

**LINWORTH LUMBER COMPANY**

**v.**

**Z.L.H., LTD. et al.\***

[Cite as *State v. King*, 126 Ohio Misc.2d 56, 2003-Ohio-7322.]

Court of Common Pleas of Ohio,

Delaware County.

No. 02CV-H-01-031.

Decided Jan 28, 2003.

---

David L. Lackey and Shannon C. Boston, for plaintiff Linworth Lumber Company.

Dennis A. Schulze and Faye D. Cox, for defendant Z.L.H., Ltd.

---

HENRY E. SHAW JR., Judge.

{¶1} This case is presently pending before this court on defendant Z.L.H., Ltd.'s motion for summary judgment against plaintiff, Linworth Lumber Company and memorandum in support; plaintiff Linworth Lumber Company's memorandum contra defendant Z.L.H., Ltd.'s motion for summary judgment and plaintiff Linworth Lumber Company's motion for summary judgment against defendants, Z.L.H., Ltd. and First American Title Insurance Company and request for an oral hearing and memorandum in

---

\* Reporter's Note: An appeal to the Fifth District Court of Appeals was affirmed in [2003-Ohio-4190](#), 2003 WL 21805626. The Supreme Court of Ohio declined to accept jurisdiction. 100 Ohio St.3d 1473, [2003-Ohio-5772](#), 798 N.E.2d 407.

support; defendant's memorandum contra plaintiff's motion for summary judgment; and plaintiff Linworth Lumber Company's reply to defendant Z.L.H., Ltd.'s memorandum contra.

{¶2} This court must make disposition of the instant motions for summary judgment within the confines of Civ.R. 56(C), as well as the interpretation of that rule by the Supreme Court of Ohio. Civ.R. 56; see *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 663 N.E.2d 639; *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264. Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of dispute as to a material fact. *Dresher*, 75 Ohio St.3d at 293. However, the moving party cannot discharge its burden with a conclusory assertion that the nonmoving party has no evidence to prove its case; the moving party must be able to point to evidence of a type listed in Civ.R. 56(C), affirmatively demonstrating that the nonmoving party has no evidence to support the claims. *Id.*; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 674 N.E.2d 1164. Moreover, summary judgment is appropriate if the nonmoving party does not respond with, or fails to set forth, by affidavit or as otherwise provided in Civ.R. 56, specific facts showing that there is a genuine issue for trial. *Dresher*, 75 Ohio St.3d at 293; Civ.R. 56(E).

{¶3} Inevitably, a motion for summary judgment may not be granted unless the court determines that (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the

party against whom the motion for summary judgment is made. *Tompkins*, 75 Ohio St.3d at 448.

{¶4} This case concerns the validity of two mechanic's liens placed on property located along East Powell Road, Delaware County, Ohio. In early 2001, the owners of the property, defendant, Z.L.H., Ltd. ("ZLH"), contracted to have office suites constructed on the property. On February 9, 2001, ZLH recorded a notice of commencement of the construction project. The notice of commencement provides:

"Keith Hamilton, after having been duly cautioned and sworn, states as follows:

"1. The real estate described on the attached Exhibit A (the 'Real Estate') is or will be improved with Commercial Office Buildings, the ('Project').

"2. Z.L.H., LTD., as the Owner of the Real Estate, has contracted for the Project, and has an address of 3790 East Powell Road, Suite A, Lewis Center, Ohio 43035.

"3. The fee owner of the Real Estate is Z.L.H., LTD., whose address is 3790 East Powell Road, Suite A, Lewis Center, Ohio 43035.

"4. The Owner's designee, if any, is NONE, with an address of \_\_\_\_\_.

"5. The Owner has executed a contract for the Project with Horvath Custom Builders, Inc. with an address of 3790 East Powell Road, Suite A, Lewis Center, Ohio 43035.

"6. The name and address of any lending institution(s) providing financing for the Project are as follows:

Fifth Third Bank  
21 East State Street  
Columbus, Ohio 43215

“7. The name and address of all sureties, if any, guaranteeing payment of the obligation to       NONE       are as follows:

“8. TO LIEN CLAIMANTS AND SUBSEQUENT PURCHASERS: TAKE NOTICE THAT LABOR OR WORK IS ABOUT TO BEGIN ON OR MATERIALS ARE ABOUT TO BE FURNISHED FOR AN IMPROVEMENT TO THE REAL PROPERTY DESCRIBED IN THIS INSTRUMENT. A PERSON HAVING A MECHANIC’S LIEN MAY PRESERVE THE LIEN BY PROVIDING A NOTICE OF FURNISHING TO THE ABOVE NAMED DESIGNEE AND HIS ORIGINAL CONTRACTOR, IF ANY, AND BY TIMELY RECORDING AN AFFIDAVIT PURSUANT TO SECTION 1311.06 OF THE OHIO REVISED CODE.

“A COPY OF THIS NOTICE MAY BE OBTAINED UPON MAKING A WRITTEN REQUEST BY CERTIFIED MAIL TO THE ABOVE NAMED OWNER, LESSEE, DESIGNEE OR THE PERSON WITH WHOM YOU HAVE CONTRACTED.

“10. The name and address of the person who prepared this Private Improvement Notice of Commencement is: Sheri D. Ash.

“11. Keith Hamilton, having been duly sworn, states that the information contained herein is true and correct.”

{¶5} The notice of commencement is signed by Keith Hamilton and notarized by Sheri D. Ash. The notice of commencement also contains an attached “Exhibit A.” Exhibit A sets forth the legal description for the property upon which the improvement would be constructed.

{¶6} Plaintiff contracted with third-party defendant CW Group, Inc., d.b.a. The Construction Group (“CW Group”), to provide certain materials necessary for construction of the office suites. Plaintiff supplied the materials but did not serve a notice of furnishing. The CW Group failed to pay plaintiff for the materials. Consequently, plaintiff filed the two mechanic's liens to secure payment of the amount owed.

{¶7} On January 16, 2002, plaintiff initiated the instant case seeking foreclosure on its mechanic’s liens. Plaintiff and ZLH subsequently filed the instant motions for

summary judgment. The motions present two dispositive issues: whether or not the notice of commencement ZLH recorded conformed to the provisions of R.C. 1311.04 and, if the notice of commencement failed to conform to the requirements of R.C. 1311.04, whether or not the recording of the defective notice of commencement excused plaintiff from serving a notice of furnishing pursuant to the provisions of R.C. 1311.05. These issues represent ones of first impression for this court and ones that have received little, if any, treatment in the case law. Nevertheless, in order to resolve the instant motions, this court must certainly examine the interplay between and apply the provisions of R.C. 1311.04 and 1311.05.

{¶8} R.C. 1311.04 sets forth the statutory provisions relative to notices of commencement. In particular, R.C. 1311.04(A)(1) requires an owner, part owner, or lessee of real property upon which an improvement is to be made to record a notice of commencement. R.C. 1311.04(A)(1). R.C. 1311.04(A)(1) further requires that a notice of commencement appear “in substantially the form specified in division (B) of” R.C. 1311.04. Id. On that point, R.C. 1311.04(B) sets forth the information that must appear in a notice of commencement. Specifically, R.C. 1311.04(B) provides:

“(B) The notice of commencement required under division (A) of this section shall contain, in affidavit form, all of the following information:

“(1) The legal description of the real property on which the improvement is to be made. For purposes of this division, a description sufficient to describe the real property for the purpose of conveyance, or contained in the instrument by which the owner, part owner, or lessee took title, is a legal description.

“(2) A brief description of the improvement to be performed on the property containing sufficient specificity to permit lien claimants to identify the improvement;

“(3) The name, address, and capacity of the owner, part owner, or lessee of the real property contracting for the improvement;

“(4) The name and address of the owner of the real property, if the person contracting for the improvement is a land contract vendee or lessee;

“(5) The name and address of the owner’s, part owner’s, or lessee’s designee, if any;

“(6) The name and address of all original contractors, except that if the notice of commencement is recorded for an improvement involving a single- or double-family dwelling and if more than one original contractor is involved, instead of listing each original contractor, the owner shall state that multiple original contractors are involved in the improvement;

“(7) The date the owner, part owner, or lessee first executed a contract with an original contractor for the improvement;

“(8) The name and address of all lending institutions which provide financing for the improvements, if any;

“(9) The name and address of all sureties on any bond which guarantee payment of the original contractor’s obligations under the contract for the improvement, if any;

“(10) The following statement:

“To Lien Claimants and Subsequent Purchasers:

“Take notice that labor or work is about to begin on or materials are about to be furnished for an improvement to the real property described in this instrument. A person having a mechanics’ lien may preserve the lien by providing a notice of furnishing to the above-named designee and his original contractor, if any, and by timely recording an affidavit pursuant to section 1311.06 of the Revised Code.

“A copy of this notice may be obtained upon making a written request by certified mail to the above-named owner, part owner, lessee, designee, or the person with whom you have contracted.’

“(11) The name and address of the person preparing the notice;

“(12) An affidavit of the owner, part owner, or lessee or the agent of the owner, part owner, or lessee which verifies the notice.”

{¶9} Last, R.C. 1311.04(R) provides:

“If an owner, part owner, lessee, or designee fails to record a notice of commencement in accordance with this section, no subcontractor or materialman who performs labor or work upon or furnishes material in furtherance of that improvement has to serve a notice of furnishing in accordance with section 1311.05 of the Revised Code in order to preserve his lien rights.”

{¶10} R.C. 1311.05, on the other hand, sets forth the statutory provisions relative to notices of furnishing. First and foremost, R.C. 1311.05(A) places a mandatory duty upon subcontractors and material suppliers to serve a notice of furnishing in order to preserve lien rights. Specifically, R.C. 1311.05(A) provides that “a subcontractor or materialman who performs labor or work upon or furnishes material in furtherance of an improvement to real property and who wishes to preserve his lien rights shall serve a notice of furnishing.” R.C. 1311.05(A). However, the provisions of R.C. 1311.05(A) condition serving a notice of furnishing upon “any person [having] recorded a notice of commencement in accordance with section 1311.04 of the Revised Code.” *Id.* Procedurally, the provisions of R.C. 1311.05(A) direct the subcontractor or material supplier to serve a notice of furnishing “upon the owner’s, part owner’s, or lessee’s designee named in the notice of commencement or amended notice and the original contractor \* \* \* as named in the notice of commencement or amended notice” at the address stated in the notice of commencement. *Id.* If no designee is named in the notice of commencement, the provisions of R.C. 1311.05 direct the subcontractor or material supplier to “serve the notice of furnishing upon the owner, part owner, or lessee named in the notice of commencement.” *Id.*; see, also, R.C. 1311.19. Last, language similar to that contained R.C. 1311.04(R) appears in R.C. 1311.05(H). In particular, R.C. 1311.05(H) provides:

“No subcontractor or materialman who performs labor or work upon or furnishes material in furtherance of an improvement has to serve a notice of furnishing in accordance with this section in order to preserve his lien rights if the owner, part owner, or lessee who contracted for the labor, work, or materials fails to record a notice of commencement in accordance with section 1311.04 of the Revised Code.”

{¶11} Turning to the issues at hand, ZLH contends that the failure on the part of the plaintiff to serve a notice of furnishing renders invalid the mechanic’s liens at issue. R.C. 1311.05 plainly and unambiguously states that a subcontractor or material supplier seeking to preserve lien rights must serve a notice of furnishing. Indeed, the use of the word “shall” in statutory language typically imposes a mandatory duty. *Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917* (1992), 65 Ohio St.3d 532, 534, 605 N.E.2d 368. It is undisputed that plaintiff did not serve a notice of furnishing. Thus, by not serving a notice of furnishing, it appears that plaintiff failed to preserve its lien rights.

{¶12} Nevertheless, plaintiff argues that the failure on the part of ZLH to record a notice of commencement that conformed to the requirements of R.C. 1311.04 excused plaintiff from serving a notice of furnishing. Plaintiff’s argument thus presents the issue of whether or not the notice of commencement ZLH recorded conformed to the requirements of R.C. 1311.04(B). An examination of the notice of commencement reveals two deficiencies. First, the notice fails to set forth the date that the owner, part owner, or lessee of the property executed the contract with the original contractor. See R.C. 1311.04(B)(7). And the notice of commencement also fails to state an address for the person who prepared the notice. See R.C. 1311.04(B)(11).

{¶13} To reiterate, the use of the word “shall” in statutory language establishes a mandatory duty. *Sons of Italy*, supra. The provisions of R.C. 1311.04(B) demand that a

notice of commencement provide all of the information set forth in that section. The notice of commencement at issue does not contain all of the information that the provisions of that section require. Therefore, the notice of commencement ZLH recorded failed to conform to the requirements of R.C. 1311.04(B).

{¶14} Given that ZLH failed to record a notice of commencement that conformed to the requirements of R.C. 1311.04(B), plaintiff contends that the provisions of R.C. 1311.04(R) and 1311.05(H) support its argument that it was excused from filing a notice of furnishing. Plaintiff focuses especially on the phrase “fails to record a notice of commencement in accordance with section 1311.04.” Plaintiff believes that this language requires ZLH’s notice of commencement to be “in accordance with” R.C. 1311.04 at the time of its recording. Better stated, plaintiff believes that a notice of commencement must contain all of the information set forth in R.C. 1311.04(B)(1) through (12) when it is recorded and that if the notice of commencement is not “in accordance with” R.C. 1311.04 in the slightest degree, the provisions of R.C. 1311.04(R) and 1311.05(H) excuse plaintiff from serving a notice of furnishing. Plaintiff thus urges this court to interpret and construe the language of R.C. 1311.04(R) and 1311.05(H) accordingly.

{¶15} Clearly, resolution of the motions at issue herein and, ultimately, the instant case, will rest on determining whether or not the General Assembly of Ohio intended by the provisions of R.C. 1311.04(R) and 1311.05(H) to excuse subcontractors and material suppliers from serving notices of furnishing where a notice of commencement, although recorded, fails to conform to the provisions of R.C. 1311.04. To that end, this court must derive the intent of the legislature initially from the express

language used in the statute. *Christe v. GMS Mgt. Co., Inc.* (2000), 88 Ohio St.3d 376, 377, 726 N.E.2d 497. The words used in the statute are to be given their plain and ordinary meaning. *Basic Distrib. Corp. v. Ohio Dept. of Taxation* (2002), 94 Ohio St.3d 287, 291, 762 N.E.2d 979. Moreover, a court must read the language of the statute in light of its grammatical context, R.C. 1.42, and a court must not supply or delete language from the statute to reach a certain result. *Vought Industries, Inc. v. Tracy* (1995), 72 Ohio St.3d 261, 265, 648 N.E.2d 1364. If the language used is unambiguous and the legislative intent clear, a court must apply the statute as written. *Id.*

{¶16} Immediately, a question arises in this court’s mind regarding the language upon which plaintiff relies; what exactly must accord with R.C. 1311.04: the act of recording the notice of commencement or simply the notice of commencement itself, or perhaps both? R.C. 1311.04(A)(1) directs that a notice of commencement be recorded in the county where the real property to be improved is located. And R.C. 1311.04(A)(1) requires that one prepare a notice of commencement “in substantially the form specified in division (B)” of R.C. 1311.04. So the provisions of R.C. 1311.04(A) contain directives relating both to the act of recording a notice of commencement and the notice of commencement itself. Thus, under one view, both the act of recording and, more important, the notice of commencement must be “in accordance with” R.C. 1311.04. Yet viewing the structure and the grammar of this language, one could reasonably read the “a notice commencement” language as merely explaining or defining the object that the verb “to record” acts upon. Under that reading, only the act of recording must be “in accordance with” R.C. 1311.04. As a result, the language at issue is subject to more than

one reasonable interpretation. Therefore, this court finds the subject language ambiguous.

{¶17} Where a court finds statutory language ambiguous, it may invoke any number of rules of statutory construction to determine legislative intent. *Christe*, 88 Ohio St.3d at 377, citing *Symmes Twp. Bd. of Trustees v. Smith* (2000), 87 Ohio St.3d 549, 553, 721 N.E.2d 1057. Primarily, a court should consider such matters as (1) the object sought to be attained; (2) the circumstances under which the statute was enacted; (3) the legislative history; (4) the common law or former statutory provisions; and (5) the consequences of a particular construction. R.C. 1.49.

{¶18} Under the common law, mechanic's liens were not recognized generally because a lack of privity between a lien claimant and the owner of the improved real property precluded the attachment of a lien on the owner's real property. 53 American Jurisprudence 2d, Mechanics' Liens, Sections 1-4. Instead, mechanic's liens were devices created statutorily as a measure of security for laborers, material suppliers, artisans, and so forth, to encourage those persons to mix their efforts and materials with real property to improve the same. *Id.* at Sections 5-6. However, even after the enactment of the first mechanic's lien statutes, the consequences of the lack of privity between a potential lien claimant and the real property owner remained. The lack of privity usually resulted in the owners' being unaware of a potential lien claim lodged against his or her real property by the persons entitled to assert a mechanic's lien. Consequently, provisions were drafted to protect the owner of real property against these "hidden liens." Today, the mechanic's lien statute in Ohio provides this protection by requiring subcontractors and material suppliers to serve a notice of furnishing upon the

owner or certain other persons. See R.C. 1311.05(A). Thus, the purpose underlying serving a notice of furnishing upon an owner of real property is to inform the owner of a potential claim that may arise against the property so that the owner may undertake measures necessary to remedy the claim. Marti & Goldstein, *Ohio Mechanics' and Materialmen's Liens* (2d Ed.1992), Section 5-4; Curry & Durham, *Ohio Real Property Law and Practice* (5th Ed.1997), Section 18-8(b)(3).

{¶19} Nevertheless, the owner must take certain affirmative steps to receive the protection afforded by the mechanic's lien statute. Beyond the duty to post, serve, and record a notice of commencement at and upon various persons and places, see, e.g., R.C. 1311.04(D) and (G), the owner must prepare a notice of commencement in conformity with the provisions of R.C. 1311.04(A) and (B), and R.C. 1311.04. In addition to its recording function as a precondition to the serving of a notice of furnishing, a notice of commencement also serves an informational purpose. Curry & Durham, *Ohio Real Property Law and Practice*, Section 18-7(a). A notice of commencement provides the information necessary not only to serve a notice of furnishing, see R.C. 1311.05(A), but also provides, for example, the information the county recorder requires to index properly the real property subject to the improvements. See R.C. 1311.04(P). Beyond merely providing to various persons the information necessary to satisfy certain statutory responsibilities, the fact that R.C. 1311.04(A) requires the recording of a notice of commencement demonstrates that a notice of commencement serves to provide information to all users of the recording system. Given the broad informational function that a notice of commencement serves, it can be said that such a function constitutes the

primary purpose of a notice of commencement rather than the recording of which functioning as a condition to another's performing a consequent duty.

{¶20} Against that backdrop, the issue returns to whether or not the General Assembly intended by the language in question to encompass situations where a notice of commencement is recorded, but the notice in some way fails to conform to the requirements of R.C. 1311.04. Plaintiff urges this court to find that any defect, however minor, in a recorded notice of commencement renders the entire notice void ab initio for purposes of R.C. 1311.04(R) and 1311.05(H). To so find, however, reads a discretionary component into language imposing a mandatory duty. Essentially, such a reading would confer upon subcontractors and material suppliers discretion to decide whether or not to serve a notice of furnishing where statutorily required information fails to appear in the notice of commencement. Yet not to adopt plaintiff's reading of the language at issue fails to account for circumstances where a subcontractor or material supplier finds that a notice of commencement wholly fails to contain the information necessary to serve a notice of furnishing.

{¶21} The provisions of the mechanic's lien statute seek to strike a balance between the rights of those persons providing labor and materials adding value to real property and the owners of real property receiving the benefit of those goods and services. Of course, mechanic's lien statutes were enacted principally to create a statutory lien to secure payment for the goods and services lien claimants provided for the improvement of real property. However, although courts must liberally construe the provisions of the mechanic's lien statute to effect its remedial nature, in order to receive the protections of the statute in the first place, the lien claimant must strictly comply with

the procedures necessary to ultimately perfect the lien, *West Virginia Elec. Supply Co. v. Ohio River Plaza Assn., Ltd.* (4th Dist. 1992), 82 Ohio App.3d 605, 610, 612 N.E.2d 1263, and a court must strictly construe the provisions relating to perfection of the lien. *Hoppes Builders & Dev. Co. v. Hurren Builders, Inc.* (2d Dist. 1996), 118 Ohio App.3d 210, 213, 692 N.E.2d 622.

{¶22} With the above considerations in mind, this court finds that for purposes of serving a notice of furnishing, the General Assembly intended the language requiring the recording of a notice of commencement to be “in accordance with” R.C. 1311.04 to mean that recorded notices of commencement must provide the information necessary to allow subcontractors and material suppliers to serve a notice of furnishing. Consequently, if the recorded notice of commencement fails to contain the information necessary to permit a subcontractor or material supplier to serve a notice of furnishing, the provisions of R.C. 1311.04(R) and 1311.05(H) excuse a subcontractor or material supplier from serving a notice of furnishing. Conversely, if the recorded notice of commencement contains the information necessary to serve a notice of furnishing, the provisions of R.C. 1311.04(R) and 1311.05(H) do not excuse a subcontractor or material supplier from serving a notice of furnishing. And where a recorded notice of commencement contains the information necessary to serve a notice of furnishing, a subcontractor or material supplier fails to perfect its mechanic’s lien where no notice of furnishing is served.

{¶23} Applying the foregoing, the notice of commencement provides the name and address of the owner of the real property and the original contractor. That information represents all that plaintiff needed to serve a notice of furnishing. See R.C.

1311.05. Again, it is undisputed that plaintiff failed to serve a notice of furnishing. Therefore, this court finds that plaintiff failed to perfect its two mechanic's liens.

{¶24} Plaintiff, nonetheless, asserts and provides evidence of other deficiencies not apparent on the face of the notice of commencement. Specifically, plaintiff presents evidence that ZLH never executed an original contract with Horvath Custom Builders and that Horvath Custom Builders never served as an original contractor on the construction project. Moreover, plaintiff presents evidence that the notice of commencement failed to set forth other original contractors serving on the project. This court, however, must disregard this evidence. R.C. 1311.04(B) requires that a notice of commencement appear in affidavit form. R.C. 1311.04(B). The notice of commencement herein, in fact, appears in affidavit form. As a result, the information contained therein constitutes sworn testimony. Thus, the evidence plaintiff presents, at best, merely calls into question the reliability of the testimonial information, indeed the evidence, set forth in the notice of commencement. The testimonial and evidentiary quality of the information set forth in a notice of commencement, in conjunction with the mandatory duty to serve a notice of furnishing, demands that a subcontractor or material supplier rely upon the information contained in the notice of commencement. Contrary to plaintiff's contentions, R.C. 1311.04(C) provides protection to subcontractors and material suppliers in the event that such persons rely upon incorrect information, such as that allegedly existing herein, contained in the notice of commencement. See R.C. 1311.04(C). Therefore, the extrinsic evidence plaintiff submits calling into question the reliability of the information set forth in the notice of commencement in no way relieves plaintiff from serving a notice of furnishing.

{¶25} In conclusion, this court finds that no genuine issue exists as to the material facts and that defendant Z.L.H., Ltd. is entitled to summary judgment as a matter of law. Accordingly, defendant Z.L.H., Ltd.'s motion for summary judgment against plaintiff, Linworth Lumber Company, is hereby SUSTAINED, and plaintiff Linworth Lumber Company's motion for summary judgment against defendants Z.L.H., Ltd. and First American Title Insurance Company is hereby OVERRULED.

---