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Creditor's Rights—Mechanics' Liens—Rental Equipment: *Lembke Const. Co. v. J. D. Coggins Co.*, 382 P.2d 983 (N.M. 1963)

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CREDITOR'S RIGHTS—MECHANICS' LIENS—RENTAL EQUIPMENT*—Mechanics' and materialmen's liens were unknown at common law. They are entirely dependent upon statute.¹ The lien is based upon unjust enrichment; its purpose is the protection of those who have increased the value of real property either by furnishing material or performing labor.² Since remedial in nature, the statutes should be construed liberally.³ However, a liberal construction will not be applied "where none exists or was intended by the legislature."⁴

In 1880, New Mexico enacted its mechanics' and materialmen's lien statute,⁵ copying an 1872 California statute⁶ which had been amended in 1874.⁷ Another amendment in 1911⁸ made the California statute substantially different from what it had been in 1874. New Mexico's statute has never been revised. It follows, therefore, that all California precedent construing a statute similar to New Mexico's present statute is at least fifty-two years old. Nevertheless, the New Mexico Supreme Court has deemed it proper to continue following the old California decisions.⁹ The anachronism is obvious: the supreme court must

* *Lembke Constr. Co. v. J. D. Coggins Co.*, 382 P.2d 983 (N.M. 1963).

1. *Ackerson v. Albuquerque Lumber Co.*, 38 N.M. 191, 29 P.2d 714 (1934); *Ford v. Springer Land Ass'n*, 8 N.M. 37, 41 Pac. 541 (1895), *aff'd*, 168 U.S. 513 (1897).

2. *Hobbs v. Spiegelberg*, 3 N.M. (Gild.) 357, 363, 5 Pac. 529, 531 (1885): "The object of a lien is to protect those who by their labor, services, skill, or materials furnished, have enhanced the value of the property sought to be charged."

3. *Chavez v. Sedillo*, 59 N.M. 357, 284 P.2d 1026 (1955); *Dysart v. Youngblood*, 44 N.M. 351, 102 P.2d 664 (1940).

4. *Lembke Constr. Co. v. J. D. Coggins Co.*, 382 P.2d 983, 985 (N.M. 1963). See *Ex parte Devore*, 18 N.M. 246, 254, 136 Pac. 47, 49 (1918), where the supreme court quoted from *United States v. Winn*, 28 Fed. Cas. 733 (No. 16740) (C.C.D. Mass. 1838), "[T]he proper course . . . is to search out and follow the true intent of the legislature, and to adopt that sense of the words which . . . promotes in the fullest manner the apparent policy and objects of the legislature."

5. N.M. Laws 1880, ch. 16, § 2; see N.M. Stat. Ann. § 61-2-2 (1953):

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 of 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.

6. Cal. Civ. Proc. tit. IV, ch. II, § 1183 (1872).

7. Cal. Civ. Proc. tit. IV, ch. II, § 1183 (1874).

8. Cal. Civ. Proc. tit. IV, ch. II, § 1183 (1911).

9. *Chavez v. Sedillo*, 59 N.M. 357, 364, 284 P.2d 1026, 1030 (1955): "[W]e declared we would follow the California decisions in the construction of our lien statute." *Tabet v. Davenport*, 57 N.M. 540, 542, 260 P.2d 722, 723 (1953): "This court has consistently followed the California decisions in construing our lien statute and we are not persuaded we should now repudiate them."

However, it should be noted that in *Smith v. Meadows*, 56 N.M. 242, 250, 242 P.2d

decide current lien problems under an archaic statute not designed for present exigencies.

This comment undertakes to justify rent as a lienable item within the meaning of the New Mexico mechanics' and materialmen's lien statute: first, as labor performed; and second, as materials furnished.

In *Lembke Constr. Co. v. J. D. Coggins Co.*,¹⁰ Lembke entered into a contract to do certain construction work and to furnish therefor all labor and materials for Winrock Shopping Center. Lembke subcontracted the excavation work to Harris. Harris leased earth-moving equipment, for use in the project, from Coggins. Harris failed to pay the rental on the leased equipment, and Coggins filed a claim of lien for the amount of rental against Winrock Enterprises, Inc., the owner of the shopping center. Lembke disclaimed any liability under the lien and filed an action seeking a declaratory judgment to determine whether the rental price for such equipment was lienable under the New Mexico mechanics' and materialmen's lien statute.¹¹ By stipulation, the sole question submitted to the district court was whether Coggins was entitled to a lien for such rental.¹² Judgment was rendered in favor of Lembke. On appeal

1006, 1011 (1952), the court stated that when adopting verbatim a statute from another state, the New Mexico Legislature "is presumed to have adopted the prior construction and interpretation of such statute by the highest court . . . [of that state]." It follows that if, prior to the adoption by New Mexico of California's mechanics' and materialmen's lien statute, there had been no interpretation of rent as a lienable item under the California statute, then *subsequent* California interpretation would not be authority for construing New Mexico's adopted lien statute.

10. 382 P.2d 983 (N.M. 1963).

11. N.M. Stat. Ann. § 61-2-2 (1953); see note 5 *supra*.

12. *Lembke Constr. Co. v. J. D. Coggins Co.*, 382 P.2d 983, 984 (N.M. 1963):

Thus the sole question to be decided on appeal by this court is whether *rent, as such*, for equipment used in doing the work is a lienable item under the Mechanics' and Materialmen's statutes of New Mexico. We are not confronted with the situation in which the *lien claimant* seeks to establish a lien for the *reasonable* value of materials furnished which are the product of manual labor and that done by the use of machinery upon materials used in the project, or for the value of labor done manually and by the use of machinery. [Emphasis added.]

Unfortunately, the court is neither clear in its question nor its answer. If the "sole question" is whether "rent, as such" is a lienable item, the issue concerns the amount of recovery, *i.e.*, whether the rental price for the equipment is the basis of recovery. The court could then conclude that the valuation used for recovery is or is not the price paid for rental of the equipment.

However, this would then leave undecided the question of whether recovery would be allowed on some other basis, *i.e.*, value of enhancement to the property, reasonable rental value (differing from the stated rental price), or reasonable value of materials furnished or labor performed. It seems that the court intended to make this distinction, for it stated it was not confronted with a situation dealing with establishment of a "lien for the reasonable value of materials furnished . . . or for the value of labor . . ." 382 P.2d at 984. The inference is that the outcome might have been different if the court had been faced with a question of reasonable value. However, after reading the cases cited by the court as authority for its position, the distinction between rent,

to the New Mexico Supreme Court, *held*, Affirmed.¹³

For its decision, the court relied on a "general rule"¹⁴ which says that rental

reasonable value, and rental value is lost. The failure to make this distinction, and the absence of any discussion by the court concerning rental value or reasonable value as a basis for recovery, indicates that the court was not concerned with this distinction. Nevertheless, the distinction was made when the question was presented. A clarification of this point must await some subsequent court action.

The court states that it is not confronted with a question in which the lien claimant, who claims a lien for reasonable value, has furnished materials or performed labor. Aside from the issue of reasonable value, which is discussed above, the court avoids the question; since that which the claimant stipulated is that with which the court decides it is not faced. Perhaps the court meant that the issue of furnishing material or performing labor is not pertinent because the claimant did not furnish or perform—that Coggins had no *physical* contact with the construction. However, physical contact with the work is not necessary in New Mexico. See note 20 *infra* and accompanying text.

By saying that it is not confronted with an issue concerning "materials furnished which are the product of manual labor and that done by the use of machinery upon materials used in the project, or for the value of labor done manually and by the use of machinery," 382 P.2d at 984, the court is again limiting the problem so as not to apply to the facts in issue. By using the conjunctive "and," the court can easily dispose of the question. However, the lien statute says nothing about labor *and* machinery to supply materials or to perform labor. What the court means is that it is not faced with a problem concerning a lien for the value of materials furnished either by machinery, labor, or both, nor is it concerned with the problem of labor performed by machinery, labor, or both. These, however, are precisely the problems that faced the court in *Lembke*.

13. 382 P.2d at 989.

14. 382 P.2d at 984-85, quoting 57 C.J.S. Mechanics' Liens § 44 (1948):

'Ordinarily, unless expressly so provided by statute, no lien may be acquired for the value or use of tools, machinery, equipment, or appliances furnished or lent for the purposes of facilitating the work, where they remain the property of the contractor *and are not consumed in their use, but remain capable of use in other construction or improvement work.*

* * * *

Generally, a lien may be acquired for materials which, although not incorporated in the building or improvement, are used in the construction and, *by their use, are actually or practically consumed*, wasted, destroyed, or rendered worthless or unfit for further use.' [Emphasis added.]

The cases cited in 57 C.J.S. Mechanics' Liens § 44 (1948), as authority for the court's position, are in conflict:

This exclusion also embraces machinery entirely worn out. However, that the discrimination be not too strictly enforced, there is generally regarded as coming within the purview of the obligation material which was consumed, wasted, or destroyed, almost or altogether in the work, even though it was not incorporated in the improvement as a constituent part of it. Of such are oils, and gasoline, explosives, and lumber used in scaffolding or forms for concrete.

* * * *

'The line must be drawn somewhere, and we think there is no more appropriate, as well as no more certain place to draw it, than at the point of entire consumption of the article in its use in performing the work . . . '

* * * *

There could be no difference if the machinery had been entirely worn out on the job . . .

of equipment is not a lienable item. It also relied on an 1889 California case concerning a lien for the value of "picks, shovels, and other like material,"¹⁵ and a case dealing with a denial of lien for the rental of horses.¹⁶ Further support was found in dicta of a pre-1911 California case holding that a furnisher of transportation was unable to enforce a lien for such transportation.¹⁷ Authority was found in cases which, without consideration, dismissed the prob-

Marion Steam Shovel Co. v. Union Indemnity Co., 255 Ky. 817, 75 S.W.2d 542, 543 (1934).

It is well settled that, in actions to enforce liens, materials used by a contractor as mere appliances or tools or equipment, and which may be used again in the construction of other buildings or structures, are not materials for which a lien can be enforced.

The rule is different if the materials have lost their identity or fitness for future use to any material extent.

Webb v. Freng, 181 Wis. 39, 45, 194 N.W. 155, 157 (Webb v. Lee) (1923). (Emphasis added.)

According to *Marion Steam Shovel*, the value of machinery entirely worn out is non-lienable; but lumber used in scaffolding or concrete forms is lienable to the extent that it is consumed. Is the one not lienable because made of metal, and the other lienable since made of wood? If so, the distinction seems arbitrary. Of what class is metal scaffolding? Is it material partly consumed through use thus lienable, or partly consumed but not lienable, being a tool of the contractor? The court draws the line at the point of total consumption. This raises a further issue: Is the property owner liable for the total value of the completely consumed material, even though ninety per cent of the material's usefulness was consumed when it was used on someone else's project? Or is it possible that the property owner, making use of the last ten per cent of the material's usefulness, will have a lien against his property for this ten per cent, prior consumption or depreciation being forgotten?

Webb complicates the problem. There it was held that *materials* may be used as *tools* or equipment, and if the fitness for future use is altered, the amount lost through wear is lienable.

It must be assumed that the New Mexico Supreme Court, in accepting this general rule, also accepted as correct the cases responsible for the rule.

15. *Gordon Hardware Co. v. San Francisco & S.R.R.*, 3 Cal. Unrep. 140, 143, 22 Pac. 406, 407 (1889). The point in *Gordon* was to disallow a lien for the value of tools, or materials *akin* to picks and shovels. Earth-moving equipment cannot be likened to a pick or a shovel any more than a nail can be likened to a steel girder. A hand tool might well last for the life of its owner; heavy equipment probably will be reduced to scrap value within ten to fifteen years. Depreciation on a pick may amount to several cents a year; earth-moving equipment will have an average depreciation of several thousand dollars annually.

16. *Clark v. Brown*, 141 Cal. 93, 74 Pac. 548 (1903). This case concerned a statute applying specifically to liens for wages owed to threshing machine operators.

17. *Kritzer v. Tracy Eng'r Co.*, 16 Cal. App. 287, 116 Pac. 700 (1911). This case is not analogous to *Lembke*. No one would contend that transporting a person to his place of work was the furnishing of material or performing labor used in construction. However, the California court did take note that the type of labor performed need not be of a specific kind in order that its value be lienable. The *Kritzer* court quoted from *Capron v. Strout*, 11 Nev. 304, 310 (1876): "According to the findings, he [an architect] certainly did work in the mine, though not with his hands, and it is clear that the *direct tendency of his work* was to develop the property." *Kritzer v. Tracy Eng'r Co.*, 16 Cal. App. 287, 116 Pac. 700, 702 (1911). (Emphasis added.)

lem of rent as a lienable item: "too plain to admit of extended discussion,"¹⁸ "well settled."¹⁹ The court relied on two Wisconsin cases which prohibited the lien but also expressly disallowed liens for non-manual labor²⁰—a view which has been rejected in New Mexico.²¹

The equipment used for the excavation work could be considered as performing labor. When operated by Harris, the equipment did the work of perhaps one hundred men. If these men had been *employed* by Harris or Coggins, each of these one hundred men would have been able to claim a lien on the improved property for the amount of his individual work. Because the work was done by equipment, not men, the court disallowed the claim. It must be assumed the court reasoned that equipment doing the work of men was not "performing labor."²² The statute gives a lien to every "person performing labor," looking to *performance* as reason for the lien. However, the court refused to substitute "equipment" for "person," although in each case the performance and the benefit to the property would be the same. The distinction seems strained. There is a simple analogy between rental of equipment and wages of individual workers. The "performance of an act"²³ should sustain the lien.

Strict construction of the statute in *Lembke* is to be contrasted with the more liberal construction the court has given the statute in other cases. In interpreting "structure" within the meaning of the statute, the court has included a dry water well,²⁴ an oil well,²⁵ and a reservoir.²⁶ "Labor" has been expanded to include the services of an architect who did no supervisory work.²⁷

18. Hall v. Cowen, 51 Wash. 295, 98 Pac. 670, 671 (1908).

19. Wilkinson v. Pacific Mid-West Oil Co., 152 Kan. 712, 107 P.2d 726, 727 (1940).

20. In Southern Sur. Co. v. Metropolitan Sewerage Comm'n, 187 Wis. 206, 201 N.W. 980 (1925), the Wisconsin court, interpreting a statute similar to New Mexico's, disallowed a claim of lien for certain fuels and rentals. Strictness in the court's interpretation of the statute is seen in the allowance of a claim for wages "as to one performing both superintendence and manual labor." *Id.* at 218, 201 N.W. at 985. (Emphasis added.)

In McAuliffe v. Jorgenson, 107 Wis. 132, 82 N.W. 706 (1900), the court avoided the issue of rental by saying that since the lessor did no manual labor in operating the machine, he was not entitled to a claim of lien. However, the court did make a distinction between work being done by the operator and that done by the use of the machine, giving the operator a lien for the value of both.

21. See Gaastra, Gladding & Johnson v. Bishop's Lodge Co., 35 N.M. 396, 299 Pac. 347 (1931).

22. N.M. Stat. Ann. § 61-2-2 (1953); see note 5 *supra*.

23. N.M. Stat. Ann. § 61-2-1 (1953): "A lien is a charge imposed on specific property, by which it is made security for the performance of an act."

24. Dysart v. Youngblood, 44 N.M. 351, 102 P.2d 664 (1940).

25. Albuquerque Foundry & Mach. Works v. Stone, 34 N.M. 540, 286 Pac. 157 (1930).

26. Ford v. Springer Land Ass'n, 8 N.M. 37, 41 Pac. 541 (1895), *aff'd*, 168 U.S. 513 (1897).

27. Gaastra, Gladding & Johnson v. Bishop's Lodge Co., 35 N.M. 396, 299 Pac. 347 (1931).

If not sustainable as a lien for labor performed, the rental value of the equipment could have been considered by the court to be that part of the total value of the equipment which was used or consumed in its operation—the amount of material furnished and consumed. That portion lost through wear was certainly consumed; it is no longer available for future use.²⁸ The value of this consumed portion is recognized as a depreciation charge—a charge which, with minor factors, determines the rental price. However, the court summarily disposed of any possibility that a *portion* of equipment used and consumed is material used and consumed.²⁹

A close analogy to the depreciation or consumption of equipment is found in the depreciation or consumption of lumber used in making concrete forms. In both cases the instrument aiding the construction, whether machinery or lumber, incurs wear decreasing its useful life. The general rule is that the value of lumber used in making concrete forms is lienable if that portion upon which the lien is claimed is not again useable.³⁰ Recovery is limited to the value of the depreciation or consumption of the lumber, since that amount was consumed and became a part of the construction.³¹ The value of wooden scaffolding also has been supported as lienable.³² Lubricants, soldering paste, and electric wire

28. The New Mexico Supreme Court has declared that not only must the material be furnished in order to have a lien, but that it must be used up in the construction. *Tabet v. Davenport*, 57 N.M. 540, 260 P.2d 722 (1953). For a discussion concerning the delivery and use of materials, see Annot., 39 A.L.R.2d 394 (1955); Annot., 71 A.L.R. 110 (1931).

29. *Lembke Constr. Co. v. J. D. Coggins Co.*, 382 P.2d 983, 988 (N.M. 1963):

The appellant urges that if the rental for the equipment is not a lienable item as labor it is such as material furnished and used up in the construction of the project. With this we cannot agree. Here the same reasoning applies to both theories, as the court found it did in *Hall v. Cowen*, *supra*.

30. *Chicago Lumber Co. v. Douglas*, 89 Kan. 308, 131 Pac. 563 (1913); *B. F. Avery & Sons v. Woodruff & Cahill*, 144 Ky. 227, 137 S.W. 1088 (1911). Both of these cases interpreted a mechanics' lien statute similar to New Mexico's. See generally Annot., 84 A.L.R. 460 (1933).

31. *Ibid.*

32. *Giant-Powder Co. v. Oregon Pac. Ry.*, 42 Fed. 470, 475 (C.C.D. Ore. 1890):

However, it does not thereby literally enter into the composition of the building, nor, so to speak, become part of it. But . . . it . . . [has] been 'used' in the construction of the building . . . within the meaning of the lien law, and the purpose for which it was enacted.

In *Stimson Co. v. Los Angeles Traction Co.*, 141 Cal. 30, 74 Pac. 357 (1903), the court held that a lien could not be claimed for the value of materials merely used in constructing the structure and not becoming a part of it. However, the thrust of this decision is weakened since the lumber was carted away by the claimant—the lumber had been used to construct a temporary structure which did not require use of the lumber for its completion. Research has uncovered no pre-1911 California case directly concerning a lien for the value of lumber consumed or depreciated in furtherance of construction. See *Smith v. Meadows*, 56 N.M. 242, 250, 242 P.2d 1006, 1011 (1952), *supra* note 9.

are materials for which a lien has been allowed.³³ Explosives aid in construction, are consumed with use, and their value is lienable.³⁴ Indeed, under a proper interpretation of the New Mexico statute, these materials were consumed in becoming a part of the construction. Similarly, that portion of equipment consumed in construction was material furnished.

In *Lembke*, the supreme court strictly interpreted "performing labor" and "furnishing materials" within the meaning of the lien statute. By rigidly adhering to old, inconsistent precedent, it rendered the statute ineffective in dealing with modern construction practices and conditions.³⁵ California and Washington found their lien statutes inadequate and amended them.³⁶ Nevertheless,

33. *Pacific Sash & Door Co. v. Bumiller*, 162 Cal. 664, 667, 124 Pac. 230, 231 (1912): Some soapstone was used on the inside of pipes, as a lubricant, to facilitate the pulling of wires through the pipes. This being a *part of the work of construction*, we think it may also be considered as a part of the material used in construction, for which a lien may be claimed. [Emphasis added.]

The claim of lien was filed in 1908—the statute interpreted was the same as New Mexico's.

34. *Giant-Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 20 Pac. 419 (1889); *Keystone Mining Co. v. Gallagher*, 5 Colo. 23 (1879).

35. The great population increase in New Mexico has spurred residential and commercial construction. When the mechanics' and materialmen's lien statute was enacted, New Mexico had a population of 119,565. United States Census Bureau, Historical Statistics of the United States—Colonial Times to 1957 (1960). The 1963 population figure exceeds 1,000,000. This is an increase of 1,000 per cent over the 1880 figure. See Edgel, *Estimates of the 1963 Population of New Mexico Counties* (Univ. of N.M., Bureau of Business Research, Business Information Series No. 41, 1963).

When the New Mexico lien statute was enacted, earth-moving work was done largely by men using picks and shovels; today this work is done by heavy equipment. Fifty-two years ago there might have been an occasional leasing by an owner-operator; today it is a separate business. *Lease, Rental Business Boom: Equipment Deals Top \$1½ Billion*, 189 *Iron Age* 66 (1962): "U.S. business will lease over \$1 billion in machinery. This is a 42 pct hike over the \$710 million in 1961."

36. Cal. Civ. Proc. § 1181; Wash. Rev. Code Ann. § 60.04.010 (1961).

A Texas lien statute gives a claim of lien for the rental value of equipment used in construction:

The words 'material', 'furnish material' or 'material furnished' as used in this Act are to be construed to mean any part or all of the following:

* * * *

(2) Rent at a reasonable rate . . . for construction equipment used in the direct prosecution of the work . . .

Tex. Rev. Civ. Stat. Ann. art. 5452b (Supp. 1962).

Tennessee has a lien statute similar to New Mexico's. Tenn. Code Ann. § 64-1102 (1955). It has been construed by the Tennessee court to include the rental value of equipment: "In the first place, the dirt moving equipment was not 'purchased' by the contractor. Only its use for a given purpose was purchased. Thus the thing purchased was consumed." *R. L. Harris, Inc. v. Cincinnati, N. O. & Tex. Pac. Ry.*, 198 Tenn. 339, 280 S.W.2d 800, 802 (1955).

the New Mexico Supreme Court still follows the *old* reasoning of these states.³⁷

However, in *Lembke*, the court did recognize the ineffectiveness of the statute, as presently interpreted, to deal with present construction practices.³⁸

Since the court will not interpret the lien statute so as to include equipment rentals, thereby failing to afford protection to those whose work or materials have enhanced the value of property, *Lembke* furnishes notice to the Legislature that it must amend the mechanics' and materialmen's lien statute.

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37. Cases from California relied on in *Lembke* have been distinguished in notes 15, 16, and 17 *supra*. See also note 9 *supra*.

In *Lembke* the court seems to have placed great weight on the summary dismissal of the lien issue in *Hall v. Cowen*, 51 Wash. 295, 98 Pac. 670-71 (1908), when it quoted the following from *Hall*: "It seems to us too plain to admit of extended argument or discussion that a claim for the rental of scrapers is neither for labor performed or materials furnished within the purview of this section." *Lembke Constr. Co. v. J. D. Coggins Co.*, 382 P.2d 983, 986, 988 (N.M. 1963).

38. *Lembke Constr. Co. v. J. D. Coggins Co.*, 382 P.2d 983, 988-89 (N.M. 1963):

While we may feel that . . . the rental of such machinery might well be the basis of a claim of lien, we do not find such to be the law as it exists in New Mexico today; nor do we believe we should enlarge the scope of our present lien law by judicial construction