1967

Smith Brothers Lumber Company v. William E. Johnson and His Wife, Lila Johnson : Respondent's Brief

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.

Case
No. 10701

RESPONDENT'S BRIEF

Appeal from the judgment of the First District Court
of Cache County

Honorable Lewis Jones, Judge

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STATEMENT OF THE KIND OF CASE

This is an action brought by plaintiff to enforce a Mechanic's Lien against the defendants, one of whom, William E. Johnson, purchased or rather acquired the property in a real estate transaction, during the time plaintiff had an effective and valid lien against the premises for materials delivered and actually used in the improvements then being made upon the premises.

DISPOSITION IN LOWER COURT

This is an appeal from a judgment and decree of foreclosure of Mechanic's Lien rendered in favor of plaintiff and against the defendant based on a written stipulation entered into between the parties hereto which submits only one question so far as this appeal is concerned, to-wit:

"Is the plaintiff, who supplied the materials directly to the owner of the property, the Skabelunds, under Title 38, Chapter 1, Mechanics Lien, UCA 1953, as amended, an original contractor and entitled to 80 days within which to file said lien," or, "Is plaintiff other than an original contractor under 38-1-7 UCA 1953 and only entitled to 60 days?"

The defendants appeal from the decision of the lower court holding plaintiff to be an original contractor and entitled to 80 days within which to file the Notice of Intention to Claim a Lien. The lien was found to have been recorded well within the 80 day period.

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent seeks an affirmance of the lower court's decision, with costs, and for such further action then to be taken by the lower court as provided by the terms of said Stipulation.

STATEMENT OF FACTS

Respondent believes appellants' statement of facts to be ample and fair, except as hereinafter pointed out, and so agree with them, but in this regard beleives it proper to again draw this court's attention to the fact that the judgment and decree and findings and conclusions entered herein are based upon the written Stipulation entered into between the parties by the terms of which there is only submitted the above questions which divides the parties, the Stipulation further providing that in the event of an appeal to this court and an affirmance by this court, that then the judgment of the lower court shall include

costs and attorney's fees as provided by law and the custom of the court, and in the event of a reversal by this court, then the lower court shall proceed further as to whether or not the defendants are entitled to any recovery upon their counterclaim filed therein and if so, how much.

Appellants state in "The Facts," second paragraph, that William E. Johnson purchased the property on which the improvements had been made without actual knowledge of the outstanding debt. Respondent believes that whether or not he so purchased the property is immaterial and not within the scope of this appeal but if it has any materiality, then it is apparent Johnson purchased the property before delivery of the last materials, on August 6, 1964, and so purchased it before completion of the improvements and hence the statement "improvements had been made" is inaccurate. Improvements were still being made when he purchased the property by the admitted facts. Both his, Johnson's, senses of smell and sight should have advised him of improvements being made. Work in prograss is always notice to one dealing with the property of the statutory right of the person furnishing materials to perfect liens therefor. This comment is made because Respondent beleives whether or not Johnson purchased the property without actual knowledge of the outstanding debt is immaterial and should form no part of the facts.

ARGUMENT

POINT NO. 1. THE COURT CORRECTLY HELD THAT THE PLAINTIFF-RESPONDENT WAS AN ORIGINAL CONTRACTOR UNDER THE PROVIS-

IONS OF 38-1-2, UCA, 1953 AND AS SUCH HAD 80 DAYS WITHIN WHICH TO FILE NOTICE OF INTENTION TO CLAIM A MECHANIC'S LIEN.

A: Respondent believes that Section 38-1-2, UCA, 1953 and which reads as follows, is controlling as to whether or not it, claimant, is an original contractor, to-wit:

> "Contractors" and "subcontractors" defined. – Whoever shall do work or furnish materials by contract, express or implied, with the owner, as in this chapter provided, shall be deemed an original contractor, and all other persons doing work or furnishing materials shall be deemed subcontractors."

Following the statute, under Comparable Provision, it is pointed out that Iowa Code Ann., Sec. 572.1, Subd 2 ("Subcontractor" includes every person furnishing materials or performing labor, except those having contracts directly with owner, his agent or trustee). There is then cited Holbrook v. Webster's Inc. 7 U. (2) 148,320 P. 2d 661 from which it appears that the answer to the question in this lawsuit has been indicated by this court. In this case, at page 662, after quoting Sec. 38-1-2 and referring to Sec. 38-1-7 entitled Notice of Claim—Contents—Contents—Recording, had this to say: "The trial court did not indicate in its Summary Judgment whether or not it found that Elvin Coon was the owner of the real estate. If such fact were unequivacably established, then appellant was necessarily an original contractor." It further appeared that Webster's, Inc. furnished the building materials to Elvin Coon, et ux, who as mortgagor, gave a mortgage to Prudential Savings & Loan Ass'n. who in turn assigned the mortgage to Ward C. Holbrook, plaintiff, and in which

mortgage, he, the mortgagor, recited that, "the mortgagor is lawfully seized of the premises in fee simple and has good and lawful right to mortgage, sell and convey the same." And the holding by this court was then to the effect that having sold and delivered materials to the owner of the property, Webster's Inc. was, therefore, an original contractor and entitled to 80 days within which to file its lien under the provisions of 38-1-7. In fact, Holbrook v. Webster's, Inc. is cited under said Sec. 38-1-7.

Following Sec. 38-1-2, attention is directed to 36 Am. Jur. 46, Mechanic's Lien, Sec. 51 wherein it is stated:

> "In order to constitute a lien claimant an original contractor, there must exist or have existed a contract, either express or implied, between such lien claimant and the owner of the property"

citing Prouty Lbr. & Box Co. v. McGuirk, 156 OR 418, 66 P (2d) 481, 68 P (2d) 473, citing RCL. And said section further provides:

> "One who deals with the party in interest who is the source of authority for the improvement is contracting with the owner, and not a subcontractor, but is an original contractor"

citing Jordan v. Natrona Lbr. Co. 52 Wyo. 393, 75 P (2d) 378, citing RLC. See also Freidenbloom v. Pecos Valley Lbr. Co., 35 N.M. 154, 290 P 796, 798; Mitchell v. McCutcheon, 33 N.M. 78, 260 P 1086; Colorado Iron Works v. Rickenberg, 4 Idaho 262, 38 P 651, Gray v. New Mexico Pumice Store Co., 15 N.M. 478, 110 P 603, and other cases

cited at page 385 of the Jordan case, supra. See also Words & Phrases Permanent Edition 30, at page 298-299. Additional cases are also cited under ORIGINAL CONTRACTOR in the 1966 Cumulative Annual Pocket to Vol. 30, including Lakeview Drilling Co. v. Stark 310 P (2d) 627, 630, 210 Ore. 306; Anderson v. Chambliss, 262 P (2d), 298, 299, 199 Or. 400. It will be observed from a reading of the case cited that decisions based on statutes such as 38-1-2 are in harmony with the holding in the Utah case of Holbrook v. Webster's Inc., supra.

B: Sec. 38-1-3, Those entitled to lien—so far as applicable to the case at bar provides:

> "Contractors, subcontractors, and *all persons performing labor on, or furnishing materials to be used in,* the construction or alteration of or addition to, or repair of, any building, structure or improvement upon land;"
>
> and then it further provides, "shall have a lien upon the property upon or concerning which they have rendered service, performed labor or furnished materials, for the value of the service rendered, labor performed or materials furnished by each respectively, *whether at the instance of the owner or of any other person acting by his authority as agent, contractor or otherwise.*"

The purpose of the lien statute is to protect those therein enumerated who have added directly to the value of the property by performance of labor or adding materials and is designed to prevent the landowner from taking the benefit of improvements without paying therefor.

Stanton Transporation Co. v. Davis 9 U (2) 184, 341 P (2d) 207; King Bros., Inc. v. Utah Dry Kiln Co., 13 U (2d) 339, 374 P (2) 254.

I have italicised part of the statute above quoted to point out that the statute does not specifically "define," "classify," "contemplate" or "create four classes"—contractors, subcontractors, "LABORERS BY THE DAY OR PIECE" and "MATERIALMEN" as such. To so contend is simply adding two additional designations or classifications by counsel which are not provided for in the statute and which is misleading; because the statute does not so provide does not render it either "ambiguous" or "misleading." The language simply provides for "or covers them" each of whom are protected and may be entitled to a lien by complying with the provisions thereof.

Nor does Sec. 38-1-14 providing for the order of satisfaction in the decree provide any inconsistency in providing for the following order: (1) "Subcontractors who are laborers or mechanics working by the day or piece, but without furnishing materials therefor." It covers those persons, laborers or mechanics, who so work at the request of the subcontractors. A subcontractor under our statute, 38-1-2, is one who does work at the instance of the original contractor for it states that "all other persons doing work or furnishing materials shall be deemed subcontractors." Here there is no subcontractor involved. Respondent would come under (3) of said section were others (1) and (2) involved or not. Respondent sees no inconsistencyency in this classification. It does not attempt to change the time allowed for claiming liens under 38-1-7.

Undoubtedly the State has a right to provide for the subcontractor-order of satisfying claimants. This is consistent with the holdings generally, for the persons designated in (1) and (2) could not exceed the claim of the original contractor against the owner. See 57 CJS Mechanic's Liens, Sec. 319 and also Garland v. Bear Lake and River Water Works & Irr. Co. 34 P 368, 9 Utah 350. 40 CJ page 492, note 7. The mere fact, however, that (2) of said section uses the work "materialman" does not preclude claimant herein from being an "original contractor." Such a classification is logical. Otherwise, as pointed out in Colorado Iron Works v. Riekenberg (Idaho) 38 P 651 at page 652 the situation could become ridiculous, because as stated therein, suppose A, the owner, contracts with B to do all the construction work for $5000.00 and then contracts with C to furnish all the material for the building for $10,000.00. Then, if as is claimed by the appellant, B is the only "original contractor" and C is only a "materialman" and both find it necessary to file liens for their security, what sort of a position are they in? The amount of C's security from B cannot exceed the contract price B is to receive for erecting the building and that only equals one-half of the contract price agreed to be paid by the owner to C for material used in constructing the building. This case also holds: "A materialman. who contracts directly with the owner, and has no privity of interest or cantract with the contractor for construction, is an original contractor, under the statute of Idaho, and as such is entitled to 60 days provided by satute within which to file his lien." Fitzgerald v. Neal, (Ore.) 231 P 645. See syllabus 14 page 646. "The term, "subcontractor," from its very definition, means one who has

contracted with the original contractor for the performance of all or a part of the work or services which such contractor has himself contracted to perform."

At page 6 of brief, appellant refers to Sec. 45-5-12 Idaho Code (Judgment to Declare Prority) and then states that it is "comparable" to Sec. 38-1-14 and then cites Riggens v. Perkins et al (Idaho) 246 P 962. Facts in this case disclose that Perkins, owner, entered into a contract with Arco Mill & Bldg. Co. by the terms of which it agreed to "provide all the materials and to perform all the work in erecting the dwelling according to plans and specifications." Riggens brought suit to foreclose 8 labor liens (himself and 7 assignors) for work done on the dwelling. The court held against him because he did not deal direct with Perkins and that his contractor, Arco Mill & Bldg. Co. was statutory agent for the purpose of giving a lien to persons employed by it direct, but not for the purpose of making a loborer employed by it the direct contract–employee of the owner. See discussion (2) first column at page 963. No one disagreed that the defendant, Brownell Bros. Co. was entitled to a lien because all of its dealings were had with the owner's contractor, Arco Mill & Bldg. Co., but the classification given was disputed. The court held that as to the materials it furnished consisting of paints, hardware and the like in the sum of $410.00 it was entitled to a lien under classification 2 of the statute, but that as to the heating plant and its installation it was entitled to a lien under classification (3) as a subcontractor, and that no reasonable theory could support it as having a lien as a laborer. The decision also states that Brownell Bros. C. "had such a

contract as, if made with Perkins direct, would have made the appellant a contractor, not a materialman." See discussion at (3) page 964. The evidence supplied by Gem State Lbr. Co. is not given. The only statement contained in the case is that which appears at top of second column page 964 and which is quoted by appellant at the top of page 7 of brief. It is clear from a reading of the case that the evidence produced by Gem State Lbr. Co. was that it furnished materials, only, at the request of the contractor, and not the owner. It is clear from the case that a labor lien under the Mechanic's Lien statutes as to the property being constructed can exist only if *furnished* at the request of the general contractor, and that if supplied at the request of the owner, such laborer then becomes an original contractor. See syllabus 5 page 962. Nor is counsel's statement, bottom page 5 of brief, justified by Sec. 38-1-3 when he makes the statement that it "contemplates" the classification he makes. Counsel for respondent states that the holding in the Riggens v. Perkins case, supra, is a decision in its favor.

It is believed that the above two paragraphs in particular and the previous pages of this brief fully answers the further contentions made by counsel on pages 7, 8 and the first half of page 9 of his brief.

C. The court corrctly held plaintiff, claimant, entitled to 80 days after completion of its contract to file its Claim under the provisions of Sec. 38-1-7, the first part of which provides as follows: "Every original contractor within eighty days after completion of his contract," and etc. . .

What else could claimant be other than an original contractor? The facts admitted are that defendant is owner, the last materials were delivered to him August 6, 1964, the lien was filed Oct. 7, 1964, well within the 80 day period, the materials went into the improvement, no other person performed labor or furnished any materials at the request of either the owner, "or any one acting under his authority as agent. contractor, or otherwise," claimant, or any other person. Claimant certainly could not be a subcontractor. The second paragraph of this section can have no application because claimant, the only person who could be an original contractor, had no dealings with any person, nor did the owner. There is no classification making any one who furnishes material, a MATERIAL-MAN. It is difficult to see how this situation makes this paragraph "a useless and confusing provision." It just has no application in the case at bar. Jordan v. Natrona Lbr. Co., supra, syllabus 4 holds that lumber company that furnished materials upon open account was an original contractor as against contention that formal precise contract states exact amount of materials needed and prices to be paid was necessary and that implied contract was insufficient. It is believed that what counsel concludes is a "genuine contractor's contract" is a term of his own making and has no application. It is a common knowledge that contracts for construction are of an endless variety, and are both oral and written, express and implied, and that they cover labor or material, or both, and with all kinds of conditions and limitations.

Answering Point 1-B: Sec. 38-1-7 does not classify lienors in accordance with Sec. 38-1-3. Appellant's state-

ment that it does is entirely erroneous. As previously pointed out herein, neither of these sections CLASSIFY LEINORS. Sec. 3 sets out who is entitled to a lien, either for labor or materials "whether at the instance of the owner or of any other person acting by his authority as agent, contractor or otherwise." Section 7 makes no attempt at classification. It does not allow MATERIALMEN as such 60 days from delivery of last material to file notice of lien. The right of a person who furnishes materials depends on the kind of contract—with whom he contracts. See extensive comments in the Idaho case of Higgins v. Perkins, supra, which appellant cites and relies upon but which respondent believes is a holding in its favor. It is believed that what is here and previously stated answers fully the columns shown at pages 9 and 10 of brief.

> 36 Am. Jur, Mechanic's Liens, 52 Materialmen, states: "All materialmen to be entitled to a lien, must be specifically referred to within the statute, for it cannot be extended to that class by construction. Thus, materialmen are not generally within the term "subcontractor."

See generally said Sec. 52, Materialsmen, which is to the same effect as 57 CJS Mechanic's Liens, Sec. 89, note 2, citing Eberle v. Drennan 40 Okla 59, 136 P 162, 51 LRA (NS) 68, to the effect that one who furnishes material to the contractor is entitled to a lien.

My main reason for referring to this comment by the text is to show that to whom lienors are give liens as "materialmen" depends upon the wording of the statute

in question. It will also be observed that in some states, which is particularly true of the other states of California and Oregon, the statutes have been changed. The meaning of who is entitled to a machanic's lien in the State of Utah can be ascertained by a reference to the applicable statutes which appear to be Sections 38-1-2, 38-1-3 and 38-1-7. These statutes specify the persons who have a right to a mechanic's lien and those specifically not mentioned are excluded. Holbrook v. Webster (Utah) supra is cited under 38-1-7.

Again under Point No. 1C at page 10 of appellant's brief, he states that respondent is a "materialman" and not an "original contractor" for the purposes of Sec. 7 and cites Sparks v. Butte County Gravel Mining Co. (1880) 55 Cal 389 and Heacock Sash & Door Co. v. Weatherford (1931) 135 Or. 153, 294 P 344.

> 57 CJS Mechanics Liens, Sec. 86 provides: "A mechanics lien can be acquired only by a person who is within the class or one of the classes of persons to whom the lien is given by the Statute or constiutional provision under which he claims" citing under note 24, Riggens v. Perkins (Idaho) 246 P 962, supra.

36 Am Jur Mechanics Liens, Sec. 52 Materialman, is to the same effect: "Materialmen, to be entitled to a lien, must be specifically referred to within the statute, for it cannot be extended to that classification" citing under note Hiln-Hammond Lbr. Co. vs. Elsom (1915) (Calif.) 154 P 12, and other cases.

> 57 CJS Mechanics Liens (Materialman) Sec. 89 provides: "While a materialman has been held not to

> come within some early mechanics' lien statutes restricted to particular class of persons and not mentioning a materialman, nevertheless many statutes, especially the later ones, *expressly confer* a lien on a materialmen or a person furnishing materials," citing under note 75: Idaho Lumber & Hardware Co. v. DiGiacomo, 61 Idaho 383, 102 P (2d) 637 and Riggens v. Perkins, supra. Heacock Sash & Door Co. v. Weatherford (1931) 135 Or 153, 294 P 344.

The text 57 CJS Sec. 89 states: "the rights of materialmen are fixed by law, and nothing that the owner can do can change them." Utah Mechanic Lien Statutes do not expressly confer a lien on "materialmen."

It will be observed that the Sparks case, supra, is one of ancient vintage, the decision having been rendered 16 years before Utah became a state, and before publication of the Pacific Reports, the first volume of which appears to have been published in 1884. The case is reported in Pacific State Reports, Book 18, page 389. The statute is not quoted but from a reading of the case it would appear the decision is based upon a definite classification. From Hiln v. Hammond Lbr. Co., supra, it would seem it is no longer the law in California.

141 ALR 323 also cites Hiln-Hammond Lbr. Co. v. Elsom (1915) 171 Cal. 570, 154 P 12, from which appellant quotes extensively at pages 11-12 of brief. It appears from the quote that the word "subcontractor" has a much narrower meaining in the mechanic's lien laws which divides the liens into four classes, including "materialmen," "that the term subcontractor as so used must be determined by reference to this classification and to the sub-

ject to which it relates," etc. . . Syllabus 2 indicates the decision was rendered because of the peculiar classification under the heading "materialmen." Utah statutes have no such classification. The Hiln case is also cited in Riggens v. Perkins, supra, at page 964 to the effect that any person who contracts direct with the owner is a contractor and not a materialman. The decision is a holding in plaintiff-respondent's favor.

Counsel then at page 11 quotes from 36 Am Jur, Sec. 52, Materialmen and refers to the Supplement page 7, supplement to note 20 page 46, from which it appears clearly that it refers to statutes having particular classifications and so is inapplicable to the case at bar. The very next paragraph then refers to Anno: 141 ALR 325, which cites Fisher v. Tomlinson 40 Or 111, 66 P 696 and Heacock Sash & Door Co. v. Weatherford 135 Or 135 294 P 344 which holds that persons who furnish materials only are not "materialmen" under statutes not having a classification to that effect. These holdings are also in plaintiff-respondent's favor.

The case of Hiln-Hammond Co. v. Elsom cited at page 11 of brief has already been commented on above. The statement quoted from the following case cited. Forsberg v. Koss Constr. Co. 218 Ia 818, 252 NW 258, is simply a statement made by the court in the course of its opinion under the Iowa Statute and can have no application to the case at bar. The next case cited, Staples v. Adams, Payne & Gleaves 215 F 322 to which counsel refers is simply a holding to the effect that proper notice was not served to bring the case within the peculiar provisions of the Virginia statute, the construction of which is binding

upon the Fourth Circuit Court of Appeals. As to the comments made by counsel pertaining to open or running accounts making any difference, or the comments following Wilson v. Hind, 1896) 113 Cal. 357, 45 P 685, see Jordan v. Natrona Lbr. Co., supra.

"The fact that a contract, instead of being for a stipulated sum, is what is known as a "cost plus" contract does not convert the person contracting with the owner into an agent or dissentitle him to a lien as a contractor." See 57 Mechanics' Liens Sec. 90, Contractors in General, at page 603. which refers to the cases cited at notes 30 and 31. Nor is there any requirement that labor must be bestowed on materials to change the form or make them fit in order to become a valid lien. It is difficult to see in what manner the holding in either of these cases favors appellant's contention. The following case of Fisher v. Tomlinson 40 Or. 111, 66 P 696 at 697 is a holding to the effect that plaintiff, a supplier of building materials, did not come within the terms of the lien statute, substance of which is given at page 696 and so was not entitled to a lien. Finlay v. Tagholm 62 Wash 341, 113 P 1083, 1084 is also a holding that the statute was not compiled with by delivery of a copy of statement showing when materials were delivered and so not entitled to a lien. The statement quoted by counsel at page 14 of brief obviously can have no application so far as the case at bar is concerned. Nor can the remaining two cases cited at page 14 of brief, Stephens Lbr. Co v. Townsend-Stark Corp., 228 Mich 182, 199 NW 706, 201 NW 213, and Forman v. St. Germain, 81 Minn 26, 83 NW 438, have any application to the facts and statute in the case at bar.

CONCLUSION

Respondent believes appellant bases his entire brief upon a fallacy: That the applicable statutes, Sec. 38-1-2, 38-1-3 and 38-1-7 either "contemplates," "defines," "classifies" or "creates" four different classes of liens, one of which, that of a "materialman" he then attempts to bring respondent within. The Utah Mechanics' Lien Laws makes no such classification as I believe has been satisfactorily shown, directly, nor is there any basis for such an inference. It is submitted that in order to have such a classification as appellant contends for would require a legislative enactment. Nor is there anything in the statutes requiring that a contract be in any particular form. It is common knowledge that construction contracts are oral or written, or partly each, with all manner of conditions, specifications, and limitations, and that they may be for labor and material or for labor or material only. The form is immaterial under Utah Mechanic's Lien laws. The question rather is, with whom was the contract made? It is believed that the Utah Statutes are clear and concise, the meaning and interpretation of all the terms therein contained appears from the texts referred to and the cases cited by plaintiff-respondent, and as pointed out in many of the cases cited by appellant, the meaning of the language clarified and the sense thereof fixed, if indeed any doubts exists.

For the reasons given in this brief it is believed that appellant has not shown where the lower court has erred either as to the facts or the law and that because thereof the Judgment and Decree of Foreclosure is entitled to be affirmed and the lower court entitled to modify the same

by adding to the amount due the additional costs involved in this appeal in accordance with the stipulation entered into between the parties. Respondent so prays.

Respectfully submitted,

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