

CUMBERLAND VALLEY SAVINGS AND LOAN ASSOCIATION v. HASAN, et al., C. P. Franklin County Branch, No. A.D. 1978 - 137

Mortgage Foreclosure - Priority of Liens - "Erection and Construction" - Section 1201 of the Mechanic's Lien Law of 1963 - Constitutionality

1. Work done to the exterior of the structure such as removal of a chimney, new basement structure, new sidewalks, new concrete steps, new parking lot and driveway, removal of trees and shrubs and installing a new and larger door constitute a "newness of structure" under *Miller v. Hershey*, 59 Pa. 64 (1868), and are sufficiently material to warrant the finding of "erection and construction" as defined in Section 1201 of the Mechanics' Lien Law of 1963, 49 P.S. Sect. 1201 (10).

2. Material changes to the exterior of the structure furnish notice that there could be liens.

3. Article III, Section 32 of the Pennsylvania Constitution, as amended on May 16, 1967, does not contain any limitations on mechanic's liens.

Robert C. Schollaert, Esq., Counsel for Plaintiff

Paul F. Mower, Esq., Counsel for Exceptant

OPINION AND ORDER

KELLER, J. April 18, 1979:

On September 5, 1975, Marlin E. Gayman, general contractor, contracted to perform work and supply materials to convert a single family residence, owned by Saad M. Hasan and his wife, into a radiology office. At the time the work was commenced the real estate was subject to a mortgage dated April 25, 1975, granted by Saad M. Hasan and his wife to Cumberland Valley Savings and Loan Association in the amount of \$30,800.00. On December 16, 1975, Cumberland Valley Savings and Loan Association loaned an additional \$20,000.00 to the Hasans with the original mortgage being security for any additional loans. Marlin E. Gayman entered his mechanics' lien claim on April 3, 1976, in the office of the Prothonotary in the amount of \$26,195.71.

A mortgage foreclosure action was instituted on March 19, 1978 by Cumberland Valley Savings and Loan

Association against the Hasans. On May 31, 1978 Gayman's mechanics' lien claim was reduced to judgement. On June 8, 1978 a judgment in the mortgage foreclosure action was entered against the Hasans in the amount of \$57,869.31, plus interest and costs of suit. Pursuant to a writ of execution issued on June 9, 1978, the Sheriff of Franklin County sold the said property of the Hasans at public sale on July 28, 1978. The property was purchased by Cumberland Valley Savings and Loan for \$49,000.00.

The Sheriff prepared a schedule of distribution which did not include Marlin E. Gayman for any part of his mechanics' lien claim. Mr. Gayman filed exceptions to the schedule of distribution on August 28, 1978 claiming all monies realized from the Sheriff's Sale over and above the amount due on the original mortgage, plus costs, should be paid to him.

The exceptant bases his claim on Sect. 1508 of the Mechanics' Lien Law of 1963, 49 P.S. 1508 which provides:

The lien of a claim filed under this act shall take effect and have priority:

(a) In the case of the erection or construction of an improvement, as of the date of the visible commencement upon the ground of the work by erecting or constructing the improvement; and

(b) In the case of the alteration or repair of an improvement, as of the date of the filing of the claim.

It is Gayman's position that his lien is for "erection and construction" and takes effect on the date of commencement of construction which was September 5, 1975, and renders the second loan of Cumberland Valley Savings and Loan on December 16, 1975, subordinate.

"Erection and construction" and "alterations and repairs" are defined in Sect. 1201 of the Mechanics' Lien Law of 1963, 49 P.S. 1201 as follows:

(10) "Erection and construction" means the construction of a new improvement or of a substantial addition to an existing improvement or any adaptation of an existing improvement rendering the same fit for new or distinct use and effecting a material change *in the interior or exterior thereof* (italics ours).

(11) "Alteration and repair" means any alteration or repair of an existing improvement which does not constitute erection or construction as defined herein.

The Comment by the Joint State Government Commission following Sect. 1201 is:

Subdivision (10). The Act of 1901 contained no express definition of erection and construction. This definition is adapted in part from Section 3, Act of 1901, 49 P.S. 26, dealing with substantial additions to and adaptation of old structures. *No change in the law is intended* (italics ours).

Since "no change" in law was intended, our decision as to what constitutes erection and construction must be governed by the principles of law as they existed at the time of the enactment of the Mechanics' Lien Law of 1963. *Henshue v. Kunsman*, 37 Northampton Co. Rep. 199 (1965).

The leading case on construction versus repair is *Miller v. Hershey*, 59 Pa. 64 (1868), Justice Agnew discussed what constitutes erection and construction as follows:

"The idea which runs throughout all the cases is the newness of structure in the main mass of the building — that entire change of external appearance, which denotes a different building from that which gave place to it, though into the composition of the new structure some of the old parts may have entered. This newness must be in the exterior, the main plan of the building, and not in its interior arrangements. There appears to be good reason for this not only in the fact that the external walls of a building constitute the strongest mark of its identity and are its main part, but also in the notice that the external change furnishes to purchasers and lien creditors.... It is but fair that the building should present to the eye that external change indicating newness of structure which is calculated to put purchasers, mortgagees and other lien creditors upon inquiry for liens." (Supra at 69)

This principle as stated in *Miller v. Hershey* has frequently been cited by the courts in cases dealing with mechanics' liens when the question of erection and construction as applied to repair and alteration is at issue. *Anastasi v. Brunet*, 171 Pa. Super. 464 (1952); *Henshue v. Kunsman*, supra; *Lauriello v. Calio*, 25 D&C 2d 93 (1958);

Zussman v. Yeagle, 58 Mont. L.R. 262 (1942); *Huber v. Russell*, 105 Pa. Super. 293 (1932).

The record indicates the following work done to the property in question, located at the corner of Fifth Avenue and Lincoln Way East in Chambersburg to the exterior:

- (1) Chimney was removed and there were repairs to the siding and roof where the chimney had been.
- (2) Installation of a basement entrance off Fifth Avenue.
- (3) Removal of existing front sidewalk and replacing it with a wider sidewalk.
- (4) Installation of a driveway entrance and black-top parking area at the rear of the building covering what used to be the entire backyard and part of the side yard.
- (5) Removal of a substantial amount of trees and shrubs.
- (6) Installation of concrete steps and sidewalk on the Fifth Avenue side of the building.
- (7) Installation of a new and larger front door.

To the interior there were substantial changes in converting the residence into a radiology office including:

- (1) Removal of basement floor, excavating 18 inches and pouring of a new concrete floor.
- (2) Installation of partitions in the basement to divide it into patient diagnostic treatment rooms.
- (3) Construction of a new stairway from the basement to the first floor.
- (4) Conversion of kitchen area into a laboratory.
- (5) Converting of the sitting room into an x-ray room which included building a concrete pedestal from the basement to the first floor to reenforce the floor to support the x-ray table, convering all the walls and floors with lead sheathing, installation of a steel support system of the ceiling to support the overhead x-ray unit, removal of existing French doors and replacing with a lead core door and dropping of the ceiling.

LEGAL NOTICES, cont.

the Borough of Chambersburg, Frank-
Pennsylvania, deceased.

BYERS First and final account, statement
of proposed distribution and notice to
the creditors of Betty M. Wolford,
executrix of the estate of Ellen Janet
Byers, late of the Borough of Cham-
bersburg, Franklin County, Pennsyl-
vania, deceased.

GLENN E. SHADLE

Clerk of the Orphans' Court
Franklin County, Pennsylvania

(5-11, 5-18, 5-25, 6-1)

SHERIFF'S SALES

Pursuant to Writ of Execution issued on
Judgment A.D. 1979-70 of the Court of
Common Pleas of the Thirty-Ninth Judicial
District, Franklin County Branch, I will sell
at public auction sale in Court Room No.
One of the Franklin County Court House,
Memorial Square, Chambersburg, Pennsyl-
vania, at One O'clock P.M. on Friday,
May 25, 1979 the following real estate im-
proved as indicated:

ALL the following described real estate
lying and being situate in Metal Township,
Franklin County, Pennsylvania, bounded and
limited as follows:

BEGINNING at an existing iron pin
at corner of lands now or formerly of
Billy L. Fleming and Jacqueline Fleming
and Larry Carlin; thence by land now
or formerly of said Billy L. Fleming and
Jacqueline Fleming south 47 degrees 45
minutes west 198.80 feet to a set iron
pin; thence along land now or formerly
of Thomas M. Adams and Eleanor M.
Adams, his wife, north 39 degrees 15
minutes west 254.45 feet to a railroad
spike in the middle of Pennsylvania
Traffic Route 75; thence along Pennsyl-
vania Traffic Route 75 north 53 degrees
30 minutes east 198.75 feet to an exist-
ing railroad spike; thence along lands
now or formerly of Larry Carlin south
39 degrees 15 minutes east 234.51 feet
to the place of beginning, CONTAIN-
ING a total acreage of 1.114 acres as
shown on a draft of Matthew H. Mc-
Allen, R.S., dated May 13, 1977, for
Thomas M. and Eleanor M. Adams and
being recorded with the hereinafter re-
cited deed, and being the same real
estate which Thomas M. Adams and
Eleanor M. Adams, his wife, by their
deed dated August 25, 1977, and re-
corded in the Office of the Recorder of
Deeds of Franklin County, Pennsylvania,
in Deed Book Volume 747, Page 333,
conveyed to Robert L. Morrison and
Betty K. Morrison, his wife.

Having erected thereon a dwelling for
office (real estate), with concrete block
foundation, full basement area of concrete
floor. Exterior walls are of frame construc-
tion covered with 1/2 vertical wood and
1/2 brick veneer. Metal roof. Interior walls
are of dry wall, floors of finished yellow
pine flooring. Heated by automatic hot
water oil burner. Also air conditioning.

Seized and taken in Execution as the real
estate of Robert L. Morrison and Betty K.
Morrison, his wife, under Judgement No.
A.D. 1979-70.

Pursuant to Writ of Execution issued on
Judgment A.D. 1979-30 of the Court of
Common Pleas of the Thirty-Ninth Judicial
District, Franklin County Branch, I will sell
at public auction sale in Court Room No.

SHERIFF'S SALES, cont.

One of the Franklin County Court House,
Memorial Square, Chambersburg, Pennsyl-
vania, at One O'clock P.M. on Friday,
May 25, 1979 the following real estate im-
proved as indicated:

The land subject to the Mortgage is all
the following described real estate situate
in Quincy Township, Franklin County,
Pennsylvania, bounded and described as
follows:

BEGINNING at a spike in the center
of Township road 410 known as the Gap
Road, a corner of lands of Virginia M.
Mentzer; thence by the latter North 76
degrees 16 minutes West 251.2 feet to
an iron pin; thence by lands now or
formerly of Rebecca Cordell North 15
degrees East 260.9 feet to an iron pin;
thence by lands now or formerly of
Chester Bricker South 76 degrees 15
minutes East 251.2 feet, more or less,
to a spike in the center of said road;
thence still with center of said road
South 14 degrees 45 minutes West 227.7
feet to a spike in the center of said road;
thence still with center of said road
South 14 degrees 9 minutes West 27.8
feet to the place of beginning.

The above described real estate is the same
real estate which Judith L. Mentzer, single;
Virginia M. Mentzer, single; Bonnie E.
Mentzer Sprengle, widow; Ivan L. Mentzer
and Arletta Mentzer, his wife; Martha M.
Mentzer Fitz and Richard Fitz, her hus-
band; Wilbur M. Mentzer, single; Thomas
C. Mentzer and Rebecca Mentzer, his wife;
and Deborah F. Mentzer Lynch and Kenneth
Lynch, her husband, by their deed dated
November 25, 1975 and recorded in the Re-
corder's Office of Franklin County, Penn-
sylvania in Deed Book Volume 723, Page
807, conveyed to Wilbur M. Mentzer, single,
Mortgagor herein.

Having erected thereon a single family
dwelling of conventional design, with a
brick or stone foundation, full basement
area. Exterior walls are of frame construc-
tion and asphalt shingles. Interior walls
are of Plaster board.

Seized and taken in Execution as the real
estate of Wilbur M. Mentzer, under Judge-
ment No. A.D. 1979-30.

TERMS: The successful bidder shall pay
20% of the purchase price immediately after
the property is struck down, and shall pay
the balance within ten days following the sale.
If the bidder fails to do so, the real estate
shall be re-sold at the next Sheriff's sale and
the defaulting bidder shall be liable for any
deficiency including additional costs. Any
deposit made by the bidder shall be applied
to the same. In addition the bidder shall pay
\$20.00 for preparation, acknowledgement and
recording of the deed. A Return of Sale and
Proposed Schedule of Distribution shall be
filed in the Sheriff's Office on June 13,
1979, and when a lien creditor's receipt is
given, the same shall be read in open court
at 9:30 A.M. on said date. Unless objections
be filed to such return and schedule on or
before June 22, 1979, distribution will be
made in accord therewith.

FRANK H. BENDER, Sheriff of
Franklin County, Pennsylvania

April 27, 1979

(5-4, 5-11, 5-18)

(6) Diningroom was converted into dressing rooms and
x-ray film checking room.

(7) Livingroom was converted into a patient waiting room
with built-in reception desk.

(8) One of the upstairs bedrooms was converted into an
office and another bedroom was prepared for a future
x-ray room with lead sheathing on the floor.

(9) A steel self-closing door was installed at the top of the
stairwell.

(10) Installation of two complete heating and cooling units
in the attic, and duct work, a cooling system installed in
the basement with duct work.

(11) The entire building was rewired and 400 amp electric
service installed.

Where the facts are undisputed, it is for the Court to
determine whether the structure against which the claim is
filed is alteration and repair, or erection and construction.
Porter v. Neighman, 29 Pa. Super. 488 (1905), *Henshue v.*
Kunsman, supra. The facts clearly indicate to the Court that
there has been extensive alteration to the interior of the
structure constituting material change. The interior was
completely converted from a single family residence to a
radiology office. The Cumberland Valley Savings and Loan
Association does not refute the material change to the
interior, but contends that the exterior change was not
sufficiently material to meet the "newness of structure"
standard of *Miller v. Hershey*.

It can be argued that the work done to the exterior;
removal of the chimney, new entrance to the basement, new
sidewalk, installation of driveway and parking lot, addition
of concrete steps, removal of trees and shrubs and repairs
to the wood and siding, does not constitute a change to the
main mass of the structure "which denotes a different
building from that which gave place to it." However, it is
our conclusion that the changes to the exterior were
sufficiently material to warrant the finding of erection and
construction as defined in the Mechanics' Lien Law of
1963.

The court in *Miller v. Hershey* relied on the fact that
material change to the exterior furnishes notice to others
that there could be liens. "It is but fair that the building

should present to the eye that external change indicating newness of structure which is calculated to put purchasers, mortgagees or other lien creditors upon an inquiry for liens." The type of work done to the exterior of the building was sufficient to have put any reasonable person on notice that there were extensive changes being made and that there could be liens. The blacktopping of the yard to convert it into a parking lot would surely put one on notice that extensive changes were taking place, especially considering that the structure is located in a residential section of the city. This, coupled with the other construction being done, the trucks, materials and workmen who were present at the site, was sufficient to provide notice to the creditors. The construction to the exterior effected the material change to meet the requirements of erection and construction.

The Cumberland Valley Saving and Loan Association further argues that even if the court reached the conclusion that the work performed comes within the definition of "erection and construction", the exceptant still is not entitled to relief because Section 1201 of the Mechanics' Lien Act which defines erection and construction is unconstitutional. This contention is based on the constitutional limitations on mechanics' lien legislation set forth in Article III, Section 7 of the Constitution, 1874. Article III, Section 7 prohibited the enactment of any legislation "authorizing the creation, extension, or impairing of liens." Thus, Article III, Section 7 prohibited mechanics' liens from being extended by legislation. Beyond the point reached at the time of the adoption of the Constitution of 1874. *Anastasi v. Brunet*, 171 Pa. Super. 464 (1952).

We note that Article III, Section 7 of the Pennsylvania Constitution was amended on May 16, 1967, and is now Article 3, Section 32 and the amended Constitution does not contain any limitations on mechanics' liens.

In application of the 1874 constitutional limitation to Section 3 of the Mechanics' Lien Act of 1901, 49 P.S. 26, the section from which Section 1201 of the 1963 Act was adopted without change, it was held in *Malone v. Hosfeld*, 53 Pa. Super. 134 (1913) that it offended the constitution to extend the right to file a lien for "erection and construction" to a case which failed to conform to the standards established by the court prior to 1874. 12 Standard Pa. Practice, Ch. 51, Sect. 5, P. 13-15. Thus to apply this section for liens involving erection and construction to a situation that would not be considered erection and

construction before 1874, is unconstitutional.

In *Malone*, the court dealt with that portion of Section 3 of the 1901 law which is almost identical to the portion of the definition of erection and construction in Section 1201 of the 1963 Act upon which the exceptant bases his claim. That portion of Section 3 of the Mechanics' Lien Act dealt with by the court in *Malone* provides: "Every adaptation of an old structure or other improvement to a new or distinct use, which effects a material change in the interior or exterior thereof, shall also be deemed an erection or construction thereof." *Supra*. 140. The court continued by saying:

"We are not prepared to say that this clause would not bear a construction which would include a case like the present, and therefore, it becomes necessary to consider whether and to which extent it is a valid enactment. Under the old law, it was the extent and character of the alterations, and *not the mere change of purpose of the building*, that was the test by which to determine whether they constitute an erection or construction of a building within the meaning of the statute: *Norris App.* 30 Pa. 122. As to the extent and character of the alteration required, the rule established by the decisions was thus stated by Agnew, J. in *Miller v. Hershey*.... (italics ours)."

The court in *Malone* enumerated the "newness of structure" standard of *Miller v. Hershey* above referred to. In *Malone* the court found that the work done to the buildings in question failed to meet the standards of *Miller v. Hershey*. The court concluded that to extend erection and construction of Section 3 of the 1901 Act to cover a situation where there was only a change of purpose of the building and not satisfying the *Miller v. Hershey* standards, would be divergent from the Mechanics' Lien Law as it stood at the time of the constitution and would be in conflict with Section 7, Article III. Section 3 of 1901 Act was not held unconstitutional, only certain applications were forbidden. *Anastasi v. Brunet*, *supra*.

Since we have already determined that the work done to the building was sufficiently material to meet the standard of *Miller v. Hershey*, we find no unconstitutional application of Section 1201 of the Mechanics' Lien Law of 1963.

ORDER

NOW, this 18th day of April 1979, the exception of Marlin E. Gayman is sustained.

The Sheriff of Franklin County is directed to amend his schedule of distribution to award Marlin E. Gayman all proceeds of the mortgage foreclosure sale over and above the principal sum due on the original mortgage of the Cumberland Valley Savings and Loan Association, interest thereon, costs and proper counsel fees.

Exceptions are granted Cumberland Valley Savings and Loan Association.

COMMONWEALTH EX REL., REIDOUT v. SHAFFER, C.P.
Franklin County Branch, F. R. 1978 - 457 - S

Petition to Vacate Judgment - Pa. RCP 2034(d) - Minor

1. The setting aside of a decree of judgment is discretionary with the Court.
2. A verdict of judgment entered against a minor before selection of a guardian is voidable only.
3. The test in determining whether the verdict of judgment should be vacated is whether the minor's interests are sufficiently protected, i.e., whether the case is adequately prepared, defended and tried so as to assure the minor's rights are sufficiently protected.

John F. Nelson, Assistant District Attorney, Counsel for the Commonwealth

Frederic G. Antoun, Jr., Esq., Counsel for Defendant

OPINION AND ORDER
PETITION TO APPOINT GUARDIAN AND TO
VACATE VERDICT AND JUDGMENT

KELLER, J., May 2, 1979:

April J. Reidout signed her complaint for support against Stephon J. Shaffer on October 26, 1978. The complaint alleged that Nicholas D. Reidout, son of the plaintiff and defendant, was born December 20, 1977; is in the custody of the plaintiff; that the plaintiff has demanded the defendant to contribute to the support and maintenance of the child; and that the defendant has neglected and refused to provide proper support for the child; and that the plaintiff is receiving Public Assistance bi-weekly in the amount of \$41.00 for the said child. An order was signed November 21, 1978, setting December 13, 1978 at 1:30 o'clock P.M. for the date and time for hearing on the

matter. On December 13, 1978 counsel for defendant advised the Court that the defendant denied paternity and desired to have the matter tried by a jury, and on motion of counsel an order was entered continuing the case and placing it on the list for trial by jury on January 8, 1979, at 9:30 o'clock A.M. On January 5, 1979 on application of the defendant for blood tests, an order was entered directing the plaintiff, defendant and defendant's son, Nicholas D. Reidout, to appear on January 18, 1979 at the Carlisle Hospital, Carlisle, Pennsylvania and submit to blood testing and analysis and continuing the trial until the results of said blood tests are available.

The defendant waived trial by jury and on March 15, 1979. The Court heard the testimony of the plaintiff and the defendant's witnesses; observed the child, Nicholas Drew Reidout; heard the arguments of counsel, and concluded that the plaintiff had established by a preponderance of the evidence the paternity of the child, and that Stephon J. Shaffer, defendant, was the father of the child. Hearing was scheduled for March 28, 1979 at 1:30 P.M. on the issue of the appropriate amount of the order for support. On March 27, 1979 counsel for the defendant petitioned the Court alleging that the defendant was 17 years old of age at the time of trial, and would not reach majority until April 20, 1979, and that he was not represented by a guardian at the time of the trial, and therefore a guardian should be appointed and the verdict entered against the defendant in favor of April J. Reidout be vacated and a new trial ordered. On March 28, 1979 the matter was stayed pending further action of the Court on the defendant's petition, and counsel were directed to prepare and present to the Court briefs on the issues raised by the petition. Briefs have been received and the matter is ripe for disposition.

Preliminarily, it is appropriate that we note that we have reviewed our trial notes of the bench trial and can conclude without any reservation that the defendant was ably and capably represented by Frederic G. Antoun, Jr., Esq., throughout the preparation of the case and in the presentation of the defense.

Case law interpreting Pa. R.C.P. 2034(d) establishes that the setting aside of a decree of judgment is discretionary with the court, and that a verdict or judgment entered against a minor before selection of a guardian is voidable only. *Herron v. Piatone*, 95 Mont. Co. Reports 290 (1972); *Ohlweiler v. Ohlweiler*, 72 Pa. Super. 518 (1919); *Hamilton v. Moore*, 335 Pa. 433, 6 A. 2d 787 (1939).

The test in determining whether the verdict or judgment