2018 IL App (1st) 171355-U

SIXTH DIVISION
Order filed: February 2, 2018

No. 1-17-1355

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE MERIDIAN GROUP, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff and Counterdefendant-Appellant,	)	Cook County
	)	
v.	)	
	)	Nos. 16 CH 14240
ANDREW GEPPERT, HELEN HEJNY, UNKNOWN OWNERS and OTHER UNKNOWN INTERESTED PARTIES,	)	16 L 12101 (Cons.)
	)	
Defendants,	)	
	)	Honorable
(Andrew Geppert and Helen Hejny, Defendants and Counterplaintiffs-Appellees).	)	Lisa R. Curcio,
	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed count I of the contractor's complaint, which sought to foreclose on a mechanics lien, where the contractor failed to strictly comply with section 5 of the Mechanics Lien Act (770 ILCS 60/5 (West 2016)) by providing the homeowners with a sworn statement pursuant to the homeowners' request.

¶ 2 The plaintiff and counterdefendant, The Meridian Group, Inc. (Meridian), appeals from an order of the circuit court of Cook County dismissing its mechanics lien foreclosure claim

pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2016)), based upon its failure to strictly comply with section 5 of the Mechanics Lien Act (Act) (770 ILCS 60/5 (West 2016)). For the reasons that follow, we affirm.

¶ 3 The following facts are derived from the various pleadings, which we accept as true in the context of a dismissal pursuant to section 2-619. See *Wackrow v. Niemi*, 231 Ill. 2d 418, 420 (2008).

¶ 4 In October 2015, Meridian entered into a written contract with Andrew Geppert and Helen Hejny (Owners) to provide restoration and repair services to their residence, located at 3913 West Eddy Street in Chicago, Illinois. The contract price was $136,339. During the course of the renovations, the parties agreed to several change orders, which pushed the estimated completion date to September 2, 2016, and increased the contract price to $265,601.98. The record reflects that the Owners made periodic payments to Meridian totaling $199,361.44.

¶ 5 On September 8, 2016, Geppert sent an email to Peter Desmond, the president of Meridian, informing him that, as of September 2, 2016, some of the work had not been completed. Geppert requested that Meridian return to the residence to complete the work and further demanded that it provide him with a sworn statement pursuant to section 5 of the Act (770 ILCS 60/5 (West 2016)). He stated, in pertinent part, as follows:

> "Under Section 5 of the Illinois Mechanics Lien Act you are required to provide a Sworn Statement of Contractor and Subcontractor to Owner *** as well as lien releases from any subcontractors. Per Section 5, I am required to demand that this is provided prior to making any payment until I receive said statement. Additionally, [section 5(b)] requires that a listing of subcontractors be provided along with the outstanding amounts due to each.

> Please provide these requested documents by 5pm CST Tuesday, September 13th, 2016."

¶ 6 On September 10, 2016, Meridian sent a letter to the Owners stating that it would return to the residence "later this week" to address the "punch-list items." Meridian further informed the Owners that it considered them "to be in default" since work was "substantially complete" and they "have refused to make payment." As such, it advised the Owners of its intent to file a mechanics lien and a foreclosure suit "to protect [its] position." Meridian concluded the letter by stating:

> "You have requested final waivers of lien which is your right. Final waivers of lien, as well as a release of lien if applicable, will be exchanged at such time as you deliver payment in full. I can tell you that [Meridian] will be the sole payee when payment is delivered or judgment is rendered."

Meridian's letter did not respond to the Owners' request for a sworn statement.

¶ 7 On September 12, 2016, Meridian recorded a mechanics lien, claiming it was owed $27,613.42, for worked performed through September 1, 2016. Also on September 12, 2016, Steven Fuoco, counsel for Meridian, informed Shorge Sato, counsel for the Owners, that a lien had been recorded and that Meridian "will arrive tomorrow [morning] to begin punch list itemized work ***." Fuoco also memorialized the fact that he and Sato previously agreed to serve as a "conduit for the payment and sworn statements and lien release exchange."

¶ 8 In a reply email, Sato informed Fuoco, in pertinent part, as follows:

> "One logistical hurdle: I am leaving town Friday morning for a 10-day family trip to Japan. *** [T]o avoid a delay in payment it makes sense for us to have an agreement as to all forms. Specifically, I would like to see a filled out

> Section 5 contractors affidavit with all names of subs, etc. and a corresponding set of lien waivers from the subs. The Section 5 affidavit and lien waivers can be unsigned."

¶ 9 On September 15, 2016, Sato reminded Fuoco of his travel plans and again requested that he send copies of the "Section 5 affidavit, lien waivers and lien release[ ] for my review ASAP." Sato also stated that the Owners "cannot release payment for your client until we have the forms and substance approved *** so if [Meridian] wants to be paid this week, [it] needs to send us the paperwork." The record does not contain a response from Fuoco.

¶ 10 The next day, Sato sent a letter to Fuoco, which stated that the Owners are terminating the contract "for cause" based upon Meridian's failure to "complete work by the adjusted completion date ***." The letter also advised Meridian that the Owners had previously requested "sworn statements and partial/final lien waivers" and that they "hereby reiterate their demand for all sworn statements and final lien waivers for any and all contractors, subcontractors and materialmen who have worked on the site ***."

¶ 11 On September 30, 2016, Meridian recorded an amended mechanics lien, asserting it had performed all of the work on the Owners' residence and that it was owed $73,368.38. On October 5, 2016, Fuoco notified Sato that Meridian had recorded an amended lien and that "Meridian's Final Pay Application documents called for in [Attachment No. 6 to the contract] are ready to be exchanged when you have your clients' certified funds payment check to provide."[1] Sato replied to Fuoco's email later that same day, stating that Meridian is not entitled

[1] Attachment No. 6 states as follows: "Contractor shall submit a payment application (and, if requested by Owner, [s]hall provide the usual and customary documents, sworn statements and partial/final lien waivers including customary sworn statements, documents and lien waivers from subcontractors and materialmen ('Payment Application')."

to final payment until it "compl[ies] with the terms of the Contract (and provide[s] the required documents)." He also demanded that Meridian release its "frivolous and false lien."

¶ 12 On October 31, 2016, Meridian filed a three-count complaint in the circuit court against the Owners, seeking to foreclose on its lien (count I) and asserting claims of breach of contract (count II) and *quantum meruit* (count III). The Owners thereupon filed counterclaims against Meridian, alleging negligence (count I), breach of contract (count II), breach of warranty (count III), common law fraud and misrepresentation (count IV), consumer fraud (count V), and conversion (count VI). These actions were consolidated.

¶ 13 In February 2017, the Owners moved to dismiss Meridian's complaint in its entirety pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)). Relevant here, the Owners argued that Meridian's refusal to strictly comply with section 5 of the Act (770 ILCS 60/5(a) (West 2016)) by providing them with a sworn contractor's statement after their demands, defeated enforceability of its lien and that they were justified in withholding final payment. In support of their motion, the Owners attached the affidavit of Geppert who averred that he had yet to receive a sworn contractor's statement from Meridian.

¶ 14 In opposing the motion, Meridian argued that the motion to dismiss its mechanics lien foreclosure claim should be denied because a question of material fact exists based upon undisputed evidence that the Owners' requested an *unsigned* sworn statement. According to Meridian, the Owners' request for an unsigned sworn statement was "the same as legally making no request at all" and that the Owners, therefore, waived their right to a sworn statement.

¶ 15 Meridian relied upon the affidavits of Desmond and Fuoco and also attached, *inter alia*, a "sworn statement of contractor to owner" to its response memorandum.[2] In his affidavit, Desmond asserted that Meridian never "refused" to provide the Owners with a sworn statement. Rather, he attested that Geppert "did not permit enough time for Meridian to prepare such a document before his September 13, 2016[,] deadline" as work was not complete and Meridian "did not have the numbers for [its] contractor's statement." Desmond further averred that Geppert failed to state whether he wanted a signed or unsigned sworn statement and "it was never clear *** what version of this document *** [the Owners] were requesting." Finally, Desmond stated in his affidavit that the Owners "were never at risk" because Meridian paid each subcontractor and material supplier in full and obtained final lien waivers from them. Fuoco attested in his affidavit that he received an email from Sato on September 12, 2016, requesting an unsigned sworn statement and that, at no point thereafter, did Sato request a compliant sworn statement.

¶ 16 On May 3, 2017, the circuit court granted the Owners' motion to dismiss as to count I of Meridian's complaint with prejudice, finding that the Owners made "an unequivocal request for a sworn statement" and that Meridian's failure to furnish the Owners with a sworn statement was "a bar to the mechanics lien claim." The court denied the Owners' motion to dismiss as to counts II and III of Meridian's complaint, alleging breach of contract and *quantum meruit*, respectively. The court made an express written finding pursuant to Supreme Court Rule 304(a) (eff. Mar. 8,

[2] The sworn statement is dated March 21, 2016, the day before Meridian's response memorandum was due. The statement listed, *inter alia*, the names and addresses of the subcontractors who furnished material or labor on the project and the amount due or to become due to each. The sworn statement is signed by Desmond and notarized.

2016) that there was no just reason to delay enforcement or appeal of its ruling. This timely appeal followed.[3]

¶ 17 A section 2-619(a) motion to dismiss admits the legal sufficiency of a complaint but asserts certain defects, defenses, or other affirmative matters outside of the pleadings which defeat the claim. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. When ruling on the motion, the court construes the pleadings and supporting documents in the light most favorable to the nonmoving party, and accepts as true all well-pleaded facts in the complaint. *Id*. "The question on appeal is 'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *Id*. (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)). Our review is *de novo*. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21.

¶ 18 Meridian argues that the circuit court erred in dismissing its mechanics lien foreclosure claim on grounds that its failure to supply the Owners with a sworn statement pursuant to section 5 of the Act (770 ILCS 60/5 (West 2016)) defeated its claim. According to Meridian, its duty to provide a sworn statement was never triggered because the Owners requested an unsigned, and therefore noncompliant, sworn statement. The Owners counter that they made several demands for a sworn statement, which clearly and unequivocally invoked the protections of the Act.

¶ 19 The issue raised in this appeal requires us to construe the Act (770 ILCS 60/1 *et seq.* (West 2016)). The primary objective of statutory interpretation is to ascertain and give effect to the intent of the legislature. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009). The most reliable indication of legislative intent is the language of the statute, which

[3] Only count I of Meridian's complaint is at issue in this appeal. Counts II and III of Meridian's complaint, as well as the Owners' counterclaims, are still pending in the circuit court.

must be given its plain and ordinary meaning. *Id*. The statute must be read as a whole and construed so that no part is rendered meaningless or superfluous. *Id*. at 390. The court will not depart from the statute's plain language by reading into it exceptions, limitations, or conditions that conflict with the legislative intent. *Id*. The interpretation of a statute is a question of law that is reviewed *de novo. Id*. at 389.

¶ 20 We begin our analysis by addressing Meridian's argument that, pursuant to section 5 of the Act, an owner who requests an unsigned or otherwise noncompliant sworn statement, thereby waives their right to the sworn statement. Section 5 of the Act provides, in relevant part, as follows:

> "It shall be the duty of the contractor to give the owner, and the duty of the owner to require of the contractor, before the owner *** shall pay or cause to be paid to the contractor or to his order any moneys or other consideration due or to become due to the contractor ***, a statement in writing, under oath or verified by affidavit, of the names and addresses of all parties furnishing labor, services, material, fixtures, apparatus or machinery, forms or form work and of the amounts due or to become due to each." 770 ILCS 60/5(a) (West 2016).

¶ 21 In this case, the Owners clearly and unambiguously demanded, in writing, a sworn statement from Meridian. On September 8, 2016, for example, Geppert sent an email to Desmond citing section 5 of the Act and requesting that Meridian provide him with a sworn statement "listing of subcontractors *** along with the outstanding amounts due to each." In addition, Sato's emails to Fuoco expressly invoked the Owners' statutory rights by requesting a draft of the sworn statement and advising Fuoco that final payment would not be released until he had an opportunity to review and approve the sworn statement. Although Sato stated that

Meridian could submit an unsigned version of the sworn statement, nothing in the form or the circumstances of his statement suggests that it was intended to waive the Owners' right to a compliant sworn statement. See *Pyramid Development, LLC v. Dukane Precast, Inc.*, 2014 IL App (2d) 131131, ¶ 29 (holding that "an owner cannot *** excuse a contractor's duty to provide a compliant sworn affidavit once the owner has requested the affidavit"). Indeed, the record reveals that Sato and Geppert continued to follow up with Fuoco and Desmond on several occasions requesting that Meridian furnish them with a sworn statement. In a letter dated September 16, 2016, for example, the Owners reiterated their demand for "all sworn statements *** for any and all contractors, subcontractors and materialmen who have worked on the site." These written requests were sufficient to invoke the protections of section 5 of the Act, and we do not believe that Sato's statement that he was willing to accept an unsigned draft of the sworn statement for purposes of attorney-review waived the Owners' right to a compliant sworn statement. See *id.* ("The plain language of section 5 provides that an owner waives the requirement that a contractor furnish a compliant sworn affidavit *only by not requesting it*." (Emphasis added.)).

¶ 22 Our holding serves the purpose of section 5, which is to "create a duty upon the owner to protect the claims of the subcontractors named in the contractor's sworn statement." *Weather-Tite*, 233 Ill. 2d at 393. As our supreme court explained, when a subcontractor is identified in a contractor's sworn statement as one furnishing materials or labor on the premises, the owner must retain funds sufficient to pay the subcontractor, or risk liability to the subcontractor despite any payments made to the general contractor. *Id.* at 393-94. Thus, to protect itself from paying twice for the same work, the owner must demand from the contractor a sworn statement listing the subcontractors and the amounts due or to become due to them. *Abbott Electrical*

Construction Co. v. Ladin, 144 Ill. App. 3d 974, 977 (1986). If, however, the owner does not request a sworn statement, the contractor is under no duty to give it (*id.*), and the owner is unprotected against having to pay twice for the same work (*Lazar Brothers Trucking, Inc. v. A & B Excavating, Inc.*, 365 Ill. App. 3d 559, 563 (2006)). If the owner requests a sworn statement, the contractor must give the owner the names of all parties furnishing labor or materials and the amounts due each of them, or to become due each of them, under oath or verified by affidavit. *Deerfield Electric Co. v. Herbert W. Jaeger & Associates, Inc.*, 74 Ill. App. 3d 380, 385 (1979).

¶ 23 Nonetheless, Meridian urges this court to apply a liberal construction of the Act's requirements and excuse its failure to furnish the Owners with a sworn statement. It argues that it "protected" the Owners by paying each subcontractor and that its failure to furnish the Owners with a sworn statement was "a non-material error" that posed "no danger" to the Owners.

¶ 24 It is well settled, however, that the Act must be strictly construed with respect to all of the statutory requirements upon which the right to a lien depends. *Cityline Construction Fire & Water Restoration, Inc. v. Roberts*, 2014 IL App (1st) 130730, ¶ 10. This is because "[t]he rights created under the Act are statutory and in derogation of the common law, and the technical and procedural requirements necessary for a party to invoke the benefits of the Act must be strictly construed." *Id.* Strict construction ensures that a contractor's lien " 'is valid only if each of the statutory requirements is scrupulously observed.' " *Id.* (quoting *Aluma Systems, Inc. v. Frederick Quinn Corp.*, 206 Ill. App. 3d 828, 839 (1990)). Only after a contractor complies with the procedural requirements of the Act will courts liberally construe it in order to accomplish its remedial purpose. *Weydert Homes, Inc. v. Kammes*, 395 Ill. App. 3d 512, 516 (2009).

¶ 25 In *Cityline*, 2014 IL App (1st) 130730, ¶ 18, this court addressed and rejected virtually the same arguments raised by Meridian. In that case, the contractor was hired to repair the

owners' residence after it was damaged by a fire. While the job was underway, the owners requested a sworn statement from the contractor but the contractor never provided one. *Id.* ¶ 4. On appeal, this court held that the contractor's failure to strictly comply with section 5 of the Act by providing the owners with a sworn statement rendered its mechanics lien unenforceable. *Id.* ¶ 18. In so holding, we found no merit to the contractor's arguments that its failure to comply with the Act should be excused where all of the subcontractors had been paid, the owners were not prejudiced by the lack of a sworn statement, and that it would be unfair to allow a "technicality" to defeat its mechanics lien. *Id.* ¶ 18. This court reasoned that the "rules of equity jurisprudence are irrelevant at this stage" and "we cannot look beyond [the contractor's] failure to comply with section 5 based upon equitable considerations such as whether the Owners were prejudiced by the lack of a sworn contractor's statement." *Id.*

¶ 26 We see no reason to depart from the reasoning expressed in *Cityline* and the cases it relied upon. See, *e.g.*, *Deerfield*, 74 Ill. App. 3d at 386; *Weydert Homes*, 395 Ill. App. 3d at 518-19. In this case, it is undisputed that the Owners requested a sworn statement and that Meridian did not provide one. Although Meridian maintains that all of the subcontractors had been paid and the Owners suffered no prejudice or "danger" from the lack of a sworn statement, the Act must be strictly construed and we cannot look beyond Meridian's failure to comply with section 5 of the Act based upon equitable considerations. Nor are we persuaded by Meridian's contention that the Owners' request for a sworn statement prior to the completion of work favors "such liberal construction to preserve [its] lien right[s]." It is readily apparent that under such circumstances, Meridian could have submitted a sworn statement certifying that its subcontractors were still working at the residence and it did not know the amount to become due to them. See *Malesa v. Royal Harbour Management Corp.*, 187 Ill. App. 3d 655, 659 (1989)

("Section 5 requires contractors to provide information that is within their knowledge but which may not be known to the owner."). In sum, we cannot excuse Meridian's failure to strictly comply with section 5 of the Act.

¶ 27 Finally, Meridian contends that the circuit court "procedurally erred" by ruling on the section 2-619 motion to dismiss without holding an evidentiary hearing. According to Meridian, "[a]n issue of controverted fact was presented" in Sato's statement that the "[t]he Section 5 affidavit and lien waivers can be unsigned." As discussed above, the question of whether the Owners requested a signed or unsigned sworn statement is immaterial. What is material (and undisputed) is the fact that the Owners requested a sworn statement. Because Meridian does not dispute the evidence of record establishing that the Owners made several requests for a sworn statement, the circuit court properly ruled on the motion to dismiss.

¶ 28 A dismissal under section 2-619 is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Sandholm*, 2012 IL 111443, ¶ 55. In this case, there are no issues of material fact and, as a matter of law, Meridian is not entitled to enforce its mechanics lien based upon its failure to strictly comply with section 5 of the Act. We conclude, therefore, that the circuit court properly dismissed count I of Meridian's complaint with prejudice.

¶ 29 As a final matter, the Owners request the imposition of sanctions for what they term a "frivolous" appeal. Illinois Supreme Court Rule 375(b) (eff. Dec. 1, 1994) provides for the imposition of sanctions for frivolous appeals that are not taken in good faith. To determine whether an appeal is frivolous, we employ an objective standard, asking whether the appeal would have been brought in good faith by a reasonable, prudent attorney. *Penn v. Gerig*, 334 Ill. App. 3d 345, 356 (2002). The imposition of sanctions under Supreme Court Rule 375(b) is left

entirely to the discretion of the reviewing court. *McNally v. Bredemann*, 2015 IL App (1st) 134048, ¶ 24. Although we have ruled in favor of the Owners in this case, we cannot conclude that no reasonable, prudent attorney would have filed this appeal. We deny the Owners' request for sanctions pursuant to Rule 375.

¶ 30 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County dismissing count I of Meridian's complaint with prejudice.

¶ 31 Affirmed.