

[Cite as *Huntington Natl. Bank v. 5777 Grant, L.L.C.*, 2016-Ohio-3463.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 103557

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**HUNTINGTON NATIONAL BANK, ET AL.**

PLAINTIFFS

vs.

**5777 GRANT, L.L.C., ET AL.**

DEFENDANTS-APPELLEES

[Appeal by Gritvise, Ltd., d.b.a. Koussa  
Construction, Ltd. Plaintiff-Appellant]

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**JUDGMENT:**  
**AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-12-796997

**BEFORE:** Boyle, J., McCormack, P.J., and E.T. Gallagher, J.

**RELEASED AND JOURNALIZED:** June 16, 2016

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MARY J. BOYLE, J.:

{¶1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶2} This appeal involves the resolution of lien priority on the real estate at 5777 Grant Avenue in Cleveland, Ohio (“the property”). The trial court found that the mortgage held by plaintiff-appellee, Huntington National Bank (“Huntington”), has priority over the mechanic’s lien held by third-party plaintiff-appellant, Gritvise, Ltd., d.b.a. Koussa Construction, Ltd. (“Koussa”). Koussa appeals this decision, arguing that Huntington failed to meet its burden of proof to demonstrate that it is entitled to summary judgment on its lien claim. We affirm.

### **A. Procedural History and Facts**

#### *1. Huntington Bank’s Loan and Mortgage*

{¶3} On December 23, 2011, 5777 Grant, L.L.C. (“Grant”) and Cleveland Corporate Services, Inc., as the owners of the property, entered into a loan and security agreement with Huntington to obtain financing for certain improvements to the property and to pay off prior encumbrances. On that same day, Grant executed and delivered to Huntington an open-end mortgage on the property, an assignment of leases and rents, and a security agreement (the “mortgage”). Likewise, the mortgage and then a notice of commencement were also filed and recorded on that same day.

{¶4} On December 6, 2012, after various defaults under the loan documents, Huntington filed a complaint for cognovit judgment against Grant and Grant’s general

manager, Gregory Peck. The trial court granted judgment for Huntington against Grant and Peck, jointly and severally, in the amount of \$588,078.41, plus interest on the unpaid balance. Eleven days later, upon Huntington's motion, the trial court appointed a receiver to sell the property and satisfy the outstanding liens.

2. *Koussa's Mechanic's Lien*

{¶5} On December 31, 2012, Koussa recorded its affidavit for mechanic's lien, attesting that it had furnished labor and materials on the property beginning December 15, 2010, and ending on November 21, 2012. Koussa's mechanic's lien was amended on March 8, 2013, to include additional work performed up until February 25, 2013. The mechanic's lien attests to \$487,423.71 remaining due and owing to Koussa for labor and materials related to the property.

3. *Koussa's Third-Party Complaint and Court's Order Granting  
Koussa Judgment as to the Validity of its Mechanic's Lien*

{¶6} In June 2013, after obtaining leave to intervene, Koussa filed its third-party complaint against Grant, alleging that Grant owes it \$487,423.74,<sup>1</sup> with interest, for labor and materials it furnished to Grant beginning December 15, 2010. Koussa further alleged that it recorded affidavits for a mechanic's lien on December 31, 2012, and March 8, 2013, and that it has the first and best lien on the property. Huntington answered Koussa's complaint, asserting that its mortgage has priority over any mechanic's lien on the property.

{¶7} In April 2014, the trial court granted Koussa's unopposed motion for summary judgment as to the validity of Koussa's mechanic's lien on the property.

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<sup>1</sup>We note that in the body of the complaint Koussa alleges that Grant owes \$487,423.74, but in its attached affidavit for a mechanic's lien it identifies \$487,423.71 as the amount due and owing.

#### 4. *Cross-Motions for Summary Judgment on Lien Priority*

{¶8} Huntington and Koussa subsequently filed cross-motions for summary judgment on the issue of priority. Koussa argued that it holds the first and best lien on the funds because its mechanic's lien has an effective date of December 15, 2010, which precedes the filing date of Huntington's mortgage. Conversely, Huntington argued that because the mechanic's lien was filed to secure labor and/or materials furnished "entirely after the notice of commencement," the mechanic's lien's effective date is the same day as the notice of commencement; therefore, Huntington's mortgage precedes the mechanic's lien and has priority under R.C. 1311.13. Huntington further argued that, under R.C. 1311.14, it has "super priority" over the mechanic's lien because its mortgage was used to finance improvements and pay off prior encumbrances.

{¶9} The trial court ultimately denied Koussa's motion for summary judgment and granted Huntington's motion, finding that Huntington "has first and best lien priority" as it relates to the property and "is therefore entitled to the proceeds of the sale of said property."

{¶10} From that decision, Koussa appeals, raising the following single assignment of error:

The trial court erred by granting summary judgment to Huntington National Bank.

#### **B. Standard of Review**

{¶11} An appellate court reviews a trial court's decision to grant summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d

241 (1996). De novo review means that this court “uses the same standard that the trial court should have used, and we examine the evidence to determine if as a matter of law no genuine issues exist for trial.” *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal*, 64 Ohio St.2d 116, 413 N.E.2d 1187 (1980). In other words, we review the trial court’s decision without according the trial court any deference. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

{¶12} Under Civ.R. 56(C), summary judgment is properly granted when (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1976). If the moving party fails to satisfy its initial burden, “the motion for summary judgment must be denied.” *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). But if the moving party satisfies

its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.

*Id.*

### **C. Lien Priority**

{¶13} In its single assignment of error challenging the trial court’s award of summary judgment in favor of Huntington, Koussa argues that Huntington is not entitled

to judgment as a matter of law under either of the following two alternative theories that it moved for summary judgment: (1) super priority under R.C. 1311.14, or (2) application of R.C. 1311.13 and the effective date of the notice of commencement. For ease of discussion, we will address the Koussa's latter argument first.

*1. Application of R.C. 1311.13 and Notice of Commencement*

{¶14} Lien priority is established by statute. *Bank of Am. NA v. Omega Design/Build Group, L.L.C.*, 1st Dist. Hamilton No. C-100018, 2011-Ohio-1650, ¶ 9.

The statute at issue, R.C. 1311.13, which addresses the attaching of liens, continuance, and priority, provides in relevant part:

(A)\_\_\_

(1)\_\_\_All liens under sections 1311.01 to 1311.22 of the Revised Code for labor or work performed or materials furnished to the same improvement prior to the recording of the notice of commencement pursuant to section 1311.04 of the Revised Code are effective from the date the first visible work or labor is performed or the first materials are furnished by the first original contractor, subcontractor, material supplier, or laborer to work, labor on, or provide materials to the improvement.

(2)\_\_\_Except as provided in division (A)(3) of this section, liens under sections 1311.01 to 1311.22 of the Revised Code for labor or work performed or materials furnished after the recording of a notice of commencement pursuant to section 1311.04 of the Revised Code are effective from the date of the recording of the notice of commencement.

(B)\_\_\_

(1)\_\_\_Except for the liens of laborers as provided in division (B)(2) of this section, a lien securing the claim of a claimant who has performed labor or work or furnished materials both prior to and after the recording of the notice of commencement pursuant to section 1311.04 of the Revised Code has two effective dates. That portion of the lien which arises from labor or work performed or materials furnished prior to the filing of the notice of commencement has the effective date described in division (A)(1) of this



section and that portion of the lien which arises from labor or work performed or materials furnished on or after the filing of the notice of commencement has the effective date described in division (A)(2) of this section. Any payment received by the lien claimant both before and after the filing of a lien shall be applied first to the labor or work performed or materials furnished prior to the filing of the notice of commencement, and then to labor or work performed or materials furnished on and after the filing of the notice of commencement.

{¶15} Relevant to this appeal, the statute further provides that

if a mortgage securing financing for the construction of an improvement

and notice of commencement for said improvement are recorded on the

same day, the mortgage shall be considered recorded before the notice of

commencement for purposes of priority described in this section.

R.C. 1311.13(G).

{¶16} Koussa argues that Huntington “failed to demonstrate its notice of commencement effects [sic] Koussa’s mechanic’s lien priority.” Koussa maintains that, because the notice of commencement was filed more than a year after Koussa began work on the property, the notice of commencement does not “affect” its mechanic’s lien.

According to Koussa, the trial court should not have looked beyond R.C. 1311.13(A)(1) — the first subsection, which “reflects the general rule that mechanic’s liens are effective from the date the first labor or materials are furnished.” This argument, however, lacks merits.

*a. Validity of the Notice of Commencement*

{¶17} Initially, we address Koussa’s claim as to the validity of the notice of commencement, namely, that it is “ineffective” because it was filed more than a year after

Koussa began work on the property. Although R.C. 1311.04 clearly provides that the notice of commencement should be filed *prior* to any performance of labor, or work, or furnishing of materials, for the purpose of improvement, the statute does not render a delayed filing “ineffective” for purposes of R.C. 1311.13. See *Structural Grouting Sys., Inc. v. Precision Wood Designs, Inc.*, 9th Dist. Summit No. 3086-M, 2001 Ohio App. LEXIS 730 (Feb. 28, 2001). Indeed, R.C. 1311.04 specifically contemplates scenarios when a notice of commencement has been filed after work has begun on the property, affording contractors and subcontractors certain additional rights. See R.C. 1311.04(I) and (M)(1). Moreover, R.C. 1311.13 specifically addresses liens related to work performed both before and after a filing of a notice of commencement. See R.C. 1311.13(B)(1).

{¶18} The notice of commencement at issue substantially complied with the provisions of R.C. 1311.04, containing the required substantive information set forth in R.C. 1311.04(B). Notably, Koussa never challenged the contents of the notice of commencement below. As for Koussa’s unsupported claim that a notice of commencement is “not valid” if filed after work has begun on a property, we find this argument to have no merit.

*b. Huntington Established that Koussa’s Lien Relates to Work Performed After the Filing of the Notice of Commencement*

{¶19} Having found that the notice of commencement is valid, the critical issue on appeal is whether Koussa’s mechanic’s lien was filed to secure labor and/or materials furnished before or after the filing of the notice of commencement. And here, we find

that the record unequivocally establishes that Koussa's mechanic's lien relates to labor and/or materials furnished after the notice of commencement, namely, July 8, 2012, through February 25, 2013.

{¶20} While Koussa's mechanic's lien states on its face that Koussa "first furnished labor and materials \* \* \* on or about December 15, 2010," the affidavit makes no allegation that the mechanic's lien was actually filed to secure any labor or materials furnished beginning on that date. Conversely, Koussa's third-party complaint with Exhibit B (an attached accounts receivable) and Koussa's motion for summary judgment on the validity of its mechanic's lien establish that Koussa's claim for \$487,423.71 relates to labor and materials furnished at the property "beginning on July 8, 2012 \* \* \* continuing through February 25, 2013." The accounts receivable attached to Koussa's third-party complaint indicates that the unpaid labor and materials for which Koussa claims a lien on the property (totaling \$487,423.71) stems from unpaid invoices dating from July 8, 2012, through February 25, 2013. Notably, despite Huntington relying on this evidence in support of its motion for summary judgment on lien priority, Koussa failed to make any argument refuting it.

{¶21} To the extent that Koussa now attempts to attack this evidence on appeal, we find its argument not compelling and untimely. *See Gregory v. Reed*, 8th Dist. Cuyahoga No. 96459, 2011-Ohio-5182, ¶ 24; *RBS Citizens, N.A. v. Zigdon*, 8th Dist. Cuyahoga No. 93945, 2010-Ohio-3511, ¶ 31-33, quoting *Goldfuss v. Davidson*, 79 Ohio

St.3d 116, 121, 679 N.E.2d 1099 (1997) (“failure to timely advise a trial court of possible error, by objection or otherwise, results in a waiver of the issue for purposes of appeal”).

{¶22} We likewise find no plain error with respect to Koussa’s new claim of an issue of fact related to the application of R.C. 5301.232. Aside from Koussa never raising this argument below, Koussa moved for summary judgment, affirmatively asserting that no genuine issues of material fact exist in this case. Nor did Koussa oppose Huntington’s motion for summary judgment on the basis that a genuine issue of material fact exists. Koussa’s newly raised argument on appeal is disingenuous and without merit.

{¶23} Because Koussa’s mechanic’s lien was filed to secure labor and/or materials furnished after the notice of commencement, R.C. 1311.13(A)(2) applies. Under this statute, the effective date of Koussa’s mechanic’s lien is December 23, 2011 — the date the notice of commencement was filed. Aside from Huntington’s mortgage being filed earlier than the notice of commencement on that day, R.C. 1311.13(G) recognizes that the mortgage is considered recorded before the notice of commencement “for purposes of priority” described in R.C. 1311.13. Huntington’s mortgage therefore precedes and has priority over Koussa’s mechanic’s lien.

*c. Application of R.C. 1311.13(B)(1)*

Moreover, even if we assumed that Koussa filed its mechanic’s lien to secure labor and/or materials furnished prior to the notice of commencement, Huntington’s mortgage still has priority under R.C. 1311.13(B)(1). The statute recognizes two effective dates

for a lien securing a claim for a claimant who has performed labor or work or furnished materials *both prior to and after* the recording of the notice of commencement. The portion of the lien arising from labor and/or materials furnished prior to the notice of commencement is effective as of the date the first visible work is performed or materials furnished. R.C. 1311.13(B)(1). The portion of the lien arising from labor and/or materials furnished after the notice of commencement is effective from the date the notice of commencement was recorded. *Id.*

{¶24} While Koussa alleged that it first performed labor and/or furnished materials on December 10, 2010 — one year prior to the filing of the notice of commencement — the record unequivocally establishes that Koussa was paid in full for any labor and/or materials furnished prior to the notice of commencement. Thus, because that portion of the mechanic's lien related to work performed prior to the filing of the notice of commencement was satisfied, it does not have priority. *See* R.C. 1311.13(B)(1); *Arts Rental Equip. v. Bear Creek Constr., L.L.C.*, Hamilton C.P. No. A0902785, 2011 Ohio Misc. LEXIS 437, \*18 (Aug. 10, 2011) (holding that lienholders who were paid in full for work performed prior to the filing of the notice of commencement did not have priority over a subsequent mortgage). Here, Koussa's mechanic's lien has an effective date as of the notice of commencement, namely, December 23, 2011, which does not precede Huntington's mortgage. *See* R.C. 1311.13(G).

{¶25} Accordingly, because R.C. 1311.13 mandates that Huntington's mortgage has priority over Koussa's mechanic's lien, the trial court properly granted summary judgment in favor of Huntington on its claim.

{¶26} Based on our finding that Huntington is entitled to judgment as a matter of law under R.C. 1311.13, we need not address whether an issue of fact exists under Huntington's alternative theory for judgment, namely, super-priority under R.C. 1311.14. *See* App.R. 12(A)(1)(c).

{¶27} Koussa's single assignment of error is overruled.

{¶28} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

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MARY J. BOYLE, JUDGE

TIM McCORMACK, P.J., and  
EILEEN T. GALLAGHER, J., CONCUR