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X-6326

IN THE SUPREME COURT OF THE STATE OF IDAHO

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(No. 5147)

G. F. HANSBROUGH,

Respondent,

vs.

D. W. STANDROD & COMPANY, a defunct banking corporation of the State of Idaho, D. W. STANDROD, D. L. EVANS, GEORGE F. GAGON and W. F. SORGATZ, As trustees and directors in office of D. W. STANDROD & COMPANY, a defunct banking corporation of the State of Idaho, K. L. SCOTT AND E. P. DUNLAP, deputies of the Commissioner of Finance of the State of Idaho,

Defendants.

and

E. W. PORTER, Commissioner of Finance of the State of Idaho, UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation, and FEDERAL RESERVE BANK OF SAN FRANCISCO, a corporation,

Appellants.

Pocatello, April Term, 1929

Filed, May 31, 1929

Clay Koelsch, Clerk

Appeal from the District Court of the Sixth Judicial District, for Bingham County. Hon. Ralph W. Adair, Judge.

Action to enforce attorney's lien. Judgment for plaintiff.

REVERSED.

John W. Jones and Guy Stevens, for appellants E. W. Porter, Commissioner of Finance, and United States Fidelity & Guaranty Co.,

Merrill & Merrill, for appellant Federal Reserve Bank of San Francisco

Thomas & Anderson and G. F. Hansbrough, for respondent,

BRINCK, District Judge. 417

The respondent is a practicing attorney at law who, in November, 1921, was employed by D. W. Standrod & Company, a banking institution, to bring a suit against a firm known as Swauger Brothers and others. After the suit was commenced a settlement was made between the plaintiff and defendants therein, whereby the bank received certain notes of the defendants and, as collateral security for their payment, received 81,999 shares of the capital stock of Swauger Land & Livestock Company, a corporation. Upon learning of the settlement, respondent obtained an agreement from the Standrod bank that his fees should be credited upon notes he had given to the bank and which were then held by the appellant Federal Reserve Bank of San Francisco. In February, 1923, respondent and the law firm of Thomas & Anderson were employed by the Standrod bank to bring suit upon the Swauger notes which had been obtained in the previous settlement. This suit, after it was commenced, was likewise settled before trial, this time with the consent of counsel, and in this settlement the Standrod Bank became the owner of the shares of stock that had previously been pledged to it, and received in addition notes of the Swaugers aggregating some $22,000. In this connection it was again agreed that the attorney's fees earned by respondent and his associates in the second suit should be credited upon notes they had given to the Standrod Bank, which notes were also in the hands of the Federal Reserve Bank as pledges. On November 28, 1923, the Standrod bank closed its doors, and was taken in charge by the appellant Commissioner of Finance of the State of Idaho; and the attorney's fees of respondent and his associates were never credited upon their notes to the Standrod bank, these notes having been at all times herein involved in the possession of the Federal Reserve Bank as collateral securing notes to it

of the Standrod bank.

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After the Standrod Bank closed, respondent filed with the Commissioner of Finance a claim for his attorney's fees and for a preference as a trust fund, which preference was disallowed. He appealed from said ruling to the District Court which denied the preference, but allowed him an attorney's lien upon the massed assets of the bank. On appeal to this court the judgment of the District Court allowing a lien upon the massed assets was reversed, but, the record and briefs indicating that the Swauger notes and certificates of stock were then in the hands of the Commissioner, the District Court was directed to enter a judgment declaring an attorney's lien on that specific property and ordering its sale. Hansbrough v. D. W. Standrod & Co., 43 Idaho 119, 249 Pac. 897 (decided September 24, 1926.)

It now appears, however, that in October, 1923, the Standrod bank had transferred the Swauger notes and the stock owned by it in the Swauger Company to the Federal Reserve Bank as collateral to secure its own notes to that bank, for which it had been given credit, and that the notes and stock were never in the hands of the Commissioner of Finance as assets of the Standrod Bank. It is shown that the Federal Reserve Bank accepted these securities without knowledge of the lien of plaintiff and his associates, and that it was first advised thereof after it had in September, 1924, received from J. W. Swauger an offer to purchase the Swauger notes and stock for $15,000, and had notified the Commissioner of Finance that the offer would be accepted in the absence of objection within a specified time. The offer was accepted and the sale of the collateral made.

After the decision in the former case, the respondent, in his

own right and as assignee of his associates, brought this suit against the appellants Federal Reserve Bank and the Commissioner of Finance and his surety, to recover the amount of the attorney's fees of himself and his assignors as damages for the alleged conversion of the Swauger notes and stock upon which respondent and his assignors had an attorney's lien. The trial court found that the appellants had, by a sale of the property to Swauger, converted it; that the liens of respondent and his assignors had not been affected by the pledge of the property to the Federal Reserve Bank; that they were not guilty of laches and had not waived their liens upon the property; and awarded the respondent judgment against the appellants for $7,000 and interest, from which judgment this appeal is taken.

It is urged that in no event could an action for conversion be maintained, since plaintiff had a more lien without right of possession. The complaint may be treated, however, as stating a cause of action on the case for the destruction of the property subject to the lien.

The principal questions presented are as to whether the proceeds of the compromised litigation can be subjected to a lien in the hands of a third person who took without knowledge of the claim of lien; and whether, if such claim can ever be asserted, the respondent and his assignors were guilty of laches which would preclude them from now asserting it. C. S. sec. 6576, which governs attorney's liens, is as follows:

> "The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosesoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment."

As to whether, under a statutory lien where possession is not delivered, property may be followed into the hands of an innocent purchaser, the authorities are not in harmony. It was said in Beall v. White, 94 U.S. 382 (386), 24 L.Ed. 173, that statutory liens have, without possession, the same operation and efficacy that existed in common-law liens where the possession was delivered. This doctrine is rejected in Finney v. Harding, 136 Ill. 573, 27 N. E. 289. A statutory landlord's lien is in some states allowed to be enforced as against an innocent purchaser unless he is expressly protected by the statute. Richardson Bros. v. Peterson, 58 Iowa 724, 13 N. W. 63; Newman v. Bank of Greenville, 66 Misc. 323, 5 So. 753. In other states a bone fide purchaser is protected as against such a lien (Finney v. Harding, supra; Thornton v. Carver, 80 Ga. 397, 6 S. E. 915), and a like conclusion was reached as to a different kind of statutory lien in Lanterman v. Luby, 96 N. J. Law 255, 114 Atl. 325. The latter view is favored both by weight of authority and upon reason by authors of some of the texts. 1 Jones on Liens (3rd ed.) Sec. 1048; 2 Underhill on Landlord and Tenant, Sec. 834; 37 C. J. p. 331. Counsel express their inability to find decisions directly upon the point under the attorney's lien statutes, and we have found none. C. S. Sec. 6576 is identical with the statute existing in New York. The Court of appeals of that state said in Fischer Hansen v. Brooklyn Heights R. Co., 173 N. Y. 492, 66 N.E. 395, that the lien given by the statute "clings to any property or money into which the subject can be traced, until it reaches the hands of a bona fide purchaser;" and this language is quoted with approved in Conkling v. Austin, 111 Mo. app. 292, 86 S. W. 911, which decision in turn is approved by the Supreme Court of Missouri in Wait v. Atchison, T. and S.F. Ry. Co., 204 Mo. 491, 103 S.W. 60. In Pettibone v.

Thomson, 72 Misc. Rep. 486, 130 N. Y. S. 284 (289), and Sargent vs. New York Central & N. R.R.Co. 209 N. Y. 360, 103 N. E. 164 (166), the courts of New York appear to treat as of consequence the matter of notice to a third person in possession of property upon which an attorney's lien is claimed. Because we deem the question of laches determinative of this case in any event, we do not decide the first question raised by appellants.

Assuming, but not deciding, that respondent and his assignors, if diligent in asserting their claim, could have followed the property here involved into the hands of an innocent purchaser, we think they have lost that right as against these appellants. Instead of proceeding to attach themselves to or to sequester the property which was the fruits of the litigation, or to otherwise enforce their lien, they left the property undisturbed in the hands of the Standrod bank, notwithstanding it was the kind of property that banks freely deal in, hypothecate, and transfer in the ordinary course of business.

In Iowa, which of all the states has perhaps most rigidly enforced a statutory landlord's lien as against innocent purchasers, an exception was created to the lien, making it subject to the course of business of the tenant, so as not to interfere with sales of property contemplated by the character of the business prosecured by the tenant, to which the landlord is presumed to have assented upon the leasing of the premises. Richardson Bros. v. Peterson, supra.

By failing to assert and enforce their lien when their rights accrued, respondent and his assignors made it possible for the Standrod bank, upon the strength of its apparent unincumbered ownership of the property, to obtain a credit from the Federal Reserve Bank, which had no

knowledge or notice of their secret lien.

The right to enforce an attorney's lien may be lost by laches, Lee v. Vacuum Oil Co., 126 N. Y. 579, 27 N. E. 1018 Fillmore v. Wells, 10 Colo. 228, 15 Pac. 343; Colorado State Bank v. Davidson, 7 Colo. App. 91, 42 Pac. 687. Laches is delay that works disadvantage to another. 4 Pomeroy's Equity Jurisprudence (4th ed.) Sec. 1442. With reference to the lien in this case, it was said in Hansbrough v. D. W. Standrod & Co. Supra;

> "The lien could have been discharged only by payment, express agreement backed by a consideration, or laches . . . . . it is urged that respondent's failure to assert his lien for more than two years constituted laches. But, so long as no one was being injured, he was entitled to the full period of limitations, which had not expired when he appealed from the Commissioner's decision."

It now appears that to enforce the lien would injure the Federal Reserve Bank to which the Standrod Bank still owes some $300,000. We think it clear that whatever the right respondent and his assignors might have had when the property first came into the hands of their client, they, by their delay in enforcing it, lost the privilege of asserting it as against the subsequent innocent pledgee, the Federal Reserve Bank.

The decision in Hansbrough v. D. W. Standrod & Co. declaring a lien upon the property, is not an adjudication of the rights of the Federal Reserve Bank, which was not a party to that action. As to the Commissioner of Finance, it is shown in this case that he never had possession of the property, and could not have converted it. It is true that nearly two years before that decision was rendered, the Federal Reserve Bank, desiring to hold some of the stock in its own name so as to have access to the corporate books of the Swauger Land & Livestock Company, with the consent of the Commissioner had the certificates rewritten, a portion

of the stock being reissued in the name of that bank and a portion in the name of the Commissioner, who indorsed the certificate so made out to him over to the Federal Reserve Bank. This was a mere change in form, without any intention of releasing the lien, and the Commissioner did not thereby have or become entitled to possession of the certificates of stock, which were at all times subject to the pledge agreement under which the Federal Reserve Bank had received it from the Standrod bank.

It is unnecessary to consider the other errors assigned, The Judgment of the trial court is reversed, with costs to appellants.

GIVENS, T. BAILEY LEE, WM. E. LEE AND VARIAN, JJ., Concur.