

EXHIBIT C

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

FIRSTMERIT BANK, N.A., as Assignee)	
of the FDIC, receiver for Midwest Bank)	
and Trust Company,)	
)	
Plaintiff,)	Case No. 12 C 9567
v.)	
)	Judge Joan B. Gottschall
ANTIOCH BOWLING LANES, INC.,)	
et al.,)	
)	
Defendants.)	

ORDER

Plaintiff's motion for summary judgment against Defendant Morning Dew Exteriors, Inc. [53] is granted. For details, see below. As the order addressing Plaintiff's motion resolves all claims as to all parties with respect to the relief sought by Plaintiff, the clerk is directed to terminate this case. Collateral proceedings shall continue with respect to the receivership.

STATEMENT

In this foreclosure action, plaintiff FirstMerit Bank, N.A. ("FirstMerit"), as Assignee of the FDIC, which is the receiver for Midwest Bank and Trust Co. ("Midwest Bank"), moves for summary judgment against defendant Morning Dew Exteriors, Inc. ("Morning Dew") pursuant to Federal Rule of Civil Procedure 56. Morning Dew was named as a party to this action in order to extinguish a mechanics lien it filed against the mortgaged property. FirstMerit contends that the undisputed facts demonstrate that Morning Dew's mechanics lien should be extinguished. The court agrees and grants the motion.¹

I. LEGAL STANDARD

¹ The court previously granted FirstMerit's motion for a default judgment against defendant Chicago Title Land Trust Company and FirstMerit's motion for summary judgment against defendants Antioch Bowling Lanes, Inc., Joseph Sterbenz, and Kenneth Sterbenz.

Summary judgment is appropriate when the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Smith v. Hope Sch.*, 560 F.3d 694, 699 (7th Cir. 2009). The court ruling on the motion construes all facts and makes all reasonable inferences in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is called for when the nonmoving party cannot establish an essential element of its case on which it will bear the burden of proof at trial. *Kidwell v. Eisenhower*, 679 F.3d 957, 964 (7th Cir. 2012).

II. FACTS

The following facts are undisputed for purposes of the motion for summary judgment. On or about May 14, 2010, Midwest Bank, the original lender in this case, was closed by bank regulatory authorities. The FDIC, in its capacity as receiver for Midwest Bank, sold certain assets of Midwest Bank to FirstMerit, including the Note, Mortgage, Commercial Guaranty, and other loan documents that are the subject of this action.

A. The Note and Mortgage

The borrower under the loan documents was Antioch Bowling Lanes, Inc., an Illinois corporation that operates as a bowling alley. On or about September 24, 2007, Antioch Bowling Lanes executed and delivered to Midwest Bank a Note in the original principal amount of \$1,034,736.03. FirstMerit is now the owner of the Note. The Note is secured by a Mortgage dated September 24, 2002, that was recorded in Lake County, Illinois on October 10, 2002. Joseph Sterbenz guaranteed the amounts due from Antioch Bowling Lanes under the loan.

The Note matured by its express terms on September 24, 2012. Upon maturity of the Note, FirstMerit demanded payment from Antioch Bowling Lanes and Joseph Sterbenz. When they failed to pay the Note in full, FirstMerit filed a complaint against all of the defendants on

November 30, 2012, alleging claims for mortgage foreclosure and breach of the Note and Guaranty. An order of default was entered against defendant Chicago Title Land Trust Company on June 26, 2013. Antioch Bowling Lanes, Joseph Sterbenz, and Kenneth Sterbenz raised no defenses to their default under the loan documents or to the foreclosure of the mortgage. As a result, the court granted summary judgment against Antioch Bowling Lanes, Joseph Sterbenz, and Kenneth Sterbenz on August 8, 2013. The court held that a total of \$1,083,914.07 was due from Antioch Bowling and Joseph Sterbenz to FirstMerit, along with \$37,811.00 in attorneys' fees and \$1,170.65 in costs.

B. Morning Dew's Mechanics Lien

On July 20, 2010, Morning Dew, Antioch Bowling Lanes, and Kenneth Sterbenz entered into a contract for Morning Dew to complete roofing, gutter, and trim work on Antioch Bowling Lanes. Morning Dew completed the work on or about April 6, 2011. The total contract price was \$197,000.00. After accounting for all credits in favor of Antioch Bowling Lanes, Joseph Sterbenz, and Kenneth Sterbenz, \$23,428.88 remained due. On or about June 3, 2011, Morning Dew recorded a mechanics lien in Lake County, Illinois, in the amount of \$23,428.88, plus interest and costs. Morning Dew claims that its roofing, gutter, and trim work increased the value of the property.

Morning Dew was joined as a defendant in this action because FirstMerit wishes to terminate its mechanics lien upon the mortgaged real estate. Morning Dew was served with a summons and copy of the complaint on January 12, 2013. It filed an appearance on May 8, 2013, and filed an answer to the complaint on June 12, 2013. The complaint did not mention the mechanics lien; it merely listed Morning Dew as an entity with an interest in the property. In its answer, Morning Dew stated that it lacked sufficient information to admit or deny the allegations

concerning the execution of the Note, Mortgage, Assignment of Rents, and Guaranty; the default under the loan documents; the amounts due to the lender under the loan documents; and the parties joined in the complaint whose interests in the real property FirstMerit sought to terminate. Morning Dew admitted that the Note had matured and admitted the legitimacy and contents of the Mortgage, but denied that FirstMerit was entitled to any relief. Morning Dew did not include in its answer a defense or counterclaim related to the mechanics lien.

III. ANALYSIS

The Mechanics Lien Act, 770 Ill. Comp. Stat. 60/1 et seq., “attempts to balance the rights and duties of owners, subcontractors, and materialmen.” *Bricks, Inc. v. C & F Developers, Inc.*, 836 N.E.2d 743, 748 (Ill. App. Ct. 2005). It allows a contractor to assert “a lien on premises when the owner has received a benefit, and the furnishing of labor and materials have increased the value or improved the condition of the property.” *Weather-Tite, Inc. v. Univ. of St. Francis*, 909 N.E.2d 830, 834 (Ill. 2009).

As a lienholder, Morning Dew had a partial priority over an existing mortgage on the property. Under 770 Ill. Comp. Stat. 60/16, the mechanics lien had priority “with respect to the value of the property attributable to those improvements for which [Morning Dew] furnished material or services.” *LaSalle Bank Nat. Ass’n v. Cypress Creek 1, LP*, 950 N.E.2d 1109, 1118 (Ill. 2011). In opposition to First Merit’s motion for summary judgment, Morning Dew argues that extinguishment of its mechanics lien is improper because FirstMerit will obtain the benefits of the improvements made to the property by Morning Dew. Morning Dew argues that under 770 Ill. Comp. Stat. 60/16, the proceeds of a sheriff’s sale of the property, if insufficient to satisfy the mortgage and mechanics lien, should be allocated so as to credit Morning Dew its

share of the value of those improvements. Morning Dew contends that issues of material fact as to the proper apportionment of the sale price of the property preclude summary judgment.

FirstMerit responds that Morning Dew's mechanics lien is unenforceable. It argues that pursuant to 770 Ill. Comp. Stat. 60/9, the statute of limitations to enforce a mechanics lien is two years. If a contractor does not file suit to enforce its lien within that two-year limit, it has no right to the lien. Morning Dew completed its work on the property on April 6, 2011. It thus had until April 6, 2013, to enforce its lien. Morning Dew filed no claim or counterclaim attempting to enforce the lien prior to that date.

The court agrees that Morning Dew's lien is unenforceable because it was asserted outside of the statute of limitations governing claims under the Mechanics Lien Act. Because rights under the Act are a creation of statute, not found in common law or equity, the Act's technical and procedural requirements must be "strictly construed." *First Fed. Savings & Loan Ass'n of Chi. v. Connelly*, 454 N.E.2d 314, 316 (Ill. 1983). As the Illinois Supreme Court has explained, "[a] contractor's rights under the Act are dependent on its taking the necessary steps to perfect a lien." *Norman A. Koglin Assocs. v. Valenz Oro, Inc.*, 680 N.E.2d 283, 286 (Ill. 1997). The contractor must first record a "claim for lien," pursuant to 770 Ill. Comp. Stat. 60/7, and "can then seek to enforce the lien within two years of completion of the work," pursuant to 770 Ill. Comp. Stat. 60/9. *Id.*

Section 9 of the Act provides in relevant part,

If payment shall not be made to the contractor having a lien by virtue of this act of any amount due when the same becomes due, then such contractor may bring suit to enforce his lien in the circuit court in the county where the improvement is located. . . . *Such suit shall be commenced or counterclaim filed within two years after the completion of the contract, or completion of the extra or additional work, or furnishing of extra or additional material thereunder.*

770 Ill. Comp. Stat. 60/9 (emphasis added). In *Bank of New York v. Jurado*, 977 N.E.2d 1202 (Ill. App. Ct. 2012), the Illinois Appellate Court affirmed summary judgment in favor of a lender because the contractor did not enforce its mechanics lien within two years following completion of the work on the subject property. The court noted that the contractor “could have filed its own case to foreclose the lien before the time elapsed.” *Id.* at 1206.

Based on Illinois case law and the plain language of the Act, a lien claimant must file suit to enforce a mechanics lien within two years or lose its rights. A defendant in a foreclosure action may enforce the lien by counterclaim, or by including in its answer the elements required to support a claim. *Norman A. Koglin Assocs.*, 680 N.E.2d at 287. But the answer or counterclaim must be timely filed. *See id.* at 291 (holding that the defendant “asserted its lien in a timely manner although it failed to correctly label its lien as a counterclaim”). Here, Morning Dew’s answer makes no mention of its lien and includes no counterclaim. And even if the answer could be construed to assert a claim based on the lien, the answer was not filed within the two-year statute of limitations. It was filed on June 12, 2013, after the limitations period expired on April 6, 2013. Because Morning Dew’s attempt to assert its mechanics lien is untimely, FirstMerit’s motion for summary judgment is granted.

IV. CONCLUSION

FirstMerit’s motion for summary judgment against defendant Morning Dew Exteriors, Inc. is granted. The clerk is directed to terminate this case.

DATED: November 21, 2013

 /s/
JOAN B. GOTTSCHALL
United States District Judge