1989

Jack C. Daniels v. Deseret Federal Savings and Loan Association, et al. : Reply Brief

Utah Supreme Court

David R. Olsen; Carl F. Huffner; Charles P. Sampson; Suitter Axland Armstrong & Hanson; Attorneys for Respondent.
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IN THE SUPREME COURT OF THE STATE OF UTAH

JACK C. DANIELS, Third-Party Plaintiff and Appellant, vs. DESERET FEDERAL SAVINGS & LOAN ASSOCIATION, et al., Third-Party Defendants and Deseret Federal Savings & Loan Association being also Respondent.	)	Case No. 890208 Category No. 13
CEN CORPORATION, Plaintiff, vs. JACK C. DANIELS, et al., Defendants.	)	

REPLY BRIEF

PETITION FOR WRIT OF CERTIORARI
TO REVIEW DECISION OF THE UTAH COURT OF APPEALS
BEFORE JUDGES DAVIDSON, GARFF AND JACKSON

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REPLY BRIEF

Third-party plaintiff and appellant, Jack C. Daniels, hereby replies to the Brief of Respondent in Opposition to Petition for Writ of Certiorari:

POINT I. THE QUESTION OF WHETHER ESTOPPEL IS AVAILABLE TO EXTEND THE TIME FOR FILING MECHANIC'S LIEN IN UTAH HAS NOT YET BEEN DECIDED BY THIS COURT.

Deseret Federal asserts that AAA Fencing Co. v. Raintree Development & Energy Co., 714 P2d 289 (1986), is dispositive of this case. Said case is not in point.

AAA Fencing Co. involved a situation in which the plaintiff sought foreclosure of a mechanic's lien, but did not commence the action within the one-year period as provided in Section 38-1-11. Defendant failed to assert as an affirmative defense the Statute of Limitations. The lower court granted summary judgment for plaintiff, and the Supreme Court in that case held that it was not necessary for defendant to raise Statute of Limitations as an affirmative defense because Section 38-1-11 was jurisdictional and not subject to waiver by failure of defendant to plead the bar of the statute.

The instant case involves Section 38-1-7, not Section 38-1-11. Action in this case was commenced with the one-year period of time mandated by Section 38-1-11. The present action involves the question of whether or not estoppel is available to a materialman or laborer in the creation of the lien, and that

subject was not even addressed in AAA Fencing Co.

Although the court used the words "waiver and estoppel," in AAA Fencing Co. that case only involved waiver, and the case did not involve conduct on the part of an owner inducing a mechanic's lienholder not to file his action in time. This court may or may not follow AAA Fencing Co. in that situation. The issue of whether or not an owner guilty of misrepresentation is estopped to assert an untimely mechanic's lien filing has not yet been decided by this court and is an issue which should be determined by this court after a full and complete briefing.

In Rice v. Granite School District, 23 Ut 2d 22, 456 P2d 159 (1969), the Supreme Court held that: "Waiver or estoppel may be found in the face of a manditory statute." The statute referred to is Section 63-30-15, which required that in a suit against a governmental entity "action must be commenced within one year after denial or the denial period as specified herein." In Rice the court did not find that the Governmental Immunity Act creates a right as well as a remedy and that failure to file within one year constitutes a failure of the right as well as of the remedy. In the Rice case no doubt the repeated assurances by the insurance adjuster were an important consideration which persuaded the court to uphold the availability of estoppel in the interests of justice, even in the face of a mandatory statute.

In the instant case we believe that, because of the affirmative representation by the owner that Daniels would be paid

if he would not file his lien, and because of the purpose and nature of 38-1-7 the court should, as in Rice, uphold the validity of the doctrine of estoppel in cases involving creation of a lien. We do not believe that the legislature intended to allow the misrepresentations of an owner to be rewarded by an interpretation which precludes the assertion of estoppel in those circumstances.

Utah Savings & Loan v. Mecham, 12 Ut 2d 335, 366 P2d 598 (1961), cited by Deseret Federal is also not in point. In that case the lender had priority over the mechanic's lien claimants, and the court said that the lender could lose that priority by its own conduct of "concealment" or "misrepresentation." It did not hold that a lender had to be guilty of such concealment or misrepresentation to be estopped where it did not have priority. Likewise In Re Williamsen, 43 B.R. 813 (Bankruptcy D Utah 1984), is not in point. That case held that where a lien was timely filed, but was invalid on its face, as lacking signature, such lien did not constitute notice. As to estoppel the court held that it might be a valid argument if the debtor himself were raising the issue, but not where a third-party creditor (not in privity with the debtor) was raising it.

POINT II. JUDGE DEE'S ORDER RELEASING MECHANIC'S LIEN DID NOT EXCUSE DESERET FEDERAL FROM DUTY OF INQUIRY.

At page 13 Deseret Federal alleges that had it made inquiry as to the validity of Daniels' lien, it would have found an order of Judge Dee releasing the lien. Deseret Federal was on

notice that there is no procedure for releasing a lien upon the posting of a bond--certainly not one (as here)with personal sureties who might go bankrupt the next day. Judge Dee's order was a nullity on its face and was not a final order under Rule 54(b), URCP, and was thus "subject to revision at any time" and was in fact later revoked.

POINT III. DOCTRINE OF ESTOPPEL NOT APPLICABLE AGAINST DANIELS.

At page 13 Deseret Federal alleges that Daniels somehow induced Deseret Federal to lend the money and should thus be estopped himself. It is admitted by Deseret Federal that Daniels' lien was recorded before Deseret Federal's trust deed was executed, so Daniels obviously did not induce Deseret Federal to do anything.

POINT IV. DANIELS' PAYMENT WAS NOT CONDITIONAL UPON SALE OF UNITS.

At the top of page 15 Deseret Federal asserts that Daniels "was to be paid out of the proceeds from the sale of the project." This is not so. The construction contract provided that Daniels was to be paid within 60 days of completion, without regard to the sale of the units.

POINT V. DANIELS DOES NOT ASSERT THAT THE MAJORITY OF THE COURT MUST AGREE ON REASONS.

At page 17 of Deseret Federal's Brief, it is asserted that "under Daniels' first alternative, there could be no judgment

of an appellate court unless a majority of the members of the court agreed not only on the judgment but also on the reasons for the judgment." That assertion is erroneous. All that Daniels asserts is that a majority must state their reasons. Those reasons may be different, but they must be stated.

POINT VI. ISSUES OF FACT PRECLUDED SUMMARY JUDGMENT.

At page 15 Deseret Federal concedes that the purpose of the $80,253 "is not clear from the record." How then could the court determine as a matter of law that said sum was not lienable when factual issues remain as to its nature. Daniels is entitled to have a factual determination as to just what the $80,253 represented. Respondent goes on at page 16 to state,

> "At best, Daniels' argument raises a factual questions as to the purposes for the $80,253 'profit'. . . If Daniels' lien is invalid because he did not timely record a notice of his lien, it does not matter what the lien was for."

That argument begs the question. The lien was not filed within the 100-day period, but the issue is whether or not the period for filing under 38-1-7 is extended by estoppel.

CONCLUSION

Daniels' Petition for Certiorari shows special and important reasons for granting a review and should be granted.

Respectfully submitted:

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Jack C. Daniels

CERTIFICATE OF MAILING

I certify that four copies of the foregoing Reply Brief to Respondent's Brief in Opposition to Petition for Writ of Certiorari were mailed to David R. Olsen and Paul M. Simmons, attorneys for the respondent, Deseret Federal Savings & Loan, at their address, 175 South West Temple, #700, Salt Lake City, Utah 84101, postage prepaid, the _____ day of August, 1989.

_____
Attorney for Petitioner