



IN THE COURT OF APPEALS OF IOWA

CASHWAY LUMBER STORE, INC.,)

Appellant,)

Filed March 14, 1977

v.)

ANDERSEN'S MILL WRIGHT SERVICE)
COMPANY, INC., PIONEER FEDERAL)
SAVINGS & LOAN ASSOCIATION,)
GUADALUPE F. RUIZ AND FLORENCE)
E. RUIZ, Husband and Wife, THE)
IOWA DEPARTMENT OF REVENUE OF)
THE STATE OF IOWA, JOHN C.)
BUSCH and CHARLES E. BUSCH,)

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2-57542

Appellees.)
)

Appeal from Cerro Gordo District Court - J. W. Frye, Judge.

Plaintiff appeals the dismissal of its petition to foreclose
a mechanic's lien as time-barred by § 572.27, The Code.

Affirmed.

Warren L. De Vries, of Mason City, for appellant.

Richard Tompkins of Nelsen and Folkers of Mason City, and
Levinson and Enabnit, of Mason City, for appellees.

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

OXBERGER, J.

Plaintiff Cashway Lumber appeals the trial court's order dismissing its petition to foreclose a mechanics lien. The trial court ruled Cashway failed to bring its suit within the time allowed under § 572.27, The Code. We affirm.

Cashway urges on appeal that the trial court erred 1) in finding the period for its § 572.27 action began to run May 20, 1971 rather than November 27, 1971 and 2) in allowing defendant Busch, a subsequent purchaser with notice of the lien to assert the statute of limitations as an affirmative defense.

An action to enforce a mechanic's lien is an equity action. Section 572.26, The Code. Accordingly, our review is de novo. Rule 334, Rules of Civil Procedure. *Peterman v. Hardenbergh*, 250 Iowa 931, 933, 97 N.W.2d 152, 154 (1959). We must give weight to the trial court's findings of fact, although we are not bound by them. Rule 344(f), R.C.P.

The trial court found that defendant Andersen and Cashway entered into an oral agreement whereby Cashway would furnish material to Andersen to build a home. The first materials were furnished on November 20, 1970. The receipts attached to Cashway's mechanics lien indicate that materials were regularly supplied until May 20, 1971. After that date there were no materials charged to Andersen until November 27, 1971. During this interim period the property was purchased from Andersen by the defendants Mr. and Mrs. Ruiz by contract dated July 7, 1971. The November 27, 1971 transaction consisted of a charge to Andersen's account by Mrs. Ruiz for certain bathroom fixtures in the amount of \$7.11. Cashway perfected its mechanics lien by filing on January 12, 1973. The property was subsequently deeded to defendant Busch on August 8, 1973. The petition to foreclose the mechanic's lien

was filed August 31, 1973 with service upon the various defendants made on September 10, 1973. A't. B.

The determination of the date on which the last material was furnished is pivotal. Section 572.27, The Code, operates as a statute of limitations for the foreclosure of mechanics liens. This section provides that any action to foreclose a mechanics lien must be brought within two years and 90 days from the last date on which material or labor is furnished by a contractor. If that date is November 27, 1971, Cashway's action was timely commenced on September 10, 1973. If the last date is found to be May 20, 1971 Cashway's action is barred by the terms of § 572.27, The Code.

The court refused in *Denniston & Partridge Co. v. Luther*, 194 Iowa 464, 188 N.W. 664 (1922) to hold that a charge for screen doors made six months after the last entry in the supplier's account was a transaction extending the continuity of the account and the beginning of the 90-day statutory period for mechanic's liens.

" . . . 'the space between the items is such as to raise the *presumption* that the work had once ceased, and the contract was completed.' (citations omitted) There is a large measure of equity in the rule which requires the claimant of a lien to act promptly in filing his statement, and refuses, except in a clear case, to permit him to prolong the time allowed therefore, by making a trifling or delayed item of charge in his account." (emphasis added) 194 Iowa at 469, 188 N.W. at 666.

The trial court found the \$7.11 charge to be a "trifling and delayed charge." X. 45.

Following the reasoning of *Denniston*, we find no indication that at the time Mr. and Mrs. Ruiz purchased the house there was any unfinished construction to be completed. Nor is there any indication that either Cashway or Andersen contemplated a delay in the construction or anticipated sub-

stantial changes or additions subsequent to May 20, 1971. 194 Iowa at 468, 188 N.W. at 666. Cashway has failed to rebut the *Denniston* presumption that at the time the home was sold the original contract between Cashway and Andersen had been completed. The last entry on the account statements that falls within the continuous contract was May 20, 1971. The charge of \$7.11 for the bathroom fixtures occurred some six months after the continuity of the contract was broken. The finding of the trial court that the subsequent purchase of the bathroom fixtures on November 21, 1971 was a separate transaction apart from the original contract is justified. It follows that the date on which the last materials were furnished was May 20, 1971. Since Cashway's action to foreclose was filed more than two years and ninety days later, it was not timely filed and is barred by § 572.27, The Code. Failure to timely foreclose the mechanics lien results in "no lien against the property." *Finn v. Grant*, 224 Iowa 527, 535, 278 N.W. 225, 229 (1938).

Cashway alternatively argues that defendant Busch's knowledge of the lien imposed upon him the burden of satisfying it upon Andersen's default. Apparently, Cashway would impose liability upon Busch upon a theory that his purchase with knowledge on August 8, 1973 tolled the statute. We note § 572.27, The Code, provides the statute is tolled by suit to enforce the lien within two years and nine months and specifically states "and not afterwards."

If Cashway is in reality claiming the statute is tolled by an equitable estoppel theory, the record does not contain facts warranting its invocation. The doctrine of equitable estoppel is applicable to statutes of limitations, *L & W Construction Co. v. Kinser*, 251 Iowa 56, 66, 99 N.W.2d 276,

282 (1959) upon proof of these essential elements:

"(1) false representation or concealment of material facts; (2) lack of knowledge of the true facts on the part of the person to whom the misrepresentation is made; (3) intent of the party making the representation that the party to whom it is made shall rely thereon; (4) reliance on such fraudulent statements or concealment by the party to whom made resulting in his prejudice." Grandon v. Ellingson, 259 Iowa 514, 522, 144 N.W.2d 898, 903 (1966).

Cashway has not alleged any representation or concealment by Busch upon which they relied, nor does the record reveal any such proof.

Accordingly, the argument that the affirmative defense of the statute of limitations should be denied Busch must be rejected.

Affirmed.