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.

: THIRD DISTRICT CASE NO. 84-548

PETITIONERS' BRIEF ON THE MERITS

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INTRODUCTION

Petitioners, C.U. ASSOCIATES, INC., and AETNA CASUALTY AND SURETY COMPANY ("C.U."), filed a petition for review which was granted by this court pursuant to Article V, Section (3)(b)(3) and Fla.R.App. 9.030(a)(2)(A)(iv). This court accepted jurisdiction on February 6, 1985. The Respondent is R.B. GROVE ("GROVE") who was the appellee below.

All references to the trial transcript shall be noted as: "T." and references to the record shall be noted as "R." and references to the appendix shall be noted as "A."

Petitioners respectfully submit that the decision of the Third District Court of Appeal conflicts with clearly established and applicable law in determining the prevailing party under the Florida Mechanics' Lien Law and must be reversed.

STATEMENT OF CASE AND FACTS

GROVE brought this action to foreclose a mechanics' lien pursuant to Chapter 713, Florida Statutes. C.U., the electrical contractor[1] on a construction project, had entered into a contract with GROVE whereby GROVE agreed to supply the generator for the project. C.U. answered the complaint asserting defenses and a counterclaim seeking setoff on the grounds that GROVE did not properly perform the contract due to the failure of the generator to work as promised until August, 1982. C.U. also denied liability for interest which GROVE claimed was due. The contract price for the generator was $34,320.00. Of this amount, C.U. paid GROVE $27,481.75, on August 19, 1982. As is customary in the industry where non-conforming goods are delivered, 20% of the contract price was retained pending final approval of the generator by the owner. (T.77-79). Shortly thereafter, C.U. tendered and offered the remaining unpaid balance on the contract to GROVE (T.80). GROVE, however, refused to accept the balance of the contract price, claiming that it was owed more than $3,400 in accrued interest. There was no authorization in the contract between the parties for such an interest charge.

1. The action was brought against C.U. because it posted a transfer bond pursuant to Fla. Stat. §713.24. Thus, the actual "owner" of the real property was not a party to this litigation.

The trial court, without making findings of fact, ruled in favor of C.U. with respect to interest and awarded only the unpaid principal balance of the contract (A. 4-5). This was the amount offered and tendered by C.U. prior to trial. However, the trial court awarded GROVE attorneys' fees, in the amount of $8,200, ruling that GROVE was the "prevailing party," despite the fact that GROVE failed to recover any more than was offered or tendered prior to the institution of the litigation.

The Third District Court of Appeal affirmed this result noting that "a party prevails and is entitled to fees and costs when he receives a favorable judgment, and it is irrelevant that he turned down a more favorable prelitigation offer or that his victory in court is 'pyrrhic'." C.U. Associates v. R.B. Grove, Inc., 455 So.2d 1109 (Fla. 3d DCA 1984). Also, the Third District awarded additional attorneys' fees to GROVE in the amount of $1,000.00. (A. 1-3). C.U. filed a petition for discretionary review to this Court which was granted on February 6, 1985.

POINT FOR REVIEW

WHETHER A PARTY WHICH FAILS TO RECOVER MORE THAN WAS OFFERED OR TENDERED PRIOR TO INSTITUTION OF LITIGATION IS THE PREVAILING PARTY AS DEFINED IN THE FLORIDA MECHANICS' LIEN LAW.

SUMMARY OF ARGUMENT

C.U. respectfully submits that the decision of the Third District Court of Appeal which affirmed the ruling that GROVE was the prevailing party was erroneous. The Third District is in conflict with S.C.M. Associates, Inc. v. Rhodes, 395 So.2d 532 (Fla. 2d DCA 1977) and Monde Investments No. 2, Inc. v. R.D. Taylor-Made Enterprises, Inc., 344 So.2d 871 (Fla. 4th DCA 1977).

In this regard, under these precedents, C.U. is the prevailing party because it offered and tendered to GROVE all that it owed GROVE before the litigation commenced. In determining who is the prevailing party under Florida's Mechanics' Lien law, the court must consider the parties' settlement activities prior to the litigation. By taking such conduct into account the court is encouraging settlement and rewards the parties for complying with their contractual duties. Therefore, this court should construe the statute to define prevailing party as one who recovers only an amount in excess of that which was offered or tendered before the litigation commenced.

This issue has never been addressed by this court. The decision of the second and fourth districts cited above, are consistent with the purpose of the Mechanics' Lien law and the policy of this court. Accordingly, this court should adopt the better view of this issue as discussed in the SCM and Monde Investments opinions.

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ARGUMENT

A PARTY WHICH FAILS TO RECOVER MORE THAN WAS OFFERED OR TENDERED PRIOR TO INSTITUTION OF LITIGATION IS NOT THE PREVAILING PARTY AS DEFINED IN THE FLORIDA MECHANICS' LIEN LAW.

C.U. is the prevailing party in this litigation because it tendered and offered to GROVE, before the lawsuit below was filed, the same amount which GROVE recovered at trial. The decision of the Third District, however, diverts from precedent in holding that a prelitigation offer or tender is irrelevant in determining who is the prevailing party in Mechanics' Lien litigation. Specifically the court opined:

> While appellant's position finds some support elsewhere in this state, see Monde Investments No. 2, Inc. v. R. D. Taylor-Made Enterprises, Inc., 344 So.2d 871 (Fla. 4th DCA 1977); cf. S.C.M. Associates, Inc. v. Rhodes, 395 So.2d 632 (Fla. 2d DCA 1981), 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[tion] 713.29" without regard to whether the judgment recovered exceeds, equals or is less than any prelitigation offer. Acadia Development Corp. v. Rinker Materials Corp., 419 So.2d 1142, 1144 (Fla. 3d DCA 1982), rev. denied, 431 So.2d 988 (Fla. 1983). In essence, then, a party prevails and is entitled to fees and costs when he receives a favorable judgment, and it is irrelevant that he turned down a more favorable prelitigation offer or that his victory in court is pyrrhic."

456 So.2d at 1110.

Florida Mechanics' Lien Law provides for an award of reasonable attorneys' fees to the prevailing party. Fla. Stat. §713.29 (1981). C.U. is seeking to have this Court define the term "prevailing party" to exclude a party such as GROVE, who fails to recover an amount in excess of what was offered or tendered prior to the institution of any litigation. In determining the prevailing party under Fla. Stat. §713.29, therefore, the court should look at the conduct of the parties before the lawsuit is filed. Any recovery in excess of a prelitigation tender or offer would be sufficient to have the party "prevail" as defined in Fla. Stat. §713.29. This was recognized by the Third District which recently noted that a party prevails "even though the amount [recovered] is only $5.00 in excess of that tendered by the Defendant." Hubcap Heaven, Inc. v. Goodman, 431 So.2d 323, 324 n.1 (Fla. 3d DCA 1983).

Earlier Florida decisions first established this definition of prevailing party. The Second District refused to award attorneys' fees to a party that failed to recover an amount greater than the amounts tendered or offered prior to litigation. S.C.M. Associates, Inc. v. Rhodes, 395 So.2d 632 (Fla. 2d DCA 1981). In SCM the second district found that where a party brought an action pursuant to the Mechanics' Lien statute and recovered less than was offered prior to the litigation, it was not the prevailing party. In that case, SCM, recovered an

affirmative judgment as to its claimed mechanics' lien, but such amount was less than that which was "offered" prior to the litigation. 395 So.2d at 634. Despite having to pay money damages to SCM, Rhodes was found to be the prevailing party in that litigation and was awarded reasonable attorneys fees. In that case, as in this one, the trial court did not award any prejudgment interest because the prelitigation tender tolled any running of interest.

A Fourth District decision reached an identical result. In Monde Investments, No. 2, Inc. v. R.D. Taylor-Made Enterprises, Inc., 344 So.2d 871 (Fla. 4th DCA 1977), there was an offer made prior to filing the lawsuit that was the exact amount recovered at trial. The court held: "Since Hardrives did not accept the amount it should have accepted it was not the prevailing party in this lawsuit." 344 So.2d at 872 (emphasis supplied). In Monde Investments, the trial court admitted into evidence the settlement negotiations between the parties before the litigation. The Fourth District noted: "Evidence of this type of 'offer of settlement' is peculiarly permitted in mechanics' lien cases." 344 So.2d at 872 n.1.

Both the Monde Investments and SCM decisions focused on the parties' settlement activities prior to the institution of any litigation. Such evidence is not only relevant with respect to the issue of prejudgment interest, but it is also relevant as to

who is the prevailing party, under the Florida Mechanics' Lien Statute.

The trial court herein, awarded the unpaid, but tendered, principal balance and recognized that the outstanding debt which existed prior to the institution of this lawsuit was the amount that was offered to GROVE prior to the litigation. GROVE did not accept the amount it should have accepted. Thus, as in Monde Investments, GROVE is not the prevailing party to this lawsuit since GROVE failed to recover anything in excess of the amounts tendered.

Additionally, the trial testimony conclusively established that C.U. acted properly with regard to GROVE's claim. As Robert Riley, president of C.U., testified at trial:

> Q. Did you ever speak to Mr. Haugen from GROVE with respect to the billing of this account?
>
> A. Yes, sir. When I got ready to pay the first time, I asked him to come over and sign a receipt for the money. Once the things were worked out I told him that I needed a receipt for the final amount of money, the final 20% to return it to the owner. I needed a receipt, a final receipt, so that we could get our money and he could get his. He refused at that point, he said, "No." He asked for more than what was listed on the contract and we came to where we are now.
>
> Q. So, you did offer Mr. Haugen the principal balance on the account?
>
> A. From day one. (T.80)(emphasis supplied).

After an objection, the trial court ruled that "the allegations for demands made, what monies, if any, not paid as to that I will overrule the objection. I will not take it in the context of the settlement, but just what the party did." (T. 80).

The trial court, therefore, recognized that C.U. offered that which it was obligated to pay. (R. 359-360). C.U. did not offer or tender the $10,200 claimed by GROVE prior to trial. Nevertheless, a tender made subject to a condition upon which a party has a right to insist is a valid tender in Florida. See McGhee v. Mata, 330 So.2d 248 (Fla. 3d DCA 1976). Accordingly, C.U. had the right to insist upon release of the lien by GROVE upon payment of the principal amount.[2] Moreover, as in Monde Investments, proof of an "offer" as opposed to a tender is sufficient. On the basis of this proof, the trial court recognized that the monies were available to GROVE and proceeded to only award GROVE the principal amount of the contract and no prejudg-

2. C.U.'s oral offer to pay the principal balance was a legally sufficient tender in Florida. GROVE insisted upon collection of the $3,400 in interest charges and was not interested in accepting the proper amount due. Under such circumstances, therefore, a more "formal" tender was not necessary since Grove would not accept it. The law does not require performance of a futile or idle act. Sisco v. Rotenberg, 104 So.2d 365 (Fla. 1958); See also Haimovitz v. Robb, 130 Fla. 844, 178 So. 827 (1937). Since Riley's testimony establishes that C.U. notified Grove that it was ready, willing, and able to pay the unpaid principal amount, the tender requirements of a tender were satisfied. Moreover, Grove's wrongful insistence on the interest payment constitutes a waiver of a formal tender. Martin v. Albee, 93 Fla. 941, 113 So. 415 (1927).

ment interest. Since GROVE did not cross-appeal this ruling it is established as the law of this case.

C.U. satisfied all of its responsibilities under its contract with GROVE. The Third District, however, determined that this was irrelevant for purposes of determining who was the prevailing party and cited its decision in Acadia Development Corp. v. Rinker Materials Corp., 419 So.2d 1142 (Fla. 3d DCA 1982), rev. denied 431 So.2d 988 (Fla. 1983), as authority for naming GROVE the prevailing party. The Acadia decision, however, concerned an offer to settle during the litigation. The Acadia court noted that "the record indicates that Rinker rejected an oral offer to settle the litigation for $15,000..." 419 So.2d 1144 (emphasis supplied). Thus, the Third District's reliance on this decision is misplaced since the present case involves prelitigation settlement activities. Moreover, the Third District's suggestion that a party such as C.U. file an offer of judgment to cut off attorneys' fees and costs only stops those fees and costs incurred after making such an offer. 455 So.2d at 1110.

Accordingly, the instant decision is not consistent with the purpose of the Florida Mechanics' Lien statute.[3] The purpose of

3. Section 713.29, Florida Statutes (1981) provides: "In any action brought to enforce a lien under Part I, the prevailing party shall be entitled to recover a reasonable fee for the services of his attorney for trial and appeal, to be determined by the court, which shall be taxed as part of his costs, as allowed in equitable actions."

that statute is to make the prevailing party "whole" for successfully prosecuting a mechanics' lien case. It is not intended to be used as a sword against a party who properly offers the exact amount due. To hold otherwise encourages litigation and rewards a party who wrongfully charges interest in violation of its contract, as GROVE attempted to do here and then litigates the matter to extract additional damages by virtue of attorneys' fees and court costs. Such a result clearly is not the intent of Florida Mechanics' Lien Law or any law and cannot be permitted by this court. GROVE would have been made whole by simply accepting the monies offered prior to trial. It chose not to accept the monies and instead filed a lawsuit only to recover the same amount as that offered before litigation.

Therefore, C.U. maintains that this Court must construe Fla. Stat. §713.29 (1981) to define a prevailing party as one who recovers monies in excess of that offered before the litigation commences. Such construction not only encourages settlement of disputes, but also rewards parties for complying with their contractual duties. Accordingly, this court should adopt the position of the Second and Fourth districts as the law in Florida. Applying such a holding, therefore, makes C.U. the prevailing party in this litigation, entitled to recover its attorneys' fees and costs.

CONCLUSION

C.U. asks the court to reverse the decision of the Third District and the award of attorneys fees to GROVE. It further requests that this court rule that C.U. is the prevailing party in this litigation entitled to recover all reasonable attorneys' fees and costs incurred in this action.

Respectfully submitted,

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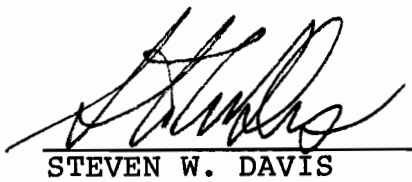
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellants was mailed to Fred A. Harrison, Jr., P.A., Attorney for the Appellee, Suite 304, 7600 Red Road, South Miami, FL 33143, this 26th day of February, 1985.



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