

1979

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MOTIVATED MANAGEMENT)
INTERNATIONAL, a Utah)
corporation,)

Plaintiff-Appellant,)

vs.)

ROBERT L. FINNEY and)
ISABELLE FINNEY, his wife,)

Defendants-Respondents.)

Supreme Court No. 16131

REPLY 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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Case No. 16131

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REPLY BRIEF OF APPELLANTS

ARGUMENT

Appellant answers to the new matter included in respondents' brief as follows:

1. Point I of respondents' brief indicates that the error in dating renders the lien fatal. The Notice of Lien, located at Record p. 4, contains a dating error. The same date, December 24, 1975, was used in the two blanks indicating the date first material furnished and the last material furnished. The actual work was substantially completed by October 15, 1976, as indicated in the complaint. The failure of the lien, however, does not negate any common law remedies, as indicated in Harris-Dudley Plumbing Co. v. Professional United

World Travel Association, Inc., ---P.2d--- (Utah, filed February 15, 1979):

The purpose of the liens thus created by statute is to assist in the collection of laborers' and material-men's claims and not to diminish in any way the claimant's rights to enforce the obligation of contracts, or any other remedy the claimant may have. In harmony with the foregoing and to the same general purpose, both the foreclosure of such a lien and a judgment on the contract may be entered for the amount necessary to discharge the debt as proven.

2. As to the contention of Point II of respondents' brief that appellant was the contractor, in the original agreement, the owner was clearly the general contractor, and appellant agreed to perform certain work on a cost basis, wages for work performed, which was one of the estimated items in the first agreement. The second agreement, drafted by respondents' attorney, located at Record pp. 20-24, had as its purpose to better define the relationship between the parties, adding a licensed contractor for the work, so that other financing could be obtained. (Record, pp. 12-13, affidavit of William P. Hansen.) The contractor, Eco Development, was brought onto the job, to complete the rough frame work and other carpentry work. Respondents continued to act as the general contractor as originally anticipated, by selecting subcontractors and making disbursements without consulting appellant. (Record, pp. 12-13, affidavit of William P. Hansen.) The first paragraph of the original contract (Record, p. 14, cited at p. 7, respondent's brief),

called for a cash price of \$32,648. The second agreement (Record p. 21, paragraph 4) calls for a price of \$50,831. Extras to be added, cited at Record pp. 22,23, and 24, increase the total price. Further, because respondents selected their own subcontractors and certain materials for a portion of the work at bids higher than estimated by the parties at Record, p. 15 (and supporting itimization at Record pp. 16-19), the actual cost considerably exceeded the price in the second agreement.

In support of respondents' theory that appellant was solely responsible for labor performed, respondents, at p. 8 of their brief, cite certain portion of the second agreement, but no reference is made to paragraph 2, which provides as follows:

2. Eco acknowledges that it has entered into its own agreement with Capital to perform the labor and render the supervisory work hereinbefore indicated and it agrees with Finneys that it will perform the said work and labor in accordance with best construction practices.

3. In Point III, respondents' brief, the respondents refuse to acknowledge the amended complaint wherein the licensed contractor, Eco Development, is described. Additionally, respondents had taken it upon themselves to build the home to save money in the first agreement. The second agreement acknowledges that they were assisted in this undertaking by an architect, Gerald Anderson, who was paid by respondents and who would

periodically inspect the work and make a certification to respondents as work was completed so that construction draws could be made. (Record, pp. 21-22, paragraphs 4, 6.) The relationship of general contractor to subcontractor, which respondents attempt to use to distinguish the instant case from Fillmore Products Inc. v. Western States Paving, Inc., 561 P.2d 687 (Utah, 1977), is similar relationship between the respondents as builders of their own home, aided by an architect, and appellant, as the materialman, to the point where respondents requested that Eko Development join the relationship to satisfy the new financing arrangements.

4. In Points IV and V, respondents argue that a separate cause of action must be stated in the pleadings for alternative relief on the same set of facts. Rule 10(b) of the Utah Rules of Civil Procedure provides that only separate transactions need "be stated in a separate count" where a "separation facilitates the clear presentation of the matters set forth." Appellant has been unable to locate any authority for the proposition that the prayer for relief may not ask for alternative relief in the form of a judgment in the event the lien fails. That such relief is regularly requested in the same cause of action is indicated in 17 Am. Jur. Pleading and Practice Forms 627 (1971). Section 38-1-11, Utah Code Ann. (1953),

provides as follows:

. . . Nothing herein contained shall be construed to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the same.

5. In Point VI, respondents argue that appellant may not stand in the shoes of Eco Development. However, it was respondents, through their attorney, who drafted the second agreement, and insisted on the addition of Eco Development, who was to be paid by appellant. Appellant furnished all of the materials used by Eco Development, which had been previously delivered to the job site. The denial of appellant to at least its materials costs in supplying the bulk of the materials for the job is unconscionable.

6. In Point VIII of respondents' brief, respondents argue that the Motion to Dismiss was argued prior to the filing of appellant's Amended Complaint and thus this Court cannot consider the appellant's Amended Complaint. The sequence of events proceeded as follows:

Complaint filed	Sep. 19, 1977
Summons filed	Sep. 22, 1977
Motion to Dismiss filed by Boyd Bunnell	Oct. 5, 1977
Affidavit in Opposition to Motion to Dismiss, together with Response to Motion to Dismiss and Motion for Leave to Amend and an Amended Complaint filed	Oct. 27, 1977
Boyd Bunnell appointed District Judge	Dec. 6, 1977
Notice of Withdrawal of Boyd Bunnell	Mar. 8, 1978
Notice of Appearance of Jackson Howard	Jul. 31, 1978
Notice of Hearing	Aug. 16, 1978
Hearing	Sep. 28, 1978

The Motion for Leave to Amend and Amended Complaint were on file for nearly a year before the hearing. The merits of the Amended Complaint were addressed by both counsel in the hearing, as indicated in the transcript, and specifically at pages 1, 7, and 8. The lower court erred in failing to rule on the Motion for Leave to Amend the Complaint and in dismissing the Complaint; or if it allowed the Amended Complaint and dismissed it as well, for dismissing the Amended Complaint.


CONCLUSION

The disconcerting error in this case is not only that the substantial materials furnished by appellant do not have to be paid for by respondents, but that the agreement prepared by their counsel, who appeared to have all of the facts at their disposal, which added a licensed contractor paid for by appellant, may now be interposed to defeat appellant's recovery for the work completed. The law intended to protect owners from unqualified contractors should not be available to avoid the payment for materials and reimbursement for labor payments mandated by the owner's agreement.

DATED this 28th day of September, 1979.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I mailed two copies of the foregoing brief to Jackson Howard, 120 East 300 North, Provo, Utah 84601, postage prepaid, this 29th day of September, 1979.

