1980

Interiors Contracting Incorporated et al v. Navalco et al : Brief of Defendant-Appellant

Utah Supreme Court

Walker E. Anderson; Parson, Behle & Latimer; Attorneys for Respondents;
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IN THE SUPREME COURT

OF THE STATE OF UTAH

INTERIORS CONTRACTING INCORPORATED, and ACTION FIRE SPRINKLER COMPANY, a Utah Corporation, Plaintiffs and Respondents, vs. NAVALCO, a Utah Corporation, aka NAVALCO OF UTAH, et al., Defendant and Appellant. vs. GREEN ACRES OF AMERICA, INC., Defendant, Cross Claim Defendant and Respondent.	Case No. 17096

BRIEF OF DEFENDANT-APPELLANT

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Appeal from a Judgment of the
Third Judicial District Court
in and for Salt Lake County, Utah
Honorable Christine M. Durham, Judge
Honorable David K. Winder, Judge

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BRIEF OF DEFENDANT-APPELLANT

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NATURE OF THE CASE

Plaintiffs-Respondents recorded liens against property of Defendant-Appellant to recover for the cost of material and services which they provided for Hungry Hawaiian, Inc., a sublessee from Green Acres of America, Inc., Cross Claim Defendant and Respondent herein.

DISPOSITION IN LOWER COURT

The District Court for Salt Lake County, Judge David K. Winder, held that the necessary relationship to entitle Plaintiffs to

a lien grew out of the lease, sublease and letter of acceptance involved in this case. Judge Winder failed to rule on the Cross Complaint of Defendant-Appellant, Navalco of Utah, against Cross Claim Defendant and Respondent, Green Acres of America, Inc. Upon Motion to Amend the Findings of Fact, Conclusions of Law and Judgment to so provide, Judge Christine M. Durham denied the Motion and in addition, also denied Appellant's Motion for New Trial.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks to have the decisions of the District Court reversed.

STATEMENT OF FACTS

Defendant-Appellant, Navalco of Utah, entered into a lease agreement under date of January 24, 1975 in which the subject property was leased to Defendant, Green Acres of America, Inc. (Exhibit 2-P). The lease required certain construction which was duly accomplished. Thereafter, on or about the 17th day of January, 1978, Green Acres of America, Inc. subleased a portion of the subject premises to Hungry Hawaiian, Inc. for use as a restaurant. This agreement is Exhibit 3-P in the record. Green Acres of America, Inc. submitted a letter, dated January 17, 1978, to Navalco of Utah requesting permission to enter into the sublease (Exhibit 16-P). Navalco of Utah responded as follows:

> "Accepted this 31st day of January, 1978 on the condition that on ten days written demand after any default in the lease between Green Acres of America, Inc. and Navalco of Utah will assign to Navalco the sublease and, further this condition and acceptance shall not vary any provision or condition of the lease between Green Acres of America, Inc. and Navalco. (Underlining ours)

Thereafter, Hungry Hawaiian, Inc. proceeded to engage various persons to apply materials to the premises (e.g. Exhibit 2-P), but thereafter found itself unable to pay all the amounts due. Liens were timely filed against the premises by Plaintiffs-Respondents, Interiors Contracting, Inc. and Action Fire Sprinkler Company, and by Defendants and Cross Claimants, Herbert Bergmann, Economy Builder's Supply, Inc., John Darrell Tohara, Lawrence Lincoln, Terrance Tohara and Lynn H. Gray dba Gray's Electric (Exhibit 1-P).

Action was brought by the Plaintiffs to foreclose the liens naming as Defendants Navalco of Utah, Green Acres of America, Inc. and Roy E. and Carol M. Christensen. Defendants, Green Acres of America, Inc. and Roy E. and Carol M. Christensen, filed Motions to Dismiss and for Summary Judgment. As a result, the Christensens were dismissed from the case entirely and dismissals were granted to Green Acres of America, Inc. as to all parties except Defendants, Lincoln, Tohara and Tohara (see Volume I of pleadings, etc., pages 343 and 344). Defendant-Appellant, Navalco of Utah, filed a Cross Claim against Defendant, Green Acres of America, Inc., claiming that pursuant to the provisions of the lease, said Defendant was obligated to hold Defendant-Appellant, Navalco of Utah, harmless for any loss in these proceedings.

Defendant-Appellant, Navalco of Utah, filed a Motion for Summary Judgment as against all Plaintiffs and lien-claim Defendants. The Motion was granted and Summary Judgment was entered as against all of the lien-claim Defendants (see Volume II of pleadings, page 536). Judge Durham ruled that none of the lien claimants, including Plaintiffs, furnished materials or services at the instance of the owner or of any other person acting by his authority as agent, contractor or otherwise. Attorney's fees were also awarded in favor of Defendant-Appellant, Navalco of Utah, as against all lien-claim Defendants.

Prior to denying the Motion for Summary Judgment as to the Plaintiffs, Judge Durham permitted evidence by way of testimony offered by Jerry Cutshaw, President of Plaintiff-Respondent, Interiors Contracting, Inc., and by Ed Smith, President of Plaintiff-Respondent, Action Fire Sprinkler Company (see Transcript of that hearing, Clerk's page nos. 1090-1118). The testimony of Plaintiff-Respondent, Interiors Contracting, Inc., indicated a possibility of an action based upon a conversation which occurred between Mr. Cutshaw and the staff of Navalco of Utah prior to the completion of all work on the contract wherein an officer of Navalco indicated to Mr. Cutshaw that the financial condition of Hungry Hawaiian was good enough to insure payment to Interiors Contracting, Inc. for the work and materials furnished by them. Interiors Contracting, Inc. then completed the job. The issue of estoppel was reserved for trial.

The case was tried before Judge Winder who, for matters pertinent to this appeal, ordered as follows (Volume III, of pleadings, etc., pages 741-745):

A. Ruled that on the basis of the lease, sublease and letter of January 17, 1978 consenting to the sublease, a lien was created in favor of the Plaintiffs and against Defendant-Appellant, Navalco of Utah. This ruling was directly in conflict with the rulings which Judge Durham had made on the Motions to Dismiss and Motions for Summary Judgment upon which she had acted.

B. Judge Winder made no ruling on the Cross Claim of Defendant-Appellant, Navalco of Utah, against Defendant, Green Acres of America, Inc. Motion was then made by counsel for Defendant-Appellant, Navalco of Utah, seeking amendment of the Findings of Fact, Conclusions of Law and Judgment to award judgment on its Cross Claim against Defendant, Green Acres of America, Inc., and a Motion for New Trial was also made. These Motions were denied by Judge Durham, who heard these matters inasmuch as Judge Winder had prior to that time resigned from the District Bench.

Appellant Navalco of Utah's failure to assert its Cross Claim at the time of trial arose from the following facts (Volume III, of pleadings, etc., pages 899-902):

Counsel for the two parties had been negotiating to settle the question of attorney's fees on the Cross Complaint, but had not been able to reduce their agreement in writing in time for the trial. At the close of the presentation of the testimony by Defendant-

Appellant, Navalco of Utah, Ms. Barbara Polich, attorney for Green Acres of America, Inc., represented to the Court that the parties had a tentative settlement agreement and that no further testimony was required as between them. Counsel for Navalco of Utah assented to this. However, the settlement agreement was never finalized. At the same time, all of the evidence necessary to establish Navalco of Utah's rights under its Cross Complaint against Defendant, Green Acres of America, Inc., was admitted in evidence. Furthermore, Defendant Navalco of Utah's Trial Memorandum did state that this was one of the issues of the case.

Defendant-Appellant, Navalco of Utah, argued that its counsel was misled by Judge Winder's statements during trial to Mr. Anderson that he was following the law of the case as established by Judge Durham and that the Plaintiffs could recover only if they produced evidence indicating some sort of an agency or express agreement existed or could be established between Defendant-Appellant, Navalco of Utah, and the lien claimants themselves. His ruling was such that it encouraged counsel for Navalco of Utah to believe that no further steps need be taken with reference to the Counterclaim.

STATEMENT OF POINTS

I. IT WAS ERROR FOR JUDGE WINDER TO RULE THAT THE PLAINTIFFS WERE ENTITLED TO LIENS AGAINST THE REAL PROPERTY INTEREST OF DEFENDANT, NAVALCO OF UTAH, AND AWARDED JUDGMENT AGAINST DEFENDANT, NAVALCO OF UTAH, BASED UPON SUCH LIEN INTEREST.

II. IT WAS ERROR FOR JUDGE WINDER TO FAIL TO AWARD JUDGMENT UPON THE CROSS COMPLAINT OF DEFENDANT, NAVALCO OF UTAH, AGAINST DEFENDANT, GREEN ACRES OF AMERICA, INC.

III. JUDGE WINDER SO MISLED COUNSEL FOR DEFENDANT, NAVALCO OF UTAH, IN HIS STATEMENTS IN REFERENCE TO THE LAW OF THE CASE THAT A NEW TRIAL SHOULD BE GRANTED.

IV. IT WAS ERROR FOR JUDGE DURHAM TO REFUSE TO AMEND THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT SO THAT THEY WOULD GRANT JUDGMENT TO DEFENDANT, NAVALCO OF UTAH, ON ITS CROSS COMPLAINT AGAINST DEFENDANT, GREEN ACRES OF AMERICA, INC.

ARGUMENT

POINT I

IT WAS ERROR FOR JUDGE WINDER TO RULE THAT THE PLAINTIFFS WERE ENTITLED TO LIENS AGAINST THE REAL PROPERTY INTEREST OF DEFENDANT, NAVALCO OF UTAH, AND AWARDED JUDGMENT AGAINST DEFENDANT, NAVALCO OF UTAH, BASED UPON SUCH LIEN INTEREST.

The pertinent statute is Section 38-1-3, Utah Code Annotated, 1953, Replacement Volume 4B:

> 38-1-3. Those entitled to lien - What may be attached - Lien on ores mined. Contractors, subcontractors and all persons performing any services or furnishing any materials used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner; all persons who shall do work or furnish materials for the prospecting, development, preservation or working of any mining claim, mine, quarry, oil or gas well, or deposit; and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the

> property upon or concerning which they have rendered service, performed labor or furnished materials, for the value of the service rendered, labor performed or materials furnished by each respectively, whether at the instance of the owner or of any other person acting by this authority as agent, contractor or otherwise. Such liens shall attach only to such interest as the owner may have in the property, but the interest of a lessee of a mining claim, mine or deposit, whether working under bond or otherwise, shall for the purposes of this chapter include products mined and excavated while the same remain upon the premises included within the lease.

The critical phrase of the above statute is, "whether at the instance of the owner or of any other person acting by his authority as agent, contractor or otherwise."

In Judge Winder's Memorandum Decision of December 13, 1979, at Page 2, II A, he stated as follows:

> "A. The Court finds that Navalco impliedly authorized Interiors and Action Fire to furnish to Navalco's premises labor and materials they furnished. This finding of implied authorization is premised entirely on what is contained in the master lease, Exhibit 2, the sublease, Exhibit 3, and the acceptance of the sublease by Navalco, Exhibit 16, and is further premised on the work contracted for by the parties to these documents and which was done for them by Interiors and Action Fire."

The Court then states:

> "Said finding is not premised on any other circumstance"

and then goes on to make an exception for the case of estoppel against Navalco and in favor of Interiors Contracting (which we do not dispute).

The original lease between Navalco and Green Acres provided for some $100,000 worth of work to be done on the premises and was accompanied by a loan in that amount to finance the same. As the records show all of such work was completed and paid for some three

years before the events upon which this case is based. (See Exhibits D-73, D-74, D-75, D-76, D-77, D-78, D-79 and D-80. Exhibits D-79 and D-80 trace the disbursement of all of the 1975 construction funds. Also see Transcript pages 103-107, Clerk's pages 1223-1227.)

Certainly, nothing in the documents to which Judge Winder refers, that is the master lease, Exhibit 2, the sublease, Exhibit 3, and the acceptance of the sublease by Navalco, Exhibit 16, meets the statutory test set forth hereinabove.

The labor performed and the materials furnished were furnished clearly at the instance of Hungry Hawaiian. Appellant merely consented to the sublease and made a specific reservation "that this condition and acceptance shall not vary any provision or condition of the lease between Green Acres of America, Inc. and Navalco."

It should be kept in mind that in the absence of the mechanics' lien statutes no right at all would exist as between parties not in privity. Therefore, a statutory lien right must be based strictly upon the terms of the statute. Indeed, the lower court failed to find any evidence that Hungry Hawaiian, the sub-lessee, was acting as agent, contractor or otherwise for Appellant, but based its decision on the recited documents only.

This matter has been dealt with most recently in the case of Zions First National Bank vs. Carlson, et al., 464 P.2d 387, 23 U.2d 395 (Utah Supreme Court, 1970).

The Court states the question at page 389:

> "The critical issue of the instant action is whether Zions impliedly authorized the architectural services and thus impliedly granted its lessee authority to bind its fee interest."

The Court goes on to state:

> "The trial court found as a matter of fact that the lessee had been granted implied authority to bind the lessor's interest by the following: (a) The provisions of the option to lease and the lease; (b) Approval of preliminary sketches; (c) Execution of zoning variance applications and appearances and participation in zoning hearings; (d) Approval of architectural services. . ."

The Supreme Court of Utah rejected the trial court's findings and reversed, stating at page 389:

> "The facts to support findings (b) and (d) were merely expressions of knowledge of the lessor that the lessee was proceeding with the development of the property and do not constitute an implied authorization. Zion's participation in the zoning hearings was in compliance with the specific provisions of the lease, which cannot be distorted into an agency agreement. . ."

The Utah Supreme Court quoting Utley vs. Wear, 333 S.W. 2d 787, (Mo.App., 1960), states:

> "If, on account of the shortness of the lease, the extent, cost and character of the improvements, or other facts in evidence, such as the participation by the lessor in the erection or construction thereof, it can be seen that the improvement is really for the benefit of the lessor, and that he is having the work done through his lessee, then it can be said with justice that the lessee in such case is acting for the lessor."

The facts in the instant case are far removed from such a test. In the case here, the lessee was approximately three years into its primary term with an option for a five-year renewal thereafter. The construction work was for a restaurant, which certainly

cannot be said to have value to the Appellant at this time. Any future value to Appellant is entirely spectulative. We submit that the Zions First National Bank case is direct and positive authority against Judge Winder's decision and dispositive of this issue.

Judge Winder did not handle this case from the beginning. The documents construed and relied upon by Judge Winder in his decision were all dealt with exhaustively by Judge Christine M. Durham much earlier in the case.

In the earliest phases of the case, counsel for Defendant, Green Acres of America, Inc., filed a Motion to Dismiss Plaintiff's Complaint and also the Cross Claims of the lien claimant Defendants.

On February 20, 1979, Judge Durham issued a Memorandum Opinion (see Volume I of Third Judicial District Court Appeal, record of pleadings, etc., page 343 and 344).

The Court ruled "Defendant, Green Acres of America, lessee, did not contract for the improvements made by Plaintiffs; nor did it do anything to induce reliance by Plaintiffs, nor was its lessee its agent in contracting for the services and materials. Therefore, a lien may not attach to its property. The motion for failure to state a claim is granted. . .".[1]

Thereafter, Appellant, Navalco of Utah, filed a Motion for Summary Judgment against the Plaintiffs and all Defendant lien

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[1]The case of In Re Estate of Mecham, 537 P.2d 312 (Utah 1975) expresses the law in the jurisdiction concerning the ability of one district judge to overrule another judge in the same case.

claimants. This raised the same basic issue as Judge Durham had ruled upon in response to Green Acres' Motion to Dismiss.

On June 5, 1979, Judge Durham denied the Motion for Summary Judgment as to the Plaintiffs, but it should be pointed out that this was done after receiving testimony from Jerry L. Cutshaw and Edward D. Smith which raised a question as to the possibility of some claim based upon estoppel. The same basis was alluded to by Judge Winder in his ultimate decision, and he actually fixed the amount of damages growing out of that claim. However, as to all of the other lien claimants, Judge Durham granted Navalco's Motion for Summary Judgment on June 18, 1979 as shown in her Order appearing in Volume II of the pleadings and orders at page 536.

All of Judge Durham's rulings, on the basic question of whether the mere existence of the lessor-lessee relationship created a lien right, were consistent and identical. She clearly found that no such lien right existed. Only where there was evidence of some additional relationship or where there were some facts which might constitute an estoppel did she find any possibility of any right at all to recovery.

We submit that this then became the law of the case. We further submit that Judge Winder was obligated to follow the law of the case as established by Judge Durham. His ruling that the basic agreements established a right in Plaintiffs against Defendant, Navalco of Utah, was clearly contrary to the law of the case as established by Judge Durham.

Judge Durham left open the question of whether there was a right by way of estoppel against Navalco of Utah and in favor of the Plaintiffs. Judge Winder, in his Memorandum Opinion, found that such a right existed in favor of Plaintiff, Interiors Contracting, Inc., in the amount of $582. We do not contest this decision and we think that it is correct only to the extent that an obligation between Navalco of Utah and Interiors Contracting, Inc. grew out of the conversation held about a week before Interiors completed its contract and that this is a right totally independent from the mechanics' lien statute. Furthermore, no right to attorney's fees could grow out of this right. We submit that the balance of Judge Winder's decision against Navalco of Utah is contrary to the law of the case as established by Judge Durham, is contrary to the statute and the law of Utah as pronounced most recently by the Utah Supreme Court in the Zions First National Bank vs. Carlson case, and that ruling should be reversed.

POINT II

IT WAS ERROR FOR JUDGE WINDER TO FAIL TO AWARD JUDGMENT UPON THE CROSS COMPLAINT OF DEFENDANT, NAVALCO OF UTAH, AGAINST DEFENDANT, GREEN ACRES OF AMERICA, INC.

Judge Winder had Navalco of Utah's Cross Complaint against Green Acres of America, Inc. before him. It was clearly stated in the original pleadings filed by Navalco of Utah and furthermore, was reiterated in the pre-trial statement (please see Volume III of the compendium of pleadings and orders, page 715.) The following appears:

> "This Defendant has filed a Cross Complaint against Defendant, Green Acres of America, Inc. for (A) protection from any lien claimants against this Defendant or its title and, (B) reimbursement for the attorney's fees expended by this Defendant in the course of this action. It is our position that both of these obligations were imposed upon Defendant, Green Acres of America, Inc., by the terms of the lease agreement between these two parties."

Inasmuch as the above-referred to lease agreement became an exhibit in the case (Exhibit 2-P), no further testimony was offered on this point. Therefore, once Judge Winder awarded Judgment in favor of the Plaintiffs and against Defendant, Navalco of Utah, we respectfully submit that it was his duty to then rule upon the Cross Complaint.

POINT III

JUDGE WINDER SO MISLED COUNSEL FOR DEFENDANT, NAVALCO OF UTAH, IN HIS STATEMENTS IN REFERENCE TO THE LAW OF THE CASE THAT A NEW TRIAL SHOULD BE GRANTED.

On March 6, 1980, Navalco filed a Motion for New Trial which appears in the compendium of pleadings, etc., in Volume III at page 896 et seq. Accompanying this Motion was the Affidavit of Glen M. Hatch appearing at page 899 et seq. The basis of this Motion was the assertion that Judge Winder led counsel for Navalco to believe that he would follow the law of the case as set down by Judge Durham. We furnish the following statements in the record by Judge Winder which led Mr. Hatch to believe that he was following the law of the case as established by Judge Durham:

1. Transcript, page 8, beginning on line 12 through page 9, line 1:

"THE COURT: So there is a default, in effect, against Hungry Hawaiian but it hasn't been litigated against Navalco and Green Acres?

Go ahead and put on your proof as to whether they are liable. I know generally what the law is, but there would be no point in these two huge files if that had been adjudicated and it hasn't been. This has got to be at the instance of Navalco and, as I understand the law, there has got to have been either a contract with them or an agency or something like that. I don't think unjust enrichment is sufficient.

MR. ANDERSON: Implied contract.

THE COURT: I don't think implied contract is enough and I think Judge Durham so ruled. I think it is the law of the case in one of her decisions.

Go ahead and put on whatever evidence you want. You have got a judgment against Hungry Hawaiian which, I guess, is worthless. If you want to get a judgment against Navalco, put on some evidence that Navalco either authorized these repairs or something that contractually or agency-wise will cause liability in them and do the same with Green Acres."

2. Transcript, page 117-118, beginning at line 14:

"THE COURT: Well, Mr. Anderson, I think I understand or have read these abstract principles, but what it comes down to, as

I understand it in your claim as against Navalco, is whether what you did was at the instance of Navalco or any other person acting with authority of Navalco. What I would like you to tell me is to summarize the evidence that you--or give me the highlights of what you think supports that.

Certainly, if Navalco had absolutely nothing to do with these improvements being put in, the mere fact that they are put into the building, that they enhance the value of the building, is not sufficient under Utah laws as I understand it. It has got to be done at the instance of the owner or some person acting by his authority as agent, contractor or otherwise.

In the Dugger case, the contractors entered into a subcontract and material was furnished to the subcontractor, clearly. I mean, that is covered by the lien statute.

But what is it in this case, factually, that would cause Navalco to be responsible to your two clients? That is what would be the most helpful to me to know, what it is that they have done that fits this test."

3. Transcript, page 119, beginning at line 18:

"THE COURT: Well, but how does that benefit Navalco though? If I lease my house and--

MR. ANDERSON: It is their building. They own the building.

THE COURT: I understand. They have entered into a lease. The amount they are going to get is fixed. It doesn't benefit them in any way if it is improved or not improved. It benefits the tenant.

If I lease my house to somebody and it is not improved, in other words, it is just a shell of a house and I know they are going to fix it up, then--

MR. ANDERSON: You are happy if they fix it up because the house is going to revert to you when it is finished.

THE COURT: Is it your understanding under Utah law that if I enter into a lease of ten years on my house and I know some repairs are going to be put into that house, substantial repairs, that if they are put in there, that I am responsible for them under the Lien Statute?

MR. ANDERSON: If you know that they are put in there.

THE COURT: That is your understanding of the law?

MR. ANDERSON: Either express or implied contract, Your Honor.

THE COURT: No. I own a house.

MR. ANDERSON: You own it.

THE COURT: And I lease it for ten years to somebody and that person, they are permitted to make repairs. And let's say that I have to give my consent to the repairs that are made.

All right. If repairs are made and if the tenant doesn't pay for them, they can lien the house and get it from me as the owner. Is that your understanding?

MR. ANDERSON: That is my understanding of the Mechanic's Lien Law and the Utah Supreme Court interpretation.

THE COURT: I know you are dealing with something else, Mr. Hatch. Do you agree?

MR. HATCH: Absolutely.

THE COURT: That the owner is liable?

MR. HATCH: Oh, no. I agree with what you said. The first page of my argument--

THE COURT: I really am a little unclear, perhaps, and that is what I want to find out.

But it is my understanding that under the facts that I just gave, that it isn't enough. Now obviously, there doesn't have to be a contractual relationship between the person who is trying to put the lien on and the person against whom the lien is asserted, or else the Lien laws would add nothing to the law of Utah. But it has to be at the instance and request. It doesn't have to rise to the level of a contract, but it doesn't attach simply because you own property. Otherwise, this wording, 'At the instance of the owner or any other person acting by authority,' would be meaningless in the statute. If you eliminated that and you just had the language above that, then I suppose ownership alone would subject you to a lien to the extent of the interest the owner has in the property. But that isn't the Utah law, Mr. Anderson. That it what this case is all about, as I understand it.

It is just what has been done at the instance and request of the owner."

4. Statements to the above effect also appear at page 29 lines 18 through 27:

"MR. ANDERSON: But the sublease of the lease of the building from the owner standing there having a conversation with the man who is putting labor and materials into the building--

THE COURT: That implicates the sublessee, but it doesn't have anything to do with the owner unless the owner has caused this person to be his agent or unless there is a contractual arrangement, as I understand the law. Maybe I am construing this too narrowly. Go ahead. Overruled. Go ahead with your questions."

5. Page 100, line 29:

"THE COURT: Mr. Anderson, let me just say this. The way that it appears, I don't think there is any question about the material and labor that went into that job. I think the only thing that is in issue, as I understand it, is really whether there is any kind of authority or any kind of agency or anything like that from Navalco."

Mr. Hatch's Affidavit, page 900, Item 3, states:

> 3. Affiant, who has practiced law for over 32 years in the courts of the State of Utah and in the Federal Courts and many administrative tribunals, concluded therefrom that this established the law of the case.

We quote from Moore's Federal Practice, Volume 1B, page 453:

> "The correct rule is well stated by Judge Lummus of the Massachusetts Supreme Court in Peterson v. Hopson:

> 'A judge should hesitate to undo his own work. . . Still more should he hesitate to undo the work of another judge. . . . But until final judgment or decree there is no lack of power, and occasionally the power may properly be exercised.'"

This statement of the law is certainly consistent with Mr. Hatch's reaction to Judge Winder's comments.

Relying upon the Judge's statement, Mr. Hatch stated in Item 6, on page 901, as follows:

> "6. At the close of the testimony, Miss Polich representing Defendant, Green Acres of America, Inc., indicated to the Court that she had a tentative agreement with Affiant which would obviate further testimony or argument concerning the Cross Complaint of Defendant, Navalco of Utah, against Defendant, Green Acres of America, Inc."

It should be noted that the reference is to a "tentative agreement." As appears from the draft of that agreement which was prepared after the hearing and submitted to Mr. Hatch after the hearing (see Volume III of pleadings, etc., page 933 et seq.), that it was based upon the assumption that Judge Winder would follow the law of the case as to the question of a lien running against Navalco of Utah.

We respectfully submit that the combination of these facts created circumstances of surprise, which induced Mr. Hatch to make no further statement in support of the Cross Complaint against Green Acres of America. It certainly did not constitute an abandonment of that Cross Complaint and, therefore, a new trial should be granted on the Cross Complaint.

POINT IV

IT WAS ERROR FOR JUDGE DURHAM TO REFUSE TO AMEND THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT SO THAT THEY WOULD GRANT JUDGMENT TO DEFENDANT, NAVALCO OF UTAH, ON ITS CROSS COMPLAINT AGAINST DEFENDANT, GREEN ACRES OF AMERICA, INC.

Navalco filed a Motion to Amend the Findings of Fact, Conclusions of Law and Judgment and award judgment to Navalco of Utah against Green Acres of America, Inc. upon Navalco's Cross Complaint. This appears beginning at page 838 of Volume III of the compendium of pleadings.

We take the position that Judge Durham who heard this matter after Judge Winder had left the Third District Bench could simply have granted the order based upon the facts of the case. Section 78-7-21, U.C.A., Replacement Volume 9A provides:

> Proceedings unaffected by vacancy in office of judge. - No proceeding in any court of justice, in any action or special proceeding pending therein, is affected by a vacancy in the office of all or any of the judges, or by the failure of a term thereof.

Rule 63 Rules of Civil Procedure, U.C.A., Replacement Volume 9B, page 289, provides:

> If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these Rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform these duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

However, Judge Durham ruled that it was necessary for counsel for Navalco to "submit the issue to the Court." She took the position that by failing to "submit" the issue, Navalco abandoned it. We respectfully urge this Court to rule otherwise. This matter was in the pleadings, was raised in the pre-trial statement and all of the proof necessary for consideration of the issue was before the Court. Entirely aside from the unique circumstances which induced counsel for Navalco to fail to say anything further on the matter, we think the Court should rule that the matter was before the Trial Court and since Judge Winder failed to dispose of it, then Judge Durham should have acted upon the question.

We also respectfully suggest that the very matters raised in our Motion for New Trial were ample basis for Judge Durham to amend the Findings of Fact, Conclusions of Law and Judgment as requested. She was apprised by Mr. Hatch's Affidavit of the fact that the tentative agreement had not been reduced to writing and presented to Mr. Hatch prior to the completion of the argument in the case and that further, it included provisions upon which the parties had never reached agreement. This coupled with the fact that Judge Winder led counsel to believe that the question simply would not be raised is, we submit, sufficient basis for her to order the amendment in question.

CONCLUSION

The ruling of Judge Durham that none of the lien claimants furnished materials or services at the instance of Appellant or any

other person acting by Appellant's authority as agent, contractor or otherwise and, therefore, not entitled to a lien against Appellant's interest became the "law of the case" and should have been adhered to by Judge Winder. Moreover, the documents relied upon by Judge Winder to establish Plaintiffs' lien by "implied authorization" cannot be construed as such under the test heretofore established in the Zions decision (supra). We, therefore, submit that the judgment of Judge Winder should be reversed.

The law of the case was correctly established by Judge Durham in her rulings affecting most of the parties. Insofar as the question presented to Judge Durham was whether the Plaintiffs were entitled to a lien against the fee interest of Defendant, Navalco of Utah, nothing new was established at the trial which should have warranted Judge Winder, in effect, to reverse Judge Durham. We submit that no case was made out establishing such a lien right and it should have been denied.

Defendant-Appellant, Navalco of Utah, clearly stated a Cross Complaint against Defendant-Respondent, Green Acres of America, Inc., in its pleadings and reasserted the matter in the pre-trial memorandum. Furthermore, ample evidence for granting judgment on the basis of the lease, Exhibit 2, was before the Court and judgment on the Cross Claim should have been awarded.

If the Court reverses the Trial Court's decision that a lien existed against Navalco of Utah, the Court should remand the case to the trial court for a determination of the amount of

attorney's fees, which should be awarded Appellant, Navalco of Utah, under the Cross Complaint.

Finally, in the event that the Court fails to reverse the judgment of Judge Winder granting a lien against Navalco of Utah, the Court should remaind the case to the lower court for trial of Appellant's Cross Claim.

DATED this 29th day of July, 1980.

Respectfully submitted,

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Mailing Certificate

I hereby certify that I mailed a true and correct copy of the above and foregoing Brief of Defendant-Appellant by placing the same in the U.S. mail, postage prepaid, on the 29th day of July, 1980, to the following:

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