[Cite as *JJO Constr., Inc. v. Penrod*, 2010-Ohio-2601.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93230

JJO CONSTRUCTION, INC.

PLAINTIFF-APPELLEE

vs.

MICHAEL J. PENROD, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-631016

BEFORE: Stewart, J., Rocco, P.J., and Blackmon, J.

RELEASED: June 10, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Defendant-cross-claimant-appellant Refrigeration Sales Corporation, a supplier to a subcontractor on a construction project, appeals from a declaratory judgment finding that it failed to preserve its mechanic's lien rights against plaintiff-appellee J.J.O. Construction, Inc. ("JJO"), the general contractor on the project. Refrigeration Sales challenges a number of findings made by the trial court that fall into two groups: the adequacy of the lien application and the weight of the evidence. While we agree that the court erred by finding the lien application defective, we find no basis for reversing the court's factual finding that Refrigeration Sales did not timely record its mechanic's lien.

I

{¶ 2} JJO was the general contractor on a construction project to build a Rite Aid drug store. It subcontracted the installation of heating, ventilation, and air conditioning equipment for the building to Air Technologies. The contract specifically required that Air Technologies install "new" equipment. Air Technologies, in turn, contracted with Refrigeration Sales to supply the equipment. Refrigeration Sales provided the equipment to Air Technologies, but Air Technologies failed to tender payment to Refrigeration Sales, so Refrigeration Sales filed a mechanic's lien against the

project. As required by its contract with Rite Aid, JJO posted bond on the lien sufficient to cover Refrigeration Sales' claim against Air Technologies.

{¶ 3} JJO then brought this action, asserting a breach of contract claim against Air Technologies and seeking a declaration that Refrigeration Sales did not timely file its mechanic's lien. Refrigeration Sales filed a cross-claim against Air Technologies for breach of contract and a counterclaim against JJO seeking judgment on the lien. Refrigeration Sales also asked the court to order the underwriting surety to pay the proceeds of the bond. The parties tried the issues to the court, but neither Air Technologies nor its principals attended trial.[1] In findings of fact, the court granted judgment to both JJO and Refrigeration Sales on their claims against Air Technologies. As to the declaratory judgment claims, the court found that the mechanic's lien affidavit submitted by Refrigeration Sales was defective because Refrigeration Sales misidentified the property and the owner of the property and it failed to record its lien affidavit within 75 days from the date on which it last furnished material to Air Technologies. The court therefore invalidated and discharged the mechanic's lien.

II

[1]JJO learned that Air Technologies' corporate charter had been revoked by the secretary of state for nonpayment of the charter fee, so it named Air Technologies' controlling member, Michael J. Penrod, as a defendant. Penrod's attorney withdrew before trial, and Penrod found no replacement counsel.

{¶ 4} We first consider the assignments of error challenging the court's findings that Refrigeration Sales filed a deficient lien affidavit because the affidavit misidentified both the parcels of land and the owner of the land.

A

{¶ 5} A mechanic's lien is a prioritized security interest in the amount of unpaid labor or materials provided on a contract. In construction cases like this, a mechanic's lien creates rights in derogation of the common law — JJO had no contractual relationship with Refrigeration Sales, having only contracted with Air Technologies. Yet the law allows Refrigeration Sales to file a mechanic's lien that has the effect of prioritizing its claims against those of JJO, the general contractor, thus jeopardizing the completion of the construction project. This has the practical effect of putting JJO at risk of paying twice: once with Air Technologies as required by its contract and again with Refrigeration Sales in order to discharge the lien.[2]

{¶ 6} The law permits the use of mechanic's liens in furtherance of two public policies: protecting those who have provided labor or materials on a construction project and serving as a penalty for owners of property who could benefit from labor or materials that remain unpaid. See Koprince, The Slow Erosion of Suretyship Principles: an Uncertain Future for "Pay-when-paid"

[2] JJO's contract with the owner of the property stated that in the event a subcontractor filed a mechanic's lien, it was required to post a bond with a surety to discharge the lien.

and "Pay-if-paid" Clauses in Public Construction Subcontracts (2008), 38 Public Contract. L.J. 47, 50-51. But because mechanic's liens are in derogation of the common law, they are strictly construed and "the steps prescribed by statute to perfect such lien must be followed[.]" *C.C. Constance & Sons v. Lay* (1930), 122 Ohio St. 468, 469, 172 N.E. 283; *Crock Constr. Co. v. Stanley Miller Constr. Co.*, 66 Ohio St.3d 588, 592, 1993-Ohio-212, 613 N.E.2d 1027.

B

{¶ 7} R.C. 1311.02 states: "every person who as a subcontractor, laborer, or material supplier, performs any labor or work or furnishes any material to an original contractor or any subcontractor, in carrying forward, performing, or completing any improvement, has a lien to secure the payment therefor upon the improvement and all interests that the owner, part owner, or lessee may have or subsequently acquire in the land or leasehold to which the improvement was made or removed."

{¶ 8} To perfect a mechanic's lien, the subcontractor must file the lien with the county recorder by submitting an affidavit showing the amount due, "a description of the property to be charged with the lien, the name and address of the person to or for whom the labor or work was performed or material was furnished, the name of the owner, part owner, or lessee, if known, the name and address of the lien claimant, and the first and last

dates that the lien claimant performed any labor or work or furnished any material to the improvement giving rise to his lien." See R.C. 1311.06(A).

{¶ 9} The court found that Refrigeration Sales "incorrectly identified the owner as Rite Aid Corporation of Ohio." JJO offered evidence to show that the correct corporate name is "Rite Aid of Ohio, Inc." As noted, the courts have strictly construed the mechanic's liens statutes and have held that a failure to name the correct party is fatal to the lien. In *Hoppes Builders & Dev. Co. v. Hurren Builders, Inc.* (1996), 118 Ohio App.3d 210, 692 N.E.2d 622, the court of appeals strictly construed R.C. 1311.06(A) to find that it could "not interpret the name 'Mike Hurren' to be an equivalent substitute for the name 'Hurren Builders, Inc.'" Id. at 215.

{¶ 10} In *Efficient Air, Inc. v. Qualstan Corp.* [*In re Qualstan Corp.*] (Bankr.S.D.Ohio 2003), 302 B.R. 575, a federal bankruptcy court declined to follow *Hoppes Builders*, believing that its holding and that of similar cases "were wrong." The bankruptcy court stated:

{¶ 11} "Although both courts were correct in * * * stat[ing] that the procedural requirements of mechanics' liens' statutes should be strictly followed, the statute itself in this instance is liberal. Section 1311.06 in pertinent part states a lien affidavit must show '* * * the name of the owner, part owner, or lessee, *if known*.' O.R.C. § 1311.06 [emphasis added]. The language 'if known' in the statute mitigates in part the requirement to have

the absolute correct name. Certainly, if the Ohio legislature intended to have an absolute standard with regard to the names of the owners, it would not have included the 'if known' language." Id. at 586.

{¶ 12} The decision of a federal bankruptcy court on a question of Ohio law is not binding on us. *State v. Burnett*, 93 Ohio St.3d 419, 423-424, 2001-Ohio-1581, 755 N.E.2d 857 ("state courts are not bound by federal district court decisions"). *Efficient Air* is, however, highly persuasive. In *C.C. Constance & Sons*, the supreme court acknowledged that the "mechanic's lien law contains the provision that the same shall be liberally construed in so far as it is remedial[.]" *C.C. Constance & Sons*, 122 Ohio St. at 469. The "if known" language used by R.C. 1311.06(A) suggests that the General Assembly did not consider "the name of the owner, part owner, or lessee" to be a vital part of the affidavit. In *Queen City Lumber Co. v. O.G. Ent., Inc.* (Mar. 30, 1983), 1st Dist. No. C-820440, the First District Court of Appeals held that the "the gratuitous insertion of an extra name technically not properly included in the affidavit" was a superfluity that was "neither misleading nor sufficient to invalidate the lien." Id., citing *Holmes v. J. B. Schmitt Co.* (App. 1931), 11 Ohio Law Abs. 648, 650; Demann, Ohio Mechanic's Lien Law, Second (1953), Section 9.5.

{¶ 13} Refrigeration Sales' alleged defect in naming the wrong corporation is of no consequence — the difference between "Rite Aid

Corporation of Ohio" as stated by Refrigeration Sales and the correct name of "Rite Aid of Ohio, Inc." is too trivial a basis for finding the affidavit defective. There was no allegation that the very slight difference in names was misleading nor could such an allegation have been sustainable, if made. This was a major construction project and JJO, as the general contractor, knew that Rite Aid was the owner of the building. It is beyond belief that the interested parties in this case would not have been able to ascertain the correct owner of the building based solely upon the company name listed in the affidavit. To hold otherwise would lead to the absurd proposition that even the most technical mistakes like a misspelling or omitted punctuation would result in a fatal defect to the mechanic's lien.

{¶ 14} We therefore find that the court erred as a matter of law by finding the affidavit deficient for listing an incorrect name for the owner of the building.

C

{¶ 15} We likewise disagree with the court's conclusion that Refrigeration Sales' affidavit failed to give "a description of the property to be charged with the lien[.]"

{¶ 16} R.C. 1311.04(A)(1) states an owner who contracts for the performance of any labor or work or for the furnishing of any materials for an improvement on real property that may give rise to a mechanic's lien must

file a notice of commencement. This notice must contain, in affidavit form, the legal description of the real property on which the improvement is to be made. See R.C. 1311.04(B)(1). For purposes of this division, "a description sufficient to describe the real property for the purpose of conveyance, or contained in the instrument by which the owner, part owner, or lessee took title, is a legal description." Id. In other words, the legal description of property contained in a deed is sufficient to satisfy the statute.

{¶ 17} As for the party claiming the lien, R.C. 1311.06(D) requires a description of the property that will be charged by the lien, and further states that a legal description of the property is sufficient if made consistent with R.C. 1311.04(B)(1). "An incorrect description of the property that is the subject of a mechanic's lien generally vitiates that lien." *Internatl. Refractory Serv. Corp. v. Woodmen of the World Life Ins. Soc.* (1990), 68 Ohio App.3d 513, 516, 589 N.E.2d 79.

{¶ 18} Refrigeration Sales submitted an affidavit that identified the subject property parcels with the same legal description used by Rite Aid in its notice of commencement, except for one detail: the description of Parcel No. 2 listed a Permanent Parcel Number of "443-47-008" while Rite Aid's notice of commencement listed the Parcel No. 2's Permanent Parcel No. as "443-17-008." It is uncontested that Rite Aid does not own Permanent Parcel No. "443-47-008."

{¶ 19} A "permanent parcel number" is not the same thing as a "legal description." A "legal description" of real property "means a description of the property by metes and bounds or lot numbers of a recorded plat including a description of any portion of the property subject to an easement or reservation, if any." See R.C. 5313.01(E). A "permanent parcel number" is a sequential number assigned to real and public utility property parcels in the county by the county auditor. See R.C. 319.28(A). Unlike a legal description of property, the designation of permanent parcel numbers is not mandatory, and even if established within a county, a permanent parcel numbering system can be rescinded by agreement of the county auditor and county treasurer. Id. Hence, Ohio statutes recognize the distinction between a legal description and a permanent parcel number. See, e.g., R.C. 5721.18(B)(1) ("In any county that has adopted a permanent parcel number system, the parcel may be described in the notice by parcel number only, instead of also with a complete legal description * * *.")

{¶ 20} Construing R.C. 1311.06(A) strictly, we conclude that an affidavit that contains a correct legal description of property subject to a mechanic's lien is sufficient even if it includes an incorrect permanent parcel number. The statute only requires a legal description of the owner's property, so any reference to a permanent parcel number would be a superfluity. Indeed, had the mechanic's lien affidavit set forth a correct permanent parcel number and

omitted any legal description of the property, we would arguably be compelled to find that the affidavit failed to adhere to the strict terms of the statute. So any reference to a permanent parcel number, even if incorrectly stated in the affidavit, is not a fatal defect under R.C. 1311.06(A).

{¶ 21} The evidence showed that Refrigeration Sales did include the correct legal description of the property as required by R.C. 1311.04(B)(1): it gave the same legal description of the property as that given by Rite Aid in its notice of commencement. In any event, JJO has not contested the validity of the legal description used by Refrigeration Sales, so the court had no grounds for finding the affidavit defective on that basis.

III

{¶ 22} The factual issues raised in this appeal collectively complain that various aspects of the court's judgment relating to the timeliness of the affidavit are against the manifest weight of the evidence.

A

{¶ 23} Principles of appellate review require us to presume that court's factual findings are correct and further require us to affirm the court's judgment if those factual findings are supported by some "competent, credible evidence going to all the essential elements of the case." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus. In doing so, we acknowledge that the court is in the best position to weigh the

evidence and judge the credibility of witnesses. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 79-80, 461 N.E.2d 1273.

B

{¶ 24} The parties agree that Refrigeration Sales had to file its mechanic's lien affidavit within 75 days from the date on which it last furnished material to Air Technologies. See R.C. 1311.06(B)(3). Refrigeration Sales recorded its mechanic's lien in the amount of $30,731.01 on January 31, 2007. In the affidavit it filed in conjunction with its mechanic's lien, Refrigeration Sales represented that it last furnished material (two "power exhausts") to Air Technologies on January 22, 2007. JJO disputed this claim, arguing that Refrigeration Sales could only prove delivery of equipment on October 31, 2006 and offered testimony to show that all of the heating, ventilation, and air conditioning work on the project had been substantially completed by January 18, 2007. Refrigeration Sales offered testimony to show that on January 22, 2007, it sent two power exhausts to Canton Erectors, a third-party that would transport the units to the job site and lift them on the roof of the building.

{¶ 25} The parties agreed that the shipment date was crucial to determining the timeliness of the lien — if Refrigeration Sales last furnished power exhausts on October 31, 2006, the 75-day time in which to file the mechanic's lien expired on January 14, 2007; if the power exhausts were

furnished to Canton Erectors Company on January 22, 2007, the lien would be timely.

{¶ 26} In its findings of fact, the court found that "[t]he equipment listed on RSC's January 23, 2007 invoice was shipped to Canton Erectors in Canton, Ohio on January 22, 2007. RSC failed to establish any connection between Canton Erectors and Air Technologies, JJO, or the Project." The court also found that Refrigeration Sales failed to establish that the equipment sold to Air Technologies on January 22, 2007 had been incorporated into the project. It found that Refrigeration Sales altered a January 23, 2007 invoice to remove the words "damaged equipment" when JJO's contract with Air Technologies specified that all HVAC equipment must be "new." It therefore concluded that the equipment shipped to Air Technologies on October 31, 2006 was the last equipment furnished by Refrigeration Sales that could form the basis for a mechanic's lien.

{¶ 27} Refrigeration Sales argues that it was entitled to judgment on the mechanic's lien because the court found that power exhausts had shipped to Canton Erectors on January 22, 2007, thus establishing that it filled its mechanic's lien within 75 days from which it last furnished materials for the project.

{¶ 28} R.C. 1311.12(A)(1) states in part:

{¶ 29} "(A) A mechanic's lien for furnishing materials arises under sections 1311.01 to 1311.22 of the Revised Code only if the materials are:

{¶ 30} "(1) Furnished with the intent, as evidenced by the contract of sale, the delivery order, delivery to the site by the claimant or at the claimant's direction, or by other evidence, that the materials be used in the course of the improvement with which the lien arises;

{¶ 31} "(2) Incorporated in the improvement or consumed as normal wastage in the course of the improvement[.]"

{¶ 32} While the court found that the power exhausts were "shippped" to Canton Erectors, there was no evidence to show that the power exhausts were "delivered" as required by the statute. Refrigeration Sales maintains that it offered testimony by its "planning inspect estimator" to show that the power exhausts were delivered, but that assertion is a mischaracterization of her testimony. She claimed that the order acknowledgment from the manufacturer showed that the power exhausts were supposed to be shipped directly to Canton Erectors, but conceded that the January 22, 2007 invoice showed that the power exhausts had been shipped from Refrigeration Sales to Air Technologies in Dalton, Ohio. She further conceded that she had no record that acknowledged delivery of the power exhausts to either Air

Technologies or Canton Erectors. When asked if she knew where the power exhausts were shipped, she answered, "I don't know."

{¶ 33} The credit manager for Refrigeration Sales testified that he placed a credit hold on Air Technologies' account due to its non-payment of other equipment used in the construction project and suspended delivery of the power exhausts. He rescinded the credit hold after acceding to JJO's demands that the power exhausts be shipped so that the project could be completed. He testified that the January 22, 2007 invoice showed that the power exhausts were shipped from a Refrigeration Sales warehouse used to store damaged equipment directly to Canton Erectors, but offered no evidence to show that the power exhausts were actually delivered. He also conceded that he had no knowledge of whether Air Technologies had been billed for two power exhausts.

{¶ 34} For its part, JJO offered testimony contradicting the assertion that it called the Refrigeration Sales credit manager to demand shipment of the power exhausts and that it received an invoice for the power exhausts because Air Technologies had not paid Refrigeration Sales.

{¶ 35} The evidence needed to uphold the validity of the lien required proof of one of two points: did Refrigeration Sales actually deliver the power exhausts or were those power exhausts actually incorporated into the building? Either fact should have been simple to prove. There must have

been multiple sources that could confirm delivery of the power exhausts: a shipping manifest or receipt or even the direct testimony from a representative of Canton Erectors could have proved that the power exhausts were delivered. The incorporation of the power exhausts into the project should have been simple to prove with evidence or testimony showing that the units were actually placed on the roof. So when Refrigeration Sales failed to offer any proof on what should have been easy to establish, the court could rationally have concluded that no such proof existed. And to further diminish Refrigeration Sales' case, the court heard the credit manager concede that he had altered the January 22, 2007 invoice removing a notation stating "damaged equipment." The construction contract called for the installation of "new" equipment and the credit manager said that he altered the invoice to avoid confusion — he said the equipment was undamaged, but came from a "damaged equipment warehouse." Although the alteration of the January 22, 2007 invoice might have been for a benign purpose, the court could have viewed this testimony in conjunction with the lack of proof to conclude that no delivery had been made. With the steps prescribed in the mechanic's lien statute being strictly construed against the lien, the court's judgment finding that Refrigeration Sales failed to timely file its lien was not against the manifest weight of the evidence.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR