

1978

Gary Kendrick, Inc., Dba Gary's Drywall and Peterson Glass Company v. Gene W. Miller Ad Ruth B. Miller : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GARY KENDRICK, Inc., dba)
GARY'S DRYWALL and PETERSON)
GLASS COMPANY,)
)
Plaintiffs and Appellant,)
)
-vs-)
)
GENE W. MILLER and RUTH B.)
MILLER,)
)
Defendants and Respondents.)

Civil No. _____

BRIEF OF APPELLANT

Appeal from the District Court of Cache County

Honorable VeNoy Christofferson

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CASES AND AUTHORITIES CITED

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IN THE SUPREME COURT OF THE STATE OF UTAH

GARY KENDRICK, Inc., dba)
GARY'S DRYWALL and PETERSON)
GLASS COMPANY,)

APPELLANT'S BRIEF

Plaintiffs and Appellant,)

-vs-

Civil No. 15995

GENE W. MILLER and RUTH B.)
MILLER,)

Defendants and Respondents.)

STATEMENT OF KIND OF CASE

This is a civil action brought by Plaintiffs against Defendants-landowners who became personally liable for materials and labor under Section 14-2-1 of the Utah Code Annotated, 1953 as amended.

DISPOSITION IN LOWER COURT

This action was tried in the District Court of the First Judicial District in and for Cache County, Utah, the Honorable Judge VeNoy Christoffersen presiding. The Court sitting without a jury granted Judgment in part to Plaintiff and held in part that Plaintiff's right to recover was partially barred because of a Lien Release executed by Plaintiff.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks a reversal of the Trial Court's Judgment on the partial invalidity of Plaintiff's claim, and for an order of this Court directing the Trial Court to enter Judgment in favor of the Plaintiff and against the Defendant for the balance of Plaintiff's claim, the sum of \$1,309.00, plus interest and costs.

STATEMENT OF FACTS

In this Brief, the Appellant shall be referred to as the Plaintiff and the Respondent shall be referred to as the Defendants, and Laron Wardle dba Sundown Construction, Inc. shall be referred to as Wardle.

At all times pertinent to these proceedings the Defendants were the owners of the following described real property in Cache County, Utah:

A Parcel of land located in the West half of the Southwest quarter of Section 14, Township 11 North, range 1 East of the Salt Lake Base and Meridian, being further described as follows:

Beginning at a point in the East line of said West half which is South 310.00 feet from a point described by record as being south 40 rods from the Northeast corner of said West half; thence continuing South 0° 00' West along said East line, 150.00 feet; thence North 89°05' West 568.50 feet; thence North 0°00' East 150.00 feet; thence South 89°05' East 568.50 feet to the point of beginning, less the East 1 rod being used as a city street.

Plaintiff at all times pertinent hereto was a businessman furnishing supplies, labor and materials to contractors.

Defendants had entered into an agreement with Wardle for the construction of a home for Defendants. Wardle had several homes under construction during this same time; two of which were designated as the Stewart Hill Job and the Miller Job (Defendants' home).

Plaintiff furnished to Wardle various materials and supplies and labor during the times mentioned herein (Tr. p. 6, lines 7 & 9).

The Stewart Hill Job was commenced in July, 1975 and was finished in August, 1975 as far as Plaintiff's furnishing of materials, labor and supplies was concerned (Tr. p. 9, lines 3-19) and that Plaintiff's bill for the Stewart Hill Job was \$1,309.00.

On August 27, 1975, Wardle came to Plaintiff's place of business and gave to Joel Cowan, Plaintiff's Manager, a check in the amount of \$1,309.00 (Tr. p. 18, lines 11-15) which was designated by Wardle to be for the Stewart Hill Job (Tr. p. 18, lines 16-21 & p. 31, lines 2-9). Joel Cowan signed a Lien Release in exchange for the \$1,309.00 paid by Wardle (Tr. p. 19, lines 15-17, lines 19 & 20), which particular Lien Release was signed in blank (Tr. p. 19, lines 13 & 14) and intended by both Wardle and Cowan to release the Stewart Hill Job.

Subsequent to August 27, 1975, and approximately on September 2, 1975, Plaintiff commenced furnishing labor and materials to Defendants, and on September 24, 1975, Plaintiff finished furnishing

sheetrock and labor on Defendants' home (Tr. p. 8, lines 412), with a total amount of \$2,516.93. There is no dispute that this sum has not been paid.

Subsequent to the time he paid Joel Cowan the check for \$1,309.00 on the Stewart Hill Job, Wardle through mistake or inadvertance, filled in the blank Lien Release received from Joel Cowan with the words "For South Bench Providence Miller Home" (Tr. p. 30, lines 5-23). It was never intended by Wardle to release any sums that subsequently became due and payable to Plaintiff (Tr. p. 30, lines 24, 25; p. 31, line 1).

Subsequently, Wardle presented the Lien Release (Exhibit 5) to First National Bank, Logan, Utah, and sums were deducted from Defendants' account and the sums were apparently paid to Wardle.

Plaintiff brought an action against Defendants to collect the sum of \$2,516.93 plus interest and costs under Section 14-2-1, U.C.A. by virtue of Defendants having failed to secure a bond and for sums not paid by the general contractor, Wardle.

This matter was tried in the above Court on April 6, 1978. The Court granted Plaintiff Judgment but offset the Judgment by \$1,309.00 holding that the Lien Release signed by Joel Cowan, in blank, was a valid release and that the amount covered by it should be deducted from the \$2,516.93 owed Plaintiff by Defendant:

From the Findings and the Judgment allowing a deduction, Plaintiff appeals.

ARGUMENT

Plaintiff has a valid claim against Defendants and said claim should be enforced by this Court.

Under the Provisions of Section 14-2-1, Utah Code Annotated, 1953:

"14-2-1. Bond to protect mechanics and materialmen. -- The owner of any interest in land entering into a contract, involving \$500 or more, for the construction, ... improvement upon land shall, before any such work is commenced, obtain from the contractor a bond in a sum equal to the contract price, with good and sufficient sureties, ..."

and Section 14-2-2 of the Utah Code Annotated, 1953, provides as follows:

"14-2-2. Failure to require bond--Direct liability--Limitation of actions. -- Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond, or to exhibit the same, as herein required, shall be personally liable to all persons who have furnished materials or performed labor under the contract for the reasonable value of such materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon. Actions to recover on such liability shall be commenced within one year from the last date the last materials were furnished or the labor performed."

Defendants failed to comply with the above-stated Provisions of the Utah Code and became personally liable to Plaintiff for the materials furnished to the Defendants by and through Laron Wardle doing business as Sundown Construction, Inc.

The Court granted Judgment in favor of Defendants, but deducted therefrom the sum of \$1,309.00 holding that Johnson Construction

Company -vs- Kennedy, 541 P2d 1038 was controlling.

In the instant case, the facts are substantially different than those of the Johnson Case.

FIRST: In the Johnson Case, Longstroth, the contractor, became heavily indebted to Johnson, the supplier, and paid to Johnson an amount in excess of the amount due and owing for the Kennedy Job, and without apparent designation as to which accounts the money should be applied.

In the instant case, Plaintiff furnished labor and materials to Wardle for a job known as the Stewart Hill Job, commencing July 21, 1975, and completed in August, 1975 (Tr. p. 9, lines 3-16). The total amount of this job was \$1,309.00 (Tr. p. 9, line 23). Wardle came to Plaintiff's place of business and presented to Plaintiff's agent a check for \$1,309.00 (Tr. p. 18, lines 11-15) and designated that the amount was for the Stewart Hill Job (Tr. p. 18, lines 19-21).

SECOND: In the Johnson Case, after Longstroth had received a payment from Kennedy's lender, he then obtained a Lien Waiver from Johnson.

In the instant case, Wardle paid in full the Stewart Hill Job with his own funds and received a Lien Release concurrent therewith (Tr. p. 20, lines 19-21). It wasn't until sometime later that Wardle went to the bank, presented the Lien Release and secured payment (Tr. p. 30, lines 9-11).

THIRD: In the Johnson case, the contractor apparently let the payments to suppliers go and thereby became heavily indebted to Johnson, and thereby created an open account covering several jobs.

In the instant case, such was not the case. Wardle paid his bills upon the completion of each job as far as Plaintiff was concerned (Tr. p. 22, lines 15-20). Furthermore, in the instant case, Wardle paid Plaintiff for the labor and material on the Stewart Hill Job prior to the time Plaintiff was to furnish labor and materials on the Defendants' home (Miller Job) (Tr. p. 7, lines 7-11).

FOURTH: In the Johnson Case, it appears that the contractor obtained Lien Waivers and Releases for the purpose of obtaining payments for other jobs and then made payments to the supplier.

In the instant case, the contractor paid for the Lien Release before he submitted it to anyone else (Tr. p. 18, lines 11-23).

FIFTH: In the Johnson Case, the contractor made it a practice of first obtaining Lien Releases for the purpose of obtaining money from the lenders.

In the instant case, Wardle always paid for the Lien Releases at the same time (Tr. p. 20, lines 19-21; p. 22, lines 15-19) and designated the job for which the payment was to be applied. There was always consideration paid for the execution of the Lien Release (Tr. p. 22, lines 15-19).

Additionally, in looking at Exhibit 5, it is apparent that Wardle already considered himself to have paid for the Lien Release.

A Lien Release must be construed as to the intention of the parties. 53 Am. Jur. 2d, Mechanic's Liens, Sec. 294.

The lower Court held that the Lien Release signed in blank on August 27, 1975 was a valid release as to the \$1,309.00 due and owing Plaintiff by Defendants and thereby barred Plaintiff from recovering. Such an application of the law is unsupported in the instant case.

Mechanic's Liens are subject to the same rules of construction as other contracts. The following elements are necessary to have a valid Lien Release:

1) Valuable consideration. Plaintiff has not to date received any consideration for the Release of Lien imputed by the Court. 53 Am. Jur. 2d, Mechanic's Liens, Sec. 292 states:

"A waiver or release of a mechanic's lien by contract or agreement, specifically, a contract executed in the course of or following the completion of the work, must, like other contracts, be supported by a legal consideration to be valid and binding -- that is, there must be a consideration except where there is an estoppel. ..."

2) Intention to waive or release a Lien. "... That knowledge, intention or consent of the person entitled to the Lien is necessary to the waiver of the Lien..." 53 Am. Jur. 2d, Mechanic's Liens, Sec. 290. In the instant case the intent of the parties was to release the Stewart Hill Job--not the Miller Job (Tr. p. 18, lines 7-21).

5) Material furnished before the Lien Waiver. While a Lien Release may be executed releasing fully all claims due and owing at the time the Lien Release was given, it certainly cannot be construed to apply to materials or labor supplied after the date of the release. 53 Am. Jur. 2d, Mechanic's Liens, Sec. 293. In the instant case, the date and execution of the release was August 27, 1975. The Miller Job was not started until September 2, 1975 (Tr. p. 7, lines 8, 9). This Court has discussed this very point in Brimwood Homes, Inc. vs Knudsen Builders Supply Co., 14 Ut. 419, 385 P.2d 982. In construing the language of a Lien Waiver, the Court stated:

"... This receipt is executed and delivered by the undersigned to the Association to induce it to make payment to the undersigned of the above stated sum from funds held by it for the owner of above described real property and in consideration thereof the undersigned hereby waives, releases and discharges any lien or right to lien the undersigned has or may hereafter acquire against said property." (Emphasis added)

The Court said:

"Under the circumstances of this case we do not believe that the defendant, nor the plaintiff, intended that the release and waiver agreement would relate to any future lien rights which the defendant might acquire. The executed documents, designated as a 'release and waiver' related only to the particular debt paid and receipted for in the particular transaction encompassed by that particular instrument. This included any lien the defendant 'has or may hereafter acquire against said property' in regard only to that particular debt."

"Furthermore, it must be noted that the defendant, in receiving the payments from Prudential, was being paid no more than what it was legally entitled to at that time. Thus, a promise by the defendant to waive rights to future liens for other debts would be without consideration."

In Boise Cascade Corporation -vs- Stephens, 572 P.2d 1380, 1382, Justice Crockett, while concurring with the main opinion, added the following comments:

"It must be recognized that after a right to receive money, including wages, has accrued, it is a legitimate subject of waiver. However, with respect to the waiver of the right to liens which may accrue in the future, the situation is somewhat different. A primary purpose of the lien statutes is to guard against a laborer (or a material supplier) from working on a building and being cheated of the reward of his labor and thus avoiding evil consequences to him, his family, and the economy generally. If he can be required to sign away his rights prospectively, the purpose of the statute can be (and likely will be) defeated. Because of the fact that such agreements to waive future rights to liens are in contravention of the law and its purpose, I think that courts should refuse to enforce such a covenant to waive rights to liens which may accrue in the future as being contrary to the law and public policy. ..."

To apply the Johnson Case to this case would have the effect to have Plaintiff release his rights prospectively, and thereby defeat the purpose of the lien statute.

Clearly the evidence shows that Wardle and Plaintiff's agent clearly intended to release the Stewart Hill Job commenced in July and finished in August, 1975, not Defendants' job commenced on September 2, 1975. Thus Plaintiff submits that the Brimwood Homes Case is controlling as to this point.

The conduct of Wardle should not operate as an estoppel to Plaintiff since the intention of Wardle and Plaintiff was to

release the Stewart Hill Job and not the Defendants'. While Wardle did change the intent of the Lien Release, he did so without the knowledge or intent of Plaintiff. Thus if Wardle is construed to be Plaintiff's agent, he acted beyond his scope of authority either expressly or impliedly, and such should not operate to bar Plaintiff's claim of \$1,309.00.

CONCLUSION

On August 27, 1975, in exchange for the sum of \$1,309.00 paid to Plaintiff's agent by Wardle, the agent executed a Lien Release for a project known as the Stewart Hill Job having been so designated by Wardle, a job having nothing to do with Defendants' home.

On September 2, 1975, Plaintiff commenced furnishing labor and material to Defendants home for which he has not been paid in the amount of \$1,309.00.

Sometime after August 27, 1975, Wardle, through mistake or inadvertance, but certainly beyond any scope of authority, took the said Lien Release, filled in the same, designated the Defendants home herein instead of the Stewart Hill Job for which job Wardle had paid \$1,309.00 to secure said Lien Release and presented it to Defendants' bank for payment.

The Court held that the execution of a release in blank armed Wardle with the authority of Plaintiff and cited the Johnson

Case for its sole reason.

Plaintiff contends that upon the facts, the Johnson Case is so different in fact from the instant case that certainly it should not be controlling; and that in fact the Brimwood Homes Case is controlling.

Defendants failed to secure a bond and by Statute became personally liable to Plaintiff for the labor and materials furnished by Plaintiff for which they owe the Plaintiff a balance of \$1,309.00 and Defendants certainly should not be allowed to use a release signed six days before the work commenced on their home by Plaintiff to bar Plaintiff from his claim. If Defendants have a claim, it would seem that it would be against Wardle not Plaintiff. Defendants paid no consideration to Plaintiff for the release, and without consideration, the release is and should be invalid.

Respectfully submitted,

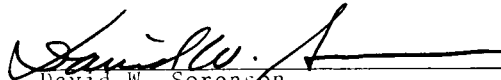
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I hereby certify that I served two (2) copies of the foregoing Appellant's Brief on Defendants-Respondents by

delivery of said copies to Gary Anderson, Attorney for Defendants-
Respondents, this 14 day of September, 1978.



David W. Sorenson