

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 20, 2008.

Appeal from the Circuit Court of Cook County, Illinois Trial Judge: Clifford L. Meacham, Trial Court No. 03 CH 6309 Consolidated, Date of Notice of Appeal: February 21, 2008, Date of Judgment: February 15, 2008

Response Brief of Plaintiff-Appellee

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***3 ARGUMENT**

The Defendant, First Midwest Bank (FMB) in its brief alleges the following errors by the Trial Court in its awarding Judgment in favor of Plaintiff, Cordeck Sales, Inc. (Cordeck);

I The Trial Court erred as a matter of Law by failing to dismiss the Cordeck lien claim for constructive fraud.

II The Trial Court erred as a matter of law by failing to Dismiss the Lien Claims of Construction Systems, Inc. (CSI) and Cordeck on the Grounds that the General Contractors work was not completed with three years as required by section 6.

III The Trial Court abused its discretion by refusing to require Cordeck and CSI to produce their Settlement Agreement.

***4** IV The Court should not follow or should limit prior Case Law permitting admission of extrinsic evidence to determine innocent reliance “on lien waivers.”

I THERE WAS NO CONSTRUCTIVE FRAUD

Section 7 of the Illinois Mechanics Lien statute states as follows:

“No such lien shall be defeated to the proper amount thereof because of an error or overcharging on the part of any person claiming a lien therefore under this Act, unless it shall be shown that such error or overcharge is made with intent to defraud”. 760 ILCS 60/7.

This Court in the case of *Cordeck v Construction Systems, Inc.* 328 Ill App3d 334, 369 (1st District, 2008) (hereinafter Cordeck I) in making reference to the claim of Reinke Gypsum Supply Company stated as follows:

“We thus find that Reinke's claim is overstated by \$24,819.15. There is no evidence, however, that the overstatement was made with an intent to defraud. Even under a constructive fraud theory, a lien claim will not be invalidated simply because it contains an overstatement. *Peter J. Hactmon Co.*, 353 Ill App3d at 708, 288 Ill Dec263, 817 NI2d 913. In this case, aside from the lien claim itself, First Midwest points to no other evidence from which fraudulent intent can be inferred.” 382 Ill App3d at 369.

Under Illinois law, FMB has the burden of pointing to and providing evidence from which intent could be inferred. *Cordeck I.* at 369.

FMB's argument on its face is based upon what it describes as lack of evidence (FMB's brief at P22) rather than evidence actually admitted.

FMB states that the failure of Cordeck to seek extras after it amended its complaint and deleted these extras from its claim is evidence.

Neither answer filed by FMB in this case, R Vol. 1 P34 to 36 and Record Vol. 1 P121 to 137 alleged Constructive Fraud as an affirmative defense or an affirmative fact allegation under FMB's analysis that would put Cordeck on notice that it was obligated to introduce evidence to rebut non-existent allegations.

*5 FMB introduced no evidence at trial and asked no questions of any witness relevant or material to the issue of Constructive Fraud.

In addition, the other evidence cited by FMB related to the denied Motion for Summary Judgment. The affidavits and documents considered by the Court in deciding the Motion for Summary Judgment were not admitted into evidence at trial and therefore are not part of the record upon which the trial court's decision was made.

The decision made by this Court in *Cordeck I* relating to Reinke was based on its review of the Summary Judgment ruling so the entire record of the motion, affidavits, and documents submitted in support and opposition to the motion formed the record on appeal for that decision.

The ruling of the Trial Judge, in this case paragraph 65, of the Trial Judge's ruling stated:

“65. FMB has failed to prove fraud or constructive fraud was committed by any claimant. See Conclusion of Law, paragraph nine (9) and twelve (12) and footnote seven (7).

In paragraph twelve (12) of the Conclusion of Law the Court cited the case *Atlee Electric Company v Jonson Construction Company*, 14 Ill App3d 716 (1st District, 1973) in denying the constructive fraud defense.

The *Atlee*, supra, opinion states at 14 Ill App3d at 725 “In other words, the Courts of Illinois have held that errors or overcharging by lien claimants will not defeat their claim for lien absent clear intent to defraud. This principle is in complete accord with the language of the statute above cited and is another corollary to the generally accepted and wise legal principle that fraud is never presumed but must be the subject of clear and convincing proof (citation omitted)”

Perry Haberer, the President of CSI, and Sherri Longshore, the agent of Codeck, both testified at trial and FMB's trial counsel did not ask a single question of either witness relevant to the issue of whether Cordeck's claim was overstated or why it was overstated.

*6 FMB also contends that one of the evidentiary grounds proving constructive fraud is the failure of Cordeck to

introduce evidence of its extras.

Prior to trial, Cordeck filed a Motion to Amend Its Complaint on the basis that it had settled its claim for extras with CSI and as a part of the settlement was reducing its total lien claim by \$563,099.22. Record Volume 5 P1104 to 1105.

The motion to Amend was granted along with a stipulation dismissing all claims between Cordeck and CSI R Volume 5 P1109.

FMB had the right and opportunity to introduce any evidence it believed established constructive fraud and failed to even ask a single question of Cordeck and CSI's witnesses relative to that contention.

In fact, its argument on page 23 of the brief, references the pleadings of CSI by citing Count VIII of CSI's First Amended Counterclaim, alleging that it cost CSI over \$526,423.02 to correct Cordeck's mistake.

FMB not cannot rely on contested issues of fact alleged in pleadings when it had the opportunity to present evidence by cross examining the witness(es) who created the pleadings.

Cordeck had no duty to introduce evidence negating any intent to defraud when FMB failed to introduce any evidence on the issue.

Moreover, during the trial CSI's Perry Haberer gave extensive testimony demonstrating that Cordeck performed extra work as follows:

1. Page 23 of Testimony of November 20, 2006 Invoices 2536 through 2540 RC Volume 7 P.211.
2. Page 79 of testimony of November 20, 2006 RC V.17 P.225.
3. Page 86 of testimony of November 20, 2006 RC Vol. 7 Page 227.
- *7 4. Page 119 of testimony of November 20, 2006 RC Vol. 7 page 236.
5. Page 122 of testimony of November 20, 2006 RC Vol. 17 page 237.
6. Page 123-124 of testimony of November 20, 2006 Vol. 7 page 237.
7. Page 18-19 of the testimony of November 21, 2006 RC Vol. 7 Page 246.
8. Page 21, 22 of the testimony of November 21, 2006 RC Vol. 7 Page 246-247.
9. Page 7 of the testimony of November 21, 2006 RC Volume 8 Page 7.
10. Page 96 of the testimony of November 21, 2006 RC Volume 8 Page 7.
11. Page 72 of the testimony of December 7, 2006 RC Vol. 8 Page 70.
12. Page 74, 75, 76, 77, Testimony of December 7, 2006 RC Volume 8 Page 71.

CSI proved by clear and convincing evidence extras totaling \$757,370,99. FMB is asking this Court to assume these extras do not include the \$563,099.00 requested by Cordeck for extras in its lien claim. Again FMB failed to address this question at trial and is now asking this Court to presume a finding of fact without any supporting evidence in the trial record.

FMB not only did not introduce evidence of constructive fraud at trial but it made no effort to do so, despite the fact that the Trial Judge in denying the Motion to Bar the Defense of Constructive Fraud stated:

“The fact is that you know constructive fraud requires at least from my perspective a little deeper analysis than mere overcharging.... Constructive Fraud, again in order for a Court to find constructive fraud I believe that an inference has to be drawn, and the inference rests on something more than just an excessive lien.” Judge Meacham's statement of Record on November 2, 2006 Record Volume 7 P28.

Therefore, despite being given a road map of what the trial Judge needed to see or hear, FMB refused and failed to introduce any material evidence at trial.

*8 In its Post Trial memorandum, FMB's argument was limited to the contention that since the lien on its face was in excess of the amount shown on its last contractors statement, it is constructively fraudulent without further explanation. Record Volume 5 P1155.

It now appears that after the trial, FMB learned that Illinois does not permit an inference of constructive fraud based solely on the amount of the lien. Therefore, with no evidence at trial there is no proven constructive fraud.

Lastly, this Court should note that FMB argued in its closing argument after trial that CSI's claim was also constructively fraudulent Record Volume 5 P1153, but has not made that argument on appeal, only making this allegation against Cordeck. Since CSI introduced evidence of Cordeck's extras which were accepted by the trial court, this inconsistency makes no rational sense.

II CORDECK'S MECHANICS LIEN DOES NOT FAIL DUE TO SECTION 6

FMB in its brief makes no distinction between Cordeck and Construction Systems, Inc. as to this issue, so Cordeck hereby adopts the Response of Construction System's Inc. contained in the Brief of Construction Systems, Inc.

Cordeck realleges the exact same argument as CSI and just substitutes Cordeck for CSI, in lieu of setting forth the arguments herein except to emphasize that the record shows Cordeck completed its work on the project in November, 2002, approximately six (6) months earlier than CSI.

If FMB is correct in its argument under Section 6, then a subcontractor who properly completed its work and then filed a lien for nonpayment would find that its lien would become unenforceable at a future date simply because the General Contractor did not complete the construction within three (3) years.

*9 Cordeck submits that this is obviously not the intent of Section 6. 760 ILCS 60/6

Lastly, and most importantly, FMB asserts that there was undisputed evidence a trial which established that the work of the contractor Construction Services International, Inc. was not completed within three (3) years of commencement. (FMB Brief Page 26)

This so called undisputed evidence is not part of the trial record of either Cordeck or CSI.

The evidence cited by FMB was part of the trial record in the trials on lien claims filed by F.E. Moran and Austin Mechanical. Neither Cordeck nor CSI participated in these trials and any evidence introduced therein is not part of the trial of Cordeck or CSI claims. In addition, FE Moran and Austin Mechanical are not parties to this appeal.

In the Cordeck and CSI cases, there was no evidence introduced to show when Construction Services International, Inc. commenced and completed it work.

III THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT COMPELLING CORDECK TO PRODUCE THE SETTLEMENT AGREEMENT.

The argument made by FMB regarding the trial court's abuse of discretion in not compelling the production of the settlement agreement applies equally to Cordeck and CSI. Cordeck therefore adopts the argument made by CSI in its Response Brief just substituting Cordeck for CSI where it appears.

Cordeck is perplexed by the statement made in FMB's brief that "FMB is prejudiced by its inability to obtain the

settlement agreement and understand the impact of the agreement on Cordeck's lien claim". (FMB Brief Page 32)

On November 20, 2006, Cordeck's filed a Motion to Amend Its Complaint Record Vol. 5 Page 1104-1105, which could not have been clearer as to the impact of the settlement on Cordeck's claim.

***10** The Motion on its face stated that Cordeck had filed a lien claim in the amount of \$978,259.70 consisting of \$563,099.22 in extras and \$416,600.00 based on the original contract on the above claim.

The Motion also stated that Cordeck settled its claim for extras with CSI and was therefore no longer seeking to foreclose on the extras portion of its lien.

This was the impact of the settlement agreement between CSI and Cordeck on Cordeck's claim.

**IV THE COURT SHOULD NOT REVERSE OR LIMIT PRIOR CASE LAW PERMITTING ADMISSION OF
EXTRINSIC EVIDENCE TO DETERMINE "INNOCENT RELIANCE" ON LIEN WAIVERS.**

Since the arguments made by FMB in this part of its Brief do not distinguish between Cordeck and CSI, Cordeck hereby adopts the Arguments made by CSI.

FMB in its brief has not addressed the Standard of Review for this argument.

In addition, FMB has not set forth in its argument what error the Trial Court made in applying existing case law to this case, nor has FMB set forth in its argument that by reversing or limiting the existing case law that the result of the Trial Court in this case would be different.

FMB points to no evidence in the trial record in support of its statements on page 44 of its Brief that "CSI and Cordeck knew they were being asked to waive liens "to date" and the waivers voluntarily signed and delivered to third parties unambiguously expressing their intention to relinquish their rights "to date" in exchange for a set payment".

In fact, the evidence is quite to the contrary.

Sherri Longshore testified for Cordeck on December 7, 2006.

***11** Commencing on page 41 of her testimony R Vol. 1 Page 83 the following exchange took place;

Q. Now, as part of the regular payment process, Cordeck gave waivers in exchange for payments is that correct.

A. Yes

Q. Tell me how the process worked.

A. Receive a call -- well received payment, and then they ask for a waiver - a partial waiver for monies received.

Q. So when was the waiver - was the waiver a document that you were required to submit.

A. Yes.

Q. Who required it.

A. Construction Systems.

Q. What's your understanding of what happens to that waiver once you give it to Construction Systems.

A. It is forwarded on to their customer.

Q. And all the way up the chain.

A. Yes.

Further testimony on page 45 R Volume 8 page 84

Q. Ms. Longshore, I'd like to direct your attention to what we've ... what we're calling Exhibit 715A. It also has the

Exhibit Cordeck 4 stricken on it. Do you see that.

A. Yes

***12 Q.** Have you seen this document before

A. Yes

Q. What is it?

A. It is a partial waiver of lien.

Q. It is dated September 19, 2002 correct.

A. Yes

Q. And it states that Cordeck's contract amount - - - I'm just giving to read from ---this is now the contractors affidavit portion. It says: The total amount of the contract including extras and there is a little asterik, is \$960,000.00.

Q. Do you see that.

A. Yes.

Q. And the grid, you've got the contract price for Cordeck \$960,000.00 right?

A. Yes.

Q. Would that indicate to you that this is the first waiver and affidavit on this project.

A. This is the first partial waiver of lien.

Q. It says payment is \$72,000.00 correct.

A. Yes.

Q. Now, that \$888,000.00, as of that particular moment in time, that was for work not yet completed but anticipated to be completed in some --- at some future date, is that right.

A. Yes.

Q. Its for money not yet due.

A. For money that was either not yet due ---- Yes. Yes.

***13** The testimony continued as to each partial waiver delivered by Cordeck and signed by her and all of the questions are directed to the testimony shows FMB's counsel refers to as "the contractors affidavit portion".

The testimony of Sherri Longshire is clear and unambiguous that the intention of the partial waiver of lien was to waive lien rights as to money received.

In addition, the testimony of Ticor representative Pamela Hitzeman, about her procedures for collecting and relying on lien waivers in the context of the draw review.

Pamela Hitzeman testified at length about her involvement with Ticor on the payment process:

Starting on page 33 Record Vol. 8 Page 116 the following questions:

Q. All right. What is the purpose behind obtaining a waiver of lien.

A. Behind Obtaining It.

Q. Yeah.

A. The party signing the document is waiving the right to lien as to THAT payment. (Emphasis Added)

Further on page 65 Record Vol. 8 Page 124,

Q. What is the difference between a partial and final waiver.

A. A partial waiver is a waiver of lien to date stating that they have received the party signing has waived their rights to lien as to the payment that they have received.

Q. There might be further money.

A. There might be further money.

Q. A final waiver means you have been paid in full.

***14 A.** You have been paid in full.

Q. Now if the waiver shows an amount to become due in the contractor's affidavit portion, then that would normally be a partial waiver, correct.

A. Especially you would expect there to be a balance due on the contractor's affidavit if they're giving a partial waiver.

Q. You would normally treat that waiver as waiving all lien rights for amounts previously paid and on the disbursement for the amount that the waiver is received correct.

A. That's what I would expect, yes.

Q. And if the waiver is not a final waiver, wouldn't you anticipate future waivers when amounts due in the amounts about to become due column are requested.

A. Are requested? You mean the amounts due are to become due on an owners statement?

Q. You got the contractors affidavit portion which shows an amount to become due?

A. Okay.

Q. So when they ask for that, wouldn't they then submit new waivers?

A. You would expect to see some waivers, yes.

The argument being advanced by FMB regarding the parol evidence rule fails to take into account that the document in question, i.e. the waiver of lien, is not just a waiver of lien, but a waiver of lien with a Contractors Affidavit right below it on the same page. Record Vol. 15 (various waivers of lien shown therein, for some reason these pages are not numbered).

FMB would like this Court to rely on only a portion of a document as opposed to the document as a whole.

***15** The document as a whole creates an ambiguity or a dispute within the document itself.

Parol or extrinsic evidence has always been allowed to explain or dispute an ambiguity within a document itself. [*Koester v Weber Cohn & Roley, Inc.*, 193 Ill App3d 1045 \(1st District, 1989\)](#).

The Attorney for FMB in the examination described above referred to the "Contractors Affidavit Portion of the waiver of lien". This shows that FMB knew it was truly one (1) integrated document.

In addition, and most compelling, in arguing Constructive Fraud in their Brief FMB states "other evidence of constructive fraud is contained in Cordeck's own contractor's affidavits"..... (FMB Brief Page 22) would like this court to believe that for purpose of lien waivers the contractors affidavit is meaningless but for purposes of Constructive Fraud the Contractors Affidavit is controlling.

Lastly, FMB seems to be arguing that previous decisions such as *Cordeck I* should be overturned because it is affecting the nature of the construction industry.

Ms. Hitzeman's testimony as quoted above is clear that this is not the case.

Ms. Hitzeman stated that Ticor, like any Title Company or lender, examines the balance due on the Contractors Affidavit portion of the waiver of lien and does not expect to receive a lien waiver unless that amount is paid.

FMB in conjunction with Ticor is attempting to subvert the innocent contractors who never thought that the partial lien waiver for a specific amount on the same document as a contractors affidavit showing a balance due would be waiving lien rights for amounts not yet paid but shown as due.

***16** The Title Company and Lender are adequately protected by following the Contractors Affidavits and making sure they are consistent, and withholding or having available in the loan sufficient funds to pay the balance due. This is called keeping the loan in balance to prevent mechanics liens.

CONCLUSION

For the foregoing reasons, Cordeck Sales, Inc. should be awarded the following relief:

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

B. This Court should affirm the trial court's order of February 15, 2008, granting judgment to Cordeck in the amount of \$415,430.48 plus interest in the amount of \$214,550.70, for a total judgment as of February 15, 2008 of \$629,981.18;

C. This Court should affirm the trial court's ruling which granted Cordeck a valid and subsisting mechanic's lien against the proceeds presently being held by the receiver from the sale of units and parking spaces at The Montrev-elle Condominiums, 520 N. Halsted, Chicago, Illinois in the amounts set forth in paragraph B *supra*, together with post-judgment interest at a rate of nine (9%) percent per annum from February 15, 2008;

D. 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 6745361 (Ill.App. 1 Dist.) (Appellate Brief)

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