1963

Brimwood Homes Inc. v. Knudsen Builders Supply Co. et al : Brief of Respondent

Utah Supreme Court

Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Defendant-Appellant;
Bell & Bell; Attorneys for Plaintiff-Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

BRIMWOOD HOMES, INC.,
Plaintiff-Respondent,

v.

KNUDSEN BUILDERS SUPPLY COMPANY,
Defendant-Appellant,

ELBERT G. ADAMSON, PETE J. BUFFO, CAROLINE P. BUFFO, his wife, DAVID RALPH STEWART, PHYLLIS G. STEWART, his wife, CONTINENTAL THRIFT AND LOAN COMPANY, and WESTERN STATES THRIFT COMPANY,
Cross Defendants-Respondents.

Case No. 9794

RESPONDENT'S AND CROSS-APPELLANTS' BRIEF

Appeal from the Judgment of the
District Court for Salt Lake County
Honorable Stewart M. Hanson, Judge

BELL & BELL
303 East 2100 South
Salt Lake City, Utah
Attorneys for Plaintiff-Respondent and Cross Defendants-Appellants

VAN COTT, BAGLEY, CORNWALL & McCARTHY
Suite 300, 65 South Main Street
Salt Lake City, Utah
Attorneys for Defendant-Appellant

PRINTERS INC. - SUGAR HOUSE

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

Cases Cited

Statutes Cited

Texts

IN THE SUPREME COURT OF THE STATE OF UTAH

BRIMWOOD HOMES, INC.,
Plaintiff-Respondent,

v.

KNUDSEN BUILDERS SUPPLY COMPANY,
Defendant-Appellant,

ELBERT G. ADAMSON, PETE J. BUFFO, CAROLINE P. BUFFO, his wife, DAVID RALPH STEWART, PHYLLIS G. STEWART, his wife, CONTINENTAL THRIFT AND LOAN COMPANY, and WESTERN STATES THRIFT COMPANY,
Cross Defendants-Respondents.

Case No. 9794

RESPONDENT'S AND CROSS-APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

So far as this appeal is concerned, the plaintiff brought an action pursuant to Section 38-1-24, Utah Code Annotated, 1953, to recover the penalty therein provided for the failure to release liens upon request and to have the liens declared invalid; certain of the cross-defendants,

who also prosecute this cross appeal, filed cross claims against the defendant asking for the same relief as the plaintiff.

DISPOSITION IN LOWER COURT

The case was tried without a jury and judgment was entered awarding the defendant the amount alleged in its lien. The lien itself was adjudged to have been invalid; the relief sought pursuant to Section 38-1-24 was denied with prejudice on the merits; upon Motion of plaintiff to amend the Findings, Conclusions and Judgment, the plaintiff was awarded an attorney's fee in the amount of $1,000.00 which was deducted from the amount awarded the defendant in the original Judgment.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks (a) a reversal of the judgment and amended judgment granting defendant judgment on open account; a reversal of the judgment and amended judgment denying relief to plaintiff on its complaint and likewise denial of relief to the cross-defendants on their cross claims brought pursuant to the above designated Section, and for judgment pursuant thereto. For simplification, since the relief sought by plaintiffs and cross-defendants is similar, the use of the term plaintiff will normally include the cross-defendants, although it is acknowledged that the cross-defendants received their interest in the real

property upon which the liens have been levied subsequent to the filing of the same.

STATEMENT OF FACTS

The plaintiff owns a tract of land in Salt Lake County which it subdivided into lots known as Jordan Village No. 2 Subdivision (R.1). It obtained from Prudential Savings and Loan Association, hereinafter designated as Prudential, a mortgage on each lot, commonly known as a construction mortgage. Defendant Knudsen Builders Supply Company furnished a large amount of building materials used in the construction of homes. At various times defendant tendered to the plaintiff CONTRACTORS AUTHORIZATION FOR PAYMENT. On the other side of the same was a RECEIPT AND LIEN RELEASE. Although these documents are practically identical with the document set forth in Holbrook v. Webster's Inc., 7 Utah 2d 148, 320 P.2d 661, for convenience one of the documents in this case is as follows:

CONTRACTORS AUTHORIZATION FOR PAYMENT

NON-NEGOTIABLE

01-11478 Salt Lake City, Utah, March 21, 1961.

TO PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION:

This authorizes you to pay to Knudsen Bldrs. Supply the sum of Six Hundred Ten 60/100 DOLLARS ($610.60) for and on account of labor and/or materials furnished and delivered by said payee to

the undersigned on account of construction of building and improvements on Lot 203 of Jordon Village #2; said payment to be charged to the undersigned with respect to your Loan No. 01-11478.

Craft Materials $511.00
Alum siding 99.60

/s/ J. O. Trayner, Jr.
Contractor-Owner
Brimwood Homes

NON-NEGOTIABLE

(The receipt and lien release on the reverse side hereof must be executed by the payee above named)

RECEIPT AND LIEN RELEASE

Salt Lake City, Utah, April 21, 1961

Received from PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, (hereinafter designated Association), the sum of Six Hundred Ten and 60.100 DOLLARS ($610.60) in Full / Partial payment of labor and/or materials furnished and delivered by the undersigned for construction of building and improvements on Lot 203 of Jordan Village #2. 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 funds held by it for the owner of 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.

KNUDSEN BUILDERS SUPPLY CO.
/s/ Leland A. Searle, Treas.

As a practical matter and as the record does bear

out in this case, the side entitled CONTRACTOR'S AUTHORIZATION FOR PAYMENT is signed by the contractor and otherwise filled in but is sometimes filled in by defendant. The other side of the document entitled RECEIPT AND LIEN RELEASE is always signed by the defendant and other blanks thereon are filled in by the contractor or by the defendant. Sixteen of such documents were executed by the plaintiff and the defendant and delivered by defendant to Prudential (Ex. P-7-12). The only variation in them is with respect to the date, the amount of money and the lot number.

The trial court found that between the 19th day of February, 1961, and the 27th day of May, 1961, the defendant sold and delivered to the plaintiff, at its special instance and request, building materials of the reasonable value of $3,911.64 after crediting all payments theretofore made; that the materials were used by the plaintiff in the construction of improvements on the lots; that the last material was furnished on May 26, 1961; that defendant's notice of claim of lien was recorded on July 18, 1961; that at each time a payment was made to Prudential or directly by plaintiff's own check, there remained a balance owing to the defendant. The Findings conclude that by executing the document set forth and delivering the same, the defendant released and discharged any lien which it had then or thereafter acquired. The Memorandum Decision of the Court held the lien to be invalid under the authority

cited or based upon argument by plaintiff's attorney. (R.34).

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DETERMINED THE LIENS OF THE DEFENDANT TO BE INVALID.

A: PLAINTIFF IS A PARTY TO RECEIPT AND LIEN RELEASE

The language at the bottom of the CONTRACTOR'S AUTHORIZATION FOR PAYMENT reading:

> The receipt and lien release on the reverse side hereon must be executed by the payee above named.

is highly significant. For this language together with the balance of the authorization itself differentiates this case from the authorities cited by the appellant. It is submitted that the authorization is an offer by the contractor, the plaintiff in this case, to pay to defendant through plaintiff's agent a sum certain upon the condition that the lien release on the reverse side thereof is executed by the defendant, which offer the defendant accepted. The defendant-appellant has never claimed that it was defrauded or tricked into the acceptance of the offer and the execution of the lien releases. In fact it wholeheartedly accepted th same, executed it and delivered it without comment or inquiry in order to acquire the funds of the plaintiff and then applied

the same to the account of the plaintiff but not in conformance with the document designation. It may be construed that the document is a three party agreement between plaintiff, defendant and Prudential, but it is respectfully submitted that the plaintiff is a party to the same and cannot be found otherwise. The Holbrook vs. Webster case cited above is directly in point and controlling in this case. It suggests that the document could not be varied by parole evidence, and in this case the documents were not varied by parole nor was any claim made in the pleadings, pretrial, or trial to that effect.

B. CLAIMED AMBIGUITY IS WITHOUT MERIT

Much is made of the fact that since the words "Full" and "Partial" both appear in the lien release, it is ambiguous. The ambiguity, if any, should be resolved in favor of the plaintiff since the defendant could have stricken the inappropriate word at the time of execution. Further, assuming that the word "Full" was stricken, leaving only "Partial" payment, the document on its face should still be construed as releasing the lien, and when looked at as a whole, it would consist of a lien release and a receipt of part payment of an obligation owed by the contractor.

C. MANNER OF DOING BUSINESS

The evidence in this case clearly established without doubt that at any given time neither the plaintiff nor the

defendant knew the exact amount of material invoiced to a particular house, and that the money received by check directly from the plaintiff or received pursuant to an authorization and a lien release was not disbursed in accordance with the written directions (R.25). Neither party knew exactly how to apply payments or how to allocate them to a particular invoice or lots (R.23, R.25). It was merely a question of waiving the lien, present and future, and obtaining money wherever there was an available source and generally looking to the credit of the defendant.

For instance, apparently the defendant approximately furnished the same amount of materials for each lot, yet an examination of the paid and unpaid invoices (Ex. D-2, D-3) show that invoices, both paid and unpaid, attributed to Lot 206 total $974.44, but the authorizations and lien waivers in evidence (Ex. P 7-12) on the same lot total $1,701.48, a difference of $727.04 in favor of the plaintiff over and above all claimed invoices and assumed deliveries. However, plaintiff claims a lien of $302.66 on Lot 206. Incidently, if we assume, which assumption is not conceded, that the date of the last invoice to Lot 206 is also the date of last delivery, then the lien is not within the statutory period of time since the last invoice B05306 is dated May 16, 1961, and the lien is filed July 18, 1961, an elapse of 63 days—3 days over the lien period.

Another example is the paid and unpaid invoices attributed to Lot 207, total $1563.66, but the authoriza-

tions and lien releases amount to the sum of $1499.80 leaving an open account balance in the sum of $63.86 in favor of the defendant; but the defendant claimed a lien in the sum of $763.01. These payments reflect only the payments made through Prudential and not any paid directly by the plaintiff.

In the event the Court is interested in argument of the defendant that there was no consideration for the lien releases and future lien releases set forth in the document, the foregoing shows a built in consideration in each document since no one knew the exact amount that was actually invoiced to a particular lot at a given time and particularly at the time money was disbursed, nor was money paid to the defendant and applied in the specifically designated manner on the document. The argument of defendant presupposes an exactness and science of bookkeeping and accounting which was not kept nor intended to be kept. In addition the paid invoices reflect that materials were delivered to lots not owned by the plaintiff as there was the Potter job in Sandy (R.171), a building at 650 East 2100 South (R.172) and 3362 South Main (R.173) which invoices were paid by funds of the defendant held by Prudential.

D. NO PROOF OF DATE OR OF LAST DELIVERY

The lien is further invalid as defendant did not sustain its burden of proof in showing the date of last delivery.

The date of first delivery was established by Mr. Trayner as March 28, 1960 (R.115). However he did not testify nor did anyone else testify as to the date of last delivery. The last invoice, B10781 (Ex. D-3) is dated 5-26-61. It is the only Invoice so dated but there is no evidence, and certainly it cannot be concluded from the bare invoice that the materials designated thereon were ever received by the defendant let alone used in construction, and yet it is this invoice and material upon which defendant must rely that it filed its lien timely. There are four invoices dated 5-19-61 which are next in line insofar as chronological order is concerned.

E: DEFENDANT FAILED TO FILE PROPER NOTICE OF LIEN

In addition, defendant has not complied with Section 38-1-8, Utah Code Annotated, 1953, when construed in the light of Utah Savings and Loan Association vs. Mecham 12 Utah 2d 335, 336 P.2d 598, which permits several liens to be filed in one claim. It is submitted that they do not do away with the requirements of the preceding Section 38-1-7 requiring amounts as well as dates of last material furnished to be set forth. Section 38-1-8, with which the Court is very familiar, states that "Liens * * * may be included in one claim * * *. It is procedural in that it permits one claim to be filed, instead of many, wherein the claimant may set forth several liens. To hold otherwise

automatically extends the last delivery date to each lot under common ownership as the date of last delivery to any lot of the common ownership.

POINT II

CROSS APPEAL IS PROPER

This Cross Appeal is made pursuant to Rule 74, Utah Rules of Civil Procedure. Sub-section b provides:

> (b) CROSS APPEALS. Where any one or more parties have filed a notice of appeal as required by Rule 73, other parties may separately or together cross appeal from the order or judgment of the lower court without filing a notice of appeal; provided, however, such party or parties shall file a statement of the points on which he intends to rely on such cross-appeal within the time and as required by subdivision (d) of Rule 75.

When these Rules were originally published, a Committee made notes to the same and in regard to the quoted section, the following appears:

> Note: This is a new subdivision not contained in the Federal Rules and not now a part of our practice. It will authorize a party to cross appeal from a judgment after the time for filing a notice of appeal has expired, if any other party has appealed.

POINT III

THE COURT ERRED IN GIVING THE DEFENDANT A JUDGMENT ON OPEN ACCOUNT.

A: DEFENDANT FAILED TO PROVE ITS ACCOUNT

The defendant introduced the invoices claimed to be charged against the plaintiff into evidence as books and records of account of the defendant (Ex. D-2, D-3) (R.80) (R.86). The defendant called the former president of the plaintiff as its witness and not as a hostile witness. However, there is no testimony in the record, aside from the invoices themselves, tying the invoices to actual material received or used by the plaintiff. The defendant had the burden of proof to tie some accuracy or verification between the invoices billed and the amounts of material received by plaintiff. In a suit upon an unsettled account, the proof must go to the separate items of the account and evidence tending to show that the plaintiff was indebted to the defendant in some amount is not such proof as is required to entitle defendant to a judgment. 1 Am. Jur. 2d 391, Accounts and Accounting, Section 19. There was no such evidence.

B: SURPRISE IN CHANGE OF LEGAL THEORY

No claim was made at pretrial that the defendant would fall back on open account and the plaintiff was genuinely surprised at time of trial. There was a consistant effort by the plaintiff to obtain documents which would bear on a proper accounting, particularly the invoices in Exhibit D-2 as well as payments. The president of the defendant failed to produce anything of consequence at the time of Deposition. A Motion was brought and an Order obtained requiring production. The president of the plaintiff attempted to acquire an accounting before suit was commenced or a lien filed (R.177-8), and stated on the stand that if he could get the invoices he could verify the correctness or incorrectness of the charges (R.195).

The plaintiff was prejudiced by the sudden change of legal theory by the defendant.

POINT IV

THE COURT SHOULD HAVE GRANTED PLAINTIFF AND CROSS-DEFENDANTS RELIEF PURSUANT TO SECTION 38-1-24, UTAH CODE ANNOTATED, 1953.

This Section provides:

> CANCELLATION OF RECORD-PENALTY. The claimant of any lien filed as provided herein, on the payment of the amount thereof together with the costs incurred and the fees for cancellation, shall at the request of any person interested in the property charged therewith cause said lien to be cancelled of record within ten days from the request, and upon failure to so cancel his lien within the time aforesaid shall forfeit and pay to the person making the request the sum of $20.00 per day until the same shall be cancelled, to be recovered in the same manner as other debts.

Pursuant to this Section, notice and compliance therewith was served upon the defendant on the 9th day of January, 1962. (R.4) and again on the 27th day of April, 1962 (R.29). The Pre-Trial Court and the Trial Court apparently took the position that the foregoing Statute is not effective when the claimant acts in good faith or in the absence of malice or bad faith. The state of Nevada did have a Statute practically identical with our Statute with the exception that their Statute required an "acknowledgment of satisfaction." It uses the language "shall forfeit and pay to the person making the request the sum of $20.00 per day until the same shall be entered, to be recovered in the same manner as other debts." The case of Ruppert v. Edwards, 216 P 2d 616, construed this Section and the Court after noting that forfeitures and penalties are not favored pointed out that the Section made

very clear the necessity for such a lien to be released and discharged within the time fixed. It stated at page 629:

> ***It is the law, by virtue of the mandatory provisions of the statute, that the prescribed penalty, thus imposed, be upheld.

The Court did not make any finding of bad faith, malice or that the acts of the defendant were in good faith; in fact the Court reminded that when a lien had been paid, one could not be allowed or permitted to contend that they were not required to release and discharge the lien pursuant to the statute quoting the old adage, "One cannot have his cake and eat it too." The testimony of the president of the plaintiff clearly shows the damage incurred by the filing of the liens and the necessity and justification for the enforcement of the statute (R. 188).

SUMMARY

It is respectfully submitted that the judgment granted to the defendant on open account be reversed; that the judgment holding the lien to be invalid be upheld; that the plaintiff and cross defendants be awarded judgment in the sum of $20.00 per day per house since the 27th day of April, 1962, pursuant to Section 38-1-24, and appeal costs.

Respectfully submitted,
BELL & BELL, by
J. Richard Bell
Attorneys for Plaintiff-Respondent and Cross Defendants-Appellants