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SUPREME COURT OF FLORIDA

HOME ELECTRIC OF DADE COUNTY,
INC.,

Petitioner,

v.

Case No. 73,337

ROY B. GONAS, ET AL.,

DISTRICT COURT OF APPEAL,
3RD DISTRICT - NO. 88-306
88-794

Respondents.

_____ /

Appeal from the District Court of
Appeal of Florida, Third District

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

The Petitioner was the Appellee below and the Plaintiff in the trial court. The Respondents were the Appellants below and the Defendants in the trial court. In this brief the Petitioner will be referred to as "Home Electric" and the Respondents will be referred to as "Owners".

The same symbols will be used by the Petitioner as used by the parties in the briefs filed below.

STATEMENT OF THE CASE AND FACTS

On October 6, 1986, Home Electric filed a Complaint to Foreclose Claim of Lien. (R v.I 1-3) In that Complaint, Home Electric prayed for alternate relief in the nature of an equitable lien if for some reason the trial court denied the prayer for a foreclosure of lien. (R v.I 2) This Complaint was based on a Claim of Lien filed by Home Electric on July 15, 1986. (R v.I Pl. Exh. 1) On September 12, 1986, prior to suit being filed by Home Electric, the Owners served a letter on Home Electric which the Owners contend is a demand for an accounting under Florida Statute 713.16(2). (R v.I 8-9) Home Electric responded to the purported request for an accounting by the Owners but not under oath. (R v.I 20-21) After suit was filed, Owners moved for a summary judgment on the grounds that Home Electric was deprived of its lien by its failure to respond to the Owners demand for accounting. (R v.I 5-6) The trial court

denied summary judgment after reviewing Home Electric's affidavit in opposition to the motion and on the holding in Alex v. Randy, Inc., 305 So. 2d 13, 15 (Fla. 1st DCA 1974). After a period of intense litigation, the case proceeded to trial resulting in a final judgment of foreclosure in favor of Home Electric. (R v.I 93-94) Thereafter the Owners appealed the judgment to the Third District Court. That Court reversed the trial court relying on the decision in Palmer Elec. Servs., Inc. v. Filler, 482 So. 2d 509, 510 (Fla. 2d DCA 1986) but acknowledged the conflict in the holding of that case with the decision in Alex.

This Court accepted jurisdiction of the case after a timely filed notice invoking this court's discretionary jurisdiction and a timely filed jurisdictional brief were filed by Home Electric.

SUMMARY OF ARGUMENT

Home Electric first relies on the decision of Alex v. Randy, Inc., 305 So. 2d 13, 15 (Fla. 1st DCA 1974) to reverse the Third District Court. Alex is directly on point and is an opinion of logic and reason. The case of Palmer Elec. Servs., Inc. v. Filler, 482 So. 2d 509, 510 (Fla. 2d DCA 1986) followed by the Third District Court may be on point but is wrongly decided. If the Palmer case is accepted by this Court it will result in an unconscionable result. There is no question that a strict, unbending interpretation of Florida Statute 713.16(2) would create

a monster and turn the statute into a trap for the unwary. By contrast, the result reached in Alex, that the lienor be apprised that he has a stated period of time to comply or be deprived of his lien, is the correct rule of law. Any other holding falls short of common sense and equitable principles.

Home Electric next relies on the facts in the instant case for reversal. Home Electric does not concede in any fashion that the letter of the Owners satisfies the requirements of Florida Statute 713.16(2). The Owners position is tenable only if the steps mandated by the statute are completed. The record demonstrates an absence of compliance by the Owners. The Third District simply did not give sufficient thought to the facts in the record.

ARGUMENTS INVOLVED ON APPEAL

WHETHER FLORIDA STATUTE 713.16(2) REQUIRES AN OWNER MAKING A PROPER DEMAND FOR A STATEMENT TO A LIENOR TO ADVISE THE LIENOR THAT HE HAS 30 DAYS UNDER THE CITED STATUTE TO FURNISH THE STATEMENT OR OTHERWISE LOSE THE LIEN.

WHETHER THE DEMAND LETTER OF THE OWNERS CONFORMED TO THE REQUIREMENTS OF FLORIDA STATUTE 713.16(2) THUS REQUIRING HOME ELECTRIC TO STRICTLY COMPLY WITH THE SUBJECT STATUTE.

This case is before this Court to review the decision of the Third District Court of Appeal. The district court reversed the trial court's judgment relying on the case of Palmer Elec. Servs., Inc. v. Filler, 482 So. 2d 509, 510 (Fla. 2d DCA 1986) rather than affirming the lower

court on the holding in Alex v. Randy, Inc., 305 So. 2d 13, 15 (Fla. 1st DCA 1974). Palmer and Alex both construed Florida Statute 713.16(2) but ended up with different results. Florida Statute 713.16(2) states:

At the time any payment is to be made by the owner to the contractor or directly to a lienor, the owner may in writing demand of any lienor a written statement under oath of his account showing the nature of the labor or services performed and to be performed, the materials furnished and to be furnished, the amount paid on account to date, the amount due, and the amount to become due. Failure or refusal to furnish the statement within 30 days after the demand, or furnishing of a false or fraudulent statement, shall deprive the person so failing or refusing to furnish such statement of his lien.

It is submitted that the phrase in the cited statute, "at the time any payment is to be made by the owner ... directly to a lienor" clearly appears to be a statutory precondition mandated by the Florida Legislature. This requirement, which according to the opinion in Palmer, was a letter from the lienor demanding payment from the owner. No such letter was ever written to the Owners in the instant case after Home Electric filed its lien. In the absence of such a letter, the Owners had no statutory basis to demand a written statement from Home Electric. In Palmer, the case which the Third District Court choose to follow, the lienor's counsel, after sending the owner a demand letter for payment, did not respond to the statutory demand from owners' counsel. In the case at bar the record does not reflect a situation as existed in Palmer. Here there was no letter from Home Electric's counsel demanding

payment after the lien was filed. Simply put, the predicate or the grounds required by Florida Statute 713.16(2) for the Owners in the present case to use this statute were not "triggered" or set in motion by any act of Home Electric according to the language of the statute. It is respectfully submitted that the facts in Palmer are clearly distinguishable from the present case. Further, an examination and review of the so-called demand letter of the Owners in the instant case clearly shows that it was not in strict compliance with Florida Statute 713.16(2). First, it is suggested that an objective scrutiny of the Owners' letter shows an absence of any language to warn Home Electric to come to terms with any of the recitals in the correspondence. Grammatically speaking, the first paragraph of the letter is deficient and is not even a sentence. It is a phrase taken out of the statute that this Court has decided to interpret. In no way does it convey to the reader that he must do something or lose a statutory right. The same criticism applies to the remaining portions of the letter. Next, it was not in response to a demand letter for payment by a lienor as was the case in Palmer and further it contained the language "Upon receipt of the foregoing, an attempt will be made to settle the account". By this representation, the Owners clearly conceded that they were not going to make a payment directly to Home Electric but admitted an attempt would be made to settle the account. It is further submitted that there was not a "proper demand" by the Owners since the letter failed to advise Home Electric

that it had thirty days to furnish a statement of account or lose its lien. Moreover, the opinion rendered by the Third District Court overlooked the fact that Home Electric, did respond to the demand of the Owners but the response was not under oath. (R v.I 20-21) It is respectfully submitted that the absence of the oath, when one considers the informal or imperfect letter of demand made by the Owners, should not result in a forfeiture of lien rights by Home Electric. If Home Electric is to be held to strict compliance with Florida Statute 713.16(2), the Owners should also be held to that standard.

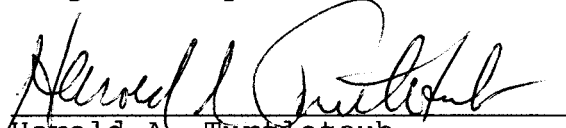
Home Electric submits the statute is flawed if strictly construed since it allows a property owner to deceive or "sand bag" a lienor. If a lienor is brought to the point where it has to file a lien, it can be reasonably assumed that he and the property owner are not at good terms at that point. A letter then arrives from the owner making demands to produce this and that under the pretense that when the lienor complies maybe payment will be made. Why should the lienor comply at that point unless he is sufficiently apprised by the demand letter that he will lose his lien, if there is non-compliance? If the Owners in this case were really interested in substance and not outright trickery, a mere reference to the statute or an outright warning in the demand letter would have been the catalyst to warn Home Electric to consult counsel or to review the cited

statute. Without the warning of non-compliance or a reference to the statute, any owner can effectively maneuver an unsuspecting lienor to forfeit his lien rights. It is logical to assume that our legislature did not intend the statute to be applied in that manner or fashion. Any other interpretation would produce an unfair or unjust consequence. Finally, and not conceding that it did not properly perfect its mechanic's lien, Home Electric is entitled to an equitable lien on unpaid funds. Combs v. St. Joe Papermakers Federal Credit Union, 383 So. 2d 298 (Fla. 1st DCA 1980) The pleadings below prayed for an equitable lien. (R v.I 3)


CONCLUSION

The rationale expressed in the Alex case is a rational sensible construction of Florida Statute 713.16(2). Any other interpretation would produce an unreasonable result at variance with logic and wisdom. For all of the reasons set previously forth, Home Electric respectfully requests this Court to enter an order reversing the decision of the Third District Court.

Respectfully submitted,


Harold A. Turteltaub
Attorney for Home Electric

THE UNDERSIGNED hereby certifies that a copy of the foregoing petitioner's brief was served by mail on Roy B. Gonas, Attorney for Respondents, 2600 Douglas Road, Suite 1008, Coral Gables, FL 33134 this 14th day of MARCH, 1989.


Harold A. Turteltaub