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IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

SWIFT & COMPANY,

Appellant,

vs.

A. E. STALEY MANUFACTURING
COMPANY,

Appellee.

Filed March 22, 1979

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2-61674 & 2-62020

Appeal from Polk District Court - James P. Denato, Judge.

Plaintiff seller of four soybean processing mills to defendant appeals the trial court's order dismissing its petition to foreclose a mechanic's lien. AFFIRMED.

Donald A. Wine and Thomas J. Shroyer of Thoma, Schoenthal, Davis, Hockenberg & Wine, Des Moines, Iowa; and Frederic S. Lane of Sonnenschein, Carlin, Nath & Rosenthal, Chicago, Illinois; for appellant.

B. A. Webster and Brent B. Green of Gamble, Riepe, Burt, Webster & Fletcher, Des Moines, Iowa; and Harry P. Sacks of Sacks, Montgomery, Molineaux & Pastore, New York, New York; for appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiff, Swift & Company, hereinafter referred to as "Swift," appeals the trial court's order dismissing its petition to foreclose a mechanic's lien against A. E. Staley Manufacturing Company, hereinafter referred to as "Staley".

On or about March 1, 1976, Swift and Staley entered into an "Agreement for Sale of Certain Assets of Swift Edible Oil Company, a Division of Swift & Company to A. E. Staley Manufacturing Company." Under the agreement, Swift sold Staley four soybean processing mills. As a consequence of the transfer, Swift got out of the soybean processing business, selling the assets with which it had conducted that business to Staley.

As of the date of the agreement's execution, Swift was performing construction work at the Des Moines, Iowa, plant, one of the four soybean plants sold by Swift to Staley pursuant to the agreement. Rather than Staley taking over the plant "as is" on March 1, 1976, and completing the work on its own, Staley elected to purchase a completed plant from Swift as spelled out in the sales agreement. Thus, there was some construction work performed incidental to the sale of assets under the sales agreement.

The lump sum purchase price for the assets sold was \$45 million, subject to certain adjustments at the time of closing and further provided for the assumption by Staley of certain liabilities with respect to raw materials, contracts, etc. The purchase price of \$45 million, provided in Article II of the sales agreement, was inclusive and covered all of the assets sold under the agreement. No provision in the sales agreement was made for payment to Swift for performance of the incidental construction work at the Des Moines plant and no valuation of the construction work was made.

Article VII of that agreement provided that as "collateral security" for the representations made by Swift in the sales agreement with respect to the Des Moines plant, 10 percent of the entire purchase price for all assets would be held by Staley until satisfactory completion of the Des Moines plant. The sales agreement contemplated that Staley would purchase a completed plant at Des Moines, as opposed to Staley purchasing the plant "as is."

The transaction was closed on March 29, 1976, and Swift completed the work on the Des Moines plant on September 9, 1977. However, Staley did not pay Swift the \$4.5

million dollars retained. Swift then filed and perfected a mechanic's lien and in this action, sought to foreclose that lien for the \$4.5 million dollars which Swift alleges was retained specifically for the construction project.

In ruling upon Staley's motion to dismiss, the trial court specifically found that the contract was for the sale of assets of an entire division of Swift's Multi-Division Corp. for a total purchase price of \$45 million dollars. As part of the agreement, Swift was to complete construction on the plant building in Des Moines. The court found that the relation of these parties was not simply for the provision of labor and material on a piece of realty in Des Moines, but rather it was a sales contract incidental to which Swift was to complete construction on one of the buildings being sold. Additionally, the court found that no separate price for this work was stated, finding that the \$4.5 million retention was simply for security, not a price for the labor and material to be provided on one item which was incidental to the sale of many assets of the physical and non-physical nature. From that ruling Swift has appealed.

Both Swift and Staley have raised and ably argued several issues on appeal. However, our review of the briefs and the arguments contained therein leads us to the conclusion that one issue is dispositive. Although the resolution of the question of whether Swift and/or Staley is the "owner" of the property in question and therefore legally capable of enforcing a valid mechanic's lien, is crucial, even if resolved in favor of Swift, it does not dispose of the question of whether the dollar value of the "collateral security" related solely to the costs of the construction project or whether it was simply a percentage of the total purchase price of the entire sale of assets which was withheld to ensure satisfactory completion of the Des Moines plant.

Our review is de novo. Olberding Construction Co. v. Ruden, 243 N.W.2d 872, 875 (Iowa 1976). We give weight to the trial court's findings of fact, but are not bound by them. Olberding, 243 N.W.2d at 875; Iowa R. App. P. 14(f)(7). The principal issue before this court is whether, as a result of the agreement entered into between Swift and Staley, a mechanics lien can attach to the unpaid portion of the purchase price retained by Staley as "collateral security" pending the completion of the construction by Swift. Stated otherwise: Is a lienable item (the plant construction) rendered non-lienable by virtue of its inclusion in the overall sale of assets?

There is no Iowa case which answers the question directly. 57 C.J.S. Mechanic's

Liens § 165 at 707-08 states:

The lien is not defeated by the inclusion in the lien claim or statement of charges for items which are not lienable, such as materials which were not actually furnished or used in the building or improvement, where the inclusion of such charges is due to inadvertence or an honest mistake without fraudulent intent, the lien paper contains one lienable item, and the items for which claimant is entitled to a lien can be segregated from those which are improperly included; in such case the illegal charges will be eliminated and the lien will be enforced as to the proper and lienable charges.

The inclusion of such improper charges will, however, defeat the entire lien where they are willfully and intentionally included by claimant in order to obtain a lien for a larger amount than he is entitled to, or where their inclusion is due to gross carelessness or a recklessness tantamount to bad faith, or where the account is so stated that the lienable and nonlienable items cannot be segregated. (Emphasis added).

The quoted material indicates that where the purported lien includes both lienable and non-lienable items, the enforceability of the lien depends upon the amount of the non-lienable items, the reason for their inclusion, and their separability. Where the claim is so stated that the lienable and non-lienable items cannot be segregated, the entire lien will be defeated.

In Healy v. Toles, 266 Mich. 584, 254 N.W. 213 (1934), the plaintiff sought to enforce a lien for the sum of \$102,959 for the building, deepening, excavating and leveling of certain canals and the filling in of certain lands. The Michigan Supreme Court held that the state's mechanics lien law could not be extended by equitable principles, and that the statute was limited to "structures" and could not be interpreted to include "ditch or canal." Id. at 590, 254 N.W. at 215.

The plaintiff in Healy also attempted to argue that a part of his claim included work of excavating for abutment of bridges. While not discussing the contention fully, the court stated that even if plaintiff were entitled to a lien on that account, it could not be allowed in the instant case. The court stated:

Neither the number of such bridges nor the amount claimed for the work done in that connection is set forth. Furthermore, the claim is not segregated in any manner, but is indefinite and uncertain, and completely intermingled with the general claim. Under these circumstances, the lien must fail. (Emphasis added)

Id.

In Verplank Concrete & Supply, Inc. v. Marsh, 40 Ill. App.3d 742, 353 N.E.2d 27

(Ill. App. Ct. 1976), the plaintiff sought enforcement of its mechanic's lien for concrete and for "truck rental." The defendant attempted to argue that by alleging a contract both for concrete and for truck rental, plaintiff had alleged a contract for a lump sum which embraces both lienable and non-lienable items that the court could not separate. The Illinois Appellate Court stated: "Clearly if lienable and non-lienable items cannot be separated, the entire lien is defeated." Id. at 744, 353 N.E.2d at 29. However, the court ruled in plaintiff's favor and enforced the lien because under the particular facts of the case, the use of the trucks in transporting the concrete was incorporated into the building. Id.

In the instant case, the entire contract was for the sale of all of Swift's assets in its Edible Oil Division. Included in the sale was a complete plant in Des Moines, Iowa. The construction at the Des Moines Plant was only part of the overall sale, the price for which was not separately stated. The inclusion of the non-lienable items and the inability to segregate those items renders the lien unenforceable. Healy, 266 Mich. at 590, 254 N.W.2d at 215; Verplant, 40 Ill. App. 3d at 744, 353 N.E.2d at 29. For that reason Swift's claim must fail and the judgment of the trial court is affirmed. Costs taxed to plaintiffs.

AFFIRMED.