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Property

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by

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I. MECHANICS' AND MATERIALMEN'S LIENS

Priority of Constitutional Lien. The most significant developments in the field of property law during the year related to mechanics' and materialmen's liens. In *Irving Lumber Co. v. Alltex Mortgage Co.*[1] Irving, a developer, brought suit against a lender, Alltex, and a developer, Merit Homes, Inc., for a declaratory judgment to establish the priority of Irving's mechanics' and materialmen's liens over deed-of-trust liens of Alltex on four pieces of property and for a judgment of foreclosure of its mechanics' and materialmen's liens against Merit. Irving had entered into oral contracts with Merit whereby Irving was to supply certain materials for and provide construction on homes through the "shell" stage.[2] Thereafter Merit secured financing from Alltex for construction of the improvements on the property. Merit executed a promissory note to Alltex, secured by vendor's liens and by deed-of-trust liens. After the loan from Alltex Irving began to furnish labor and materials to Merit and commenced construction of improvements.

Irving made no contention that its mechanics' and materialmen's liens were superior to the vendor's liens of Alltex, but contended that its liens were superior to the deed-of-trust liens of Alltex because the mechanics' and materialmen's liens related back to and had their inception at the time the oral contracts to furnish labor and materials were entered into with Alltex, relying upon the holding of the Texas Supreme Court in *Oriental Hotel Co. v. Griffiths.*[3] The court of civil appeals held that the "relation back" doctrine of *Oriental Hotel* did not apply, since there was no general contract between Irving and Merit, but only an oral contract to construct the homes through the "shell" stage, that no labor or materials were actually furnished prior to the recordation of the Alltex deed of trust, and that the improvements on the property could not be severed and sold without damage to the realty—the Alltex vendor's liens being admittedly superior to Irving's liens.

The Supreme Court of Texas reversed the decision of the court of civil appeals,[4] and held that the time of inception of the mechanic's and materialman's lien of Irving was the time that the oral contracts were entered into with Merit, relying upon the "relation back" doctrine of *Oriental Hotel* and on its finding that the trial court had improperly excluded evidence which would

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[1] 468 S.W.2d 341 (Tex. 1971), *aff'g* 446 S.W.2d 64 (Tex. Civ. App.—Dallas 1969).

[2] The permanent financing of the improvements being constructed by Merit Homes, Inc. was guaranteed by the FHA. FHA inspections were to be made in three stages: "(1) when the foundation has been completed and the plumbing 'roughed in'; (2) when the wall sections, the roof trusses, the cornice material and the exterior ceilings have been constructed; and (3) when the houses are completed." 446 S.W.2d at 67. Under the oral contracts between Irving and Merit, Irving was to provide materials and construction only through the second, or "shell," stage.

[3] 88 Tex. 574, 33 S.W. 652 (1895).

[4] 14 Tex. Sup. Ct. J. 212 (1971).

have proved the oral contract to be the type of contract under consideration in *Oriental Hotel.*

On rehearing the supreme court set aside its initial decision in *Irving Lumber* and affirmed the decision of the court of civil appeals, based upon the court's finding that Merit was not the owner of the property in question at the time the Alltex deeds of trust were executed, and that the title to the property passed to the purchaser burdened by the deed of trust and security interest of Alltex. The foreclosure by Alltex effectively cut off the inferior mechanic's lien on the property. The setting aside of its original decision by the court did not have the impact it might have had due to the action of the Texas Legislature in amending article 5459,[5] thus averting the confusion which, having been spawned by *Oriental Hotel,* could have been extended by *Irving Lumber.* This amendment became effective May 17, 1971, and resolved the question of the time of "inception" of a mechanic's or materialman's lien by providing:

> The time of the inception of the lien, as used in this article, shall mean the occurrence of the earliest of any one of the following events: (a) The actual commencement of construction of the improvements or the delivery of material to the land upon which the improvements are to be located for use thereon for which the lien herein provided results, provided such commencement or material is actually visible from inspection of the land upon which the improvements are being made; or (b) If the agreement for the construction of the improvements or any part thereof or the agreement to perform labor or furnish material or provide specially fabricated material in connection with such construction resulting in the lien herein provided for is written, the recording of such agreement in the Mechanic's Lien Records of the county in which said land is located; or (c) If the agreement for the construction of the improvements or any part thereof or the agreement to perform labor or furnish material or provide specially fabricated material in connection with such construction resulting in the lien herein provided for is oral, the recording of an affidavit in the Mechanic's Lien Records of the county in which said land is located stating that the lien claimant has entered into an agreement with the owner of such property or with the owner's contractor or sub-contractor for construction of improvements thereon, which affidavit shall contain a description of the land, the name and address of the lien claimant, the name and address of the person with whom the lien claimant has contracted for such improvements, labor, materials or specially fabricated materials, and a general description of the improvements contracted for.[6]

As a result of this amendment the only difficulty in determining the priority of mechanics' and materialmen's liens should be in proving that commencement of construction of improvements or delivery of material was actually visible from an inspection of the land. This is a definite improvement over the past practice of straining to fit within the rule of *Oriental Hotel* and related decisions.

Timely Notice of Claim. The Houston court of civil appeals in the recent case of *Fidelity & Deposit Co. v. Industrial Handling Engineers, Inc.*[7] decided a

[5] Ch. 231, § 1, [1971] Tex. Laws 1082.
[6] TEX. REV. CIV. STAT. ANN. art. 5459 (Supp. 1972).
[7] No. 549 (Tex. Civ. App.—Houston [14th Dist.], Dec. 10, 1971).

question of first impression involving the construction of the notice provisions of the Hardeman Act.[8] In that case Green Valley, Inc., the owner, entered into a general contract with Tex Thornton, Inc., the original contractor, for the construction of a shopping center project. Fidelity issued a performance and payment bond covering the original contractor's performance on and payment of claims against the project. The original contractor then entered into a subcontract with Industrial whereby Industrial was to furnish and install a platform lift on the construction site. Industrial ordered the lift, but at the time it was delivered to the jobsite in September 1966 a transformer that was necessary to the installation of the platform lift was not available. The transformer did not arrive until November 1966, at which time the lift and transformer were installed. Industrial billed the original contractor for the lift and its installation but the original contractor failed to pay. Industrial gave notice of its claim to Fidelity on February 14, 1967. In the trial court Fidelity contended that the notice of Industrial's claim was not timely because it was past the ninety-day period specified by the Hardeman Act, the date of delivery of the lift being the date from which the period began to run. Industrial, however, contended that the date from which the period began was the date that the indebtedness accrued, and that this date was not until such time as the transformer and lift were actually installed. This question had never been decided under the Hardeman Act, and the court relied on decisions construing the provisions of the McGregor Act,[9] primarily *Pacific Indemnity Co. v. Bowles & Edens Supply Co.*,[10] in finding that the date of delivery to the jobsite of materials, whether in whole or in part, begins the period within which notice must be given under the Hardeman Act.

II. RESTRICTIVE COVENANTS

Implementation. In *Gibbs v. Garden Oaks Board of Trustees*[11] the civil appeals court distinguished between the dedication of property pursuant to a general scheme and the actual implementation of that scheme in the subdivision. Various homeowners were granted a mandatory injunction by the trial court to compel another homeowner to remove a fence and a carport, which were asserted to have been constructed in violation of certain subdivision building-line restrictions. In reversing the trial court, the court of civil appeals noted that the record evidenced only one single conveyance of land from the subdivision since the dedication of the subdivision, and that the record was devoid of any indication that the restrictions had been incorporated in any subsequent deeds or looked to, complied with, or relied upon, by anyone. In support of their decision the court cited *Dalberg v. Holden*,[12] and noted that while it is not necessary that one be a direct party to a covenant sought to be enforced, it is necessary that he should have bought with notice of, and in reli-

[8] TEX. REV. CIV. STAT. ANN. arts. 5452-72d (1958).
[9] *Id.* art. 5160 (1971). This Act applies to subcontract work done for the state or one of its subsidiaries, while the Hardeman Act relates to subcontracts entered into with private owners.
[10] 290 S.W.2d 353 (Tex. Civ. App.—Dallas 1956), *error ref. n.r.e.*
[11] 459 S.W.2d 478 (Tex. Civ. App.—Houston 1970).
[12] 150 Tex. 174, 238 S.W.2d 699 (1951).

ance upon, such covenant, or that the covenant should have been entered into for the benefit of the land, and not merely for the personal advantage of the original covenantee. The court further relied on *Massengill v. Jones*,[13] in which it was held that the showing of a dedication, without evidencing that the general building plan or scheme was ever implemented, is not sufficient to support the issuance of a mandatory injunction. Therefore, since the evidence showed that the plan had never been implemented, the restriction was held to be unenforceable.

In *Hussey v. Ray*[14] the civil appeals court was faced with a problem of interpreting a restrictive covenant. In *Hussey* the action was brought by various residents and owners of lots situated in a subdivision to enjoin the owner of another lot from maintaining a mobile home on his lot. The plaintiffs' claim was based on a restriction which stated that "[n]o trailer, tent, shack, stable or barn shall be placed, erected, or be permitted to remain on any lot, nor shall any structure of a temporary character be used at any time as a residence."[15] The facts were not disputed, and the record showed that the appellee placed a new mobile home on the lot in the subdivision subject to the above-stated restriction. The mobile home was fully equipped, with all the normal home facilities. After the mobile home was placed on the lot its wheels were removed and the mobile home was placed upon a permanent concrete block foundation. The mobile home was connected to city water lines, electric power lines, and telephone lines. The court, in rendering its decision, looked to Webster's dictionary for the definition of the term "trailer," and noted that a trailer is a vehicle designed to be hauled. With this in mind, and noting that covenants or restrictions on the use of property should always be construed strictly in favor of the grantee, the court held that the mobile home was no longer a trailer because it had become permanently affixed to the ground. In coming to this conclusion, the court also noted *Stubblefield v. Pasadena Development Co.*,[16] wherein the court held that the intent of the parties and the object of a restriction should govern in giving the instrument a just and fair interpretation. The court in *Hussey* seemingly went out of its way to justly interpret the restriction by delving deeply into its purpose. The court concluded that the restriction was intended to prevent the use of any and all structures used for temporary human habitation, and, therefore, since the mobile home in question was not considered to be temporary, its use could not be prevented.

The new decisions, while not revolutionary, continue to evidence the tendency of the courts to balance the "equities" of each fact situation prior to disturbing the status quo.

Enforcement by Municipality. Article 974a-1, passed into law May 26, 1971, extends the right to enjoin or abate a violation of any restriction contained in a recorded plan, plat, replat, or other instrument affecting a subdivision with-

[13] 308 S.W.2d 535 (Tex. Civ. App.—Texarkana 1957), *error ref. n.r.e.*
[14] 462 S.W.2d 45 (Tex. Civ. App.—Tyler 1970).
[15] *Id.*
[16] 250 S.W.2d 308 (Tex. Civ. App.—Galveston 1952).

in the boundaries of the incorporated municipality.[17] The right does not extend to all incorporated municipalities, but only to those situated in counties with populations in excess of 1,000,000, and only to those which pass ordinances that require uniform application and enforcement of article 974a-1. This act should enable the smaller incorporated municipalities to adequately plan the growth of their communities without the necessity of organizing a zoning commission and planning zoning requirements for growth in advance.

III. LANDLORD AND TENANT

In *Henderson v. Nitschke* a lessee was given the "prior right to be exercised by it or by its nominee to buy the leased premises," the lease further providing that:

> If Lessor receives from a third party an acceptable bona fide offer to buy such property, Lessor shall forthwith give Lessee written notice thereof together with a copy of such offer. Lessee or its nominee shall have . . . 60 days from the receipt of such notice and offer to buy such property at the terms of such offer relating to such property . . . . If Lessee or its nominee fails to exercise this option and Lessor sells such property to a third person, such sale shall be made subject to the terms and provisions of this lease . . . .[18]

The lessor received a signed written contract to sell the property in question to a third party. By letter the lessor gave written notice to the lessee of the proposed sale, requesting the lessee to advise the lessor of the lessee's election to exercise the right of first refusal granted to them in the lease. Subsequently, the lessor notified the lessee that the offer of the third party to purchase property was revoked, and, therefore, that the lessor's offer to sell to the lessee pursuant to the lease was also revoked. Thereafter, within the sixty-day period stipulated in the lease, the lessee notified the lessor by letter of its election to nominate Henderson to exercise the prior right option contained in the lease. The court of civil appeals, holding for Henderson, relied heavily on decisions from other jurisdictions. Even though the former Texas court of civil appeals decision of *Stone v. Tigner*[19] addressed itself to an analogous provision in a lease, it was not controlling. In *Stone* the court was faced with a provision that granted to the lessee the first right and option to purchase any and all of the lands and premises contemplated to be sold by the lessors under the lease, as opposed to the provision in the lease in *Henderson*, pursuant to which the lessee was granted prior right to purchase the leased premises. Even though the court in *Stone* held for the lessee, and, therefore, granted specific performance following the lessor's sale to a third party, the court in *Henderson* determined that an enforceable option existed under the facts, not from the wording of the lease but from the actions of the parties. In looking to the cases of other jurisdictions,[20] the court held that when the lessor sent notice pursuant to the lease, the right of first refusal or preemptive right of purchase ma-

[17] Ch. 37, § 1, [1971] Tex. Laws 1384 (codified at TEX. REV. CIV. STAT. ANN. art. 974a-1 (Supp. 1972)).

[18] 470 S.W.2d 410, 411 (Tex. Civ. App.—Eastland 1971).

[19] 165 S.W.2d 124 (Tex. Civ. App.—Galveston 1942), *error ref.*

[20] Imperial Refineries Corp. v. Morrissey, 254 Iowa 934, 119 N.W.2d 872 (1963); Anderson v. Armour & Co., 205 Kan. 801, 473 P.2d 84 (1970).

tured into an enforceable option under the lease, and, therefore, the lessee had sixty days in which to exercise the option after notice from the lessor of an acceptable, bona fide offer from a third party. Further, the court of civil appeals looked to prior Texas law in determining that the option was supported by consideration,[21] and stated that the consideration for the lease, that is the agreement to pay rent, will support the option when the lease and option constitute but one contract the provisions of which are independent.

IV. MORTGAGES

In *Bradford v. Thompson*[22] Thompson foreclosed on a second lien against property owned by the Bradfords, contending that the Bradfords were in default for failure to make monthly payments on a promissory note in favor of Thompson and assumed by Bradford. The note called for payments to be made *on or before* a certain day of each month, payments being made to Security Savings Association, the first lien holder on the property. The note stated: "The principal of this note is payable in equal monthly installments of $10.00 each including interest, said installments to be credited first to the interest accrued to date of such installments and the balance to the reduction of principal . . . ."[23] At the time of the foreclosure Bradford had paid $700.00 to the Security Savings Association on the second lien note, while only $280.00 would have been necessary to meet the monthly payments called for under the note.

The court of civil appeals held that the prepayments made by Bradford were prepayments of principal and did not in any way relieve Bradford of his obligation to make that portion of the monthly payments that constituted interest. In reversing the decision of the court of civil appeals in this case of first impression in Texas, the Texas Supreme Court relied upon a 1919 California decision, *Los Angeles Investment Co. v. Wilson*,[24] in which it was held that when a note calls for payment on or before a certain date of each month, payments made in advance apply to principal and interest constituting the monthly payments. This decision, however, would apply only in the instance in which the note specified payments are to be made on *or before* a certain date of each month, and would not be applicable in a situation in which payments were to be made *on* a certain day of each month.

V. DEED COVENANTS

In *Schaefer v. Bonner*[25] the owner of certain real property entered into a lease agreement with a corporation. The lessee, not needing all the space contained in the premises, subleased half of the premises to another corporation. At the time the sublease was entered into, the lessors entered into a "survival agreement" with the sublessees that the sublease would remain in effect even in the event of the default of the primary lessor. Subsequent to

[21] Moore v. Kirgan, 250 S.W.2d 759 (Tex. Civ. App.—El Paso 1952).
[22] 470 S.W.2d 633 (Tex. 1971).
[23] *Id.* at 635.
[24] 181 Cal. 616, 185 P. 853 (1919).
[25] 469 S.W.2d 216 (Tex. Civ. App.—San Antonio 1971).

the execution of the sublease, the lessor, Schaefer, conveyed the premises to Bonner by a general warranty deed. The general warranty deed conveying the premises to Bonner made no mention of the primary lease or sublease as being encumbrances against the property. After the primary lessee defaulted under the lease, Bonner brought suit against Schaefer to recover damages for breach of the covenant of general warranty in the warranty deed.

Although the court found that Bonner was under a duty to inquire into the rights of the lessee and sublessee and was, therefore, charged with knowledge of the encumbrances against the property, the court held that Bonner's knowledge of the existence of such encumbrances did not affect his right to recover damages for breach of warranty. Although it is difficult to justify the recovery of damages for breach of a covenant when the grantee is charged with knowledge of an encumbrance, the court did qualify the statement to the extent that evidence of the grantee's knowledge could be introduced in mitigation of damages. In reaching its decision, the court relied upon its earlier decision in *City of Beaumont v. Moore*, in which the court stated: "[The grantee's] rights under the warranties arise not from any independent knowledge he possessed, or with which he was charged, but solely from the language of the deed and the warranties included and read into it."[26] It would seem that knowledge of an encumbrance of the grantee, if proved, should completely defeat recovery and not merely be introduced in mitigation of damages. By its decision in *Schaefer*, the court has perpetuated an artificial concept and has attempted to reduce the impact of its decision by allowing such knowledge to mitigate damages.

[26] 146 Tex. 46, 57, 202 S.W.2d 448, 455 (1947).