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First of Denver Mortgage Investors and Citibank, N. A. v. C. N. Zundel and Associates et al : Brief of Defendant-Respondent

Utah Supreme Court

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Madsen & Cummings; George K. Fadel; Callister, Greene & Nebeker; Turner, Perkins & Schwobe;

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IN THE SUPREME COURT OF THE STATE OF UTAH

FIRST OF DENVER MORTGAGE
INVESTORS; and CITIBANK, N.A.,

Plaintiffs and
Appellants,

vs.

C. N. ZUNDEL AND ASSOCIATES,
a limited partnership; MOUNTAIN
SPRINGS CONSTRUCTION COMPANY OF
UTAH, a Utah corporation; MOUNTAIN
SPRINGS CONSTRUCTION COMPANY, a
California corporation; F. D.
ASHDOWN and ALFRETTE B. ASHDOWN,
Trustees; FMA LEASING COMPANY;
DUNCAN ELECTRIC SUPPLY, INC.;
HOLT-WITMER INTERIORS, et al.,

Case No. 15696

Defendants and
Respondents.

BRIEF OF DEFENDANT-RESPONDENT
ROBERT J. WARDROP, dba
K & W PAINTING AND DECORATING

Appeal from the Second Judicial District Court
of Davis County, State of Utah
The Honorable J. Duffy Palmer, District Judge

FILED

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CALLISTER, GREENE & NEBEKER
Richard H. Nebeker
800 Kennecott Building
Salt Lake City, Utah 84133
Attorneys for Plaintiffs-
Appellants

MADSEN & CUMMINGS
Robert C. Cummings
320 South Third East
Salt Lake City, Utah 84111
Attorneys for Bland Brothers, Inc.

Clerk, Supreme Court, Utah

TURNER, PERKINS & SCHWOBE
David H. Schwobe
343 South 400 East
Salt Lake City, Utah 84111
Attorney for K & W Painting
and Decorating

George K. Fadel
170 West Fourth South
Bountiful, Utah 84010
Attorney for Duncan Electric,
Ashdowns and Graham Tile Co.

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CALLISTER, GREENE & NEBEKER
Richard H. Nebeker
800 Kennecott Building
Salt Lake City, Utah 84133
Attorneys for Plaintiffs-
Appellants

MADSEN & CUMMINGS
Robert C. Cummings
320 South Third East
Salt Lake City, Utah 84111
Attorneys for Bland Brothers, Inc.

TURNER, PERKINS & SCHWOBE
David H. Schwobe
343 South 400 East
Salt Lake City, Utah 84111
Attorney for K & W Painting
and Decorating

George K. Fadel
170 West Fourth South
Bountiful, Utah 84010
Attorney for Duncan Electric,
Ashdowns and Graham Tile Co.

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NATURE OF THE CASE

This is an action in which Respondents sought foreclosure against real property known as the LAKEVIEW TERRACE SUBDIVISION in Davis County, Utah, pursuant to mechanics liens, an Appellant sought foreclosure against said property on the basis of a Trust Deed.

DISPOSITION IN LOWER COURT

The trial court granted Respondent's Motions for Summary Judgment, ruling that the following Defendant-Lien Claimants were entitled to first priority against the property in question, followed by Plaintiff-Appellant: Duncan Electric Supply, Inc., Robert J. Wardrop, dba K & W Painting and Decorating, Countertop Shop, Inc., Max D. Scheel, dba Vermax Corp., Ronald Graham Tile Company, Bland Brothers, Inc., Child Brothers, Inc., and Holt-Witmer Interiors, Inc. The trial court awarded combined claims of the foregoing lien claimants in a total amount of \$44,732.86.

RELIEF SOUGHT ON APPEAL

Respondent, Robert J. Wardrop, dba K & W Painting and Decorating, seeks to have ruling of the Lower Court sustained on Appeal, and for a ruling of this Honorable Court allowing him an increase in the amount of his priority claim to reimburse him for his reasonable attorney's fees expended on Appeal.

JOINDER WITH OTHER LIEN CLAIMANTS

Defendant-Respondent, Robert J. Wardrop, dba K & W Painting and Decorating, hereby joins with the other Defendant-Respondents, lien claimants in opposing the Appellant in upholding the Judgment of the trial court granting priority to the claims of liens of laborers and materialmen over that of the Appellant mortgagee.

STATEMENT OF FACTS

Respondent, Robert J. Wardrop, dba K & W Painting and Decorating, generally agrees with the Statment of Facts contained within the Brief of Appellant but does incorporate herein the exception to said Statement of Facts taken by Respondents Duncan Electric Supply, Ronald Graham Tile Co., Child Brothers, Inc., and Bland Brothers, Inc. Respondent further amplifies said Statement of Facts as follows.

Plaintiffs original Trust Deed was recorded August 1, 1973, against the subject property. Child Brothers, Inc. did begin its work on the subject property on or about the 15th day of November, 1973. As set forth in the Brief of Duncan Electric Supply, Inc. and Ronald Graham Tile Co., on or about the 19th day of February, 1974, the original loan was satisfied and the original Trust Deed released, the same being replaced with the Trust Deed currently in issue. Said loan specifically contemplated land development, roads, sewer, water, and construction of

condominium units and facilities. At the time of said refinancing and filing on the 19th day of February, 1974, Plaintiff-Appellant failed to request or acquire lien releases from Respondent Child Brothers, Inc., and the subsequent lien release acquired from Child Brothers, Inc. was not in fact filed until on or about the 17th day of June, 1976.

As set forth in the Statement of Facts of Appellant, the work begun by the other seven (7) lien claimants who have been adjudged prior to the subsequent in second Trust Deed filed by Appellant on or about the 19th day of February, 1974, each began their work prior to the release by Child Brothers, Inc. of it's claim on or about the 17th day of June, 1976. The work of Respondent Robert J. Wardrop, dba K & W Painting and Decorating, was completed and, in fact, he did record his lien as a matter of record on the 26th day of April, 1976.

ARGUMENT

POINT I. THE TRIAL COURT WAS CORRECT IN RULING THAT RESPONDENT LIEN CLAIMANTS HAVE PRIORITY OVER THE TRUST DEED OF APPELLANTS BY REASON OF RELATION BACK TO THE TIME OF CHILD BROTHERS, INC.'s SEWER AND WATER LINE WORK FOR THE SUBDIVISION.

Appellant states in Point I of it's Brief that the following facts are undisputed:

1. That all of the lien claimants, except Child Brothers, Inc., performed work on Lakeview Terrace, Phase One, after Plaintiff-Appellants Trust Deed for \$1,500,000.00 was recorded on February 19, 1974.

2. That the lien claimant Child Brothers, Inc. laid water line and sewer pipe for the subdivision, commencing its first work on November 15, 1973.

3. That Child Brothers, Inc., in consideration of payment of \$13,210.40, released all claim of lien for work performed prior to June 17, 1976.

Appellant, however, in listing the above set forth undisputed facts, fails to delineate other undisputed facts that are also very relevant to its Argument:

1. Plaintiff-Appellant was familiar with the project in that it had made a prior loan in the amount of approximately \$450,000.00 on the subject property, a Trust Deed securing the same being recorded on the 1st day of August, 1973.

2. That upon making its second loan, which in part paid off the first loan, Plaintiff failed to retain the original priority afforded it by the August 1st filing and either failed to adequately inspect the subject property, or demand lien releases for the obvious work performed on the subject property by Child Brothers, Inc. and did, in fact, reconvey the original Trust Deed recorded in August and file a second Trust Deed on or about the 19th of February, 1974.

3. That the release of claims referred to in paragraph 3 of the facts that which Appellants alleges are undisputed above, was recorded on June 17, 1976, subsequent to the beginning of work on the project by each of the Respondents herein, and subsequent to the recording of the lien of Robert J. Wardrop,

dba K & W Painting and Decorating on or about April 26, 1976.

4. That the loan secured by the second Trust Deed recorded on or about the 19th day of February, 1974, was, as set forth in the Brief of Respondent Duncan Electric Supply and Ronald Graham Tile Co., a blanket Trust Deed under a blanket construction loan agreement for the development of the entire project containing the full forty-four (44) acres and not limited to any particular part, parcel, or lot thereon. (R. 11).

Appellant, in it's Brief, relies upon Section 38-1-5, U.C.A. (1953, as amended) as the controlling statute in this matter and Respondent does not contest the same. However, Appellant further relies upon the case of Western Mortgage Loan Corporation v. Cottonwood Construction Company, 18 Utah 2d 409, 424 P.2d 437 (1967), with the interpretation of Section 38-1-5, supra., contained therein to be controlling in this case. It is the position of this Respondent that Western Mortgage Loan Corporation, supra., is distinguishable for the purposes that Appellant proposes it and, in fact, does favor Respondents. As argued by the other Respondents filing Briefs in this action, Western Mortgage Loan Corporation v. Cottonwood Construction Company, supra., dealt with a construction loan for one single unit on one lot in an entire subdivision. The instant case deals with the construction loan for an entire subdivision. When Appellant released it's first Trust Deed recorded in August of 1973 and refiled in February of 1974, it had notice or should of

had notice of the work performed by Child Brothers, Inc. as of that date and should not, at this time, be allowed to prevail over mechanics lien claimants on the authority of Western Mortgage Loan Corporation v. Cottonwood Construction Company, supra. The court in Western Mortgage Loan, supra., stated:

To tack the liens for labor and materials that went into the construction of the house to the liens that may have arisen for labor and materials furnished in off-site improvements in connection with the laying out and construction of facilities used in connection with the subdivision as a whole would be going beyond the intent of the statute. The problem is one of notice. The presence of materials on the building site or evidence on the ground that work has commenced on a structure or preparatory thereto is notice to all the world that liens may have attached. However, the off-site construction in developing the subdivision for building sites would not necessarily bring to the attention of a lender that someone is claiming a lien on a particular lot in the subdivision. This is especially true as in this case, where the lender advanced money to build a home long after the subdivision had been laid out and developed. It is apparent that the persons who supplied labor or materials for the construction of roads, sewers, etc., could have filed liens for unpaid balances due them, if any. The erection of the home was separate and severable from the earlier work in developing the subdivision. (Emphasis added.)

In the instant case, there is no problem with notice. If the Appellant was refinancing the entire package and knew or should have known that the work of Child Brothers, Inc. had taken place and would take priority over the refinancing.

Appellant attempts in its Brief to utilize the subsequent release by Child Brothers, Inc., the same being affective as of June 17, 1976. It is the position of this

Respondent that as to this Respondent that release is irrelevant in that his work was both contracted for and completed prior to the recording of the same.

Plaintiff-Appellant also utilizes the case of Aladdin Corporation v. Trustees of the Central States, 563 P.2d 82, in support of its argument against relation back in that Aladdin Heating, supra., cites Western Mortgage Loan Corporation, supra. Not only is Aladdin Heating, supra., distinguishable from the instant case, but is also distinguishable from Western Mortgage Loan, supra. Aladdin Heating, supra., is decided around a Nevada statute, NRS 108.225, which prefers "liens for work or labor, which work or labor was begun prior to the filing of a mortgage, but begun after the commencement of the erection of the building..." Section 38-1-5 U.C.A. (1953, as amended) states, "The liens herein provided shall relate back to, and take effect as of, the time of the commencement to do work or furnish materials on the ground for the structure or improvement...." In the instant case there is no question that the actions taken by Child Brothers November 19, 1973, was a "commencement to do work for the improvement which was, in fact, as financed by Plaintiff, not one particular building, but an entire subdivision." While the Nevada statute would appear to require the actual commencement of the erection of the building, the same appears to be more stringent than 38-1-5, supra., and not applicable to the instant case. Further, Aladdin Heating, supra., also appears to center around

the issue of notice as previously discussed in Western Mortgage Loan, supra. The court states, "...mechanics liens could relate back to a time long before there were any visible signs of construction to inform perspective lenders inspecting the premises that liens had attached. Under such circumstances, no prudent businessman would be willing to lend construction money."

The courts concern in Aladdin Heating, supra., simply does not apply to the facts in the instant case. Not only did the action by Child Brothers leave visible signs, but Plaintiff-Appellant had, in fact, made one previous loan on the subject property and was simply refinancing the construction of the subdivision. It knew or should have known during an inspection of the premises that work had been done and services rendered to that forty-four (44) acres, and on that basis should have retained it's original priority date or spent sufficient efforts and time to determine exactly whether or not claims had attached and required the same to be satisfied prior to reconveying it's original Trust Deed and filing of the second Trust Deed in February of 1974.

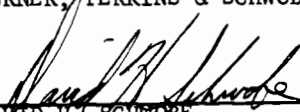
CONCLUSION

As propounded in the Briefs of Respondents filed prior to this filing, the position of Respondents that the work of Child Brothers was part and parcel of the total project, contemplated and financed by Appellant, that the work was done prior to the release by Appellant of it's first Trust Deed and refinancing,

that Appellant did not, at that time, concern itself with claims that may have attached and apparently did not pursue Child Brothers for release of any claim that may have attached until after the services and materials supplied by Respondents herein had also been contributed to the project. It would be inequitable for this court to bind these Respondents by the ruling in Western Mortgage Loan, supra., in that it is clear that Appellant knew or should have known what was happening to that property, prior to it's refinancing. It is imparative to point out that Appellant knew when it refinanced that it was financing the entire project, that it was financing condominium units, and that the work performed by Child Brothers was integral to the common services and property included within said project.

The Judgment of the trial court should be affirmed, and Respondents should be awarded additional attorney's fees for the defense of this appeal.

Respectfully submitted,
TURNER, PERKINS & SCHWOBE



DAVID H. SCHWOBE
Attorney for Respondent
Robert J. Wardrop, dba
K & W Painting and Decorating

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Defendant-Respondent Robert J. Wardrop, dba K & W Painting and Decorating, postage prepaid, this 25th day of August, 1978, to the following:

Robert C. Cummings
Attorney at Law
320 South Third East
Salt Lake City, Utah 84111

Carvel R. Shaffer
Attorney at Law
807 East South Temple, No. 301
Salt Lake City, Utah 84102

Robert S. Howell
Attorney at Law
1210 Deseret Building
Salt Lake City, Utah 84111

George K. Fadel
Attorney at Law
170 West Fourth South
Bountiful, Utah 84010

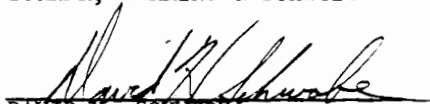
Richard H. Nebeker
Attorney at Law
800 Kennecott Building
Salt Lake City, Utah 84133

John H. Kelly
2434 Beacon Drive
Salt Lake City, Utah 84108

Richard C. Davidson
Attorney at Law
1408 South 1100 East
Salt Lake City, Utah 84105

Randy S. Ludlow
Attorney at Law
430 Judge Building
Salt Lake City, Utah 84111

TURNER, PERKINS & SCHWOBE


DAVID H. SCHWOBE
Attorney for Defendant-Respondent
Robert J. Wardrop, dba
K & W Painting and Decorating