2012 IL App (2d) 110512-U
No. 2-11-0512
Order filed March 6, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ULS, INC.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff, Counter-defendant, and	)	
Third-Party Plaintiff-Appellant,	)	
	)	
v.	)	No. 08-L-1180
	)	
127 NORTH WALNUT PARTNERS, LLC,	)	
PREMIER RISK SERVICES, INC.,	)	
CAREY ELECTRIC CONTRACTING, INC.,	)	
and KOLE CONSTRUCTION COMPANY	)	
OF LEMONT, INC.,	)	
	)	
Defendants, Counter-defendants and	)	
Counter-plaintiffs-Appellees,	)	
	)	
REPUBLIC BANK OF CHICAGO, f/k/a	)	
National Bank of Commerce,	)	
	)	
Defendant and Counter-defendant-	)	
Appellee	)	
	)	
(Gillespie Design Group, Ltd., Defendant,	)	
Counter-Defendant and Counter-plaintiff,	)	
Jimmy'Z Masonry Corp. and Carmichael	)	
Construction, Third-Party Defendants,	)	Honorable
Unknown Owners and Non-record Claimants,	)	Robert G. Gibson,
Defendants.)	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Bowman and Birkett concurred in the judgment.

Held: The appellant demonstrated *prima facie* reversible error, no appellee brief was filed, and reversal was therefore appropriate.

ORDER

¶ 1 In this appeal, the plaintiff/counter-defendant, ULS, Inc., protests the trial court's entry of an order approving a settlement agreement among the defendants/counter-plaintiffs 127 North Walnut Partners, LLC, Premier Risk Services, Inc., and Kole Construction Company of Lamont, Inc. that restricted ULS's potential remedies on its own claims. ULS asserts that the settlement agreement and restriction are unauthorized and unfair. We reverse and remand.

¶ 2 This dispute grows out of a construction project for a mixed-use building located at 127 N. Walnut Street in Itasca. The owners of the property were 127 North Walnut Partners, LLC, and Premier Risk Services, Inc. (collectively, the Owners). ULS, Inc. was the general contractor for the project. Among the subcontractors hired by ULS was Kole.

¶ 3 In October 2008, ULS sued the Owners and Kole, among others, asserting claims of breach of contract, unjust enrichment, *quantum meruit*, and for foreclosure of its mechanic's lien. ULS alleged that the Owners owed it $662,620.79 for its work on the project. The Owners filed a counterclaim against ULS, alleging that there were defects in the construction. Kole filed a counterclaim against the Owners and ULS, based on its own mechanic's lien. Most of the other parties also filed crossclaims and counterclaims.

¶ 4 In February 2011, the Owners filed a motion to approve a settlement agreement between themselves and Kole. Pursuant to the agreement, the Owners would pay Kole $38,000, and Kole would give the Owners a release of its mechanic's lien and would dismiss its counterclaim. The

language of the settlement agreement did not explicitly bar any claims by ULS, including ULS's claim against Kole as the holder of a subcontractor's mechanic's lien. However, in their motion to approve the settlement agreement, the Owners sought a finding by the trial court that, in light of the agreement's existence, ULS's claims against the Owners could not include "any amounts that were due, would have been due, or resulted from the work of Kole." The Owners pointed out that, under section 27 of the Mechanics Lien Act (Act) (770 ILCS 60/27 (West 2008)), an owner must "retain, from any money due [or owing to] the contractor, an amount sufficient to pay all demands" due to subcontractors, and must pay that money directly to the subcontractors. They argued that the proposed finding was necessary so that they would not have to make double payment for Kole's work (to Kole via the settlement and then to ULS in the litigation).

¶ 5 ULS objected to the proposed settlement and finding on several grounds. First, it pointed out that the Owners had not attached the proposed settlement agreement to their motion, and thus there was no valid settlement agreement to approve. (The Owners eventually attached a copy of the proposed settlement to their reply brief, but it was not signed. Kole's attorney was not present during the hearing on the motion, and there was no evidence that Kole in fact had signed the agreement or intended to.) ULS also argued that the trial court was not authorized to restrict ULS's right to recover on the basis of a settlement to which it was not a party, as the Act did not permit it and the Joint Tortfeasor Contribution Act (740 ILCS 100/2 (West 2008)) did not apply to the contract-based and mechanic's lien claims of the parties.

¶ 6 Finally, ULS also argued that, even if the finding sought by the Owners were legally permissible, it would unfairly prejudice ULS. ULS's reasoning was as follows. The Owners had countersued ULS, claiming that there were defects in the construction. It appeared quite possible

(although the parties were still in the process of discovery on the issue) that many of the claimed defects involved Kole's work. (Kole provided construction and drywall for the project, among other things, and the alleged defects included leaks in the walls.) If there were no settlement and finding, ULS would be free to litigate Kole's responsibility for the claimed defects in the process of resolving the mechanic's lien action. If Kole were found to be liable for the claimed defects in an amount exceeding Kole's own mechanic's lien, the recovery from Kole could include a release of that lien, a secured interest. However, if the trial court approved the settlement and entered the requested finding, ULS could no longer litigate Kole's possible liability for the claimed defects in the mechanic's lien litigation. If ULS wanted to ensure that it would not bear the cost of any such defects that were Kole's fault, it would have to file a claim against Kole for indemnity, and its remedy would be less certain, because it would have to rely on Kole's assets to cover any potential damages rather than being able to off-set Kole's lien. ULS offered to withdraw its objection to the entry of the settlement and the proposed finding if the Owners would agree not to pursue any claims related to defects caused by Kole's work, but the Owners would not agree to this. ULS also objected to the fairness of the settlement agreement based on possible inequities in the amount eventually received by all of the parties. At the hearing on the motion, the Owners stated that they could not say whether there was sufficient money to pay both the proposed settlement and the remaining claims. Under the Act, if it ultimately turned out that the amount available was not sufficient to pay all of the claims of the mechanic's lienholders and the mortgagee, the available amount would be divided *pro rata* among the lienholders. In that case, Kole (by settling in advance) could receive more than its *pro rata* share.

¶ 7 On May 4, 2011, after briefing and oral argument on the motion, the trial court granted the motion. Paragraph 2 of the order entered on that date stated:

> "The motion of 127 N. Walnut Partners, LLC and Premier Risk Services, Inc. to approve settlement and for a finding that payment is not wrongful is granted. The court approves the proposed settlement between 127 Walnut and Kole Construction Company of Lemont, Inc., and holds that any payment made by 127 Walnut to Kole pursuant to the settlement is not illegal or wrongful and *ULS' claims* against Walnut and/or Premier cannot include any claims for amounts that were due Kole, would have been due Kole, or resulted from the work of Kole." (Emphasis added.)

The order included a finding pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there was no just reason to delay enforcement or appeal of paragraph 2 of the order. ULS filed a timely notice of appeal.

¶ 8 As a preliminary matter, we note that none of the named appellees filed a brief. We have three choices in how to proceed in such a case. *Thomas v. Koe*, 395 Ill. App. 3d 570, 577 (2009). The lack of an appellee brief does not prevent the court from reviewing a judgment on the merits "[i]f the record is simple and the issues are such that the court can easily decide them without the aid of an appellee's brief." *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). However, a court of review is not "compelled to serve as an advocate for the appellee" (although it may chose to act as such if justice requires—that is the second option). *Id.*; see also *Thomas*, 395 Ill. App. 3d at 577. Finally, "[w]here the appeal cannot be easily evaluated, the appellant's brief makes a *prima facie* showing of reversible error, and the record supports the

allegations of error, a reviewing court may reverse." *In re Marriage of Charles*, 284 Ill. App. 3d 339, 342 (1996).

¶ 9 Here, the record is replete with counter- and cross-claims among the parties, who assert both mechanic's lien and contract claims. The amounts due on the various claims, and the amount available to pay those claims, are uncertain. We find that this appeal does not fall within the category of appeals that are so simple and easily evaluated that we may reach the merits without the aid of an appellee's brief. See *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 79 (1995) (describing Illinois law on mechanic's liens as "technical and complex"). Nor is this a case in which justice requires us to serve as an advocate for the appellee. Thus, under *Talandis*, we must consider whether the appellant's brief makes a *prima facie* showing of reversible error that finds support in the record. *Talandis*, 63 Ill. 2d at 133; see also *Coleman v. Windy City Balloon Port, Ltd.*, 160 Ill. App. 3d 408, 411-12 (1987) (where neither of the first two options discussed in *Talandis* applied, reviewing court would use the third option and consider whether the appellant had made out a case of *prima facie* reversible error). In making this determination, we bear in mind principles of law from sister states that were cited by our supreme court in *Talandis*. The first of these is that, where there is no appellee brief, the reviewing court "is entitled to accept as true the statement of facts in the opening brief and is under no duty to seek out points of law in support of the judgment." *Talandis*, 63 Ill. 2d at 132 (citing *Evans v. Evans*, 185 Cal. App. 2d 566, 569 (1960)). The second is the definition of *prima facie*, which includes the meanings of "on the face of it," "so far as can be judged from the first disclosure," and "a fact presumed true unless disproved by some evidence to the contrary." *Id.* (quoting *Harrington v. Hartman*, 233 N.E.2d 189, 191 (Ind. App. Ct. 1967) (citations omitted)).

¶ 10 On appeal, ULS argues that the trial court erred in approving the settlement between the owners and Kole and barring ULS from recovering for "claims for amounts that *** resulted from the work of Kole," on the same grounds on which it opposed the settlement and finding before the trial court. After considering these arguments and reviewing the record, we conclude that ULS's brief demonstrates *prima facie* error on the part of the trial court pursuant to *Talandis*. See *Thomas*, 395 Ill. App. 3d at 578. We therefore reverse that portion of the trial court's order dated May 4, 2011, that approved the settlement and restricted ULS's ability to recover damages relating to Kole's work, and remand for further proceedings.

¶ 11 Reversed and remanded.