

**20210107
IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Wades Welding, LLC,)
)
Plaintiff and Appellee,) **Supreme Court No.: 20210107**
)
vs.) **District Court No.: 53-2019-CV-01545**
)
Tioga Properties, LLC,)
)
Defendant and Appellant.)

Appeal from Judgment dated February 17, 2021; from the Order Denying Motions to Continue dated November 24, 2020 and December 7, 2020; and from the Order Granting a Witness to Testify by Reliable Electronic Means dated December 4, 2020 all issued by the Honorable Paul W. Jacobson in the Northwest Judicial District, Williams County, North Dakota.

REPLY BRIEF OF DEFENDANT – APPELLANT TIOGA PROPERTIES, LLC

ORAL ARGUMENT REQUESTED

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SUMMARY OF REPLY

[¶1] The District Court erroneously found that Susan Gordon was an owner of the Restaurant Property and the Mobile Home Property under section 35-27-01(5) of the North Dakota Century Code. However, in the event that this Court finds that Susan Gordon *is* an owner under section 35-27-01(5) of the North Dakota Century Code, Appellee's construction liens should attach to Susan Gordon, not Tioga Properties, LLC. Attachment to Susan Gordon should occur as she was the contracting party that immediately benefitted from Appellee's improvements. Furthermore, Appellee's claim under the doctrine of unjust enrichment must fail because under the law, Appellee has an alternative remedy at its disposal. Appellee's remaining and unexercised remedy under the law is the commencement of a civil action against Susan Gordon. Commencement of a civil action against Susan Gordon is logical as she was the only other party privy to the improvement contracts with Appellee. The Court also erroneously determined that Tioga Properties, LLC was statutorily deemed to have authorized the improvements under chapter 35-27 of the North Dakota Century Code. The District Court erred in finding that John Ellsworth, Jr. was an authorized agent for Tioga Properties, LLC and also that Tioga Properties, LLC had constructive notice of the improvements performed by Appellee. Because no authorized agent of Tioga Properties, LLC had actual or constructive notice (and thus was unable to object) as required under 35-27-07 of the North Dakota Century Code, the construction liens against Tioga Properties, LLC should have failed. Allowing the ruling of the District Court to stand would deviate from existing North Dakota law and would establish a catastrophic precedent for landlords across the state of North Dakota.

ARGUMENT

I. **The Court erroneously found that Susan Gordon was an owner of the Restaurant Property and the Mobile Home Property under section 35-27-01(5) of the North Dakota Century Code.**

[¶2] The Court erroneously found that Susan Gordon was an owner of the Restaurant Property and the Mobile Home Property under section 35-27-01(5) of the North Dakota Century Code. Appellee correctly states in paragraph 26 of their brief that the District Court determined that Susan Gordon hired Wades Welding to make improvements to the Restaurant Property and the Mobile Home Property, and that Gordon was an “owner” for purposes of the lien statute because she occupied the properties, and the improvements were for her immediate use and benefit. (Brief of Appellee, ¶26). However, while Appellee correctly characterized the findings of the District Court, Appellant vehemently asserted in its principal brief and now reasserts that the District Court erred in arriving at that conclusion. Appellant hereby relies on its argument set forth in its principal brief regarding this point of law.

[¶3] In no way, shape, or form is Tioga Properties, LLC conceding that Susan Gordon is an owner of under section 35-27-01(5) of the North Dakota Century Code. However, in the event that this Court agrees with the District Court and holds that Susan Gordon is an owner under section 35-27-01(5) of the North Dakota Century Code, Susan Gordon, not Tioga Properties, LLC, must be held responsible for the construction liens on the Mobile Home and Restaurant Properties. In Hessinger v. Sorenson, the North Dakota Supreme Court held that “Under the provisions of the mechanic's lien law the ‘owner’ of real estate on whose interest a mechanic's lien will attach is the person for whose immediate use and

benefit the building, erection, or improvement is made.” Hessinger v. Sorenson, 180 N.W.2d 910 (N.D. 1970) (emphasis added).

[¶4] Appellee argues in its brief that Susan Gordon was an “owner” for purposes of the lien statute because “the improvements were for her immediate use and benefit.” (Brief of Appellee, ¶ 26). If in fact this Court does find that Susan Gordon was an owner for purposes of the lien statute, then according to Appellee’s arguments and to the holding in Hessinger, both construction liens should attach to Susan Gordon, as she was the person for whose immediate use and benefit the improvement was made. According to the evidence presented at trial, Susan Gordon ordered the repairs to the properties, unbeknownst to Janice Ellsworth or Tioga Properties, LLC. See App. at pg. 63: Tr. at 12:8-11. Tr. at 19:15-25. Tr. at 24:16-18. Tr. at 27:6-10, 13-14. Tr. at 28:1-7. Tr. at 30:10-16. Tr. at 97:8-25. Tr. at 101:14-16).

[¶5] Thus, pursuant to the holding in Hessinger, the construction liens filed by Appellee should attach to the person that “immediately benefitted from the improvements” which, as stated by Appellee, was Susan Gordon.

II. Appellee has another remedy under the law, thus Appellee’s claim under the doctrine of unjust enrichment must fail.

[¶6] Appellee has another remedy under the law, thus Appellee’s claim under the doctrine of unjust enrichment must fail. The Court in KLE Const., LLC v. Twalker Development, LLC held the following:

“To recover under a theory of unjust enrichment, the plaintiff must prove: (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and the impoverishment, (4) the absence of a justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law.” KLE Const., LLC v. Twalker Dev., LLC, 2016 ND 229, 887 N.W.2d 536.

¶7 Appellee has every right to commence a civil action to recover damages against Susan Gordon. There is nothing precluding Appellee from taking this course of action. In fact, commencing a civil action against Susan Gordon should have been the first logical first step as Appellee entered into repair contracts with Susan Gordon herself, not Tioga Properties, LLC. Initiating a breach of contract action against Susan Gordon is a readily available recovery option under the law. Because Appellee still has this option at their disposal, pursuant to the holding in KLE Const., LLC v. Twalker Development, LLC, Appellee's award under the equitable doctrine of unjust enrichment must fail.

III. The Court erroneously determined that Tioga Properties was statutorily deemed to have authorized work under chapter 37-27 of the North Dakota Century Code.

¶8 The Court erroneously determined that Tioga Properties was statutorily deemed to have authorized work under chapter 35-27 of the North Dakota Century Code. Appellee correctly states that the District Court determined Tioga Properties was statutorily deemed to have authorized work because John Ellsworth, Jr. was deemed an agent/local manager of Tioga Properties, LLC (Brief of Appellee, ¶41). The District Court erroneously arrived at its conclusion because the record clearly establishes that Janice Ellsworth was the only authorized agent to act on behalf of Tioga Properties, LLC. (See App. at pg. 63: Tr. at 16: 19-25; Tr. at 17: 1-16; Tr. at 17: 23-25; Tr. at 18:1; Tr. at 79: 1-25; Tr. at 80: 1-25; Tr. at 81: 1-25; Tr. at 82: 1-15; Tr. at 88: 5-6; Tr. at 92: 4-13; Tr. at 95: 1-2; Tr. at 99: 13-20; Tr. at 102: 1-20; Tr. at 105: 14-16; Tr. at 112: 3-6).

¶9 The District Court also erroneously arrived at its conclusion that Tioga Properties, LLC had constructive notice of the improvements or ever received any information regarding repairs completed by Appellee until after the repairs were made. (See App. at

pg. 63: Tr. at 97:8-25. Tr. at 101:14-16. Tr. at 114:6-9). As evidenced in the record, John Ellsworth, Jr. was not an agent of Tioga Properties, LLC, and because John Ellsworth, Jr. was not an agent of Tioga Properties, LLC, no authorized agent of Tioga Properties, LLC had actual or constructive notice of the improvements before the completion date. Thus, the District Court should have rendered a ruling that reflected evidence contained in the trial record. Not only are the findings of the District Court inconsistent with the record, but they are also in direct contradiction of North Dakota caselaw.

[¶10] In Price v. Burke, the Court ruled against a lien claimant by finding that a certain lien was not proper because the owner was not aware of improvements until after the work was completed. Price v. Burke, 27 N.D. 65, 145 N.W. 405 (1914). The Appellant in Price argued for the enforcement of the lien. The Court held as follows:

“Appellant relies upon section 6237, R. C. 1905, of the mechanic's lien law, providing that an owner shall be presumed to have consented to the making of an improvement if he had knowledge thereof and did not give notice of his objection to the person entitled to a lien. But under these facts this statutory provision can have no application, as manifestly the time mentioned in the phrase “if at the time he had knowledge thereof” means at the time of the doing of the work or the making of the improvement and does not apply to a case of this kind, where the work was done and the improvement completed before knowledge of it was acquired.” Id. at 409.

[¶11] While 6237 R.C. 1905 is no longer a valid statute, section 35-27-07 of the North Dakota Century Code is a valid statute. Section 35-27-07 of the North Dakota Century Code is essentially the current version of 6237 R.C. 1905. The relevant part of 35-27-07 states that “As against a lessor no lien is given for repairs made by or at the instance of the lessor's lessee, unless the lessor has actual or constructive notice thereof and does not object thereto.” N.D.C.C. § 35-27-07 (emphasis added). The record is abundantly clear, Susan Gordon, the lessee of Tioga Properties, LLC, contracted with Wades Welding to

make improvements to both the mobile home and restaurant properties, unbeknownst to Tioga Properties' sole agent, Janice Ellsworth. (See App. at pg. 63: Tr. at 12:8-11. Tr. at 19:15-25. Tr. at 24:16-18. Tr. at 27:6-10, 13-14. Tr. at 28:1-7. Tr. at 30:10-16. Tr. at 67:5-11. Tr. 68:1-24. Tr. at 69:1-3, 11-12, 19-24. Tr. at 97:9-25. Tr. at 101:14-16. Tr. at 114:6-9).

[¶12] The District Court charged Tioga Properties, LLC with constructive notice of the improvements because John Ellsworth, Jr. purportedly observed Wades Welding conducting work. This finding only has merit if the evidence at trial was sufficient to establish that John Ellsworth, Jr. was an authorized agent of Tioga Properties, LLC. However, the opposite is true. The evidence presented at trial unequivocally proves that John Ellsworth, Jr. was not an authorized agent of Tioga Properties, LLC. (See App. at pg. 63: Tr. at 12: 6-11; Tr. at 24:16-18; Tr. at 27: 6-10, 13-14. Tr. at 28:1-7; Tr. at 30:11-16; Tr. at 67: 2-11. Tr. 68: 22 - 25. Tr. at 69:1-3, 8-12, 19-24. Tr. at 79:15-20. Tr. at 88:5-6. Tr. at 97: 7-25).

[¶13] Regrettably, the District Court erroneously found that John Ellsworth, Jr. was authorized to receive notice on behalf of Tioga Properties, LLC. As stated in the record, Appellee simply failed to establish that John Ellsworth, Jr. had the authority to act on behalf of and receive notice for Tioga Properties, LLC. Any knowledge that John Ellsworth, Jr. may have possessed regarding the improvements to the Mobile Home Property and the Restaurant Property *cannot* be imputed to Janice Ellsworth or Tioga Properties, LLC. Because no authorized agent of Tioga Properties, LLC knew of the improvements being made, Tioga Properties, LLC simply cannot be charged with having actual or constructive notice of the repairs ordered solely by its lessee, Susan Gordon. Therefore, Appellee's lien cannot attach to Tioga Properties, LLC under section 37-27-07 and the holding in Price. Ultimately, the District Court erred in charging Tioga

Properties, LLC with having actual or constructive notice of the repairs through John Ellsworth, Jr., a non-agent of Tioga Properties, LLC.

IV. Allowing the ruling of the District Court to stand would deviate from existing North Dakota law establish a damaging precedent for landlords across the state of North Dakota.

[¶14] Allowing the ruling of the District Court to stand would deviate from existing North Dakota law establish a damaging precedent for landlords across the state of North Dakota. From a public policy perspective, this Court also must take into consideration, the net effect of a ruling based on the Appellee's position. The ramifications of ruling that a tenant can order repairs to be paid by the landlord/property owner with no input as to the choice of contractor, price, etc. would be detrimental to landlord/tenant relationships across the State of North Dakota. Additionally, a ruling where a disinterested third party with a family relationship but no agency authority, can make a property owner liable by merely observing work being done, would be catastrophic and a deviation from prior caselaw.

[¶15] Susan Gordon, the tenant of Tioga Properties, LLC contracted with Wades Welding, LLC and subsequently ordered the repairs to both the Restaurant and Mobile Home Properties. The District Court essentially ruled that a tenant can enter into a contract, incur obligations under that contract and then is permitted to evade repayment responsibility by imputing any repayment responsibility to the landlord. If this ruling is allowed to become precedent under North Dakota law, what is to stop tenant from entering into a contract to improve a leased space, abandoning the leased space, and leaving the landlord with the bill for improvements to the leased space? That outcome will be commonplace if the District Court's ruling is allowed to stand. Especially now

that a disinterested third party with a family relationship but no agency authority, that merely observes work being done, constitutes constructive notice to the landlord.

[¶16] If this Court does not disturb this ruling of the District Court, an unfortunate precedent will be established and will inevitably have unpredictable and disastrous implications for landlords in landlord/tenant relationships. It was clearly established at trial that the sole owner of the of Tioga Properties, LLC is Janice Ellsworth. It was also clearly established that John Ellsworth, Jr. was not an agent or authorized to act on behalf of Tioga Properties, LLC. Thus, the District Court should have found that Tioga Properties, LLC was not aware of the improvements until after the improvements were made. Because Tioga Properties, LLC did not know of the improvements prior to completion, it was impossible for Tioga Properties, LLC to object to the construction. Allowing this flawed ruling of the District Court to stand would be a deviation of North Dakota precedent and would establish a damaging precedent for landlords across the state of North Dakota.

CONCLUSION

[¶17] Based on the aforementioned law and reasoning, Appellant respectfully requests the Supreme Court reverse the District Court order granting Plaintiff's claims, and remand to the District Court for a decision on the merits.

CERTIFICATE OF COMPLIANCE

[¶18] Pursuant to N.D.R.App.P. 32(a)(8)(A), undersigned counsel certifies that this brief complies with the page limitation as this reply brief contains 11 pages.

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