

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

REPLY BRIEF OF APPELLANT

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

Attorney for Plaintiff-Appellant,
George Weis Company

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REPLY 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.

Defendants, Hurlbut Investments, LLC (“Hurlbut”) and Southwest Bank of St. Louis (“Southwest”) argue that the standard of review is abuse of discretion, citing James v Poppa, 85 S.W. 3d 8, 9 (Mo. banc 2002). See pp. 8-9 of Hurlbut and Southwest’s brief. Defendant, Stratum Design-Build, Inc. (the general contractor) and Title Insurers Agency, Inc. (the escrow agent), did not file a brief.

The standard of review for issues of law is *de novo*, and for findings of fact (by a judge) is abuse of discretion.

A primary issue presented in this appeal is whether a prior equitable (meaning more than one claimant) mechanic’s lien action precludes the Circuit Court from exercising subject matter jurisdiction over a subsequent (timely) action which does not

seek to enforce a mechanic's lien, but concerns the same construction project as the prior equitable mechanic's lien action.

The trial court recognized that there is a conflict of authority on this question as reflected by the decisions of the Missouri Court of Appeals, Eastern District in Drywall Interior Systems Construction, Inc. v Ladue Building & Excavating Corp., 857 S.W. 2d 523, 524 (Mo. App. E.D. 1993) and the Western District in Mabin Construction Company, Inc. v Historic Constructors, Inc., 851 S.W. 2d 98, 100-102 (Mo. App. W.D. 1993). See page A-3 of the appendix to Appellant's opening brief (p. 2 of the trial court's decision). The trial court elected to follow Drywall Interior Systems Construction, Inc. v. Ladue Building & Excavating Corp., 857 S.W. 2d 523, 524 (Mo. App. E.D. 1993) (A-3). That decision involves an issue of law, not findings of fact.

A primary issue is whether RSMo §§ 429.290 and 429.300 denies subject matter jurisdiction to the circuit court over the current action (which does not seek to enforce a mechanic's lien) because there was a prior, equitable (involving more than one Claimant) mechanic's lien action concerning the same construction project. Appellant-Plaintiff, George Weis Company, was not a party to the prior equitable mechanic's lien action, and the trial court did not find, as a fact, that it was. To the contrary, the trial court correctly found that George Weis Company was not a party to the prior, equitable mechanic's lien action. (A-2).

On their face, RSMo §§ 429.290 and 429.300 apply to actions seeking to enforce mechanic's liens, but do not apply to actions (even those arising from the same construction project as a prior equitable mechanic's lien action) that do not seek to

enforce a mechanic's lien. The statutes are set forth at pp. 5 and 6 of the appendix to Hurlbut and Southwest's brief and, in relevant part, at p. 19 of the opening brief of Plaintiff-Appellant, George Weis Company.

The trial court's decision on this point determines a question of law, i.e. interpretation and application of RSMo §§ 429.290 and 429.300 to the current petition, which does not seek to enforce a mechanic's lien, but instead seeks money damages for breach of contract, breach of a fiduciary duty and breach of the construction escrow agreement. 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 Airlines, Inc. v Dir. of Revenue, 908 S.W. 2d 353, 355 (Mo. banc 1995).

In James v Poppa, 85 S.W. 3d 8, 9 (Mo. banc 2002), the principal case that Hurlbut and Southwest rely on for the standard of review, the factual issue was whether the Defendant was an independent doctor over which the circuit court had jurisdiction, or whether the Defendant was a servant or agent for the Plaintiff's employer, Heartland Hospital. If the Defendant, Dr. Poppa, treated the Plaintiff as an agent of Plaintiff's employer, Heartland Hospital, the Plaintiff's claims against Dr. Poppa would be barred by the Worker's Compensation Act, RSMo § 287.120. The issue before the trial court was whether Dr. Poppa was an agent of Heartland Hospital, which would deny the circuit court jurisdiction of the claim against him, or whether he was an independent physician

who was not protected by the Worker's Compensation Act by reason of his relationship to the Plaintiff's employer, and therefore could be sued in the circuit court. That issue, whether Dr. Poppa was an independent physician or an agent of the hospital, was a question of fact and the standard of review was abuse of discretion. Since the petition did not allege that Dr. Poppa was an agent of Heartland Hospital, and there was no evidence in the record suggesting that he was an agent, the decision of the circuit court dismissing Plaintiff's action against Dr. Poppa on the grounds that he was protected by the Worker's Compensation Act was reversed. The issue before the trial court was not the proper interpretation of the Worker's Compensation Act, but whether Dr. Poppa was an agent of the Plaintiff's employer, or an independent physician.

In contrast, the issue before the Court in the case at bar is the proper interpretation and application of the Missouri Mechanic's Lien Act. That clearly presents an issue of law and the standard of review is *de novo*. The trial court did not have discretion to interpret and apply RSMo §§ 429.290 and 429.300 to bar a non-mechanic's lien action on the grounds that it should have been included with a prior equitable mechanic's lien action. The standard of review is *de novo*.

It is unclear how the trial court determined that Plaintiff, George Weis Company, was aware of the prior equitable mechanic's lien action. See A-3. The trial court took judicial notice of the prior equitable mechanic's lien action. A-2. However, the trial court did not identify any specific material in that file which would reflect that George Weis Company had knowledge of the prior equitable mechanic's lien action. See A-3. Hurlbut and Southwest argue that the Court could have made this determination of

George Weis Company's notice of the prior equitable mechanic's lien action simply because they make that statement in their unverified motion to dismiss. See p. 13 of Hurlbut and Southwest's brief and the last sentence in ¶ 1 of their unverified motion to dismiss, L.F. 51. The position of Plaintiff-Appellant, George Weis Company, however, does not depend upon that determination of fact. It is the position of George Weis Company that the Mechanic's Lien Statue does not require the joinder of non-mechanic's lien actions with a prior equitable mechanic's lien suit, irrespective of whether the current (non-mechanic's lien) Plaintiff knows of the pendency of the prior, equitable, mechanic's lien action. To the contrary, the purpose of RSMo §§ 429.290 and 429.300 was to require all parties asserting a mechanic's lien claim against the real estate to join in the same, equitable, mechanic's lien action, to avoid competing actions to foreclose on the same parcel of real estate. See State ex rel Kirkwood Excavating, Inc. v Stussie, 689 S.W. 2d 131, 135 (Mo. App. E.D. 1985), where Judge Gerald Smith stated in his concurring opinion:

“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.**”

See also Mabin Construction Company, Inc. v. Historic Constructors, Inc., 851 S.W. 2d 98, 100 (Mo. App. W.D. 1993).

It is significant that the Missouri Supreme Court cited Mabin Construction Company, Inc. v Historic Constructors, Inc., 851 S.W. 2d 98, 100 (Mo. App. W.D. 1993)

with approval, while failing to cite Drywall Interior Systems Construction, inc. v Ladue Building & Excavating Corp., 857 S.W. 2d 523, 524 (Mo. App. E.D. 1993). Mabin Construction Company v Historic Constructors and Drywall Interior Systems V Ladue Building & Excavating Corp. are the only two cases that have decided the precise point at issue in this appeal, i.e. whether the failure to join a timely non-mechanical lien petition with a prior, now settled, equitable mechanic's lien action arising from the same project, to which the current Plaintiff was not a party, denies jurisdiction to the circuit court to hear the current non-mechanic's lien action. See p. 22 of the opening brief of Plaintiff-Appellant for the quote by the Missouri Supreme Court in Dunn Industrial Group, Inc. v City of Sugar Creek, 112 S.W. 3d 421, 430 (Mo. banc 2003), holding that the purpose of the equitable mechanic's lien action is to enforce multiple mechanic's lien claims filed against the same real estate and to adjudicate all conflicting liens, encumbrances or other interests in the property. The Supreme Court cited Mabin Construction Company v Historic Constructors, Inc., 851 S.W. 2d 98, 100 (Mo. App. W.D. 1993) for that general rule. See p. 22 of Appellant's opening brief.

The Missouri Supreme Court cited Mabin Construction Company v Historic Constructors, Inc., 851 S.W. 2d 98 (Mo. App. W.D. 1993) with approval in Dunn Industrial Group, Inc. v City of Sugar Creek, 112 S.W. 3d 421 (Mo. banc 2003), while failing to cite Drywall Interior Systems Construction, Inc. v Ladue Building & Excavating Corp., 857 S.W. 2d 523 (Mo. App. E.D. 1993) for good reason. The statute itself clearly does not deny jurisdiction to the circuit courts to hear post-equitable mechanic's lien action cases that do not seek to impose or enforce a mechanic's lien (or

other lien) against real property. RSMo § 429.290 provides that an equitable mechanic's lien action (involving more than one mechanic's lien claimant) shall be exclusive of other remedies "for the enforcement of mechanic's liens" and RSMo § 429.300 provides that once an equitable mechanic's lien action is filed "all other suits that may have been brought on any mechanic's lien claim or demand shall be stayed and no further prosecuted". Nothing in the Mechanic's Lien Act requires that actions seeking breach of contract, but not seeking to enforce a mechanic's lien, may only be filed and prosecuted as part of an equitable mechanic's lien action. There is no risk from such non-mechanic's lien actions that competing lawsuits will seek to foreclosure on the same parcel of real estate.

All Defendants to the current action were parties to the prior equitable mechanic's lien suit, and Title Insurers Agency and Stratum Design-Build were parties to both the predecessor suit and the current suit filed by George Weis Company. Hurlbut and Southwest had the same knowledge of the two successive lawsuits filed by George Weis Company that the trial court found George Weis Company to have of the prior equitable mechanic's lien action. None of these parties moved to consolidate either action filed by George Weis Company with the prior equitable mechanic's lien action while the equitable mechanic's lien action was still pending. Hurlbut and Southwest did not raise this as an issue, in the current case, until after the prior equitable mechanic's lien action had been settled and dismissed.

The trial court erred as a matter of law in dismissing the current non-mechanic's lien action under RSMo §§ 429.290 and 429.300.

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 JOINDER 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* because it involves an issue of law, the denial of Plaintiff's constitutional right of due process under the Missouri and United States Constitution.

Even if the trial court's finding that Appellant-Plaintiff, George Weis Company, had notice of the equitable mechanic's lien action before it was settled and dismissed (A-3) is upheld simply because Hurlbut and Southwest stated that in the last sentence of ¶ 1 of their unverified motion to dismiss (L.F. 51, ¶ 1), it is undisputed that none of the current Defendants, or any of the parties in the prior equitable mechanic's lien action, or anyone else provided George Weis Company with notice that its non-mechanic's lien claims would be barred unless joined with the mechanic's lien claims in the prior equitable mechanic's lien action until it was too late for George Weis Company to seek joinder with the prior equitable mechanic's lien action. This was raised in George Weis Company's response to the motion to dismiss (his first opportunity to raise this issue). L.F. 38. See p. 26 of Appellant's opening brief. The trial court did not address the

constitutional issue. There was no evidentiary hearing in the trial court. The motion of Hurlbut and Southwest to dismiss was briefed and orally argued (the oral argument was not recorded), then subsequently decided by the court's orders of November 29 and November 30, 2005. (A-1; A-2).

There was no finding by the trial court that George Weis Company was provided notice (before it was too late) that his failure to join the prior equitable mechanic's lien action would result in barring his non-mechanic's lien claims.

All Defendants to the current action were parties to the prior equitable mechanic's lien suit, and Title Insurers Agency and Stratum Design-Build were parties to both the predecessor suit and the current suit filed by George Weis Company. Hurlbut and Southwest had the same knowledge of the two successive lawsuits filed by George Weis Company that the trial court found George Weis Company to have of the prior equitable mechanic's lien action. None of these parties moved to consolidate either action filed by George Weis Company with the prior equitable mechanic's lien action while the equitable mechanic's lien action was still pending. Hurlbut and Southwest did not raise this as an issue, in the current case, until after the prior equitable mechanic's lien action had been settled and dismissed.

Judge Gerald Smith previously suggested, in his concurring opinion in State ex rel. Kirkwood Excavating, Inc. v Stussie, 689 S.W. 2d 131, 134-135 (Mo. App. E.D. 1985), that minimum due process requires 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. See also p. 27 of Appellant's opening brief and Nelson v. Adams, USA, Inc., 529 U.S. 460, 466-67, 120 S. Ct. 1579, 1584-85, 146 L.Ed. 2d 530 (2000).

Minimum due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution require that George Weis Company should have been joined as a party to the prior equitable lien action, and notified of its impact on George Weis Company, before the resolution of that lawsuit (George Weis Company was not a party to that lawsuit) could bar George Weis Company's non-mechanic's lien claims. State ex rel. Kirkwood Excavating, Inc. v Stussie, 689 S.W. 2d 131, 134-35 (Mo. App. E.D. 1985).

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 parties agree that the standard of review for Point III is whether the petition alleges facts entitling the Plaintiff to relief against the respective Defendants under Counts I, II, III and IV of the petition.

At p. 24 of their brief, Hurlbut and Southwest suggest that Appellant presents terms and requirements of the construction escrow agreement that are not contained in the petition. The construction escrow agreement was attached to the petition as Exhibit A and incorporated by reference. (A-7, ¶ 13). The terms of the construction escrow agreement were before the Court as part of the petition.

The latest case decided by the Missouri Supreme Court on third-party beneficiary contract claims is L.A.C. v Ward Parkway Shopping Center, Co., 75 S.W. 3d 247, 260 (Mo. banc 2002). It is not necessary for the parties to the contract to have as their primary object the goal of benefiting 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). The 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. The security contract did not contain express language that it was intended for the benefit of the mall patrons or that it was created specifically for the protection of mall patrons.

In the case at bar, the construction escrow agreement specifically provides that the escrow agent, Title Insurers Agency, Inc. (“TIA”), **shall** be furnished with a sworn statement **from the owner** (Hurlbut) and the general contractor (Stratum Design-Build) 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 contingent lien waivers for all sums disbursed (prior to each disbursement) setting forth “the amounts to be received from each said disbursement”, along with the statements (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) 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. Under ¶ 4 (A-15) Southwest, as lender, was not to pay TIA the principal amount of requested advances until and unless all terms and conditions of the construction escrow agreement had been complied with to the satisfaction of Southwest. See ¶¶ 35-37 (A-12) of the petition.

Hurlbut, Southwest and TIA disbursed about \$1,400,000.00 under the escrow agreement, with knowledge that none of these requirements of the escrow agreement had been met. See ¶¶ 25-27 and 35-37 of the petition (A-10-11; A-12).

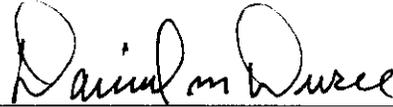
Plaintiff alleged facts establishing a breach of fiduciary duty by TIA, as the escrow agreement, by failing to honestly and scrupulously carry out its duty under the terms of the escrow agreement. See H.B.I. Corporation v. Jimenez, 803 S.W. 2d 100, 103 (Mo.

App. 1990); Eastern Atlantic Transportation and Mechanical Engineering, Inc. v Harry L. Dingman, 727 S.W. 2d 418, 422-23 (Mo. App. 1987); Southern Cross Lumber & Millwork Co. v Becker, 761 S.W. 2d 269, 270, 272 (Mo. App. 1988); Kansas City N.O. Nelson Co. v Mid-Western Construction Company of MO, Inc., 782 S.W. 2d 672, 677 (Mo. App. 1989) and J. Louis Crum Corp. v Alfred Lindgren, Inc., 564 S.W. 2d 544, 548-549 (Mo. App. 1978).

The petition, including the attached construction escrow agreement, also sufficiently alleges facts to establish a litigable claim against Defendants Southwest and Hurlbut on the basis of Plaintiff's status as a third-party beneficiary of the construction escrow agreement. Stratum Design-Build, Inc., Title Insurers Agency, Inc., Hurlbut Investments, LLC and Southwest Bank of St. Louis are all parties to the construction escrow agreement. The obvious purpose of the construction escrow agreement is to insure that the construction fund is used to pay the suppliers and subcontractors of Stratum Design-Build, Inc. for work performed on the Hurlbut Auto Spa.

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.



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-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 reply 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 3,875 words;
3. Contains 3,548 words, according to Microsoft Word 2000, which is the word processing system used to prepare this reply 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 reply brief attached**, was sent to the Clerk at moapped@courts.mo.gov.



David M. Duree

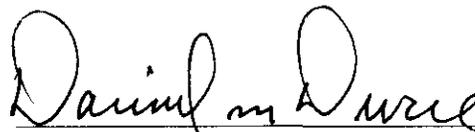
PROOF OF SERVICE

The undersigned hereby certifies that on the 25th day of August 2006, one copy of Appellant's reply brief and one copy of a computer disk (in Word format) containing the reply 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:

Mr. David T. Streett
Herren, Dare & Streett
1051 North Harrison Avenue
St. Louis, MO 63122
Attorneys/Registered Agent for
Defendant-Respondent, Stratum Design-Build, Inc.

Mr. Eric B. Krauss
Wuestling & James, LC
720 Olive Street, Suite 2020
St. Louis, MO 63101
Attorneys for Defendants, Hurlbut
Investments, LLC and Southwest Bank of St. Louis

Mr. Adam R. Lorenz
Jones, Haywood, Bick, Kistner
& Jones, P.C.
7700 Bonhomme Avenue, Suite 200
Clayton, MO 63105
Attorneys for Receiver for Title Insurers Agency, Inc.



David M. Duree