

1979

# Motivated Management International, A Utah Corporation v. Robert L. Finney and Isabelle Finney, His Wife : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MOTIVATED MANAGEMENT	)	
INTERNATIONAL,	)	
a Utah corporation,	)	
	)	Supreme Court No. 16131
Plaintiff-Appellant,	)	
	)	
vs.	)	
	)	
ROBERT L. FINNEY and	)	
ISABELLE FINNEY, his wife,	)	
	)	
Defendants-Respondents.	)	

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BRIEF OF APPELLANT

An Appeal from the Judgment of the Seventh  
District Court in and for the County of  
Carbon, State of Utah

Honorable A. John Ruggeri, Judge Pro-Tem

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FILED

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Clerk, Supreme Court, Utah

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## AUTHORITIES CITED

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MOTIVATED MANAGEMENT  
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corporation,

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Plaintiff-Appellant,

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ROBERT L. FINNEY and  
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Defendants-Respondents.

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BRIEF OF APPELLANT

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NATURE OF THE CASE

This is an action to recover money damages for materials supplied and labor performed in the construction of a personal residence near Price, Utah.

DISPOSITION IN THE LOWER COURT

The lower court, Honorable A. John Ruggeri, Judge Pro-Tem, dismissed plaintiff's amended complaint for failure to state a cause of action.

THE NATURE OF RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment with the direction that plaintiff be permitted to proceed on its amended complaint and that defendant be required to answer or otherwise plead.

STATEMENT OF FACTS

This matter having been dismissed for failure to state a claim, the facts are as alleged in the amended complaint, affidavit of plaintiff, and identified documents. The facts are set forth in numbered paragraphs to facilitate referencing.

1. The parties entered into a written agreement (Record pp. 14-19) whereby plaintiff agreed to furnish materials for a package home which contains all of the required parts to complete a home. In that agreement, plaintiff agreed to arrange for rough framing of the home after defendants, acting as their own contractor, completed the excavation, septic tank, and the foundations and footings. Defendants were to then furnish the balance of the finish work, whether they obtained others to finish the work or did the work themselves.
2. During the course of construction, when a portion

of the rough framing was completed, defendants decided to change their financing, and the new lender prepared a contract which defendants asked plaintiff to sign.

(Record pp. 20-22.) The parties entered into this second Agreement which added Eco Development and Construction Co., a licensed Utah contractor, as the party responsible for the construction portion of the job. However, pursuant to paragraph 2 of the new agreement (Record p. 21), plaintiff was responsible for payment of the contractor. Under the new agreement, plaintiff continued to supply the agreed materials specified in the first agreement, together with changes desired by defendants. Since defendants had already arranged for some of the subcontractors and finish trades, they continued to do so and paid subcontractors directly for services, as provided in paragraph 5 of the second agreement (Record, p. 22).

3. After execution of the second agreement, additional changes were made during the course of construction, as evidenced by the written changes at Record pp. 22-24.

4. During the course of construction, defendants made direct payments to trades, materialmen, and subcontractors without notice to plaintiff and without plaintiff's knowledge. (Record p. 13.)

5. Plaintiff made all payments from its funds to

Eco Development and Construction Co. for its work. (Record p. 14.)

6. At the end of the construction, a dispute arose between the parties as to the amounts due plaintiff, and plaintiff filed a lien against the property for unpaid materials and labor furnished by Eco Development and other subcontractors, which, pursuant to the second agreement, plaintiff was obliged to pay. Within the proper statutory period, plaintiff filed its complaint herein to foreclose its lien, or if the lien failed, to recover as agreed by the parties. The defendants have resided in the home since its completion.

7. This action was filed September 19, 1977, and a Motion to Dismiss was filed October 5, 1977. Plaintiff responded to the motion and moved for leave to amend the complaint to clarify the position of Eco Development, the contractor added by the second agreement. The original attorney for defendants was appointed to the bench, and as a result the matter was left pending until new counsel was appointed by defendants and a pro-tem judge was available to hear the motions. The order entered dismissed the complaint and did not mention the amended complaint. At the hearing on the motions in September, 1978, the Court and defendants'



counsel had the following interchange:

COURT: Just for clarification, Mr. Howard, you want the Court to consider in the motion both the original complaint and the amended complaint on the grounds that you specify just as though the motion was filed after the amended complaint were filed; is that correct?

MR. HOWARD: I'm willing to do that, even though I recognize the Court has authorized the filing of the amended complaint. I'm willing to do that. I'm willing to let the Court assume the amended complaint is properly filed. I'll submit it on that. Because I think even the amended complaint doesn't state a cause of action. (Transcript p. 7, lines 3-13.)

Since the final order does not specify that the amended complaint is dismissed or permitted to be filed, this technical defect should be addressed by this Court if it reverses the trial court as urged by appellant.

ARGUMENT

POINT I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S AMENDED COMPLAINT SOLELY BECAUSE OF A LACK OF A CONTRACTOR'S LICENSE.

This case is similar to several recently decided by this Court in that it challenges a dismissal for failure to state a claim based solely on lack of a contractor's license. It is different from other cases in that the allegations are that in the original relationship between the parties, the home owners were acting as their own contractor, and the claimant was primarily acting as a materialman assisting the owners, but when additional financing was needed by the home owners, a licensed contractor was brought into the contract as the general contractor for the job, with the owners still performing substantial functions as a contractor.

In reviewing the alleged second agreement (Record pp. 21-23), it is clear the defendant home owners knew of the relationship of the plaintiff as a supplier, and not as a contractor, and that the second agreement substantially changed the basic character of the first agreement wherein the home owners were to perform the contracting function. This differentiates this case from earlier decisions of this Court which have denied any claims for construction work if the builder did not comply with the contracting license law. Those cases are summarized in

Meridian Corporation v. McGlynn/Garmaker Company, 567 P.2d 1110 (Utah, 1977).

Those earlier cases have been rightfully distinguished in later cases, Fillmore Products, Inc. v. Western States Paving, Inc., 561 P.2d 687 (Utah, 1977), and Stucki v. Mailander, --- P.2d --- (Utah, filed Jan. 5, 1979), which recognize that a balancing between protection of the public and the injustice from allowing a party to invoke the non-license defense as a shield for avoidance of a just obligation, must be made by the Courts.

In the instant case, the defendants sought to avoid some of the high costs of skilled labor by performing their own labor or arranging for tradesmen to perform labor without the cost of a general contractor. As their financing arrangements were modified, they contracted with a third party who was licensed as a contractor, but who was separately obliged to plaintiff, to oversee the general contractor work. They have now tried to interpose the defense that plaintiff is a stranger to the contractor and had no right to enforce its material claims and labor payment claims against them, even though plaintiff was obliged by the agreement to pay the general contractor, and was obliged to supply the materials agreed upon. The defendants received their completed home at a greatly reduced price; the general contractor has been paid; all other materialmen or tradesmen have been paid; but the defendants claim they owe nothing to plaintiff because of the license statute.

This seems to be an unjust enrichment of the most remarkable sort, particularly when the defendants' attorney drafted the second agreement.

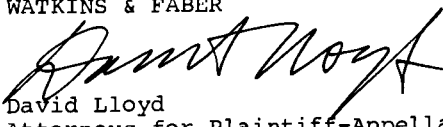
One of issues which may have caused some confusion to the lower court was the portion of the pleading requesting foreclosure of the plaintiff's lien. Plaintiff is clearly entitled to claim payment for materials supplied to the defendants. And to secure this protection, the law provides for materialmen liens. In any event this Court should reverse the lower court and permit the plaintiff to proceed to collect for any unpaid materials. Where the defendants agreed that plaintiff should pay the general contractor, it is only fair that the plaintiff should be placed in the same position as the rights of the contractor, who is allowed at a minimum a cause of action for unpaid labor, and who is also allowed by law a labor lien. It is plaintiff's position that plaintiff should also be allowed to have lien rights as to unpaid labor costs it has paid for, pursuant to the agreement, but if that portion of the lien fails, it should surely be allowed to recover its funds paid to the general contractor and the subcontractors as required by the second agreement.

CONCLUSION

This matter is not clearly a case to which the earlier contractor's license defense can apply. Originally the contracting work was to be done by the defendants, in an attempt to save money on their home purchase. When financing changed during the course of construction, a general contractor was brought onto the project, and the relationships changed. To deny the plaintiff any recovery, either as a lienor or in general damages for breach of the promise to pay for the materials furnished and the payments made to the general contractor, is an absolute denial of justice, and the license defense is so strained in the context of this matter as to be wholly indefensible. The lower court's order should be reversed and the matter remanded for trial or other proceedings to permit plaintiff to foreclose its lien, if applicable, or to recover money damages, as appropriate.

DATED this 9th day of February, 1979.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed three copies of the foregoing brief to Mr. Jackson Howard, HOWARD, LEWIS AND PETERSEN, P.O. Box 778, Provo, Utah 84601, postage prepaid, this 9th day of February, 1979.

A handwritten signature in dark ink, appearing to read "David Moya", is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.