1965

Whiting Brothers Construction Company, Inc. v. M & S Construction and Engineering Company, Kent Hoyt, Smith Welding and Steel, et al. : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

WHITING BROTHERS CONSTRUCTION COMPANY, INC., a corporation,
Plaintiff-Appellant,

—vs.—

M & S CONSTRUCTION AND ENGINEERING COMPANY, a corporation, KENT HOYT, SMITH WELDING AND STEEL, et al,
Defendants-Respondents.

Case No. 10390

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Third District Court for Salt Lake County
Hon. Aldon J. Anderson

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RESPONDENTS' BRIEF

STATEMENT OF THE KIND OF CASE

Defendants-Respondents herein agree with Plaintiff-Appellant's statement as to the nature of the case.

DISPOSITION IN LOWER COURT

Defendants-Respondents agree with Plaintiff-Appellant's statement as to the disposition in the lower court.

RELIEF SOUGHT ON APPEAL

Respondents request that the decision of the lower court be affirmed and they be awarded their cost of this appeal.

STATEMENT OF FACTS

Respondents admit the Appellant's contract with Cedar City Corporation and the Federal Aviation Agency and its subcontract with M & S Construction and Engineering Company and also that Respondents furnished labor and materials to said project at the instance of M & S Construction. Respondents deny that they failed to give notice to the Appellant within the time required but affirmatively allege and represent that both Respondents gave sufficient and adequate notice to the Appellant pursuant to the law.

It is correct that the defendants Smith, performed labor and services for M & S Construction from August 1, 1963, to and including September 25, 1963. That thereafter no formal notice was sent by Smith to anyone connected with the project except M & S Construction, until on or about December 5, 1963, at which time the said Smith discussed the matter personally with Jack Whiting, one of the owners of Whiting Bros. Construction. At that time Jack Whiting and Whiting Bros. Construction were aware that M & S Construction was not going to complete its contract as it was removing its equipment from the job. On at least two occasions thereafter, and within the next few days the said Smith again discussed the bill with Jack Whiting who assured Smith that all bills would be paid because all principal parties were bonded. That there

after and on or about December 27, 1963, Smith received a copy of the letter from one Lloyd D. George, Attorney for Whiting Bros. Construction Company, reference to which is made in more detail, hereafter.

With respect to the Respondent Hoyt, he also contracted with M & S Construction to furnish a welding machine and certain supplies on a monthly basis commencing September 17, 1963, and ending December 17, 1963, at an agreed price of $150.00 per month. That on or about December 5, 1963, the M & S Construction started pulling its equipment off the job as it was no longer able to perform its agreed contract. That on December 5, 1963, Hoyt contacted James H. Mendenhall, Vice President and Superintendent of M & S Construction relative to his bill whereupon Mendenhall executed an assignment in favor of Hoyt on funds owing from Whiting Bros. Construction. On that same date the assignment was delivered to Jack Whiting at Cedar City, Utah, with a full explanation to Whiting of the purpose, nature, and reason for the assignment. Hoyt was assured by Jack Whiting that a check for the amount due ($565.00) would be sent from Whiting's office in Las Vegas, Nevada on the bus to Cedar City the following day. On December 6, 1963, Jack Whiting informed Hoyt and Smith, that all amounts then due and owing to M & S Construction had been previously assigned to a bank in Clearfield, Utah. Thereupon, Whiting assured both Smith and Hoyt that there were various bonds in existence to protect everyone concerned with the project. Thereafter, and on other occasions, both Hoyt and Smith were assured by Jack Whitning that everything was being done to protect the various creditors.

On or about December 27, 1963, Hoyt also received a mimeographed copy of the letter sent by one Lloyd D. George, Attorney for Whiting Bros. Construction, relative to the situation with M and S Construction and the payment of the various creditors.

It is the contention of the Respondents, although ad-

mitting that no formal demand was made upon the Appellant by registered mail as set forth in the statute, that the meaning and purpose of the law was complied with and it would be inequitable and unjust to permit the Appellants to escape liability on a technicality of law not contemplated by the law itself.

ARGUMENT

POINT I

RESPONDENTS SMITH AND HOYT GAVE ADEQUATE AND SUFFICIENT NOTICE TO APPELLANT WITHIN THE MEANING AND INTENT OF THE STATUTE.

The appellant has set forth the Statute in its brief in detail at page 5 thereof and the same is incorporated herein by reference. The important part thereof and the portion with which we are concerned, in substance states, that for a materialman or a subcontractor to have a cause of action over and against the prime contractor, he must give written notice within ninety days after the last work performed or material furnished to the prime contractor, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.

It should first be noted, and the case so hold, that the statute involved is remedial and under the authorities should be liberally construed. United States for the Use of Hallenbeck v. Fleisher Engineering and Construction Co., 2 Cir., 107 F2d 295, affimed 311 U. S. 15, S. ct. 81, 85 L. Ed. 12. Also, that the provisions of the statute have been held to be directory rather than mandatory.

The appellant raises the additional requirement that the notice or claim must demand that the prime contractor pay the debt but there is nothing in the statute of this nature.

The notice provision of the Miller Act has been given a liberal construction in many cases, the courts holding that the main purpose of the provision is to insure that the general contractor has knowledge of the claim and the circumstances surrounding it, and that if it can be shown that the general contractor has such knowledge, the notice may be regarded as sufficient despite the fact

that the formalities of the notice provision may not have been met.

Very briefly and in view of the foregoing, let's look at the facts. On December 5, 1963, Whiting Bros. knew that M & S Construction could not and did not intend to complete its subcontract. It was also aware that a general assignment of all funds owing to M & S Construction had been made to a third party not connected with the project either as a supplier or laborer. Both Smith and Hoyt discussed their accounts, both as to amount and nature, with Jack Whiting on or about that same date and on various other occasions thereafter and further they each received a letter from Whiting Bros. Construction directed to and acknowledging that they and each of them, were creditors of M & S Construction on that same project.

POINT II

THE LETTER OF APPELLANT'S COUNSEL SENT TO RESPONDENTS SMITH AND HOYT WAS AN ACKNOWLEDGMENT OF THEIR CLAIM AND APPELLANT IS ESTOPPED FROM CLAIMING LACK OF NOTICE.

The letter in question (R 19-21) was dated December 26, 1063, and was received by both Smith and Hoyt within a day or two thereafter. The letter is directed to creditors of M & S Construction and sent to each of the Respondents herein which would clearly indicate knowlege on the part of Whiting Bros. Construction that these individuals had a claim. The letter acknowledges money in the hands of Whiting Bros. Construction which belonged to M & S Construction and its creditors and on page 2 of said letter the method by which creditors may expect payment is also outlined. Also, in the last paragraph on page 2, the letter also persuade creditors that they are not being mislead or misdirected and the only question is who is entitled to the funds. This letter in

conjunction with Jack Whiting's assurance that the claimants had no reason to be concerned for their money in view of the fact that all parties were bonded, constitutes notice, reasonable reliance by the claimants which would in turn estop the Appellant from now claiming lack of proper notice. In support of this contention Respondents cite the case of United States use of Hopper Bros. Quarries vs. Peerless Casualty Co. 255 F2d 137, cert den 358 U S 831, 3 L ed 2nd 69, 79 S ct. 51, and further cited in 78 ALR 2d at page 430. In that case the claimant had sent a letter to the general contractor within the 90 day period seeking information with respect to its bill and the general contractor had referred the claimant to the subcontractors' bonding company. The court concluded that the general contractor had misled the claimant and lured him into not perfecting a notice by referring to the subcontractor's bonding company as a possible source for the claimant to recover payment, when, in fact, only the general contractor could sue on this bond, and the general contractor knew that it alone was liable to the claimant if he was unable to recover from the subcontractor. The court continued: "The inevitable effect of the answer so volunteered by the contractor was to prevent plaintiff from taking advice or adding anything to the written notice of the claim which it had given to the contractor in its letter. Plaintiff had reason to believe that the contractor found the written notice sufficient and it would be unconscionable to permit the contractor and the bondsman to escape their just obligation to pay because of any deficiency in what was, under the circumstances, a matter of form, and that deficiency in form was attributable to their own conduct. There can be no claim that any substantial right of any of the parties was in and degree affected by the omission from the written notice of the dollars and cents due and the defendants in this action are plainly estopped to defeat recovery on that ground. To hold otherwise would be to exalt

form over substance and frustrate the purpose for which the Act was passed."

The cases all seem to agree that the purpose of the statute is for the protection of materialmen and laborers and that the general contractor and his surety should not be permitted to avoid its obligations arising from contracts within the meaning and scope of the statute upon technicalities not contemplated by the law. The purpose of the statute was intended for two main purposes, namely, that the general contractor be placed on notice of a claim against a subcontractor and the amount thereof and then, secondly, to permit the general contractor to withhold any further funds due the subcontractor until the claims are settled. In the instant case, on the date that prime contractor was first contacted by the two Respondents, the subcontractor, M & S Construction, was pulling off the job and did not intend to complete the contract, which the Appellant well knew. The Appellant was in possession of all money then due M & S Construction for the work done to date, as evidenced by the subsequent letter in question herein (R 19-20-21), and thereafter, the Appellant obtained all other monies due on the subcontract as it, the Appellant, completed the remainder of the subcontract. The general contractor (Appellant) was then in a position to adequately protect itself and did so, to the injury of the Respondents and other claimants.

Two further cases are cited in support of Respondents view, although there are many others to the same effect, but none found by the Respondents so closely on all four with the instant case. In the case of Houston Fire and Casualty Insurance Company vs. United States of America for the Use and Benefit of the Trane Company, 217 F 2d 727, annotated in 78 ALR 2d 435, wherein the representative of the materialman had talked with a representative of the prime contractor with reference to the bill and the amount owing and the prime subcontractor had subsequently and in writing acknowl-

edged the conversation, there being no express or explicit writing from the materialman to the prime contractor, and the court therein held "It is not necessary that the writing relied on be signed by the supplier, it is sufficient that there exists a writing from which, in connection with oral testimony, it plainly appears that the nature and state of the indebtedness was brought home to the general contractor. When this appears the object of the statute, to assure that the contractor will have notice, is attained and the statute is sufficiently complied with."

In Coffee vs. United States (1946, CA5 Fla.) 157 F2d 968, annotated in 78 ALR 2d 433,, the plaintiff therein had visited one of the partners comprising the prime contractor and had advised him of the balance due from a subcontractor, and at the same time handing the partner a statement in writing of the sums claimed to be due for the work although there was no showing that the partner (prime contractor) in fact accepted actual delivery and possession of the statement the court therein held "In the case now before us we hold that a writing containing the information which the stature requires, exhibited to the contractor by the claimant as a notice of his claim and which the contractor examines and discusses it and might have taken if he desired, as a written notice sufficiently served."

With respect to the third point raised by the Appellant it its brief, namely, that the defendants Smith and Hoyt had no express or implied contract with the plaintiff, surfice it to say that the defendants therein and the Respondents herein do not contend any contractural obligation between themselves and the Appellant herein (prime contractor) except insofar as a contractural obligation is created by the Miller Act itself, the statute with which we are concerned.

CONCLUSION

Defendants submit to this court, as their conclusion, that based on the authorities herein cited and upon the law as it is written and taking into consideration the nature and purpose of the law and the fact situation as herein set forth, that the lower court properly concluded that the defendants Smith and Hoyt were entitled to a judgment against the plaintiff therein and that the action of the lower court should be affirmed with costs given to these defendants.

Respectfully Submitted,

ROBERT L. GARDNER