

IN THE UTAH COURT OF APPEALS

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John C. Baxter,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellant,)	
)	Case No. 20070744-CA
v.)	
)	F I L E D
)	(December 6, 2007)
Naomi N. Symkoviak; Estate of)	
Paul F. Symkoviak; and Symko)	2007 UT App 388
Enterprises, LLC,)	
)	
Defendants and Appellees.)	

Third District, Salt Lake Department, 070904213
The Honorable William W. Barrett

Attorneys: John McCoy, Salt Lake City, for Appellant
Steven C. Tycksen and Jonathan C. Moffitt, Draper,
for Appellees

Before Judges Bench, Greenwood, and Billings.

PER CURIAM:

Appellant John C. Baxter appeals from an order declaring two lis pendens to be defective and void. This case is before the court on Appellees' motion for summary dismissal for lack of jurisdiction. We dismiss the appeal.

The district court conducted a hearing under Utah Code section 38-9-7 to determine whether the two lis pendens Baxter filed were wrongful liens on real property. See Utah Code Ann. § 38-9-7 (2005). The scope of the proceeding is limited by subsection 38-9-7(4), which states that "[a] summary proceeding under this section is only to determine whether or not a document is a wrongful lien. The proceeding shall not determine any other property or legal rights of the parties nor restrict other legal remedies of any party." Id. § 38-9-7(4). The district court determined that Baxter's two lis pendens were procedurally defective. As an additional ground for releasing and nullifying

the two lis pendens, the district court stated in its May 16, 2007 order that Baxter could not prevail on his claim for specific performance of an alleged oral contract for the sale of real property. Pursuant to statute, the district court entered an order "declaring the wrongful lien void ab initio and releasing the property from the lien." Id. § 38-9-7(5)(a). The order did not make an award of costs and reasonable attorney fees as authorized by the statute. See id.

Baxter contends that the district court's order of May 16, 2007 was a "de facto" summary judgment because the district court rejected his claim for specific performance--the sole claim for relief in his complaint. Therefore, he contends that the court's August 21, 2007 order denying his motions to set aside, alter, or amend the court's previous order was a final, appealable judgment. Accordingly, he claims that his notice of appeal was effective to establish our jurisdiction over an appeal of right. The argument is without merit.

The district court made statements regarding the lack of merit in Baxter's complaint only in the context of the statutory proceeding to declare the two lis pendens to be wrongful liens. There was no motion for summary judgment or motion to dismiss before the court at that time.¹ It follows that the court could not have granted either dismissal or summary judgment, and no final, appealable judgment had been entered at the time that Baxter initiated an appeal. In addition, the district court had not resolved any claim for an award of attorney fees under the statutory provisions pertaining to wrongful liens.

Both the May 16, 2007 and August 21, 2007 orders are interlocutory. Baxter did not file a timely petition for permission to appeal from either order in accordance with rule 5 of the Utah Rules of Appellate Procedure. See Utah R. App. P. 5(a). The notice of appeal was ineffective to confer jurisdiction because the order it seeks to appeal is not final and appealable. Until a final judgment resolving the case is entered, the time for appeal will not begin to run.

We dismiss the appeal, without prejudice to a timely appeal filed after the entry of a final judgment. Having determined that we lack jurisdiction, we retain only the authority to dismiss the appeal. See Varian-Eimac, Inc. v. Lamoreaux, 767

¹Appellees represent that they have since amended their counterclaim and filed a motion for summary judgment on the merits of Baxter's complaint.

P.2d 569, 570 (Utah Ct. App. 1989). We deny Appellees' request for attorney fees.

Russell W. Bench,
Presiding Judge

Pamela T. Greenwood,
Associate Presiding Judge

Judith M. Billings, Judge