Opinion No. 59-128

August 28, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Mr. Paul W. Robinson District Attorney Second Judicial District Bernalillo County Courthouse Albuquerque, New Mexico

*{*197}* This is in response to your recent request for an opinion on the following:

1. May a utility lien be filed and foreclosed against property which has changed ownership after the delinquency has accrued?

2. Is there any statute of limitations covering the filing of such lien in relationship to the date the delinquency accrues?

3. Is there any right of personal action against the the owner or user of such utility in lieu of or in conjunction with the lien procedure?

4. In reference to water, can the city shut off the water supply until the arrearages are paid if the delinquency was not incurred by the present owner?

In our opinion, answers to those questions which can be answered without further facts are as follows:

1. If the new purchaser qualifies as a purchaser in good faith, for value and without notice, then his rights would be superior to any rights of the city arising under an unrecorded lien. (But see answer to question No. 4 below)

2. Yes.

3. Not answered; see reasons given below.

4. Yes.

The pertinent sections for securing the payment of utilities through the lien procedure are §§ 14-39-3 to 14-39-6, N.M.S.A., 1953 Compilation, and these sections provide:

Section 14-39-4:

"Any incorporated city, town, or village owning and operating a public utility shall have a lien upon any lot or parcel of land for all legal charges for the product of such utility used or consumed thereon by the owner thereof."

Section 14-39-5:

"The municipality shall have a lien upon the lot or parcel of land **from the date of filing such lien,** and the filing thereof shall be notice to all of the world of the existence of such lien and the contents of said notice of lien." (Emphasis Supplied)

Section 14-39-6:

"The lien herein provided for shall be enforced in the manner provided for the foreclosure of municipal liens as provided by chapter 106, Laws of 1923 (article 3, chapter 82, New Mexico Statutes Annotated, 1929 Compilation) [14-45-1 to 14-45-5].

The filing (or recording) of such lien is notice to all the world of the existence of the right of the person who furnishes the utilities to the land. This is constructive notice and the question of actual *{*198}* notice is immaterial under these circumstances. However, when the lien has not been recorded so as to give constructive notice, the question of **actual notice** is material. The city has a right to a lien for unpaid utility bills. This right, if known to the purchaser at or before the time of purchase, is superior to his right. If not known, the right is not superior to his. You could file the city's lien, but whether or not you could foreclose it under the circumstances outlined in your question would depend upon the question of actual notice.

For the answer to your second question, your attention is invited to Section 23-1-4, N.M.S.A., 1953 Compilation, which reads as follows:

"Those founded upon accounts and unwritten contracts; those brought for injuries to property or for the conversion of personal property or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified within four [4] years."

I am unable to locate any specific statute of limitations for the payment of utility bills and am of the opinion that such an action would be governed by this section.

The answer to the third question would depend upon so many factors which are not known at this time that no attempt to answer it will be made. Whether or not a cause of action exists against any particular person depends upon the facts and circumstances surrounding the transaction on which such an action is based. Without facts, no answer can be given.

The fourth question is answered in the affirmative and is based on the assumption that your city has an ordinance providing for water shut-off in the case of nonpayment of the water bill. In the absence of such an ordinance, you would have the right to shut off the water to the premises now owned by the same person who incurred the arrearages, but you probably could not shut off the water to the premises now owned by a person who did not incur the arrearages, under the general rule.

The case of **Miller v. Wilkes-Barre Gas Co.,** 206 Pa. 254, stated:

"That a municipality or corporation furnishing water or gas may, by ordinance or bylaws, make reasonable rules and regulations to insure the payment of bills -- among other, that of stopping the supply unless all arrearages are paid, whether owing by the tenant in possession or his predecessor, -- has been settled . . . But there must be notice to, or knowledge of, the incoming tenant of such a rule. **In the case of a municipality the regulation must be by ordinance of this, all have actual notice."** (Emphasis Supplied).

In the case of **State ex rel., Scotillo v. Water Co.,** 19 N.M. 27 laid down the rule in New Mexico as follows:

". . . the rule which requires the delinquent charges to be paid before water will be supplied to the premises, is reasonable, and **may be enforced against the subsequent owner or occupant."** (Emphasis Supplied).

This case is still law in New Mexico. See also State ex rel., Otero de Burg v. Water Co., 19 N.M. 36. Presuming the City of Albuquerque to have an ordinance allowing a discontinuance of service for unpaid water bills, the city would have the right to refuse to furnish water to premises on which arrearages are outstanding, and this without regard to who incurred the bills, owner or tenant, past or present.

By: B. J. Baggett

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