Opinion No. 58-148

July 18, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Alfred P. Whittaker, Assistant Attorney General

TO: Mr. Robert L. Guice, Administrative Officer, State Soil Conservation Committee, P. O. Box 786, State College, New Mexico

QUESTION

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Assuming that a soil conservation district, as a service to the landowner, enters into an agreement with a contractor to level a piece of land for the landowner in accordance with a farm plan developed by the district, and upon completion and inspection of the work, collects from the landowner and pays the contractor for his services:

1. To what extent is the district liable in the event that the contractor defaults on payment of his debts for equipment, fuel and materials used?

2. Can the contractor's creditors impose a lien of any nature against the district for the contractor's debts?

3. Is the landowner liable for any of the contractor's obligations?

CONCLUSIONS

1. The Soil Conservation district cannot in any event be held liable for the contractor's defaults.

2. No lien can be imposed against the soil conservation district for the contractor's debts.

3. Possibly; and the property is subject to liens for labor and materials furnished, as provided by statute.

OPINION

ANALYSIS

The questions put apparently presuppose an agreement of some sort, whether formal or informal, between the landowner and the soil conservation district, whereby the district undertakes to procure the performance of certain work upon the property of the landowner, and the landowner undertakes to reimburse the district for the cost thereof.

The district, in turn, directly contracts with a contractor for such works of improvement, and the contractor, it is assumed, deals with various laborers and materialmen in undertaking the performance of the work. In answering your questions, we assume the validity and effectiveness of such agreement between the landowner and the district, and deal only with the legal relationship of the district and the landowner respectively as against laborers and materialmen dealing directly with the contractor.

Soil conservation districts are organized under Chapter 219, Laws of 1937, as amended (e.g.) Laws 1955, Ch. 243), compiled at Section 45-5-1 through 45-5-18, N.M.S.A., 1953 (1957 p.s.). The governing law expressly states at several places that soil conservation districts shall be governmental subdivisions of the state, and public bodies corporate and politic. Sections 45-5-3, 45-5-6(f), 45-5-9. The immunity from suit of the State of New Mexico, and the agencies through which it functions in the absence of clear and unequivocal consent to such action, is well established. **Hathaway v. New Mexico State Police,** 57 N.M. 747, 263 P. (2d) 690; **Vigil v. Penitentiary of New Mexico,** 52 N.M. 224, 195 P. (2d) 1014; **Eyring v. Board of Regents,** 59 N.M. 3, 277 P. (2d) 550. Such sovereign immunity from suit, in the absence of explicit consent, extends to a political subdivision of the state. **McWhorter v. Board of Education,** 63 N.M. 421, 320 P. (2d) 1025 (1958).

Clearly, there is no statutory consent by the state that its political subdivision, the soil conservation district, may be sued by laborers or materialmen dealing with a prime contractor, and not dealing directly with the district. No such liability can be implied. To exist, it must explicitly be contemplated and authorized. The legislature has not provided for such liability. Thus, in response to your first inquiry, we conclude that the soil conservation district cannot in any event be held liable for the contractor's defaults. In so concluding, we do not find it necessary to pass upon the question of direct contractual liability of the district, since that is not involve.

Your second question contemplates the possible imposition of a lien against the soil conservation district for the contractor's debts. By this, we assume that you have reference to the possible imposition of a lien against property of the district, since a lien by definition must relate to specific property, real or personal. Just as the sovereign state and its subdivision is immune from suit, absent explicit legislative consent, so it is the rule that a lien cannot attach to public property. Sec 53 C.J.S., Liens, Sec. 7, p. 851, and cases there cited. Clearly, no lien can be imposed against the property of the soil conservation district for debts incurred by the contractor.

Your third question deals with the possible subjection of the landowner to liability for obligations incurred by the contractor. No ready answer of general applicability seems possible or useful. The facts as to the precise relations of the parties undoubtedly would guide the court in reaching its conclusion as to the legal relations of the parties. The general rule, of course, is that an action on a contract cannot be maintained against one not a party to that contract. See 17 C.J.S., Contracts, § 520, p. 1143. On the other hand, that rule may be relaxed on varying theories of legal analysis in situations analogous to that which you describe. Thus, in **Prouty Lumber & Box Co. v McGuirk,**

66 P. (2d) 481 (Ore., 1937), a materialman who failed in his action to foreclose his lien, because the lien was not timely filed, was nevertheless allowed to recover against the property owner for the value of materials furnished, on the theory that the contract between owner and contractor was one made for the benefit of materialmen. In other cases, recovery has been denied, in the absence of a showing that the prime contractor, in dealing with materialmen, acted as the agent of the property owner, or in the absence of a showing of direct agreement with the owner. See e. g., **Porter v. Marotta,** 267 S.W. (2d 222 (Tex. Civ. App. 1954); **Russell Lumber & Supply Co. v. Grooms,** 21 S. W. (2d) 835 (Ky. 1929). It is possible, then, that the Supreme Court of New Mexico might find liability on the part of the landowner in the situation which you describe. We find no decision directly in point. However, we do observe that the transaction which you describe goes a step further than many involving similar questions. Usually, such cases involve three parties - the owner, the prime contractor, and materialmen, for example. Your case involves four - the owner, the district, the prime contractor and the materialmen, thus rendering the question of liability of the owner to the materialmen more doubtful.

However, it seems probable that those who furnish labor or materials at the contractor's request may avail themselves of the statutory provisions for a lien upon the land improved. It seems likely that the improvements which you describe would be held within the provisions of the lien law. **Ford v. Springer Land Ass'n., 8** N.M. 37, 41 Pac. 541, affirmed 168 U.S. 513. The statute provides as follows:

"61-2-2. **Labor and materials furnished -- Liens -- Definition of agent of owner. --** Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad wagon road or aqueduct to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent, and every contractor, subcontractor, architect, builder, or other person having charge of any mining, or the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this article."

Under this statute, privity of contract is not required to give rise to the right to a lien. In the **Ford** case, supra, the Court enforced the lien against the landowner, although there was no direct contractual relationship between the landowner and the contractor.

Although the question is not entirely free of doubt, in our view the Court should conclude that those furnishing labor or materials to the contractor in the situation which you describe would be able to avail themselves of the statutory provisions whereby materialmen and laborers may perfect liens against the property benefited.

Finally, we suggest that the soil conservation districts concerned might well give consideration to the provisions of Section 6-6-11, N.M.S.A., 1953. This statute provides as follows:

"6-6-11. **Bonds of public contractors -- Sureties. --** Whenever any contract shall be entered into with the state or any county, municipality, district, department, board, or public corporation thereof, for the construction, alteration, improvement of repair of any public building, structure or highway, or for any public work, the contract price for which exceeds five hundred dollars ($ 500), the contractor shall, before beginning work thereunder, furnish a bond executed by the contractor and some surety company authorized to do business in the state, or other suitable sureties to be approved by state board of finance in an amount equal to fifty (50) per cent of the contract price, conditioned for the performance and completion of such contract according to its terms, compliance with all requirements of law, and the payments as they become due of all just claims for labor performed, and materials and supplies furnished, upon or for the work under said contract, whether said labor be performed, and said materials and supplies be furnished under the original contractor under any subcontract. The said bond shall be in form as approved by the attorney general, district attorney, or attorney for the obligee in said contract, and as to sureties subject to approval of the authorities letting the contract. Personal sureties may be accepted if the authorities letting the contract so determine, but in such case the amount of the bond shall be the full contract price and the sureties shall justify under oath in amounts above liabilities and exemptions aggregating double the amount of the bond.

The statute appears to apply to the transactions which you describe. Observance of the statutory requirement - which is mandatory - clearly should protect the landowner and the soil conservation district from the risks which you envisage.