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

Utah Supreme Court

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IN THE SUPREME COURT

of the
STATE OF UTAH

AUG 28 1964

JOE TOTORICA,

Plaintiff and Respondent, Supreme Court, Utah

vs.

RAY E. THOMAS, et al,
RELIANCE NATIONAL
LIFE INSURANCE
COMPANY, a corporation,
Defendants and Appellants.

Case No.
10,152

RESPONDENT'S BRIEF

DEFENDANT'S APPEAL FROM JUDGMENT
OF DISTRICT COURT

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RESPONDENT'S BRIEF

NATURE OF THE CASE

For convenience Plaintiff-Respondent will hereinafter in this brief be referred to simply as plaintiff, and Defendant-Appellant will be referred to as defendant.

This is a contest for priority between a lien-claimant (plaintiff) and a mortgagee (defendant) wherein the majority of the construction of the building in question was completed before the recording of defendant's mortgage and defendant claims that plaintiff's lien was not filed or sued upon in time. From judgment for plaintiff, defendant appeals.

DISPOSITION IN THE LOWER COURT

After hearing evidence of both parties the District Court determined that plaintiff's lien was properly and timely filed; that its suit to foreclose was begun in time; and that its lien was superior to that of defendant whose mortgage was recorded near the completion of the work done by plaintiff.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the judgment of the District Court affirmed, and for its costs and attorneys' fees incurred in bringing this appeal.

STATEMENT OF FACTS

Plaintiff, a duly licensed general contractor, contracted with Ray E. Thomas to construct a residence at 1916 South 16th East for the sum of \$12,000.00 contract price; only the sum of \$9,000.00 was paid. Plaintiff recorded a notice of lien on April 10, 1962, and filed an action to foreclose said lien on March 28, 1963. Defendant made a loan on the property in question on March 15, 1962, and received a note and mortgage which were recorded on March 23, 1962. At the time of making said loan the construction of the premises by plaintiff was mostly complete.

Although the premises were not completed they were occupied by Daniel G. Thomas, the brother of the Ray Thomas, with whom plaintiff contracted in September, 1961. After occupancy by Thomas, plaintiff continued to complete the construction of

the premises on a fairly regular basis, (R-75 line 14 and following). Plaintiff testified to specific items of work done on the premises in every month from September, 1961, through April, 1962, except the month of December, 1961.

After January 22, 1962, a period eighty (80) days prior to the filing of plaintiff's lien, plaintiff;

(a) Installed rain guttering. Although it was not specifically provided for in the contract, plaintiff provided the guttering at his own expense because he felt that it was a part of the contract. (R-74 line 23 and following.)

(b) Plaintiff installed an aluminum mullion in the corner of a corner window which was necessary to prevent wind from blowing through an opening otherwise left in said corner.

(c) Plaintiff plastered the foundation which could not have been plastered during the winter months because of a requirement that it be done in mild weather. (R-66 line 10 and the following and R-87 line 17 and following.)

(d) Plaintiff painted the carport. The painting had not been completed earlier because the owner wanted to have that work done by another contractor and failed because of a misunderstanding between the owner and the other contractor.

ARGUMENT

POINT I

PLAINTIFF'S NOTICE OF LIEN WAS FILED WITHIN THE TIME AND IN THE MANNER REQUIRED BY LAW.

Whether plaintiff's lien was timely recorded was the matter about which the trial of this case revolved. Defendant had opportunity and did meet this issue fully at trial. The Trial court having the benefit of all the argument now offered to this Court, together with the evidence in "live" form decided that question against it. This Court should not now substitute its judgment for that of the trial court on what is essentially a question of fact, i.e., whether the contract was completed prior to January 22, 1962, or 80 days prior to the date the lien was recorded.

In support of its arguments, Reliance has cited *Wilcox vs. Cloward*, 56 Pacific 2nd 1, 88 Utah 503, saying at page 11 of its brief,

"Under the rule of *Wilcox v. Cloward*, . . . trivial or minor adjustments done after the main work may not be used by contractor to extend his lien rights."

It may be that we can reduce the dispute here to "which party correctly interprets the *Wilcox* case?" Plaintiff, too, believes it to be controlling. It is on its facts and a number of its legal points strikingly similar to the case at bar. Let's examine it.

To the extent applicable here it involves claims

of two different contractors, Wilcox and Ferguson, competing for priority with the mortgagee who contend, as here, that the contractors were late in filing their liens and bringing their action. The contractors in turn relied upon certain small last jobs done by them in the completion of their contract after occupancy of the premises by the owners. The specific facts and the Court's analysis and rulings can be found at pages 6, 7 and 8 of the 52 Pacific 2d Reporter and pages 513 and following of the 88 Utah Reporter. Because of the length of what we consider to be the pertinent parts thereof we do not quote those pages here but in the alternative set forth a summary of the points made by the court in that case. At the same time we strongly urge upon the Court the relevance of the discussion on those pages to the problems in the instant case.

1. In the case of both contractors the court in the Wilcox case found the lien rights were valid and had priority.

2. The items of last work are factually comparable to the case at bar. The case at bar being, if anything, stronger.

3. The court repeatedly deferred to the judgment of the lower court because of its advantageous observation of the evidence.

4. The importance of a continuous pattern of work before and after the crucial date was observed. In the instant case work was done in Sep-

tember, October, November, January, February, March and April of the years 1961 and 1962 respectively. In addition, plaintiff testified,

“Well, I can’t remember the exact dates, but I know we worked all along the line doing something in there. We always done something there.” (R-75, line 18.)

5. The effect of whether the items of last work were done in good faith as part of the contract or were done for the purpose of extending the lien period was observed. In this case the work done was done at the request of the owner, and was necessary to complete the contract.

6. A distinction was made between trivial or minor *adjustments* made casually and long after the main work and small comparatively minor jobs made to *complete* the contract. A further distinction is made between work remedial in nature and work done to finish or complete the job. In this case the foundation plastering, carport painting, rain guttering, and window mullion were obviously installed to complete the job.

7. The court reviewed a number of cases and the last work sufficient to extend the lien period in each included,

- (a) Cleaning up debris.
- (b) Installing heavier wires.
- (c) A flight of marble stairs.
- (d) A *second* coat of paint.
- (e) A grate, mantle and tiling.

8. The court observed the frequently controlling significance of whether the work in question was done at the instance of the owner. It noted that at times this was decided on an estoppel basis. Defendant observes at page 5 of his brief that the rain guttering and other items were done at the insistence and request of Daniel G. Thomas, the brother of Ray Thomas and the person defendant now claims is the owner of the premises.

9. The court observed with approval and cited cases holding that,

“Where there is a conflict in the evidence, not only the finding of the court as to what work and when it was done will be accepted by the review court, but, further, the lower court’s finding the ultimate fact that the work was bona fide in a continuation of or by way of completion of the contract which the plaintiff was bound to perform will also be accepted by the review court; see *Foster v. Brickbank*, *Supra*: ‘whether the items of work done after the date on which the appellant claimed the building was completed were “trivial imperfections” was a matter of fact to be determined by the court’. *Willamette Steam Mills Company v. Kremer*, 94 Cal. 205, 29 Pacific 633; *Stigger v. McPhee*, *Supra*. These cases held that the court’s deduction that the work was done in good faith and that it was not a minor or trivial repair and that it was something still necessary in the completion of the contract, must stand unless clearly erroneous.”

The court in the Wilcox case relied largely on an an-

notation at 54 ALR 984 entitled "Substitution or Replacement of Material as Affecting Time for Filing Mechanics Lien."

The Wilcox case also contradicts Reliance's assertion that because a lien foreclosure is an equity case "this court may fully review the facts as well as the conclusions before the trial court". The court in Wilcox said as page 4 of the 56 Pacific 2d Reporter and at page 510 of the 88 Utah Reporter,

"In an *equity* case it has been the rule of this court *not* to disturb a finding of the lower court on contested or conflicting evidence unless the evidence clearly preponderates the conclusion or finding." (Emphasis added)

The bald assertion made without argument or authority that the burden is on plaintiff asserting what is incorrectly characterized as a delayed mechanics' lien to establish strict compliance with statutory requirements is likewise without merit. UCA 68-3-2 provides:

"The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail."

This court applied that rule to lien foreclosure situations in the case of *Elwell v. Morrow*, 78 Pacific 605-Utah-, by the following language:

“The weight of authority is to the effect that the well established rule that remedial provisions of statutes are to be liberally construed applies to, and should be followed in, proceedings to foreclose mechanics liens.”

POINT II

DEFENDANT'S ARGUMENT THAT PLAINTIFF'S ACTION TO FORECLOSE THE LIEN WAS NOT FILED WITHIN THE TIME ALLOWED BY LAW, IS SPECIOUS.

Defendant in its brief has done some mental gymnastics with the provisions of UCA 38-1-11, to impose upon plaintiff in this Court a completely distorted but never intended interpretation of that statute. The first sentence of that statute is as follows:

“Actions to enforce the liens herein provided for must be begun within twelve months after the completion of the original contract, or the suspension of work thereunder for a period of thirty days.”

Defendant begins its distortion by telling us that the twelve-month period “starts” (appellant's brief page 16.) The thought conveyed is that once it starts it can't be turned off. He then subtly inserts an “either” before the completion or suspension alternatives which the framers of the statute apparently didn't feel was required. (Appellant's brief page 16, 4th line from the bottom.) He then completes

his work by returning to the starting date concept which he tells us can be initiated in either of the two alternate ways. (Appellant's brief, page 17, second paragraph.)

This distortion is difficult to expose because of its novelty. As far as this writer can determine no one has had the temerity to impose such an argument on this or any other appellant court before. It is significant that no case was cited by defendant in support of it.

Perhaps the best answer is to just invite plain reading of the first sentence of the statute,

“Actions to enforce the liens herein provided for must be begun within twelve months after the completion of the original contract, or the suspension of work thereunder for a period of thirty days.”

If we put a period after contract we have no problem, the sentence then reads “Actions must be begun within twelve months of completion of the original contract.” By adding “or” as an alternative the problem should not be increased. The “or” does not impose anything additional, only an alternative.

To find the intention of the legislature let's put ourselves in the shoes of the drafter of this provision. Obviously he couldn't just conclude with a period after “completion of the contract” because he wouldn't then provide liens in cases where the contract was not completed. So he added the alter-

native not as an additional limitation but to provide for not completed contracts.

This becomes clearer upon an examination of the absurd results that would follow the interpretation urged by defendant. First it would render the provision inconsistent with the time for filing notice of lien provisions. That is, in a case where work was interrupted for an excess of thirty days near the beginning or in the middle of a particular job by say a strike or material shortage and then resumed for more than a year, according to defendant's interpretation the contractor could file his lien in plenty of time but could never sue on it. Second, and perhaps most importantly, it would impose upon mechanics and material men an obligation to watch jobs to which they furnished material or services not only to see if they were completed but also to observe if any work stoppages exceeded thirty days. This would include, as here, even mechanics and material men who knew that they themselves would later add additional work or material to the project. As above pointed out the lien statutes being remedial in nature should be liberally construed to give their intended remedy to mechanics and materials men. Moreover, neither material men, mortgagees nor the courts should be saddled by the uncertainty inherent in the rule proposed by defendant. Imagine, if you will, the invitation to lawsuits over whether work stoppages were for more or less than the thirty-day period. Consider also

the opportunity given to conniving property owners on prolonged projects to avoid the effect of the lien laws.

POINT III

THE EQUITIES DO NOT FAVOR DEFENDANT AS ASSERTED IN ITS BRIEF.

Defendant, money changer, piously protests it is more innocent than plaintiff, carpenter, from whom it now prays protection. But let's examine the matter. This is not a situation where a mortgagee makes construction possible with its money only to find that all of the laborers and material men have a prior claim because a relatively insignificant item of work that escaped its notice was done prior to construction. If it were, defendant's cries of ex post facto and statutory amnesty, etc., while an affront to a long-established rule of law, would at least be understandable. In this case plaintiff had advanced most of the money and built the major part of the building prior to defendant's loan which looked to that self-same building for its security. Defendant complains, without any proof or evidence in the record, that it did not know of plaintiff's claim and that because of its lack of knowledge, which it calls innocence, it should be preferred. What it asks thereby is that after plaintiff had invested his money and labors in the building that the circumstances of defendants *then* loaning money without knowledge or control on the part of plaintiff should deprive plaintiff of his security.

Let us turn now to whether defendants claimed lack of knowledge was, as it says, "innocence", or whether it is more aptly described as negligence. We assume for sake of argument and lack of evidence that said failure of knowledge is real. Mortgagee's customarily inspect property upon which they loan money. An inspection of this property would have revealed very new construction — it would be impossible to tell exactly how new — but the apparent newness should have placed on the proposed mortgagee a duty of inquiry. Any kind of closer examination at all would have revealed the fact that the home was not yet finished, that the painting was not complete and that the foundation was unplastered. Inquiry of the mortgagor by something more than a dry routine form would have revealed the situation. (We are reminded by defendant's brief that the completion was at their insistence. Appellant's brief, page 5.) Of course, if we assume that upon inquiry they did or would have misrepresented the fact of completion, defendant not plaintiff should suffer the consequences for having dealt with a thief. Plaintiff, on the other hand, could not protect himself from defendant's coming in and loaning the Thomases money at a time when the majority of his money was already advanced. His only protection lies in the enforcement of the laws he now asks this Court to uphold and which the trial Court has already upheld — laws the operation of which were at all times fully known by defendant.

There is one other matter. Defendant grandly gestures that plaintiff can look to the person with whom he contracted for his money. This is of course also true of defendant except that defendant has an additional advantage, that being a written promissory note providing for interest and attorney's fees which plaintiff does not have.

POINT IV

PLAINTIFF'S LIEN ON LOTS 29 AND 30, BLOCK 2, EAST WESTMINSTER ADDITION, IS SUPERIOR TO THAT OF DEFENDANT.

Defendant has at pages 14 and 15 of its brief, without making any specific point, criticized the dismissal of Daniel Thomas's who he now claims are the record owners of the property in question. Defendant's attorney, filing an answer for it and both the Ray and Daniel Thomases, alleged in said answer that Daniel Thomases were tenants of Ray Thomas's, (R-14). So that this Court will not be confused, plaintiff now draws attention to a stipulation (R-44) whereby defendants Daniel Thomases stipulate to judgment of foreclosure. For purpose of this proceeding plaintiff asks only that this Court affirm that as to Lots 29 and 30, Block 2 of East Westminster Subdivision, Salt Lake County, Utah, plaintiff's lien is superior to that of defendant.

POINT V

PLAINTIFF IS ENTITLED TO ATTORNEY'S FEE ON APPEAL.

UCA 38-1-18, as amended, provides:

"In any action brought to enforce any lien

under this chapter the successful party shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxes as cost of this action."

Plaintiff received judgment in the lower court for attorneys' fees in the sum of \$568.33. This fee was obviously only intended to cover attorneys' fees incurred to judgment. As this Court well knows, a great deal of preparation and expense are required to bring a case before it, for which plaintiff is entitled to recover.

CONCLUSION

The judgment of the District Court that plaintiff's lien and suit were filed in time is entitled to a presumption of correctness by this Court that has not been rebutted. More than that, it is both correct and fair. Plaintiff respectfully urges that it should be affirmed, and that plaintiff should be awarded its attorneys' fees and costs incurred in bringing this appeal.

Respectfully submitted,

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