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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

EDWIN TAYLOR CORPORATION,)
a Florida corporation,)
)
Appellant,)
)
v.)
)
MORTGAGE ELECTRONIC)
REGISTRATION SYSTEMS, INC.,)
a foreign corporation, and BRANCH)
BANKING AND TRUST COMPANY,)
a foreign corporation,)
)
Appellees.)
_____)

Case No. 2D19-1531

Opinion filed June 17, 2020.

Appeal from the Circuit Court for
Hillsborough County; Paul L. Huey,
Judge.

J. Ronald Denman, Grant W. Kindrick,
Jade A. Craig, and Victoria M. Pearce of
Bleakley Bovol Denman and Grace,
Tampa, for Appellant.

Larry M. Segall of Gibbons Neuman,
Tampa, for Appellees.

SMITH, Judge.

In this construction lien foreclosure action, Edwin Taylor Corporation
(Edwin Taylor) appeals the final summary judgment in favor of Branch Banking and

Trust Company and Mortgage Electronic Registration Systems, Inc., as its nominee (collectively BB&T), wherein the trial court found Edwin Taylor's construction lien junior in priority to the mortgage of BB&T. Because we hold the trial court erred in determining as a matter of law that the January 7, 2014, notice of commencement was a nullity because it was not signed by the property owner pursuant to section 713.13(1)(a), Florida Statutes (2014), summary judgment on this ground was error. Accordingly, we reverse.

On January 7, 2014, the general contractor, Griffin Contracting, Inc., executed and recorded a notice of commencement. For all purposes the general contractor's notice of commencement was complete and accurate, with the exception that it was not signed by the owner of the property. Notwithstanding, the owner was aware of the general contractor's notice of commencement and made no objection to the same, nor did the owner terminate the general contractor's January 7, 2014, notice of commencement. No lender was listed on the January 7, 2014, general contractor's notice of commencement. The following day, January 8, 2014, BB&T recorded a mortgage against the subject property and recorded its own notice of commencement, listing BB&T as the lender. BB&T's notice of commencement was signed by the owner of the property.¹

Edwin Taylor, who subcontracted with the general contractor to perform construction improvements on the property, served a notice to owner pursuant to section 713.06(2)(a) and eventually recorded a construction claim of lien against the

¹BB&T's notice of commencement did contain some inaccuracies, which included a misspelling in the name of the owner and incorrect name of the general contractor. These inaccuracies are not germane to this appeal.

property on September 25, 2014, for work performed. When efforts to collect the monies due under the lien failed, Edwin Taylor filed suit to foreclose its lien free and clear from all other claims—including BB&T's claim.

BB&T moved for summary judgment arguing that because the general contractor's January 7, 2014, notice of commencement was not signed by the owner as required by section 713.13(1)(g), it was not a valid notice of commencement and Edwin Taylor's lien priority should have been determined by the date it recorded its claim of lien, September 26, 2014. Because Edwin Taylor's claim of lien was filed after BB&T's mortgage was recorded on January 8, 2014, Edwin Taylor's lien was inferior to BB&T's mortgage. In support of the summary judgment motion, BB&T filed the affidavit of a title examiner, who attested he performed a title search and examination of the public records of Hillsborough County, Florida, for the period from May 22, 2012, through August 27, 2018, at 8:00 a.m. He also reviewed the file of the prior title agent who performed the initial examination that resulted in the issuance of the policy insuring BB&T's mortgage.² The affidavit further attested that the general contractor's January 7, 2014, notice of commencement was not executed by the owner of the property.

The trial court found merit in the summary judgment motion and ultimately entered final summary judgment in favor of BB&T, concluding as a matter of law that the general contractor's January 7, 2014, notice of commencement was a nullity because it was not signed by the property owner and, therefore, Edwin Taylor's claim of lien could not relate back to the January 7, 2014, notice of commencement. Instead, the trial court found Edwin Taylor's claim of lien related back to BB&T's January 8, 2014, notice of

²It is unclear from the affidavit the period reviewed by the initial title agent or date the title policy was issued to BB&T.

commencement, which was signed by the owner and recorded after BB&T's mortgage, making Edwin Taylor's claim of lien junior in priority to BB&T's mortgage. This was error.

The issue before us is one of first impression in this court—whether the failure of the owner to sign the notice of commencement renders the notice invalid so that a lienor who strictly complies with the construction lien laws and properly perfects a claim of lien is precluded from having its lien relate back to the date of the recording of the notice of commencement under section 713.07.

"[T]he fundamental purpose of [the construction lien law] . . . is, to protect those whose materials, labor and skills improve the land of others by providing a plan by which such persons or firms may receive their fair share of the moneys payable by the owner to the general contractor" Crane Co. v. Fine, 221 So. 2d 145, 152 (Fla. 1969). The construction lien laws not only benefit contractors in direct contract with the owner of the improved real property, but specifically all those materialmen, laborers, subcontractors, and sub-subcontractors down the chain, who are typically not in privity with the owner, by allowing them to place a lien on the property for all amounts owing to them under their contracts with either a subcontractor or contractor. § 713.06(1). The construction lien laws were enacted for the protection of those who improve real property and are not sympathetic to a party seeking affirmative relief unless the party strictly complies with the provisions under the laws. See Hiller v. Phoenix Assocs. of S. Fla., Inc., 189 So. 3d 272, 274 (Fla. 2d DCA 2016); see also Stock Bldg. Supply of Fla., Inc. v. Soares Da Costa Constr. Servs., 76 So. 3d 313, 316 (Fla. 3d DCA 2011) ("Construction liens are purely creatures of statute and must be strictly construed." (citing Aetna Cas. & Sur. Co. v. Buck, 594 So. 2d 280, 281 (Fla. 1992))). One exception

to this rule is where the party against whom the lien is sought is not adversely affected, and even then, the party seeking affirmative relief must have substantially complied with the statutory provisions. See Trump Endeavor 12 LLC v. Fernich, Inc., 216 So. 3d 704, 709-10 (Fla. 3d DCA 2017) ("A plain reading of the applicable statute evidences that if [the subcontractor] has 'substantially complied' with section 713.06(2)(a), 6(b) and (c), 'errors and omissions do not prevent the enforcement of a claim against a person who has not been adversely affected by such omission or error.' " (footnote omitted) (quoting § 713.06(2)(f), Fla. Stat. (2013))).

Integral to our analysis here is the statutory notice of commencement under section 713.13. The recording of the notice of commencement must precede the commencement of construction to improve real property. § 713.13(1)(a). The notice of commencement serves two main purposes. First, it serves to protect the owner by providing a trigger date for when the statute of limitations begins to run. Design Aluminum, Inc. v. DeSanti, 521 So. 2d 285, 287 (Fla. 2d DCA 1988). Second, and equally important, the notice of commencement serves to provide a lienor with the necessary information for purposes of serving the required notice to owner under section 713.06(2)(a), thereby perfecting the lien. Id. The notice of commencement is in essence a roadmap for the lienor and contains the name of the owner of the real property to be improved; the description of the real property; the name of the general contractor, surety, and lender; and where the formal notices to the owner are to be sent and who is to receive copies of the same. § 713.13(1)(a).

The statute allows the owner of the property or the owner's authorized agent to record the notice of commencement, but it is the "owner [who] must sign the notice of commencement and no one else may be permitted to sign in his or her stead."

§ 713.13(1)(g). It follows that the owner bears the burden of ensuring that the notice of commencement is accurate, and thus, the "risk of any errors in the Notice of Commencement [falls] squarely on the shoulders of the *owners*." Design Aluminum, 521 So. 2d at 287 (citing Symons Corp. v. Tartan-Lavers Delray Beach, Inc., 456 So. 2d 1254, 1259-60 (Fla. 4th DCA 1984)); cf. Napolitano v. Sec. First Fed. Sav. & Loan Ass'n, 533 So. 2d 948, 950 (Fla. 5th DCA 1988) (holding when the lender records a notice of commencement as the authorized agent of the owner, that risk of any errors in the notice of commencement shifts to the lender). BB&T, without any legal authority, seeks to shift this risk to the *lienor*. However, our research has only confirmed the contrary—the lienor bears no such burden to warrant against errors in the notice of commencement. Design Aluminum, 521 So. 2d at 287 (recognizing the lack of authority for imposing such burden on the lienor).

Importantly here, BB&T takes no issue with the form and substance of the claim of lien itself, nor does it contest the perfecting of the claim of lien. See § 713.08. Instead, BB&T challenges the validity of the general contractor's January 7, 2014, notice of commencement under section 713.13(1)(g) and Edwin Taylor's ability to have its claim of lien relate-back to the recording date of the general contractor's notice of commencement under section 713.07(2). Therefore, for purposes of our analysis, we accept the form and substance of Edwin Taylor's claim of lien, as well as accept that Edwin Taylor complied with the statutory notice to owner and properly perfected the claim of lien. See §§ 713.06,.08; Athans v. Soble, 553 So. 2d 1361, 1362 (Fla. 2d DCA 1989) ("In considering a motion for summary judgment, the court must draw every possible inference in favor of the nonmoving party." (citing Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985))).

We first examine Gulfside Properties Corp. v. Chapman Corp., 737 So. 2d 604, 607 n.2 (Fla. 1st DCA 1999), advanced by BB&T and cited by the trial court as support for the proposition that a notice of commencement not signed by an owner is and was at all times "null and void." In Gulfside, the property owner appealed a judgment in favor of the materialman who sought to foreclose its claim of lien. On appeal the property owner argued his failure to sign the notice of commencement did not excuse the materialman from serving the statutory notice to owner under section 713.06 and that the materialman's failure to serve the notice to owner operated as a complete bar to the materialman's lien enforcement action. Id. at 605.

The materialman sought to deflect its own shortcomings in failing to serve the statutorily required notice to owner by arguing that the invalid notice of commencement excused the materialman from any further statutory requirements of the construction lien laws. Id. at 607. The First District in Gulfside was not persuaded, noting the materialman made no good-faith effort to serve the notice to owner, instead arguing notice through an invoice that was previously sent via facsimile transmission.³ The court properly held that the materialman, as the party seeking to enforce the lien, had the initial burden of establishing that the statutory requirements under chapter 713 were met, which included perfecting its lien, failing which the property owner was entitled to raise this failure as "complete defense to enforcement of a lien," despite the

³Cf. Symons Corp., 456 So. 2d at 1260 (holding if a lienor detrimentally relied on the information contained in the notice of commencement in sending the notice to owner, the owner is estopped from denying receipt of the notice to owner); S & S Air Conditioning Co. v. Cantor, 343 So. 2d 923, 926 (Fla. 3d DCA 1977) (holding if no notice of commencement is recorded, the owner is estopped to deny the effectiveness of a notice to owner mailed to the address indicated in the deed by which the owner took title).

defect in the notice of commencement. Id. at 607; see also Torres v. MacIntyre, 334 So. 2d 59, 60 (Fla. 3d DCA 1976) (noting the initial burden is "upon the lienor to show his performance of the statutory requirements of a lien").

There is a marked difference between the facts in Gulfside and the facts here. First, and most significantly, is that the validity of the notice of commencement under section 713.13(1)(g) was not the issue to be resolved by Gulfside, a fact that BB&T acknowledges in its brief. The court's discussion of the validity of the notice of commencement in Gulfside constitutes nonbinding dicta that has no precedential authority. See Cont'l Assurance Co. v. Carroll, 485 So. 2d 406, 408 (Fla. 1986) ("[D]icta is at most persuasive and cannot function as ground-breaking precedent."); see also Michael Abramowicz & Maxwell Stearns, Defining Dicta, 57 Stan. L. Rev. 953, 1065 (2005) ("A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta."). Second, BB&T concedes Edwin Taylor met its burden in establishing the statutory requirements under chapter 713 in perfecting its lien; whereas the materialman in Gulfside fell short of meeting its burden. For these reasons, we find Gulfside has no application to the issue before us.

Edwin Taylor, on the other hand, implores us to follow the line of reasoning in Sasso Air Conditioning, Inc. v. United Companies Lending Corp., 742 So. 2d 468 (Fla. 4th DCA 1999), wherein the Fourth District held that a notice of commencement is not invalidated by an owner's error where the owner substantially complies with the construction lien laws. In Sasso, the bank sought to foreclose its mortgage as superior to the subcontractor's claim of lien, which, if valid, related back to

the notice of commencement filed by the general contractor that was recorded prior to the mortgage. The bank argued the notice of commencement was defective because it was not signed by all owners of the property and because the subcontractor failed to have its name on the notice of commencement; therefore, the contractor's claim of lien could not relate back to the void notice of commencement. Id. at 469. The court rejected these arguments holding the duty to ensure the accuracy of the notice of commencement is on the owner, whereas the subcontractor has "no practical way to protect itself, particularly when faced with a notice of commencement which appeared regular and complete in all respects [because] [t]he law does not require every contractor to conduct a title search to verify that the information contained in the notice is true and correct." Id. at 471. The court reasoned "[i]t would be a strange construction to permit the lienor to lose its protection and the value of its labor because an owner, over whom the lienor had no control, failed to complete some detail in the recording of the notice of commencement." Id. at 470.

In reaching its conclusion, the court in Sasso also considered that the bank was in the best position to protect its priority by performing a title search—which would have revealed the notice of commencement filed by the general contractor and recorded prior to the mortgage—and the bank should not benefit from a defect in the notice of commencement, to the detriment of the subcontractor, where it was "the party who was most able to protect itself from loss." Id. at 471. Accordingly, the court reversed the summary judgment rendered in favor of the bank and directed summary judgment in favor of the subcontractor holding that the subcontractor had the right to rely upon the notice of commencement where the notice of commencement was in substantial compliance with the construction lien laws. Id. at 470-71.

We find Sasso instructive. As in Sasso, the general contractor's January 7, 2014, notice of commencement in this case substantially complied with the requirements of section 713.13 because it contained all of the relevant and required information that satisfied the dual purposes of the notice of commencement: (1) to measure time limitations and (2) to provide the lienor with the current names and addresses of the owner and general contractor allowing the lienor to properly mail the statutorily required notice to owner. See Symons Corp., 456 So. 2d at 1259. Further, BB&T, like the bank in Sasso, was in the better position to protect itself by performing an updated title search through the date it filed its mortgage or by otherwise requiring the owner of the property to terminate the general contractor's January 7, 2014, notice of commencement pursuant to section 713.132 before recording BB&T's mortgage.⁴

Accordingly, we hold that a notice of commencement not signed by the owner, but instead signed by the general contractor with the owner's authority, is not a nullity, per se, in a lien foreclosure action brought by a subcontractor where the subcontractor has strictly complied with chapter 713 and relies upon the defective notice of commencement, which is otherwise in substantial compliance with section 713.07. In other words, the lender may not use the deficient notice of commencement as a sword against a subcontractor who bears no duty to ensure the validity and accuracy of the

⁴The record before us is limited. While the affidavit of the title examiner filed in support of the motion for summary judgment indicates the affiant performed a title search spanning from May 22, 2012, through August 27, 2018, and further provides that his title search revealed the general contractor's January 7, 2014, notice of commencement, the affidavit is silent as to the exact dates of any title search performed before BB&T gave its mortgage and is silent as to the date BB&T's title policy was issued insuring BB&T's mortgage.

notice of commencement. Therefore, the trial court's entry of summary judgment in favor of the lender on this basis was error. Because there remain genuine, disputed issues of material fact, we reverse and remand for further proceedings.

Reversed and remanded.

KELLY and LUCAS, JJ., Concur.