

1964

Joe Totorica v. Ray E. Thomas et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

JOE TOTORICA,

Plaintiff and Respondent.

VS.

Ray E. Thomas, et al,

RELIANCE NATIONAL LIFE IN-
SURANCE COMPANY, a corpora-
tion,

Defendants and Appellants.

FILED
JUL 27 1964

Supreme Court, Utah
Case. No.
10,152

APPELLANT'S BRIEF

APPEAL OF RELIANCE NATIONAL LIFE
INSURANCE COMPANY FROM JUDGMENT
OF DISTRICT COURT

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APPELLANT'S BRIEF

NATURE OF THE CASE

This is an appeal from the judgment of the District Court wherein it was determined that the plaintiff's (Totorica) lien for labor and materials is prior in time and right to defendant and appellant's (Reliance) mortgage upon the premises.

DISPOSITION IN THE DISTRICT COURT

The matter came on for trial before the District Court for foreclosure of plaintiff's lien for labor and materials and Reliance contended that its mortgage, which was recorded two weeks before plaintiff's delayed lien notice, was prior in time and right to the lien of the plaintiff; that plaintiff had completed his contract and suspended his work for more than thirty days and had not brought his action to enforce the lien within twelve months after such suspension of work.

RELIEF SOUGHT ON APPEAL

By this appeal, defendant seeks to have its mortgage declared first in time and right ahead of the late-filed mechanic's lien of plaintiff. Also, to determine whether this action was filed within the twelve-month period required by Section 38-1-11, UCA 1953.

STATEMENT OF FACTS

Appellant's mortgage was dated March 15, 1962, and executed by Daniel G. Thomas and Bette E. Thomas, the then record title owners of the property, to secure a promissory note in favor of appellant and such was duly recorded in the office of the Salt Lake County Recorder on March 23, 1962. The plaintiff's Notice of Lien was not recorded until April 10, 1962, in the Office

of the Salt Lake County Recorder. At that time, and now, Daniel G. Thomas and his wife were, and still are, the owners of record of such real estate. At the time of pre-trial the plaintiff dismissed his lien foreclosure action against said owners of the property, Daniel G. Thomas, et ux. (R. 26)

The Notice of Lien recites a written contract between plaintiff and Ray E. Thomas (a brother to Daniel G. Thomas, but not an owner of record) and asserts that the first work was done on June 1, 1961, but that the last work was not done until March 31, 1962. A \$3,000 unpaid balance is asserted by the plaintiff on a \$12,000 contract. The undisputed facts are that Daniel G. Thomas and his wife and family moved into the property on or about September 1, 1961, and have continuously occupied the premises since then.

The record further shows that except for trifling, insignificant items of work done since September, 1961, the construction of the residence and completion of the contract was finished in September, 1961. Plaintiff testified that he had certain minor items of work done and materials furnished subsequent to that date, but no work was done on the contract itself between the end of October and the end of December, 1961, a period of more than 30 days.

Though the work was suspended for more than said 30-day period during the last two months of 1961, this action was not filed until March 28, 1963, a period of more than twelve months after suspension of work thereunder for a period of thirty days referred to in Section 38-1-11, UCA 1953. Reference to the details in the record showing such suspension of work will be made in the Argument hereafter.

The time schedule, so far as is here pertinent in the issues, reads as follows:

May 28, 1961	Contract for construction of home between Ray E. Thomas and plaintiff; (Exh. P-3)
September, 1961	Daniel Thomas moved into completed house.
Last part of October or first part of November:	Poured concrete in corner of window. (R-76-77)
November	"We hanged the storm doors in November." (R-75) (The record appears to be clear that such were not included in the specifications and they were procured and ordered by the tenant Dan Thomas and paid for by him.) (R-76)
January 10, 1962	Front door threshold. (R-75 and 77) (Only a short piece of wood under door)

January 19, 1962	Insulation into attic completed. (R-58) No cost stated.
February 12, 1962	Rain guttering (R-58) No in contract.
February 12, 1962	Aluminum mullion. (R-60) \$2.83 plus one hour.
March 15, 1962	Note and mortgage executed by Thomas to Reliance (Exh. P-1 and P-2)
March 23, 1962	Mortgage recorded, Book 1903, Page 353.
March 30, 1962	Plastering of foundation (R-63-65) (\$25.00)
April, 1962	Painting. R-66067 (\$35.00)
April 10, 1962	Notice of Lien recorded (Exh. P-4)
March 28, 1963	Action filed to foreclose lien.

The rain guttering was not a part of the original contract and it, and the other items done several months after completion of the contract, were at the insistence and request of Daniel G. Thomas, not the one with whom the contract was made.

The court, in pursuance of pre-trial order entered in this case and case No. 145329, entitled Reliance National Life Insurance Company vs. Daniel G. Thomas,

et al, directed that both matters be heard consecutively by the trial court as the second noted case was the morgage foreclosure proceeding brought by appellant. The determination of the priority of the mortgage of the plaintiff's mechanic's lien in the present proceeding (case No. 142254) should control in both cases. In the second case all defendants defaulted and evidence was duly adduced at the pre-trial and, hence, carried forward to the trial date, showing the execution and delivery of the mortgage referred to above and the fact of default therein by the defendants; and the District Court thereupon directed foreclosure on the said mortgage action against the premises. Such order was made subject to the priority of the plaintiff's mechanic's lien as determined in this Case No. 142254 now under appeal.

The plaintiff failed to present any evidence that the Reliance mortgage was not taken and recorded in complete good faith, without notice of plaintiff's claims. Said mortgage was recorded March 23, 1962, prior to any Notice given by plaintiff April 10, 1962. The home had been occupied since September, 1961, and none of the insignificant items done by plaintiff in 1962 would alert or give notice to a mortgage of an uncompleted construction contract upon which lien rights might still exist.

ARGUMENT

POINT I

RELIANCE IS A BONA FIDE MORTGAGEE WITHOUT
NOTICE OF PLAINTIFF'S LATER FILED LIEN.

The recording statutes of Utah have been established to protect purchasers and mortgagees against prior liens and encumbrances on realty. Reliance has dealt with this property in absolute good faith. The note and mortgage were executed by the record title owner who was in possession. No visible construction was in progress when the mortgage was taken in March 1962. The owner had occupied the completed dwelling since September 1961 — six months prior to the inspection and mortgage date.

Section 57-3-2 U.C.A. 1953 provides that the recording of the mortgage "imparts notice to all persons of the contents thereof; and subsequent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice." This statutory rule, plus the presumption of authenticity which attends the mortgage, affirms the priority and good faith position of Reliance.

Neither at the pre-trial nor at the trial was any attack made by plaintiff upon this mortgage. If the Court is to consider the equities between the parties,

Reliance as the innocent mortgagee must have first claim upon the property.

Plaintiff, from the time the premises were completed and occupied in September 1961, had 80 days within which to file his Notice of Lien. Had such been done, no mortgage would have been taken and no loss suffered by Reliance. Plaintiff has slept on his rights as to the liening of the premises and permitted Reliance to suffer this unfortunate circumstances now imposed by the District Court.

That plaintiff knew of his earlier right to lien the property back in December 1961 is evidenced by the registered mail letter delivered to Mr. Ray Thomas (not in possession or the owner of record) as shown by Exh. D-10. This calls attention to the unpaid balance owing for construction of 1916 South 16th East and says, "If satisfactory arrangements are not made by December 26, 1961, lien will be filed to protect our interests." The fact of completion of the contract must be inferred from this as no right of lien exists in an original contractor such as plaintiff unless and until there has been "completion of the contract," 38-1-7 U.C.A. 1953.

No lien notice was ever filed until more than three and one-half months after that letter and more than two weeks after the Reliance mortgage had been recorded. A bona fide mortgagee is entitled to protection in its priority rights under these circumstances.

Exhibit P-2, the Mortgage, has within it the following paragraph:

“2. He is lawfully seized of said premises in fee simple and has good and lawful right to mortgage, sell and convey the same, and will warrant and defend the same against all claims and demands whatsoever. The only liens, charges, or encumbrances against said property are as follows: None.”

Thus, Reliance not only had the benefit of the recording statutes to protect its mortgage priority, but the representation of the record owner, who was in possession, that there were no other liens or encumbrances. These are the things which a normal, prudent mortgagee would look for to be certain its mortgage would be a first lien on the residence. Plaintiff should be estopped from asserting at this late date his purported lien, as between him and Reliance. As to the owners, his lien rights are not under appeal.

POINT II

BURDEN OF PROOF FALLS ON PLAINTIFF ASSERTING DELAYED MECHANIC'S LIEN, TO ESTABLISH STRICT COMPLIANCE WITH STATUTORY REQUIREMENTS.

POINT III

PLAINTIFF'S NOTICE OF LIEN WAS NOT FILED WITHIN THE TIME OR IN THE MANNER REQUIRED BY LAW SO AS TO PERMIT IT TO RELATE BACK AHEAD OF THE PRIOR RECORDED RELIANCE MORTGAGE.

Absent some special statutory amnesty, plaintiff will concede that its lien rights, being tardily filed, are subsequent in time and right to the Reliance mortgage already of record. Section 38-1-5 U.C.A. 1953 purports to relate liens back to the date of commencement of the building (back to June 1961). To take advantage of this legislative ex post facto, plaintiff must comply strictly with the lien statutes.

As these lien rights asserted by plaintiff are in derogation of the common law, strict construction of the statutes becomes the rule; and, in addition, plaintiff must establish complete adherence to those statutory prerequisites. Equitably, the plaintiff cannot justify a priority over the prior recorded Reliance mortgage. The burden of proof is on plaintiff to show an escape route from his dilatory lien recording.

Permit us to test the lien of plaintiff against the statutory requirements. The contract (Exh. P-3) is dated May 28, 1961, the Notice of Lien (Exh. P-4) refers to a written contract dated March 31, 1961. First work

was June 1, 1961 and the completed house was delivered into possession of owner in September 1961. Plaintiff was an "original contractor" and, hence, had 80 days "after completion of his contract." (Sec. 38-1-7)

This 80-day period would take plaintiff to about December 10, 1961, dependent upon the time in September when he finished the house and delivered possession. The Court is fortunate in having corroborating evidence from the plaintiff himself in the Exhibit D-10. This is his registered mail letter to Mr. Thomas dated December 15, 1961, which says that if the balance owing is not paid or satisfactory arrangements made by December 26, 1961, then the lien would be filed. By this letter, plaintiff is, in essence, acknowledging that he had heretofore completed his contract (or he would not have any lien rights). Thus, once again, his time for filing Notice of Lien could not conceivably extend to April 10, 1962 when he finally recorded his Notice.

The few insignificant items of work done after September 1961 are itemized above. Under the rule of *Wilcox v. Cloward*, 56 P. 2d 88, Utah 503, trivial or minor adjustments done after the main work may not be used by contractor to extend his lien rights. In November they hung storm doors, but these are not in the plans or specifications and were at the request of Daniel Thomas, not the one contracting for the construction. On January 10, 1961, the front door thresh-

hold was installed. Anyone knows that such is a small piece of wood which goes under the door to keep out drafts and would probably cost about \$2.00, though no figure was given. Similar minor items are detailed by plaintiff in his testimony.

Working back from the recording date on the lien notice (April 10, 1962) for 80 days, we would go back to January 20, 1962. During this 80-day period only four things were done:

February 12	Rain guttering — not in the contract;
February 12	Aluminum mullion in corner window — \$2.83 (Exh. P-6) plus one hour;
March 30	Plastering the foundation — \$25.00
April	Painting carport — \$35.00

All of these could have been done back in September 1961. The contractor either had no direct duty on these, delayed them solely for his own convenience or to try to reestablish his lost lien rights. These do not qualify for any more than a lien right for about \$66.00. New work not in the contract does not relate back lien rights.

It seems significant to us that another exhibit prepared by plaintiff himself probably speaks eloquently

against him. He voluntarily brought in his account book (Exh. P-23). On the very page where the exhibit marking is made, we find all of his expenditures for materials on the 1916 South 16th East. These records in his handwriting show the last expenditure by him to be on November 21, 1961. None of his pretended later items are reflected. This account book confirms that the contract had been completed well in advance of November 1961.

Exhibit P-24, also presented by plaintiff, contains this language, "Jobs Finish 1961 but bill paid 1962." Then it contains three references to awnings and insulation for 1916 South 16th East. Hence, again in his own hand, the plaintiff has confirmed our position that the contract was completed in 1961.

Plaintiff has the burden of proof that he has complied fully with the lien statutes of Utah to permit this Notice of April 10, 1962, to relate back to June 1961, the date of first work on this small house. The time schedules all refer back to the "completion of his contract" date for the commencement of the 80-day lien filing. Everything, except for plaintiff's belated attempts to rejuvenate a dead lien, demonstrate that the home was completed in September 1961:

(a) Home occupied September 1961;

- (b) Account book (Exh. P-23);
- (c) 1962 accounts (Exh. P-24);
- (d) Registered mail notice in December (Exh. D-10).

At a fairly recent date, this Court reviewed the lien laws carefully and held in *Utah Savings & Loan vs. Mecham*, 366 P. (2d) 598, 12 Ut. (2d) 335, that the liens are “purely statutory, not contractual, and none can be acquired unless the claimant has complied with the statutory provisions creating the lien.”

We urge strongly that the plaintiff has failed to show by his proof such compliance with the statute. The contract was “completed” in 1961 and no Notice of Lien was filed within 80 days. No stretch of the rule in favor of the plaintiff is appropriate here because of the innocent nature of Reliance in loaning the money and taking and recording its mortgage on a home apparently fully completed many, many months before. As we are contesting priorities, the Court should properly leave plaintiff to his personal remedy against Mr. Ray Thomas, the one with whom he contracted. The judgment for the unpaid sum is not attacked herein.

In passing, we call to the Court’s attention the unique procedural position adopted by plaintiff. He

has dismissed the case as against the owners of record (mortgagors) Daniel Thomas, et ux. How can he hope to have a valid forecloure of his purported lien without the record title holders in the case? Apparently, he had elected to rely upon the credit of Ray Thomas with whom he has contracted.

Another procedural defect is apparent. Section 38-1-11 U.C.A. 1953 requires the filing of a lis pendens and states that the lien shall be void as to persons not parties. Plaintiff has voluntarily dismissed out the record title owners, as noted above, so no valid foreclosure could be ordered by the District Court. The record is devoid of any evidence of a lis pendens being executed or filed.

A request for a Finding clearly spelling out the extraordinary dismissal of the record title owners was presented (R-30) by this appellant, Reliance. The trial Court failed to make any Finding though the pre-trial order (R-26) clearly recites plaintiff's dismissal as against the said record title owners, Daniel G. and Bette E. Thomas.

POINT IV

PLAINTIFF FAILED TO FILE HIS ACTION TO FORECLOSE HIS LIEN WITHIN THE TIME REQUIRED BY SECTION 38-1-11, UCA 1953.

Should the Court deem the preceeding three Points insufficient to reverse the Judgment herein as to priorities of the Reliance mortgage and plaintiff's asserted lien, still this last point is fatal to plaintiff's cause of action. Because of the preemptive character of the lien laws and, particularly, the "relating back" language, the Legislature imposed a *twelve month* limitation for action on a lien.

This twelve-month period starts (Sec. 38-1-11 U.C.A. 1953):

(a) completion of the original contract

or

(b) the suspension of work thereunder for a period of thirty days.

No doubt, the Legislature had in mind situations just as have developed in our present case. It was not intended that a contractor could trap the unwary or even the prudent mortgagee or purchaser. If a contractor was not paid, he must file his lien within 80 days; but he must file his *lis pendens* *and* he must file his action within twelve months after either completion or suspension of work for thirty days.

As we have discussed the "completion" phase above in regards to the 80 day lien filing period, we will not

repeat the details here. But we must call to your attention the fact that the home apparently completed and occupied in September 1961 and this action was not filed until March 28, 1963, 18 months after apparent completion.

We turn now to the alternate, but equally valid, starting date for the running of the 12 month limitation. The statute sets this time as "or the suspension of work thereunder for a period of thirty days." No dispute exists in the record on a suspension of work for more than thirty days. We refer you back to the schedule in the statement of facts and call to your attention the lapse from November 1961 to January 10, 1962. Actually, the November work was on storm door for Daniel Thomas and not a part of the contract and so, in fact, the time runs from October 1961, when the corner window sill was poured, until January 10, 1962, when the threshold was installed for the front door.

Work on this house was undeniably suspended for over thirty days. Plaintiff had delivered possession of the completed home in September 1961. He testified that thereafter he was building a separate and entirely different home next door. Apparently, he may have attended to the few minor items in 1962 as an accommodation for Mr. Daniel Thomas but not a part of his contract on the home at issue.

This same statute preserves for plaintiff his personal action for debt against persons for whom labor and materials are furnished. We make no complaint about that and no appeal is taken from the personal judgment for the unpaid balance on his contract with Mr. Ray Thomas.

Reliance, as appellant in this matter, respectfully submits to the Court that the trial court erred in not finding that the cause of action of he plaintiff was barred by the statute for either or both of the reasons that the action to foreclose the lien was not filed within one year after completion of the contract or was not filed within one year after a 30-day suspension of work. This defense was pleaded at the very inception and was maintained throughout the trial and restated in the objections to the proposed findings that had been submitted to the Court. As this Court stated in *Langton Lime and Cement Co. v. Peery*, 159 Pac. 49, 48 Ut. 112, an action to enforce a mechanic's lien is an *equity* case. Thus, this Court may fully review the facts as well as the conclusions before the trial court and determine with appellant that the trial court erred in permitting the mechanic's lien to have priority ahead of the Reliance mortgage which was taken and recorded in good faith.

CONCLUSION

The mortgage financing of residences both on new construction and existing construction is a vital element in the growth and development of Utah. Utah has long prided itself as being a state of home owners rather than mere tenants and we believe that the decisions of this court have fostered that growth. The industry is dependent upon a stability of law so that the priority of mortgages will not be a matter of speculation and conjecture. Here the builder of this home delivered possession in September of 1961 but waited until April of 1962 before filing his lien for the unpaid \$3,000 balance and until March of 1963 before commencing an action to foreclose that pretended lien. His dilatory attempt to assert the lien has led an innocent mortgagee into financing this home in reliance upon the apparent completion of the dwelling more than six months before the mortgage was taken. Not only would it be inequitable and unjust to permit this late filed lien to relate back ahead of the mortgage, but it would also create a precedent which would inhibit the normal mortgage financing of dwellings and, to that extent, stifle the natural growth and development of home ownership.

In reversing the District Court solely on the issue of priority, your Court is not leaving the builder without his recourse. The Legislature has spelled out his rights as against the property owner. Though plaintiff

has voluntarily dismissed the case against the true owner, thereby waiving his rights against the property, we believe, yet he has the judgment against the person with whom he contracted for construction of the residence. We urge that the Court determine that the Reliance mortgage priority is ahead of the lien claimant's rights and to that extent reverse the District Court's finding and judgment in this case.

Respectfully submitted.

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