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NO. COA09-1448-2
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

PEGRAM-WEST, INC.,
Plaintiff-appellant

v.

Guilford County
No. 08 CVS 10825

SANDRA ANDERSON BUILDERS, INC., SANDRA B. ANDERSON (GROAT), HOUSING AUTHORITY OF THE CITY OF GREENSBORO, WILLOW OAKS DEVELOPMENT, LLC, CAROLINA BANK, FRANKLIN J. DAYE and wife, GWEN DAYE, ANDREA M. BULLARD, CRYSTAL M.YOUNG, MARCUS L. PURCELL and wife, LAKEISHA R. PURCELL,
Defendant-appellees

Appeal by plaintiff from order entered 22 April 2009 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 13 April 2010. Petition for rehearing allowed 19 April 2011. The following opinion supersedes and replaces the opinion filed 15 March 2011.

Smith, James, Rowlett & Cohen, L.L.P., by Seth R. Cohen and J. David James, for plaintiff-appellant.

Sharpless & Stavola, P.A., by Joseph P. Booth III, for defendant-appellee Housing Authority of the City of Greensboro.

Womble Carlyle Sandridge & Rice, PLLC, by Michael Montecalvo and Sarah L. Buthe, for defendant-appellee Willow Oaks Development, LLC.

Ward and Smith, P.A., by Thomas S. Babel, for defendant-appellees Carolina Bank, Andrea M. Bullard, Crystal M. Young, Marcus L. Purcell and Lakeisha R. Purcell.

CALABRIA, Judge.

Pegram-West, Inc. ("plaintiff") appeals the trial court's order (1) granting Sandra Anderson (Groat)'s motion to strike and (2) discharging plaintiff's "Notices of and Claims of Lien." We affirm in part and dismiss in part.

I. Background

From July 2007 through July 2008, plaintiff delivered building materials and supplies for the construction of ten homes, located on lots 18, 20, 25, 25B, 34, 37, 41, 44, 52 and 59 of Willow Oaks - Zone B (collectively "the properties"), to defendant contractor Sandra Anderson Builders, Inc. ("SAB").[1] The cost of the materials provided to the properties totaled $260,539.60.[2] SAB failed to pay plaintiff for the materials it supplied.

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[1] SAB is now dissolved and not a party to this appeal.

[2] The complaint in this action alleged that SAB was indebted to plaintiff for $362,038.93. On appeal, plaintiff claims that the debt asserted in the complaint included amounts owed for the

At the time plaintiff delivered building materials and supplies to the properties, they were owned by defendant Housing Authority of the City of Greensboro ("the Housing Authority"). The Housing Authority had entered into a ground lease ("the Ground Lease") covering the properties, along with numerous additional properties, with defendant Willow Oaks Development, LLC ("Willow Oaks"). Willow Oaks, in turn, individually subleased the properties, along with many others, to SAB ("the Ground Subleases" or "the Subleases").

Under the terms of the Ground Subleases, SAB was required to construct certain improvements on the properties; specifically, SAB was to construct single-family homes. In each of the Subleases, Willow Oaks and SAB acknowledged and agreed that SAB would be the owner of these improvements during the term of the Subleases. However, upon completion of the improvements on any lot, SAB was required to "convey the Improvements to a Homebuyer in accordance with the provisions set forth in the Master Ground Lease." At the end of the term of the Subleases, SAB was required to surrender the properties in "as-is" condition. Additionally, the Subleases specifically

provision of construction materials on properties not at issue in the instant case. Plaintiff asserts that the debt resulting from SAB's failure to pay for the provision of materials to the ten properties at issue totals $260,539.60.

stated that SAB had no right to bind any interest of Willow Oaks to any lien or other security interest. The Subleases were officially recorded with the Guilford County Register of Deeds ("the Register of Deeds").

The construction of the homes was financed by defendant Carolina Bank. In order to secure this financing, the Housing Authority, Willow Oaks, SAB and Carolina Bank entered into a Multiparty Agreement ("the Multiparty Agreements") for each of the properties, whereby the Housing Authority and Willow Oaks agreed to subordinate their interests in the properties to Carolina Bank's deeds of trust in SAB's subleasehold interests in the properties. Each of the Multiparty Agreements included a provision describing the duties of Carolina Bank, the Housing Authority, and Willow Oaks in the event of SAB's default on the loan. In the event of default, Carolina Bank could (1) elect to assume the rights and responsibilities of SAB (i.e., become the sublessee) or (2) force the Housing Authority to choose between either (a) paying the amount due under the loan or (b) transferring to Carolina Bank, upon the payment of $15,000.00, the interests of the Housing Authority and Willow Oaks in the subject property. The Multiparty Agreements were all officially recorded with the Register of Deeds.

On 3 July and 11 July 2008, plaintiff filed ten "Notices of and Claims of Lien" ("the filings" or "plaintiff's filings") on each of the properties, which were purported to be filed "pursuant to Article 2 of Chapter 44A of the North Carolina General Statutes." The filings were given file numbers 08 CVM 334 and 336-344 by the clerk of court. Each of plaintiff's filings alleged that plaintiff had provided, pursuant to a contract with SAB, "labor and/or materials" for the construction of real property improvements located on the properties. While there was some variation in the exact dates the labor and/or materials were provided to the individual properties, the filings all referenced labor and/or materials that were provided between March and June 2008. The specific dates for each lot, according to plaintiff's filings, were as follows:

File Number:	**Lot Number:**	**Date Materials First Provided:**	**Date Materials Last Provided:**
08 CVM 334	Lot 59	20 July 2007	6 March 2008
08 CVM 336	Lot 18	13 March 2008	2 June 2008
08 CVM 337	Lot 44	17 October 2007	14 May 2008
08 CVM 338	Lot 41	12 September 2007	9 May 2008
08 CVM 339	Lot 52	21 April 2008	7 May 2008
08 CVM 340	Lot 37	16 October 2007	2 May 2008
08 CVM 341	Lot 20	31 January 2008	24 April 2008
08 CVM 342	Lot 34	6 August 2007	23 April 2008
08 CVM 343	Lot 25B	24 September 2007	9 April 2008
08 CVM 344	Lot 25	24 September 2007	9 April 2008

At the time plaintiff's filings were made, four of the properties had been conveyed by general warranty deed from the

Housing Authority and SAB: (1) Lot 25B was conveyed to defendants Marcus and Lakeisha Purcell ("the Purcells")(deed recorded 1 February 2008); (2) Lot 34 was conveyed to defendant Crystal M. Young ("Ms. Young")(deed recorded 17 April 2008); and (3) Lot 25 was conveyed to defendant Andrea M. Bullard ("Ms. Bullard")(deed recorded 10 April 2008).[3] In addition, Lot 59 was conveyed to defendants Franklin J. Daye and Gwen Daye ("the Dayes") at some point prior to plaintiff's filings.[4] Each deed to the private owners included a clause which provided that the Housing Authority and SAB released the conveyed property from the Ground Lease, its respective Ground Sublease, and the respective Multiparty Agreement. Additionally, the deeds stated that the Ground Leases, Ground Subleases, and Multiparty Agreements were expressly terminated "and shall have no further force or effect with respect to the property" conveyed in the deed.

On 29 August 2008, plaintiff filed a "Complaint and Action to Enforce Lien" against SAB, Sandra B. Anderson (Groat), the

[3] The Purcells, Ms. Young, and Ms. Bullard will be collectively referred to as "the private owners."

[4] The deed to the Dayes was not included in the record on appeal. However, plaintiff's filing with respect to their property indicates that Lot 59 was conveyed to the Dayes at some point prior to the filing. The Dayes are not a party to this appeal.

Housing Authority, Willow Oaks, Carolina Bank, the Dayes, and the private owners (collectively "defendants"). In its complaint, plaintiff alleged, *inter alia*, that it had valid and enforceable materialman's liens against the properties. In addition to the materialman's liens, the complaint also sought an "equitable lien" against the interests of the Housing Authority and Willow Oaks. Furthermore, the complaint alleged that plaintiff was entitled to money damages from SAB, Sandra Anderson (Groat) individually, the Housing Authority, and Willow Oaks. Plaintiff's prayer for relief requested, *inter alia*, that the trial court enforce its liens and order a sale of the properties.

On 16 September 2008, defendant Sandra Anderson (Groat) filed a motion to strike pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(f). The motion to strike requested that the trial court "strike the allegations regarding Notice of and Claim of Lien and the Notices of and Claims of Lien . . . as referenced in the Complaint and that the Court award her such other and further relief as to the Court may seem just and proper." None of the other defendants joined in the motion to strike.

On 8 October 2008 and 2 February 2009, the trial court conducted separate hearings on the motion to strike. Plaintiff

was represented by different counsel at the different hearings. At the first hearing, plaintiff's counsel argued that the filings constituted valid notices of claim of lien on funds pursuant to N.C. Gen. Stat. § 44A, Article 2, Part 2. At the second hearing, plaintiff's counsel argued that the filings constituted valid claims of lien pursuant to N.C. Gen. Stat. § 44A, Article 2, Part 1.

On 4 February 2009, the six unsold properties, lots 18, 20, 37, 41, 44 and 52 were foreclosed upon (and subsequently purchased) by Carolina Bank. For two of the properties, lots 18 and 52, Carolina Bank's deeds of trust were executed and filed before plaintiff had provided labor and/or materials. For the remaining properties, lots 20, 37, 41 and 44, plaintiff provided labor and/or materials prior to Carolina Bank recording a deed of trust.

On 22 April 2009, the trial court issued an order stating that each of the filings that plaintiff sought to enforce was invalid. In addition, the trial court's order struck from plaintiff's complaint a number of allegations including, *inter alia*, each assertion that plaintiff had a valid lien on the properties. The order further stated that "[u]pon the filing of this order with the Clerk of Superior Court, the Notices of and

Claims of Lien [for all the properties] shall be marked as discharged, pursuant to N.C.G.S. § 44A-16."

As a result of the trial court's order, plaintiff voluntarily dismissed, with prejudice, all of its claims against Carolina Bank and voluntarily dismissed, without prejudice, some of its claims against Sandra Anderson (Groat). In addition, the trial court later dismissed plaintiff's claims against the Housing Authority, Willow Oaks, and the private owners. On 2 June 2009, the trial court entered a consent order for summary judgment against SAB for $362,038.93. After final judgment was entered on the remaining claims on 30 July 2009, plaintiff appealed the trial court's 22 April 2009 order.

II. Discharge of Notices of and Claims of Lien

Plaintiff argues that the trial court erred by discharging the filings because they complied with all relevant statutory requirements. Plaintiff contends that plaintiff's filings were valid and enforceable against SAB's subleasehold interest in each of the properties.

As an initial matter, it is necessary to address the procedural irregularities which led to the trial court's order. The trial court's order granted two forms of relief: the discharge of the liens pursuant to N.C. Gen. Stat. § 44A-16 and

the striking of any references to the liens from plaintiff's complaint pursuant to Rule 12(f). However, the motion to strike filed by Sandra Anderson (Groat) was based solely upon Rule 12(f). Moreover, since the motion to strike was only filed by Sandra Anderson (Groat) in her individual capacity, it is not clear from the record why the trial court granted relief to the remaining defendants when it granted the motion.[5]

A final determination on the merits is not the relief contemplated by a defendant filing a motion to strike pursuant to Rule 12(f). Rule 12(f), by its own terms, only allows the trial court to strike matters from "*any pleading* any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter." N.C. Gen. Stat. § 1A-1, Rule 12(f) (2009)(emphasis added). Thus, a ruling on a Rule 12(f) motion should not have been used as the basis for discharging plaintiff's filings upon the filing of the order, because striking material from the pleadings is not akin to reaching a final determination of the matter.

The discharge of statutory liens is instead governed by N.C. Gen. Stat. § 44A-16 (2009). Indeed, the trial court's

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[5] The record on appeal does not contain a transcript from either of the hearings on the motion to strike, and as a result, we are unable to determine which additional defendants, if any, participated in these hearings.

order stated that it was discharging the liens pursuant to that statute. N.C. Gen. Stat. § 44A-16 lists six methods by which a filed lien can be discharged. Subsection 4 is the relevant method of discharge in the instant case. This subsection states:

> Any claim of lien on real property filed under this Article may be discharged by any of the following methods:
>
> . . .
>
> > (4) By filing in the office of the clerk of superior court the original or certified copy of a judgment or decree of a court of competent jurisdiction showing that the action by the claimant to enforce the claim of lien on real property has been dismissed or finally determined adversely to the claimant.

N.C. Gen. Stat. § 44A-16 (2009)(emphasis added). Typically, "[t]his subsection requires that a judgment be filed showing that the action to perfect a lien has been dismissed or otherwise decided adversely to the lien claimant in order to discharge the lien." *Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc.*, 333 N.C. 250, 251, 424 S.E.2d 383, 384 (1993). The trial court's order decreed that, "upon the filing of this order with the Clerk of Superior Court, the Notices of and Claims of Lien . . . shall be marked as discharged, pursuant

to N.C. Gen. Stat. § 44A-16[.]" Since the trial court's order appears to comply with N.C. Gen. Stat. § 44A-16 (4) and plaintiff does not contend that this portion of the trial court's order was not validly entered, we will review the portion of the trial court's order which directed that plaintiff's filings be discharged.

The materialman's lien statute has its genesis in our State Constitution, which requires that "[t]he General Assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject matter of their labor." N.C. Const. art. X, § 3. This requirement for a materialman's lien statute was satisfied by the enactment of Chapter 44A of our General Statutes ("Chapter 44A"). When interpreting Chapter 44A, our Supreme Court has made clear that

> [t]he materialman's lien statute is remedial in that it seeks to protect the interests of those who supply labor and materials that improve the value of the owner's property. A remedial statute must be construed broadly in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained.

O & M Indus. v. Smith Eng'r Co., 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006)(internal quotations and citations omitted).

Article 2 of Chapter 44A contains two parts: Part 1 of Article 2 ("Part 1") governs the "Liens of Mechanics, Laborers,

and Materialmen Dealing with Owner." It is intended to govern the rights of contractors and materialmen who deal directly with the owner of the subject property. Specifically, Part 1 entitles such mechanics, laborers, and materialmen to a lien on an owner's property in order to ensure they are compensated for their work and/or materials, so long as they follow the proper procedure in the statute, including the filing of a "claim of lien." N.C. Gen. Stat. § 44A-8 (2009). A suggested format for a claim of lien is contained in N.C. Gen. Stat. § 44A-12 (2009).

In contrast, Part 2 of Article 2 ("Part 2") governs the "Liens of Mechanics, Laborers, and Materialmen Dealing with One Other Than Owner." Part 2 is intended to govern the rights of subcontractors and delineate their priority in the funds which are due to the contractor. *See* N.C. Gen. Stat. §§ 44A-8 and -18 (2009). Specifically, it entitles a subcontractor to a lien on funds paid to the contractor or subcontractor with whom it had dealt for the improvements for which the subcontractor had provided labor, materials, or rental equipment. Part 2 requires the subcontractor to follow specific procedures, including serving the party the subcontractor dealt with a "notice of claim of lien upon funds." N.C. Gen. Stat. § 44A-20 (2009). A

suggested format for a notice of claim of lien upon funds is contained in N.C. Gen. Stat. § 44A-19 (2009).

In the instant case, SAB fit both the definitions of: (1) an owner of the properties under Part 1, by virtue of the Subleases, *see* N.C. Gen. Stat. § 44A-7 (2009) ("An 'owner' is a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made."); and (2) a contractor under Part 2, based upon the language in the Subleases in which owner Willow Oaks required it to make improvements upon the properties. *See* N.C. Gen. Stat. § 44A-17 ("'Contractor' means a person who contracts with an owner to improve real property."). Plaintiff's filings indicate that its counsel attempted to ensure that his client received the protections of Parts 1 and 2 by filing an amalgamation of the forms contained in Parts 1 and 2, titling each of plaintiff's filings as a "Notice of and Claim of Lien" and including substantially all of the information contained on each statutory form.

A claimant utilizing either a claim of lien or a notice of claim of lien on funds is not required to use the model statutory form and "deviation from the statutory form is permissible so long as all of the information set out in the

statutory form is contained" within the filing. *Contract Steel Sales, Inc. v. Freedom Const. Co.*, 321 N.C. 215, 222, 362 S.E.2d 547, 551 (1987). However, a claim of lien and a notice of claim of lien on funds each require specific information in order to be valid. The major difference between the two is that a claim of lien "need only identify the owner, the claimant, and the party with which the claimant contracted[,]" while a notice of claim of lien on funds "must identify all the parties in the 'contractual chain' between the claimant and the owner." *Universal Mechanical v. Hunt*, 114 N.C. App. 484, 488, 442 S.E.2d 130, 132 (1994). The specific requirements for a claim of lien affecting title to real property are

> intended to place "the world" on notice of the claim. Such notice must clearly delineate the tiered relationships in which the claimant is involved. This is so the owner may understand how the lien has arisen, and also so a title searcher may ascertain which entities are potential claimants and how each is connected to the real estate.

Cameron & Barkley Co. v. American Insurance Co., 112 N.C. App. 36, 45, 434 S.E.2d 632, 637 (1993).

Plaintiff's filings contain all of the information required by N.C. Gen. Stat. §§ 44A-12 and -19. Moreover, the filings contain enough information to allow a title searcher to

"ascertain which entities are potential claimants and how each is connected to the real estate." *Id.* Thus, plaintiff's filings were sufficient to protect its rights under both parts of Article 2 of Chapter 44A. Nonetheless, it must still be determined whether plaintiff's filings actually created a valid claim of lien under Part 1 or a valid notice of claim of lien on funds under Part 2.

A. The Housing Authority

We briefly address the argument of the Housing Authority and incorporated by the other defendants, that plaintiff's filings should be dismissed because they were filed against properties owned by the Housing Authority that constituted public property. It is true that Article 2 of Chapter 44A does not "apply to public bodies or public buildings." N.C. Gen. Stat. § 44A-34 (2009). However, we remind the Housing Authority that public bodies are exempt from materialmen's liens because they are instead required to obtain a performance and payment bond for any construction project which exceeds $300,000.00. N.C. Gen. Stat. § 44A-26 (2009). The failure of the official appointed by a public body to obtain this bond is a Class 1 misdemeanor. N.C. Gen. Stat. § 44A-32 (2009). In the instant case, there is no evidence that the Housing Authority

ever obtained a performance and payment bond. Nonetheless, on appeal plaintiff does not assert that it has a valid claim against the Housing Authority or its interests in the properties, and so we need not address the Housing Authority's argument further.

B. The Private Owners

The private owners argue that any claims of liens or notices of claim of lien on funds filed against their properties were invalid because they each received general warranty deeds that cancelled the interests of SAB in their properties before plaintiff's filings were made. We agree.

1. Claims of Lien

Our Supreme Court has explicitly approved the judicial enforcement of a materialman's lien against a leasehold (and, by extension, a subleasehold) interest in real property, when the enforcement is completed before the interest terminates. *See Asheville Woodworking Co. v. Southwick*, 119 N.C. 611, 615, 26 S.E. 253, 254 (1896)(A materialman's lien on a leasehold interest "can be levied upon and sold under execution. The mechanic's lien is executionary in its nature, operation, and effect, and, like other attaching liens, it gives cause of action."); *Weathers v. Cox*, 159 N.C. 575, 577, 76 S.E. 7, 8

(1912)(A materialman's lien "attaches to a lessee's leasehold estate, subject to all the conditions of the lease . . . .").

However, a claim of lien is only valid "to the extent of the interest of the owner." N.C. Gen. Stat. § 44A-9 (2009). In the instant case, plaintiff did not begin enforcement proceedings on lots 25, 25B, and 34 until after SAB's ownership interests in the properties as sublessee had been extinguished by the sale and conveyance of the properties to the private owners. Upon the termination of this interest by a conveyance, which was explicitly required by the terms of the Subleases filed with the Register of Deeds, "the property revert[ed] to the lessor, free from the lien of mechanics, unless these [we]re in some way protected by the statute." *Id.* Since our statutes only provide plaintiff with a claim of lien to the extent of SAB's interest, plaintiff possessed no statutory protection after that interest was terminated. Thus, the trial court properly ordered plaintiff's claims of lien against lots 25, 25B, and 34, filed in 08 CVM 342-44, to be discharged.

As the facts of the instant case demonstrate, the combination of the time limited nature of a leasehold interest and the time required to judicially enforce a materialman's lien effectively makes the protections of a claim of lien against a

leasehold interest almost theoretical for shorter-termed leases. However, this result is necessitated by previous decisions of our Supreme Court and by the language of Chapter 44A of our General Statutes. It was ultimately plaintiff's decision to furnish materials to an entity with only a time-limited interest in the properties. The extent and terms of SAB's interest in the properties were filed with the Register of Deeds and were thus a matter of public record, readily ascertainable by plaintiff. As our Supreme Court has previously admonished a party similarly situated to plaintiff,

> [i]f [plaintiff was] unwilling to do the work and furnish the material upon ... credit and intended to look to the security provided by statute, ordinary prudence required that [plaintiff] exercise that degree of diligence which would enable them to ascertain the status of the title to the land upon which the building was to be erected and to obtain the approval or procurement of the owners. Their loss must be attributed to their failure so to do.

Brown v. Ward, 221 N.C. 344, 347-48, 20 S.E.2d 324, 326-27 (1942).

2. Notices of Claim of Lien on Funds

In addition, the sale and conveyance of the private owners' properties extinguished plaintiff's filed notices of claim of

lien on funds. Under Part 2, a claim of lien on funds does not attach to any funds until after it is received by an obligor:

> *Upon receipt of the notice of claim of lien upon funds provided for in this Article*, the obligor shall be under a duty to retain any funds subject to the lien or liens upon funds under this Article up to the total amount of such liens upon funds as to which notices of claims of lien upon funds have been received.

N.C. Gen. Stat. § 44A-20 (a) (2009)(emphasis added). In Part 2, an "'Obligor' means an owner, contractor or subcontractor in any tier who owes money to another as a result of the other's partial or total performance of a contract to improve real property." N.C. Gen. Stat. § 44A-17(3) (2009). Thus, at the time plaintiff provided services and supplies to what would later become the private owners' properties, only SAB, by virtue of its ownership interest in the properties, qualified as an obligor under the statute. Although Carolina Bank, as a construction lender, held a deed of trust in the properties, it did not qualify as an owner, and thus, was not an obligor under the statute. *See Con Co. v. Wilson Acres Apts.*, 56 N.C. App. 661, 666-67, 289 S.E.2d 633, 637 (1982)(Construction lender holding a deed of trust not an owner under the materialman's lien statutes because it is not "a person 'for whom an improvement was made' or 'who ordered the improvement to be

made.'"). Thus, the trial court correctly discharged the notices of claim of lien on funds against Carolina Bank on all of the properties.

The record is silent on whether SAB failed to comply with N.C. Gen. Stat. § 44A-20 after it received notice of plaintiff's filings. However, such information is immaterial, because plaintiff eventually received a judgment against SAB for the full amount it sought in its complaint. This judgment was consented to by SAB and was not appealed. Therefore, even assuming, *arguendo*, that plaintiff possessed a valid lien on funds paid by SAB, so that the trial court's order discharging the lien on funds would constitute error, that error would be harmless. Plaintiff could not have received a larger judgment if it had been permitted to pursue a lien on funds against SAB than it had already received by virtue of the consent judgment. The assignments of error regarding plaintiff's filings filed against the private owners' properties are overruled.

C. Lots 18 and 52

On 4 February 2009, Carolina Bank foreclosed upon its deeds of trust on lots 18 and 52. Carolina Bank recorded a deed of trust on lot 18 on 4 March 2008. Plaintiff's claim of lien alleged that labor and/or materials were first provided to lot

18 on 13 March 2008, after the deed of trust was recorded. Similarly, plaintiff's claim of lien on lot 52 alleged that labor and/or materials were first provided to that lot on 21 April 2008, after Carolina Bank recorded a deed of trust on 2 April 2008.

1. Claims of Lien

"A claim of lien on real property granted by this Article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the claim of lien on real property." N.C. Gen. Stat. § 44A-10 (2009). Since Carolina Bank recorded deeds of trust on lots 18 and 52 before plaintiff provided labor and/or materials to them, Carolina Bank's deeds of trust were senior to plaintiff's claims of lien.

> Long settled case law holds, [t]he sale [under a mortgage or deed of trust] . . . cuts out and extinguishes all liens, encumbrances and junior mortgages executed subsequent to the mortgage containing the power. Ordinarily, all encumbrances and liens which the mortgagor or trustor imposed on the property subsequent to the execution and recording of the senior mortgage or deed of trust will be extinguished by sale under foreclosure of the senior instrument.

In re Foreclosure of Lien by Ridgeloch Homeowners Ass'n, 182 N.C. App. 464, 469, 642 S.E.2d 532, 536 (2007)(internal

quotations and citations omitted). Therefore, foreclosure by Carolina Bank of these two properties extinguished plaintiff's claims of lien against lots 18 and 52. Because plaintiff's interests resulting from the claims of liens filed on lots 18 and 52, in file numbers 08 CVM 336 and 339, had been extinguished, the trial court properly ordered these claims of lien to be discharged.

2. Notices of Claim of Lien on Funds

However, a notice of claim of lien on funds only attaches to "funds that are owed to the contractor with whom the . . . subcontractor dealt and that arise out of the improvement on which the . . . subcontractor worked or furnished materials." N.C. Gen. Stat. § 44A-18 (2009). A lien on funds does not attach to real property, and thus the foreclosures of lots 18 and 52 had no effect on these filings. Nonetheless, as previously noted, the erroneous discharge of any lien on funds against SAB would be harmless, and thus we do not disturb the trial court's order discharging the notices of claim of lien on funds for improvements on lots 18 and 52 against SAB.

C. Lots 20, 37, 41 and 44

1. Claims of Lien

Plaintiff's claims of lien on the remaining properties, lots 20, 37, 41 and 44, allege that labor and/or materials were provided prior to Carolina Bank recording a deed of trust on these properties. For lot 20, labor and/or materials were first alleged to be provided on 31 January 2008, while Carolina Bank recorded its deed of trust on 6 February 2008. For lot 37, the relevant dates were 16 October 2007 (claim of lien) and 1 November 2007 (deed of trust). For lot 41, the relevant dates were 12 September 2007 (claim of lien) and 15 October 2007 (deed of trust). Finally, for lot 44, the relevant dates were 17 October 2007 (claim of lien) and 11 December 2007 (deed of trust). Because plaintiff's claims of lien had been filed before Carolina Bank recorded its deeds of trust, plaintiff's claims of lien were senior to Carolina Bank's deeds of trust in SAB's subleasehold interests in these properties. Thus, plaintiff's claims of lien on these lots were not extinguished by their subsequent foreclosure by Carolina Bank.

> A trustee may only sell the interest conveyed to him. If the trustee is only foreclosing on the junior deed of trust, the senior lien continues with the property and the trustee must sell subject to the senior lien. Therefore, the purchaser at the foreclosure sale of a junior lien purchases the property subject to senior liens.

Shaikh v. Burwell, 105 N.C. App. 291, 293, 412 S.E.2d 924, 926 (1992) (internal citations omitted). When Carolina Bank foreclosed upon its junior deeds of trust, plaintiff's claims of lien continued, with each of the four properties being sold subject to plaintiff's senior lien. Thus, plaintiff still possessed valid claims of lien on these properties at the time the trial court entered its order.

However, we must note that the Ground Sublease that included lot 37 was executed on 27 September 2007 and the Ground Sublease that included lots 20, 41 and 44 was executed on 10 July 2007. These Subleases expired by their own terms after three years elapsed. There is nothing in our statutes which would postpone the expiration of a leasehold interest under the express terms of the lease, even by litigation attempting to enforce a materialman's lien against that interest. Since more than three years have now elapsed since the execution of these Subleases, the Subleases have expired. Upon this expiration, the subleasehold interests in lots 20, 37, 41, and 44 "revert[ed] to the lessor, free from the lien of mechanics. . . ." *Weathers*, 159 N.C. at 577, 76 S.E. at 6. Thus, plaintiff will be unable to recover on its claims of lien against the former subleasehold interests of SAB in these lots. As we can

no longer grant plaintiff the relief it seeks, plaintiff's attempts to enforce its claims of lien against these properties are now moot and must be dismissed.[6]

2. Notices of Claims of Lien on Funds

As with lots 18 and 52, Carolina Bank's foreclosures of lots 20, 37, 41, and 44 had no effect on plaintiff's notices of claim of lien on funds for the improvements on these properties. However, we again note that the erroneous discharge of any lien on funds against SAB would be harmless.

VI. Motion to Strike

Plaintiff finally argues that the trial court erred by granting the motion to strike any reference to the plaintiff's filings in plaintiff's complaint. We disagree.

Rule 12(f) states:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him or upon the judge's own initiative at any time, the judge may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter.

[6] Although the question of mootness was raised by several defendants, plaintiff did not argue that its claims would fall within any of the exceptions to the mootness doctrine.

N.C. Gen. Stat. § 1A-1, Rule 12(f) (2009). "Rule 12(f) motions are addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of discretion." *Reese v. City of Charlotte*, 196 N.C. App. 557, 567, 676 S.E.2d 493, 499 (2009)(internal quotations and citation omitted). "Matter should not be stricken unless it has no possible bearing upon the litigation. If there is any question as to whether an issue may arise, the motion [to strike] should be denied." *Id.*

In the instant case, plaintiff's complaint sought to enforce its filings of both a claim of lien and a notice of claim of lien on funds against all of the properties. The trial court's order struck all allegations regarding these filings. Since we have determined that the trial court did not commit reversible error when it discharged all of plaintiff's claims of lien and notices of claims of lien, the trial court did not abuse its discretion by striking any allegations related to plaintiff's filings. This assignment of error is overruled.

VII. Conclusion

Plaintiff argued only that its filings were valid against SAB's subleasehold interest in each of the properties. Because SAB's subleasehold interests in lots 25, 25B, and 34 had been extinguished by general warranty deeds to the private owners, as

explicitly contemplated by the Subleases, the trial court properly discharged plaintiff’s claims of lien filed in 08 CVM 342-44. That portion of the trial court’s order is affirmed.

In addition, although the record does not reveal whether SAB complied with N.C. Gen. Stat. § 44A-20 after it received notice of plaintiff’s filings, a judgment was entered against SAB for the full amount plaintiff sought in its complaint. Therefore, even if the trial court erred by discharging all of plaintiff’s notices of claims of lien on funds on all of the properties, such error would be harmless. That portion of the trial court’s order is also affirmed.

Carolina Bank’s foreclosure of its deeds of trust on lots 18 and 52 extinguished plaintiff’s alleged junior claims of lien. Thus, the trial court properly discharged plaintiff’s claims of lien filed in 08 CVM 336 and 339. That portion of the trial court’s order is affirmed.

Plaintiff’s claims of lien against lots 20, 37, 41, and 44 were senior to the deeds of trust eventually foreclosed upon by Carolina Bank. Thus, plaintiff still possessed a valid and enforceable claim of lien on those properties after Carolina Bank’s foreclosure proceedings. Nonetheless, the Subleases on those properties have now expired by their own terms, and so

plaintiff's claims of lien against lots 20, 37, 41 and 44 are now unenforceable. Thus, plaintiff's attempts to enforce these claims of lien have become moot and must be dismissed.

Finally, the trial court did not abuse its discretion by striking the allegations in plaintiff's complaint that referred to discharged claims of lien and notices of claim of lien on funds. That portion of the trial court's order is affirmed.

Affirmed in part and dismissed in part.

Judge HUNTER, JR., Robert N. concurs.

Judge STEELMAN concurs with separate opinion

Report per Rule 30(e).

NO. COA09-1448-2

NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

PEGRAM-WEST, INC.,
Plaintiff-appellant,

v.

Guilford County
No. 08 CVS 10825

SANDRA ANDERSON BUILDERS, INC., SANDRA B. ANDERSON (GROAT), HOUSING AUTHORITY OF THE CITY OF GREENSBORO, WILLOW OAKS DEVELOPMENT, LLC, CAROLINA BANK, FRANKLIN J. DAYE and wife, GWEN DAYE, ANDREA M. BULLARD, CRYSTAL M. YOUNG, MARCUS L. PURCELL and wife, LAKEISHA R. PURCELL,
Defendant-appellees.

STEELMAN, Judge, concurring.

I concur in the majority opinion. It carefully and thoroughly analyzes each of the transactions involved and reaches the correct legal conclusions under the present state of our statutory and case law.

I write separately because I am concerned that the present state of our law does not provide adequate protection to suppliers of labor and materials as envisioned by Article X, section 3 of the North Carolina Constitution. In addition, the increasingly complex real estate arrangements now being used

make it virtually impossible for a supplier of labor or materials to protect themselves under our lien laws.

I. Constitutional Provisions

Article X, section 3 of the North Carolina Constitution provides:

> Sec. 3. Mechanics' and laborers' liens.
>
> The General Assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject matter of their labor. The provisions of Sections 1 and 2 of this Article shall not be so construed as to prevent a laborer's lien for work done and performed for the person claiming the exemption or a mechanic's lien for work done on the premises.

The General Assembly enacted Article 2 of Chapter 44A of the General Statutes to give effect to this Constitutional provision. *See Steel Corp. v. Brinkley*, 255 N.C. 162, 164, 120 S.E.2d 529, 531 (1961) ("Our Constitution contains a mandate directing the General Assembly to enact legislation to give mechanics and laborers a lien on the subject matter of their labor."); *Smith & Associates v. Properties, Inc.*, 29 N.C. App. 447, 449, 224 S.E.2d 692, 693 (1976) ("North Carolina's Lien Law is mandated by Article X, Section 3, of our State Constitution . . . ."). The purpose of the materialman's lien statute is to "protect the interest of the contractor, laborer or

materialman." *Embree Construction Group v. Rafcor, Inc.*, 330 N.C. 487, 492, 411 S.E.2d 916, 920 (1992) (citation omitted); *see also Carolina Builders Corp. v. Howard Veasey Homes, Inc.*, 72 N.C. App. 224, 229, 324 S.E.2d 626, 629 (stating that the purpose of Article 2 is "to protect the interest of the supplier in the materials it supplies; the materialman . . . should have the benefit of materials that go into the property and give it value." (citation omitted)), *disc. review denied*, 313 N.C. 597, 330 S.E.2d 606 (1985).

II. Contractor as Lessee

In the instant case, the property was owned by the Housing Authority, which leased the property to Willow Oaks, which sub-leased the property to SAB. Plaintiff supplied labor and materials to SAB. Any lien is valid "to the extent of the interest of the owner." N.C. Gen. Stat. § 44A-9 (2009). In a lease situation, such as that before this Court, the lien protection of the supplier of labor and materials is illusory. The lien can only attach to the extent of the sublessee's interest, and this evaporates upon expiration of the lease. I agree that this result is mandated by the Supreme Court decision in *Brown v. Ward*, 221 N.C. 344, 20 S.E.2d 324 (1942). However, I believe that such a holding does not provide suppliers of

labor and materials with "an adequate lien" as mandated by our Constitution. The Supreme Court should reconsider its holding in *Brown* and the General Assembly should consider revising the provisions of Chapter 44A to prevent this unjust result.

III. Complex Real Estate Agreements

In the instant case, a series of complex agreements were executed to achieve two purposes: (1) the erection of dwellings upon the lots owned by the Housing Authority; and (2) by contract to eliminate the possibility of any lien ever attaching to the lots and improvements in question.

Where it is clear that the principal purpose of the agreements was the construction of improvements upon real estate to the joint benefit of the owner, the lessee, and the sublessee, those parties should be deemed to be joint venturers, and the clauses in the leases prohibiting the lessee and sublessee from causing any lien to attach to the lots be declared void as against public policy.

If such provisions in leases and subleases are enforced by the courts, then they will effectively eviscerate the constitutionally protected lien rights of laborers and materialmen.