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2014 IL App (3d) 130643-U

Order filed December 18, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

ARK SPECIALTY SERVICE COMPANY,)
an Illinois Corporation,)

Plaintiff-Appellant,)

v.)

VINCE L. LETAMENDI and RUTH FREILE,)
a/k/a RUTH LETAMENDI, MORTGAGE)
ELECTRONIC REGISTRATION SYSTEMS,)
INC., UNKNOWN NECESSARY PARTIES)
and UNKNOWN OWNERS,)

Defendants-Appellees.)

Appeal from the Circuit Court
of the 12th Judicial Circuit,
Will County, Illinois.

Appeal No. 3-13-0643
Circuit Nos. 09-CH-2055
09-CH-5686

ONE WEST BANK, FSB (U.S. Bank National)
Association, as Trustee for LXS 2007-4N))

Plaintiff-Appellee,)

v.)

VINCE L. LETAMENDI and RUTH FREILE,)
a/k/a RUTH LETAMENDI, MORTGAGE)
ELECTRONIC REGISTRATION SYSTEMS,)
INC., UNKNOWN NECESSARY PARTIES)
and UNKNOWN OWNERS,)

Defendants)

(ARK Specialty Service Company,
Defendant-Appellant).

Honorable Richard J. Siegel,
Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in finding ARK's mechanic's lien subordinate to the preexisting mortgage, where ARK failed to file said lien within four months of completion of its work.

¶ 2 The primary issue before us is whether a contractor's failure to file its mechanic's lien within four months of completion of its work rendered its lien inferior to that of a preexisting mortgagee. The trial court held that it did. We agree and affirm.

BACKGROUND

¶ 4 Homeowner, Vince Letamendi, granted a mortgage to Mortgage Electronic Registration Systems, Inc., (MERS) in August 2006. A fire substantially damaged the property in November 2007. Letamendi contracted with a repair servicer to restore the property. The contractor stopped performing on the contract prior to completing the job. Letamendi contracted with ARK Specialty Service Company (ARK) to complete the work. ARK completed its work on October 6, 2008. On February 24, 2009, 4 months and 16 days after the completion of the work, ARK recorded its mechanic's lien with the recorder of deeds. From the date of the contract through the date of filing the lien, no creditor or purchaser obtained any interest in the land.

¶ 5 ARK filed for foreclosure upon its mechanic's lien on April 17, 2009. At that time, Letamendi owned the home; MERS held the preexisting and only mortgage interest in the property. ARK named MERS as a party defendant. On November 17, 2009, MERS assigned the

mortgage to OneWest Bank. On November 16, 2009, one day before the date of the assignment, OneWest Bank filed a mortgage foreclosure action.

¶ 6 ARK filed a motion to dismiss OneWest's foreclosure complaint, claiming: (1) ARK's foreclosure action was a prior pending action; and (2) OneWest lacked standing to file for foreclosure. Subsequently, ARK withdrew its motion to dismiss. The court consolidated ARK's mechanic's lien foreclosure action with OneWest Bank's foreclosure action.

¶ 7 OneWest Bank filed a motion for summary judgment, seeking a judgment of foreclosure and a determination that the mortgage had priority over the mechanic's lien. During litigation, U.S. Bank purchased the mortgage.

¶ 8 The court entered summary judgment in favor of U.S. Bank. The trial court found ARK's lien subordinate to the mortgage as a result of ARK's failure to file its mechanic's lien within four months of completing its work.

¶ 9 ARK appeals.

¶ 10 ANALYSIS

¶ 11 I. OneWest Bank's Standing

¶ 12 ARK argues that OneWest Bank lacked standing due to the fact that OneWest Bank initiated a foreclosure action prior to receiving an assignment of the mortgage. The bank argues that ARK failed to preserve the issue for appeal. We agree.

¶ 13 Lack of standing is an affirmative defense; failing to raise the standing issue in a timely manner in front of the trial court results in the party forfeiting the issue on appeal. *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6 (2010) (citing *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988)). Here, ARK filed a motion

to dismiss, alleging that OneWest Bank lacked standing, but subsequently withdrew the motion. Therefore, ARK affirmatively waived the standing issue by abandoning the issue below.

¶ 14 II. Priority of ARK's Mechanic's Lien with Respect to the Preexisting Mortgage

¶ 15 ARK argues that its mechanic's lien has priority over the preexisting mortgage; the four-month filing requirement is meant to protect only those interests acquired after construction began. The four-month filing period, says ARK, does not apply to preexisting mortgages. Additionally, ARK argues that the preexisting mortgagee held an ownership interest in the property at the time the improvements were made; thus the Mechanics Lien Act (the Act) (770 ILCS 60/1 (West 2010)) required ARK to file its lien within two years after completion of its work. We disagree.

¶ 16 Section 16 of the Act addresses the priority of competing incumbrances against the land:

"No incumbrance upon land, created before or after the making of the contract under the provisions of this act, shall operate upon the building erected, or materials furnished until a lien in favor of the persons having done work or furnished material shall have been satisfied, and upon questions arising between incumbrancers and lien creditors, all previous incumbrances shall be preferred to the extent of the value of the land at the time of making of the contract, and the lien creditor shall be preferred to the value of the improvements erected on said premises, and the court shall ascertain by jury or otherwise, as the case may require, what proportion of the proceeds of any sale shall be paid to the several parties in interest." 770 ILCS

60/16 (West 2010).

¶ 17

Section 7 of the Act in relevant part states:

"(a) 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." 770 ILCS 60/7(a) (West 2010).

¶ 18 A mechanic's lien "extends to an estate in fee, for life, for years, or any other estate or any right of redemption or other interest that the owner may have *** at the time of making such contract or may subsequently acquire." 770 ILCS 60/1(a) (West 2010).

¶ 19 A. Four-Month Filing Requirement

¶ 20 ARK requests that this court to interpret "any other creditor, incumbrancer, or purchaser" to mean only those interests acquired after the construction or improvements began; if the legislature intended to include preexisting mortgages, section 7 would simply state "any" creditor. We disagree.

¶ 21 Mechanic's liens were not recognized at common law, thus the statute will be strictly construed. *First Federal Savings & Loan Ass'n of Chicago v. Connelly*, 97 Ill. 2d 242, 246 (1983). Where the language of the statute is clear and unambiguous, a court will apply the statute as written without reference to extrinsic evidence. *People v. Perry*, 224 Ill. 2d 312, 323 (2007). Additionally, a court will not read into the plain meaning exceptions, limitations, or conditions that conflict with the expressed words. *People v. Martinez*, 184 Ill. 2d 547, 550 (1998). Section 7 does not distinguish between interests acquired before or after the construction contract. Instead, "any other" distinguishes the contractor, who is a creditor, from other creditors, purchasers, or incumbrancers.

¶ 22 Moreover, no court has distinguished creditors, incumbrancers, and purchasers based on whether the creditor acquired an interest prior to or subsequent to the construction contract.

Over 150 years ago, our supreme court held “any other creditor, or incumbrancer” used in the then-current mechanic's lien statute meant all creditors and incumbrancers, whether those interests were created prior to or subsequent to the making of the contract under which the person seeks to enforce the lien. *Shaeffer v. Weed*, 8 Ill. 511, 513 (1846). In *McDonald v. Rosengarten*, the Illinois Supreme Court held that no creditor can enforce a mechanic's lien against any other creditor or incumbrancer unless the lien was filed within four months; the court rejected the argument that this did not apply to preexisting liens. *McDonald*, 134 Ill. 126, 130-32 (1890) (citing *Shaeffer v. Weed*, 8 Ill. 511 (1846)). The legislature did not reject the judicial construction of the term “any other creditors or incumbrancer” when amending the statute in 1903. Therefore, the judicial construction of the term is part of section 7. *La Salle Bank National Ass'n v. Cypress Creek I, LP*, 242 Ill. 2d 231, 243 (2011) (consistent judicial construction of a statute becomes part of the statute unless the legislatures rejects the interpretation).

¶ 23 The Act required ARK to file its mechanic's lien within four months of completion of its work in order to establish priority over the mortgage, regardless of the fact that the mortgage was preexisting. ARK failed to do so. The trial court did not err in ruling that the preexisting mortgage had priority over ARK's mechanic's lien.

¶ 24 B. Mortgagee's Interest in Mortgaged Premise: Lien Versus Ownership

¶ 25 ARK argues that the mortgagee held an ownership interest, as opposed to third party interest; thus the Act required ARK to file its lien within two years of completion of its work. We disagree.

¶ 26 A mortgage does not convey either legal or equitable title to the mortgaged property; it merely gives the holder of the mortgage a lien on the property. *M. Ecker & Co. v. La Salle*

National Bank, 268 Ill. App. 3d 874, 878 (1994). An owner holds some interest in the land, either an equitable or a legal interest. *Id.* A mortgagee is not an owner, but is, instead, a third party. *Id.* "[T]hird parties" refer to other " 'creditor[s] or incumbrancer[s] or purchaser[s]' " and courts use the term to distinguish that group from owners. *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 359 (2008). Here, the mortgagee did not hold a legal or equitable title to the mortgaged property; the bank merely had a lien on the property. The court did not err in finding that the bank did not hold an ownership interest.

¶ 27

CONCLUSION

¶ 28

Mortgagees are lienholders, not owners. ARK's failure to record its lien within four months of completing its work prevents it from establishing priority over the preexisting mortgage.

¶ 29

For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 30

Affirmed.