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Mortgages and Mechanics' Liens—Priorities Where Separate Contracts Are Performed Subsequent to Attachment of the Mortgage Lien.—American-First Title & Trust Co. v. Ewing

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employer and the primary employer. The present court implicitly found that an intent to break down relations between neutrals was sufficient. Certainly the section's broad language permits this finding; yet, on this point, one case stands contrary to the instant decision. In *Retail Fruit Clerks v. NLRB*,[21] the Ninth Circuit held that picketing the entrance to a large market complex when the dispute was solely with the lessor who operated a minority of the stands inside was an unlawful secondary boycott. In dicta, however, the court stated its understanding of the section "indicates that the neutral employer must be doing some sort of business with the primary employer."[22] The court was silent on the merits of the Board's argument that there would be a violation if there was only a disruption of the neutral's business with his suppliers and found a violation in that the lessor and lessee were forced to cease doing business with one another. Under this rationale, since Cambridge Carriers, the primary employer in the dispute, did no business with any of the employers involved in the work stoppage in New Orleans, there was no cessation of the business dealings between the primary employer and neutral employers and hence there was no violation.

Despite the apparently unanimous agreement of congressmen and the weight of case authority that the section is sufficiently broad to forbid secondary pressures arising out of inter-union disputes, section 8(b)(4)(i)(ii)(B) contains a clause that secondary work stoppages or coercion, where an object is "forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees" are prohibited *unless* "such labor organization has been certified as the representative of such employees. . . ." Since Congress was apparently willing to allow neutral employers to be injured by a certified union when a primary employer refused to recognize it, it is possible to argue that the NMU should have been able to institute secondary pressure against MEBA. The harm to the neutral is as great whether the original source of the pressure is a union-employer or an inter-union dispute, and there is no reason to permit this form of union self-help in the one instance and not in the other. The purpose of Congress in allowing this exception to the prohibition against secondary pressures seems to be to secure the recognition of the certified union as bargaining agent, and it would be in line with this policy to secure acquiescence from a rival union as well as from the employer. On this reasoning, the instant decision is questionable.

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Mortgages and Mechanics' Liens—Priorities Where Separate Contracts Are Performed Subsequent to Attachment of the Mortgage Lien.— ***American-First Title & Trust Co. v. Ewing.***[1]—First Federal Savings and Loan Association, a Kansas lending institution, was mortgagee of the real estate in question, located in Oklahoma. Upon the mortgagor's failure to

21 249 F.2d 591 (9th Cir. 1957).
22 Id. at 594.

1 403 P.2d 488 (Okla. 1965).

maintain payments, First Federal commenced foreclosure proceedings in which American-First Title and Trust Company intervened as plaintiff because it had guaranteed the mortgage. The mortgaged property was subject to mechanics' and materialmen's liens which had been perfected. The trial court found that one defendant, Barlow, had commenced furnishing materials for the construction of a dwelling on the mortgaged premises on September 27, 1960, that the mortgage lien had been recorded two days later, and that the owner had subsequently continued his construction project, acting as his own general contractor and negotiating oral contracts with the remaining mechanics and materialmen for separate segments of construction. It was admitted that there had been full performance by each of the defendant lienors, after which proper lien statements had been filed. The trial court determined that the construction project had been continuous but that there was no general contract.[2] Upon these fact findings, it entered judgment permitting all lienors to foreclose, and adjudging all of the mechanics' and materialmen's liens superior to plaintiff's mortgage lien. The plaintiff's motion for a new trial as to that portion of the decision which established the priority of the defendants' liens was denied, and it appealed. By stipulation, the parties accepted the facts as found by the trial court, as well as the priority of Barlow's lien. The Supreme Court of Oklahoma HELD: Where there is a continuous construction project but no general contract, the rights of the mortgage lien claimant are superior to those of after-acquired mechanics' and materialmen's lienors.[3] In rendering its present decision, the court expressly overruled its holding in *Industrial Tile Co. v. Home Fed. Sav. & Loan Ass'n*[4] and re-adopted the rule of law first pronounced in *Fleharty & Co. v. National Loan & Inv. Co.*[5]

These cases were decided under a single controlling statute[6] which had been amended in 1919.[7] The applicable portion of the statute prior to 1919 read:

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[2] The construction of a dwelling may be said to be continuous when the activity continues from cellar hole to finished product without interruption or abandonment. The general contract would arise between the owner and a home builder who would subcontract portions of the project to various tradesmen. Contracts of this nature are governed by Okla. Stat. tit. 42, § 143 (1951). That act protects all subcontractors by vesting their liens as of the date of the general contract.

[3] However, the court chose to limit the effect of its decision by making the new rule prospective only. The judgment of the trial court here was affirmed. It could be said that appellant here lost the battle but won the war. The concept of prospective relief in this type of case appears proper. See Note, 60 Harv. L. Rev. 437 (1947). The court should, however, have declared that rights of parties which vested on or before the date of decision would be governed by the rule of Industrial Tile. Such a pronouncement would have eliminated uncertainty within the construction and lending communities as to priorities of liens arising after Industrial Tile but before this decision.

[4] 331 P.2d 918 (Okla. 1958).

[5] 89 Okla. 292, 215 Pac. 744 (1923).

[6] R.L. 1910 § 3862, Okla. Stat. tit. 42, § 141 (1951).

[7] Laws 1919, ch. 258, § 1, at 367. This statute was also amended in 1923; however, the 1923 amendment is not applicable to the present discussion since it was concerned with that portion of the statute dealing with contracts made by a lessee. Laws 1923, ch. 54, § 1, at 97.

> Any person who shall, under oral or written contract with the owner of any tract or piece of land, perform labor, or furnish material for the erection, alteration or repair of any building, improvement, or structure thereon . . . shall have a lien upon the whole of said tract or piece of land, the buildings and appurtenances. . . . Such liens shall be preferred to all other liens or incumbrances which may attach to or upon such land, buildings or improvements or either of them, *subsequent to the commencement of such building* . . .[8] (Emphasis added.)

The 1919 amendment added:

> . . . and such lien shall follow said property and each and every part thereof, and be enforceable against the said property wherever the same may be found, and compliance with the provisions of this Article shall constitute constructive notice of the claimant's lien to all purchasers and encumbrancers of said property or any part thereof, *subsequent to the date of the furnishing of the first item of material or the date of the performance of the first labor.*[9] (Emphasis added.)

The controlling statute is logically capable of two distinct constructions: one making the commencement of the construction project the date from which all liens emanate, the other establishing the lien of each participating mechanic and materialman from the date of *his* initial contribution to the project. In some previous cases, the Oklahoma Supreme Court had referred to the commencement of construction[10] as decisive in ascertaining the point in time at which all mechanics' liens attached, while on other occasions the furnishing of first material or performance of first labor by the individual lienor had been held to be the determinant.[11] Prior to *American-First*, the court had been confronted only twice with cases which demanded that the time of attachment of mechanics' liens be precisely defined. The first occasion was the 1923 *Fleharty* case[12] where the court construed a plumbing contract to be separate from the contract between the property owner and the builder because the plumbing company was not a party to the original contract. It was there held that the plumbing lien attached on " 'the date of the furnishing of the first item of material or the date of the performance of the first labor' under the *plumbing* contract."[13] (Emphasis added.)

A factual situation more closely resembling that of the instant case was presented in *Industrial Tile*,[14] where the court ruled that:

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8 R.L. 1910 § 3862, Okla. Stat. tit. 42, § 141 (1951).

9 Laws 1919, ch. 258, § 1, at 367.

10 See, e.g., Pittsburg Mortgage Inv. Co. v. Standard Lumber Co., 148 Okla. 297, 298 Pac. 885 (1931); Dickason Goodman Lumber Co. v. Foresman, 120 Okla. 168, 251 Pac. 70 (1926); Sherbondy v. Tulsa Boiler & Mach. Co., 99 Okla. 214, 226 Pac. 564 (1924).

11 See, e.g., Antrim Lumber Co. v. Claremore Fed. Sav. & Loan Ass'n, 204 Okla. 387, 230 P.2d 274 (1951); Antrim Lumber Co. v. Anderson, 173 Okla. 371, 48 P.2d 825 (1935); Braden Co. v. Robinson, 171 Okla. 278, 43 P.2d 437 (1934).

12 Fleharty & Co. v. National Loan & Inv. Co., supra note 5.

13 Id. at 293, 215 Pac. at 746.

14 Industrial Tile Co. v. Home Fed. Sav. & Loan Ass'n, supra note 4.

> The determinative factor, therefore, is that the owner have one project. How many persons he enters into contracts with to complete the project is of no concern. The lien of such person for the portion of the project performed by him, or it, is preferred and prior to all encumbrances which attach upon the land and building after the commencement of the building. In other words the lien in such case attaches as of the date of the commencement of the building, not as of the particular date of the furnishing of the material or performance of the labor of each.[15]

The *Industrial Tile* court distinguished the factual situation presented in *Fleharty*, emphasizing that the project must be continuous in order to invoke the general contract theory which protects all mechanics and materialmen from the date of the first performance under the general contract. *Industrial Tile* indicated that the absence of a formal general contractor did not warrant a denial of the protection to mechanics and materialmen of the relating-back theory of the general contract rule. So long as the project was continuous (not comprised of separate and distinct projects), the statute would protect the rights of late starting mechanics and materialmen from the date of the first mechanic's or materialman's performance.[16]

The court in *American-First* expressly overruled *Industrial Tile* and revived *Fleharty*. It attempted to justify its departure from the rule and rationale of *Industrial Tile* by resorting to a reappraisal of the *Fleharty* facts, stressing the amendatory language of the statute. It failed, however, to indicate the method by which its reappraisal of *Fleharty* was accomplished and merely stated that

> on re-examination of the *Fleharty* case we can only conclude that the case was decided upon the grounds that there was one continuous building project but the materialman's lien claimant failed to prove that it furnished labor and materials prior to the attachment of the mortgage lien.[17]

It is submitted that the rule of *American-First* is opposed to the historical expansion of mechanics' liens in Oklahoma and is contrary to the rule in Kansas, the state from which the statute was derived, as well as to the equities of the factual situation presented. Although, prior to 1919, the court was not called upon to answer the precise question which was before it in the present case, it would appear that, had the issue arisen, the court would have ruled that the date on which construction began was the critical date

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[15] Id. at 920.

[16] Id. at 921:

However, as applied to the assumed state of facts as outlined in the opinion, it not appearing that there was one continuous building project, and limited to the situation disclosed therein, the construction of § 141, supra, in the case of Fleharty v. National Loan & Inv. Co., supra, was correct and properly fixed the priority of the mortgage over the lien. This being true such case is not only not in conflict with, but is in conformity with our holding in this case.

[17] Supra note 1, at 492.

in fixing priorities.[18] Such a ruling would have been consistent with the rule in Kansas.[19]

The status of liens and encumbrances on property is normally determined by their priority in point of time,[20] and the determination of priority by the date of commencement of construction constitutes an exception to the rule. The courts of Oklahoma, in interpreting the statute creating the exception, have expressed the opinion that the legislative intent behind its enactment was the protection of the classes therein named.[21] Therefore, the mechanics' lien statute is to be liberally construed in favor of those persons who bring themselves within its provisions.[22] Applying a liberal construction to the statute, it is difficult to accept the restrictive effect which the present case attributes to it.

The absence of legislative clarity should not lead the court to interpret the statute restrictively without full consideration of all relevant factors. The present decision mentions four factors which would have to be disregarded if all mechanics' and materialmen's liens were related back to the commencement of the building. These factors are: (1) That the mechanics and materialmen had no privity of contract with the owner prior to the time the mortgage lien attached; (2) that they deraigned no contractual, accrued or vested rights from the owner; (3) that they had full notice and knowledge of the mortgage lien when they first furnished labor and materials; and (4) that they had no obligations to the owner or the mortgagee.[23] These factors, though all significant, are not exclusive, and it is submitted that the following factors, which the instant court failed to consider, make the rule of *Industrial Tile* the preferred method for establishing the vesting time for all liens. It is important to recognize that, in Oklahoma, mechanics' liens and

18 Basham v. Goodholm & Sparrow Inv. Co., 52 Okla. 536, 152 Pac. 416 (1915).

19 Kansas Mortgage Co. v. Weyerhaeuser, 48 Kan. 335, 29 Pac. 153 (1892); Deatherage & Ewart v. Henderson, 43 Kan. 684, 23 Pac. 1052 (1890).

20 Osborne, Mortgages § 181 (1951).

21 Eberle v. Drennan, 40 Okla. 59, 136 Pac. 162 (1913). In this case the court quoted from Putnam v. Ross, 46 Mo. 337, 338 (1870):

> The defendants' view seems to be founded upon the theory that the mechanic's lien enactment is in derogation of the common law, and that its provisions are therefore to be construed with a rigid strictness against those who seek to avail themselves of its intended benefits. There may be decisions which lend support to that theory, but the better opinion is that the provisions of the mechanic's lien law should be interpreted so as to carry out the object had in view by the Legislature in enacting it, namely: the security of classes of persons named in the act, upon its provisions being in good faith substantially complied with on their part. It has become the settled policy of this state, as in most, if not all, the states, to secure mechanics and material-men by giving them a lien upon the property they have contributed to improve or create. The law itself has grown up from small beginnings to its present unquestioned importance. And the whole course of legislation on the subject shows that it has been the intention of the legislature to avoid unfriendly strictness and mere technicality.
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> The spirit and purpose of the law is to do substantial justice to all parties who may be affected by its provisions.

22 Martin Coal & Coke Co. v. Brewer, 185 Okla. 169, 90 P.2d 653 (1939); Neves v. Mills, 74 Okla. 7, 176 Pac. 509 (1918).

23 Supra note 1, at 495.

mortgage liens attach both to the land and the improvements made upon the land, so that the lien having first priority in foreclosure will obtain satisfaction out of the entire proceeds of sale before other liens are satisfied.[24] Also relevant is the fact that the mortgagee is ordinarily in a position to determine the existence of a construction project and to protect himself accordingly. Chief Justice Halley's dissent in the present case sets out this position:

> The Legislature undoubtedly realized that it was better for the lending agencies to determine what improvements were upon the property when their mortgages are put of record. It is far better that they have this responsibility than a laborer. When a mortgage goes on record after a building is started the lending agency can protect itself by refusing to make a loan or by seeing that all bills are paid on the building as they accrued.[25]

The legislature's intent to ignore the time-priority rule in situations where a party is at a disadvantage because of his inferior bargaining position is illustrated by the laborers' lien statute which provides that laborers' liens will be superior to any other encumbrance "whether created prior or subsequent to the laborer's lien."[26] It cannot be said that the legislature, in drafting the statutory language, was unaware of the inferiority of the bargaining position held by mechanics and materialmen, nor can it be said that the legislature did not intend to compensate that class by affording them increased statutory protection.

The necessity to foreclose arises because of the mortgagor's default. In such a situation it would seem that legislative enactments, and judicial decisions under those enactments, should be concerned with balancing the equities between two equally blameless parties who have dealt with the defaulting mortgagor and, as between the two, it is submitted that assigning mechanics' liens priority over those of mortgagees is normally the more just solution. The lenders are much better equipped to invoke protective devices which will avoid subordination of their claims. Their superior bargaining position enables them to condition their secured loans with such self-protecting measures as the requirement of an affirmative statement by the prospective mortgagor-builder that no prior contracts have been made with mechanics or materialmen. If the mortgagor is unable to make such an affirmation, the lender can demand that waivers be secured from those mechanics and materialmen whose contract rights precede the mortgage. Still another device would require the mortgagor-builder to present receipts to the lender showing full payment of accrued construction costs before the mortgagee makes any further payment, or an agreement allowing payment of such costs directly by the lender. Each of these measures is in common use and casts no undue burden upon the lender.

Other considerations also favor the priority of mechanics' liens over

[24] Okla. Stat. tit. 42, § 141 (1951); Antrim Lumber Co. v. Claremore Fed. Sav. & Loan Ass'n, supra note 11; Basham v. Goodholm & Sparrow Inv. Co., supra note 18.

[25] Supra note 1, at 496-97.

[26] Okla. Stat. tit. 42, §§ 92-96 (1951).

those of mortgagees. The mortgagee will normally accept a mortgage as security for a loan only after a thorough credit check of the applicant, an inspection of the record title of the property and a physical inspection of the land. The mechanic is not in a bargaining position to demand such things as waivers nor can he afford to make thorough investigations of those who request his services. The mortgagee should not be allowed to have the swollen value of his secured asset accrue to him at the expense of the mechanics and materialmen whose time, money, labor and material have made the increased value a reality. The mechanics and materialmen, having fully performed, should have a higher priority in foreclosure than the mortgagee who has suffered only a defeat of his expectations by the failure of the mortgagor to repay the personal obligation for which the mortgage served as security.

If the court maintains a rigid adherence to the time-priority rule, a more equitable solution than the rule of the present case would be to measure the reasonable value of the services rendered by the mechanics and, as to that amount, allow the mechanic first recovery from the proceeds of the foreclosure sale. After the pool has been depleted to this extent, the full amount of the mortgage claim would be disbursed and the mechanic would take the remainder, if any, to make up any difference between the reasonable value of his services and the contract price. This method would allow the interests and equities to remain undisturbed; the mortgagee's anticipated enhancement of the property's value would be subordinated to the reasonable value of services rendered by the mechanic, while the mechanic's anticipated profit would be inferior to the bargained-for benefit of the mortgagee.

The *Fleharty, Industrial Tile* and *American-First* decisions are demonstrative of the judicial inconsistency which can be caused by legislative ambiguity. The Oklahoma Legislature, which has not removed the ambiguous language from its statute, must bear the major portion of the responsibility for the confusion surrounding the question of which class of claimants is to be favored. It remains to be seen whether the seven years of legislative silence following the decision in *Industrial Tile* was an affirmation of that interpretation of the statute or was the implied delegation of law-making power to the court, for these diametrically opposite results on priority cannot both reflect the intent of the legislature. The need for legislative action in this area is clear and the type of legislation needed should reflect a balancing of bargaining positions between mortgagees and mechanics and materialmen.

JAMES B. KRUMSIEK

Municipal Corporations—Special Assessments—Local Improvement Districts.—***Heavens v. King County Rural Library Dist.***[1]—This case involves the constitutionality of a special or betterment assessment for the construction of a library. A 1961 Washington statute[2] empowers rural library districts[3] to form local improvement districts[4] and to finance new libraries by

[1] 404 P.2d 453 (Wash. 1965).

[2] Wash. Rev. Code § 27.14.020 (Supp. 1963).

[3] A rural county library district is a library serving all the area of a county not