IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,075

SHELDON E. STUNKEL, et al.,

Petitioner,

- vs. -

GAZEBO LANDSCAPING DESIGN, INC.,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL PURSUANT TO A CERTIFIED QUESTION

PETITIONER'S REPLY BRIEF

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REPLY TO THE STATEMENT OF CASE AND FACTS

In its answer brief, GAZEBO suggests incorrectly to this Court that "what the STUNKELS did not state is that the record also reflects that at the time GAZEBO provided these gratuitous accommodations, GAZEBO had not yet entered into an enforceable contract with the contractor." This is not a fact, but rather a legal conclusion derived from GAZEBO's testimony, which this court needs to evaluate, not simply accept. In addition, despite GAZEBO's false assertions, the STUNKEL's have informed this Court regarding testimony of GAZEBO's representatives and sets forth on page 5 of their initial brief the language that GAZEBO quotes in its Reply Brief. In addition, despite this language, the district court specifically stated that there was an oral contract between Bill Free and GAZEBO:

> for GAZEBO to obtain and plant trees, which were to be hand selected by the STUNKELS.

(A.2). Thus, the only issue is when that contract was formed and when the first activities pursuant to that contract were undertaken. GAZEBO haphazardly asserts that it did not have a contract until it either dug holes on the premises, planted the trees, the trees were accepted, or they got paid. The district court found that this testimony established a fact question regarding the commencement issue. Nevertheless, it noted that it found no Florida cases on the issue and was careful to establish that it was not ruling as a matter of law that GAZEBO's assertion was correct. In addition, it certified to this court the question whether the conduct of GAZEBO's representatives in travelling with the contractor and owner to select trees was the

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commencement of work.[1] In order to assess that issue, this court must look to all the facts, not just those selected by GAZEBO, and decide whether the evidence was such that the trial court could find that there was no further question regarding the commencement issue or whether the district court's determination that the trip could be construed as simply a sales effort is correct.

Although the STUNKEL's concede for purposes of this review that there was evidence of sales efforts on the part of GAZEBO that continued for several months prior to obtaining a contract, the evidence supports the trial court's conclusion that those efforts ended and a contract came into existence well before the first hole was dug.

Specifically, prior to the actual selection of the trees that were ultimately planted GAZEBO had one of its regular suppliers deliver trees otherwise destined for its inventory directly to the job site for the contractor to inspect for compliance with the STUNKEL's specifications. (T.101). As GAZEBO's representative testified:

> The guy's name was Eddie Thompson, a guy we hired. He has a crane truck. He goes to Miami and buys trees out of people's yards. He buys them and brings them to our nursery.
>
> I told him, in this case, to buy them and bring them to the job and show them to Jerry to see if they are acceptable.

---

[1] Although the district court found that this trip was gratuitous with no valid binding contract to do so, that framing begs the question and ignores the evidence below. Under the circumstances, this court can and should restate the question in order to squarely address the issue.

> I didn't want to get into that problem of bringing all these trees and paying thousands of dollars and have them rejected.
>
> I didn't pay for those trees. They were brought out there simply as a sample to show these guys what we were supplying.

(T.103). Gazebo's representative was adamant that he "did not a have a crew there to put them in the ground" and only "had the palms at the job to see if they were acceptable." (T.104). Only if they were accepted with no chance that they would be rejected would they have prepared to dig the holes. As he stated:

> We didn't do any digging or work there until the trees were approved. It would be a waste of my time.
>
> He would have to put these trees in the ground and have somebody say, 'No, they are no good. Take them out.'

(T.105-106). After these trees arrived, the landscape contractor, the GAZEBO representative, and the contractor all realized that these trees were unacceptable and rejected them. The contractor's daily logs reflected that they walked the job and rejected these Canary Palms on November 20, 1990. (T.112).

After this unsuccessful effort to provide trees that complied with the contract specifications, GAZEBO's representative continued to put " a lot of pressure" on Bill Free's supervisor to give them this " big contract". (T.96). In response:

> the guy that supervised the job made [GAZEBO] well-aware of the fact these trees had to be specifically picked, and they had to match the trees that were in Las Vegas.

(T.96) In order to meet these requirements and to assure that he got the job, GAZEBO's representative:

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> recommended at that time--I said, "I really want this job. Why don't we have the owner pick them personally, that way, I don't have to," you know---

(T.97). This recommendation was accepted and the parties travelled to Tampa to meet with Gazebo's chosen tree supplier, Turner Tree and Landscaping. After STUNKEL rejected the trees in Turner's inventory, they drove around the Tampa area and over the course of several hours identified trees that complied with the contract specifications and the owners requirements. As GAZEBO's representative stated:

> Well, we went out to Tampa in the plane. We flew out there and looked at the trees.
>
> We individually tagged each one, and looked at each one, and said they were okay, and ordered them to be delivered.

(T.97) In addition, GAZEBO's representative stated, "If the guy likes the trees, we sold the deal."[2] He also testified:

> When we went out there to tag the tree, we put a physical band around each tree that has a number.
>
> It is a plastic band that goes around. It says, "This tree is five." We write down five.
>
> When the tree arrives, they band the seal and know they got the same tree they banded. It was pretty cut and dry.

---

[2] GAZEBO of course refers to the later testimony of its representative that refutes that a contract was thus formed when Mr. Stunkel selected and tagged the particular trees he wanted, but a review of the testimony as a whole reflects that this convenient waffling on the issue is nothing more than a self-interested witness' wishful presentation of a legal conclusion, not a factual determination that prevents the trial court from ruling as it did below.

(T.113-114). Mr. Stunkel himself physically tagged the trees and accepted them and said, "These are the trees I want. These are the trees I like." (T.115). In fact, photographs were taken of Mr. Stunkel next to each tree that he tagged. On November 28, 1990, a deposit was made by GAZEBO to Turner Tree & Landscaping in the amount of $5,106.96, to hold the trees that were selected. (T.51).

On December 5, 1990, GAZEBO billed Bill Free for the trees:

> Because we were digging the holes to put them in the ground and they had been, at that time, were comfortable with the acceptance of them.

(T.123).

On a question from the Court, followed up by GAZEBO's counsel, whether or not GAZEBO was comfortable with the idea that Bill Free would accept the trees, GAZEBO's representative stated:

> Well, Mr. Stunkel had tagged them, personally. So I guess the only change would be if the trees arrived, and they did not have the tags on them, it would have been rejected.
>
> THE COURT: If the same trees arrived---
>
> THE WITNESS: If the trees arrived and it was the same, it was a comfortable done deal, sure.

(T.124).

Although he testified that Mr. Stunkel could have said that the trees were no good and, therefore, no bill would be sent to Bill Free Custom Homes, who could then have hired someone else (T.125), the invoice itself was generated prior to the time that the trees were delivered to the property on December 7 (T.123) and thus prior to the time for any purported right of rejection.

Finally, despite the language in the trial court's order, in announcing its ruling the trial court clearly took the evidence in the case in the light most favorable to the non-moving party and determined that the commencement of the work pursuant to the contractual undertaking took place long before December 5, 1990. As the trial court stated in ruling on the Motion for Involuntary Dismissal at the close of the plaintiff's case:

> I know I have to do it in a light most favorable to the unmoving party.
>
> This testimony was not sworn to this claim of lien. I think that is something more than a minor lapse, and I think that the work was commenced long before that, and I think that is being charitable; okay?

(T.125).

The district court found that, under that standard, the evidence suggested that there might not have been a contract and, therefore, implicitly addressed the question of the statements in the trial court's order with respect to the standard that it applied.

REPLY TO ARGUMENT

For the first time in any court, GAZEBO now argues that the trial court could not have found that their claim of lien was untimely, because they were not a "subcontractor" and thus not a "lienor" until the trees were installed, accepted and paid for. Notwithstanding that this argument should not even be accepted by this Court at this time, close analysis of that argument reveals its fatal flaws. GAZEBO's position does not add clarity to the law of mechanic's liens, as the district court suggested would

occur if the trial court adopted a previously unknown approach with respect to the issue on remand, but rather will promote uncertainty in the mechanic's lien law. If accepted, errant lienors, through interested fact witnesses, can successfully alter basic contractual principles by simply asserting convenient self-serving legal conclusions regarding when a particular contract was formed.[3] It would override the trial court's power to make a determination when a contract is formed and place into the hands of abortive lienors the power to breathe life into a barred lien claim simply through oral testimony in circumstances in which they did not take even the opportunity to reduce their agreement to writing. When, as here, an oral contract is found, the court is free to determine the terms and conditions of that contract either as expressed, or implied in fact or law. This is exactly what the trial court did and he properly rejected GAZEBO's legal conclusion disguised as fact. Further, a close review of the testimony in light of the statutes reveals that GAZEBO's argument is simply untenable.

Under §713.01(1), Florida Statutes (1990), which GAZEBO does not discuss, the term "contract":

> means an agreement for improving real property, written or unwritten, express or implied.

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[3] Under GAZEBO's analysis, if their conclusory testimony is given the force of law, then they never had a contract and the lien that they have filed, whether late or not, is fraudulent. Under GAZEBO's scenario, if they did not have a contract until the trees were installed, accepted, and a check received for those trees, then one of the conditions that they assert for establishing the contract in the initial instance never occurred because they were never paid. Viewed in this manner, the dubious nature of respondent's argument becomes evident.

Thus, the statute contemplates that there can be an oral contract, the existence and terms of which can be implied in fact or law. There is no dispute that there was an oral contract entered into between Bill Free and GAZEBO for the landscaping portion of the project. The only possible dispute is when that contract was formed and that issue could be and was decided properly by the trial court after the close of the plaintiff's case.

Bill Free had agreed under its direct contract with the STUNKELS to obtain and plant certain trees and provide other landscaping services. These trees were to meet the STUNKEL's requirements regarding type, size, and appearance. Once STUNKEL was shown those trees, selected them, and approved them, those trees became identifiable to the contract and the contract sprang into existence.[4]

The fact that prior to actual installation the trees had to undergo approximately two hours of preparatory pruning by Turner does not change the existence of the contract or the fact that GAZEBO's work commenced at the time the trees were selected. Rather, the notice to owner, which should state among other things "the nature of the services or materials furnished or to be furnished", must be served not later than 45 days after

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[4] In addition, at the time STUNKEL selected and tagged the particular trees, GAZEBO and Bill Free had also determined a contract price. This was further indicia of the contract and was not even required for a contract to exist. Under §713.01, a contract price need not be explicit for a contract to exist and if no price is agreed upon by the contracting parties, the price terms shall be deemed to be the value of all labor, services or materials covered by the contract.

commencing "to furnish" those services or materials. §713.06(2)(a), Florida Statutes (1990). In addition:

> "furnish" when used in connection with the words "labor" or "services" or "materials" means ... furnishing by the lienor or by another for him.

§713.01(22), Florida Statutes (1990). Accordingly, although Turner Tree and Landscape may have provided certain services or materials and, as Gazebo concedes, be entitled to file a materialman's lien, that fact does not mean that GAZEBO has not also "furnished" those services or materials under the lien law or relieved itself of its contractual obligation to furnish them.

Thus, under Arlington Lumber & Trim Co. v. Vaughn, 548 So.2d 1315 (Fla. 1992), which the District Court distinguished incorrectly,[5] a material lien attaches at the time that those trees are identified to the contract and tagged for delivery with a deposit made to assure that they are delivered. Accordingly, Turners acts of obtaining, trimming and furnishing the trees on behalf of GAZEBO starts the clock running on GAZEBO's statutory notice period as well.[6] It strains credibility for GAZEBO to

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[5] The district court found Arlington inapplicable because there were "no affirmative acts taken by Gazebo which establish that Gazebo actually began to furnish materials, the trees, to the Stunkels". However, the actions of Turner in beginning to furnish materials and services combined with GAZEBO's actions in assuring that work was commenced is sufficient under the statute to start the notice period running.

[6] In addition, even if the selection of the trees cannot be identified as an over-the-counter sale, then the provisions regarding specialty goods apply, which requires that the notice to owner be given within 45 days of the day the trees were selected and preparations begun. See Oolite Ind. Inc. v. Millman Const. Co., Inc., 501 So. 2d 655 (Fla. 3d DCA 1987).

suggest that a materialman could have a lien for the materials it was to supply, but that the subcontractor who requested that the materialman supply those materials to meet its contractual obligations to the prime contractor and who will charge for those materials does not also have lien rights at that time. A materialman is someone who simply supplies materials and does not do any labor with respect thereto. A subcontractor, on the other hand, is someone who does supply labor, but may also supply materials. GAZEBO would have this court believe that they were providing only services, not material, and that, therefore, any statutory provisions applying to the actual procurement and furnishing of those materials only applies to materialman, not subcontractors. Nevertheless, pursuant to the applicable statutes, GAZEBO is deemed to be furnishing services or materials whether it does so directly or through another.

Furthermore, GAZEBO's suggestion that it did not have an actual oral contract with Bill Free until such a time as trees were actually placed in the ground and "a check was received" is equally misguided. Although there may be circumstances in which particular terms of a contract may be subject to a factual determination, it is invariably a legal determination whether or not that contract existed in the initial instance. In addition, where certain provisions are missing, the courts can supply them and imply the existence of the contract both in law and in fact. In the instant action that is exactly what the trial court accomplished. Accordingly, to allow the lienor, who even by its own assertion waited until the last possible day, to establish

the validity of a lien through the presentation of self-serving legal conclusions in the guise of factual testimony does nothing to promote certainty. In fact, it promotes confusion.[7]

GAZEBO suggests that, pursuant to Restatement of Contracts (Second), §50, this was an offer that required acceptance by performance and that the contractor made nothing more than an offer to purchase various types of palm trees at set prices which could only result in a binding contract upon the delivery to the owner's property, acceptance by the owner, and installation on the premises. (T.12).[8] This is a misapplication of the Restatement regarding contract formation.

The testimony established that Bill Free sought a subcontractor, in this case GAZEBO, who could provide trees that were acceptable to the STUNKELS and agreed to pay a set price for those trees once they were identified. Mr. Stunkel specifically identified and tagged the trees he wanted. Thus, those trees became identified to the contract. Thus, there was an offer and acceptance and a promise on the part of GAZEBO to obtain, deliver and install the trees on the premises. There was also a concurrent promise on the part of Bill Free to pay for those trees once they were installed. Even under the most liberal interpretation of the self-serving testimony of GAZEBO, any

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[7] It also may promote the wholesale use of oral rather than written contracts and may lead to perjury.

[8] Comment "b" which GAZEBO refers to simply does not support its conclusion. An example noted in that comment is an offer for a reward in which the offer itself requires acceptance by performance and does not invite a return promise. The instant contract is not of this type.

additional requirement that the STUNKELS had to re-approve or could reject the trees once they were delivered, is nothing more than a condition[9] on the obligor Bill Free's duty to pay for those trees. It does not affect the formation of an underlying contractual relationship. Indeed, the testimony of GAZEBO's representative identifies this term as a condition since it was sufficiently satisfied that the terms and conditions of the agreement had been complied with that it began digging the holes for the trees to be placed on the property and invoiced its services even before the trees arrived. If the STUNKELS were not satisfied with the trees, then the contractor would be relieved of its duty to pay and be free to obtain another subcontractor. It would not defeat the contract, but simply would apply an existing contract condition.[10]

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[9] Under Restatement of Contracts (Second), §224:

> A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under the contract becomes due.

See also §225 of the Restatement and illustration 3 (related to the condition of third party approval); and §62 (where an offer invites offeree to accept by performance or by promise, the beginning of performance or tender of a beginning is acceptance by performance and operates as a promise to render complete performance.

[10] In addition, even assuming that the STUNKELS had the ability to reject the trees once they were delivered, the court has to assume they would exercise that option in good faith and also has to assume also that any problem with respect to trimming of the trees could be correctable. If not correctable it would raise a breach of contract or breach of warranty claim, not defeat the existence of the contract vel non. Furthermore, this situation is much different than the earlier attempt to comply with the general offer to bid. As GAZEBO's representative testified, it would have been a waste of time for them to deliver

(continued...)

Finally, with respect to the trial court's additional finding, which GAZEBO incorrectly suggests is not reviewable here, analysis of the issue suggests that he trial court was well within its discretion in refusing to enforce the lien under the circumstances presented. Rather, the errors were of such a character that the trial court did not have to exercise its discretion to excuse those errors. Furthermore, if the test is whether the person to be charged was not adversely affected, GAZEBO presented no testimony or other evidence that the STUNKELS were not so affected and thus cannot even meet the test that would allow discretion in the initial instance.[11]

REASONS IN SUPPORT OF ACCEPTING JURISDICTION

This Court, in its Order setting a briefing schedule in this matter, deferred consideration of whether to accept jurisdiction of the case pending receipt of the briefs. Based upon the analysis and issues presented in the briefs, this Court should accept jurisdiction in order to determine this important issue related to the Mechanics Lien Statutes. Under the Statutes, which are to be strictly construed, but allow creation of a lien in circumstances in which unwritten, implied contracts can form the basis of the lien, it is imperative that this Court clarify whether potential lienors will be held accountable for the

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[10](...continued)
trees, dig holes and do other work if they did not have a contract. Here they did all of those things after the contract was formed.

[11] GAZEBO's suggestion that the STUNKELS have never paid for the trees at issue is contained nowhere in the record and is unsubstantiated. Accordingly, this court should ignore this statement.

effects of their oral agreements. Where, as here, a clear indicia of a contractual formation is present, then it is a question for determination by the court as to when that contract began and no legal conclusions in the guise of factual testimony should change the underlying legal principles to be applied by the courts.

CONCLUSION

For the foregoing reasons, the Stunkels respectfully request that this Court accept jurisdiction of this case, answer the certified question in the STUNKEL's favor, reverse the district court ruling, and remand with instructions to affirm the trial court.

Respectfully submitted,

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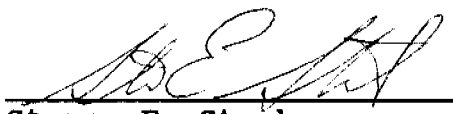
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on this 11th day of October, 1994 to Robert E. Ferencik, Jr., Esq., Leiby Ferencik Libanoff and Brandt, P.A., Attorneys for Appellant, 290 N.W. 165th Street, Penthouse 2, Miami, Florida 33169.



Steven E. Stark

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