

No. 1-10-0104

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e).

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ACTIVE CONCRETE, INC.,)	Appeal from the
an Illinois corporation,)	Circuit Court of
)	Cook County.
Plaintiff,)	
)	
v.)	No. 08CH40152
)	
POTER CONSTRUCTION &)	
DEVELOPMENT COMPANY,)	
an Illinois corporation, its Shareholders)	
Individually, SHERIDAN PLACE UPTOWN)	
L.P., its Members/Partners Individually,)	
NEW CENTURY BANK, OAK BROOK)	
BANK, and All other Claimants of Interest,)	Honorable
)	Carolyn G. Quinn,
Defendants.)	Judge Presiding.

____ JUSTICE PUCINSKI delivered the judgment of the court.

Presiding Justice Gallagher and Justice Lavin concurred in the judgment.

O R D E R

HELD: Where plaintiff failed to comply with the statutory filing requirements of section 9 and section 7 of the Mechanic's Lien Act (770 ILCS 60/7, 770 ILCS 60/9 (West 2008)) the circuit court's dismissal of its mechanic's lien action against third parties was affirmed.

Plaintiff Active Concrete, Inc. (Active Concrete) appeals an order of the circuit court granting defendant New Century Bank (NCB) and third-party intervenor Leland Holding LLC (Leland)'s joint motion to dismiss Active Concrete's amended claim to foreclose its mechanic's lien filed pursuant to the Mechanic's Lien Act (Act) (770 ILCS 60/1 *et seq.* (West 2008)). On appeal, Active Concrete contends the circuit court erred in finding that its complaint to foreclose its lien was filed beyond the applicable statute of limitations and was unenforceable against third parties. For the reasons detailed herein, we affirm the judgment of the circuit court.

BACKGROUND

This appeal stems from a dispute among parties involved in a construction project (Project). The property at issue, a building known as Sheridan Place in Uptown (Property) located at 4701 North Sheridan in Chicago, was owned by Sheridan Place in Uptown L.P. (Sheridan Place). Sheridan Place employed Poter Construction & Development Company (Poter) as the general contractor of the Project, and on April 18, 2005, Active Concrete entered into a subcontract with Poter to provide concrete services on the Project in exchange for payment of \$1,240,000. The amount of Active Concrete's subcontract was subsequently increased to \$1,321,300.13 because of the additional concrete subcontracting services it was called upon to provide during the course of the Project.

Sheridan Place sought NCB's financing for the Project and NCB became the lender for the Property. Sheridan Place obtained a mortgage on the Property with NCB on October 18, 2004, and the document was recorded with the Cook County Recorder of Deeds. Thereafter, Sheridan Place obtained a junior mortgage on the Property with NCB on December 26, 2006, and

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this document was also recorded with the Cook County Recorder of Deeds.

On October 26, 2006, after providing subcontracting services on the Project, Active Concrete recorded a mechanic's lien claim with the Cook County Recorder of Deeds against Poter and Owner. In pertinent part, Active Concrete alleged that on April 18, 2005, it entered into a contract with Poter to provide concrete subcontracting services and materials valued at \$1,240,000. Active Concrete further alleged that it provided those services and materials as well as additional services and materials valued at \$81,200.13 by July 5, 2006. After accounting for a \$1,033,666.32 credit owed to Sheridan Place, Active Concrete asserted a lien claim for \$287,633.81 plus interest.

Nearly two years later, on October 16, 2008, Active Concrete recorded an amended mechanic's lien claim with the Cook County Recorder of Deeds against Poter and Sheridan Place. In its amended lien claim, Active Concrete alleged that it entered into a subcontract with Poter, the general contractor, on April 18, 2005, to provide concrete services and materials on the Project in exchange for payment totaling \$1,240,000. Active Concrete further alleged that it performed the work specified in the contract as well as additional work and services totaling \$81,300.13 by February 12, 2007. The total value of the materials and services Active Concrete provided amounted to \$1,321,300.13, and after accounting for \$1,033,666.32 in credits due to Sheridan Place, Active Concrete asserted a lien for \$143,522.23.

On October 24, 2008, Active Concrete filed a multi-count complaint in the circuit court relating to the materials and services it provided on the Project. One of the counts included in Active Concrete's complaint was a count to foreclose its amended mechanic's lien.

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On December 30, 2008, during the course of the litigation, Sheridan Place executed a warranty deed granting all of its rights, titles, and interests in the Property to Leland, a limited liability company whose members included NCB and Midwest Bank & Trust. The warranty deed was executed as part of a settlement agreement reached between Sheridan Place and NCB to release Sheridan Place from liability on the loans it obtained from NCB to finance construction on the Property. After obtaining the deed to the Property, Leland filed a motion to intervene in Active Concrete's lien foreclosure action, which the trial court subsequently granted.

Thereafter, on March 3, 2009, NCB and Leland filed a joint motion seeking dismissal of Active Concrete's claim to foreclose its mechanic's lien pursuant to sections 2-619 and 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2008); 735 ILCS 2/615 (West 2008)). In their motion, NCB and Leland sought dismissal of Active Concrete's lien claim on the basis that Active Concrete failed to file its complaint to foreclose its mechanics's lien within two years of the completion of its work as required by Section 9 of the Mechanic's Lien Act (770 ILCS 60/9 (West 2008)). NCB and Leland observed that Active Concrete recorded its original mechanic's lien with the Cook County Recorder of Deeds on October 26, 2006, in which it identified its last day of work on the Project as July 5, 2006. Accordingly, NCB and Leland argued that because Active Concrete's complaint to foreclose its lien was filed on October 24, 2008, more than two years after it completed work on the Project, Active Concrete's lien was time-barred.

Additionally, NCB and Leland argued that Active Concrete's amended lien claim, filed October 16, 2008, provided no basis with which Active Concrete could resurrect its expired lien

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rights. NCB and Leland observed that Active Concrete's amended lien identified February 12, 2007, as the date it completed its work on the Project, and argued that Active Concrete's amendment lacked credibility. Moreover, NCB and Leland argued that even if the amended claim's February 12, 2007, completion date was correct, Active Concrete could not enforce its amended claim, which it recorded on October 16, 2008, against NCB or Leland because it was not recorded within four months of the last date of work as required by section 7 of the Act (770 ILCS 60/7 (West 2008)) in order to assert claims against third parties.

Active Concrete responded, arguing that its complaint complied with the 2-year statute of limitations period set forth in section 9 of the Act (770 ILCS 60/9 (West 2008)). Active Concrete observed that its amended lien was filed on October 16, 2008, and identified February 12, 2007, as its final date of work. Accordingly, because Active Concrete's complaint, filed on October 24, 2008, was filed within 2 years of the February 12, 2007, completion date, it argued that its complaint was timely. Moreover, Active Concrete argued that NCB and Leland had knowledge of its claims on the Property because of the initial lien it had recorded years earlier and that the notice requirement of section 7 of the Act (770 ILCS 60/7 (West 2008)) was not designed to protect third parties with such knowledge.

The trial court granted NCB and Leland's combined motion. In the written order, the court explained that it granted the motion "for the reasons stated in open court;" however, no transcripts of the proceedings regarding the motion to dismiss appear in the record. Active Concrete subsequently filed a motion to reconsider the trial court's ruling. Following a hearing, the transcripts of which also do not appear in the record, the trial court denied Active Concrete's

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motion to reconsider, finding: “Count V, the Mechanics Lien Foreclosure Count is dismissed as to third parties under the Mechanics Lien Act, including New Century Bank, Leland Holdings and excluding Sheridan Place Uptown L.P.” This appeal followed.

ANALYSIS

On appeal, Active Concrete challenges the trial court’s order dismissing its mechanic’s lien claim against NCB and Leland. It argues that the trial court erred in finding that the statute of limitations barred Active Concrete from enforcing its lien claim against third parties because its complaint was filed within 2 years of the completion date identified in its amended lien claim as required by section 9 of the Act (770 ILCS 60/9 (West 2008)). Active Concrete also argues that the amended claim should be enforced against NCB and Leland because they are not the kind of third parties section 7 of the Act was designed to protect (770 ILCS 60/7 (West 2008)).

NCB and Leland respond that Active Concrete’s mechanic’s lien count was properly dismissed because it failed to comply with section 9 of the Act and did not file its complaint to enforce its claim within two years of the completion date identified in its original lien claim. Moreover, NCB and Leland argue that, because they are third parties and not owners under the Act, Active Concrete cannot enforce its amended claim against them because it was not recorded within 4 months of its completion date as required by section 7 of the Act (770 ILCS 60/9 (West 2008)). Moreover, they argue the amended claim fails because section 7 prohibits the enforcement of untimely amended claims to the detriment of third parties. Accordingly, NCB and Leland assert that the trial court correctly found that Active Concrete could not enforce its amended lien claim against third parties.

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Before we address the substantive merit of this appeal, we note as a threshold matter that jurisdiction over this appeal is proper as we are reviewing the propriety of the trial court's order granting NCB and Leland's motion to dismiss. The order is a final judgment as to NCB and Leland, but not as to all parties, and the trial court specifically found that there was no just reason to delay enforcement or appeal of its order in accordance with Supreme Court Rule 304(a) (134 Ill. 2d R. 304(a)). Accordingly, this court has jurisdiction over this appeal pursuant to 735 ILCS 5/1-107 (West 2008) and Rule 304(a).

As another preliminary matter, we observe that the trial court proceedings addressing NCB and Leland's section 2-615 and section 2-619 motion to dismiss as well as Active Concrete's motion to reconsider do not appear in the record. It is the burden of the appealing party to provide the reviewing court with a sufficiently complete record to allow for meaningful appellate review. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984); *Lewandowski v. Jelenski*, 401 Ill. App. 3d 893, 902 (2010). As a general rule, "[a]n issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding." *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005). In the absence of a sufficiently complete record, a reviewing court will resolve all insufficiencies apparent therein against the appellant and will presume that the trial court's ruling had a sufficient legal and factual basis. *Foutch*, 99 Ill. 2d at 391-92; *Lewandowski*, 401 Ill. App. 3d at 902. Keeping these principles in mind, we review the propriety of the trial court's ruling on NCB and Leland's motion to dismiss Active Concrete's mechanic's lien claim.

A motion to dismiss filed pursuant to section 2-615 of the Code attacks the legal

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sufficiency of the plaintiff's complaint, arguing that it is defective on its face. 735 ILCS 5/2-615 (West 2006); *Stafford-Smith, Inc. v. Intercontinental River East, LLC.*, 378 Ill. App. 3d 236, 239 (2007). The purpose of a section 2-615 motion to dismiss is to determine whether the plaintiff, on the face of the complaint, has advanced a viable cause of action against the defendant.

McClellan v. Rockford Country Club, 352 Ill. App. 3d 229, 238 (2004). A motion to dismiss filed pursuant to section 2-619 of the Code, in contrast, admits the legal sufficiency of the plaintiff's claim, but argues that an affirmative defense or other defects exist beyond the face of the pleading that defeat the claim. 735 ILCS 5/2-619 (West 2006); *Stafford-Smith*, 378 Ill. App. 3d at 239. For example, dismissal of a complaint pursuant to section 2-619 is proper if the plaintiff did not file its action within the requisite statutory time period required by law. 735 ILCS 5/2-619(a)(5) (West 2006). The purpose of a section 2-619 motion is to dispose of issues of law and easily proven issues of facts early in the litigation process. *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008); *Skarin Custom Homes, Inc. v. Ross*, 388 Ill. App. 3d 739, 743 (2009). Accordingly, when ruling on a section 2-619 motion, the circuit court may consider depositions, affidavits and other documents in addition to the pleading itself. *Stafford-Smith*, 378 Ill. App. 3d at 229-40. Circuit court rulings on motions to dismiss filed under either section 2-615 or section 2-619 of the Code are subject to *de novo* review. *Id.* at 240.

The Act is a comprehensive statutory enactment that sets forth the rights, remedies, and responsibilities of the parties to construction contracts, including property owners, contractors and subcontractors. *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 353 (2008). The purpose of the Act is to permit contractors and subcontractors that furnish labor and

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materials, thereby increasing the value or condition of a property, to assert a lien upon that property and recover the monetary benefits the party has conferred upon the property's owner. *Weather-Tite, Inc. v. University of St. Francis*, Ill. 2d 385, 391 (2009); see also *Inter-Rail Systems, Inc. v. Ravi Corp.*, 387 Ill. App. 3d 510, 516 (2008). Because the remedies provided for in the Act are statutory and in derogation of common law, a lien-claimant must strictly comply with the technical requirements of the Act in order to be eligible for relief. *Cordeck Sales*, 382 Ill. 3d at 353; see also *Tefco Construction Co., Inc. v. Continental Community Bank & Trust Co.*, 357 Ill. App. 3d 714, 719 (2005) ("While the Act should be construed liberally as a remedial one, being in derogation of common law, it is strictly construed with reference to the requirements upon which the right to a lien depends").

To successfully assert a lien claim pursuant to the Act, a lien claimant must satisfy the Act's statutory requirements, which vary depending on the party against whom the claimant asserts its lien. 770 ILCS 60/1 *et seq.* (West 2008); *Cordeck Sales*, 382 Ill. App. 3d at 357. Notably, the statute of limitations period differs upon whether the party against whom the lien is asserted is an owner or a third party creditor, encumbrancer or purchaser.

To properly perfect a mechanic's lien claim against a party other than an owner of property, the claimant must abide by the requirements of section 7 of the Act (770 ILCS 60/7 (West 2008)) and record its claim within four months of the completion of its work. *Cordeck Sales*, 382 Ill. App. 3d at 356; *Tefco*, 357 Ill. App. 3d at 719. " 'This requirement 'is a condition of liability itself and not just a limitation on the remedy.' " *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership*, 314 Ill. App. 3d 848, 856 (2000), quoting *Waldbilling*

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Woodworking, Inc. v. King Arthur's North, Ltd., 104 Ill. App. 3d 417, 420 (1982). In pertinent part, section 7 highlights the different limitations periods afforded to owners and third parties and provides:

“No contractor shall be allowed to enforce such a lien against or to the prejudice of any other creditor or incumbrancer or purchaser, unless within *4 months* after completion [of work] *** he or she shall either bring an action to enforce his or her lien therefor or shall file in the office of the recorder of the county in which the building, erection or other improvement to be charged with the lien is situated, a claim for lien ***. Such a claim for lien may be filed at any time after the claimant's contract is made, and as to the owner may be filed at any time after the contract is made and within *2 years* after the completion of the contract, or the completion of any extra work or the furnishing of any extra labor, services, material, fixtures, apparatus or machinery, forms or form work thereunder, and as to such owner may be amended at any time before the final judgment.” (Emphasis added.) 770 ILCS 60/7 (West 2006).

In addition to setting forth different statute of limitations periods applicable to owners and third parties, section 7 also makes it clear that while a lien claimant may amend its lien claim against an owner at any time prior to final judgment, amendments filed outside the four-month statutory period required by section 7 are not enforceable against third parties. 770 ILCS 60/7 (West 2008); *Cordeck Sales*, 382 Ill. App. 3d at 358; *Federal Savings & Loan Insurance Corp. v.*

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American Bank & Trust Co. of Chicago, 115 Ill. App. 3d 426, 428-29 (1983).

The different statute of limitations periods applicable to owners and third parties exist because “the need for notice is ‘less significant’ when a contractor seeks to enforce a lien against a party with an ownership in the property.” *Stafford-Smith*, 378 Ill. App. 3d at 241, quoting *Norman A. Koglin Associates v. Valenz Oro, Inc.*, 176 Ill. 2d 385, 391 (1997). Because of the different limitations periods set forth in the Act, it is possible that a lien claim may be invalid against a third party, but may be enforceable against an original owner due to the lengthier limitations period permitted under the Act. See *Behl v. Gingerich*, 396 Ill. App. 3d 1078, 1094 (2009).

Once a lien claimant records a valid lien, it may need to bring a suit to enforce its lien in the circuit court. Accordingly, the lien claimant must also satisfy the filing requirement of section 9 of the Act, which requires a lien claimant to file a suit to enforce its lien in the circuit court within 2 years after the completion of its contract. 770 ILCS 60/9 (West 2008).

Specifically, section 9 provides:

“If payments shall not be made to the contractor having a lien by virtue of this act of any amount due when the same becomes due, then such contractor may bring suit to enforce his lien in the circuit court in the county where the improvement is located ***. Such suit shall be commenced or counterclaim filed within *two years* after the completion of the contract, or completion of the extra or additional work, or furnishing of extra or additional material thereunder.” (Emphasis added.) 770 ILCS

60/9 (West 2008).

Keeping these statutory requirements in mind, we now determine the timeliness of Active Concrete's lien as well as timeliness of the claim it filed in the circuit court to enforce its lien.

As a threshold matter, Active Concrete apparently concedes, and we agree, that NCB and Leland are not owners; rather they are third parties as defined under the Act. NCB was Sheridan Place's lender and recorded a mortgage and junior mortgage on the property. In this capacity, NCB was a third party "incumbrancer" pursuant to section 7 of the Act. See *M. Ecker & Co. v. LaSalle National Bank*, 268 Ill. App. 3d 874, 878 (1994). Similarly, although Leland acquired title to the Property after the initiation of Active Concrete's lawsuit, it is also not an "owner" as contemplated by section 7 of the Act because it did not have an ownership interest in the Property at the time when Active Concrete contracted to provide subcontracting services on the Project. See *Stafford-Smith*, 378 Ill. App. 3d at 242-43 (recognizing that a party's status as an owner depends whether it had ownership of the property at the time of contract formation). Instead, Leland is a "purchaser" as contemplated by section 7 of the Act.¹ Accordingly, the

¹ The transfer of the warranty deed took place on December 30, 2008. Secretary of State filings included in the record by Active Concrete appear to show that Leland filed with the Illinois Secretary of State on December 31, 2008. We acknowledge the irregularities in the timing of the transfer and the incorporation, but observe that this does not affect Leland's status as a "purchaser." There is no dispute that the work that Active Concrete performed was completed pursuant to the subcontract formed on April 18, 2005, a time in which Sheridan Place was undisputably the owner. Indeed, all of the work that Active Concrete performed occurred

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enforceability of Active Concrete's lien claim against NCB and Leland, a third party incumbrancer and purchaser respectively, depends upon whether its lien claim was recorded within 4 months after it completed work on the Project. 770 ILCS 60/7 (West 2008); *Stafford-Smith*, 378 Ill. App. 3d at 240-41.

Here, Active Concrete recorded its initial lien claim on October 26, 2006, and identified July 5, 2006, as the date in which it completed its subcontracting work on the Project. The lien was recorded within 4 months of Active Concrete's stated completion date and thus provided the requisite notice to "creditor[s], incumbrancer[s] [and] purchaser[s]" as required by section 7 of the Act. 770 ILCS 60/7 (West 2008). To enforce its lien, however, Active Concrete was required to comply with section 9 of the Act and bring suit in the circuit court within 2 years of the July 5, 2006, completion date. 770 ILCS 60/9 (West 2008). Active Concrete failed to do so.

Instead of filing a claim to foreclose its mechanic's lien claim by July 5, 2008, to comply with the section 9 of the Act, Active Concrete took no further action until October 16, 2008, when it recorded an amended lien claim with a new completion date.² In its amended claim, Active Concrete cited February 12, 2007, as the last day on which it provided its subcontracting

during Sheridan Place's ownership.

² We observe that no work orders or other documentation are present in the record to support the completion date identified in Active Concrete's amended lien. Instead, in response to NCB and Leland's attack on the credibility of Active Concrete's new completion date, Active Concrete filed an affidavit of Onofrio Lorusso, an officer and agent of Active Concrete, attesting to the February 12, 2007, completion date.

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services on the Project. Thereafter, on October 24, 2008, Active Concrete filed a complaint to enforce its amended mechanic's lien claim in the circuit court. The claim to foreclose its lien, filed 8 days after the amended lien was recorded, clearly satisfied the 2-year filing requirement of section 9. It is apparent from the face of the amended claim, however, that it was not recorded within 4 months of its new completion date, and accordingly, is not enforceable against NCB or Leland, undisputed third parties, who are subject to the protections of section 7 of the Act. 770 ILCS 60/7 (West 2008).

Although the amended claim was not recorded within 4 months of the stated completion date, Active Concrete urges this court to ignore this defect and enforce its amended lien against NCB and Leland because they are not the types of third parties that the Act was designed to protect. Specifically, Active Concrete argues that both NCB and Leland had knowledge of Active Concrete's lien interests. Active Concrete observes that NCB was the lender for the Project and provided Sheridan Place with funds to finance the Project. Due to NCB's involvement in the Project, it necessarily had knowledge of Active Concrete's lien rights. Additionally, Active Concrete argues that Leland took ownership of the Property after Active Concrete recorded its original and amended mechanic's liens and after it filed its complaint in the circuit court. Because of the timing of Leland's assumption of ownership interest in the Property, Active Concrete argues that Leland is not a "*bona fide* purchaser for value" and therefore cannot be afforded the protections of section 7 of the Act.

Initially, we observe that the plain language of section 7 of the Act does not reference a "*bona fide* purchaser for value;" rather, it simply requires a lien claimant to record any claim it

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seeks to bring against a “purchaser” within 4 months of the last date it provided work on the owner’s property. 770 ILCS 60/7 (West 2008). Moreover, Active Concrete violates Supreme Court Rule 341(h)(7) (210 Ill. 2d R. 341(h)(7)), in that it fails to cite any relevant binding authority interpreting section 7 as requiring a purchaser to be a *bona fide* purchaser for value with no knowledge of any claims on the property. See 210 Ill. 2d R. 341(h)(7) (requiring appellants to support their arguments with “citations of the authorities *** relied on”); see also *Palm v. 2800 Lake Shore Drive Condominium Association*, 401 Ill. App. 3d 868, 883 (2010) (recognizing that a party’s failure to comply with Rule 341(h)(7) and provide a reviewing court with citations to the authorities it relies upon to support its argument results in waiver of that argument on appeal).

Notwithstanding Active Concrete’s failure to support its argument, we find its claim to be without merit because a third party’s actual notice of claims on a property, does not relieve the burden of a mechanic’s lien claimant to comply with the statutory recording and filing requirements of the Act. See *Braun-Skiba, Ltd. v. LaSalle National Bank*, 279 Ill. App. 3d 912, 918-19 (1996) (recognizing that whether a third party has actual or constructive notice is “irrelevant” if the lien claimant fails to comply with section 7's four-month recording requirement); see also *Mutual Services, Inc. v. Ballantrae Development Co.*, 159 Ill. App. 3d 549, 551(1987); *D.M. Foley Co. v. North West Federal Savings & Loan Association*, 122 Ill. App. 3d 411, 418 (1984). Accordingly, any actual notice NCB and Leland had of Active Concrete’s lien via their involvement in the Project and their relationship to the Property is irrelevant.

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We similarly find that any notice of Active Concrete's lien rights that NCB and Leland had by virtue of the recording of Active Concrete's initial lien claim to be similarly irrelevant and does not permit enforcement of its amended claim. Although the original claim was recorded within 4 months of its completion date, Active Concrete failed to proceed with its claim until it filed its amended claim years later. Section 7, however, makes it clear that while a lien claimant may amend its lien claim against an owner at any time prior to final judgment, amendments filed outside the four-month statutory period required by section 7 are not enforceable against third parties. (770 ILCS 60/7 (West 2008)); *Cordeck Sales*, 382 Ill. App. 3d at 358; *Federal Savings*, 115 Ill. App. 3d at 428-29. Active Concrete's amendment was not timely and enforceable against third-parties. Therefore we find that the trial court did not err in dismissing Active Concrete's amended mechanic's lien claim against NCB and Leland.

CONCLUSION

Accordingly, for the aforementioned reasons, we affirm the judgment of the circuit court.

Affirmed.