New Jersey Court of Errors and Appeals

Between ELEVETH WARD BUILDING AND LOAN ASSOCIATION, *Complainant-Respondent,* *and* CARLO CAMPAGNA, MRS. CARLO CAMPAGNA, wife of CARLO CAMPAGNA; ENRICO BENACQUISTA; CHANNEL LUMBER COMPANY OF BELLEVILLE, N. J.; H. B. SALMON COMPANY, and BELLEVILLE SASH & DOOR CORP., *Defendants-Appellants.*	*On Appeal from Chancery.*

BRIEF OF COMPLAINANT-RESPONDENT

STATEMENT OF FACTS.

The material facts are tersely and fairly stated by Vice-Chancellor Church in his opinion, and which counsel is willing to adopt as the facts in this case.

FINAL DECREE.

The Final Decree adjudges that the respondent's mortgage is prior to the liens of appellants, who, as materialmen, furnished materials for the erection of the building on the mortgaged lands.

GROUNDS OF APPEAL.

Appellants claim that their liens are prior to the construction mortgage of respondent.

1. Because the owner and contractor purchased materials from them, notwithstanding the filing of the written contract between the owner and contractor, in which contract the contractor agreed to perform the labor and furnish the materials for the erection of the building on the premises in question.

2. Because the contract was fraudulent and fictitious.

Respondent contends that the Decree was not erroneous, for the reasons given by the Vice-Chancellor in his opinion, and for the reasons hereinafter stated.

ARGUMENT.

POINT I.

Appellants cite the case of *Mechanics Mutual Loan Association* vs. *Albertson*, 23 N. J. E. 318, in support of their first contention.

Respondent says, that the facts in that case are entirely different from those now before this Court, and are fully and aptly stated by the Vice-Chancellor in his opinion, and respondent does not deem it necessary to further discuss this difference.

POINT II.

Answering the second point of appellants, namely, that the filed contract is fraudulent and fictitious, and made between parties who were not actually contracting, but who were merely pretending to do so, and by reason thereof the same does not bar appellants' liens.

There is no proof of this. The fact that contractor and owner stated to one of the appellant's agents that they were both the owners of the property;

and that the delivery tickets were signed by both owner and contractor, or one of them; and that the bank account was in the name of both parties; or that both parties worked on the job; or that the specifications stated that Raffaele Benacquista was the owner of premises on North Fifteenth Street, is not evidence that the contract was fraudulent or fictitious.

Fraud must be proved. It cannot be presumed.

On the contrary, the presumption is that the contract was the true contract between the parties, as in fact it was.

Respondent agrees with the doctrine set forth in the cases cited in appellants' brief, viz.: *Young* vs. *Wilson*, 44 N. J. L. 57; *Improved Association* vs. *Larkin*, 88 N. J. E. 52; *Earle* vs. *Willetts*, 56 N. J. L. 334; but says that none of these cases apply to the situation now before the Court.

As was stated by Vice-Chancellor Berry in the case of *Harrington Co.* vs. *Kadrey, et al.*, 105 N. J. Eq. 393, in a suit for specific performance, citing the case of *Aron* vs. *Rialto Realty Co.*, 100 N. J. E. 513, affirmed by this Court, (not officially reported) see 6 Advance Rept. 484, where answer first set up certain claims:

> "It would seem that this defense was an afterthought, and seized upon as an excuse, and not a reason for nonperformance."

If the contract was fraudulent, it must have been so at its inception. The appellants were willing to, and did deal with the Benacquistas, notwithstanding this filed contract, and it was not until after the furnishing of their last materials, and in the pleadings filed herein, that they claimed the contract was fraudulent and fictitious. Apparently it was an

afterthought and excuse, and respondent contends that there is no merit in this contention of fraud.

POINT III.

Appellants' third point is:—that, having established the validity of their liens against the lands, the decree should have adjudged these liens prior to respondent's mortgage.

If the Court dismisses the first and second argument of appellants, this contention of appellants would also fall, and further argument on this point is not considered necessary.

POINT IV.

Appellants are estopped from claiming priority over respondent's mortgage.

It is a well known principle in equity, "that he who wants equity must do equity."

Appellants had knowledge of respondent's mortgage; of the filed contract, and that the title of the lands on the records was in the name of Enrico Benacquista. They knew that the building was being erected on the lands; and at the time the respondent's mortgage was recorded, that the building had not as yet been erected, and that respondent's mortgage was a construction mortgage. They knew that respondent was advancing money to erect the building, and that the building in fact was erected by respondent's money. They knew that the filed contract on its face, with the specifications thereto attached, was regular in form. They knew by the same analogy, as materialmen and laborers could rely upon the filed contract, so the respondent, who had contracted to loan money to erect the building, might and did rely upon the filed contract. They

knew that they were receiving the benefit of respondent's money. They failed to notify respondent that they were furnishing materials in the erection of the building, or that the contract was fraudulent, and that they claimed a lien for goods furnished on the building prior to the respondent's mortgage.

As was said by Vice-Chancellor Backes in the case of *Muller* vs. *Thomann*, (not officially reported) see 7 Advance Repts. 525.

> "That an estoppel, an invention of equity for the promotion of justice is not inherent, but springs to the defense of an action, and arises to disarm one from maintaining a right which otherwise he would have were it not for his voluntary conduct, which precludes him from asserting it against another thereby mislead to his injury."

and in *Todd* vs. *Exeter Land Company*, decided by this Court May 20, 1929, 7 Advance Repts. 702 (not officially reported), the Court, among other things says:

> "That whatever puts a party upon inquiry amounts in judgment of law to notice, provided the inquiry became a duty and would lead to the knowledge of the requisite facts by the exercise of ordinary diligence and understanding.
>
> "The principle of equitable estoppel proceeds upon the ground that he who has been silent as to alleged rights when he ought in good faith to have spoken, should not be heard to speak when he ought to be silent.
>
> "A person is not permitted to deny a state of things which by his culpable silence has lead another to believe existed, and who has acted accordingly upon that belief. The doctrine always presupposes error on one side, and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom it is asserted to take advantage."

As was said by Vice-Chancellor Pitney in the case

of *Summer* vs. *Seaton,* 2 Dick. Chy. page 103, at page 111:

> "There is no principle better established in this Court, nor one founded on more solid foundations of equity and public utility, than that which declares, that if one man knowingly, though he does it passively by looking on, suffers another to purchase or to expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterward be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel."

and on page 115 he continues:

> "Thus, if one suffers another to purchase and expend money upon a tract of land, and knows that that other has a mistaken opinion respecting the title to it, and does not make known his claim, he shall not afterward be permitted to set up a claim to that land against the purchaser."

and on page 116:

> "The question is not so much what the party setting up the estoppel might or ought to have known or supposed, as to what he actually did know and suppose to the knowledge of the other party."

and on page 121:

> "A court of equity considers that when one party saw the mistake into which the other party had fallen, it was his duty to be active and state his adverse title."

As was said by Vice-Chancellor Backes in the recent case of *Herder* vs. *Garman,* 106 N. J. Eq. 13:

> "It is true that equity will not relieve complainants if they, being put upon or having resorted to inquiry, could have with ordinary care discovered that the facts were not as represented. Equity will not aid one whose indifference contributed materially to the injury he complains of."

In view of the above, it is contended that appellants are now precluded from asserting any priority over respondent's mortgage.

POINT V.

Where a party has two securities, the complainant but one, it is the duty of the party having the two securities to resort to its collateral before resorting to the common security.

See *Schaefer* vs. *Metzger*, 105 N. J. Eq. 307, opinion by Vice-Chancellor Backes, citing many cases.

In the case before this Court, appellants recovered general judgments against Enrico Benacquista and Raffaele Benacquista, individually and as co-partners trading as Benacquista Brothers, and therefore have two or more creditors and securities. Respondent herein claims that appellants should exhaust their remedy against the partnership assets, and against the two Benacquistas individually, before resorting to respondent's security.

Respondent has but one security.

There is evidence that the partners were engaged in the cement and stone business, and there is no evidence that appellants have taken any proceedings to enforce their judgment against the partnership, or against either Enrico or Raffaele as individuals, and which they should do by execution or otherwise, before resorting to respondent's security.

POINT VI.

The schedule attached to the complaint of the appellant Belleville Sash & Door Company, Exhibit C 9, shows that a portion of the goods for which they claim a lien, was furnished on premises No.

892 Clifton Avenue, Newark, N. J., and therefore this appellant's lien claim is invalid.

POINT VII.

The statement of respondent in evidence, showing payments of the mortgage moneys, among other things sets forth that a considerable portion of the money was used to pay off existing encumbrances, and therefore, to this extent at least, respondent should be subrogated to the rights of these prior encumbrances.

The Building and Loan Act provides that building and loan mortgages shall be a first lien on the mortgaged lands.

As was said by Vice-Chancellor Fallon in *Jackson Trust Co.* vs. *Gilkinson,* 105 N. J. Eq. 116:

> A mortgagee whose lien was intended to be a first lien, and at the time of closing, the mortgagor made an affidavit it was a first lien, subject only to a then prior mortgage, and taxes, &c., which mortgagee was thereafter paid out of the mortgage moneys, on foreclosure of the mortgage the Court held it to be a first lien, and that the mortgagee could be subrogated to the rights of the previous mortgagee, and taxes which he paid, and that the mortgage was prior to Mechanics Lien claimant who had contracted to build a garage on the land prior to the recording of the mortgage.

Doctrine of Subrogation is fully discussed in this case.

CONCLUSION.

Respondent respectfully submits that the Decree below should be affirmed.

Respectfully submitted,

SCOTT GERMAN,

Solicitor for and of Counsel with Respondent.