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980061

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Supreme Court No. 980061

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SUPREME COURT

MAY 22 1998

Almont Lumber & Equipment Company, )  
a/k/a Marshall Lumber Company )  
a corporation, )

Appellant, )

vs. )

Mainard B. Dirk and )  
Sandy K. Dirk, )

Appellees. )

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

MAY 22 1998

STATE OF NORTH DAKOTA

APPEAL FROM JUDGMENT OF SOUTH CENTRAL JUDICIAL DISTRICT COURT  
MORTON COUNTY, CITY OF MANDAN, NORTH DAKOTA  
THE HONORABLE BURT RISKEDAH, PRESIDING

\* \* \* \* \*  
\*  
\* BRIEF OF APPELLANT \*  
\* ALMONT LUMBER & EQUIPMENT COMPANY \*  
\*  
\* \* \* \* \*

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STATEMENT OF THE ISSUES

- I. DOES AN ENDORSEMENT STAMP UNDER A LIEN WAIVER NOTICE CONSTITUTE A SIGNATURE FOR PURPOSES OF A KNOWING AND VOLUNTARY RELINQUISHMENT OF THE RIGHT TO A MECHANIC'S LIEN?
- II. CAN A LIEN WAIVER BE EXTENDED TO MATERIALS FURNISHED AFTER THE DATE OF THE TIME PERIOD COVERED BY SAID WAIVER?
- III. IS MARSHALL LUMBER ENTITLED TO FORECLOSE UPON ITS LIEN?



### STATEMENT OF THE CASE

This is an action to foreclose a mechanic's lien for building materials furnished to Mainard Dirk and Sandy Dirk for the construction of a house in Mandan, North Dakota. The matter was brought on for trial in District Court, County of Morton, State of North Dakota on November 26, 1997, before the Honorable Burt L. Riskedahl, District Court Judge, sitting without a jury. The Court executed Findings of Fact, Conclusions of Law, and Order for Judgment on February 5, 1998, which awarded the Plaintiff a judgment against the Defendants and determined that the mechanic's lien of the Plaintiff dated January 9, 1996, was declared void and unenforceable. The Plaintiff has appealed from the decision of the lower court.

### STATEMENT OF THE FACTS

Almont Lumber and Equipment Company is a corporation in the State of North Dakota engaged in the business of wholesale and retail sale of lumber and building materials. Almont Lumber and Equipment Company also operates under the name of Marshall Lumber Company, (hereinafter Marshall Lumber). (Tr. p. 3). Appellant's principal place of business is located in Mandan, North Dakota. (Tr. p. 3). Appellee, Mainard Dirk, (hereinafter Dirk) at the time of this action was a contractor in the Bismarck/Mandan area. (Tr. p. 3). Marshall Feland (hereinafter Feland) is President of Almont Lumber and Equipment Company. (Tr. p. 3).

The parties entered into an agreement in August of 1992 whereby Dirk would open one credit account for purchasing building supplies and materials from Marshall Lumber. (Tr. pp. 3-4). Under the terms of the agreement, Dirk was to pay any balance due on the account by the 10th of the following month. (Tr. p. 4). For any charges not paid within that time period, a finance charge of 18% per annum would be assessed against the account. (Tr. p. 18). Dirk was not only aware of but agreed to the finance charge as was shown by his signature on several of the invoices, and Dirk's historic payment of the finance charges assessed against his account. (Tr. pp. 18-19); (Pl. Exh. 1, 5 & 10).

Dirk authorized others to charge on his account. (Tr. pp. 6-7). As a rule, Dirk and others in his employ signed or initialed the invoices at the time materials were purchased. (Tr. pp. 6-73, 92); (Pl. Exh. 5, 10). However, in many instances, Dirk would be in a hurry and tell Feland to "mark it down" on his slip. (Tr. pp. 6-7).

During the course of business, Dirk, on several occasions, asked Feland to prepare estimates and prices for material lists. (Tr. pp. 7-8). In October of 1994, Dirk requested an estimate on a pole barn to take to the bank for financing. (Tr. pp. 8-10). A few days later Dirk gave Feland the go ahead to order materials for the barn. (Tr. p. 8). Feland subsequently ordered the metal

for the building. (Tr. p. 8).

In December of 1994, Dirk made a Five Thousand Dollar (\$5,000.00) payment on his account. (Tr. p. 19). Shortly after making the payment, Dirk contacted Feland and canceled materials for the pole barn. (Tr. p. 26). The December 1994 payment to Marshall Lumber came from the proceeds of a bank loan. (Tr. p 93).

On January 4 of 1994, Dirk requested a price estimate from Feland for a material list Dirk prepared for the construction of a home. (Tr. pp. 10-12). Feland, at Dirk's request, priced the list, having added additional materials for a deck at Dirk's request. (Tr. pp. 11-12); (Pl. Exh. 3).

Several months later Dirk came to Feland and told him that Feland's bid had been the lowest and that Dirk would be getting the materials for the house from Feland. (Tr. p. 97). Feland testified that he told Dirk he couldn't provide Dirk any more materials on credit until Dirk made a payment on his account. (Tr. p. 27). Dirk responded by requesting a typed list of the material price list to take to the bank. (Tr. pp. 12, 27). Feland had his wife type the material list as requested by Dirk. (Tr. p. 12). (Pl Exh. 4).

The material list was presented to 1st Southwest Bank by Dirk as a bill. (Tr. pp. 69, 75). Dirk had previously obtained a construction loan from First Southwest Bank. (Tr. pp. 67-68).



By presenting the "bill" to the bank, Dirk was able to get funds to apply to his account at Marshall Lumber Company. (Tr. pp. 75).

Shortly thereafter, Dirk delivered to Marshall Lumber, a check in the amount of \$21,594.47. (Tr. pp. 19-20). Said check was stamped with Marshall Lumber's "deposit only" stamp and subsequently deposited in Marshall Lumber's bank account. (Tr. p. 20).

The \$21,594.47 check was applied to Dirk's account in the same manner as every other payment made by Dirk. (Tr. p. 20) Following application of the payment, Dirk had a credit balance of Thirteen Thousand Three Hundred Sixteen Dollars and Forty-seven Cents (\$13,316.47). (Tr. p. 20).

No discussion took place between Feland and Dirk concerning the opening of a separate account or that the June 26, 1995 payment was to be handled any differently than other payments. (Tr. pp. 20-21). Dirk did not contact Feland following receipt of account statements following application of the June 26, 1995 to his account to discuss any problems with how the payment had been handled. (Tr. pp. 94, 102-103).

Following the June 26, 1995 payment, Dirk began to purchase materials for the construction of his home. Credit purchases by Dirk were separated by job. (Tr. pp. 30-31). Materials for each job were kept on separate invoices. (Tr. pp. 30-31).



Dirk did not question any transaction with regard to his account until he was served with a Notice of Intention to File a Lien by Plaintiff. (Tr. pp. 93-95). Following receipt of the Notice, Dirk took Feland out to breakfast in an effort to resolve the matter. (Tr. p. 23). After Feland refused to hold off filing the Mechanic's Lien, Dirk came into the Lumberyard and requested copies of all of his invoices. (Tr. pp. 23-24). Several days later, Dirk came back to the lumberyard stating that he had found numerous mistakes on his account. (Tr. p. 24). Dirk refused to show Feland the errors stating that Feland could find the errors himself. (Tr. pp. 24, 107-108).

After Dirk's visit, Feland had his bookkeeper go through every invoice on Dirk's account line by line to look for errors. (Tr. pp. 22-24). As a result of the reaccounting, Dirk owed Marshall Lumber an additional Eight Hundred Eighty-one Dollars and Fifty-six Cents (\$881.56). (Tr. pp 25-26); (Pl. Exh. 6).

Prior to filing a mechanic's lien, Feland had contacted Dirk in the fall to inquire about getting a payment on Dirk's account as the account was in severe arrears. (Tr. p. 28). Dirk promised to pay the balance on his account once he closed on his house. (Tr. pp. 27-28).

In December when Dirk moved into his house, Feland again inquired as to when he could expect to receive payment. (Tr. p. 28). Dirk stated that once he sold his double-wide trailer, he

would settle up with Feland. (Tr. p. 28). Feland inquired as to the amount of equity Dirk had in the trailer home. (Tr. p. 28). Dirk stated that a mortgage was owing against the trailer. (Tr. p. 28). Feland felt that he had no choice but to file a mechanic's lien in order to secure his right to receive payment for the materials provided to Dirk. (Tr. p. 28).

Dirk then promised to have Feland paid up within six months. (Tr. p. 23). Dirk sold the trailer and received payment on the other jobs for which he had previously received materials from Marshall Lumber. (Tr. pp. 105-106). Dirk did not paid off Marshall Lumber as promised. (Tr. p 106).

**Defendant's Claim.** Dirk claimed that the lien waiver endorsed by Marshall Lumber operated to waive any mechanic's lien for any materials provided by Marshall Lumber.

**The building materials for Dirk's house were furnished after Execution of Lien Waiver.** Marshall Lumber did not supply any materials for Dirk's house until July 2, 1995. (Pl. Exh. 1). The last delivery occurred on October 30, 1995 with some minor additional materials being delivered between October 30, 1995 and December 2, 1995.

By December 2, 1995, Marshall Lumber had provided building materials in the amount of \$20,103.88 which had yet been unpaid. In December, 1996, Mainard Dirk and Sandy Dirk were served with a Notice of Intent to Claim Mechanic's Lien. Specifically, Dirks

were served, by certified mail a copy of the Notice of Intent to File a Mechanic's Lien on December 23, 1995. (App. p. 115). The Mechanic's Lien Statement and Account of Demand Due was recorded and served on January 9, 1996. (Pl. Exh. 8).

**The Trial Court's Decision.** Judge Burt Riskedahl interpreted the mechanic's lien waiver in his Findings of Fact and Conclusions of Law and concluded that "By endorsing and processing the First Southwest Bank draft dated June 26, 1995, the Plaintiff, Marshall Lumber is estopped from asserting a mechanic's lien for materials furnished." Findings of Fact, Conclusions of Law and Order for Judgment, (App. p. 27).

Judge Riskedahl also concluded that the Mechanic's Lien recorded against the property was not properly perfected . . . since a valid lien waiver was issued by Defendant. Findings of Fact, Conclusions of Law, and Order for Judgment, Item 48, App. p. 20.

Judge Riskedahl did not make a finding regarding how the lien would affect the purchase of materials after the date of the waiver, specifically June 26, 1995.

#### **SUMMARY OF ARGUMENT**

The mechanic's lien statute was created to protect materialmen such as Marshall Lumber. Marshall Lumber properly perfected its mechanic's lien in accordance with North Dakota statutes.



The first issue of appeal relates to the court's improper application of the facts to the law. The court erroneously failed to recite any precedent or law supporting the conclusion that a deposit stamp constitutes "a signed writing voluntarily and intentionally relinquishing a known right or privilege". The facts of the case clearly show that Marshall Lumber did not "voluntarily and intentionally relinquish its right to a mechanic's lien. The facts also clearly show that Marshall Feland did not sign a writing waiving such right. The lien waiver was in small type on the back of a bank check. Said waiver was stamped with a bank deposit endorsement. Marshall Feland did not have knowledge of the waiver. The Defendant brought the draft from the bank and did not even know of the lien waiver's existence. (Tr. p. 97, lines 6-11). There was no testimony or evidence presented that either party was aware of the existence of the lien waiver. Yet, the court concluded that the stamped endorsement was made with "full knowledge" of the lien. (App. p. 24). The court's finding that the lien waiver was valid was clearly an error.

The second issue of appeal is whether the court properly construed or interpreted the language of the Lien Waiver allegedly executed by Marshall Lumber. The waiver clearly refers to building materials purchased on or before June 26, 1995, and waives mechanics liens for materials provided prior to June 26,



1995. Marshall Lumber, as of June 26, 1995, had provided no material for the Dirk house. The Lien Waiver clearly was intended to affect only those materials purchased prior to June 26, 1995, and the court erroneously interpreted the document as extending to a list of estimated materials. A list which was not a part of the alleged lien waiver.

The trial court clearly erred in not ruling on the affect of the lien to the extent of the \$20,103.88 in building materials provided by Marshall Lumber after June 26, 1995.

#### ARGUMENT

Mechanic's lien statutes were created to protect suppliers of material and labor in the construction and building trade, and mechanic's lien law is to be liberally construed to protect materialmen and laborers. Pudwill v. Bismarck Lumber Company, 89 N.W.2d 424, 429 (N.D. 1958); 53 Am.Jur.2d Mechanic's Liens Section 6, p.520.

North Dakota's mechanic's lien law allows a mechanic's lien to be perfected by, "[a]ny person who improves real estate by the contribution of labor, skill or materials, whether under contract with the owner of such real estate or under contract with any agent, trustee, contractor, or subcontractor of the owner . . . ." N.D.C.C. Section 35-27-02.

Under the requirements of N.D.C.C. Section 35-27-11, the mechanics lien claimant is not entitled to a lien unless he:

- "1) keeps an itemized account thereof separate and apart from all other items of account against the purchaser;
- 2) serves a written notice by registered or certified mail upon the owner subject to Section 35-27-02, demanding payment of such account and notifying such owner if payment is not made within fifteen days (15) of the date of mailing such notice a lien will be perfected according to law; and
- 3) records with the Register of Deeds of the county in which the land, building or improvement is situated, a verified notice in writing signed by the person entitled to the mechanic's lien or by his authorized agent stating all of the following:
  - a. The name of the person in possession of the land;
  - b. The description of the property to be charged with the lien;
  - c. The date of the contract;
  - d. That a mechanic's lien against the building, improvement, or premises will be perfected according to law unless the account shall have been paid."

Unless a mechanics lien claimant deals directly with the owner, he must give the owner notice that he is about to furnish materials to a contractor and the probable cost thereof, in order to lay foundation for the filing of a valid lien. See, Schaffer v. Smith, 113 N.W. 2d 668 (N.D. 1962). Notice of intention to claim a mechanic's lien is not a prerequisite to perfecting a lien against a person owning property, who had contracted for the material to be used in erecting a building or making improvements

therein. See, Northwest Mut. Sav. and Loan Assn. V. Kessler, 268 N.W. 692 (N.D. 1936).

Marshall Lumber, although not required to, provided Dirk with a Notice of its intent to file a mechanic's lien, nevertheless fulfilled the requirements for providing notice. As was shown by Plaintiff's Exhibit 8, Marshall Lumber kept a separate itemized account, of materials which were used in the construction of Dirk's home apart from all other charges against the account.

Marshall Lumber recorded its Notice of Intention to Claim a Mechanic's Lien with the Morton County Register of Deeds office and served said notice upon Dirk by certified mail December 23, 1995. The language of said notice included a notification that if the owner did not make payment within fifteen days (15) of the filing of the notice, a lien would be perfected according to the law. (Pl. Exh. 7). Dirk, during his testimony, acknowledged receipt of the notice of intent to file a lien. (Tr. p. 107).

Marshall Lumber complied with the requirements of N.D.C.C. Section 35-27-11 for an entitlement to a mechanic's lien. (Pl. Exh. 7).

N.D.C.C. Section 35-27-13 provides that every person desiring to perfect a lien shall record with the Register of Deeds office of the county in which the property is situated, within ninety days after all his contribution is done, a



mechanic's lien describing the property and stating the amount due.

On January 9, 1996, approximately 71 days after completing its agreement for the delivery of materials, Marshall Lumber filed with the Register of Deeds office for Morton County a Mechanic's Lien for materials furnished to Dirk for construction of his house on the above referenced property. (Pl. Exh. 8). Said mechanic's lien was served upon Dirk by registered mail on January 11, 1996. Marshall Lumber's action in filing the mechanic's lien was well within the ninety day statutory period and is entitled to enforce the mechanic's lien pursuant to N.D.C.C. S 35-27-24, by this foreclosure action.

I. AN ENDORSEMENT STAMP UNDER A LIEN WAIVER DOES NOT CONSTITUTE A SIGNATURE FOR PURPOSES OF EXECUTING A KNOWING AND VOLUNTARY RELINQUISHMENT OF THE RIGHT TO A MECHANIC'S LIEN.

Dirk claims that Marshall Lumber waived its right to a mechanic's lien for material furnished for Dirk's house when Marshall Lumber endorsed the June 26, 1995, bank draft containing a lien waiver in the form of an endorsement notice on its back. The alleged waiver of lien found in the preprinted endorsement notice on the back of said bank draft provides as follows:

"NOTICE BEFORE ENDORSING MECHANIC'S  
LIEN WAIVER  
IN CONSIDERATION OF PAYMENT RECEIVED ON AND BY  
THIS ENDORSEMENT THE PAYEE WAIVES ANY AND  
ALL MECHANIC'S LIENS ACQUIRED BY REASON OF  
LABOR PERFORMED OR MATERIALS, SKILL OR  
MACHINERY FURNISHED PRIOR TO AND INCLUDING  
THE 26 DAY OF JUNE 1996 TO THE



PREMISES SITUATED AT  
LOT 3 OF LOT K IN SECTION 15, TOWNSHIP 139, RANGE 39,  
MANDAN, NORTH DAKOTA."

A party entitled to a mechanic's lien may waive that right by a signed writing, or may be estopped to assert the mechanic's lien by acts conduct constituting estoppel. See, N.D.C.C. 35-27-02; 1-01-08; 1-01-28; Mechanical, Inc. V. Nereson, 466 N.W. 2d 568 (N.D. 1991). A waiver requires the voluntary and intentional relinquishment of a known right or privilege. Peterson v. Front Page, Inc., 462 N.W. 2d 157 (N.D. 1990). A waiver involves the act and conduct of only one of the parties. 28 Am.Jur.2d Estoppel and Waiver, Section 30(1966). Waiver implies a choice to forgo some present advantage. 28 Am.Jur.2d Estoppel and Waiver, Section 157 (1966). To constitute a waiver, the right claimed to have been waived must be in existence at the time it was purported to be waived. Id. A person cannot waive a right before he is in a position to assert it. Id.

The party claiming the waiver must show that the person against whom the waiver is claimed had at the time knowledge of the existence of his rights. 28 Am.Jur.2d Estoppel and Waiver, Section 158 (1966). A person cannot be bound by a waiver of his right unless such waiver is distinctly made with full knowledge of the rights which he intends to waive; and the knowledge of the intent to waive said rights must plainly appear. Id.

In Peterson Mechanical, Peterson Mechanical promised Nereson

that it would accept a specified amount as full payment for the remodeling of Nereson's property and promised to waive all rights to file a mechanic's lien against the same for materials furnished before November 11, 1995. See, Mechanical, Inc. V. Nereson, 466 N.W. 2d 568 (N.D. 1991). The court held Peterson Mechanical's written waiver was a valid waiver of its right to file a mechanic's lien with respect to work performed and materials provided **prior to** November 11, 1995. Id.

The endorsement notice on the back of June 26, 1995 bank draft is not a lien waiver. By stamping the check "for deposit only", Marshall Lumber did not "voluntarily and knowingly" sign away its right to file a mechanic's lien. No signature appears anywhere on said draft. (Pl. Exh. 9). Feland testified that he did not see or sign a waiver on the bank draft. (Tr. p. 21). Feland further testified that he has signed lien waivers in the past and that they were always in the form of a separate document or on a bank draft having a notation on the face of the draft and requiring the "signature" of a person authorized to sign on behalf of the company. (Tr. p. 21). The bank draft in this case had neither a notation on its face nor was the alleged waiver on the back signed. (Pl. Exh. 9).

Dirk failed to show any evidence that Marshall Lumber had knowledge of the mechanic's lien waiver. By his own testimony did not see the waiver on the back of the June 26, 1995 bank

draft when he took it to Marshall Lumber. (Tr. p. 97, Lines 9-11).

In addition to neither party being aware of the waiver, Dirk had not purchased any materials prior to Marshall Lumber's receipt of the bank draft. Marshall Lumber cannot assert a lien on materials it has yet to deliver. Thus, it had no lien to waive. The trial court clearly failed to properly construe the parties ability to execute a waiver on materials yet to be furnished.

**II. THE LIEN WAIVER DOES NOT EXTEND TO MATERIALS PURCHASED AFTER THE TIME PERIOD COVERED BY THE WAIVER.**

Even if the endorsement notice is found to be a valid waiver, the waiver extends only to those purchases made **prior to** June 26, 1995. The documentation and testimony of both parties shows that the first purchases of materials for the Dirk house were made on July 2, 1995. (Pl. Exh. 1). No subsequent lien waiver was executed by Marshall Lumber. To allow the lien waiver to extend beyond its terms is to allow the Defendant and the bank more than what was "bargained for".

Dirk was well aware that the June 26, 1995 bank draft would be applied in the same manner as the December 16, 1994 bank draft. Dirk was sent monthly bills showing the application of the December 1994 and June 1995 payments. (Tr. pp. 13-15). Yet, at no time prior to the filing of the mechanic's lien did Dirk contact Marshall Lumber to indicate a problem with his account.



(Tr. pp. 93-94). Dirk cannot now complain that Marshall Lumber did exactly what it was told to do; apply the June 26, 1995 bank draft to Dirk's account. See, Midwest Federal Savings & Loan Assoc. V. Miller, 349 N.W. 2d 19 (N.D. 1984).

### III. MARSHALL LUMBER IS ENTITLED TO FORECLOSE ON ITS LIEN.

N.D.C.C. Section 35-27-04 provides that any person having a lien by virtue of Chapter 35-27 may bring an action to enforce the lien having given written notice of his intention to do so. N.D.C.C. Section 35-27-04 further provides that said notice must be served at least ten (10) days before an action to enforce the lien is commenced.

Marshall Lumber served Dirk with a Notice Before Foreclosure on August 16, 1996. The action to commence foreclosure of this lien was initiated August 30, 1996 by service and filing of a summons and complaint; more than 10 days after service of the Notice Before Foreclosure.

### CONCLUSION

Marshall Lumber has complied with the statutory requirements for perfection and foreclosure of a mechanic's lien. Marshall Lumber is entitled to the amount owing for items purchased on account by Dirk for the construction of his home at 410 29th Street North in the city of Mandan, Morton County, North Dakota, legally described as Lot 3 of Lot K of the Southwest Quarter,



Section 15, Township 139, Range 81.

The Plaintiff respectfully requests that this Court reverse the trial court's determination that the lien waiver was valid or in the alternative that the lien waiver only applies to materials purchased prior to June 26, 1995.

Dated this 19<sup>th</sup> day of May, 1998.

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