[Cite as *Halsey, Inc. v. Isbel*, 2010-Ohio-2052.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

HALSEY, INC. dba Warren County Lumber & Truss,	:	
	:	CASE NO. CA2009-12-159
Plaintiff-Appellant,	:	O P I N I O N
	:	5/10/2010
- vs -	:	
	:	
ROBERT J. ISBEL, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08 CV 71082

Valerie Halsey, 4962 Thomas Road, Trenton, Ohio 45067, for plaintiff-appellant

Kohnen & Patton LLP, Malinda L. Langston, Richard N. Haines, 201 East 5th Street, Cincinnati, Ohio 45202, for defendant-appellee, National Bank & Trust Co.

RINGLAND, J.

{¶1} Plaintiff-appellant, Halsey, Inc., appeals a decision of the Warren County Court of Common Pleas granting summary judgment in favor of defendant-appellee, National Bank & Trust Co. (NB&T).

{¶2} In the spring of 2007, Scott and Keli Fleming hired Robert Isbel dba Isbel

Custom Homes, Inc., to build a home. NB&T financed construction of the residence and entered into a construction loan with the Flemings. In May 2007, Isbel entered into a verbal agreement with Halsey to provide materials for construction.

{¶3} On May 14, 2007, Halsey sent a notice of furnishing via certified mail to NB&T, which stated that Halsey intended to provide approximately $64,000 of materials to Isbel during construction of the Fleming's residence. Materials were first furnished to Halsey on May 15, 2007. The bank received the notice on May 17, 2007.

{¶4} During construction, Isbel requested payments from NB&T to be drawn from the Flemings' construction loan. Before releasing the funds, NB&T ordered a title examination and a physical inspection of the property by an outside appraiser to insure that there were no outstanding liens filed against the property, and that the construction completed at the time warranted the amount requested. NB&T further requested that the Flemings and Isbel execute an affidavit confirming both the amount requested and identifying any subcontractors who still needed to be paid for work performed or materials provided for the construction project. On October 19, 2007, NB&T disbursed funds to Halsey.

{¶5} In December 2007, Isbel executed a final affidavit, indicating that the home construction was complete, that no other subcontractors were owed funds, and that he was entitled to the balance of the construction loan. After an inspection of the property, a title exam, and in reliance upon Isbel's affidavit, NB&T made the final disbursement to Isbel. On or about February 11, 2008, the Flemings closed on the residence. NB&T paid the balance of the home construction loan pursuant to the closing affidavit of the Flemings and Isbel's representations that all subcontractors had been paid in full. However, on February 21, 2008, Halsey recorded a mechanic's lien, stating that a balance of $11,476.61 remained due for construction materials provided to Isbel during construction of the Flemings' residence.

{¶6} Halsey filed suit against Isbel, NB&T and the Flemings for payment of the

balance. The Flemings were dismissed from the action since they had paid Isbel in full for the purchase of the residence. NB&T moved for summary judgment. In opposition, Halsey argued that NB&T was grossly negligent for failing to obtain a waiver from Halsey before disbursing the funds to Isbel. The trial court granted summary judgment in favor of NB&T, finding that Halsey's notice of furnishing was not properly perfected.

{¶7} Halsey timely appeals, raising one assignment of error:

{¶8} "THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS THE NOTICE SENT BY PLAINTIFF-APPELLANT WAS SUFFICIENT TO PUT DEFENDANT-APPELLEE ON NOTICE OF THEIR DUTIES UNDER R.C. 1311.011(B)(5)."

STANDARD OF REVIEW

{¶9} On appeal, a trial court's decision granting summary judgment is reviewed de novo. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. See Civ.R. 56(C); see, also, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The movant bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt,* 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once this burden is met, the nonmovant has a reciprocal burden to set forth specific facts showing a genuine issue for trial. Id.

ANALYSIS

{¶10} In its sole assignment of error, Halsey argues that the trial court erred in granting summary judgment to NB&T. Halsey's primary argument claims that the bank received a timely notice of furnishing and, as a result, the bank was prima facie liable for

gross negligence when it failed to disburse funds pursuant to the lien. R.C. 1311.011(B)(5).

WAIVER

{¶11} The bank initially attacks Halsey's assignment of error by arguing waiver. Specifically, the bank argues that Halsey never raised the issue of timely service at the trial level. A review of Halsey's motion in opposition to summary judgment argues that, based upon the facts in the record, "[i]t is obvious that NB&T was put on notice of an amount of material that plaintiff intended to supply to the project." Halsey clearly argued that at the trial level that its notice was effective. Accordingly, we find no merit in NB&T's argument.

NOTICE OF FURNISHING

{¶12} "[A] subcontractor * * * who furnishes materials in furtherance of real property and who wishes to preserve the subcontractor's * * * lien rights shall serve a notice of furnishing * * * within twenty-one days after * * * furnishing the first materials." R.C. 1311.05(A).

{¶13} Halsey argues in this case that its lien is valid under the statute because NB&T received the notice of furnishing after Halsey had furnished materials to Isbel. However, the service provision of Ohio's lien statute provides, "service is complete upon receipt by the party being served * * * *if service of a notice of furnishing is made by certified mail, service is complete on the date of the mailing*." (Emphasis added.) R.C. 1311.19(B).

{¶14} Service of the notice of furnishing in this case occurred before any materials had been supplied by Halsey. Specifically, Halsey sent the notice of furnishing by certified mail on May 14, 2007. Due to the statute's service provision, the notice was considered served on that date. Materials were first furnished on May 15, 2007. R.C. 1311.19(B) clearly provides that a notice of furnishing should not be served until after materials are furnished. Since Halsey's notice was served before materials had been furnished, its notice of furnishing was not valid. *Buy-Rite Lumber Co. v. Bank One, Akron, N.A.* (1991), 81 Ohio

App.3d 74, 76-77.

GROSS NEGLIGENCE

{¶15} A "lending institution is not financially liable * * * for any payments, except for gross negligence or fraud committed by the lending institution in making any payment to the original contractor." R.C. 1311.011(B)(5).

a. Prima-Facie Gross Negligence

{¶16} "After receipt of a written notice of a claim of a right to a mechanic's lien by a lending institution, failure of the lending institution to obtain a lien release from the subcontractor * * * who serves notice of such claim is prima-facie evidence of gross negligence." Id.

{¶17} Since Halsey did not perfect a valid notice of furnishing, it cannot assert a prima-facie case for gross negligence under R.C. 1311.011(B)(5). *Buy-Rite* at 77.

a. Lien by Implication/Estoppel

{¶18} Nevertheless, Halsey argues that, even if the notice of furnishing was invalid, genuine issues of material fact still exist. Halsey asserts that the notice of furnishing placed NB&T on notice that a claim of right existed, which the bank implicitly acknowledged when it disbursed a payment to Halsey in October 2007. Then, after receiving an invalid affidavit from Isbel and without receiving a release from Halsey, the bank failed to investigate or determine whether an outstanding balance existed. Halsey essentially argues that NB&T's conduct created a lien by implication or estoppel and that the bank's conduct amounted to gross negligence. Halsey urges that the bank should not be allowed to be aware of the existence of a lien, commit gross negligence by improperly relying upon Isbel's affidavit and failing to obtain a release, then be relieved of liability.

{¶19} While a potential claim could exist based upon Halsey's theory, see, e.g., *Thompson Elec., Inc. v. Bank One, Akron, N.A.* (1988), 37 Ohio St.3d 259, 266 (finding that

the prima facie example in R.C. 1311.011(B)(5) is not the exclusive form of gross negligence; other acts or omissions by a lending institution may constitute gross negligence), Halsey's counsel never raised a reliance, estoppel, or lien by implication argument at the trial level. The sole theory of the case advanced by Halsey in the trial court argued that the notice of furnishing was properly and timely perfected. Accordingly, Halsey's argument is waived and cannot be considered by this court. *State ex rel. Gibson v. Indus. Comm. of Ohio* (1988), 39 Ohio St.3d 319, 320; *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278, 1993-Ohio-49; *Van Camp v. Riley* (1984), 16 Ohio App.3d 457, 463.

{¶20} Halsey's sole assignment of error is overruled.

{¶21} Judgment affirmed.

YOUNG, P.J., and BRESSLER, J., concur.

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