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.
December 19, 2008.

Appeal from the Circuit Court of Cook County, Illinois
Trial Judge: Clifford L. Meacham
Trial Court No. 03 CH 6309

Reply Brief of Defendant-Appellant First Midwest Bank

Stephen P. Kikoler, James M. Dash, Much Shelist Denenberg Ament & Rubenstein, P.C., 191 North Wacker Drive, Suite 1800, Chicago, Illinois 60606, 312/521-2000.

***1** *ARGUMENT*

I. CSI'S CLAIM FAILS TO COMPLY WITH SECTION 7 OF THE ACT

A. FIRST MIDWEST DID NOT WAIVE CSI's FAILURE TO PROPERLY DESCRIBE THE SUBJECT PROPERTY

Construction Systems, Inc. ("CSI") contends that First Midwest waived the argument that CSI's lien claim is defective under Section 7 of the Mechanics Lien Act (sometimes referred to as the "Act") for failure to use the condominium legal description. CSI's contention is both legally and factually incorrect.

1. The Trial Court Actually Considered, And Ruled Upon, the issue Of CSI's Compliance with Section 7 and, Therefore, It Cannot Be Waived For Failure to Raise In the Trial Court

First, CSI cites cases that hold that "an issue not presented to or considered by the trial court cannot be raised for the first time on review" (CSI Brief at 7, 10-11.) But these cases are utterly irrelevant. First Midwest raised this issue in the trial court in both its supplemental response to CSI's motion for partial summary judgment on the issue of the validity of its mechanic's lien (R. C936) and its post-trial memorandum (R. C 119). Moreover, the trial court considered and actually ruled on First Midwest's argument. It entered findings of fact in the CSI section of its opinion regarding the effect of using a legal description different than that in the declaration of condominium (¶¶ 37, 38 and 39 of the Findings of Fact, R. C1234-35) and then ruled that as a matter of law that "CSI recited a sufficiently correct description of the lot, lots, or tracts of land to identify the same" (¶ 3 of the Conclusions of Law, R. C1240, and ¶ 4).

The trial court did consider this issue and First Midwest is not raising it for the first time on appeal.

***2** *2. First Midwest Was Not Required To Raise the Issue of Section 7 Deficiencies As An Affirmative Defense*

CSI also argues that the Section 7 legal description issue needed to be raised as an affirmative defense (CSI Brief at 7.) But Illinois law is clear that it is the claimant's burden to prove all of the elements of its case. Those elements include: (i) the validity of its claim against the original owner; and (ii) the technical perfection of its claim for lien over the interests of third parties such as First Midwest. *See, e.g., First Fed. S&L Assoc. v. Connelly,* 97 Ill. 2d 242, 246 (1983); *Aluma Systems, Inc. v. Frederick Quinn Corp.,* 206 Ill. App. 3d 828, 838-39 (1st Dist. 1990) (citing *Edward Electric Co. v. Automation, Inc.* 164 Ill. App. 3d 547, 549 (1st Dist. 1987)). CSI cites no case - and none exists - for the proposition that a defect in a Section 7 recorded lien claim is an "affirmative defense."

3. First Midwest Did Not Submit Evidentiary Materials "After Hearing

CSI also argues that First Midwest is barred from presenting evidentiary materials after hearing (CSI Brief at 11-12.) To support this argument, CSI cites *Robidoux v. Oliphant,* 201 Ill. 2d 324 (2002), in which a trial court entered summary judgment against plaintiff based in part on the insufficiency of counteraffidavits. The Illinois Supreme Court affirmed the trial court's refusal to accept supplemental affidavits on motion for reconsideration. CSI also cites to Section 2-1005(c), which "allows an opposing party to file a counteraffidavit prior to or at the time of hearing," and *Amaral v. Woodfield Ford Sales, Inc.,* 220 Ill. App. 3d 357 (1st Dist. 1991), which defined the term "hearing" and affirmed a trial court's refusal to accept counteraffidavits after hearing.

These cases, however, are irrelevant. First Midwest's supplemental brief on summary judgment (R. C936) did not present counteraffidavits on the Section 7 issue of legal description, which is a pure issue of law. Nor was First Midwest's supplemental brief presented on ***3** reconsideration; rather, it was presented prior to the conclusion of hearing. As discussed in the *Amaral* case, "[t]he hearing consists of the actual arguments of the parties ...." 220 Ill. App. 3d at 360. The October 12, 2006 order (R. C.860) stated that "hearing was continued" to October 30, 2006, and the record reflects that substantial argument occurred on that date (10/30/06 Tr. at 5 ff., R. V.6). First Midwest thus did raise this legal issue at or before hearing and none of these cases bar First Midwest from raising it now.

It appears that CSI is trying to make it appear that the trial court made some order or ruling that barred First Midwest from raising the legal description issue in the October 30, 2006 hearing. But the oral comments from the October 12 and 30 hearings do not amount to such a prohibition, nor did any such prohibition make it into written form CSI does not cite to the record for its statement that "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 Brief at 9 (emphasis in original)). Furthermore, the partial summary judgment entered on October 30, 2006 was merely an interlocutory order that could be vacated or modified at any time prior to final judgment. 735 ILCS 5/2-1301(e); *Rowe v. State Bank,* 125 Ill. 2d 203, 213 (1988); *Berry v. Chade Fashions, Inc.,* 383 Ill. App. 3d 1005, 1009 (1st Dist. 2008). The trial court did, in fact, expressly consider the substance of the issue in its February 15, 2007 judgment order and rule on it (R. C1234-35, 1240). There was no waiver.

B. THE STEINBERG CASE IS CONTROLLING AUTHORITY ON THE SUFFICIENCY OF CSI's DESCRIPTION OF THE PROPERTY

In its opening brief, First Midwest demonstrated that all of the trial court's rulings on the issue of the insufficiency of CSI's legal description were rejected in this Court's opinion in *Steinberg v. Chicago Title & Trust Co.,* 142 Ill. App. 3d 601 (1st Dist. 1986). But in light of CSI's brief, some of the details bear further mention.

***4** CSI asserts that its recorded lien would "appear in the chain of title" and, therefore, would be detected by the public in any real property search (CSI Brief at 16.) CSI also attempts to lift an idea from mechanics lien waiver law and introduce the idea of the "innocence" of the third party (*Id.* at 18.) However, the *Steinberg* court, quoted in First

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

Midwest's opening brief (at 12-13), expressly rejected these kinds of arguments on the ground that it is the duty of the claimant to comply with Section 7, not merely to provide notice to third parties of its claim. *Steinberg,* 142 Ill. App. 3d at 607. Other cases, too, have recognized that a lien claim is not effective just because it gives notice of the claim. For example, in *Braun-Skiba, Ltd. v. LaSalle Nat'l Bank,* 279 Ill. App. 3d 912, 918-19 (1st Dist. 1996), this Court wrote:

Plaintiff argues that despite the defects of the lien, defendant had actual notice of the debt when it purchased the property. *Plaintiff, however, overlooks that the law in Illinois is that, regardless of actual notice, it was required to file with the recorder a proper lien in order to enforce it. Mutual Services, [Inc. v. Ballantrae Dev. Co.,* 159 Ill. App. 3d 549 (1st Dist. 1987)]; *D.M. Foley [Co., Inc. v. North West Fed. S&L Assoc.,* 122 Ill. App. 3d 411 (1st Dist. 1984)]. This is evidenced by the holding in *Mutual Services* where even though a notice of the lien was specifically sent to the defendant, well within the four month filing date, this court found that the lien was unenforceable against the defendant. *Mutual Services,* 159 Ill.App.3d at 551.... Thus, it is irrelevant that defendant had actual notice; the first lien is unenforceable against it because of its patent invalidity.

***5** (Emphasis supplied). Strict compliance with Section 7 is a condition precedent to enforcement of a mechanics lien and that requirement cannot be evaded by referring to "detection" or "innocence."

C. CSI CAN NOT AVOID COMPLIANCE WITH SECTION 7 JUST BECAUSE NO CONDOMINIUM UNITS WERE SOLD AT THE TIME OF RECORDING

CSI raises one argument not raised in, or by, the trial court. The second paragraph of section 9.1(a) of the Condominium Property Act (the "Condo Act") provides that: "Each mortgage and other lien, including mechanics 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." CSI argues that, because no units had yet been sold to purchasers at the time of the recording of its lien claim, the provisions of the Condo Act did not apply to its claim (CSI Brief at 19.)

1. The Condo Act Cannot Relieve CSI Of Its Failure to Comply With Section 7 of the Mechanics Lien Act

However, CSI's lien claim is invalid not because it failed to comply with the provisions of the Condo Act, but because it failed to comply with Section 7 of the Mechanics Lien Act. Section 7 requires a "sufficiently correct legal description." For property that is legally described by plat, the lien claim must use the plat description. *Steinberg, supra.* A condominium declaration is simply a vertical plat. 765 ILCS 605/2(i), 4(b), 5. Under *Steinberg,* the lienor has not used a sufficiently correct legal description unless it has used the most current legal description for the property. 142 Ill. App. 3d at 606-07. Accordingly, a lien claim that fails to describe the property by reference to that vertical plat fails to use a sufficiently correct legal description and is deficient. CSI's failure to comply with Section 7 of the Mechanics Lien Act rendered its claim unenforceable against First Midwest regardless of whether the Condo Act applies.

***6** *2. CSI Also Misreads the Condo Act*

Furthermore, CSI mis-reads section 9. 1 (a) of the Condo Act. If anything, Section 9.1(a) creates an *additional* obligation to utilize the condominium legal description in all subsequently recorded documents. The first sentence of section 9.1(a) provides that: "Subsequent to the recording of the declaration, no liens *of any nature* shall be created or arise against any portion of the property except against an individual unit or units" (emphasis supplied). This provision flatly applies in its clear and unambiguous terms to all liens that are created or arise after the recordation of the declaration and is not made conditional in any respect.

The terms "created or arise" are not explicitly used in the Mechanics Lien Act so they must be interpreted in the context of the Mechanics Lien Act. It has long been the case that "[t]he lien is valid only if each of the statutory re-

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

quirements is scrupulously observed." *First Fed. Sav. & Loan Ass'n v. Connelly,* 97 Ill. 2d 242, 246 (1983). "A mechanics lien is not perfected unless all relevant provisions of the statute have been strictly complied with." *Edward Electric,* 164 Ill. App. 3d at 551 (citing *Steinberg,* 142 Ill. App. 3d at 605).

One of the statutory requirements for perfecting and enforcing a valid lien is Section 7 of the Mechanics Lien Act. Under Section 7, CSI's lien is not enforceable against First Midwest unless it recorded a mechanics lien claim against the property that complied with Section 7. The filing of a Section 7 notice that failed to use the condominium legal description would violate Section 7 as decided by *Steinberg* - and would independently violate the first sentence of Section 9.1 since otherwise it would "create" or cause a lien claim to "arise" against property other than individual condominium units.

CSI cites the federal district court's opinion in *Argonne Constr. Co. v. Norton,* 29 B.R. 731 (N.D. Ill. 1983), to support its argument. However, the federal court *Argonne* could not overrule this Court's decision in *Steinberg* on the requirement of Section 7 even if it purported ***7** to do so, which it did not. Indeed, the correctness of the legal description in a Section 7 mechanics lien claim was *not* at issue in *Argonne.* If anything, *Argonne* supports First Midwest's argument because *Argonne* found that under the circumstances of that case, the mechanic lienors' "lien arose after recordation of a declaration of condominium. Therefore, under this statutory construction, the first paragraph of Section 9.1 applies and the lien could have attached only to a specific unit or units." 29 B.R. at 738.

CSI is relying on a discussion in *Argonne* about the second paragraph of Section 9.1. However, that discussion is *dicta* because *Argonne* did not find that the second paragraph applied. Furthermore, neither that *dicta* nor CSI's argument is well grounded in the language of Section 9.1 Section 9.1 contains many other provisions that are intended to apply after the developer commences sales, such as provisions: (i) limiting the developer's ability to enter into contracts that could result in liens on sold units; and (ii) requiring a lien holder provide an address to the unit owners association at the time of recordation. But none of those provisions are at issue in this case.

In sum, CSI's failure to use the condominium legal description violates Section 7 of the Mechanics Lien Act regardless of the applicability of the Condo Act; and if anything, Section 9.1 of the Condo Act imposed an additional obligation on CSI to use the condominium description in a Section 7 notice. CSI's failure to use the condominium description renders its claim for lien ineffective under Section 7.

D. AN ISSUE OF FACT REMAINS ON WHETHER CSI RECORDED ITS LIEN WITHIN FOUR MONTHS OF ITS COMPLETION DATE

First Midwest argued in its initial brief that: (i) the trial court utilized the wrong legal standard for determining whether CSI performed work within four months of the recordation of the mechanics lien; and (ii) under the correct legal standard, there is a material issue of ***8** fact that required a trial and summary judgment was inappropriate. CSI does not address this argument and tries to re-cast First Midwest's argument as an attack on the affidavit of CSI's vice-president, Perry Haberer, for failure to comply with Supreme Court Rule 191(b). Because it was not raised in the trial court, CSI argues, First Midwest waived an attack on Mr. Haberer's affidavit.

However, First Midwest did not in the trial court, and does not in this appeal, assert that CSI's motion for summary judgment was deficient because Mr. Haberer's affidavit did not comply with Rule 191 (b). Rather, CSI's motion was deficient because it was unsupported by any evidence at all on a key fact: the recording its claim for lien within four months of the completion of the work for which the lien holder is charging, as stated in the lien. Braun *Skiba,* 279 Ill. App. 3d at 918; *see also* *D.M. Foley,* 122 Ill. App. 3d at 414-415. First Midwest expressly raised this argument in the trial court (R. C955, 956). There is no evidence that work performed within four months of recording (on or after May 25, 2003) was charged for in the lien, which is the correct standard under Illinois law.

There is little question why CSI cites no authority, and fails to even attempt, to support the trial court's "substantial

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

completion" standard - because no such authority exists. Instead, CSI tries to deflect attention from its lack of authority by attempting to distinguish *Braun-Skiba, D.M. Foley, Merchants Environmental* and *Mutual Services* on their facts. But CSI never comes to grips with the fact that each of these cases involved a calculation of the completion date for the purposes of perfecting a mechanic's lien and each states the standard for determining the completion date. On this issue, none of these cases are distinguishable from the instant case. The legal standard is that the completion date is no later than the last ***9** date of work for *which the lien holder is charging, as stated in the lien.* This is the law that the trial court should have enforced but did not.

CSI also argues that First Midwest should be barred from arguing that a triable issue of fact remains on CSI's claim because First Midwest filed its own motion for summary judgment. CSI argues that First Midwest's filing of a motion for summary judgment "acknowledges the absence of any issues of fact," citing *State Farm Fire & Cas. Co. v. Martinez, 384* Ill. App. 3d 494 (1st Dist. 2008), and *Makanda Twp. Road Dist. v. Devils Kitchen Water Dist.,* 379 Ill. App. 3d 1064 (5th Dist. 2008).[FN1] However, First Midwest's motion was limited to the issue of waiver - it did not agree, and has never agreed, that CSI's version of the facts related to its completion date (or any fact other than CSI's acknowledged waivers of lien) was correct. Accordingly, *State Farm* and *Makanda* are easily distinguished.

FN1. Even assuming the correctness of CSI's statement of legal principle, in the *State Farm* and *Makanda* cases the parties filed true cross-motions for summary judgment stating that the same facts were not in dispute and each argued that, under the agreed facts, he/it was entitled to judgment as a matter of law. *State Farm,* 384 Ill. App. 3d at 504-05 (parties agreed as to text of insurance policy; the dispute was over its meaning); *Makanda,* 379 Ill. App. 3d at 1066 (parties agreed as to location of a water line; the dispute was over legal right-of-way).

Moreover, while the filing of cross-motions for summary judgment may be a general invitation to decide the issues presented in the action as questions of law, the mere filing of a cross-motion "cannot confer upon the court the power to grant a summary judgment to one of the parties where genuine issues remain precluding summary judgment in favor of either party." *American States Ins. Co. v. Koloms, 281* Ill. App. 3d 725, 727-28 (1st Dist. 1996). In sum, the filing of a cross-motion for summary judgment - even on the same facts (which ***10** was not the case here) - is not a bar to opposing a motion for summary judgment and does not require the grant of either motion.

II. CORDECK'S ARGUMENTS DO NOT REMEDY THE TRIAL COURT'S ERROR IN FAILING TO DISMISS CORDECK'S CLAIM FOR CONSTRUCTIVE FRAUD

A. CONSTRUCTIVE FRAUD IS NOT AN AFFIRMATIVE DEFENSE

Section 7 of the Act requires the lien claimant to accurately state "the balance due after allowing all credits." It contains a savings provision that prevents the lien from being defeated "to the proper amount thereof because of an error or overcharging on the part of any person claiming a lien therefor under this Act, unless it shall be shown that such error or overcharge is made with intent to defraud." 770 ILCS 60/7.

Accordingly, constructive fraud is not an affirmative defense because a correct statement of the "balance due after allowing all credits" is an essential element of a claim. Moreover, the trial court did not refuse to consider constructive fraud on the basis of a failure to plead any affirmative defense.

B. FIRST MIDWEST HAS SATISFIED THE STANDARD FOR CONSTRUCTIVE FRAUD

Cordeck recorded a claim for mechanic's lien in the amount of $1,003,489.90 [Cordeck Ex. 4]. That document, which was unilaterally prepared and recorded by Cordeck, is verified by the affidavit of Cordeck's president, Susan Moore. However, at the trial, Cordeck: (i) introduced evidence that it was owed only $415,430.00; (ii) did not introduce any evidence with respect to the balance of $588,000; and (iii) withdrew its claim against its customer CSI, that

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

it was due any more money. Cordeck nevertheless argues that the trial court was entitled to find that Cordeck did not commit constructive fraud. According to Cordeck: (a) First Midwest did not point to any evidence, in addition to the overcharge itself, from which intent may be inferred; and (b) there was evidence to support Cordeck's performance of "extra work" from which the trial court could find a lack of intent to overcharge.

***11** However, First Midwest pointed to overwhelming evidence from which Cordeck's intent to overcharge can and must be inferred. At pages 21-24 of its opening brief, First Midwest cited, *inter alia,* five of Cordeck's own contractor's affidavits [FMB Ex. 715, pp. CS 2-3, 3-4, 3-5, and Ex. 715(A)] stating throughout the project that its contract price, INCLUDING EXTRAS, never exceeded $960,000. Because the sworn statements were Cordeck documents, Cordeck had *actual knowledge* that its claim could never exceed $960,000, even if Cordeck had never been paid a nickel. And by the time that Cordeck recorded its claim for lien, it had actually received payments totaling $519,609.52 and acknowledged a credit of $25,230 (2/15/08 Judgment Order at 13, ¶ 54; R. C1236).

Because Cordeck never sought in the lawsuit to recover anything close to the amount claimed in its recorded mechanic's lien claim, it is obvious why Cordeck, according to the trial court, "elected not to litigate its claim for extras" *[id.].* Cordeck swore on five separate occasions that they did not exist.

In the face of that and other evidence cited by First Midwest in its opening brief, Cordeck maintains that there was evidence from which the trial court was entitled to conclude that Cordeck did not intend to overstate its lien. Cordeck provides twelve citations to the testimony of CSI's Perry Haberer. However, Mr. Haberer's testimony does not help Cordeck because there is no evidence that Cordeck was entitled to any additional money - much less the $588,000 necessary to justify Cordeck's recording a lien of $1,003,489.90.

Section 7 of the Act would save Cordeck if the overcharge this was a mere error or accident. But the evidence is conclusive that: (i) Cordeck *knew* that it was due, under its contract with CSI, less than $416,000; and, despite this knowledge, (ii) recorded a lien in excess of $1 million. On this basis this Court should reverse the judgment entered in favor of Cordeck.

***12** III.THE TRIAL COURT ERRED IN FAILING TO INVALIDATE THE CSI AND CORDECK LIEN CLAIMS UNDER SECTION 6

A. COMPLIANCE WITH SECTION 6 IS NOT AN AFFIRMATIVE DEFENSE

In its opening brief, First Midwest provided an extensive analysis of section 2-613(d) of the Code of Civil Procedure (735 ILCS 5/2-613(d)), to show that the claimants' failure to prove their compliance with the Act forming the basis of their claim is not an affirmative defense that First Midwest was required to plead. With little analysis, CSI (but not Cordeck) disputes this point, for the most part merely asserting that the case of *Midwest Environ. Consulting & Remediation Servs., Inc. v. Peoples Bank,* 251 Ill. App. 3d 256 (4th Dist. 1993), holds otherwise.

Midwest Environmental is easily distinguished because the affirmative defense in that case was a violation of a statute other than the statute with which the claimant had to prove compliance. In *Midwest Environmental,* an unlicensed engineer sought a mechanic's lien under section 1 of the Act, which provides a lien for those who contract to provide services as an engineer (770 ILCS 60/1). The defendant did not plead (and did not seek to amend to conform to the proof) that rendering engineering services without a license: (i) was a violation of the Professional Engineering Practice Act ("PEPA"); (ii) was a criminal act under PEPA; and (iii) prohibited the engineer from compensation under PEPA. *Id.* at 261. This Court ruled that the violation of the PEPA was an affirmative defense that the defendant was required to plead, and its failure to do so justified the trial court's refusal to consider the issue because it was not properly framed in the pleadings. *Id.*

However, while compliance with any statute other than the Mechanics Lien Act itself is not an essential element of a

claim under the Act, a claimant must plead and prove compliance with all of the relevant provisions of the Act itself because, as pointed out at page 30 of First Midwest's initial brief, “[a] mechanic lien is not perfected unless all relevant provisions ***13** of the [Act] have been strictly complied with.” *E.g., Edward Elec. Co. v. Automation, Inc.,* 164 Ill. App. 3d 547, 551 (1st Dist. 1987). The claimants' failure to comply with the Act, including section 6, is not an affirmative defense; it is an essential element of their claim.

B. DISMISSAL OF THE CLAIM IS REQUIRED AS A MATTER OF LAW

The briefs filed by both Cordeck and CSI confirm that there is no dispute as to the material fact related to their failure to comply with section 6 of the Act - that is, that the work of the original contractor, Construction Services International, Inc., was not completed within three years of commencement.

In its opening brief, First Midwest traced the history of section 6, its antecedents and the cases decided thereunder, to demonstrate that: (i) it is the duration of the performance of the *original* contractor, not its subcontractors, that determines the validity of a lien under section 6 (because it is the original contract that provides the basis of the mechanic's lien); and (ii) stipulations of a completion date and a payment date will not salvage a lien if the performance of the original contractor exceeds three years (First Midwest Brief at 24-28).[FN2]

FN2. *See also Cook v. Vreeland,* 21 Ill. 431 (1859), for the proposition that, even if a contractual stipulation to a completion date longer than the statutory period (here, three years) could salvage a lien, failing to honor that completion date renders the lien unenforceable. In this case, the contract between Savannah (the owner) and Construction Services International, Inc. (the original contractor) does not contain any stipulation of the payment date and contains a pro-posed completion date (of December 15, 2002) which was not adhered to.

CSI and Cordeck largely ignore the considerable authority cited in First Midwest's brief. Cordeck does not cite a single case. Except for pointing out that a statute must be read as a whole - a principle that lacks any specific application here, CSI cites only the case of ***14***Robb v. Lindquist,* 23 Ill. App. 3d 186 (3d Dist. 1974). CSI pulls the following language out of the *Robb* case: “the three-year period [in section 6 of the Act] commences with the beginning of work for which the mechanic's lien is asserted and not with the date upon which the contract for such work was entered into.” 23 Ill. App. 3d at 188. CSI argues that the court in *Robb,* contrary to the Illinois Supreme Court's opinions cited in First Midwest's opening brief in *Von Platen & Dick v. Winterbotham,* 203 Ill. 198 (1903), and *Williams v. Rittenhouse & Embree Co.,* 198 Ill. 602 (1902), intended to hold that it is the duration of the subcontractor-claimant's performance, not the duration of performance of the original contractor, that dictates compliance with section 6.

Even if the Appellate Court in Robb intended the holding suggested by CSI (and it clearly did not, as no subcontractors were involved), it could not overrule the cited Supreme Court opinions. In *Von Platen,* the Supreme Court wrote that: “where the original contract did not comply with the requirements of the statute, without which no lien could be had by virtue of the act, there would be no lien in favor of a subcontractor.” 203 Ill. at 203 (citing *Williams).* The Supreme Court's holding could not be clearer.

Moreover, the court in *Robb* could not have intended to contradict the Supreme Court's holdings in *Von Platen* and *Williams* because in *Robb,* the claimant was an *original* contractor whose lien against two separate tracts owned by the same owner (Lindquist). The fact that the claimant in *Robb* was an original contractor and not a subcontractor obviated the need for further analysis.

Finally, CSI asserts that it should be excused from compliance with section 6 because “projects such as the Montrevelle are routinely shut down” and that this project was “shut down and delayed through no fault of CSI,” from which CSI concludes that the actual duration ***15** of the original contractor's performance was less than three

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

years (CSI Brief at 38-42.) However, no evidence on this issue was introduced at trial. Instead, CSI cites to its own (probably its attorneys') speculation that projects are "routinely" shut down, and to depositions and affidavits filed in the case but not introduced at trial. All of the materials cited by CSI would have been patently inadmissible at trial (*i.e.,* as hearsay or rank speculation), assuming that CSI had attempted to introduce them - which it did not (and these reference should be stricken). In any event, these claims were tried to the court and assuming that any of the alleged statements of fact in its brief was actually material to the section 6 analysis, CSI needed to *prove* these facts at trial with admissible evidence. It did not even attempt to do so, and section 6 remains a bar to any subcontractor liens under the Act.

IV. THE FAILURE TO REQUIRE CSI AND CORDECK TO PRODUCE THEIR SETTLEMENT AGREEMENT WAS AN ABUSE OF DISCRETION

This issue applies only to Cordeck's claim for lien.

It appears to be without dispute that the purpose of Cordeck's mechanic's lien is to secure repayment of CSI's subcontract debt to Cordeck (*see* First Midwest Brief at 32.) To the extent that the settlement agreement between CSI and Cordeck adjusted the amount due to Cordeck under its subcontract, it is patently relevant because: (i) the amount of Cordeck's claim for mechanic's lien cannot exceed the amount CSI's debt to Cordeck under the subcontract between them; and (ii) any agreement that Cordeck makes to reduce the amount of the subcontract debt owed to it by CSI (perhaps by over $580,000).[FN3]

FN3. In addition, the agreement could provide evidence of Cordeck's intent to overstate its claim in support First Midwest's constructive fraud claim. CSI's contention that "the resolution of the claim between CSI and its subcontractor has no bearing on any aspect of First Midwest's case" is baseless.

***16** Thus, when Cordeck and CSI announced to the trial court that they had reached a settlement of the debt owed by CSI to Cordeck under the subcontract between them, it seemed that a request for a copy of that document should be routinely granted. But that request was not granted, purportedly because CSI and Cordeck called their agreement "confidential" be-tween them and agreed to keep their settlement agreement secret from the rest of the world, including the court and First Midwest. CSI asserts that this should be acceptable because public policy favors the freedom to contract (CSI Brief at 43.)

If CSI is deemed to be correct that "freedom to contract" means that parties have the right by agreement to trump discovery rules and exempt from disclosure relevant evidence that is not privileged and does not constitute trade secrets or the like, this would be a revolutionary change in Illinois law.

CSI's position is, of course, preposterous. If CSI's position becomes the law, parties will routinely agree to keep all of their agreements, communications and other documents "confidential," thereby avoiding those nettlesome Supreme Court Rules that require disclosure of unprivileged relevant evidence.

The Supreme Court Rules governing discovery and disclosure do, and must, take precedence over private confidentiality agreements absent a legitimate claim of privilege or other exception provided by law. If there was something in the settlement agreement to which Cordeck and/or CSI wished to claim a protectible interest, it could have asked for a protective order limiting distribution. But neither CSI nor Cordeck advanced any protectible interest; they merely declined to provide a copy of their agreement on the ground of "confidentiality" and the trial court uncritically accepted this claim.

***17** First Midwest is not obligated to accept the representation of Cordeck's counsel - or anyone else, including the trial judge - as to the effect of the settlement agreement between CSI and Cordeck. First Midwest is entitled to examine the settlement agreement itself and the trial court erred in refusing this request.

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

V. THE COURT SHOULD NOT FOLLOW OR SHOULD LIMIT PRIOR CASE LAW PERMITTING ADMISSION OF EXTRINSIC EVIDENCE TO DETER-MINE "INNOCENT RELIANCE" ON LIEN WAIVER

A. THE ISSUE OF THE EFFECT OF LIEN WAIVERS IS PROPERLY BEFORE THIS COURT

CSI begins its argument on the effect of its waivers of lien with the contention that this Court should not even consider the issue because it is not properly before the Court. The basis of this argument is the *Cordeck Sales I* opinion, which CSI calls the "law of the case."

"Law of the case" is a rule of practice that the "unreserved decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit." *E.g., Continental Ins. Co. v. Skidmore, Owings & Merrill,* 271 Ill. App. 3d 692, 696-97 (1st Dist. 1995); *Heller Financial, Inc. v. Johns-Byrne Co.,* 264 Ill. App. 3d 681,694 (1st Dist. 1994). The Court's decision in *Cordeck Sales I* is not "law of the case" on this appeal. This appeal is not a subsequent stage of the counterclaims that were the subject of *Cordeck Sales I.* It is an appeal from judgments entered on a complaint and counterclaim distinct from the counterclaims on which summary judgments were entered in *Cordeck Sales I.* Though some facts are common, other facts are different. This appeal is effectively a separate case and this Court should review the issue of waiver as though presented in a new case.

B. CORDECK'S AND CSI's ARGUMENTS DO NOT ADDRESS THE FUNDAMENTAL IS-SUES RAISED BY FIRST MIDWEST

In its opening brief (at pp. 35-37), First Midwest analyzed the Illinois Supreme Court cases distinguishing between the doctrines of equitable estoppel and waiver. These cases ***18** hold that, while estoppel requires proof of reliance, reliance is irrelevant to the question of whether a waiver should be enforced.

Cordeck and CSI make no effort to address this line of Supreme Court cases, but nevertheless contend that First Midwest is seeking an "exception" to the "rule" that reliance must be proved to establish waiver. First Midwest recognizes the line of case law cited in *Cordeck Sales I* requiring innocent reliance, but respectfully submits that the rule is the general law of waiver, as expressed by the Illinois Supreme Court, and the exception to that rule is found in the mechanic's lien cases. The general law of waiver renders reliance irrelevant; only the mechanic's lien cases make reliance at all relevant. First Midwest further submits that the mechanic's lien exception to the broader rule arose in early cases in which delivery of the waiver was induced by the owner's fraud or assurances, while no such fraud or assurances are at issue here.

CSI does not address these legal issues. CSI instead cites to testimony from the discovery deposition of Pamela Hitzemann regarding reliance. But First Midwest's legal argument is that such testimony should be irrelevant.[FN4]

FN4. On this point, CSI cites yet additional material that was not introduced into evidence at trial - discovery deposition testimony of Pamela Hitzemann. This testimony is not evidence and all references to it should be stricken.

CSI also argues that First Midwest's title company had information at the time of the waiver indicating that there were "balances due." But knowledge that a balance due exists should not invalidate a waiver of lien for part or all of that balance. A waiver is a voluntary relinquishment of a known right. A right to lien only exists for *unpaid* work. Thus a lien waiver is by definition a voluntary relinquishment of a right to lien for unpaid work. It ***19** should not matter that the recipient of the waiver knows that the work is unpaid. The recipient's knowledge that the waived work is unpaid is entirely consistent with a valid and effective waiver. Indeed, there can be no lien for paid work, so a waiver of lien for work for which the contractor has been paid is superfluous. Nothing is relinquished by a waiver that waives a lien only for paid work.[FN5]

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

FN5. CSI asserts that First Midwest has acknowledged that CSI did not receive payment for its waivers of lien (CSI Brief at 44.) This is an over-statement. By its own admission, CSI was paid for several of its waivers, the most recent of which was dated November 20, 2002 [Haberer, 11/21/06 PM Tr. at 110-12, V.8].

First Midwest also pointed in its opening brief to the importance of maintaining the integrity of the parol evidence rule, which prohibits extrinsic evidence from being introduced to alter the meaning of an unambiguous agreement because the agreement "must be presumed to speak the intentions of the parties who signed it.... It is not to be changed by extrinsic evidence." Air Safety Inc. v. Teachers Realty Corp., 185 Ill. 2d 457, 462 (1999); *Western Ill. Oil Co. v. Thompson,* 26 Ill. 2d 287, 291 (1962).

Cordeck's argument is a prime example of how that rule is disregarded in this case. Cordeck presented the testimony of Sherri Longshore as to her supposed intent in signing waiver. But this is exactly the sort of testimony that the parol evidence rule is intended to exclude. Cordeck's waivers are in writing and unambiguous as to intent. Ms. Longshore should not be able to vary and contradict that unambiguous written document with oral expressions. Moreover, there is no evidence cited by Cordeck that Ms. Longshore ever actually expressed her intent to First Midwest or its title company; to the contrary, Ms. Long-shore testified that she had no communications with First Midwest (then CoVest) or the title ***20** company about the waivers (Longshore, 12/7/06 PM Tr. at 48-49, V.8.) Her conclusory, foundation-less testimony about secret intent is doubly irrelevant.

Finally, CSI asserts that its waivers of lien should be vitiated because of disparate commercial bargaining power or because a lender supposedly "is in a far better position to protect itself against loss where conduct of their borrowers places payments to subcontractors at risk" (CSI Brief at 48.) But no such argument has ever previously been made; CSI is not a consumer; the record does not even begin to support such findings; and no such findings have ever been made by the trial court or even considered.

CONCLUSION

For the foregoing reasons, the trial court's judgment should be reversed and judgment should be entered in favor FMB and against CSI and Cordeck; or alternatively, the case should be remanded for further proceedings in accordance with the decisions of this Court.

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 6745362 (Ill.App. 1 Dist.) (Appellate Brief)

END OF DOCUMENT

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.