9-4-2009

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

PARKWEST HOMES LLC, an Idaho limited liability company,

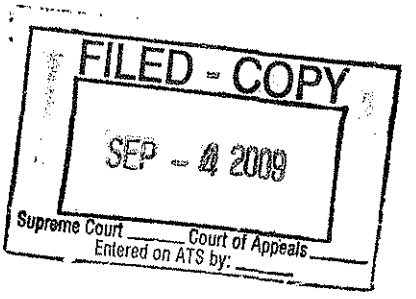
Plaintiff/Appellant,

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



RESPONDENT'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
Telephone: (208) 344-6000
Facsimile: (208) 342-3829

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Other Authorities

Mortgage Electronic Registration Systems, Inc., as nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.) ("MERS"), Defendant-Respondent in the above-captioned appeal, by and through its attorneys of record, Hawley Troxell Ennis & Hawley LLP, respectfully submits this Respondent's Brief in opposition to Appellant's Brief filed by ParkWest Homes LLC ("ParkWest").

I.
STATEMENT OF THE CASE

A. Nature Of The Case

MERS holds deeds of trust of unquestioned validity covering the property at issue in this case (the "Property"). ParkWest claims a mechanic's lien (the "Lien") with respect to the Property, and claims that the Lien is prior in right to MERS' deeds of trust. As MERS' argues and the District Court held, however, ParkWest's Lien is both facially invalid and unenforceable: ParkWest failed to register as a contractor under the Idaho Contractor Registration Act, and, as a result, ParkWest's lien rights were stripped as a matter of unambiguous and unchallenged law.

Now, in this appeal, ParkWest claims that it has been unjustly dealt with in that it was first "stiffed for much of the contract price" that the owner of the Property, Julie G. Barnson ("Barnson") agreed to pay in exchange for ParkWest's services and second, that the district court then eliminated "all possibility of recovery by ParkWest." ParkWest downplays the fact that it voluntarily, and without any involvement of District Court or MERS, expressly stipulated to that arrangement with Barnson.

ParkWest, via its agent Zawadzki, violated Idaho law in originally contracting with Barnson, with whom Zawadzki had a romantic relationship. Barnson and Zawadzki then had a series of disputes which led to ParkWest filing and attempting to foreclose its Lien. ParkWest has never sought, in this lawsuit, a money judgment against Barnson for the amount ParkWest alleges it is owed; instead, ParkWest has attempted to pass the costs of construction on to MERS. To advance that effort, ParkWest and Barnson expressly agreed to a judgment in favor of ParkWest as to Barnson's interest in the Property, "provided [that] no award for damages [be] taken against Barnson personally" (the "Barnson Stipulation"). That arrangement allowed ParkWest to take possession of the Property and continue to press this litigation, while Barnson was absolved of all liability to ParkWest. There has never been any hint of allegation that MERS is anything less than a good faith encumbrancer; nevertheless, MERS has been compelled to expend substantial amounts in costs and attorneys' fees to protect itself from ParkWest's efforts to have MERS pay for the improvements on the Property and to defend the priority of MERS' Deeds of Trust. Any undesirable consequence faced by ParkWest in connection with the Property or this case has been ParkWest's own doing, and if any party has been unjustly dealt with in this matter, it is MERS. The judgment of the trial court should be affirmed.

B. Course Of Proceedings

1. On November 28, 2006, ParkWest filed its Lien against the Property, which is located in Canyon County, Idaho, and more particularly described as:

Lot 4 in Block 1 of Riverbend Subdivision, according to the official plat thereof, filed in Book 34 of Plats at Page(s) 2, Official Records of Canyon County, Idaho.

R. pp. 11-12, 54.

2. On April 13, 2007, Barnson filed a Chapter 11 Bankruptcy petition in United States Bankruptcy Case No. 07-00573 (the "Bankruptcy Case"). R. p. 63.

3. In an Adversary Proceeding (the "Adversary Proceeding") within the Bankruptcy Case, ParkWest homes brought a Counterclaim and Third-Party Complaint against Barnson and MERS to foreclose the Lien and for a declaration that ParkWest's interest in the Property, via the Lien, is senior in priority to MERS' interest in the Property. R. p. 85.

4. On August 7, 2007, ParkWest filed its "Verified Complaint To Foreclose Lien" in the district court (the "State Court Case"). R. p. 4. ParkWest never sought a money judgment against Barnson in the State Court Case, only the right to foreclose its Lien as against Barnson and MERS. R. pp. 7-8, 99-100.

5. On February 27, 2008, the district court entered an order, on stipulation of the parties, to stay the State Court Case during the pendency of the Adversary Proceeding and Bankruptcy Case. R. pp. 1, 116.

6. The Bankruptcy Case was converted from a Chapter 7 to a Chapter 11, and a subsequent attempt was made to convert it from a Chapter 11 to a Chapter 13. R. p. 63.

7. On April 4, 2008, MERS moved for summary judgment in the Adversary Proceeding as to ParkWest's Third Party Complaint, but before MERS' Motion for Summary

Judgment could be heard Barnson moved to voluntarily dismiss her Bankruptcy Case altogether. On September 4, 2008, the stay in the State Court Case was lifted. R. p. 1.

8. On September 29, 2008, ParkWest and Barnson filed a Stipulation For Entry Of Default Judgment (the "Barnson Stipulation") in the State Court Case, whereby Barnson consented to entry of judgment as against her interest in the Property, and ParkWest agreed it would not seek an "award for damages . . . against Barnson personally." R. pp. 107, 117. The District Court described the Barnson Stipulation as a "side deal with Barnson apparently relieving her of any further liability." R. p. 131. MERS had no part in the Barnson Stipulation, and learned of it for the first time when it was filed and served on MERS on or about September 29, 2008. R. p. 117.

9. On October 2, 2008, MERS filed its Motion for Summary Judgment against ParkWest in the State Court Case, alleging a right to judgment as a matter of law due to: (1) ParkWest's failure to verify the Lien as required under Idaho Code § 51-109(4); (2) ParkWest's failure to register as a contractor under the Idaho Contractor Registration Act; and (3) ParkWest's failure to provide Barnson the pre-contract disclosures required under Idaho Code § 45-525. R. pp. 31-34.

10. On October 6, 2008, ParkWest filed its Second Amended Complaint To Foreclose Lien, which, like ParkWest's original Complaint in the State Court Case, did not request a money judgment as against Barnson. R. pp. 95, 99-100.

11. On October 7, 2008, pursuant to the Barnson Stipulation, the District Court entered Default Judgment Against Julie G. Barnson Only. R. p. 106.

12. Thereafter, MERS' Motion For Summary Judgment was briefed and argued, and on January 6, 2009, the District Court entered its Memorandum Decision On Defendant Mortgage Electronic Systems, Inc.'s Motion For Summary Judgment (the "Decision"). R. p. 115.

13. The District Court entered Judgment in favor of MERS on January 26, 2009. R. p. 134.

14. On or about March 9, 2009, ParkWest filed this instant appeal. R. p. 137.

C. Statement Of Facts

1. In 2004, Barnson and David Zawadzki ("Zawadzki") were romantic partners. R. p. 44.

2. During their relationship, Barnson and Zawadzki discussed a business plan in which they would construct, and sell to the public, residential homes. R. p. 44. At the time of these discussions, Zawadzki was a member of ParkWest Homes LLC, and in fact was "personally in charge of managing all work performed by ParkWest." R. p. 112.

3. Pursuant to Zawadzki's and Barnson's business plan, on March 15, 2006, ParkWest and Barnson entered into a contract (the "Contract") to build a $422,000 home on the Property. R. pp. 45, 49.

4. The Contract allowed Barnson to obtain a loan from Black Hawke Construction Lending, L.L.C. ("Black Hawke"), by which she purchased the Property on April 10, 2006. Repayment of the Black Hawke loan was secured by a Deed of Trust which was recorded against the Property on April 10, 2006 as well. R. p. 45.

5. During the time the parties discussed their business plan, negotiated and signed the Contract, and Barnson obtained the Black Hawke loan, ParkWest was not registered under the Idaho Contractor Registration Act, Idaho Code §§ 54-5201 et seq. (the "Act"). R. pp. 36, 40. ParkWest has expressly admitted this fact. R. p. 76; Appellant's Brief, p. 3.

6. ParkWest did not register under the Idaho Contractor's Registration Act until May 2, 2006. R. p. 76; Appellant's Brief, p. 3.

7. On November 14, 2006, Barnson caused two Deeds of Trust to be recorded as Instrument Nos. 200690998 and 200690999, official records of Canyon County, Idaho (the "MERS Deeds of Trust"). MERS is the beneficiary under the MERS Deeds of Trust. R. p. 96.

8. On November 28, 2006, ParkWest filed its Lien as Instrument No. 200694511, Official Records of Canyon County, Idaho, against the Property, asserting a right to payment in the amount of $189,117.99. R. pp. 103-104.

9. The Lien does not contain a verification as required under Idaho Code § 45-507 and § 51-109(4). R. pp. 103-104.

10. On April 13, 2007, Barnson filed a petition for Chapter 11 Bankruptcy relief, which gave rise to the Bankruptcy Case. But for the Lien filed by ParkWest and the resulting litigation, Barnson would not have filed for Bankruptcy relief. R. p. 46.

11. Barnson believes that she has paid ParkWest all sums which are due ParkWest under the Contract. R. p. 46.

12. ParkWest did not complete the work required of it under the Contract. R. p. 46.

II.
ADDITIONAL ISSUES PRESENTED ON APPEAL

MERS asserts that the issues on appeal should be stated as follows:

A. Was the District Court correct in ruling that the ParkWest-Barnson Contract was void due to ParkWest's violation of the Idaho Contractor Registration Act, Idaho Code §§ 54-5201, et seq.?

B. Was the District Court correct in ruling that ParkWest's Lien was invalid due to ParkWest's failure to comply with the "statement of demand" and "verification" requirements of Idaho Code § 45-507 and § 51-109(4)?

C. Was the District Court correct in ruling that the issue of unjust enrichment was not before the Court on MERS' Motion for Summary Judgment?

D. Is MERS entitled to attorneys' fees incurred on appeal, pursuant to Idaho Code § 12-121 and Idaho Appellate Rule 41, because the law is clear and unambiguous and ParkWest

cannot show that the District Court misapplied the law in granting summary judgment in favor of MERS?

III.
ARGUMENT

A. Standard Of Review

The standard of review by the Idaho Supreme Court of an order from the district court granting summary judgment is *de novo*. When the Idaho Supreme Court "reviews a district court's grant of summary judgment, it uses the same standard properly employed by the district court originally ruling on the motion." *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). Under that standard, summary judgment "shall be rendered forthwith 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 a judgment as a matter of law." I.R.C.P. 56(c). The moving party has the burden of establishing the lack of a genuine issue of material fact. *Orthman v. Idaho Power Co.*, 130 Idaho 597, 600, 944 P.2d 1360, 1363 (1997). To meet this burden, the moving party must challenge in its motion and establish through evidence that no issue of material fact exists for an element of the nonmoving party's case. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996). The nonmoving party "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided

in this rule, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e).

The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999). "[A] mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for purposes of summary judgment." *Samuel*, 996 P.2d at 306.

In its appeal, ParkWest has not alleged any issue of material fact. ParkWest has admitted that it was not a registered contractor when it negotiated and entered into the Contract with Barnson (see, for example, Appellant's Brief, p. 3); there is no issue of fact as to what the Lien says on its face (R. pp. 103-104); and there is no issue of fact that ParkWest freely entered into the Barnson Stipulation (ParkWest does not appeal the Default Judgment Against Julie G. Barnson Only, R. pp. 106-110), by which ParkWest abandoned all right to recover on any unjust enrichment claim. Instead of raising an issue of fact, ParkWest argues that the District Court committed errors of law in rendering judgment in MERS' favor. For the reasons set forth herein, the District Court's rulings of law on the undisputed facts were correct and should be affirmed.

B. The Contract Between Barnson And ParkWest Is Void Under The Idaho Contractor Registration Act.

Idaho Code § 54-5204 makes it illegal for any person "to engage in the business of, or hold himself out as, a contractor within this state without being registered [under the Idaho

Contractor Registration Act]." In that regard, the Idaho Contractor Registration Act (the "Act") treats construction contractors like members of other regulated professions or trades – such as lawyers, accountants, doctors, and plumber – have long been treated. In other words, the Act recognizes the need to limit the business of construction contracting to those who meet minimum standards necessary for the public's protection, and it imposes a registration requirement as a means of ensuring those standards are met. I.C. § 54-5202.

The registration requirement of the Act is enforced by Idaho Code § 54-5208, which provides that, "A contractor who is not registered as set forth in this chapter . . . shall be denied and shall be deemed to have conclusively waived any right to place a lien upon real property as provided for in Chapter 5, Title 45, Idaho Code."

The act of contracting is an essential part of being a contractor, and Idaho Code § 54-5203(4)(a) requires registration before any contractor can legally "undertake[], offer[] to undertake, purport[] to have the capacity to undertake, or submit[] a bid to, or . . . himself or by or through others, perform construction." ParkWest admits it was not registered at the time it "offered to undertake, purported to have the capacity to undertake, [and] submitted a bid to . . . perform construction" with respect to Barnson and the Property. By the plain language of Idaho Code § 54-5208, ParkWest's Lien is invalidated.

To underscore the seriousness of its intent to strip an unregistered contractor of its lien rights, the Idaho legislature also stripped unregistered contractors of their rights to use the power of the court to collect on a contract procured when the contractor was unregistered:

> No person engaged in the business or acting in the capacity of a contractor, unless otherwise exempt, may bring or maintain any action in any court of this state for the collection of compensation for the performance of any act or contract for which registration is required by this chapter without alleging and proving that he was a duly registered contractor, or that he was otherwise exempt as provided for in this chapter, at all times during the performance of such act or contract.

I.C. § 54-5217(2) (emphasis added).

The Act is designed to eliminate contracting by unregistered contractors, and is both in harmony with, and expands upon, the fundamental condition of mechanic's liens set forth in Idaho Code § 45-501: a mechanic's lien can only be claimed by one who is "legally authorized to perform" the work that forms the basis of the lien claim. Any purported contractor who negotiates and enters into a contract to "perform construction" without being registered as a contractor is not "legally authorized to perform" "the construction," and therefore has no lien rights under Idaho law. I.C. § 45-501 and § 54-5208.

Both the Lien and ParkWest's Second Amended Complaint To Foreclose Lien (the "SAC") are premised on the construction contract for the Property ParkWest negotiated and executed with Barnson during the time ParkWest was not registered as a contractor. ParkWest was not "legally authorized" to perform the work which allegedly forms the basis for the Lien, and therefore has no lien rights under Idaho Code § 45-501 and § 54-5208.

ParkWest attempts to discount the significance of a contractor's not registering before obtaining a contract to perform construction work, provided the contractor becomes registered

before actually performing the work. ParkWest's argument ignores the plain language of the statute, as well as the obvious significance of the contracting stage of an owner-contractor relationship. The Act's objective is to protect the public by funneling construction work to registered contractors. An unregistered contractor flouts that objective by contracting to perform construction work and thus preventing a registered contractor from obtaining the contract. Moreover, there is no assurance an unregistered contractor who contracts to perform construction work can, or even will attempt to, satisfy the Act's registration requirements before performing the work.

By defining the business of a "contractor" to include soliciting, not just performing, construction work, the Act makes evident its intention to apply the registration requirement to all phases of the owner-contractor relationship. A contractor that chooses to disregard the registration requirement waives its lien rights. I.C. § 54-5208. Nothing in the Act gives the contractor an opportunity to cure its failure to register – and thereby rescind the waiver of its lien rights – partway through the relationship.

While the Act's intent to strip unregistered contractors' lien rights may seem a harsh penalty for failing to register prior to negotiating a contract, it is precisely the penalty that the Idaho legislature intended, as underscored by the Act's even harsher penalty for unregistered contractors: not only are they barred from filing mechanic's liens, but the Act bars contractors from filing *any* lawsuit to collect under the contract if the contractor was not registered at all

times it acted as a contractor, including during the time the contractor solicited the construction work. I.C. § 54-5217(2).

This lawsuit is an action to enforce ParkWest's Lien, and so is an action to collect compensation for the performance of ParkWest's services on the Property. Inasmuch as soliciting, negotiating, and entering into a construction contract are acts "for which registration [as a contractor] is required" by the Act, and inasmuch as ParkWest was not registered as a contractor at the time it solicited, negotiated, and entered into the Contract, ParkWest was not a "duly registered contractor . . . at all times" relevant to the Contract. ParkWest is barred under Idaho Code § 54-5217 from bringing this action.

Based on the foregoing, the Court should affirm the District Court's ruling that the Barnson-ParkWest Contract is void, that ParkWest's Lien on the Property is invalid under Idaho Code § 54-5208, and that ParkWest's lawsuit to enforce its Lien is barred under Idaho Code § 54-5217. Given the invalidity of the Lien, ParkWest has no rights in the Property that are prior in right to the MERS' Deeds of Trust, and no right to litigate the enforcement of its Lien. MERS was entitled to summary judgment in this case.

In its Appellant's Brief, ParkWest argues that this Court should give validity to the Lien, despite the clear Idaho statute denying it. ParkWest's arguments, and MERS' responses, are as follows:

ParkWest argues: *This Court should give validity to the Lien because the District Court's ruling that the Contract is void was raised* sua sponte (Appellant's Brief, p. 15). While the

District Court stated that it "raised the issue of an illegal contract . . . *sua sponte*," (R. p. 128), MERS raised the issue of ParkWest's failure to comply with the Idaho Contractor Registration Act on which the Court's "illegal contract" ruling is based. R. pp. 32, 126. To the extent the District Court acted *sua sponte*, such action is not grounds for appeal: as pointed out by the District Court, the District Court had a duty to raise the issue of illegality under *Quiring v. Quiring*, 130 Idaho 560, 566, 944 P.2d 695, 701 (1997) and *Trees v. Kersey*, 138 Idaho 3, 6, 56 P.3d 765, 768 (2002). (R. p. 128).

ParkWest further argues that "*Barnson ratified the Contract* after *ParkWest obtained registration as a contractor by the State of Idaho.*" (Appellant's Brief, p. 15). ParkWest's ratification argument fails, first and foremost, because the Idaho Contractor's Registration Act does not contain a "ratification" provision. If ParkWest wanted to have a legal, enforceable contract, it could have registered as a contractor, and then entered a new contract with Barnson; by ParkWest's own contention, it registered as a contractor before making any improvements to the Property. Instead, ParkWest chose not to comply with the law; ParkWest should not be heard now to complain of the law's clearly spelled-out consequences.

ParkWest has not cited any Idaho authority supporting its ratification argument. The lone Idaho case cited by ParkWest has no bearing on this case: *Manning v. Twin Falls Clinic & Hospital, Inc.*, 122 Idaho 47, 830 P.2d 1185 (1992), involved an analysis of when a principal has authorized the acts of its agent, such that the principal can be liable for the agent's actions. *Manning* does not involve the Idaho Contractor's Registration Act or the ratification of any

prohibited action under Idaho law by an aggrieved party, or a party's consent and ratification of an otherwise illegal contract.

ParkWest's citation to CORBIN ON CONTRACTS and to *Corpus Juris Secundum* are also unavailing. First, the CORBIN citation expressly states that where a statute makes "the bargains of an unlicensed person unlawful and prohibited," "the procuring of a license [after entering into the bargain] does not make the bargainer's antecedent bargain enforceable by the originally unlicensed bargainer." 15 CORBIN ON CONTRACTS § 89.14 (2003). Moreover, the passage quoted by ParkWest states that a void contract *may* be ratified only when (1) the law has changed, and (2) the facts have also changed. ParkWest has made no showing that the law has changed, and indeed it has not. *Corpus Juris Secundum* states that only "voidable" contracts may be ratified; "However, contracts that are void cannot be ratified." 17A C.J.S. *Contracts* § 138 (2009). The District Court ruled that the ParkWest-Barnson contract was void, not merely voidable, and thus it cannot be ratified. Even were the ParkWest-Barnson contract merely voidable, C.J.S. states that, "Ratification must be accomplished by one with . . . full knowledge of all material facts. Ratification may not be based upon mere negligence." *Id.* There is no evidence that Barnson ever learned, during the course of the construction on the Property, of the invalidity of her Contract with ParkWest, such that she could have ratified it "with full knowledge of" ParkWest's act of unregistered contracting. Thus, even the authority cited by ParkWest stands in stark opposition to the position urged by ParkWest.

There are more fundamental reasons why ParkWest's "ratification" argument must fail. The Idaho Contractor's Registration Act does not provide for ratification of an illegal contract by an unlicensed contractor. The logical extension of ParkWest's argument would destroy the Act entirely: under ParkWest's argument, any owner who allows a contractor, unlicensed at the time of contracting, to continue with the building project "ratifies" the illegal contract, whether the owner knew of the illegality or the contractor's unregistered status or not. By its "ratification" argument, ParkWest would thus render the Idaho Contractor's Registration Act a nullity, and the Act, designed to protect property owners from unscrupulous contractors, would offer property owners no such protection. Even assuming a given property owner knew of a contract's invalidity, ParkWest's argument would make that property owner an accomplice to an unregistered contractor in flouting Idaho law by granting such owners a license to "allow" an unregistered contractor to engage in illegal contracting. Nothing in the Idaho Contractor's Registration Act grants property owners such power.

ParkWest argues that if this Court should uphold Idaho law, this Court will be *allowing "Barnson to avoid obligations she assumed" in dealing with ParkWest.* (Appellant's Brief, p. 17). Neither this Court, the District Court, nor MERS engaged in illegal contracting, and neither this Court, the District Court, nor MERS participated in the Barnson Stipulation which released Barnson of personal liability to ParkWest. Moreover, there is good evidence in the Record that Barnson has not avoided any obligation. In ParkWest's Second Amended Complaint To Foreclose Lien (the "SAC"), ParkWest alleges that ParkWest and Barnson entered into a

contract to build a home on the Property for $422,000.00. R. p. 98. ParkWest alleges it remains unpaid for only $141,208.39, and that this amount is due to "increased costs to and work by ParkWest" attributable to Barnson's "requested changes, together with Barnson's delay in making numerous decisions." R. pp. 96-98. Thus, ParkWest is not alleging that it has never been paid anything, or that it built Barnson's house "for free." From ParkWest's own court filings, it is evident that ParkWest has been paid most of what it was owed under the Contract – and Barnson's testimony is that ParkWest has been paid all of what it is owed. R. p. 46.

Finally to the extent Barnson has been relieved of any obligation, it was ParkWest, not the District Court, who granted that relief: via the Barnson Stipulation, ParkWest released Barnson from any personal liability for the amounts claimed under the Lien. R. p. 107. To the extent the District Court's grant of summary judgment in this case would result in ParkWest being unpaid, such a result is attributable to ParkWest alone. ParkWest cannot complain of a harsh result when ParkWest freely contracted for that result.

C. The Lien Is Facially Invalid.

ParkWest's Lien fails to meet the statutory requirements of both Idaho Code § 45-507 and Idaho Code § 51-109(4), which (1) require that the Lien be verified, and (2) specify the form of the verification. In a phrase, where a lien claimant "has failed to strictly comply with the requirements of I.C. § 51-109(4) . . . its liens do not substantially comply with I.C. § 45-507." *Cornerstone Builders, Inc. v. McReynolds*, 136 Idaho 843, 845, 41 P.3d 271, 273 (Ct. App. 2001). The Lien does not contain "A certificate of verification . . . follow[ing] the maker's

signature . . . certify[ing] that the maker personally appeared, was sworn, stated his authority for making the instrument, and averred the truth of the statements therein," as required by Idaho Code § 51-109(4) (emphasis added), and therefore the Lien is invalid as a matter of law.

Idaho Code § 51-109, Idaho's Notary Public Act, sets forth the necessary elements of proper verification under Idaho Code § 45-507. *See Oregon Shortline Railroad Co. v. Minidoka County*, 28 Idaho 214, 218, 153 P. 424, 425 (1915) (holding that "where there is one statute dealing with one subject in general and comprehensive terms, and another dealing with the same subject in a more minute and definite way, the two should be read together and harmonized"). Idaho Code § 51-109(4) states that:

> A certificate of verification of an instrument shall follow the maker's signature and shall identify the notary public and certify that the maker personally appeared, was sworn, stated his authority for making the instrument, and averred the truth of the statements therein.

Idaho Code § 51-109(4) then sets forth the form of a conforming verification:

> the verification of a corporate document by an officer of the corporation should be in substantially the following form:
>
> I, ..., a notary public, do hereby certify that on this .... day of ....., 19..., personally appeared before me ....., who, being by me first duly sworn, declared that he is the ..... of ....., that he signed the foregoing document as ..... of the corporation, and that the statement therein contained are true.

These statutory requirements are clear and unambiguous, yet ParkWest failed to comply with them, making the Lien invalid on its face.

The Lien at issue is a lien of ParkWest Homes LLC, and is therefore a corporate document requiring a corporate verification in substantially the form set forth in Idaho Code § 51-109(4). To hold otherwise would be to make the statutory language of Idaho Code § 51-109(4) a nullity, something that Idaho Courts have refused to do with respect to mechanic's lien verifications. *Cornerstone*, 41 P.3d at 275. *See Zener v. Velde*, 135 Idaho 352, 356, 17 P.3d 296, 300 (Ct. App. 2000) (holding that a statutory interpretation that would "lead to the absurd result of nullifying the effect of [a] subsection" of the statute must be rejected). *See also State v. Doe*, 144 Idaho 796, 172 P.3d 551, 554 (Ct. App. 2007) (holding that "It is incumbent upon a court to give a statute an interpretation which will not render it a nullity"). There is no dispute that the "verification" argued for by ParkWest is not in the corporate form required by Idaho Code § 51-109(4), and therefore the Lien is facially invalid.

Strict construction of the verification requirement is consistent with Idaho courts' strict construction of other procedural requirements necessary to perfect and foreclose on a mechanic's lien. For example, Idaho courts have a long history of strictly construing the six (6) month limitation for filing foreclosure actions under Idaho Code § 45-510. *See Western Loan and Bldg. Co. v. Gem State Lumber Co.*, 32 Idaho 497, 501, 185 P.554 (1919) (voiding a lien after suit to foreclose was untimely filed); *D.W. Standrod & Co. v. Utah Implement-Vehicle Co.*, 223 F.517, 518 (9th Cir. 1915) (voiding a lien as against all subsequent encumbrances who were not made parties to an action to foreclose the lien within six months from the date of filing thereof); and *Utah Implement-Vehicle Co. v. Bowman*, 209 F. 942, 947-48 (D. Idaho 1913) (where the

mortgagee of property was not made a party to a suit to enforce a mechanic's lien within the statutory period, the lien was of no effect against mortgagee's interests).

Idaho courts have also strictly construed Idaho Code § 45-507's requirement that a true and correct copy of the claim of lien be served on the owner of the property no later than five business days following the filing of the claim of lien. In *Ashley Glass Co., Inc. v. Bithell*, 123 Idaho 544, 850 P.2d 193 (1993), the lien claimant orally notified the property owner of the lien but made no effort to serve the mechanic's lien by mail or personally. The Idaho Supreme Court held that the lien was invalid because it was not served on the owner within the time limit specified in the statute, and such service was "a statutory condition for an effective lien." *Id.*, 850 P.2d at 196. Statutory conditions for valid liens are strictly construed, and this Court should follow the precedent set by Idaho courts and others in holding that a verification in the form required by Idaho Code § 51-109 is a mandatory condition precedent, without which the lien is invalid.

In its Appellant's Brief, ParkWest argues, "*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 statue require that the verification explicitly adhere to any specified form.*" (Appellant's Brief, p. 12). As set forth above, Idaho Code § 51-109 defines "verification" and sets forth the forms of "proper" verifications under Idaho law. Idaho Code § 45-507 does not need to expressly incorporate 51-109 to make 51-109 applicable: the verification requirement has meaning only to the extent it refers to other provisions of the Idaho

Code. ParkWest's citation to *State v. Parker*, 81 Idaho 51, 336 P.2d 318 (1959) does not support ParkWest's argument. *State v. Parker* concerned the form of oath required in connection with a criminal complaint, and the Court expressly held that the criminal complaint at issue sufficiently complied with Idaho Code section 19-3901, because Idaho's criminal law "statute does not provide for a particular form of oath." *Id.* 336 P.2d at 320. As set forth herein, Idaho law does provide for a particular form of verification when a corporation files a mechanic's lien.

ParkWest would have this Court hold that by failing to reference Idaho Code § 51-109, section 45-507 *nullifies* 51-109. ParkWest's argument that "no form of verification is specified" implies that the verification requirement is wholly subjective, that whatever the *lien claimant* deems a "verification" will suffice, regardless of what Idaho law says. Under ParkWest's argument, the lien claimant, not the Court, decides whether a lien contains a proper verification.

ParkWest's argument has far-reaching implications. Idaho Code § 45-507 requires liens to be filed "for record with the county recorder," but does not expressly reference any of Idaho's recording statutes. An extension of ParkWest's argument might, therefore, make the recording laws inapplicable to mechanic's liens and permit a lien claimant alone to determine when a lien has been "filed for record." ParkWest's argument has similar implications with respect to the contents of the lien claim or service of the claim of lien. That ParkWest does in fact intend its argument to have this kind of far-reaching implications is reflected in ParkWest's argument that *because "Section 45-507 does not* explicitly require [*the phrase 'after deducting all just credits and offsets'*] *to be included in a lien claim, ParkWest's Claim of Lien substantially complies with*

the requirement of the controlling statute." (Appellant's Brief, p. 10). ParkWest concedes that ParkWest's lien claim does not contain the statutory language, yet ParkWest would have this Court nullify that statutory requirement: ParkWest urges that because *it* has decided that its lien complies with Idaho Code § 45-507 ("because ParkWest's statement of its claim was *in fact* made 'after deducting all just credits and offsets' . . . ParkWest's Claim of Lien substantially complies with the . . . statute" (Appellant's Brief, p. 10)), the Lien is valid. This Court should not nullify the statutory requirements of either Idaho Code § 45-507 or § 51-109. The absence of the statutory language "after deducting all just credits and offsets" was not the sole or even primary basis for the District Court's decision to grant summary judgment in favor of MERS, but it is illustrative of ParkWest's Lien deficiencies, and it is also indicative of the direction ParkWest would have this Court steer Idaho's mechanic's lien law. Mechanic's liens are creatures of statute, and the statutory requirements should be strictly complied with; no portion of the Idaho Code should be dismissed or nullified simply to validate a mechanic's lien, as urged by ParkWest.

D. Because Of ParkWest's Side Deal With Barnson, The Issue Of Unjust Enrichment Was Not Before The District Court And Is Not Before This Court.

After finding that the ParkWest-Barnson Contract was void, the District Court then asked and answered the following rhetorical question:

> Does that mean that PARKWEST built the house free? Not until it elected to enter into a side deal with BARNSON apparently relieving her of any further liability. At the very least, PARKWEST should have been entitled to a recovery based upon

> unjust enrichment. [Citation omitted.] Nevertheless, that issue is not before the court.

R. p. 131. The "side deal" the District Court was referring to was the Barnson Stipulation referenced above, wherein ParkWest voluntarily, and without any influence of the Court or MERS, agreed to release "BARNSON from any personal liability." R. p. 117. The Barnson Stipulation thus released Barnson from any liability to ParkWest under an unjust enrichment claim. ParkWest does not have a right to recover for unjust enrichment against MERS, the only other defendant in this lawsuit, and ParkWest has never asserted such a right. *See Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 979 P.2d 627 (Idaho 1999). Moreover, the issue of unjust enrichment has never been before this Court: ParkWest's Second Amended Complaint is entitled "Second Amended Complaint *To Foreclose Lien*" (emphasis added), and does not assert a right to a money judgment under unjust enrichment or any other theory. The Second Amended Complaint only asks the District Court to declare ParkWest's Lien valid and enforceable, and thus Plaintiff's citations to *Cafferty v. State*, 144 Idaho 324, 160 P.3d 763 (2007), and *Seiniger Law Office v. North Pacific Ins. Co.*, 145 Idaho 241, 178 P.3d 606 (2008), are unavailing. The issue of unjust enrichment was never before the District Court, and to the extent ParkWest would raise it now, it is improperly before this Court:

> This Court will not entertain issues or theories not raised in the court below. In rejecting new issues, this Court often notes that it "does not consider issues raised for the first time on appeal." The Rammells try to satisfy this rule by arguing that because they raised these issues in their Amended Answer, they are technically not being raised for the first time on appeal. However, Idaho case

> law requires that the party asserting an issue seek a specific ruling on that issue at each stage of the appeal. Asserting an issue in the pleadings and failing to actually argue that issue and seek a ruling thereon is inadequate to preserve that issue for appeal.

Rammell v. Idaho State Dep't of Agriculture, 147 Idaho 415, 210 P.3d 523 (2009) (internal citations omitted).

ParkWest argues: "*Because the [factual statements in ParkWest's Second Amended Complaint] fully supports ParkWest's recovery under the alternative legal theor[y] of unjust enrichment . . . should the Contract be illegal and void, the district court also erred in ruling sua sponte that the issue of unjust enrichment was not raised by allegations pleaded in the SAC.*" (Appellant's Brief, p. 20). As set forth above, there are at least four reasons that the issue of unjust enrichment was not before the District Court, and should not be considered by this Court: (1) in its Second Amended Complaint, ParkWest only sought the right to foreclose its Lien as against Barnson and MERS' interests in the Property, and the theory of unjust enrichment was never alleged against anyone; (2) the issue on summary judgment in the proceedings below concerned ParkWest's right to foreclose its Lien as against MERS – the issue of unjust enrichment was not argued by any party, nor did ParkWest seek "a specific ruling on that issue," as required by *Rammell*, *supra*; (3) ParkWest affirmatively and expressly abandoned any unjust enrichment claim it might have had when it entered into the Barnson Stipulation; and (4) ParkWest has no claim for unjust enrichment as against MERS under *Great Plains Equipment, Inc.*, *supra.*

E. MERS' Request For Attorneys' Fees On Appeal.

The basis for MERS' request for attorneys' fees is, as set forth herein, that ParkWest cannot show that the District Court misapplied the law in granting summary judgment in favor of MERS. The District Court merely applied the Idaho Contractor Registration Act, which provides clearly established penalties for ParkWest's illegal actions. Any allegedly harsh results that follow are ParkWest's own creation in (1) not complying with the law, and (2) entering the Barnson Stipulation. An adverse result does not create a valid appealable issue in this instance. ParkWest's arguments are "largely incomprehensible, unreasonable, and lacking foundation in law," and an award of attorneys' fees to MERS is justified. *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 377, 973 P.2d 142, 148 (1999). "An award of attorney fees is appropriate if the law is well-settled and the appellants have made no substantial showing that the district court misapplied the law." *Id.* (internal citations omitted).

IV.
CONCLUSION

For the reasons set forth above, MERS respectfully requests that this Court affirm the decision of the District Court and award MERS its costs and attorneys' fees on appeal.

RESPECTFULLY SUBMITTED THIS 4th day of September, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
Ryan T. McFarland, ISB No. 7347
Attorneys for Third Party Defendants
Mortgage Electronic Registration Systems, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of September, 2009, I caused to be served a true copy of the foregoing RESPONDENT'S BRIEF by the method indicated below, and addressed to each of the following:

Robert B. Burns
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 ParkWest Homes LLC]

____ U.S. Mail, Postage Prepaid
_X_ Hand Delivered
____ Overnight Mail
____ E-mail
____ Telecopy

David E. Wishney
Attorney at Law
300 W. Myrtle Street, Suite 200
P.O. Box 837
Boise, ID 83701-0837
[Attorney for Defendant/Respondent Julie G. Barnson]

____ U.S. Mail, Postage Prepaid
_X_ Hand Delivered
____ Overnight Mail
____ E-mail
____ Telecopy

Ryan T. McFarland