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Utah Savings and Loan Association v. Robert B. Mecham, et al., Ludlow Plumbing Supply Co. : Response to Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT of the STATE OF UTAH

UTAH SAVINGS AND LOAN ASSOCIATION,
Plaintiff-Respondent,

vs.

ROBERT B. MECHAM, et al., LUDLOW PLUMBING SUPPLY CO.,
Defendant-Appellant.

Case No. 9159

REPLY OF PLAINTIFF-RESPONDENT TO PETITION OF APPELLANT, LUDLOW PLUMBING SUPPLY CO. FOR REHEARING

Appeal from the Judgment of the Fourth District Court for Utah County
Hon. R. L. Tuckett, Judge

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Comes now the plaintiff-respondent, Utah Savings and Loan Association, and makes the following reply to the petition of Ludlow Plumbing Supply Co., for rehearing.

STATEMENT OF KIND OF CASE

This case involves the issue of priority between an unpaid mortgagee whose mortgages were unduly recorded prior to the furnishing of materials and an unpaid materialman. Only one

materialman now appears, namely Ludlow Plumbing Supply Co.

DISPOSITION IN LOWER COURT

The matter was tried on a consolidated record of three cases filed for foreclosure of 35 mortgages. As to the defendant-appellant, Ludlow Plumbing, the trial court found and adjudged that all of the mortgages were prior in time and in right and accordingly awarded judgment for foreclosure of those mortgages.

RELIEF SOUGHT ON APPEAL

On appeal this court then held that the priority so determined by the District Court is subject to an equitable apportionment rule and to a further restriction as to sums disbursed by the mortgagee after the materialmen had commenced furnishing materials. The case was remanded for further findings. Petitions for Rehearing were duly filed and argued and now this court has reconsidered the issues and held that the mortgages, having been duly recorded in conformance with the statute and prior to the furnishing of materials, are prior to the lien claimants and further that the Ludlow lien notice was fatally defective because of the failure to segregate the sums claimed as to properties and the inclusion in it of five non-contiguous tracts owned by several different owners. Ludlow now seeks a re-hearing.

STATEMENT OF FACTS

The numerous prior briefs filed by parties in this proceeding have more than adequately stated the facts in the matter, and we shall refer to the pertinent facts for argument within

the discussion of the points below. Basically this is a mortgage foreclosure proceeding in which the court has found as a fact, upon undisputed evidence, that the mortgages were recorded prior to the furnishing of materials or the commencement of work upon the ground in each of the three areas covered by the mortgages involved in the proceeding. The lien of the defendant-appellant Ludlow Plumbing Supply Company describes five separate subdivisions or building areas, noncontiguous, some many blocks removed from others. Included in the lien notice are two separate Keyridge Heights subdivisions in the Orem area, owned by several corporations; the Schauerhamer Lots, part of which were owned by Mecham, part of which were owned by Mid Continent Broadcasting Company and one of which was owned by Joseph A. Day; a piece of land in Provo at about 5th North and 16th West, consisting of 7.79 acres in the name of Mecham alone; 24 lots in the LaMesa Subdivision in the Oream area; and 4 lots in the Rowley area, the last two being solely in the names of Mecham and his wife.

ARGUMENT

POINT I

THE PETITION FOR REHEARING IS REPETITIOUS OF THE ISSUES TWICE SET FORTH, BOTH AS TO FACTS AND POINTS OF LAW, IN THE PRIOR PRESENTATION OF THE MATTER BEFORE THIS COURT.

This petition filed by Ludlow is actually a petition for re-hearing, and admittedly is repetitious of the matters earlier

presented to the Court by Ludlow. Its initial brief consisted of 62 pages and its reply brief later was 14 pages. Now this appellant would ask the Court for a soul-searching review of all that has transpired before.

The inference of this appellant, Ludlow, whose claim was denied in its entirety by the trial court, is that your Court in its two extensive opinions and consideration of the case, has not weighed the evidence carefully. We resist any such implication. Those matters not fully considered in the initial presentation certainly were adequately reviewed on the second time around. The Court will recall that not only were new briefs filed, but the case was also re-argued before your court.

Two theories are presented in this re-hearing petition:

(a) Fraud

(b) Estoppel

However, the well established basic elements of these defenses have not been pleaded, nor have they been proven. There is no evidence of false representations, holding out or concealment by the plaintiff and respondent to Ludlow upon which it could or did reply to its detriment.

POINT II

THE PETITION FOR REHEARING IGNORES THE FINDINGS OF THE DISTRICT COURT WHICH ARE SUPPORTED BY COMPETENT EVIDENCE.

The mortgages involved in the primary litigation consisted of seven mortgages on dwellings and lots in the Schauer-

hamer area, four mortgages on lots in the so-called Rowley area, and twenty-four separate mortgages upon 24 dwellings on 24 lots in the LaMesa area. The trial court in each of the three cases involved found as follows:

> "23. That on December 14, 1956, after the recording of mortgages thereon, defendant Mecham, as owner-builder, commenced construction on an additional 7 dwellings on 7 lots in the Schauerhamer area.
>
> "24. That on or about February 1, 1957, after the recording of four separate mortgages thereon, defendant Mecham, as owner-builder, commenced construction of 4 dwellings on the 4 Rowley lots.
>
> "25. That on February 21, 1957, after the recording of 24 separate mortgages thereon, defendant Mecham, as owner-builder, commenced the construction of 24 dwellings on 24 lots in the LaMesa Subdivision."

These findings are based upon substantial evidence in the record given by interested as well as disinterested witnesses. In addition, the Court found, based upon competent evidence in the record, that part of the work that was done by Mecham on properties covered by the lien and asserted by Ludlow Plumbing was commenced in the summer of 1956 without the knowledge or consent of the plaintiff or any of its officers or agents. It refers particularly to 5 homes in the Schauerhamer area, as well as to the construction of a structure upon the Provo area, and also the court found that the said Mecham had used part of the materials in general building and contracting business outside of the entire areas covered by the

liens and by the litigation, including the construction of a home for Wes Parks, a house being sold by a ward of the L.D.S. Church, and later on a bishop's storehouse, and the construction of a masonry building on his own home property.

In the first decision of this Court, October 18, 1960, 11 Utah (2d) 159, 356 Pac. 2d. 281, this court did not disturb the finding of the District Court as to the fact that the mortgages were entitled to a priority because the mortgages had been duly recorded prior to the commencement of the work or the furnishing of materials upon the ground, but rather your Court gave full credence to such a finding by engaging in the discussion whereby certain priorities were accorded only as to funds advanced by the mortgagor subsequent to the commencement of work and the delivery of materials. In fact, in the said decision of October 18, 1960, the Court said in part:

> "We must be guided by our statute, which provides that a mortgage be given priority as against any materialman who commenced delivering materials upon the particular property subsequent to the recordation of the mortgage. It must be appreciated that a mortgagee who is loaning money to a mortgage-borrower generally is not only entitled, but obliged to pay out the money in accordance with the directions of the borrower."

In the November 22, 1961, decision on re-hearing, the Court said in part:

> "All of plaintiff's mortgages on the lots covered by the liens of Masonry Specialties and Central Utah Block

were recorded prior to the time the latter commenced furnishing materials."

It is to be noted, of course, that the same findings of the Court apply to the materials furnished by the present appellant, Ludlow, unless the Court accepts Ludlow's contention that the furnishing of the first materials relates back to commencement of work on the Keyridge Subdivision more than a year prior thereto, at a location more than a mile remote from the areas involved in this litigation, under circumstances foreign and unrelated to the situation under which the properties covered by the mortgage foreclosures here involved were developed.

To be successful in this proceeding the appellant on *re*-rehearing Ludlow Supply Company, must induce the Court to indulge in some rare equitable theories and philosophies contrary to the findings of fact of the trial court in this proceeding. Basically the appellant Ludlow would ask the court at this point on *re*-rehearing to find that there was a nefarious conspiracy in existence, wherein Ludlow has been defrauded of its materials by the mortgagee, Utah Savings and Loan Association. We wish to call to the attention of the court at the very inception that there has already been a finding by the District Court on this matter which apparently was forgotten or overlooked by counsel in this petition for re-rehearing. We direct your attention now to the findings of the District Court, No. 34 and No. 35, which read as follows:

"34. That no agreement of partnership was entered into between Robert B. Mecham and D. Spencer Grow

or between Robert B. Mecham and the plaintiff or the corporate cross-defendants, nor did any of such parties hold themselves out as partners to the public or to the suppliers of materials.

"35. That Robert B. Mecham was never appointed or held out as an agent of D. Spencer Grow, the plaintiff, or any of the corporate cross-defendants."

As stated, this same finding appears in all three of the cases, though having different paragraph numbers.

It would be wholly irresponsible of the court at this point to negate the carefully considered findings of the District Court, which spent so much trial time in hearing the evidence and viewing the numerous exhibits, just to respond to the fancied and belated claims of this appellant Ludlow in this unique petition for re-rehearing.

By involved reasoning appellant seeks to tie Grow, Mecham, Utah Savings and the corporations formerly interested in the Keyridge subdivisions into one neat little package, grandly designating each as agent and alter-ego for the other. Unfortunately for Ludlow, the facts do not agree with or support these broad inferences. We quote from pages 39-40 of the Utah Savings answering brief to the brief of Ludlow, filed earlier in this case:

"Even Mecham himself never claimed that he was the agent for Mr. Grow, as contended by Appellant, or that he purchased any property for and on behalf of Respondent or Mr. Grow or any of the Cross-defendants. Don Rowley, from which Mecham bought Rowley and

and LaMesa properties, in his testimony said that Mecham told him he had been building homes for Grow or Utah Savings and then had gone into the Schauerhamer area on his own, and that was what he was going to do with the Rowley and LaMesa properties (Tr. 827, 828).

"Mr. D. Spencer Grow said in his testimony, commencing at page 721, that he asked Mecham to get him a cost estimate and pursuant to that request a cost estimate was furnished to him on which the prices of the Keyridge properties were negotiated. He further said, on page 731, that Mecham told him that some people by the name of Rowley owned some acreage located just east of Crystal Acres, that he (Mecham) could purchase and give back a mortgage, and out of the proceeds of the sale of homes, could pay off the mortgage (Tr. 731). Mr. Grow denied that he had anything to do with the acquisition of land by Mecham from Ruben Schauerhamer and in fact testified that Mecham had owned it many months before Mr. Grow even knew about it. (Tr. 732). He further said that he had nothing to do with the negotiations and purchase of the four Rowley lots by Mecham or the LaMesa property and that he did not instruct or otherwise counsel Mr. Mecham to purchase this ground, or advise him or assist him in the negotiations for it. (Tr. 733). The Trial Court found the facts substantially as testified to by Mr. Grow.

"Appellant is not in a position to claim an estoppel against anyone, except perhaps Mecham, because upon only one occasion was inquiry made by it or on its behalf

to Respondent as to the monies available on the mortgages, and that was after construction had virtually ceased. (Tr. 649, 650). Appellant was then correctly informed that there were not balances on the mortgages. If it knew Respondent was financing Mecham's building and Mecham wasn't paying his bills, then some prior inquiries were in order. Appellant knew that the ownership of LaMesa and Keyridge were different, but even with that knowledge failed to keep or insist upon separate accounts as between those two projects. If it relied upon Mecham's statement that it made no difference, then if there is any estoppel, it would have to be against Mecham and not Respondent."

One might indulge in tears of sorrow for Ludlow in its present plight, were it not for the fact that it had it in its own power to protect itself in the transactions. Its operations and credit extensions to Mecham were based upon assumptions and guesses. This was clearly seen by the trial court. Its findings on these issues recite:

"27. That during the period commencing June 1956 and continuing until June 1957, plumbing materials and supplies were sold to defendant Mecham on an open account by defendant Ludlow Plumbing Supply Company, and were not sold for use on any specified property or project described in its notice of lien referred to in Paragraph 12 hereof, and were sold for use by defendant Mecham in such manner and for use upon such properties or projects as Mecham should determine.

"28. That during the period June 1956 to June 1957, defendant Ludlow Plumbing Supply Company de-

livered said plumbing materials and supplies from its place of business in Salt Lake City, Utah, to Orem, Utah, to the defendant Mecham mostly by common carrier, and such materials were delivered to Keyridge Subdivision and to the LaMesa Subdivision, and none were delivered by Ludlow to the Schauerhamer, Rowley or Provo areas.

"29. That at no time during 1956 and until the spring of 1957 was defendant Ludlow Plumbing Supply Company aware that defendant Mecham was building homes in the Schauerhamer area or on the Provo property or the Rowley area, but did know and understand that all of Keyridge Subdivision was owned by some of cross-defendants, and all of the LaMesa Subdivision was owned by defendant Mecham; that at various times shipments of materials to defendant Mecham by defendant Ludlow were made simultaneously to Keyridge Subdivision and LaMesa Subdivision.

"30. That there is no evidence from which the Court can determine the value of any materials or supplies used in or upon the buildings on any of the lots involved in this action or upon any of the buildings on lots described in the notices of lien heretofore referred to."

We search in vain for facts which would negative these findings. Ludlow has not demonstrated by its briefs that any error occurred in such findings. Such being true, the final decision of this Court must stand.

POINT III

IT WOULD BE JUDICIAL FOLLY TO RETURN THE CASE TO THE TRIAL COURT FOR MAKING OF ADDITIONAL FINDINGS AND DETERMINATIONS WHEN THE BASIC ISSUES HAVE BEEN FULLY HEARD AND DETERMINED BY THIS COURT AND APPELLANT'S ADDITIONAL POINTS WOULD BE IMMATERIAL TO THE DECISION REACHED BY THIS COURT.

It would be useless for this Court to remand the cases to the District Court for the purposes urged by the appellant, as the basic legal issues have now been resolved adverse to Ludlow's position.

The free use by appellant now of such descriptive words as "scheme", "devise", "aided and abetted", "exploit and saddle losses", "innocent materialmen", "sharp practices", "villains", etc., will not overwhelm the reason of this Honorable Court. No matter how it embellishes this petition for *re*-rehearing, Ludlow must face up to the issue: The bona fide mortgage, having its mortgages recorded prior to the supplying of materials or commencement of work on a subdivision, has actual and legal priority over the materialmen, both in law, in equity and under our statutes.

A reversal of this final decision by the Court would leave all lending agencies floundering when requested to make construction loans. The standard practice of inspecting the realty for absence of materials or construction prior to recording the construction mortgage was followed in this case. Nowhere is there any evidence that Ludlow, prior to furnishing materials,

checked the Recorder's office for mortgages or took any precaution, except to continue its open account dealings with Mr. Mecham.

This Court should not be burdened further with recitals of facts, theories and arguments. The final decision followed a period of over one year after the first opinion herein. During that time ample opportunity was embraced by the Court to study and resolve the very contentions reasserted by Ludlow now. In light of the determinations finally enunciated, no useful purpose would be subserved to remand the case for further trial procedures.

CONCLUSION

We recognize that this has been an involved and difficult case for both the trial court and your Honorable Justices. It is to your credit that you squarely faced these intricate issues and made a final decision following the briefs and argument on rehearing.

The lien right is statutory. Ludlow cannot escape that fact, and also that it failed to comply with such statutes. We do not have the implied spectacle of a nefarious property owner taking advantage of an innocent materialman alone. Rather the prior mortgagee prevails over the materialman. Each has advanced its funds and materials in good faith upon the credit of one Mecham, the owner-builder.

As must come to all cases, a final decision had to be issued. The appellant, Ludlow, must accept the fact that it has had

a full and fair hearing, has briefed the matter and argued it twice before and cannot now ask this Court for a third bite at the apple.

We find nothing in the petition for re-rehearing of a new or substantial nature which would merit the Court giving further consideration to the issues. Therefore, we respectfully request that the petition be denied and that the case be remanded to the District Court for entry of judgment in accordance with your final decision of November 22, 1961.

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and

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