[Cite as *Bank of Am., N.A. v. Omega Design/Build Group, L.L.C.*, 2011-Ohio-1650.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

BANK OF AMERICA NA, SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION,	:	APPEAL NO. C-100018 TRIAL NO. A-0810535
Plaintiff-Appellant,	:	*D E C I S I O N.*
vs.	:	
OMEGA DESIGN/BUILD GROUP, LLC.,	:	
TRU WALL CONCRETE, INC.,	:	
THE OSTERWISCH COMPANY, TRI-STATE CONCRETE,	:	
JACOB MASONRY CONTRACTORS, LLC.,	:	
D.E.P.E., L.L.C., d/b/a PELLA WINDOWS & DOORS,	:	
Defendants-Appellees	:	
and	:	
THE OVERLOOK AT EDEN PARK, ET AL.	:	
Defendants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: April 6, 2011

Daniel E. Izenson, Christy M. Nageleisen-Blades, and *Keating Muething & Klekamp,* and *Michael J. Sikora III, Maria Mariano Guthrie,* and *Sikora Law LLC,* for Plaintiff-Appellant,

Carl J. Stich and *White, Getgey, and Myer Co., LPA,* for Defendant-Appellee Omega Design/Build Group LLC.,

William A. Huddleson and *Graydon Head & Ritchey LLP,* for Defendant-Appellee Tru Wall Concrete, Inc.,

Warren J. Ritchie and *Keating Ritchie,* for Defendant-Appellee The Osterwisch Company,

Dennis Miller and *Droder & Miller Co. LPA,* for Defendant-Appellee Tri-State Concrete,

Peter E. Koenig and *Buechner Haffer Meyers and Koenig, Co. LPA,* for Defendant-Appellee Jacob Masonry Contractors, LLC.,

Meghan D. Donnellon, Thomas E. Donnellon, and *Donnellon, Donnellon & Miller LPA,* for Defendant-Appellee D.E.P.E., LLC, d.b.a. Pella Windows & Doors.

Please note: This case has been removed from the accelerated calendar.

J. HOWARD SUNDERMANN, Judge.

{¶1} In this foreclosure action, plaintiff-appellant Bank of America (the Bank) appeals from the trial court's order denying its motion for summary judgment and granting partial summary judgment to defendants-appellees Omega Design Build Group, LLC., Tru Wall Concrete, Inc., The Osterwisch Company, Tri-State Concrete, Jacob Masonry Contractors, LLC., and D.E.P.E., LLC, d.b.a. Pella Windows & Doors on the priority of their mechanic's liens over the Bank's mortgage under the provisions of R.C. Chapter 1311. Finding none of the Bank's assignments of error to be meritorious, we affirm the trial court's order.

I. Overlook at Eden Park Condominiums

{¶2} This case involves a multistory luxury residential condominium complex ("the project") known as The Overlook at Eden Park. The complex is owned by the defendant, Overlook at Eden Park L.P. ("Overlook"). Bank of America is the lender for the project. Omega Design Build is the prime contractor for the project. Tru Wall Concrete, The Osterwisch Company, Jacob Masonry, and D.E.P.E. are subcontractors of Omega who have filed mechanic's liens. TriState Concrete performed work directly for Overlook and has also filed a mechanic's lien.

{¶3} The project began with the filing of an original notice of commencement with the Hamilton County Recorder on September 1, 2005. A year later, LaSalle Bank, Bank of America's predecessor in interest, closed on a loan with Overlook. On September 15, 2006, at 2:42 p.m., LaSalle Bank filed its mortgage with the county recorder. Approximately three minutes later, a document styled "Affidavit to Terminate Notice of Commencement" was filed, asserting that "all improvements on and to the property which relate to work covered by the [original]

notice of commencement are completed * * *." The affidavit purported then to terminate the original notice of commencement, stating in relevant part as follows:

{¶4} "Affiant states that at the time of filing of this Affidavit all improvements on and to the property which relate to work covered by the aforesaid Notice of Commencement are complete and all monies due to the general contractor and any subcontractors, materialmen and laborers for the completion of said improvements have been paid and the Notice of Commencement is terminated as to this Property."

{¶5} According to the Bank, the affidavit was filed "[t]o ensure that the mortgage was [the] first and best lien on the property." Approximately one minute after filing the "Affidavit to Terminate Notice of Commencement," a new notice of commencement was filed. It identified exactly the same improvements on the property as did the original notice: "construction of a thirteen (13) story condominium tower."

{¶6} The defendants-appellees performed work and entered into subcontracts for materials and services for the project. The Bank subsequently declared Overlook in default and refused to advance further funds for the project. Overlook then stopped paying Omega and the remaining contractors on the project. As a result, Omega and the other contractors filed affidavits for mechanic's liens.

II. The Foreclosure Action

{¶7} The Bank then filed the current foreclosure action, claiming priority over the mechanic's-lien claimants. Thereafter, the Bank and Overlook entered into a consent order appointing a receiver to manage the property. The receiver was also given the authority, among other things, to direct the completion of construction of the unoccupied units and common areas and to market, lease and/or sell the

unoccupied condominium units. The receiver ultimately reported that he had obtained contracts to sell five condominium units, but that he had been unable to convey marketable title to the units due to the liens of the mechanic's-lien claimants. As a result, the bank sought to post a bond in place of the mechanic's liens, pursuant to R.C. 1311.11, for one and a half times the value of the liens, so that the receiver could consummate the sales of the five units.

{¶8} A number of the mechanic's-lien claimants, including Omega, objected to the proposed language in the bond. They argued that the bond did not comply with the statute because it voided any lien junior to the Bank's mortgage without providing any security to the junior lienholders, and because it also permitted the release of the bond upon the invalidity of "any and all" mechanic's liens. The mechanic's-lien claimants argued that to facilitate and enhance the settlement of their claims and to narrow the issues for trial, the trial court should determine as a threshold matter the issue of priority between the Bank and the mechanic's-lien claimants.

{¶9} As a result, defendants-appellees filed partial motions for summary judgment, asking the court to hold that their mechanic's liens had priority over the Bank's mortgage as a matter of law pursuant to R.C. 1311.04(A)(2). Their motions focused on a single legal issue: whether the affidavit of termination filed by Overlook at the request of the Bank had the desired effect under the mechanic's-lien statutes of "terminating" the initial notice of commencement so that the Bank could file its mortgage after the termination and then have Overlook file a new notice of commencement one year later, thereby creating the essential hierarchy of recorded documents necessary to allow the Bank's mortgage to have priority over the mechanic's liens.

{¶10} In response to each of the motions, Bank of America timely filed a Civ.R. 56(F) motion for additional discovery. When the trial court, at a subsequent hearing, indicated its intent to rule on the merits of the defendants-appellees' motions for partial summary judgment in the absence of the requested discovery, the Bank filed a response and a cross-motion for summary judgment on the sole legal issue of the priority of its mortgage over the mechanic's liens based upon the termination procedure that it had employed.

III. The Trial Court's Order

{¶11} Following a hearing on the motions, the trial court ruled that, based upon the plain language of R.C. 1311.04(A)(2), the effective date of the notice of commencement for the Overlook project was September 1, 2005. The court held that the affidavit terminating that notice was a legal nullity because it violated the statute. Thus, it held that the notice of commencement filed by the Bank in 2006 was, in effect, an amendment that related back to the original notice of commencement. As a result, it granted partial summary judgment to the mechanic's-lien claimants, ruling that any valid mechanic's liens for work and materials supplied in connection with the improvements identified in the original notice of commencement would have priority over the Bank's mortgage. The court, however, expressly stated in its order that it was reserving any determination concerning the validity of the individual mechanic's liens. This appeal followed with the Bank raising five assignments of error for our review.

IV. Finality of the Trial Court's Order

{¶12} Before addressing the merits of the Bank's assignments of error, we must first determine if we have jurisdiction to entertain the Bank's appeal. Defendants-appellees have filed a motion to dismiss the Bank's appeal, arguing that

the trial court's order is not final and appealable because it does not meet the requirements of either R.C. 2505.02 or Civ.R. 54(B).

{¶13} The Bank, however, argues that the trial court's entry is a final and appealable order because it has addressed the priority of the liens in this case. It relies on *Queen City Savings & Loan Co. v. Foley*,[1] where the Ohio Supreme Court clearly and unequivocally held that "[i]n a mortgage foreclosure action, a journalized order determining that the mortgage constitutes the first and best lien upon the subject real estate is a judgment or final order from which an appeal may be perfected."[2] The supreme court underscored the ramifications and extreme prejudice to a lienholder if such an order is not immediately appealable by stating the following:

{¶14} "A lien holder who is a party to a mortgage foreclosure action and who fails to perfect an appeal from a judgment determining the mortgage to be the first and best lien on the subject premises cannot thereafter in an appeal from a subsequent judgment confirming such priority attack the correctness of such earlier judgment."

{¶15} The Bank argues that the trial court's entry in this case specifically determined the issue of priority by reciting that "[the Bank's] mortgage [* * *] is [* * *] junior to the mechanics liens filed for work and materials [* * *], [and] the mechanics liens filed for work and materials supplied in connection with the improvements identified in the Original Notice of Commencement are prior in time and have priority over the mortgage of plaintiff Bank of America."

[1] (1960), 170 Ohio St. 383, 165 N.E.2d 633.
[2] Id. at syllabus

{¶16} Both the Bank and defendants-appellees acknowledge that since the Ohio Supreme Court issued its holding in *Queen City*, Ohio "appellate courts have varied on the question whether an order determining the priority of liens, but not ordering foreclosure and sale, is final and appealable, even if the court has not yet ordered foreclosure or sale of the property."[3] Defendants-appellees have cited a number of cases that hold such orders to be interlocutory by distinguishing *Queen City* on its facts,[4] while the Bank has cited other cases that hold that such orders are final and appealable.[5]

{¶17} After reviewing that case law, we find the decision in *TCIF Reo GCM, LLC v. National City Bank* to be most instructive on the finality of the order before this court. In that case, the Eighth Appellate District considered whether an order in a foreclosure action determining priority between two lenders, which expressly stated that it was partial and which clearly contemplated further proceedings to complete the foreclosure and sale of the property, was final and appealable.[6] After reviewing the *Queen City* case, the Eighth Appellate District held that although the syllabus in *Queen City* was somewhat broader than the facts of the case required, and that it could distinguish *Queen City* from the order before it on its facts, the syllabus in *Queen City* was unequivocal, and "pursuant to Rule 1(B)(2) of the Supreme Court Rules for Reporting of Opinions, the syllabus of the supreme court's opinion in

[3] See *TCIF Reo GCM, LLC v. National City Bank*, 8th Dist. No. 92447, 2009-Ohio-4040, at ¶13.
[4] See *Mtge Electronic Registration Sys., Inc. v. Aleskin*, 9th Dist. No. 23723, 2007-Ohio-6295, at ¶9; *Ameriquest Mtge Co. v. Middlebrooks*, 6th Dist. No. L-06-1006, 2007-Ohio-93, at ¶19.
[5] See *St Clair Savings Assn. v. Janson* (1974), 40 Ohio App.2d 211, 215, 318 N.E.2d 538; *TCIF*, supra, at ¶12 and 14; *Washington Mut. Bank v. Loveland*, 10th Dist. No. 04AP-920, 2005-Ohio-1542, at ¶6; *Bank One v. Jude*, 10th Dist. No. 02P-1268, 2003-Ohio-3343, at ¶16; *Frey Roofing, Lumber & Supply, Inc. v. Oller Builders and Restoration* (Aug 10, 1994), 3rd Dist. No. 13094-16; *Cardinal Fed. Savings Bank v. Thomas & Thomas Constr. Co.* (Aug. 14, 1987), 11th Dist. No. 1334.
[6] *TCIF*, supra, at ¶10.

Queen City is controlling over the text or footnotes, where there is disharmony."[7] As a result, the Eighth Appellate District held that the trial court's order determining that National City Bank's mortgage had priority over TCIF's mortgage was a final appealable order.[8]

{¶18} We agree with the reasoning of the Eighth Appellate District in *TCIF*. And although this court has not expressly cited *Queen City's* syllabus, we have recently acted consistently with the explicit syllabus holding in *Queen City* by exercising jurisdiction to review decisions on motions for partial summary judgment that have determined only the priority of liens against real property.[9] For these reasons, we hold that the trial court's entry in this case is a final appealable order.

V. Analysis

{¶19} In its first assignment of error, the Bank argues that the trial court erred in granting the defendants-appellees' motions for summary judgment and denying its cross-motion for summary judgment on the issue of the priority of its mortgage over the liens of the mechanic's-lien claimants.

{¶20} "Summary judgment is appropriate where there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion. We review the entry of summary judgment as a matter of law under a de novo standard."[10]

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[7] Id. at ¶12 and 14.
[8] Id. at ¶14.
[9] *Morequity Inc. v. Fifth Third Natl. Bank*, 1st Dist. No. C-080824, 2009-Ohio-2735, at ¶7-9; *Old Republic Natl. Title Ins. Co. v. Fifth Third Ban*k, 1st Dist. No. C-070567, 2008-Ohio-2059, at ¶9-10.
[10] *Morton v. Contintental Cas. Co.*, 1st Dist. Nos. C-030771 and C-030799, 2004-Ohio-7126, at ¶6.

{¶21} The priority dispute in this case revolves around R.C. 1311.04, which requires the owner of property on which work is to be performed to file a notice of commencement prior to the performance of any labor or work or the furnishing of materials. The notice of commencement establishes the priority date of liens for any subcontractors or materialmen on the project identified in the notice. R.C. 1311.13(A)(2) provides that all mechanic's liens are effective from the date of the recording of the notice of commencement.[11] Thus, once a project has commenced, those who perform work or provide materials are entitled to rely upon the commencement date to fix the priority of their liens.

{¶22} R.C. 1311.04(A) adopts that policy in unequivocal terms for only one notice: "Only one notice of commencement is required to be filed for a single improvement and if more than one notice of commencement is filed for a single improvement, all notices filed after the original notice shall be deemed to be amendments to the original notice * * * . The date of the filing of the amended notice is the date of the filing of the original notice of commencement."[12]

{¶23} The Bank argues in this case that the statute does not explicitly prohibit an "Affidavit of Termination of Notice of Commencement." But it is not the "Affidavit of Termination" itself that creates the problem in this case. Rather, it is the use of an affidavit of termination, followed immediately by the filing of a second notice of commencement for exactly the same improvement, that runs afoul of the statute. If the project had actually been terminated, the owner could have filed an affidavit of termination. If the project was at an end, and contractors were no longer furnishing materials or labor, the existence or nonexistence of a notice of

[11] R.C. 1311.13(A)(2).
[12] R.C. 1311.04(A)(2).

commencement would have been be meaningless. But that is not what happened in this case. The real violation of the statute was the Bank's attempt to restart the lien clock by terminating the original notice, filing its mortgage, and then refiling the notice of commencement as an express means of gaining lien priority for the mortgagee.

{¶24} An explicit prohibition on the owner terminating the original notice is unnecessary when the very operation of the statute is inconsistent with the cancellation and refiling of a notice of commencement as a means of circumventing the statute. If the General Assembly had intended to permit such an artifice, it would have stated that any subsequent amendment would be effective from the date specified in the amendment, or that the notice was effective until cancelled and re-filed. Instead, the legislature worded the statute to provide for only one notice, for all subsequent notices to be amendments, and for all amendments to relate back to the filing of the original notice. The language of the statute precludes cancellation and refiling. The contents of the notice of commencement can be changed by amendment, but the effective date of the notice remains the date of the original filing.

{¶25} That is not to say that an owner is prevented from filing a new notice if there is a new and different improvement to real property. For example, if Overlook had constructed a garage on the property after building the condominium tower, that "single improvement" would not have been the same as construction of the condominium tower itself. A new notice of commencement could have been filed for that new improvement, and it would not have related back to the notice for the condominium tower itself. But that is not what happened here. The "new" notice of commencement listed the same improvement specified in the original notice—

construction of a 13-story condominium tower. The averments of the affidavit purporting to cancel the original notice of commencement were simply untrue; the work on the improvement was not and could not have been completed. Both notices related to the same improvement, and the second was, therefore, by law an amendment to the original notice that was effective as of the original filing date.

{¶26} "The first rule of statutory construction is that a statute which is clear is to be applied, not construed. 'There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend, or improve the provisions of the statute to meet a situation not provided for.' [The court's] obligation is to apply the statute as written."[13]

{¶27} "In construing a statute, courts have an obligation to give effect to the intention of the general assembly. In determining legislative intent, courts must first look to the language of the statute. If the language conveys a meaning that is clear and unequivocal, interpretation is at an end, and the statute must be applied accordingly."[14]

{¶28} The requirement that there can be only one notice of commencement for an improvement on real property and that any subsequent notices for that improvement are deemed amendments is clear and unequivocal. Given the unambiguous language of R.C. 1311.04(A)(2), we conclude that the only possible effective date of the notice of commencement for the Overlook project—and hence the effective date of the mechanic's liens for improvements on the property—was when the original notice of commencement was filed on September 1, 2005. The

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[13] *Vought Industries, Inc. v. Tracy*, 72 Ohio St.3d 261, 265-66, 1995-Ohio-18, 648 N.E.2d 1364, quoting *State ex rel. Foster v. Evatt* (1944), 144 Ohio St.65, 56 N.E.2d 265, paragraph eight of the syllabus.

[14] *Basic Distrib. Corp. v. Ohio Dept. of Taxation*, 94 Ohio St.3d 287, 291, 2002-Ohio-794, 762 N.E.2d 979.

affidavit purporting to cancel that notice of commencement was meaningless. The notice of commencement filed in September 2006 related to the same improvement specified in the original notice and must be treated as an amendment that related back to the original notice.

{¶29} The Bank argues, nonetheless, that Ohio lien law is to be strictly construed against the mechanic's-lien claimants. But the cases it cites for that principle address compliance of the lienholders themselves with the requirements of the statutes. For example, *Crock Constr. Co. v. Stanley Miller Constr. Co.*[15] and *C.C. Constance & Sons v. Lay*[16] denied relief based upon deficiencies in the mechanic's-lien affidavits. *Manpower, Inc. v. Phillips*[17] and *Robert V. Clapp Co. v. Fox*[18] held that the claimants were not proper suppliers and were therefore not entitled to file liens in the first place. None of those cases allow owners or lenders to subordinate mechanic's liens by unilaterally changing the attachment date of the liens. None of those cases grant owners carte blanche to engage in unauthorized filings as a means of circumventing the law.

{¶30} Ohio courts have stated that strict compliance with the statutes is required for a lien to attach, but "once a lien has attached, the procedural and remedial provisions should be liberally construed."[19] The rule of liberal construction in favor of the mechanic's-lien claimants is embodied in the legislative mandate that the lien statutes "are to be construed liberally to secure the beneficial results, intents,

[15] 66 Ohio St.3d 588, 1993-Ohio-212, 613 N.E.2d 1027.
[16] (1930), 122 Ohio St. 468, 172 N.E.2d 283.
[17] (1962), 173 Ohio St. 45, 179 N.E.2d 922.
[18] (1931), 124 Ohio St. 331, 178 N.E.2d 586.
[19] *Midland-East Sales Corp. v. Adams Sewer, Inc.* (Oct. 3, 1985), 8th Dist. No. 49433.

and purposes thereof; and a substantial compliance with those sections is sufficient for the validity of the liens under those sections * * * ."[20]

{¶31} The holdings cited by the Bank neither require nor permit the courts to rewrite statutes to allow an owner to stop and start the lien clock at will. Basic rules of statutory construction still apply, as attested by the holding in one of the cases upon which the Bank itself relies: "It is a general rule that courts, in the interpretation of a statute, may not take, strike, or read anything out of a statute, or delete, subtract, or omit anything therefrom. To the contrary, it is a cardinal rule of statutory construction that significance and effect should if possible be accorded every word, phrase, sentence, and part of an act."[21]

{¶32} To adopt the Bank's interpretation of the statute, this court would have to delete everything after the first clause of R.C. 1311.04(A)(2). Doing so would allow an owner (most likely under compulsion by a lender) to nullify the lien rights of contractors and retroactively make those rights junior to the rights of a mortgagee. The legislature took specific steps to prohibit that, and those prohibitions cannot be judicially repealed.

{¶33} Moreover, the Bank's contention that a notice of commencement exists for "eternity" is an overwrought objection to the plain framework of the 1991 lien law. If the improvement described in the notice of commencement has been finished or abandoned, the notice ceases to have meaning. A supplier or contractor cannot file a legitimate lien for a project that does not exist. If a new project is undertaken for the same real estate, it would cause the owner to file a new notice of commencement for a new and different improvement to the real estate.

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[20] R.C. 1311.22.
[21] *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 237, 78 N.E.2d 370.

{¶34} By specifying just one effective date for the notice of commencement on a given improvement, the General Assembly sought to insure certainty for everyone involved in a given project. It did so by tying key events to the notice of commencement. The General Assembly avoided the risk of confusion by providing in R.C. 1311.13(A)(2) that mechanic's liens "for labor or work performed or materials furnished after the recording of a notice of commencement pursuant to section 1311.04 of the Revised Code are effective from the date of recording of the notice of commencement." The statute refers to the "notice of commencement" in the singular, not the plural. A reading of R.C. Chapter 1311 in its entirety makes it apparent that the legislature intended R.C. 1311.04 to be the linchpin for establishing the rights, duties, remedies, and safeguards for both owners and mechanic's-lien claimants. That is why the normal practice for a construction lender is to insure that its mortgage is recorded prior to the recording of the notice of commencement to avoid any priority issues.

{¶35} Finally, the Bank argues that the legislature amended the lien law in 2007—after the relevant events in this case—to signal what it meant to say in 1991. The new provision did not change R.C. 1311.04(A); instead, it added an entirely new subsection (S), which states, "A notice of commencement filed as provided herein expires six years after its filing date unless the notice of commencement or amendments made to the notice of commencement specify otherwise." The provision does not state that a new notice of commencement may then be filed for the same improvement, or that one can "amend" a notice to revoke it retroactively.

{¶36} Nonetheless, the Bank argues that this new provision is proof that in 1991 the General Assembly intended to allow the type of artifice forced upon the owner in this case. Of course, if the Bank's interpretation of R.C. 1311.04(A) were

correct, the amendment of the statute in 2007 would have been unnecessary. If anything, the amendment of the statute after the relevant filings in this case confirms that prior to March 2007 there was no statutory sunset on a notice of commencement for a specific improvement. But even under the new section, there is no provision for multiple notices of commencement or affidavits of termination.

{¶37} The real impact of the amendment is far more mundane. Under R.C. 1311.13(C), a mechanic's lien expires six years after the date it is filed with the county recorder. The new provision makes the duration of the notice of commencement consistent with the life of a mechanic's lien; i.e., the notice of commencement cannot have a longer life than the mechanic's liens it spawns. Nothing in the legislative history indicates that the General Assembly amended the statute to allow the type of stratagem attempted by the Bank in this case, nor did the General Assembly voice concern that R.C. 1311.04(A) had been misunderstood. If that were the concern, the obvious solution would have been to amend R.C. 1311.04(A) itself, not to add a sunset provision to the end of the statute.

{¶38} Based upon our review of the undisputed facts in this case and the plain language of R.C. 1311.04, we cannot say that the trial court erred by granting summary judgment to the defendants-appellees and by denying the Bank's cross-motion for summary judgment. We, therefore, overrule the Bank's first assignment of error.

{¶39} In its second assignment of error, the Bank argues that the trial court erred in denying its Civ.R. 56(F) motion for additional discovery.

{¶40} "The decision to allow additional time under Civ.R. 56(F) is within the trial court's sound discretion."[22] "Thus, the trial court's decision to grant or deny a motion for continuance pursuant to Civ.R. 56(F) will not be disturbed on appeal unless the court abused its discretion. * * * The party seeking a continuance under Civ.R. 56(F) bears the burden of demonstrating that it is warranted."[23] When a party fails to show that evidence sought by the motion would have precluded the entry of summary judgment, a trial court's denial of the motion should be upheld.[24]

{¶41} Here, the Bank's Civ.R. 56(F) motion was premised on the need for discovery from the defendants-appellees regarding the validity and amounts of their individual mechanic's liens. As a result, the defendants-appellees narrowed their summary-judgment motions to focus exclusively on the issue that could be resolved without further discovery: the effective date of the notice of commencement, with any issues regarding lien validity reserved for further proceedings. The trial court's ruling addressed that narrowed issue, which could be resolved by reviewing the undisputed filings with the county recorder.

{¶42} Because the trial court's ruling merely applied the plain language of the statute to those uncontested filing dates, no other evidence was relevant to a determination of that issue before the trial court. The trial court, furthermore, expressly stated in its entry that it was not ruling upon the conduct of the parties or the validity of any particular liens. Therefore, if Omega's conduct or that of some other lienholder could possibly provide the Bank with defenses to enforcement of the liens, those defenses can be raised when the trial court rules upon the validity and

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[22] *Ramos v. Khawli*, 181 Ohio App.3d 176, 2009-Ohio-798, 908 N.E.2d 495, at ¶37.
[23] *Cassner v. Bank One Trust Co., N.A.*, 10th Dist. No. C-03AP-1114, 2004-Ohio-3484, at ¶12 and 18.
[24] See *State ex rel. Denton v. Bedinghaus*, 98 Ohio St.3d 298, 2003-Ohio-861, 784 N.E.2d 99, at ¶31-32; see, also, *Ball v. Hilton Hotels, Inc.* (1972), 32 Ohio App.2d 293, 295, 290 N.E.2d 859.

amounts of the liens. Because the discovery sought by the Bank was not necessary for the court's resolution of the issue before it, the trial court did not abuse its discretion in denying the Bank's motion for additional time to conduct discovery. As a result, we overrule its second assignment of error.

{¶43} In its third assignment of error, the Bank argues that the trial court erred in granting summary judgment to the defendants-appellees when they failed to attach to their motion, or point to, evidence that complied with Civ.R. 56(C) and (E).

{¶44} The only evidence germane to the issue before the court in the cross-motions for summary judgment concerned the filing dates of the notices of commencement, the Bank's affidavit to terminate the original notice, and the Bank's mortgage. The filing dates for the documents relevant to that determination were uncontested. The Bank in its response and cross-motion for summary judgment did not refute these facts, but based its argument upon the same sequence of filings, and it attached an affidavit of its own expert attesting to the same documents upon which the defendants-appellees had relied.

{¶45} On appeal, the Bank has cited the same history of filings and has argued based upon those filing that it, not the defendants-appellees, was entitled to judgment as a matter of law. So even if the defendants-appellees had failed in their initial filings to tender an affidavit with certified copies of the documents, the Bank has effectively waived any objection to the court's consideration of the uncontested facts represented in those documents—the dates and sequence of filing of the original notice of commencement, the affidavit of termination, the mortgage, and the second notice of commencement.[25]

[25] See, e.g., *Robinson v. Gansheimer*, 2007-Ohio-3845, at¶12-13 (no error to consider unauthenticated records where appellant filed cross-motion for summary judgment, reciting facts

{¶46} Because the only issue decided by the trial court was the effective date of the notice of commencement in comparison to the effective date of the mortgage, and because those filing dates were uncontested, there was no need for the defendants-appellees to introduce additional evidence in support of their motions for summary judgment. Because the defendants-appellees fulfilled their Civ.R. 56 burden as to the narrow issue on which summary judgment was granted, the burden was on the Bank to demonstrate a disputed issue of material fact, which it could not do because it had admitted the only facts relevant to the motions and cross-motion.[26] As a result, we overrule the Bank's third assignment of error.

{¶47} In its fourth and fifth assignments of error, the Bank argues that the trial court erred by granting summary judgment sua sponte in favor of parties that had not filed motions for summary judgment and by deciding issues that had not been raised or briefed by the parties.

{¶48} In its entry, the trial court stated that it was only determining priority based upon which notice of commencement was effective. The trial court, furthermore, expressly stated that it was "reserv[ing] [a] ruling on the validity of specific mechanics liens pending further proceedings." The Bank additionally surrendered its right to complain about an adverse ruling when it filed its cross-motion for summary judgment. " 'While Civ.R. 56 does not ordinarily authorize courts to enter summary judgment in favor of a non-moving party * * * an entry of summary judgment against the moving party does not prejudice his due process rights where all the relevant evidence is before

consistent with contents of uncertified copies); *Internatl. Bhd. of Elec. Workers v. Smith* (1992), 76 Ohio App.3d 652, 660, 602 N.E.2d 782 (harmless error to consider unverified exhibits when appellant did not challenge authenticity).

[26] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 291-292, 662 N.E.2d 264 ("Movant must be able to point to evidentiary material in the record, but there is no requirement in Civ.R.56 that the moving party support its motion for summary judgment with any *affirmative evidence*, i.e., affidavits or similar materials *produced by the movant*." [Emphasis in original.]).

the court, no genuine issue as to any material fact exists, and the non-moving party is entitled to judgment as a matter of law.' "[27]

{¶49} Here, the Bank argued the legal issue from an uncontested set of facts. It cannot now protest that other parties will have benefitted from the fact that it was wrong. As a result, we overrule the fourth and fifth assignments of error.

VII. Conclusion

{¶50} Having found none of the Bank's assignments of error to be meritorious, we affirm the judgment of the trial court.

Judgment affirmed.

HENDON, J., concurs.
CUNNINGHAM, P.J., dissents.

CUNNINGHAM, P.J., dissenting.

{¶1} I respectfully dissent. Unlike my colleagues, I cannot reach the merits of the Bank's assignments of error on appeal, because the entry from which it has appealed is not a final appealable order.

{¶2} This court's jurisdiction is limited to the review of "final order[s], judgment[s], or decree[s]."[28] Where, as here, the action involves multiple parties and multiple claims, this court must engage in a two-step analysis by first determining if the order is final within the requirements of R.C. 2505.02. If the order complies with R.C. 2505.02 and is in fact, final, the court must then determine if Civ.R. 54(B) language is required.[29]

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[27] *Todd Dev. Co. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, at ¶16, quoting *State ex rel. Cuyahoga Cty. Hosp. v. Ohio Bureau of Workers' Comp.* (1986), 27 Ohio St.3d 25, 28, 500 N.E.2d 1370; but, see, *Lawless v. Indus. Comm. of Ohio* (Mar. 26, 1997), 1st Dist. No. C-960420.
[28] R.C. 2505.03; Section 3(B)(2), Article IV, Ohio Constitution.
[29] *Denham v. New Carlisle*, 86 Ohio St.3d 594, 596, 199-Ohio-128, 716 N.E.2d 184; *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009-Ohio-1971, 909 N.E.2d 88, at ¶10.

{¶3} The order being appealed from in this case provides, in pertinent part, as follows: "The court therefore, finds that mechanics' liens filed for work and materials supplied in connection with the improvements identified in the Original Notice of Commencement are prior in time and have priority over the mortgage of the plaintiff the Bank of America, and to that extent the Defendants' motions are GRANTED, and Plaintiff's motion is OVERRULED. *The Court reserves ruling on the validity of specific mechanics' liens pending further proceedings.*" (Emphasis added.)

{¶4} In holding that the entry is final, the majority relies solely upon the syllabus paragraphs in *Queen City Savings and Loan Co. v. Foley*, which provide that a court's order or judgment that determines the priority of liens is a final and appealable order. The majority reasons that because the order in this case stated that the Bank's mortgage was junior to the mechanic's liens filed for work and materials supplied in connection with the improvements identified in the original notice of commencement, the order, in effect, determined the priority of the liens and, therefore, is immediately appealable.

{¶5} The majority's reliance on *Queen City* is misplaced. *Queen City* does not apply because any determination of priority in this case cannot occur until the court rules on the validity of the mechanic's liens. Until the trial court rules that the mechanic's-lien claimants have valid liens under the original notice of commencement, no relief has been afforded to any party. The trial court itself anticipated further proceedings by acknowledging that its order did not determine the validity and enforceability of the mechanic's liens of the appellees and the other defendants in this case.

{¶6} Because the trial court's order "remains an interlocutory order: an interim or temporary order that is 'tentative, informal, or incomplete,'[30] that is subject to change or reconsideration upon the trial court's own motion or that of a party, and that does not determine the action and prevent a judgment,"[31] it is not a final appealable order, and this court is without jurisdiction to entertain the Bank's assignments of error on appeal. For that reason, I would dismiss the Bank's appeal.

Please Note:

The court has recorded its own entry this date.

[30] *Yantek v. Coach Builders Inc.*, 1st Dist. No. C-060601, 2007-Ohio-5126, at ¶14, quoting *Cohen v. Beneficial Indus. Loan Corp.* (1949), 337 U.S. 541, 546, 69 S.Ct. 1221.
[31] Id. at ¶14, citing R.C. 2505.02(B)(1) and *Pitts v. Dept. of Transp.* (1981), 67 Ohio St.2d 378, 423 N.E.2d 1105, fn. 1.