Opinion No. 62-108

August 15, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

TO: Mr. Victor C. Breen, District Attorney, Tenth Judicial District, Tucumcari, New Mexico

QUESTION

QUESTIONS

(1) May the city file a lien against the property of a landlord for unpaid charges for the product of electrical and water utilities furnished by the City and consumed on the landlord's property by the tenant?

(2) When service is discontinued for non-payment of electrical and water bills by a tenant when the tenant put up the deposit, may the City refuse service to a new tenant until the arrearages are paid?

(3) Where there is a lessee of premises who puts up a deposit and secures service for his tenant in lessee's name, and the tenant vacates with a bill owing to the city for electrical and water service on said premises, does the City, after applying the deposit on the delinquent bill, have a cause of action against the lessee for the delinquency?

(4) Is there any liability on the part of the City officials for refusal to furnish service to a new tenant tendering the proper deposit, when arrearages exist for services furnished a prior tenant on the same premises, and for which arrearages service had been discontinued by the City?

CONCLUSIONS

(1) No.

(2) No.

(3) Yes.

(4) Yes.

OPINION

ANALYSIS

In answering your questions it is necessary to give a certain amount of historical background. The Supreme Court of New Mexico dealt with this entire area in the early case of **State ex rel. Scotillo v. Water Co.,** 19 N.M. 27, 140 Pac. 1056, and there set forth the following rule regarding liens for unpaid utility bills and the right to cut-off service to subsequent tenants:

"On the other hand, it seems to be equally well settled by the adjudicated cases, that, where the state law gives to the water company or municipality, **a lien upon the land and premises,** for unpaid dues, or uses words equivalent to giving a lien, or where a city ordinance enacted under authority conferred by the legislature, makes such unpaid dues a lien upon the land, a rule or regulation of the water company which provides for shutting off the supply and discontinuing the service until the delinquent charges are paid, is reasonable and may be enforced against a subsequent tenant, owner or occupant of the **building or premises upon which the lien exists."** (Emphasis added)

In discussing the statute which formed the basis for the decision in the Scotillo case (Chapter 68, Laws 1912) the Court stated as follows:

"But it is argued that it is unjust to require the subsequent owner or occupant to pay for water used by some other person, or the landlord to pay for water used by the tenant. **This argument, admittedly very persuasive, might have great weight with the legislature, but it has, however, seen proper to make the charge upon the real estate."** (Emphasis added)

Some years after the decision in the Scotillo case the legislature did see fit to repeal Chapter 68. Laws 1912, which had granted every water utility, whether public or private, "a lien upon any lot or subdivision of such city, town or village for all legal charges for water furnished by such city, town, village, person or corporation and **used upon such lot or subdivision** or in or upon any buildings thereon situate." (Emphasis added)

Section 14-39-3, N.M.S.A., 1953 Compilation, enacted to replace the repealed provision, made the creation of a lien dependent not only upon use or consumption on the premises but also upon use or consumption on the premises **by the owner.** This Section reads, as follows:

"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."** (Emphasis added)

Unless expressly authorized by statute, a municipal utility cannot make delinquent water and electric bills a lien on the property. 12 McQuillen, **Municipal Corporations.,** § 35.38. And a statute giving a lien for such delinquent charges must necessarily be limited to its terms. Therefore, in this State, a lien on the realty for utility arrearages exists only where the owner of the property, legal or equitable, was the one who used or consumed the utility's product on the property. Such being the case, your first question must be answered in the negative.

In answer to your second question, it is necessary to point out that the right of a municipal utility to cut-off service to a second tenant when the first tenant has a delinquent bill and to reinstate service to the premises only when the arrearages have been paid is intimately connected with the lien question.

Again quoting from the Scotillo case, we find the following rule announced:

". . . in the absence of a statute, or an ordinance enacted under authority of a statute, making a charge for water supplied, **a lien upon the land or premises** for unpaid dues . . . a rule or regulation which authorizes a water company to shut off the supply from consumers in all cases of nonpayment of water rates, would be unreasonable and void, if so construed as to permit the water to be shut off or not turned on, because a former . . . occupant had not paid his bill for water, and thereby coerce the new . . . occupant into paying for water, or service, for which they did not contract and from which they received no benefit." (Emphasis added)

As we have seen, our present municipal utility lien law does not provide for a lien on the premises **unless** the product of the utility is used or consumed on the premises **by the owner** of such premises. Section 14-39-3, supra. And our Supreme Court has adopted the majority rule which makes the right to deny or cut-off service to a subsequent tenant who did not incur the arrearages dependent upon the existence or non-existence of a lien on the premises. This rule applies whether or not the municipality has adopted a cut-off ordinance or regulation, since the ordinance as to subsequent tenants would have no statutory authorization.

The rationale for this rule is stated as follows in the Scotillo case:

"Where the lien exists, the water company by the rule under discussion does not seek to foreclose its lien. It enforces the rule . . . by refusing to continue the services until the delinquency is paid. The rule is held to be reasonable, because, **being a lien on the real estate,** it could be foreclosed by an appropriate proceeding in the courts, and the real estate sold, and all rights of the owner, occupant or tenant be thereby cut off. Such being true, 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. **The charge being a lien upon the real estate,** if it should be foreclosed in court, the subsequent owner or occupant could only protect his right to the possession and enjoyment of the property by discharging the lien, and this being so, it is not unreasonable to require the payment of the delinquent dues in order to procure a supply of water for the premises on which the lien exists." (Emphasis added)

The right to cut off service to a subsequent tenant being dependent upon the existence of a lien on the premises, and a lien existing only when the owner himself used the product of the utility on the premises, the utility company has no right to refuse to supply water or electricity to a subsequent tenant who himself is not in default and did not incur the delinquent charges.

The answer to your third question is that the utility company does have a claim for relief (cause of action) for delinquent charges against the lessee who put up the deposit and secured the service for his tenant in the lessee's name. This is based on general principles of contract law. Further, a rule which provides for shutting off the supply from the defaulting person who contracted for and received the service is just and reasonable and may be enforced where there is no dispute as to the amount owing, and the service was furnished to the premises in question. **State ex rel. Scotillo v. Water Supply Co.,** supra; **Sei v. Water Supply Co.,** 19 N.M. 70, 140 Pac. 1067.

We might mention at this point that a water or electric company has the right to demand payment in advance, or a reasonable deposit to secure payment for the contemplated service. **Miller v. Roswell Gas & Electric Co.,** 22 N.M. 594, 166 Pac. 1177.

Your fourth question asks whether there is any liability on the part of the City officials for refusal to furnish service to a new tenant tendering the proper deposit, when arrearages exist for services furnished a prior tenant on the same premises and for which arrearages service had been discontinued by the City.

Section 40-37-1, N.M.S.A., 1953 Compilation makes it a misdemeanor to refuse water or electric service for domestic use to a person who has applied for such service and has tendered the required deposit or charges. The only exception is in the case of "persons who may be in arrears upon any contract with such water or light company." In the question posed, the subsequent tenant has tendered the required deposit and is not in arrears on any contract with the utility company. Such being the case, the municipal utility company would subject itself to legal liability by refusing to supply to the subsequent tenant.

The answer to question No. 4 in Opinion No. 59-128, August 28, 1959, is too broad and to the extent it conflicts with this Opinion it is overruled.