

**STATE OF MINNESOTA  
COUNTY OF SCOTT**

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**DISTRICT COURT  
FIRST JUDICIAL DISTRICT**

In re M.W. Johnson Construction, Inc.,  
Mechanic's Lien Foreclosure Litigation

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Master Court File No. 70-CV-09-7343

Stewart Plumbing, Inc.,

Individual Consolidated Case  
Court File No. 70-CV-09-8051

Plaintiff,

vs.

Original Court File No. 27-CV-08-22702

Peter A. Lucs, Emily Beth Dutot, Mortgage  
Electronic Registration Systems, Inc., XYZ  
Corporation, ABC Partnership, John Doe  
and Mary Roe,

**FILED**

**ORDER**

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Defendants.

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SCOTT COUNTY COURTS

The above-entitled matter came before the Honorable Jerome B. Abrams, Judge of District Court, on October 22, 2009, at the Scott County Courthouse, Shakopee, Minnesota for a court trial. Susanne Glasser, Attorney at Law, appeared as counsel for and on behalf of the Plaintiff. Steve Little, Attorney at Law, appeared as counsel for and on behalf of the Defendants Peter A. Lucs, Emily Beth Dutot, and Mortgage Electronic Registration Systems, Inc. Other appearances were as noted on the record.

At the end of trial, the Court granted the parties an opportunity to submit simultaneous letter briefs and proposed findings. These submissions were originally scheduled to be due on October 30, 2009. Upon the joint request of counsel, the Court extended the deadline until November 2, 2009. After receiving the submissions of the parties, the matter was taken under advisement.

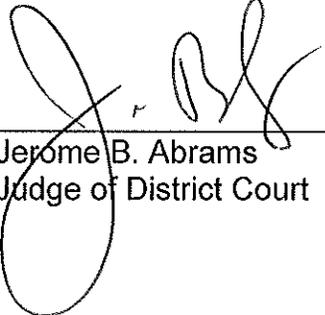
Based upon the proceedings, this Court makes the following:

**ORDER**

1. Plaintiff's request to foreclose its mechanic's lien is DENIED. Judgment on Plaintiff's mechanic's lien claim shall be entered in favor of the Defendants. The Notice of Lis Pendens filed on September 3, 2008 at 3:46 p.m. with the Hennepin County Recorder's Office, document number 9178693, against the property known as Lot 3, Block 1, Heritage Park Housing 2<sup>nd</sup> Addition, Hennepin County, Minnesota (commonly described as 1208 10<sup>th</sup> Avenue North, Minneapolis, MN 55411) shall be discharged.
2. Judgment shall be entered in Defendants' favor on Plaintiff's unjust enrichment claim.
3. Judgment shall be entered in Plaintiff's favor on Defendants' slander of title counterclaim.
4. The attached memorandum is incorporated herein by reference.

Dated: 11-19-09

**BY THE COURT:**

  
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Jerome B. Abrams  
Judge of District Court

## MEMORANDUM

This case is one of twenty three mechanic's lien foreclosure actions involving M.W. Johnson Construction, Inc. that was assigned to the Court by Order of the Minnesota Supreme Court. In re M.W. Johnson Construction, Inc., Mechanic's Lien Foreclosure Litigation, A09-454 (March 31, 2009). Of those twenty three cases, this is the only one that was not resolved through a stipulated agreement or by summary judgment.<sup>1</sup>

The issue presented in this case, *Stewart Plumbing, Inc. v. Lucs, et al.*, 70-CV-09-8051, is whether warranty work done by Stewart Plumbing upon the residence located at 1208 10<sup>th</sup> Avenue North, Minneapolis, Minnesota<sup>2</sup> (the "Residence") revived the mechanic's lien. Stewart Plumbing provided plumbing materials and labor for the construction of the Residence. As part of this work, one of Stewart Plumbing's employees provided job information to Construction Lien Experts Inc. who prepared a mechanic's lien statement on Stewart Plumbing's behalf. Construction Lien Experts Inc. ("Construction Lien Experts") filed this mechanic's lien statement with the Hennepin County Recorder on October 12, 2007 (the "October 12<sup>th</sup> Lien Statement"). Exhibit 2 (Document No. 9051989).

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<sup>1</sup> Although the Court is still awaiting a signed stipulation for dismissal on behalf of Ryan Contracting Co., the Court was shown a copy of correspondence between counsel during the pre-trial conference indicating a resolution had been reached and a stipulation for dismissal would be forthcoming.

<sup>2</sup> The residence consists of property identified both on a torrens and an abstract basis and is legally described as follows:

Torrens:

All that part of Lot 3, Block 1, Heritage Park Housing 2d Addition, embraced within Outlot A, Bethune First Addition, according to the recorded plat thereof; and

Abstract:

All that part of Lot 3, Block 2, Heritage Park Housing 2d Addition, Except that part embraced within Outlot A, Bethune Frist Addition, according to the recorded plat thereof.

## **October 12<sup>th</sup> Lien Statement**

The October 12<sup>th</sup> Lien Statement stated the value of the materials and labor provided was \$13,649.35. Id. It also states the first date of work was March 21, 2007 and the last date of work was August 14, 2007. Id. The last date of work provided to Construction Lien Experts and included within the mechanic's lien statement was incorrect. Upon learning of this error from the Department of Labor and Industry (DOLI), Scott Stewart (Stewart), president of Stewart Plumbing, filed a Release of Mechanic's Lien ("Release") on December 26, 2007 that released Stewart Plumbing's interest set forth in the October 12<sup>th</sup> Lien Statement. Exhibit 3 (Document No. 4456734). The Release specifically stated that it "shall in no way extinguish, release or otherwise alter any other remedies or causes of action of Stewart Plumbing, Inc. against Peter Lucs, Emily Dutot or M.W. Johnson Construction, Inc." Id.

## **Warranty Work**

As part of the home building process, M.W. Johnson Construction had developed a one year review walk through. The purpose of this walk through was for the home buyer to identify any problems with the construction that had been discovered after moving in but before expiration of the one year statutory warranty period. The home buyers, Peter Lucs ("Lucs") and Emily Dutot ("Dutot"), identified problems to a M.W. Johnson Construction employee during the walkthrough. Lucs specifically identified the following plumbing issues for review and repair to this employee:

1. Low flow on the sink faucet in the master bath;
2. A creaking sound from the tub in the other upstairs bath; and
3. At least one of the toilets was running at random times.

The M.W. Johnson Construction employee who received the complaints scheduled a

repair with Stewart Plumbing.<sup>3</sup>

On June 27, 2008 Kent of Stewart Plumbing responded to M.W. Johnson Construction's work order request and performed the scheduled repair. Kent removed a kinked water line that was causing the low flow problem on the sink faucet in the master bath, replaced an aerator, sprayed some foam underneath the tub in the other upstairs bath to prevent the creaking noise, removed and replaced the stop on the tub, and took a look at the toilets. Lucs testified he was told there was no repair for the toilet running problem which had been identified; that was just how the toilets operated. Kent estimated he spent 30 to 45 minutes working on the Residence.<sup>4</sup> Lucs estimated the time at 20 to 30 minutes. Stewart estimated the total cost to Stewart Plumbing for Kent's work at about \$265.50; \$160 per hour for 1.5 hours plus material costs of \$10 for spray foam, \$0.50 for an aerator, and \$15 for a tub drain.

### **July 22<sup>nd</sup> Lien Statement**

Stewart testified that Stewart Plumbing had to do the work because it was required by their contract with M.W. Johnson Construction and the statutory state warranty law. See Minn. Stat. § 327A.02, subd. 1. They did not charge for the work because it was warranty work. Lucs testified he would not have allowed Stewart Plumbing to perform the warranty work if he had known it could revive their mechanic's lien. Regardless, Stewart Plumbing did perform the work and filed a second mechanic's lien statement with the Hennepin County Recorder's Office on July 22, 2008 (the "July 22<sup>nd</sup> Lien Statement"). Exhibit 4 (Document No. 9161990). This lien statement was

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<sup>3</sup> Lucs and Dutot identified other minor problems to M.W. Johnson Construction which were dealt with on the same day as the scheduled repairs by Stewart Plumbing.

<sup>4</sup> Stewart Plumbing billed 1.5 hours internally for Kent's work. This included time spent on the job and for travel one way to the job in accordance with Stewart Plumbing's billing practices.

similar to the October 12<sup>th</sup> Lien Statement in all material respects except that it identified June 27, 2008 as the last date of work. Id.

Lucs and Dutot paid the full purchase price of the home to M.W. Johnson Construction. However, Stewart Plumbing was never paid for its work by M.W. Johnson Construction. To recover for the labor and materials provided, Stewart Plumbing is seeking relief by foreclosing the mechanic's lien pursuant to the July 22<sup>nd</sup> Lien Statement. The testimony and evidence offered at trial and the parties' arguments focus almost exclusively upon this cause of action. Despite this focus, claims of unjust enrichment and slander of title were also made and must be resolved.

### **Validity of Mechanic's Lien**

Subcontractors such as Stewart Plumbing may obtain a lien upon real property to which they have provided labor or materials. See Minn. Stat. § 514.01. However, these lien rights cease to exist 120 days after the last date of labor or furnishing of the last material unless a mechanic's lien statement is filed. Minn. Stat. § 514.08. The filing of this lien statement extends the subcontractor's lien rights for up to one year from the last date of work. See Minn. Stat. § 514.12, subd. 3. Failure to commence suit within this one year period results in extinguishment of a subcontractor's lien rights. Minn. Stat. § 514.12, subd. 3. Minnesota statutes are "strictly construed on whether a mechanic's lien attaches, but liberally construed after the lien has been created." Enviro-Fab, Inc. v. Blandin Paper Co., 349 N.W.2d 842, 846 (Minn. App. 1984) (citing Dolder v. Griffin, 323 N.W.2d 773, 780 (Minn. 1982)).

Stewart Plumbing filed two mechanic's lien statements against the Residence in an attempt to collect upon the unpaid plumbing contract with M.W. Johnson Construction. The first mechanic's lien statement, the October 12<sup>th</sup> Lien Statement,

contained an incorrect last date of work and a dispute arose over the validity of Stewart Plumbing's lien rights. Presumably the correct date of Stewart Plumbing's last day of work was more than 120 days prior to the filing of the October 12<sup>th</sup> Lien Statement or at least 120 days prior to filing of the lien waiver.<sup>5</sup> As resolution of this dispute and in response to communications arising out of a complaint filed with DOLI, Stewart Plumbing released its lien rights by filing a lien waiver.

Generally speaking, a valid lien waiver releases the right to enforce a lien for the entire interest identified. See, e.g., Engler Bros. Const. Co. v. L'Allier, 280 Minn. 208, 212, 159 N.W.2d 183, 185-86 (1968); Lundstrom Const. Co. v. Dygert, 254 Minn. 224, 228-29, 94 N.W.2d 527, 531-32 (1959); Home Supply Co. v. Ostrom, 164 Minn. 99, 204 N.W. 647 (1925). In this case, Stewart Plumbing set the bounds of its lien waiver by reference to the October 12<sup>th</sup> Lien Statement. In doing so, Stewart Plumbing effectively waived its lien rights for the entire \$13,649.35 amount encompassed by the lien statement identified.

Stewart Plumbing argues its right to enforce a mechanic's lien for the entire \$13,649.35 amount was revived, despite the lien waiver, when they performed the warranty work. In support of this position, Stewart Plumbing cites to Kahle v. McClary. 255 Minn. 239, 96 N.W.2d 243 (1959). Kahle deals with whether subsequent work by a prospective lienholder may revive a lien. Id. at 241-43, 96 N.W.2d at 245-47, discussed by Geo. Sedgwick Heating & Air Conditioning Co. v. Riverwood Companies, Inc., 409 N.W.2d 289, 290-91 (Minn. App. 1987). See also R.B. Thompson, JR. Lumber Co. v.

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<sup>5</sup> Neither party provided direct testimony or evidence of Stewart Plumbing's actual last date of work. Rather, the Court infers from the testimony of Lucs that the Residence was complete when he closed and moved into it in May, 2007; Stewart's testimony the warranty work done on June 27, 2008 was completed approximately one year after construction of the Residence was completed; and Stewart Plumbing's filing of a lien waiver rather than an amended mechanic's lien statement in response to DOLI's letter of November 15, 2007.

Windsor Development Co., 383 N.W.2d 357, 361 (Minn. App. 1986) (affirming revival upon finding work not performed solely to revive expired lien rights). In reaching a decision about revival of a lien, several factors are examined including: length of time between the dates of work; nature and extent of the subsequent work; and general circumstances of the work being done. Kahle, 255 Minn. at 241-42, 96 N.W.2d at 246. However, “[r]evival of the lien is clearly disallowed when de minimus operations are performed for the sole purpose of extending the time for the lien and the work is otherwise substantially completed.” Id. at 242, 96 N.W.2d at 246 (citing Guy T. Bisbee Co. v. Granite City Investing Co., 159 Minn. 442, 446-47, 199 N.W. 17, 18-9). But cf. W. B. Martin Lumber Co. v. Noss, 256 Minn. 471, 475, 99 N.W.2d 65, 68-9 (1959) (holding facts of case required opposite result). The insignificance of the extent of the later work in relation to the whole project is not conclusive by itself. W.B. Martin Lumber Co. v. Noss, 256 Minn. 471, 475, 99 N.W.2d 65, 68 (Minn. 1959).

In this case the warranty work completed by Stewart Plumbing was not enough to revive its lien rights under these circumstances; particularly with the existence of a valid lien waiver. The warranty work performed by Stewart Plumbing occurred nearly a year or more after original work was completed. In the interim, Stewart Plumbing had filed a mechanic’s lien statement and then released its right to enforce the lien identified therein. This evidences the parties’ understanding that the plumbing work for which M.W. Johnson Construction had retained Stewart Plumbing was completed.

The nature of the subsequent work as warranty work also leads to the conclusion the lien was not revived. Under the current statutory warranty, work performed at the behest of a vendor cannot revive a lien without eviscerating the notice requirements of the lien statutes. See Geo Sedgwick, 409 N.W.2d at 291 (holding denial of lien

appropriate because work was “insignificant warranty work”). Purchasers of new homes and home owners contracting for home improvements are statutorily entitled to one year, two year, and ten year warranties from the warranty date.<sup>6</sup> Minn. Stat. § 327A.02, subds. 1 & 3. These warranties presuppose the vendor<sup>7</sup> will be given an opportunity to repair whatever items are defective. See Minn. Stat. § 327A.02, subd. 4. The period of 120 days from the last date of work has been selected within which a potential lienholder must notify the world, through filing with the county recorder or register of titles, of their interest. Minn. Stat. § 514.08, subd. 1. If the repair work contemplated by the statutory warranty can revive the original lien, then the certainty provided by the 120 day time period would become an illusion and eviscerate the protection afforded unsuspecting property owners. See Dolder, 323 N.W.2d at 780 (explaining purpose of lien statute being to protect workers and unsuspecting homeowners). The lack of certainty which would be created if Stewart Plumbing’s argument were accepted is contrary to the mechanic’s lien statement filing requirement. This is particularly true when, as demonstrated in this case, neither a lien waiver nor notice by a mechanic’s lien statement would be sufficient to provide any assurance as to the status of a property’s title.

Furthermore, the warranty work Stewart Plumbing relies upon for revival of its lien was minimal. The amount expended upon materials was less than \$50 and the time spent on the actual work was certainly no more than 45 minutes. The work that was done did not require any particularly specialized skill and could have easily been

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<sup>6</sup> The warranty date is defined as the earlier of the date of first occupancy or receipt of legal or equitable title for new home warranty and the last day of work home improvement warranty. See Minn. Stat. § 327A.01, subd. 8.

<sup>7</sup> A vendor is defined as “any person, firm or corporation which constructs dwellings for the purpose of sale . . . .” Minn. Stat. § 327A.01, subd. 7.

done by the homeowner. It was because the Residence was a new home and M.W. Johnson Construction had this walk through process established to satisfy its customers that Stewart Plumbing did the work. Had Lucs known the property would be encumbered by a \$13,649.35 obligation as a result of work he could have accomplished for less than \$50, he would never have permitted the warrant work to occur. Under these circumstances, revival of Stewart Plumbing's lien is inappropriate.

This is not to say Stewart Plumbing performed the warranty work maliciously. Rather, Stewart testified the work was done because he believed it was required both by state law and their contract with M.W. Johnson Construction. Once the work had been done, a possibility existed for Stewart Plumbing to possibly collect on the outstanding \$13,649.35 obligation which remained unpaid. It was not maliciousness on the part of Stewart Plumbing that led to the filing of the July 22<sup>nd</sup> Lien Statement but a desire to recoup whatever losses it could and a lack of clarity in the application of the law to these circumstances.

### **Slander of Title**

"The elements required for a slander of title claim are:

- (1) That there was a false statement concerning the real property owned by the plaintiff;
- (2) That the false statement was published to others;
- (3) That the false statement was published maliciously;
- (4) That the publication of the false statement concerning title to the property caused the plaintiff pecuniary loss in the form of special damages.

Paidar v. Hughes, 615 N.W.2d 276, 279-80 (Minn. 2000), cited by Brickner v. One Land Development Co., 742 N.W.2d 706, 711 (Minn. App. 2007). "The filing of an instrument known to be inoperative is a false statement that, if done maliciously, constitutes slander of title." Id. at 280. Defendants' counterclaim for slander of title fails because

there is no factual basis to support a finding of maliciousness on the part of Stewart Plumbing. As explained previously, Stewart Plumbing did not file the second mechanic's lien statement knowing it was false. It was the operation of the law applied to these narrow circumstances that makes the mechanic's lien invalid, not falsification of the facts underlying the lien statement. In other words, Stewart Plumbing had a legitimate basis to pursue the matter to this end and its failure at this stage does not amount to maliciousness. In the absence of any other evidence, Defendants' fail to fulfill their burden of establishing the requisite elements for a slander of title claim.

### **Unjust Enrichment**

"To establish a claim for unjust enrichment, the claimant must show that another party knowingly received something of value to which he was not entitled and that the circumstances are such that it would be unjust for that person to retain the benefit." Mon-Ray, Inc. v. Granite Re, Inc., 677 N.W.2d 434, 440 (Minn. App. 2004) (citing ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc., 544 N.W.2d 302, 306 (Minn. 1996)). "[U]njust enrichment claims do not lie simply because one party benefits from the efforts or obligations of others, but instead it must be shown that a party was unjustly enriched in the sense that the term 'unjustly' could mean illegally or unlawfully." First Nat'l Bank of St. Paul v. Ramier, 311 N.W.2d 502, 504 (Minn.1981), cited by ServiceMaster, 544 N.W.2d at 306. "Unjust enrichment may be founded on failure of consideration, fraud, or mistake, or 'situations where it would be morally wrong for one party to enrich himself at the expense of another.'" Mon-Ray, Inc., 677 N.W.2d at 440 (quoting Holman v. CPT Corp., 457 N.W.2d 740, 745 (Minn. App. 1990)).

No unjust enrichment claim may rest upon the facts provided at trial to the Court. The Defendants were not unjustly enriched at the expense of Stewart Plumbing.

Although the Defendants received the benefit of the labor and materials provided by Stewart Plumbing at the Residence, the Defendants paid the general contractor M.W. Johnson Construction in full for this labor and these materials. It was M.W. Johnson Construction's fraud, mistake, or failure to pay its subcontractors that resulted in the loss to Stewart Plumbing, not lack of consideration, fraud, or mistake on behalf of the Defendants. As Stewart Plumbing may have already realized, M.W. Johnson Construction is the party that may have been enriched in an unjust fashion in these circumstances.

### **Conclusion**

Judgment shall be entered in favor of the Defendants on the unjust enrichment claim. Judgment shall also be entered in favor of the Defendants on the mechanic's lien claim. Stewart Plumbing's request to foreclose their mechanic's lien is denied. However, judgment shall be entered in favor of Stewart Plumbing on the slander of title counterclaim for the reasons set forth herein.

A handwritten signature in black ink, followed by the date "01/19/09". The signature is stylized and appears to be "M.W. Johnson".