SUPREME COURT OF FLORIDA

Case No. 71,387

Third District Court of Appeal

No. 87-108

HOLDING ELECTRIC, INC.,

Petitioner

v.

LINDA M. ROBERTS

Respondent

REPLY BRIEF OF PETITIONER

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ARGUMENT

Petitioner-Appellant deems it necessary to file this Reply Brief, and would like to respond to each argument of the Respondent separately.

I. REPLY TO RESPONDENT'S "STATEMENT OF THE CASE AND FACTS"

In Respondent's 'Statement of the Case and of the Facts', Counsel states that Respondent-Appellee was an innocent purchaser of the condominium unit and had no knowledge of the outstanding debt due Petitioner by Bonefish Yacht Club, Ltd., the owner-developer of the condominium. On the date Respondent purchased her condominium unit from Bonefish, 8 November 1985, Petitioner had recorded two (2) liens with the Monroe County Clerk. One of the liens was filed on 1 July 1985 in Official Records Book 946, Page 1180 of the Monroe County Records, and the second lien was filed on 29 August 1985, in Official Records Book 951, Page 1840, Monroe County Records. Copies of these liens are contained in the Appendix of Petitioner's Initial Brief.

II. REPLY TO RESPONDENT'S FIRST ARGUMENT

In Respondent's first argument contained in her Answer Brief, the entire argument is based upon the premise that the Affidavit was never served upon the owner. On Page 9, Paragraph 1, lines 2, 3 and 4 of Respondent's Brief, Counsel argues

> "The purpose of requiring that a contractor serve the Affidavit on an owner***"

Later on on the same page, Counsel again argues

> "The owner has the right to rely on the Affidavit and protect himself from subsequent claims***"

and again on page 9

> "Without the Affidavit, the owner may be unaware of subcontractors, materialmen or laborers***"

On the top of Page 10 of her Brief, Respondent continues to argue

> "The decisions guarantee that an owner cannot be in default and subject to a maintainable suit for failure to tender payment until a contractor has served the Affidavit on the owner and removed the risk of double payment."

later on in the same page

> "Where the contractor has not served the Affidavit, the money cannot be properly paid to him or the owner because***"

again at the bottom of Page 10

> "It is, therefore, clear that, if the owner has not yet received the Contractor's Affidavit***"

On Page 12 of Respondent's Brief, she again argues

"If the opinions are overruled, it would rewrite the Florida Statutes by depriving the owner of his right to protection against double payment by effectively eliminating his right to a Contractor's Affidavit***"

Certainly if the Affidavit had not been timely served upon the owner, as was the case in Mardan Kitchen Cabinets, Inc. v. Bruns, 321 So.2d 769 (Fla. 3d DCA 1975) (Affidavit served on owner three days before trial), or in Gold v. M and G Services, Inc., 491 So.2d 1292 (Fla. 3d DCA 1986) (the Affidavit was never delivered to owner), counsel for Respondent is certainly right in his arguments. However, the crucial point counsel for Respondent is missing is that, in the case at bar, the Affidavit was served upon the owner more than five days prior to the date Petitioner filed his Amended Complaint.

So in this case, as in McMahan Construction Co., Inc. v. Carol's Care Center, Inc., 460 So.2d 1001 (Fla. 5th DCA 1984), and Shores of Indian River, et al v. Gart Urban Associates, Inc., 478, So.2d 893 (Fla. 4th DCA 1985), the owner hasn't suffered any detriment, nor has the owner been prejudiced at all. The owner sees the Affidavit, he sees that all the subcontractors, laborers and materialmen have been paid. If the owner is in good faith, he then pays the contractor. What has the owner lost? Maybe the owner has incurred a moderate attorney's fee, which he could probably prevail upon the Circuit Court to assess against the contractor, as the Affidavit had not been filed prior to the actual

suit being started. This would be his only detriment. He has incurred no loss of interest, no other expense at all.

Certainly the owner has the right to protect himself against the risk of double payment. Certainly the owner should not have to pay the contractor until he sees the Affidavit. Once the owner sees the Affidavit, and after he sees that all of the subcontractors, laborers and materialmen under the contract of the contractor have been paid, he can then safely pay the contractor. This is the case whether the Affidavit is served five days prior to the institution of the action, or whether the Affidavit is served after the action has been instituted, but before an Amended Complaint is filed alleging service of the Affidavit, after leave of Court.

The owner cannot be forced to make double payments, because he doesn't have to pay the contractor until he sees the Affidavit. The only difference is that instead of dismissing the case, and then forcing the contractor to start all over again, the contractor is simply allowed to amend his Complaint, plead delivery of the Affidavit, and then pursue the matter.

Certainly the Legislature never intended the 'form over substance' position argued by Respondent.

III. REPLY TO RESPONDENT'S SECOND ARGUMENT

To follow the holding in McMahan Construction Co., Inc. v. Carol's Care Center, Inc., 460 So.2d 1001 (Fla. 5th DCA 1984), and the analogous Commercial Carrier Corporation, et al v. Indian River County and Dade County, 371 So.2d 1010 (1979) ruling does not constitute liberal construction of the Statute in question.

Strict construction does not demand form over substance. The purpose for which a Statute was enacted is of primary importance in the interpretation. The intent of the Legislature is the touchstone. United Bonding Insurance Company v. Tuggle, 216 So.2d 80 (Fla. 2nd DCA 1968).

The intent of the Legislature in this Statute is to insure that the owner is protected against double payment.

In this case, the Affidavit was filed five days before filing the Amended Complaint against the owner instead of five days before filing the Original Complaint against the owner.

Let us assume in this case the Trial Court had granted Bonefish's Motion to Dismiss and the Trial Court had actually dismissed Petitioner's Original Complaint without leave to amend. Because several months still remained in the one year limitation period, during which Petitioner had the right to file an action to foreclose this Lien, Petitioner could have then simply served the Affidavit on Bonefish, and then filed another action against the

same owner, Bonefish; making the same allegations it had in the previous Complaint, but now it would have alleged that it had timely served the Statutory 'Affidavit of Contractor'. If that scenario had occurred, are the parties in any different situation than they were immediately after the Trial Court allowed Petitioner to amend its Complaint pleading delivery of the Affidavit.

Obviously, the parties, especially the owner, would have been in exactly the same situation in either series of events. The rulings in McMahan (supra) and Commercial Carrier (supra) do not constitute liberal construction of Statutes, but simply constitute common sense and foster the intent of the Legislature in the enactment of the Statute.

IV. REPLY TO RESPONDENT'S THIRD ARGUMENT

As indicated in Respondent's Third Argument, "the duty of the Court is restricted to carrying out Legislative intent***". Clearly this Court, in its Commercial Carriers (supra) decision, and the Fourth and Fifth Districts, feel that allowing an Amended Complaint to be filed alleging service of the Affidavit carries out the intent of the Legislature.

> "Nontheless, failure of the Pleadings in this regard does not call for dismissal with prejudice. In view of our holding herein, the Third Party Complaint in each case should have been dismissed with leave to amend." Commercial Carriers (supra).
>
> "Since McMahan alleged the Affidavit was filed five days before the amendment was sought, the Trial Court should have allowed the Second Amended Complaint to be filed." McMahan (supra).

V. REPLY TO RESPONDENT'S FOURTH ARGUMENT

In the opening paragraph of Respondent's Fourth Argument, Respondent accuses Petitioner and Amicus of 'butchering' the holdings of numerous cases and applying 'warped' interpretations of their meanings.

If there is any 'butchering' or 'warping' of cases, it is being done by Respondent.

On Page 21 of her Brief, Respondent has completely warped the facts and law contained in Bishop Signs, Inc. v. Magee, 494 So.2nd 532 (Fla. 4th DCA 1986) and Shores of Indian River, et al v. Gart Urban Associates, Inc., 478 So.2d 893 (Fla. 4th DCA 1985).

Bishop (supra) certainly cited McMahan (supra) with approval, but simply stated that because the Petitioner never did file the Affidavit, McMahan was inapplicable. In our case, the Affidavit was timely filed.

In Shores of Indian River (supra), the Fourth District clearly adopted and approved the McMahan holding. The Fourth District did not, as Respondent would suggest, rely on Leader Mortgage Co. v.Rickards Electric Service, Inc., 348 So.2d 1201 (Fla. 4th DCA 1977). The Fourth District said

> "We believe the facts of that case (McMahan) as well as the similar facts involved herein, are distinguishable from prior cases on the issue of the filing of a Contractor's Affidavit as a condition to maintaining an action for foreclosure of a mechanic's lien."

In McMahan and Shores of Indian River, the contractor had delivered the Affidavit prior to filing his Amended Complaint. In Leader Mortgage Co., the contractor never delivered the Affidavit.

Respondent further argues in her Fourth Argument that Commercial Carriers (supra) is not applicable in this case, because it involves another Statute.

Section 768.28(6) Fla. Stat., and the Statute in this case both create law that did not exist under the common Law. The Waiver of Sovereign Immunity Statute, Section 768.28 Fla. Stat. waives the immunity that the common Law gave to the sovereign since the days of the Magna Carta. This Statute was certainly a strident overruling of historical common Law.

The Statute in this case, the Mechanic's Lien Law did not exist at common Law and came into existance only because of the Statute. Both Statutes provide for similar notices. Both Statutes attempt to warn the sovereign and owner, respectively, that money is due, and both are designed to eliminate the necessity of litigation, if possible.

Strict compliance is necessary under both Statutes. This Court believed that strict compliance had occurred in Commercial Carriers (supra), just as the Fourth and Fifth Districts felt that strict compliance had occurred in McMahan (supra) and Shores of Indian River (supra). The intent of the Legislature was carried out in all of these cases.

VI. REPLY TO RESPONDENT'S FIFTH ARGUMENT

In its initial Brief, Petitioner argued that the Statute did not apply to the Respondent as she is not an 'owner' under the Statute, as she had no contract with the Petitioner for the improvement of real property.

Respondent in her Answer Brief argues that the Affidavit in question must be filed before the institution of any action to enforce the contractor's lien.

Throughout Respondent's Answer Brief, she argues that the intent of the Statute is to protect the owner from double payment on his contract with a contractor. If that is the intent of the Statute, and the definition of 'owner', as defined by Section 713.01(12) Fla. Stat. does not include the Respondent, then how can the Respondent be entitled to the protection of the Statute. It clearly does not apply to her.

However, assuming, arguendo, that the Statute does apply to the Respondent, and that Respondent is included in the umbrella of the Statute, then Petitioner did not 'institute an action' against the Respondent until long after delivering the requisite Affidavit to the owner, Bonefish.

Petitioner's action against the Respondent was instituted when it filed a Motion seeking permission from the Trial Court to add

the Respondent as a party defendant to this case, and when Petitioner filed the Second Amended Complaint against the Respondent.

The Second District, in Kornblum v. Heflin, 183 So.2d 843 (Fla. 2nd DCA 1966), in construing an analogous Limitation Statute (Claims in Probate), 733.16 Fla. Stat. stated on Page 845 of the opinion that

> "We are of the view that the filing of a Motion to Substitute a Personal Representative as a party defendant is also the equivalent to filing suit against the estate within the meaning of Section 733.16(1)(a)." (emphasis supplied)

Earlier on the same page, the Court quoted from Cloer v. Shawver, 177 So.2d 691 (Fla. 1st DCA 1965)

> "Rule 1.2(a), which provides; 'Every suit of a civil nature shall be deemed as commenced when the Complaint is filed;***', has been construed to mean what it says; that is, the filing of the Complaint constitutes the bringing of the action so that such tolls the Statute of Limitations. By the same reasoning, where a suit is pending prior to the death of the defendant, the filing of the Suggestion of Death, and the Motion for substituting the representatives of the estate as party defendants is equivalent to the filing of a complaint against the estate.***"

Suit was therefore instituted against Respondent when the motion was made by Petitioner to add Respondent as a party defendant and when the Second Amended Complaint was filed in this cause against her.

Months before the motion to add Respondent as a party defendant and the filing of the Second Amended Complaint, Petitioner served its Affidavit upon the owner.

As far as the Respondent is concerned, if she falls under the protection of the Statute, then Petitioner has complied with the Statute relative to having timely served the Affidavit upon the owner.

VII. REPLY TO RESPONDENT'S SIXTH ARGUMENT

Respondent lumps several miscellaneous arguments together in the Sixth Argument in her Answer Brief. The Petitioner would like to reply briefly to two of those arguments.

Using reasoning this writer has difficulty following, on page 28 of her Answer Brief, Respondent argues that it would be possible under the Commercial Carriers (supra) and McMahan (supra) rulings that a Plaintiff could institute actions after a limitation period had run. This argument is simply a 'red herring' and is seemingly pure nonsense.

Lastly, Respondent claims that she is an innocent purchaser and it would be inequitable to allow Petitioner to enforce its lien rights against her. To repeat, two mechanic's lien had been filed of record with the Monroe County Clerk when Petitioner purchased her condominium.

CONCLUSION

The Petitioner again respectfully requests this Court to reverse the Order of Dismissal of the Trial Court and remand the case for further proceedings.

Respectfully submitted,

Dated: 5 February 1988

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 5th day of February, 1988, to W. Wyndham Geyer, Jr., Esq., Ruden, Barnett, McClosky, Smith, Schuster & Russell, P.A., NCNB Plaza, Penthouse B, 110 East Broward Boulevard, Post Office Box 1900, Fort Lauderdale, FL 33302 and to Ronald P. Gossett, Gossett, McDonald, Gossett & Crawford, 3595 Sheridan St., Suite 204, Hollywood, Florida 33021.

Dated: 5 February 1988

JOHN W. CONLIN