

1961

# Utah Savings & Loan Association v. Robert B. Mecham et al : Second Reply Brief of Appellant Ludlow Plumbing Supply Co.

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

UTAH SAVING & LOAN ASSOCIATION,

*Plaintiff and Respondent,*

vs.

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

FILED

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Clerk, Supreme Court, Utah  
Case

No. 9159

SECOND REPLY BRIEF OF APPELLANT LUDLOW  
PLUMBING SUPPLY CO.

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Backman, Backman and Clark  
*Attorneys for Appellant*

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SECOND REPLY BRIEF OF APPELLANT LUDLOW  
PLUMBING SUPPLY CO.

Not only does loaning institutions and title insurance companies rely upon decisions of this Honorable Court in Mechanic's Lien cases, in financing construction and insuring titles to real properties in the state of Utah, but mechanics and materialmen also rely on the same decisions in furnishing labor and materials for construction work.

This court has construed the lien laws of this state in the many cases cited and relied upon by appellant. There appears to be but little factual difference in the instant case and in the United States Building & Loan vs. Midvale case quoted from in appellant's original brief. In the Building & Loan case there were numerous owners, purchasers under contract, and the lots liened and owned by the contract purchasers were not all contiguous but some were separated by lots of other owners not represented in the action. The same objection was urged there as is urged by respondent in this case. The same principal of law was applied in the U. S. Building & Loan case as was applied in the early case of Garner v Van Patten, 20 U. 342 and in the Eccles Lumber Co .v Martin case, cited in appellant's original brief.

In the above three mentioned cases this court particularly construed Sec. 38-1-8 UCA 1953 which section is so heavily relied upon by respondent. The court held that under our lien laws one is not limited to the filing of a lien on two or more properties only if they are contiguous where more than one structure is involved. Neither has this court held that title to the properties liened must be in one owner where building is by one contractor and materials are furnished under one contract.

It is to be noted that section 38-1-8 UCA 1953 is identical with Sec. 1387 R.S. 1898, and C.L. 1907, Sec. 1387; C.L. 1917, Sec. 3737; R.S. 1933 & C. 1943, Sec. 52-1-8, and the above mentioned cases having been decided after the enactment of these laws, our legislature has adopted the judicial construction given to section 38-1-8 UCA 1953 in those decisions. See Stamm Elec. Co. v HamiltonBrown

Shoe Co. (Mo.) 165 S.W. 2d 437, 441, and Drake Lumber v. Paget, (Or.) 274 P2d 804.

Respondent insists on singling out and relying upon but one section of our lien statute Section 38-1-8 and completely ignores section 38-1-3 giving materialmen a lien upon the property for which they furnish materials, and section 38-1-4 making two or more lots or subdivisions one for the purpose of the lien law. Neither one of those sections contain the words “provided the properties are in the name of one owner.”

In the Eccles Lumber case the court said one cannot single out or segregate a section or a part of a chapter and get the meaning or intent in the following words of Justice Frick:

“In order to arrive at the true legislative intent, courts cannot segregate a section or a part of an entire chapter upon a given subject, and from such part alone determine the true meaning or intent of the whole. Moreover, the object or purpose of the law as a whole must be considered.”

In the same case, Justice Frick makes an interesting analysis of section 1386, which is now Section 38-1-7 UCA 1953 and section 1387 which is identical with section 38-1-8 wherein the same question was raised as is raised by respondent in the instant case, that the claimant failed to state the amount due on each building lien. Justice Frick further said:

“the lien is complete by complying with section 1386. The statement of the amount due on each building separately, as provided in section 1387, would be but a restatement of the amount of the claim as

required by section 1386, in another form. As we view it, this restatement was not intended as an essential part in acquiring the lien. It could subserve no purpose to attain that end. It could in no way affect the amount claimed against the entire property. A discrimination must be made between the things that are necessary to acquire a lien and those that are merely intended to protect the interests of the lien claimants between or among themselves. The statements in section 1387, as we view it, clearly belong to the latter class. The statements of the claimant provided for in section 1387 are made sufficient to acquire a lien and to protect the owner of the property. To hold that a restatement of the amount of the claim in another form is likewise necessary to acquire a lien, unless the statute requires this to be done in terms, is adding, by construction, an essential not required by the statute."

Section 38-1-7 requires the name of the owner to be given, provided the name of the owner is known to the lien claimant. It is evident that the legislature did not consider the name of the owner important. As was held in the Golden Belt Lumber case, (Kan.) 26 P2d 274, it is the delivery of materials under a single contract which determine the question whether several lots are subject to a lien and not the location of the lots or the matter of ownership, and the lots need not be contiguous. It appears by the Eccles and U. S. Bldg. & Loan cases the provisions of the statute is met if the work is done by the same person and we think this is the same construction placed on the cases found in 10 ALR and 75 ALR relied upon by respondent in it's petition and brief for re-hearing at page 5. Both of these references appear in annotation to section 38-1-8 UCA 1953.

Respondent says at page 5 of it's brief that in none of the cases annotated in the two ALR volumes above referred



to, and in no case cited by appellant Ludlow, or which respondent has been able to discover, has a single blanket lien covering property owned in severalty, in the face of an unambiguous statute prohibiting the same, been allowed. It appears that respondent has misconstrued the decisions handed down by this court in the Garner, Eccles, and U. S. Bldg. & Loan cases and in the Colorado case of Branan Sand & Gravel quoted from in appellant's original brief at pages 22 and 23.

In the cases annotated in 10 and 75 ALR relied on by respondent the property affected was not in one owner, it appears this was not considered necessary.

In the Golden Belt Lb. case cited at pages 28 and 33 of appellant's original brief, there the court at page 276 quotes from *Stoltze v Hurd*, 29 N.D. 412, 128 N.W. 115, 30 LRA (N.S.) 1219, Ann. Cas. 1912 C, 871 as follows:

"It was held that where 2 persons owning adjoining lots made a single contract for the erection of a building thereon, the lien must follow the contract, and a person who supplied materials for the building under a single contract was entitled to a joint lien on the building and on both lots, but was not entitled to separate liens on both lots."

and in *Humphrey v Harrison Bros.*, U. S. Court of Appeals, 196 F. 2d 630, held where materials are furnished to a multiplicity of houses comprised in a single project, it is not essential to validity of lien claim that furnisher show in what houses specific materials were used, or indeed that the materials were actually used on the project if they were purchased for and delivered to the site of the work, and such

rule is applied whether materialman deals directly with the owner or sells to builder who in turn contracted with the owner to place materials in buildings. This same case held the lien valid as against 29 houses in a 135 house project although it was shown that plumbing supplies had not been installed in the 29 houses liened, but in other houses in the project. The evidence showed all the materials were taken to the site from time to time as needed and the bills showed that the goods were intended for and charged to the project.

In *Miller v Laval*, (Ky.) 140 SW 2nd 376 it was held that the intention of the parties determines whether a contract is to be treated as an entirety or as severable.

In the instant case the contractor was either the owner, should the court adopt the contention of respondent, or the agent for the owner if appellant's contention is adopted and it makes no difference whether the contract is with the owner or his agent in the application of our lien statute where the delivery of materials is admitted and where the only question is as to the validity and priority of the lien. In this case the account of appellant is admitted by the contractor.

The only importance to the instant case whether respondent, Grow or Grow's companies or Mecham was in fact the owner of the properties liened is not on the question of validity of the lien or its priority but in the application of the bonding act should appellant's lien be determined to be invalid, it having been admitted that no performance bond was furnished as to any of the improvements. Neither the trial court or this Honorable Court ruled on this point although it was pleaded by appellant and the evidence was to the effect that no bond was furnished.

It was admitted that one of Grow's companies, Mid-Utah Broadcasting Company, a defendant in the action, became the owner of the Schauerhamer area properties either during the course of construction or prior to construction of some of the houses and that Mecham was its contractor and that no performance bond was ever furnished.

The trial court should have found that Mecham, the contractor, had no monies with which to purchase the LaMesa and Rowley properties, that the monies with which those properties were purchased came from respondent and therefore Mecham held title to same in trust for respondent which company was the real party in interest.

While the trial court found that Mecham acquired the Rowley and LaMesa properties for a consideration which Mecham paid. The court did not find that Mecham was the owner of those properties. In fact the trial court did not make a finding as to who was in fact the owner of the properties. If appellant should concede for the purpose of argument that Mecham was the owner of the properties mortgaged, and the lien of appellant covered properties not owned by Mecham, even if the law was as is contended by respondent, appellant's lien would not be invalid but appellant would be entitled to have its lien apportioned and applied to those lots owned by Mecham, as was done by the Colorado court in the Branan case cited by appellant in its original brief at page 22, which case was based on a statute of Colorado identical with section 38-1-3 UCA 1953 as is pointed out in appellant's original brief; then Mecham would have dealt with appellant as owner-contractor and the statute would still apply.

In respondent's brief in support of its petition for rehearing it has cited at page 7 the case of *W. P. Fuller v Fisher*, 217 P.53, a California case predicated on Sec. 1183 Code of Civil Procedure of California. From an examination of the case and Sec. 1183, it is apparent that the law there provides for the furnishing of the materials with the purpose that it be used or consumed in the work on the particular building upon which the lien is claimed and not a delivery to the site of construction. Respondent also cites the case of *B. F. Salzer Lumber Co.* a Colorado decision which it appears is favorable to appellant, the court having held where materials were furnished by a lumber company and delivered to and stockpiled on a vacant lot not a part of the property being improved, and it was contended that little or none of the material went into the construction but that some was used in another building being constructed by the contractor for other parties and that some of the lumber was sold by the contractor to other parties. It was also urged that the contractor ordered more lumber than was necessary for the building liened and that another lumber company was also furnishing the same kind of lumber to the building. There the court said:

“These contentions of fact must be admitted with the additional statement that the lumber company did not have knowledge that lumber for the same purpose was being furnished by another company.”

In the *Salzar Lumber* case the court cites the case of *Small v Foley*, 8 Colo. App. 444, 17 P.67, in which it appeared that \$35 worth of hardware furnished by the lien claimant was removed by the contractor and used in another house not under the contract under which the improvements

were being made on the property liened. As to this fact the court there said:

“So far as appears, those materials were removed by Rankin without the knowledge of the hardware company. Counsel says it was error to include this amount in the decree.”

In each of the above cases relied upon by respondent court held in favor of the lien claimant stating that it is not required that the materialman see that the material actually goes into the building. In so holding the court further said in the Salzer Lumber case:

“There is nothing in this case tending to show other than a good faith sale by Salzer to the contractors, and that the materials so sold was for use in the Opera House building and delivered on the grounds in the city of Ft. Collins used for the storage of materials to be used in such building. The claim of lien should be sustained.”

The facts in the Whittier v Puget Sound case also cited by respondent at page 7 are not in any degree like those of the instant case, and in the Eisenbeis v Workman case also cited at page 7 it appeared from claimants own testimony that he was furnishing brick to the contractors without any regard as to where they were going to use them and some of the brick were even used in a Customs House being erected by the contractor for the U. S. upon which the supplier could have had no lien.

At page 9 of this same brief respondent says with reference to a number of cases cited by appellant in it's

brief, which cases included the *Sierra Nevada Lumber v Whitmore* and the *United States Building v Midvale* cases, they were unable to find any support for appellant's position and that the *Badger Lumber* case cited by appellant is directly to the contrary to the contention of appellant. The court held in the *Badger Lumber* case where work is performed on two separate houses the claimant cannot file a lien for the whole amount of his lien on one house even though he attempts to approximate the amount, that a mere approximation in segregation will not suffice. Such was the holding by this Honorable Court in *Holbrook v Webster* cited at page 6 of appellant's original reply brief.

Respondent also states at page 7 of its brief in support of its petition for re-hearing, there are two bases under which a materialman makes his sale to a contractor, (1) on open account with no reference on his records to any property or project and (2) upon open account or specifically designated account and requires from the purchaser a designation of the property on which the materials are to be used. The evidence in the instant case is to the effect that appellant inquired of Mecham, the contractor, when appellant observed materials being removed from each stockpile and used in houses in each area, if it should segregate its account and Mecham said: "No it was not necessary. it made no difference." (R. 62).

At page 11 of respondent's brief in support of its motion for rehearing respondent inserts a few quotes from Mecham, the contractor's testimony, which portion together with other testimony given by Mecham is also inserted in appellant's brief at pages 17, 18 and 19. Then respondent

argues that for this court to apply the equitable apportionment rule based upon such evidence would make multiple construction financing virtually impossible, and respondent further argues that none of the authorities cited support this application. It must be remembered that Mecham was an adverse witness when giving his testimony, he was called under the rules, he did not deny that materials were used in the houses in each area of construction and taken from the stockpiles set up by him and to which appellant was instructed to make deliveries, on the contrary he admits that all materials ordered by him from appellant were delivered by appellant to the site and used in construction in the four areas as houses were made ready to receive plumbing materials, (R. 579,580), therefore materials having been delivered to the site of construction by appellant as ordered and directed by the contractor and neither the contractor or the supplier being able to determine the amount of materials which went into each house, under all of the authorities cited, appellant is entitled to have it's lien equally apportioned with an equal amount charged against each house.

## CONCLUSION

As heretofore stated, this Honorable Court having already construed the Mechanic's Lien laws of this state, and appellant in reliance upon that construction having furnished its materials which enhanced the value of the properties, and respondent having had a part in the manner in which construction was carried on on the property affected by these cases, whereas appellant acted in good faith at all times, respondent and not appellant who is an innocent party should suffer. The judgment should be reversed and the trial court

should be directed to apply the doctrine of equitable estoppel as urged in appellant's original brief, or if estoppel is not applied then to find for appellant apportioning the lien of appellant equally as against the properties affected by the actions.

*Respectfully submitted,*

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