[Cite as *Midwest Curtainwalls, Inc. v. Pinnacle 701, L.L.C.*, 2009-Ohio-3740.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92269

MIDWEST CURTAINWALLS, INC.

PLAINTIFF-APPELLEE

vs.

PINNACLE 701, LLC, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-607384 and CV-608370

BEFORE: Kilbane, J., Gallagher, P.J., and Celebrezze, J.

RELEASED: July 30, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, J.:

{¶ 1} Appellants, Pinnacle 701, LLC ("Pinnacle") and Cincinnati Insurance Company ("Cincinnati"), appeal the trial court's grant of summary judgment in favor of Midwest Curtainwalls, Inc. ("Midwest"), allowing Midwest to foreclose on a mechanic's lien bond posted by Cincinnati for lienable work performed by Midwest on the Pinnacle Building located at 701 Lakeside Avenue, Cleveland, Ohio. After reviewing the pertinent law and facts, we affirm.

{¶ 2} The protracted nature of this dispute and its rather tortured procedural history warrant an extended explanation of the facts of this case and its related litigation before we discuss the merits of the appeal.

A. The Project and the Parties

{¶ 3} This case arises out of the construction of a condominium building in downtown Cleveland, Ohio, known as the Pinnacle Project. The project was built above an existing structure that houses a parking garage located at 701 Lakeside Avenue, in Cleveland, Ohio. Pinnacle is a limited liability company that was the fee simple title owner of this project and of the real property on which the project was located. Kostas Construction, LLC ("Kostas") was the general contractor on the construction project. Gus Georgalis owns and controls both Kostas and Pinnacle. Midwest is a subcontractor that was employed to furnish a glass curtainwall system for the Pinnacle project. Cincinnati is the surety on the mechanic's lien bond posted by Pinnacle pursuant to R.C. 1311.11(C) to release Midwest's mechanic's lien.

B. Project Funding and Georgalis's Relationship to Kostas and Pinnacle

{¶ 4} According to the record, Georgalis owned the underlying structure and transferred the air rights for the Pinnacle Project to Pinnacle 701. Aside from owning and controlling Pinnacle, Georgalis is also the owner and sole member of Kostas, the general contractor on the Pinnacle Project.

{¶ 5} Funding for the construction project came from two sources: Huntington National Bank and the Cleveland Civil Housing Fund. To obtain these loans, documents had to be signed on behalf of Pinnacle 701, Kostas, and Georgalis. Each and every document was signed only by Georgalis. Georgalis also signed the subcontract agreement between Kostas and Midwest. In addition, the same law firm represented Pinnacle, Kostas, and Georgalis in their dealings with Huntington Bank and Midwest.

C. Midwest's Subcontract with Kostas

{¶ 6} On January 2, 2004, Kostas subcontracted with Midwest to build a glass curtainwall system for the project at a cost of $1,650,000. Under the subcontract, Midwest fabricated and provided materials with the intent to use them in the course of the project. Midwest's responsibilities included engineering, supplying, producing, and delivering the glass curtainwall system to the site. Kostas executed a separate agreement with a third party, Glass, Inc., for the installation of the curtainwall system.

D. The Dispute

{¶ 7} In December of 2004, a dispute arose between Kostas and Midwest regarding payments due and owing to Midwest for materials it fabricated and delivered to the Pinnacle Project. According to the parties, Midwest contended that Kostas failed to submit full payment according to the Schedule of Values set forth in the contract between Kostas and Midwest. The parties were unable to resolve the dispute, forcing Kostas to contract with Harmon, Inc., to complete the curtainwall system.

E. Midwest Demands Arbitration; Files a Mechanic's Lien; Sues in Federal Court; the Parties Agree to Arbitration

{¶ 8} On February 2, 2005, Midwest filed a Demand for Arbitration against Kostas under section 6.2 of the parties' subcontract. Under this article, Midwest and Kostas agreed in writing that any disputes arising out of or related to the subcontract would be submitted for arbitration, and that such arbitration would be administered by the American Arbitration Association. Such arbitration was designated Midwest Curtainwalls, Inc. and Kostas Construction, LLC, American Arbitration Case No. 53 110 J 0011905.

{¶ 9} On March 8, 2005, Midwest filed and served an affidavit for mechanic's lien for the remainder of the unpaid balance owed pursuant to the subcontract between Kostas and Midwest.

{¶ 10} On April 26, 2005, Midwest amended its demand for arbitration against Kostas to include trade secret claims.

{¶ 11} On May 20, 2005, Midwest filed a complaint in federal court against Gus Georgalis and Harmon, Inc. for unauthorized use of its drawings. The parties eventually agreed to arbitrate these claims within the pre-existing demand for arbitration.

{¶ 12} On September 8, 2005, Midwest, Kostas, Georgalis, and Harmon entered into a written agreement to arbitrate. Neither Pinnacle nor Cincinnati was party to the arbitration. They were and are, however, parties to the separate mechanic's lien action.

F. Release of the Mechanic's Lien Bond

{¶ 13} On October 24, 2005, Pinnacle, as principal, and Cincinnati, as surety, issued a release of mechanic's lien bond No. B-8870095 (the bond), in the amount of $876,057 as security for and on account of labor and/or materials furnished to Pinnacle by Midwest. The purpose of the bond was to remove the defect in title created by Midwest's mechanic's lien, which was interfering with Pinnacle's pending and future financing.

G. The Arbitration and Award

{¶ 14} On May 15 through May 19, 2006, the parties proceeded through arbitration.

{¶ 15} On August 31, 2006, the arbitrator awarded Midwest $573,511.51, including $115,089.55 jointly and severally against Georgalis and Kostas for attorney fees and costs. The arbitration award was itemized as follows:

a. $336,740 for the unpaid balance of the subcontract;

b. $92,173 for pending change orders resulting from extra work performed by Midwest for the project;

c. $29,508.96 for interest;

d. $100,000 for attorney fees; and

e. $15,089.55 in arbitration costs.

H. State Court Litigation: The Arbitration Award is Confirmed, Appealed and Upheld; Summary Judgment is Granted on the Mechanic's Lien Bond; Pinnacle and Cincinnati Appeal the Grant of Summary Judgment

{¶ 16} On November 15, 2006, Midwest filed an action to confirm its arbitration award against Kostas and Georgalis and to foreclose upon the mechanic's lien bond posted by Cincinnati on Pinnacle's behalf in the trial court at Case No. CV-607384.

{¶ 17} On November 28, 2006, presumably in response to this action, Kostas filed an action against Midwest in the lower court at Case No. CV-608370, in which it attempted to vacate the arbitration award.

{¶ 18} On January 19, 2007, both cases were consolidated into one action, retaining the older case number: CV-607384.

{¶ 19} On September 24, 2007, the trial court entered judgment in favor of Midwest, confirming the arbitrator's award. Midwest's attempt to foreclose on the mechanic's lien bond remained pending.

{¶ 20} On October 23, 2007, Georgalis only appealed the trial court's order confirming the award against him personally.

{¶ 21} On October 31, 2007, Midwest filed its motion for summary judgment on its attempt to foreclose on the mechanic's lien bond.

{¶ 22} On April 4, 2008, the trial court sua sponte stayed the case in the trial court, pending the outcome of Georgalis's appeal as to his personal liability on the arbitration award.

{¶ 23} On June 2, 2008, Midwest filed a motion with the trial court to lift the stay and restore the case to the active docket. Pinnacle and Cincinnati opposed the motion on June 9, 2008.

{¶ 24} On July 18, 2008, the trial court lifted its stay and returned the case to the active docket.

{¶ 25} On September 19, 2008, the trial court granted summary judgment in favor of Midwest on its attempt to foreclose upon the mechanic's lien bond that eventually became the subject of the instant appeal.

{¶ 26} On October 2, 2008, in App. No. 90591, this court affirmed the trial court's decision affirming the arbitration award against Georgalis ("*Midwest I*").

{¶ 27} On May 20, 2009, we remanded this case to the trial court pursuant to Civ.R. 60(A) in order to clarify the dollar amount of the judgment in the court below in favor of Midwest.

{¶ 28} On June 1, 2009, the trial court entered judgment in favor of Midwest and against Pinnacle and Cincinnati Insurance as follows:

> **"It is hereby ordered, adjudged and decreed that judgment is granted in favor of Midwest Curtainwalls, Inc. and against Defendants Pinnacle 701, LLC and Cincinnati Insurance Company in the amount of $611,608.33 as of September 19, 2008, the date upon which Summary Judgment was granted, and interest that shall accrue at the statutory rate from date of judgment until the judgment is paid in full.**

The Court orders that the bond filed by Cincinnati Insurance Company shall pay from the proceeds of the bond the amount of this judgment and interest at the statutory rate from date of judgment that shall continue to accrue until full payment of this judgment is made to the Plaintiff. This judgment is final and all costs are to be paid by the Defendants."

{¶ 29} This appeal followed.

{¶ 30} Pinnacle and Cincinnati's first and second assignments of error read as follows:

Assignment of Error One

"The trial court erred in awarding summary judgment to appellee [Midwest] on the basis of issue preclusion as an arbitration award for breach of construction contract in favor of appellee does not invoke res judicata for purposes of foreclosure on appellants' bond posted as security for Mechanic's Lien."

Assignment of Error Two

"The trial court erred in awarding summary judgment to appellee as genuine issues of material fact existed as to the amounts recoverable under the mechanic's lien."

Summary Judgment Standard of Review

{¶ 31} We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 10, 746 N.E.2d 618. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.

Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs. (1997), 121 Ohio App.3d 188, 192, 699 N.E.2d 534.

{¶ 32} Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that "(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *State ex rel. Duganitz v. Ohio Adult Parole Auth*., 77 Ohio St.3d 190, 191, 1996-Ohio-326.

{¶ 33} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107. If the movant fails to meet this burden, summary judgment is not appropriate, but if the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. Id. at 293.

{¶ 34} Within their first assignment of error, Pinnacle and Cincinnati argue first that because the issue of recovery under the lien was not decided in the arbitration, the trial court could not grant summary judgment to foreclose upon the mechanic's lien bond. Next, they argue that Midwest was not in privity with the parties subject to the arbitration award, and that, even if it was in privity, res judicata prevents Midwest from "pursuing another action pertaining to the construction project." Finally, within this assignment of error, Pinnacle and Cincinnati argue that Midwest is collaterally

estopped from applying the costs and interest awarded in the underlying arbitration to Midwest in this action.

{¶ 35} Within their final assignment of error, Pinnacle and Cincinnati argue generally that genuine issues of material fact remain for purposes of summary judgment.

Mechanic's Lien, Arbitration, and Res Judicata

{¶ 36} As to their first contention, Pinnacle and Cincinnati argue that because the matter below sounded in breach of contract, not the narrower issue of whether Kostas paid for labor and material pursuant to the lien, the trial court erred in granting summary judgment. In support of this, Appellants cite *Refrigeration Sales Corp. v. Western Reserve Air Conditioning Co.* (1977), Cuyahoga App. No. 35587, for the proposition that because an action for breach of contract and an action to foreclose on a mechanic's lien are not one in the same, the trial court erred in finding in favor of Midwest when it confirmed the arbitration award. Id. While we agree with the general expression in *Refrigeration Sales Corp.* that the evidence necessary to sustain these two claims is different, we disagree with Appellants' argument. The facts in the case at bar are wholly distinguishable from those in *Refrigeration Sales Corp.*

{¶ 37} In that case, Refrigeration Sales Corp. filed a breach of contract action against Brunswick Construction Company ("Brunswick") in Cuyahoga County Common Pleas Court. In response, Brunswick filed a motion to dismiss, or in the alternative motion for summary judgment, in which it attached a certified copy of a

judgment obtained against it by Refrigeration Sales Corporation, in Medina County, based upon Brunswick's failure to properly perfect a mechanic's lien. The trial court dismissed Brunswick on this basis, stating that the prior action acted as res judicata, and the court of appeals reversed. In its decision, this court specifically stated that although the trial court did not err in considering the defense of res judicata, actions for breach of contract and actions to foreclose upon mechanic's liens do not assert the same causes of action. Id. at 7.

{¶ 38} Further, we note that neither Pinnacle nor Cincinnati were parties to the arbitration. For this reason, Midwest therefore could not have sought to foreclose on the mechanic's lien bond at arbitration. Cincinnati and Pinnacle's arguments to the contrary on this point are not well-taken.

{¶ 39} In addition, we cannot resolve the seemingly contradictory arguments that since the parties were not in privity, res judicata does not apply; but if the parties were in privity, it would apply to bar Midwest from pursuing another action based upon the construction project at issue. This is in direct contravention to the holding in *Refrigeration Sales Corp.,* which states in pertinent part: "A former judgment * * * does bar a subsequent action where the causes of action are not the same even though both actions involve the same subject matter" Id. at 3, citing *Norwood v. McDonald* (1943), 142 Ohio St. 299, 52 N.E.2d 67. The fact that the "former judgment" in this case is an arbitration award does not bar the use of evidence in support of it to prove a breach of contract claim.

{¶ 40} In the case sub judice, as evidence of the breach of contract, Midwest used the arbitration award and an uncontested affidavit establishing that all of the amounts due and owing by the arbitrator were for lienable work. The value of that work went unchallenged by Pinnacle and Cincinnati at the trial court. They argue that because the evidence for the value of the lienable work was, in some instances, the same as that used to prove the breach of contract, the court could not rely on it based upon the holding in *Refrigeration Sales Corp.* We disagree.

{¶ 41} The arbitration award and affidavit that Midwest used to prove it was entitled to summary judgment on its attempt to foreclose on the mechanic's lien bond in the trial court are entirely admissible to prove the value of the contract at issue, i.e., the lien. The amount due for the breach of contract is the same amount due and owing under the foreclosure of the bond posted as security for the mechanic's lien. The arbitrator's determination of the contract value of the work performed is prima facie evidence of its value for purposes of the mechanic's lien claim. What is more, under the holding of *Refrigeration Sales Corp.*, the trial court was expressly permitted to consider the doctrine of res judicata in determining the case.[1]

{¶ 42} Pinnacle and Cincinnati also argue that because it was not in privity with the parties subject to the arbitration award, Midwest is collaterally estopped from foreclosing on the mechanic's lien. This argument lacks merit. According to the

[1] Albeit in *Refrigeration Sales Corp.*, res judicata was applied as a defense: "The trial court did not err in considering the defense of res judicata." Id. at 4.

record, Pinnacle is in direct privity of contract with Kostas, and both Kostas and Pinnacle were owned and controlled by Georgalis, who signed all documents and contracts on behalf of both Kostas and Pinnacle, and admitted during his deposition taken in aid of execution of the judgment against him that Kostas was merely a shell corporation for Pinnacle. The following excerpts are taken from Georgalis's deposition:

> **"Kostas Construction Company was a shell thing strictly. When the bank gave us the money for the particular building, we put it through, because to show we have the Kostas Construction Company. The minute the bank cut us off, there is no more Kostas. Kostas was a shell, nothing more, nothing less.**
>
> **"* * ***
>
> **"Kostas, at that time, I was – my giving, I put expenses through the pay up cash. If the bank bless[es] it, fine, we get money to live. Otherwise, it was nothing. There was not books, no records, no employees, none of that stuff. Here is your statements, from day one until the last day Huntington closed shop." Deposition of Gus Georgalis at 59-60.**

{¶ 43} The test for determining whether parties are in privity for purposes of res judicata determinations is as follows:

> **"The doctrine of res judicata * * * applies when a defendant, although not a party to the prior suit, is in privity with the named defendants in the prior suit. For purposes of res judicata, a person is in privity with another if he is so identified in interest with such person that he represents the same legal right."** ***Deaton v. Burney*** **(1995), 107 Ohio App.3d 407, 413, 669 N.E.2d 1.**

{¶ 44} While a contractual or beneficiary relationship is sufficient, it is not necessary to establish privity. *Brown v. City of Dayton* (2000), 89 Ohio St.3d 245,

730 N.E.2d 958. Even unrelated parties will be bound by the result in a prior proceeding where there is "a mutuality of interest, including an identity of a desired result." Id. at 248.

{¶ 45} Midwest argues in favor of privity because Georgalis signed the Owner/Contractor Agreement for Kostas and Pinnacle in addition to all of the documents required to obtain the construction financing, whether for Kostas, Pinnacle, or himself.

{¶ 46} As stated above, Georgalis owned and controlled both Pinnacle and Kostas. He participated in the underlying case and the arbitration, where he testified at length regarding the relationship between himself, his various closely-held corporate concerns, and the project that was to become subject of so much litigation.

{¶ 47} According to Georgalis's own testimony, he owns either 92 percent or 100 percent of Pinnacle. He was also the sole owner and member of Kostas. In addition, Georgalis signed each and every payment application and certification submitted by Kostas to Huntington Bank and met with the bank to review each application.

{¶ 48} As Midwest argues, it is hard to imagine three parties more "identified in interest" than Georgalis, Pinnacle, and Kostas. Based upon the evidence in the record, we find that Pinnacle was in privity with both Kostas and Georgalis because of the mutuality of its interests to the parties in the actions below.

{¶ 49} As an adjunct to its privity argument, Appellants state that Midwest lacks the mutuality of interest necessary to be in privity with Pinnacle and Cincinnati. In support of its argument, Appellants cite *Johnson's Island, Inc. v. Bd. of Twp. Trustees of Danbury Twp.* (1982), 69 Ohio St.2d 241, 244, 431 N.E.2d 672, wherein the court held that "privity" also requires a mutuality of interest, and mutuality exists only if "the person taking advantage of the judgment would have been bound by it had the result been the opposite." Pinnacle and Cincinnati argue that because Midwest would not have been bound by an arbitration award in favor of Kostas in a subsequent mechanic's lien claim against Pinnacle and Cincinnati, collateral estoppel does not apply. We disagree.

{¶ 50} Midwest does not claim that a cause of action for recovery on the mechanic's lien bond was included in the arbitration. Nor does it claim that the arbitration by itself established Midwest's right to a mechanic's lien or to recovery on the bond. Rather, Midwest claims the amount of the lien is conclusively established by the arbitration award, as confirmed by the trial court. Midwest further argues that the value of the work performed for which Midwest was not paid was conclusively established by the Arbitration Award, and that under the doctrine of claim preclusion -- not issue preclusion, as Pinnacle argues -- <u>all</u> of the parties to this appeal are precluded from challenging claims upon which the arbitrator ruled.

{¶ 51} We agree. That arbitration award was subject to a separate appeal, already affirmed by this court in *Midwest I*. Without putting too fine a point on it, we agree with Midwest that all of the parties to this appeal are precluded from

challenging the arbitrator's ruling in *Midwest I*. However, whether Pinnacle and Cincinnati are estopped from claiming the value of the work performed by Midwest was established at arbitration is of no consequence. This is true not only because neither Pinnacle or Cincinnati was a party to the arbitration (so it is axiomatic that it could not later challenge that ruling), but also because privity has already been conclusively established by the near exact identity of interest extant between Pinnacle, Georgalis, and Kostas.

{¶ 52} Next, Appellants argue that even if the parties are in privity, res judicata extinguishes Midwest's claim for foreclosure on the mechanic's lien bond because Midwest did not include this claim in the arbitration. In support of this, they cite *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, and argue that the final judgment rendered upon the merits of the arbitration claims "bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." Id. at 381. We disagree.

{¶ 53} First, as stated above, Appellants do not, and cannot, challenge the merits of the arbitrator's award in this appeal.[2] However, based upon its distinct privity with the parties below, Pinnacle and Cincinnati are estopped from asserting that the fair value of the work performed under the contract is somehow less than the contract price. See, e.g., *First Catholic Slovak Union v. Buckeye Union Ins. Co.*

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[2]As Pinnacle and Cincinnati admit at page 16, ¶3 of their brief, "[t]his matter involves the foreclosure on a release of a mechanic's lien bond"; they do not challenge the merits of the arbitrator's decision.

(1986), 27 Ohio App.3d 169, 499 N.E.2d 1303 (where two entities employ the same agent, both are charged with the agent's knowledge).

{¶ 54} Second, Appellants urge us in their initial arguments to abide by the holding in *Refrigeration Sales Corp.* In so doing, we cannot say that the arbitrator's decision "bars all subsequent actions" against Pinnacle and Cincinnati. The issue in this case is not whether the arbitrator's award operates to bar foreclosure on the mechanic's lien bond; under the holding of *Refrigeration Sales Corp.*, it does not. The issue, as Midwest points out, is "whether a ruling on an element of proof common to both cases could be binding in the subsequent case." (Midwest brief at 29.) We answer, yes.

{¶ 55} In its effort to foreclose on the mechanic's lien, Midwest used the award as prima facie evidence of the value of work performed in establishing the amount of the mechanic's lien. In the underlying action in common pleas court, there is no way Midwest could have sought an amount greater than that awarded by the arbitrator, because the in personam contractual action arises out of the underlying project, which also happens to be subject to an *in rem* action upon the lien. Such elements of proof, though common to each of the separate claims, are binding upon Pinnacle and Cincinnati.

{¶ 56} The Franklin County Court of Appeals stated in *Guernsey Bank v. Milano Sports Enters., LLC,* 177 Ohio App.3d 314, 2008-Ohio-2420, that "[w]henever a holder of a mechanic's lien enforces its lien in court, it recovers against the property owner based upon a statutorily-granted right. Although some holders may

also have contractual actions against the property owner, foreclosure on a mechanic's lien does not implicate any contractual right to recovery." Id. at 336, citing *Crandall v. Irwin* (1942), 139 Ohio St. 253, 258-259. This is one such instance where the holder has a separate in personam contractual action against the owner and, in the course of proving that contractual action, uses common evidence from the *in rem* action on the mechanic's lien. As stated in *Guernsey Bank*, "the entitlement to enforce a mechanic's lien arises as a matter of law and not from a written instrument or verbal contract * * *." *Guernsey Bank* at 336. Contrary to Appellants' assertions, recovery on one cause of action does not bar recovery in another entirely separate cause of action by way of res judicata.

{¶ 57} Lastly, this court has already recognized that a judgment in favor of a contractor and against the owner on a contract action was admissible to establish the amount of the contractor's mechanic's lien in a subsequent action against a successor owner. See, e.g., *Curtis v. Nero Enterprises, Inc.*, (Oct. 24, 1974), Cuyahoga App. No. 33502.[3] Appellants' arguments on this issue are not well taken. The parties are clearly in privity. The arbitrator's award does not extinguish Midwest's claim for foreclosure on the mechanic's lien bond.

Collateral Estoppel, Interest, Costs & Damages

[3] In fact, *Curtis* permits the recovery of prejudgment interest where, as here, privity of contract exists. Id. at 6.

{¶ 58} Pinnacle and Cincinnati argue that because Midwest is not in privity with either Cincinnati or Pinnacle, collateral estoppel does not apply, and that it is "significantly disturbing" and "wholly erroneous" for the trial court to apply the doctrine of collateral estoppel in awarding relief to Midwest as it applies to various costs, interest, and change orders in the arbitration award. Based upon the above privity analysis, we disagree.

{¶ 59} Finally, we note that because Cincinnati is in direct privity with Pinnacle, the determination as to the amount of Midwest's claim is also binding on it. *Talco Capital Corp. v. State Underground Parking Comm.* (1974), 41 Ohio App.2d 171, 324 N.E.2d 762. As a surety on the bond, Cincinnati had all defenses available to it that were available to Pinnacle. Moreover, the bond is simply a substitute for the property. Id.; *In re Mechanics' Lien of Whitta* (1982), 7 Ohio App.3d 153, 454 N.E.2d 953.

Change Orders

{¶ 60} Pinnacle and Cincinnati's claim that "unapproved change orders" are not recoverable under The Mechanic's Lien Act, R.C. 1311.01 through 1311.32, was not argued in the trial court; it is therefore waived on appeal. See *Thompson v. Preferred Risk Mut. Ins. Co.* (1987), 32 Ohio St.3d 340, 513 N.E.2d 733, holding "where an issue presented for review by the appellate court was not briefed and argued * * *, the issue is waived for purposes of consideration on appeal." Id. at 342. Yet, even if it were not waived, Appellants cite no authority for this proposition. Its argument on this issue is not well taken.

{¶ 61} There is no provision in the Ohio Mechanic's Lien Act that requires a signed change order before a contractor can recover for extra labor and materials otherwise within the ambit of the Act. As the arbitrator's award makes clear, these pending change orders were for work that Kostas and Georgalis demanded, and Midwest performed under the Act. There has been no allegation or evidence in this case that such labor and materials were not expended by Midwest. A party's verbal instructions to build a project other than what was included in the specifications creates a "constructive change order" that is a proper basis to allow recovery of additional costs. *Julian Speer Co. v. Ohio State Univ*. (1997), 83 Ohio Misc.2d 93, 680 N.E.2d 254. Such is the case here. Ohio law has been clear for over one hundred years that when a subcontractor performs extra work on an improvement to real property, it may include such extra work in its lien claim. *Dunn & Witt v. Rankin & Co.* (1875), 27 Ohio St. 132. As such, the inclusion of allegedly unapproved change orders in the trial court's award was not error.

Interest

{¶ 62} Pinnacle and Cincinnati further argue that interest on the arbitrator's award is not allowed under the Mechanic's Lien Act. However, Ohio law clearly permits recovery of prejudgment interest on a mechanic's lien claim where, as here, there is privity between the contractor and the owner of the subject property. See, e.g., *ABC Supply Co. v. Custom Installation* (1993), 89 Ohio App.3d 758, 627 N.E.2d 618; *Curtis*, supra. While it is true that here, Midwest is a subcontractor and traditionally recovery only extends to owners and contractors who are in privity, it is

also true that the other entities involved in this case, by admission, exist in name only, and in the body of one Gus Georgalis. Under these circumstances, it can hardly be argued that there was no privity between Kostas and Pinnacle.

{¶ 63} In *ABC Supply,* the contractor contracted directly with the owner. After the contractor filed its mechanic's lien affidavits, however, the owner sold the property in question to an unrelated party. The contractor sued to enforce its mechanic's lien, and the trial court entered judgment for the contractor against the subsequent owner and awarded interest.

{¶ 64} This court found that the lien was invalid on other grounds, but with respect to the award of prejudgment interest against the subsequent owner, this court held that the contractor had "sufficiently demonstrated privity of contract with the 'owner' of the properties since it had contracted directly with [the first owner], which was the recorded owner of the properties until after [the plaintiff's] liens were filed." Id. at 766.

{¶ 65} Simply stated, if privity exists between successive and unrelated owners of property, privity also exists between a shell corporation, a general contractor, and an owner, all of which are wholly owned, controlled, and operated by the same individual.

{¶ 66} What is more, the Arbitrator's Award adopted the interest calculations submitted by Georgalis himself and applied an interest rate of six percent. This calculation included only $2,739.66 in interest calculated at the Prompt Pay Act rate.

The remainder was calculated at the statutory rate for contracts. According to the record, the trial court relied on these calculations in making its determination.

{¶ 67} No party has challenged the trial court's calculation of interest at the statutory rate, only its ability to award interest. As we have already determined, the trial court was within its discretion in awarding interest based upon the privity of the parties. *ABC Supply*, supra. We defer to the trial court's judgment with respect to the propriety of its interest calculations at the statutory rate and affirm the trial court's determination on this issue in its entirety.

Attorney Fees and Costs

{¶ 68} Pinnacle and Cincinnati next argue that because mechanic's liens are statutory creations, the only valid recovery under a mechanic's lien is for labor and materials provided in furtherance of an improvement by virtue of a contract. In support of this, they cite R.C. 1311.02. We disagree. This is not an action to recover upon the mechanic's lien itself, but rather to foreclose upon the bond that stands in its stead.

{¶ 69} In Ohio, a lien holder may proceed against his debtor to recover a personal judgment or institute an action in equity to foreclose the lien, or he may unite in the same petition causes of action for a personal judgment and foreclosure of lien. *Lockland Lumber Co. v. Robinson* (1927), 116 Ohio St. 725, 157 N.E. 376 (decided under former analogous section); *Eggar v. Corwin* (1917), 8 Ohio App. 313; *Evans v. Lawyer* (1930), 123 Ohio St. 62, 173 N.E. 735; *Erie-Huron Realty Co. v. Van Dorn Iron Works Co.* (1923), 108 Ohio St. 314, 140 N.E. 325; *Mahoning Park*

Co. v. Warren Home Dev. Co. (1924), 109 Ohio St. 358, 142 N.E. 883; *Garrett v. Lishawa* (1930), 36 Ohio App. 129, 172 N.E. 845; *Simon v. Union Trust Co.* (1933), 126 Ohio St. 346, 185 N.E. 425. What is more, R.C. 1311.16 expressly authorizes the collection of attorney fees "[w]hen judgment is rendered in the proceeding in favor of the parties succeeding therein." R.C. 1311.16. In such cases, Ohio law permits "reasonable attorney fees to be paid out of the fund realized for lien claimants," in this case, the bond. Id.

Remaining Questions of Fact For Summary Judgment

{¶ 70} Pinnacle and Cincinnati also argue generally that the evidence presented at the arbitration did not establish the amount of labor and materials supplied to the project pursuant to R.C. 1311.02 or R.C. 1311.12. We disagree. Midwest has established the value of the work provided to the project by utilizing, in part, the arbitrator's computation of the amount due Midwest for lienable materials and labor. Midwest has also conclusively established privity with Kostas based upon the identity of Kostas's interests with Pinnacle and Georgalis. Because of this identity and the mutuality of interest between Pinnacle and Georgalis, Pinnacle is estopped from denying that value of the work performed for which Midwest was not paid was conclusively established by the arbitration award.

{¶ 71} They finally argue that the differing testimony of two witnesses in the arbitration as to the number of truckloads used on the project creates a material question of fact that precludes summary judgment. Midwest argues that such testimony is not a part of the record before us.

{¶ 72} However, as stated above, Pinnacle and Cincinnati were not a parties to the arbitration. They therefore cannot attempt to create questions of fact upon an award that was already confirmed, appealed, and upheld in *Midwest I*. The issue in this appeal is not whether there were factual disputes in the arbitration, but whether there were factual disputes in the trial court's order granting summary judgment pursuant to the mechanic's lien bond.

{¶ 73} Yet, even assuming arguendo that Appellants could raise these issues based upon the identity of their interest with Kostas and Georgalis, the portions of the record that they identify do not create questions of material fact that preclude summary judgment.

{¶ 74} Pinnacle and Cincinnati argue that Midwest's product manager testified from his memory that there were 32 or 33 truckloads to the jobsite, but that documentation of the truckloads was introduced that evidence 38 truckloads. After referring to the documents, another Midwest witness testified that there were 38 truckloads.

{¶ 75} Even if the number of truckloads to the project job site was properly contested in this appeal, which it is not, the unrefuted documentary evidence submitted on this point vitiates any question of material fact regarding it. This alleged discrepancy does not raise a question of material fact that prohibits summary judgment.

{¶ 76} Pinnacle and Cincinnati also claim that an unknown number of fabricated but undelivered materials were destroyed by Midwest and that, because

the arbitration was limited to a breach of contract action, the issue of labor and materials remain to be litigated. Midwest admits that after it was terminated it did sell some materials for scrap, but only after it gave notice to Kostas and Kostas was given credit for the amounts received under R.C. 1302.80. Midwest produced unrefuted documentary evidence of this in the trial court in its reply brief to its motion to confirm the arbitration award at exhibit C.

{¶ 77} Finally, Pinnacle and Cincinnati argue for the first time in their reply brief that Midwest's mechanic's lien fails because it does not meet the statutory requirements of R.C. 1311 et seq. However, they do not raise this issue as an assignment of error or argue it in their initial brief. We therefore decline to address it. See, e.g., App.R. 12(A)(2) and App.R. 16(A)(7). Further, we note that under App.R. 16(C), reply briefs are to be used only to rebut arguments raised in an appellee's brief, and an appellant may not use a reply brief to raise new issues or assignments of error. *Ostendorf v. Bd. of County Commrs.,* Montgomery App. Nos. 20257, 20261, 2004-Ohio-4520.

{¶ 78} Finally, we note that even if this argument was properly raised as an assignment of error, it would not change our opinion in this matter. Midwest conclusively established that the lien was properly perfected by submitting unrefuted documentary evidence; specifically, the supplemental affidavit of Donald F. Kelly and related documents with the trial court. Cincinnati, by posting the bond as security for the mechanic's lien, in fact released the lien. While it is true that a bonding agent cannot be responsible on a bond that replaces an invalid lien, as a corollary,

Cincinnati can be held responsible as surety where, as here, the bond releases a valid lien. See *Constr. One, Inc. v. Shore Thing, Inc.*, Cuyahoga App. No. 81135, 2003-Ohio-1339.

{¶ 79} Pinnacle and Cincinnati's first and second assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

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.

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MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR