

[Cite as *Flemco, L.L.C. v. 12307 St. Clair, Ltd.*, 2018-Ohio-588.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105956

FLEMCO, LLC

PLAINTIFF-APPELLEE

vs.

**12307 ST. CLAIR, LTD., A.K.A.
EXPRESS GAS AND FOOD**

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-845301

BEFORE: Keough, J., Kilbane, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: February 15, 2018

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KATHLEEN ANN KEOUGH, J.:

{¶1} Defendant-appellant 12307 St. Clair Ltd. a.k.a. Express Gas and Food (“St. Clair”) appeals from the trial court’s judgment that adopted and approved the magistrate’s decision granting summary judgment to plaintiffs-appellees Flemco L.L.C. (“Flemco”) and Carter Jones Lumber Company d.b.a. Carter Lumber Company (“Carter Lumber”) on their mechanics’ liens. We reverse and remand.

I. Facts and Procedural Background

{¶2} In August 2011, St. Clair and Flemco entered into a construction contract whereby Flemco agreed to construct an addition to St. Clair’s existing commercial property in Cleveland. As itemized in the contract, Flemco was to construct a foundation; install a concrete slab and concrete blocks; install framing, insulation, drywall, roof trusses, a roof, a steel door, gutters, and downspouts; provide framing for two new restrooms in the existing building, relocate existing electric and gas services, and remove and haul away all debris from the site upon completion. The work was to be performed in conformance with drawings and plans provided by architect Kevin Moran. The agreed contract price was \$43,000; St. Clair made an advance payment of \$12,000 to Flemco.

{¶3} Flemco began work at the site in December 2011. St. Clair asserts that it terminated the contract shortly thereafter because Flemco deviated from the architect’s plans, thereby breaching the contract, and that it was forced to complete the project with other contractors.

{¶4} In June 2012, Flemco filed an affidavit for mechanics' lien with the Cuyahoga County recorder, asserting that St. Clair owed it \$26,750 for labor and materials furnished from December 18, 2011 through April 12, 2012 pursuant to the contract.

{¶5} In May 2015, Flemco filed a complaint against St. Clair for foreclosure of its mechanics' lien. It also asserted claims for breach of contract and unjust enrichment. St. Clair answered the complaint and asserted counterclaims for breach of contract and unjust enrichment. The matter was referred to a court magistrate.

{¶6} In February 2016, the trial court dismissed Flemco's complaint without prejudice for Flemco's failure to prosecute its claims. The court subsequently granted Flemco's motion for reconsideration and reinstated the case. Noting that Flemco's original complaint had failed to name all lien holders as defendants, the court ordered Flemco to file an amended complaint listing all lien holders identified in the preliminary judicial report, stating that Flemco's failure to do so "will" result in dismissal without prejudice.

{¶7} In March 2016, Flemco filed an amended complaint for declaratory judgment and foreclosure of its lien. Unlike its original complaint, it did not also assert claims for breach of contract or unjust enrichment. St. Clair answered the amended complaint asserting various affirmative defenses but no counterclaims.

{¶8} In July 2016, Flemco filed a motion for summary judgment for foreclosure of its lien against St. Clair. Flemco asserted that there were no genuine issues of material

fact that it was entitled to judgment because it held “a valid and perfected” mechanics’ lien of \$26,750.

{¶9} In August 2016, St. Clair filed a motion to dismiss Flemco’s amended complaint, noting that Flemco had failed to name Carter Lumber as a party-defendant, even though Carter Lumber was named on the preliminary judicial report as a lien holder.

Despite its earlier order that Flemco’s failure to properly amend its complaint to include all necessary parties would result in dismissal, the trial court denied St. Clair’s motion and subsequently granted Flemco’s motion to file a second amended complaint to add Carter Lumber as a party-plaintiff.

{¶10} In its second amended complaint, Flemco asserted that it had recorded a mechanics’ lien against St. Clair for \$26,750 and was entitled to foreclose on that lien. It also asserted that Carter Lumber had a mechanics’ lien against St. Clair for \$26,750, and asked the court to render judgment for Carter Lumber for \$26,750, even though the copy of Carter Lumber’s affidavit for mechanics’ lien attached to the second amended complaint indicated that Carter Lumber’s lien was actually for \$4,496.66. St. Clair answered the second amended complaint, again asserting various affirmative defenses but no counterclaims.

{¶11} St. Clair then filed a brief in opposition to Flemco’s motion for summary judgment. St. Clair argued that there were genuine issues of material fact regarding the validity of Flemco’s lien. It attached copies of Flemco’s answers to interrogatories and

request for production of documents in which Flemco admitted that it had not performed much of the contracted-for work.

{¶12} The trial court subsequently held a hearing at which it granted default judgment against the non-answering defendants; it also ordered Flemco to refile its motion for summary judgment. Flemco refiled a summary judgment motion that was identical to its first motion for summary judgment. The motion made no mention of Carter Lumber. St. Clair did not oppose the motion, and the magistrate subsequently issued a decision granting Flemco's motion, entering judgment for Flemco and Carter Lumber, dismissing St. Clair's counterclaims, and ordering a sheriff's sale of St. Clair's property. Although the magistrate's decision noted that Flemco and Carter Lumber had separately filed mechanics' liens, it ordered judgment for \$26,750, the amount of Flemco's lien, in favor of Flemco and Carter Lumber.

{¶13} St. Clair filed objections to the magistrate's decision, and requested findings of fact and conclusions of law, which the magistrate subsequently issued. The trial court then issued a judgment overruling St. Clair's objections and adopting the magistrate's decision granting summary judgment to Flemco and Carter Lumber. This appeal followed.

II. Law and Analysis

{¶14} In its first assignment of error, St. Clair contends that the trial court erred in adopting the magistrate's decision that granted summary judgment to Flemco and Carter

Lumber because there were genuine issues of material fact regarding the validity of both liens.

A. Standard of Review

{¶15} A trial court's decision to adopt a magistrate's decision is reviewed for an abuse of discretion. *Kapadia v. Kapadia*, 8th Dist. Cuyahoga No. 94456, 2011-Ohio-2255, ¶ 7. A discretionary act that reaches an end or purpose clearly against reason and evidence is an abuse of discretion. *In re Guardianship of S.H.*, 9th Dist. Medina No. 13CA0066-M, 2013-Ohio-4380, ¶ 9.

{¶16} We review a trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 210 (1998).

{¶17} The party moving for summary judgment bears the burden of demonstrating that no material issues of fact exist for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). The moving party has the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims. *Id.* After the moving party has satisfied this

initial burden, the nonmoving party has a reciprocal duty to set forth specific facts by the means listed in Civ.R. 56(C) showing that there is a genuine issue of material fact. *Id.*

B. Mechanics' Liens

{¶18} R.C. 1311.02 states that

Every person who performs work or labor upon or furnishes material in furtherance of any improvement undertaken by virtue of a contract, express or implied, with the owner * * * of any interest in real estate * * * and every person who as a subcontractor, laborer, or material supplier, performs any labor or work or furnishes any material to an original contractor or any subcontractor, in carrying forward, performing, or completing any improvement, has a lien to secure the payment therefore upon the improvement and all interests that the owner * * * may have or subsequently acquire in the land or leasehold to which the improvement was made or removed.

{¶19} To perfect a mechanics' lien, the contractor or subcontractor must file the lien with the county recorder by submitting an affidavit showing the amount due, a description of the property to be charged with the lien, the name and address of the person to or for whom the labor or work was performed or material was furnished, the property owner's name, the name and address of the lien claimant, and the first and last dates that the lien claimant performed any labor or work or furnished any material to the improvement giving rise to the lien. R.C. 1311.06(A).

{¶20} "The purpose of the mechanics' lien law is to provide a contractor or materialman with a means of obtaining a lien on real estate to secure a claim for labor performed or material supplied." *Thrush v. Thrush*, 3d Dist. Union No. 14-86-17, 1988 Ohio App. LEXIS 1659, *8 (Apr. 26, 1988). "A mechanics' lien (1) gives a materialman an interest in the property to secure payment for materials and (2) fixes the

order of priority for that payment.” *Williams v. Williams*, 5th Dist. Morrow No. 2010-CA-0006, 2011-Ohio-1200, ¶ 20, quoting *Portco, Inc. v. Eve Specialists, Inc.*, 177 Ohio App.3d 139, 2008-Ohio-3154, 894 N.E.2d 84, ¶ 9 (4th Dist.). “Compliance with the statutory requirements for filing a lien is a prerequisite to obtaining a valid lien but the existence of a valid, legally enforceable claim is fundamental to the existence of the lien. Without a valid debt there is nothing to secure and the filing of a mechanics’ lien is pointless.” *Williams* at ¶ 20, quoting *Thrush* at *8.

{¶21} Flemco attached a copy of its affidavit for mechanics’ lien to its refiled motion for summary judgment. In its motion, Flemco asserted that because it held a “valid and perfected” lien against St. Clair in the amount of \$26,750, it was necessarily entitled to summary judgment for that amount. The magistrate apparently agreed, stating in her decision that Flemco and Carter Lumber had filed liens with the county recorder, and that such liens “thereby became and are valid liens upon the subject premises.” The magistrate determined that because Flemco and Carter Lumber had unpaid filed liens, they were entitled to foreclose.

{¶22} However, “there is no authority for the proposition that the admission into evidence of the mechanics’ lien affidavit is per se proof of the facts alleged in the affidavit.” *Williams* at ¶ 21, citing *Schleuter v. Shaheen*, 3d Dist. Hancock No. 5-88-27, 1989 Ohio App. LEXIS 4270, *12 (Nov. 8, 1989). Rather, the party seeking to foreclose has the burden of establishing the validity of the claim underlying the lien. *Williams* at ¶ 22. Thus, it was Flemco and Carter Lumber’s burden to establish the reasonable value of

the labor and materials each furnished to St. Clair in order to prove the validity of their liens.

{¶23} In addition to a copy of its affidavit for mechanics' lien, Flemco attached the affidavit of Gregory Fleming, a member of Flemco, L.L.C., to its refiled motion for summary judgment. In his affidavit, Fleming averred that Flemco had performed labor and furnished material to St. Clair pursuant to the contract, and that it was owed \$26,750 for that material and labor. This affidavit is some evidence of the value of Flemco's mechanics' lien.

{¶24} However, in its brief in opposition to Flemco's initial motion for summary judgment, St. Clair attached a copy of Flemco's responses to St. Clair's interrogatories and request for production of documents. In the interrogatories, St. Clair asked Flemco to describe the labor and materials it provided with respect to each contract element, and to provide receipts documenting the materials and labor it provided.¹

{¶25} With respect to the work it performed on the foundation (Interrogatory 12), Flemco stated that it provided "supervision and site preparation." Regarding pouring the slab (Interrogatory 13), Flemco admitted that "no work was performed on this portion of

¹We recognize that St. Clair did not file a brief in opposition to Flemco's refiled motion for summary judgment and thus, Flemco's answers to interrogatories and document requests, which were never filed, were not before the court for consideration. Nevertheless, we discuss St. Clair's response to Flemco's initial motion because the magistrate's decision granting summary judgment is not clear as to which motion for summary judgment she considered in rendering her decision. And even if she considered Flemco's refiled motion, the only evidence presented by Flemco in support of its refiled motion was Fleming's affidavit, which by itself is insufficient to establish the validity of the underlying debt supporting Flemco's lien.

the contract.” With respect to the concrete block construction (Interrogatory 14), Flemco stated that it provided “site supervision, materials and project layout for the subcontractor,” but it provided no documentation demonstrating its purchase of any materials or any payment to the subcontractor. With respect to framing the addition (Interrogatory 15), Flemco stated that “this portion of the work was never started.” Regarding installation of drywall (Interrogatory 16), Flemco admitted that it performed no work and did not furnish any materials in regard to this part of the contract. With respect to installation of the roof trusses and construction of the roof on the addition (Interrogatory 17), Flemco stated that trusses were delivered but not installed. With respect to installation of the steel door (Interrogatory 18), Flemco stated that it purchased and installed a steel door. With respect to installation of gutters on the addition (Interrogatory 19), Flemco admitted that “the work was never started.” Regarding installation of down spouts (Interrogatory 20), Flemco admitted that “no work was performed.” Regarding installation of electrical and plumbing systems (Interrogatory 21), Flemco admitted that it did not perform the work. Despite the document requests, Flemco produced no receipts or other documentation regarding any of the materials or work allegedly supplied, but it asserted that it was “not able to complete all of the contracted work due to the fact the owner breached the contract.”

{¶26} In light of Flemco’s answers to interrogatories, which make clear that Flemco did not provide labor or materials for a large part of the improvements specified in the contract, and Flemco’s failure to otherwise prove its damages, the record contained

evidence demonstrating there is obviously a genuine issue of material fact regarding whether Flemco is entitled to recover the full value of its mechanics' lien. Accordingly, the trial court erred in adopting the magistrate's decision that awarded summary judgment to Flemco for the full value of its lien.

{¶27} The record also reflects that there is a genuine issue of material fact regarding which party, if either, breached the contract. In its brief in opposition to Flemco's initial motion for summary judgment, St. Clair asserted that Flemco breached the contract. It supported this assertion with the affidavit of Mohamed Widdi, the owner of St. Clair, in which Widdi averred that St. Clair fired Flemco shortly after construction started because Flemco breached the contract by deviating from the plans prepared by architect Kevin Moran. In its answers to St. Clair's interrogatories, however, Flemco asserted that St. Clair breached the contract and then contracted with Flemco's subcontractors to complete the work. But, in his affidavit attached to Flemco's motion for summary judgment, Fleming averred that "Flemco completed its duties per the agreement on or about April 12, 2012," a statement that implies there was no contract breach. In light of this conflicting evidence, the trial court erred in adopting the magistrate's decision granting summary judgment to Flemco.

{¶28} The trial court also erred in adopting that portion of the magistrate's decision that granted summary judgment to Carter Lumber. Although Carter Lumber filed an affidavit for mechanics' lien, a copy of which was attached to the second amended complaint, Carter Lumber offered no evidence other than the affidavit to prove

the existence of a valid, legally enforceable debt underlying the lien. Without proof of a valid debt, the mechanics' lien is pointless. *Williams*, 5th Dist. Morrow No. 2010-CA-0006, 2011-Ohio-122 at ¶ 20.

{¶29} Moreover, although Carter Lumber's lien was for \$4,496.66, the magistrate's decision awarded to "plaintiffs, the sum of \$26,750." But \$26,750 was the amount of Flemco's lien. Thus, even assuming that both Flemco and Carter Lumber had each proved the validity of the underlying debt supporting their separate liens, which the magistrate apparently found, the amount of the judgment was in error.

{¶30} Because there are genuine issues of material fact regarding the validity of both Flemco and Carter Lumber's liens, the trial court erred in adopting the magistrate's decision that granted summary judgment to Flemco and Carter Lumber. The first assignment of error is sustained, and the judgment is reversed.

C. St. Clair's Counterclaims

{¶31} In its second assignment of error, St. Clair contends that the trial court erred in adopting the magistrate's decision because it improperly dismissed St. Clair's counterclaims for breach of contract and unjust enrichment.

{¶32} The record reflects that Flemco filed its original complaint on May 7, 2015. It filed an amended complaint on March 30, 2016. Then, after obtaining leave of court, it filed a second amended complaint on August 10, 2016. Although St. Clair filed counterclaims for breach of contract and unjust enrichment to Flemco's original

complaint, it did not file any counterclaims in response to Flemco's amended or second amended complaints.

{¶33} “An amended pleading substitutes for or replaces the original pleading.” *Steiner v. Steiner*, 85 Ohio App.3d 513, 519, 620 N.E.2d 152 (4th Dist.1993). Thus, St. Clair's answer to Flemco's amended complaint replaced its answers to the original and amended complaints and, because it did not file any counterclaims in its answer to the second amended complaint, no counterclaims were pending to be dismissed.

{¶34} However, the magistrate's decision states that:

This cause was submitted to the magistrate and heard upon *the complaint, Defendant 12307 St. Clair Ltd.'s Answer and Counterclaim, Plaintiff's Reply to Counterclaim, Plaintiffs Flemco, LLC and The Carter Jones Lumber Co. dba Carter Lumber's Motions for Default Judgment and Summary Judgment, the affidavit and exhibits in support thereof, the answer of defendant property owner, the answer of defendant KeyBank, N.A., and the evidence.*

{¶35} The magistrate's findings of fact and conclusions of law likewise state that the matter was decided upon “the complaint.” Because an amended pleading substitutes for the original pleading, the magistrate should have considered Flemco's *second amended complaint*, not the original complaint, in rendering her decision. And because Carter Lumber was not added as a party until the second amended complaint, if the magistrate decided the motion based upon the complaint, rather than the second amended complaint, she could not have rendered judgment for Carter Lumber.

{¶36} Because there were no counterclaims pending to be dismissed, St. Clair's second assignment of error is overruled. Should St. Clair wish to assert its

counterclaims, it should move the court upon remand for leave to file an amended answer to the second amended complaint.

D. Summary Judgment for Carter Lumber

{¶37} In its third assignment of error, St. Clair contends that the trial court erred in adopting the magistrate's decision that granted summary judgment to Carter Lumber. We agree.

{¶38} Initially, we note that the trial court improperly allowed Flemco to add Carter Lumber as a party-plaintiff. Carter Lumber's claims against St. Clair are entirely independent of Flemco's and, accordingly, Flemco had no authority to add Carter Lumber as a party-plaintiff. The proper procedure would have been for Carter Lumber to move to intervene in the action pursuant to Civ.R. 24(A)(2), or for Flemco to amend its complaint to add Carter Lumber as a party-defendant. St. Clair does not raise this issue, however, and thus has waived it.

{¶39} In its refiled motion for summary judgment, Flemco moved for summary judgment on its own behalf; it never mentioned Carter Lumber. The magistrate apparently interpreted Flemco's motion to include a request for summary judgment for Carter Lumber, which did not file its own motion, and rendered summary judgment for both Flemco and Carter Lumber. But Civ.R. 56(C) does not allow a party to move for summary judgment on behalf of another party. *Deutsche Bank Natl. Trust Co. v. Taylor*, 9th Dist. Summit No. 26626, 2013-Ohio-4278, ¶ 18. Nor does it authorize courts to

enter summary judgment in favor of a nonmoving party. *Marshall v. Aaron*, 15 Ohio St.3d 48, 472 N.E.2d 335 (1984), syllabus.

{¶40} Moreover, even if the magistrate could somehow consider Flemco's motion for summary judgment as a motion for judgment in favor of Carter Lumber, there was no evidence whatsoever demonstrating the validity of the underlying debt supporting Carter Lumber's lien. As discussed above, the only evidence before the court was Carter Lumber's affidavit of mechanics' lien (attached to Flemco's second amended complaint), which by itself was not sufficient to demonstrate the validity of the lien. Accordingly, the trial court erred in adopting the magistrate's decision granting summary judgment to Carter Lumber. The third assignment of error is sustained.

{¶41} Judgment reversed and remanded.

It is, therefore, considered that appellant recover of appellee its costs herein.

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.

KATHLEEN ANN KEOUGH, JUDGE

MARY EILEEN KILBANE, P.J., and
ANITA LASTER MAYS, J., CONCUR