7-10-2009

Parkwest Homes LLC v. Barnson Appellant's Brief Dckt. 36246

IN THE SUPREME COURT OF THE STATE OF IDAHO

PARKWEST HOMES LLC, an Idaho limited liability company, Plaintiff/Appellant, vs. JULIE G. BARNSON, an unmarried woman; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, as Nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.), a Delaware limited liability company; and DOES 1-10, Defendants-Respondents.	Docket No. 36246-2009

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF CANYON
HONORABLE GORDON W. PETRIE, DISTRICT JUDGE, PRESIDING

Robert B. Burns, ISB No. 3744
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384

Attorneys for Plaintiff-Appellant
ParkWest Homes LLC

Stephen C. Hardesty
Ryan T. McFarland
HAWLEY, TROXELL, ENNIS & HAWLEY, LLP
877 W. Main St., Ste. 1000
Post Office Box 1617
Boise, Idaho 83701-1617
Facsimile (208) 342-3829

Attorneys for Defendant-Respondent
Mortgage Electronic Registration Systems, Inc.

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I. INTRODUCTION

The present action was brought after Plaintiff ParkWest Homes LLC ("ParkWest") was stiffed for much of the contract price Defendant Julie G. Barnson ("Barnson") promised to pay ParkWest for constructing a single-family residence. Although a final judgment had previously been entered in ParkWest's favor against Barnson, the district court granted the nominee for her mortgage lender, Defendant Mortgage Electronic Registration Systems, Inc. ("MERS"), summary judgment voiding ParkWest's lien in the residence it built and eliminating all possibility of recovery by ParkWest. Moreover, all but one of the legal issues adopted in support of the judgment here challenged were raised *sua sponte* by the district court when issuing its memorandum decision and were neither discussed in the briefing by the parties nor argued on the hearing of MERS' motion.

For the reasons discussed below, the judgment in MERS' favor should be reversed and the matter remanded for further proceedings and trial.

II. STATEMENT OF THE CASE

A. Nature of the Case.

On November 28, 2006, ParkWest filed with the Canyon County Recorder a Claim of Lien in the amount of $189,117.99 and then mailed to Barnson by certified mail a copy of the recorded document. Clerk's Record ("R"), p. 97 at ¶ 8. Following the commencement of this action, Barnson consented to the filing of the Second Amended Complaint ("SAC") in the district court and the entry of default judgment in ParkWest's favor against her, provided no award for damages was taken against her personally. R, p. 107. Based on this stipulation, the

SAC was filed in the district court, and the district court then entered a final judgment against Barnson to the extent of her interest in the liened property, *but not personally*, for the amounts pleaded in the SAC (the "Barnson Judgment"). R, pp. 106-08. The Barnson Judgment was neither appealed nor otherwise challenged in the proceedings before the district court.

Nevertheless, in granting MERS' motion for summary judgment, the district court held (i) that ParkWest's Claim of Lien failed to substantially comply with the requirements of Idaho Code Sections 45-507(3)(a) and 45-507(4), R, pp. 125-26; (ii) that the contract on which the Barnson Judgment was based is void, R, pp. 130-31; and (iii) that, although ParkWest should "at the very least" have been entitled to recover for unjust enrichment, the issue of unjust enrichment was not before the district court, R, p. 131. ParkWest contends that the district court erred in all of its foregoing rulings.

B. Course of the Proceedings and Disposition Below.

ParkWest filed its Verified Complaint to Foreclose Lien on August 7, 2007, and, as a matter of course, filed its First Amended Verified Complaint to Foreclose Lien on September 12, 2007. R, p. 1. However, following the bankruptcy filing of Barnson, all proceedings were stayed by order entered February 27, 2008, through September 4, 2008, when ParkWest filed a motion for leave to file its SAC shortly after the dismissal of the Barnson bankruptcy proceedings. *Id.* The SAC was thereafter filed on October 6, 2008, pursuant to order of the district court. R, p. 2. No answer was ever filed in this action by either Barnson or MERS.

On September 29, 2008, ParkWest filed a stipulation with counsel for Barnson consenting to the filing of the SAC and the entry of default judgment in ParkWest's favor against Barnson, provided no award for damages was taken against her personally. R, pp. 2 and 107. In accordance with the terms of the stipulation, the district court entered final judgment against Barnson in ParkWest's favor on October 7, 2008, for the total amount of $174,208.39. R, pp. 2 and 106-08.

MERS' motion for summary judgment, filed October 2, 2008, was argued to the district court on November 24, 2008, and, on January 6, 2009, the district court entered its Memorandum Decision on Defendant Mortgage Electronic Systems, Inc.'s Motion for Summary Judgment ("Decision"). R, pp. 115-33. Judgment in favor of MERS was thereafter filed on January 26, 2009. R, pp. 134-36. In accordance with I.A.R. 14(a), ParkWest timely filed its Notice of Appeal with respect to MERS' judgment on March 9, 2009. R, pp. 137-40.

C. Statement of the Facts.

On or about March 15, 2006, Barnson and ParkWest entered into a contract (the "Contract") for ParkWest's construction of a two-story residence for Barnson on a lot located in Canyon County, Idaho (the "Property"), for the sum of $450,000. R, p. 96 (SAC ¶¶ 2 and 6). Although ParkWest was not registered as a contractor by the State of Idaho when the Contract was executed, ParkWest (i) obtained its registration on May 2, 2006, (ii) obtained a building permit to construct the improvements to the Property on May 18, 2006, and (iii) performed its first work in constructing the improvements to the Property on May 22, 2006. R, p. 112 (Affidavit of David Zawadzki ("Zawadzki Aff.") ¶ 3). Moreover, during the course of

construction, Barnson requested that numerous upgrades and changes in the scope and the cost of the work be performed, which ParkWest undertook to do based on the assurances of Barnson that she would pay for such upgrades and additional work. R, pp. 96-97 (SAC ¶ 6). No compensation is being sought in this action by ParkWest for any work or other acts performed in connection with either the construction of the improvements to the Property or the performance of the Contract which were undertaken prior to ParkWest's registration as a contractor on May 2, 2006. R, p. 112 (Zawadzki Aff. ¶ 4).

Based on Barnson's failure to pay ParkWest for the work it performed in constructing her residence, ParkWest filed with the Canyon County Recorder on November 28, 2006, its Claim of Lien. R, p. 97 (SAC ¶ 8). Those portions of the Claim of Lien relevant to the issues on appeal are set forth and signaled on the following page.

The sum of **One hundred and eighty-nine thousand one hundred and seventeen dollars and ninety-nine cents ($189,117.99)** *together with interest calculated at the rate of Eighteen percent per year from* November 1st 2006 is due claimant for the following labor and materials furnished by the claimant:

General Description of the Work and Materials Furnished

Construction of a single family residence

Claimant furnished the work and materials at the request of, or under contract with Juli G. Barnson

The owner and reputed owners of the property are Julie G. Barnson

ParkWest Homes — David Zawadzki
Company Name — Authorized Representative of Said Company

VERIFICATION:
I, the undersigned, say: I am the Authorized Representative of the claimant of the foregoing mechanic's lien; I have read said mechanic's lien and know the contents thereof; the same is true of my knowledge.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on this 28th day of November, 2006, at Nampa, Idaho.

Signature

WITNESS the hands and seal of said Grantors this 28th day of November, 2006

I, Janice C. Hanson, a Notary Public in and for said County and State, hereby certify that David M. Zawadzki personally known to me (or proved to me on the basis on satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same voluntarily on the day the same bears date.

JANICE C. HANSON
NOTARY PUBLIC
STATE OF IDAHO

WITNESS my hand and official seal.

County of Canyon — State of Idaho

Signed and sworn to before me this 28th day of November 2006

Notary Public

JANICE C. HANSON
NOTARY PUBLIC
STATE OF IDAHO
Seal

Sept 30, 2010
My Commission Expires

R, pp. 103-04 (SAC Ex. B) (signals added).

Finally, after stipulating to both the filing of the SAC and the entry of a default judgment against her, the district court entered a final judgment against Barnson to the extent of her interest in the Property, but not personally, for the amounts pleaded in the SAC. R, p. 107.

III. ISSUES PRESENTED ON APPEAL

A. Did the district court err in ruling that ParkWest's Claim of Lien failed to substantially comply with the requirements of Idaho Code Section 45-507?

B. Did the district court err in ruling that the Contract is void?

C. Did the district court err in ruling that the issue of unjust enrichment was not raised by the allegations pleaded in the SAC?

IV. ARGUMENT

A. Standard of Review.

All issues on appeal are subject to this court's free review. Thus, as summarized in *Nat'l Union Fire Ins. Co. v. Dixon*, 141 Idaho 537, 112 P.3d 825 (2005):

> Summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). On review this Court construes the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. *Hardy v. McGill*, 137 Idaho 280, 285, 47 P.3d 1250, 1255 (2002). Where there are no disputed issues of material fact, only a question of law remains, and this Court exercises free review. *Construction Management Systems, Inc. v. Assurance Co. of America*, 135 Idaho 680, 682, 23 P.3d 142, 144 (2001).

Nat'l Union Fire Ins. Co., 141 Idaho at 540, 112 P.3d at 828.

B. The District Court Erred in Ruling That ParkWest's Claim of Lien Failed to Substantially Comply With the Requirements of Idaho Code Section 45-507.

As recently reaffirmed in *BMC W. Corp. v. Horkley*, 144 Idaho 890, 174 P.3d 399 (2007): "Materialman's lien laws are construed liberally 'in favor of the person who performs labor upon or furnishes materials to be used in the construction of a building.'" [Citation omitted.] "'To create a valid lien, there must be *substantial compliance* with the requirements of the statutes.'" 144 Idaho at 893-94, 174 P.3d at 402-03 (quoting *Franklin Bldg. Supply Co. v. Sumpter*, 139 Idaho 846, 850, 87 P.3d 955, 959 (2004) (emphasis added)). In deciding MERS' motion for summary judgment, the district court ruled that ParkWest's Claim of Lien failed to substantially comply with the requirements of both Idaho Code Sections 45-507(3)(a) and 45-507(4).[1] R, pp. 124-26. These two grounds for invalidating ParkWest's lien are discussed in turn below.

---

[1] Idaho Code Sections 45-507(3) and (4) provide, in their entirety, as follows:

> (3) The claim shall contain:
>
> (a) A statement of his demand, after deducting all just credits and offsets;
>
> (b) The name of the owner, or reputed owner, if known;
>
> (c) The name of the person by whom he was employed or to whom he furnished the materials; and
>
> (d) A description of the property to be charged with the lien, sufficient for identification.
>
> (4) Such claim must be verified by the oath of the claimant, his agent or attorney, to the effect that the affiant believes the same to be just.

1. The Claim of Lien substantially complies with the requirements of Section 45-507(3)(a).

The district court ruled that ParkWest's Claim of Lien is invalid because Section 45-507(3)(a) requires that it contain a "statement of [ParkWest's] demand, after deducting all just credits and offsets." R, pp. 125-26. As set forth above, however, the Claim of Lien contains the following express statement:

→ **The sum of One hundred and eighty-nine thousand one hundred and seventeen dollars and ninety-nine cents ($189,117.99) together with interest calculated at the rate of Eighteen percent per year from November 1st 2006 is due claimant for the following labor and materials furnished by the claimant:**

The Claim of Lien thus unequivocally contains a statement of ParkWest's demand. Moreover, there was no allegation or affirmative defense raised by any party to this action that ParkWest's Claim of Lien was not made "after deducting all just credits and offsets." The district court's ruling must therefore be based on the fact that the words "after deducting all just credits and offsets" are not included in the statement of ParkWest's demand. This purported deficiency was raised *sua sponte* by the district court when it issued its Decision and was neither discussed in either party's briefing nor addressed at the hearing on MERS' motion. Nor does the district court cite any authority holding that the words "after deducting all just credits and offsets" must be expressly included in a lien claimant's demand.

The fact that ParkWest's statement of its claim was made "after deducting all just credits and offsets" is supported by the following undisputed facts:

1. The Contract for Barnson's residence was in the amount of $450,000, and the constructed improvements were completed on November 1, 2006. R, pp. 96-97 (SAC ¶¶ 6-7).

2. The Claim of Lien recorded November 28, 2006, was in the amount of $189,117.99, or less than half of the Contract price. R, p. 97 (SAC ¶ 8).

3. ParkWest was not provided with documentation establishing Barnson's execution of an amendment to the Contract reducing the contract price (and lien claim) by $28,000 until after this action was filed. R, p. 98 (SAC ¶ 10).

4. The Barnson Judgment was in the amount of $174,208.39. R, pp. 2 and 107. Thus, after adjustment for the referenced amendment to the Contract, the amounts of the Claim of Lien and the Barnson Judgment are consistent.

The starting point, of course, in determining what must be included in the Claim of Lien is the language of the controlling statute. And although Section 45-507(3)(a) expressly requires that the statement of ParkWest's demand be made "after deducting all just credits and offsets," nowhere does the statute require that a lien claim must explicitly state that it has been made after such deductions were effected. The recent decision in *BMC W. Corp.*, *supra*, should control the resolution of the question on appeal.

There, because "Kamachi, the agent of BMC, typed her name rather than signing it, Horkley argue[d] that the lien was not properly verified by oath." *Id.*, 144 Idaho at 896, 174 P.3d at 405. The court, however, rejected the argument holding as follows:

> Idaho Code § 45-507 does not state that the lien must be signed; it only states that it must be verified by the oath of the claimant. Because Kamachi was given an oath by a notary public, and *because a signature is not explicitly required,* her typewritten name suffices.

144 Idaho at 897, 174 P.3d at 406 (emphasis added). Accordingly, applying the foregoing holding to the present issue, because ParkWest's statement of its claim was *in fact* made "after deducting all just credits and offsets" and Section 45-507 does not *explicitly require* the foregoing quoted phrase to be included in a lien claim, ParkWest's Claim of Lien substantially complies with the requirements of the controlling statute. The district court therefore erred in ruling that the Claim of Lien fails to substantially comply with Section 45-507(3)(a).

2. The Claim of Lien substantially complies with the requirements of Section 45-507(4).

In issuing the only ruling on appeal that was made with respect to a question raised by MERS and therefore briefed and argued by the parties in the proceedings below, the district court ruled that ParkWest's Claim of Lien is invalid because "it fails to contain any verification even 'remotely similar' to the one upheld in *Treasure Valley Plumbing and Heating*."[2] R, p. 126. As previously set forth, the Claim of Lien contains the following verification:

[2] *Treasure Valley Plumbing & Heating, Inc. v. Earth Res. Co.*, 106 Idaho 920, 684 P.2d 322 (Ct. App. 1984).

VERIFICATION:
I, the undersigned, say: I am the Authorized Representative of the claimant of the foregoing mechanic's lien; I have read said mechanic's lien and know the contents thereof; the same is true of my knowledge.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on this 28th day of November, 2006, at Nampa, Idaho.

Signature

WITNESS the hands and seal of said Grantors this 28th day of November, 2006.

I, Janice C. Hanson, a Notary Public in and for said County and State, hereby certify that David M. Zawadzki personally known to me (or proved to me on the basis on satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same voluntarily on the day the same bears date.

JANICE C. HANSON
NOTARY PUBLIC
STATE OF IDAHO

WITNESS my hand and official seal.

County of Canyon **State of Idaho**

Signed and sworn to before me this 28th day of November 2006

JANICE C. HANSON
NOTARY PUBLIC
STATE OF IDAHO

Seal

Notary Public

Sept 30, 2010

My Commission Expires

Or in sum, after expressly stating that the "undersigned" is "the Authorized Representative of the claimant of the foregoing mechanic's lien;" and that he has "read said mechanic's lien and know[s] the contents thereof;" and that "the same is true of my knowledge":

1. The Claim of Lien is executed by David Zawadzki "under penalty of perjury that the foregoing is true and correct";

2. Zawadzki's execution of the Claim of Lien is acknowledged by a notary public; and

3. Zawadzki's execution and oath are verified by a notary public using the form specified in Idaho Code Section 51-109(2).[3]

As with the prior issue discussed, the starting point in determining what must be included in the Claim of Lien is the language of the controlling statute, which specifies: "Such claim must be *verified by the oath of* the claimant, *his agent* or attorney, to the effect that the affiant believes the same to be just." IDAHO CODE § 45-507(4) (emphasis added). Thus, although Idaho Code Section 45-507(4) expressly requires that ParkWest's Claim of Lien be verified by the oath of ParkWest or its agent or attorney, nowhere does the statute require that the verification explicitly adhere to any specified form.

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[3] Idaho Code Section 51-109(2) provides, in its entirety, as follows:

> (2) *An oath or affirmation*, which is in writing, shall be signed by the person who takes it, and the notary public shall enter thereunder substantially the following:
>
> "State of Idaho)
>) ss.
> County of . . . .)
> Subscribed and sworn (or affirmed) before me this . . . . day of . . . . . ., ...
> . . . . . (official signature and seal)"

(Emphasis added.) Idaho Code Section 18-5402 defines the term "oath" for purposes of perjury to include "an affirmation, and every other mode authorized by law of attesting the truth of that which is stated." *Accord State v. Parker*, 81 Idaho 51, 55, 336 P.2d 318, 320 (1959). *See also* 67 C.J.S. *Oaths and Affirmations* § 8 (2002) ("The elements of an oath include a solemn declaration, manifestation of intent to be bound by the statement, the signature of the declarer, and an acknowledgment by an authorized person that the oath was taken.").

Also as with the prior issue discussed, the following holding in *BMC W. Corp.* should control the resolution of the question on appeal:

> [S]ince Kamachi, the agent of BMC, typed her name rather than signing it, Horkley argues that the lien was not properly verified by oath. Idaho Code § 45-507 requires that claims of lien "be verified by the oath of the claimant, his agent or attorney, to the effect that the affiant believes the same to be just." Black's Law Dictionary (8th ed.2004) defines *"verification" as a "formal declaration made in the presence of an authorized officer, such as a notary public . . . ."* Kamachi was "sworn upon oath" by a notary public. Idaho Code § 45-507 does not state that the lien must be signed; it only states that it must be verified by the oath of the claimant. Because Kamachi was given an oath by a notary public, and because a signature is not explicitly required, her typewritten name suffices. Kamachi's verification therefore was not defective.

144 Idaho at 896-97, 174 P.3d at 405-06 (emphasis added). Accordingly, applying the foregoing holding to the present issue, because ParkWest's Claim of Lien was verified by the oath of its agent in a "formal declaration made in the presence of an authorized officer, such as a notary public . . ." and Section 45-507 does not explicitly require the verification to adhere to any specified form, Zawadzki's verification substantially complies with the requirements of the controlling statute.

Although the district court quotes in its Decision much of the foregoing holding in *BMC W. Corp.*, *see* R, p. 123, the district court provides no rationale for why the holding in that case does not control the resolution of the present issue. Moreover, the district court's ruling that ParkWest's Claim of Lien is invalid because "it fails to contain any verification even 'remotely similar' to the one upheld in *Treasure Valley Plumbing and Heating*" is substantively inaccurate.

In *Treasure Valley Plumbing and Heating*, the court of appeals held that a valid verification existed where the certificate of the lien claimant's president recited that an oath had been administered and the claim was believed to be true and just, and the accompanying notary public's certificate contained "not merely a corporate acknowledgment but also a statement that the corporation's president 'did subscribe and swear to' the lien claim before the notary." 106 Idaho at 922, 684 P.2d at 324. In support of its holding "that these certificates taken together, constitute a verification" the court of appeals explained: "*A verification is a '[c]onfirmation of correctness, truth, or authenticity, by affidavit, oath, or deposition.*" *Ibid* (quoting BLACK'S LAW DICTIONARY 1400 (rev. 5th ed. 1979) (emphasis added)). Accordingly, ParkWest respectfully submits that Zawadzki's declaration made "under penalty of perjury that the foregoing is true and correct" coupled with the accompanying notary public's verification that the declaration had been "[s]igned and sworn to" by Zawadzki constitutes a "verification" equally under both the definition contained in the revised fifth edition of Black's Law Dictionary, as cited and relied upon by the Idaho Court of Appeals in *Treasure Valley Plumbing and Heating*, and the definition contained in the eighth edition of Black's Law Dictionary, as cited and relied upon by the Idaho Supreme Court in *BMC W. Corp.* The district court thus erred in ruling that Zawadzki's verification fails to substantially comply with Section 45-507(4).

C. The District Court Erred in Ruling That the Contract Is Void.

The district court ruled that the Contract is void, "[s]ince PARKWEST, by its own admission, entered into a contract with BARNSON (thus, 'acted') before it complied with

the requirements of the [Idaho Contractor Registration] Act[4] . . . ." R, p. 130. As with the first question discussed above, this issue was raised *sua sponte* by the district court when it issued its Decision and was neither discussed in either party's briefing nor addressed at the hearing on MERS' motion. Accordingly, the district court did not consider ParkWest's contention that the Contract had been ratified by Barnson *after* ParkWest obtained registration as a contractor by the State of Idaho.

As explained in Corbin on Contracts:

> Courts often state that a void contract cannot be ratified. Courts apply this principle to contracts involving public policy issues because, historically, courts viewed contracts deemed "illegal" as void contracts. Thus, the parties could not ratify these contracts. This is a correct rule so long as the applicable law has not changed and the facts remain the same. *If, however, a change has occurred such that the bargain, if entered into at the later time, would be valid, a ratification at the later time may itself constitute an enforceable contract.* Neither the making of such a bargain nor its performance is prohibited. All that is necessary is that the ratifying transaction shall itself fulfill ordinary contract requirements.

15 GRACE MCLANE GIESEL, CORBIN ON CONTRACTS, *Contracts Contrary to Public Policy* § 89.14 (Joseph M. Perillo ed., rev. ed. 2003) (emphasis added; footnotes omitted). *Accord* 17A C.J.S. *Contracts* § 287(a) (1999).

The relevant facts supporting Barnson's "subsequent" ratification of the Contract are set forth above as follows:

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[4] IDAHO CODE §§ 54-5201 to 5219.

1. Although ParkWest was not registered as a contractor by the State of Idaho when the Contract was executed, ParkWest (a) obtained its registration on May 2, 2006, (b) obtained a building permit to construct the improvements to the Property on May 18, 2006, and (c) performed its first work in constructing the improvements to the Property on May 22, 2006.

2. During the course of construction, Barnson requested that numerous upgrades and changes in the scope and the cost of the work be performed, which ParkWest undertook to do based on the assurances of Barnson that she would pay for such upgrades and additional work.

3. No compensation is being sought in this action by ParkWest for any work or other acts performed in connection with either the construction of the improvements to the Property or the performance of the Contract which were undertaken prior to ParkWest's registration as a contractor on May 2, 2006.

4. After Barnson stipulated to both the filing of the SAC and the entry of a default judgment against her, the district court entered a final judgment against Barnson to the extent of her interest in the Property, *but not personally*, for the amounts pleaded in the SAC.

Although neither of Idaho's appellate courts appears to have addressed the question here presented, the general rules with respect to "ratification" are summarized in Corpus Juris Secondum as follows:

> Ratification of a contract may be found under a variety of circumstances, such as intentionally accepting benefits under the contract after discovery of facts that would warrant rescission,

> remaining silent or acquiescing in the contract for a period of time after having the opportunity to avoid it, or recognizing the validity of the contract by acting upon it, performing under it, or affirmatively acknowledging it.

17A C.J.S. *Contracts* § 138 (1999) (footnotes omitted). *Cf. Manning v. Twin Falls Clinic & Hosp., Inc.*, 122 Idaho 47, 55, 830 P.2d 1185, 1193 (1992) (summarizing the doctrine of implied ratification by a principal in a contract setting). Therefore, based on the rule that the record must be construed in the light most favorable to the party opposing summary judgment, "drawing all reasonable inferences and conclusions in that party's favor," *Nat'l Union Fire Ins. Co., supra*, ParkWest submits that Barnson ratified the Contract *after* ParkWest obtained registration as a contractor by the State of Idaho. Any other ruling would allow Barnson to avoid obligations she assumed in connection with inducing ParkWest, which was then duly registered as a contractor, into both making numerous upgrades and changes in the scope and the cost of the work it performed at her request and settling its claims against Barnson—and releasing her personally—in exchange for her stipulation to ParkWest's lien in the Property, as pleaded in the SAC. Accordingly, the district court erred in ruling *sua sponte* that the Contract is void.

D. The District Court Erred in Ruling That the Issue of Unjust Enrichment Was Not Raised by the Allegations Pleaded in the SAC.

In connection with ruling that the Contract is void, the district court acknowledged that, "[a]t the very least, PARKWEST should have been entitled to a recovery based upon unjust enrichment." R, p. 131 (citing *Barry v. Pac. W. Constr., Inc.*, 140 Idaho 827, 833, 103 P.3d 440, 446 (2004)). "Nevertheless," as the district court went on to rule, "that issue is not before the court." R, p. 131. The determination of whether the issue was then before the

court was also made *sua sponte* by the district court, with neither party raising the issue in its briefing nor addressing it at the hearing on MERS' motion. Nor does the district court cite any authority or include any analysis in its Decision supporting its ruling.

The pleading requirements under Idaho law are articulated in *Seiniger Law Office, P.A. v. N. Pacific Ins. Co.*, 145 Idaho 241, 178 P.3d 606 (2008), as follows:

> Generally, a claim for relief need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." I.R.C.P. 8(a)(1). Under notice pleading, "a party is no longer slavishly bound to stating particular theories in its pleadings." *Cook v. Skyline Corp.*, 135 Idaho 26, 33, 13 P.3d 857, 864 (2000) (citation omitted). A complaint need only state claims upon which relief may be granted. *Id.* at 34, 13 P.3d at 865. A party's pleadings should be liberally construed to secure a just, speedy and inexpensive resolution of the case. *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 427, 95 P.3d 34, 45 (2004) (citations omitted). The emphasis is to insure that a just result is accomplished, rather than requiring strict adherence to rigid forms of pleading. *Id.* "The key issue in determining the validity of a complaint is whether the adverse party is put on notice of the claims brought against it." *Id.*

145 Idaho at 246-47, 178 P.3d at 611-12. *See also Cafferty v. State, Dept. of Transp.*, 144 Idaho 324, 328, 160 P.3d 763, 777 (2007) ("A complaint need only contain a concise statement of facts constituting the cause of action and a demand for relief." (citation omitted)).

In this regard, although ParkWest specifically pleads the existence of its lien against the Property and seeks a decree of foreclosure,[5] nowhere in the SAC does ParkWest specify or limit the particular legal theories on which its claim is based. Rather, in accordance

[5] Indeed, the SAC's full title is "Second Amended Complaint to Foreclose Lien." R, p. 95.

with the foregoing pleading requirements, ParkWest set forth the following concise statement of facts constituting its claim:

> 6. On or about March 15, 2006, Barnson, as "Owner," and ParkWest, as "Contractor," entered into a contract for ParkWest's construction of a two-story residence (the "Residence") on the Property for the sum of $450,000. Thereafter, Barnson requested that numerous upgrades and changes in the scope and the cost of the work be performed, which ParkWest undertook to do based on the assurances of Barnson that she would pay for such upgrades and additional work. Such requested changes, together with Barnson's delay in making numerous decisions and selections reasonably required for the construction work to progress, resulted in substantial increased costs to and work by ParkWest for which it is entitled to be paid by Barnson. Additionally, pursuant to the terms of the parties' construction contract, Barnson agreed to pay interest at the rate of 18% per annum on amounts not paid within five days after request for payment was made. As a result of the foregoing, ParkWest reasonably estimated and believed that Barnson owed ParkWest the approximate sum of $189,117.99 as of November 1, 2006.
>
> * * *
>
> 8. Based on Barnson's failure to pay ParkWest for the foregoing referenced work, upgrades, changes, delays, and interest, ParkWest filed with the Canyon County Recorder on November 28, 2006, a Claim of Lien in the amount of $189,117.99 and mailed to Barnson by certified mail a copy of the recorded Claim of Lien on November 30, 2006. Copies of the referenced Claim of Lien and proof of receipt are attached hereto as Exhibit B.
>
> * * *
>
> 10. Because, among other reasons, ParkWest was not provided until after this action was filed with documentation establishing Barnson's execution of a contract amendment she had requested reducing the contract sum to $422,000 or with the amounts paid on ParkWest's behalf by Barnson's construction lender to subcontractors, materialmen, or others with respect to the

> Residence, ParkWest had no way of determining the actual amount owed by Barnson to ParkWest for its construction of the Residence prior to the time it filed its Claim of Lien. However, based on discovery undertaken and documentation obtained by ParkWest in the bankruptcy proceedings, Barnson owed ParkWest the sum of $141,208.39 as of November 1, 2006.

R, pp. 96-98 (SAC ¶¶ 6, 8, and 10).

Because the foregoing factual statement fully supports ParkWest's recovery under the alternative legal theories of unjust enrichment[6] or quantum meruit[7] should the Contract be illegal and void,[8] the district court also erred in ruling *sua sponte* that the issue of unjust enrichment was not raised by the allegations pleaded in the SAC. *See, e.g., Seiniger Law Office, P.A., supra.*

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[6] *See Barry*, 140 Idaho at 834, 103 P.3d at 447 ("Unjust enrichment, or restitution, is the measure of recovery under a contract implied in law. A contract implied in law, or quasi-contract, 'is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent of the agreement of the parties . . . .'" (citations omitted)).

[7] *See Barry*, 140 Idaho at 834, 103 P.3d at 447 ("quantum meruit is the appropriate recovery under a contract implied in fact. A contract implied in fact exists where there is no express agreement but the parties conduct evidences an agreement." (citation omitted)).

[8] Although in *Barry* the plaintiff was limited in its recovery to unjust enrichment, the policy considerations supporting the plaintiff's recovery in that case to restitution are not here applicable. *See Barry*, 140 Idaho at 833-34, 103 P.3d at 446-47. Thus, if the Contract was not ratified by Barnson, quantum meruit should inure because (a) all of the work performed by ParkWest was undertaken *after* it obtained registration as a contractor by the State of Idaho and (b) the parties' *post-registration* conduct evidences their agreement.

V. CONCLUSION

Based on the foregoing points and authorities, the judgment in MERS' favor should be reversed and the matter remanded to the district court for further proceedings and trial.

DATED this 10th day of July 2009.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Robert B. Burns – Of the Firm
Attorneys for Plaintiff-Appellant
ParkWest Homes LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of July 2009, I caused a true and correct copy of the foregoing **APPELLANT'S BRIEF** to be served by the method indicated below, and addressed to the following:

Stephen C. Hardesty
Ryan T. McFarland
HAWLEY, TROXELL, ENNIS & HAWLEY, LLP
877 W. Main St., Ste. 1000
P.O. Box 1617
Boise, ID 83701-1617
Facsimile (208) 342-3829

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Robert B. Burns