[Cite as *Regency Centre Dev. Co., Ltd. v. Constr. Dimensions, Inc.*, 2003-Ohio-5067.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81171

REGENCY CENTRE DEVELOPMENT COMPANY, LTD.	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee/ Cross-Appellant	:	AND
-vs-	:	OPINION
CONSTRUCTION DIMENSIONS, INC., ET AL.	:	
Defendant	:	
DAVID E. BARTRUM	:	
Defendant-Appellant/ Cross-Appellee	:	

Date of Announcement of Decision:	SEPTEMBER 25, 2003
Character of Proceeding:	Civil appeal from Court of Common Pleas Case No. 413936
Judgment:	Affirmed; cross-appeal denied.
Date of Journalization:	
Appearances:	
For Plaintiff-Appellee/ Cross-Appellant:	THOMAS R. PAHYS, ESQ. 18123 Sloane Avenue Lakewood, Ohio 44107
For Defendant-Appellant/	JAMAES A. HOFELICH, ESQ.

Cross-Appellee: Bank One Center, Suite 1300
Cleveland, Ohio 44114

JAMES J. SWEENEY, J.:

{¶1} Defendant-appellant/cross-appellee David E. Bartrum ("Bartrum") and plaintiff-appellee/cross-appellant Regency Centre Development Company, Ltd. ("Regency") appeal/cross-appeal from the judgment and opinion entered by the Cuyahoga County Court of Common Pleas after trial. For the reasons that follow, we affirm the decision of the trial court.

{¶2} The facts adduced at trial establish that Regency entered into two agreements with CDI General Contractors, Construction Dimensions, Inc. ("CDI").[1] The parties stipulated at trial that Regency paid CDI $957,808.26 in connection with the two agreements; paying fully the February 3, 2000 agreement and withholding the sum of $131,652.60 on the remaining agreement. Testimony establishes that Regency withheld the final payment after receiving two applications for payment containing unexecuted Waivers of Lien forms. Regency's General Manager contacted CDI after June 2, 2000 and was advised that CDI was out of business and had no money to pay subcontractors.

{¶3} Thereafter, Regency terminated the agreements by letter dated June 30, 2000, and pursuant to Article 7(f) found in both

[1]Agreement Between Owner and General Contractor dated February 3, 2000 referred to at trial as the "PMC contract"; and Agreement Between Owner and General Contractor dated August 20, 1999.

agreements which provides in pertinent part: "*** Owner may terminate the Contract by giving fourteen (14) days prior written notice to the General Contractor *** if the General Contractor fails to perform the Work properly, or fails to make prompt payments to Sub-Contractors or for materials or labor ***. In such event, Owner may terminate the employment of General Contractor and take possession of all or part of the Contractor's materials, tools, equipment and appliances, and complete the Work by such means as the Owner and General Contractor agree and charge the actual cost (reasonable and without management fees) thereof to the General Contractor, crediting or debiting his account as the case may be when the Work under this General Contractor is fully completed and accepted."

{¶4} The record contains evidence of six mechanics liens filed by various subcontractors on Regency's property. Regency also submitted a worksheet detailing alleged amounts owed to subcontractors unpaid by CDI. CDI disputes at least some of the subcontractors' claims for payment.

{¶5} Months before CDI went out of business, defendant David E. Bartrum, a 50% owner of CDI, determined to retire. Bartrum had served at times relevant as a director and officer of the company. On or around January 31, 2000, Bartrum resigned. It is undisputed that Bartrum deferred his wages for the years 1996 through 1998. While testimony conflicts as to the amount of wages CDI actually owed Mr. Bartrum for this time period, CDI issued payment to

Bartrum in the amount of $81,000 on February 2, 2000, through four separate checks: one check for each year of deferred wage (1996-1998), and a fourth check earmarked for federal payroll taxes related thereto.

{¶6} Bartrum testified that prior to taking payment, he first determined that it would not render CDI insolvent. There is evidence that CDI had approximately $300,000 on February 2, 2000. Bartrum's described business partner also testified that he believed the company's assets exceeded its liabilities at that time. Bartrum further testified that he conferred with the company accountant and the office manager prior to taking payment. By May 2000, Bartrum laid off the CDI workforce due to lack of work. By approximately June 2000 CDI was out of business.

{¶7} Initially, CDI classified the $81,000 as wages, but later re-categorized it as a distribution. Consequently, the federal government issued a refund to CDI in the amount of $34,601.01 in September 2000. At that time, Bartrum cashed the refund check made payable to CDI, used $14,068.52 to cover payroll taxes for himself and employees of North Coast Computers, and deposited the balance of $20,532.49 into his own personal account.

{¶8} On July 28, 2000, Regency commenced this action against CDI and Bartrum alleging breach of contract against CDI (Counts I and II), and violations of R.C. 1313.56-58, and R.C. 1336.01-12 against Bartrum (Counts III and IV). The two-day trial commenced on December 4, 2000. Thereafter, Regency filed a motion for

default judgment against CDI on December 31, 2001, which Bartrum opposed and the trial court denied. On March 14, 2002, the trial court entered judgment in favor of Regency's claim of fraudulent transfer under R.C. 1336.04(A) as to Bartrum's negotiation of the treasury check issued to CDI in September 2000. In all other respects, the court entered judgment in favor of defendants CDI and Bartrum. Both Bartrum and Regency appeal from this judgment. For ease of discussion, we first address the cross-appeal of Regency and then those errors assigned by Bartrum.

{¶9} "CROSS ASSIGNMENT OF ERROR I. The trial court's judgment in favor of CDI against Regency is not sustained by the manifest weight of the evidence and is contrary to law."

{¶10} The standard of review provides that we may not reverse the trial court's decision as being against the manifest weight of the evidence if we find that the judgment is supported by some competent, credible evidence in the record. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. We are likewise bound, in reviewing a bench trial, to presume that the findings of the trier of fact are correct. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273. Regency contends that the evidence establishes that CDI breached the agreements by failing to pay the subcontractors. Regency refers to Articles 2, 4, 7(b) & (f) of the agreements in support. The agreements do provide that Regency may terminate the agreements for CDI's failure to pay subcontractors (Article 7(f)) and charge the

actual cost to CDI "crediting or debiting [its] account as the case may be."[2] To that end, Regency was entitled to make direct payments to the unpaid subcontractors and to offset those amounts from the balance it owed CDI under the agreement. However, by the time of trial, the evidence established that Regency had $30,924 remaining from the balance it withheld under its agreement with CDI. In other words, Regency established that it paid out over $100,000 to subcontractors unpaid by CDI and that other subcontractors still remained unpaid at that point. It was further established that Regency successfully settled some of the subcontractor's claims for less than the full amount. Yet, in calculating its claimed damages against CDI, Regency assumed the validity of the full amounts allegedly owed to the remaining unpaid subcontractors.

{¶11} A party bringing a cause of action for breach of contract must demonstrate the following: (1) the existence of a binding contract or agreement; (2) that the non-breaching party performed its contractual obligations; (3) that the other party failed to fulfill its contractual obligations without legal excuse; and (4) that the non-breaching party suffered damages as a result

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[2]We do not agree with Bartrum's reading of Article 7(f) in that we do not find, as he contends, that Regency's right to terminate only arises if CDI substantially failed to complete the jobs. In actuality, that is only one of several events that give rise to Regency's right to terminate as evidenced by the use of the disjunctive "or" throughout that provision. We find that the terms of Article 7(f) independently provide a right to terminate for CDI's failure to pay subcontractors. Ibid.

of the breach. *Garofalo v. Chicago Title Insurance Co.* (1995), 104 Ohio App.3d 95; *McIntyre v. Thriftco, Inc.* (May 17, 2001), Cuyahoga App. No. 77767.

{¶12} The extent of Regency's claimed damages in this case depend entirely upon the amounts allegedly owed to the remaining unpaid subcontractors. While some subcontractors have filed mechanic's liens on Regency's property, there is no evidence to definitively establish that Regency is obligated to pay the subcontractors and Regency has admittedly not made payments on those amounts. As the trial court noted, there is no evidence that any subcontractor assigned its rights to Regency to collect the amounts allegedly due them from CDI. While the dissent states that the element of damages is not speculative because the subcontractors have filed mechanics liens, Regency itself in its appeal concedes that the only way to resolve the remaining subcontractor claims is through settlement or additional litigation presumably with the relevant subcontractors. The validity of the liens is also not definitively established in this record.

{¶13} Therefore, the extent of Regency's alleged damage as a result of CDI's failure to pay the remaining subcontractor(s) is speculative and, as such, the trial court did not err in entering judgment in favor of CDI on the breach of contract claims. Accord, *Textron Financial Corporation v. Nationwide Mutual Ins. Co.* (1996), 115 Ohio App.3d 137, 144.

{¶14} We can not agree with the reasons the dissent presents for sustaining this assignment of error. First, the dissent concludes that the trial court erred in denying the motion for leave to amend the complaint to add the subcontractors by interpleader. The dissent reasons that evidence of damages could have been presented at trial if the court had granted Regency's motion for leave to file an amended complaint. That may very well be the case, however, Regency failed to appeal that February 12, 2001 ruling in its notice of cross-appeal and in its brief. Moreover, the denial of a motion for leave to amend a complaint necessitates a review under an abuse of discretion standard.[3] This cross-assignment of error challenges the March 14, 2002 judgment and requires us to review it based upon the manifest weight of the evidence that is in the record. As set forth previously, the evidence in this record is insufficient to establish damages. We can not guess what the record evidence would have been if the court had granted leave to file an amended complaint and we can not address assignments of error that have not been properly raised on appeal. App.R. 12.

{¶15} Alternatively, Regency asserts that the trial court erred in denying its motion for default judgment which it filed

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[3]In reviewing a trial court's denial of a motion to amend a complaint "[t]his court's role is to determine whether the trial judge's decision was an abuse of discretion, not whether it was the same decision we might have made." *Lalak v. Crestmont Constr. Inc.* (Jan. 14, 1998), Cuyahoga App. No. 72567, citing *State, ex rel. Wargo v. Price* (1978), 56 Ohio St.2d 65.

several weeks after the close of trial. Rule 55 of the Ohio Rules of Civil Procedure governs the application for entry of default judgment and provides, in pertinent part, "[i]f, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties." Civ.R. 55(A). If the court hears evidence, "it follows that the court should make its decision conform to the law as applicable to the facts proven, and if no cause of action is shown no default judgment in plaintiff's favor should be rendered." *Streeton v. Roehm* (1948), 83 Ohio App. 148.

{¶16} In this instance, Regency failed to move for default judgment prior to trial. The trial court consequently heard the evidence at trial. It was, therefore, incumbent upon the trial court to conform to the law as applicable to the facts adduced at the trial. Ibid. "A trial court's ruling on a motion for default judgment will not be reversed absent an abuse of discretion." *Mancino v. Third Federal Savings & Loan* (Oct. 28, 1999), Cuyahoga App. No. 75063, citing *Davis v. Immediate Med. Serv., Inc.* (1997), 80 Ohio St.3d 10. Because the trial court heard the evidence without objection from Regency and therefrom determined that the facts did not support the breach of contract claims against CDI, we

do not find that the trial court abused its discretion in denying the motion for default judgment.

{¶17} Cross-Assignment of Error I is overruled.

{¶18} "CROSS ASSIGNMENT OF ERROR II. The trial court's judgment in favor of Bartrum against Regency regarding Bartrum's February 2, 2000 transfer of $81,000.00 from CDI to Bartrum is not sustained by the manifest weight of the evidence and is contrary to law."

{¶19} Regency contends that CDI's February 2, 2000 transfer of $81,000 to Bartrum constituted a fraudulent transfer in violation of R.C. 1336.04(A)(1) and 1336.04(A)(2). Again, Regency maintains that the trial court's finding to the contrary was against the manifest weight of the evidence. Adhering to the requisite standard of review, we must disagree. There is ample, competent and credible evidence to support the trial court's finding that the transfer on February 2, 2000 did not amount to a violation of the referenced statutory provisions.

{¶20} R.C. 1336.04(A) provides that "[a] transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:

{¶21} "(1) With actual intent to hinder, delay, or defraud any creditor of the debtor;

{¶22} "(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and if either of the following applies:

{¶23} "(a) The debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;

{¶24} "(b) The debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due."

{¶25} R.C. 1336.04(B) provides a list of factors to aid in ascertaining actual intent under R.C. 1336.04(A)(1).

{¶26} In finding in favor of defendants on this claim, the court found only one "badge of fraud" under R.C. 1336.04(B) persuasive; that being that the transfer was made to Bartrum who was an insider as contemplated in R.C. 1336.04(B)(1).

{¶27} The record provides both competent and credible evidence to support the balance of the trial court's reasoning in reaching its determination. The record supports the trial court's factual findings that Bartrum disclosed the transfer; that CDI had substantial assets at the time of the transfer; that Bartrum arguably provided equivalent value in that he had deferred three years of wage compensation between 1996 and 1998; and that the evidence failed to establish that the transfer was the cause of

CDI's insolvency. For these reasons, Cross-Assignment of Error II is overruled.

{¶28} "CROSS ASSIGNMENT OF ERROR III. The trial court erred in failing to grant judgment in favor of Regency against Bartrum for attorney's fees."

{¶29} Regency essentially maintains that because the court found that Bartrum fraudulently transferred assets by negotiating the September 2000 U.S. treasury check made payable to CDI, the court erred in failing to award attorney fees. Regency relies upon the authority of *Locafrance U.S. Corp. v. Interstate Distribution Services, Inc.* (1983), 6 Ohio St.3d 198. While *Locafrance* holds that "[c]ommon law remedies, including the law of fraud, may be applied when appropriate in fraudulent conveyance cases ***," it does not sanction an automatic award of attorney fees to those prevailing upon a claim under the statute. In particular, the court found that "'[i]f punitive damages are proper, the aggrieved party may also recover reasonable attorney fees.'" Id. at 202-203, quoting *Columbus Finance v. Howard* (1975), 42 Ohio St.2d 178.

{¶30} In *Locafrance*, the plaintiff sought both punitive damages and attorney fees in connection with a fraudulent conveyance claim. In ascertaining whether such damages were warranted, the court examined whether the fraudulent conveyance involved "malicious and intentional conduct" as required for a punitive award. As such, the court went beyond the statutory elements of a fraudulent conveyance claim. Id.; accord *Aristocrat*

Lakewood Nursing Home v. Mayne (1999), 133 Ohio App.3d 651, 672-673 (finding that the "aggravated mental state of 'actual malice' is distinct from the mental state, if any, necessary to establish the underlying fraudulent conveyance." [Citations omitted]).

{¶31} In this case, Regency simply relies upon the finding of a fraudulent conveyance under the statute and does not point to any additional indicia of "actual malice" as related to common-law fraud and required to support an award of common-law remedies beyond those provided for by the statute. Based on the foregoing, we are not persuaded that the trial court erred by not awarding attorney fees under these circumstances.

{¶32} Cross-Assignment of Error III is overruled.

{¶33} We now address Bartrum's appeal assigning two errors for our review.

{¶34} "I. The trial court erred to the prejudice of defendant-appellant David Bartrum in ruling that plaintiff-appellee Regency Centre Development Company, Ltd. had standing as a CDI creditor to assert a fraudulent transfer claim against CDI and Bartrum under Ohio Revised Code Chapter 1336."

{¶35} First, Bartrum argues that Regency was not a "creditor" of CDI under R.C. Chapter 1336 because he contends it owed CDI $131,652.71 under the August 20, 1999 agreement. Under R.C. 1336.01(D), a "'Creditor' means a person who has a claim." In turn, R.C. 1336.01(C) provides that a "'Claim' means a right to payment, whether or not the right is reduced to judgment,

liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." As we have previously found, the agreements provide that Regency may terminate the agreements in the event CDI failed to pay subcontractors and charge the actual cost to CDI "crediting or debiting [its] account as the case may be." There is sufficient competent and credible evidence in the record to support a finding that Regency has a "claim" against CDI due to CDI's failure to pay the subcontractors. Therefore, Regency is a "creditor" of CDI within the meaning of the statute.

{¶36} Assignment of Error I is overruled.

{¶37} "II. The trial court erred to the prejudice of defendant-appellant David E. Bartrum in ruling that his negotiation in September 2000 of a U.S. Treasury check consisting of the federal payroll and income withhold taxes associated with defendant Construction Dimensions, Inc.'s ('CDI') $81,000 gross wage payment to him on February 2, 2000 constituted a fraudulent transfer of an asset of CDI under Ohio Revised Code Chapter 1336."

{¶38} We review this error under the manifest weight standard articulated previously herein. In doing so, we examine whether competent, credible evidence in the record supported the trial court's determination that CDI's September 2000 transfer of $34,601.01 constituted a fraudulent transfer in violation of R.C. 1336.04(A).

{¶39} Bartrum contends that the U.S. Treasury check made payable to CDI was not an "asset" of CDI and thus Bartrum's negotiation thereof did not constitute a fraudulent transfer. An "asset" is defined as "property of a debtor, but does not include any of the following:

{¶40} "(1) Property to the extent that it is encumbered by a valid lien;

{¶41} "(2) Property to the extent it generally is exempt under nonbankruptcy law, including, but not limited, section 2329.66 of the Revised Code;

{¶42} "(3) An interest in property held in the form of a tenancy by the entireties created under section 5302.17 of the Revised Code prior to April 4, 1985, to the extent it is not subject to process by a creditor holding a claim against only one tenant."

{¶43} A "transfer" is defined as "every direct or indirect, absolute or conditional, and voluntary or involuntary method of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." R.C. 1336.01(L).

{¶44} Bartrum argues that because the amount of the treasury check is allegedly traceable to the amount of federal payroll and income withholding taxes associated with his February 2, 2000 payment, it belongs to him and/or the government and not CDI. Had the distribution remained classified as wages and had the

government kept possession of the money as taxes, we would be inclined to agree. This, however, is not the case.

{¶45} The government refunded the money to CDI because the $81,000 payment was reported as a distribution purportedly for the very purpose of having the money returned to CDI's possession.[4] The contention that certain provisions of the Internal Revenue Code impressed a trust on that money as the exclusive property of the U.S. Government glosses over the fact that it was the U.S. Government that returned the money to CDI. Once the February 2000 payment was categorized as a distribution, the refunded money was returned to the possession of CDI, thus qualifying the funds as an "asset" of CDI within the statutory definition.

{¶46} Next, Bartrum contends that the evidence does not support a finding that the check was negotiated with actual intent to hinder, delay, or defraud any creditor of CDI. The trial court, however, found several of the "badges of fraud" present in reasoning as follows: "CDI, while Bartrum was still an officer or director, was shut down in May 2000. It is without question that in September 2000, Bartrum's transfer constituted substantially all of CDI's assets. The September transfer was also concealed. It was established at trial that Bartrum himself cashed the check and

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[4]While Bartrum relies upon the Internal Revenue Code and federal law, including *Candy's Tortilla Factory, Inc. v. United States of America* (D. Col. 1997), 1997 U.S. LEXIS 15669, none of the authority cited is analogous with this case which involves the classification of a payment as a distribution.

placed over Twenty Thousand Dollars ($20,000) into his own account, at all times controlling said funds. Trial testimony established that neither CDI's outside accountant nor Michael Marron, former general manager and president of CDI, knew of the transfer." ®. 74, Vol. 2716, Pg. 117). The record evidence supports these findings.

{¶47} Lastly, Bartrum contends that CDI received equivalent value in exchange for the money and that the negotiation of the check did not render CDI insolvent or unable to conduct its business. We find Bartrum's contentions insufficient to rebut the presumption that the findings of the trial court were correct. Ibid. The financial condition of CDI in September 2000 differed significantly from its state in February 2000 when Bartrum took the initial payment. Connecting the payment to the initial distribution does not shelter the funds from the reach of CDI's creditors. By September 2000, CDI was without any active employees, out of business, insolvent, and unable to pay its debts. The evidence further supports the trial court's observation that "the September transfer occurred shortly after substantial debt was incurred; specifically, the arbitration award and judgment against CDI by Stella Moga was over Two Hundred Nineteen Thousand Dollars ($219,000.)" To that end, we find that the record contains both competent and credible evidence in support of the trial court's finding that a fraudulent transfer occurred with respect to the

endorsement of the U.S. treasury check from CDI to Bartrum in September 2000.

{¶48} Assignment of Error II is overruled.

Judgment affirmed; cross-appeal denied.

It is ordered that appellant/cross-appellee and appellee/cross-appellant shall each pay their respective costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, P.J., CONCURS.
DIANE KARPINSKI, J., CONCURS IN PART AND DISSENTS IN PART.
(See concurring and dissenting opinion attached).

JAMES J. SWEENEY
JUDGE

KARPINSKI, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶49} I concur with the majority on all issues except Regency's first cross-assignment of error. In that assignment, Regency argues the trial court erred when it dismissed its claims

against CDI for $61,602.25, the amount of money still owed to various subs.

{¶50} The trial court determined that Regency did not have a breach of contract claim against CDI for its failure to pay the subcontractors because it "does not have a contractual relationship with any of the subcontractors on whose behalf it is attempting to collect money from CDI. Furthermore, no subcontractor has assigned Plaintiff any alleged claim against CDI. Plaintiff is, therefore, not in a position to bring claims against CDI on behalf of subcontractors."

{¶51} Regency argues the court erred when it determined there had to be a direct contractual relationship between Regency and the unpaid subs in order to sustain its claim of breach against CDI. I agree. The trial court based its dismissal of Regency's breach of contract claim against CDI on the assumption that Regency was suing CDI on "behalf" of the subcontractors. The majority agrees with the trial court's rationale. There is nothing in the record, however, indicating that Regency was suing "on behalf" of anyone but itself.

{¶52} Regency had moved merely to require certain subcontractors interplead their claims, not to sue on their behalf. An interpleader action is available to a party who may be exposed to double or multiple liability for an admitted debt. Civ.R. 22. The purpose of an interpleader is to "expedite the settlement of claims to the same subject matter, prevent multiplicity of suits,

with the attendant delay and added expense, and to provide for the prompt administration of justice." *Sharp v. Shelby Mutual Ins. Co.* (1968), 15 Ohio St.2d 134, 144, 239 N.E.2d 49.

{¶53} The procedure to be followed in an interpleader is outlined in Civ.R. 22. The rule provides, in pertinent part: "In such an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money ***, a party may deposit all or any part of such sum *** with the court upon notice to every other party and leave of court. The court may make an order for the safekeeping, payment or disposition of such sum or thing."

{¶54} This rule "allows a party to deposit the money which is sought by the multiple claimants with the court upon notice to the parties and leave of court. The staff notes to Civ.R. 22 accurately describe an interpleader action as: '*** a two-stage action. A stakeholder who controls a fund is subjected to the claims of two or more claimants. The stakeholder does not know who is the proper claimant. The stakeholder does not wish to pay the "wrong" claimant and thus expose himself to suit by the "proper" claimant. In the first stage, the stakeholder, in order to avoid a multiplicity of suits and possible multiple liability, interpleads the claimants. In the second stage, ordinarily, the stakeholder drops out, leaving the claimants to establish the validity of one of the claims. One claimant will be successful in the second stage.'" *Lincoln Nat'l Life Ins. Co. v. Taylor* (June 17, 1993),

Franklin App. Nos. 92AP-1724, 92AP-1725, 1993 Ohio App. Lexis 3117, at *6-7.

{¶55} When a dispute arises between a general contractor and owner concerning amounts unpaid to subcontractors on the job, the owner's request to interplead the subcontractors is proper. *Sturm v. Ritz* (1876), 7 Ohio Dec. Reprint 135, 1876 Ohio Misc. LEXIS 117. Thus the trial court erred in denying Regency's motion to interplead the contractors.

{¶56} Although Regency was denied the help an interpleader would make possible in straightening out what is yet owed to each subcontractor, the majority criticizes Regency for not proving the value of the damages it suffered from the breach.[5] For that reason, the majority concluded Regency has not satisfied all the elements of its breach of contract claim.

{¶57} To prevail on a breach of contract, the party asserting the breach must present the following: a contract did indeed exist, the party asserting the breach performed, the other party breached the contract, and the non-breaching party suffered damages. *Doner v. Snapp* (1994), 98 Ohio App.3d 597, 600, 649 N.E.2d 42.

{¶58} Regency met this burden. Under Regency's contract with CDI, it is clear that CDI's failure to pay the subs would constitute a material breach. CDI admits it did not pay all the

[5]The majority misunderstands the reason I discuss the court's denying an interpleader. It is true appellant failed to appeal this order. However, it is reasonable to observe an obvious judicial error to *explain* why appellant did not establish the extent of his damages. Such background should also alert the court to avoid compounding the error by requiring more evidence than is necessary to establish mere nominal damages.

subcontractors. It also claims that "Regency has depleted the $131,652.71 it owes to CDI by unilaterally paying certain subcontractors." CDI states, "the total amount of Regency's 'damages' would be only $102,631.00, which is about $29,000.00 less than what Regency owes CDI." The $102,631.00 sum reflects the amount of six mechanics' liens filed against Regency by some of the unpaid subcontractors. The amount of two of these liens is in dispute.

{¶59} The trial court never reached the issue of damages, although the majority focuses on it here. The majority determined that "the extent of Regency's alleged damage as a result of CDI's failure to pay the remaining subcontractor(s) is speculative***."[6] The majority then concluded that "the evidence in this record is insufficient to establish damages." I disagree.

{¶60} A mechanic's lien is not speculative. A mechanic's lien is a form of damage to one's real property. It is a *cloud on the title* of the property, which is typically removed when payment has been made to the lienholder. See *Gustafson v. Buckley* (1953), 96 Ohio App. 115, 121 N.E.2d 280. The mere *filing* of a mechanic's lien, therefore, constitutes a nominal damage sufficient to satisfy the damage requirement in the breach of contract claim.

[6] Had Regency's motion to interplead been granted, the very evidence the majority says is missing in this case could have been produced.

{¶61} Regency presented sufficient evidence of damages simply by showing that six liens were filed, a direct result of CDI's breach in not paying the subcontractors. In *Stockman v. Yanesh* (1981), 68 Ohio St.2d 63, 428 N.E.2d 417, defendants executed a warranty deed stating that there were no liens or encumbrances on the property plaintiffs purchased. After plaintiffs took possession of the property, they learned the property was in fact encumbered by several different liens including a judgment lien and a tax lien.

{¶62} The Supreme Court of Ohio held: "A covenant against encumbrances is breached as soon as made if an encumbrance in fact exists. However, in an action based on such a breach, only nominal damages can be recovered unless the covenantee has removed the encumbrance, had his possession disturbed, or had his use or enjoyment of the land, in some way, interfered with by reason of the encumbrance." Id., at syllabus.

{¶63} In the case at bar, the majority has not addressed the mere act of filing the mechanic's liens as creating an encumbrance that suffices to establish nominal damages. In the case at bar, CDI's obligation to pay all subcontractors was breached, resulting in six different liens being filed against Regency's property. Under *Yanesh*, Regency is at least entitled to nominal damages, which can satisfy the breach of contract claim. To support its claim that the damages are speculative, the majority

cites to Regency's statement that "the only way to resolve the remaining subcontractor claims is through settlement or additional litigation presumably with the relevant subcontractors." Ante at 7. Regency's statement, however, goes to the extent of the damages, not to nominal damages, which is the issue here.

{¶64} Moreover, when Regency presented the two disputed liens filed by Salman and Handyman, CDI, not Regency, had the burden to rebut the amounts it stated should be lower. CDI's records show that Salman and Handyman are owed $21,093.52. On the other hand, Regency's evidence shows that the total of the two liens amounts to $41,424, a difference of $20,330.48, that Regency may have to pay. The majority further argues that the record has "not definitively established the validity of the liens." That the amount of a lien is undetermined does not mean the lien is invalid, no more than the fact that the amount stated in an affidavit is in excess of the correct amount would render an affidavit invalid. *Thomas v. Huesman* (1859), 10 OS 152; *Tucker Construction, Inc. v. Kitchen* (March 1, 1995), Summit App. No. 16636. The burden of proving the validity of each lien, moreover, is not on Regency as CDI argues; that burden belongs to each person/subcontractor who has asserted a lien on the property in question. *Bender v. Stettinius* (1897), 10 Ohio Dec. Reprint 163, 1897 Ohio Misc. LEXIS 570.

{¶65} In its appellate brief CDI complains that the mechanics' liens are invalid because notices of furnishings were not provided. CDI relies upon Regency's

testimony that "it did not receive any Notice of Furnishings." CDI has omitted, however, the last part of Regency's testimony clarifying this statement. Regency went on to explain it did receive notices of furnishings, but it could not recall from which subcontractors. Tr. 290. CDI failed to pursue or clarify Regency's response at the time of its examination on re-cross. CDI also failed to present any of its own evidence that the liens were invalid. Moreover, CDI did not raise this argument during the trial or in its post-trial brief. Thus CDI has waived here any argument as to the invalidity of the mechanics' liens.

{¶66} Since the trial court denied the interpleader request, the validity of the mechanics' liens must now be dealt with separately.

{¶67} Regency acknowledges that additional litigation is necessary to resolve these subcontractor claims. The majority points to this acknowledgment presumably to support its claim that the element of damages is speculative. As I said earlier, this case is a breach of contract claim and nominal damages suffice for that claim. It would be in the second stage of the trial that the actual damages would have to be determined. At this stage of Regency's case for breach of contract, however, the necessary elements have been satisfied.

{¶68} CDI further argues, again for the first time on appeal, that there can be no damages if Regency withheld from its payment to CDI the same amount specified in the four liens. I find

this argument specious, first, because two other liens are in dispute and remain unpaid. Second, nominal damages are justified on all the claims because of the filing of mechanics' liens and the undisputed breach of contract. Third, plaintiff is owed attorney fees on this breach.

{¶69} The majority also argues Regency's claim for breach is speculative because none of the unpaid subs brought a suit against Regency. I disagree, again for the same reason that the filing of the mechanics' lines suffices for nominal damages. Moreover, there is nothing speculative about the fact that Regency remains vulnerable to at least two of the subs who filed liens for amounts that would push Regency's total cost beyond its contract with CDI. Without a judgment that CDI breached the contracts by failing to pay them, Regency is at risk of a result inconsistent with the undisputed facts in this case. Regency is entitled to have a final judgment and record of the fact that CDI breached the contracts by failing to pay the subcontractors.

{¶70} The record shows that Bartrum's position on CDI's liability and the amounts owed to the subcontractors continually shifted. In Bartrum's opposition to the motion to interplead the subcontractor's claims, Bartrum agreed that "CDI has not contested these [the subcontractor's] claims." Brief at 2. At trial and in his appellate brief, however, Bartrum stated here and below that Salman's lien was for $34,649 but CDI claimed only $14,793.52 was owed. Handyman's lien was for $6,775, but CDI's records show only

$6,300 was owed. Tr. 282; App. Brief p. 8. Even though the amounts of the two liens are disputed, Bartrum states, "Regency could have discharged all of the mechanics' liens by paying those subcontractors $102,631.00." App. Brief at 26. CDI cannot be allowed to argue there is no contest on the amounts owed, an argument used to oppose the motion to interplead, only to argue later that two liens are disputed, when the issue shifts to damages.

{¶71} The facts in evidence demonstrate that CDI, by its own admission, breached its contract by not paying subcontractors. This admission is enough evidence for Regency to prove its claim against CDI for breach. The undisputed evidence of six mechanics' liens being filed is enough to prove a claim for nominal damages at the very least.[7] The majority errs in deciding otherwise.

{¶72} For the foregoing reasons, I would sustain this assignment of error and enter judgment for Regency against CDI for breach of contract.

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[7] More troubling is the effect of any subsequent litigation between Regency and the subcontractors it tried to interplead. Regency will be estopped from looking to CDI for recompense, under the doctrine of res judicata or collateral estoppel. *National Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 558 N.E.2d 1178; *Grava v. Parkman Twp*. (1995), 73 Ohio St. 3d 379, 653 N.E.2d 226. Such a result is highly prejudicial to Regency. Moreover, if there is subsequent litigation between Regency and the unpaid subcontractors, there may be more significant damages involved if Regency ends up paying the face amount of the Salman and Handyman liens as opposed to the lesser amount CDI shows in its records.