HECTORS LTD. ..... APPELLANT;

AND

THE MANUFACTURERS LIFE INSURANCE CO. and CITY INVESTMENT CORPORATION LTD. ..... RESPONDENTS.

1966
*Dec. 2
1967
Jan. 24

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Mechanics' liens—Contract to supply certain material for fixed price—Whether subsequent supply of material outside contract will keep mechanic's lien alive—The Mechanics Lien Act 1960 (Alta.), c. 64.

By a quotation dated January 23, 1964, the appellant offered to supply a contractor with a quantity of welded wire mesh. The offer was accepted in writing on February 3, 1964. From time to time these materials were delivered under the contract as the builder required them, and the last materials supplied under the contract were delivered in June 1964. The builder, from time to time, telephoned individual orders for special material—prefabricated lintel angles. These lintel angles were supplied as the telephone orders were received. The last of these orders was filed on October 14, 1964, and the appellant filed a lien on November 16, 1964, for a claim which included the balance owing on the original contract together with whatever was owing on the lintel angles.

In the submission of the appellant, the supply of lintel angles kept the lien alive and the claim, having been filed within thirty-five days after the last of the materials was furnished, as required by *The Mechanics Lien Act,* 1960 (Alta.), c. 64, was in time. This submission was ruled against at trial, and, on appeal, the decision of the trial judge was affirmed by a majority of the Court of Appeal. A further appeal was then brought to this Court.

Held: The appeal should be dismissed.

There was a finding of fact by the Courts below that the lintel angles subsequently supplied by the appellant were unrelated to the material supplied under the original contract—welded wire mesh. In a situation such as found here, where there was a contract to supply certain material for a fixed price and the subsequent supply of material outside the contract, the lien claimant could not tack on the subsequent supply of materials outside the contract and thus keep the lien alive. *Rathbone v. Michael* (1909), 19 O.L.R. 428, affirmed (1910), 20 O.L.R. 503; *Fulton Hardware Co. v. Mitchell* (1923), 54 O.L.R. 472; *Whitlock v. Loney,* [1917] 3 W.W.R. 971, followed; *Hurst v. Morris* (1914), 32 O.L.R. 346; *George Taylor Hardware Ltd. v. Canadian Associated Gold Fields Ltd.* (1929), 64 O.L.R. 94, distinguished.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], dismissing an appeal from a judgment of Milvain J. Appeal dismissed.

[1] (1966), 56 W.W.R. 449, 57 D.L.R. (2d) 581, *sub nom. Inglewood Plumbing & Gasfitting Ltd. v. Northgate Development Ltd. et al. and Hectors Ltd.*

*PRESENT: Fauteux, Martland, Judson, Ritchie and Spence JJ.

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HECTORS LTD. v. MANUFACTURERS LIFE INSURANCE CO.

John A. S. McDonald, Q.C., for the appellant.

R. J. G. McBain, for the respondents.

The judgment of the Court was delivered by

JUDSON J.:—The problem involved in this appeal is whether in a case where there is a contract to supply certain material for a fixed price, the subsequent supply of material outside the contract will keep a mechanic's lien alive. Milvain J. decided that it would not. His judgment was affirmed by the Court of Appeal[1] with McDermid J.A. dissenting. In my opinion, the judgment of the Appellate Division should be affirmed.

By a quotation dated January 23, 1964, Hectors Limited, the appellant in this Court, offered to supply Willmar Construction with 8,500 square feet of welded wire mesh (approximately 120 tons) for $24,821. This offer was accepted in writing on February 3, 1964. From time to time these materials were delivered under this contract as the builder required them, and there is a finding of fact that the last materials supplied under this contract were delivered in June 1964. No lien was filed until November 1964. If there had been no other dealings between the parties, the filing of the lien was clearly out of time, for the statute requires it be filed "within thirty-five days after the last of the materials is furnished".

However, from time to time the builder telephoned individual orders for special material—pre-fabricated lintel angles. These lintel angles had nothing to do with the original quotation for the supplying of welded wire mesh. They cannot be regarded as extras to that contract. They were supplied as the telephone orders were received. The last of these orders was filled on October 14, 1964 and the lien was filed on November 16, 1964 for a claim which included the balance owing on the original contract together with whatever was owing for the lintel angles. If the supply of lintel angles kept the lien alive, then the claim, being filed within a period of thirty-five days from October 14, 1964, was in time. This is the submission of the appel-

[1] (1966), 56 W.W.R. 449, 57 D.L.R. (2d) 581, *sub nom. Inglewood Plumbing & Gasfitting Ltd. v. Northgate Development Ltd. et al. and Hectors Ltd.*

lant, Hectors Limited, and it is this submission that has been ruled against both at trial and on appeal.

The Appellate Division founded its judgment on the general principles stated in *Whitlock v. Loney*[1], a decision of the Supreme Court of Saskatchewan *en banc*. These general principles are stated in 13 C.E.D. (Ont. 2nd), p. 347, as follows:

> Where material is supplied under a prevenient arrangement or under a continuing or entire contract, it makes little difference how long a time elapses between deliveries, so long as the lien is filed, within thirty-seven days after the furnishing or placing of the last material "so furnished or placed," and the date of the last material being furnished is all that is of importance. Under s. 21(2), it becomes wholly immaterial whether the material is furnished under but one contract or under fifty; and it will be seen that this is independent of the completion of the work but if there is a contract to supply certain material for a fixed price, the subsequent supply of material outside the contract will not keep the lien alive.

The Supreme Court of Saskatchewan in the *Whitlock* case found that the facts proved what has been referred to as a prevenient arrangement or a continuing or entire contract. For that reason they upheld the lien. But they recognized that in a situation such as we find here, and which the Alberta Courts have expressly found to exist, a lien claimant cannot tack on the subsequent supply of materials outside the contract and thus keep the lien alive.

There are decisions to the same effect, both before and after the *Whitlock* case, in the Ontario Court of Appeal —*Rathbone v. Michael*[2]; and *Fulton Hardware Co. v. Mitchell*[3].

In *Rathbone v. Michael* there was a contract to furnish certain specified materials for the sum of $1,700. The last delivery under this contract was September 16, 1908. Further material was supplied between August 1 and October 8, 1908, on separate orders from time to time. A divisional Court first found that this further material was outside the contract and that the time of delivery of material outside the contract did not extend the time for filing the lien to include a claim under the original contract. On an application to adduce further evidence before the same Court, it was found that the additional material had been improperly charged as an extra outside the original con-

[1] [1917] 3 W.W.R. 971, 38 D.L.R. 52, 10 S.L.R. 377.
[2] (1909), 19 O.L.R. 428.
[3] (1923), 54 O.L.R. 472.

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tract and that it should have been charged under and as part of the original contract. The lien was, therefore, upheld. This admission of new evidence and the affirmance of the lien was upheld on an appeal to the Court of Appeal; see: *Rathbone v. Michael*[1]. The underlying assumption of all the judgments is that if the materials had not been supplied as part of the contract, the filing of the lien would have been out of time.

Fulton Hardware Co. v. Mitchell, supra, is to the same effect. Here there were two contracts, one for a roof for $3,806, and another for a skylight. There were also materials supplied not connected with either of these contracts. The point in issue is stated in the judgment of Meredith C.J.O. at p. 473:

> It is contended on the appellant's behalf that, inasmuch as all the work done and materials supplied for purposes of the two contracts, as well as the materials supplied for purposes outside the two contracts, were charged for in one running account, and work was done on the roof contract within the 30 days, the lien for the materials is saved.

Meredith C.J.O. approved the principles enunciated in *Whitlock v. Loney*. The judgment of the Court is contained in the following paragraph from p. 474:

> There is nothing in the evidence to indicate that all the work which was done and all the materials that were supplied were done and furnished under one continuing contract; but on the contrary, the work done and the materials supplied for the roof contract were furnished under a separate contract from that as to the skylight and that as to the materials. What was supplied under the last mentioned contract would, no doubt, come within the principle relied on by the appellant, and it is to such a contract that the language of Riddell, J., in *Hurst v. Morris* (1914), 32 O.L.R. 346, at p. 351, must have had reference.

Counsel for the appellant relied entirely on *Hurst v. Morris*[2] and *George Taylor Hardware Ltd. v. Canadian Associated Gold Fields Ltd.*[3]. These are not cases where, as here, there was a contract to supply certain material for a fixed price and the subsequent supply of material outside the contract. They were cases where the material was supplied under a prevenient arrangement as required from time to time. As Meredith C.J.O. pointed out, this was the situation that Riddell J. was referring to in *Hurst v. Morris* when he said:

> Thus it becomes wholly immaterial whether the material is furnished under one contract or under fifty, and it will be seen that this is

[1] (1910), 20 O.L.R. 503. [2] (1914), 32 O.L.R. 346.
[3] (1929), 64 O.L.R. 94.

independent of the completion of the work. Most of the difficulty in this case arises from not considering the language of the Statutes.

Here we have a finding of fact by the Alberta Courts that the lintel angles subsequently supplied by Hectors Limited were unrelated to the material supplied under the original contract—welded wire mesh. Consequently, they followed the principle stated in *Rathbone v. Michael* and *Fulton Hardware Co. v. Mitchell* and held that *Hurst v. Morris* and *George Taylor Hardware Ltd. v. Canadian Associated Gold Fields Ltd.* had no application.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Cohen, McDonald, Filer & Sallenback, Calgary.

Solicitors for the respondent, Manufacturers Life Insurance Co.: Burnet, Duckworth, Palmer & Tomblin, Calgary.

Solicitors for the respondent, City Investment Corporation Ltd.: Barron, Barron & McBain, Calgary.