

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)(1).

NO. 4-10-0892

Filed 6/10/11

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

ENTLER EXCAVATING COMPANY, INC.,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Macon County
HORVE DEVELOPERS, LLC,)	No. 09CH415
Defendant-Appellee,)	
and)	
EGYPTIAN CONCRETE COMPANY, a)	
Corporation; and HUTCHENS)	Honorable
BULLDOZING, INC., a Corporation,)	Albert G. Webber,
Defendants.)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Presiding Justice Knecht and Justice Appleton concurred in the judgment.

ORDER

Held: Defendant Horve’s failure to request a contractor’s affidavit as required under section 5 of the Mechanics Lien Act was not in violation of plaintiff’s rights and interests as a subcontractor. Thus, the trial court did not err by granting Horve’s motion to dismiss filed under section 2-619(a)(9) of the Code of Civil Procedure.

Plaintiff, Entler Excavating Company, Inc., filed a complaint against defendants, Horve Developers, LLC (Horve); Egyptian Concrete Company, a corporation (Egyptian); and Hutchens Bulldozing, Inc., a corporation (Hutchens), for foreclosure of a mechanic's lien. In June 2010, the trial court granted, with prejudice, Horve’s motion pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2008)) to dismiss plaintiff’s complaint. In August 2010, the court allowed plaintiff to file an amended complaint seeking recovery under the equitable theories of unjust enrichment and *quantum meruit*. In October 2010, the court granted,

with prejudice, Horve's motion pursuant to section 2-619(a)(9) of the Code to dismiss the amended counts of plaintiff's complaint. Plaintiff appeals, arguing the court erred by granting Horve's June 2010 motion to dismiss. We affirm.

Horve sought approval of a plat for Grayhawk Addition subdivisions from the Village of Forsyth (Village). As an inducement for the Village to approve the plat, Horve entered into a construction agreement with the Village where Horve agreed to construct Hundley Road and bridge. In furtherance of that agreement, Horve entered into a construction agreement with Hutchens, as a general contractor, for the construction of the bridge. Subsequently, Hutchens entered into a subcontractor agreement with Egyptian for the design and construction of the bridge.

After Egyptian completed construction on the bridge, the Village determined the bridge was structurally defective. Consequently, Egyptian entered into a written agreement with the Village and Horve where Egyptian agreed to correct the deficiencies in the bridge at no additional cost. Thereafter, Egyptian entered into a subcontractor agreement with plaintiff where plaintiff agreed to fix the deficiencies in the bridge. Construction on the bridge was completed by plaintiff on June 10, 2009; however, Egyptian did not pay plaintiff the entire amount due under their contract.

On August 5, 2009, plaintiff filed a claim for mechanic's lien in accordance with section 7 of the Mechanics Lien Act (Act) (770 ILCS 60/7 (West 2008)) on Grayhawk Addition, Grayhawk Second Addition, and Grayhawk Third Addition.

In December 2009, plaintiff filed a complaint against defendants. First, plaintiff sought a judgment of foreclosure and sale of the mechanic's lien and for a judgment in the

amount of \$110,846.50 plus interest. Additionally, plaintiff asserted a breach-of-contract claim against Egyptian for failure to pay the entire amount due under their written contract.

In February 2010, Horve filed a motion to dismiss under section 2-619(a)(9) of the Code, arguing that plaintiff's complaint should be dismissed pursuant to section 21(d) of the Act (770 ILCS 60/21(d) (West 2008)). According to the motion to dismiss, Horve made final payment to Hutchens pursuant to their contract, and Hutchens executed a final waiver of lien on May 26, 2009. Subsequently, on July 2, 2009, Horve received notice of plaintiff's lien against the property pursuant to a notice of subcontractor's lien filed by plaintiff.

In the motion to dismiss, Horve argued plaintiff's complaint to foreclose the mechanic's lien should be dismissed pursuant to section 21 of the Act because it was not required to pay a sum greater than the price established in the original contract. Therefore, Horve argues it was not liable for the \$110,846.50 owed to plaintiff for the repairs on the bridge. Alternatively, Horve argued plaintiff's lien improperly extended to the individual lots in Grayhawk Addition, Grayhawk Second Addition, and Grayhawk Third Addition. Horve argued labor and materials furnished to provide access to lots in a subdivision were excluded from the Act under section 1 of the Act (770 ILCS 60/1 (West 2008)).

In June 2010, plaintiff filed a response to Horve's motion to dismiss, arguing Horve was liable for the balance due under plaintiff's contract with Egyptian for its failure to obtain a sworn statement from Hutchens, the contractor, prior to making payment under the contract as required in section 5 of the Act (770 ILCS 60/5 (West 2008)). Plaintiff argued a payment made by an owner to a contractor without retaining sufficient funds to pay subcontractors could be considered illegal and in violation of a subcontractor's rights. Additionally,

plaintiff argued the mechanic's lien could attach to the lots in Grayhawk Addition, Grayhawk Second Addition, and Grayhawk Third Addition because the construction on the bridge was connected to the development and improvement of those subdivisions.

Also in June 2010, the trial court granted, with prejudice, Horve's motion to dismiss plaintiff's complaint. Specifically, the court stated, in pertinent part, as follows:

"[T]he contract under which [plaintiff] worked as a subcontractor was a contract under which Horve owed nothing to any party; and the contract under which Horve did owe money was paid in full prior to [plaintiff] providing a lien notice to Horve. No payments could be made by Horve in violation of the rights or interests of [plaintiff] under these circumstances. To enforce [plaintiff's] lien would require Horve to pay more than the price of the original contract under which any money was owed, in violation of Section 21."

In July 2010, plaintiff filed a motion for leave of court to amend his complaint and file counts III and IV seeking recovery under the equitable theories of unjust enrichment and *quantum meruit*. The trial court granted plaintiff's motion. Also in July 2010, plaintiff filed a motion to reconsider the court's June 2010 ruling, arguing the court erred by determining plaintiff's lien was invalid due to the final payment being made prior to Horve receiving notice of plaintiff's lien.

In August 2010, the trial court denied plaintiff's motion to reconsider, stating that under the facts of this case, section 21 of the Act controlled. The court stated it "did not see that

there was a right to be protected so far as [plaintiff] was concerned as there would have been a right to be protected if the contractual relationship between the parties [had] been somewhat different." Therefore, the court determined its earlier ruling was correct.

In September 2010, Horve filed a motion to dismiss counts III and IV of plaintiff's complaint, arguing unjust enrichment was inapplicable to cases involving mechanic's liens when the entire work was contracted for and placed under the supervision of a general contractor. Horve argued the doctrine of *quantum meruit* was also inapplicable because a contractual relationship did not exist between Horve and plaintiff.

In October 2010, the trial court entered a default judgment in favor of plaintiff and against Egyptian on count II of plaintiff's complaint in the amount of \$110,846.50 plus costs. However, during the hearing, plaintiff informed the court that a receivership had been formed because Egyptian was in debt, and it was unlikely sufficient funds would be available to pay plaintiff's judgment.

Also in October 2010, the trial court granted, with prejudice, Horve's motion to dismiss the amended counts of plaintiff's complaint. In particular, the court stated "claims for equitable remedies generally cannot stand where an express contract exists." The court noted (1) plaintiff entered into an express contract with Egyptian and not Horve, (2) plaintiff did not allege any privity with Horve in its complaint, and (3) plaintiff only alleged Horve was aware or knew of plaintiff's involvement in the construction project. Consequently, the court determined plaintiff "cannot pursue equitable claims against Horve."

This appeal followed.

"Challenges to a motion to dismiss pursuant to section 2-619 of the Code are

reviewed *de novo*." *Matanky Realty Group, Inc. v. Katris*, 367 Ill. App. 3d 839, 841, 856 N.E.2d 579, 582 (2006). When considering a motion to dismiss, the reviewing court "accepts all well-pled facts as true and draws all reasonable inferences in favor of the nonmoving party." *Matanky Realty Group, Inc.*, 367 Ill. App. 3d at 841, 856 N.E.2d at 582.

Section 21(d) of the Act (770 ILCS 60/21(d) (West 2008)) provides, in pertinent part, as follows:

"In no case, except as hereinafter provided, shall the owner be compelled to pay a greater sum for or on account of the completion of such house, building or other improvement than the price or sum stipulated in said original contract or agreement, *unless payment be made to the contractor or to his order, in violation of the rights and interests of the persons intended to be benefited by this act[.]*" (Emphasis added.)

Similarly, section 32 of the Act (770 ILCS 60/32 (West 2008)) states as follows:

"No payments to the contractor or to his order of any money or other considerations due or to become due to the contractor shall be regarded as rightfully made, as against the sub-contractor, laborer, or party furnishing labor, services, material, fixtures, apparatus or machinery, forms or form work if made by the owner without exercising and enforcing the rights and powers conferred upon him in Sections 5, 21, and 22 of this Act."

Further, section 5(a) of the Act (770 ILCS 60/5(a) (West 2008)) requires an owner

to communicate with the contractor before making any payment as assurance that payments are rightfully made and not in violation of the Act. Specifically, section 5(a) of the Act (770 ILCS 60/5(a) (West 2008)) states, in pertinent part, as follows:

"It shall be the duty of the contractor to give the owner, and the duty of the owner to require of the contractor, before the owner or his agent *** shall pay or cause to be paid to the contractor or to his order any moneys or other consideration due or to become due to the contractor, *** a statement in writing, under oath or verified by affidavit, of the names and addresses of all parties furnishing labor, services, material, fixtures, apparatus or machinery, forms or form work and of the amounts due or to become due to each."

An owner who pays a contractor without acquiring a contractor's statement runs the risk of making a payment in violation of a subcontractor's rights and interests, and the owner may be compelled to make payment to the subcontractor regardless of whether the contractor was previously paid in full. *Brady Brick & Supply Co. v. Lotito*, 43 Ill. App. 3d 69, 73, 356 N.E.2d 1126, 1130 (1976). Failure to acquire a contractor's statement is not excused by the fact that final payment was made prior to the owner receiving notice of the subcontractor's involvement in the construction project. See *Brady Brick & Supply Co.*, 43 Ill. App. 3d at 73, 356 N.E.2d at 1130. "[A]n innocent owner protects itself and a subcontractor by complying with the Act; but if an otherwise innocent owner does not follow the terms of the Act, the subcontractor is entitled to relief." *Weather-Tite, Inc. v. University of St. Francis*, 383 Ill. App. 3d 304, 308, 892 N.E.2d 49,

53 (2008).

Here, Horve entered into an agreement with Hutchens to provide labor, material, and equipment necessary for the construction of Hundley Road and bridge, and Hutchens entered into a subcontractor's agreement with Egyptian for the design and construction of the bridge. After Egyptian completed the construction on the bridge, the Village and Egyptian agreed the finished bridge was structurally deficient. Therefore, the Village and Horve entered into an agreement with Egyptian where the parties agreed the repairs would be "performed by Egyptian or its subcontractor *** at no additional cost to [the Village] or Horve" with work to begin on or about August 11, 2008.

On August 18, 2008, Egyptian entered into a subcontractor agreement with plaintiff where plaintiff agreed to complete the bridge-rehabilitation project with work to commence on August 19, 2008. According to the agreement, Egyptian agreed to pay plaintiff for performance of the agreement "on a time and materials basis [in] accordance with the rates and charges" set forth in attachment A to the agreement.

Subsequently, Horve made payments to Hutchens under the original construction agreement, while plaintiff was fixing the defects in the bridge pursuant to its contract with Egyptian. In May 2009, Horve fulfilled its obligations under the construction contract by making final payment to Hutchens, who then executed a final waiver of lien. Hutchens paid Egyptian pursuant to the subcontractor's agreement, but Egyptian failed to pay plaintiff despite owing \$111,846.50.

After making final payment, Horve received notice of plaintiff's lien against the property pursuant to a notice of subcontractor's lien. Plaintiff subsequently filed its claim for

mechanic's lien and sought foreclosure of the lien.

Plaintiff argues Horve should be obligated to pay the amount due under its subcontractor's agreement with Egyptian. Plaintiff argues the contract between the Village, Horve, and Egyptian for the repair work to the bridge was an extension of the subcontractor agreement between Hutchens and Egyptian because it reinforced Egyptian's preexisting duty to build and deliver a bridge in good workmanlike quality. In support of its position, plaintiff notes the agreement between the Village, Horve, and Egyptian referenced the original subcontractor agreement. Therefore, plaintiff argues that any payment made under the original subcontractor agreement was in violation of its rights and interest because Horve failed to comply with the requirements of section 5(a) of the Act.

Horve argues it was not obligated to pay the remaining balance due under plaintiff's contract with Egyptian because section 21 of the Act prohibits an owner from being compelled to pay a greater sum for the completion of a construction project than the price set forth in the original construction contract. Although Horve admits it failed to comply with the requirements of section 5 of the Act, it argues section 21 of the Act controls because the payments made under the original construction agreement were not connected to the subsequent agreement between the Village, Horve, and Egyptian. Instead, Horve argues plaintiff was operating as a subcontractor to Egyptian and was obligated to perform under Egyptian's contract to fix the deficiencies in the bridge at no additional cost. Consequently, Horve argues the contractor's statement was not required because no payments were made under this contract.

Plaintiff was operating as a subcontractor under the contract between the Village, Horve, and Egyptian. Under this contract, Egyptian or its subcontractor was obligated to perform

the repairs to the bridge without seeking additional compensation. Any payment made in violation of the Act was made under the original contract and original subcontractor agreement, which provided for the initial design and construction of the bridge. Consequently, the trial court was correct when it stated that no payment could be made by Horve in violation of plaintiff's rights and interests under the Act. Additionally, because the original contract was paid in full and no payment was made in violation of plaintiff's rights and interests, a determination that Horve was obligated to pay the balance due under plaintiff's contract with Egyptian would require Horve to pay more than the original contract price set forth in its contract with Hutchens and would be in violation of section 21(d) of the Act. Accordingly, the trial court did not err by dismissing plaintiff's complaint for foreclosure of its liens. For the reasons stated, we affirm the trial court's judgment.

Affirmed.