

File No. 38877

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMAFARMERS ELEVATOR MUTUAL
INSURANCE COMPANY,

Plaintiff,

vs.

COLEMAN WADE, d/b/a/ Wade
Contracting Company, THE
NATIONAL TANK COMPANY, A
Corporation, THE PERRYTON
EQUITY EXCHANGE, a Corporate
Cooperative Association,

Defendants.

FILED
SEP 18 1963
VERA L. HOWARD
Clerk, U.S. District Court
By CECIL A. QUALLS
DeputyCIVIL ACTION
No. 63 - 59J U D G M E N T

This cause came on to be heard this 18th day of September, 1963, pursuant to regular assignment for trial, the plaintiff, Farmers Elevator Mutual Insurance Company being present by its attorneys, Cheek, Cheek & Cheek, defendant Bernice P. Wade, Executrix of the Estate of Coleman Wade, deceased, being present by her attorney Stansell E. Whiteside, defendant Perryton Equity Exchange, a corporation, being present by its attorneys, Allen, Allen & Reavis, and defendant National Tank Company, a Nevada corporation, being present by its attorney, Don Turner. All parties announced ready and their waiver of jury hearing and the Court, after hearing, finds upon the issues of law and fact presented by the pleadings and by the agreement of the parties as follows:

FINDINGS OF FACT

1. Plaintiff is a bonding corporation organized and existing under the laws of the State of Iowa, and authorized to and transacting business in the State of Oklahoma; that defendant Coleman Wade, deceased, was a citizen and resident of the State of Oklahoma, doing business as Wade Contracting Company, and that said defendant has been substituted in this action by Bernice P. Wade, Executrix of the Estate of Coleman Wade, deceased, and that said Bernice P. Wade is the duly appointed, qualified and acting Executrix of the Estate of Coleman Wade, deceased, as reflected by the records of Cause No. 3588 of the County Court of Jackson County, Oklahoma; that defendant National Tank Company is a Nevada corporation authorized to and doing business in Oklahoma, with its principal office at Tulsa, Oklahoma; that it has previously been dismissed from this action but has since filed a petition for intervention and a cross-complaint, and said dismissal order should be set aside and National Tank Company reinstated as a defendant in accordance with the original complaint; that defendant Perryton Equity Exchange is a corporate cooperative association organized under the laws of Texas and doing business in Oklahoma. That there is a complete diversity of citizenship between the parties hereto; and the amount in controversy, exclusive of interests and costs, exceeds the sum of \$10,000.00, and that this Court has jurisdiction.

2. That on or about the 18th day of May, 1962, the defendant Coleman Wade, doing business as Wade Contracting Company, and the Perryton Equity Exchange entered into a contract to construct certain facilities for the defendant Perryton Equity Exchange.

3. Pursuant to this construction contract, the plaintiff herein, Farmers Elevator Mutual Insurance Company, as surety, executed a payment and performance bond with the defendant Coleman Wade, doing business as Wade Contracting Company, as principal, and in favor of the Perryton Equity Exchange as obligee. The bond was properly executed as required by law. The bond obligated the payment of all material and labor bills and the plaintiff to indemnify the obligee for any loss resulting from the failure of performance or payment under the contract.

4. That the material and goods furnished by National Tank Company to the said Coleman Wade, as represented by Exhibit "B" attached to plaintiff's Complaint, were in truth and in fact duly delivered and sold to the defendant Coleman Wade and all of said goods and materials were expended and used in the construction of those certain facilities as contracted with the defendant Perryton Equity Exchange, and that there is now owing by the estate of Coleman Wade, deceased, in favor of National Tank Company, the sum of \$24,178.49, plus interest at 6% per annum on \$21,817.05 from May 28, 1962, on \$60.50 from June 4, 1962, and on \$2,300.94 from June 12, 1962.

5. That the materialmen's lien of said National Tank Company, as represented by Exhibit "B" attached to plaintiff's Complaint, is a good and valid lien and remains wholly unsatisfied and is due, owing and unpaid.

6. That since the first notice of default by the defendant Wade came to the attention of the plaintiff, Perryton Equity Exchange and plaintiff have made repeated demands upon the principal, Wade, to pay these materialmen and obtain releases of the liens on file in order that the property owned by Perryton Equity Exchange would be free and clear of any and all encumbrances resulting from the work performed on the subject contract, and to release the bonding company.

7. That the estate of Coleman Wade, deceased, is presently without funds with which to pay said lien and claim of National Tank Company, but that said deceased, prior to his death, did execute and deliver certain instruments and pledges in favor of the plaintiff, the purpose of which was to fully hold harmless and to indemnify plaintiff against any loss arising out of the bond executed by plaintiff, and the defendant Wade, in favor of the Perryton Equity Exchange. The above instruments being warranty deeds from Coleman Wade and Bernice P. Wade to plaintiff, Farmers Elevator Mutual Insurance Company in trust as collateral to indemnify against loss on the bond in favor of Perryton Equity Exchange.

8. Plaintiff is entitled by the terms of the surety agreement herein, and at law, to an order of this Court requiring defendant Bernice P. Wade, Executrix of the Estate of Coleman Wade, deceased, to apply the assets of the estate to the payment of the obligation created thereunder, and is further entitled to an order of this Court requiring the sale of the land covered by the warranty deeds above described, and that the proceeds of such sale, after payment of any mortgages, be applied to the obligation herein.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the order dismissing defendant National Tank Company is set aside and said Company is reinstated as a party defendant to this action, and that the materials and goods furnished by National Tank Company to the said Coleman Wade, as represented by Exhibit "B" attached to plaintiff's Complaint herein, was in truth and in fact duly delivered and sold to defendant Coleman Wade and that all of said materials and goods were expended and used in the construction of those facilities as contracted with the defendant Perryton Equity Exchange. That the materialmen's lien of National Tank Company as represented by said Exhibit "B" Attached to plaintiff's Complaint is a good and valid lien and remains wholly unsatisfied, and is due, owing and unpaid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant Coleman Wade, deceased, prior to his death, received repeated demands from the Exchange and plaintiff herein to make payment on said liens in order that the property owned by Perryton Equity Exchange would be free and clear of all encumbrances resulting from the work performed. That the estate of Coleman Wade, deceased, is presently without funds with which to pay said Lien and claim of National Tank Company. That as a result of Coleman Wade's failure during his lifetime to make payment and obtain releases of these liens, and the failure and/or inability of the estate of Coleman Wade, deceased, to presently pay these liens, the plaintiff herein, Farmers Elevator Mutual Insurance Company, is hereby granted judgment against Bernice P. Wade, Executrix of the Estate of Coleman Wade, deceased, in the amount of \$24,178.49, plus interest at 6% per annum on \$21,817.05 from May 28, 1962, on \$60.50 from June 4, 1962, and on \$2,300.94 from June 12, 1962, plus a reasonable attorney fee in the Amount of ~~\$1,250.00~~ ^{\$2,500.00} payable to Cheek, Cheek, & Cheek, and costs of this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the National Tank Company is entitled to and shall have judgment against Bernice P. Wade, Executrix of the Estate of Coleman Wade, deceased, the Perryton Equity Exchange and Farmers Elevator Mutual Insurance Company in the sum of \$24,178.49, plus interest at 6% per annum on \$21,817.05 from May 28, 1962, on \$60.50 from June 4, 1962, and on \$2,300.94 from June 12, 1962, plus costs of this action, provided however that the Farmers Elevator Mutual Insurance Company shall save the Perryton Equity Exchange harmless and from loss from any liability of loss by virtue hereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Farmers Elevator mutual Insurance Company suffered a loss on the bond which it executed in favor of Perryton Equity Exchange on the date of the sale of the material to said Exchange, and that the warranty deeds, copies attached, dated in March, 1963, executed by Coleman Wade and Bernice P. Wade, subject to first mortgage in the sum of \$15,000.00 in favor of John M. Davis of Altus, Oklahoma, were good and valid liens against the property described therein on the date of execution. Further, Bernice P. Wade, Executrix of the Estate of Coleman Wade, deceased, is hereby ordered to sell all of said property and to apply the proceeds of said sale, after payment of the first mortgage, to the payment of the obligation herein.

Dated this 18th day of September, 1963.

LUTHER BOHANON
U.S. District Judge

O.K. AS TO FORM:
CHEEK, CHEEK & CHEEK
Attorneys for Plaintiff
By W.C.Cheek

Stansell E. Whiteside
STANSELL E. WHITESIDE
Attorney for Defendant Wade

ALLEN, ALLEN & REAVIS
Attorneys for Defendant Perryton

By Dan H. Reavis

Don Turner

DON TURNER

Attorney for Defendant National Tank

INDIVIDUAL
WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS:

THAT Coleman Wade and Bernice Wade, husband and wife, parties of the first part, in consideration of the sum of One and more -----dollars, and other valuable considerations, in hand paid, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto Farmers Elevator Mutual Insurance Company, in trust as collateral to indemnify against loss on bond in favor of Perryton Equity Exchange, party of the second part, the following described real property and premises situate in Jackson County, State of Oklahoma, to-wit:

The Southeast Quarter and the South Half of the Southwest
Quarter of Section 9, Township 2 North of Range

together with all and the improvements thereon and the appurtenances thereunto belonging, and warrant the title to the same.

TO HAVE AND TO HOLD said described premises unto the said party of the second part, their heirs and assigns forever, free, clear and discharged of and from all former grants, charges, taxes, judgments, mortgages, and other liens and incumbrances of whatsoever nature. Subject to first mortgage in the principal sum of \$15,000.00 in favor of John M. Davis, Altus, Oklahoma.

Signed and delivered this _____ day of March, 1963.

Coleman Wade
Coleman Wade

Bernice Wade
Bernice Wade

State of OKLAHOMA, County of JACKSON, ss.

Before me, a Notary Public in and for said County and State, on this ____ day of March, 1963, personally appeared Coleman Wade and Bernice Wade, husband and wife, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and seal the day and year last above written.

My Commission expires 2-5-65

(NOTARIAL SEAL)

Stansell Whiteside Notary Public

INDIVIDUAL
WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS:

THAT Coleman Wade and Bernice Wade, husband and wife, parties of the first part, in consideration of the sum of One and more ----- dollars, and other valuable considerations, in hand paid, the receipt of which is hereby acknowledged do hereby grant, bargain, sell and convey unto Farmers Elevator Mutual Insurance Company, in trust as collateral to indemnify against loss on bond in favor of Perryton Equity Exchange, party of the second part, the following described real property and premises situate in _____ County, State of Nevada, to-wit:

320 Acres in the Mount Diablo Meridian, South Half of
Section 11, Township 20 North, Range 53 East, State of
Nevada,

together with all the improvements thereon and the appurtenances thereunto belonging, and warrant the title to the same.

TO HAVE AND TO HOLD said described premises unto the said party of the second part, their heirs and assigns forever, free, clear and discharged of and from all former grants, charges, taxes, judgments, mortgages, and other liens and incumbrances of whatsoever nature.

Signed and delivered this 6th day of March, 1963.

Coleman Wade
Coleman Wade

Bernice Wade
Bernice Wade

INDIVIDUAL ACKNOWLEDGEMENT- OKLAHOMA FORM

STATE OF OKLA , County of Jackson, SS.

Before me, a Notary Public in and for said County, and State, on this 6th day of March, 1963, personally appeared Coleman Wade and Bernice Wade, husband and wife, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and seal the day and year last above written.

My commission expires 2-5-65 Stansell Whiteside, Notary Public

UNITED STATES OF AMERICA
Western District of Oklahoma

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) SS

I, Vera L. Howard, Clerk of the U.S. Dist. Court for the West. Dist. of Okla., do hereby certify that the foregoing is a true and full copy of the original instrument as appears of record in my office.

WITNESS my hand and the seal of said court this 18 day of September, 1963.

(OFFICIAL SEAL)

VERA L. HOWARD, CLERK

BY: Cecil A. Qualls Deputy

Recorded at the request of Stansell Whiteside October 14, A.D., 1963 At 05 minutes past 8 A.M.

Willis A. DePaoli - Recorder.