

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 23 1982

CLERK SUPREME COURT

AMERICAN BUILDINGS COMPANY,)

Plaintiff-Appellant,)

vs.)

TOM KELDERMAN, GERRIT KELDERMAN,
and SYLVIA KELDERMAN,)

Defendants-Appellees.)

Filed March 23, 1982

384

I-418
2-66395

Appeal from Mahaska District Court - James D. Jenkins, Judge.

Plaintiff appeals from trial court's judgment against it in an action to foreclose a mechanic's lien on a prefabricated building sold to defendants, asserting trial court erred in determining that it was estopped from foreclosing the mechanic's lien and that plaintiff's truck drivers had apparent authority to bind plaintiff. AFFIRMED.

Garold F. Heslinga and David D. Dixon of Heslinga & Heslinga, Oskaloosa, Iowa, for plaintiff-appellant.

Charles F. Helsten of Spayde, White & Helsten, Oskaloosa, Iowa, for defendants-appellees.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Plaintiff, American Building Company, appeals from trial court's judgment against it in an action to foreclose a mechanic's lien on a prefabricated building sold to defendant, Tom Kelderman.¹ On appeal, plaintiff asserts trial court erred in determining that it was estopped from foreclosing the mechanic's lien and that plaintiff's truck drivers had apparent authority to bind plaintiff. We affirm.

Plaintiff is a foreign corporation engaged in the manufacture and sale of prefabricated steel buildings, which are sold in component parts to independent dealers. The individual dealers sell the structures to the ultimate purchasers but plaintiff normally delivers the unassembled structure to the purchaser's premises. Defendant entered into a contract with Central States Clear Span Company, one of plaintiff's independent dealers, for the purchase of such a steel building. Central States ordered the building from plaintiff and specified that it was to be delivered to defendant's farm. Plaintiff delivered the component parts to defendant's farm in two semi-trailer loads.

Plaintiff's drivers had previously been instructed to accept only a cashier's check in payment, but defendant did not have a cashier's check and attempted to make payment with a personal check made payable to Central States. One of the drivers contacted the company dispatcher, explained the situation and ultimately received permission to accept the personal check.² The drivers thereafter unloaded the two shipments and returned to the branch office with the check. The

¹ Defendant Tom Kelderman is the contract buyer of the land upon which the building was to be erected; defendant Gerret and Sylvia Kelderman are the contract sellers of the land.

² Although trial court found that the driver told the company dispatcher that defendant was offering a personal check made payable to Central States, we do not find sufficient evidence from which to conclude that the payee on the check was specifically discussed in this conversation. However, for reasons which follow below, we do not find this void in the evidence defeats defendant's defense of estoppel.

check ultimately was delivered to Central States, which negotiated it. Subsequently, Central States issued a check in payment to the plaintiff but the check was not honored by the drawee.

On November 27, 1978, plaintiff filed a mechanic's lien on defendant's property, alleging a principle sum due of \$15,158.28. On June 19, 1979, plaintiff filed a petition to foreclose the lien. The case was tried to the court. Trial court found the facts as set out above and concluded that plaintiff acquired a valid mechanic's lien but that plaintiff's truck driver had apparent authority to accept the check made payable to Central States and, as a result, plaintiff was estopped from asserting its lien. From this judgment against it, plaintiff appeals.

I. Scope of Review. Since this is an action in equity, our review is *de novo*. § 572.26, The Code; Iowa R. App. P. 4.

II. Estoppel.

A. General Principles. "The doctrine of equitable estoppel ... is founded upon principles of morality and fair dealing and is intended to subserve the ends of justice." Sioux City v. Johnson, 165 N.W.2d 762, 767 (Iowa 1969). "An estoppel is based upon the idea that one who has made certain representations or taken a certain position, should not thereafter be permitted to change his position to the prejudice of one who has relied thereon." Laverty v. Hawkeye Security Insurance Co., 258 Iowa 717, 726, 140 N.W.2d 83, 88 (1966). Estoppel arises

[W]hen a person by his acts, representations, or admissions, or even by his silence when it is his duty to speak, intentionally or through culpable negligence, induces another to believe that certain facts exist, and that the other person rightfully relies on and acts on such belief, and will be prejudiced if the former is permitted to deny the existence of such facts.

Id., quoting 31 C.J.S. Estoppel, § 59 at 368 (1964). Estoppel lies where a subcontractor specifically advises a property owner that the subcontractor would look to the principal contractor for payment of his fees. See Green Bay Lumber Co. v. Thomas, 106 Iowa 154, 76 N.W. 651 (1898). Specific statements to the

property owner, however, are not required. If the subcontractor stands by in silence and watches full payment made to the principal contractor without objection, the subcontractor is estopped from asserting that payment is owed him. Vreeland v. Ellsworth, 71 Iowa 347, 350, 32 N.W. 374, 375 (1887). We thus conclude that if the subcontractor, or his agent acting within the scope of the agency's authority, accepts a check payable to the principal contractor as payment for the subcontractor's services, the latter accepts that instrument as payment of the debt and is estopped from asserting otherwise. It is then the subcontractor's responsibility to ensure his own receipt of the funds. In the instant case, it was plaintiff's truck driver who, as plaintiff's agent, accepted the check on plaintiff's behalf; we therefore must determine the scope of his authority.

B. Agent's Scope of Authority. We believe resolution of this issue rests upon the actual authority of the driver. We thus will not consider the parties' analysis of apparent authority. "The power of an agent to create legal relations between the principal and third person is a characteristic element of the agency relation." See Seavy, Handbook of the Law of Agency § 8(A) at 11 (1964). "Authority is the privileged power of the agent to bind the principal, the privilege being based upon the principal's manifestations of a consent to him." Id. Actual authority includes both express and implied authority. Newberry v. Bart, Inc., 252 N.W.2d 711, 714 (Iowa 1977). "Express authority is that specifically mentioned by the principal in setting up the extent of the agent's duties." Id. citing Seavey, Agency § 8(C) at 12. Implied authority is that authority which is necessary, usual and proper to effectuate the main authority expressly conferred. Newberry, 252 N.W.2d at 714.

In the instant case, plaintiff's drivers were clearly his agents for certain purposes. In addition to transporting the materials, the drivers had express authority to receive certified checks. In fact, plaintiff expressly prohibited its drivers from delivering the materials until they received payment in accordance

with the company rules. As a result the drivers were specifically responsible for determining that they were given a properly drawn instrument. In this specific instance, one driver was given express authority to accept defendant's personal check. We further believe that he had implied authority to determine that the check he received was properly drawn. We believe that he was as much responsible for determining the correct payee as he was for determining the type of instrument, amount, and drawee. These ministerial duties were clearly within the scope of his employment. We thus believe knowledge that the check was payable to Central States is chargeable to plaintiff. Further, it would be inequitable to charge defendants with the burden of double payment when plaintiff had possession of the negotiable instrument and evidently gave it to the principal contractor. Plaintiff could have easily protected its interest by dealing directly with defendant.

In summary, we conclude that when the driver accepted the check on behalf of plaintiff, he represented to defendant that it was satisfactory in all regards. Defendant was entitled to rely, and did rely, upon that representation and plaintiff is thereby estopped from asserting the lien. We thus affirm trial court's judgment.

AFFIRMED.

All judges concur except Carter, J., who dissents.

I dissent. The record on this *de novo* appeal furnishes no basis for defeating plaintiff's mechanic's lien claim on either of the theories employed by the majority.

By making the check payable to Central States, defendants clearly cast the transaction in a posture whereby they are precluded from now asserting that they intended to pay the plaintiff. As a result, defendants assumed the risk of nonpayment of plaintiff's subcontract by Central States. See § 572.14, The Code.

There is no basis to establish an equitable estoppel against the plaintiff through the acts of its employees. Defendants in no way changed their position in reliance as a result of the fact that plaintiff's employees accepted a check payable to the general contractor. They are thus in the same position as any owner who pays the general contractor without lien waivers from subcontractors and before subcontractors' claims are barred by limitations. As between plaintiff and defendants, it is the latter's acts which cause the problem and the statute (§ 572.14) protects the plaintiff in such situations.

Lastly, whatever the authority of plaintiff's agents to accept the check payable to Central States, there is absolutely no basis to infer that this transaction was in payment of plaintiff's subcontract. Defendants, by their own act, made the check payable to the general contractor, a circumstance which is entirely inconsistent with the finding that payment was made to plaintiff. I would reverse the trial court.