

**TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA**



THOMAS D. HORNE, JUDGE
POST OFFICE BOX 727
LEESBURG, VIRGINIA 20178

JAMES H. CHAMBLIN, JUDGE
POST OFFICE BOX 123
LEESBURG, VIRGINIA 20178

BURKE F. MCCAILL, JUDGE
POST OFFICE BOX 9
LEESBURG, VIRGINIA 20178

JEFFREY W. PARKER, JUDGE
40 CULPEPER STREET
WARRENTON, VIRGINIA 22186

LOUDOUN, FAUQUIER AND
RAPPAHANNOCK COUNTIES

RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED
W. SHORE ROBERTSON, JUDGE RETIRED
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February 8, 2011

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James R. Hart, Esquire
10505 Judicial Drive, Suite 101
Fairfax, VA 22030

In Re: TWP Enterprises, Inc., t/a TW Perry v. James Bruce Dressel, et al.
Civil No. 61335

Dear Counsel:

The case is before the court on the defendant's motion to reconsider my ruling that overruled the defendant's demurrer. This is a suit to enforce a mechanic's lien against homeowners by TWP, a supplier of construction materials. The plaintiff supplied building materials to Foster, a builder for the defendants. Foster had a written agreement (commercial account application) with the builder that contains the following provision that is at issue:

**9. TITLE FOR ALL GOODS AND/OR MATERIALS
REMAINS WITH TWP ENTERPRISES UNTIL PAID
FOR IN FULL BY THE PURCHASER. Should any
purchaser take any action until Title 11 of the United States
Code, or any state insolvency law, purchaser agrees to
promptly return any goods and/or materials not paid for in
full. Purchaser agrees to keep the goods and/or materials
fully insured until paid for in full. Risk of loss is on the
purchaser.**

I have already ruled that the homeowners are not third party beneficiaries of this agreement entered into years before their builder began their project. Obviously the homeowners are not in privity with the plaintiff as supplier of construction materials. There is no dispute that the building materials (windows, etc.) have been incorporated into the homeowner's structure.

Because this is a demurrer, the truth of the facts alleged in the complaint as well as any facts that may be reasonably implied and inferred from the allegations are admitted. The correctness of the conclusion of law are not admitted. The demurrer tests the legal sufficiency of the facts alleged in the pleadings and the court is to determine whether the complaint states a cause of action upon which the request for relief can be granted.

The defendant acknowledges "the uncontroverted general proposition" that permanent improvements such as these placed upon a structure become part of the realty. *Nixdorf v. Blount*, 111 Va. 127, 129 (1910). The plaintiff has alleged that these items have been incorporated into the structure. These factual allegations are deemed to be true. However the court is not bound by the legal conclusions of the plaintiff that they have become fixtures.

While accepting the general proposition, the defendants argue that the contract between the plaintiff and supplier controls:

"... It is well settled that by agreement the parties may fix the character and control the disposition of property, which, in the absence of such a contract, would be held to be a fixture, where no absurdity or general inconvenience would result from the transaction." *Tunis Co. v. Dennis Co.*, 97 Va. 682, 686 (1899).

It follows, then, that since the parties to this controversy agreed upon the classifications of property which should remain upon, or could be removed from, the leased premises upon expiration of the lease, their rights are to be determined, not by the law relating to fixtures, but by the law of contracts (emphasis added). *Bolin v. Laderburg*, 207 Va. 795, 800-801 (1967).

Having reconsidered this matter, the demurrer is again overruled for the following reasons:

First, defendant's reliance on *Massie v. Firmstone*, 134 Va. 450 (1922), is misplaced. There has been no sworn testimony by the plaintiff. This case is being heard on the defendant's demurrer. Nor do I feel the plaintiff is estopped by their factual allegations of the existence of this contractual provision in the complaint. There is nothing that suggests the defendants were induced by this contractual provision between

the plaintiff and the builder to enter into their agreement with the builder nor is there a suggestion of any reliance or any damages as a result.

Second, the defendant's argument that the case should be determined "not by the law relating to fixtures but by the law of contracts" does not allow examination of all the law that may relate to this topic. I cannot ignore the general law of fixtures conceded by the defendant. In addition having already decided the defendant is neither a party to this contract or a third party beneficiary I do not believe they can now ask the court to enforce this provision against the plaintiff. The plaintiff is a party to the contract and unlike the defendant, has the right to waive enforcement of this provision. This is a contractual provision for the benefit of the plaintiff, not this defendant. None of the cases cited extend this proposition advanced by the defendant to a non-party. The language of the cases seems to suggest that this proposition relates to the ability of a party to a contract to insist upon enforcement. Just as stated in *Bolin*, "their rights" (meaning the parties to the contract) are determined by the law of contracts. All of the cases that have adopted this principal of the law have involved disputes between the parties to an agreement, typically a lease between a landlord and tenant.

Third, even between parties to a contract, the rule is not absolute. It is not applied if it creates an "absurdity" or "general inconvenience". Applying the rule in the *Tunis* case to this case does create an "absurdity". It would allow the defendant to require the plaintiff to be bound by a contractual provision with another party yet I have already determined the defendant is not a third party beneficiary. The plaintiff would be precluded from electing, for example, not to enforce its contractual rights. The contract language does not expressly waive the plaintiff's right to a mechanic's lien. Applying the rule in *Tunis* would result in an implied waiver of plaintiff's statutory rights to a mechanic's lien. "Either a waiver must be expressed, or, if it is to be implied, it must be established by clear and convincing evidence." *McMerit Const. Co. v. Knightsbridge Devel. Co.*, 235 Va. 368, 373 (1988). It is an "absurdity" that when the agreement between the plaintiff and Foster was signed in 2001 that plaintiff intended that an unknown homeowner that subsequently had plaintiff's material incorporated nine years later would be able to claim that plaintiff had expressly or impliedly waived it's statutory rights to a mechanic's lien.

Fourth, it also creates an absurdity that materials that may lose their separate identity and which cannot be severed remain titled to the plaintiff after their incorporation under the circumstances of this case. The defendants correctly argued in their original brief:

A mechanic's lien is a creature of statute. It is found on the notion that a workmen or a materialman mixes his labor and/or materials into the freehold such that it cannot be readily separated from the freehold, because the labor and/or materials have become part of the freehold. To protect him, mechanic's lien statutes give him a security interest in the improvements, to protect the value of the

labor and materials which have not inextricably become part of the freehold. Title to the freehold, now including the labor and/or materials, remains in the homeowner, which is of course why the lien is a security interest and not an ownership interest.

There is a line of cases that allows a party to vary this by contract, but it does create an absurdity under the facts of this case.

Therefore the demurrer is overruled. Mr. Hart may prepare a suitable order to which the defendant's may note their objection.

Very truly yours,



Burke F. McCahill
Judge

BFM/gpt