

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 5, 2009 Session

BOLON CUSTOM KITCHENS v. ROBERT AND NORMA PARMAN

**Appeal from the Circuit Court for Maury County
No. 12452 Stella Hargrove, Judge**

No. M2009-00495-COA-R3-CV - Filed March 5, 2010

Materials supplier filed suit to enforce a lien upon property for unpaid costs of improvement to the residence; the trial court granted supplier's motion for summary judgment. The property owners appeal, asserting that supplier's lien was barred by the filing of the Notice of Completion or, in the alternative, that supplier's Notice of Lien was not properly filed with the Register's Office. Finding that supplier had a valid lien, the trial court's judgment is affirmed.

Tenn. R. App. P. 2 Appeal as of Right; Judgment of the Circuit Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S. and ANDY D. BENNETT, J., joined.

David B. Herbert, Nashville, Tennessee, for the appellants, Robert and Norma Parman.

Donald R. Barrett and Samuel B. Dreiling, Franklin, Tennessee, for the appellee Bolon Custom Kitchens.

OPINION

This appeal involves the validity of a materialman's lien. The defendants, Robert and Norma Parman (the "Parmans"), appeal an order of the trial court granting summary judgment in favor of the plaintiff, Bolon Custom Kitchens ("Bolon").¹

¹ The material facts as recited in this opinion were gleaned from the record and the parties' briefs on appeal and do not appear to be in dispute.

I. Procedural and Factual Background

On November 9, 2007, the Parmans entered into a “New Construction Purchase and Sale Agreement” (“Agreement”) with Scott Construction (“Scott”) to purchase real property located in Spring Hill, Tennessee, owned by Scott. On November 14, Scott entered into a contract with Bolon to furnish materials and labor for improvements to the residence on the property. On December 14, Bolon completed its work on the home, but was not paid. On December 20, Scott conveyed the property by warranty deed to the Parmans and filed a Notice of Completion with the Maury County Register’s Office. On March 3, 2008, Bolon filed a Mechanic’s and Materialman’s lien (“Notice of Lien”) with the Register’s Office.

On May 5, 2008, Bolon filed a complaint in the Maury County Circuit Court against Scott and the Parmans, seeking a monetary judgment against Scott of \$13,626.00 for the work performed under the contract and that a lien be imposed on the property to the extent of Bolon’s claim. On May 29, the Parmans filed an answer and a cross-complaint against Scott. On June 4, Scott filed for bankruptcy; the case proceeded without the active participation of Scott. On July 10, 2008, the Parmans filed a motion to dismiss on the ground that the Notice of Lien did not contain a statutorily required sworn statement. On August 21, the trial court denied the motion, holding that the “recorded Notice of...Lien Claim substantially complie[d] with the applicable statutes and constitute[d] a valid lien claim.”

On October 16, 2008, Bolon filed a motion for summary judgment, asserting that a notice of completion is statutorily required to be served upon a prime contractor before it affects that contractor’s unrecorded lien and, consequently, that the filing of the Notice of Completion did not affect Bolon’s lien rights because Bolon was a prime contractor who did not receive service. In response, the Parmans contended that Bolon was a remote contractor whose unrecorded lien was barred by the filing of the Notice of Completion because remote contractors are not statutorily entitled to service before its unrecorded lien is affected; the Parmans also re-raised the issue of the sufficiency of the Notice of Lien, as set forth in their motion to dismiss.

On February 2, 2009, the trial court granted Bolon’s motion for summary judgment, finding that the “Notice of Lien at issue in this matter g[ave] rise to a valid lien which [wa]s superior to the any [sic] interest of the defendants herein” and decreeing that the “Notice of...Lien Claim...constitute[d] a valid lien in the amount of \$13,626.00” against the Parmans’ property. The Parmans filed a Notice of Appeal on March 5, 2009 and on May 4, this Court entered an order holding that the trial court’s February 2 order was not final because it did not resolve the claims against Scott. The Parmans were ordered to obtain a final order from the trial court and cause the order to be transmitted to this Court. The Parmans thereafter filed a motion in the trial court reporting that Scott had been discharged in bankruptcy and

asking the court to enter a final judgment in accordance with Rule 54.02, Tenn. R. Civ. P.; the motion was granted. The Parmans duly filed a supplemental record in this Court containing the trial court's July 1 order.

II. Statement of the Issues

The Parmans raise the following issues:

1. Was the Notice of Completion sufficient to release the lien of Bolon because the Parmans were equitable owners of the property under the theory of equitable conversion?
2. Was the lien filed by Bolon invalid and unenforceable for lack of a jurat?

Bolon raises the following issue:

1. Whether jurisdiction for this cause properly lies in the Court of Appeals of Tennessee because the Parmans have failed to comply with the mandatory and jurisdictional requirements of Tenn. R. App. P. 4.

III. Standard of Review

This case was resolved in the trial court upon Bolon's motion for summary judgment. Summary judgment is appropriate if no genuine issues of material fact exist, and the movant meets its burden of proving that it is entitled to a judgment as a matter of law. *See* Tenn. R. Civ. P. 56.03; *Martin v. Norfolk Southern Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008). We have reviewed the record and the parties' briefs on appeal and have determined that the materials facts are not in dispute; the only question is whether Bolon was entitled to judgment as a matter of law. Review of the trial court's conclusions of law is *de novo* with no presumption of correctness afforded to the trial court's decision. *See Kaplan v. Bugalla*, 199 S.W.3d 632, 635 (Tenn. 2006).

IV. Analysis

A. Appeal

Bolon contends that this appeal is not properly before the Court because the Parmans did not file a notice of appeal within the 30 day time-period following entry of the trial

court's July 1, 2009 final order, as required by Rule 4(a), Tenn. R. App. P.² While subsection (a) does not allow for a notice of appeal to be filed more than 30 days after entry of a final judgment, subsection (d) provides that "[a] *prematurely* filed notice of appeal shall be treated as filed after the entry of the judgment from which the appeal is taken and on the day thereof." (Emphasis added). The notice of appeal was filed by the Parmans after the court granted Bolon's motion for summary judgment; the order granting summary judgment declared that the lien recorded by Bolon was a valid lien on the Parman's property but did not address Bolon's monetary claim against Scott. The effect of the July 1 order was to determine that, in light of Scott's discharge in bankruptcy, final judgment was appropriate. Through the application of subsection (d), the notice of appeal filed on March 5, 2009 is treated as filed on July 1, 2009, the date of entry of the final judgment; consequently, this court has jurisdiction of this case.

B. The Notice of Completion

In order to be protected from unrecorded liens, the "owner or purchaser of improved real property...may, upon the completion of the improvement, record in the office of the register of deeds...a notice of completion." Tenn. Code Ann. § 66-11-143(a). The owner must "serve a copy of any notice of completion recorded with the register of deeds on the prime contractor." *Id.* "If a prime contractor is entitled to be served with a copy of any notice of completion recorded with the register of deeds, then the lien rights of the prime contractor not so served a copy shall not be affected by the notice of completion." *Id.* The question before the court, therefore, is whether Bolon was a prime contractor at the time of filing of the Notice of Completion.³ If Bolon is determined to be the prime contractor then its claimed lien is valid because Bolon was not served with the Notice of Completion; if Bolon was a remote contractor, then it was not entitled to service of the Notice of Completion and its claimed lien is lost.

² Tenn. R. App. P. 4(a) provides that "[i]n an appeal as of right to the...Court of Appeals, ...the notice of appeal...shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from."

³ A prime contractor is "any person other than a remote contractor who supervises or performs work or labor or who furnishes material, services, equipment, or machinery in furtherance of any improvement; provided, that the person is in direct privity of contract with an owner, or the owner's agent, of the improvement." Tenn. Code Ann. § 66-11-101(12).

This question, in turn, is determined by whether Scott was the statutorily defined owner of the property at the time the contract was entered into.⁴ The Parmans assert that Scott was not the owner at the time it contracted with Bolon because the Parmans became the “equitable owners of the property” upon signing the Agreement. In support of their contention, the Parmans rely upon the doctrine of equitable conversion, which provides that:

[A] contract for the sale of land operates as an equitable conversion and the vendee’s interest under the contract becomes realty and the vendor’s interest becomes personalty, and in equity the vendee is regarded as the owner, subject to liability for the unpaid price, and the vendor is regarded as holding only the legal title in trust for the vendee from the time a valid contract for the purchase of land is entered into.

Campbell v. Miller, 562 S.W.2d 827, 831-32 (Tenn. Ct. App. 1977).

While the Parmans obtained an equitable interest in the property upon signing the Agreement, Scott retained legal title to the property. Scott’s title fell within the statutory definition of owner, *i.e.*, “any person having any right, title or interest, *legal or equitable*, in real property” Tenn. Code Ann. § 66-11-101(8) (emphasis added), and enabled Scott to enter into the agreement with Bolon, thereby bringing Bolon into direct privity of contract with Scott and satisfying the statutory criteria to make Bolon a prime contractor, *see* Tenn. Code Ann. § 66-1-101 (12). Consequently, Bolon was entitled to service of the Notice of Completion before its lien rights could be affected.⁵ Tenn. Code Ann. § 66-11-143(a).

C. The Notice of Lien

In order to preserve a lien’s priority, Tenn. Code Ann. § 66-11-112 requires a lienor “to record in the office of the register of deeds of the county where the real property...lies, a sworn statement of the amount for, and a reasonably certain description of the real property on, which the lien is claimed.” Tenn. Code Ann. § 66-11-112(a). The statute provides a

⁴ An owner “includes the owner in fee of real property, or of a less estate in real property,...a vendee in possession under a contract for the purchase of real property, and any person having any right, title or interest, legal or equitable, in real property, that may be sold under process.” Tenn. Code Ann. § 66-11-101(8).

⁵ Scott Construction was also the record owner of the property at the time it contracted with Bolon and Bolon was entitled to rely on such recordation as proof that it was contracting with the owner of the property in determining its lien rights. *See C & C Aluminum Builders Supply v. Rynd*, 4 S.W.3d 191 (Tenn. Ct. App. 1999).

sample sworn statement, which calls for a “Notary Acknowledgment” after the signature of the lienor.⁶ Tenn. Code Ann. § 66-11-112(d).

The Parmans assert that the Notice of Lien filed by Bolon was invalid because the sworn statement accompanying the notice did not contain a jurat which, they contend, is a requirement of a valid sworn statement or affidavit.⁷ Specifically, the Parmans contend that, without a jurat, Ms. Atkins’ statement “does not specify who was a witness to [her] swearing and what type of oath was taken,” that “[t]he notary’s language makes no reference to [Ms. Atkins] being sworn in the presence of the notary,” and that, therefore, “the notary cannot truthfully aver that the statement made was sworn.” Upon a review of the record and the applicable law, we find that the notice of lien was valid.⁸

In support of their assertion that a jurat is required to properly register a notice of lien, the Parmans rely upon this Court’s holding in *D.T. McCall & Sons v. Seagraves*, 796 S.W.2d 457 (Tenn. Ct. App. 1990). In *D.T. McCall & Sons*, we found that a suppliers’ notice of lien was in “substantial compliance with the Legislature’s intention,” in part, because the sworn statement contained a jurat affirming that the statement was “sworn to and subscribed” before a notary public. *Id.* at 462.

Renee Atkins, Bolon’s president, executed the Notice of Lien, which contained the following language:

That the undersigned, Renee L. Atkins, being first duly sworn, states she is the Proprietor of Bolon’s Custom Kitchens; that she is authorized to sign this document, that the foregoing statements set forth in this Notice of Lien Claim are true and correct to the best of her knowledge and belief and that the amount owed by Scott Construction of TN and, (owner of the property) for labor, materials, supplies and equipment used in improving the real estate described herein is in the amount of \$13,626.

⁶ “An acknowledgment...is for the purpose of authenticating an instrument for registration”; it “authenticates the due execution of a document and is the formal statement of the person signing the document that his signature was freely done.” *D.T. McCall & Sons v. Seagraves*, 796 S.W.2d 457, 463 (Tenn. Ct. App. 1990).

⁷ A jurat is a “certification added to an affidavit or deposition stating when and before what authority the affidavit or deposition was made.” Black’s Law Dictionary (8th ed. 2004).

⁸ It is undisputed that the sworn statement contained the amount of the lien and the description of the property upon which the lien was claimed as required by Tenn. Code Ann. § 66-11-112(a).

The Notice of Lien also contained the following language from the Notary Public, accompanied by his signature and seal:

Personally appeared before me, the undersigned, a Notary Public in and for said County and State, Renee L. Atkins, with whom I am personally acquainted and who proved herself to be the Proprietor of Bolon's Custom Kitchens, and who, being authorized to do so, acknowledged she executed the foregoing instrument for the purposes therein contained.

We find that the Notice of Lien substantially complied with the statutory requirements. While we agree with the holding in *D.T. McCall & Sons* that a jurat contained in a notice of lien substantially complies with the legislative intent, we do not find that a jurat is the minimum requirement for compliance with the statute since the sample sworn statement set forth in subsection (d) contains only a requirement for a "Notary Acknowledgment"; the statute does not require jurat certification.⁹ Consequently, the notary acknowledgment of Ms. Atkins' sworn statement substantially complied with the statutory requirements of Tenn. Code Ann. § 66-11-112(a) and (d).

V. Conclusion

For the reasons set forth above, the trial court's judgment is AFFIRMED. Costs of this appeal are assessed against the Parmans for which execution may issue if necessary.

RICHARD H. DINKINS, JUDGE

⁹ The Parmans also assert that sworn statements or affidavits always require a jurat. The Tennessee Supreme Court has held, however, that "we have found no constitutional or statutory rule stating that an indispensable prerequisite to a valid affidavit is a jurat." *State v. Keith*, 978 S.W.2d 861, 869 (Tenn. 1998).