S. C. No. 14937.

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

IN THE MATTER OF "MECHANICS' LIEN ACT", Chapter 178 of the Revised Statutes of Nova Scotia, 1967, and amendments thereto.

BETWEEN:

D & E INDUSTRIES LIMITED, a body corporate, — Plaintiff Respondent

-and-

OLE DANIELSEN and ERNEST EISNOR, — Defendants Appellants

HEARD — at Halifax, N. S., April 17, 1970 before the Honourable Chief Justice McKinnon, the Honourable Mr. Justice Coffin, and the Honourable Mr. Justice Cooper of the Appeal Division.

OPINION — May 19, 1970.

COUNSEL — Walton W. Cook, Esq., for the plaintiff-respondent

F. R. Saunders, Esq.,)
V. Blaine Allaby, Esq.,) for the defendants-appellants.

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COFFIN, J.A.:

This was an action under the Mechanics' Lien Act, Chapter 178, R.S.N.S. 1967.

The respondent Company constructed for the appellant Ole Danielsen a car wash in Mahone Bay, Lunenburg County, the last work having been done on December 23, 1968.

A Mechanics' Lien was filed against the "Estate of Ole Danielsen and Ernest Eisnor" on January 31, 1969.

A certificate of lis pendens was registered in the office of the Registrar of Deeds for the registration district of Lunenburg in the County of Lunenburg, Bridgewater,

Nova Scotia, on March 24, 1969, March 23rd of that year having fallen on a Sunday.

The defendants-appellants raised certain preliminary objections:

1. There was no evidence that the plaintiff authorized or executed the claim of Lien nor is there evidence that the car wash was constructed on the lands described therein.

As to the first portion of this objection, the claim was on file as Exhibit N/A with the documents in the case and forms part of the record. The Registrar of Deeds testified that it was registered. The affidavit of David Emeneau is annexed to the claim of Lien.

As to the second part, it is obvious from David Emeneau's evidence that the car wash was to go on the property on which Ernest Eisnor operated an Esso Service Station. Mr. Ole Danielsen himself said in cross-examination in answer to a question as to the location of the land - "It is on the corner of Highway 3A and Clearland Street."

2. There was no proper evidence to establish that the plaintiff is a body corporate under the laws of the Province of Nova Scotia or of Federal jurisdiction or otherwise - nor that the "plaintiff is a body corporate under any law coming within the jurisdiction of this Honourable Court," entitled to carry on business in Nova Scotia and bring this action.

David Emeneau, an officer of the Company, said that its head office was on Lincoln Street, Lunenburg, that it was incorporated April 28, 1965, and that he knew it to be a Company "Because of a Certificate of Corporation." He further stated that the full status was maintained during 1968 and 1969.

3. That Ole Danielsen's interest in the steel equipment was as purchaser under a conditional sale agreement, filed under the provisions of the Conditional Sales Act, 1967, R.S.N.S., c. 48, and thus cannot be affected by this action.

This Conditional Sale Agreement was "filed" in the office of the Registrar of Deeds December 9, 1968. It was not "recorded" as a document in any way affecting the real estate.

In my view there is adequate evidence that the steel was erected on a concrete foundation to which it was affixed. It was not a chattel and could not under all the circumstances of this case be considered subject to the Conditional Sale Agreement as against the respondents.

4. That the interest of Ole Danielsen was that of lessee only and was thus subject to s. 7(2) of the Act.

> "7 (2) Where the estate or interest upon which the lien attaches is leasehold, the fee simple may also, with the consent of the owner thereof, be subject to the lien, provided that such consent is testified by the signature of the owner upon the

claim of lien at the time of the registering thereof, verified by affidavit."

Mr. Danielsen's own evidence was that Ernest Eisnor was the owner of the property and he the lessee. If that evidence be accepted at face value, he cannot very well dispute his landlord's title. He did admit that he had an agreement with Ernest Eisnor as to the eventual ownership of the property.

I agree that the proof of the title is somewhat sketchy just as that of the incorporation of the plaintiff Company leaves much to be desired, but I believe the situation is quite clear and that the appellant Ole Danielsen did have an "estate or interest in the land," which can be the subject of a lien under the definition of owner in s. 1(d) of the Act.

I am not sure that there is sufficient evidence of Mr. Eisnor's involvement in the whole matter to make his interest subject to the lien, but that of Ole Danielsen under an agreement with Eisnor is an "estate or interest" within the meaning of the Act.

I do not consider any of these objections fatal.

The trial judge made this comment:

"There was some argument presented by the Defence that the action was not maintainable against the Defendants on the grounds that the Defendant Danielsen's interest was leasehold only and Eisnor being the owner of the realty he had

> not given his consent by signature upon the claim of lien (Sec. 7 of the Mechanics Lien Act). There was also some argument that the steel structure was not part of the Realty and the title remained in the Vendor under the Conditional Sales Act. If these matters are correct they were not established to my satisfaction."

I agree that the evidence is not in great detail but it is there and the trial judge could draw inferences from those facts which were placed before him. I do not feel that he was clearly wrong.

The main issue between the parties is the final cost of the work. The plaintiff's account was for $4,399.25 of which $500.00 was paid October 31, 1968, leaving a balance of $3,899.25 as the amount of the claim. The trial judge credited the appellant with $300.00 for cost of defects in the building when erected and allowed the plaintiff the balance - $3,599.25.

He does not specifically state whether he is allowing the lien against both defendants or indeed against even the interest of Ole Danielsen. He says merely - "There will be judgment for the Plaintiff in this amount . . ." referring to $3,599.25.

There were some defects - a leak in the cement work in the utility room, man-hole covers stuck by cement. There is no dispute about the allowance of $300.00 for these defects.

There is no doubt that the plaintiff was not too familiar with the type of construction he was undertaking.

He did make a "rough" price after examining some drawings given him by Danielsen. He did not remember exactly what it was but he said: "I also gave to him a tendered "price for the erection of the steel which I said I couldn't "even think about standing behind because we had no drawings "for the steel itself."

The defendant's evidence was that the prices mentioned were $1,200.00 for the slab construction, that is, the foundation work and $600.00 for the erection of the building.

I do not think too much turns on these figures. They were quite irrelevant to the actual requirements even accepting the evidence of Mr. Joseph Mason called for the defence. Mr. Danielsen admitted that they were both feeling their way along.

Apparently Mr. Danielsen objected even to the alleged price first given but he nevertheless allowed the plaintiff to proceed.

The area was levelled with a back hoe and plaintiff proceeded to dig out footings at the site. The forms were installed September 23, 1968.

The building was to be set on a concrete slab, but after work commenced the defendant Danielsen made a change requiring the erection of concrete walls to raise the building. The effect of this was to raise the building two feet. It required no additional steel.

The concrete foundation took from September 23, 1968 to October 24th to complete - one month including excavation.

The erection of the steel began November 4, 1968 and was completed December 7th, another month. David Emeneau quite frankly admitted his Company's inexperience in erecting steel, but he said he brought in competent people to do it.

> "Q. Yet it took competent people a month to do it?
>
> A. That's right."

He obtained the services of Mr. Tanner of Atlantic Bridge, who he said "was a fully qualified charge hand "of Atlantic Bridge working in their steel department."

The only comparable building to which Mr. Emeneau could refer was a car wash constructed for Nauss Brothers, having four bays, whereas the building in question had two bays.

I quote the following from the direct examination of Mr. Fred Nauss:

"Q. Are these buildings, do they bear any relationship to one another or is there any likeness between the two?

A. They are of similar structure but the one in Bridgewater is larger than the one in Mahone Bay. There are four bays in the one in Bridgewater and in Mahone Bay two bays."

The plaintiff's account was drawn as follows:

"TO: Construct foundation for Car Wash.		
Labour & Transportation:	1,539.07	
Materials: (as per attached slips) including H. Tax $32.34	1,463.18	
		$3,002.25
TO: Erect steel building for Car Wash.		
Labour & Transportation:	1,332.58	
Materials: (as per attached slips) including H. Tax $.76	64.42	1,397.00
		$4,399.25
LESS: Payment October 31/68		500.00
TOTAL TO DATE		$3,899.25"

Invoices were provided which support a sum for disbursements slightly in excess of those claimed on this statement.

For labour and transportation we have only the statement itself in evidence.

The position of the appellants is that there was a firm price of $1,800.00 for construction, and allowing $450.00 for change of design, the balance owing after crediting $300.00 to correct deficiencies and the deposit of $500.00, the amount owing would be $1,450.00.

Should the Court not accept $1,800.00 as the proper basic price, it was contended on behalf of the appellants

that the best the plaintiff could hope for was an award on the basis of quantum meruit.

To support a conclusion on this principle, they submitted the testimony of Joseph Mason, of Halifax, estimator and construction supervisor for Stephen and Fiske Construction Limited, engaged in general construction, with over seven years experience in that Company.

He estimated the maximum cost for the labour in the foundation of the Mahone Bay project six or seven hundred dollars. He found no difficulty with the material used but he felt the labour was high. Two weeks was more than adequate for the time required to complete the foundation. In his view the labour was six hundred and fifty to seven hundred dollars high on both foundation and erection of the steel. Two weeks would be enough even for an inexperienced crew to erect the metal building.

The total cost he estimated in the area of $3,000.00.

The change made in raising the foundation two feet he said "could run approximately Three Hundred and "Fifty to Four Hundred Dollars."

To correct the deficiencies he allowed two or three hundred dollars.

He distinguished the Nauss building because "His included electrical and plumbing which would make up a "major portion of that contract."

He admitted that a slow crew would cost a little higher but felt that the Company "should put the foreman "on that knows that particular job."

His three thousand dollar estimate was based on the completed work; but he was asked on cross-examination:

> "Q. What do you say about the difference in the cement work that was to be done there as to whether that was a separate Four Hundred dollar item or not? Is it Thirty-four Hundred or Three Thousand Dollars?
>
> A. If you came in in the middle and you were ready to pour the walls and somebody stopped you and you had to tear down the inside wall and rebuild them, it would be over and above the Three Thousand Dollars.
>
> Q. So you are up to Thirty-four Hundred Dollars if that takes place?
>
> A. Yes."

In my view there is absence of agreement on the price to be paid and the compensation should be awarded upon a quantum meruit. Macaulay and Bruce "Canadian Mechanics' Liens" p. 34.

The only evidence the plaintiff tendered was his account which I have already quoted.

The plaintiff's evidence is not too clear in detail.

We know the Company was asked to erect the steel for a car wash. Mr. Emeneau at the trial complained that one of the difficulties was that no erection drawings had been provided - "just a blue line drawing." He did say that a gentleman who was sent down by the supplier was of no value in the erection of the building because he was a sales representative and could not assist in the problem.

It is quite true that the plaintiff Company did not have wide experience in this work. Nevertheless it did the work, albeit the time required for its completion was perhaps too great. The plaintiff Company hired a man from Atlantic Bridge with special knowledge of steel erection. This must have cost the plaintiff something but we do not know the exact amount, as the time sheets were not presented.

Mr. Mason's evidence must be taken into consideration but, in all fairness, it is clear that he was talking about optimum conditions from the point of view of experience and efficiency.

The plaintiff should not be paid too much nor should it be penalized.

I would award the plaintiff Company $3,900.00 from which must be deducted the deposit of $500.00 and the allowance for defects - $300.00, leaving a balance of $3,100.00.

The plaintiff is entitled to a lien against the estate of Ole Danielsen in the property in question.

There was no contract with the defendant Ernest Eisnor, nor was any service performed for him. His interest in the property is not subject to the lien nor is he liable for personal judgment.

As success was divided, the plaintiff's costs on the trial will not be disturbed but there will be no costs to either party on the appeal.

J. H. Coffin
J.A.

Halifax, N. S.,
May 19, 1970.