121 Md. 303, 88 A. 140, Am.Ann.Cas. 1915B, 865, 48 L.R.A.N.S. 678

Court of Appeals of Maryland.
LOMBARD GOVERNOR CO. et al.
v.
MAYOR AND **CITY COUNCIL** OF **BALTIMORE** et al.
June 25, 1913.

Appeal from Circuit Court of Baltimore City; Carroll T. Bond, Judge.

Suit by the Lombard Governor Company and others against the Mayor and City Council of Baltimore and others. From a decree dismissing the bill on demurrer, plaintiffs appeal. Affirmed.

West Headnotes

Municipal Corporations 268 ⚿376
268k376 Most Cited Cases
A city ordinance and a provision in a contract for a public improvement, requiring the contractor as a condition precedent to receiving the balance of the contract price from city to show payment of all claims of materialmen having filed notice, etc., held not to entitle unpaid materialmen to maintain a suit in equity in the nature of a garnishment to have the balance due the contract or subjected to their claims.

Argued before BOYD, C. J, and BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Joseph Townsend England and W. Milnes Maloy, both of Baltimore, for appellants. Robert F. Leach, Jr., and John Hinkley, both of Baltimore, for appellees.

STOCKBRIDGE, J.
This appeal is from a decree of the circuit court of Baltimore city dismissing the bill of complaint of the Lombard Governor Company and the National Meter Company against the mayor and city council of Baltimore and certain other defendants.

The material allegations of the bill are to the following effect:

In May, 1910, the McCay Engineering Company entered into a contract with the mayor and city council of Baltimore, known as Sanitary Contract No. 51, by which the McCay Company "undertook to furnish the electrical and mechanical equipment, to erect metal stairways, build special floors, piers, and abutments, and other parts of the equipment for a building for the Sewage Disposal Works, erected under the supervision of the sewerage commission of the city of Baltimore, *** which lot and improvements thereon are the property of the mayor and city council of Baltimore."

It is further alleged that the Lombard Governor Company furnished to the McCay Company machinery and equipment to the value of $949.56, which is still due and unpaid; that the National Meter Company furnished machinery and equipment to the amount of $1,365.50; that the Ft. Wayne Electric Works and the Trump Manufacturing Company likewise furnished certain parts of the equipment, the value of which is not given. But, on the contrary, the bill alleges that the plaintiffs are without knowledge what rights these creditors have, and whether they or either of them have waived any of their rights; that the National Bank of Baltimore had loaned to the McCay Company a certain sum of money, amount unknown, and that as security therefor the McCay Company had assigned to the bank Sanitary Contract No. 51, or certain rights thereunder; that the McCay Company became financially embarrassed, and in April and May, 1912, receivers were appointed for that company, both in Delaware, where it was chartered, and ancillary receivers in Baltimore city, and such ancillary receivers are also made parties to the bill of complaint. The bill also sets out that there still

remains in the hands of the city of Baltimore $9,012.32, a large portion of which is now due and payable under Contract No. 51, and that the said Contract No. 51 has been fully performed. The prayer of the bill is that jurisdiction over this fund be assumed by the court; a discovery had of the amount of the claims of the several parties thereto; that the plaintiffs may be decreed to have a lien, or claim in the nature of a lien, on the funds ***141** in the hands of the city; and that out of such fund the plaintiffs may be paid the amounts of their claims. The Bank of Baltimore filed an answer to the bill of complaint and a demurrer to the ninth paragraph of the bill, and demurrers were filed on the part of the mayor and city council of Baltimore and the receivers of the McCay Company to the entire bill. The case was heard upon the demurrers, and by the decree of the circuit court the demurrers were sustained, and the bill dismissed. In passing upon this case, therefore, this court can deal only with the allegations of the bill, without any reference whatever to the matters set forth in the answer of the bank.

The plaintiffs rely for the support of their case upon the provisions of an ordinance of the mayor and city council of Baltimore, approved April 4, 1898, being ordinance No. 25, and which reads as follows:

"An ordinance to provide for the insertion in all contracts for the construction of city buildings, of a clause requiring the contractor or contractors to produce vouchers showing settlement in full for materials used in such construction.

"Section 1. Be it enacted and ordained by the mayor and city council of Baltimore, that in all contracts hereafter made by the mayor, or any of the city's departments for the construction of city buildings, there shall be inserted a clause stipulating and providing that the contractor or contractors so employed shall at time of tendering the delivery of the completed buildings also produce vouchers showing settlement in full by him or them, with all persons or corporations, who have furnished labor and materials used in the construction of said building."

This ordinance, it is claimed, must be read into as constituting a part of Sanitary Contract No. 51; but, whether that contention be well founded or not, substantially the same ground is covered by a provision in the contract itself, which is: "The contractor shall furnish the commission with satisfactory evidence that all persons who have done work or furnished material under the contract and who have given written notices to the commission, before or within ten (10) days after the final completion and acceptance of the whole work under the contract, that any balance for such work or materials is due and unpaid have been fully paid or satisfactorily secured. And in case such evidence is not furnished as aforesaid, such amount as may be necessary to meet the claims of the persons aforesaid may be retained from any moneys due the contractor under the contract until the liabilities aforesaid shall be fully discharged or such notice withdrawn. The city or the commission may also, with the written consent of the contractor, use any moneys retained, due or to become due under the contract, for the purpose of paying for both labor and material for the work for which claims have not been filed in the office of the commission."

The plaintiffs, both in their oral argument and in their brief, conceded that they are not entitled to any lien as against the city's property for materials furnished to the McCay Engineering Company, and that they are not entitled to recover the amounts due them by means of attachment, but the bill is filed upon the theory of an equitable jurisdiction to treat the fund remaining in the hands of the city as a trust fund, which may be subjected to their claims; the effect of this is to say that, while they have no lien or right of attachment at law, they can accomplish the same

thing through the interposition of a court of equity. This contention rests entirely upon three cases. In the city of New York there was an ordinance of the mayor and aldermen that: "In all contracts for work done by or for the corporation, the head of a department having charge thereof shall cause to be inserted a provision that the payment of the last installment due in pursuance thereof shall be retained until the head of such department shall have satisfactory evidence that all persons who have done work or furnished materials under any such contract, and who may have given written notice to the head of the department any time within ten days after the completion of the work that any balance for work or material is still due and unpaid, have been fully paid and secured such balance, and if any person so having done work or furnished materials and given such notice as aforesaid shall furnish satisfactory evidence as aforesaid to the department that money is due to him by the contractor, such head of department shall retain such last installment, or such portion thereof as may be necessary, until such liability shall be discharged or secured."

It will be observed that the language in this case is far more mandatory in form than that of the ordinance passed by the mayor and city council of Baltimore. The New York ordinance came up for construction in the Merchants' & Traders' National Bank v. New York, 97 N. Y. 355, and it was there held that the purpose of the ordinance was to secure persons furnishing labor and materials to contractors with the city some of the advantages which the lien law of the state gave, and that this was sought to be accomplished by making the city a trustee of the unpaid balance due upon the contracts with it for the benefit of such persons; but at the same time the court distinctly held that: "The city in such a contract assumed no express liability to pay the laborers and materialmen and cannot be sued upon such a liability; but it is placed under an implied obligation to hold the money as trustee, according to the terms and effect of the contract, which can be enforced in an action to which all persons interested in the money ***142** are made parties." It was evidently this language which induced the plaintiffs to make as parties defendant in this case the Ft. Wayne Electric Works and the Trump Manufacturing Company, neither of which have appeared in the case, nor as against which, as nonresident corporations, does any notice by advertisement appear from the record to have been made. The next case is that of the Mechanics' & Traders' National Bank v. Winant, 123 N. Y. 265, 25 N. E. 262, in which the question arose between an assignee of the original contractor and a subcontractor as to the relative priority of their claims, and that was the sole question passed upon in that case. The case of Luthy v. Woods, 6 Mo. App. 67, grew out of a contract in connection with the building of a schoolhouse, under the phraseology of a contract which provided that the school board might retain certain funds in their hands for the purpose of meeting the demands of those who furnished materials, and this provision of the contract was held to constitute an equitable assignment of the fund, not the conferring of a positive right of action arising out of the relation of original and subcontractor. The case of St. Louis v. Keane, 27 Mo. App. 642, is hardly in point, inasmuch as in that case the city filed a bill of interpleader and brought the fund in its hands into court for distribution, and the contest in that case related solely to the relative priorities between contending creditors of the contractor.

The appellants have referred to a case in the District Court of the United States in the matter of James E. Granberry, bankrupt. It is difficult to see upon what theory this case can be cited to support the appellants' claim. Mr. Granberry had entered into a contract with the mayor and city council of Baltimore for erecting and furnishing a heating plant and laundry machinery at the Field House in

Patterson Park, and also for furnishing and delivering certain machinery at Walters Baths No. 1. At the time when Granberry was adjudicated a bankrupt, there was a balance still due him by the city of $796.70; this was claimed by his trustee in bankruptcy and by the Troy Laundry Company, which had furnished certain material to Mr. Granberry as contractor. The ordinance relied upon in this case was also set up in that case. No question was raised as to any standing of the parties, but it was expressly agreed that the District Court in Bankruptcy should adjudicate to whom this fund belonged, and after full hearing Judge Morris awarded the fund to Mr. Howard Embert, the bankrupt's trustee; if in the present case the receivers of the McCay Company, the plaintiffs, and the mayor and city council of Baltimore had all agreed upon a submission to the circuit court for a determination as to the proper ownership of the fund in question, the Granberry Case would undoubtedly be an authority for its award to the receivers of the McCay Company. Instead of pursuing this course the city and the receivers each demurred to the bill of complaint, and the order of Judge Morris constitutes no precedent whatever in determining the sufficiency or insufficiency of the bill.

As opposed to the view of the New York court are numerous cases, reference to a few of which will be sufficient.

In Lesley v. Kite and the City of Philadelphia, 192 Pa. 268, 43 Atl. 959, the proceeding was one in a court of equity, as in the present case. An ordinance of the city of Philadelphia provided that "the director of public works shall give one month's notice of the date of final payment and satisfactory evidence shall be furnished that full compensation has been made for all labor and materials furnished previous to drawing a warrant for final payment." This was not a separate and independent ordinance, but included as part of an ordinance for the construction of sewers in that city. Kite & Co. had taken a contract to build, and the contract in a general way incorporated the provisions of the ordinance above recited. Kite not paying all of the subcontractors, proceedings were instituted in equity, as in the present case, and upon demurrer the bill was dismissed. The opinion of the court, after a statement of the facts, says: "Properly construed, *** the ordinance relied on *** never created, nor was it intended to create, any contractual or other relation between the city and its contractors for municipal improvements, or subcontractors under the latter, or between any of them, that would authorize the maintenance of any such proceeding as that now under consideration. If it did, it would be clearly ultra vires the city councils and also void, as being manifestly in conflict with sound principles of public policy. *** It is unnecessary to multiply authorities for the purpose of showing that city councils have no authority whatever, express or implied, to provide a new remedy in the nature of an attachment, lien, or trust of any kind whereby subcontractors may enforce payment of their claim out of money due the principal contractor. On grounds of public policy, the Legislature has hitherto withheld from contractors and subcontractors not only the right of lien on public buildings, but also the right of attaching money in the hands of the city. On the same principle, it cannot be successfully contended that councils may by ordinance empower the director of public works to retain money due one of the city's contractors in order that his creditors, who are not parties to the contract, may proceed by bill in equity or otherwise against him, and thus have the money applied to their claim."

A similar case arose in the District of Columbia, and was there decided by Alvey, ***143** C. J., formerly of this court. As in this case, the proceeding was by bill in equity, and in disposing of it Judge Alvey says: "This is an attempt by equitable garnishment to bind the money due the contractor, Thomas, in the hands of the municipal

corporation of this district. This, we think, cannot be done. If it could be done in this instance, it could be done in hundreds of other cases, and the consequences would be that the municipal government would constantly be liable to the obstruction and embarrassment in the administration of municipal affairs, that such claims and resulting litigation would necessarily produce. In the absence of express legislation making the municipal corporation liable to such proceedings, both reason and public policy forbid it."

Among the authorities cited by him is the case of Merwin v. Chicago, 45 Ill. 133, 92 Am. Dec. 204, and the rule there laid down is as follows: "The city should not be subjected to this species of litigation, no matter what may be the character of its indebtedness. If we hold it must answer in all these cases, and the exemption from liability be allowed to depend in each case upon the character of the indebtedness, we still leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials in the management of matters wholly foreign to the object of its creation. A municipal corporation cannot be properly turned into an agency or instrument for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits, in order that one private individual may the better collect a demand due from another. *** A municipal corporation is a part of the government. Its powers are held as a trust for the common good. It should be permitted to act only with reference to that object, and should not be subjected to duties, liabilities, or expenditures, merely to promote private interest or private convenience."

It will be thus seen that, so far as the principle applicable to these cases is concerned, outside of the state of New York, no distinction whatever is drawn between the rule applicable in a suit at law and a proceeding in equity, and, upon the same ground relied on in the cases thus quoted from, a like conclusion has been reached in Electric Appliance Co. v. U. S. F. & G. Co., 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609; Albany v. Lynch, 119 Ga. 491, 46 S. E. 622; McDougal v. Supervisors, 4 Minn. 184 (Gil. 130) ; Wallace v. Lawyer, 54 Ind. 501, 23 Am. Rep. 661; Switzer v. Wellington, 40 Kan. 250, 19 Pac. 620, 10 Am. St. Rep. 196.

While a number of other questions are raised or suggested in the brief of the appellants, they relate to matters which can have no material effect in the determination of this case, and need not therefore be discussed. In view of the very great weight of authority, and the sound ground of public policy upon which the conclusion is placed, the decree appealed from will be affirmed.

Decree affirmed, with costs to the appellee.

Md. 1913.
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