

IN THE MISSOURI SUPREME COURT

No. SC84667

STATE EX REL. SPRINGFIELD UNDERGROUND, INC. ,

Relator,

v.

THE HONORABLE J. MILES SWEENEY,

Respondent.

PETITION FOR WRIT OF PROHIBITION

REPLY BRIEF OF RELATOR SPRINGFIELD UNDERGROUND, INC.

40372

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INTRODUCTION

Respondent, The Honorable J. Miles Sweeney, and plaintiff in the underlying action have filed a brief in response to the brief of relator Springfield Underground, Inc. Springfield Underground believes that it is necessary to reply to the brief of respondent and plaintiff so that the court will have a full and complete understanding of the issues raised in the brief of respondent and plaintiff.

ARGUMENT

Pittsburg Steel, while not expressly admitting that it has made a mistake in this action, seeks refuge in the language of §429.080, RSMo., which provides as follows:

It shall be the duty of every original contractor, every journeyman and day laborer, and every other person seeking to obtain the benefit of the provisions of sections 429.010 to 429.340, within six months after the indebtedness shall have accrued to file with the clerk of the circuit court of the proper county a just and true account of the demand due him or them after all just credits have been given, which is to be a lien upon such building or other improvements, and a true description of the property, or so near as to identify the same, upon which the lien is intended to apply, with the name of the owner or contractor, or both, if known to the person filing the lien, which shall, in all cases, be verified by the oath of himself or some credible person for him.

Pittsburg argues that it substantially complied with the mechanic's lien statute since its lien filing enabled Springfield Underground to identify the premises intended to be covered by the lien. Pittsburg focuses on the words "or so

near as to identify the same, upon which the lien is intended to apply” in §429.080 RSMb. to support its argument. However, this argument ignores the preceding portion of the sentence in the statute which says “a true description of **the property.**” (emphasis added) The words “the property” specifically refer to the specific property upon which the improvement is located. Thus, §429.080 allows a lien claimant to make minor mistakes in the legal description of the specific property upon which the improvement is located so long as the description set forth is sufficient to identify that specific property. It does not, however, allow the lien claimant to preserve its lien by filing a lien against a totally separate tract of property that does not contain the improvement.

In this case it is immaterial whether or not Springfield Underground was able to identify the premises intended to be covered by the lien. The simple fact is that Pittsburg Steel has not filed its lien on the property upon which the improvement for which it supplied labor, materials, and supplies is located. Pittsburg Steel cannot have any rights greater than that conferred upon it by §429.010. Section 429.010 grants it the right to a lien upon the improvement into which its labor, materials, and supplies are incorporated and the land upon which

that improvement is located and nothing more. By filing its lien on the wrong property, it has exceeded the rights given to it under §429.010, and it has no lien. This is why the trial court lacks subject matter jurisdiction and the motion for summary judgment should have been sustained.

Pittsburg cites the court to **Breckenridge Material Company v. Byrnesville Construction Company, Inc.**, 842 S.W.2d 551 (Mo.App. E.D. 1992), to support its argument in this case. However, **Breckenridge** is not at all similar to this case. In **Breckenridge**, the issue before the court was a mechanic's lien that dealt with two parcels of property in Jefferson County. There was no dispute that the legal description of one parcel was accurate. However, with respect to the remaining parcel, the lien statement omitted two of seven consecutive "thence" statements that described the land by metes and bounds. The omitted "thence" statements described two sides of a seven-sided tract. Therefore, the parcel, as described in the lien statement, failed to close. **Id at 552.**

At page 553 of its opinion, the Eastern District said that it was not prepared to find that a lien description of an unenclosed tract may never constitute a proper description of property pursuant to §429.080. The court said that the

description at issue in the case correctly identified the owners and contained legal descriptions, set forth by metes and bounds, that correctly identified the property's county, section, township, range, total acreage and five of the seven boundary lines. The court said that although the descriptions identified an unenclosed tract, the listing of the total acreage significantly limited the area subject to the lien and provided some indication of the missing boundaries' location. The court said that under those circumstances the description was sufficient to enable one familiar with the locality to identify the premises intended to be covered by the lien. **Id at 553.**

The issue in this case is not an incomplete or inaccurate legal description. If it was, **Breckenridge** might be applicable. The issue before this court is Pittsburg Steel filing its lien on the wrong property. Thus, the property description in the lien statement and Pittsburg's Steel's petition cannot be sufficient to satisfy the requirements of §429.080, RSMo., because Pittsburg Steel has no right to a lien on the property pursuant to §429.010, RSMo.

In a desperate attempt to avoid admitting its mistake, Pittsburg Steel makes the following statement at page 14 of its brief:

“Springfield owns one large tract of land that it has internally, but secretly, contended that it has divided into five separate tracts in order to try to defeat the justifiable claim of Pittsburg by Springfield claiming that Pittsburg has filed a claim on the wrong property.”

Pittsburg Steel cites no factual basis for this statement because none exists. Had Pittsburg Steel taken the time to conduct a title search of the property owned by Springfield Underground in Greene County, or simply taken the time to contact the Greene County Assessor’s Office, it would have discovered that the property set forth in the survey, which is reproduced at pages A56 and A59 of the appendix to relator’s brief, is, and has been for many years prior to the completion of the survey, five separate tracts of property with five separate legal descriptions that Springfield Underground has obtained over time for its quarry operations.

Pittsburg Steel’s willingness to make such unjustifiable allegations against Springfield Underground in an attempt to avoid the consequences of its own mistake demonstrates the overall carelessness it has exercised in attempting to file a lien against Springfield Underground’s property. Pittsburg

could have learned of the untruthfulness of this statement before filing its brief by simply going to the website of the Greene County Assessor at www.greenecountymo.org. Had it done so, it could have discovered the true history of these five separate tracts of real estate. It could have even viewed a map of each tract.

Pittsburg Steel also contends that even if it made a mistake in the legal description, which it will not admit, the law is clear that any deficiencies in the property description can be cured by amendment at any time prior to judgment. In support of this proposition, it cites the court to **Hill Behan Lumber Company v. Dinan**, 786 S.W.2d 904 (Mo. App. E. D. 1990); **Paradise Homes, Inc. v. Helton**, 631 S.W.2d 51 (Mo. App. 1981); and **Hertel Electric Company v. Gabriel**, 292 S.W.2d 95 (Mo. App. 1956).

None of these cases support the proposition advanced by Pittsburg Steel in its brief. All of them deal with the issue of amending a legal description to specify the particular three acre tract of land upon which the lien claimant was claiming its lien when so limited by §429.010, RSMo. In **Hill Behan Lumber Company**, the court said that the parties briefed the case assuming that the three acre limitation set forth in §429.010

applied, and the court adopted that assumption. **Hill Behan Lumber Company v. Dinan**, 786 S.W.2d at 906. The court went on to say that at times courts have held that where the lien statement and petition described land in excess of the statutory maximum and there was no attempt before a judgment to specifically describe the proper size, no lien may be imposed. The court went on to say that this rule is qualified when there is a prejudgment request for permission to survey the land in question in order to specifically describe the three acres upon which the lien is sought to be imposed. **Id.**

In **Paradise Homes**, the appellant asserted that the trial court erred in denying appellant's lien if it based its denial on appellant's failure to describe specifically the three acres subject to the lien. **Paradise Homes, Inc. v. Helton**, 631 S.W.2d at 53. The court went on to find that appellant's point that his prejudgment request that the court permit him to survey the property in order to specify the three acres upon which he was claiming a lien saved the description from indefiniteness. **Id.**

Finally, in **Hertel Electric**, the issue was whether a verdict was valid because it described an entire 6.19 acre tract of land upon which an improvement was located instead of

the specific one acre tract as required by the wording of §429.010 that was in effect at that time. ***Hertel Electric Company v. Gabriel***, 292 S.W.2d at 99.

No Missouri case, including those cited by Pittsburg Steel in its brief, has ever held that a lien claimant that files a lien on the wrong land has the right to amend its lien after the expiration of the statutorily prescribed period of time for filing a lien to insert the correct legal description. Such a holding would render §429.010 meaningless.

Finally, Pittsburg Steel claims that there would be no harm to Springfield Underground or to interested third parties if the case was sent back to the trial court and Pittsburg Steel was allowed to amend its lien. Pittsburg Steel goes on to state at page 15 of its brief that “[t]he sole harm in this entire procedure would be to allow Springfield to have the benefit of the steel and to avoid paying for the steel fabricated by Pittsburg in good faith and to require Pittsburg to incur a loss as a result of a secret survey by Springfield.” Implicit in Pittsburg’s statement is that Springfield Underground had some obligation to pay Pittsburg Steel and did not do so, which is simply untrue. Springfield Underground’s contract was with Sesco Conveyors and Engineers, not Pittsburg Steel. (Appellant’s

statement of facts, pp. 5 and 6.) It is Sesco Conveyors that failed to pay Pittsburg Steel, not Springfield Underground. To date, Springfield Underground has paid Sesco Conveyors and Engineers \$217,073.50. Thus, if this matter is allowed to proceed, great harm will result to Springfield Underground, Inc.

CONCLUSION

Pittsburg Steel is trying to exceed the rights granted to it under §429.010, RSMb. Pittsburg Steel was only entitled to a lien against the property upon which the improvement into which its labor, materials and supplies were incorporated. Pittsburg failed to comply with the most essential element of the mechanic's lien statute in that it failed to file its lien on the correct property. It now seeks to have respondent, The Honorable J. Miles Sweeney, proceed to hear this matter when he has no subject matter jurisdiction. The court should not allow this to occur and should make its preliminary writ of prohibition absolute.

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

This brief complies with the limitations contained in Rule 84.06(b). There are 2,238 words in this brief. Counsel for relator relied on the word count of his word processing system in making this certification.

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CERTIFICATE OF SERVICE

I hereby certify that a printed copy of this brief and a disk containing this brief were sent via first class mail, postage prepaid, on the 22nd day of November, 2002, to Richard W. Miller and Danne W. Webb, Miller Law Firm, PC, 4310 Madison Avenue, Kansas City, MO 64111, telephone (816) 531-0755, counsel for Pittsburg Steel, and hand delivered on the 22nd day of November, 2002, to The Honorable J. Miles Sweeney, Circuit Judge, Greene County, Missouri, Greene County Judicial Center, 1010 Boonville, Springfield, MO 65802, telephone (417) 868-4086.

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