2014 IL App (2d) 131090-U
No. 2-13-1090
Order filed October 17, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

J. NORMAN YOUNG, as Trustee of the J. Norman Young Trust, dated September 16, 1993, and J. NORMAN YOUNG, as Successor Trustee of the Nadyne H. Young Trust, dated September 16, 1993,	)	Appeal from the Circuit Court of De Kalb County.
Plaintiff-Appellant and Cross-Appellee,	)	
v.	)	No. 08-CH-185
CES, INC., EAGLE HOMES, INC., EAGLE HOMES-NATURE'S CROSSING, LLC, EAGLE HOMES-SETTLERS' LANDING, LLC, and KEN WISNIEWSKI,	)	
Defendants-Appellees and Cross-Appellants.	)	Honorable Thomas L. Doherty, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in foreclosing on two mechanics liens, but did err in denying the defendant/cross-appellant engineering firm's request for prejudgment interest. Affirmed in part, reversed in part, and remanded.

¶ 2 After two real estate developments failed, plaintiff, J. Norman Young, as Trustee of the J. Norman Young Trust Dated September 16, 1993, and J. Norman Young (Dr. Young or Young), as Successor Trustee of the Nadyne H. Young Trust Dated September 16, 1993[1], filed a complaint against defendants, CES, Inc. (an engineering and surveying firm), Eagle Homes, Inc. (a real estate developer), Eagle Homes-Nature's Crossing, LLC (the Nature's Crossing development), Eagle Homes-Settlers' Landing, LLC (the Landmark development), and Ken (Kenneth J.) Wisniewski (manager/president of the Eagle entities), to, *inter alia*, quiet title to two properties one or both of the Youngs owned in De Kalb and Ogle Counties and that Eagle was contemplating to develop. CES counterclaimed, seeking to foreclose two mechanics liens it had filed against the Youngs' properties and further alleging breach of contract against Eagle Homes, which had hired CES.

¶ 3 Following a bench trial, the trial court foreclosed on the liens, finding that: (1) Dr. Young's testimony was not credible; (2) Dr. Young authorized Eagle Homes to make necessary improvements to the subject properties to prepare them for development; (3) an agency relationship existed between the Youngs and Eagle and that Young was aware of CES's involvement and knowingly permitted CES's predevelopment work on the subject properties; (4) CES's work "created value" to the Youngs' land; and (5) CES's liens were facially valid and enforceable. The court determined that the Youngs were liable to CES for surveying and engineering fees and awarded judgment in CES's favor and against the Youngs for $63,808 on the De Kalb property (Nature's Crossing in Cortland) and $86,542.50 on the Ogle property

[1] Initially, Nadyne H. Young was a co-plaintiff with Dr. Young in her capacity as trustee of her trust. Following her death on March 3, 2010, Dr. Young, as successor trustee of Nadyne's trust, was substituted as a party-plaintiff

(Landmark in Rochelle). Subsequently, upon CES's motion, the trial court awarded CES its costs of suit, but denied its request for prejudgment interest and attorney fees. The Youngs appeal, arguing that the court erred in foreclosing on CES's liens, where (1) the liens were facially invalid; (2) there were no express contracts between the Youngs and CES; (3) there was no agency relationship between the Youngs and Eagle; (4) the evidence did not demonstrate that Nadyne either contracted with CES or knowingly permitted CES's work; (5) the evidence did not demonstrate that the Youngs knowingly authorized CES's work; and (6) CES did not perform lienable work. CES cross-appeals, arguing that the trial court erred in denying its request for prejudgment interest. We affirm the trial court's findings concerning the liens, reverse its denial of CES's request for prejudgment interest, and remand for assessment of interest.

¶ 4 I. BACKGROUND

¶ 5 J. Norman Young is a retired doctor from Hinsdale, and his wife, Nadyne Young is deceased (in March 2010). In 2003 or 2004, the Youngs became "land bank" investors with Eagle Homes in two developments relevant to this appeal. Under each arrangement, the Youngs held title to the subject property and Eagle Homes would develop it through annexation, re-zoning, and platting work. When the property was ready to be built upon, Eagle would then purchase, in phases, portions of the property from the Youngs. The first parcel at issue, the Nature's Crossing property, consists of 155 acres in Cortland in De Kalb County, and the second parcel, the Landmark property, consists of about 53 acres in Rochelle in Ogle County. Eagle hired CES to perform engineering and surveying services on the parcels. In 2008, after it could not collect payment from Eagle, CES recorded two mechanics liens against the Youngs' parcels, specifically, Phase II of Nature's Crossing and the Landmark property.

¶ 6 The Youngs' investment in the parcels came about when Steven Milner, a local commercial real estate broker, contacted the Youngs to inquire whether they would be willing to serve as land bank investors for Eagle Homes. The Youngs accepted assignments of Eagle's rights under existing contracts to purchase the subject properties. As noted, under the arrangement, the Youngs would retain ownership until such time as Eagle was prepared, in phases, to purchase the properties to develop two residential subdivisions. On October 14, 2004, the Youngs received an assignment of the real estate purchase contract between Eagle Homes and the Fenstermaker family, and they purchased the Nature's Crossing property for $2,700,090 ($17,419.94 per acre). Under the agreement, Eagle was to purchase from the Youngs a minimum of 50 acres within six months of acquisition, with a price that started at $23,000 per acre (an over $5,000-per-acre profit for the Youngs). Thereafter, Eagle was obligated to purchase the remaining property in contiguous tracts of at least 25 acres each. The agreement required Eagle to complete the purchase of the entire Nature's Crossing property within three years of the Youngs' acquisition of title. The Youngs retained sole and exclusive possession and the right to rent (as cropland) any portion of the property not conveyed to Eagle by March 1 of any calendar year. Eagle Homes maintained the property at its sole cost and expense, free from waste, and performed all obligations of an owner, including payments to Cortland for sanitary sewer and other public improvements; it was also required to pay the real estate and *ad valorem* taxes on the Nature's Crossing property.

¶ 7 Subsequently, on September 8, 2006, Dr. Young (specifically, the "J. Norman Young Trust") and Eagle Homes, LLC, entered into a substantially similar agreement with respect to the Landmark property, which he purchased for $2.65 million and under which Eagle was obligated to purchase tracts of at least 10 acres each.

¶ 8 Of the 155 acres that comprised the Nature's Crossing property, Eagle Homes ultimately purchased only about 51 acres (Phase I) from the Youngs. All of the infrastructure work for the project was completed and paid for, but Eagle Homes was unable to sell more than half of the newly-created residential lots. As a result, Eagle's construction lender commenced foreclosure proceedings. Dr. Young still owns the balance of the Nature's Crossing property and all of the Landmark property, which remain under cultivation. These parcels are the subject of the present dispute.

¶ 9 CES became involved in the subject projects as follows. In 2003 (before the Youngs had purchased the property), CES and Eagle entered into an oral agreement for CES to provide services and CES provided services at Nature's Crossing through October 31, 2007. Subsequently, Eagle Homes entered into a written contract with CES, under which CES would provide surveying and engineering work on Phase I of the Nature's Crossing property. CES designed and prepared infrastructure plans for permits, sewer, water, grading, storm sewer, access, construction plans, elevations, roads, and other improvements. It performed this work on Phase I before the Youngs sold the Phase I property to Eagle Homes. Next, in January 2007, CES commenced work on Phase II of the Nature's Crossing property. On March 20, 2007, Kevin Bunge, president and owner of CES, forwarded a proposal via email to Keith Wisniewski (Ken's son), director of land acquisition and development for Eagle Homes, for survey and engineering work, which was the same scope of work as that for Phase I. Although Keith did not sign the Phase II proposal, he asked that the work be done. Keith marked each CES invoice with his initials in the lower right corner to reflect his approval for payment.

¶ 10 As to the Landmark property, on February 2, 2007, CES forwarded a proposal via email to Keith for survey and engineering work. On March 15, 2007, Wisniewski authorized the work,

and CES worked on that project through November 30, 2007. (It had actually begun to work on this project in 2006 pursuant to an oral agreement.)

¶ 11 In November 2007, CES employees were directed to stop work on all Eagle Homes projects due to Eagle's lack of payment. On January 18, 2008, CES filed its mechanics liens, one for Phase II of the Nature's Crossing property and one for the Landmark property. The amount due and unpaid for its work on Phase II of Nature's Crossing is listed as $63,809,[2] and the lien states that CES last performed work on October 31, 2007. The amount due and unpaid for the work CES performed on the Landmark project is $86,542.50, and it last performed work on that project on November 30, 2007. Both liens state that they were a "notice of Claim for Lien against J. Norman Young, as Trustee of the J. Norman Young Trust dated September 16, 1993, Owner."[3] They further state that "said Owner made a contract with the claimant to perform engineering work *** as specifically set forth in the attached invoice for and in said improvement upon the real estate aforesaid." The liens also state the date on which the work was completed, have attached a summary balance of the amounts due and owing, and state that "Detailed invoices will be provided upon proper request." Also, the liens reference the "amounts unpaid and left due and owing to the Claimant."

¶ 12 In 2008, the Youngs filed a complaint against defendants to quite title and for other relief. In a subsequent amended complaint, they raised claims: (1) to quiet title against CES (count I); (2) for slander of title against CES (count II); and (3) for implied indemnification against all defendants except CES (count III). The Youngs sought a declaration that CES's mechanics liens

[2] The trial court's order reflects an award for $63,808, an amount not challenged on appeal.

[3] The Nature's Crossing lien also lists Nadyne (as trustee of her trust) as an "Owner."

were invalid and unenforceable and requested damages for slander of title. They claimed that they, as owners of the subject properties, never contracted with CES or authorized or knowingly permitted any work to be performed by it, and that the work did not benefit the Youngs; thus, CES could only be a subcontractor whose liens, if any, were not properly and timely perfected.

¶ 13 CES denied the Youngs' allegations, and, in a counterclaim, alleged that the Youngs knew or should have known that Eagle would need to retain engineering and surveying services to develop the property and that the Youngs knew that Eagle had retained CES (by referencing CES's plat in a contract to sell property to Eagle). CES further alleged that the Youngs had failed to pay the surveying and engineering fees that Eagle was authorized to make to their properties and that the mechanics liens against the Youngs were valid and enforceable. They pleaded a count to foreclose on the liens and included a separate breach-of-contract claim against Eagle. CES's claim for damages also included a request for prejudgment interest (and attorney fees, which are not at issue in this appeal).

¶ 14 A. Bench Trial

¶ 15 1. Plaintiff's Case - James Norman Young

¶ 16 At the bench trial,[4] James Norman Young, age 86 and a retired surgeon, testified as the sole witness on his behalf that he resides in Florida, but maintains a residence in Hinsdale during the warmer months.

[4] Ken petitioned for bankruptcy, and, on June 18, 2012, he received a discharge. The remaining defendants were companies that were owned or controlled by Ken. Eagle Homes-Nature's Crossing and Eagle Homes-Settlers' Landing were single-asset developers, and the real estate these companies owned was sold and/or foreclosed upon by the time of trial. Eagle Homes was an umbrella corporation, and its liabilities exceeded its assets. Immediately prior to

¶ 17 Milner first informed the Youngs of the opportunity to invest in 155 acres in Cortland (ultimately the Nature's Crossing development). On October 14, 2004, Eagle transferred its rights under the purchase contract with the Fenstermaker family to the Youngs as trustees of their respective trusts. Under the agreement, Eagle was required to purchase the property from the Youngs within three years. Eagle's obligations under the contract were to negotiate with the Town of Cortland to annex the property. "We were not involved in the business of this at all."

¶ 18 Young asserted that he had no control over the Eagle's activities on the property and that he was not aware of who was performing any services for Eagle on Phase I of the property (about 51 acres) after he sold it to Eagle. Prior to the closing, Young visited the property once with Milner. After the closing, he visited it once or twice. One visit occurred in 2008 when Young visited the farmer who rented his property. Eagle was in default on its Nature's Crossing purchases at this time.

¶ 19 Milner also introduced Dr. Young to the possibility of investing in the Landmark project in Rochelle, which consisted of about 53 acres of farmland. The agreement was executed on September 8, 2006. Young testified that, ultimately, Eagle never purchased any portion of the Rochelle property, and he continues to hold title to it and rents it to a farmer. Other than his

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trial, in early 2013, the parties' stipulated that, in the event CES was found to possess valid liens, Eagle Homes and Eagle Homes-Nature's Crossing consented to entry of a joint and several judgment against them for the full amount due under the liens in accordance with the relief sought in count III of the Youngs' complaint (seeking indemnification against Eagle if CES was found to possess valid liens). In this respect, Eagle presented no defense in the case. (Also, Young withdrew count III (slander of title) of his complaint.)

initial visit to the property, Young returned to see it only one time prior to entering into the contract with Eagle.

¶ 20 As to both parcels at issue in this case, Dr. Young testified that he never authorized any of the Eagle defendants to enter into agreements with respect to the development of the property that had not been sold to Eagle. Nor was he aware of any activities taking place on either property that he had not sold to Eagle. Young testified that neither he nor Nadyne ever designated any of the Eagle defendants as their agents for any purpose, and he denied having any conversations with anyone affiliated with the Eagle entities concerning CES's activities on either of the subject parcels that he had not sold to Eagle.

¶ 21 According to Young, he first learned of CES in late summer 2008, when he discovered infrastructure on his property during a visit there with the farmer (Randy Willret). Willret informed Young that there were manholes and an irrigation rig on the property. Young was "astounded." He contacted his attorney, and, afterwards, learned of the existence of CES.

¶ 22 On cross-examination, Young testified concerning his history of real estate investments. In addition to a 15-unit apartment, he also invested in a limited partnership that developed a De Kalb shopping center (with Kmart as a tenant). The Youngs invested in these properties prior to Dr. Young's retirement. He also invested with Eagle in a property in Malta. Young could not recall how he financed his transactions with Eagle.

¶ 23 Young denied seeing any development plans from Eagle or CES. Young further testified that it was only after the purchases that he saw a plat that Eagle had proposed to the Town of Cortland. He also claimed that, prior to the execution of the contract, he saw no document reflecting that a school would be built on the site (on property to be donated by the Youngs). However, when asked to explain how the final plat depicting the 17 acres set aside for the school

came to be attached to the contract, Young replied that he could not recall if he had viewed the plat or something similar prior to entering into the contract. Young denied seeing "anything of any importance," such as a plat, prior to entering into the Nature's Crossing agreement with Eagle. However, at his 2010 deposition, Dr. Young testified that he *was* shown drawings prior to the time that Eagle purchased the land from him.

¶ 24 As to Eagle's plans, Young testified that he understood that Eagle was going to develop the property in stages. The agreements provide that Eagle is obligated to maintain the properties free from waste and neglect and perform or cause to be performed (until closing day) the property owner's obligations under applicable laws. Young explained that Eagle could not take any action, including maintenance, on the properties until *after* it purchased its segments from the Youngs. That is, Dr. Young's understanding was that Eagle could not do anything with the properties until it owned the property.

¶ 25 At his deposition, Dr. Young testified that he would not have contracted with Eagle for the Nature's Crossing property if the Town of Cortland had not allowed development of the property. He also testified at his deposition about the relationship between Eagle and the Youngs' trusts, stating that he was "[a]bsolutely" relying on Eagle to handle all aspects of the development and to handle whatever communications with third parties that were necessary to make the development happen.

¶ 26 Young was questioned about a provision (paragraph 31) in the Nature's Crossing agreement between the Youngs' trusts and Eagle, which addresses utility easements. The provision states that, at any time after the first closing date, the purchaser may, via written notice to the seller, request that the seller execute (and the seller cannot unreasonably refuse) a perpetual utility easement for the benefit of the property purchased by the purchaser on the first

closing date through, over, and under the *remaining* portion of the property (at an agreed location). At trial, Dr. Young testified that he interpreted the provision to apply only after Eagle owned the property and believed that it did not permit easements on unpurchased portions of the parcel. That is, Young understood that easements were not allowed on unpurchased portions of the properties.

¶ 27 Addressing a FedEx package that several witnesses would testify to, Dr. Young denied calling CES in April 2005 to request a copy of the utility easements and/or drawings on the Nature's Crossing property. Addressing a special service area (SSA) agreement and an ordinance addressing Nature's Crossing property, Dr. Young agreed that the SSA addressed the property that had not yet been purchased by Eagle, but disagreed that Eagle was taking actions (such as a plat of dedication for easements) toward development on property it did not yet own (*e.g.*, all of Nature's Crossing). Dr. Young signed it.

¶ 28 As to the Landmark property, Young could not recall stating at his June 2008 deposition that the contract between Eagle and the Town of Cortland was extremely important to his involvement in the transaction because the contract resolved issues with water, sewer septic system, and infrastructure. At trial, he testified that resolution of annexation issues, prior to acquiring title, was critical to his investment because it ensured the viability of the developments. The Youngs' $18,000-per-acre purchase price was about twice the value of the properties solely as farmland; thus, they paid a premium in hopes that the development would come to fruition.

¶ 29 2. CES's Case - Lisa Wolf

¶ 30 Lisa Wolf, a licensed professional engineer and engineering manager at CES, testified on CES's behalf that she was the project manager on Phase I of the Nature's Crossing project and performed work on Phase II as well. She oversaw engineers and technicians who designed the

infrastructure plans for the subdivision permits, sewer, water, grading, storm water management, and access. Wolf was personally involved in the preparation of construction plans for elevations, roads, improvements, *et cetera*. Phase II involved similar work and a complete set of plans was prepared, but it did not progress as far as getting permitted and constructed. Wolf testified that CES's client on the Nature's Crossing project was Eagle Homes and that the property owner was Dr. Young.

¶ 31 CES commenced work on Phase I before the final plat was recorded and "likely" occurred before title was transferred from the Youngs to Eagle. In Wolf's experience, it is not unusual for surveying and engineering work to be performed before there is a sale and a recording of the final plat; it is "very common." In CES's preparation of plats for Phase I, an issue arose concerning utilities that would have to be placed on property that would be encompassed by future phases. CES prepared easements plats for this property. On the plat, there is a space for an owner to certify the plat. Wolf's recollection was that Norman Young was the owner that was to certify that plat.

¶ 32 As to Phase II, CES prepared a written proposal for Eagle, but no contract was ever signed approving of CES's work, although Keith orally approved the work and ordered certain work (as evidenced by emails). Wolf had conversations with Keith concerning Phase II, including notifying him as to when CES personnel would be on the property to survey it. They discussed the limits of Phase II and the laying out of the lots, including access issues. There was also a need to do soil borings. Wolf coordinated with Keith as to obtaining proposals and permission to access the property. As to the soil borings, Wolf participated in a June 21, 2007, email exchange with Keith and Kevin Bunge, CES's owner. Bunge asked Keith if he could order soil borings for Phase II and asked if he needed to coordinate with the landowner. Keith

responded by asking Wolf's office how many borings were needed for Phase II and then for the remainder of the site; he also stated that, if CES was ready, they needed "to let Norm know" before any truck drove onto his property to obtain soil borings. (Wolf was instructed during Phase I that CES could not pile dirt on the Youngs' Phase II property during the soil boring work.) Wolf asked Keith via email about the Youngs' permission, and he instructed Wolf to proceed with the soil boring work. She understood this to mean that Dr. Young had given permission to have the soil borings done.

¶ 33 Wolf never spoke with the Youngs and never viewed an email between anyone at CES and the Youngs. The only communication of which she is aware is that "we were asked to *** mail or FedEx some plans or something" to the Youngs. Wolf examined the company's log of incoming and outgoing mail or deliveries and discovered that the plans were sent to Dr. Norman Young.

¶ 34 Wolf was also involved in the work CES performed on the Landmark project, which never reached the point where construction stakes were placed in the ground or where plans were submitted for permit. However, Wolf testified that CES conducted preliminary engineering work and prepared plats to submit to the City of Rochelle. She was uncertain who owned the Landmark property. For the Landmark project, CES contracted with Eagle Homes, LLC, on March 15, 2007.

¶ 35 On cross-examination, Wolf testified that she typically identifies the owner of a parcel. Addressing Phase II of Nature's Crossing, Wolf stated that she was not aware that the Youngs were "overly involved" in that project, but she knew they were the owners and that Eagle was responsible for putting together the project. She assumed the Youngs were aware of it, and Wolf dealt with Eagle and Keith "as their agent, I would imagine." She explained that engineers do

not typically communicate with the property owner. Wolf did not have contact with the Youngs, but CES was directed during Phase I to send plans to Dr. Young. She described the plans as "the overall improvements in [P]hase [I] and maybe what we were doing through his property north of plat 1, that off-site sanitary we talked about."

¶ 36 3. Keith Wisniewski

¶ 37 Keith Wisniewski, Ken's son, testified that, between 2002 and 2008, he worked at Eagle Management Consultants, LLC, a wholly-owned subsidiary of Eagle Homes, LLC, (his father's company) as director of land development and acquisition. Keith helped negotiate the purchase of the Nature's Crossing property and worked directly with company engineers and its land planner.

¶ 38 Nature's Crossing was planned as a 300- or 400-home development, and the Landmark project was intended to consist of 350 units. At Nature's Crossing, 140 lots were planned for Phase I, but only 38 homes were ultimately constructed. The Nature's Crossing and Landmark projects failed, and all of the properties have been foreclosed by Eagle's lender.

¶ 39 Eagle retained CES prior to the Youngs' purchase of the Nature's Crossing property. "[W]e would have needed their services [*i.e.*, initial topographical surveys] for preliminary engineering." At the time Eagle purchased the land from the Youngs, the Youngs wanted the development ready for groundbreaking. According to Keith, Eagle had to own the property in order to begin construction. At the initial meeting with the Youngs, a concept plan was presented to them.

¶ 40 As to Phase II, on March 20, 2007, Eagle Homes agreed to CES's proposal, but no contract was ever signed; Keith initialed invoices that contained charges of which he approved.

CES's work on Phase II commenced in April 2007. Addressing the Landmark project, Keith approved CES's work on that project on March 15, 2007.

¶ 41 According to Keith, Wolf wanted permission from the property owner to have soil boring work done on the Phase II property. Keith's understanding of the parties' contract was that Eagle could have certain studies performed as needed for the project. "I mean, there are certain things that we have to be able to do on property that [Dr. Young] was currently holding for us."

¶ 42 Keith (who often listened in on conference calls) and/or Ken (the primary contact person) met or spoke on the phone with Dr. Young or Milner (or both) to address the status of the projects (including the irrigation easements at Nature's Crossing) about once or twice per month. Dr. Young was a hands-on owner and frequently (about twice per month) contacted Eagle to inquire about the projects. Eagle also contacted Milner concerning many issues because Dr. Young was not easily reached. Keith ordered the soil boring work and could not recall if he obtained Dr. Young's permission.

¶ 43 On the Nature's Crossing project, prior to receiving preliminary plat approval, Eagle reached an agreement with the Town of Cortland for a lift station (addressing irrigation and sanitation issues) to be located on the Phase II property. (Ultimately, the lift station was placed elsewhere.) Eagle kept Dr. Young apprised of these issues. "We had to. We needed easements[.] *** [T]he entire infrastructure for the sanitary sewer system in Cortland was redirected through our [P]hase [I] Nature's Crossing site." In order to issue a final plat and final engineering approval for Phase I, Cortland required easements for the sanitary main, storm water sewer, and irrigation. Easements were required to be signed by the landowner. In this case, the municipality passed an ordinance with an easement, but neither Dr. Young nor Nadyne's signatures appear on the ordinance or the recorded plat. Keith could not recall specific

conversations with Dr. Young during which the easements were discussed, but Young was kept apprised of the status of the project. Keith explained that Young was concerned about the farm tenant on his property and the impact the irrigation rig would have on his crops and potential loss of acreage due to the easement.

¶ 44 Keith could not identify a specific provision in Eagle's contract with Young that provided Eagle with access to Young's property. Keith further testified that the Youngs never specifically authorized any of the Eagle defendants to enter into any contracts on their behalf. Keith did not inform the Youngs that Eagle entered into any type of contractual relationship with CES. Also, Keith did nothing to suggest to CES that Eagle was performing development work for the Youngs or that the Youngs were responsible for paying CES's invoices. However, the Youngs never instructed Keith or Eagle that they could not contract with CES or not to do development work on the property. Addressing Eagle's contracts with the Youngs, Keith believed that the provision that requires delivery of a survey at closing would necessarily grant Eagle access to the property prior to closing to have the surveying work done. The contract also granted Eagle, according to Keith, after its purchase of Phase I, the right to request an easement (for which a surveyor would have to enter the land) from Dr. Young, and he could not unreasonably withhold it. Keith testified that he was "under the assumption that we had the right to access the property, and I ordered the soil borings to be completed." However, in response to Wolf's inquiry, he stated that he would check with Dr. Young and secure his approval. At trial, Keith stated that he could not recall why he would have told Wolf that he would check with Dr. Young when he assumed that Eagle already had authority to perform the work pursuant to his understanding.

¶ 45 The Phase II work began after CES's Phase I work was completed, and it commenced after Bunge approached Keith about it; Eagle was not ready to proceed with the project. At his

deposition, Keith stated that, in August 2007, Bunge was running out of work to keep his staff busy and asked if he could commence Phase II work; Keith told him to proceed with engineering work, but he could not provide him with soil borings. Prior emails that year (March and June 2007) between Eagle and CES did not reference CES's need to keep its employees busy, nor did they contain a response from Keith that Eagle could not proceed. Again, the statement concerning keeping CES's employees busy was made in an August 2007 email. Thus, Keith agreed, CES's alleged need to keep its employees busy had no bearing on Eagle's agreements, in March 2007, with CES concerning Phase II and Landmark and its obligation to pay for CES's work.

¶ 46 At trial, when asked why he told Bunge that he could not provide him with soil boring or other studies if he had an entitlement to access to the property, he explained that he could not pay for it (a $30,000 expense) and that, other than his inability to pay for it, he had Dr. Young's consent to go on the land. Ultimately, Eagle's lender stopped authorizing further draws in its construction financing and, thus, Eagle did not have funds to pay CES for Phase II work. Keith told CES that they could proceed with their work, but there is no written contract. He also told CES that Eagle would not pay CES until such time as it received its construction financing. By March 26, 2007, Bunge expressed his concern to Keith that he was not being timely paid by Eagle. Keith informed Bunge that he was having difficulty securing financing on Phase II. Prior to this time, on March 15, 2007, Keith signed a document accepting CES's proposal for engineering services on the Landmark project. (Eagle was attempting to secure financing on both Nature's Crossing and Landmark from American National Bank; Keith further testified that he was seeking other sources of financing for the Landmark project.) Keith agreed to CES's proposal on March 20, 2007, and never informed the entity that it would not be paid for its work.

¶ 47 4. Ken Wisniewski

¶ 48 Ken Wisniewski, Keith's father and manager/president of the Eagle entities, testified that he has been a land developer and builder for 38 years.

¶ 49 Ken believed that Eagle had authority to proceed with the entitlement work (*i.e.*, engineering and other predevelopment activities) on the Nature's Crossing and Landmark properties because the projects would not become viable unless the technical engineering phase was completed. "We have to get all that approved before we [could] do any of the actual land improvements."

¶ 50 Based on his interpretation of the Nature's Crossing contract with the Youngs, Ken did not believe that he needed Dr. Young's consent to go on the property for survey work or any other engineering-type of work because survey work "really does not do crop damage."

¶ 51 Ken testified that the engineering and improvements increased the value of the Nature's Crossing and Landmark properties. Specifically, the sanitary, water main, and pond increased the value of the Phase I and Phase II parcels. (The only work completed on Phase II was the sanitary main.)

¶ 52 Ken explained that receiving preliminary plan approval adds value to a property because the municipality has approved the project subject to final engineering. The use of the property has changed from agricultural to residential, and residential lots are worth more on a per-acre basis than agricultural land. Proceeding with the engineering and improvements was in both Eagle's and Dr. Young's best interests, but Ken agreed that Young's only financial stake was the payment he would receive when Eagle purchased the properties; he had no financial stake in how successful Eagle was in the developments.

¶ 53 5. Steven Milner

¶ 54 Steven Milner, a commercial real estate broker, testified that he has known Dr. Young for over 20 years and has brokered seven tracts in which Young has invested. At the initial meeting with the Youngs, Eagle presented a concept plan. Milner opined that Dr. Young is an experienced real estate investor, and, other than one project involving a Kmart store, Young was essentially a land speculator, not a developer. His sole financial stake in the Nature's Crossing and Landmark properties was to sell the property to Eagle. His intent was to structure deals that returned at least 10% compounded annually. For Nature's Crossing and Landmark, if the developments did not go through, Young intended to keep them indefinitely. He believed that the land would appreciate in value, regardless of whether Eagle developed it.

¶ 55 Milner testified that, while Young still owned the properties, Eagle should have sought Young's permission before doing any work that could have resulted in a lien or encumbrance on them. Milner understood that Eagle was not to perform entitlement work before purchasing a phase of the parcel. Milner further testified that Dr. Young had no interest in becoming a partner in the Eagle projects. That is, he did not want to be a party to any of the development costs. Young had a "very substantial" net worth and was very concerned about liability issues. According to Milner, Dr. Young never approved any work that CES performed at the Landmark property.

¶ 56 Addressing whether proceeding with the Landmark project would increase the value of the property, Milner opined that it *would* based on development's density. As to Nature's Crossing, Milner opined that proceeding with preliminary improvements was in both Eagle's and Dr. Young's best financial interests because "we already had a proven program that was rolling through there at that point." It would have increased the value of the property. Ultimately, Nature's Crossing became part of an SSA, and Young was "extremely upset" about it. Milner

opined that the SSA designation "destroyed 100 percent of the equity in the property." In his view, "Neither that property nor any other that's in the SSA that was not developed currently has any net worth of value." Any work that CES performed in subjecting Dr. Young's property to the SSA would not have enhanced its value because it is in the SSA and "they created massive densities on these properties that they based these SSA taxes on."[5] But Milner testified that CES did not have any involvement in the SSA. But for the SSA, CES's work would have increased the property's value and it would have been in both Dr. Young's and Eagle's best interests for that work to have been done.

¶ 57 Milner stated that the property would have to be developable for Eagle to purchase it from Dr. Young; such preliminary ("soft") development (including CES's work) would have to have been performed in order for Eagle to purchase it; and Dr. Young understood this. The work that CES performed would have been preparatory for the subsequent development of Phases II and III. It was valuable to Dr. Young. Although a final plat was not recorded for Phase II of Nature's Crossing, if the property was not in an SSA, then the engineering work would have added value to the land. At the present time, assuming no sunset period has expired on the plats, the preliminary engineering would not have to be redone. In the normal course of these projects, "it would have been much better for [Eagle] to purchase [subsequent phases of Nature's Crossing from Dr. Young] once the engineering was completed."

¶ 58 6. Catherine A. Grimes

[5] Milner explained that the builder paid the SSA tax upon selling a unit. The taxes would eventually be amortized, but that period had not commenced. Thus, Dr. Young's tax bill, which was about $1,800 initially, rose to $250,000 per year.

¶ 59 Catherine A. Grimes testified that, in April 2005, she worked as a receptionist at CES. She testified concerning a contact that CES alleged Dr. Young had with the firm.

¶ 60 Grimes identified a message book she used at the time to record phone messages. One message she recorded was from Norman Young, on April 12, 2005, at 2:25 p.m. It noted that the message was for "KCB," whom Grimes explained was Bunge. Grimes testified that the caller identified himself as Norman Young, and the message is recorded as concerning the plat for sewer lines at Nature's Crossing, 53.7 acres, overnighted to him, FedEx No. 1194633157, with an address in Tequesta, Florida. Grimes also testified to a time entry from April 12, 2005, that she prepared and that was also kept in the course of CES's regularly conducted business. The entry reflects a trip to the bank and then to FedEx to drop off a package. Grimes had no independent recollection of going to the FedEx drop box, but stated, "If my time sheet says I went to the FedEx drop box, I went to the FedEx drop box."

¶ 61 Grimes does not have an independent recollection of the April 2005 events. Also, the prior three messages in the message book have the box checked that states that the person on the message had actually called, whereas the one referencing Young's name does not. Grimes stated that she sometimes forgot to check that box, but also stated the only thing she can state for certain is that someone called on the specified date requesting that sewer line plats be sent to Norman Young.

¶ 62 Grimes also stated that the person she had contact with that day identified himself as Norman Young and that is why she wrote down his name: "I have to believe that I had a conversation with Mr. Young because that's what I wrote down. I have very specific information about his plat. And the message was for Kevin, so Kevin couldn't have given me the message." When Young's counsel noted that she had agreed at her deposition that it was

possible that the call could have come from Eagle or Ken, Grimes replied, "I would have thought that I would have written down that someone—that they were from somewhere else, because I did on all the other messages that are on that page."

¶ 63 7. Kevin C. Bunge

¶ 64 Kevin C. Bunge, president and owner of CES, testified at length. He stated that, in the 15 years prior to the developments at issue in this case, his company worked on 300 to 400 subdivision projects. He did not contract with the owner; rather, his company always contracted with the developer and "every one of them had gone well. I'd have no reason to change that process."

¶ 65 CES began working on the Nature's Crossing property in 2003. The Youngs purchased it in October 2004. By 2007, CES had been doing work for Eagle for about seven or eight years and Eagle had never refused or failed to pay for CES's work. On Phase II, Eagle paid CES $480 and the balance still owed on its invoices is $63,809. Eagle owes CES $86,542.50 for its work on the Landmark project. CES performed the preliminary and part of the final engineering, surveying, and topographical work there and prepared a final plat for Phase II. Ultimately, neither municipality formally approved CES's plans, but each had reviewed and commented on the plans; the plans could have been re-submitted after revisions.

¶ 66 Bunge explained that he first came to know of Dr. Young through the Eagle projects at issue in this case. He believed that Eagle, Ken, and Keith were the Youngs' agents for the projects. However, CES's contract with Eagle did not specify that Eagle was the Youngs' agent, and Bunge never spoke to the Youngs. At his deposition, Bunge had testified that, at the time he entered into the contract for work on the Landmark project, he did not know who owned the property; at some time during the project, he became aware that Dr. Young was the owner.

Bunge did not send any of CES's Landmark work product to Young. When asked why his firm's preliminary Landmark engineering plans list Eagle as the property owner for the project, Bunge explained that they were preliminary working documents and that his draftsperson or engineer merely included information of which he or she was aware at that point in time. The documents were not finalized and contain no seal. The preliminary plan and plat for the Landmark project was not a finished document. It reflected only what the draftsperson was told. Bunge stated that the documents were sent back and forth between CES and the Wisniewskis, who reviewed them. Bunge was aware that Eagle was not the property owner.

¶ 67 In Bunge's view, Dr. Young was an experienced investor. Bunge based his opinion on Young's experience with various projects, including the Kmart plaza. "[A]ny developer with any experience would be aware of [*sic*] that those things [(*i.e.*, engineering, zoning, platting)] had to happen for a development to move forward."

¶ 68 Bunge pointed to two documents that reflected, in his view, that Dr. Young was aware of CES's activities at the Nature's Crossing project. First, he identified the contents of the FedEx package Grimes testified to. The package included the overall plans for the development, including the sewer and water for Phase I and "where it went off-site into [P]hase [II] and [III]" and the sanitary sewer "running outside of [P]hase [I] through [P]hases [II] and [III]." Bunge believes that, if Dr. Young called CES, then he was aware that CES was performing work on Phase II: "he knew who we were, what we were doing, and he knew exactly what to ask for." Second, Bunge identified the contract Dr. Young signed to sell the property to Eagle, to which a drawing was attached that contained CES's logo and information.

¶ 69 Bunge also believed that the Youngs knowingly permitted CES to perform the Phase II work that is the subject of the lien. He based his belief on the fact that the contract between

Eagle and the Youngs provided for Eagle to move forward with developing the project, and "the knowledge that the engineer that was on [P]hase [I] was still involved and would be engineering for [P]hase [II], my opinion, is by no means a stretch." The Youngs, in his view, had no reason to think that CES would not be continuing to work on the project. As to the Landmark project, Bunge also believed that the Youngs knew or should have known that CES was working on it. He explained that they would have known this based on their status updates from Eagle "or other parties involved with the Youngs *** [that] somebody was doing the engineering plans."

¶ 70 As to both the Nature's Crossing and Landmark projects, Bunge's understanding was that Dr. Young had authorized Eagle to be its agent and enter into agreements on his behalf. He believed this because Young served as a land bank investor, where, consistent with Bunge's experience, the developer obtains the landowner's approval for certain aspects of the development: "we hear from clients a lot of times as well, that's fine, I've just got to get the landowner's okay or check with the landowner, or the landowner will have to be compensated for crop damage or these kind of things, but that's—that's just standard across a lot of our projects." On Phase II, CES had to access the property to do work on the irrigation system plat. "I doubt we asked for separate authorization for that. We had been on the property since we first started on it several years prior." Further, easement preparation work does not cause crop damage.

¶ 71 Addressing the make-work allegations, Bunge testified that Keith did not sign CES's March 20, 2007, proposal for Phase II, but Keith orally accepted it by ordering work that was specified in the proposal. CES commenced work, and, as it progressed, Bunge had discussions and exchanged emails (dated March, August, September, and November 2007 and February 2008) with Keith. In none of his responses did Keith claim that the work CES was performing

was not authorized or demand that the work be stopped; nor did he complain that the work was improper. According to Bunge, Keith never stated, orally or in writing, that Eagle did not have to pay for the work because it did not obtain financing and did not close on Phase II. Bunge denied having any phone conversation with Keith in February or August 2007 wherein Bunge stated that he needed to keep his employees busy. "[W]e were not in a position—not in a need to work on projects that we weren't going to get paid for, and didn't have such a practice." He further explained that the Landmark project was a lucrative one for his company: "I was certainly not looking for work. I was trying to figure out how to get that project done." Bunge had two of his offices working on the project. Bunge further testified that, at the commencement of CES's Phase II work, his company was not seeing a drop-off in business. He disagreed that he testified at his deposition that he saw a decline in business, explaining that he was referring to payments from clients. He explained that the sub-prime mortgage crisis occurred in 2007 and had an impact on CES by late 2007 in that clients were late in making payments; however, workflow was not affected at this point and CES did not start laying off employees until late 2008 or early 2009. He also challenged Keith's claim that Eagle experienced financing issues at this time. According to Bunge, CES's services are considered "soft costs" and are almost always self-financed by the developer at the beginning of a project. Once the developer has construction plans or a plat, it can obtain construction financing and title companies typically, but not always, require that the developer obtain a lien waiver from firms such as CES.

¶ 72 Addressing the utility plans that CES asserts were sent, via FedEx, to Dr. Young, Bunge explained that they relate to work on Phase I and for which CES has been fully compensated. The plans "depict where the utilities were going off of [P]hase 1 into other phases." CES sent its Phase II proposal to Eagle and not to Young, even though it was aware he was the landowner,

because it was not "standard practice. The developer—we worked for the developer and we contracted with them." Bunge believed that, with respect to Phase II, he was contracting with "Eagle Homes as an agent of the landowner."

¶ 73 In a June 20, 2007, email to Keith, Bunge asked if CES needed Young's permission to access the Phase II property to prepare for soil borings; Bunge wanted assurance that Young had consented to this. Keith responded by asking how many borings were needed for Phase II and how many for the remainder of the site. Keith also wrote that there was no coordination required and that, when ready, "we just need to let Norm know." When asked at trial why he inquired about consent when he also believed that Eagle was Young's agent, Bunge replied that it was "based on experience with these projects" and "almost a service to Eagle Homes of [*sic*] by the way, do you need to let the landowner know this is going to happen, in case there's going to be a rig out there." He believed that Eagle, as agent, could authorize the work and testified that he had no concerns about the scope of Eagle's agency. "We're saying you're going to send a 10-ton rig onto vacant property that is not under [P]hase [I] right now, do you need to let the landowner know, that simple." He wanted to avoid surprise. "We try really hard to take care of our clients." Bunge further explained that, earlier in the project, when CES conducted its first survey, they had a pickup truck on the property that damaged some crops. Keith contacted Bunge, informing him that the landowner (either Fenstermaker or Young) was upset about it. Based on this experience, Bunge would contact (or have someone contact) the owner on every survey project his firm worked on to note that certain activities would be taking place on the land.

¶ 74 As to the package Grimes testified to, Bunge described a document log (exhibit No. 6) that CES kept that recorded where and when it sent its plans and permits. Another exhibit, No.

7, consisted of three pages of the Nature's Crossing improvement plans. Both documents are maintained in the regular course of CES's business and on its computers. The document log contains an April 12, 2005, entry, lists what documents were sent, and notes that they were sent to Dr. Young. It also contains Grimes' initials, reflecting that she was the employee who sent the plans via FedEx.

¶ 75 Bunge opined that CES's work on Phase I improved subsequent phases of Nature's Crossing because the Phase II detention area, which takes up land and is costly, was built while Phase I was being built. The sanitary sewer and water main on Phase I are "stubbed" to appropriate points in Phase II so that they can be hooked up and extended. While Phase I was being constructed, part of the water main was run through Phase II so that the water main would operate. Thus, part of Phase II already has a water main in it and part of Phase III has sanitary sewer running through it. Bunge further testified as to Nature's Crossing that CES did not perform any work related to the SSA adopted by the Town of Cortland.

¶ 76 B. Trial Court's Findings and Subsequent Proceedings

¶ 77 In an October 1, 2013, amended order, the trial court found that: (1) Eagle homes was the Youngs' authorized agent; (2) the liens were facially valid and enforceable; (3) there was an agency relationship between the Youngs and Eagle Homes; (4) that Dr. Young was aware of and authorized the work to be done by CES; and (5) CES's work was lienable. Accordingly, the court foreclosed on the liens and entered judgment in defendants' favor and against the Youngs in the amount of $63,808 on the Nature's Crossing project and $86,542.50 on the Landmark project, plus costs. The trial court also entered judgment in the Youngs' favor against Ken, Eagle Homes, and Eagle Homes-Nature's Crossing in the amount of $63,808 on the Nature's Crossing project and $86,542.30 [*sic*], plus costs.

¶ 78 Specifically, the trial court found Young not credible upon cross-examination. "His memory was selective beyond consideration for his age and the length of time since the Nature's Crossing project began." The court found the other witnesses credible. Addressing authority, the court determined that Eagle Homes had authority from Young to make necessary improvements for the development of the projects. It noted that it would be "naïve" to find that Young expected the projects to be development-ready and to be taken down in phases by Eagle without the pre-development work. Also, the court found that there was evidence that Young was aware of CES involvement based on a request for copies of CES documents and other witness testimony.

¶ 79 Addressing the agency issue, the court found that, although there was no express contract between Young and Eagle Homes, the evidence weighed in favor of finding that there was an agency relationship between the parties authorizing Eagle Homes to prepare the subject land for development and to return "significant" profit to Young upon the sale of the land to Eagle Homes. Young, the court found, was aware of the work necessary for predevelopment in order to bring Phase I of Nature's Crossing to fruition and must have known that the same work would be necessary for the subsequent phases. A valid lien claim under the Mechanics Lien Act (Act) (770 ILCS 60/0.01 *et seq.* (West 2012)), the court determined, does not require a direct contract with the property owner. As the evidence showed that Young was aware of the predevelopment work, without objection, he knowingly permitted and established an agency relationship in that regard. The court further found that the evidence established Young's involvement in the predevelopment approval process, where he had conversations with Ken and with Milner with regard to the development of the properties.

¶ 80 As to the question whether CES's work "created value" to the Youngs' land, the trial court found that CES's predevelopment work resulted in Eagle Homes' purchase of the property from the Youngs at a profit to them of over $5,000 per acre (per contractual agreement). "Plaintiff purchased the property and took the risk that in the event the property was not properly prepared for development that Plaintiff would not realize profit." CES's work (*i.e.*, engineering and surveyor's services, which are covered by the Act), the court found, reduced the Youngs' risk and created "substantial 'value' to the land."

¶ 81 Accordingly, the trial court found that the mechanics lien claims were valid and met the Act's requirements. Invoking the maxim that strict construction is not meant to be a pitfall for those who act in good faith and by which an adversary can defeat a claim due to an immaterial misstep, the trial court further found that the misstatement in the liens that the Youngs had a contract with the lien claimant was not fatal, where the contract was with Eagle Homes, the Youngs' agent.

¶ 82 Subsequently, CES moved for costs of suit, interest, and attorney fees. 735 ILCS 5/2-1203 (West 2012). On February 18, 2014, the trial court denied CES's motion as to interest and attorney fees, but granted it with regard to costs (as to nonlitigation expenses) against Young. The court further found that, to receive interest, a contract is statutorily required (815 ILCS 205/2 (West 2012)). The court reiterated its findings that there was an agency relationship between Dr. Young and Eagle. It explained that, given Young's experience and "his situation," the evidence showed that he knew or had to know that predevelopment work had to be performed on the property in order for him to earn his $5,000-per-acre profit upon sale to Eagle. However, the court found that, as to any interest award, "it's a stretch to extend that agency relationship to imply he had knowledge of the contents of the contract between Eagle Homes and

CES." Accordingly, the trial court denied CES's request for prejudgment interest. (As to attorney fees, the court denied the motion, finding that Young pursued the litigation in good faith.)

¶ 83 Young appeals the trial court's order concerning the liens, and CES cross-appeals the court's order concerning its request for prejudgment interest.

¶ 84 II. ANALYSIS

¶ 85 A. Young's Appeal

¶ 86 In his appeal, Young argues that CES failed to establish the elements for a valid mechanics lien and, therefore, he was entitled to entry of a judgment quieting title to the subject properties free and clear of CES's alleged interest. Specifically, Young asserts that the trial court's findings were against the manifest weight of the evidence, where: (1) the liens are facially invalid; (2) there were no express contracts between the Youngs and CES; (3) there was no agency relationship between the Youngs and Eagle; (4) the evidence did not demonstrate that Nadyne either contracted with CES or knowingly permitted CES's work; (5) the evidence did not demonstrate that the Youngs knowingly authorized CES's work; and (6) CES did not perform lienable work. We reject Young's arguments.

¶ 87 In a bench trial, the trial court must weigh the evidence and make findings of fact. In close cases, where findings of fact depend on witness credibility, it is particularly true that a reviewing court will defer to the findings of the trial court unless they are against the manifest weight of the evidence. *Chicago Investment Corp. v. Dolins*, 107 Ill. 2d 120, 124 (1985). This standard also applies regarding the existence of an agency relationship. *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 47 (1994). A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be

unreasonable, arbitrary, or not based on the evidence. *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 242 (1996).

¶ 88 The purpose of the Act is to protect contractors and subcontractors who provide labor and materials for the benefit of an owner's property by permitting them a lien on the property. *Parkway Bank & Trust Co. v. Meseljevic*, 406 Ill. App. 3d 435, 446 (2010). Rights under the Act are in derogation of the common law, and the steps necessary to invoke those rights must be strictly construed. *Id.* "However, once the contractor or subcontractor has strictly complied with the requirements and the lien has properly attached, then the Act should be liberally construed to accomplish its remedial purpose." *Id.*

¶ 89 1. Liens' Facial Validity

¶ 90 First, Young argues that there is an irreconcilable discrepancy between the liens and the CES's counterclaim allegations. The liens reflect that CES contracted directly with the Youngs, while the counterclaim, Young asserts, alleges that CES performed the services giving rise to the liens under separate agreements with Eagle. He urges that the liens do not correctly describe the contracts. We reject Young's argument.

¶ 91 To enforce a lien against a creditor, a contractor must comply with the prerequisites of section 7 of the Act. *Tefco Construction Co. v. Continental Community Bank & Trust Co.*, 357 Ill. App. 3d 714, 719 (2005). Section 7(a) instructs a lien claimant only to: (1) file its claim within four months after the completion of the work; (2) verify the lien by affidavit of the claimant or an agent or employee; (3) include a brief statement of the contract; (4) set forth the balance due; and (5) provide a sufficiently correct description of the lot, lots, or tracts of land to identify the same. 770 ILCS 60/7(a) (West 2012); *Tefco*, 357 Ill. App. 3d at 719. See generally *First Federal Savings & Loan Ass'n v. Connelly*, 97 Ill. 2d 242, 249 (1983) (lien claim sufficient

even though it pertained to a contract for work on four different buildings likely performed on different dates); *Lyons Federal Trust & Savings Bank v. Moline National Bank*, 193 Ill. App. 3d 108, 112 (1990) ("a statement of mechanics lien does not necessarily require a contract date to be alleged").

¶ 92 Again, the Act requires that the lien contain only a brief statement of the contract. 770 ILCS 60/7(a) (West 2012). Here, the trial court found that the misstatement that the *Youngs* had a contract with CES, the lien claimant, was not fatal because the evidence showed that the contract was with the Youngs' *agent*, Eagle Homes.

¶ 93 We conclude that the trial court did not err in assessing the liens' validity. *Bale v. Barnhart*, 343 Ill. App. 3d 708 (2003), upon which Young relies, is distinguishable. In that case, the court upheld the dismissal of a complaint, where the caption identified the plaintiff/lien claimant as the claimant, but the text of the lien identified the claimant in two places as "Carla S. Bale," the claimant's agent and the individual identified in the caption as the one who prepared the form. *Id.* at 713. In addition, Carla Bale signed the verification as " 'the claimant, agent[,] or employee of claimant,' " and the text described the contract as one between " 'claimant' " and the defendants. *Id.* The appellate court held that, because the lien did not accurately describe the contract, the lien did not satisfy section 7 of the Act. *Id.* at 714. The court also rejected the argument that the lien's text controlled, where there was a conflict between the caption and the text. *Id.* It reasoned that, at a minimum, this fact created an ambiguity resulting in an inaccurate description of the contract and that, strictly construing the Act, the lien did not comply with section 7. *Id.*

¶ 94 Here, the liens properly identified the property owners as the Youngs. Both liens state that they were a "notice of Claim for Lien against J. Norman Young, as Trustee of the J. Norman

Young Trust dated September 16, 1993, Owner." The Nature's Crossing lien also lists Nadyne (as trustee of her trust) as an "Owner." Thus, unlike the *Bale* lien, which listed the agent as the claimant, CES's liens accurately identify the claimant, as well as the property owners. Compare *Ronning Engineering Co. v. Adams Pride Alfalfa Corp.*, 181 Ill. App. 3d 753, 759 (1989) (affirming dismissal of complaint; lien unenforceable where it did not contain a sufficient statement of the contract; lien described the wrong contract, misstating the property owner's name as Adams Pride and not Adams County and reflecting that the lien was based upon a verbal contract formed in 1985, when it was actually based on a written contract executed in 1986).

¶ 95 We agree with CES that, in its liens, it did not misidentify the parties responsible for the contracts and that its failure to specify Eagle as the Youngs' agent was of no import. CES pleaded in its counterclaim that Eagle was the Youngs' agent and that the Youngs were Eagle's principals. Thus, an agreement with Eagle as agent (an issue we decide below in CES's favor) is an agreement with the Youngs, who are the principals. See, *e.g.*, *Progress Printing Corp. v. Jane Byrne Political Committee*, 235 Ill. App. 3d 292, 307 (1992) ("one generally is bound only by one's own contracts. In an agency relationship, however, a principal may empower an agent with the authority to enter into contracts with third parties on the principal's behalf."); *Daniggelis v. Pivan*, 159 Ill. App. 3d 1097, 1103 (1987) ("The long established rule, enunciated by our supreme court in *Taylor v. Taylor*, [20 Ill. 650, 652 (1858)], is that all the acts of an agent performed within the scope of his agency bind the principal and are regarded as the principal's own acts."); *Culligan Rock River Water Conditioning Co. v. Gearhart*, 111 Ill. App. 3d 254, 260 (1982) ("It is axiomatic that the acts of an agent are considered to be those of the principal [citation], and contracts executed by an agent in managing the property of its principal are

binding on said principal."). Under the circumstances of this case, the landowners (*i.e.*, the Youngs) were proper parties to identify in CES's lien claims.

¶ 96 Young also asserts that CES never sought amendment of its counterclaim to allege a written contract for the work it performed at the Landmark project in Rochelle. This claim is forfeited because it was not presented before the trial court. *Rodriguez v. Frankie's Beef/Pasta & Catering*, 2012 IL App (1st) 113155, ¶ 23 (particular issues not brought before the circuit court are forfeited upon review). Young did not move to strike and dismiss any portion of CES's counterclaim and did not move after trial to set aside the judgment on the basis that the counterclaim did not comport with the evidence. Rather, Young answered the counterclaim and the agency and contract issues were fully tried.

¶ 97 2. Existence of Express Contract between the Youngs and CES

¶ 98 Next, Young argues that the trial evidence did not show that CES had any express contracts with the Youngs. We conclude that the evidence showed an oral contract for the CES's work on the Nature's Crossing project and a written contract for its work on the Landmark development. (We address the key issue—Eagle's agency—in the following section).

¶ 99 Mechanics liens are statutory creatures, and the purpose of the Act is to permit a lien upon premises where a benefit has been received by the owner and where the value or the condition of the property has improved due to the furnishing of labor or materials. *Fieldcrest Builders, Inc. v. Antonucci*, 311 Ill. App. 3d 597, 609 (2000). It is the burden of the party seeking to enforce a mechanic's lien to satisfy the elements necessary to establish the lien. *Tefco*, 357 Ill. App. 3d at 718-19; *Fieldcrest Builders*, 311 Ill. App. 3d at 609. Section 1(a) of the Act provides, in relevant part:

> "Any person who shall by any contract or contracts, express or implied, or partly expressed or implied, with the owner of a lot or tract of land, or with one whom the owner has authorized or knowingly permitted to contract, to improve the lot or tract of land or for the purpose of improving the tract of land, or to manage a structure under construction thereon, is known under this Act as a contractor and has a lien upon the whole of such lot or tract of land and upon adjoining or adjacent lots or tracts of land of such owner constituting the same premises and occupied or used in connection with such lot or tract of land as a place of residence or business[.]" 770 ILCS 60/1(a) (West 2012).

Thus, the lien claimant must establish: (1) a valid contract; (2) with the property owner, the owner's agent, or somebody who is knowingly permitted by the owner to contract for property improvements; (3) to furnish services or materials; and (4) the lien claimant performed pursuant to the contract or had a valid excuse for its nonperformance. *Tefco*, 357 Ill. App. 3d at 719; *Fieldcrest*, 311 Ill. App. 3d at 609.

¶ 100 First, addressing the Nature's Crossing property, Young notes Bunge's testimony that Eagle principals never signed CES's written proposal for the work it performed at that development. Young also notes Bunge's testimony that he knew that the Youngs owned the Nature's Crossing property on the date he submitted his proposal, but that he sent his proposal to Eagle for its acceptance. In this regard, Young asserts, Bunge conceded that CES had no contract with the Youngs and that the work his firm performed at the Nature's Crossing was pursuant to an agreement with Eagle. He further suggests that all CES invoices were sent to Eagle with no expectation that the Youngs bore responsibility for payment.

¶ 101 Young also points to Keith's testimony, which disputed Bunge's assertion that a contract existed between Eagle and CES. Keith informed Bunge that Eagle was not, Young urges,

prepared to proceed with the Phase II work and never committed to pay CES for its services. This was consistent with Keith's understanding that the Youngs had leased the land to a farmer who was entitled to possession and unfettered access (and Keith's acknowledgement that Eagle's purchase contract with the Youngs provided no explicit access rights). Young further asserts that Keith testified that Bunge continued to "push" for permission to commence Phase II work because CES was running out of work and Bunge wanted to keep his staff busy. Wolf, Young also notes, testified as much and stated that CES had already started laying off employees.

¶ 102 CES responds that Keith's testimony reflects that he asked that the work outlined in CES's March 20, 2007, proposal be performed and that CES performed the requested work. Keith testified that the Phase II proposal did not need to be signed as long as the fees charged were consistent. Also, Keith marked each approved invoice with his initials in the lower right corner, he had no complaints with CES's work, and CES performed all of the work invoiced for Phase II. Addressing whether the Phase II work was "make work" for CES, CES argues that Keith testified that, regardless of whether anyone at CES made such a statement to Eagle, he ignored the statement going forward and that it had no effect on Eagle's agreement and obligation to pay CES.

¶ 103 As to the Nature's Crossing property, we conclude that the trial court did not err in finding in CES's favor on this issue, i.e., that there was an oral contract for CES's work on this project. The evidence, consisting of Keith and Bunge's testimony, reasonably reflected that Eagle approved CES's proposal for Phase II work at Nature's Crossing. Bunge testified that Keith orally approved of CES's Phase II proposal by ordering work that was specified in the proposal; further, they had conversations as the work progressed, and Keith never complained that the work was not authorized. Bunge denied making any statements to Keith that he needed

additional work to keep his employees busy, explaining that his firm was busy with the Landmark project and "trying to figure out how to get that project done." His firm did not start laying off employees due to the mortgage crisis until late 2008 or early 2009. Keith testified that, on March 20, 2007, Eagle agreed to proceed with CES's proposal, and that its work commenced in April 2007. Keith further testified to invoices for which he approved of CES's work. As to the make-work allegations, Keith testified at his deposition that, in August 2007, CES emailed him to request additional work because the firm needed to keep its employees busy and asked to commence Phase II work. On re-cross-examination, Keith testified that, regardless of any August 2007 statement by CES, CES's alleged need to keep its employees busy had no bearing on Eagle's agreement with CES concerning Phase II work and Eagle's obligation to pay CES for that work.

¶ 104 Addressing the Landmark property in Rochelle, Young argues that the testimony reflected that Bunge was uncertain who owned the land on the date CES's proposal was submitted to Eagle for review. In this regard, CES contends that it only learned of the Youngs' ownership interest after it contracted with Eagle. After Eagle signed the agreement, all of CES's invoices were submitted to Eagle for review and comment and no invoices were sent to the Youngs because, according to Young, CES had no expectation that the Youngs were responsible for payment. CES responds that the evidence demonstrated that it had a signed contract (by Keith on March 15, 2007) with Eagle to provide survey and engineering work on the Landmark project and performed it without Eagle's or the Youngs' objection.

¶ 105 As to the Landmark project, we conclude that the trial court's finding in CES's favor was not against the manifest weight of the evidence. The evidence showed that there was a written agreement for CES's work on the project. Again, Keith testified that he approved CES's work

on that project, initialing CES's proposal (which also specified that a 5% late fee would be added to invoices paid after 30 days) on March 15, 2007, for engineering services on that project. Young's arguments on this issue primarily concern the agency claim, which we address below.

¶ 106 3. Existence of Agency Relationship Between the Youngs and Eagle

¶ 107 Turning to the key issue in this case, Young argues that the trial court's finding that there was an agency relationship between the Youngs and Eagle was against the manifest weight of the evidence. We disagree.

¶ 108 "An agent is one who undertakes to manage the affairs of another, on the authority and for the account of the latter, who is called the principal, and to render an account to the principal." *Eychaner v. Gross*, 202 Ill. 2d 228, 258 (2002). An agency relationship has two components: (1) the principal has the right to control the manner and method in which the agent performs work for him or her; and (2) the agent has the power to subject the principal to personal liability. *Knapp v. Hill*, 276 Ill. App. 3d 376, 380 (1995). To form an agency, the parties need not use the word "agent," nor characterize their relationship as principal-agent. *RTC v. Hardisty*, 269 Ill. App. 3d 613, 619 (1995). Their actions need only demonstrate a desire to create an agency relationship; for example, through a previous course of dealing that is sanctioned or ratified by the principal. *Id.* at 67. Again, "[d]eterminative of a principal-agent relationship is whether the principal has *the right* to control the actions of the agent, not whether the principal *actually exercises* that right." (Emphases in original.) *Eychaner*, 202 Ill. 2d at 268-69. Further, even where a principal is *unaware* of the execution of an agreement, the agent's knowledge of such is binding in the principal. See *Wanzer v. Smorgas-Brickan Developers, Inc.*, 130 Ill. App. 2d 378, 383-84 (1970) (rejecting argument that principal did not consent or knowingly permit work to be done).

¶ 109 Here, the trial court found that there was an agency relationship between the Youngs and Eagle, authorizing Eagle to prepare the subject properties for development and to return a "significant" profit to Young upon the sale of the land to Eagle. The court found that Dr. Young was not credible upon cross-examination and further found that (unlike his assertions at trial) he was aware of the work necessary for predevelopment of Phase I of Nature's Crossing and knew that the same work would be necessary for development of subsequent phases. Further, because Young did not object to predevelopment work, he established an agency relationship in that regard. The trial court also noted the evidence of Young's conversations with Ken and Milner that reflected his involvement in the predevelopment approval process.

¶ 110 On appeal, Young argues that CES introduced no evidence demonstrating the existence of an agency relationship between the Youngs and Eagle. He asserts that neither he nor Nadyne had a financial or other interest in Eagle's development activities (or the developments' success) and no ability to control Eagle's work. He points to Keith's testimony that the Youngs' only financial stake was the sums they were to receive when Eagle fulfilled its contractual obligations to purchase the Nature's Crossing and Landmark properties. Young also notes that Ken denied advising CES that the Youngs had a financial stake in the projects and that Bunge confirmed this when he testified that he understood that the Youngs' interest was limited to the profit to be derived from Eagle's purchase of the properties.

¶ 111 Addressing control, Young contends that he, Ken, and Keith disclaimed that Dr. Young possessed an ability to control Eagle's conduct. Keith testified, he notes, that the Youngs never specifically authorized Eagle to enter into any contracts on their behalf. Young also notes his testimony that there was nothing for him to direct because Eagle was not authorized to enter upon unpurchased property. In arguing that CES understood this to be the case, he points to

Wolf's testimony that she made a point of contacting Keith to verify that Eagle had secured Young's permission to enter onto the Phase II property to obtain soil borings. Young asserts that, if CES believed that Eagle was the Youngs' agent, there would have been no reason for Wolf to question Eagle's ability to unilaterally grant access to the Phase II property.

¶ 112 We conclude that the trial court did not err in finding that there was an agency relationship between the Youngs and Eagle. Young's testimony that he never authorized Eagle to enter into any agreements with respect to the subject properties and that he was unaware of any activities taking place on either property was contradicted by both his deposition testimony and testimony from other witnesses. The trial court assessed witness credibility, and we cannot quarrel with its resolution of the issue. *Chicago Investment Corp.*, 107 Ill. 2d at 124; *Martin*, 163 Ill. 2d at 47. The evidence reasonably reflected that the Youngs were aware of and authorized CES work on the subject properties. Young was impeached on cross-examination by his deposition testimony. At his deposition, he testified about his relationship with Eagle, stating that he was "[a]bsolutely" relying on Eagle to handle all aspects of the development and to handle whatever communications with third parties were necessary to make the developments come to fruition. He also testified there that, prior to the Youngs' trusts' purchase of the Nature's Crossing property, he did view drawings of the developments. At trial, Keith testified that Dr. Young received regular updates (*i.e.*, once or twice per month) on the status of the projects, and he described Dr. Young as a hands-on owner. Thus, the evidence showed that Young authorized Eagle to complete all necessary work at the developments and regularly consulted with it and CES (as evidenced by the testimony concerning the FedEx package) on such.

¶ 113 Specifically as to the package, the testimony concerning the request for the plans that were sent via FedEx to Young supported a finding that Young was aware of and authorized Eagle (and CES) to conduct predevelopment work to effectuate Eagle's eventual purchase of the properties for development. It also reflects that he had control over certain aspects of the projects. Although the plans sent to Young primarily concerned Phase I, the testimony from Wolf and Bunge reflected that they depicted the sewers going offsite through future phases. Thus, Young knew that CES would continue to work on the project. Further, Bunge testified that, Young's call to CES reflected that "he knew who we were, what we were doing, and he knew exactly what to ask for." We cannot find inherently incredible Grime's or Bunge's testimony concerning the FedEx package. Grimes testified that her message reflects that Dr. Young actually called CES to request certain documents. Bunge further explained that the package sent to Dr. Young included the overall plans for the Nature's Crossing development, including the sewer and water for Phases I through III. Bunge testified that the package was sent to Dr. Young on April 12, 2005, explaining that a document log that CES kept in the regular course of its business contains an April 12, 2005, entry listing the documents sent via FedEx to Young, along with Grimes' initials (reflecting that she is the employee who sent out the plans). Bunge believed that, based on his call to CES, Dr. Young knew that CES was performing work on Phase II of Nature's Crossing. He also noted that the contract between Dr. Young and Eagle had attached to it a drawing that contained CES's log and information.

¶ 114 Additional testimony supports the trial court's agency finding. Keith testified that he understood that Eagle could have certain studies performed on the Phase II property as needed. "I mean, there are certain things that we have to be able to do on property that [Dr. Young] was currently holding for us." (Keith also testified that the provision in Eagle's contracts with Young

requiring delivery of a survey at closing necessarily granted Eagle access to Young's property prior to closing to have the surveying work completed.) He testified that he kept Dr. Young apprised of issues on the properties and met with or spoke on the phone with Dr. Young and/or Milner about once or twice per month. "We had to [keep Young apprised of issue]. We needed easements[.]" Dr. Young also had discussions with Eagle about the farm tenant on Young's property and the impact an irrigation rig would have on his crops.

¶ 115 When considered in light of Young's deposition testimony that he was relying on Eagle to handle all aspects of the developments and to handle third-party relationships, the testimony reasonably and amply supported an inference that Young had the ability to control Eagle's activities. Bunge testified about work that occurred on the Phase II property while the parties were developing Phase I. He stated that the Phase II detention area was built while Phase I was being built. The Phase II property has a water main on it because, to be operational on the Phase I property, the water main had to be run through the Phase II section. Bunge believed that, on Phase II, he was contracting with Eagle as the Youngs' agent. He was aware that the Youngs were the landowners,[6] but inquired if CES needed Dr. Young's permission to access the Phase II property to prepare soil borings as "a service to Eagle" and due to an earlier issue in the project when a pickup truck CES had ordered damaged crops and Keith subsequently informed him that the landowner was upset about it. The soil boring work on Phase II involved on-site work by large equipment (*i.e.*, "a 10-ton rig"), and Bunge wanted to avoid surprise. He further testified that, after Bunge inquired if Eagle had to coordinate with the landowner, Keith responded that no

[6] An early Landmark document lists Eagle as the landowner. Bunge explained that it was prepared by a draftsperson or engineer and included all of the information about which that person was aware at that time. It was not a final document.

coordination was required and that, when ready, "we just need to let Norm know." We cannot conclude that the foregoing testimony was inherently unbelievable, and we further find that it supports an inference that Young could and did exercise ultimate control over Eagle's activities on his properties.

¶ 116 Similarly, Ken testified that he believed he had authority to proceed with engineering and other activities on the Nature's Crossing and Landmark properties because the projects would not have become viable unless the technical engineering phases were completed. "We have to get all that approved before we can do any of the actual land improvements." He did not believe he needed Dr. Young's consent to conduct survey or other engineering work because such work does not damage any crops.

¶ 117 Bunge testified that he believed the Youngs authorized CES to perform the Phase II work and authorized Eagle to be their agent. The contract between Eagle and the Youngs provided for Eagle to move forward with developing the project. He further stated that the Youngs had no reason to believe that CES would not be continuing to work on the project. Bunge also stated that he believed that Dr. Young was an experienced investor based on his involvement with multiple projects, including a Kmart plaza. "[A]ny developer with any experience would be aware of [*sic*] that those things [(*i.e.*, engineering, zoning, platting)] had to happen for a development to move forward."

¶ 118 Milner, the commercial real estate broker who introduced the Youngs to Eagle's development opportunities, described Dr. Young as an experienced real estate investor, though he clarified that he was essentially a land speculator, not a developer. It is true that Milner testified that: (1) Young did not approve any work that CES performed at the Landmark development and had no interest in partnering with Eagle on its projects; and (2) Young did not

want to be a party to any development costs because he wanted to limit his potential liability. However, critically, Milner also explained that Dr. Young understood that, for Eagle to purchase a property, preliminary/soft development (including CES's work) would have to have been performed on the property. CES's work was preparatory for the subsequent development of Phases II and III of Nature's Crossing.

¶ 119 Based on the foregoing, the trial court's finding that there was an agency relationship between the Youngs and the Eagle entities was not against the manifest weight of the evidence.

¶ 120 4. Whether Nadyne Contracted with CES or Knowingly Permitted Its Work

¶ 121 Next, Young argues that CES presented no evidence that Nadyne possessed knowledge of what transpired at Nature's Crossing (or any of the properties), nor that she knowingly permitted work to be performed at the property. We reject this claim. The case upon which Young relies, *Fettes, Love & Sieben, Inc. v. Simon*, 46 Ill. App. 2d 232, 233-34 (1964), to argue that there is no presumption that one spouse has authority to act for the second spouse, explicitly states that its facts do not involve a situation, such as that with the Youngs, of joint ownership and distinguishes cases with those facts. *Id.* at 234 (citing cases and noting that, in the case before it, the property was solely owned by the wife). Indeed, where property is jointly owned, a contractor may acquire a mechanics lien for work performed under a contract with one spouse, and the non-contracting spouse is presumed to have consented to the contract when he or she fails to protest and accepts the benefits. See *Bingaman v. Dahm*, 307 Ill. App. 432, 437 (1940) (liens upheld the where couple were joint owners and work was open and visible and the husband had knowledge of the plaintiffs' labor). Here, again, both Youngs owned the Nature's Crossing property, Dr. Young was aware of activities on the property and authorized Eagle to

effectuate predevelopment there, and no evidence reflected that Nadyne protested any work CES performed.

¶ 122 5. Whether the Youngs Knowingly Authorized CES's Work

¶ 123 Young argues next that the trial court erred in finding that the Youngs knowingly authorized CES's work. He contends that the bulk of the knowledge CES seeks to impute relates to work performed on land that Eagle had already purchased from the Youngs or services rendered prior to the date the Youngs acquired title to the Nature's Crossing property.

¶ 124 Initially, we note again that, under the Act, anyone whom a landowner has authorized (*i.e.*, an agent) *or* knowingly permitted to contract to improve the land may have a lien attach to the land. 770 ILCS 60/1(a) (West 2012). Because we have already concluded that the trial court's agency finding was not erroneous, we need not address its additional finding that the Youngs knowingly authorized CES's work. However, because the issue is easily resolved and, again, because the trial court made this additional finding, we choose to address it.

¶ 125 The words "knowingly permit" mean being aware of and consenting to the improvements (see *M. Ecker & Co. v. LaSalle National Bank*, 268 Ill. App. 3d 874, 881 (1994)), or failing to protest and accepting the benefits (see *Fettes*, 46 Ill. App. 2d at 236). Cases have found that owners knowingly permitted work, for example, where they lived close to the subject property (*Young v. Bergner*, 243 Ill. App. 473, 476 (1927) (joint owners lived within 200 yards of worksite)), or where the owner's son managed the premises (was "general agent") and knew improvements were being contracted for (*Mutual Construction Co. v. Baker*, 237 Ill. App. 596, 603 (1925)).

¶ 126 Here, the trial court found that Young was aware of and did not object to CES's work (*i.e.*, to make improvements necessary for the projects' development). It noted that it would be

"naïve" to determine that Dr. Young expected the projects to become development-ready and to be taken down in phases by Eagle without completion of pre-development work. As further evidence that Dr. Young was aware of CES's involvement, the court pointed to Young's request for copies of CES's documents and other witness testimony.

¶ 127 Young argues that the evidence failed to show that the Youngs were advised of the work CES performed and failed to object to it. Young complains that the testimony concerning the phone message slip and FedEx mailing was insufficient to show that Young was aware of CES's Phase II work at Nature's Crossing. Further, even if he made the request at that time, Young contends that this evidence does not impute knowledge two years later to the Phase II and Landmark projects. We disagree. As noted above in our agency discussion, the testimony reasonably reflected that Dr. Young regularly met or discussed with Eagle the status of the Nature's Crossing and Landmark projects. Also, he was aware of the developments concerning the SSA designation. The testimony concerning CES's mailing of the FedEx package, which contained the plat for the sewer lines primarily at Phase I of Nature's Crossing, but which also reflected improvements at subsequent phases of the development, was also not inherently unbelievable. Other than a dirt pile that caused some crop damage, the Youngs never complained of any pre-development work being conducted on the subject properties.

¶ 128 Young next complains that the trial court's findings that there was both an agency relationship and that the Youngs' knowingly permitted CES's work without objection are "internally in conflict." He points to the trial court's ruling on the Young's indemnification claim, where it entered judgment in the Youngs' favor and against Eagle. He also notes that an agent becomes liable only if it has entered into a contract not authorized by its principal. Young contends that this result is possible only if the Youngs did not authorize Eagle to contract on

their behalf. We find that this claim is forfeited or otherwise fails because the Youngs (and Eagle) entered a stipulation at trial that, if judgment was entered in CES's favor and against the Youngs, a judgment of indemnification (pursuant to count III of the Youngs' complaint) would be entered in the Youngs' favor and against Eagle. The Youngs cannot now complain of something that they acquiesced to, indeed urged, in the trial court. See *Redlin v. Village of Hanover Park*, 278 Ill. App. 3d 183, 192 (1996) ("party cannot stipulate to the introduction of evidence and then complain on appeal its introduction was error"); see also *Sbarboro v. Vollala*, 392 Ill. App. 3d 1040, 1052 (2009) (party forfeits right to complain of an error, where to do so is inconsistent with the position taken by the party in an earlier court proceeding; a party cannot complain of error which he or she induced the court to make or to which the party consented) The trial court did not make any findings concerning indemnification; rather, it entered the stipulation Young requested. Young cannot now raise a substantive challenge to it.

¶ 129 6. Whether CES Performed Lienable Work

¶ 130 Next, Young argues that the trial court erred in finding that CES's services are lienable under the Act. We disagree.

¶ 131 Again, section 1(a) of the Act provides that any person who contracts with a landowner, "or with one whom the owner has authorized or knowingly permitted to contract, to improve the lot or tract of land or for the purpose of improving the tract of land, *** is *** a contractor and has a lien upon the whole of such lot or tract of land." 770 ILCS 60/1(a) (West 2012). The term "improve" means, in relevant part, to "perform any services or incur any expense as an architect, structural engineer, professional engineer, land surveyor or property manager in, for or on a lot or tract of land" 770 ILCS 60/1(b) (West 2012). However, a person seeking to assert a lien need not be one of the specified professionals; "[a]ny person who does improvement work on the land

under a contract with the owner can assert a mechanic's lien." *Midwest Environmental Consulting & Remediation Services, Inc. v. Peoples Bank of Bloomington*, 251 Ill. App. 3d 256, 260 (1993). "The proper focus in determining the validity of a mechanic's lien is whether the work actually enhanced the value of the land" or benefitted the landowner. *Mostardi-Platt Associates, Inc. v. Czerniejewski*, 399 Ill. App. 3d 1205, 1211 (2010) (contractor who conducted feasibility study for company holding option to purchase land from landowner did not provide services that increased value of land or benefited landowners; services rendered were not for purpose of improving the land, but for determining whether option holder should exercise its option to purchase land). Indeed, the Act's purpose is "to require a person with an interest in real property to pay for improvements or benefits which have been induced or encouraged by his or her own conduct." *Leveyfilm, Inc. v. Cosmopolitan Bank & Trust*, 274 Ill. App. 3d 348, 352 (1995). "Illinois courts have held that services that merely maintain rather than improve property are nonlienable activities." *Inter-Rail Systems, Inc. v. Ravi Corp.*, 387 Ill. App. 3d 510, 517-19 (2008) (upholding summary judgment for the defendants and holding that the removal and disposition of hazardous waste, without testimony that such work improved the property, did not improve property and, thus, was not lienable).

¶ 132 Further, "where a lump sum contract includes both lienable and nonlienable work, and such items cannot be separated, the entire lien must fail." *Cleveland Wrecking Co. v. Central National Bank*, 216 Ill. App. 3d 279, 287 (1991); see *Inter-Rail Systems*, 387 Ill. App. 3d at 519 (where the plaintiff did not file an amended complaint in the trial court when given the opportunity to do so apportioning lienable and nonlienable work, it forfeited on appeal the claim that its work could be apportioned); see also *Midwest Environmental Consulting & Remediation Services*, 251 Ill. App. 3d at 262 (forfeiture aside, disposal of contaminated soil is integral part

of, and not separable from, removal of it; it is part of overall plan to improve land and is lienable).

¶ 133 Here, Young argues that CES's work was merely preparatory to the later development of the land and, thus, should not give rise to a lien. He contends that CES's work was limited to generic references to research and meetings and partial plans that were not approved for either project. Young also asserts that CES's services were for the sole benefit of Eagle, the contract purchaser, and did not benefit the land or the Youngs; thus, no lien arose. Young also notes that the properties today continue to appear as unimproved farmland, just as they did before the Youngs acquired title. He also points to Milner's testimony that the Nature's Crossing property has no present value because it is subject to the SSA. Also, in light of the "collapse" of the residential housing market and Eagle's inability to sell even half of the Phase I lots, it is apparent, Young contends, that CES's engineering work conferred no recognizable present benefit necessary to support the liens. Finally, Young argues that CES did not apportion the lienable from non-lienable work it performed. He argues that CES's invoices contained charges for items such as driving time, "looking up surrounding land owner," and going over with "Pete companies interested in topsoil."

¶ 134 The trial court found that CES's predevelopment work (*i.e.*, engineering and surveyor's services) created substantial value to the land (noting that the Young's realized a $5,000-per-acre profit on Phase I) and reduced the Youngs' risk.

¶ 135 We conclude that the trial court did not err in finding that CES's work was lienable work, *i.e.*, it improved the land. Young continues to own the Nature's Crossing non-Phase I and Landmark properties, which are maintained as farmland. CES never submitted final plats (for permit) to either municipality for either the Phase II or Landmark projects, but it is undisputed

that the firm prepared preliminary or final unsubmitted plans and that a sanitary main was completed on Phase II. Ken and Milner provided the key testimony on this issue. Ken testified that CES's engineering work improved the value of the Nature's Crossing and Landmark developments. He testified that preliminary plan approval adds value to a property because the municipality has approved the project subject to final engineering. Further, the use of the property changes from agricultural to residential use, and residential lots are worth more on a per-acre basis than agricultural land. Although he agreed that Young had no financial stake in the success of Eagle's developments, proceeding with the engineering and other improvements CES executed was in both Eagle's and the Youngs' best interests. Ken further testified that the sanitary, water main, and pond increased the value of both the Phase I and Phase II parcels.

¶ 136 Milner testified that proceeding with preliminary improvements at the subject properties was in both Eagle's and the Youngs' best financial interests because it increased the value of the properties. Such preliminary development (including CES's work) would have to have been performed in order for Eagle to purchase the properties, and Dr. Young understood this. It was valuable, according to Milner, to Dr. Young, even if a final plat was not recorded. He also stated that, assuming no sunset period has expired on the plats, the preliminary engineering work would not have to be redone. Milner agreed with Ken that Young's sole financial stake in the properties was to sell them to Eagle.

¶ 137 Milner further testified that, when Nature's Crossing became part of the SSA in Cortland, the designation "destroyed 100 percent of the equity in the property." He explained that "[n]either that property[,] nor any other that's in the SSA that was not developed[,] currently has any net worth of value." However, he also testified that, but for the SSA (with which CES was

not involved), CES's work would have increased the value of the property and it would have been in Eagle's and the Youngs' best interests to have that work done.

¶ 138 The foregoing reasonably reflects that CES's work constituted improvements to the subject properties, even though CES's work was preliminary development work and even though the real estate market crisis ultimately contributed to the developments' (and Eagle's) failure. The survey and engineering work altered the subject properties such that the work caused them to be developable. Young and Milner testified that Dr. Young was a land speculator, not a developer. To realize a profit on his investments, Young relied on Eagle (or, now, on any interested developer) to purchase the properties. However, as Milner testified, the properties would have to be developable for Eagle to purchase them from Dr. Young and, we add, for any current developer, and Dr. Young understood this. Thus, the fact that the land remains undeveloped does not warrant a different conclusion. It remains that CES's work moved the projects in the direction of becoming, to use Milner's term, developable, which constitutes a benefit to Young, the landowner. Young's investment goal, as Milner explained, was to realize a 10% return (compounded annually) and the (elevated) price he paid for the properties was in contemplation of their development, not for continued use as farmland.

¶ 139 As to Young's argument that CES failed to apportion is lienable and nonlienable work, we find this claim forfeited. In his reply brief, Young does not refute CES's claim that Young failed to raise this issue at trial. *Rodriguez v. Frankie's Beef/Pasta & Catering*, 2012 IL App (1st) 113155, ¶ 23 (particular issues not brought before the circuit court are forfeited upon review).

¶ 140 B. CES's Cross-Appeal and Motion Taken with the Case

¶ 141 In its cross-appeal, CES argues that, after finding an agency relationship between the Youngs and Eagle, the trial court erred in denying prejudgment interest on CES's written contract for survey and engineering services on the Landmark project. We agree.

¶ 142 In denying CES's request for prejudgment interest, the trial court stated that, although it found that there was an agency relationship in this case, "it's a stretch to extend that agency relationship to imply [Young] had knowledge of the contents of the contract between Eagle Homes and CES." The decision whether to award prejudgment interest is within the trial court's discretion. *Santa's Best Craft, L.L.C. v. Zurich American Insurance Co.*, 408 Ill. App. 3d 173, 191 (2010). A trial court abuses its discretion where no reasonable person would adopt the court's view. *TruServ Corp. v. Ernst & Young LLP*, 376 Ill. App. 3d 218, 227 (2007).

¶ 143 An award of prejudgment interest is appropriate where it is "authorized by statute, agreement of the parties[,] or when warranted by equitable considerations." *Tully v. McLean*, 409 Ill. App. 3d 659, 684-85 (2011). Section 2 of the Interest Act provides that, "Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing[.]" 815 ILCS 205/2 (West 2012). Prejudgment interest may also be recovered for causes of action sounding in equity when warranted by equitable considerations. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 257 (2006); *In re Estate of Wernick*, 127 Ill. 2d 61, 87 (1989).

¶ 144 CES argues that the trial court erred as a matter of law in denying prejudgment interest pursuant to the Interest Act. It notes that the written Landmark agreement between CES and Eagle (as the Youngs' agent), which Keith approved, explicitly provides that 5% is added to an invoice that is unpaid for 30 days. CES calculates interest from January 12, 2008, the date of the last invoice, to October 1, 2013, the date of the trial court's amended order, as $25,826.21.

¶ 145 In its counterclaim, CES requested the balance due on the Landmark project, along with interest and attorney fees pursuant to the Act. It did not explicitly request *statutory* prejudgment interest pursuant to the Interest Act until it filed its posttrial motion. However, this is not problematic. See *Prignano v. Prignano*, 405 Ill. App. 3d 801, 821-22 (2010) ("Prejudgment interest need not be requested in the complaint in order to be recoverable under the Interest Act; when the evidence at trial establishes that a party is entitled to prejudgment interest under the Interest Act, a request for such interest will be read into the complaint.").

¶ 146 In ruling on CES's motion, the trial court acknowledged that the Interest Act requires a contract, but denied CES's request for prejudgment interest because it could not find that Dr. Young was aware of the contract's specific provisions (even though it re-iterated its finding after trial that the evidence showed an agency relationship between the Youngs and Eagle). Thus, it appears that, although the trial court acknowledged that CES sought statutory interest, it denied CES's request based on equitable considerations, which apparently outweighed its finding following trial that there was an agency relationship. See generally *Wanzer v. Smorgas-Brickan Developers, Inc.*, 130 Ill. App. 2d 378, 384 (1970) (landowner's lack of actual knowledge of an agreement did not defeat mechanics lien claim because agent's knowledge "is binding on the owners"); see also *McRaith v. BDO Seidman, LLP*, 391 Ill. App. 3d 565, 584 (2009) (generally, an agent's knowledge and conduct is imputed to its principal).

¶ 147 We conclude that the trial court abused its discretion in denying CES's request for prejudgment interest. The Landmark contract, signed by Keith on March 15, 2007, satisfies the Interest Act's requirement for a written instrument and explicitly provides for 5% interest for late payments. In light of the fact that the statutory prerequisites were satisfied, it was unreasonable

for the trial court to deny CES's request. Accordingly, we reverse this aspect of the court's ruling and remand for assessment of prejudgment interest.

¶ 148 Finally, we address a motion taken with this case. Dr. Young moves to strike, in whole or in part, CES's reply brief in its cross-appeal as violative of Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) (points not argued are forfeited and shall not be raised in the reply brief). He argues that CES raised for the first time therein: (1) the doctrine of apparent agency; and (2) arguments relating to the existence of an agency relationship. He contends that CES's claims are in the nature of an impermissible sur-reply. We deny Young's motion. CES *did* address the agency issue in its initial cross-appeal brief (and in the motion from which it cross-appeals). Indeed, the trial court, in ruling on CES's posttrial motion, specifically reiterated its findings that an agency relationship existed in this case. Thus, we agree with CES that the issue of agency as a basis for awarding prejudgment interest was presented to the trial court and, again, that CES raised it in its initial cross-appeal (*i.e.*, appellant's) brief. We also agree with CES that it did not raise the issue of apparent agency for the first time in its cross-appeal appellant's brief. Although it cited a case that involved that concept, we read it for its recitation of a rule concerning contract damages and, indeed, CES quoted such statement. See *Wabash Independent Oil Co. v. King & Wills Insurance Agency*, 248 Ill. App. 3d 719, 727 (1993) ("Basic contract law provides that the measure of damages for the breach of a contract is the amount necessary to compensate the injured person for the loss which a fulfillment of the contract would have prevented.")

¶ 149 III. CONCLUSION

¶ 150 For the reasons stated, the judgment of the circuit court of De Kalb County is affirmed in part, reversed in part, and remanded for further proceedings.

¶ 151 Affirmed in part and reversed in part; cause remanded.