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.

REPLY BRIEF OF PETITIONERS

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STATEMENT OF THE CASE AND FACTS

Petitioners, C.U. ASSOCIATES and AETNA CASUALTY AND SURETY COMPANY ("C.U."), rely upon the statement of the case and facts initially set forth in its brief on the merits. The statement of the case and facts submitted by the Respondent, R.B. GROVE, INC. ("GROVE"), is not relevant to this petition based upon the findings of the trial court and the posture of this case. Specifically, the Petitioner is focusing upon the definition of the prevailing party in mechanic's lien litigation, and, thus, only the facts relating to the mechanic's lien claim are relevant. Any other facts or alleged breaches of contract which Respondent attempts to set forth in its statement of case and facts are in the nature of red herrings and insignificant to the legal issues that were appealed to and being reviewed by this Court. The pertinent facts, therefore, are contained in Petitioner's brief and the pertinent rulings of law are contained in the final judgment of the trial court and opinion of the Third District Court of Appeals attached to the appendix of the Petitioner's brief on the merits.

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. asserts that the position advanced by Grove in its brief is not in accord with the policy of the Florida Mechanics' Lien law. That law, which protects the rights of materialmen, laborers, and contractors, clearly is intended to protect the contractual and equitable rights of all parties to such litigation. The position asserted by Petitioners is consistent with that purpose and should it be adopted by this Court. This is the only position that serves intent and purpose behind Florida Statute §713.29 and which rewards parties for complying with their contractual duties.

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 litigation below was instituted, the same amount which Grove recovered at trial. The position of C.U. is directly supported by S.C.M. Associates, Inc. v. Rhodes, 395 So.2d 632 (Fla. 2d DCA 1981) and Monde Investments No. 2, Inc. v. R.D. Taylor-Made Enterprises, Inc., 344 So.2d 871 (Fla. 4th DCA 1977). However, Grove's position is that if a claimant succeeds in establishing a mechanic's lien in any amount then it is the prevailing party and cites as support the decision below and Acadia Development Corp. v. Rinker Materials Corp., 419 So.2d 1142 (Fla. 3d DCA 1982), rev. denied, 431 So.2d 988 (Fla. 1983).

In this regard, the basis of Grove's position is founded upon the principle that a party in a mechanics' lien lawsuit is entitled to attorneys' fees even if it recovers less than the amount originally sought in the complaint. C.U. is in no way quarreling with that statement of the law. Examining the Acadia Development decision cited the Third District below, however, shows that Acadia Development is not good precedent for the instant case. "Rinker rejected an offer to settle the litigation

for $15,000. . ." 419 So.2d at 1144 (emphasis supplied). Rinker ultimately recovered less at trial and was ruled to be the prevailing party and awarded attorneys fees. The Third District, however, concluded "we do not believe that this conclusion conflicts with Monde Investments No. 2, Inc. v. R.D. Taylor-Made Enterprises, Inc., 344 So.2d 871 (Fla. 4th DCA 1977) or S.C.M. Associates, Inc. v. Rhodes, 395 So.2d 632 (Fla. 2d DCA 1981), cited by the appellants, which involved prelitigation tenders to the lienors in question." 419 So.2d at 1144 (emphasis supplied). Thus, from the facts given on the face of the opinion in Acadia Development, it appears that the offer to settle the litigation was rejected. Acadia Development, unlike the present case, did not involve prelitigation settlement activities. Thus, any reliance upon the Acadia Development decision as precedent for this case is not valid since the factual posture is significantly different.

A case cited by the Third District in Acadia Development provides additional support for Petitioner's position that prelitigation activities are important in determining the prevailing party. American Insulation of Fort Walton Beach, Inc. v. Pruitt, 378 So.2d 839 (Fla. 1st DCA 1979), involved Florida Statute §713.29 which provided that attorneys' fees were to be determined by the court, "which shall be taxed as part of his costs as allowed in equitable actions." Fla. Stat. §713.29

(1977). In that case the First District noted the record did not reflect whether the owner tendered an amount he agreed was due at any time before litigation. Thus, the lienor was awarded attorneys' fees even though he recovered an amount less than sought at trial. This decision indicates, therefore, that Florida courts should be reviewing prelitigation settlement activities before determining the "prevailing party" under the Mechanics' Lien Law.

In determining the prevailing party in the Florida Mechanics' Lien law, courts must not simply look at results. Rather, the courts must also examine the pretrial activities of the parties and determine what actually transpired. In this case, Grove only won the right to collect the same amount that it could have collected 17 months earlier had it not chose to wrongfully institute litigation against C.U. When compared to effect of the January 9, 1984 final judgment and the offer of full payment of the unpaid principal balance in August, 1982, it is clear that Grove did not prevail. While Grove may assert that it did "prevail" on the counterclaim, this is not relevant herein in that the counterclaim did not provide a statutory or contractual basis for the award of attorneys' fees to either party. Therefore, Grove was not the prevailing party below.

Furthermore, Grove contends that C.U.'s conduct was less than genuine. Such an assertion is blatantly devoid of any support in

the record. First, the trial judge had already ruled that C.U. was under no obligation to pay any interest. (A. 4-5). This ruling was not cross-appealed by GROVE below and conclusively establishes that C.U.'s timing and payment of the contract price to Grove was proper. Second, trial testimony established that the money was offered to Grove "from day one." (T. 80). See also (T. 147-148) Finally, since C.U. was doing work for the contractor and the owner of the project, it was C.U.'s responsibility to see that none of its subcontractors placed a lien on the subject property. Consequently, C.U. had to have a transfer bond posted on the property so that the Grove lien was removed. C.U., therefore, was in no position to pay Grove its money unless it received a final release of lien from Grove. Grove indicated that it would not accept anything less than the full $10,200 claimed, the unpaid principal balance, plus over $3,400 in wrongful interest charges before providing such a release.

Therefore, C.U.'s actions were proper in light of its obligations to Grove as well as to the contractor and the owner of the project. As stated in C.U.'s initial brief, C.U.'s oral offer to pay the principal balance was legally sufficient tender in Florida. The law does not require the performance of a futile or idle act. Sisco v. Rotenberg, 104 So.2d 365 (Fla. 1958); Haimovitz v. Robb, 130 Fla. 844, 178 So. 827 (1937). Moreover,

where one party to a contract, Grove, refused to perform the acts required by the contract, such as accept the proper amount and release its lien, C.U. was precluded from performing its contractual obligations. The Third District addressed an analogous situation and opined:

> In equity, the requirements of a tender of purchase money mean a readiness, willingness, and ability in good faith to perform the acts required by terms of the agreement provided the other party concurrently does the things which he is required by the contract to, and notice of the former to the latter of such readiness, willingness and ability.

Bowers v. Medina, 418 So.2d 1068, 1069 (Fla. 3d DCA 1982) (emphasis supplied). Since GROVE was unwilling to comply with its obligations, C.U.'s actions were legally sufficient to satisfy the requirments of a tender.

GROVE asserts in its brief, that use of the offer of judgment in accordance with Fla.R.Civ.P. 1.442 would remedy the problems asserted by C.U. This position, however, ignores the fact that such an approach would only cut off liability for fees and costs after the litigation is commenced. That position, similar to the position articulated by the Third District below, merely encourages litigation of lawsuits at least up to the point that an offer of judgment is made. Consequently, a offer of judgment made between parties and non-attorneys prior to litigation would be rendered meaningless. Additionally, such a result, as stated in C.U.'s initial brief on the merits, only encourages more

litigation.

In its brief, Grove was unable to assert any sound policy reason why C.U.'s position should not be adopted. It presupposes that trial courts and lower appellate courts would be unable to apply such a rule and would create chaos. That position is untenable in that trial courts and appellate courts apply rules of law every day. Clearly, the courts of this State could apply a rule of law that encourages parties to settle disputes before litigation and comply with their contractual duties. The courts will still have to decide each case on its particular facts. In any event, the position and rule of law suggested by C.U. does not depart from the law applied by the S.C.M., Monde Investments, and American Insulation of Fort Walton Beach, courts and would not create any confusion. Rather, C.U.'s interpretation of the law would clarify a party's rights that it cannot be subject to any additional liability so long as it complies with its duties under a contract.

In construing the Florida Mechanics' Lien statute "liberally so as to afford laborers and materialmen the greatest protection compatible with justice and equity" this court must rule in favor of C.U. See Crane Co. v. Fine, 221 So.2d 145, 152 (Fla. 1969). The position compatible with justice and equity is rewarding a party for complying with its contractual duties. Florida law requires that in order to be the prevailing party in Mechanics'

Lien litigation a party must recover monies in excess of that which was offered or tendered to it prior to the institution of the litigation. S.C.M.Associates, Inc. v. Rhodes, 395 So.2d 632 (Fla. 2d DCA 1981) and Monde Investments, Inc. v. R.D. Taylor-Made Enterprises, Inc., 344 So.2d 871 (Fla. 4th DCA 1977). Accordingly, pursuant to Florida Statutes §713.29 (1981), and in accordance with rules regarding the taxing attorneys' fees and costs in equitable actions, this court should reverse the award of attorneys' fees to Grove and tax them in favor of C.U. as the prevailing party in this litigation.

CONCLUSION

Based upon the arguments and authorities presented, this court should reverse the opinion of the Third District Court of Appeal, reversing the award of attorneys' fees to GROVE and to award C.U. its reasonable attorneys' fees and costs incurred in this action from trial through prosecution of this petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of April, 1985, a true and correct copy of the foregoing was mailed to Fred A. Harrison, Jr., Esq., Suite 304, 7600 Red Road, South Miami, FL 33143.

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