12-10-2013

Hap Taylor & Sons v. Summerwind Partners Intervenor Dckt. 40514

IN THE SUPREME COURT OF THE STATE OF IDAHO

HAP TAYLOR & SONS, INC., d/b/a KNIFE RIVER, an Oregon corporation,

Plaintiff - Cross Respondent,

v.

L222-1 ID SUMMERWIND, LLC, a Nevada limited liability corporation,

Defendant - Cross Appellant,

and

IDAHO GOLF PARTNERS, INC.,

Intervenor - Respondent - Cross Appellant,

CONGER MANAGEMENT GROUP, INC., an Idaho corporation,

Plaintiff - Counterdefendant - Cross Defendant - Respondent,

v.

STANLEY CONSULTANTS, INC.,

Defendant - Counterclaimant-Cross Claimant - Appellant,

Supreme Court No. 40514-2012

Canyon County Nos. 2008-4251 /2008-4252 / 2008-11321

BRIEF OF INTERVENOR – RESPONDENT – CROSS APPELLANT

and

INTEGRATED FINANCIAL ASSOCIATES, INC., a Nevada corporation,

Defendant - Counterdefendant - Cross Defendant- Respondent-Cross Appellant,

and

GENEVA EQUITIES, LLC, an Idaho limited liability company; TRADITIONAL SPRINKLERS AND LANDSCAPING, INC., an Idaho corporation; DENNIS PHIPPS WELL DRILLING, INC., an Idaho corporation; RIVERSIDE, INC., an Idaho corporation,

Defendants -Counterdefendants - Cross Defendants-Respondents,

and

IDAHO GOLF PARTNERS, INC.,

Intervenor - Respondent - Cross Appellant.

Appeal from the District Court of the Third Judicial District, Canyon County, Idaho

HONORABLE JUNEAL C. KERRICK, District Judge, Presiding

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Thomas E. Dvorak
Elizabeth M. Donick
GIVENS PURSLEY, LLP
P.O. Box 2720
Boise, ID 83701
Attorneys for Stanley Consultants, Inc.

Michael O. Roe
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD.
Post Office Box 829
Boise, Idaho 83701
Attorneys for Integrated Financial Associates, Inc. and Geneva Equities, LLC

Mark D. Perison
Tricia K. Soper
MARK D. PERISON, PA
PO Box 6575
Boise, ID 83707
Attorneys for Idaho Golf Partners, Inc.

David T. Krueck
FISHER PUSH & KRUECK, LLP
P.O. Box 1308
Boise, ID 83701
Attorney for Hap Taylor & Sons, Inc. d/b/a Knife River

Rebecca A. Rainey
FISHER RAINEY HUDSON
910 W. Main St., Ste. 254
Boise, Idaho 83702
Attorneys for Integrated Financial Associates, Inc., Geneva Equities, LLC and Idaho Golf Partners, Inc.

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I.

STATEMENT OF THE CASE

Idaho Golf Partners, Inc., has intervened in this appeal as a Respondent/Cross-Appellant with interests aligned with that of Respondent/Cross-Appellant, Integrated Financial Associates, Inc. In the initial brief of Integrated Financial Associates, Inc., the abbreviation "IFA" is used collectively to refer to Integrated Financial Associates, Inc., and its successors in interest, Summerwind Partners, LLC, and Idaho Golf Partners, Inc. For purposes of this brief, however, Integrated Financial Associates, Inc., will be referred to separately as "IFA," Summerwind Partners, LLC, will be referred to separately as "Summerwind Partners," and Idaho Golf Partners will be referred to separately as "IGP."

IGP concurs with IFA's analysis as to the Nature of the Case, Course of Proceedings Below, Concise Statement of Facts, Issues on Appeal, Standard of Review, and Arguments, and, for purposes of clarity and judicial economy, will refrain from simply repeating those sections and arguments. IGP therefore incorporates the facts as stated by IFA, and sets forth its additional facts and arguments below.

II.

FACTS

Hap Taylor and Sons d/b/a Knife River ("Knife River") filed various claims of lien against a residential subdivision and golf course located near Greenleaf, Idaho, for construction of residential roadways in the subdivision and cart paths on the golf course. The name of the project was "Summerwind at Orchard Hills." The lots encumbered by the claims of lien included both residential lots and common area lots designated for an eighteen-hole golf course. However, the Judgment and decree of foreclosure from which this appeal is taken (Supp. R. Vol. 9, pp. 70-76), applies only to the lots which comprise the eighteen-hole golf course. R. Vol. 9, pp. 1509-1512.

The current owner of all of the golf course lots is IGP. (Special Warranty Deed, R. Vol. 9, pp. 1458-1464). The front nine holes of the golf course consist of Phase I Lots 1, 16, 17, 18, 39, and 40, Block 1, and Lot 15, Block 2. The back nine holes of the golf course consist of Phase II Lots 41 and 66, Block 1, and Lot 1, Block 4. *Id.*, and R. Vol. 8 1270-71.

Knife River performed the paving of the residential roadways and golf course cart paths pursuant to two separate agreements with Extreme Line Logistics, LLC ("ELL"). R. Vol. 6, pp. 1042, 1044. It is undisputed that no work whatsoever was

performed on the back nine holes of the golf course. R. Vol. 6, pp. 1011-12 (Daniels Depo. p. 20, L. 19 – p. 21, L. 17).

III.

ISSUES ON APPEAL

1. Whether a lien claimant may tack together work on two projects when 113 days elapse between completion of the first project and reaching an enforceable agreement regarding the scope of work on the second project.
2. Whether the construction of residential roadways and golf course cart paths constitute the types of improvements to which Idaho Code Section 45-508 applies.
3. Alternatively, whether the district court erred in refusing to apply Idaho Code Section 45-505 to claims of liens arising from construction of improvements to the land.

IV.

ARGUMENT

A. The District Court Erred in Determining That a Single Contract Existed Between ELL and Knife River.

IGP agrees with IFA's thorough analysis as to whether two contracts exist between ELL and Knife River in this case, and will not reiterate IFA's arguments in

full here. For the same facts and reasoning as set forth by IFA, it is quite clear that based upon the lapse of time between creation of the contracts, the distinct locations of each project, the separate job numbers, and separate invoices, that the two agreements could not be construed as one continuous contract.

Based on the undisputed facts, the district court should have held, as a matter of law, that Knife River performed work on the roadways and cart paths under two separate contracts. As a result, Knife River's lien for the roadways should have been deemed untimely, and its lien for the cart paths should have been deemed subordinate to the deeds of trust of IFA, pursuant to Idaho Code Sections 45-506 and 45-507. This Court should reverse the district court's Judgment and decree of foreclosure.

B. The District Court Erred in Failing to Require Apportionment of Knife River's Liens.

In addition to the erroneous determination by the district court regarding the issue of the existence of two contracts, the district court erred on a second dispositive issue, under Section 45-508. Even if this Court upholds the district court's determination that one contract existed for purposes of the timeliness and tacking issues under Sections 45-506 and 45-507, the district court erred in determining that

Knife River was not required to designate the amount due on the separate roadway and cart path projects under Section 45-508.

Section 45-508 states:

> In every case in which one (1) claim is filed against two (2) or more buildings, mines, mining claims, or other improvements, owned by the same person, the person filing such claim must, at the same time, designate the amount due him on each of said buildings, mines, mining claims, or other improvement; otherwise the lien of such claim is postponed to other liens.

I.C. § 45-508.

In analyzing Section 45-508, the district court relied upon *Hopkins Northwest Fund v. Landscapes Unlimited, LLC*, 151 Idaho 740, 264 P.3d 379 (2011) to find that the roadways and cart paths were not the type of improvements referred to in Section 45-508. Therefore, the district court found that Knife River was not required to designate the separate amounts due on each improvement. The district court classified the roadways and cart paths as "improvements to the land" rather than "structures upon the land," which resulted in its determination that no separate designation was required pursuant to Section 45-508 as to the amount of lien to be attributed to each improvement. As stated by IFA, however, under the very language of Section 45-501, the roadways and cart paths should have been determined to be "structures" for which designation as to the amount of lien was required for each project under Section 45-508.

More importantly for purposes of Section 45-508, the *Hopkins Northwest* decision is both factually and legally distinguishable on the issue of whether the land is capable of apportionment in the first instance. In *Hopkins Northwest*, the lien claimant had been required to "level, fill, berm, contour, and otherwise improve land" in order to complete an eighteen-hole golf course. *Id.* at 746, 264 P.3d at 385. A single contract governed the services performed on the entire golf course as a whole, and there had been no segregation in the billing invoices as to individual parcels of the golf course. *Id.* at 747-48, 264 P.3d at 386-87. The *Hopkins Northwest* court therefore held that the golf course constituted but one improvement, and that it could not practically be apportioned by individual golf holes or otherwise. *Id.* at 748, 264 P.3d at 387.

Whereas it would have been very impractical for the *Hopkins Northwest* Court to have designated on which of the eighteen holes any particular work was performed, in the instant case, it is not difficult at all. The residential roadway and golf course cart path projects were performed pursuant to separate agreements, and billed separately, over a year apart, on separate invoice numbers and job numbers, on geographically distinct areas. The contract for the cart paths did not even come into existence until 113 days *after the completion* of the roadways. R. Vol. 6, p. 1044. It is

undisputed that the residential roadways and golf course cart paths were treated as two distinct projects by Knife River.

The importance of separate billing invoices was specifically noted in *Hopkins Northwest*:

> Finally, apportionment would not be practical in this case because there was only a single contract governing the project and, as discussed above, *there was never any segregation of the billings as to each parcel encumbered by the lien.*

151 Idaho at 748, 264 P.2d at 387 (citing *Addington-Beaman Lumber Co., Inc. v. Lincoln Sav. & Loan Ass'n,* 241 Va. 436, 403 S.E.2d 688, 689, 7 Va. Law Rep. 2270 (Va. 1991) (emphasis added).

Additionally, the *Hopkins Northwest* Court relied heavily upon the California case of *Warren v. Hopkins*, 110 Cal. 506, 42 P. 986 (Cal. 1895), in which the same distinction was made:

> "While section 1188 [section 508] requires the claimant who files a lien against two or more buildings, or other improvements, to designate the specific amount for which he claims a lien upon each of such improvements, it does not require him to make such designation *unless there is in fact a specific "amount due to him" on each of such improvements*; . . ."

Id. at 746, 264 P. 3d at 385 (quoting *Warren*, 42 P. at 987-88) (emphasis added).

Here, Knife River did keep separate invoices and job numbers for the roadway and cart path projects. Therefore, there was a very "specific amount due to him [Knife River]" for each of the separate projects: $166,603.50 was incurred for the

residential roadways and $49,474.80 was incurred for the cart paths on the front nine holes of the golf course[1]. Therefore, the roadways and cart paths were not properly characterized as a single improvement under the analysis required by *Hopkins Northwest*.

Importantly, IFA and IGP are not asking this Court to find that apportionment or designation on a lot by lot basis was required by Knife River. Rather, IFA and IGP are simply asking this Court to require designation in the same manner that the work was already apportioned by Knife River, *i.e.* the first project comprised the roadways, and the second project comprised the cart paths on the front nine holes of the golf course. This approach is entirely consistent with *Hopkins*, and entirely appropriate given the manner in which Knife River kept the projects, job numbers, and invoices separate.

Given the above, apportionment is not only practical in this case, but it has *already been done* by Knife River: A total of $166,603.50 was incurred for the paving of the residential roadways and $49,474.80 was incurred for the paving of the front nine golf cart paths. After having already separately designated the amounts due on the roadway and cart path projects at every step along the way, Knife River should

[1] A separate charge in the amount of $1,307.52 was claimed for a repair job on the roadways.

not now be allowed to lump all of its billings together and enforce liens for the entire amount incurred in constructing both the roadways and cart paths on the golf course lots alone.

Finally, the district court's error becomes even more apparent when the dollar amounts of the liens and the property upon which the work was performed are considered together. For instance, the lots comprising the front nine holes of the golf course are now subject to the judgment and decree of foreclosure for liens in the principal amount of $198,928.53, when it is undisputed that the amount of work done on this part of the course totaled just $49,474.80. Even more egregiously, the lots comprising the back nine holes of the golf course are also subject to the same judgment and decree of foreclosure for the same principal amount of $198,928.53, when it is undisputed that *no* work was performed on that portion of the course[2]. Supp. R. Vol. 9, pp. 70-76. A proper application of Section 45-508 would have prevented such an inequitable result.

The determination that Knife River was required to designate which amount was due on each of the projects under Section 45-508 is the only conclusion consistent with *Hopkins* and *Warren*. Because Knife River did not so designate, its claims of lien should be postponed to IFA's deeds of trust.

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[2] A further discussion of the impropriety of subjecting both the front nine and back nine parcels to the total lien amount of $198,928.53 is included in Section IV.C. below.

C. The District Court Erred in Failing to Apply Idaho Code Section 45-505.

IGP is the current owner of the golf course lots, which are now subject to a judgment and decree of foreclosure for the total amount of $198,928.53 owed on two separate projects, for which the vast majority of work was performed on land excluded from the judgment. Further, the lots comprising IGP's back nine holes are subject to a foreclosure judgment for the same amount, even though no work was completed on them at all. This scenario should have been avoided, as the district court should have applied Idaho Code Section 45-505.

Idaho Code Section 45-505 provides, in pertinent part:

> The land upon which or in connection with which any professional services are performed or any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, *to be determined by the court on rendering judgment*, is also subject to the lien . . .

I.C. § 45-505 (emphasis added).

In other words, simply because a lien claimant files a lien against a parcel of land, does not mean that the entire parcel will ultimately be found subject to the lien. The district court is required to take evidence to determine which portion of the land is "required for the convenient use and occupation thereof." *Id.* Only after the taking of evidence may the court determine what portion of the land is deemed properly subject to the lien.

In *Beall Pipe & Tank Corp. v. Tumac Intermountain, Inc.*, 108 Idaho 487, 700 P.2d 109 (Ct.App. 1985), the Idaho Court of Appeals was faced with a materialman's lien filed against four separate parcels of property based on the furnishing of pipe which was incorporated into an irrigation system. The irrigation system was installed on only one of the four parcels. The Court analyzed Section 45-505 and stated:

> We recognize, of course, that the entire parcel is not necessarily properly subject to the lien. Only the land upon which the improvement is located and so much as may be required for the convenient use and occupation of the improvement is subject to the lien . . . *Idaho Code § 45-505, however, states that the duty to determine what land is subject to the lien rests with the district court.*

Id. at 491, 700 P.2d at 113 (emphasis added). The Court of Appeals found that the district court had failed to carry out its statutory duty, and therefore, that the Court of Appeals was *required* to reverse and remand to the district court to take additional evidence to determine which land was properly subject to the lien. *Id.* (citing *Idaho Lumber and Hardware Co. v. DiGiacomo*, 61 Idaho 383, 389, 102 P.2d 637, 639 (1940); *Dybvig v. Willis*, 59 Idaho 160, 168-171, 82 P.2d 95, 99-100 (1938); and *Robertson v. Moore*, 10 Idaho 115, 77 P. 218 (1904).

Here, the district court considered Section 45-505, but held that it did not apply simply because the court had previously held that Section 45-508 did not require apportionment of Knife River's liens. (Order Granting Motion to Augment the Clerk's Record dated November 19, 2013, enclosing Order on Defendant IFA's

Second Motion for Reconsideration and Plaintiff's Second Motion for Summary Judgment dated December 23, 2011 ("Dec. 23, 2011 Order"), pp. 13-14). Despite IFA again raising the issue of the application of Section 45-505 at the October 3, 2012, hearing on Plaintiff's Second Motion for Entry of Judgment, (Tr. p. 96, L. 20 – p. 98, L. 12), the Court entered its Order and Judgment allowing Knife River's foreclosure of only the golf course lots, without consideration of Section 45-505 and without taking any evidence. Order on Motion for Entry of Judgment (R. Vol. 9, 1533-1537); Judgment (R. Vol. 9, p. 1543-1551; Judgment (Supp. R. Vol. 9, p. 70-76).

The district court's conclusion that the application of Section 45-505 is dependent upon the analysis under Section 45-508 is incorrect. In fact, whether the roadways and cart paths are deemed an "improvement" or a "structure" for purposes of Section 45-508, is simply irrelevant for purposes of Section 45-505, because Section 45-505, on its face, applies equally to both.

Further, there is no language in Section 45-505 that references the distinction between the types of liens as analyzed under Section 45-508, or which differentiates between the two types of liens created under Section 45-501. Nor does Section 45-505 require the existence of two contracts for its application. Indeed, the language of Section 45-505 applies to all types of liens encompassed by Sections 45-501 and 45-

508. It is the district court's duty to take evidence as to what portion of the land is properly subject to Knife River's liens regardless of the type of lien that is claimed or the type of improvement that was constructed. The district court failed to do so, and thus it erred as a matter of law.

The district court's failure to take evidence as required by Section 45-505 is further compounded by its failure to recognize that Knife River has reduced its claims of liens from the original amount of $217,385.82 on the Phase I lots, to $114,845.32 (R. Vol. 6, pp. 869-71), and has reduced its claim of lien on the Phase II lots from the original amount of $217,385.82 to $84,083.21 (R. Vol. 6, pp. 872-74). Thus, both phases of the golf course are subject to the judgment and decree of foreclosure in the total amount of $198,928.53, despite the fact that both of Knife River's remaining claims of lien have been reduced to substantially less than that amount. There is no basis for such a result in Idaho law. The district court's judgment should be reversed and remanded for a determination under Section 45-505 as to how much land is subject to each of Knife River's liens.

V.

CONCLUSION

For all of the foregoing reasons, IGP respectfully requests the Court reverse the district court's Judgment and decree of foreclosure (Supp. R. Vol. 9, pp. 70-76), and

find that Knife River's claims of liens are invalid or otherwise postponed or inferior to IFA's deeds of trust, pursuant to Idaho Code Sections 45-506, 45-507, and/or Section 45-508.

Alternatively, IGP requests that this Court remand with instructions requiring the district court to take evidence regarding the amount of land subject to Knife River's claims of liens for both the roadways and the cart paths, as required under Idaho Code 45-505.

MARK D. PERISON, P.A.

DATED this 10th day of December, 2013. By: _____

Mark D. Perison – of the Firm
Tricia K. Soper – of the Firm
Attorneys for Idaho Golf Partners, Inc., Intervenor – Respondent - Cross Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of December, 2013, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

David T. Krueck
FISHER PUSH & KRUECK, LLP
P.O. Box 1308
Boise, ID 83701
Attorney for Hap Taylor & Sons, Inc. d/b/a Knife River

[√] U.S. Mail
[ ] Hand Delivered
[ ] Overnight Mail
[ ] Facsimile

Thomas E. Dvorak Elizabeth M. Donick GIVENS PURSLEY, LLP P.O. Box 2720 Boise, ID 83701 *Attorneys for Stanley Consultants, Inc.*	[√] U.S. Mail [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile
Rebecca A. Rainey FISHER RAINEY HUDSON 910 W. Main St., Ste. 254 Boise, Idaho 83702 *Attorneys for Integrated Financial Associates, Inc., Geneva Equities, LLC and Idaho Golf Partners, Inc.*	[√] U.S. Mail [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile
Michael O. Roe MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD. Post Office Box 829 Boise, Idaho 83701 *Attorneys for Integrated Financial Associates, Inc. and Geneva Equities, LLC*	[√] U.S. Mail [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile

Tricia K. Soper