANK OF ST. LOUIS,)	
)	
Defendants.)	

ORDER/JUDGMENT

This matter is before the Court on a Joint Motion to Dismiss Filed by Defendants Hurlbut Investments, Inc., and Southwest Bank of St. Louis. The Motion was called, heard and submitted on November 2, 2005. The Court, having heard the arguments of counsel, having read the memoranda of law filed by the parties, and being now fully advised, enters the following Order/Judgment.

First, the Court takes judicial notice of the case *Dynamic Electric Corp., et al. vs. Stratum Design-Build, et al.*, 03CC-004361, filed in the Circuit Court of St. Louis County on October 27, 2003. *Dynamic* was an equitable mechanic's lien action instituted to determine the rights of various subcontractors involved in the Hurlbut Auto Spa project. Plaintiff herein alleges it provided construction services for the Hurlbut Auto Spa project; however, Plaintiff was not a party to this action.

The Missouri Supreme Court has interpreted the mechanics' lien statute, section 429.300, RSMo., to mean that a contractor or supplier on a construction project cannot recover in a breach of contract suit if a mechanic's lien suit is filed by a different entity which did work on the same job, *unless the breach of contract suit is joined with the mechanic's lien suit.* Clayton Green's

Nursing Center, Inc. v. Marsh, 634 S.W.2d 462 (Mo.banc 1982); State ex rel. Great Lakes Steel Corp. v. Sartorius, 249 S.W.2d 853, 855 (Mo.banc 1952) (Emphasis added). “Once an equitable mechanic’s lien action is brought, it is the *exclusive method of litigating liens and other claims* pertaining to particular property.” Dunn Industrial Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421, 430 (Mo.banc 2003). (Emphasis added.) See also, Drywall Interior Systems Construction, Inc. v. Ladue Building & Engineering Corporation, 857 S.W.2d 523, 524 (Mo.App. E.D. 1993); State ex rel. Kirkwood Excavating Inc. v. Stussie, 689 S.W.2d 131, 133 (Mo.App. E.D. 1985). The original equitable mechanic’s lien action, *Dynamic Electric Corp., et al. vs. Stratum Design-Build, et al.*, 03CC-004361, was dismissed through settlement and is no longer open for any purpose.

The Court is cognizant of the apparent conflict between the Eastern District, see, Drywall Interior Systems, supra, and the Western District, see, Mabin Construction Company, Inc. v. Historic Constructors, Inc., 851 S.W.2d 98 (Mo. App. W.D. 1993); however, the Court feels compelled to follow the decision of the Eastern District.

The Court further finds this is not a situation where Plaintiff had no notice of the equitable mechanic’s lien action or opportunity to intervene therein. To the contrary, Plaintiff was aware of the *Dynamic* case but failed to intervene or move to consolidate its breach of contract action with the equitable mechanic’s lien action.

Thus, the Court finds and concludes that the current action filed by Plaintiff is barred and that this Court lacks subject matter jurisdiction to proceed on this case.

Accordingly, the Joint Motion to Dismiss Filed by Defendants Hurlbut Investments, Inc., and Southwest Bank of St. Louis is hereby GRANTED. Counts III and IV of Plaintiff’s Petition

are dismissed with prejudice. Costs taxed against Plaintiff.

SO ORDERED:

11/29/05
Date

Barbara W. Wallace
Barbara W. Wallace, Judge

cc: David M. Duree
R.C. Wuestling
Eric B. Krauss
Robert C. Jones

IN THE CIRCUIT COURT
FOR ST. LOUIS COUNTY, MISSOURI

GEORGE WEIS COMPANY)
)
Plaintiff,)
v.)
STRATUM DESIGN-BUILD, INC.)
Serve its registered agent:)
David Street)
1051 N. Harrison Avenue)
St. Louis County, MO 63122)
and)
TITLE INSURERS AGENCY, INC.)
Serve its registered agent:)
Thomas C. Kurzenberger)
400 Cerromar Drive)
Eureka, MO 63025 (St. Louis County))
Tel: 636-938-6730)
and)
HURLBUT INVESTMENTS, LLC)
Serve its registered agent:)
Philip H. Hurlbut)
1343 Kingsford Drive)
Florissant, MO 63034)
and)
SOUTHWEST BANK OF ST. LOUIS)
Serve at:)
13205 Manchester Road)
St. Louis County, MO 63131)
Telephone: 314-543-3300)
Defendants.)

Cause No. _____

PLAINTIFF DEMANDS TRIAL BY
A JURY

13

RECORDED

PETITION

COUNT I (BREACH OF CONTRACT AND THE PROMPT PAYMENT ACT)

COMES NOW Plaintiff, George Weis Company, and for Count I of its petition against
Defendant, Stratum Design Build, Inc., states:

1. Plaintiff is a Delaware corporation with its principal place of business in Millstadt, Illinois, and is authorized to do business in the state of Missouri.

2. Defendant Stratum Design-Build, Inc. is a corporation organized and existing under and by virtue of the laws of the state of Missouri.

3. On or before March 18, 2003, Defendant Stratum Design-Build, Inc. entered into a general construction contract with Hurlbut Investments, LLC, as owner, of a project known as the Hurlbut Auto Spa at No. 8 Ellisville Town Center Dr., Ellisville, Missouri, located in St. Louis County.

4. On about March 18, 2003, Plaintiff entered into a subcontract agreement with Stratum Design-Build, Inc. to perform drywall and related work as a subcontractor on said project. The original subcontract amount was \$47,125.00. Thereafter, Stratum Design-Build, Inc. agreed to three change orders, increasing the contract amount by \$7,736.43, to the total sum of \$54,861.43.

5. Plaintiff performed its work as a subcontractor and submitted periodic invoices for that work in the amount of the original subcontract, \$47,125.00, plus authorized extras in the additional sum of \$7,736.43, submitting its final bill in the total sum of \$54,861.43 on or about August 22, 2003.

6. Stratum Design-Build, Inc. billed the owner, Hurlbut Investments, LLC for work performed by Plaintiff, and was paid about \$42,412.50 (ninety percent of \$47,125.00) by the owner for Plaintiff's work.

7. Defendant, Stratum Design-Build, Inc. has failed and refused to pay Plaintiff any amount for the work performed by Plaintiff, although Plaintiff has repeatedly demanded payment.

8. \$54,861.43 is due Plaintiff from Defendant Stratum Design-Build, Inc. for work performed on the project.

9. Plaintiff's work was accepted by Stratum Design-Build, Inc. and by the owner, Hurlbut Investments LLC.

10. Plaintiff is also entitled to recover from Defendant Stratum Design-Build, Inc. interest at the rate of one and one-half percent per month, under RSMo § 431.180(2) from August 22, 2003 until the date of payment, plus reasonable attorneys' fees in the sum of \$30,000.00.

WHEREFORE, under Count I, Plaintiff prays for judgment against Defendant, Stratum Design-Build, Inc. in the sum of \$54,861.43, plus interest at 1½ percent per month on that amount since August 22, 2003, plus attorneys' fees in the sum of \$30,000.00, plus court costs.

COUNT II (BREACH OF FIDUCIARY DUTY)

COMES NOW Plaintiff, George Weis Company, and for Count II of its petition against Defendant, Title Insurers Agency, Inc., states:

11. Plaintiff realleges and incorporates herein by reference ¶¶ 1-10 of Count I as fully set forth above.

12. Defendant, Title Insurers Agency, Inc., is a corporation authorized to conduct, and conducting, a title and escrow business within St. Louis County.

13. On or about October 3, 2002, Title Insurers Agency, Inc. entered into a construction escrow agreement with Hurlbut Investments, LLC (the owner) and Stratum Design-Build, Inc. (the general contractor) and Southwest Bank of St. Louis (the lender) as set forth in Exhibit A (in seven pages) attached hereto and incorporated herein by reference.

14. Title Insurers Agency, Inc. is the escrow agent for the Hurlbut Auto Spa project described in Count I.

15. The purpose of the construction escrow agreement was to use the escrow fund (\$1,810,369.83) to pay for the construction improvements on the Hurlbut Auto Spa. The suppliers and subcontractors of Stratum Design-Build, Inc., including Plaintiff, are primary beneficiaries of the construction escrow agreement. Plaintiff is a third party beneficiary of the construction escrow agreement in that the terms of the contract expressly and clearly intend to benefit the suppliers and subcontractors of Stratum Design-Build, Inc., by providing for payment to them for their labor and materials, and Plaintiff is an identifiable member of that class of beneficiaries (the subcontractors and material suppliers of Stratum Design-Build, Inc.).

16. Defendant, Title Insurers Agency, Inc. owed a fiduciary duty to Plaintiff to perform its obligations as escrow agent under the construction escrow agreement scrupulously, honestly and strictly in accordance with the terms of the construction escrow agreement.

17. Defendant, Title Insurers Agency, Inc. paid out and/or approved payment by executing vouchers to Stratum Design-Build, Inc. and to its suppliers and subcontractors in the sum of approximately \$1,440,000.00, in violation of the terms of the construction escrow agreement, which provides in ¶ 1 that prior to the first disbursement of funds, Title Insurers Agency, Inc. shall be furnished with a sworn statement from the owner and the general contractor disclosing the contracts, setting forth the names and addresses of the contractors, subcontractors and material suppliers that have been paid or are to be paid, together with the amounts paid and amounts due, and with a sworn statement prepaid by the general contractor setting forth in detail all work and material (broken down by trade categories) necessary to complete construction of the improvement together with estimates as to costs and with a sworn

list of all known subcontractors and material suppliers and copies of their executed contracts or bids. Paragraph 2 also provides that prior to each disbursement, Title Insurers Agency, Inc. must be furnished with lien waivers for all sums to be disbursed, setting forth the amounts to be received from said disbursements, and with statements (i.e. invoices), waivers, affidavits and supporting waivers relating to mechanic's liens, reasonable and satisfactory to Title Insurers Agency, Inc.

18. Title Insurers Agency, Inc. breached the terms of the construction escrow agreement by violating each of the provisions described in the preceding paragraph, while disbursing about \$1,440,000.00 under the terms of the construction escrow agreement, thereby breaching its fiduciary duty to Plaintiff.

19. As a direct and proximate result of Title Insurers Agency, Inc.'s breach of its fiduciary duty to the Plaintiff, as set forth above, Plaintiff sustained damages in the sum of \$54,861.43.

20. Title Insurers Agency, Inc.'s breach of its fiduciary duty, as set forth above, was intentional and outrageous, with knowledge that it was violating the terms of the construction escrow agreement, and in conscious disregard of the rights of the suppliers and subcontractors, including the Plaintiff, entitling Plaintiff to recover punitive and exemplary damages in a sum in excess of \$500,000.00.

20. Plaintiff is also entitle to recover from Defendant, Title Insurers Agency, Inc. interest at the rate of 1½ percent per month, under RSMo 431.180(2) from August 22, 2003 until the date of judgment, plus reasonable attorneys' fees in a sum in excess of \$30,000.00.

WHEREFORE, under Count II, Plaintiff prays for judgment against Title Insurers Agency, Inc. in the sum of \$54,861.43, plus interest on that sum at 1½ percent per month from

August 22, 2003 until the date of judgment, plus attorneys' fees in the sum of \$30,000.00, plus punitive damages in the sum of \$500,000.00, plus court costs.

COUNT III (BREACH OF CONSTRUCTION ESCROW AGREEMENT)

COMES NOW Plaintiff, George Weis Company, and for Count III of its petition against Defendant, Hurlbut Investments, LLC, states:

21. Plaintiff realleges and incorporates herein by reference ¶¶ 1-10 as fully set forth in Count I above.

22. Plaintiff realleges and incorporates herein by reference ¶¶ 12-20 as full set forth in Count II above.

23. Defendant Hurlbut Investments, LLC is a limited liability company organized under the laws of the state of Missouri, which at all times herein relevant was the owner of the Hurlbut Auto Spa project described in Counts I and II above.

24. Hurlbut Investments, LLC is a party to the construction escrow agreement attached hereto as Exhibit A.

25. Plaintiff is a third party beneficiary of the construction escrow agreement, for the reasons stated in Count II above.

26. Defendant Hurlbut Investments, LLC breached the construction escrow agreement by failing to provide Title Insurers Agency, Inc. with a sworn statement disclosing the contracts concerning the improvements and setting forth the names and addresses of the contractors, subcontractors and material suppliers that have been paid or are to be paid, together with the amount paid and amounts due, and by providing vouchers to Title Insurers Agency, Inc., signed by Hurlbut Investments, LLC, with knowledge that the terms of the construction escrow agreement had not been met, and by disbursing, and permitting to be disbursed, about

\$1,400,000.00 under the escrow agreement with knowledge that the terms of the escrow agreement, required before each and every disbursement, had not been met, and by failing to disburse the full \$1,810,369.83 under the terms of, and accordance with, the escrow agreement.

27. As a direct result of the breaches of the construction escrow agreement by Defendant Hurlbut Investments, LLC, described above, Plaintiff sustained damages in the sum of \$54,861.43.

28. Plaintiff is also entitle to recover from Defendant, Hurlbut Investments, LLC interest at the rate of 1½ percent per month, under RSMo 431.180(2) from August 22, 2003 until the date of judgment, plus a reasonable attorneys' fees in a sum in excess of \$30,000.00.

WHEREFORE, under Count III, Plaintiff prays for judgment against Hurlbut Investments, LLC in the sum of \$54,861.43, plus interest at 1½ percent per month since August 22, 2003 until the date of judgment, plus attorneys' fees in the sum of \$30,000.00, plus court costs.

COUNT IV (BREACH OF THE CONSTRUCTION ESCROW AGREEMENT)

COMES NOW Plaintiff, George Weis Company, and for Count IV of its petition against Defendant, Southwest Bank of St. Louis, states:

29. Plaintiff realleges and incorporates herein by reference ¶¶ 1-10 as fully set forth in Count I above.

30. Plaintiff realleges and incorporates herein by reference ¶¶ 12-20 as fully set forth in Count II above.

31. Defendant Southwest Bank of St. Louis is a Missouri banking corporation, organized and existing under and by virtue of the laws of the state of Missouri, where it maintains offices and banks within the City of St. Louis and within St. Louis County, Missouri.

32. Defendant Southwest Bank of St. Louis was the lender on the Hurlbut Auto Spa project described in Count I above.

33. Defendant Southwest Bank of St. Louis is a party, as the lender, to the construction escrow agreement attached hereto as Exhibit A.

34. For the reasons set forth in Count II above, Plaintiff is a third party beneficiary of the construction escrow agreement.

35. Paragraph 4 of the construction escrow agreement provides that Southwest Bank of St. Louis, as lender, shall pay Title Insurers Agency, Inc. the principal amount of each requested advance (i.e. payment) "if all the terms and conditions of this agreement have been complied with to the satisfaction of the lender".

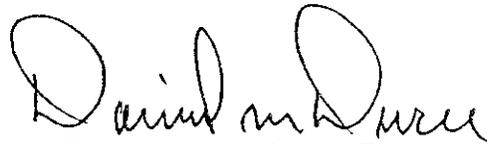
36. Defendant Southwest Bank of St. Louis paid about \$1,400,000.00 to Title Insurers Agency, Inc., by honoring vouchers executed by Title Insurers Agency, Inc., Stratum Design-Build, Inc. and Hurlbut Investments, LLC, with knowledge that Title Insurers Agency, Inc. and Hurlbut Investments, LLC and Stratum Design-Build, Inc. had not complied with the terms of the construction escrow agreement. Defendant Southwest Bank of St. Louis thereby breached the construction escrow account.

37. Defendant Southwest Bank of St. Louis also breached the construction agreement by failing to pay the remaining balance of the \$1,810,369.83 construction escrow fund (a remaining balance of about \$370,000.00) under the terms of, and in accordance with, the construction escrow agreement.

38. As a result of the breaches of the construction escrow agreement by Defendant Southwest Bank of St. Louis, described above, Plaintiff has been damaged in the sum of \$54,861.43.

39. Plaintiff is also entitled to recover from Defendant, Southwest Bank of St. Louis, Inc. interest at the rate of 1½ percent per month, under RSMo 431.180(2) from August 22, 2003 until the date of judgment, plus a reasonable attorneys' fees in a sum in excess of \$30,000.00.

WHEREFORE, under Count IV, Plaintiff prays for judgment against Defendant Southwest Bank of St. Louis in the sum of \$54,861.43, plus interest at 1½ percent per month from August 22, 2003 until the date of judgment, plus attorneys' fees in the sum of \$30,000.00, plus court costs.



David M. Duree, MBN 21003
David M. Duree & Associates, P.C.
P.O. Box 771638
St. Louis, MO 63177-1638
Tel: 314-621-5751
Fax: 314-621-0322

Attorneys for Plaintiff, George Weis Company



Main Office
226 South Meramec, Suite 100
St. Louis, MO 63105

CONSTRUCTION ESCROW AGREEMENT

Commitment/Abstract No. 93036

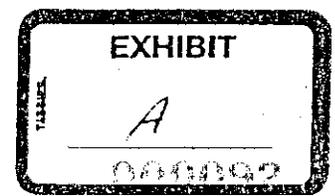
Construction Disbursing No. 9604

TITLE INSURERS AGENCY, INC. (TIA), at the request of Hurlburt Investments, LLC., ("Owner") and Stratum Design & Build, ("Contractor") and Southwest Bank, ("Lender"), will disburse \$1,810,369.83 Dollars from Owner's Equity and the proceeds of a Note (the "Loan") secured by a First Deed of Trust on the premises commonly known as 8 Ellisville Town Centre Dr. and more particularly described in the aforesaid Commitment.

The aforesaid amount shall be used to pay the costs of land and construction improvements erected and to be erected on the above described premises, along with any owner's equity outlined in Exhibit I, attached hereto and made a part hereof.

Disbursements shall be made in according with the terms and conditions hereafter set forth:

- 1. Prior to the first disbursement of loan funds hereunder, TIA shall be furnished with the following:
 - A. Lender and Owner shall request in writing any deletions to Schedule "B" concerning exceptions to the title that will appear in the policies of title insurance to be issued by TIA with respect to the land described above.
 - B. A sworn statement from the Owner(s) and General Contractor, disclosing the contracts entered into concerning the improvements to the herein described property, setting forth the names and addresses of the contractors, subcontractors and material suppliers that have been paid or are to be paid, together with the amount paid and amounts due.
 - C. A sworn statement prepared by the General Contractor setting forth in detail:
 - (i) All work and material (broken down by trade categories) necessary to complete construction of the improvements together with estimates as to costs.
 - (ii) A list of all known subcontractors and material suppliers with copies of executed contracts or bids.
 - D. A spot -foundation survey must be furnished to TIA by Owner prior to disbursement of construction funds.
 - E. A Security Agreement to be recorded as a junior encumbrance to the Lender's Deed of Trust securing the obligation of the Owner under this Agreement.
 - F. Insurance policies, with premium receipts, for the period of construction in favor of the Owner, Contractor, Mortgagee and TIA, as their interests may appear, protecting against perils of workmen's compensation, public liability, property damage and such other insurance policies as required by the Mortgagee



2. Prior to each disbursement of funds, TIA must be furnished:

- A. Payment requisitions or vouchers, executed by the Owner and General Contractor, authorizing payments for labor, material and services.
- B. Lien Waivers for all sums disbursed. The lien waivers shall set forth the amounts to be received from said disbursements, the official capacity of the signatory to the waivers, the name and address of the project, and be properly acknowledged. Each such lien waiver, whether partial or final, must set forth that all lien rights are waived with respect to the total amount disbursed up to and including the last date upon which labor or material was supplied and for which payment was made. It is understood that small expenditures of \$500.00 or less may be supported by invoices and receipts for payment.
- C. Certification of Owner's supervising architect, if any, certifying that the materials, supplies and labor incorporated in the project are in the percentage consistent with the General Contractor's application to Owner for payment.
- D. Statements, waivers, affidavits, supporting waivers and releases relating to mechanics' liens, reasonable and satisfactory to TIA.

3. Upon receipt of each request for disbursement TIA shall make such searches as it deems necessary to determine that the status of the title to the project site has not changed since the date of prior notification given to Lender, and if such status of title has changed, then TIA will give the Lender immediate notice by telephone of any intervening liens or other matters affecting title as disclosed by said records, (other than those expressly listed in the above-referenced commitment, or as may have been approved and accepted by Lender and shown in endorsements or continuations previously given to the Lender). Such telephone notice will be confirmed to Lender in writing by TIA as soon as possible thereafter. If any such intervening liens or other matters affecting title are disclosed, TIA shall withhold payment of the disbursement then being requested until the Lender notifies TIA that it waives such lien or encumbrances or that TIA is satisfied that such intervening lien or other matter is resolved.

4. On each day upon which a disbursement is requested, if all the terms and conditions of this Agreement have been complied with to the satisfaction of the Lender, the Lender shall pay TIA the principal amount of the requested advance. TIA shall, as promptly as possible thereafter, if all the conditions of this Agreement have been complied with in a manner satisfactory to it, disburse the proceeds as received from the Lender by delivering to the persons and/or entities shown in the request for disbursement, its voucher executed by Owner and General Contractor and countersigned by TIA in the amounts so requested. Mortgagee agrees to collect directly from Owner all of its charges, including, but not limited to, loan origination fees and interest due Mortgagee during construction. Further Mortgagee shall not withhold sums related to those payments from the loan funds being made available to TIA under the terms of this Agreement, except those amounts listed in Exhibit 1, hereof.

5. As TIA makes partial disbursement of Mortgage proceeds hereunder, it will automatically increase the amount of the insurance coverage to the total amount disbursed hereunder. Provided there are no intervening liens or other matters of title requiring notice to Lender pursuant to Paragraph 3, above, TIA shall not be required to furnish Lender with an interim certification endorsement, but by making any disbursement hereunder TIA does hereby agree with the Lender that TIA is insuring the Lender against loss or damage which the Lender shall sustain by reason of any inaccuracy in the above-referenced commitment and/or any endorsement thereto.

6. The undersigned hereby agree to all the conditions of this Agreement and agree as follows:

- A. Owner, General Contractor and Lender agree that agents and employees of TIA shall have the right to enter upon the premises at any time for inspection purposes.

- B. Owner agrees to cause to be constructed the improvements described in accordance with all loan documents entered into with Lender and with the agreement entered into with the General Contractor. General Contractor agrees that such construction shall be free of liens imposed by law for service, labor and material.
- C. Owner, General Contractor agree that the scope of work contemplated in this Agreement is delineated in those plans for construction as submitted to TIA and referenced in the Construction Contract.
- D. Owner and General Contractor each agree to indemnify and hold TIA harmless from all loss or damage of any nature which TIA may sustain resulting from the negligent act or omissions of the indemnifying party, as the case may be, in the performance of each of their respective obligations under this contract. Loss or damage shall include reimbursement of reasonable attorneys fees.
- E. Conditioned upon payment being made to General Contractor when due and payable in accordance with the terms of the Construction Contract, including change orders issued thereunder and approved, for all labor, services, materials and equipment furnished thereunder by General Contractor and/or its subcontractors, or at General Contractor's request, General Contractor agrees to construct the improvements described in and in accordance with said construction contract, free and clear of mechanics liens for such all labor, services, materials and equipment. In the event that any provision of the construction contract between General Contractor and Owner conflict with any provision of this Agreement, the terms of this construction contract shall prevail.
- F. Owner, General Contractor and Lender agree that the functions and duties assumed by TIA include only those described in this Agreement. TIA does not insure that the improvements will be completed nor does it insure that the building, when completed, will be in accordance with the plans and specifications, nor does it make the certifications of the supervising architect its own, nor does it assume any liability for the same other than procurement of documentation as one of the conditions precedent to each disbursement. Upon and after default hereunder, TIA, at its election, may make payments directly for any item required to be paid hereunder without first securing approval of Owner and/or Contractor.
- G. Lender hereby agrees that it will disburse all funds loaned in connection with this transaction through TIA and will notify TIA of any additional contracts for work of which it becomes aware. The architect/engineer, however, may be paid directly by the Owner with notification of such payments and appropriate lien waivers given to TIA.
- H. Owner agrees that they will not transfer title to the property insured by TIA, as agent for Chicago Title Insurance Co., under the above-referenced commitment, nor enter into additional contracts for work beyond the amount of \$1,810,369.83 without the consent of TIA. General Contractor agrees not to perform any additional work beyond the contract already executed in the amount of \$1,810,369.83 unless change orders are submitted and approved by Owner and TIA. Notwithstanding anything to the contrary contained herein, in the event TIA reasonably determines that the available loan funds are not sufficient to pay all of the cost necessary to complete the construction, TIA, at its option, may require additional escrow funds to be deposited as a condition of continuing disbursements.
- I. Owner and General Contractor hereby request that TIA issue its mortgagee's policy or policies of title insurance to Lender without exception therein as to any unfiled mechanic's or materialmen's liens, and in consideration thereof and as inducement therefor, said parties do hereby jointly and severally indemnify and hold harmless TIA from any all loss, cost, damage and expense of every kind including reasonable attorney's fees, which TIA shall or may suffer or incur or become liable for under its policy or policies now to be issued to Lender arising directly or indirectly out of or on account of any such mechanic's or materialmen's liens, or claim or in connection with its enforcement of its rights under this Agreement. All representations, agreements of indemnity and waivers are also to the benefit of any

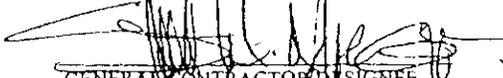
party insured under this policy issued by TIA and any action brought hereunder may be instituted in the name of TIA or said insured or both.

- J. Owner and General Contractor acknowledge that TIA must be furnished with all voided vouchers spoiled during the course of construction and all unused vouchers at the completion of construction. Failure to comply with this requirement may result in delay of receipt of funds to Owner and/or General Contractor under this Agreement.
- K. In the event that TIA undertakes to perform any act or service not required under this Agreement, including, but not limited to, inspection or review of the progress of construction, such additional act or service shall be deemed an accommodation to the parties hereto and shall not increase or extend the liability of TIA beyond that expressly assumed hereunder.
- L. Owner hereby permits TIA to erect a sign on the above described property indicating TIA as the insurance provider/agent and disbursing agent. Owner, General Contractor and Lender agree that TIA may utilize photographs and descriptive information on this project for marketing purposes.
- M. A fee of .25% of the amount disbursed in excess of the original construction contract amount shall be paid by Owner to TIA.
- N. Notwithstanding anything herein contained to the contrary, in the event TIA is served a notice by anyone that they hold a security interest executed by either the General Contractor or Owner, and demands that TIA pay over any funds in their possession to said Lender pursuant to Section 9-502 or any other provisions of the Uniform Commercial Code, then and in that event TIA is released from any and all liability incurred by it under this Agreement, except as to funds previously disbursed by TIA. However, in the event TIA is supplied with a proper release, satisfactory to it, that said notice and the demand for payment on TIA is released in full, then and in that event TIA will resume disbursing funds delivered to it pursuant to the terms of this Agreement and its liability hereunder will then remain in full force and effect.
- O. TIA shall accept and disburse funds in accordance with the terms of this Agreement, and will hold harmless Mortgagee against any loss, cost or liability on account of labor, services and materials furnished by the General contractor, subcontractors, suppliers and others for items of construction paid for by TIA out of funds deposited hereunder. However, TIA shall have no liability hereunder arising from any other mechanic's or materialmen's liens or claims of liens, and is under no duty, liability or obligation to defend any suit filed to enforce a mechanic's lien against the property herein described, which mechanic's lien arises by reason of work, labor or material supplied to the project, which is not provided for in the contract and/or the construction cost breakdown recited in Paragraph 1B of this Agreement. The defense of any such mechanic's lien and suit filed to enforce same is the obligation of the Owner and/or General Contractor, as the case may be.
- P. Owners agree that General Contractor is authorized to initiate draw requests orally and that upon receipt of such request for funds TIA shall promptly thereafter draw funds from Lender. In no event shall TIA be responsible for any interest incurred by Owner with regards to funds that are transferred to TIA and not paid out for any reason.
- Q. The Loan referred to in this agreement shall mean the Construction Loan exclusively, and shall not refer to any permanent loan or "take-out" loan.
- R. The obligations of TIA under this agreement are exclusively as Disbursing Agent and not as Title Insurance Agent. Separate arrangements must be made for title insurance for Owner and Mortgagee.

OWNER'S AUTHORIZATION

The signature (s) of any of the following individual(s) is acceptable as authorization to pay construction vouchers:


OWNER DESIGNEE


GENERAL CONTRACTOR DESIGNEE

The manner of disbursement shall be direct payment of sub-contractors and suppliers by TIA

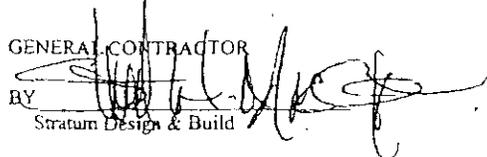
THE UNDERSIGNED acknowledge acceptance of and agreement to the terms contained in this Agreement on this 3rd day of October, 2002

TITLE INSURERS AGENCY, INC.

BY 
Thomas B. Kurzenberger, Construction Disbursing Manager

OWNER

Hartbut Investments, LLC.

GENERAL CONTRACTOR
BY 
Stratum Design & Build

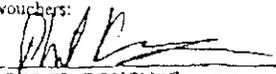
LENDER
BY 
Southwest Bank

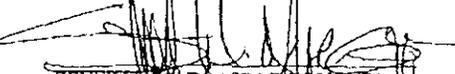
GUARANTY

The undersigned hereby jointly and severally guarantee the performance of the General Contractor under this Agreement.

OWNER'S AUTHORIZATION

The signature (s) of any of the following individual(s) is acceptable as authorization to pay construction vouchers:

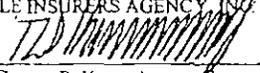

OWNER DESIGNEE


GENERAL CONTRACTOR DESIGNEE

The manner of disbursement shall be direct payment of sub-contractors and suppliers by TIA

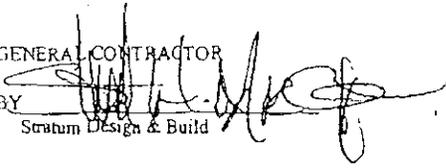
THE UNDERSIGNED acknowledge acceptance of and agreement to the terms contained in this Agreement on this 3rd day of October, 2002

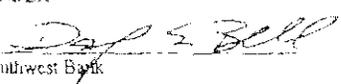
TITLE INSURERS AGENCY, INC.

BY 
Thomas B. Kurzenberger, Construction Disbursing Manager

OWNER

Harbut Investments, LLC.

GENERAL CONTRACTOR
BY 
Stratum Design & Build

LENDER
BY 
Southwest Bank

GUARANTY

The undersigned hereby jointly and severally guarantee the performance of the General Contractor under this Agreement.