O/a 5-10-85

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,045

C. U. ASSOCIATES, INC., a Florida corporation, and AETNA CASUALTY AND SURETY COMPANY, a Connecticut corporation,

Petitioners,

-vs-

R. B. GROVE, INC., a Florida corporation,

Respondent.

FILED
SID J. WHITE
MAR 11 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Case and Facts is substantially correct except that there are glaring areas of disagreement by GROVE as to C. U.'s statements. The areas of disagreement are factual omissions concerning the posture of the case before the Trial Court below.

The Court should note that C. U. was an electrical subcontractor under Apgar & Markham, a general contractor on the Esso Interamerica Building job site in Coral Gables, Florida (R-16). C. U. had submitted a Purchase Order to GROVE (R-87) and the generator was sold for Thirty-four Thousand Three Hundred Twenty Dollars ($34,320.00) under terms of "net tenth prox" on October 9, 1981 and delivered it to the job site (R-92). Apgar & Markham paid C. U. the sum of Thirty Thousand Dollars ($30,000.00) of the Thirty-four Thousand Three Hundred Twenty Dollars ($34,320.00) billed to C. U. by GROVE on December 3, 1981 (T-92). C. U. had the use of that money and didn't pay GROVE until some nine (9) months later on August 27, 1982, when it paid a partial sum of Twenty-seven Thousand Four Hundred Eighty-one and 75/100 Dollars ($27,481.75) (T-108), at which time a Partial Release of Lien was given by GROVE to C. U. (T-139).

Regular statements had been going out to C. U. from GROVE since the generator was sold to C. U., beginning with October 29, 1981 (T-27) as testified to by Richard B. Dowling, Vice President and General Manager of GROVE (T-26). No objections were ever made as to

the billing statements sent to C. U. nor did he receive any calls from Mr. Riley, C. U.'s principal officer (T-28). After partial payment had been made by C. U. to GROVE, C. U. ignored payment of the principal balance due of Six Thousand Eight Hundred Seventy and 44/100 Dollars ($6,870.44) and interest claimed.

After the Claim of Lien was filed by GROVE and it was bonded out by C. U. and AETNA (R-18), GROVE sued C. U. and AETNA, who counterclaimed against GROVE, the matter was rigorously contested between the parties and proceeded to non-jury trial before the Honorable David Levy. The Trial Court found C. U. and AETNA were liable to GROVE for the sum of Six Thousand Eight Hundred Seventy and 44/100 Dollars ($6,870.44) and disallowed interest claimed by GROVE (R-359). The Trial Court found that GROVE was the prevailing party and denied and dismissed the counterclaim of C. U. against GROVE (R-359 - 360). After taking expert witness testimony, and having a hearing before the court, the trial judge awarded to GROVE as the prevailing party attorney's fees and costs against C. U. and AETNA in the sum of Eight Thousand Six Hundred Eighty-three and 95/100 Dollars ($8,683.95) (R-337 - 338).

After appeal to the Third District Court of Appeals by C. U. and AETNA, on the issue of attorney's fees awarded GROVE, the Third District correctly affirmed the Trial Court below. C. U. and AETNA filed a Petition for Review under Article V, Sec. (3) (b) of the Florida Constitution and pursuant to Rule 9.030 (a) (2) (A) (iv) on the basis that the Third District's decision conflicts with decisions made in the Fourth and Second District Courts of Appeal and this Court granted discretionary review.

POINT FOR REVIEW

WHETHER A PREVAILING PARTY, UNDER FLORIDA STATUTE 713.29, IS ENTITLED TO FEES AND COSTS WHEN HE RECEIVES A FAVORABLE JUDGMENT, REGARDLESS OF WHETHER OR NOT THE JUDGMENT RECOVERED WAS THE SAME AS A PRELITIGATION OFFER?

ARGUMENT

A PREVAILING PARTY, UNDER FLORIDA STATUTE 713.29, IS ENTITLED TO FEES AND COSTS WHEN HE RECEIVES A FAVORABLE JUDGMENT, REGARDLESS OF WHETHER THE JUDGMENT RECOVERED WAS THE SAME AS A PRELITIGATION OFFER.

C. U. and AETNA argue in their Brief that the issue before the Court is that GROVE, who failed to recover more than what was offered or tendered before litigation in a mechanic's lien case, is not the prevailing party as defined under the Florida Mechanic's Lien Law. Because GROVE won, C. U. and AETNA argue that the decision of the Third District Court of Appeal deviates from the established law in this State and is not consistent with the purpose of the Mechanic's Lien Statute. C. U. and AETNA's position is untenable. They maintain that the Supreme Court must construe Fla. Stat. 713.29 to define a prevailing party as one who recovers monies in excess of that offered before litigation commences.

The Third District Court of Appeals in its well written and legally correct Opinion, citing Acadia Development Corp. v Rinker Materials Corp., 419 So 2d 1142, 1144 (Fla. 3d DCA 1982), rev. denied, 431 So 2d 988 (Fla. 1983) that:

> "This Court has taken the view that a claimant who succeeds in establishing a mechanic's lien and receives a judgment in his favor in any amount whatever is necessarily the 'prevailing party' under Sec. 713.29 without regard to whether the

judgment recovers, exceeds, equals or is less than any previous prelitigation offer." Ibid 455 SO 2d 1109, at pg. 1110.

C. U. and AETNA argue that they were the prevailing party in this litigation in its brief "because it tendered an offer to GROVE before the lawsuit was filed, the same amount which GROVE recovered at trial." This is an absurity. In the first place, logic dictates that C. U. could not be the prevailing party because they did not succeed in recovering a judgment in their favor and they were not the "prevailing party" in the litigation. The case presented before the trial judge between the parties resulted in GROVE "prevailing" and C. U. and AETNA "nonprevailing". The word "prevail" as used in the American Heritage Dictionary of the English Language, published by Houghton Mifflin Company, 1979 Edition, at page 1038,is defined as:

> "prevail - vailed, vailing, vas. 1. To be greater in strength or influence; to triumph or win a victory. Often used with over or against. 2. To be or become effective; succeed; win out. 3. To be most common or frequent; be predominant. 4. To be in force, use or effect; be current. 5. To use persuasion or inducement successfully. Used with on, upon, or with. - See Synonyms at persuade."

C. U. seeks to redefine the term "prevailing party" to exclude GROVE because it obtained a favorable judgment against them in the sum of Six Thousand Eight Hundred Dollars ($6,800.00), was declared to be the prevailing party and then subsequently they got hit with attorneys fees.

It argues that the Second District Court of Appeals, because

of the decision in S.C.M. Associates, Inc. v Rhodes, 395 So 2d 632 (Fla. 2d DCA 1981) is the correct position for this Court to take because in that case a party who recovered less than what was offered prior to litigation was deemed to be the prevailing party and C. U. and AETNA argue that in that case as in the case sub judice, the trial court did not award any prejudgment interest because a prelitigation tender tolled the running of interest.

The Court should examine the factual posture of the S.C.M. Associates, Inc. case. In that case, the court found in favor of the defendant on the complaint for foreclosure of the mechanic's lien and against the plaintiff, and found in favor of the defendant, counter-plaintiff on his counterclaim. No such facts are in the case under consideration. GROVE prevailed against C. U. and AETNA and C. U.'s counterclaim was denied and dismissed. There was no evidence to support that they were a "prevailing party". The fact that the trial judge below in this case did not award any prejudgment interest is of no consequence. No cross appeal by GROVE was ever filed in the Third District Court of Appeals under the authority of Peter Marich & Associates, Inc. v Powell, 365 So 2d 754 (Fla. 2d DCA 1978) and that issue is not before this Court.

C. U. and AETNA cite Monde Investments, No. 2, Inc. v R. D. Taylor-Made Enterprises, Inc., 344 So 2d 871 (Fla. 4th DCA 1977). This case involved consolidated appeals of two cases. Monde Investments owned the building and appellees, Taylor and Hardives provided goods and services. The first error in this case by the trial court below

was to award judgment in favor of Taylor, who had offered parol evidence to change the terms of a written contract. The court stated in reversing the judgment:

> "The appellee-Taylor not having been the prevailing party is therefore not entitled to attorneys fees below. The award of those attorneys fees is reversed." Ibid, 344 So 2d 871, at pg. 872.

The court also reversed the judgment in favor of Hardives because S.C.M. held back ten percent (10%) of the original contract price required under Sec. 713-06 (3) (d) (5). The ten percent (10%) held back by Monde Investments was not enough to cover the amount due him under his contract, and the court, therefore, reduced his proportional share. The court then reluctantly reversed the judgment against Monde which awarded attorneys fees.

C. U. and AETNA suggest that because the Monde Investments and S.C.M. focused on the settlement activities before the institution of litigation, that this evidence is relevant to the issue of prejudgment as well as who is the prevailing party. First, as pointed out previously, inasmuch as GROVE did not cross appeal the issue of prejudgment interest, and as this is not before the Court, this is immaterial.

The conduct of C. U. was less than genuine. If you consider the conduct of C. U. in that they were paid less than two (2) months after delivery of the generator the sum of thirty Thousand Dollars ($30,000.00) of the Thirty-four Thousand Two Hundred Dollars

($34,200.00) owed by it (T-92) to GROVE, why on December 3, 1981 didn't C. U. pay GROVE some or all of this sum? It was not their money, but GROVE's instead. It held the money until August 27, 1982, then only paid GROVE Twenty-seven Thousand Four Hundred Eighty-one and 75/100 Dollars ($27,481.75) (T-108). It should be obvious to the court, and GROVE suggests that C. U. was in financial distress and was "robbing Peter to pay Paul" and applying monies due its suppliers for its own use or for some other purpose.

The trial transcript reveals after the filing of the Claim of Lien that demand had been made upon C. U. by GROVE on October 15, 1982 and October 27, 1982 (T-26), as testified to by Richard B. Dowling, Vice President and General Manager, who handled accounts receivable. There never was an objection by C. U. to the invoices, nor was there either any calls from Mr. Riley or Mrs. Riley, or any objection in writing (T-27 - 28). On September 16, 1982 the Claim of Lien had been filed (T-33) by GROVE. C. U. and AETNA then bonded out the lien. When C. U. ignored GROVE the matter was turned over to counsel for GROVE, who made demand on November 19, 1982 for payment, which was ignored (T-34). Suit was then filed by GROVE and C. U. responded with a counterclaim.

The counterclaim, as stated by counsel for C. U. at trial, amounted to Seven Thousand Twelve and 03/100 Dollars $(7,012.03) (T-7). They lost at trial. C. U. did not prevail on its counterclaim and you can rest assured that had C. U. "prevailed", it would have sought attorneys fees as the "prevailing party" against GROVE.

The argument by C. U. and AETNA that the testimony of Mr. Riley (T-80) as to his offering GROVE the money "from day one" being conclusive that C. U. acted properly with regard to GROVE's claim is totally self-serving and disingenuous. If the Court examines the testimony of Mr. Norman Haugen employed by GROVE, to whom he allegedly made this offer to, the Court will find:

> "Q Did you pick up the $27,000.00 check and give a Partial Release of Lien to Bob Riley?
>
> "A Yes.
>
> "Q What did he tell you about paying the balance of the bill?
>
> "A The result of our discussion is that there would be no further payment because of the back charges, additional charges by C. U. Associates to R. B. Grove due to complications on this particular job." (T-139) (emphasis supplied)

GROVE submits that C. U. never intended to pay anything on the balance of Six Thousand Eight Hundred Dollars ($6,800.00) principal due at any time. This is why the Claim of Lien was filed by GROVE.

In the Third District below, C. U. and AETNA argued that a "tender" is the same as a "offer". Never at anytime was there a check made payable to GROVE by C. U. as to the remaining balance of the principal of Six Thousand Eight Hundred Dollars ($6,800.00), or any portion of it. The record is totally devoid of any prelitigation tender of the balance due GROVE by C. U. This has been clearly defined by this Court to mean not only merely the readiness and ability to pay the money, but

the actual production of the thing to be paid. Kreiss Potassium Phosphate Co. v Knight, 98 Fla. 1004, 124 So 751 (Fla. 1929); Masser v London Operating Co., 106 Fla. 474, 145 So 79 (Fla. 1932). The Third District Court covered this point and stated in a footnote in its Opinion on page 1110 the following:

> "2. We assume, without deciding, that when Grove rejected C. U.'s good faith offer and demanded a greater amount, formal tender by C. U. was excused. See Sisco v Rotenberg, 104 So 2d 365 (Fla. 1958); Martin v Albee, 93 Fla. 941, 113 So 415 (1927) (emphasis supplied).

C. U. argues that it satisfied all of its responsibilities under the contract with GROVE. This is contrary to the record. The issue to be considered by this Court is the meaning of the phrase "prevailing party". The same Second District Court of Appeals, which decided the S.C.M. Associates, Inc. v Rhodes case in Peter Marich & Associates v Powell defined a prevailing party to be:

> "A prevailing party is one in whose favor an affirmative judgment is rendered. This is true despite the fact the judgment is for less than initially sought in the complaint. R. F. Driggers Construction Co. v Bagli, 313 So 2d 450 (Fla. 2d DCA 1975); Foxbilt Electric, Inc. v Belefent, 280 So 2d 28 (Fla. 4th DCA 1973); Sharpe v Ceco Corp., 242 So 2d 464 (Fla. 3d DCA 1970). Therefore, attorney's fee appellant was entitled to a reasonable attorney's fee even though it did not recover the entire amount sought in its complaint" Peter Marich & Associates v Powell, 365 So 2d 754 (Fla. 2d DCA 1978), at pg. 756. (emphasis supplied)

The Third District below in arriving at its opinion that GROVE was the prevailing party and entitled to fees and costs when it received a favorable judgment cited the Peter Marich & Associates decision. Further, in construing Rule 1.442 of the Florida Rules of Civil Procedure as to the amount recovered by GROVE in litigation being no greater than the amount offered to it, the Third District Court said:

> "What is relevant, however, to the prevailing party's entitlement to fees and costs is whether the non-prevailing party has served an Offer of Judgment pursuant to Florida Rules of Civil Procedure 1.442 more favorable to the prevailing party than the judgment actually obtained." Ibid 455 So 2d 1109 (Fla. 3d DCA 1984) at pg. 1110.

The balance due GROVE for the purchase of the generator of Six Thousand Eight Hundred Dollars ($6,800.00) was disputed by C. U. as evidenced by its counterclaim which exceeded said sum (T-7). As C. U. and AETNA had not made an Offer of Judgment in this case and this was not an issue to be decided. (See Footnote 5, Ibid at pg. 1110). The Third District below, in its well written Opinion, applied Rule 1.442 to the factual posture presented to it and said:

> "Thus, if the Appellant herein wanted to prevent or mitigate the assessment of fees and costs against it or itself wanted to recover such fees and costs, it could have renewed its prelitigation offer in the form of a Rule 1.442 Offer of Judgment after litigation began." Ibid, 455 So 2d 1109, at pg. 1110.

As this Court is well aware, the purpose of an Offer of Judgment is to cut off liability of a party after making the Offer. This procedural vehicle was available to C. U. and AETNA, and was not used by them. The issue of an Offer of Judgment in mechanic's lien cases is not a new phenomena. See Peter Marich & Associates, Inc. v Powell, 365 So 2d 754, 756 Note 1 (Fla. 2d DCA 1978); and the Third District merely extended its application to the facts of this case. This is not inconsistent with the mandate provided in Florida Satutes 713.29 that the "prevailing party" is entitled to attorney's fees. C. U. and AETNA are using a shield, their alleged offer to GROVE, to pursuade this Court that there was some wrong doing by GROVE and somehow it was unjustly enriched at their expense. This is nonsense and violates the public policy of this State that a "prevailing party" is entitled to fees as part of its costs.

C. U. and AETNA maintain that this Court must construe Fla. Stat. 713.29 "to define a prevailing party as one who recovers monies in excess of that offered before litigation commences". They argue that this not only encourages settlement of disputes, but also rewards parties for complying with their contractural duties. This reasoning is not well founded and if such a proposition were adopted by this Court, this could only result in and create absolute chaos and confusion concerning the law, which is well settled, that the "prevailing" party shall recover reasonable attorney's fees as part of its costs in a mechanic's lien action.

If this Court were to graft upon the body of the law this

concept, would this not create further litigation as to interpretation of the phrase "offered before litigation". Should the offer be oral or in writing? Is the offer to be considered valid before the Claim of Lien is filed or after it is filed? Will the effect of such an offer discourage lienors from filing Claims of Lien? Is the materialman not in privity with an owner to be prevented from filing a Claim of Lien against the owner because the offer is made by a contractor who hired the materialman for a particular purpose? Must the offer made by the contractor be accompanied by a check in the amount which is offered? Can the offer be made without having money in the bank to pay a materialman and without a "tender"?

It should be quite apparent what confusion which would be created if this Court adopts the position maintained by C. U. and AETNA and it would defeat the intent of the Florida Mechanic's Lien Statute. The consequences would trickle down and affect the rights of all for the benefit of one. Are the rights of the many to be subjugated for the benefit of one? The wisdom of the Third District Court of Appeals in its carefully worded and thoughtful Opinion is not only reasonable and just as to the facts of this case, but also protects the rights of the many in holding that a prevailing party under Fla. Stat. 713.29 is entitled to fees and costs when he receives a favorable judgment, regardless of whether the judgment recovered was the same as a prelitigation offer or less or more. To adopt C. U. and AETNA's view would be to frustrate the very purpose of the Mechanic's Lien Statute. The Opinion of the Third District Court of Appeals below is sound, reaso-

nable and legally correct. To adopt a different view would be to reward the "non-prevailing" party its attorney's fees and costs, which is not the intent of the Mechanic's Lien Statute.

Finally, this Court has clearly expressed its philosphy in the construction of the Mechanic's Lien Statute consistent with GROVE's position, namely that "it is out duty to construe this Statute liberally so as to afford the laborers and materialmen the greatest protection compatible with justice and equity". Crane Co. v Fine, 221 So 2d 145 (Fla. 1969). The appeal by C. U. and AETNA, the losing parties in this case, is inconsistent with such construction and must fail.

CONCLUSION

Based upon the arguments and authorities presented, this Court should affirm in all respects and adopt the Opinion and analysis of the Third District Court of Appeals on the issue presented. The decision of the Third District Court of Appeals should be upheld, including the award of attorney's fees to GROVE; and further, GROVE should be awarded attorney's fees on appeal to this Court for the necessity of defending the District Court's judgment.

Respectfully submitted,

Fred A. Harrison, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed to STEVEN W. DAVIS, Esquire, Attorney for Petitioners, Broad & Cassel, 1108 Kane Concourse, Bay Harbor Islands, Florida 33154, this 8th day of March, A. D. 1985.

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