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Oral Contract to Furnish Labor and Materials to Construct Houses to the Shell Homes Stage, Second Stage of Three Stages of F.H.A. Inspection, Was Not General Contract for Purpose of Relation Back of Mechanics' and Materialmen's Statutory Liens.

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to both, but not to colleges and universities . . . the possibilities are myriad.

For the sake of a statewide, unified policy and a minimum of confusion, it would seem to be prudent to allow the issue to be presented to the Texas Supreme Court for a conclusive and final disposition.³²

Sidney Gibson

MECHANICS' AND MATERIALMEN'S LIENS—INCEPTION—ORAL CONTRACT TO FURNISH LABOR AND MATERIALS TO CONSTRUCT HOUSES TO THE "SHELL HOMES" STAGE, SECOND STAGE OF THREE STAGES OF F. H. A. INSPECTION, WAS NOT GENERAL CONTRACT FOR PURPOSE OF RELATION BACK OF MECHANICS' AND MATERIALMEN'S STATUTORY LIENS. *Irving Lumber Company v. Alltex Mortgage Company*, 446 S.W.2d 64 (Tex. Civ. App.—Dallas 1969, writ filed).

Irving Lumber Company entered into an oral contract with Merit Homes, Inc., to furnish labor and materials for construction of houses through the second inspection stage of the three stages of F. H. A. inspection requirements at which point the foundation would have been completed, the plumbing "roughed in" and the wall sections, roof trusses, cornice material and exterior ceilings completed. Thereafter, on July 8, 1964, Merit Homes executed a demand promissory note secured by deed of trust liens on the property to Alltex Mortgage Company. After July 8, 1964, Irving Lumber Company furnished the labor and materials pursuant to the contract. Subsequently, Alltex Mortgage Company foreclosed its deed of trust liens against the property, and Irving Lumber Company obtained a default judgment against Merit Homes, Inc., of \$13,967.50 principal. Irving sought a declaratory judgment against Alltex to establish the priority of its mechanics' and materialmen's liens over Alltex's deed of trust liens, but Alltex's motion for instructed verdict was sustained and judgment was rendered in the trial court that Irving take nothing. Held—*Affirmed*. Oral contract to furnish labor and materials to construct houses to the "shell homes" stage, second stage of three stages of F. H. A. inspection, was not *general contract* for purpose of relation back of mechanics' and materialmen's statutory liens.

The Texas Supreme Court first applied the relation back doctrine of inception of mechanics' and materialmen's liens to contracts in *Oriental Hotel v. Griffiths*¹ in 1895. Justice Brown's opinion in that

³² It should be noted that no writ was filed by the defendant hospital. It is conceivable that this case might yet come before the Texas Supreme Court following retrial.

¹ 88 Tex. 574, 33 S.W. 652 (1895).

case has, since its rendition, been a subject of controversy. The already complex issue in the case was further complicated by a dissimilarity between the South Western Reporter and Texas Reports versions of the opinion.² The facts in the *Oriental* case were that prior to February 28, 1890, Oriental Hotel Company had contracted for the construction of the foundation of the building, which was subsequently completed and for which payment was made. On that date, Griffiths entered a contract with Oriental Hotel Company for the greater part of the construction of the building above the foundation. April 4, 1890, Griffiths began work under his contract. May 20, 1890, a deed of trust dated May 1, 1890, was recorded securing an agreement by St. Louis Trust Company to pay the contractors engaged in the construction of the building.³ On March 19, 1891, two other contractors agreed to build and to install steam-heating and boiler apparatus and to furnish, supply and erect three elevators in the building. These two contracts were between the separate contractors and the Oriental Hotel Company. The court held that *all* the mechanics' and materialmen's liens were prior to the deed of trust lien because their inception related back to the date of the contract between the hotel company and Griffiths. In describing the contract between the hotel company and Griffiths, the court said:

Griffiths knew of the proposition to sell the bonds through the trust company, and, before closing his contract with the Oriental Hotel Company, inquired of the trust company as to the probability of completing the sale. Upon being informed that the bonds had been subscribed for by responsible parties, he entered into a contract with the hotel company, on the 28th day of February, 1890, to erect and construct the said building, in accordance with the plans and specifications, for the sum of \$315,000, and soon

² The opinion is quoted in TEXAS REPORTS, 88 Tex. 574, 583, as follows:

The word "inception" means "initial stage." Century Dictionary. It does not refer to state of actual existence, but to a condition of things or circumstances from which the thing may develop. When the building has been projected *and construction of it entered upon that is contracted for, the circumstances exist out of which all future contracts for labor and material necessary to its completion may arise*, and for all such labor and material a common lien is given by the statute; and in this state of circumstances the lien to secure each has its "inception." (emphasis added.)

The opinion is quoted in SOUTH WESTERN REPORTER, 33 S.W. 652, 662, as follows:

The word "inception" means "initial stage." Cent. Dict. It does not refer to state of actual existence, but to a condition of things or circumstances from which the thing may develop. When the building has been projected, *and construction of it entered upon,—that is, contracted for,—the circumstances exist out of which all future contracts for labor and material necessary to its completion may arise*, and for all such labor and material a common lien is given by the statute; and in this state of circumstances the lien to secure each has its "inception." (emphasis added.)

³ In *Irving Lumber Company v. Alltex Mortgage Company*, 446 S.W.2d 64 (Tex. Civ. App.—Dallas 1969, writ filed), the court states that the work under the Griffith contract in *Oriental* was begun *after* the deed of trust lien was executed.

thereafter entered upon the work of constructing the said building, in accordance with the contract.⁴

It appears that in the *Oriental* case the court contemplated that a contract sufficient to allow the relation back of the inception of a mechanics' or materialmen's lien would necessarily provide plans and specifications, a certain consideration, as well as for the construction and erection of a building.

Subsequently, in *Sullivan v. Texas Briquette & Coal Co.*,⁵ Justice Brown distinguished the *Oriental* opinion⁶ and further stated that it ". . . went as far as the law justifies to sustain such liens, which are much favored by our constitution and laws."⁷ Since this decision, the courts have been strict in their interpretation of the relation back doctrine, with few exceptions.⁸ The next Texas Supreme Court case to deal particularly with the contract requirement and its significance in the relation back doctrine was *McConnell v. Mortgage Investment Company of El Paso*.⁹ In the *McConnell* case, the Texas Supreme Court, speaking through Justice Norvell, emphasized the necessity of a *general contract* between the one claiming the statutory lien and the owner. Still, it was not stated affirmatively and specifically what a *general contract* was.

In February 1967, the San Antonio Court of Appeals in *Finger Furniture Company v. Chase Manhattan Bank*¹⁰ held that the written contract containing certain plans and specifications to construct an apartment complex provided the inception of liens arising from subsequent contracts between the owner and other contractors as well as the inception of the lien of the original contractor. This case is very close in its facts and results to *Oriental*. In *Finger Furniture* it is again emphasized that the contract provides for *completion* of the building according to certain plans and specifications.¹¹ However, in March 1967, the Texarkana Court of Civil Appeals held an overall contract to supply material on an open account between a lumber company and construction company sufficient for the relation back doctrine to apply¹²

⁴ *Oriental Hotel v. Griffiths*, 88 Tex. 574, 578, 33 S.W. 652, 659 (1895).

⁵ 94 Tex. 541, 63 S.W. 307 (1901).

⁶ *Id.* at 545, 63 S.W. at 308.

⁷ *Id.* at 545, 63 S.W. at 309.

⁸ *Newman v. Coker*, 310 S.W.2d 354 (Tex. Civ. App.—Amarillo 1958, no writ) in which the court allowed an oral contract for the purposes of the relation back doctrine in which the plans and specifications were furnished after the contract was executed; *Investor's Syndicate v. Dallas Plumbing Co.*, 61 S.W.2d 1039 (Tex. Civ. App.—El Paso 1933, no writ) in which the court allowed an oral contract for the purposes of the relation back doctrine.

⁹ 157 Tex. 572, 305 S.W.2d 280 (1957).

¹⁰ 413 S.W.2d 131 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.).

¹¹ *Id.* at 137.

¹² *Security Lumber Company v. Weighard Construction Company*, 413 S.W.2d 745 (Tex. Civ. App.—Texarkana 1967), *aff'd sub nom.*, *University Savings and Loan Association v. Security Lumber Company*, 423 S.W.2d 287 (Tex. Sup. 1968).

although the facts were admittedly dissimilar to *Oriental*.¹³ In affirming this decision, the Texas Supreme Court per Chief Justice Calvert related the liens back to the first delivery of materials and further stated that the *Oriental* case did not require "a general bilateral contract"¹⁴ for the inception of all mechanics' and materialmen's liens. Here the court distinguished between the cases of relation back to a contract and the cases of relation back to performance.

Although the Texas Supreme Court has not overruled the *Oriental* decision, it has repeatedly stated that the doctrine should be applied only in those cases in which the facts are strictly analogous to those in the *Oriental* case. However, it still recognizes that the constitutional¹⁵ and statutory¹⁶ provisions creating mechanics' and materialmen's liens should be broadly construed as a matter of public policy.¹⁷

In *Irving Lumber Company v. Alltex Mortgage Company*,¹⁸ the Dallas Court of Civil Appeals strictly interpreted the *Oriental* case and, expressly following *McConnell*, held that:

There was no general contract entered into between the parties in the sense that Lumber Company agreed to complete the construction of the improvements. It agreed only to erect houses through the second stage of F. H. A. requirements—"shell houses,"¹⁹

and that there had been no materials furnished or improvements started before Alltex's deed of trust had its inception. The result of this holding is that, to conform to this court's idea of a *general contract*, a contract must be for the completion of the construction of the improvements and not merely for the completion of a part of the improvement. The court implies that an oral contract would be sufficient if all other requirements were met.

The question "What is a general contract for relation back purposes?" is unresolved, but these points are clear:

1. A contract will not fail for relation back purposes merely because it is not written.
2. The contract must contemplate the completion of the improvement. However, when a contract is let that does contemplate completion, other lesser contracts may be let, and lienholders under them may look to the primary contract (for completion) for the inception of their liens.

¹³ *Id.* at 747.

¹⁴ *University Savings and Loan Association v. Security Lumber Company*, 423 S.W.2d 287, 295 (Tex. Sup. 1968).

¹⁵ TEX. CONST. art. XVI, § 37.

¹⁶ TEX. REV. CIV. STAT. ANN. art. 5452 (1958) and art. 5459 (Supp. 1969).

¹⁷ *Oriental Hotel v. Griffiths*, 88 Tex. 574, 583, 33 S.W. 652, 662 (1895).

¹⁸ 446 S.W.2d 64 (Tex. Civ. App.—Dallas 1969, writ filed).

¹⁹ *Id.* at 69.

3. The contract must include expressly or impliedly plans and specifications for the construction of the improvement.

These are the criteria indicated by past decisions, but it should be noted that the Texas Supreme Court has not affirmatively and specifically defined *general contract* for the purposes of the relation back doctrine of the inception of mechanics' and materialmen's liens.

Robert Michael Clark