

For Opinion See [2009 WL 2914204](#)

Appellate Court of Illinois, First District.
CORDECK SALES, INC., Plaintiff,
v.
CONSTRUCTION SYSTEMS, INC., et al., Defendants;
First Midwest Bank, Appellant,
v.
Construction Systems, Inc. and Cordeck Sales, Inc., Appellees.
No. 1-08-0554.
November 5, 2008.

Appeal from Circuit Court of Cook County, Illinois

Trial Judge: Clifford L. Meacham Trial Court No. 03 CH 6309 Consolidated Date of Notice of Appeal: 2/21/08 Date of Judgment: 2/15/08

Brief of Defendant-Appellee Construction Systems, Inc.

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***1 NATURE OF THE ACTION**

This is an action for foreclosure of a mechanic's lien claim brought by Construction Systems, Inc. ("CSI") for more than \$1.7 million for the supply of unpaid materials and services in connection with the construction of a six-story condominium building located at the intersection of Halsted, Milwaukee and Grand Avenues in Chicago, Illinois ("Montrevelle" or the "Project"). More than twenty-five mechanic's lien claims were recorded against the Project and litigated in the trial court before the Honorable Clifford L. Meacham. At no time during the course of the proceedings in the trial court did the Appellant, First Midwest Bank ("First Midwest") challenge the work performed and materials supplied by CSI or the amount claimed by CSI for its unpaid materials and services. On October 30, 2006, the trial court entered summary judgment on the validity of CSI's lien; thereafter, a trial on the issue of damages was held, after which CSI was awarded its full amount sought of \$1,786,700.65 plus interest in the amount of \$818,444.00, for a total judgment of \$2,615,144.65. The judgment includes the amount sought by CSI's erection subcontractor, Cordeck Sales, Inc., of \$415,430.48, for which a separate mechanics lien claim was pursued.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court correctly found that First Midwest waived the issue of the adequacy of the legal description attached to CSI's claim for lien in that First Midwest failed to timely raise the issue; or, alternatively,
2. In the event that First Midwest is able to raise the issue after hearing on the motions for summary judgment on the validity of the lien, whether the legal description correctly describes the property such that a third party would be placed on notice of the existence of the lien; or, alternatively,
3. Whether the Illinois Condominium Property Act requires a mechanic's lien incurred in connection with the development of the property to use the legal description recorded with the condominium declaration prior to the conveyance of a unit to a purchaser;

4. Whether First Midwest waived any attack on the sufficiency of CSI's affidavit in support of its completion date by failing to raise the issue in the trial court, or, alternatively,
5. *Whether* the trial court correctly found that no genuine issue of material fact existed with respect to whether CSI recorded its lien within four months of its completion date;
6. Whether First Midwest waived the defense of the application of Section 6 of the Mechanic's Lien Act by failing to properly raise it in the trial court, or, alternatively,
7. Whether compliance with Section 6 of the Mechanic's Lien Act was obtained by the inclusion of a completion date in the contract between the general contractor, Construction Services International, Inc. and the owner of the project; or, alternatively,
8. Whether CSI's delivery of materials and services occurred within a three-year period in view of the delays in the project which were caused by the owner, the owners title company and/or the owners lenders;
9. Whether the trial court erred in failing to require CSI to produce a settlement agreement between CSI and its erection subcontractor, Cordeck Sales, Inc. ("Cordeck Sales");
10. Whether this Court should revisit an issue resolved in the prior appeal of this case; and
11. Whether an exception to the "innocent reliance" rule should be carved out for the benefit of First Midwest.

STANDARD OF REVIEW

CSI agrees with the Standard of Review as set forth in First Midwest's brief subject to the addition of the following: whether to allow a party to raise an issue not previously formulated in a motion for summary judgment after hearing on the motion is within the discretion of the trial court. [Robidoux v. Oliphant, 201 Ill.2d 324, 775 N.E.2d 987, 266 Ill.Dec. 915 \(2002\)](#).

STATUTES INVOLVED

[765 ILCS 605/9.1:](#)

(a) Other liens; attachment and satisfaction. * * *

Each mortgage and other lien, including mechanic's liens, securing a debt incurred in the development of the land submitted to the provisions of this Act for the sale of units shall be subject to the provisions of this Act, subsequent to the conveyance of a unit to the purchaser. * *

[770 ILCS 60/6:](#)

In no event shall it be necessary to fix or stipulate in any contract a time for completion or a time for payment in order to obtain a lien under this act, provided, that *4 the work is done or material furnished within three years from the commencement of said work or the commencement of furnishing said material.

STATEMENT OF FACTS

The Statement of Facts submitted by First Midwest is incomplete in some respects. Accordingly, the undisputed facts concerning CSI's involvement in the Project are as follows:

A. The contract documents and relevant parties

On June 10, 2000, Savannah, as beneficial owner of the Project ("Owner"), entered into a General Contract with Construction Services International, Inc., pursuant to which Construction Services *International*, Inc. agreed to provide general contracting services in connection with the Project. (Cordeck Sales Exhibit 28, R.Vol. 15)^[FN1]. In order to carry out the terms of the General Contract, on or about March 8, 2002, Construction Services International, Inc., as original contractor, entered into a written agreement with CSI to provide structural steel materials and erection in connection with the Project. (R.C 00083 - 00091). Thereafter, CSI entered into a subcontract with Cordeck Sales to supply erection of CSI's materials. (Cordeck Sales Exhibit 1, R.Vol. 15).

FN1. The trial exhibits are cited by party, exhibit number and volume in the record. Witness testimony is cited by the witness' name, date/session, volume and page in the record.

B. CSI's performance on the Project

Between June, 2002 and June 18, 2003, CSI furnished materials and services in connection with the Project in the total value of \$2,815,813.40, for which CSI received payment in the amount of \$1,029,112.75. (CSI Exhibit 40, R.Vol. 11). CSI received no payments after October 11, 2002, but continued to work until June 18, 2003, based on representations of the Owner that payment was forthcoming. (R.Vol. 6 00059; R.C 00936-00941). When CSI was no longer able to pay an erector to install the materials, Perry Haberer, the vice president of CSI, and several of the employees from the fabrication plant in Minnesota, traveled to Chicago to perform work on the Project. (R.C 00936-00941). CSI completed the supply and installation of its materials on June 18, 2003. (R.C 00935-00941).

C. The litigation

On April 7, 2003, Cordeck Sales initiated this litigation by filing a complaint to foreclose its mechanic's lien claim. (R.C. 00002-00033). On July 30, 2003, CSI sent its Verified Notice of Lien to all parties entitled thereto. (R.C 00093 - 00098). On September 25, 2003, CSI recorded its lien with the Cook County Recorder of Deeds. (R.C 00100-000120).

On February 26, 2004, the Court appointed a receiver for the purpose of completing the construction of the Project and selling units; no units were conveyed prior to the appointment of the receiver. (Supp. R.C____). The proceeds from the sales of the units were placed in escrow with the Clerk of Court, to be held pending adjudication of the lien claims. (Supp. R.C____).

D. The summary judgment motions

CSI, along with other lien claimants, filed a motion for summary judgment relating to the priority of their liens over the mortgage lien of First Midwest. (2nd Supp. R.C____)^[FN2]. The trial court granted the motion, finding that since the contract between the Owner and Construction Services International, Inc. predated the recording of First Midwest's mortgage, and since the lien claimants were subcontractors of Construction Services International, Inc., the liens had priority over First Midwest's mortgage. (R.C00230 00234).

FN2. This motion, along with other materials which were discovered to be missing from the record on appeal, will be submitted as a part of a 2nd Supplemental Record on Appeal.

On June 30, 2006, First Midwest moved for partial summary judgment on CSI's counterclaim. (R.C 00175 - 00176). On July 21, 2006, CSI moved for partial summary judgment on the issues of the validity of its lien and the effect of

the partial lien waivers. (R.C 00383 - 00424; R.C 00425 - 00450). After the hearing held October 12, 2006, the trial court entered summary judgment in favor of CSI on the issue of the partial waivers of lien and asked for additional evidence regarding the last day of CSI's work on the Project. (R.C 00860, R.Vol. 6 00014 - 00018). Thereafter, CSI filed its supplemental memorandum and affidavit (R.C 00936-00941) and First Midwest filed its supplemental memorandum. (R.C 00955 - 00999; 01002 - 1071). On October 30, 2006, the trial court entered partial summary judgment in CSI's favor on the issue of the validity of its lien and denied First Midwest's cross motion. (R.C 01072). The trial court denied Cordeck Sales' motion for summary judgment and First Midwest's cross motion for summary judgment with respect to Cordeck Sales. (R.C00859).

E. The trial

CSI then proceeded to trial on the issue of damages only; Cordeck Sales proceeded to trial on the issue of the validity of its lien and its damages. Thereafter, on December 12, 2007, the trial court found in favor of CSI on the issue of the application of Section 6 of the Mechanic's Lien Act, and on February 15, 2008, entered judgment in CSI's favor in the amount of \$1,786,700.65 plus interest in the amount of \$818,444.00, for a total judgment of \$2,605,144.66. (R.C 01224- 01244).

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT CSI'S LIEN COMPLIED WITH SECTION 7 OF THE MECHANIC'S LIEN ACT

A. First Midwest waived its objection to the issue of the legal description attached to CSI's lien by not raising this issue prior to the hearing on the cross motions for summary judgment

The issue now raised by First Midwest - that CSI's lien is invalid in that it relies upon a legal description which was superseded by the filing of the condominium declaration - is without merit; First Midwest waived this argument by neither raising it prior to the hearing on the cross motions for summary judgment nor by asserting it as an affirmative defense. It has frequently been held that the theory upon which a case is tried in the lower court cannot be changed on review, and that an issue not presented to or considered by the trial court cannot be raised for the first time on review. *Kravis v. Smith Marine, Inc.*, 60 11.2d 141, 147, [324 N.E.2d 417, 420 \(1975\)](#). A corollary to this rule allows a party to defend a judgment on review by raising an issue not previously ruled upon by the trial court, but only if the necessary factual basis for the determination of such point was contained in the record. *Id.* at 147, [324 N.E.2d at 420](#). Additionally, an issue not presented to or considered by the trial court is deemed to be waived and need not be considered on appeal, including an appeal from summary judgment. *Harbor Insurance Company v. Arthur Andersen & Co.*, 149 Ill.App.3d 235, 240, 500 N.E.2d 707, 711, 102 Ill.Dec. 814, 818 (1st Dist. 1986).

***8** 1. The trial judge requested additional evidence on a specific issue only; he did not invite litigation of completely new issues.

On July 21, 2006, CSI filed its motions for partial summary judgment on the issue of the validity of its lien and the effect of the lien waiver. (R.C 00383-00424). First Midwest filed its response to CSI's motions and its own cross motion addressed to the validity of CSI's lien. (R.C00583-00682; R.C 00235-00243). During the hearing held October 12, 2006 on all motions, the trial court asked for additional evidence with regard to CSI's last day of work on the Project:

‘Mr. Dash (counsel for First Midwest): What I'm saying is, Judge, they actually have to prove, because it's their burden, that on or after May 25th Construction Systems, Inc. actually delivered material to the site, or if they were going to do some installation work, which I'm not aware has been made here. I mean, maybe Construction Systems does that, but there's no allegation that it did it here in this case.

‘The Court: What does Mr. Haberer's (the vice president of Construction Systems') affidavit say? * * * I need to

make certain that the affidavit which I have is the one that you're making reference to with respect to when and under what circumstances CSI was on-site.

'Ms. Berres (counsel for CSI): I don't believe there is another affidavit that addresses his last day on the job. He swore in his signed and attested lien claim that his last day on the job was June 18th. They have that. There is no material issue of fact.* * *There is no contrary affidavit stating that Construction Systems was not on the job. All they have put in is the bare assertion that we don't know that they were there * * * -

*9 "The Court: So we have two bare assertions. Here's what we are going to do. We are going to take the time to get this right. I will allow you to supplement (referring to counsel for CSI), and I will allow you to supplement as well (referring to counsel for First Midwest). *The issue is, as far as I'm concerned, the extent of proof or lack of proof that they were on the job either supplying materials and/or performing services.*"

(Transcript of proceedings on October 12, 2006 at pp. 13 - 17, Supplementary Appendix ("Supp. App.") at pp. 6-8; R. Vol. 6 00014- 00018). (Emphasis added).

Thus the trial court afforded both parties the right to supplement the record *solely* with respect to the last day of work on the Project. CSI filed its Supplemental Memorandum and Affidavit (Construction Systems, Inc.'s Supplemental Memorandum Regarding Completion Date, Supp. App. at pp. 66 - 70; R.C00936 - 00941); thereafter, First Midwest filed its Supplemental Response, which raised, for the first time, the issue of the adequacy of the legal description. (R.C 00955 - 00999; R.C 01002 - 01071).

At the hearing held on October 30, 2006, the Court found that First Midwest failed to timely raise the new issue:

"The Court: Not an issue, Mr. Dash. This is known as checking and raising in my world. You don't wait until this point in time, and this isn't the first time that it's done here. I consider this to be profoundly inappropriate. I won't consider it for an instant, except as an example of inappropriate conduct. * * *

"Mr. Dash: Your honor, the Court gave Ms. Berres the opportunity to supplement the record on a motion that clearly was not sufficient to grant it.

*10 "The Court: That was on an issue of the last day of work. That was on an issue that had already been formulated, and there was a reasonable question, given the AMEC documents, given everything. My job here is to get it right, Mr. Dash. My job isn't to give everybody an opportunity to make it up as they go along or to make an argument at this point in time that could have been made when you answered.

You're telling me that this argument couldn't have been raised at a much earlier point in time. Tell me what your reason is for raising it at this point; oh, because she got a chance to file a supplementary affidavit, so now I'm going to introduce an entirely different legal theory, one we haven't heard one thing about, for the first time when we are looking at this trial next week. That's fair to you, Mr. Dash?

"Mr. Dash: Your Honor, this is an essential element of the plaintiffs claim that could have been raised-

"The Court: Then why didn't you raise it years ago? * * * Why would you wait * * *

Let's see when this case was filed. Well back in about May of'03. And we're going to raise this for the first time"

(Transcript of proceedings for October 30, 2006 at pp. 9-13, Supp. App. at pp. 16-18; R. Vol. 6 00038-00043).

It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal. [Haudrich v. Howmedica, Inc.](#), 169 Ill.2d 525, 536, 662 N.E.2d 1248, 1253, 215 Ill.Dec. 108 (1996). This includes issues relating *11 to summary judgment proceedings: issues not raised and theories not argued are waived. [E&E Hauling, Inc. v. Ryan](#), 306 Ill.App.3d 131, 140, 713 N.E.2d 178, 185, 238 Ill.Dec. 932, 939 (1999); [Sasser v. Alfred Benesch & Co.](#), 216 Ill.App.3d 445, 452, 576 N.E.2d 303, 308, 159 Ill.Dec. 634 (1991). Similarly, a party cannot raise an issue for the first time on review where a factual basis for the issue is not present in the record. [Kravis v. Smith Marine, Inc.](#), 60 Ill.2d 141, 147, 324 N.E.2d 417, 420 (1975). First Midwest did not raise the issue of the adequacy of the legal description at an appropriate point in the proceedings; as a result, the issue has been waived.

2. First Midwest had a history of delay in its management of the litigation

Furthermore, a party's pattern of conduct in a case can influence and support a trial courts decision whether or not to allow an untimely filing. In [Robidoux v. Oliphant](#), 201 Ill.2d 324, 345-346, 775 N.E.2d 987, 999, 266 Ill.Dec. 915, 927 (2002), the Illinois Supreme Court considered the propriety of a trial courts refusal to accept an affidavit submitted in support of a motion to reconsider the granting of summary judgment. The *Robidoux* trial judge stated that "(t)here is simply no explanation, much less a good one tendered, as to why the supplemental affidavit * * * was not submitted' prior to the trial courts decision on the motion for summary judgment. In reaching its decision, the Illinois Supreme Court relied upon [Gardner v. Navistar International Transportation Corp.](#), 213 Ill.App.3d 242, 248-249, 571 N.E.2d 1107, 157 Ill.Dec. 88 (1991):

"Civil proceedings already suffer from far too many delays, and the interests of finality and efficiency *require* that the trial courts not consider such late-tendered evidentiary material, no matter what the contents thereof may be."

*12 (Emphasis in original). [Robidoux v. Oliphant](#), 201 Ill.2d 324, 346, 775 N.E.2d 987, 999, 266 Ill.Dec. 915, 927 (2002). The trial judge in *Robidoux* also noted that there had been a chronic pattern of tardiness throughout the case which had infected the proceedings.

Similarly, the trial court in the present case was contending with an ongoing pattern of dilatoriness in First Midwest's defense of the mechanic's lien claims:

"As I say, this is not the first time it's happened here, and I won't stand for it. Don't take it personally, but it's not the way the ball game is played here. * * *(You) don't litigate a case here for as long as this case has been litigated and wait until after there's been a fully formed Motion for Summary Judgment which doesn't even come close to raising this issue and then raise it at the 11th hour."

(Transcript of proceedings for October 30, 2006 at pp. 9-10, Supp. App. at 16-17; R. Vol. 6 00038-00039). In view of the pattern of delay, the trial judge was well within his discretion in refusing to allow First Midwest to interpose a completely new defense, with no factual basis in the record as it existed, at this point in the proceedings.

3. Section 2-1005(c) does not support the late filing of an additional defense to a motion for summary judgment

Additionally, [Section 2-1005\(c\) of the Illinois Code of Civil Procedure](#) addresses the time at which a party may file responsive materials to the motion for summary judgment:

"(c) Procedure. The opposite party may prior to or at the time of the hearing on the motion file counteraffidavits. The judgment sought shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.* * *"

*13 [735 ILCS 5/2-1005\(c\)](#).

In a similar case, the First District interpreted the meaning of the word "hearing" as it is used in the context of [Section 2-1005\(c\)](#). In [Amaral v. Woodfield Ford Sales, Inc.](#), 220 Ill.App.3d 357, 581 N.E.2d 19, 163 Ill.Dec. 68 (1st Dist. 1991), the parties argued the summary judgment motion on August 9, 1989, but the judge found that since the parties had only attached excerpts from the deposition to their pleadings, she needed the entire transcript prior to ruling. As a result, an order was entered which continued the hearing to October 10, 1989 for ruling and granting the defendant the opportunity to file the entire deposition transcript. On October 6, 1989, the plaintiff moved for leave to file his counteraffidavit; the trial court denied the motion and ultimately entered summary judgment in favor of the defendant.

On appeal the plaintiff argued that the judge abused her discretion by not granting him leave to file his counteraffidavit, in that the hearing had not concluded. The appellate court disagreed:

"The plain language of [section 2-1005\(c\)](#) allows an opposing party to file a counter-affidavit prior to or at the time

of hearing. The pivotal question raised by the facts at bar is the meaning of the phrase 'at the hearing.' Plaintiff contends that until a ruling is entered, the hearing has not concluded. Woodfield, however, contends that the hearing concluded on August 9, 1989, when the parties completed their arguments"

The hearing, the appellate court found, consists of the arguments and may conclude without a ruling; therefore, the trial court did not abuse its discretion in refusing leave to the plaintiff to file his counteraffidavit four days before the case was set for ruling.

*14 Similarly, the trial court in the present case had already held the hearing on the issues raised with respect to the motions for summary judgment relating to the validity of the lien. First Midwest did not raise the issue in its pleadings, in its cross motion for summary judgment, during briefing on the motions or even during the argument on the motions; it wasn't until after the hearing, when the trial court granted leave to the parties to supplement the record with respect to the issue of the completion date only, that First Midwest attempted, without seeking leave of court, to interject the issue of the adequacy of the legal description used in the lien. This afforded CSI no opportunity to refute the issue or to present contrary evidence. Not surprisingly, the trial court was not receptive to the new defense, raised-for the first time five years after the case was filed.

B. Even if First Midwest had been allowed to interject the issue of the adequacy of the legal description, the trial court properly found that CSI's lien was valid

1. The recorded lien would appear in the chain of title for any unit, regardless of whether the metes and bounds or the condominium declaration legal description was used

Two other claims were tried along with that of CSI (which went to trial on the issue of damages only): Cordeck Sales and Great Lakes Building Materials ("GLBM"). Both the Cordeck Sales and the GLBM claims were tried with regard to both the validity of their liens and the amount of damages. In the GLBM case, First Midwest had timely raised the issue of the legal description attached to the claim for lien; GLBM relied upon the metes and bounds legal description after the condominium declaration was recorded. Testimony was elicited from Darryl Phillips, director of the office of the Cook County Recorder of Deeds, with respect to whether a lien relying on a metes and bounds description would appear in the chain of title for the property. (Transcript of testimony of December 8, 2008 at pp. 9 - 10, 11 - 12, 16 - 18, Supp. App. at 50 - 52, 54 - 55; R. Vol. *15 8, 94 - 97). After hearing this testimony, the trial court ruled that the failure to use the legal description from the condominium declaration was not fatal to GLBM's lien. However, as a result of another defect in GLBM's lien, judgment was rendered in favor of First Midwest on GLBM's claim. (Order of February 15, 2008 at p. 17, para. 6, Supp. App. at p. 40, R.C 01240).

With respect to CSI's lien claim and the adequacy of the legal description, the trial court first points out that First Midwest had not challenged the order entered October 30, 2007, establishing the validity of CSI's lien. The trial judge then addressed the merits of the defense relating to the legal description:

"Even if this issue was timely raised, this Court finds the legal description adequate to put third parties on notice given the testimony of Darryl Phillips of the Cook County Recorder of Deeds' office: the fact that no PIN numbers had issued to condominium units, the fact that the four parcels described were identical and the fact that no units had been sold. Additionally, the stricter construction as to third parties discussed in [Steinberg v. Chicago Title & Trust Co.](#), 142 Ill.App.3d 601 (1st Dist. 1986) is distinguishable where, as here, FMB is successor by merger to CoVest, with the merger occurring well after the litigation was initiated."

(Order entered February 15, 2008, at p. 16, Supp. App. at p. 39, R.C 01243).

Darryl Phillips testified that a metes and bounds legal description with PIN numbers, such as that included in CSI's lien, when entered into the Recorder's computer, will appear on the title of every condominium unit and parking place in the Project. (Transcript of Proceedings for December 8, 2006 at pp. 12-13, 16 - 18, Supp. App. at *16 pp.54

- 55, R. Vol. 8 00095 - 00097.) This would give notice to the public of the existence of a lien against every unit and parking place in the Project. (Transcript of Proceedings for December 8, 2007 at p. 18 - 19, Supp. App. at pp. 55 - 56, R. Vol. 8 00097). Before there is a condominium there is a parcel of undivided land, and that land will have at least two underlying property identification numbers (PIN's). (Transcript of Proceedings for December 8, 2007 at pp. 16 - 17, Supp. App. at pp. 54 - 55, R. Vol. 8 00096.) After the condominium declaration is filed, it will take a year to get the individual PIN's for the condominium units. (Transcript of Proceedings for December 8, 2007 at pp. 16 - 17, Supp. App. at pp. 54 - 55, R. Vol. 8 00096). When the new PIN's are received and entered into the computer, they will appear in the chain of title of the individual units. (Transcript of Proceedings for December 8, 2007 at p. 17, Supp. App. at pp. 54 - 55, R. Vol. 8 00096). The legal description of the individual units (the kind of legal description included with a condominium declaration) is not necessary to detect the existence of a lien recorded against the entire property, as a lien with a metes and bounds description will appear on the title of the property. (Transcript of Proceedings for December 8, 2007 at pp. 17 - 18, Supp. App. at pp. 54 - 55, R. 00096 - 00097).

Thus the public, including any third parties, had they been inclined to search the property records for the Project, would have been apprised of the existence of CSI's lien despite the use of the metes and bounds description. Unlike the plaintiff in [Steinberg v. Chicago Title & Trust Co., 142 Ill.App.3d 601, 491 N.E.2d 1294, 96 Ill.Dec. 834 \(1st Dist. 1986\)](#), the use of the metes and bounds description did not place an undue burden on First Midwest, in derogation of Section 7 of the Act, by forcing them to decipher such *17 descriptions to determine the status of the property. The status of the property, including the existence of CSI's lien, was readily available whether the search was performed for the whole parcel or for an individual unit. In *Steinberg*, there was no evidence that the lien would appear in the chain of title for any of the individual parcels created by the subdivision of the property. *Id.* at 607, [491 N.E.2d at 1297-1298, 96 Ill.Dec. at 837-838](#). In the present case, the director of the Recorder of Deeds office testified that even with a metes and bounds description, the lien would appear in the title of the individual condominium units.

2. *Steinberg* is inapposite to the present case, in that no sales of any of the units, or encumbrances by new mortgages, had occurred

Additionally, First Midwest's claim is particularly disingenuous in that First Midwest assumed a pre-existing mortgage. Financing for the Project was initially provided by CoVest Bank (CoVest) pursuant to a mortgage recorded May 11, 2001. First Midwest is the successor by merger to CoVest, which merger occurred about one year after the litigation commenced. (R.C 00123 - 00158, 01225). The litigation relating to this Project commenced in April, 2003, when Cordeck Sales filed its lien foreclosure action. Both CSI and Covest were made parties defendant in this action from the outset. Unlike the defendants in *Steinberg*, First Midwest had ample notice of the existence of the liens.

Furthermore, in *Steinberg*, the mechanic's lien was not recorded until one and one-half years after the plat of subdivision had been recorded. *Id.* at 606, [491 N.E.2d at 1297, 96 Ill.Dec. at 837](#). The mechanic's lien foreclosure was not filed until five months later. "As a result, at the time the lien was filed, the land to which the lien sought to attach had changed from a raw tract of land identified by three perimeter metes and *18 bounds descriptions to subdivided land recorded by plat and sold to, or encumbered by, third parties. *In such a situation*, the use of metes and bounds descriptions when a plat legal description is available places an undue burden in derogation of section 7 on third parties by forcing them to decipher such descriptions to determine the status of the property." *Id.* at 606-607, [491 N.E.2d at 1297, 96 Ill.Dec. at 837](#). (Emphasis added). Conversely, in the present case no units had been sold to third parties and no units were encumbered by new mortgages. The recording of the condominium declaration occurred well after the recording of many mechanic's liens and after the litigation began. The only encumbrancer was First Midwest, as successor by merger to CoVest, which had encumbered the land well before the mechanic-s liens arose. The *Steinberg court* limited its holding to a situation in which subdivided land had been sold to or encumbered by third parties; no such sale or encumbrance has occurred in the present case.

The purpose of the description requirement is to protect third parties from purchasing or financing real property without being aware that it is encumbered. *Id.* at 606, [491 N.E.2d at 1297, 96 Ill.Dec. at 837](#). The case presented to

this Court does not present a situation in which an innocent third party was unable to discover the existence of CSI's lien.

C. The Illinois Condominium Property Act distinguishes between liens for work performed in the development of the land and those which occur after the condominium declaration is recorded

Another distinction between the present case and *Steinberg* arises from the statutory requirement which dictates which legal description should be used and when. In *Steinberg*, a plat of subdivision was recorded, as a result, the appellate court found the metes and bounds lien to be defective. However, at issue in the present case is the *19 Illinois Condominium Property Act, [765 ILCS 605/1 et seq.](#) (the "Condo Act"), which provides in pertinent part as follows:

"Section 9.1 Other Liens; Attachment and Satisfaction.

"* * * Each mortgage and other lien, including mechanics liens, securing a debt in the development of land submitted to the provisions of this Act for the sale of units shall be subject to the provisions of this Act, *subsequent to the conveyance of a unit to the purchaser.*" * * *

(Emphasis added). (*765 ILCS 60/9.1*, Supp. App. at 64 - 65). CSI's lien secures a debt incurred in the development of the land submitted to the provisions of the Condo Act. Pursuant to the provisions of Section 9.1, CSI's lien is only subject to the provisions of the Condo Act and the use of the condominium declaration legal description *subsequent to the conveyance of a unit to a purchaser*. This had not occurred at the time of recording of CSI's lien.

Although there are no cases specifically addressing the issue raised in the present case, in [Argonne Construction Company v. Norton, 29 B.R. 731 \(D.C. Ill.1983\)](#), the District Court addressed a similar problem:

"This has not been an easy task, but after considerable reflection, we have arrived at the following conclusions. The first paragraph (of Section 9.1 of the Condo Act) applies to all liens which arise for the first time *after* recordation. The second paragraph (of Section 9.1 of the Condo Act) applies to liens which attached to the property during development and *prior* to recordation. The first paragraph does not cover such liens, and obviously some provision must be made for their treatment in the process of transition from non-condominium to *20 condominium (multiple unit) ownership. The second paragraph recognizes that in the interim between recordation and conveyance of units there is still the same, not new ownership. Therefore, paragraph two provides that these liens shall be subject to the Act when, but not before, there is separate ownership - i.e., at the time of conveyance of separate units."

Simply stated, pursuant to Section 9.1 of the Condo Act, CSI's lien, securing a debt incurred in the development of the land and recorded prior to the sale of the first unit, is not subject to the provisions of the Condo Act. As a result, CSI was not required to use the condominium legal description from the condominium declaration when it recorded its lien.

D. CSI recorded its lien within four months of its completion date

1. First Midwest has waived any objections to the sufficiency of CSI's affidavit in support of its motion for partial summary judgment on the validity of its lien by not raising such objections in the trial court

First Midwest next argues that CSI did not record its lien within four months of its last day of work on the Project, as required by Section 7 of the Mechanic's Lien Act. On October 30, 2006, having requested additional evidence from CSI (and offering First Midwest the opportunity to refute this evidence) the trial court entered summary judgment in CSI's favor, finding that CSI had properly recorded its lien within four months of its last day of work on the Project and that as a result, CSI had a valid and subsisting lien against the property.

In support of its argument, First Midwest now argues that the affidavit of Perry Haberer, CSI's vice president, is insufficient in that it contains no evidence that the work performed by him on June 17, 18 and 19, 2003, was charged

for in the lien. Appellant's *21 Brief at p. 17. First Midwest never attacked the sufficiency of Mr. Haberer's affidavit in the trial court; as a result, this issue has been waived. A similar situation arose with respect to the affidavit of Just Rite's principal in *Cordeck Sales I*:

"In this case, it was First Midwest's burden to assert its objection regarding the sufficiency of Benner's affidavit in the trial court and obtain a ruling thereon. Because First Midwest failed to do so, it may not test the sufficiency of Benner's affidavit for the first time on appeal."

[*Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill.App.3d 334, 377, 887 N.E.2d 474, 521, 320 Ill.Dec. 330, 383 \(1st Dist. 2008\)](#), leave to appeal denied, _____ Ill.2d ____ (No. 106465) (September 24, 2008) (Supp. App. at 123 - 124). No motion was ever brought with respect to the sufficiency of Mr. Haberer's affidavit, and the issue has therefore been waived.

2. First Midwest brought a cross motion for summary judgment, attempting to invalidate CSI's lien; filing of a cross motion for summary judgment acknowledges the absence of any issues of fact

Furthermore, First Midwest cannot now argue that a material issue of fact exists with respect to CSI's last day of work on the Project. First Midwest brought a cross motion for summary judgment, claiming that CSI's lien was invalid and that it was entitled to judgment as a matter of law. (R.C 00235 - 00243). When, as in this case, the parties file cross-motions for summary judgment, they agree that no genuine issue as to any material fact exists and that only a question of law is involved, and they invite the court to decide the issues based on the record. *22 [*State Farm Fire & Casualty Company v. Martinez*, 384 Ill.App.3d 494, 893 N.E.2d 975, 2008 WL 3189608 \(1st Dist. 2008\)](#); [*Makanda Township Road District v. Devils Kitchen Water District*, 379 Ill.App.3d 1064, 885 N.E.2d 1210, 319 Ill.Dec. 530 \(5th Dist. 2008\)](#).

3. First Midwest failed to create a material issue of fact by neglecting to submit any evidence to controvert CSI's supplemental affidavit

Even if this Court were to find that First Midwest did not waive the issue of the sufficiency of Mr. Haberer's affidavit or the existence of a fact question, the sole evidence upon which First Midwest relies to defeat the affidavit is the absence of an entry in AMEC's job log indicating that CSI was on the site on the date set forth in the claim for lien. (First Midwest's Supplemental Response to Construction Systems, Inc.'s Motion for Summary Judgment and Supplement, R.C 00955 - 00999; 01002 - 01071). Although CSI initially relied upon portions of the AMEC log, during the hearing on the motions for summary judgment the trial judge indicated that he wanted more than the log to support a finding of summary judgment:

"Ms. Berres (counsel for CSI): I don't believe there is another affidavit that addresses his last day on the job. He swore in his signed and attested lien claim that his last day on the job was June 18th. They have that. There is no material issue of fact.* * * There is no contrary affidavit stating that Construction Systems was not on the job. All they have put in is the bare assertion that we don't know that they were there * * * -

"The Court: So we have two bare assertions. Here's what we are going to do. We are going to take the time to get this right. I will allow you to supplement (referring to counsel for CSI), and I will allow you to supplement as well (referring to counsel for First Midwest).* * *"

*23 (Transcript of hearing October 12, 2006 at pp. 15 - 17, Supp. App. at pp. 7 - 8, R. Vol. 6 000016 - 00018). In response, CSI submitted the supplemental affidavit of Mr. Haberer. (Construction Systems, Inc.'s Supplemental Memorandum Regarding Completion Date, Supp. App. at pp. 66 - 70; R.C 00936 - 00941); First Midwest, despite being given leave to submit additional evidence to refute the supplemental affidavit, submitted nothing. In the absence of an affidavit or other evidence controverting the supplemental affidavit, no material issue of fact was created which would defeat CSI's right to summary judgment on the validity of its lien.

4. CSI was performing work pursuant to its Subcontract on its last day on the Project

With respect to the issue of whether the work performed by CSI on June 18, 2003 was lienable, pursuant to its subcontract, CSI was to provide all labor, material, equipment, tools, supervision, freight and taxes to complete the structural steel, metal decking and miscellaneous iron work in accordance with the plans and specifications. (Construction Systems, Inc.'s Subcontract, Supp. App. at pp. 71 - 79; R.C 00023 - 00091). In his affidavit Mr. Haberer stated as follows:

"2. That between March 8, 2002, when Construction Systems entered into the subcontract with Construction Services International, Inc., and June 18, 2003, and for some time thereafter, Construction Systems fabricated the structural steel for the project * * * and also, in the spring and summer of 2003, performed certain portions of the erection of the Project.* * *

"6 As of June, 2003, due to the failure of the owners to pay its outstanding invoices, Construction Systems was unable to pay an erector to work *24 on the Project, although a certain amount of erection required under the subcontract was incomplete.

"7. Due to the demands of the owners and the general contractor that Construction Systems provide manpower to complete the work, fabricating personnel from Construction Systems traveled from Minnesota to Chicago to work on the Project.

"8. On June 16, 2003, I drove to Chicago, along with four of my employees, to work on the Project. I was accompanied by David Chavarria, Mauricio Salas, Michael Baumann and Yahir Rosales, none of whom is a member of the ironworker' union. My employees and I stayed at the Rodeway Inn & Suites, Madison at Halsted, Chicago, Illinois, on June 17, 2003 through June 19, 2003.

"9. On June 17, 2003, June 18, 2003 and June 19, 2003, my employees installed roof frames, laid deck, tightened bolts, welded unfinished braces, installed edge angle, installed grating, angles and frames on atrium and in garage area and worked on roof angles near existing building at roof.

"10. On June 18, 2003, in particular, I cut grating and angle frames at the terrace/atrium and at several exterior mechanical exhaust vents.

"11. All of the work described above was a part of the subcontract with (Construction Services International, Inc.)"

(Supplemental Affidavit of Perry Haberer in support of CSI's Motion for Partial Summary Judgment on the issue of the validity of its lien, Supp. App. at pp. 69 - 70; R.C 00936 - 00941).

*25 Under Illinois law, only work that is trivial and insubstantial, and not "essential to the completion of the contract", fails to extend the time to file a lien under the Mechanic's Lien Act. [*Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership*, 314 Ill.App.3d 848, 858, 731 N.E.2d 394, 401-402, 246 Ill.Dec. 866, 873-874 \(1st Dist. 2000\)](#). "Various factors are cited by the courts in determining whether work is trivial. Singular among them is whether the work is needed to complete the contract." *Id.* at 858 - 859, [731 N.E.2d at 402, 246 Ill.Dec. at 874](#). Another factor in determining whether work is trivial is whether it was done at the request of the owner. *Id.* at 859, [731 N.E.2d at 402, 246 Ill.Dec. at 874](#).

In the present case, CSI was hired to fabricate and install the structural steel for the Project. In his affidavit Mr. Haberer describes the nature of work that he and his employees performed, and attests to the fact that it was performed pursuant to the subcontract with the general contractor. Additionally, Mr. Haberer and his employees came to the site at the insistence of the general contractor and the owner; since he could no longer afford to pay an erector to perform the work needed to complete his subcontract, he did the work himself, along with some of the employees from the plant in Minnesota. As stated in the affidavit, the work was done in order to complete CSI's subcontract and at the request of the owner. (Supplemental Affidavit of Perry Haberer in support of CSI's Motion for Partial Summary Judgment at paragraphs 2, 7 and 11, Supp. App. at 69 - 70, R.C 00936 - 00941).

Instead of refuting these assertions with a counteraffidavit, First Midwest relied upon the AMEC logs as evidence of the non-occurrence of an event: since the logs did not reflect that CSI was present on the site, therefore CSI must not have been present. *26 First Midwest offers no substantiation for this assumption nor does it offer any evidence in support of its position. The trial court properly found that no material issue of fact existed with respect to the nature

of CSI's work on the Project on its last day.

E. CSI was performing lienable work on its last day on the Project

First Midwest also claims that the completion date relied upon by CSI is unsupportable because the work performed on June 18, 2003 was not included in CSI's lien claim. First Midwest raised a similar argument in *Cordeck Sales I* with respect to ALL Masonry's claim; this Court, relying on *Merchants Environmental*, rejected the argument: "In *Merchants*, a subcontractor identified August 29, 1997 as its completion date, and filed its section 24 notice of its mechanic's lien on November 6, 1997. A third party purchaser however, maintained that an invoice, dated June 3, 1997, labeled 'final billing,' which sought payment for an amount substantially equal to the amount sought in the lien claim, showed that even if work was performed on August 29, 1997, it was not included in the work for which the subcontractor asserted a lien and, accordingly, the subcontractor's completion date was necessarily June 3, 1997, and thus its notice was untimely. In support of its completion date, the subcontractor produced a work ticket dated August 29, 1997, which reflected that two workers spent eight hours at the jobsite on that date, as well as an affidavit completed by its project manager who averred that it was standard practice for the subcontractor to submit final bills before work on the project was completed and that when it submitted the final bill on June 3, *27 1997, it still had to install eight ceiling grids to complete its contractual obligations and that the installation took place on August 29, 1997."

[*Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill.App.3d 334, 390, 887 N.E.2d 474, 527, 320 Ill.Dec. 330, 382 - 383 \(1st Dist. 2008\), leave to appeal denied, ___ Ill.2d ___ \(No. ___\)\(September 24, 2008\) \(Supp. App. at pp. 132 - 133\).](#) In *Merchants Environmental*, this Court reversed the trial court's finding in favor of the third-party purchaser, finding that the subcontractor had created a reasonable inference that it submitted bills prior to completion of the work. Accordingly, this Court rejected First Midwest's attack on the summary judgment entered in favor of ALL Masonry, finding that there was no genuine issue of material fact as to the completion date. [*Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill.App.3d 334, 391, 887 N.E.2d 474, 528, 320 Ill.Dec. 330, 383 \(1st Dist. 2008\), leave to appeal denied, ___ Ill.2d ___ \(September 24, 2008\).](#) (Supp.App. at pp. 133 - 134)

Similarly, in the present case CSI submitted an affidavit stating with particularity the nature of the work that Mr. Haberer performed on June 18, 2003, that this work was performed pursuant to the requirements of his subcontract and that the owner directed him to perform the work. (Supplemental Affidavit of Perry Haberer in support of CSI's Motion for Partial Summary Judgment on the issue of the validity of its lien at paragraphs 2, 7 and 11, Supp. App. at pp. 69 - 70; R.C 00936 - 00941). The sole evidence submitted by First Midwest to dispute the completion date is the absence of an entry in the AMEC log. The trial court did not find this sufficient to create a genuine issue of material fact. Under this Court's rulings in *Merchants and Cordeck Sales I*, the trial court *28 correctly applied the law. The fact that the trial court may disagree with the holding in *Merchants* is irrelevant.

F. First Midwest's reliance on *Braun-Skiba*, *Merchants Environmental*, *D.M. Foley and Mutual Services* is misplaced and inapplicable

First Midwest relies on [*Braun-Skiba, Ltd. v. LaSalle National Bank*, 279 Ill.App.3d 912, 665 N.E.2d 485, 216 Ill.Dec. 425 \(1st Dist. 1996\)](#) for the proposition that CSI's lien is defective in that there was no evidence that any work after May 24, 2003 was charged for in the lien and that CSI was bound to the June 18, 2003 completion date as alleged in the lien. In *Braun-Skiba*, the lien was found to be defective because the lien claimant had previously recorded a lien stating a different completion date from that alleged in a subsequently recorded lien. The lien claimant filed a verified complaint which stated yet another completion date, March 9, 1989, and then sought to file an amended complaint which stated yet *another* completion date of June 9, 1989. Additionally, the lien claimant testified that his company did not perform any significant work after March, 1989 and that none of the amounts referenced in his unpaid invoices were for work done after March, 1989. The appellate court found the lien to be fatally defective, relying on [*Mutual Services, Inc. v. Ballantrae Development Co.*, 159 Ill.App.3d 549, 510 N.E.2d 1219, 110 Ill.Dec. 188 \(1st Dist. 1987\).](#)

In *Mutual Services*, the lien stated a completion date of February 20, 1981 and the lien was recorded on June 23, 1981. The lien claimant argued that although the lien appeared to be invalid on its face, it should be enforced because the actual date of completion was one within the mandatory filing period. The appellate court declined to accept this reasoning, finding that “prior inconsistent sworn statement(s) are a party’s formal binding admission of fact.” *Id.* at 553, 510 N.E.2d at 1222, 188 Ill.Dec. at 191.

***29** Neither of these cases is remotely similar to the present case. CSI never took a position contrary to its pleadings or its verified lien claim with respect to its completion date. June 18, 2003 is the completion date set forth in the lien claim. (R.C 00100 - 00120) and the counterclaim (R.C 00065 - 00081). Mr. Haberer’s affidavit establishes that he was on the site on June 18, 2003 and sets forth with specificity the work which he and his employees performed on that date, that this work performed at the request of the owner and that it was pursuant to his subcontract. (Supplemental Affidavit of Perry Haberer, paragraphs 2, 7 and 11, Supp. App. at 69 - 70; R.C 00936 - 00941).

D.M. Foley Co., Inc. v. Northwest Federal Savings & Loan Association, 122 Ill.App.3d 411, [461 N.E.2d 500, 77 Ill.Dec. 866](#) (1st Dist. 1984), is similarly inapplicable. In *D.M. Foley*, the lien claimant planted trees and shrubs on the project, but then continued to perform maintenance work with respect to the landscaping. Maintenance, the court held, did not qualify as enhancement of the property which might support a lien. Finally, in *Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership*, [314 Ill.App.3d 848, 731 N.E.2d 394, 246 Ill.Dec. 866](#) (1st Dist. 2000), this Court considered whether a genuine issue of fact was created by the discrepancy between the invoices submitted by the lien claimant (purportedly establishing that no substantial work was done after June 3, 1997) and the affidavits and other documents which established that the lien claimant was installing materials pursuant to its subcontract as of August 29, 1997. *Id.* at 857 - 858, [731 N.E.2d at 401, 246 Ill.Dec. at 873](#). This Court found that, at a minimum, a genuine issue of material fact existed with respect to whether the work was completed prior to August, 1997, thereby requiring reversal of summary judgment entered in favor of the owner. Furthermore, this Court held that the work performed was ***30** not a repair or correction, nor could it be described as maintenance work. *Id.* at 859, [731 N.E.2d at 402, 246 Ill.Dec. at 874](#).

In the present case, no evidence exists which refutes CSI’s stated completion date: First Midwest relies solely on the AMEC log which fails to refer to CSI’s presence on the job site. In the absence of more substantial evidence, at least evidence which states affirmatively that CSI was *not* on the job site, the trial court correctly found the absence of any issue of material fact and granted summary judgment on behalf of CSI.

Notwithstanding the strict construction given to all sections of the Mechanic’s Lien Act, there is authority which favors some flexibility in applying general rules, so that the statute’s provisions are not construed so technically that its remedial purpose is undermined and all but lost in the process. *Aluma Systems, Inc. v. Frederick Quinn Corporation*, [206 Ill.App.3d 828, 839, 564 N.E.2d 1280, 1287, 151 Ill.Dec. 618, 625](#) (1st Dist. 1990). The doctrine of strict construction was never meant to be applied as a pitfall to the unwary, in good faith pursuing a path marked by the statute, nor as an ambush from which an adversary can overwhelm him for an immaterial misstep. Its function is to preserve the substantial rights of those against whom the remedy offered by the statute is directed, and it is never to be employed otherwise. [United Cork Companies v. Volland, 365 Ill. 564, 572, 7 N.E.2d 301, 305](#) (1937).

II. THE TRIAL COURT CORRECTLY FOUND THAT CSI’S LIEN WAS NOT INVALIDATED BY APPLICATION OF SECTION 6 OF THE MECHANIC’S LIEN ACT

A. First Midwest waived the issue of the application of Section 6 by not raising it properly in the trial court

First Midwest also claims that CSI’s lien claim should be defeated by the application of Section 6 of the Mechanic’s Lien Act. Section 6 provides as follows:

***31** “In no event shall it be necessary to fix or stipulate in any contract a time for completion or a time for payment

in order to obtain a lien under this act, provided, that the work is done or material furnished within three years from the commencement of said work or the commencement of furnishing said material.”

([770 ILCS 60/6](#), Supp. App. at 142). First Midwest raised this defense for the first time in its post-trial memorandum. The trial court refused to address the issue, finding that Section 6 created an affirmative defense which First Midwest had failed to raise at an appropriate time. (Order of December 12, 2007 at p. 6, Supp. App. at p. 148; R.C 1216 - 1223).

Section 613(d) of the Illinois Code of Civil Procedure defines affirmative defenses:

“(d) The facts constituting any affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, laches, statute of frauds, illegality, that the negligence of the complaining party contributed in whole or in part to the injury of which he complains, that an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute or by reason of nondelivery, want or failure of consideration in whole or in part, and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.”

[735 ILCS 5/2-613\(d\)](#).

*32 If the defendant seeks to assert an affirmative defense, he must specifically plead it in the answer or reply so that the plaintiff is not taken by surprise. [Eckel v. Bynum](#), 240 Ill.App.3d 867, 874, 608 N.E.2d 167, 173, 181 Ill.Dec. 94, 100 (1st Dist. 1992). Similarly, a defense pointing out that a transaction that “cannot be recovered upon by reason of any statute,” which litigant wishes to assert at trial, must be set out in his answer or reply. [Afshar, Inc. v. Condor Air Cargo, Inc.](#), 250 Ill.App.3d 229, 231, 621 N.E.2d 126, 128, 190 Ill.Dec.257, 259 (1st Dist. 1993)

In [Midwest Environmental Consulting & Remediation Services, Inc. v. Peoples Bank of Bloomington](#), 251 Ill.App.3d 256, 620 N.E.2d 469, 189 Ill.Dec. 501 (4th Dist. 993), the court was asked to determine whether an unlicensed engineer was entitled to assert a claim under Section 1 of the Mechanic's Lien Act. The plaintiff filed a complaint to foreclose a mechanic's lien based upon, *inter alia*, unpaid engineering consultation fees. Defendant raised an affirmative defense based upon the plaintiffs negligent performance of the required work, but did not address the plaintiffs failure to be licensed as an engineer. Although the court noted that an unlicensed engineer could still recover under the Act, it also noted that the defendant had not raised the issue of the licensure in an affirmative defense, and held that failure to do so resulted in waiver of the defense. The issue of an engineer's ability to recover under the Mechanic's Lien Act was an affirmative defense which had to be raised. In the present case, First Midwest also attacks the ability of CSI to recover under the Mechanic's Lien Act and points to Section 6 as its basis to deny this right. Under the holding in *Midwest Environmental Consulting*, this needed to be raised as an affirmative defense.

*33 First Midwest has offered no reason for its failure to raise this defense at an earlier point in the litigation. Absent any basis for the delay, the affirmative defense is waived. [United Air Lines, Inc. v. Conductron Corp.](#), 69 Ill.App.3d 847, 855, 387 N.E.2d 1272,1278, 26 Ill.Dec. 344, 350 (1st Dist. 1979). Furthermore, raising the defense in the post-trial motion (which was filed contemporaneously with CSI's post-trial motion) deprived CSI of any opportunity to address the motion in the trial court, either factually or legally. Among the factors to be considered in determining whether or not an amendment to the pleadings should be allowed is the prejudice and surprise to the other party. [Baird & Warner, Inc. v. Ruud](#), 45 Ill.App.3d 223, 230, 359 N.E.2d 745, 750, 3 Ill.Dec. 886, 892 (1st Dist. 1976).

B. Even if the issue is properly before this Court, dismissal of the claim pursuant to Section 6 is improper

1. History of Section 6 of the Act

The current version of Section 6 of the Mechanic's Lien Act was adopted in 1903, when the Act was completely revised. ([770 ILCS 60/6](#), Supp. App. at 142). Section 6 is one of the few sections of the Act that has not been amended since 1903. Obviously, the construction industry has changed substantially since Section 6 was enacted. As a result, the original rationale behind the enactment of this statute may no longer be applicable in today's construction setting.

This version replaced Section 6 of the 1895 Act which, along with prior versions, mandated that in order to have a mechanic's lien under the Act, written contracts had to contain both a completion date of not more than three years and a time for payment of not more than one year from the date of completion. Accordingly, under the prior version of ~~*34~~ Section 6, a claimant could not maintain a lien if its contract did not include a completion and payment date.

The current version of Section 6 eliminated the language mandating that contracts fix or stipulate a date for completion and time for payment. There are few reported decisions involving the current version of Section 6. The most recent decision by an Illinois court concerning Section 6 was issued more than thirty years ago. [Robb v. Linguist](#), [23 Ill.App.3d 186, 318 N.E.2d 301 \(3rd Dist. 1974\)](#). As a result, there is little authority interpreting the language of Section 6 to provide guidance in determining its applicability to the specific facts of this matter.

The difficulties with interpreting the current version of Section 6 are further compounded by the lack of legislative history or notes regarding the purpose of its adoption. However, it appears that Section 6 was enacted to protect third-parties not involved in the construction from liens being recorded beyond a time that a party not involved in the project would normally expect.

2. The owner's agreement with Construction Services International, Inc. includes a project completion date

Section 6 of the Act only applies where the agreement for construction work does not include a project completion date. The plain language of Section 6 does not impose a time limit on completion of the work if the agreement contains a completion date. Indeed, there are two provisions contained in Section 6 separated by the conditional term "provided", which must be considered when interpreting the meaning of the statute. [Collins v. Board of Trustees of Firemen's Annuity and Benefit Fund of Chicago](#), [155 Ill.2d 103, 110-111, 610 N.E.2d 1250, 1253 \(1993\)](#)(statute must be read as a whole and ~~*35~~ no word or paragraph should be interpreted so as to be rendered meaningless). Section 6 provides:

"In no event shall it be necessary to fix or stipulate in any contract a time for the completion or a time for payment in order to obtain a lien under this Act, provided, that the work is done or material furnished within three years from the commencement of said work or the commencement of furnishing said material."

([770 ILCS 60/6](#), Supp. App. at 142). (Emphasis added).

The first provision contained in Section 6 states that it is not necessary to include a completion date or time for payment in the contract for construction. [770 ILCS 60/6](#). This provision was obviously included in Section 6 to eliminate the requirements under the former versions of the Act that mandated that all contracts contain a completion and a final payment date. There is no language in Section 6 or elsewhere in the Act prohibiting the parties to a contract from agreeing on a completion date in excess of three years from commencement of work on the Project. However, in the event that the contract does not contain a completion date, the conjunction "provided", preceding the second provision of Section 6, qualifies, restricts or conditions the language contained in the first provision by requiring that such contracts not containing a completion date, must be completed within three years of commencement. Accordingly, Section 6 requires either: (a) that the work be completed within three years of commencement; or (b) that the contract contain a completion date.

In order to accept First Midwest's position that all contracts for construction must be completed within three years from commencement regardless of whether or not they contain a completion date, the first provision of Section 6

and the conditional term *36 “provided” have to be completely ignored. Under First Midwest's reading of Section 6, there would have been no need for the legislature to include such language, and the statute could simply have read: “In no event shall it be necessary to fix or stipulate in any contract a time for completion or a time for payment. In order to obtain a lien under this Act, provided, that the work [must be] is done or material furnished within three years from the commencement of said work or the commencement of furnishing said material.”

Statutes should be construed as a whole, with each provision evaluated in connection with every other *section*. [Primeco Personal Communications, L.P. v. I.C.C., 196 Ill.2d 70, 87, 750 N.E.2d 202, 212, 255 Ill.Dec.621, 631 \(2001\)](#). First Midwest's interpretation of Section 6 simply cannot be sustained when the statute is considered in its entirety and therefore must be denied.

CSI's interpretation of Section 6 is also consistent with the practical reality of the construction industry and construction contracts. Many construction projects take more than three years to complete. Other projects are built in phases lasting more than three years in overall duration. In most instances, the parties involved in these types of projects are well aware that the duration of the project will exceed three years and make their own agreements as to time for completion of the project and time for final payment. Under First Midwest's interpretation of Section 6, contractors who perform work on such projects, notwithstanding a contractually agreed upon completion date, could never assert a valid lien.

*37 Here, Article 2 of the Owner's contract with Construction Services International, Inc. provided that work on the Project was to be substantially complete on or before December 15, 2002. Pursuant to Article 1.1.1 of the General Conditions, the Savannah-Construction Services International, Inc. contract was incorporated in its entirety into the agreement between CSI and Construction Services International, Inc. (Supp. R.C 00576; R.C 00083). Accordingly, because the agreement between CSI and Construction Services International, Inc. contained a completion date, the three year requirement is not applicable to CSI's claim for lien.

3. CSI's delivery of materials and services was performed in less than three years

Even if this Court accepts First Midwest's interpretation of Section 6, CSI's claim for lien is not barred by the three year rule. Illinois courts have held that the three year time period in Section 6 “commences with the beginning of the work for which the mechanic's lien is asserted and not with the date upon which the contract for the work was entered into.” [Robb v. Linquist, 23 Ill.App.3d 186, 188, 318 N.E.2d 301, 303 \(3rd Dist. 1974\)](#). There are no other Illinois decisions that offer any further guidance or interpretation of the calculation of the two relevant time periods referenced in Section 6: (1) “the commencement of the work,” and (2) when “the work is done.” [770 ILCS 60/6](#). As set forth herein, the work for which payment is sought for CSI's claim for lien was commenced within three years of CSI's last work on the Project.

“The work for which a mechanic's lien is asserted” commenced in June, 2002, when CSI began its first delivery of materials to the job site. This is the work for which CSI asserts its lien, not the work performed by Construction Services International, Inc. through other subcontractors, as First Midwest maintains. In order to calculate when *38 CSI's work “commenced” as that term is used in Section 6, had the defense been properly raised, the trial court would have made a determination of the date when the work for which CSI seeks recovery of monies actually began.

Furthermore, actual construction of the improvements could not commence until January 2001, due to delays in obtaining the necessary approval from the Chicago Board of Underground, which approval was not received until late January, 2001. (Affidavit of Michael Gora at paragraph 7, Supp. App. at 154; Supp.R.C 00515). As a result, installation of sheeting, which had to be in place in order to commence the excavation of the lower level and all associated work that was required to construct the lower level parking garage and the foundation work for the entire Project, did not start until Wednesday, January 31, 2001. (Affidavit of Michael Gora at paragraph 7, Supp. App. at 154;

Supp. R.C 00515).

CSI was paid through the construction escrow through October, 2002; as a result, CSI's claim for lien seeks only recovery of monies due for work performed subsequent to October, 2002 and through June, 2003. Accordingly, given that the date of CSI's last work on the Project was June 18, 2003, this date is within three years of the "commencement" date of CSI's work for which it seeks recovery in its claim for lien.

4. Construction of the Project was shut down and delayed through no fault of CSI

As set forth above, other than the *Robb* decision, there is no case law, legislative history or other authority interpreting how the time period under Section 6 is to be calculated. Assuming *arguendo* that the duration of CSI's services on the Project exceeded three years by tacking on the period prior to CSI's involvement, the draconian effect of Section 6 should not be applied to defeat CSI's lien, considering that CSI's *39 commencement on the job was delayed for almost a year solely due to shut-downs, delays and funding issues caused by Savannah, First Midwest and Ticor Title Insurance Company (Ticor).

Construction projects such as the Montrevelle are routinely shut down due to the discovery of environmental hazards, accidents, design changes, bankruptcy, court order or other non-contractor-caused bases. If the duration of such work stoppages and the parties responsible for causing the stoppages are not considered by the courts in determining whether a lien claimant has met the requirements of Section 6, the purpose of the Act in protecting those who furnish improvements to realty will be significantly frustrated. In many instances, such work stoppages result in significant delays to the overall duration of construction of the project, lasting many years. As a result, owners and lenders should not be able to utilize the time impact of non-claimant caused delays as a sword against those claimants who rendered improvements to the property.

The cardinal rule of statutory construction is to ascertain and give effect to the true intent of the legislature, while presuming the legislature did not intend to create absurdity, inconvenience or injustice. [*In re D.D.*, 196 Ill.2d 405, 418 - 419, 752 N.E.2d 1112, 1119, 256 Ill. Dec. 870, 878 \(2001\)](#); *see also*, [*Michigan Avenue National Bank v. County of Cook*, 191 Ill.2d 493, 503- 504, 732 N.E.2d 528, 535. 247 Ill. Dec. 472, 480 \(2000\)](#). When the literal enforcement of a statute would result in great injustice, and lead to consequences which the legislature could not have contemplated, the courts are bound to presume that such consequences were not intended, and adopt a construction that it may be reasonable to presume was contemplated by the legislature. [*City of Chicago v. Mayer*, 290 Ill. 142, 146, 124 N.E. 842, 844 \(1919\)](#). A court must consider the reason *40 and necessity for the law, the evil to be remedied, and the object to be obtained by the statute. [*Collins v. Board of Trustees of Firemen's Annuity and Benefit Fund of Chicago*, 155 Ill.2d 103, 111, 610 N.E.2d 1250, 1253, 183 Ill.Dec. 6, 9 \(1993\)](#); [*Castaneda v. Illinois Human Rights Commission*, 132 Ill.2d 304, 317, 547 N.E.2d 437, 443, 138 Ill.Dec. 270, 276 \(1989\)](#).

Such an absurd result would occur should courts fail to consider the time impact of work stoppages and delays not caused by a claimant in determining the duration of a claimant's performance of work on the Project when reviewing the applicability of Section 6 of the Act. Indeed, considering that the purpose of the Act is to protect those who furnish services and materials for the improvement of realty, the courts must presume that the legislature did not intend for claimants to forfeit their lien rights solely because the duration of construction of the project was significantly extended by matters outside the claimants' control or responsibility.

Here, the Project was shut down from early June, 2001, through April, 2002 due to a "Stop Work" Order issued by the City of Chicago. (Affidavit of Michael Gora at paragraph 24, Supp. App. at 158; Supp.R.C 00519). The shut down was due to defects in the structural design and the City's refusal to accept and approve any structural designs prepared by the structural engineer hired by Savannah. (Affidavit of Michael Gora at paragraph 10, Supp. App. at 155; Supp. R.C 00516). As a result of the City's rejection of the structural design, a building permit was not issued by the City until late April, 2002, resulting in a shutdown of the Project for almost eleven months.

Moreover, work on the Project was continuously delayed and effectively stopped by the beginning of October, 2003, as a result of the Owner's and First Midwest's lack of *41 funding and failure to pay trade contractors, as well as Ticor and First Midwest's failure to reach an agreement as to the disbursement of the proceeds from the sale of each unit. (Affidavit of Robert Perschon at paragraph 15, Supp. App. at 188, Supp. R.C 00619; deposition of Len Eichas at pp. 124 - 126, Supp. R.C 00661 - 00662). During the course of the Project, First Midwest was fully aware of the shut down of the Project and the extension of the construction schedule due to the shutdown, the remedial work and the delays in obtaining permits. (Deposition of Len Eichas at p. 55, Supp. R.C 00644). Moreover, First Midwest was fully aware that the delays in finding participant lenders to fund the second extension of the loan caused delays in payouts of construction draws for the Project. (Deposition of Len Eichas at pp. 98-99, Supp. R.C 00655). Accordingly to the extent that Section 6 was enacted for the protection of third parties not involved with the construction of the Project, such purposes would not be met if First Midwest were able to use these delays as a sword to defeat CSI's claim for lien.

The project shut-downs and delays resulted in a significant extension of the overall duration of the construction of the Project, as actual construction only occurred during the following periods:

January 31, 2001 to early June, 2001 (approximately five months) and

Late April, 2002 to early October, 2003 (approximately eighteen months). As shown above, the duration of the actual construction of improvements on the Project occurred for less than twenty-four months. Even if this Court were to adopt First Midwest's contention that CSI commenced its work when Construction Services International, Inc. started on January 31, 2001 and completed its work on June 18, 2003, excluding the eleven month shutdown, the duration of CSI's services on the Project *42 would total less than three years. Accordingly, should this Court determine that the eleven-month shutdown of the Project is not to be considered in reviewing compliance with Section 6, CSI's performance on the Project did not exceed three years regardless of the commencement date used for purposes of the calculation.

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO COMPEL CSI TO PRODUCE THE SETTLEMENT AGREEMENT BETWEEN CSI AND CORDECK SALES

As its next claim of error, First Midwest asserts that it was prejudiced by the failure of the trial court to compel the production of the settlement agreement between CSI and Cordeck Sales. In support of this claim, First Midwest muddies the question by relying upon case law in which a lien claim was equated, as to its *res judicata* effect, with a breach of contract claim based upon the same contract. For instance, in [Sjostrom v. McMurray, 47 Ill.App.3d 1040, 362 N.E.2d 744, 6 Ill.Dec. 109 \(2nd Dist. 1977\)](#), the appellate court refused to allow the plaintiff to relitigate his suit as a mechanic's lien foreclosure after the previous action, based upon breach of the same contract that was involved in the mechanic's lien foreclosure, had been dismissed for failure to comply with discovery violations. *Id.* at 1046, [362 N.E.2d at 748, 6 Ill.Dec. at 113](#).

Cases such as *Sjostrom* are inapposite; the contract at issue between Cordeck Sales and CSI, and the issue between them which was resolved by settlement, is not the same contract upon which the mechanic's lien foreclosure is based. CSI's lien foreclosure, and, by derivation, Cordeck Sales' lien foreclosure, arise out of the contract between CSI and Construction Services International, Inc., the general contractor for the Project. The trial court was acknowledging this in its comments as quoted in the Appellant's Brief: "Obviously a contract case would be the basis for any mechanic's lien *43 claim." (Appellant's Brief at 32, quoting November 27, 2006 transcript at pp. 3-4, R. Vol. 8 00041 - 00051.) The contract referred to by the trial court is the contract between CSI and Construction Services International, Inc. The trial court also pointed out that the lien claimants need not establish contract liability among themselves in order to pursue a mechanic's lien foreclosure; a lien claimant need not file a breach of contract action against a higher tier contractor in order to maintain a lien foreclosure. Contract liability is indeed necessary,

but this is the contract liability which arises under Section 1 of the Act: the liability of the owner or the general contractor to the parties providing material and labor for the construction of the improvements.

Public policy strongly favors the freedom to contract as is manifest in both the United States constitution and the Illinois constitution. [*McClure Engineering Associates, Inc. v. Reuben H. Donnelly Corp.*, 95 Ill.2d 68, 447 N.E.2d 400 \(1983\)](#). Illinois public policy also favors the resolution of disputes by way of settlement agreement. [*Haisma v. Edgar*, 218 Ill.App.3d 78, 578 N.E.2d 163 \(1991\)](#). There is a presumption of validity and enforceability attaching to a settlement agreement, including the non-disclosure clause; non-disclosure clauses are common attributes of settlement agreements. [*Fidelity Financial Services, Inc. v. Hicks*, 267 Ill.App.3d 887, 642 N.E.2d 759 \(1994\)](#). Furthermore, confidentiality agreements have often been utilized in various settings to protect the disclosure of valuable information. [*Jordan v. Knafel*, 355 Ill.App.3d 534, 823 N.E.2d 1113 \(2005\)](#).

In the present case, the resolution of the claim between CSI and its subcontractor has no bearing on any aspect of First Midwest's case. The proof which CSI and Cordeck Sales presented is not dependent upon proof that CSI and Cordeck Sales are at odds or in *44 harmony with each other. CSI's lien includes the balance due Cordeck Sales on its subcontract; even in the presence of a counterclaim between the parties, CSI pursued collection of the amount due Cordeck Sales. First Midwest is already on notice of the settlement between the parties; the terms of the Settlement Agreement add nothing to any attempts by First Midwest to marginalize the testimony.

IV. THIS COURT SHOULD NOT LIMIT THE ADMISSION OF EXTRINSIC EVIDENCE TO DETERMINE "INNOCENT RELIANCE" ON LIEN WAIVERS

A. The issue is not properly before this Court

Finally, First Midwest asks this Court to reconsider the policies and consequences of the "innocent reliance" line of case law (Appellant's Brief at 44). This issue is the same as that decided in *Cordeck Sales I* and need not be addressed again. "Courts generally refuse to re-open what has been decided, and 'a rule established as controlling in a particular case will continue to be the law, as long as the facts are the same.'" [*Kinzer v. Fidelity and Deposit Company of Maryland*, 273 Ill.App.3d 211, 216, 652 N.E.2d 20, 24, 209 Ill.Dec. 706, 710 \(1st Dist. 1995\)](#). (Citations omitted). When the evidence on a subsequent appeal is the same or substantially the same as that of a prior appeal, *i.e.*, there is an identity of particular issues, facts and evidence, the adjudications of the prior appeal become the law of the case, and are binding upon that court on a following appeal, regardless of whether the prior decision was right or wrong. *Id.* at 216, [652 N.E.2d at 24, 209 Ill.Dec. at 710](#). The case now before this Court presents an even less cogent reason to reconsider the "innocent reliance" line of case law. In *Cordeck Sales I*, the lien claimants were paid for the lien waivers in question. In the present case, as First Midwest acknowledges at one point in its brief, CSI did not receive payment for its waiver. (Appellant's Brief at p. 5, R. Vol. 8 00037).

*45 B. Even if the issue is properly before this Court, there is no basis for carving out an exception to the "innocent reliance" rule for First Midwest

First Midwest again argues that the "innocent reliance" rule should not apply at all, or at least not with respect to third parties. In support of this argument, First Midwest claims that the application of the "innocent reliance" rule leads to an unjust result, because the "common business practice of establishing escrows, reviewing draws and requiring (lien) waivers is utterly disregarded," Appellant's Brief at 43.

First, this ignores the testimony of the Tigor representative, Pamela Hitzemann, with respect to her purpose in reviewing the lien waiver and the information she sought to obtain from this review. When she reviewed a lien waiver, she looked at the contract price, to satisfy herself that the owner, general contractor and subcontractor were in agreement as to the amount. (Deposition of Pamela Hitzemann, part 1, at p. 103, 2nd Supp. R.C____). She looked at the date of the lien waiver, but only to confirm that it was within a few months of the date of the owner's sworn

statements (Deposition of Pamela Hitzemann, part 1, at p. 104, 2nd Supp. R.C. _____). She did not concern herself with the date through which the subcontractor was supposedly waiving its lien; her only concern was with the proximity of the date on the lien waiver to the date of the sworn statement. (Deposition of Pamela Hitzemann, part 1, at p. 105, 2nd Supp. R.C. _____). This Court has previously found that Tidor relied on the lien waivers submitted by the lien claimants; however, the extent of the reliance is not nearly as extensive as First Midwest implies. In fact, Ms. Hitzemann only relied upon the portion of the lien waivers which set forth the contract amount, not the boilerplate language relating to the date through which the lien was released. Covest employees did not review the lien waivers at all, although the Construction Loan Agreement required the *46 borrowers to provide copies to Covest. (Construction Loan Agreement at p. 10, Supp. R.C 00063). The evidence does not support First Midwest's claim of reliance on the lien waivers: no one looked at a lien waiver and reached the conclusion that a subcontractor has waived all its lien rights, no matter how large the amount to become due, in return for a payment, no matter how small.

Furthermore, this Court's ruling is consistent with the reasoning of [Merchants Environmental Industries, Inc. v. SLT Realty Limited Partnership](#), 314 Ill.App.3d 848, 731 N.E.2d 394, 246 Ill.Dec. 866 (1st Dist. 2000). In determining whether Merchants Environmental (MEI) had entirely waived its lien by tendering a lien waiver similar to that submitted by CS in the present case, the court looked to the amounts stated on the form for "this payment" and "balance due": the "balance due" was \$219,347.95 and "this payment" was \$31,938.00. "We question whether it is reasonable to infer that the defendants believed in good faith that MEI was willing to forego its mechanic's lien rights as to a balance of more than \$200,000.00 in return for a payment of \$31,938.00." *Id.* at 866, [731 N.E.2d at 408](#), [246 Ill.Dec. at 880](#). In the present case, the "balance due" CSI is also too large - \$1,206,329.66 - for First Midwest to effectively claim a good faith belief that CSI was waiving its entire lien.

Additionally, despite the statement in First Midwest's brief to the contrary, the subcontractor in the present case did not receive the consideration for the waiver. (Appellant's Brief at 41; Transcript of trial testimony of Perry Haberer, November 21, 2006, afternoon session, at p. 112, R.Vol. 8 00038 - 00042). First Midwest asks this Court to ignore the holdings of *Luczak* and *Edward Hines*, in part because the subcontractor in those cases did not receive the payment. *47 [Luczak Brothers, Inc. v. Generes](#), 116 Ill.App. 3d 286, 451 N.E.2d 1267, 71 Ill.Dec. 900 (1st Dist. 1983); [Edward Hines Lumber Company v. Dell Corporation](#), 49 Ill.App.3d 873, 364 N.E.2d 368, 7 Ill.Dec. 207 (1st Dist. 1977). CSI also did not receive the payment for its lien waiver; First Midwest's distinction of the holdings in *Luczak* and *Edward Hines* is inapplicable.

Finally, the lien waiver forms which are at issue bear language identical to the Tidor forms; this language must be in the lien waiver for it to be acceptable to Tidor. (Deposition of Pamela Hitzemann, part 1, at 99- 100, 2nd Supp. R.C. .) A contractual clause that is part of a "boilerplate" agreement has its significance greatly reduced because of the inequality in the parties bargaining power. [Williams v. Illinois State Scholarship Commission](#), 139 Ill.2d 24, 72, 563 N.E.2d 465, 487, 150 Ill.Dec. 578, 600 (1990). Where parties are in a disparate bargaining position, one party has no hand in determining the contents of the agreement but must take it or leave it, a contractual clauses which forms a part of the boilerplate agreement has greatly reduced significance because of the inequality of the parties' bargaining power. *Id.* at 74, [563 N.E.2d at 487](#), [150 Ill.Dec. at 600](#). CSI had no choice in the language to be used in its lien waiver, and alterations to the form were stringently restricted by the construction manager, as well as by Tidor. (Transcript of trial testimony of Perry Haberer, November 21, 2006, afternoon session, at pp. 117-120, R. Vol. 8 00038).

C. Equity does not favor First Midwest's request that third parties be excluded from the "innocent reliance" rule

Finally, First Midwest argues that this Court should at least restrict the application of the "innocent reliance" rule with respect to lenders (First Midwest does not address the effect of the rule on third parties other than lenders). The basis for this request is the alleged "unjust" effect of depriving the lenders of their reliance on lien waivers (which they *48 they didn't review and their title company used for a different purpose entirely). However, the lender is in a far better position to protect itself against loss where conduct of their borrowers places payments to subcontractors at

risk.

Covest, as First Midwest's predecessor in interest, had an abundance of remedies available to it upon the occurrence of an event of default, and an event of default occurred as soon as the borrower failed to observe any of its obligations, which were many. (Construction Loan Agreement at paragraph 5.1, Construction Mortgage at paragraph 6.1, Supp. R.C 00067, 00038). The lender can also deem itself insecure and require additional security of its borrowers: equity infusion, additional collateral and/or additional guarantors. The loan in question requires the borrowers to pay for inspections of the improvements for which payment is sought on the construction draws, which inspection reports are available to the lender to compare the status of the Project with the amount of undistributed proceeds of the loan. (Construction Loan Agreement at paragraph 4.1(c), Supp. R.C 00065). The lender's representatives can also visit the site to determine that the improvements are actually in place. The lender can accelerate the loan, rendering all of the borrowers' obligations immediately due and payable. (Construction Loan Agreement at paragraph 5.1, 5.2, Supp. R.C 00368 - 00369). The lender can sue the borrowers on the loan itself and on their guaranties, take possession of the property, foreclose on and sell the property to satisfy its mortgage and/or foreclose its security interest in other collateral. (Construction Loan Agreement at paragraphs 5.1, 5.2, Supp. R.C 00368 -00369). Finally, the lender can sue the title company for its mismanagement of the escrow.

***49** CSI, however, had few remedies available upon the owners' default in payment. Its choices were limited to stopping work and hoping for payment or completing the job and hoping for payment, along with the recording of its lien. If CSI is deprived in whole or in part of its lien rights by this interpretation of the lien waiver, it can only sue its contracting party, Construction Services International, Inc., which was formed solely to protect the owners from other liabilities. (Deposition of Len Eichas at p. 74, Supp. R.C 00649).

Furthermore, First Midwest's distinction of the previous line of "innocent reliance" cases as involving "situations where the subcontractor or contractor was induced to supply the waiver by the owner who was ultimately responsible for payment for the contractor or subcontractor's work" is unsupported by the record. (Appellant's Brief at 42). First Midwest maintains that where a lender is involved, the same considerations that drove the innocent reliance cases do not apply; the lender should be able to ignore the evidence presented by the lien waiver itself and avail itself of boilerplate language to defeat the subcontractor's lien rights. The lender, however, is able to avail itself of one or all of the foregoing remedies. The lien claimant will lose its priority as to the amount at issue on the lien waiver and the lien claimant's right to sue will be limited to the amount collectible from the owner's corporation and possibly the owner.

V. CONCLUSION

For the foregoing reasons, CONSTRUCTION SYSTEMS, INC. should be awarded the following relief:

***50** A. This Court should affirm the trial courts rulings of October 12, 2006 and October 30, 2006 granting summary judgment in favor of CSI and denying First Midwest's motion for summary judgment on CSI's counterclaim;

B. This Court should affirm the trial court's order of December 6, 2007, finding that CSI's lien claim is in compliance with Section 6 of the Mechanic's Lien Act;

C. This Court should affirm the trial courts order of February 15, 2008, granting judgment to CSI in the amount of \$1,786,700.65 plus interest in the amount of \$818,444.00, for a total judgment as of February 15, 2008 of \$2,615,144.65;

D. This Court should affirm the trial courts ruling which granted CSI a valid and subsisting mechanics lien against the proceeds presently being held by the receiver from the sale of units and parking spaces at The Montreville Condominiums, 520 N. Halsted, Chicago, Illinois, in the amounts set forth in paragraph 3 *supra*, together with post-

judgment interest at a rate of nine (9%) percent per annum from February 15, 2008;

E. Such other relief as the Court deems just.

CORDECK SALES, INC., Plaintiff, v. CONSTRUCTION SYSTEMS, INC., et al., Defendants; First Midwest Bank, Appellant, v. Construction Systems, Inc. and Cordeck Sales, Inc., Appellees.
2008 WL 6745360 (Ill.App. 1 Dist.) (Appellate Brief)

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