

1957

# Ward C. Holbrook v. Webster's, Inc et al : Brief of Appellants

Utah Supreme Court

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Dean E. Conder; Nielsen and Conder; Attorneys for Appellant;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

WARD C. HOLBROOK and  
MABEL F. HOLBROOK, his wife,  
*Plaintiffs and  
Respondents,*

— vs. —

WEBSTER'S, INC., a corporation,  
*Defendant and  
Appellant,*

ELVIN COON, et ux and et al,  
*Defendants,*

and

LEONARD A. TRIMBLE and  
ALICE TRIMBLE, his wife,  
*Defendants and  
Respondents.*

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Case  
No. 8724

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## Appellants' Brief

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## Appellants' Brief

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### FACTS

This appeal is taken by Webster's, Inc., from an Order granting a Summary Judgment against this Defendant.

The parties in this brief will be referred to as they appeared in the Court below with Ward C. Holbrook and

Mabel F. Holbrook being the Plaintiffs, and Webster's, Inc., being one of the Defendants, and Leonard A. Trimble and Alice Trimble being another Defendant but also a Respondent. It should be noted throughout that Webster's, Inc., was the successor to Webster Coal and Lumber Co. It should further be noted that the Plaintiffs are the Assignees of the Real Estate Mortgage originally taken by Prudential Federal Savings and Loan Association (R 11), and that the Trimbles are the successors in interest of the builder, Elvin Coon.

On September 7, 1956, the Plaintiffs filed a lawsuit against the Defendant, Webster's, Inc., and others seeking to foreclose a Mortgage on some real property in Davis County, State of Utah, and set out in the Complaint that this Defendant, among others, claimed a lien right for materials and labor furnished to the property. Mr. Elvin Coon was a general contractor and builder of homes in Salt Lake and Davis Counties and had built the home in question, together with another home on an adjacent lot, but because of financial problems had been unable to pay all of the creditors, including the materialmen, for work performed upon the property. The Defendant, Webster's, Inc., filed a materialman's lien against the property of Mr. Coon, which lien was recorded on April 11, 1956, in Book 103, at Page 574. This lien was for \$2,443.14. The lien was referred to in Plaintiffs' Complaint and recognized by the Plaintiffs as having been recorded. In filing this lien, Elvin Coon was referred to by Webster's, Inc. in the Notice of Lien as "The contractor and owner and the reputed owner of said prem-

ises . . .” (Exh. D1) The Defendant, Webster’s, Inc. answered Plaintiff’s Complaint and set up its claims to the materialman’s lien and asked for the foreclosure of said lien. Pursuant to a notice filed by Plaintiffs and on March 2, 1957, the Defendants appeared and proved up their liens as shown by Exhibits A to D inclusive and 1 to 8 inclusive. On March 29, 1957, only the Plaintiffs, Mr. and Mrs. Holbrook, filed a Motion for Summary Judgment pursuant to U. R. C. P. 56. Argument was had on this Motion for Summary Judgment and a Memorandum submitted by both parties (R 32). Thereafter, the Court on June 18, 1957, signed an Order granting Plaintiffs’ Motion for Summary Judgment and on June 28, 1957, signed an Order granting Summary Judgment to the Defendant Leonard A. Trimble and Alice Trimble against this Defendant and others. This Defendant now appeals from the Orders granting the Summary Judgments.

## STATEMENT OF POINTS

THE COURT ERRED AS A MATTER OF LAW  
IN GRANTING THE SUMMARY JUDGMENT.

## ARGUMENT

THE COURT ERRED AS A MATTER OF LAW  
IN GRANTING THE SUMMARY JUDGMENT.

There appears to be only two possible points which could be raised to permit the Court to to grant the Summary Judgment. The first of these points would be

whether or not the record unequivocally shows that the Defendant Webster's, Inc. failed to properly file and record a lien as required by the statutes of the State of Utah, and the second point would be whether or not the Defendant Webster's, Inc. has ever released its lien and claim to any lien. The applicable statutory provisions of the Utah Code relating to the filing of mechanic's liens are found in Title 38, Chapter 1, U. C. A., 1953, and the provisions which affect this action in particular are as follows:

“38-1-2. Whoever shall do work or furnish materials by contract, express or implied, with the owner, as in this chapter provided, shall be deemed an original contractor, and all other persons doing work or furnishing materials shall be deemed subcontractors.”

“38-1-7. Every original contractor within eighty days after the completion of his contract, and except as hereinafter provided, every person other than the original contractor claiming the benefit of this chapter within sixty days after furnishing the last material or performing the last labor for or on any land, building, improvement or structure, or for any alteration, addition to or repair thereof, or performance of any labor in, or furnishing any materials for, any mining or mining claim must file for record with the county recorder of the county in which the property or some part thereof, is situated a claim in writing, containing a notice of intention to hold and claim a lien, and a statement of his demand after deducting all just credits and offsets, with 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 material, with a statement of the terms, time given and condi-

tions of his contract, specifying the time when the first and last labor was performed, or the first and last material was furnished, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or some other person.

“When a subcontractor or any person furnished labor or material as stated above at the instance and request of an original contractor, then such subcontractor’s or person’s lien rights, as set forth herein, are extended so as to make the final date for the filing of a notice of intention to hold and claim a lien sixty days after completion of the original contract of the original contractor.”

In this particular case, the record shows that the Defendant, Webster’s, Inc. delivered the last materials to the job on January 18, 1956 (Defendant’s Exhibit No. 2), and the record further shows that this Defendant recorded its lien against the property on April 11, 1956 (R-4 and Defendant’s Exhibit No. 1). Thus the Defendant Webster’s, Inc. lien was filed eighty-three days after the last materials were furnished by this Defendant. The question then becomes whether or not the record unequivocally shows that Elvin Coon was the owner of the real estate so that this Defendant would have to be a general contractor and, therefore, filed its lien within eighty days or whether it had sixty days after the general construction was completed. There is no doubt but what the lien has been recorded within sixty days after the last labor and materials were performed upon the property. The notice of lien filed by Webster’s, Inc. defines Mr. Elvin Coon as being “the contractor and owner and reputed

owner of said premises.” (Defendant’s Exhibit No. 1) This makes the record questionable as to whether Mr. Coon was the “owner” or “contractor” and as such the record is not unequivocal that Mr. Coon was the owner.

The Affidavit filed in this matter by Mr. William C. Quigley (R-39) shows that Prudential Federal Savings and Loan Association dealt with Mr. Coon as the contractor in building said home and that Mr. Coon was held out as being the contractor of said home. This Affidavit is made by Mr. Quigley, who was the loan officer for Prudential Federal Savings and Loan Association and who handled and dealt with Mr. Coon in the matter of the building of this home. Since Prudential Federal Savings and Loan Association dealt with Mr. Coon as the general contractor the Plaintiffs are in exactly the same position since they are suing to foreclose a mortgage as assignees of Prudential Federal (R 11). U. R. C. P. 13(j) provides as follows:

“Except as otherwise provided by law as to negotiable instruments and assignments of accounts receivable, any claim, counterclaim, or cross-claim which could have been asserted against an assignor at the time of or before notice of such assignment, may be asserted against his assignee, to the extent that such claim, counterclaim, or cross-claim does not exceed recovery upon the claim of the assignee.”

This rule also applies in the assignments of a mortgage by a mortgagee as follows:

“The general rule is that an assignee of a mortgage is vested with the powers and rights of the

mortgagee as fully as if he had been made such in the mortgage, but succeeds to no greater rights than those possessed by the assignor. Under this general rule, the assignee of a mortgage securing a non-negotiable obligation, even though he is a bona fide purchaser for value, takes subject to all existing equities which would have been effective as against the mortgagee. This is true as to equities between the original parties, and all defenses existent at the time of the assignment which might have been interposed by the mortgagor against the mortgagee or the assignor." (37 Am. Jur. p. 448)

The Affidavit of Mr. Lyle D. Webster, who is the President of Webster's, Inc. and was the sole proprietor of the predecessor of Webster's, Inc., Webster Coal and Lumber Company, states that he was acquainted with Mr. Coon and that Mr. Coon was engaged in the general contracting business and building of homes and that during the construction of this home he represented to the affiant that he was the general contractor in the building of this particular home. (R37) We respectfully submit that there is therefore a general issue of fact as to whether or not the Defendant Webster's, Inc. dealt with Mr. Coon as the contractor or the owner of the real property. Admittedly, anyone who deals with the owner of the real property is a contractor under our statutes; however, we take the position that in this case we have a different situation than covered by the statute because the Defendant Elvin Coon held himself out as being the general contractor and therefore is estopped to deny that he was the general contractor of the property. The Defendants, Mr. and Mrs. Trimble, are his successors in interest and

take subject to his right and subject to any defenses available against him. These liens were of record before the Trimbles secured their quitclaim deed to the property. In fact, the quitclaim deed given by Mr. Coon to Mr. and Mrs. Trimble recited:

“Grantees are aware that there are lien claims against the property, in excess of its value, and that the grantors herein are about to file a petition in bankruptcy.”

Since Mr. and Mrs. Trimble obtained their interest by means of a quitclaim deed they take the property subject to all the equities and defenses that could be asserted against the grantor. This is true not only because the deed recites the interests of the lien claimants but is also shown by the general rule set forth in the annotation in 44 A.L.R. 1266 at page 1269, as follows:

“It may be stated, therefore, that as a general rule the holder of such a deed (quitclaim deed) takes the land conveyed subject to all outstanding interests and equities shown by the records and such as are discoverable by the exercise of reasonable diligence.”

The law is well established as to the quantity of proof necessary to procure a Summary Judgment.

Rule 56, U.R.C.P. (c) provides in part:

“The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, *show that there is no genuine issue as to any material fact*, and that the moving party is entitled to a judgment as a matter of law. . . .” (Emphasis added)

*Moore's Federal Practice*, Vol. 6, in discussing Rule 56, says :

“The function of the summary judgment is to avoid a useless trial; and a trial is not only useless (sic) but absolutely necessary where there is a genuine issue as to any material fact. In ruling on a motion for summary judgment, *the court's function is to determine whether such a genuine issue exists, not to resolve any existing factual issues.* This function is analogous to the practice of Rule 50, genuine issues of material fact are not to be resolved by the judge because both sides have moved for summary judgment.” (Page 2101) (Emphasis added)

“The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issues as to all the material facts, which, under applicable principals of substantive law, entitled him to judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden, the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact . . . And the papers supporting movant's are closely scrutinized, while the opposing papers are indulgently treated, in determining whether the movant has satisfied his burden.” (Page 2123)

3 We respectfully submit that there is a genuine issue of fact as to whether or not Elvin Coon held himself out as being a general contractor on the property and as a general contractor giving the individuals who supplied materials to him the rights of a sub-contractor with the right to file a lien within sixty days after the final work was completed upon the property. Certainly Elvin Coon

was estopped to claim any other position than that of a general contractor as shown by the Affidavits on file herein. Certainly in this case the Defendant Elvin Coon held himself out as being a general contractor on the property and this was relied upon by the Appellants herein to their damage, which is certainly the matter of an estoppel.

Elvin Coon built a home on the adjacent property at about the same time this home was built and Mr. Coon sold this. Obviously Mr. Coon was in the building business. He built and sold homes. This was his general occupation. He was a licensed general contractor in the State of Utah (R 38).

The Motion for Summary Judgment should not have been granted as being based upon the Receipt and Lien Release shown as Plaintiff's Exhibit A. This Receipt and Lien Release is an acknowledgment by Webster Coal and Lumber Company of a partial payment for labor and/or materials furnished upon the property in litigation. On the face of this instrument it is shown as a "Contractors Authorization for Payment" and authorizes Prudential Federal Savings and Loan Association to pay to Webster Coal and Lumber Company a sum of money for and on account of labor and materials delivered and to be charged to a particular loan. It is significant to note that Elvin Coon signed both of these forms as the "Contractor," as is shown on the form. (See Plaintiff's Exhibit A) The reverse side of this form states:

"This receipt is executed and delivered by the undersigned to the Association to induce it to make

payment to the undersigned of the above stated sum from the funds held by it for the owner of the above described real property and in consideration thereof the undersigned hereby waives, releases and discharges any lien or right to lien the undersigned has or may hereafter acquire against said real property." (Plaintiff's Exhibit A)

This Lien Release was given only for a partial payment to cover the amount of money shown on the Lien Release. (R. 37) In saying that they release and discharge any Lien which they have or may hereafter acquire against the property, the same was referring to the sum of money as shown on the Lien Release and not as to any future deliveries for merchandise and materials delivered after the date of the Lien Release nor to release any amount in excess of the sum shown. The Affidavit of Mr. Webster clearly states that the Release was given as a partial Release and for the amount of the payment only. (R 37) We do not dispute the fact that it is possible for a person to enter into a contract whereby he waives future Lien rights. We do, however, dispute the fact that the record in this case clearly shows that such was the intent of the parties when they executed the Receipt and Lien Release hereinabove referred to. The evidence must be clear and unequivocal in order to support a Summary Judgment. (*Young vs. Felornia* (1952) 121 Utah 646, (Cert. denied 344 US 885; 976 ed. 685) 244 P. 2d 862; *Ulibarri vs. Christenson* 2 Utah 2d 367, 275 P. 2d 170) We submit that in this case the evidence is not clear and unequivocal. The Affidavit of Mr. Webster, which must be accepted as evidence of the facts stated therein. The

Affidavit clearly shows that the Receipt and Lien Release was not given as a Release of all Liens against the property but rather a Release only to the extent of the payment. Defendant's Exhibit No. 2 clearly shows that considerable materials were purchased after the date of the final "Receipt and Lien Release." The ledger card attached to Defendant's Exhibit No. 2 shows that these payments were only partial payments on a considerably larger balance.

### S U M M A R Y

The Appellant respectfully requests the Court to reverse the District Court and permit the evidence to be presented to show the true position of the parties, and respectfully submits that there is no evidence here to support a Summary Judgment in that there is a conflict as to whether or not Mr. Coon was the contractor or owner of the property in question; and further that the Receipt and Lien Release was given in satisfaction of partial payment only and was neither intended nor given to waive all future lien rights to the property.

Respectfully submitted,

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