

JUNE 2010 SUPPLEMENT
to
2010 REAL ESTATE CASE LAW UPDATE

28th Annual Real Estate Symposium
Colorado Bar Association
CLE in Colorado, Inc.
Snowmass Village, Colorado
July 16, 2010

Frederick B. Skillern
Montgomery Little & Soran, P.C.
Greenwood Village, Colorado 80111

Goodman Assocs., LLC v. WP Mountain Properties, LLC
Colorado Supreme Court, January 11, 2010
222 P.3d 210 (Colo. 2010)
Service of process; registered agent; service on assistant.

This case is interesting for those who serve as registered agents for various business entities. The supreme court holds that a default judgment was erroneously set aside where the defendant failed to respond to the complaint after service of process was hand delivered to an assistant of defendant's registered agent. The registered agent "failed to find" the process papers in his in-box. Where the process server hand delivers the process papers to an assistant who performs administrative duties for the registered agent, service is accomplished under C.R.C.P. 4, even though the person served was not the registered agent's primary assistant. It follows that the trial court had personal jurisdiction over the defendant and the default judgment was not void under C.R.C.P. 60(b)(3). Further, because a reasonably careful registered agent would not have neglected to find the process papers and because equitable considerations did not favor the defendant, the defendant's failure to respond to the complaint constituted neither mistake nor excusable neglect under C.R.C.P. 60(b)(1).

Town of Erie v. Town of Frederick
Colorado Court of Appeals, June 10, 2010
2010 Colo. App. LEXIS 821
Annexation; flagpole; notice.

In January 2007, Frederick's mayor executed four petitions to annex land known as the Yardley Wetlands. Erie submitted four motions for reconsideration regarding the annexations, which were denied. However, the annexations were repealed by Frederick because it had failed to publish proper notice. In May of the same year, Frederick provided notice 25 days to a public hearing and adopted resolutions annexing the Yardley Wetlands, using Weld County Road 5 as the pole in a series of flagpole annexations. Erie submitted another set of motions for reconsideration which were again denied by Frederick's town board. Erie sued Frederick over the annexations.

C.R.S. § 31-12-105(1)(e.3) states that annexations using a public road to achieve contiguity must provide abutting landowners with written notice 90 days prior to the date of the annexation hearing. This section also provides: "Inadvertent failure to provide such notice shall neither create a cause of action in favor of any landowner nor invalidate any annexation proceedings." The trial court found that Frederick's "short notice was certainly not by design or intentional." After the trial court found that Frederick's short notice to landowners was inadvertent, Erie appealed. Erie also disputed the trial court's finding that it did not have standing to raise issues on behalf of third parties.

Erie argues to the court of appeals that Frederick's failure to provide 90 days notice to landowners adjoining the proposed annexations could not be inadvertent because Frederick was given notice of its defect in Erie's original motion for reconsideration. The Frederick mayor and town clerk both testified in the lower court that they believed notice had been timely provided

and that nobody appeared to object due to lack of sufficient notice. The court of appeals agrees with the trial court in deciding in Frederick's favor that the short notice was inadvertent.

The court of appeals also concludes that Erie, as a municipality, does not have unfettered standing to raise issues on behalf of anyone else under C.R.S. § 31-12-116. The court previously determined in *Richter v. City of Greenwood Village*, 577 P.2d 776, 777 (Colo. App. 1978) that property owners whose land is not included in a proposed annexation may not challenge the annexation. "To conclude otherwise would allow a municipality to raise issues on behalf of a party or nonparty even if that aggrieved party or nonparty did not dispute those issues."

***Thompson Creek Townhomes, LLC v. Tabernash Meadows Water & Sanitation Dist.*
Colorado Court of Appeals, June 10, 2010
Water taps; specific performance.**

Thompson Creek Townhomes, LLC (Thompson Creek) files a suit for breach of contract and promissory estoppel against the Tabernash Meadows Water and Sanitation District (the District), seeking specific performance to compel the District to reserve and make available a number of water taps. The district court rules that Thompson Creek cannot assert a claim for specific performance or promissory estoppel against the District. Thompson Creek appeals only that part of the judgment dismissing the claim for specific performance.

While the Governmental Immunity Act insulates public entities from liability in claims which lie in tort, the doctrine of sovereign immunity also extends to contract claims. However, Colorado has long recognized, that where the state or one of its governmental entities enters into a contract, "it thereby waives immunity from suit." *Ace Flying Serv., Inc. v. Colo. Dep't of Agric.*, 314 P.2d 278, 280 (Colo. 1957). This rule also applies to local governmental units, like water and sanitation districts. In *Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, LLC*, the supreme court held that "an action for specific performance of a core governmental power like eminent domain could not lie against the sovereign." 176 P.3d 737, 745 (Colo. 2007). Thompson Creek argues that *Wheat Ridge* allows a contracting party to seek specific performance against the government if the performance it seeks involves a non-core governmental power such as the reservation of water taps. The court of appeals does not read *Wheat Ridge* so narrowly that an activity must be a core governmental power. An action for specific performance lying against the sovereign as a contractual remedy has not been allowed by any Colorado case or statute, prohibiting Thompson Creek's action for specific performance in this case. The judgment dismissing specific performance is affirmed.

***Weize Co., LLC, v. Colo. Regional Construction, Inc.*
Colorado Court of Appeals, June 10, 2010
2010 Colo. App. LEXIS 814
Mechanic lien action; bond substituted for lien; *lis pendens* required as condition of suit.**

Weize is hired by Colorado Regional Construction to complete work as a plumbing subcontractor. After Weize completes a portion of the project, CRC hires a different plumber and fails to pay Weize for the completed work. Weize records a mechanic lien against the project. CRC files an action to substitute a bond for the lien, which is successful, and the lien is

released. Weize files an action within the six-month limitation period to foreclose on the bond, but does not record a notice of *lis pendens* under the provisions of C.R.S. § 38-22-110. The trial court directs a verdict against Weize for failure to record a *lis pendens* notice as required by C.R.S. § 38-22-110, which provides:

No lien claimed by virtue of this article . . . shall hold the property longer than six months after the last work or labor is performed . . . unless an action has been commenced within that time to enforce the same, *and unless also a notice stating that such action has been commenced is filed for record within that time* in the office of the county clerk and recorder of the county in which said property is situate.

In a case of first impression, the court of appeals affirms, and concludes that bonding over a lien does not eliminate the need to record a notice of *lis pendens*, however counterintuitive this may seem. The main rationale lies in the possibility that the lien could be reasserted against the property if the surety goes belly up. In that event, "any lien claimant shall be entitled to enforce such lien claim in the same manner as if no bond had been filed." C.R.S. 38-22-129(5). Also, the court reasons that ignoring the *lis pendens* requirement in a multiple lien case where no *lis pendens* was filed and the owner substituted a bond for only one lien would also produce the anomaly that only the claimant whose lien had been bonded could recover.

Joondeph v. Hicks

Colorado Supreme Court, June 28, 2010

2010 Colo. LEXIS 504

Equitable subrogation; subsequent purchaser; derivative subrogation; actual knowledge.

The supreme court in this case affirms the decision of the court of appeals, reported here last year. *Hicks v. Joondeph*, 205 P.3d 432 (Colo. App. 2008). In so doing the court rejects the doctrine of derivative subrogation applied by the trial court to allow a subrogee to transfer its equitable subrogation rights to a subsequent buyer, notwithstanding that buyer's actual knowledge of the prior recorded judgment lien.

Hicks sought to foreclose a judgment lien in 2002 on property in the Glenmoor subdivision in Cherry Hills Village that had been owned by the judgment debtor, Grubbs. Grubbs sold the property to Londre, and Chase took a deed of trust for the purchase money loan. The title company failed to locate the judgment lien. In litigation that resulted in *Hicks v. Londre*, 125 P.3d 452 (Colo. 2005), the court allowed Londre (as owner and holder of an equitable lien) and Chase to be jointly subrogated to the former first lien position of Grubbs' mortgagee.

The title insurer for Londre and Chase were persuaded to insure over the Hicks lien, and Londre sold to Joondeph, with purchase money financing from CitiMortgage. After learning of the sale, Hicks sought again to foreclose his lien, arguing that the Joondephs and their lender had actual knowledge of the Hicks lien and could not qualify for equitable subrogation under the test set out in *Hicks v. Londre, supra*. The trial court applied subrogation again, applying "derivative subrogation" in reliance on a 1996 case out of the Fifth Circuit.

The court of appeals held that the Joondephs would not be entitled to equitable subrogation because they had actual knowledge of Hicks' preexisting lien. The court also found no precedent for recognizing "derivative" equitable subrogation, which would allow the conveyance of the prior owners' subrogation rights to the petitioners via warranty deed. The supreme court affirms.

The court's opinion is short and to the point. Because the Joondephs had actual knowledge of Hicks' prior lien and were not operating under a mistaken assumption that their lien would have senior priority status, they are not entitled to equitable subrogation. The court holds that a doctrine of derivative equitable subrogation has no foundation in Colorado law. Under the test propounded in *Hicks v. Londre*, equitable subrogation remains a narrow exception to the normal order of priority established by Colorado's race-notice recording system, to be applied only on a case-by-case basis, where some mistake occurs which justifies equitable relief.