OREGON SUPREME COURT DECISIONS

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Wills v. Zanello, et al, Multnomah County.

A. N. Wills, respondent, v. G. Zanello and Fred Zanello, partners doing business as G. Zanello & Son, and the Portland Railway Light & Power Company, a corporation, appellants. Appeal from the circuit court of Multnomah county. The Hon. William N. Gatens, Judge. Argued and submitted on July 6th, 1911. A. T. Lewis, attorney for respondent. Albert H. Tanner (Franklin T. Griffith on the brief), attorneys for appellants. Bean, J. Affirmed.

This is a suit in equity to foreclose a mechanics' lien on property owned by the Portland Railway Light & Power company in Sellwood, now a part of the City of Portland, being blocks O and P, and the building, known as the "Car Barns" situated thereon.

In the construction of the building, the defendants, G. A. Zanello & Son had a contract with the Portland Railway, Light & Power Company to do the brick work; A. N. Wills, the plaintiff, having made an agreement with them to furnish the brick therefor at $8 per thousand, and plaintiff claims to have delivered 603,300 bricks, amounting to $4,814.40, after deducting a credit for sand of $12.

Bean, J. The complaint is in the usual form. The defendants, by their answer, allege that no more than 562,614 bricks were delivered by plaintiff and used in the building, amounting to $4500.11, upon which they were entitled to a credit of $12, and deny the allegation as to attorneys' fees.

The first question for determination is raised by the demurrer to the complaint, and the testimony in the case. The defendants contend that the lien was not filed within 30 days after the material was furnished, as provided by Sec. 7420, L. O. L., nor within 30 days after the completion of the building, according to the time stipulated by such section, together with Sec. 7425, L. O. L., yet contend that it was filed prematurely, being filed before the completion of the building.

From the evidence it appears that the plaintiff commenced to deliver the brick about August 12, 1909, finishing his delivery thereof about September 27th, 1909. The brick work was completed about October 13, 1909, and the lien was filed on December 3, 1909, before the building was fully constructed. Construing together the two sections of the statute above alluded to, this court has held that the laborer or material man must file his lien within 30 days after the completion of the building, not necessarily within 30 days from the date of ceasing to furnish labor or material. Ainslie v. Kohn, 16 Or., 363; Coffey v. Smith, 52 Or., 538. The defendants claim that this lien was not filed within either of these sections that is that between the time allowed for filing, within 30 days from the time of furnishing the material and before the commencement of 30 days after the completion of the building, there was a hiatus during which period such lien could not be filed. In Ainslie v. Kohn, supra, it is said that whether the claim was filed within 30 days after the work and material were furnished was unimportant, provided it was done within 30 days after the completion of the building. In this contention counsel for defendants relies upon the rule laid down in Roylance v. San Luis Hotel Company, 74 Cal., 273, but an examination of the opinion in that case, at page 277, indicates that it is based upon a statute differing from ours. The reason for not allowing the lien to be filed prior to the completion of the building being that, "under the contract between the owner and the contractor, the owner agrees to pay the contractor a certain sum for constructing the building, and this sum is a fund which may be held under the statutes for the payment, so far as it will go, of all the claims of all the various subcontractors, for work and materials furnished by them to the contractor, who is the principal and head of all; and all the parties entitled to payment or contribution out of this fund should be able to reach the fund and get their proportionate shares thereof at the same time or within the same period of time." From the language used it would appear that this rule, following that prescribed in Davis v. Bullard, 32 Kan., 234, Seaton v. Chamberlain, 32 Kan., 239, and contained in Sec. 1428, 11 Jones on Liens, is applicable to a different statute than ours. Jones on Liens, Sec. 1432, states that "Where there are distinct contracts for different parts of a building, as for instance one contract to do all the stone work and to furnish all the material for the same, and another contract for the brick work, and another for the wood work, each contract must stand upon its own merits, and liens under the different contracts must be filed within the time limited from the time of the completion of the work under each contract." This work is instructive, but neither of the sections referred to apply to our statute.

As to the necessity for prompt enforcement, it is said in Phillips on Mechanics' Liens, Sec. 322: "It has been the policy of nearly every state which has established a system of mechanics' lien to protect the rights of owners and others who may become interested in the property, by requiring those who are entitled to its benefits to be prompt in the enforcement of their claims. The privileges secured mechanics and material men are unusual in their character, effective and sometimes oppressive in their behalf, and it is only just that they should be required to be diligent in their enforcement."

This reasoning and a careful examination of our statute would indicate that the lien for materials can be filed at any time after the furnishing of the last material, and before the expiration of 30 days from the completion of the building, when the materials for its construction is furnished to the contractor or subcontractor in charge thereof, who, by Sec. 7416, L. O. L., "shall be held to be the agent of the owner for the purposes of this act." Such we think, under the decisions construing the above mentioned statutes in Ainslie v. Kohn, supra, and Coffey v. Smith, supra, was the legislative intent. To hold that one furnishing material to the person having the contract for the brick work of a building must, before filing his lien, wait until the other contractors—the carpenter, tinner, plumber and painter—finish their contracts, and the building is completed (which is often a question of dispute), and thereby limit his time for such filing to 30 days thereafter, would in our opinion nullify a part of the provisions of the statute.

As to the amount in controversy, the evidence relative thereto does not appear to be in conflict, except as to the manner or arriving at the number of bricks furnished. The plaintiff and his foreman testify that the brick was loaded in the yard and started for the car barns under the supervision of the foreman, who kept a record thereof in the form of small slip books of about 100 tickets, of which there were an original, duplicate and triplicate. When a load was sent out one of these tickets was filled with the number of bricks forwarded, nearly every load containing 1950 bricks. The duplicate and triplicate were then given to the teamster, one to be left at the place of delivery, and the other signed by the person to whom the bricks were delivered and then returned to plaintiff, who from the stub of his ticket-book each day copied on tally sheets, from which he made up his account of 623,000 delivered bricks. After the completion of the brick-work the plaintiff and defendants agreed to, and did, "lump off" the brick remaining unused, estimating the number at 20,000. If it was understood or expected by either of the parties that the brick would be estimated from the number in the walls of the building after its completion, there would have been no necessity for "lumping off," or estimating such unused brick. When a wagon was filled, it appears the number o bricks therein could be easily estimated. About two-thirds of the tickets were signed by the defendants or their foreman, and returned to plaintiff. The receipts for 97 loads, hauled before defendants began construction, were unsigned for the reason that when delivery was made there was no one there to sign them. The plaintiff and his foreman testify that the record of those loads were kept in the same manner as that of the others.

For the purpose of ascertaining the number of cubic feet therein, two competent engineers measured the walls of the building, Mr. A. Richmond computing the number as 34,756, and Mr. D. W Taylor as 33,444 feet; the number of brick to each cubic foot being variously estimated at from 18 to 21. The discrepancy in their measurements created a difference of about 6,000 bricks, taking an average estimate per cubic foot. Then there is the usual waste to be considered, making it evident that any estimate is inaccurate, and, unless agreed to by the parties themselves, or rendered absolutely necessary, such a method should not be adopted, except in connection with the other evidence. From a consideration of all the evidence, taking the testimony of the plaintiff and his foreman, and the tickets, and checking the latter by the estimates of the different experts, we are of the opinion that 603,300 bricks were delivered to defendants and used in the building, such being the number claimed to have been delivered by plaintiff, after deducting the 20,000 estimated as unused.

In accordance with our understanding the litigants stipulated that, taking the proceedings and records into consideration, the court should fix a reasonable amount as attorneys' fees, without the introduction of evidence in regard thereto. There being $4,814.11 involved, of which $320 is disputed, and no tender of the amount due having been made, the lien for the whole amount being contested by defendants, we think $350, the amount allowed by the trial court, reasonable.

It follows that the decree of the lower court must in all things be affirmed, and it is so ordered.

Salone v. Queen City Fire Ins. Co., Multnomah County.

Christine Salone, appellant, v. Queen City Fire Insurance Co., of Sioux Falls, South Dakota, a corporation, respondent. Appeal from the circuit court for Multnomah county. Hon. John B. Cleland, judge. Argued and submitted July 20, 1911. E. E. Coovert for appellant. (Coovert & Stapleton on the brief). W. E. Farrell for respondent. (U. S. G. Cherry, Wilbur & Spencer, A. M. Dibble and W. E. Farrell on the brief). Burnett, J. Affirmed.

It was stipulated by the parties that this cause should be heard upon appeal on the findings made by the lower court as upon an agreed statement of facts, together with the fire insurance policy thereto attached as a part of the same.

From these sources we glean that Frank J. Rowland and his wife, Louise Rowland, at the date of the policy were owners of certain real property in Columbia county upon which they were then erecting a dwelling house. At that time also Rowland was an agent of the defendant company at St. Helens in that county having authority to act for it in contracting insurance, countersigning insurance policies and delivering the same to persons securing fire insurance from that company. At the date of the policy the plaintiff loaned to Rowland and his wife $1,000 in cash as evidence of which the Rowlands executed to her a promissory note of that date due in three years and secured the same by mortgage on their real estate mentioned and, further, as a part of the consideration for the loan and as a part of the transaction Rowland issued the fire insurance policy in question, countersigned the same as such agent and delivered it to the plaintiff. Attached to the policy and signed by Rowland as agent for the defendant company was the "Standard Mortgage Clause with Full Contribution," sometimes known as the "Union Mortgage Clause." It provided: "Loss or damage, if any, under this policy shall be payable to Christine Salene or assigns at St. Helens, Oregon, mortgagee, as interest may appear, and this insurance as to the interest of the mortgagee only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceeding or notice of sale relating to the property nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium under this policy, the mortgagee shall, on demand, pay the same; provided also, that the mortgagee shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee, and unless permitted by this policy, it shall be noted thereon and the mortgagee shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void." The standard mortgage clause in question further provided for the right of the company to cancel the policy, for proportional liability in case other insurance is effected upon the property and for subrogation of the company to rights of the mortgage in case of payment to the latter under the policy. It further appears from the findings of fact that the plaintiff before she paid any money to Rowland knew that he was the agent of the defendant and was also one of the owners of the property upon which he was attempting to effect insurance by means of the policy in question. The defendant never received any premium on account of the policy and did not know that the same had been issued until after the property in question was destroyed by fire. In fact, it knew nothing whatever of the transaction in any way until after the fire and upon the matter being brought to its notice disaffirmed the action of Rowland and refused to accept, ratify, confirm or approve the same.

The building was destroyed by fire July 18, 1909, at which time the plaintiff's note and mortgage were in full force and effect and wholly unpaid. Plaintiff complied with the terms of the policy in the matter of giving notice of the loss and demanding paymegt of the amount of insurance. The circuit court gave judgmet for the defendant and dismissed the action from which the plaintiff apoeals.

Burnett, J. It may well be conceded that the standard mortgage clause attached as a slip to the policy, if executed with authority or ratified afterwards by the company with full knowledge of the facts, would constitute an independent contract between the insurer and the mortgagee upon which the latter may bring an action directly against the former: Brecht v. The Law Union and Crown Insurance Company, 18 L. R. A. (ns.) 197; Bacot v. Phoenix Fire Insurance Company, 25 L. R. A. (ns.) 1226.

In these cases, as well as in all those cited by the appellant in support of this proposition, the insurance was effected by agents having authority to bind the insurance company and acting solely in the interests of the company. They all contain the feature that the mortgagee had no knowledge of misrepresentation as to title or condition of the property or other disqualifying act of the mortgagor. This element pervades all the cases cited and puts the mortgagee in the role of an innocent party.

In this case, however, the innocence is on the other side. It is conceded that the defendant never received the premium for the policy in question and, furthermore, had no notice whatever of the transaction between the mortgagor and mortgagee until after the building had been destroyed by fire. It is granted by the appellant that the policy was absolutely void as to Rowland for the reason that without the knowledge and ratification of his principal, the agent cannot bind the principal in a transaction carried on in the agent's own interest: Arispe Mercantile Company v. Capital Isurance Company, 9 L. R. A. (ns.) 1084. The basic reason of this principle is that no man can serve two masters. An agent cannot act in his own interest and at the same time in the adverse interest of his principal without the affirmative knowledge and approval of the principal. It is contended that inasmuch as Rowland was the local agent of the defendant it was bound by his acts within the scope of his real or apparent authority; but it is equally true that if one dealing with an agent assuming to act for his principal and at the time knows the limitations of the agent's authority, the former takes nothing by any act of the agent in excess of that authority. Here, the plaintiff knew that Rowland was the owner of the property to be insured and also knew that he was undertaking to act as the agent of the company in his own interest as against that of the company in the transaction. She knew that Rowland was providing a security for the possible payment of his debt out of the funds of the company. Aware of all these things, she dealt with him at her peril and if she would recover from the company she must bring home to the latter knowledge of the whole transaction before any liability arose upon the policy and further show that it approved or ratified the same, having such knowledge. The law imputes to her knowledge of the legal effect of the agent's operating in his own interest and adversely to the principal whom he claimed to represent. The conclusion of the whole matter is that the contract embodied in the standard mortgage clause attached to the policy was not executed as to the defendant because the person assuming to act for and bind the defendant had no authority to so act and plaintiff knew he had no such authority. Her rights cannot rise above their source which, as we have seen, is the void act of the mortgagor, Rowland. The contract thus executed furnishes her no cause of action.

The judgment is affirmed.

The State, ex rel., O. R. & N. Co., v. Bradshaw, Wasco County.

The State, ex rel., The Oregon Railroad and Navigation Company, petitioner, v. W. L. Bradshaw, judge of the circuit court of the state of Oregon for Wasco county, respondent. Mandamus. Demurrer to return argued and submitted July 7, 1911. W. W. Cotton and Snow & McCamant for petitioner. Bennett & Sinnott for respondent. Burnett, J. Demurrer sustained.

By the initiative process at the general election in November, 1910, the constitution of this state was so amended that the supreme court may in its own discretion take original jurisdiction in mandamus proceedings. Under the sanction of this amendment and proceeding according the the direction of Sec. 614, L. O. L., the chief justice of this court, upon the petition of the Oregon Railway and Navigation company issued an alternative writ of mandamus, directed to the circuit court of the state of Oregon for the county of Wasco and to Hon. W. L. Bradshaw, its presiding judge, the recitals of which are as follows:

"Whereas, it has been made sufficiently to appear to our said court by the affidavit of the petitioner herein, the Oregon Railroad and Navigation company, that heretofore there was begun in the said circuit court of the state of Oregon for the county of Wasco an action by the said petitioner against I. H. Taffe and M. E. Taffe, his wife, and the Celilo Improvement company, for the condemnation of certain lands then and now lying in the county of Wasco, state of Oregon, and that in said action such proceedings have been had as that heretofore, and on the 25th day of June, 1910, a verdict was returned in the said cause assessing damages for the taking of the said lands at the sum of $11,000.00; and

Whereas, it has been sufficiently made to appear to our said court that no judgment has been entered in the said cause, and that on the 12th day of September, 1910, and upon demand thereto by the plaintiff in the said action, the Oregon Railroad and Navigation company, you the said circuit court of the state of Oregon for the county of Wasco refused to enter judgment in the said cause; and it now being made sufficiently to appear that no judgment will be entered in the said cause except by the command of our said court; and,

Whereas, it is sufficiently made to appear by the said affidavit of the petitioner that the petitioner desires to appeal from the judgment to be pronounced in the said cause."

The command of the writ was that upon service of the same upon the court, it cause to be entered a judgment in the action therein described, or show cause why the same had not been done. The return to the writ is in the following language: "That the said court was not authorized to enter the judgment asked for or any judgment of said court, save and except the order which was en-

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