Wyoming Law Journal

Volume 5 | Number 4 Article 8

December 2019

Willful Abandonment and Enforcement of a Mechanics' Lien

Clifford N. Bloomfield

plaintiff sought to form a conspiracy to cut prices is no defense.[13] The defendant in the name case could have brought suit under the Sherman Anti-Trust Act to break the conspiracy.[14]

The gathering and dissemination of information regarding cost, production, or prices do not, however, come within the prohibitions of the Act and are not in themselves illegal, though this would tend to make prices more uniform throughout the industry.[15] If the publication is designed for the attainment of an illegal end such as price fixing, the publication is illegal.[16]

The Supreme Court has laid down a hard and fast rule, price agreements violate the Sherman Act; the benevolent effect is immaterial, they are illegal per se. The reasoning is sound, maximum price agreements do not help or benefit the public but only the manufacturer. The public should not be the victim. Price fixing by agreement of the manufacturers does not allow the cost of goods to be dictated by competition and the market, thus keeping prices at an arbitrary level for the financial advantage of industry's owners.

P. T. LIAMOS, JR.

WILLFUL ABANDONMENT AND ENFORCEMENT OF A MECHANICS' LIEN

Plaintiff brought this action to recover judgment, and to enforce said judgment for foreclosure of a mechanics' lien which had been filed against the defendant's real property. Under the terms of the contract the plaintiff agreed to move, alter and repair the defendant's house, furnish all labor, and complete the contract in October, 1946. The defendant was to furnish all materials. The plaintiff failed to perform upon the agreed date, but continued to work upon the dwelling from time to time until December 15, 1946, at which time he willfully and without cause abandoned the work leaving a substantial part of the contract unfinished. *Held,* that abandonment is a fact made up of an intention to abandon, and the external act by which the abandonment is carried into effect. Where a contractor fails to perform a considerable part of the contract, his failure, regardless of his intentions, constitutes a bar to the enforcement of a lien for the work performed. This rule is applied in the more recent cases, and it seems clear that the plaintiff's labor lien ceased to be enforceable

13. Ibid.
14. Ibid.
15. Maple Flooring Manufacturers' Association v. United States, 268 U.S. 563, 45 S. Ct. 578, 69 L. Ed. (1925).
16. United States v. Swift and Co., CCH Trade Reg. Service (9th ed.) 1941-1943, pg. 53, 382 (N.D. Ill. 1942).

by foreclosure when the abandonment was established as a fact. The court also denied recovery upon the count in quantum meruit since the abandonment was willful. *Gillis v. Gillette,* 184 F. (2d) 872 (9th Cir. 1950).

The United States Supreme Court has defined a mechanics' lien as ". . . a claim created by law for the purpose of securing a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as the buildings erected thereon."[1] Mechanics' liens were neither recognized at common law nor allowed in equity; and, therefore, the determination of the lien claimant's rights are involved directly with the interpretation of local statutes.[2] Although the lien is created by express legislative enactment, the right to the mechanics' lien is given only when the work is done and materials furnished by virtue of a contract with the owner of the land, his agent, trustee, contractor, or sub-contractor.[3] The Wyoming Supreme Court has, by dictum, indicated that an implied contract is sufficient.[4] This is not to say that it is the contract or the breach of the contract which creates the lien[5] but rather the fact that there is an obligation to pay arising from the performance of the contract by the mechanic.[6] The courts have held that the lien does not exist when the debt is barred by the statutes of limitations, when the contract is void, or when the party performs the work voluntarily without an express or implied promise to pay.[7]

In determining whether there is an actual abandonment of the contract the courts are in general agreement that there must be the intent to abandon as well as the act by which it is effected.[8] The Supreme Court of Wyoming recognizes these two elements of abandonment.[9] The abandonment of a written contract may be by parol,[10] and if the abandonment is to be proven by acts or conduct alone, they must be positive, unequivocal, and inconsistent with the intention to be bound by the contract.[11]

The Wyoming statutes expressly require that the labor and materials be furnished "under or by virtue of any contract with the owner of the property" before the mechanics' lien arises.[12] In the case of *Sumpter v.*

1. Van Stone v. Sillwell & Bierce Mfg. Co., 142 U.S. 128, 12 S. Ct. 181, 183, 35 L. Ed. 961 (1891).
2. South Fork Canal Co. v. Gordon, 73 U.S. 561, 6 Wall. (U.S.) 561, 18 L.Ed. 894 (1867).
3. Hengstenberg v Hoyt, 109 Mo App. 622, 83 S.W. 539 (1904).
4. Jordon v. Natrona Lumber Co., 52 Wyo. 393, 75 P. (2d) 378 (1938). The Wyoming mechanics' lien law has been largley borrowed from the state of Missouri. The decisions of the appellate courts of that state are therefore helpful and persuasive when pertinent.
5. Cain v. Rea, 159 Va. 446, 166 S.E. 478, 85 A.L.R. 945 (1932).
6. Sawyer-Austin Lumber Co. v. Clark, 172 Mo. 588, 73 S.W. 137 (1903).
7. Phillips on Mechanics' Liens, sec. 112 (2d ed. 1896).
8. Peal v. Gulf Red Cedar Co. of Calif., Inc., 15 Cal. App. (2d) 196, 59 P. (2d) 183 (1936); Hoff v. Girdler Corp., 104 Colo. 56, 88 P. (2d) 100 (1939).
9. Phillips v. Hamilton, 17 Wyo. 41, 95 Pac. 846 (1908).
10. Conroy Piano Co. v. Pesch, 279 S.W. 226 (St. Louis Ct. of App. Mo. 1925).
11. Sullivan Const. Co. v. Twin Falls Amusement Co., 44 Idaho 520, 258 Pac. 529 (1927).
12. Wyo. Comp. Stat. 1945 sec. 55-201.

Hedges, the court held that the willful abandonment of the contract precludes recovery upon the contract; and unless the plaintiff can show something from which a new contract or agreement can be inferred, there may be no recovery on the count of quantum meruit.[13] The fact that the owner takes possession of the building or structure constructed upon his land will not of itself raise an implied promise to pay for which a count of quantum meruit would lie since the ownership of the land necessarily involves the possession of the improvement.[14] Having lost his right to enforce the owner's obligation under the contract, the contractor no longer has an essential element of his right to enforce the mechanics' lien, *i.e.* an obligation of the owner to pay arising from the performance of the contract by the mechanic.[15]

The denial of a mechanics' lien to the contractor who has willfully abandoned his contract may seem restrictive upon this statutory remedy. However, it should be remembered that the main purpose for which the statute was created is to prevent the unjust enrichment of the property owner. If the contractor cannot bring his act of willful abandonment within one of the principal exceptions to the rule of this case, there has more than likely been no actual unjust enrichment of the property owner. The rule, then, would obtain the proper result in the majority of the cases.

CLIFFORD N. BLOOMFIELD.

THE DRIVE-IN THEATER; IS IT A NUISANCE?

Plaintiffs brought suit to enjoin the city from issuing a permit for the construction of a conventional drive-in theater within the city limits, and to enjoin the construction and operation of this theater. Plaintiffs contended that, should this drive-in theater be constructed, the lights, crowds, congestions, and noises would constitute a nuisance, would depreciate the value of their property, would be injurious to the health of those residing within the community, and would destroy the quiet and peaceful use and enjoyment of their homes. The site of the proposed theatre was in quiet residential neighborhood. The city has no zoning ordinance. *Held*: that where it is sought to enjoin an anticipated nuisance arising out of the prospective operation of a lawful business, it must be alleged and proved that the proposed use to be made of the property will constitute it a nuisance per se, or that a nuisance must necessarily result from the contemplated act or thing; that the essential elements of a nuisance are the

13. Sumpter v. Hedges, 1 Q.B. 673 (1898); Walling v. Warren, 2 Colo. 434 (1874).
14. Elliott v. Caldwell, 43 Minn. 357, 45 N.W. 845 (1890).
15. See note 6 supra.