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Zions First National Bank, A National Association, and Howard Nix and Hazel Nix v. Reginald L. Saxton and Louise A. Saxton, His Wife; Richard D. Saxton and Annie B. Saxton, His Wife; J. D. Mcneil; Ajax, Inc.; Glen v. Shields; John Worthen, dba Exotic Swim-Ming Pool Co.; Brazier, Montmor-Ency, Hayes & Talbot Architects, Inc.; Glen Hamilton, dba Western Excavating & Pipeline Company : Respondents' Brief

Roy G. Haslam; Attorney for Defendant and Appellant Glen HamiltonRichard H. Nebeker; Attorneys for Plaintiffs and Respondents

In the Supreme Court of the State of Utah

ZIONS FIRST NATIONAL BANK, a National Association, and HOWARD NIX and HAZEL NIX,

Plaintiffs and Respondents,

vs.

REGINALD L. SAXTON and LOUISE A. SAXTON, his wife; RICHARD D. SAXTON and ANNIE B. SAXTON, his wife; J. D. McNEEL; AJAX, INC.; GLEN V. SHIELDS; JOHN WORTHEN, d/b/a EXOTIC SWIMMING POOL CO.; BRAZIER, MONTMORENCY, HAYES & TALBOT ARCHITECTS, INC.; GLEN HAMILTON, d/b/a WESTERN EXCAVATING & PIPELINE COMPANY,

Defendants and Appellants.

Case No. 12472

Respondents' Brief

Appeal from the judgment of the Third Judicial District Court, in and for Tooele County, Honorable D. Frank Wilkins, Judge.

CANNON, GREENE & NEBEKER
RICHARD H. NEBEKER
400 Kennecott Building
Salt Lake City, Utah 84111
Attorneys for Plaintiffs and Respondents

BIELE, JONES, MURPHY & HASLAM
ROY G. HASLAM
72 East 4th South, Suite 280
Salt Lake City, Utah 84111
Attorneys for Defendant and Appellant Glen Hamilton, d/b/a Western Excavating & Pipeline Co.

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RESPONDENTS' BRIEF

When respondent, Zions First National Bank, discovered that Reginald Saxton had skipped the realm and that the Bank's Trust Deed covered only five acres of a trailer court park, which was being built upon 20 acres, the Bank took an option to purchase the remaining acreage from the plaintiffs, Howard Nix and Hazel Nix. (Pleadings 178) After trial, the Bank paid the Nixes the

remaining balance owed to them by Reginald Saxton and assumed the expense of representing them on this appeal. Counsel for the Bank now represent the Nixes.

Appellant's Brief states several facts from the deposition of Steve Ellis, a Bank employee. Mr. Ellis was not called as a witness by any of the parties. Mr. Ellis sat in the courtroom for most of the trial. He is not dead, nor was he out of the county at the time of trial. His deposition was not published or used under Rule 26(d) U.R.C.P. at the trial, and the facts cited therefrom in Appellant's Brief were not presented at trial. These facts are not in evidence, and for this reason respondent does not agree with the statement of facts set forth in Appellant's Brief.

STATEMENT OF FACTS

Reginald Saxton was a mink rancher from Coalville, Utah, (Tr. 148) and a nephew of Glen Hamilton (Tr. 172) who lives in Tooele, Utah, three blocks south of the project which came to be known as the Grand View Meadows Trailer Court. Reginald Saxton skipped the realm before the time of trial and is now serving a federal sentence for tax evasion. Hamilton sugggested to Reginald that it would be a good idea for a trailer park to be built in Tooele (Tr. 173) and introduced him to the Nixes who owned a 33-acre barley field. (Exhibit 13 P). Hamilton did not have financial means to build a trailer

park, so he passed the idea on to Reginald (Tr. 174). Reginald accepted the idea, and Hamilton submitted a bid to Reginald for building the entire project on a five-acre parcel of ground for $98,490. (Exhibit 22 P.) The five-acre parcel was in the southeast corner of the 33-acre Nix parcel. (See Exhibit 13 P. reproduced as Addendum A in Appellant's Brief and the more accurate drawing at pleadings, page 142). Reginald took Hamilton's bid to the Bank and made application for a Bank SBA loan (Tr. 141 and 145). Reginald's brother, Richard Saxton, worked as Assistant Manager at the 7th East Branch, Salt Lake City, and was deeded a 10% interest in the project, but at all times Reginald was in charge of construction and all details. The loan was approved on the basis of a total cost of $132,000.00 (Tr. 146) of which amount $85,000 was to be borrowed by the Saxton brothers from the Bank and the balance of capital to be injected by Reginald from his mink ranch operation (Tr. 146). Reginald stated that the project was to be built upon five acres (Tr. 155, Tr. 171) and the Trial Court specifically found:

> At the time of applying for and obtaining the $85,000 loan from Zions First National Bank, the Saxton defendants omitted and failed to disclose to the loan officers at the Bank that the trailer court park was intended to be built upon a total of 20 acres of the Nix property, and the Bank was informed and believed that the trailer park covered only the five acres described as Tract II above.
>
> Finding of Fact No. 5, Pleading 246

Reginald's SBA loan application (Exhibit 19 P) stated that applicant would inject into the project $37,000, plus the land, $10,000. The applicants attached personal financial statements of both brothers to the SBA application showing a net worth of $266,985. On June 12, 1970, the Bank loaned $85,000 to the Saxtons and obtained a properly executed note secured by a Trust Deed on the five-acre tract. (Exhibit 16, P 17 P) On June 11, Hazel Nix and Howard Nix conveyed the five-acre tract by warranty deed to Reginald Saxton and wife, 90%, and Richard Saxton and wife, 10%. (Exhibit 18 P) Contrary to his representations to the bank, Saxton paid $10,000 for the land with loan proceeds (Tr. 191, Exhibit 26 D) Reginald had no written contract at that time with Nixes, but his oral agreement was to pay $7,500 cash for the warranty deed to five acres, and the Nixes gave him an oral option to purchase the remainder of the 33-acre field (Tr. 48). The balance of $2,500 was applied on the option to purchase the additional acreage (Tr. 48). The agreement was to sell 33 acres for $1,400 per acre ($46,200).

About a week after Glen Hamilton started construction on the water line to the trailer park, Reginald advised him that he was expanding the project to an additional 20 acres (Tr. 177). Hamilton was advised by Reginald that he had obtained a loan of $85,000 from the Bank to finance construction upon the five acres of ground and that a mortgage upon the premises was held

by the Bank (Pleadings 63). The Saxtons never made any additional payments to the Nixes to apply on the purchase price of the remaining 28 acres (Tract I, described in the Findings of Facts), and the court found that the Nixes never authorized the construction or placement of any improvements on the 28 acres. (Finding of Fact Nos. 7 and 8, P. 239) The Nixes never ratified, authorized or consented to the construction. The Trial Court quieted title in the Nixes against all lien claimants and granted the Bank a Judgment and Decree of Foreclosure against the five acre parcel.

The ultimate plan proposed by Reginald Saxton and as designed and contained on the plans drawn by the architects comprised 20.3 acres, identified on Exhibit 13 P as the 15-acre tract and the five-acre tract. (Finding of Fact No. 9) During the months of June, July, August and September, 1969, the Bank disbursed six checks to Glen Hamilton, d/b/a Tooele Excavating Company, as the general contractor on the job, totalling $74,000, and during this same period of time, Hamilton, unbeknown to the Bank, made out his personal checks to Reginald Saxton and paid him the sum of $56,000. (Finding of Fact 11 and 12; pleadings 206) There was insufficient evidence to prove what Reginald did with this money. Glen Hamilton endorsed all of the checks containing a lien waiver provision above his signature which stated as follows:

In consideration of payment of the within check, the payee upon endorsement hereby waives and releases all lien or right of lien now existing or that may hereafter arise for work or labor performed or materials furnished for the improvement of the following property:

Grand View Meadows

Tooele, Utah

Loan 51032

The payee hereby certifies that the labor or material, or both, for which this check is in payment was actually performed or used at the above described property.

/s/ Tooele Excavating Co.

Glen Hamilton

Exhibit 23 P

The voucher portion of the check also contained a "Waiver and Release of Lien" which Hamilton executed and returned subsequently to the Bank. This Waiver is reproduced at Addendum B of Appellant's Brief. The checks were issued on the basis of the Bank's form of Builder's Request for Construction Advance, which were signed by Reginald Saxton, as Borrower-Mortgagee, and by Glen Hamilton, as Contractor-Builder, which stated as follows:

GENTLEMEN:

In respect to the above referenced construction loan, we have incurred the charges as listed on this billing, for which we hereby request checks and lien waivers to be prepared and disbursed.

We certify and represent that all of the labor and materials for which these bills are presented have been used in the construction of this referenced unit, and that construction to date is acceptable and is in accordance with approved plans and specifications.

/s/ Reginald Saxton
Borrower — Mortgagee

/s/ Glen Hamilton
Contractor — Builder

Exhibit 21 P

The final proceeds of the loan were disbursed on September 12, 1969, and the Bank learned to its surprise (Tr. 202) in October of 1969, that Hamilton had returned $56,000 to Reginald. Thereafter, Reginald promised that he could get a new loan from Utah Mortgage (Tr. 206) or Valley Bank and Trust (Tr. 207), but eventually the SBA withdrew its commitment to the project due to Reginald's trouble with the Internal Revenue Service (Tr. 103). In November and December, liens were filed by the seven lien claimants named as defendants totalling $72,930. Glen Hamilton claims that he performed work worth $48,565 and that he kept $18,000 of the $74,000

paid to him by the Bank. Hamilton claims that his remaining balance of $30,565 should be secured by a mechanic's lien against the Nix parcel of property. He recognizes that he is junior in priority to the lien of the Bank's Trust Deed covering the five-acre tract.

ARGUMENT

POINT I.

GLEN HAMILTON WAIVED HIS LIEN TO THE ENTIRE PROJECT

Both the checks endorsed by Glen Hamilton at the time he deposited them to his account and the separate voucher entitled "Waiver and Release of Lien" stated that Glen Hamilton waived and released his lien for construction of building and improvements on the following property:

"GRANDVIEW MEADOWS, TOOELE, UTAH — LOAN 51032"

There was only one project. The money paid by the Bank was for trailer park improvements placed on the 20-acre parcel. Hamilton knew that his original estimate of $98,490 was to build a trailer park of five-acre size, that the loan at the Bank was for $85,000 on five acres of ground, yet within a week after starting, he was digging sewer and water trench to construct a trailer court

four times as large. He had been a contractor for ten years (Tr. 172). He testified that he knew the Builder's Request for Construction Advance, which he signed as Contractor, was to pay for labor and materials that were "to be used on the project" (Tr. 181). He understood that a lien waiver is a contract which releases his lien (Tr. 182) as to Grand View Meadows. He did not limit the intent of his lien waiver to cover the entire project.

Hamilton knew that several banks disburse money through a contractor rather than a borrower so that the money is used in proper places (Tr. 185), yet he abdicated this responsibility and knew that if he simply endorsed the checks over to Reginald that the Bank might question how the funds were being deposited in Saxton's account instead of Hamilton's (Tr. 210).

In *Holbrook v. Webster's, Inc.,* 7 Utah 2d 148, 320 P.2d 661, (1958), the Supreme Court stated:

> We are of the opinion that no genuine issue of fact is presented by the Lien Release. The only issue is one of law. It does not lie in the mouth of appellant to say that he was mistaken in the legal effect of the release or that he did not intend that it should be given the only legal effect of which it is susceptible.
>
> Even if the notice of lien was filed within the time required, the release of any lien or right to

> lien that appellant had or might thereafter acquire was effective for the purpose of releasing such lien.
>
> Had the court declined to grant the motion for summary judgment and had appellant attempted to vary the terms of the release by testimony that appellant did not intend the release to mean what its unambiguous language shows its legal effect to be, such testimony would be inadmissible . . .

In the 1963 case of *Brimwood Homes, Inc. v. Knudsen Builders Supply Co.*, 14 Utah 2d 419, 385 P.2d 982, the Supreme Court ruled that a provision in a receipt and lien release that the materialman waived and released any lien or right to lien that it might have or thereafter acquire against the realty did not apply to any future lien rights which the materialmen might acquire and related only to the particular debt paid and receipted for in a particular transaction.

> Furthermore, it must be noted that the defendant, in receiving the payments from Prudential, was being paid no more than what it was legally entitled to at that time. Thus, a promise by the defendant to waive rights to future liens for other debts would be without consideration.

The lien waivers in this case exceed Hamilton's bill by some $25,000, so under the Brimwood Homes case, he waived the lien, not only as to the property, but as to the

very debt itself. Legally, as general contractor on the job, he has been paid $74,000. His secret arrangments to give the money to Reginald Saxton cannot alter or defeat the plain expressed intent on the face of the Builder's Request for Construction Advance and two sets of lien waivers.

The payment of $74,000 to Hamilton extinguished the lien that is based on the indebtedness owed to him. This is clearly stated in the Utah Statutes 38-1-21 to 38-1-24, U.C.A. 1953. See also 51 Am. Jur. 2d, Liens, Section 49, and the cases of *Einerson v. Central Lumber and Hardware Company,* 14 U. 2d 278 382 P. 2d 655; *Maricopa County v. Douglas,* 69 Ariz. 35, 208 P.2d 646; *Kelley Brothers Lumber Co. v. Leming,* 220 Ark. 418, 248 S.W. 2d 358; *Caley v. Kohlstad,* 130 Mont. 7, 292 P.2d 995; *Trane Company v. Wortham* (Texas Civil Appellate) 428 S.W. 2d 417.

No attempt was made by the lien claimants, Hamilton included, to segregate the amount of work which they performed on the five-acre portion as against the 15-acre portion of the trailer park.

The general law on this subject is stated in Volume 53, Am. Jur. 2d, Mechanics' Liens, Section 294, as follows:

> Where a general waiver is executed, and there is nothing in the context to show a contrary intention, the court must enforce the contract as the parties have made it; and an ambiguity as to the scope or completeness of a lien waiver is to be resolved by taking into consideration the purpose for which it was executed . . .

The above text cites the case of *Lundstrom Construction Company v. Dygert* 254 Minn. 224 94 N.W. 2d 527. In this case, the lien waiver referred to all carpenter, labor, dishwasher and disposal services furnished by the contractor, and the contractor executed a full and complete lien waiver but contended in court that it was limited to the specific items enumerated. The court stated as follows:

> Here the plaintiff in clear and express terms waived *all* his lien rights for labor or materials furnished prior to the date thereof, despite the fact that the waiver provision was preceded by an acknowledgment of receipt of payment for specific items. Even if we assume that the preceding receipt provision in some way modified the explicit and unqualified lien waiver which immediately followed, the resulting modification at most created an ambiguity. An ambiguity as to the scope or completeness of a lien waiver is to be resolved by taking into consideration the purpose for which the lien waiver was executed. In this case plaintiff executed the waiver in response to defendants' demands for *complete* waivers as a condition to the making of further payments. We also have the significant circumstance that plaintiff used a printed form which on its face carried

> the admonition, "If payment is not in full to date, so state. SHOW UNPAID BALANCE, and strike out last three lines. Despite this admonition, plaintiff did not strike out the last three lines but let them stand as an absolute renunciation of all his lien rights.

The Lundstrom case relied on *Decatur Lumber & Mfg. Co. v. Crail,* 350 Ill. 319, 324, 183 N.E. 228, 230, where the court said:

> . . . While a waiver of lien for a clearly expressed special purpose will be confined by the courts to the purpose intended, yet, where a general waiver is executed, and there is nothing in the context to show a contrary intention, there is nothing left for the court to do but enforce the contract as the parties have made it.

The *Lundstrom* case also cited the case of *Crane Co. of Minnesota v. Advance Plumbing & Heating Co.,* 177 Minn. 132, 224 N.W. 847, where the court said:

> . . . Such releases are ordinarily furnished contractors to enable them to get money from somebody. . . . So, when money is paid upon the faith thereof, as the parties must expect it to be, the releasor cannot then qualify or limit the reasonable purport of his his own language by some mental reservation of his own, or some remote and far-fetched implication to which his langauge is susceptible only when read with no reference to the circumstances of its origin and intended use.

Hamilton, of course, made no reservation in any of his lien releases that it applied only to the five acres and not to the entire Grand View Meadows Trailer Park. He knew that the Bank's Trust Deed only covered five acres, and yet as general contractor he was certifying that the labor and materials for which Request for Construction Advance was requested "have been used in the construction of the referenced unit."

Respondent has been able to find two cases which appear to be directly in point. In Midwest *Engineering & Construction Co. v. Campagna,* 397 S.W. 2d 616, at 634 (Mo. 1965), a bowling alley was constructed by mistake on Parcel B as well as Parcel A. The court held that the blanket lien waviers applied to Parcel A as well as Parcel B and stated:

> Although the lien waivers described only Parcel A, we apply our conclusion that the waivers preclude claims of liens against the reversionary interests for labor and materials furnished after July 29, 1958, to both Parcel A and Parcel B. The mislocation of the building was, insofar as appears, unknown to any of the parties at the time of the execution of the waivers. By their waivers, the contractors obviously intended to forego their lien rights on the entire project. The waivers were tendered to the owners of the reversionary interest on such basis. No one contemplated that the releases were partial only. Having been executed, tendered and

> accepted on the assumption that the waivers applied to the project as a whole, they should be given such effect."

In Andrews Lumber Co. v. Cheske, 12 Wis. 2d 525, 107 N.W. 2d 481 (1961), a lien waiver was mistakenly executed as to "Lot 5" but should have referred to "Lot 6". In holding that the waiver applied also to Lot 6, the Court stated:

> "We agree with the trial court that while the waiver stated Lot 5, there is no question but that it referred to Lot 6. The appellant having waived its right to a lien on the property, the complaint was properly dismissed." 107 N.W.2d at 483.

See also *Westinghouse Electric Supply Co. vs. Levin,* 115 So. 2d 423 (Fla. App., 1959) and *A. P. Freund Sons vs. Vaupell* 53 Ill. App.2d 1, 202 N.E. 2d 350 (1964).

POINT II.

THE IMPERFECTIONS OF HAMILTON'S LIEN AGAINST THE NIX PROPERTY

Hamilton filed his first notice of claim of lien against the five-acre tract on November 14, 1969, "and all adjacent property owned by Reginald L. Saxton and others." (Exhibit 6 P) On December 29, 1969, he filed an amended lien describing a 20.3 acre parcel which in-

cluded the five-acre tract, but which excluded the remai
ing 13 acres in the 33 acre field which belonged to Nixe
The Nixes did not have a contract with Reginald to se
this particular 20 acres at all. The Nixes gave Reginal
an oral option to purchase the entire remaining 28 acre
(Tr. 33) Later in February, Valley Bank and Tru
Company asked Reginald for a copy of his real estat
contract, and Reginald then had the Nixes sign a contrac
(Exhibit 14 P) dated February 18, 1970. This contrac
compounded everyone's errors and woes because it de
scribed a parcel of real estate on the west side of Col
man Street, entirely unrelated to the partially complete
trailer park. This contract called for an installment o
$9,050.00 on or before July 1, 1970.

The Bank filed its suit for foreclosure against th
lien claimants as Civil No. 7173 on July 22, 1970. Th
Nixes filed suit to quiet title against the lien claimants t
the remaining 28 acres on the same date. The two case
were later consolidated. Hamilton never filed a cross
claim or a counterclaim seeking to foreclose his lie
against the option interest which Reginald Saxton ha
in the remaining Nix 28 acres. (Pleadings 58) Hamilto
filed a cross-claim against Saxton for moneys had an
received ($56,000) but not to foreclose any lien in Sax
ton's equity, or option whatever it was. (Pleadings 4
None of the lien claimants ever served the Saxtons w
published summons and cross-claims seeking to foreclo
their liens against Reginald's interest in the Nix acreag

The Utah Supreme Court has held that a mechanic's lien attaches to a contract purchaser's equity in the land. *Burton Walker Lumber Co. v. Howard,* 92 Utah 92,66 P. 2d 134. But in this case Reginald only had an option to purchase, and his contract of February, 1970 (on the wrong legal description) recited that the first payment had to be made on July 1, 1970. None of the lien claimants tendered any payment on the option or on the real estate contract prior to July 1, 1970, or at all. No suit, or attempt was made by the lien claimants to reform the written contract to make it apply to the 33-acre barley field — less the five acres deeded to Saxtons and mortgaged to the Bank.

There is absolutely no cross-claim by any of the lien claimants seeking to foreclose their liens against the interest which Saxton had under his option to purchase the remaining Nix 28 acres. Hamilton filed a "Third Affirmative Defense" on November 23, 1970, which hints at this theory of the case, but an affirmative defense does not constitute a cross-claim. Trial was held on December 9, 1970. On October 13, 1970, the Saxtons filed their disclaimer in court to any right, title or interest in and to the Nix 28 acres. (Pleadings 69) One wife joined in the Disclaimer (Anni); the other was personally served and defaulted (Louise). The trial court concluded (Pleadings 203) that the lien claimants did not obtain service of summons or jurisdiction over the Saxtons on any of their cross-claims seeking to impress their mater-

iahmen's liens upon whatever equity the Saxtons had purchase the 28 acres.

Rule 5(a), U.R.C.P. specifically states that:

> . . . pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

If Saxtons, by filing the Disclaimer to the Nix property, made an appearance in the case, then under the provisions of Rule 5(a), it became necessary to serve Saxtons with a cross-claim alleging that the liens attached to their interest in the property. The judgment of foreclosure would have permitted the lien claimants to bid in at sheriff's sale for the entire 28-acre parcel of the Nixes subject to the unpaid contract balance due to Nixes as vendors. This procedure would have required the lien claimants to have apportioned their liens between the separate parcels of property, which none of the lien claimants did.

In the opinion on rehearing in *Utah Savings and Loan Association v. Mecham*, 12 Utah 2d 335, 366 P.2d 598, this court pointed out that under Section 38-1-8:

> Liens against two or more buildings, mining claims or other improvements owned by the same person or persons may be included in one claim

> but in such case the person filing the claim must designate therein the amount claimed to be due him on each of such buildings, mining claims or other improvements.

The court cited the earlier decisions of *Eccles Lumber Co. v. Martin* 31 Utah 241, 87, P. 713, and *United States Building & Loan Association v. Midvale Home Finance Corporation,* 86 Utah 506, 44 P.2d 1090, as precedent for holding that liens can be filed for one amount against several buildings owned by the same person, but the Court held:

> As previously pointed out, Ludlow's notice of lien included properties owned by the Grow-controlled corporations in addition to the properties owned by the Mechams. Therefore, its claim is defective and invalid because the materials, for which claim was made, were not furnished upon buildings owned by the same person or persons.

Therefore the Hamilton lien not only was waived and released in consideration of payment of the total sum of $74,000, but could never have been foreclosed in this action because:

(1) The option of Saxton to purchase the ground expired on July 1, 1970, one year after the date of the purchase of the five-acre tract.

(2) If this is not so, the option expired on October 13, 1970, the date Saxtons filed their Disclaimer to the property.

(3) No cross-claim was ever properly framed, praying for foreclosure of the Saxton option, or interest in the 28-acre parcel belonging to Nixes.

(4) No summons was served on Saxtons seeking this relief, which was directly opposed to Saxton's Disclaimer.

(5) The lien claimants did not segregate the amount owing against the five acres and against the 15 acres either in the Notice of Lien, or at trial.

CONCLUSION

The interpretation of the Waiver and Release of Lien should be considered, together with the Builder's Request for Construction Advance, which Hamilton executed as general contractor. The Waiver of Lien extended to improvements on the property known as Grand View Meadows. Hamilton stated in his affidavit that he knew the Bank had made a loan of $85,000 secured by a Trust Deed on the five acres. If he had intended to limit his Waiver of Lien to five acres only, rather than the total 20-acre trailer park, he would have immediately called the Bank's attention to the misrepresentations of Reginald Saxton, and no further disbursements would have been made by the Bank. Every party to this lawsuit would have been saved considerable legal if Hamilton, as general contractor, had notified the

Bank's officers responsible for disbursing the loan proceeds. Equitably, Hamilton should be estopped from asserting the argument that the Lien Waiver extended only to the five acres and not the total project.

Respectfully submitted,

RICHARD H. NEBEKER
Attorney for Plaintiffs
and Respondents
400 Kennecott Building
Salt Lake City, Utah 84111