

1986

Rotta v. Hawk : Brief of Appellant

Utah Court of Appeals

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BRIEF

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DOCKET NO. 860356-CA IN THE UTAH COURT OF APPEALS
STATE OF UTAH

VINCENT ROTTA, JR., et.al. :
WESTERN GENERAL CONSTRUCTION :
COMPANY INC., a Utah Corpor- :
ation, :

Plaintiff and :
Appellant :

vs. :

HAL HAWK, et.al., :
HOME SAVINGS AND LOAN :
ASSOCIATION, a corporation :

Defendant and :
Respondent. :

Case No. 860356-CA

priority 13-13

BRIEF OF PLAINTIFF - APPELLANT
WESTERN GENERAL CONSTRUCTION COM-
PANY INC.

APPEAL FROM AN ORDER GRANTING DEFENDANT HOME
SAVINGS AND LOAN ASSOCIATION'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ENTERED BY THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE
OF UTAH, THE HONORABLE TIMOTHY R. HANSON, JUDGE.

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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Utah Code Annotated 38-1-5 (1953 as amended)

Other Authorities Cited:

1 ALR 3rd 822 at 829 8

STATEMENT OF ISSUES PRESENTED
FOR REVIEW

WHETHER OR NOT THE WORK PERFORMED BY THE GENERAL CONTRACTOR AND ITS SUB-CONTRACTORS AND SUPPLIERS PRIOR TO THE DATE THAT HOME SAVINGS AND LOAN ASSOCIATION RECORDED ITS DEED OF TRUST ON THE SAME PARCEL OF PROPERTY WAS SUFFICIENT TO CONSTITUTE THE "COMMENCEMENT OF WORK" AS THAT TERM IS USED IN 38-1-5 UTAH CODE ANNOTATED 1953, AS AMENDED, SO THAT LIENS OF THE CONTRACTOR, SUB-CONTRACTORS AND SUPPLIERS HAVE PRIORITY OVER THE DEED OF TRUST REFERRED TO.

DETERMINATIVE STATUTES

38-1-3 Utah Code Annotated: Those Entitled To Liens - Who May Be Attached - Lien on Ores and Mines.

Contractors, sub-contractors and all persons performing any services or furnishing any materials used in the construction, alteration or improvement of any building or structure or improvement to any premises in any manner; all persons who shall do work or furnish materials for the prospective development, preservation or working of any mining claim, mine, quarry, oil or gas well or deposit; and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintends or who have rendered other light professional services or bestowed labor shall have a lien upon the property upon or concerning which they shall rendered service, performed labor or furnished materials for the value of the services 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.

38-1-5. Utah Code Annotated: Priorities Over Other Encumbrances.

The liens herein provided for shall relate back to and take effect as of the time of the commencement to do work or furnish materials on the ground for the structure or improvement and shall have priority over any lien, mortgage, or other encumbrance which may have attached subsequently to the time when the building, improvement or structure was commenced, work begun, or first materials furnished on the ground; also, over any lien mortgage or other encumbrance of which the lien holder has no notice and which was unrecorded at the time the building structure or improvement was commenced, work begun or first material furnished on the ground.

STATEMENT OF THE CASE

This is an action originally commenced by Western General Construction Company Inc. (hereinafter Western) to foreclose a contractor's lien upon a parcel of real property

located at approximately 9100 South and State Street in Salt Lake County, Utah, upon which property Western had constructed a series of self-storage units. Home Savings and Loan Association, a lending institution located in Salt Lake County (hereinafter Home Savings) had recorded a Deed of Trust on the same parcel of property and the issue was before the Court on Summary Judgment motions filed by both parties to determine the priority of the lien and the Deed of Trust. Western asserting that Home Savings' Deed of Trust was inferior and subordinate to Western's Contractor's lien and Home Savings asserting that it was not. The Trial Court found in favor of Home Savings and from that ruling this appeal is taken by Western. The effect of the ruling was to dismiss Western from the suit and thus it is a final order appealable under Rule 3-A of the Utah Rules of Appellate Procedure. The final order was entered by the Trial Court under Rule 54 B of the Utah Rules of Civil Procedure on November 3, 1986 (See Record on Appeal Item #628).

STATEMENT OF FACTS

Western submits that the following facts are undisputed by Home Savings for the purposes of this appeal (See Memorandum of Home Savings in support of its Motion for Summary Judgment, Record on Appeal Item #211). This action involved the construction of buildings to be used as self-storage units on State Street in Sandy, Utah. Home Savings provided two loans on the project to Pihl and Clark Enterprises Inc., who were the project developers. One loan was for the first two phases of the project that was done in three phases. The second loan was for phase three. The project went forward in two steps, the first being constructed on property

identified as phase three. A plat map is attached hereto and was made part of Home Savings Memorandum referred to above. The parcels designated 1, 2 and 3 on the map were the subject of the first loan from Home Savings. The parcels designated A and B were the subject of the second loan. The Trust Deed of Home Savings on Parcels 1, 2 and 3 was recorded on December 12, 1983. The priority of that Trust Deed over the subsequent lien of Western is not in dispute for purposes of this appeal. Its priority is conceded as no work was done on parcels 1, 2 and 3 prior to the recording of that trust deed.

The second loan given by Home Savings was for phase three of the project and was secured by parcels A and B set forth on the attached plat.

(See again Home Savings Memorandum in support of its Motion for Summary Judgment Record on Appeal Item #211). On June 7, 1984, the Deed of Trust securing the third phase of this project was recorded in the office of the Salt Lake County Recorder (See Record on Appeal Item #169). The priority of this Deed of Trust over the lien of Western is the issue before this Court, the resolution of which will call for an interpretation of 38-1-5 Utah Code Annotated 1953 as amended, and specifically what constitutes "commencement to do work" referred to in that statute. The affidavit of J. Sterling Wootton (Record on Appeal Item #258) describes work done on phase 3 in April and May of 1984 as "the general clearing of plant material consisting of the removal of a number of trees that were over ten feet high and the removal of brush and other ground cover that exceeded heights of four feet. The work was done by large tree removal

equipment, backhoes and traxcavators, all of which were working on parcels A and B prior to June 7, 1984. A large portion of the earth that was used to prepare the property described as parcels 1, 2 and 3 came from A and B during those two months. To anyone observing the jobsite during April and May of 1984, the fact that work had begun on the project would have been apparent."

The statements contained in that Affidavit remain undisputed.

SUMMARY OF ARGUMENT

The provisions of 38-1-5 Utah Code Annotated 1953 as amended, providing that "the liens herein provided for shall relate back to and take effect as of the time of the commencement to do work or furnish materials on the ground for the structure improvements and shall have priority over any lien, mortgage or other encumbrance which may have attach subsequently to the time when the building improvement or structure was commenced, work begun, or materials furnished on the ground" should be interpreted broadly enough to encompass clearly visible excavation and site preparation if that work constitutes the first step in commencing the work to complete the improvements on the property in question. To do otherwise renders the statute referred to ineffective as a means of protecting sub-contractors and all persons performing any services or furnishing materials in the construction of those improvements against foreclosure of their interests, by

lending institutions recording their Deeds of Trust subsequent to the date on which the project starts.

ARGUMENT

The Deed of Trust recorded by Home Savings on Parcels A and B referred to in the Statement of Facts, which recording took place June 7, 1984, is subordinate and inferior to all of the mechanics liens that have been recorded on that property in connection with the construction work performed by Western by reason of the fact that clearly visible on site improvements were commenced in connection with that construction project prior to that recording date (See Affidavit of J. Sterling Wootton - Record on Appeal Item 258). Surely if the entire construction project had consisted of excavating the property and removing large trees with no further work to be done, the excavator and the tree removal service people would have a lien for the work that they had performed, and if they did so in April and May of 1984, they would clearly have priority under the provisions of 38-1-5 set out above unless, of course, tree clearing and earth moving are never to be considered improvements in any situation. To argue otherwise makes no sense at all. The fact then, that the project continued on beyond that stage should make no difference in determining priorities if excavation was in fact the first stage of a continuing project. Surely if the project to construct buildings on the job site had been terminated by the developers after excavation and tree

removal had been completed, Home Savings would not be in a position to claim that they had priority over the excavator's lien if he were not paid for the work that he did up to the point where the project was stopped. The fact then that it was not halted and continued on should make no difference, for if any one of the sub-contractors performing improvements on the job site did work prior to the trust deed recording date of June 7, 1984, then under the provisions of 38-1-5, everyone in that category has priority.

The issue in this case is whether the work done by the contractor or sub-contractors prior to June 7, 1984, on the third phase of the project in question, fits the definition of the term "work commenced" as used in 38-1-5. The reason for the rule is clear. By commencing visible work on the project the contractor gives notice to the world that the property may be subject to a mechanics lien. "The presence of materials on the building site OR evidence on the ground that work has commenced on a structure OR PREPARATORY THERETO is notice to all the world that liens may have attached." (See *Western Mortgage Ltd. Corporation vs. Cottonwood Construction Co.* 18 Utah 2nd 409-424 Pac.2nd at 437 at 439).

The purpose of the mechanics lien act is to provide protection to laborers and materialmen who have added directly to the value of the property of another by the materials or labor. (See *First of Denver Mortgage Investors vs. C.N. Zundell*, 600 Pac.2nd 521 at 525 (Ut 1979). To accomplish that purpose the

the phrase "commencement to do work" as used in the mechanics liens statute is construed in favor of the lien claimant. (See Calder Brothers Company vs. Anderson 652 Pac.2nd 922 at 924, Ut. 1982 To construe the lien statute otherwise is to create a grave injustice for lien claimants who provide the materials and do the work, for on a large construction project such as this their claims for services rendered are generally insignificant, when taken individually compared to what is generally a large construction loan, that would otherwise come ahead of them. A lien on a parcel of real property that is subject to a first Deed of trust (in excess of a million dollars in this case), is for all practical purposes, a useless lien. Any interpretation that would render it so can be justified only under circumstances where absolutely nothing in the way of visible work was performed by anyone on the property involved prior to the recording of such a Deed of Trust.

Other Courts dealing with the problem of whether the clearing, grading, and filing of the land constituted the commencement of building for mechanics liens purposes have reached a variety of results. The rule stated general is that there must be "visible commencement of operations within the meaning of the liens statute" for the lien to attach. (See 1 ALR 3rd at 829). The language of 38-1-5 UCA, Utah's lien law, is very broad and in all likelihood intentionally so for the purposes outlined above. It says: "The liens herein provided for shall relate back to and take effect as of the time of the commencement to do work

or furnish materials on the ground for the structure or improvement." It doesn't say that you must do work and (emphasis added) furnish materials, it simply says "do work or (emphasis added) furnish materials". The statute is clear. The "commencement to do work... on the ground"(emphasis added) is sufficient to meet its needs.

The outcome of any particular case addressing this problem seems to depend on three factors: The visibility of the work performed; the exact wording used in the lien statute; and the construction of this wording chosen by the Court. Some courts take the view that the work done on the land must be such that everyone could readily recognize the commencement of a building. However, some courts take a much less restrictive view of what constitutes work commenced. One 1957 Pennsylvania Court went so far as to hold that the cutting down of a single tree or shrub which had to be removed in order to construct a house on the premises constituted the commencement of the building within the meaning of the lien statute, and it was at this time that the mechanics lien attached for the benefit of all lien claimants. (See Myswaka vs. Mullan 73 Montg Co. LR 497 Pennsylvania 1957). The court pointed out that the statutory test is not whether the soil had been disturbed, but whether work had been visibly commenced upon the ground. The holding in the First of Denver Mortgage Case as cited above seems to indicated that Utah's lien statute was intended to be interpreted more like Myswaka, that is that actual work on the building need not be

commenced, in fact, the building need not be contemplated at all, for a lien to attach, as long as the work done would give notice to an observer that someone had been on the property making improvements.

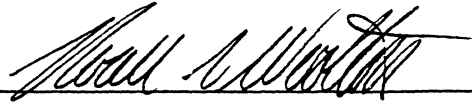
CONCLUSION

The issue in this case is whether work done on parcels A and B was sufficient to give notice to Home Savings at the time they recorded Deed of Trust on June 7, 1984, that the land may be subject to a mechanics lien had they bothered to go look at the property or make inquiry. The affidavit attached to this memorandum shows that it was and there is no evidence before the Court to the contrary (See Affidavit of J. Sterling Wootton - Record on Appeal, Item 258). The removal of large trees and undergrowth using large earth moving equipment operating on the property prior to the date the Deed of Trust in question was recorded is sufficient to give the mechanics liens priority. A decision of this Court to the contrary would not be a fair interpretation of the Utah Statute involved, based upon the facts before it.

It is respectfully submitted that the Motion for Summary Judgment filed by Home Savings determining that its Deed of Trust had priority over the mechanics liens recorded against the parcels A and B referred to above should have been denied, and the Motion for Partial Summary Judgment on the issue of priority filed by Western should have been granted, and Western

so respectfully moves this Honorable Court.

Submitted this 8th day of May, 1987.

A handwritten signature in cursive script, appearing to read "Noall T. Wootton", is written above a horizontal line.

NOALL T. WOOTTON
Attorney for Plaintiff-
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CERTIFICATE OF MAILING

I certify that four (4) true and correct copies of the foregoing Brief were mailed first class postage prepaid to the following this 8th day of May, 1987.

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WESTERN GENERAL CONSTRUCTION
Pihl & Clark Appeal (Rotta/Ha

