

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2016 IL App (3d) 150187-U

Order filed March 24, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

CELTIC FUNDING, LLC, as successor in interest to FIRST MIDWEST BANK, as successor in interest to PALOS BANK AND TRUST COMPANY,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
)	
Plaintiff-Counter-Defendant and Appellee,)	
)	
v.)	
)	
HENSLEY CONSTRUCTION, LLC,)	
)	
Defendant-Counter-Plaintiff and Appellant,)	
)	
and)	
)	
ENERGY SMART HOME BUILDERS, LLC; NEW LENOX DEVELOPMENT, LLC,)	Appeal No. 3-15-0187
)	Circuit Nos. 11-CH-5379 and
)	11-CH-5382
Defendants-Counter-Defendants and Appellees,)	
)	
and)	
)	
WALLY'S PAVING, INC.; VYTAS BALCIUNAS; JOHN P. STANTON, JR.; SCOTT B. RYAN; BOARD OF MANAGERS OF THE PRAIRIE RIDGE ESTATES HOMEOWNERS ASSOCIATION;)	
)	

UNKNOWN OWNERS and NON-RECORD)	
CLAIMANTS,)	The Honorable
)	Joseph Polito and Daniel Rippy,
Defendants-Counter-Defendants.)	Judges, presiding.

JUSTICE McDADE delivered the judgment of the court.
 Presiding Justice O'Brien and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* In a mortgage foreclosure action case, a contractor sought priority position for its mechanic's lien over a mortgage. The circuit court ruled that the mechanic's lien was invalid and dismissed the contractor's counterclaims. On appeal, the appellate court held that the mechanic's lien was not invalid, as it could potentially be enforced against the owner of the property, but not against any third parties. The appellate court reversed and remanded the case for further proceedings.

¶ 2 The plaintiff, First Midwest Bank filed mortgage foreclosure actions with regard to two parcels of land in New Lenox. One of the defendants, Hensley Construction, LLC, filed counterclaims for foreclosure of a mechanic's lien and breach of contract. The circuit court dismissed the counterclaims, finding that the mechanic's lien was invalid because it had not been filed within four months of the completion of the work. The court also granted a motion to dismiss the counterclaims on *res judicata* grounds, which stemmed from a ruling in a related but separate circuit court case. On appeal, Hensley Construction argues that the circuit court erred when it: (1) ruled that Hensley Construction's mechanic's lien was invalid; and (2) ruled that *res judicata* operated to bar Hensley Construction's counterclaims. We reverse and remand.

¶ 3 **FACTS**

¶ 4 On June 25, 2010, Energy Smart Home Builders, LLC, gave construction mortgages to Palos Bank and Trust Company as security for loans of \$380,000 and \$382,000, to purchase Lots

51 and 52 of the Prairie Ridge Estates Subdivision.¹ The mortgages were recorded on August 18, 2010.

¶ 5 On November 14, 2011, First Midwest Bank, as successor to Palos Bank and Trust, filed two separate foreclosure actions related to the aforementioned mortgages. First Midwest Bank named the following parties as defendants: (1) Energy Smart Home Builders; (2) Hensley Construction; (3) Wally's Paving, Inc.; (4) Vytas Balciunas; (5) John P. Stanton, Jr.; (6) Scott B. Ryan; (7) Board of Managers of the Prairie Ridge Estates Homeowners Association; and (8) unknown owners and non-record claimants. Count I of the complaints sought foreclosure of the mortgages; count II sought recovery on the promissory note executed by Energy Smart Home Builders; and counts III-V sought recovery on the promissory note from guarantors Balciunas, Stanton, and Ryan. These two cases were assigned circuit court case numbers 11-CH-5379 (involving Lot 52) and 11-CH-5382 (involving Lot 51).

¶ 6 On January 25, 2012, Hensley Construction filed answers and counterclaims in both cases. With regard to the mortgage foreclosure cases, Hensley Construction alleged that it had filed a mechanic's lien prior to the recording of the aforementioned mortgages. Hensley also stated that its lien was the subject of another case pending before the circuit court, which had been assigned case number 10-CH-4271.

¶ 7 With regard to its counterclaims, Hensley Construction alleged that Palos Bank and Trust was the original record title holder of the property that included Lots 51 and 52, and that it was succeeded as trustee by First Midwest Bank. Hensley Construction also alleged that New Lenox Development, LLC, was the beneficial owner of the property that included Lots 51 and 52. Further, Hensley Construction alleged that both First Midwest Bank, as successor to Palos Bank

¹ The Prairie Ridge Estates Subdivision was an approximately 79-acre parcel of land in New Lenox.

and Trust as the trustee of the property, and New Lenox Development hired Hensley on May 15, 2007, to perform utility work on the property. The contract was for \$2,950,000, and a copy of the proposal, which included signatures of acceptance by New Lenox Development, was appended to the counterclaim. Hensley Construction stated that it completed the project on July 31, 2008, and alleged that the amount still owed for the work was \$339,641.69. Hensley Construction recorded a mechanic's lien on June 4, 2010, which was recorded against the entire 79-acre parcel of land, and subsequent to that date, Lots 51 and 52 were sold and deeded to Energy Smart Home Builders. Based on these allegations, Hensley Construction's counterclaim consisted of two counts. The first count was for the foreclosure of the mechanic's lien against New Lenox Development; First Midwest Bank; Wally's Paving; Energy Smart Home Builders; Balciunas; Stanton; and Ryan. The second count was for breach of contract against both First Midwest Bank, as successor to Palos Bank and Trust as the trustee of the property, and New Lenox Development.

¶ 8 On April 12, 2013, First Midwest Bank filed motions to dismiss Hensley Construction's foreclosure counterclaims, alleging that Hensley Construction's mechanic's lien was invalid because it was not filed within four months of the completion of the work. First Midwest Bank also filed a motion to consolidate all three cases (10-CH-4271, 11-CH-5379, and 11-CH-5382). However, at the hearing on the motion, counsel for First Midwest Bank told the court that the parties were in agreement that only cases 11-CH-5379 and 11-CH-5382 would be consolidated. The court entered an agreed order accordingly.

¶ 9 On May 24, 2013, Hensley Construction filed a motion to consolidate five cases—the three aforementioned cases and two cases related to another business's attempt to foreclose on a mechanic's lien. At the hearing on the motion, the court denied the motion, stating that there

were three different judges on three different calls involved, and the court did not want to disturb the dockets of the other judges by consolidating the cases.

¶ 10 On August 6, 2013, the circuit court held a hearing on First Midwest Bank's motion to dismiss Hensley Construction's foreclosure counterclaims. The court took the matter under advisement and issued its decision in court on August 21, 2013. The court ruled that Hensley Construction's mechanic's lien was invalid because it had not been filed within four months of the completion of the work. Accordingly, the court granted First Midwest Bank's motion to dismiss Hensley Construction's foreclosure counterclaims.² Hensley Construction subsequently sought and was denied a ruling pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that it could appeal from the court's ruling.

¶ 11 On October 30, 2013, Celtic Funding, LLC, filed a motion to substitute as plaintiff. The motion alleged that First Midwest Bank had sold the note to Energy Smart Note Acquisition, who then sold the note to Celtic Funding. That motion was granted, and Celtic Funding subsequently filed a motion for consent judgment and voluntary dismissal. An agreed order was

² First Midwest Bank subsequently filed a motion to dismiss Hensley Construction's complaint in case number 10-CH-4271. The motion was brought pursuant to section 2-619(a)(4) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(4) (West 2012) (stating that involuntary dismissal can be granted if "the cause of action is barred by a prior judgment")). On September 19, 2013, the circuit court granted that motion on *res judicata* grounds due to the ruling in the consolidated cases that Hensley Construction's mechanic's lien was invalid. Subsequently, on October 1, 2014, an agreed order was entered in case number 10-CH-4271 in which Hensley Construction voluntarily dismissed, with prejudice, its claim for foreclosure of the mechanic's lien against all parties, except for the claims with regard to Lots 51 and 52, which were voluntarily dismissed without prejudice. Hensley Construction also voluntarily dismissed, without prejudice, its breach of contract claim against New Lenox Development, who also voluntarily dismissed, without prejudice, its counterclaims against Hensley Construction for breach of contract and fraud.

entered as a result; Energy Smart Home Builders and New Lenox Development consented to a judgment against them on the mortgage foreclosure count of the mortgage foreclosure complaint, and Energy Smart Home Builders consented to a judgment against it on the count seeking recovery on the note. Additionally, the counts against Balciunas, Stanton, and Ryan were voluntarily dismissed with prejudice.

¶ 12 On November 19, 2014, Energy Smart Home Builders and New Lenox Development filed a motion to dismiss Hensley Construction’s countercomplaint with prejudice on *res judicata* grounds, citing the disposition in case number 10-CH-4271 that some of Hensley Construction’s claims were voluntarily dismissed with prejudice and others were voluntarily dismissed without prejudice. After a hearing on the motion, the circuit court agreed and granted the motion to dismiss. Hensley Construction appealed.

¶ 13 ANALYSIS³

¶ 14 Hensley Construction’s first argument on appeal is that the circuit court erred when it ruled that its mechanic’s lien was invalid. In essence, Hensley Construction claims that it timely filed its lien such that it had priority over the mortgage.

¶ 15 The circuit court granted First Midwest Bank’s section 2-619 motion to dismiss Hensley Construction’s counterclaims because it ruled that the mechanic’s lien was invalid. We review a circuit court’s ruling on a section 2-619 motion to dismiss *de novo*. *DeSmet ex rel. Estate of Hays v. County of Rock Island*, 219 Ill. 2d 497, 504 (2006).

³ Initially, we note that during the pendency of this appeal, Celtic Funding filed two motions seeking the dismissal of this appeal as moot. We denied the first motion on procedural grounds. Celtic Funding then renewed the motion and included documents intended to address the substantive-evidence deficiency of the first motion. We denied the second motion. Now, on appeal, Celtic Funding raises its dismissal-as-moot argument for a third time. For a third time, we deny that argument.

¶ 16 The purpose of the Mechanics Lien Act (the Act) “is to protect those who in good faith furnish labor or materials for construction of buildings or public improvements.” *Premier Electrical Construction Co. v. American National Bank of Chicago*, 276 Ill. App. 3d 816, 821 (1995); see also *Leveyfilm, Inc. v. Cosmopolitan Bank & Trust*, 274 Ill. App. 3d 348, 352 (1995) (stating that the purpose of the Act 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”). The provisions of the Act are in derogation of the common law and must be strictly construed. *D.D. Kennedy, Inc. v. Lake Petersburg Ass’n*, 54 Ill. App. 2d 85, 102 (1964). To be valid, the mechanic’s lien must strictly meet every statutory requirement. *Stafford-Smith, Inc. v. Intercontinental River East, LLC*, 378 Ill. App. 3d 236, 240 (2007).

¶ 17 One of the statutory requirements of a valid mechanic’s lien is the recording requirement. Section 7(a) of the Act provides:

“No contractor shall be allowed to enforce such lien against or to the prejudice of any other creditor or incumbrancer or purchaser, unless within 4 months after completion, or if extra or additional work is done or labor, services, material, fixtures, apparatus or machinery, forms or form work is delivered therefor within 4 months after the completion of such extra or additional work or the final delivery of such extra or additional labor, services, material, fixtures, apparatus or machinery, forms or form work, he or she shall either bring an action to enforce his or her lien therefor or shall file in the office of the recorder of the county in which the building, erection or other improvement to be charged

with the lien is situated, a claim for lien, verified by the affidavit of himself or herself, or his or her agent or employee, which shall consist of a brief statement of the claimant's contract, the balance due after allowing all credits, and a sufficiently correct description of the lot, lots or tracts of land to identify the same. *Such claim for lien may be filed at any time after the claimant's contract is made, and as to the owner may be filed at any time after the contract is made and within 2 years after the completion of the contract, or the completion of any extra work or the furnishing of any extra labor, services, material, fixtures, apparatus or machinery, forms or form work thereunder, and as to such owner may be amended at any time before the final judgment.* No such lien shall be defeated to the proper amount thereof because of an error or overcharging on the part of any person claiming a lien therefor under this Act, unless it shall be shown that such error or overcharge is made with intent to defraud; nor shall any such lien for material be defeated because of lack of proof that the material after the delivery thereof, actually entered into the construction of such building or improvement, although it be shown that such material was not actually used in the construction of such building or improvement; provided, that it is shown that such material was delivered either to the owner or his or her agent for that building or improvement, to be used in that building or improvement, or at the place where said

building or improvement was being constructed, for the purpose of being used in construction or for the purpose of being employed in the process of construction as a means for assisting in the erection of the building or improvement in what is commonly termed forms or form work where concrete, cement or like material is used, in whole or in part.” (Emphases added.) 770 ILCS 60/7(a) (West 2012).

¶ 18 Section 7(a) contains two limitations periods—one of four months and one of two years. With regard to the four-month period, the contractor has four months from the completion of its work (or any additional work) either to record the lien or to file an action to enforce the lien. 770 ILCS 60/7(a) (West 2012). If the contractor so acts, then the mechanic’s lien can be enforced against the owner of the property as well as other creditors, incumbrancers, and purchasers. 770 ILCS 60/7(a) (West 2012); see also *In re Saberman*, 3 B.R. 316, 318 (Bankr. N.D. Ill. 1980). If the contractor fails to act within that four-month period, the contractor can still enforce a mechanic’s lien against the owner of the property—and only against the owner—if the contractor files its claim for a lien within two years of the completion of the work (or any additional work). 770 ILCS 60/7(a) (West 2012); *Apollo Heating and Air Conditioning Corp. v. American National Bank and Trust Co.*, 135 Ill. App. 3d 976, 980 (1985) (holding that the “[f]ailure of the contractor to act within four months will preclude the contractor from enforcing his lien against, or to the prejudice, of any other creditor, encumbrancer or purchaser”).

¶ 19 Our review of the record in this case reveals that the circuit court erred when it found Hensley Construction’s mechanic’s lien was invalid. Hensley Construction completed its work on July 31, 2008, and recorded its claim for a lien on June 4, 2010. Pursuant to section 7(a),

Hensley Construction could not enforce its lien against any third party, but because the claim for a lien was filed within two years, Hensley Construction could potentially enforce its lien against the owner.⁴ 770 ILCS 60/7(a) (West 2012). We must emphasize, however, that our ruling is not to be construed as a holding that the counterclaims are unassailable or are meritorious. All we are holding is that it was error for the circuit court to dismiss Hensley Construction's counterclaims on the basis that the lien was invalid in that it was not filed within four months of the completion of the work.

¶ 20 Hensley Construction's second argument on appeal is that the circuit court erred when it ruled that *res judicata* operated to bar Hensley Construction's counterclaims. However, our ruling on the first issue on appeal obviates the need to address at length the merits of Hensley Construction's second argument. The court's *res judicata* ruling ultimately resulted from the earlier ruling of August 21, 2013, in which the court found that the lien was invalid. We have held that ruling to be erroneous, and this case must be remanded for further proceedings consistent with this order.

¶ 21 Lastly, we note that Hensley Construction also claims that the questions presented for review include that the circuit court erred when it denied Hensley Construction's motion for summary judgment. However, Hensley Construction does not develop this argument at all in its brief. Pursuant to Supreme Court Rule 341(h)(7) (eff. July 1, 2008) (stating that "[p]oints not argued are waived ****"), Hensley Construction has waived this argument.

¶ 22 **CONCLUSION**

⁴ Again, Hensley alleged in its counterclaim that the owners were: (1) First Midwest Bank, as successor in interest to Palos Bank and Trust as trustee; and (2) New Lenox Development, in that the former was the "record title holder" and the latter was the "beneficial owner."

¶ 23 The judgment of the circuit court of Will County is reversed and the cause is remanded for further proceedings.

¶ 24 Reversed and remanded.