1982

Kelly Graff and Keri Graff v. Boise Cascade Corp. : Brief of Appellants

Utah Supreme Court

Earl D. Tanner; Tanner, Kesler, Rust & Williams; Craig S. Cook; Attorneys for Appellants;
Robert D. Maack; Vincent C. Rampton; Watkiss & Campbell; Attorneys for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

- -

KELLY GRAFF and KERI
GRAFF, his wife,

Plaintiffs-Appellants,

vs. No. 18062

BOISE CASCADE CORPORATION,
a corporation,

Defendant-Respondent.

- -

BRIEF OF APPELLANTS

- -

Appeal from the Judgment of the
Fourth Judicial District Court, Utah County
Honorable David Sam, Judge

- -

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NATURE OF THE CASE

This is an action commenced by Plaintiffs-Appellants against Defendant-Respondent seeking to invalidate a mechanics lien filed against Plaintiffs' property.

DISPOSITION IN LOWER COURT

The controversy was submitted to the court on dual motions for summary judgment. The court granted Defendant's motion and denied Plaintiffs' motion and accordingly ruled that the mechanics lien was valid.

RELIEF SOUGHT ON APPEAL

Plaintiffs-Appellants seek reversal of the trial court's ruling and an order invalidating the mechanics lien.

STATEMENT OF FACTS

The facts in this case are undisputed. On November 9, 1979 defendant Boise Cascade filed a Materialmen's Notice and Claim of Lien in the Utah County Recorder's office. The Notice and Claim of Lien was executed and signed by Berk Buttars. The Notice was contained in a printed form prepared by Boise Cascade Corporation. (R. 8). The lien concerned property located in Utah County with the record title holder being listed as Roncor, Inc.

At the time the lien was filed Plaintiffs owned the equitable title to such property by way of an unrecorded agreement between Roncor and Plaintiffs dated May 14, 1979. Subsequently, in April of 1980 Plaintiffs filed notice of their interest in the property with the Utah County Recorder.

On December 11, 1979 Boise Cascade filed a suit against Roncor, Inc. requesting foreclosure of the various mechanics liens against Utah County properties, including that of Plaintiffs. Plaintiffs were not named as party-defendants either at the commencement of suit or subsequently in that action. That lawsuit was filed in the Fourth Judicial District Court of Utah County and was assigned to Judge Bullock as Civil No. 53223.

On March 17, 1980 this action was originally filed in the Third Judicial District Court. Subsequently, Defendants moved to dismiss the action based upon "priority of jurisdic-

tion" claiming the Utah County suit precluded the Salt Lake County action. (R. 5-13). After a hearing before the Third Judicial District Court Defendant's motion was denied. (R. 18).

On June 19, 1980 Defendants moved to change venue to Utah County. (R. 20). This motion was granted and the case was transferred to Utah County as Civil No. 55438.

The parties filed dual motions for summary judgment based upon the undisputed facts and upon various affidavits. (R. 134-136; 90-92; 171-173). On August 26, 1981 Judge David Sam ruled that Defendant was in substantial compliance with the mechanics lien law and therefore granted Defendant's motion for summary judgment and denied the motion of Plaintiffs. (R. 187-188). It is from this order that the present appeal is taken. (R. 193).

ARGUMENT

THE LOWER COURT ERRED IN FAILING TO HOLD THE MECHANICS LIEN OF DEFENDANT INVALID SINCE IT FAILED TO COMPLY WITH UTAH LAW.

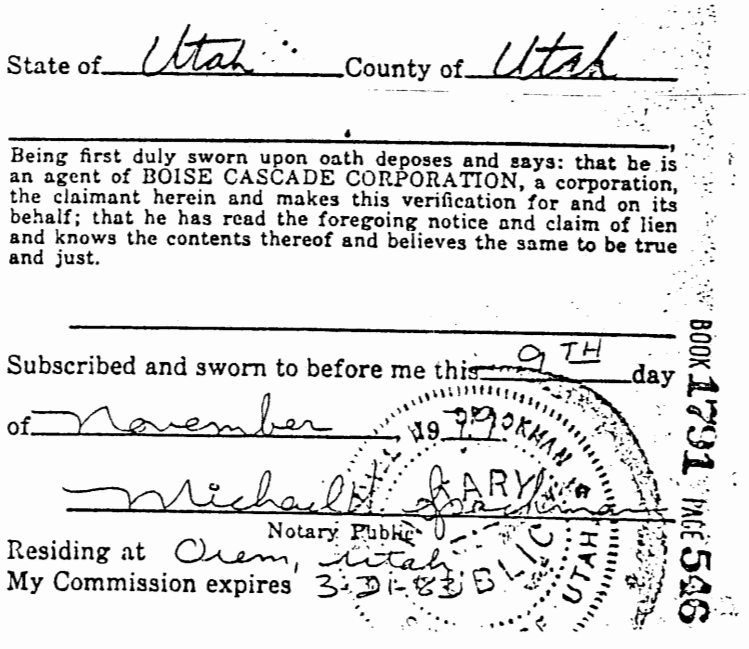
The sole question before this Court is the validity of the mechanics lien notice filed by Defendant on November 9, 1979. If the notice complied with Section 38-1-7, U.C.A., the ruling of the lower court would be correct--however, if it failed to comply with this statute the court was in error.

Plaintiffs contended in the lower court that the notice was defective because it was not properly verified and did not contain the name of the person to whom the materials were

furnished. The notice was printed on a form prepared by defendant Boise Cascade Corporation. For the convenience of the court a copy is contained as an appendix to this Brief. The parts of the notice which Plaintiffs claim are defective concern the verification block and the first three lines of the notice.

The signature block contained the words BOISE CASCADE CORPORATION By /s/ Berk Buttars, Agent.

The verification block appeared as follows:



State of Utah County of Utah

Being first duly sworn upon oath deposes and says: that he is an agent of BOISE CASCADE CORPORATION, a corporation, the claimant herein and makes this verification for and on its behalf; that he has read the foregoing notice and claim of lien and knows the contents thereof and believes the same to be true and just.

Subscribed and sworn to before me this 9TH day of November 19 79

Notary Public

Residing at Orem, Utah

My Commission expires 3-21-83

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The mechanics lien statute has been part of Utah law since its admittance to statehood. This Court has consistently held that a mechanics lien is statutory and not contractual

and that a lien cannot be acquired unless the claimant complies strictly with the statutory provisions. Eccles Lumber Co. v. Martin, 87 P. 713 (Utah 1906); First Security Mortgage Co. v. Hansen, No. 17229, June 10, 1981 (Utah).

Section 38-1-7 U.C.A. (the lien notice statute) has been amended on several occasions by the Legislature but basically has maintained the same requirements for a valid lien as originally required in 1898. The statute requires that the notice of lien state, among other things, "the name of the owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials" and that, the claim must "be verified by the oath of himself or of some other person."

Courts in Utah and throughout the country have required a lien claimant to strictly comply with notice requirements provided by the various lien laws because of the serious consequence such a lien can place upon the owner's property. Justice Howe in First Security Mortgage Co. v. Hansen, supra, stated this policy as follows:

> The policy underlying these decisions is sound. A lien creates an encumbrance on property that deprives the owner of his ability to convey clear title and impairs his credit. The filing of a lien for an excessive amount could be used to force a settlement unfairly weighted in favor of the claimant. Such abuse is made a misdemeanor by Section 38-1-25. These serious consequences justify the statutory imposition of a requirement that one who makes the claim must furnish a sworn

> statement to the truthfulness of the facts giving rise to it. Frivilous, unfounded, and inflated claims can thereby be minimized, and the pre-judgment property rights of the individuals receive their due protection. (Slip Opinion, p. 4).

The Montana Supreme Court has also elaborated on the requirement of verification and the test to be applied. The court there stated:

> This extraordinary claim should not be placed on the property of another unless the facts out of which the lien arises are vouched for on oath by some person who knows them to exist. . . . The sanction of perjury insures the veracity of the statements made by the person with knowledge. Thus, a test of the sufficiency of the affidavit to a mechanics lien is whether perjury is assignable upon the verification to it. Saunders Cash-Way v. Herrick, 587 P.2d 947 (Mont. 1978). (Emphasis added).

See also, H.A.M.S. Co. v. Electrical Contractors of Alaska, 563 P.2d 258 (Alaska 1977); Hoffman v. Palm Springs, 337 P.2d 132 (Cal. App. 1959).

In the instant case, Mr. Buttars signed on behalf of the corporation in the signature block. No agent, however, was listed as "being first duly sworn" nor did any agent execute the line immediately below the oath of verification. The oath of verification as printed on the form stated that the person verifying the lien was an agent of Boise Cascade Corporation, that verification was made on behalf of the corporation, and that the person had read the foregoing notice and claim and knew the contents and believed they were true and just. The "jurat" of the notary public, following the

blank line, merely states: "Subscribed and sworn" and then contains the name of the notary, date, and commission information.

Plaintiffs contended in the lower court that the failure of any person to actually sign the written oath and statement contained on the Notice and Claim of Lien caused the lien to fail since it was not "verified". The lower court held the signature of Buttars in the signature block substantially complied with the verification requirement. (R. 187-188). The court assumed that because Buttars had signed on behalf of the corporation in the signature block of the lien that he was the person who would have been "first duly sworn" and that he was the person whom the notary described as "subscribed and sworn".

The decision of the lower court was erroneous. As the notice was written there was no person described as "being first duly sworn" nor was any signature executed following the oath. The verification block must be viewed separately from the signature block since it is possible that one person signs on behalf of the corporation but does not know the contents to be true while another person is aware of the true contents but is not authorized by the corporation to file liens.

Here, the verification block states that _____ _____ "being first duly sworn under oath deposes and

says. . . ." It is unsigned. The jurat of the notary states "Subscribed and sworn to before me this 9th day of November, 1979" followed by the notary's signature.

Thus, had this been a normal affidavit it would have been defective on its face since the reader would not know whose affidavit was being "subscribed and sworn" to nor would there be any signature binding the affiant. The fact that Buttars signed a separate portion of the lien notice is immaterial to the sufficiency of the verification block.

The initial Utah lien law was enacted in 1898. At that time it required the same elements including verification. Section 2983 of the 1898 code provided the definition of verification as used at that time. It stated: "The affidavit of verification must state that the pleading is true to the knowledge of the deponent. . . ." The statute continued, "When the pleading is verified by the attorney or other person, except one of the parties, the verification must show the reason why it is not made by a party. . . ."

The oath and statement contained on the lien form provided by Boise Cascade would have met the requirements of Utah law had it been executed. First, it would have confirmed that the signer was an agent of Boise Cascade Corporation and made the verification on its behalf. The Supreme Court of Kansas in Ekstrom United Supply Co. v. Ash Grove Lime and Portland Cement Co., 400 P.2d 707 (Kan. 1956) invalidated a lien

in which the oath taken by the agent of the corporation failed to state that he was acting on behalf of the corporation. Unless the person signing the lien claim swears that he is authorized to act on behalf of the corporation a valid lien verification has not been made.

Likewise, the printed oath stated that the signer "had read the foregoing notice and knew the contents thereof and believed the same to be true and just." It is essential that the claimant state under oath that the charges listed in the lien were actually incurred and are correct. Merely stating that the form itself appears to be a correct listing of the charges or that the charges appear to be correct based upon information and belief is not sufficient. Saunders Cash-Way v. Herrick, 587 P.2d 947 (Mont. 1978).

This Court has stated that an acknowledgement of mere corporate authority is insufficient without also a sworn statement that the charges are correct and true. First Security Mortgage Co. v. Hansen, supra. See also, H.A.M.S. Co. v. Electrical Contractors of Alaska, 568 P.2d 258 (Alaska 1977).

The instant "Materialmen's Notice and Claim of Lien" failed these requirements since the critical information contained in the printed form was not executed. There could be no charge of perjury made against any person if the lien notice was proven fraudulent. The lien clearly fails to meet the "verification" requirement of the statute since verifi-

cation includes both the actual swearing to the truth of the statements by the subscriber and also the certification thereto by the notary or other officer authorized by law to administer oaths. 71 C.J.S., Pleading, §343, p. 743. See also, In Re James Passero & Sons, 261 N.Y.S. 661 (N.Y. Supp. Ct. 1933).

The jurat is not a part of the affidavit but is simply a certificate of a notary that the person who executed the signature was in fact the true person whose name appeared. It is no part of the oath but is merely evidence of the fact that the person appeared before the notary. Stern v. Board of Elections of Cuyahoga County, 237 N.E.2d 313 (Ohio 1968). As such, the broad "subscribed and sworn" language used in this document cannot of itself give rise to the requirement of verification since the notary was not attempting to verify the truth of the charges contained in the lien. The jurat is merely ancillary to the actual oath and signature of the affiant to verify the accuracy of the signature and to confirm that an oath was taken. As stated by the Supreme Court of Maine:

> If a certificate of oath were not a necessary prerequisite to the recording of the lien claim notice and essential to its validity and the fact that the oath had been administered could be shown at trial, such a practice would open the door to abuses, mischiefs, errors, and potential fraud difficult to detect. The temptation would be there for witnesses, including justices of the peace, notary publics, and attorneys involved in the alleged administration of the oath, to activate

> doubtful memories to fit their interests. Pineland Lumber Co. v. Robinson, 382 A.2d 33 (Me. 1978).

In addition, not only did the materialmen's notice fail to state specifically the verification required by law but the subsequent affidavit of Mr. Buttars filed on July 10, 1981 attempting to "verify that he has read said materalmen's notice and claim of lien and knows the contents thereof and believes the same to be true and just" is also deficient since that affidavit was not notarized. (R. 90-91). Thus, on both documents no charge of perjury could ever be levied against any person since the lien was unsigned.

The affidavit of Buttars, even if it had been notarized, would not have cured the defect. Extrinsic evidence as to the validity of a mechanics lien is not sufficient. As noted by the Kansas Supreme Court:

> Plaintiff offered to show and did testify that when the acknowledgement was made he was sworn to the statement, but the statement filed to constitute a lien must be complete in itself and must show on its face all the matters which the statute requires to be shown to create and fix the lien. . . . [R]eferences and evidence outside the lien statement are not sufficient to support a lien. Reeves v. Kansas Coop. Wheat Marketing Assn., 15 P.2d 446 (Kan. 1940).

In the instant case there is no sworn statement by any person that he knew the charges of the lien and knew them to be true and just.

As this Court is aware the form of verification is

critical to successfully claiming a valid mechanics lien. Numerous cases, as mentioned earlier, have struck down liens because they have not strictly complied with the statutory requirement of verification. A mechanics lien, unlike a normal affidavit, has a devastating effect in and of itself whereas most affidavits have no effect except to assist in an underlying purpose such as a lawsuit.

Besides the verification defect the notice states that Boise Cascade upon the request of Boise Cascade furnished materials comprising the subject of the lien. The statute requires that the person who requests the work be listed in the lien. This requirement is no doubt present to eliminate any problems involved when persons other than the owner request work to be performed. As the form now stands it is unknown whether the owner Roncor requested the material or whether some other contractor, subcontractor, or person actually entered into the agreement. Failing to include proper names in notices of claims have also invalidated the lien. H & L Supply, Inc. v. Ewing, 61 Cal. Rptr. 289 (Cal. App. 1968); Lewis v. Midway Lumber, 568 P.2d 750 (Ct. Ariz. 1977).

This error combined with the failure to properly verify clearly invalidates the mechanics lien notice and the decision of the lower court is therefore erroneous.

CONCLUSION

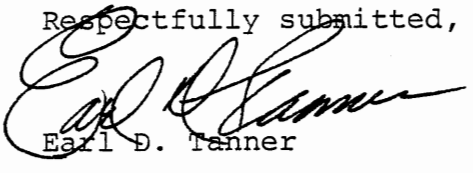
The failure of Defendant to properly verify the lien is

fatal to enforcement of the lien. This requirement is not a mere technicality with no purpose. This deficiency is analogous to a witness at trial testifying without having sworn to the truth of his testimony. It is analogous to an affidavit in which no notarization appears. All these procedures are designed to impose sanctions against falsehoods and to imput the significance of the statement to the affiant.

Defendant's failure to even list who was "sworn" together with the failure of an executed signature cannot be overcome by arguing "substantial compliance" because the verification in this case was not a deficiency of degree but was lacking in total. Likewise, the error of listing Boise Cascade as ordering the materials from itself cannot be overcome by "substantial compliance" since this information was statutorily required and was simply wrong--no room for equitable adjustment exists.

The decision of the lower court should be reversed and judgment entered on behalf of Plaintiffs.

Respectfully submitted,



Earl D. Tanner

Craig S. Cook

Attorneys for Appellants

APPENDIX

EXHIBIT "A"

RECEIVED MATT ALMAN'S NOTICE AND CLAIM

NOTICE IS HEREBY GIVEN, that BOISE CASCADE CORPORATION, Claimant herein, at the request of Boise Cascade Corporation EARL D. TANNER

did on the 2nd day of August, 1979, begin to sell, furnish and deliver materials to them and at their request did continue to sell, furnish and deliver building materials to them until the 4th day of September, 1979, which was the last day on which said materials were so sold, furnished and delivered, to be used for Construction of a new house

upon the following described lands, to-wit:

Harbor Park Subdivision, Plat A, Lot #29.

(6)

46116
RECORDED AT THE REQUEST OF Boise Cascade
1979 NOV -9 AM 10:25
1291 546
FEE PAID
Plat A

in the County of Utah State of Utah

The building materials so sold, furnished and delivered were used in the construction and/or alteration and repair of the building(s) and improvements above mentioned.

The name(s) of the owner(s) and reputed owner(s) of the lands, building(s) and improvements to be charged with the lien is/are Roncor Incorporated - Heritage Property Company

The building materials so sold, furnished and delivered amounted in value to the sum of One thousand one hundred fifty one dollars 64/100---------- Dollars ($1151.64) and no part of this amount has been paid and there are no just credits or offsets except None Dollars ($ -0-).

There is a balance due and unpaid for such materials to this claimant over and above all just credits and offsets of One thousand one hundred fifty one dollars 64/100------- Dollars ($ 1151.64), for which last named sum BOISE CASCADE CORPORATION claims a lien upon the said newly constructed house and the lands above described.

Dated at Orem, Utah, the 8th day of November, 1979

For Recorder's Use

BOISE CASCADE CORPORATION.

By Bob Bastian
Agent

State of Utah County of Utah

Being first duly sworn upon oath deposes and says: that he is an agent of BOISE CASCADE CORPORATION, a corporation, the claimant herein and makes this verification for and on its behalf; that he has read the foregoing notice and claim of lien and knows the contents thereof and believes the same to be true and just.

Subscribed and sworn to before me this 9TH day of November 1979.

Michael L. Barry
Notary Public

Residing at Orem, Utah
My Commission expires 3-21-83

Mail to:
Boise

CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Brief of Appellants to Robert D. Maack, Vincent C. Rampton, Watkiss & Campbell, 12th Floor, 310 South Main Street, Salt Lake City, Utah 84101 this 16th day of February, 1982.

Lerain Lood