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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re GEORGE SORENSON, dba BIG DADDY'S CAR WASH, fdba HIGHLAND DRIVE CAR WASH AND DOUGHNUT DELIGHT, Debtor.	Bankruptcy No. 84C-00746 Chapter 11
L. JOEL & ELLIOTT ANDERSON GENERAL CONTRACTOR, a Utah corporation, Plaintiff-Appellant, v. GEORGE SORENSON, SUZANNE HAMMOND and JOHN DOES 1-10, Defendants-Appellees.	Adversary Proceeding No. 84P-0965 Appeal No. C-85-0436J MEMORANDUM OPINION AND ORDER

On September 12, 1985, the court heard arguments on this appeal from the bankruptcy court's order granting summary judgment to the defendants in the adversary proceeding. L. Mark Ferre appeared on behalf of L. Joel & Elliott Anderson General Contractor ("Anderson"), the plaintiff and appellant. John T. Morgan appeared on behalf of defendant and appellee George Sorenson, the debtor in the bankruptcy proceeding. The court

took the matter under advisement at that time. Having considered the relevant authorities and the arguments of counsel, it now enters this memorandum opinion and order.

I. Background

During 1982 and 1983 Anderson did extensive remodeling to improvements on premises that the debtor, Sorenson, leased for his car wash business. For this work, Sorenson owed Anderson $141,783.63. When this debt wasn't paid, Anderson filed a notice of mechanic's lien with the Salt Lake County recorder. Anderson, through its agent Thomas L. Anderson, its secretary-treasurer, signed the notice but neglected to sign the verification block at the end of the notice of lien form.[1] Then, in January 1984, Anderson sued in state court to foreclose its lien. After

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[1] The verification block, which was on the second page of the notice of lien form, read

STATE OF UTAH,)
ss.
County of Salt Lake)

Thomas L. Anderson being first duly sworn, says that he is _____ claimant in the foregoing Notice of Lien; that he has read said notice and knows the contents thereof, and that the same is true of his own knowledge.

Subscribed and sworn to before me this 14th day of April, 1983

/s/ Shirley C. Glaus
Notary Public

Sorenson filed for relief under chapter 11 of the bankruptcy code, the matter was removed to the bankruptcy court. Sorenson moved for partial summary judgment on the grounds that the lien was invalid, and, relying on its decision in In re Williamson, 43 Bankr. 813 (Bankr. D. Utah 1984), the bankruptcy court granted the motion.

The bankruptcy court's judgment renders Anderson an unsecured creditor of the debtor. Under Sorenson's chapter 11 plan, unsecured creditors with claims over $500 will receive twenty-five percent of their allowed claim. If Anderson's lien were valid, Anderson would be a secured creditor and would receive at least the allowed amount of its claim up to the value of Sorenson's interest in the property, which has been appraised at $85,000.

Anderson raises two arguments on appeal. First, it argues that the mechanic's lien was valid because the notice of lien complied substantially with Utah's mechanics' liens statute, Utah Code Ann. §§ 38-1-1 through -26 (1974 & Supp. 1985). Second, it argues that, if the notice did not comply with the statute, the court should apply retroactively to this case a 1985 amendment to the statute, which did away with the requirement that the notice of claim be verified.

II. Verification

The parties agree that the validity of the statutory lien at

issue in this case must be determined by the applicable Utah law. See 2 Collier on Bankruptcy ¶ 101.31 at 101-67 & n.4 (L. King 15th ed. 1985). Before it was amended in 1985, Utah's mechanics' liens statute required any contractor claiming a mechanic's lien to file with the county recorder "a claim in writing, containing a notice of intention to hold and claim a lien, . . . which claim must be verified by the oath of himself or of some other person." Utah Code Ann. § 38-1-7 (Supp. 1983).

To "verify" means to affirm or establish the truthfulness of something, generally by an oath or affidavit. See Black's Law Dictionary 1400 (5th ed. 1979). An "oath" is an affirmation of the truth of a statement that renders one who willfully asserts an untrue statement punishable for perjury. See id. at 966.

Sorenson argues that, because Anderson did not sign the verification block of the notice of lien form, the claim was not properly verified and the lien is therefore invalid.

The bankruptcy court agreed. It found its decision in In re Williamson, 43 Bankr. 813, controlling. Williamson involved fourteen lien notices, twelve of which included a verification block identical to the one in this case. On ten of those lien notices the person whose name appeared in the opening blank of the verification block failed to sign it. The bankruptcy court concluded that under Utah law this failure rendered the liens invalid:

> . . . [I]n Utah, the signature of the person making a written oath is essential. Absent this signature, the oath and acknowledgment are void. Without the oath and the acknowledgment, the requirements of Utah Code Ann.

> Sections 38-1-7 and 57-2-2 (1953) are not met, and the notice of lien is, therefore, invalid.

43 Bankr. at 823-24.2

The bankruptcy court rightly concluded that Williamson was directly on point. However, Williamson is not binding precedent in this court. In questions of state law, such as this, this court is bound to follow the pronouncements of the state's highest court. The Utah Supreme Court has never been presented with the precise issue here. In such a case this court must use its own discretion to decide what the state supreme court would likely do if faced with the issue. Holler v. United States, 724 F.2d 104, 105 (10th Cir. 1983); Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1332 (10th Cir. 1983), cert. denied, 104 S. Ct. 2170 (1984). This court believes that, in an identical case, the Utah Supreme Court would reach a different result than Williamson.

Williamson relied primarily on two Utah cases in concluding that the claimant's signature in the verification block was an essential part of any verification under section 38-1-7. The first, McKnight v. State Land Board, 14 Utah 2d 238, 381 P.2d 726 (1963), involved applications for oil and gas leases, which, under Utah law, had to "be accompanied by . . . a statement under oath over applicant's signature of his qualifications . . . ." Utah Code Ann. § 65-1-88 (repealed 1967), quoted in 381 P.2d at 730. One Erving Wolf had filed three applications for leases on

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2 Section 57-2-2 of the Utah Code requires that proof or acknowledgment of conveyances affecting real estate be taken by a designated officer. That statute is not at issue on this appeal.

February 2, 1962, the one-day filing period. He used forms that he had signed in blank before February 2 but in the presence of Miles A. Williams, an authorized notary public. At Wolf's request Williams or his employee had filled out the forms on February 2, and each was notarized by Williams "Subscribed and sworn to before me this 2nd day of February, 1962, at Salt Lake City, Utah." Wolf was not in Salt Lake City on February 2, but he did talk to Williams by telephone on that day. The state land board concluded that the applications were deficient in three ways, one of which was that they "were not accompanied with a statement under oath, over the applicant's signature, of his qualifications as an Applicant . . . as required by Section 65-1-88 . . . ." Quoted in 381 P.2d at 729. The land board, however, allowed Wolf to amend his applications to correct these deficiencies and further allowed the amendments to relate back to the date of filing. As a result, Wolf was given priority over McKnight, another applicant, who brought suit for review of the board's decision. The only issue before the supreme court was whether the land board properly treated the corrected applications as having been filed on February 2. The court concluded that it had.

Nevertheless, in the course of its discussion the court considered each of the claimed deficiencies in Wolf's application. In discussing the validity of Wolf's oath, the court made the following statement, on which the bankruptcy court in Williamson relied:

"The essentials of an oath are:

"1. A solemn declaration.

"2. Manifestation of an intent to be bound by the statement.

"3. Signature of declarer.

"4. Acknowledgment by an authorized person that oath was taken."

381 P.2d at 734 (emphasis added). It was the third "essential" that the bankruptcy court found missing here and in Williamson. This dicta from McKnight, however, must be understood in context. So understood, this court concludes that the oath in this case was valid, despite the fact that it was not signed by the declarer.

First of all, obviously not every oath has to be signed by the declarer under Utah law. For example, witnesses who testify in court proceedings testify under oath, but they are not required to sign anything. See Utah Code Ann. § 78-24-17 (1977); Utah R. Evid. 603. As the McKnight court recognized, the administration of an oath "need not follow any set pattern. The ritual is of secondary importance and does not affect the validity of the oath." 381 P.2d at 734. The court in McKnight suggested that a valid oath could even be made over the telephone, see id. at 733 and infra note 3, casting further doubt on any requirement that all oaths must be signed.

Second, the court in McKnight was dealing with a statute that not only required an oath but also expressly required that

the statement under oath be made "over [the] applicant's signature . . . ." Utah Code Ann. § 65-1-88 (repealed 1967). The mechanics' liens statute has no such requirement.

Third, any deficiency in Wolf's oath was apparently due to its content and not to its form, since "the Land Board held the oath valid," 381 P.2d at 733, and the land board's finding was "sustained," id. at 734. It appears from the court's discussion in McKnight that the only deficiency in the oath was that it did not relate to Wolf's qualifications as an applicant--not that the oath was oral.[3]

In short, McKnight does not support the bankruptcy court's blanket assertion that, "in Utah, the signature of the person making a written oath is essential." 43 Bankr. at 823.[4] Wolf's

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3 The court in McKnight apparently considered Wolf's oath a valid oral oath, despite the fact that Wolf had presigned his application in the presence of Williams, a notary public. The court quoted with approval language from another Utah case suggesting that "mere signature to a printed form of oath" did not constitute the taking of an oath. 381 P.2d at 733 (quoting Spangler v. District Court, 104 Utah 584, 140 P.2d 755, 758 (1943)). The court then noted that Wolf conferred by phone with Williams on the day of the applications and concluded: "While we do not favor the making or taking of an oath by phone or when the one taking it is not in the presence of the officer giving it, we do not think the facts in this case would justify holding the oath given to Wolf invalid." Id.

4 Although the bankruptcy court's holding in Williamson was limited to "written" oaths, a recent Utah Supreme Court decision makes questionable any distinction between oral and written oaths. Colman v. Schwendiman, 680 P.2d 29 (Utah 1984). Colman had his driver's license revoked because he refused to take a breathalyzer test after a highway patrol officer had stopped him for driving erratically. Under Utah's implied consent statute, Utah Code Ann. § 41-6-44.10 (Supp. 1985), before Colman's license could be revoked the officer had to submit "a sworn report that he had grounds to believe the arrested person had been driving" under the influence of alcohol or drugs. The officer filled out a form affidavit to that effect and signed it in the presence of

signature on his application was statutorily required as part of his "statement" of qualifications, but apparently it was not an essential element of the "oath" under which that statement had to be made, notwithstanding the court's dicta to the contrary. There is simply no general requirement under Utah law that all oaths be signed by the declarer.

The second case the bankruptcy court relied on, Graff v. Boise Cascade Corp., 660 P.2d 721 (Utah 1983), involved a factual situation similar to this one but distinguishable in one important respect. In that case, Boise Cascade had filed a notice of lien, which was signed by one Berk Buttars as its agent. The notice contained a verification block similar to the one in this case, with a line for the name of the person to be sworn and a line for his signature. In Graff, however, both lines were left blank, and the court held the notice invalid for lack of verification.

Boise Cascade argued that "the verification was complete except for the fact that the lien claimant's signature appears on the wrong line." 660 P.2d at 722. In other words, Boise Cascade argued, the court should have read the form as though Buttars'

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a notary. The notary completed and signed the jurat, which read, "Subscribed and sworn to before me this . . . day." The notary did not administer any oath, however, nor did the officer "affirmatively swear to that report," 680 P.2d at 31, by which the court apparently meant that he made no oral oath or affirmation. The court held that, because there was no "formal verbal affirmation," the report was not validly sworn to. Thus, an oral statement was apparently required, even though the statute itself required only a "sworn report" and arguably the officer swore to the report in writing by signing the affidavit in the presence of the notary.

signature on the notice proper had followed the verification block. The court disagreed: "In order to adopt defendant's contention, it must be assumed that the name and the signature of Berk Buttars were intended to be affixed on the blank line provided for verification of the notice of claim. We are not free to make those assumptions." Id. The court concluded that,

> [i]n the absence of a name appearing to identify the person verifying the claim, and in the further absence of the signature of the person who purportedly swore under oath as to the veracity of the claim, . . . the notice of claim of lien clearly lacked verification and that the statutory requirements have not been substantially complied with.

Id. at 722-23 (emphasis added).

This case is clearly distinguishable from Graff. In both cases, the signature of the person verifying the claim was missing from the verification block. In Graff, however, the name of that person was also missing. In fact, the only evidence that the claim had been verified at all was the signature of the notary.[5] With both lines of the verification block left blank, there was no way of knowing who (if anyone) had verified the claim. Here, on the other hand, the first line of the verification block was filled in, with the name of Thomas L. Anderson, the claimant's agent.

At first blush this may seem like a distinction without a

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5 Here, as well as in Graff, the jurat following the verification block was signed and dated by a notary public. An earlier Utah case, White v. Heber City, 82 Utah 547, 26 P.2d 333 (1933), suggests that this alone is sufficient verification. See infra. The Graff court, however, apparently did not find it so.

difference, but the court believes it is legally significant. The Utah mechanics' liens statute required that the claim be verified by the oath of the claimant "or of some other person." Obviously, "some other person" must be someone with knowledge of the facts who can state under oath that they are true. Unless one knows who verified the claim, one cannot judge his qualifications and credibility and hence cannot judge the value of any verification.

In theory, at least, a verification under oath serves another useful function.[6] It protects owners from false claims against their property that could injure the owner's credit, coerce an unjustified settlement, or cloud the owner's title to his property, thus restraining alienation. H.A.M.S. Co. v. Electrical Contractors, 563 P.2d 258, 263-64 (Alaska 1977); First Sec. Mortg. Co. v. Hansen, 631 P.2d 919, 922 (Utah 1981). A verification serves this function by impressing on the mind of the lien claimant the significance of filing his claim and making the claimant criminally liable for perjury if he verifies a false claim. See H.A.M.S. Co., 563 P.2d at 264. But if the identity of the person who verified the claim is not known, there can be no perjury prosecution, and the value of the verification procedure is diminished.

In Graff the court would have had to make a series of assumptions to determine not only whether the lien claim was

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6 The Utah legislature may disagree, as evidenced by its recent repeal of the verification requirement. See Utah Code Ann. § 38-1-7 (Supp. 1985).

verified but also who verified it.[7] Here, on the other hand, there is no question that Mr. Anderson actually verified the claim. He testified under oath in the bankruptcy court that, because he had read the mechanics' liens statute and knew an oath was required, he "did declare to [the notary] an oath" verifying the claim, even though she had not asked him to. The debtor has submitted an affidavit from the notary stating that it is not her practice to administer a verbal oath to persons signing documents, but she does not remember this particular transaction and has not disputed Mr. Anderson's testimony that he in fact verified the claim under oath. Thus, in this case not only is it uncontroverted that the claim was verified by oath, but it is also clear from the verification block on the form who made the oath. Graff therefore is not controlling.

The court's interpretation of Graff makes it consistent with an earlier Utah case not discussed in Graff, namely, White v. Heber City, 82 Utah 547, 26 P.2d 333 (Utah 1933). White involved a claim against a city, which by statute had to be "properly . . . verified." White filed his signed claim with a

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7 Of course, the signature of the notary on the jurat suggests that the claim was actually verified. But notaries--especially busy notaries--often cannot remember long after the fact who appeared before them, let alone any details of the verification. In all likelihood the notary would have to make the same assumption that the court would, namely, that the person who verified the claim was the same person who signed the notice of claim form. Where the two events--completion of the notice of claim form and verification--do not occur simultaneously or the notary does not witness both, the assumption may not be reasonable. Perhaps for this reason the cases generally hold that a notary's signature on a jurat is not sufficient without more to support a perjury conviction. See Annot., 80 A.L.R.3d 278, 309-12 (1977) and cases cited therein.

jurat attached thereto, signed by a notary public. The city argued that White's claim was not properly verified because the claim itself did not purport to have been made under oath. The court found sufficient verification in the jurat, which read, "Subscribed and sworn to before me this 7th day of January, 1930." The court reasoned:

> Such phrase or language, "Subscribed and sworn to before me," fairly and reasonably means not only that the claimant subscribed the claim in the presence of the notary, but also that the notary administered an oath to the claimant, and that he under oath in substance and effect stated that the statements contained in the instrument or document subscribed by him were true. No other effect or meaning may fairly or reasonably be given such language. If by such phrase, the claimant did not in substance and effect declare, under oath, that the statement signed by him were true, it is difficult to conceive for what other purpose or effect the oath was or could have been administered to him.

26 P.2d at 335.

In White, the court could infer that the claimant was the one who had sworn under oath that the statements in the claim were true. See First Sec. Mortg. Co., 631 P.2d at 921.[8] The same inference can be made here, since Thomas L. Anderson's name appears in the verification block as the person who appeared before the notary and swore to the truthfulness of the contents of the claim. In Graff, on the other hand, the court was unwilling to make that inference, because there was no direct evidence as to who--if anyone--appeared before the notary to

8 Colman v. Schwendiman, 680 P.2d 29 (Utah 1984), is distinguishable because there the court could not make such an inference, since the undisputed evidence showed that the highway patrol officer had in fact not made any statement to the notary under oath.

verify the claim. The court would have had to make an additional assumption. It would have had to assume that Berk Buttars' name--as well as his signature--appeared in the verification block.9

Having concluded that neither McKnight nor Graff disposes of this case, this court must now decide whether the Utah Supreme Court would uphold Anderson's lien despite the absence of any signature in the verification block. The court concludes that it would.

Although verification "is a mandatory condition precedent to the very creation and existence of a lien" and lack of verification "is not a hypertechnicality that the Court is free to discount," Graff, 660 P.2d at 722, the mechanics' liens statute itself only requires that the claim "be verified by . . . oath . . . ." It does not require the oath taker's signature or mandate any particular form for either the verification or the oath. Nor is there anything in the definitions of "verify" or "oath" to suggest that the declarant must sign the verification or oath. In fact, Utah law recognizes the validity of oral verifications, at least under some circumstances. See, e.g.,

9 Sorenson tries to distinguish White on the grounds that the statute involved in that case did not create a property right in the claimant but "merely gave the injured person the ability to make a claim against the city." Appellee's Brief in Opposition to Appellant's Appeal to [sic] the Bankruptcy Court's Grant of Summary Judgment at 5. He argues that the important policy considerations involved when a property right is created "demand something more than inference." Id. at 6. The court finds this argument unpersuasive. The policy of protecting property owners from unjustified claims does not warrant a greater insistence on procedural exactness than the policy of protecting local governments from unjustified claims.

White, 26 P.2d 333. The Utah Supreme Court has said that all that is required for an oath is some

> definite evidence that affiant was conscious that he was taking an oath; that is, there must be not only the consciousness of affiant that he was taking an oath, but there must be some outward act from which that consciousness can be definitely inferred. That cannot be done from the mere signature to a printed form of oath.

Spangler v. District Court, 104 Utah 584, 140 P.2d 755, 758 (1943). See also Colman v. Schwendiman, 680 P.2d 29, 31 (Utah 1984) (Utah precedents "require a formal verbal affirmation in order for a statement to be validly sworn to") (emphasis added). Cf. Annot., 80 A.L.R.3d 278, 282 (1977) (for a valid oath that will support a perjury prosecution "there must be, in some form, and in the presence of an officer authorized to administer an oath, an unequivocal and present act by which the affiant consciously takes upon himself the obligation thereof").

Here, it is undisputed that Mr. Anderson verified the truthfulness of the claim by oath. His signature in the verification block would not have been sufficient by itself; and where, as here, the oath is established by other evidence, it should not be necessary.

Requiring the declarant's signature to an otherwise valid oath would add nothing to the protection afforded property owners. The chief value of the verification requirement is to assure truthful claims by the threat of a perjury prosecution. The mere fact that Mr. Anderson did not sign the verification block would not bar a prosecution for perjury if he in fact made

the oath and the claim was proved false. Campbell v. State, 23 Okla. Crim. 250, 214 P. 738, 743 (1923). See also State v. Snyder, 304 So.2d 334 (La. 1974) (either an oral or written oath can support a perjury prosecution). See generally Annot., 80 A.L.R.3d 278 (1977) (one can be convicted of perjury if the evidence is sufficient to support a finding that an oath was actually taken, even if it was taken in an irregular way). Where questionable formalities would not increase substantive protections, the court should not insist on them.

On the other hand, if Mr. Anderson made the oath, thereby subjecting himself to criminal liability, Anderson's claim should not be held unsecured simply because an arguably ambiguous signature line was left blank.

Other jurisdictions that have considered the question under similar statutes have uniformly concluded that the claimant's signature is not necessary if he did in fact verify his claim under oath. See, e.g., Anchorage Sand & Gravel Co. v. Wooldridge, 619 P.2d 1014 (Alaska 1980); Stephenson v. Ketchikan Spruce Mills, Inc., 412 P.2d 496 (Alaska 1966); Ainslie v. Kohn, 16 Or. 363, 19 P. 97 (1888); Fircrest Supply, Inc. v. Plummer, 30 Wash. App. 384, 634 P.2d 891 (1981). See also S. Phillips, Mechanics' Liens § 366 at 638-39 (3d ed. 1893) ("A law requiring the lien statement to be verified by oath of the claimant does not require him to sign it"), quoted in Fircrest Supply, 634 P.2d at 895.

The court concludes that, if faced with the same factual

situation, the Utah Supreme Court would follow this clear weight of authority. Although "verification" may not be a "hypertechnicality" that this court can discount, to insist on a signature that is not statutorily required would work a grave injustice by allowing Sorenson and his other creditors to escape an obligation that they clearly had notice of.

III. Conclusion

As Mr. Justice Holmes once cautioned: "Whatever the value of the notion of forms, the only use of the forms is to present their contents, just as the only use of a pint pot is to present the beer . . . ; and infinite meditation upon the pot never will give you the beer." Justice Holmes to Doctor Wu: An Intimate Correspondence, 1921-1932 16 (n.d.). Here, any form of oath required was to ensure that the person making the claim realized that he was duty bound to assert his claim truthfully. It is undisputed that Mr. Anderson made an oral oath as to the truthfulness of his claim. The claim was in writing. The claim was signed. The claim was verified by oath. The statute by its terms does not require more, and "infinite meditation" on the requirements of an oath will not give the property owner greater protection.

The court therefore holds that the party verifying a mechanic's lien claim by oath need not sign the verification block of the notice of claim form where, as here, the party in

fact signed the claim form, his identity is clear from the verification block and it is established that he affirmed the truthfulness of the claim before a notary public. Under these circumstances, to insist on a second, superfluous signature would exalt form over substance.

Because the court concludes that Anderson's notice of lien was valid under former section 38-1-7, it need not consider Anderson's fall-back position that the 1985 amendment to that section should be applied retroactively.

The order of the bankruptcy court granting defendant Sorenson's motion for partial summary judgment is hereby REVERSED, and this matter is REMANDED to the bankruptcy court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

DATED this 30 day of April, 1986.

BY THE COURT

BRUCE S. JENKINS
UNITED STATES DISTRICT JUDGE