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SECOND DIVISION  
MAY 17, 2011

1-10-2580

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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CAPITALSOURCE FINANCE, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff and Counterdefendant-	)	Cook County
Appellee,	)	
	)	
v.	)	No. 08 CH 37270
	)	
CMC ORGANIZATION, LLC,	)	Honorable
	)	Thomas Mulroy
Defendant and Counterplaintiff-	)	Judge Presiding.
Appellant	)	
	)	
(Dellisart-Chicago B, LLC et al.,	)	
	)	
Defendants.)	)	

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JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

**ORDER**

*Held* : Where issue of material fact existed regarding whether recorded releases for mechanics liens were procured by fraudulent inducement, dismissal under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2008)) of counterclaim to enforce mechanics liens was not appropriate.

Defendant CMC Organization, LLC (CMC) appeals from the dismissal of four counts of its counterclaim against plaintiff CapitalSource Finance, LLC (CapitalSource), in which defendant sought to enforce several mechanic's liens. The circuit court dismissed the counts on

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the ground that the liens had been satisfied and released of record pursuant to section 35 of the Mechanic's Lien Act (770 ILCS 60/35 (West 2008)). For the reasons that follow, we reverse and remand.

### BACKGROUND

This appeal arises out of a failed construction project. Because this case comes to us after dismissal under section 2-619 of the Code of Civil Procedure, our recitation of the following alleged facts is based on the allegations in CMC's verified counterclaim and on affidavits found in the record. See *Doe v. Diocese of Dallas*, 234 Ill. 2d 393, 396 (2009).

In 2006, Dellisart-Chicago B, LLC (Dellisart), a property developer, entered into a loan agreement with CapitalSource in order to finance the construction of a hotel on property owned by Dellisart. The loan was secured by a mortgage on the property. Through a series of three direct contracts with Dellisart and one subcontract with Walsh Construction Company, which was another general contractor and also acted as Dellisart's agent, Dellisart engaged the services of CMC to perform various construction projects on the property.

For reasons not relevant to this appeal, Dellisart and CapitalSource ran into difficulties financing the project, which in turn led to Dellisart failing to make timely payments to CMC for work performed. The financial situation became so bad that Walsh ceased work on the project in June 2008, bringing the entire project to a halt. In order to protect its own financial interests, CMC recorded four mechanics liens against the property, each representing one of the contracts.

After the liens were recorded, Dellisart informed CMC that CapitalSource wanted CMC to release its liens on the property immediately. According to affidavits in the record, CapitalSource had approached a third party about additional financing, but these outside

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investors were unwilling to invest in the project because of the cloud on the property's title created by CMC's liens. CMC was reluctant to release the liens because the liens ensured that CMC's right to receive payment had priority over other creditors in the event that the project failed and investors foreclosed on the property. However, after some discussions and negotiations among the various parties and a promise of payment from Dellisart when the new financing came through, CMC agreed to release the liens. CMC recorded releases of the four liens in July 2008, and in exchange for recording the releases CMC received a partial payment from Dellisart on two of the contracts.

The new financing never came through and the project collapsed. The reason for this is unclear in the record, but according to the affidavit of Craig McNay, manager of CMC, the financing fell through because CapitalSource refused to sign necessary documents with the third party, not because of CMC's liens. CapitalSource disputes this version of events, but there does not appear to be a counteraffidavit to McNay's affidavit in the record.

Following the financing failure, CMC decided to re-record the liens. CMC recorded a second set of liens for the four contracts, filing three liens in September 2008 and the fourth in October 2008. Although the new liens purport to be based on the same four contracts as the original liens that were recorded in June 2008, the September/October liens are not identical to the June liens. Instead, the September/October liens appear to reflect not only the value of the contracts as they stood in June 2008, less the partial payment by Dellisart, but also the value of additional work performed by CMC on the project between June and September/October, although the existence and extent of any overlap is disputed and unclear in the record. Additionally, CMC recorded amendments to two of the new liens in December 2008, allegedly

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due to a miscalculation in the value of the liens filed in September/October.

Due to the collapse of the project, CapitalSource filed the instant action to foreclose Dellisart's mortgage on the property and named as defendants all parties with a legal interest in the project, including CMC. In order to enforce its liens and ensure its priority as a creditor in the foreclosure action, CMC counterclaimed against CapitalSource and all other parties to the litigation. Counts I through IV of the counterclaim, which are the only counts at issue in this appeal, sought to enforce the four liens that CMC had recorded in September/October.

However, in its complaint and amended complaint CMC refers only to the September/October liens, and nowhere does it mention either the June liens or the July releases.

CapitalSource moved to dismiss the lien counts of CMC's counterclaim pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2008)). CapitalSource asserted a number of affirmative matters that barred CMC's counterclaim, but the most prominent argument was that CMC failed to comply with section 7 of the Mechanics Lien Act (770 ILCS 60/7 (West 2008)), which governs the requirements for perfecting liens in order to enforce them against a property owner or third parties. CapitalSource asserted that CMC had not only failed to properly comply with the timing and descriptive requirements for recording an enforceable lien, but also that CMC's claim was barred because it had impermissibly filed two sets of liens for the same work or, alternatively, that the September/October liens were impermissible "amended" liens. CapitalSource also stated that the June liens had been released and attached copies of the releases to its motion.

CMC's response to the motion to dismiss included affidavits in which it related its version of the events recited above. The general thrust of CMC's argument was that it had only

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released the liens at CapitalSource's demand, and only then because it had relied on CapitalSource's assertion that the liens were holding up the new financing and on Dellisart's promise to pay the amounts reflected in the liens. CMC also presented responses to CapitalSource's section 7-related arguments with respect to the September/October liens.

However, when the circuit court ruled on the motion to dismiss, it did not rely on any of the grounds advanced by CapitalSource and responded to by CMC. Instead, the circuit court held that, because CMC had recorded releases of the June liens, section 35(b) of the Mechanic's Lien Act (770 ILCS 60/35(b) (West 2008)) precluded CMC's action to enforce the liens. The circuit court consequently granted CapitalSource's motion and dismissed the lien counts of CMC's counterclaim. It does not appear from the record that section 35 was ever raised by either party.

Following denial of a motion to reconsider by CMC, the circuit court entered an order under Illinois Supreme Court Rule 304(a) (eff. Jan. 1, 2006), allowing an interlocutory appeal of its partial dismissal of CMC's counterclaim. CMC timely appealed, and this case is now before us.

## ANALYSIS

The primary basis of CapitalSource's motion to dismiss the lien counts of CMC's counterclaim is section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2008)). “A section 2-619 motion to dismiss admits the legal sufficiency of the plaintiff's claim, but asserts an affirmative matter that defeats the claim.” *Hubble v. Bi-State Development Agency of the Illinois-Missouri Metropolitan District*, 238 Ill. 2d 262, 267 (2010). The question on appeal is “whether the existence of a genuine issue of material fact should have precluded the dismissal

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or, absent such an issue of fact, whether dismissal is proper as a matter of law.” (Internal quotation marks omitted.) *O'Casek v. Children's Home & Aid Society*, 229 Ill. 2d 421, 436 (2008) (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)). A reviewing court may “consider all facts presented in the pleadings, affidavits, and depositions found in the record.” *Doe*, 234 Ill. 2d at 396. Our review is *de novo*, considering “all pleadings and supporting documents in the light most favorable to the nonmoving party.” *Hubble*, 238 Ill. 2d at 267.

Among the affirmative matters that may be asserted is that the plaintiff's claim has been released or satisfied of record. See 735 ILCS 5/2-619(a)(6) (West 2008). Despite the presentation of a number of issues by the parties in their briefs, the single dispositive question for this case is whether the existence of the July releases precludes an action to enforce CMC's mechanic's liens. As we will explain, there are several disputed factual issues that relate to this question, which necessarily precludes the dismissal of CMC's lien claims at this point in the litigation.

The initial burden of proof is on the movant to establish the existence of an affirmative matter that would defeat the nonmovant's claim. See *Callaghan v. Village of Clarendon Hills*, 401 Ill. App. 3d 287, 290-91 (2010). In this case, CapitalSource asserted in its motion to dismiss that CMC's claims were barred by the recorded releases, copies of which it attached to the motion. Each of the lien releases states that CMC “releases the above filed lien on the above described property, and its owner personally, from all liability arising from the labor performed and material furnished by [CMC] through June 30, 2008 under the terms of the above mentioned contract and recorded \*\*\*, and authorizes and directs that the lien be discharged of record.”

There are no qualifications or conditions precedent to discharging the liens present in the releases, and they appear to be valid on their face. Because the releases unambiguously discharge the liens without qualifications, CapitalSource has carried its burden of raising an affirmative matter that would defeat CMC's claim.

The burden now shifts to CMC to "sufficiently allege and prove that a material issue of fact exists that would invalidate the release agreement." *Brady v. Prairie Material Sales, Inc.*, 190 Ill. App. 3d 571, 579 (1989) (citing *Rakowski v. Lucente*, 104 Ill. 2d 317 (1984)). Among other reasons, a release may be invalid if it was obtained by fraud in the inducement, which occurs when one party "is induced to enter into the release by false representations by the other party." See *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 117 (2010). Fraud in the inducement is proven by showing "a false representation of material fact, made with knowledge or belief of that representation's falsity, and made with the purpose of inducing another party to act or to refrain from acting, where the other party reasonably relies upon the representation to its detriment." *Enterprise Recovery Systems v. Salmeron*, 401 Ill. App. 3d 65, 72 (2010).

In his affidavit, CMC's manager Craig McNay recounted a conversation that he had with George Lora, a CapitalSource loan officer who was involved in the financing for the project. According to McNay's affidavit, Lora informed McNay that "CapitalSource wanted the lien releases in full because the liens were interfering with the additional financing and CapitalSource was concerned that if CMC did not release its liens, the [third party] investment group would not go forward with its investment and the Project would fail." McNay attested that he fully believed Lora's statements. Importantly, McNay attested, "I would not have agreed to file the releases if I had not been told by CapitalSource that CMC's liens were holding up and

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endangering the additional financing. Up until that point, I was under the belief that the halt of the Project was only temporary. \*\*\* When I was told that CMC's liens were interfering with the additional financing, I became concerned that the investment group would withdraw from the Project and the Project would be permanently halted.” Despite the statements of CapitalSource's loan officer, however, McNay attested that he later discovered that “CapitalSource's claim that CMC was interfering with the additional financing was not true. \*\*\* [T]he real reason the additional financing was not completed is CapitalSource refused to sign the necessary documents.”

CapitalSource argues that McNay's accusations are “speculative” and “self-serving,” and that we should disregard them because they do not appear in CMC's amended complaint. However, CapitalSource has not provided any counteraffidavit to McNay's affidavit in the record. See *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995) (“When supporting affidavits have not been challenged or contradicted by counter-affidavits or other appropriate means, the facts stated therein are deemed admitted.”). McNay's affidavit raises a serious question of fact as to whether the releases were obtained by fraudulent inducement. If CapitalSource falsely told CMC that the liens were holding up the new financing in order to induce CMC to release its statutory lien claims on the property, then the releases may not be valid on the ground of fraudulent inducement and CMC's counterclaim might be able to move forward.

In sum, although CapitalSource has properly raised the releases as an affirmative matter that would defeat CMC's claim, there is a question of material fact regarding the validity of the releases. But *cf. Rochelle Vault Co. v. First National Bank*, 5 Ill. App. 3d 354, 356 (1972) (noting that “[i]n the instant case no evidence of fraud appears in the record. As a result, the



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filing of the release of the lien did in fact release the property in question from any claim the plaintiff might have against the property.”). Because an issue of fact exists regarding the releases, it is not appropriate to dismiss CMC's lien claims at this stage in the proceedings pursuant to section 2-619 on this particular ground.

Finally, we observe that when it dismissed the lien count the circuit court relied on section 35(b) of the Mechanics Lien Act (770 ILCS 60/35(b) (West 2008)), which states that a properly recorded lien release “shall forever thereafter discharge and release the claim for lien and shall bar all actions brought or to be brought thereupon.” The majority of CMC's argument on appeal is directed to the question of whether the circuit court correctly interpreted and applied section 35 to the facts of this case. However, we do not reach this question because our resolution of this appeal is based on the existence of issues of material fact rather than on a legal interpretation of section 35. There is no dispute in this case that CMC properly recorded releases for the June liens in July 2008, but whether the releases are invalid due to fraudulent inducement is a threshold question of fact that must be resolved before the effect of section 35 on CMC's claims can be considered.

CapitalSource offers a number of alternative reasons in support of dismissing CMC's claim, all of which are grounds that were raised in front of but not reached by the circuit court. Although we may affirm the judgment of the circuit court for any reason appearing in the record (*American Service Insurance Co. v. City of Chicago*, 404 Ill. App. 3d 769, 776-77 (2010)), we decline to do so in this case because the alternative grounds that CapitalSource advances are entangled with the factual question of the validity of the releases.

CapitalSource makes three major arguments in favor of dismissal. First, CapitalSource

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argues that section 7 of the Mechanics Lien Act (770 ILCS 60/7 (West 2008)) prohibits a lienholder from either amending a previously filed lien in order to enforce it against a third party or filing a second lien that arises out of the same work, citing in support *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 361 (2008). Although *Cordeck* stands for the proposition that amended lien claims cannot be asserted against third parties, whether the liens at issue in this case are amended liens is a disputed question. CMC argues that the fact that the June liens were released means that the September/October liens necessarily cannot “amend” anything, while CapitalSource argues that the September/October liens must qualify as amended liens because they arise out of the same contracts.

However, it is unclear from the record precisely what work the liens cover. For example, although CMC asserted that the September/October liens included “the \$71,715.14 of the June lien which was unpaid,” CMC also asserted that the claim covered additional work not included in the June liens. From this and other portions of the record, it is unclear what work each lien covers, and it appears that there may be some overlap.

Moreover, the fact that the validity of the releases is in dispute prevents us from determining whether these liens qualify as amended. Although *Cordeck* dealt with a similar situation in which the lienholder performed additional work after the initial lien was recorded, we cannot say what effect, if any, a factual finding that the releases are either valid or invalid may have on the status of the liens. This determination is best left until after the release question has been resolved.

Second, CapitalSource asserts that some counts must be dismissed because they were not timely filed. CapitalSource argues that two of the counts must be dismissed because CMC did

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not record those liens within four months of the completion of its work on the project as required by section 7. CapitalSource alternatively argues that one of the same counts must be dismissed because CMC failed to serve notice of completion of work within 90 days as required by section 24 (770 ILCS 60/24 (West 2008)). CapitalSource claims that the last invoice that CMC generated was dated May 1, 2008, which was more than four months before the September/October liens were recorded. However, the McNay affidavit asserts that CMC performed work on the project into July, which creates an issue of fact as to when work was actually completed for purposes of section 7 and section 24. This question is also affected by the factual question of whether the June liens were validly released. Either way, issues of fact preclude dismissal on those grounds at this point in the case.

Finally, CapitalSource makes two arguments with respect to count III of the counterclaim, which deals with the lien for a contract for interior finishing work on the project. In contrast to the other arguments already discussed, this portion of CapitalSource's brief asserts that count III should be dismissed under section 2-615 (735 ILCS 5/2-615 (West 2008)), rather than section 2-619. Unlike a section 2-619 motion, a section 2-615 motion challenges the legal sufficiency of the complaint. See *Haddick v. Valor Insurance*, 198 Ill. 2d 409, 413-14 (2001). A complaint should not be dismissed under this section “unless it is clear that the plaintiff cannot prove any set of facts entitling her to relief.” *Id.* at 414.

CapitalSource argues that the count must be dismissed because CMC failed to allege the performance of lienable work, and alternatively that CMC's lien did not accurately describe the contract as required by section 7.<sup>1</sup> CapitalSource points to the lack of a written contract

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<sup>1</sup> CapitalSource does not state in its brief whether this particular argument is based on section 2-

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supporting this lien and apparent contradictions between the lien and the claimed oral contract. CMC responds that this count is premised on an oral contract with Dellisart and that the work consisted of services performed at the direction of Dellisart and its agents, which is lienable work under section 1 of the Mechanics Lien Act (770 ILCS 60/1 (West 2008)).

Count III alleged that CMC, at Dellisart's request, performed \$280,000 worth of work, which involved, among other things, consulting on plans and design of the interior of the project, selecting and pricing materials, and preparing construction materials for the project. The contract ultimately was not performed due to the work stoppage, and CapitalSource argues that CMC has no lienable claim because it never actually improved the property but rather only prepared for work on the interior finishing contract. However, liens under section 1 of the Mechanics Lien Act (770 ILCS 60/1 (West 2008)) include the amount due under a contract for “material, fixtures, apparatus, machinery, *services and labor*, and interest.” (Emphasis added.) Reviewing the allegations in the count III in the light most favorable to CMC (see *Haddick*, 198 Ill. 2d at 414), there are sufficient allegations to establish a cause of action on this count and dismissal under section 2-615 is not appropriate.

To the extent that CapitalSource argues that there is a fatal discrepancy between the allegations in count III and the corresponding lien, any discrepancy is not material. At this point, we are concerned only with whether the counterclaim alleges some set of facts that might entitle 615 or section 2-619. Based on the absence of any affirmative matter in the argument and CapitalSource's assertion that the complaint fails to comply with section 7 of the Mechanics Lien Act (770 ILCS 60/7 (West 2008)), we will treat this argument as an attack on the validity of the complaint under section 2-615.

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CMC to relief. See *Haddick*, 198 Ill. 2d at 413-14 . Count III alleges that the written contract was prepared but never executed, although the lien appears to be premised on the existence of a contract. The count also alleges performance of work at Dellisart's direction and in reliance on Dellisart's promises. Section 1 does not require an executed, written contract in order for a lien to exist, instead allowing a lien based on “any contract or contracts, express or implied, or partly expressed or implied.” 770 ILCS 60/1 (West 2008). Taking the allegations in the counterclaim in the light most favorable to CMC, count III alleges that a lienable contract of some kind was formed. Whether CMC can ultimately prove that the oral contract existed and that it performed lienable work is not the question at this early stage in the proceedings.

#### CONCLUSION

As discussed above, there is an issue of material fact regarding the validity of the lien releases, which precludes dismissal of CMC's lien counts under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2008)). Although CapitalSource has raised alternative grounds to sustain the judgment of dismissal, we decline to affirm on those grounds because issues of fact remain that must be resolved in the circuit court. We consequently reverse the order of the circuit court dismissing counts I through IV of CMC's complaint and remand this case to the circuit court for further proceedings.

Reversed and remanded.