IN THE UTAH COURT OF APPEALS

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Doug Jessop Construction, Inc. dba Sage Builders, Petitioner and Appellee, v. Estate of Joseph D. Anderton and Prime Time Marketing Services, Inc., Respondents and Appellants.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070251-CA F I L E D (October 30, 2008) 2008 UT App 393

Third District, Salt Lake Department, 060910691
The Honorable Glenn K. Iwasaki

Attorneys: Jay R. Mohlman, Bountiful, for Appellants
John D. Morris and Jamie L. Nopper, Salt Lake City, for Appellee

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Before Judges Billings, Davis, and McHugh.

McHUGH, Judge:

Appellant, the Estate of Joseph D. Anderton (the Estate),[1] appeals the trial court's December 18, 2006 order holding Anderton in civil contempt and the court's March 12, 2007 order and judgment awarding reasonable attorney fees and costs to Doug Jessop Construction, Inc. dba Sage Builders (Sage). We reverse and remand.

This suit arises out of the sale of property in Salt Lake County. Through its president, Anderton, Prime Time Marketing Services, Inc. (Prime Time)[2] entered into a Real Estate Purchase

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[1]Joseph D. Anderton died after this appeal was filed, and his estate was substituted as the appellant.

[2]Prime Time is also named as an appellant. However, the trial court's contempt order and corresponding award of attorney fees and costs to Sage--the orders on appeal--were entered

(continued...)

Contract with Sage. Due to disagreements between the parties, the sale never occurred. Between May 10, 2006, and August 14, 2006, Anderton recorded a notice of interest and two separate lis pendenses against the property.[3] The trial court determined that when Anderton filed the second lis pendens on August 14, 2006, he was acting in contempt of an existing order.[4] Subsequently, on March 12, 2007, the trial court awarded Sage $25,335.13 in attorney fees and costs. Anderton now appeals both the December 18, 2006 civil contempt order, as well as the March 12, 2007 order and judgment awarding attorney fees and costs to Sage.

We first address the Estate's challenge to the trial court's civil contempt order. "The trial court's discretion includes . . . the power to decide whether a party should be held in contempt . . . ." Shipman v. Evans, 2004 UT 44, ¶ 40, 100 P.3d 1151; see also Bartholomew v. Bartholomew, 548 P.2d 238, 240 (Utah 1976) ("[T]he issuance of an order relating to contempt of court, or the holding of a party in contempt of court, are matters which . . . rest within [the trial court's] sound discretion."); Anderson v. Thompson, 2008 UT App 3, ¶ 11, 176 P.3d 464. Therefore, Utah appellate courts "review a trial court's exercise of its contempt power to determine whether it

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[2](...continued)
against only Anderton in his individual capacity. We therefore refer to Prime Time only to the extent that its conduct is relevant to the issues raised by the Estate on appeal.

[3]This court previously addressed Anderton and Prime Time's separate appeal of the trial court's determination that their notice of interest and two lis pendenses were wrongful liens under Utah's Wrongful Lien statute, see Utah Code Ann. § 38-9-1 (2005), and that their second lis pendens also violated the Wrongful Lien Injunction statute, see id. §§ 38-9a-101 to -205 (2005). See Doug Jessop Constr., Inc. v. Anderton (Jessop I), 2008 UT App 348. A more complete description of the facts relevant to the instant case can be found in that decision. See id. ¶¶ 2-9.

[4]At the hearing on December 1, 2006, the trial court ruled that Anderton was in civil contempt of court and that Sage was entitled to its attorney fees as damages. Additionally, the court sentenced Anderton to thirty days in the county jail, which sentence would be stayed to give Anderton the chance to pay the fees instead. The court's oral ruling was memorialized in its December 18, 2006 civil contempt order and in its subsequent order awarding attorney fees and costs to Sage. Anderton spent ten days in jail but was released after paying the fees and costs.

exceeded the scope of its lawful discretion." Shipman, 2004 UT 44, ¶ 39. "Only rarely will we reverse the trial court's [finding of contempt]. . . . 'In the absence of any action [by the trial court] which is so unreasonable as to be classified as capricious and arbitrary, or a clear abuse of . . . discretion, we will not overturn the trial court's order.'" Id. (second alteration and second omission in original) (quoting Dansie v. Dansie, 1999 UT App 92, ¶ 6, 977 P.2d 539); accord Bartholomew, 548 P.2d at 240; Anderson, 2008 UT App 3, ¶ 11.

The scope of the trial court's discretion in this area, however, is not without limitation. Utah law requires that "'in order to prove contempt for failure to comply with a court order[,] it must be shown that the person cited for contempt knew what was required, had the ability to comply, and intentionally failed or refused to do so.'" Anderson, 2008 UT App 3, ¶ 16 (quoting Homeyer v. Stagg & Assocs., 2006 UT App 89, ¶ 6, 132 P.3d 684); accord Von Hake v. Thomas, 759 P.2d 1162, 1172 (Utah 1988). To hold a party in civil contempt, "[t]hese three elements must be proven . . . by clear and convincing evidence." Von Hake, 759 P.2d at 1172 (citation omitted). Although "we accept the trial court's findings of fact unless they are clearly erroneous," id., a court can only hold a party in contempt of "an order [that is] sufficiently specific and definite as to leave no reasonable basis for doubt regarding its meaning," Salt Lake City v. Dorman-Ligh, 912 P.2d 452, 455 (Utah Ct. App. 1996); see also Foreman v. Foreman, 111 Utah 72, 176 P.2d 144, 156 (1946) (Wolfe, J., concurring) (stating that a court can only hold a party in contempt of an order if that order is "clear and unambiguous").

The Estate argues that the order at issue cannot meet this clarity requirement. Specifically, the Estate challenges the trial court's findings regarding the first and third contempt elements: knowledge and intent. It argues that the court's July 17, 2006 order was not clear and that such ambiguity "was compounded by the trial court's own comments made from the bench on August 11 in which [it] authorized a filing of a new action." Therefore, the Estate argues, Anderton could not have "acted intentionally to violate the [July 17, 2006] order." A panel of this court has already concluded that "the trial court essentially invited the filing of [Anderton's] separate action, which independently and predictably triggered the concomitant recordation of the second lis pendens." Doug Jessop Constr., Inc. v. Anderton (Jessop I), 2008 UT App 348, ¶ 20.

The court's July 17, 2006 order--which Anderton was held in contempt for violating--enjoined Prime Time and Anderton "from making, uttering, recording, or filing any further liens without specific permission from the court." Subsequently, at the August 11, 2006 hearing, the trial court told Anderton and Prime Time

that they could still file "any subsequent independent action of a lawsuit . . . against [Sage] and whomever else for all of the alleged damages and whatever relief he wishes to do." In Doug Jessop Construction, Inc. v. Anderton (Jessop I), 2008 UT App 348, this court held that the trial court's instruction "would not foreclose the recording of a lis pendens pertaining to a new lawsuit if the new lawsuit was of a sort that properly triggers the recording of a lis pendens." Id. ¶ 23. Furthermore, that case "reverse[d] the trial court's determination that Anderton violated the [July 17, 2006] wrongful lien injunction by recording the second lis pendens because the lawsuit of which it gave notice was both authorized by the trial court and by statute." Id.; see also id. ¶ 22 (discussing Utah Code Ann. § 78-40-2 (2002)). Under the principle of horizontal stare decisis, we follow prior decisions from this court. See State v. Tenorio, 2007 UT App 92, ¶ 9, 156 P.3d 854. By holding that the July 17, 2006 order did not prohibit the filing of the second lis pendens, the Jessop I panel necessarily also determined that the trial court failed to notify Anderton clearly that he could not file that lis pendens.[5] We thus reverse the trial court's determination of civil contempt.[6]

Second, the Estate challenges the trial court's award of attorney fees to Sage. In its March 12, 2007 order and judgment, the trial court ordered $24,873.50 in attorney fees and $461.63 in costs, with interest, to Sage "pursuant to th[e] Court's prior Civil Contempt Order." The civil contempt order specified that Sage was entitled to "all reasonable attorney fees and costs . . . related to Mr. Anderton's contemptuous conduct including but not limited to fees and costs incurred in removing the August 14, 2006, Lis Pendens and fees and costs incurred in bringing the motion for contempt." Because we have reversed the civil contempt order, which was the basis for the award, we also vacate the order awarding attorney fees and costs to Sage.

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[5]Because we conclude that the order was not clear, we need not address the issues raised concerning Anderton's alleged right to suppress the disclosures of his attorneys. Likewise, the absence of an unambiguous order ends our inquiry without review of the sufficiency of the trial court's findings of fact on the three elements of contempt or Anderton's preservation of that argument in the trial court.

[6]The Estate also challenges the trial court's civil contempt order because it "[c]ondition[ed] incarceration upon payment of a just-levied award of attorneys' fees" as a contemporaneous contempt sanction. We also need not address this issue due to our reversal of the contempt order.

Finally, the Estate asserts that it is entitled to attorney fees on appeal. Rule 24 of the Utah Rules of Appellate Procedure requires that "[a] party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award." Utah R. App. P. 24(a)(9). The basis upon which the Estate claims that it is entitled to fees is Utah's wrongful lien injunction statute, see Utah Code Ann. § 38-9a-205(3) (2005). The Jessop I panel ruled that the second lis pendens--the one at issue here--did not violate the wrongful lien injunction, remanded for a reduction of Sage's attorney fees, if appropriate, and declined to award either party attorney fees on appeal because each party only partially prevailed on the basis of the wrongful lien statute.[7] See 2008 UT App 348, ¶¶ 23-25. This appeal concerns the Estate's challenge to the civil contempt order. We therefore reject the Estate's claim for fees incurred in this appeal based on the wrongful lien injunction statute.

We reverse the court's December 18, 2006 civil contempt order, vacate its related March 12, 2007 order and judgment regarding attorney fees and costs, and remand to the trial court for the entry of an order consistent with this opinion for the repayment to the Estate of the amounts advanced for fees and costs resulting from the contempt order.

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Carolyn B. McHugh, Judge

WE CONCUR:

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Judith M. Billings, Judge

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James Z. Davis, Judge

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[7]In Doug Jessop Construction, Inc. v. Anderton (Jessop I), 2008 UT App 348, this court affirmed the trial court's rulings that Anderton's recording of the notice of interest and first lis pendens were wrongful liens under the wrongful lien statute. See id. ¶¶ 9, 16, 19, 25. Thus, Anderton prevailed only on the claim that his second lis pendens did not violate the wrongful lien injunction statute. See id. ¶¶ 23, 25.