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Personal Property - Mechanic's Lien - Waiver by Judgment on Note

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PERSONAL PROPERTY—MECHANIC'S LIEN—WAIVER BY JUDGMENT ON NOTE. *Roseliep* v. *Herro et al* ___ Wis.____, 239 N.W. 413 Sup. Ct. Wis. Dec. 8, 1931. This case is noteworthy in that it establishes a Wisconsin precedent in a field of law where over-emphasis upon legal technicalities is apt to muddle and confuse the principle involved. The question in this case concerns itself with the right of a lien claimant to secure a foreclosure of his lien after he had already secured a judgment on a promissory note which was issued in payment of the property on which the lien was secured.

One A. F. Leitgabel had installed a heating system in a building owned by the defendants. Leitgabel filed a claim for a mechanic's lien in accordance with Wisconsin Statutes 289.41, and also received a promissory note from the Herros, on Nov. 8, 1928, for $3,836 payable in thirty-six equal monthly installments. Subsequently, Leitgabel assigned both note and lien to the Heating & Plumbing Finance Corporation. Upon default on the note by Herros, the Heating & Plumbing Finance Corp. commenced an action against the Herros, receiving judgment by default for $3,593.28 due on the note, and for $547.84 in costs, and disbursements. The judgment was not satisfied, so that when the plaintiff, Chas H. Roseliep, brought an action against the defendants, Herros, to foreclose on a mortgage given by the defendant, Herros, the Heating & Plumbing Finance Corp. by petition became a party to the defense, and cross claimed against Herros for foreclosure on the lien. Herros did not answer the cross complaint, but the trial court held that the Finance Corp. could not have two judgments, ruling that it waived its mechanic's lien by commencing action upon the note and receiving judgment, and therefore dismissed the cross complaint. Defendant appealed.

Thus, this case clearly resolves itself into two questions: the first and the most important, "did the Finance Corp. by taking judgment on its note vaive the right to foreclose on its lien?"; and the second, really a subsidiary of the first, "did the Finance Corp. by taking judgment on its note *for an amount in excess of that due Leitgabel for his work* waive the right to foreclose on its lien?"

Justice Nelson of the Wisconsin Supreme Court answers the first and the major question by lining up with the weight of authority in the United States. In his decision, he states that it has been consistently held by the Supreme Court of Wisconsin that the lien statutes of Wisconsin provide new or additional remedies supplementary to the common law remedies, and that such laws should be liberally construed for the purpose of aiding material men and laborers to obtain compensation for their materials and services. He further quotes the Wisconsin Statutes, section 289.05, to the effect that the "taking of a promissory

note or other evidence of indebtedness for any such work, labor, or materials done or furnished shall not discharge the lien therefor hereby given unless expressly received as payment therefor and so specified thereon." Thus he limits the question of waiver to the intention of the parties, supporting his decision by the precedent established in the cases of Phoenix Mfg. Co. v. McCormick Harvesting Machine Co., 111 Wis. 570, and Carl Miller Lumber Co. v. Meyer, 183 Wis. 360.

There is no Wisconsin precedent, however, in regard to the question of whether the *taking of a judgment on the promissory note* acts as a waiver to the lien when the judgment is merely entered and not satisfied. Justice Nelson therefore quotes the general rule that the lien claimant may bring a personal action against the owner for the amount of the debt for which a lien is claimed as a cumulative remedy without waiving the right to the lien. The following cases were cited in support of this view: West v. Fleming, 18 Ill. 248, 68 Am. Dec. 539; Southern Surety Co. v. York Tire Service, 209 Iowa 104, 227 N.W. 606; Kirkwood v. Hoxie, 95 Mich. 62, 54 N.W. 720; Kinzel v. Joslyn, 158 Minn. 194, 197 N.W. 217; Erickson v. Russ, 21 N.D. 208, 129 N.W. 1025.

This general rule is given fuller treatment in 65 A.L.R. 313. In the case of the Germania Bldg. & L. Asso. v. Wagner, 61 Cal. 349, the court stated that there is no waiver when the lien holder takes judgment for the same account as that covered by the lien, first, because there is a merger of the claim, and not the security; and second, because a waiver occurs when a creditor has gained a higher security, and the taking of judgment does not increase the security.

In Kinzel v. Joslyn, supra, it was held that where a personal judgment had been recovered by the lien holder, the personal action to recover the amount of the debt and a proceeding to enforce the lien could be maintained simultaneously, and that the lien was not waived by bringing a personal action on the claim, nor by the recovery of a judgment therein. The facts in the case of Hale v. Pettigrove, 10 Hun. (N.Y.) 609, are perhaps most similar to the facts in the present case. In that case, the plaintiff made an agreement with the defendant to repair a building at a stipulated price, taking a mortgage on the premises to secure payment, and on the completion of the work, filed a lien, foreclosed the mortgage, and entered a personal judgment for the deficiency. The court held that he had not waived his right to a lien, because he was entitled to pursue all the remedies he had, until he realized the amount of his claim.

In regard to the second and minor question, the plaintiff held that since the note, due to financing charges and the fifteen per cent attorney charges in case of default, promised an amount in excess of that

due Leitgabel, the acceptance of the note and the securement of a judgment on it acted as a waiver of the lien. The case of Miller-Piehl v. Mullen, 170 Wis. 378, 174 N.W. 542, was cited in support of this view. The court, however, answered this contention by showing that in the case cited a note secured by a mortgage on four acres of land was given to cover a lien filed on one acre of land and *an additional indebtedness.* In the case under discussion, on the other hand, the intention of the parties clearly shows that the note was not to waive the lien, since payment of the note was to be made in installments, and since Leitgabel was to retain his lien until the last payment was made. After all, the note did not give Leitgabel any additional security. Under ordinary circumstances Leitgabel should have received payment within a short period of time; instead he gave the defendants, Herros, the opportunity of paying for the work in installments, receiving as consideration financing charges. Consequently, it can be seen that Leitgabel and the Finance Corp. did not receive any valuable consideration in the form of the note. They were entitled to payment for the work done; they were entitled to the financing charges for carrying the Herros along on the installment basis; and they were entitled to the costs, expenses, and disbursements incurred in securing a judgment upon the note after the Herros had defaulted in payment.

But a judgment rendered upon parties incapable of meeting it is a hollow mockery. It would be a travesty of justice to state that a man having a mechanic's lien upon property should lose that lien merely because he secured a judgment for the amount due him, when the holder of the property is insolvent and cannot meet that judgment. Legal red tape, under such circumstances, would confuse the very purpose of the law. The lien holder in the last analysis does not desire the mere formality of securing a judgment. What he desires is the payment of the amount due him, or else the recovery of his property. As far as he is concerned, a judgment without payment is a scrap of paper and no remedy at all. The exercise of his lien, consequently, by necessity becomes his only choice of action. To deny him that right would be to countenance every form of trickery and knavery.

Thus, it is with satisfaction that the writer observes this decision of the Wisconsin Supreme Court which declares that there is no waiver or release of the lien herein resulting by virtue of the entry of judgment under the circumstances of the case, thereby reversing judgment with directions to enter judgment in favor of the Heating & Plumbing Finance Corp. on its claim for its lien.

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