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In the Supreme Court of the State of Utah

SMITH BROTHERS LUMBER COMPANY.

Plaintiff-Respondent,

vs.

WILLIAM E. JOHNSON and his wife, LILA JOHNSON,

Defendants-Appellants.

BRIEF OF APPELLANTS

Case No. 10701

APPELLANT'S BRIEF

Appeal from the Judgment of the 1st District Court for Cache County

Honorable Lewis Jones, District Judge

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FILED

NOV 2 1 1966

Clerk, Supreme Court, Utah

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MISCELLANEOUS

In the Supreme Court of the State of Utah

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STATEMENT OF THE KIND OF CASE

This is an action brought by the Plaintiff-Respondent to enforce a Mechanics Lien against a subsequent purchaser of real property without notice.

DISPOSITION OF LOWER COURT

The case was tried to the Court. From a judgment for the Plaintiff, Defendants appeal.

RELIEF SOUGHT ON APPEAL

Defendants seek a reversal of the judgment and a judgment in their favor as a matter of law.

THE FACTS

The Plaintiff, a Utah Corporation, engaged in the business of marketing building supplies, furnished building supplies from materials in stock to L. Edward Skabelund, for the purpose of making certain improvements on the Skabelund property in Logan. Delivery of the materials was made between March 5, 1963 and August 6, 1964, which was the last of such deliveries. Mr. Skabelund being a carpenter by trade did the work himself after hours and on holidays, and in the course of the construction incorporated all of the materials furnished him by the Plaintiff of the value of $1,927.16, for which he paid the sum of $1,270.11, leaving $657.05 due and owing at the time of the commencement of this action.

On June 29, 1964, William E. Johnson, one of the Defendants, purchased the property on which the improvements had been made without actual knowledge of the outstanding debt.

On October 7, 1964, the Plaintiff filed a "Notice of Intention to Claim a Lien", it being 62 days after the last delivery of materials to the building site.

The Plaintiff thereupon brought this action to enforce the supposed lien which it had filed notice of intention to claim.

ARGUMENT

POINT NO. 1: THE COURT ERRED IN FINDING THAT THE PLAINTIFF-RESPONDENT WAS AN "ORIGINAL CONTRACTOR" FOR THE PURPOSE OF SECTION 38-1-7, U.C.A., 1953, AND AS SUCH HAD EIGHTY DAYS WITHIN WHICH TO FILE NOTICE OF INTENTION TO CLAIM A MECHANICS LIEN.

POINT NO. 1A: SECTION 38-1-3, U.C.A, 1953, (THOSE ENTITLED TO LIEN) CREATES FOUR CLASSES OF POSSIBLE LIENORS: 1. CONTRACTORS, 2. SUBCONTRACTORS, 3. LABORERS BY THE DAY OR PIECE, 4. MATERIALMEN.

According to Section 38-1-7, U.C.A., 1953, there are three distinct periods limiting the time allowed different classes of lienors to file a notice of intention to claim a lien.

1. Eighty days after the completion of the "Original contract".

2. Sixty days after the last material delivered or labor done.

3. Sixty days after the original contract is completed.

Limitation No. 3 pertains to those operating at the insistence of the original contractor and includes "a subcontractor or any person furnishes labor or materials" . . . Limitation No. 1 pertains to "original con-

tractors". If the total scheme of classification of possible lienors contemplates only "original contractors" and "subcontractors" then the limitation No. 2 is a useless and confusing provision.

Section 38-1-3, U.C.A., 1953 (THOSE ENTITLED TO LIEN) defines not two but four classes of lienors and says "CONTRACTORS, SUBCONTRACTORS (2) and all persons PERFORMING LABOR (4) upon or FURNISHING MATERIALS (3) to be used in, the construction . . . shall have a lien on the property . . ." When we superimpose on this section the three distinct periods of limitation for filing (as per Section 7) we find the 60 day after last delivery period a meaningful and sensible provision. If we, however, disregard the classification and say that groups (3) and (4) do not exist separately but are only repetitive definitions of Contractors and Subcontractors 60 days after last delivery as well as the order of satisfaction (as per section 14) and the priority of claims (as per Section 6), becomes not only meaningless and of no effect, but also senseless and confusing of the whole scheme of liens and lien holders as described by the other sections of the chapter. Unless we want to walk blindly through the remainder of the sections we must affirm the existence of the traditional group of lien holders widely and commonly known as "Materialmen" who supply materials from their stocks at regular prices AND without bidding or any of the other normal attendant characteristics of

a genuine contractor's contract.

The classes so set forth by this section is carried consistently through the sections of the chapter which have relevence to the classes of lienors (Section 3), priority of claims (Section 6), order of satisfaction (Section 14), the equal footings of materialmens and laborers liens (Section 10).

Section 38-1-6, U.C.A., 1953, clearly designates four classes of people eligible for the benefits of the chapter of the code " . . . due to an ORIGINAL CONTRACTOR (1) from the owner of any property subject to lien under this chapter shall be valid as against any lien of a SUBCONTRACTOR (2) or MATERIALMAN (3) and no such attachment, garnishment or levy upon any money due to a SUBCONTRACTOR (2) or MATERIALMAN (3) from the CONTRACTOR (1) shall be valid as against any lien of a LABORER EMPLOYED BY THE DAY OR PIECE (4).

Section 38-1-3, U.C.A., 1953 contemplates the identical scheme of classification: "CONTRACTORS (1), SUBCONTRACTORS (2), and all persons PERFORMING LABOR (4), or FURNISHING MATERIALS (3) to be used in, the construction . . ."

Section 38-1-14, U.C.A., 1953 also re-identifies the classes for the purpose of order in satisfaction of decree: "In every case in which liens are claimed against the same property the decree shall provide for their satis-

faction in the following order: 1. SUBCONTRACTORS who are laborers or mechanics who are working for the day or piece."

The Idaho Code follows the same scheme but is somewhat clearer in making the distinctions. In Section 45-5-12 Judgment to declare priority, (this is comparable to Section 38-1-14, U.C.A., 1953).

1. All laborers, other than contractors or subcontractors.

2. All Materialmen other than contractors or subcontractors.

3. Subcontractors.

4. The original Contractor.

Certainly all of these (as in the Utah code) possible lienors have a relation which is contractual in nature. The conclusion from both Codes is obvious, that all those who have contractual relations are not either Contractors or Subcontractors, there are two other groups, Laborers (defined as those working by the day or piece in Utah, 42 Ida 391, 246 P 962) and Materialman (one who furnishes materials to be used). Since all have contractual relations of a sort the dividing factor is the nature and extent of that relation, and based on that distinction some will be classified as "Contractors" and some as "Materialmen", though both are furnishing materials and both have some sort of contractual re-

lation. "The evidence on behalf of the Gem State Lumber Company is sufficient to support a finding that it was a materialman and entitled to a lien as such. "Supra" . . We must then look at the contractual relation between the parties to see if they are those of a "Contractor" or merely those of a "Materialman".

The only substantial difference between the Utah statute and the Idaho statute is that the priorities are re-arranged, the classification has remained consistent. Under the Utah statute the materialman and the subcontractor are given equal priorities, while the laborer is given first priority.

Sections 14-2-1, Idaho Code, 14-2-2, Idaho Code Bond Stats. talk of materialmen.

In the second paragraph of the seventh section of this chapter, there is a separation of those who are operating at the insistence of the original contractor into two groups, SUBCONTRACTORS, and ANY PERSON WHO FURNISHES LABOR OR MATERIALS AT THE INSTANCE AND REQUEST OF AN ORIGINAL CONTRACTOR. Even on the subcontractor level (or on the level of those operating at the insistence of the original contractor) there is a distinction between those on contract (technical Subcontractors) and those working at the insistence of the Contractor but not on "contract" to do so (who are laborers by day or piece or material suppliers). For the purpose of setting periods of

filing of limitation both of these categories are grouped together "then such SUBCONTRACTORS or PERSON'S lien rights, . . . are extended so as to make the final date for the filing of a notice of intention to hold and claim a lien sixty days after competion of the original contract of the original contractor". Had there been no contemplation of separate categories for "Materialmen" and Laborers by the day or piece" (as opposed to Subcontractors) the articulation of this section would not have shown such careful protection of the rights of this other group of furnishers or labor and materials.

The definitions in Section 2 are useful in understanding the intent of the distinction in Sections 19, 21 and 22, but we contend should not be allowed to destroy the meaning and internal consistency of the remaining and most important sections of the chapter (and those which are uniquely in point in this litigation).

Much of the difficulty in interpreting what the definitons in Section 2 mean and were meant to effect might hinge around what was meant by the words "by contract". If the legislature meant a traditional building or construction contract with a customer discrete job to be done at a certain total price and not just any obligation which might expressly or impliedly arise from an off the shelf dispensing of individual items for use in construction, then Contractor as defined in Section 2

would be consistent not only with Sections 19, 21 and 22, but with the whole chapter, in that it would allow for the existence of MATERIALMEN and LABORERS BY THE DAY OR PIECE. And if the wording "all other persons doing work or furnishing materials shall be deemed subcontractors", was intended to mean all other persons doing work or furnishing materials by contract express or implied "at the insistence of an original contractor, shall be deemed Subcontractors, then Subcontractors, for the same reasons as stated above would be a useful category, consistent with not just a part but all of the chapter.

POINT NO. 1B: SECTION 38-1-7, U.C.A., 1953 (NOTICE OF CLAIM - CONTENTS RECORDING), CLASSIFIES LIENORS IN ACCORDANCE WITH SECTION 3, AND ALLOWS MATERIALMEN SIXTY DAYS FROM THE DATE OF THE LAST DELIVERY OF MATERIALS TO FILE A NOTICE OF INTENTION TO CLAIM A LIEN.

The wording of Section 7 illustrates its consistency with the classification scheme of Sections 3, 6, 10 and 14.

PERIOD	CLASS TO WHICH IT IS APPLICABLE
1. 80 days after the completion of the original contract	Original Contractors (those contractors who are operating under a specific contract directly with the owner.)

2. 60 days after last material delivered or labor done	MATERIALMEN AND LABORERS (Laborers who work by the day or piece, and materialmen who furnish goods directly to the owner but are not on "contractors" analagous to working by the day or piece by laborers.)
3. 60 days after the contract by the original contractor has been completed	SUBCONTRACTORS (those who labor or materials or both at the insistence of the original contractor or are on a specific contract to do so.)

POINT NO. 1 C: THE PLAINTIFF-RESPONDENT IS A "MATERIALMAN" AND NOT AN ORIGINAL CONTRACTOR FOR THE PURPOSES OF SECTION SEVEN.

One furnishing, under a contract with the owner, materials to be used in the construction of a building is a materialman and not an original contractor within the provision of the mechanics lien law relating to the time for filing a lien. SPARKS v. BUTTE COUNTY GRAVEL MIN. CO. (1880) 55 Cal 389; Heacock Sash and Door Co. v. Weatherford (1931) 135 or 153, 294 P 344.

141 ALR 324 b. FURNISHING MATERIALS ONLY

"Generally, one who merely furnishes materials to the OWNER or a contractor is a materialman, and not

a contractor or a subcontractor, within the meaning of mechanic's lien laws."

Am Jur 36 Mechanics Liens Section 52 MATERIALMEN

The right to assert a mechanics lien is now generally extended to materialmen or THOSE PEOPLE WHO SUPPLY MATERIALS FOR THE STRUCTURE AND HAVE NO OTHER CONNECTION WITH THE WORK.

36 Am Jur (1966) supplement page 7 to supplement note 20 page 47 "Nor is one who merely furnishes material a "contractor" within the meaning of mechanics lien laws.

36 Am Jur Section 165 WHO IS A "CONTRACTOR" A "Contractor" within the provisions of a mechanics lien statute with limit liens of subcontractors, laborers or materialmen for material or labor furnished to the contractor to the amount earned but unpaid on the contract, or which give such liens by subrogation, IS ONE WHO WOULD BE CHARACTERIZED AS A CONTRACTOR IN THE COMMON SPEECH OF MEN. AND WE THINK NOT JUST A BUILDING SUPPLIES CUSTOMER.

HINN HAMMOND LUMBER CO. v ELSON 171 Cal 570 154 P 12

That literally, a subcontractor is one who agrees with

another to perform a part or all of the obligation which the second party owes by contract to a third party, but that the word has much narrower meaning in mechanics lien law which divides the liens into four classes, to-wit, laborers, materialmen, subcontractors and original contractors, that the term subcontractor as so used must be determined by reference to this classification and to the subject to which it relates, and embraces all persons who agree with the original contractor to furnish the material and construct for him on the premises some part of the structure which the original contractor had agreed to erect for the owner, and that persons who merely furnish materials to the contractors to be used and which are used, in the construction of the building come within the second class — as materialmen.

FORSEBERG v. KOSS CONSTR. CO. (1934) 218 IOWA 818, 252 NW 258

One who delivered sand was not a subcontractor but a materialman.

STAPLES v ADAMS, PAYNE AND GLEAVES (1914) CCA 4th) 215 F 322, in reference to one who furnished materials to a building contractor it was stated that whether he was a subcontractor was doubtful, that there was no attempt to prove the existence of a contract entered into any time, or for any definite quantity of materials, that nothing more was shown than an ordinary running account between a dealer and his

customer, that the building contractor, each of whose purchases was a separate transaction, was free, at any time, to purchase elsewhere, and that is as the Court supposed, there was a clear distinction between a subcontractor and a materialman, it was unable to see that the furnisher of the materials was anything more than a materialman. "Holding that one who furnished materials to a building contractor on a running account did not serve in time the required notice to the owner under a statute making the latter personally liable to a subcontractor to the extent of the amount due from the owner to the original contractor, the Court said that he was nothing more than a materialman.

WILSON ET AL v. HIND ET AL (1896) 113 Cal 357, 45 P 685.

1. A person contracting to furnish material for a building, such as doors, sashes, blinds, etc., which, instead of manufacturing to order, he purchased ready made is a materialman only."

FISHER ET AL V. TOMLINSON ET AL 1901 40 Or 111, 60 P 390, 66 P 696 at 697 . . . His letters to Plaintiffs to the effect that he had secured the contract to furnish all the shop work, sash, doors, glass, etc., do not intimate that he was to place in the building, as a part thereof any of the material ordered. He was therefore as the evidence clearly shows, only a materialman . . .

FINLAY V. TAGHOLM 1911 62 Wash 341, 113 P 1083, 1084.

"The third point urged, that the appellant is a subcontractor, is without merit. If one who furnishes the sashes, doors, and glass for a building is a subcontractor, every materialman would fall in that class, and such construction would nullify the plain terms of the statute.

STEPHENS LUMBER CO V. TOWNSEND-STARK CORP. (1924) 228 Mich 182, 1999 NW 706, 201 NW 213. A lumber company doing no work on the premises, but only furnishing lumber and door frames and window frames and other things which it carried in stock and did not have to manufacture according to the building contractor's specifications, is a materialman, and not a contractor, and therefore, entitled to a lien without filing the affidavit required of contractors.

FORMAN V. ST. GERMAIN (1900) 81 Minn 26, 83 NW 438. Owner ordered glass delivered and installed by the furnisher was not a contractor but a materialman.

CONCLUSION

There has been no assertion that the Plaintiff made any improvements on the materials to make them more suitable for the particular job in which they were to be used, or that he aided in their installation in the building. In fact there is nothing to indicate that the relation of the Plaintiff and the Defendants was any more than a

customer or purchaser and seller. The agreement entered into by the parties was the kind that any casual customer implies or expresses, and the Defendant was not bound by it to continue buying from the Plaintiff, he could have at any point ceased his purchases and become the customer of any of a variety of other firms. The Plaintiff is at most a supplier of materials and as such did not meet the time requirements exacted of his class of lienors for filing a notice of intention to claim a lien.

For these reasons and those stated in the body of the argument we pray the Court for a reversal of the judgment entered below.

Respectfully submitted
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