2013 IL App (2d) 130329-U No. 2-13-0329 Order filed December 2, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DIRTWERKS EXCAVATING, INC., Plaintiff-Appellant,	 Appeal from the Circuit Court of Lake County.
v.) No. 09-CH-502
KIRAN KORITALA; ANDREA M. KORITALA; NIRAV D. PATEL; SAPNA P. PATEL; ZHEN WANG; AMY ZHI YING CAO; PANKAJ A. PATEL; and SURABHI PATEL,)))))
Defendants-Appellees)
(Astoria Federal Mortgage Corp.; ING Bank, FSB; Expedia Mortgage Company; Countrywide Bank, FSB; Lake Zurich One, LLC; and Unknown Necessary Parties, Defendants).)) Honorable) Mitchell L. Hoffman,) Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court. Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the trial court dismissing with prejudice plaintiff's mechanic's lien claims was reversed and the cause was remanded for further proceedings; the court held that where plaintiff perfected its contractor's liens within four months of the day it completed work, it was entitled to enforce its liens.

Plaintiff, Dirtwerks Excavating, Inc., appeals from an order of the circuit court of Lake County dismissing with prejudice its third amended complaint against defendants, Nirav D. Patel, Sapna P. Patel, Zhen Wang, Amy Zhi Ying Cao, Pankaj A. Patel, and Surabhi Patel (collectively homeowners). While the third amended complaint contained counts to foreclose plaintiff's mechanic's liens, as well as counts sounding in breach of contract and *quantum meruit*, plaintiff argues only that the trial court incorrectly dismissed its mechanic's lien claims. Apparently, plaintiff does not contest the dismissal with prejudice of its breach-of-contract and *quantum meruit* claims. Therefore, the dismissal of those counts is affirmed. However, for the reasons that follow, we reverse the dismissal of the mechanic's lien counts and remand for further proceedings.

¶ 3 Plaintiff initiated this action to foreclose mechanics liens it filed against each of the properties owned by the homeowners in Lake Zurich, Illinois. According to plaintiff's third amended complaint, plaintiff had entered into a contract with Lake Zurich One, LLC (LZO),¹ to furnish labor and materials for the construction of sidewalks and driveways on the properties. At the time plaintiff and LZO entered into the contract, LZO owned the properties. Plaintiff completed work on May 12 and May 13, 2008, but was not paid by LZO. Plaintiff recorded its claims for lien against the properties on September 10, 2008. The record shows that the homeowners acquired title to the properties prior to the time plaintiff recorded its claims for lien. The trial court granted with prejudice the homeowners' motion to dismiss the third amended complaint on the basis that plaintiff failed to give the homeowners the 90-day notice of its claims for lien as required by section 24 of

¹The record shows that LZO was defaulted and judgment was entered against it and in favor of plaintiff in the amount of \$44,516.32 plus costs of \$435 and attorney fees in the amount of \$5,575.

the Mechanic's Lien Act (Act) (770 ILCS 60/24 (West 2010)). The trial court held that plaintiff was a contractor within the meaning of the Act when it entered into the agreement with LZO, but that it became a subcontractor at the time the homeowners acquired title. Plaintiff appealed.

¶4 The contract between plaintiff and LZO that was entered into on July 5, 2005, and that was attached as an exhibit to plaintiff's third amended complaint, is a generic preprinted form titled "Subcontract Agreement with Standard Terms and Conditions for Building Construction." Also attached as exhibits to the third amended complaint were copies of sworn "contractor's affidavits," furnished by an agent of plaintiff pursuant to section 5 of the Act, which requires a contractor to give the owner an affidavit of the names and addresses of all subcontractors furnishing labor, services, material, fixtures, apparatus, machinery, or forms or form work. (770 ILCS 60/5 (West 2010)). Plaintiff's sworn affidavits stated that plaintiff was a contractor and that a business named VCNA Prairie Illinois, Inc., was a subcontractor that supplied concrete on behalf of plaintiff, as contractor. Plaintiff's claims for liens, attached as exhibits to the third amended complaint, recited that plaintiff entered into a contract with the then-owner of the properties, LZO, to provide labor and material to install concrete drives, approaches, and walks.

¶5 The purpose of the Act is to protect those who, in good faith, furnish material or labor for the improvement of real property. *Mostardi-Platt Associates, Inc. v. Czerniejewski*, 399 Ill. App. 3d 1205, 1209 (2010). The Act permits a lien upon property where a benefit has been received by the owner and where the value or condition of the property has been increased or improved by the furnishing of the labor or materials. *Czerniejewski*, 399 Ill. App. 3d at 1209. The Act is a comprehensive statutory enactment that outlines the rights, responsibilities, and remedies of parties to construction contracts, including owners, contractors, subcontractors, and third parties. *Cordeck*

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Sales, Inc. v. Construction Systems, Inc., 382 III. App. 3d 334, 353 (2008). The burden of proving that each requirement of the Act has been satisfied is on the party seeking to enforce the lien. *Czerniejewski*, 399 III. App. 3d at 1209. Because the right to a mechanic's lien is statutory, a contractor must strictly comply with the Act. *Cordeck*, 382 III. App. 3d at 353. However, once a plaintiff has complied with the procedural requisites, the Act is liberally construed in order to accomplish its remedial purpose. *Weydert Homes, Inc. v. Kammes*, 395 III. App. 3d 512, 516 (2009). $\P 6$ Plaintiff contends that the trial court erred in dismissing with prejudice its third amended complaint to foreclose its mechanic's liens. We review the order dismissing the complaint *de novo*.

Kindel v. Tennis, 409 Ill. App. 3d 1138, 1140 (2011). The homeowners maintain (1) that plaintiff was a subcontractor when it contracted with LZO to furnish concrete work, or (2) that plaintiff was a contractor when it entered into the agreement with LZO but was converted to a subcontractor when it filed its claims for lien. The homeowners contend that, because they purchased the properties before plaintiff filed its claims for lien, plaintiff's status as a contractor shifted to that of a subcontractor. Whether plaintiff was a contractor or a subcontractor is significant, because a subcontractor is required to serve the owner of record with a written notice of his or her lien claim within 90 days after the completion of work. 770 ILCS 60/24(a) (West 2010). A contractor is not subject to the 90-day notice requirement. Parkway Bank & Trust Co. v. Meseljevic, 406 Ill. App. 3d 435, 447 (2010). In the present case, plaintiff did not serve a 90-day written notice on the homeowners pursuant to section 24(a) of the Act. Thus, if plaintiff was a subcontractor, its lien was never perfected. See Parkway, 406 Ill. App. 3d at 447 ("to perfect a mechanic's lien claim, section 24(a) of the Act requires a subcontractor to send or serve a notice of its lien claim within 90 days after completion of its work"). On the other hand, if plaintiff was a contractor, all it had to do to

perfect its lien against a purchaser was file its claims for lien within four months after completing work. 770 ILCS 60/7 (West 2010).

The homeowners argue that plaintiff admitted that it was a subcontractor in pleading its ¶ 7 original complaint. Plaintiff's original, unverified complaint, alleged that the homeowners were the "owners" of the properties; that LZO was a "contractor"; and that plaintiff was a "subcontractor" that was "originally employed" by the "general contractor." The homeowners successfully moved to dismiss the complaint on the basis that plaintiff failed to give the homeowners the written 90-day notice required of subcontractors under section 24(a) of the Act.² Plaintiff subsequently alleged in its first, second, and third amended complaints that it was a contractor. On appeal, the homeowners argue that plaintiff could not contradict its original admission that it was a subcontractor. Generally, an amended pleading supersedes a prior pleading, except that, where the original pleading is verified, it remains a part of the record and any admissions contained in the original verified pleading that are not the product of mistake or inadvertence are binding judicial admissions. Michael v. First Chicago Corp., 139 Ill. App. 3d 374, 379 (1986). In our case, the original complaint was not verified. Therefore, the rule that where an amendment to a pleading is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be part of the record for most purposes (Foxcroft Townhome Owners Assoc. v. Hoffman Rosner Corp., 96 Ill. 2d 150, 154 (1983)) applies to the instant situation. Additionally, the homeowners' characterization of the pleading as an "admission" is erroneous. Pleading that one is a subcontractor or a contractor is a legal conclusion that the court must disregard. *Parkway*, 406 Ill. App. 3d at 448.

² The court dismissed the complaint with prejudice but granted in part plaintiff's motion to reconsider, making the dismissal without prejudice and giving plaintiff leave to amend.

¶ 8 The term "contractor" is defined in section 1 of the Act, as follows:

"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 ***." 770 ILCS 60/1(a) (West 2010).

A subcontractor is defined as follows:

"every mechanic, worker or other person who shall furnish any labor, services, material, fixtures, apparatus or machinery, forms or form work for the contractor, or shall furnish any material to be employed in the process of construction as a means for assisting in the erection of the building or improvement in what is commonly termed form or form work, where concrete, cement or like material is used in whole or in part, shall be known under this Act as a subcontractor ***." 770 ILCS 60/21(a) (West 2010).

Quite simply, an entity that enters into a contract with an owner is a contractor under the Act. *Lyons Federal Trust & Savings Bank v. Moline National Bank*, 193 Ill. App. 3d 108, 115 (1990). Although the contract between plaintiff and LZO stated that plaintiff was a subcontractor, the contract was entered into by LZO as the owner, not as a general contractor. The preamble recited that the agreement was made between LZO as "owner" and plaintiff. The signature line on the last page of the contract showed clearly and unequivocally that LZO signed the contract as the owner. The parties do not dispute that LZO was actually the owner of the properties at the time of the contract. Plaintiff's claims for lien state that plaintiff entered into a contract with LZO, as owner.

¶9 It is LZO's status that necessarily determines plaintiff's status. See Lyons, 193 Ill. App. 3d at 115. In Lyons, certain individuals doing business as a real estate partnership owned the beneficial interest in an apartment complex development. Lyons, 193 Ill. App. 3d at 110. Wolfe provided electrical and plumbing services at the development, which resulted in the filing of a mechanic's lien. Lyons, 193 Ill. App. 3d at 110. The trial court denied Wolfe judgment on its mechanic's lien claim on the basis that it failed to give a timely subcontractor's notice under section 24 of the Act. Lyons, 193 Ill. App. 3d at 110. On appeal, Wolfe contended that it was a contractor, not a subcontractor. Lyons, 193 Ill. App. 3d at 114. The evidence showed that Wolfe had entered into a contract with one of the partners, who also owned the construction company that was the original contractor. Lyons, 193 Ill. App. 3d at 114. The question for the appellate court was whether, in contracting with Wolfe, the partner was purely a partial owner and agent of the partnership, or whether he was an original contractor in his capacity as owner of the construction company. Lyons, 193 Ill. App. 3d at 114-15. The court said that "determining [the partner's] status will necessarily determine Wolfe's status." Lvons, 193 Ill. App. 3d at 115. Even though Wolfe's invoices were directed to the partner's construction company, and even though the construction company filed a statement with the lender listing Wolfe as a subcontractor, the appellate court held that Wolfe was a contractor, because "[the partner], as authorized agent for [the partnership] entered into a contract with Wolfe." Lyons, 193 Ill. App. 3d at 115. Given that the partner, as owner and not as general contractor, entered into the contract with Wolfe, the court held that "it is clear that Wolfe must be considered a contractor under the Act." Lyons, 193 Ill. App. 3d at 115. Here, the evidence that plaintiff was a contractor is even more compelling. Unlike Wolfe, plaintiff at all times treated itself as a contractor, submitting a contractor's sworn statement and filing lien claims as a contractor.

Moreover, as plaintiff points out in its reply brief, there is no evidence that LZO could meet the definition of a contractor, as one who contracted with the owner for the purpose of improving a tract of land. LZO was the owner. This case does not present the situation that arose in *Lyons*, where the owner also owned a construction company that was involved in the development. Consequently, we conclude that plaintiff was a contractor under the Act.

¶ 10 The next question is whether the homeowners' purchases of the properties after plaintiff contracted with LZO to furnish labor and materials transmogrified plaintiff into a subcontractor. The homeowners attempt to distinguish cases cited by plaintiff, but the homeowners cite no authority for their position that plaintiff's contractor's liens metamorphosed into subcontractor's liens. In other words, the homeowners are adamant that the nature of a claimant's lien rights is determined by who owns the property at the time the claims for lien are filed. The homeowners vigorously contend, without authority, that subsequent purchasers who are not in privity of contract with the contractor, render the contractor a subcontractor who must give them a 90-day subcontractor's notice pursuant to section 24(a) of the Act. In the trial court, but less so before this court, the homeowners relied on Edward Electric Co. v. Automation, Inc., 164 Ill. App. 3d 547 (1988). Edward is inapposite, as it involved construction of section 24 of the Act, relating to subcontractors. The lien claimant in Edward was unquestionably a subcontractor. Edward, 164 Ill. App. 3d at 549. The issue before the court was whether a subsequent purchaser was an "owner of record," within the meaning of section 24, who had to be given the 90-day subcontractor's written notice. Edward, 164 Ill. App. 3d at 551-53. Here, plaintiff was a contractor, and the homeowners wholly ignore section 7 of the Act, which provides that a contractor can perfect its lien against subsequent purchasers by filing the claim for lien within four months of the last day of work:

"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* *** *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* ***. (Emphasis added). 770 ILCS 60/7 (West 2010).

The legislature plainly intended that a contractor who complies with the requirements of section 7 of the Act shall have the right to enforce his lien against subsequent purchasers. The lien rights created by the Act are entirely governed by the Act and not by rules of equity jurisprudence. *Wingler v. Niblack*, 58 Ill. App. 3d 287, 289 (1978). "[A]ny deviation from this principle by the courts in expanding or contracting the literal provisions of the law places the courts in the position of impermissibly exercising a legislative function." *Wingler*, 58 Ill. App. 3d at 289. In the present case, the trial court's ruling that a subsequent purchaser renders a contractor's lien a subcontractor's lien deviates from the literal provisions of the Act, as it eviscerates section 7.

¶ 11 Our supreme court in *Clark v. Moore*, 64 Ill. 273 (1872), articulated the law with regard to contractors' liens:

"When the contract to perform labor is made, the lien attaches. *** These liens are secret, attaching simply by furnishing labor or materials in constructing the building. The laborer or material-man is required to do no other act to secure his lien. *** *After the lien has attached, all persons deal with the property at their peril.* Under the law, it is the duty of those purchasing or taking liens on the property to ascertain, as best they may, whether it is

incumbered with mechanic's liens, *and they purchase it subject to such liens*." (Emphases added). *Clark*, 64 Ill. at 279.

Our supreme court followed Clark in City of Salem v. Lane & Bodley Co., 189 Ill. 593, 600 (1901), and confirmed that a subsequent conveyance does not impair a contractor's lien. This principle has endured into modern times. In Crane Erectors & Riggers, Inc. v. La Salle National Bank, 125 III. App. 3d 658 (1984), the plaintiff, a contractor that furnished a crane which became a permanent improvement, was entitled to enforce its mechanic's lien against a subsequent purchaser of the property. This court rejected the defendant's claim that it was not bound by the plaintiff's mechanic lien because it was a subsequent purchaser that took without notice of the lien. Crane, 125 Ill. App. 3d at 665. This court held that where the plaintiff perfected its lien within the four-month period required under the statute to enforce its lien against subsequent purchasers and brought suit within two years, proof of actual notice is irrelevant. Crane, 125 Ill. App. 3d at 665. In In re Saberman, 3 B.R. 316 (N.D. Ill. 1980), the court explained that, under Illinois law, if a contractor files a claim for lien within four months after the day of completion of performance, the lien will prevail against the original owner and other creditors, incumbrancers, and *purchasers*. Saberman, 3 B.R. at 318. If, however, the claim for lien is filed after four months, the lien will prevail against only the original owner but not third persons. Saberman, 3 B.R. at 318. Saberman stated that "this view has been strictly adhered to by the courts." Saberman, 3 B.R. at 319. In In re Germanson Decorating, Inc., 149 B.R. 522 (N.D. Ill. 1993), the court stated that if the contractor acts within the four-month period to perfect its lien, the perfection relates back and is good against any intervening claimants. Germanson, 149 B.R. at 527. The court made clear that where an owner sells the property to a bona fide purchaser without notice of the mechanic's lien claim, and where the mechanic's lien claimant

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perfected its lien before the four-month period expired, the mechanic's lien claim is good against the *bona fide* purchaser. *Germanson*, 149 B.R. at 528, n.10.

¶ 12 Thus, if plaintiff in our case filed its claims for lien within four months after the day it completed work, the lien claims are good against the homeowners. The record shows the following. With respect to the Koritala property, plaintiff completed work on May 13, 2008, and filed its claim for lien on September 10, 2008. With respect to the Nirav and Sapna Patel property, plaintiff completed work on May 13, 2008, and filed its claim for lien on September 10, 2008, and filed its claim for lien on September 10, 2008, and filed its claim for lien on September 10, 2008, and filed its claim for lien on September 10, 2008, and filed its claim for lien on September 10, 2008. With respect to the Zhen Wang/Amy Zhi Ying Cao property, plaintiff completed work on May 12, 2008, and filed its claim for lien on September 10, 2008. With respect to the Pankaj and Surabhi Patel property, plaintiff completed work on May 12, 2008, and filed its claim for lien on September 10, 2008. Each of the lien claims was filed within the statutory four-month period. Accordingly, plaintiff is entitled to enforce its mechanic's liens against the homeowners.

¶ 13 For the foregoing reasons, the judgment of the circuit court of Lake County dismissing with prejudice plaintiff's claims for breach of contract and quantum meruit is affirmed; the judgment dismissing with prejudice plaintiff's mechanic's lien claims is reversed and remanded for further proceedings consistent with this order.

¶ 14 Affirmed in part; reversed in part; remanded.

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