[Cite as *KEyBank Natl. Assn. v. Southwest Greens of Ohio, L.L.C.*, 2013-Ohio-1243.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

KeyBank National Association et al.,	:	
Plaintiffs-Appellees,	:	No. 11AP-920 (C.P.C. No. 09CVE 7 9921)
v.	:	(REGULAR CALENDAR)
Columbus Campus, LLC et al.,	:	
Defendants-Appellees,	:	
(Southwest Greens of Ohio, LLC,	:	
Defendant-Appellant).	:	
KeyBank National Association et al.,	:	
Plaintiffs-Appellees,	:	No. 11AP-952 (C.P.C. No. 09CVE 7 9921)
v.	:	(REGULAR CALENDAR)
Columbus Campus, LLC et al.,	:	
Defendants-Appellees,	:	
(W.H. Canon et al.,	:	
Defendants-Appellants).	:	
KeyBank National Association et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 11AP-955 (C.P.C. No. 09CVE 7 9921)
Columbus Campus, LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(John Eramo & Sons, Inc.,	:	
Defendants-Appellants).	:	

KeyBank National Association et al.,	:	
Plaintiffs-Appellees,	:	No. 11AP-958 (C.P.C. No. 09 CVE 7 9921)
v.	:	(REGULAR CALENDAR)
Columbus Campus, LLC et al.,	:	
Defendants-Appellees,	:	
(Braun Construction Group, Inc.,	:	
Defendant-Appellant).	:	
KeyBank National Association et al.,	:	
Plaintiffs-Appellees,	:	No. 11AP-959 (C.P.C. No. 09 CVE 7 9921)
v.	:	(REGULAR CALENDAR)
Columbus Campus, LLC et al.,	:	
Defendants-Appellees,	:	
(Karst & Sons, Inc.,	:	
Defendant-Appellant).	:	
KeyBank National Association et al.,	:	
Plaintiffs-Appellees,	:	No. 11AP-963 (C.P.C. No. 09 CVE 7 9921)
v.	:	(REGULAR CALENDAR)
Columbus Campus, LLC et al.,	:	
Defendants-Appellees,	:	
(Rite Rug Company,	:	
Defendant-Appellant).	:	

KeyBank National Association et al.,	:	No. 11AP-964
Plaintiffs-Appellees,	:	(C.P.C. No. 09 CVE 7 9921)
v.	:	(REGULAR CALENDAR)
Columbus Campus, LLC et al.,	:	
Defendants-Appellees,	:	
(Majestic Drywall Services, Inc.,	:	
Defendant-Appellant).	:	

D E C I S I O N

Rendered on March 29, 2013

Porter Wright Morris & Arthur LLP, Polly J. Harris, Craig R. Carlson, and *Christen M. Moore*, for KeyBank National Association et al.

Kegler, Brown, Hill & Ritter, Donald W. Gregory, and *Eric B. Travers; Kevin E. Humphreys; Rance, Pritchett, Brantner, Keller & Ely Co., LPA*, and *Jeffrey W. Brantner; Strip, Hoppers, Leithart, McGrath & Terlecky Co., LPA, Paul W. Leithart II*, and *Timothy McGrath; Dinsmore & Shohl, LLP, Donald B. Leach, Jr., Peter W. Hahn*, and *Adam R. Todd; Lane, Alton & Horst, LLC*, and *Michael J. Kelley; Keith M. Karr* and *David W. Culley; Troy B. Morris* and *Joshua D. Rockwell*, for appellants.

O'Rourke & Associates, Co., LPA, R. Russell O'Rourke, and *Daniel J. Myers*, counsel for Amicus Curiae American Subcontractors Association & American Subcontractors Association of Ohio.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, J.

{¶ 1} These consolidated appeals arise from a judgment of the Franklin County Court of Common Pleas on cross-motions for summary judgment determining the order of priority between claims by a construction loan mortgagee and numerous subcontractors who filed mechanic's liens.

{¶ 2} Sometime prior to 2008, Columbus Campus, LLC ("Campus") and its single member, Erickson Retirement Communities, LLC ("Erickson"), planned to build and operate a continuing care retirement community in Hilliard, Ohio, to be known as Hickory Chase. In January 2008, Windsor Ohio Holdings, LLC ("Windsor") loaned Campus approximately $12 million to acquire the land upon which Hickory Chase would be built. The Windsor loan was secured by a mortgage which was recorded on January 17, 2008. Later that month, Campus contracted with general contractor J.M. Olson Corporation ("Olson") to perform the initial site preparation. On March 10, 2008, Olson contracted with several subcontractors to provide labor and materials for the project. That same day, Campus filed a Notice of Commencement. After completing substantially all its site preparation work, Olson terminated its involvement with the project. Braun Construction Group, Inc. ("Braun") succeeded Olson as general contractor and entered into several construction contracts with Campus related to the project. Braun assumed Olson's subcontract agreements and entered into several additional subcontract agreements.

{¶ 3} Subsequently, on April 16, 2008, a consortium of six lenders ("Lenders")[1] executed a $90 million construction loan agreement with Campus to fund Phase I of the Hickory Chase project; Erickson guaranteed the loan. The loan was secured by an open-end mortgage on the Hickory Chase property, which was recorded on April 22, 2008. Also on April 16, 2008, Windsor refinanced the January 2008 loan to Campus. On April 22, 2008, Windsor recorded a new mortgage, released its January 2008 mortgage, and agreed to permit the Lenders to take a lien position senior to that of Windsor. Campus filed an Amended Notice of Commencement on September 16, 2008, to identify

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[1] The consortium consists of KeyBank National Association ("Keybank"), Fifth Third Bank, Hillcrest Bank, N.A., as successor to Hillcrest Bank, Manufacturers and Traders Trust Company, as successor to Wilmington Trust FSB, Arvest Bank fka Solutions Bank, and First Commonwealth Bank. Keybank is the administrative agent for itself and the other lenders.

Braun as the current general contractor. In May 2008, the Lenders obtained a policy of title insurance from Chicago Title Insurance Company ("Chicago Title").

{¶ 4} Between June 2008 and March 2009, the Lenders, at Campus's direction, disbursed approximately $45 million, pursuant to the terms of the loan agreement, through 11 separate draw requests. Each draw request included a list of all contractors, subcontractors, and suppliers providing materials and labor, a cost breakdown, architectural certifications, lien waivers, and an independent consultant's report. Prior to advancing funds, Keybank, as the Lenders' agent, examined the documentation supporting each draw request. Once convinced that all conditions of the loan agreement were satisfied, the Lenders disbursed the funds.

{¶ 5} The first four disbursements, totaling approximately $20 million, were paid to Erickson, which timely paid Braun the amounts it was due under the general contracts. The next seven disbursements, totaling approximately $25 million, were paid to Campus, which timely paid Braun the amounts it was due under the general contracts. Upon receipt of its payments, Braun timely paid the subcontractors, material suppliers, and laborers the amounts to which they were entitled under the terms of their contracts with Braun. In sum, Braun and the subcontractors were paid nearly $27 million for work performed and materials provided through February 28, 2009.

{¶ 6} In early March 2009, the Lenders, concerned about Campus' financial health, decided not to advance further funds to Campus or Erickson for the project. Unaware that the Lenders had decided to cease funding, Braun and the subcontractors continued work on the project. On April 28, 2009, the Lenders issued Campus a written notice of default. Thereafter, in a letter dated May 11, 2009, Erickson, as agent for Campus, directed Braun to indefinitely suspend work on the project. As of the date of the suspension notice, two unpaid draw requests totaling approximately $9 million had been certified to the Lenders for payment. On June 29, 2009, Braun and the subcontractors filed mechanic's liens for approximately $9 million in unpaid labor and materials provided on the project after February 28, 2009. On August 4, 2009, Braun notified Campus and Erickson that it was terminating the construction contracts due to non-payment. To date, the Hickory Chase project has not been completed.

{¶ 7} On July 2, 2009, the Lenders filed a complaint for money judgment, foreclosure of the mortgage, foreclosure of collateral, and appointment of a receiver. In addition to Campus, the Lenders joined as defendants Braun and the subcontractors ("Subcontractors") who had filed mechanic's liens. On July 9, 2009, Campus filed a consent to foreclosure, money judgment, and appointment of a receiver. In this filing, Campus specifically admitted to defaulting on the construction loan.

{¶ 8} The Lenders filed an amended complaint on July 20, 2009, to add a claim against Erickson on its guaranty of Campus' obligations. Braun and the Subcontractors filed responses to the amended complaint, challenging, as relevant here, the Lenders' claimed first lien status. In October 2009, both Campus and Erickson filed for bankruptcy protection.

{¶ 9} In a case scheduling order dated December 3, 2010, the trial court ordered the Lenders and the Subcontractors to file motions for summary judgment on the issue of lien priority between the construction mortgage and the mechanic's liens. Pursuant to this order, the Subcontractors and the Lenders filed cross-motions for summary judgment. The parties' summary judgment briefing was supported by numerous stipulations and the deposition testimony of KeyBank's Andrew Yesso, IV, who administered the construction loan on behalf of the Lenders.

{¶ 10} The Subcontractors argued: (1) their mechanic's liens were entitled to priority established by the record date of the initial Notice of Commencement, March 10, 2008, (2) the Lenders' construction mortgage was not entitled to "super" priority over the Subcontractors' mechanic's liens under R.C. 1311.14 because the Lenders did not comply with the statute's provisions, and (3) the Subcontractors did not contractually subordinate their mechanic's liens to the Lenders' construction mortgage. The Lenders filed a memorandum contra disputing the Subcontractors' arguments. In their reply to the Lenders' memorandum contra, the Subcontractors maintained, inter alia, that equity demanded that even if they had contractually agreed to subordinate their lien rights, the Lenders were required to pay the Subcontractors for all unpaid work performed after February 28, 2009, as consideration for the subordination.

{¶ 11} In their motion for summary judgment, the Lenders argued: (1) the Subcontractors contractually agreed to subordinate any lien claims to the Lenders'

construction mortgage, (2) the Lenders' construction mortgage was entitled to priority over the Subcontractors' mechanic's liens pursuant to R.C. 1311.14, and (3) the doctrine of equitable subrogation entitled the Lenders to priority for the $27 million advanced and paid to the Subcontractors. In their memorandum contra, the Subcontractors averred: (1) the Lenders were not entitled to equitable subrogation, (2) the Lenders waived their contractual subordination claim, and (3) the Lenders did not obtain "super" priority via R.C. 1311.14 because they did not comply with its requirements.

{¶ 12} In a decision issued September 14, 2011, the trial court granted the Lenders' motion for summary judgment and denied the Subcontractors' motion for summary judgment, finding: (1) the Lenders' mortgage was entitled to priority under R.C. 1311.14, and (2) the Subcontractors contractually agreed to subordinate their mechanic's liens to the Lenders' mortgage. The trial court journalized its decision in an entry filed October 4, 2011.[2]

{¶ 13} The Subcontractors, appellants here, assign the following four errors for our review:

> I. The trial court erred by failing to order the Lenders to pay for the Subcontractors' unpaid work, as part of its decision and entry granting summary judgment in favor of the Lenders and denying summary judgment for Subcontractors.
>
> II. The trial court erred by determining that the Lenders' mortgage had priority pursuant to R.C. § 1311.14, over the Subcontractors' mechanics' liens when it granted summary judgment in favor of the Lenders and denied summary judgment to the Subcontractors.
>
> III. The trial court erred by determining that the Lenders' mortgage had lien priority pursuant to contractual subordination, over the Subcontractors' mechanics' liens when it granted summary judgment in favor of the Lenders and denied summary judgment to the Subcontractors.
>
> IV. The trial court erred in excluding evidence relating to the Lenders' prior knowledge of the priority of the mechanics'

[2] The decision and entry from which the subcontractors appeal is a final appealable order. *Queen City S. & L. Co. v. Foley*, 170 Ohio St. 383 (1960), paragraph one of the syllabus. ("In 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.")

> liens and the Lenders' claim of bad faith conduct of Chicago Title under the title policy insuring against mechanics' liens for the Project.

{¶ 14} In addition to the briefs filed by the Subcontractors and the appellee Lenders, American Subcontractors Association & American Subcontractors Association of Ohio have filed an amicus curiae brief.

{¶ 15} The Subcontractors' first and third assignments of error are interrelated and will be addressed together. Because our resolution of the third assignment of error impacts our decision regarding the first assignment of error, we shall discuss it first.

{¶ 16} In the third assignment of error, the Subcontractors contend the trial court erroneously granted summary judgment in favor of the Lenders on grounds that the Subcontractors contractually subordinated their mechanic's lien rights to the Lenders' construction mortgage. Appellate review of summary judgment is de novo. *Comer v. Risko,* 106 Ohio St.3d 185, 2005-Ohio-4559, ¶ 8. Under Civ.R. 56(C), summary judgment is proper if: (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 such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *New Destiny Treatment Ctr., Inc., v. Wheeler,* 129 Ohio St.3d 39, 2011-Ohio-2266, ¶ 24.

{¶ 17} As noted above, Campus and its general contractors (Braun and its predecessor Olson) entered into several contracts (the "Prime Contracts") related to the Hickory Chase project. Each of the Prime Contracts consisted of two American Institute of Architects ("AIA") standard documents.[3] The first document, AIA A111-1997, is a "Standard Form of Agreement Between the Owner [Campus] and Contractor [Braun]." The second document, AIA A201-1997, sets out the "General Conditions of the Contract for Construction" ("General Conditions"). AIA A111-1997 expressly incorporates by reference the General Conditions set forth in AIA A201-1997. The General Conditions include the following subordination provisions:

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[3] The American Institute of Architects produces AIA form contracts for use in the construction industry. They are the most widely used construction contracts and are familiar to most entities in the construction industry. *J.E. Dunn Constr. Co. v. S.R.P. Dev. Ltd. Partnership,* D.Md. No. DKC 11-1948 (Sept. 20, 2012).

ARTICLE 13 MISCELLANEOUS PROVISIONS

§ 13.1 GOVERNING LAW

* * *

§ 13.1.2 To the extent permitted by law, the Contractor and all Subcontractors * * * are hereby subordinate to any and all statutory, constitutional and contractual liens, security interests and right each may now or in the future may have against the Project or any portion thereof to the liens, security interests, and rights of any lender having a lien against all or any portion of the Project, from time to time. Contractor and all subcontractors agree to execute and deliver to Owner, such documents as may be requested by Owner to acknowledge such subordination.

* * *

ARTICLE 16

SUBORDINATION

§ 16.1 The Contractor [and] all Subcontractors * * * are hereby subordinate to any and all statutory, constitutional, contractual and constitutional liens, security interests and rights it may now or in the future have against the Project or any portion thereof to the liens, security interests and rights of any lender * * * having a lien against all or any part of the Project. Contractor shall include this provision of this Article 16 in each agreement between Contractor and Subcontractor.

{¶ 18} The Subcontractors contend that the Subcontracts[4] executed between them and Braun do not contain specific language incorporating the Prime Contracts and the General Conditions into the Subcontracts, and, therefore, the foregoing subordination provisions never became part of the Subcontracts. In support, they point to Article XXIX of the Subcontracts, which provides that "The complete Subcontract Agreement is comprised of this Subcontract Agreement, along with the following exhibits." The Subcontracts then list seven exhibits (Exhibits A-G), none of which are the Prime

[4] Braun, the general contractor, did not utilize standard AIA subcontracts. Accordingly, the Subcontracts at issue here do not correlate to the provisions of the AIA forms used by Campus and Braun. This is not to say, however, that use of an AIA subcontract would have prevented controversy.

Contracts or the General Conditions. The Subcontractors contend that had Braun intended that the Prime Contracts and the General Conditions be fully incorporated into the Subcontracts, it would have attached the Prime Contracts in full as exhibits and listed them specifically along with the other seven Subcontract exhibits. According to the Subcontractors, absent such incorporation, the parties did not intend for the Prime Contracts and the General Conditions containing the subordination clauses to apply to the Subcontractors.

{¶ 19} In contrast, the Lenders maintain that the Prime Contracts, including the General Conditions containing the subordination clauses, are incorporated into the Subcontracts and are binding on the Subcontractors. The Lenders contend that the language in Article XXIX upon which the Subcontractors rely means that the Subcontracts include not only the seven listed exhibits, but the Subcontracts themselves. The Subcontracts include a "flow down" provision which provides, in pertinent part:

> **ARTICLE I – WORK TO BE PERFORMED**
>
> * * *
>
> Subcontractor shall be bound by the terms of the Prime Contract and all documents incorporated therein, including without limitation, the General and Supplementary Conditions, and assumes toward the Contractor, with respect to Subcontractor's Work, all of the obligations and responsibilities that the Contractor, by the Prime Contract, has assumed toward the Owner.

{¶ 20} "When a 'flow down' clause is used in a subcontract, the subcontract need not contain additional language of incorporation in order to impose on a subcontractor duties owed by the general contractor to the project owner." *L & B Constr. Co. v. Ragan Ent., Inc.,* 267 Ga. 809, 812 (1997). The issue thus resolves to whether the language of the flow down provision in the Subcontracts sufficiently incorporates the Prime Contracts, and more specifically, the General Conditions and the subordination clauses.

{¶ 21} In Ohio, under general principles of contract law, separate agreements may be incorporated by reference into a signed contract. When a document is incorporated into another by reference, both instruments must be read and construed together. *Christe v. GMS Mgt. Co.,* 124 Ohio App.3d 84, 88 (9th Dist.1997).

{¶ 22} A flow down provision is a closely related concept to incorporation by reference. *See* T. Bart Gary, *Incorporation by Reference and Flow-Down Clauses,* CONSTRUCTION LAW, August 1990, 46. Both types of provisions conveniently serve to incorporate a number of documents into a single contract and, for that reason, are common in construction contracts, which are typically characterized by a voluminous number of documents. *Id.* Flow down provisions are often used in construction subcontracts to create obligations between subcontractor and contractor that mirror the obligations between the contractor and the project owner. *Id.*

{¶ 23} The Subcontractors construe the flow down provision in their Subcontracts as one clause meaning that the Subcontractors agreed to be bound by and assume to Braun only those obligations under the Prime Contracts and the General Conditions relating to the scope, quality, character, and manner of the work to be performed under the Subcontracts. Accordingly, they contend that, because the subordination provisions in the Prime Contracts do not relate to the Subcontractors' work, they are not incorporated into the Subcontracts via the flow down clause.

{¶ 24} The Lenders respond that the flow down provision incorporates the entire Prime Contract, including the General Conditions and the subordination provisions. The Lenders construe the flow down provision as two separate clauses, binding the Subcontractors to two distinct obligations in connection with the Prime Contracts. According to the Lenders, under the first clause, the Subcontractors agreed to be bound by all documents incorporated into the Prime Contracts, including the General Conditions which contain the subordination provisions; under the second clause, the Subcontractors assumed the obligations of Braun pertaining to the Subcontractors' work.

{¶ 25} Thus, the central issue presented here is one of contract interpretation. Interpretation of a written contract is a matter of law. *St. Marys v. Auglaize Cty. Bd. of Commrs.,* 115 Ohio St.3d 387, 2007-Ohio-5026, ¶ 38. "Unlike determinations of fact which are given great deference, questions of law are reviewed by a court *de novo*." (Emphasis sic.) *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1995).

{¶ 26} The goal of contract interpretation is to ascertain and effectuate the parties' intent. *Graham v. Drydock Coal Co.,* 76 Ohio St.3d 311, 313 (1996). The parties' intent is

evidenced by the contractual language employed. *Skivolocki v. E. Ohio Gas Co.,* 38 Ohio St.2d 244, 247 (1974). *See also Saunders v. Mortensen,* 101 Ohio St.3d 86, 2004-Ohio-24, ¶ 9 (it is presumed that the intent of the parties to the contract lies within the language used in the contract).

{¶ 27} When parties to a contract dispute the meaning of the contract language, courts must first look to the four corners of the document to determine whether an ambiguity exists. *B.C.I. v. DeRycke,* 9th Dist. No. 21459, 2003-Ohio-6321, ¶ 16. If the contract terms are clear and precise, the contract is not ambiguous and must be enforced as written. *Corl v. Thomas & King,* 10th Dist. No. 05AP-1128, 2006-Ohio-2956, ¶ 26. Contract language is ambiguous if its meaning cannot be determined from the four corners of the contract or if the contract language is susceptible of two or more conflicting, yet reasonable, interpretations. *Covington v. Lucia,* 151 Ohio App.3d 409, 2003-Ohio-346, ¶ 18 (10th Dist.). Whether a contract's terms are clear or ambiguous is a question of law for the court. *Nationwide Life Ins. Co. v. Canton,* 10th Dist. No. 09AP-939, 2010-Ohio-4088, ¶ 20.

{¶ 28} We agree with the Lenders (and the trial court) that the Prime Contracts, including the General Conditions containing the subordination clauses, are incorporated into the Subcontracts and are binding on the Subcontractors pursuant to the flow down clause in the Subcontracts. We find no ambiguity in the language of the flow down clause. In our view, the flow down provision contains two separate clauses. By the first clause, the Subcontractors are bound to the terms of the Prime Contract, including the subordination provisions included in the General Conditions. By the second clause, the Subcontractors assume Braun's obligations to Campus regarding the work to be performed by the Subcontractors.

{¶ 29} The Subcontractors rely on case law from another jurisdiction to support their position that the flow down clause at issue here should be narrowly construed to bind them only to those obligations under the Prime Contracts and the General Conditions relating to the scope, quality, character, and manner of the work to be performed under the Subcontracts. In particular, the Subcontractors cite *CooperVision, Inc. v. Intek Integration Tech., Inc.*, 7 Misc.3d 592 (2005), where the court considered whether a forum selection clause in a software licensing agreement was incorporated by

reference into the parties' implementation agreement. The implementation agreement did not expressly state that the forum selection clause in the software licensing agreement was incorporated by reference; instead, it defined the "entire contract" between the parties as including the implementation agreement itself, the software licensing agreement, and other unrelated documents. The implementation agreement also contained an "order of preference" clause that set forth which agreement controlled in the event a conflict as to the documents' terms arose. *Id.*

{¶ 30} The court found that the absence of any express incorporation by reference, coupled with the choice of an "order of preference" clause, which was triggered only in the event of conflict between the documents, meant that the drafter intended that each agreement have and maintain its own identity in the absence of a conflict. *Id.* The court further found that the mere reference to the software licensing agreement as part of the "entire agreement" of the parties, without an express provision making the forum selection clause applicable to disputes arising under the implementation agreement, meant that the parties intended that the forum selection clause be confined to the software licensing agreement. The court noted that the implementation agreement employed, at most, a general incorporation clause and the reference to the software licensing agreement was only for the purpose of identifying it as one of the documents that comprised the overall agreement of the parties.

{¶ 31} The court analogized the case to New York construction contract cases, which, the court stated, hold that "general 'incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind the subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor' " and that "[p]rovisions other than the scope, quality, character and manner of the work must be specifically incorporated to be effective against the subcontractor." *Id.* at 600, quoting *Bussanich v. 310 E. 55th Tenants*, 282 A.D.2d 243, 244 (2001).

{¶ 32} In our view, *CooperVision* is inapposite. Although the *CooperVision* court referenced construction contract cases in its analysis, the case did not involve a construction contract. Moreover, the Subcontracts at issue here do not contain an "order of preference" clause. Furthermore, we agree with the criticism of *CooperVision* leveled

by the Arizona Supreme Court in *Weatherguard Roofing Co., Inc. v. D.R. Ward Constr. Co., Inc.,* 214 Ariz. 344 (2007). In *Weatherguard,* the court considered a subcontractor's claim that an arbitration clause included in the general conditions of the prime contract between the owner and the general contractor was not incorporated into its subcontract with the general contractor. The subcontract included a flow down provision which stated:

> The Contract Documents consist of the Subcontract (including the cover page, *general conditions* and all exhibits hereto); all Work Orders or Notices to Proceed issued pursuant thereto; all addenda issued prior to and all approved Change Orders or other modifications issued after the execution of the Subcontract, the plans and specifications, working drawings and details pertaining to the Work; *the terms and conditions of the Contract between the Owner and Contractor for the construction of the Project (the "General Contract"). Subcontractor shall assume and agree to perform all obligations of Contractor in the General Contract, and any amendments thereof, insofar as they pertain to the Work, and Subcontractor shall assume toward Contractor all of the obligations and responsibilities which Contractor assumes toward Owner under the General Contract.* Subcontractor shall be bound by the determination of any disputed question made, pursuant to the provisions of the General Contract. *Contractor shall have the same rights and privileges as against Subcontractor as the Owner in the General Contract has against the Contractor.*

(Emphasis sic.) *Id.* at ¶ 11.

{¶ 33} The court noted that although the flow down provision required the subcontractor to perform all of the general contractor's obligations in the general contract "insofar as they pertain to work," the flow down provision also stated the "Subcontractor shall assume toward Contractor all of the obligations and responsibilities which Contractor assumes toward Owner under the General Agreement" and "Contractor shall have the same rights and privileges as against Subcontractor as the Owner in the General Contract has against Contractor." The court found that this latter language granted the general contractor the same rights and privileges against the subcontractor as the owners had against the general contractor, and those rights and privileges included arbitration.

{¶ 34} The *Weatherguard* court rejected the subcontractor's reliance on *CooperVision*'s narrow construction of a flow down provision, stating "the New York approach, which allows incorporation by reference of clauses pertaining to the scope, quality, or manner of work but disallows incorporation by reference of a clause pertaining to the way a dispute over that work should be resolved, strikes us as artificial and contrary to this state's general policy favoring arbitration." *Id.* at 349. Accordingly, we decline the Subcontractors' urging to follow *CooperVision.*

{¶ 35} Moreover, Ohio courts have broadly construed subcontract flow down provisions analogous to the one at issue here. For instance, in *Gibbons-Grable Co. v. Gilbane Bldg. Co.,* 34 Ohio App.3d 170 (8th Dist.1986), the prime contract between the project owner and the general contractor, Gilbane, included an arbitration provision; the subcontract between Gilbane and Gibbons-Grable did not. The subcontract did, however, include a provision (Section 10.1) which stated that, "To the extent that the provisions of the contract documents between the Owner [Sohio] and Contractor [Gilbane] apply to the work of the Subcontractor [Gibbons-Grable] as defined in this agreement, the Contractor shall assume toward the Subcontractor all the obligations and responsibilities that the Owner, by those documents, assumes toward the Contractor. The Contractor shall have the benefit of all rights, remedies, and redress against the Subcontractor which the Owner, by those documents, has against the Contractor. Where any provision of the Contract documents between the Owner and the Contractor is inconsistent with any provision of this agreement, this agreement shall govern." *Id.* at 173. Gibbons-Grable argued that it was not bound by the arbitration clause in the prime contract because arbitration had nothing to do with the work it performed under the subcontract. The court rejected this argument, finding that the arbitration provision was expressly incorporated into the subcontract pursuant to the second sentence of Section 10.1, along with two other subcontract provisions – Section 4.1, which stated that "The contract documents consist of this agreement and any exhibits attached hereto, the agreement between the Owner and the Contractor, the conditions of the agreement between the Owner and the contractor, general conditions, supplementary, special and other conditions," – and Section 4.3, which stated that "The Subcontractor agrees to be bound to and assume toward the Contractor all of the obligations and responsibilities that the

Contractor by those documents, assumes toward the Owner." *Id.* at 175. Applying Ohio's principles of contract interpretation, the court held that the subcontract's incorporation by reference of general conditions contained in the contract between the owner and general contractor bound the subcontractor to the arbitration provision.

{¶ 36} The Sixth District Court of Appeals, in *Matrix Technologies, Inc. v. Kuss Corp.,* 6th Dist. No. L-07-1301, 2008-Ohio-1301, reached a similar result. There, the prime contract between the owner and the contractor included a Master Terms and Conditions provision (Article 8.1) which included a mandatory arbitration clause. Another provision in the Master Terms and Conditions (Article 1.1.2) stated "In addition to its other obligations under the Agreement, [Matrix] shall cooperate with Contractor and shall be bound to perform its services hereunder in the same manner and to the same extent the Contractor is bound by the Prime Contract between Owner and Contractor to perform such services for Owner." *Id.* at ¶ 14. Article 3.1 of the subcontract between the contractor and Matrix stated that "[Matrix], agrees that all terms and conditions of the [prime contract] are incorporated herein by reference as if fully rewritten herein and are applicable to this Project. A copy of the Master Terms and Conditions have previously been provided to [Matrix]." *Id.* at ¶ 12.

{¶ 37} Matrix argued that it was not subject to the arbitration provision in the prime contract. The court relied upon the "substantively analogous" subcontract language in *Gibbons-Grable* that "[t]he Subcontractor agrees to be bound to and assume toward the Contractor all of the obligations and responsibilities that the Contractor by those documents, assumes towards the Owner," in concluding that "[b]ased upon the express incorporation of a mandatory arbitration clause into the Matrix subcontract, as evidenced by reading Articles 3.1 and 8.1 in conjunction with each other," Matrix was bound to submit to mandatory arbitration. *Id.* at ¶ 15-16.

{¶ 38} In *E.D. Masonry, Inc. v. R.P. Carbone Constr. Co.,* 8th Dist. No. 63936 (Jan. 7, 1993), the prime contract between a municipality and a contractor contained a mandatory arbitration provision. The subcontract between the contractor and one of its subcontractors included a provision (paragraph 21) stating, in pertinent part, that "*Subcontractor acknowledges that he is familiar with the documents referred to above and he agrees to be bound by [the contractor] by the terms thereof as far as applicable*

to the Subcontractor's work and to assume toward [the contractor] all the obligations and responsibilities that it, by those documents, assume toward the Owner." (Emphasis sic.) *Id.* The contractor argued that the arbitration provision in the prime contract was incorporated by reference into the subcontract. The court agreed, stating "Paragraph 21 of the subcontractor contract acknowledges familiarity with the general contract by [the subcontractor] and [the subcontractor's] agreement to be bound by [the contractor] by the terms thereof 'as far as applicable to the Subcontractor's work and to assume toward [the contractor] all the obligations and responsibilities that it, by those documents, assume toward' the [municipality]. * * * [T]he arbitration provisions contained in the general contract were sufficiently incorporated by these references contained in the subcontractor[']s contract, and are therefore binding on [the subcontractor]." *Id.*

{¶ 39} Other jurisdictions have also broadly construed construction contract flow down provisions. In *MCC Powers v. Ford Motor Co.,* 361 S.E.2d 716 (Ga.App.1987), Ford Motor Company ("Ford") entered into a general contract with Barge/Arconics ("Barge"). Barge subcontracted a portion of its work to Huffman-Wolfe Company ("Huffman"), who then sub-subcontracted some of its work to MCC Powers. When MCC Powers did not receive payment for its work from Huffman, MCC Powers filed a lien against Ford's property. Ford sought summary judgment on grounds that the lien waiver provision in its contract with Barge had been incorporated into the provisions of the subcontract between Barge and Huffman, and was subsequently incorporated into the sub-subcontract between Huffman and MCC Powers.

{¶ 40} The court noted that in its contract with Huffman, MCC Powers, as subcontractor, recognized and agreed that the Barge-Huffman contract, and the general and specific conditions, plans, drawings, specifications, and addenda prepared by the architect and/or engineer, and all other documents that formed a part of the Barge-Huffman contract were made part of the Huffman-MCC Powers subcontract. The court held that MCC Powers had executed a written waiver of its right to claim a lien by signing the Huffman-MCC Powers contract. "The Huffman-MCC Powers contract made the Ford-Barge contract, which contained the lien waiver, a part of the Huffman-MCC Powers contract, and MCC Powers agreed to be bound by that document incorporated by reference." *Id.* at 488.

{¶ 41} In *Clark Resources, Inc. v. Verizon Business Network Serv.,* M.D.Pa. No. 1:10-cv-1119 (Apr. 18, 2012), the subcontractor signed a flow down agreement which included language that the subcontractor "also agrees that it accepts all of the terms and conditions required of [the contractor] and will indemnify and hold [the contractor] harmless for the services that [the subcontractor] provides as a [contractor] subcontractor." The court noted that the flow down agreement was broadly written and referenced the prime contract. The court stated that "[b]y the clear and unambiguous terms of the flow-down agreement [the subcontractor] accepts all terms and conditions included in the [prime contract]. This is precisely the type of agreement that courts have found to incorporate both the substantive and procedural terms of a general contract into a subcontract." *Id.* The court then cited several cases supporting its broad interpretation of the flow down provision to incorporate both the substantive and procedural terms of the prime contract into the subcontract. Those cases include *Dynamic Drywall, Inc. v. Walton Constr. Co., L.L.C.,* D.Kan. No. 06-1280-JTM (Jan. 19, 2007) (concluding that the flow down agreement incorporates the prime contract's forum selection clause into a subcontract where the flow down agreement provides that the subcontractor "shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner"), and *Indus. Indem. Co. v. Wick Constr. Co.,* 680 P.2d 1100, 1104 (Alaska 1984) (concluding that, in an action by a contractor against a subcontractor, a flow down agreement incorporates both the substantive and remedial provisions of the prime contract where the flow down agreement provides that the subcontractor assumes "all the obligations and responsibilities which the [contractor] assumed toward the owner").

{¶ 42} The third case cited in *Clark Resources* is particularly relevant to the present case. In *Scott Co. of Cal. v. U.S. Eng. Co., N.D. Cal.* No. C 94-1963 FMS (Sept. 19, 1994), the subcontractor argued that the forum selection clause in the prime contract was not incorporated into the subcontract. Of relevance here, the subcontract included the following language: "Subcontractor is hereby bound to * * * Owner's Contract * * * insofar as said duties are and obligations are related, directly or indirectly to the work to be done pursuant to the Subcontract." *Id.* The court rejected the subcontractor's argument that when a construction subcontract incorporates by reference the prime

contract, the subcontractor is bound only by those provisions in the prime contract which relate to the "scope and manner" of the work to be performed by the subcontractor. *Id.* In so doing, the court noted that the subcontract included provisions indicating that the prime contract would be made available to the subcontractor for examination and review upon request of the subcontractor, that the subcontractor acknowledged responsibility to examine the prime contract, and that it had examined the prime contract to its satisfaction. The court further noted that the subcontractor had not alleged that it was unfamiliar with the provisions of the prime contract, but stated that even if it had propounded such an argument, it would still be bound by the terms of the prime contract. The court further reasoned that "[t]he forum in which an action is brought for non-performance of the Subcontract is clearly related to 'the work to be done pursuant to this Subcontract.' " *Id.*

{¶ 43} As in *Scott,* the Subcontracts in the present case state that the Prime Contracts, including the General Conditions, were made available to the Subcontractors for review. The trial court found this to be significant, noting that "[i]f the subcontractor read the Prime Contract, and signed the subcontract, he or she agreed to the terms of the Prime Contract including paragraphs 13.1.2 and 16.1. If the subcontractor did not avail himself of the opportunity to read the prime contract and attachments thereto he is estopped to argue he is not bound by them." (Trial Court Decision, 16). Further, *Scott* rejected the same argument raised by the Subcontractors here, i.e., that the flow down provision in the subcontract bound them only to those provisions in the prime contract related to the work to be performed by the subcontractor. Finally, in our view, the *Scott* court's reasoning that a forum selection clause is related to the work to be performed under a subcontract applies equally to a clause which subordinates mechanic's lien rights to a lender. The Subcontractors' mechanic's liens relate to and arise from the work to be performed under the Subcontract.

{¶ 44} In short, the first clause of the flow down provision at issue in the present case is drafted broadly, and clearly binds the Subcontractors to the terms of the Prime Contract, including the subordination provisions included in the General Conditions. As noted above, courts interpreting similar provisions have held that such provisions should

be read to place the subcontractor in the same position in relation to the general contractor as the general contractor is to the party hiring the general contractor.

{¶ 45} The Hickory Chase project was a multi-million dollar project involving a consortium of six lenders, two general contractors, and numerous subcontractors. We agree with the trial court's observation that "[t]o be considered eligible to work on a project of this magnitude the Prime Contractor and the Subcontractors had to be sophisticated, well staffed, and experienced companies with a high degree of construction acumen," who certainly "would have expected a mortgage to be involved in the project" and that such expectation "would have enhanced their ability to fully understand the [subordination] provisions included in the contracts they signed." (Trial Court Decision, 22).

{¶ 46} Furthermore, we disagree with the Subcontractors' assertion that the qualifying sentence in Section 1.1.2 of the Prime Contracts, stating that "The Contract Documents shall not be construed to create a contractual relationship of any kind * * * between the Owner and a Subcontractor * * * or between any persons or entities other than the Owner and Contractor" is controlling in light of the subsequent Subcontracts' flow down provision.

{¶ 47} We also disagree with the Subcontractors' contention that the subordination provisions in the General Conditions of the Prime Contracts required either that the Subcontractors execute a document acknowledging subordination (§ 13.1.2) or that Braun insert express subordination language into the Subcontracts (§ 16.1). They maintain that because they did not sign subordination agreements and Braun did not include express subordination language in the Subcontracts, they never agreed to subordinate their mechanic's lien rights.

{¶ 48} As noted by the trial court, Section 13.1.2 of the Prime Contracts did not mandate a signed subordination agreement; rather, such was optional with Campus (the owner) or the Lenders (as assignees of the Prime Contracts). In contrast, Section 16.1 did mandate inclusion of subordination language in the Subcontracts. We agree with the trial court that the inclusion of the flow down language in the Subcontracts rendered unnecessary any further documentation as contemplated by Section 13.1.2 and served as compliance with the requirement set forth in Section 16.1.

{¶ 49} For all the foregoing reasons, we conclude that the subordination provisions included in the General Conditions of the Prime Contracts between Campus and Braun are incorporated into the Subcontracts between Braun and the Subcontractors via the flow down clause.

{¶ 50} The Subcontractors further argue that, even if the subordination provisions included in the General Conditions of the Prime Contracts are incorporated into the Subcontracts, they are unenforceable. More specifically, the Subcontractors maintain that the subordination provisions lack the essential terms necessary for enforceability.

{¶ 51} Ohio law mandates that subordination agreements comport with traditional contract principles, including the proverbial "meeting of the minds on the essential terms of the contract." *DB Midwest, L.L.C. v. Pataskala Sixteen, L.L.C.,* 3d Dist. No. 8-08-18, 2008-Ohio-6750, ¶ 19. No specific terms are necessary to make a subordination agreement valid. *Id.* at ¶ 20. A subordination agreement may be found by implication or by express language. *Id.* " '[A] subordination agreement is nothing more than a contractual modification of lien priorities and must be construed according to the expressed intention of the parties and its terms.' " *Total Technical Serv. v. Kafoure Assoc., Inc.*, 8th Dist. No. 51339 (Dec. 4, 1986), quoting *Vahlsing Christina Corp. v. First Natl. Bank of Hobbs*, 491 S.W.2d 954, 958 (1973).

{¶ 52} The Subcontractors rely on *DB Midwest* in arguing that the subordination provisions at issue here are unenforceable. In *DB Midwest,* L.P.Z. Construction Company, Inc. ("LPZ") entered into a real estate purchase contract with Players Glen, LLC ("Players"). LPZ agreed to finance part of the purchase price for Players, who purchased the property as part of a development project. To assist Players in obtaining development financing from other lenders, LPZ agreed in the purchase contract to subordinate its mortgage to Player's unknown, future development mortgage.

{¶ 53} Prior to the closing, Players assigned all its rights under the purchase contract to Pataskala Sixteen, LLC ("Pataskala"). Pursuant to the real estate contract, Pataskala signed a promissory note to LPZ as payee for the remainder of the purchase price. The note included language that it was secured by the LPZ mortgage, which "shall be subordinated to first mortgage financing obtained by [Pataskala]." Pataskala also executed a mortgage on the property in favor of LPZ. The mortgage included the

subordination agreement language, stating the "[t]his mortgage shall be subordinated to first mortgage financing obtained by * * * Pataskala."

{¶ 54} Pataskala later entered into a loan agreement with a bank for development financing. Under the terms of the agreement, the loan was to be secured by a first mortgage lien on the property. Pataskala signed a promissory note to the bank and executed an open-end mortgage. Pataskala defaulted on the note, and the bank filed a foreclosure action against Pataskala and all other parties claiming an interest in the property, including LPZ. In its answer, LPZ claimed priority over the bank's mortgage. The trial court issued a default judgment in foreclosure against Pataskala, found that both the bank and LPZ had valid mortgages on the property, and ordered a foreclosure sale to satisfy the debts owed to the parties.

{¶ 55} The bank filed a motion for summary judgment as to its lien priority, asserting that it held a first priority lien on the foreclosed property because of the subordination agreement between LPZ and Pataskala. LPZ opposed the motion, asserting that the subordination agreement in the contract, note, and mortgage was unenforceable because it lacked essential terms; that the bank was not a party to the agreement nor had it provided consideration for the agreement and thus had no right to enforce it; and that summary judgment should be granted finding that LPZ occupied a first priority position on the mortgage because it filed its mortgage first in time. In support of its motion, LPZ filed the affidavit of its owner, who averred, among other things, that she signed the purchase contract but was unaware of the subordination language contained therein; that she always understood she would have a first mortgage on the property; and that she would never have knowingly permitted LPZ's mortgage to occupy a junior position.

{¶ 56} The court in *DB Midwest* analyzed the subordination clause in the purchase contract, note, and mortgage, and found it to be only a general agreement that LPZ would subordinate its first lien priority, with no specifics as to "the amount of the subordination, length of time of the subordination, when the subordination would occur, or to whom it would subordinate." *Id.* at ¶ 22. The court concluded that because the subordination clause lacked specific, essential terms, there was no meeting of the minds to constitute a valid and enforceable agreement under contract law principles. *Id.* at ¶ 23. The court also noted that "no subsequent agreement was ever made between the parties to cure the

indefiniteness of the agreement, and [the bank] never contacted LPZ regarding subordination, a simple step that would have likely solved any dispute regarding priority and prevented this litigation." *Id.*

{¶ 57} The court further found that the purpose of the subordination agreement supported a finding that the agreement was not an enforceable "self-executing" subordination agreement, but was merely an agreement to agree to subordinate in the future. The court stated:

> Pataskala purchased the property from LPZ with the intention of developing the property and selling it off in separate lots. By this purpose and the lack of essential terms in subordination clause, it appears that the clause was placed into the contract, note, and mortgage to facilitate Pataskala's efforts in obtaining development financing by providing an incentive to institutions to lend funds by offering them the potential opportunity to have first lien priority, not by granting any future lender automatic priority. Although the subordination clause in the note and mortgage state that LPZ's interest "*shall* be subordinated to first mortgage financing" and not that it may be subordinated, we find the lack of essential terms in the subordination clause and the underlying purpose of the clause support the trial court's grant of summary judgment based on the conclusion that this was an agreement to agree to future subordination and not a self-executing subordination agreement.

(Emphasis sic.) *Id.* at ¶ 24.

{¶ 58} In the present case, the Subcontractors contend that like the unenforceable subordination agreement in *DB Midwest,* the subordination language in the General Conditions of the Prime Contracts lacks specific terms as to the amount of the subordination, the length of time of the subordination, when the subordination would occur, and to whom lien rights were to be subordinated. The Subcontractors further contend that, like the bank in *DB Midwest,* the Lenders made no attempt to cure the indefiniteness of the subordination provisions and never contacted the Subcontractors regarding subordination.

{¶ 59} In our view, *DB Midwest* is both factually and legally distinguishable. *DB Midwest* was not a construction contract case. Further, the subordination language at issue here unambiguously demonstrates both: (1) that the subordination became effective

immediately, and (2) to whom the Subcontractors were subordinating their lien rights. Indeed, pursuant to the subordination provision, the Subcontractors agreed to "hereby subordinate" the entire amount of their lien rights to the "rights of any lender having a lien against all or any portion of the Project." Further, the Subcontractors presented no Civ.R. 56 materials refuting the fact that by executing the Subcontracts, they understood and agreed to the subordination of their lien rights.

{¶ 60} We further agree with the trial court's treatment of the Subcontractors' broad contention that subordination agreements cannot adversely affect the interests of non-parties. The Subcontractors aver that an agreement between an owner and prime contractor cannot limit a subcontractor's right of recovery provided for in Ohio's mechanic's lien law. In support of this contention, the Subcontractors cite *Howk v. Krotzer,* 140 Ohio St. 100 (1942), and *Sprague v. Provident Sav. & Trust Co.,* 163 F. 449 (6th Cir.1908). As the trial court noted, these cases essentially hold that a prime contractor's express waiver of its lien rights does not necessarily affect the lien rights of a subcontractor who is not a party to the contract; however, both cases are distinguishable. In *Howk* and *Sprague,* the subcontractors were not parties to the agreement between the owner and contractor either directly or by incorporation. In the present case, the Subcontractors agreed to the subordination of their liens via the flow down provision in the Subcontracts they signed. Pursuant to Ohio law, nothing prevents a subcontractor from waiving (or, as relevant here, subordinating) lien rights. *See Steveco, Inc. v. C & G Invest. Assoc.,* 10th Dist. No. 77AP-101 (Aug. 4, 1977).

{¶ 61} For all the foregoing reasons, we conclude that the trial court did not err in granting summary judgment in favor of the Lenders on grounds that the Subcontractors contractually subordinated their mechanic's lien rights to the Lenders' construction mortgage. Accordingly, the third assignment of error is overruled.

{¶ 62} By their first assignment of error, the Subcontractors contend the trial court erroneously failed to include in its decision and entry granting summary judgment to the Lenders an order that the Lenders pay the Subcontractors, from the undistributed portion of the mortgage loan, the Subcontractors' portion of the $9 million for unpaid labor and materials provided on the project after February 28, 2009. The Subcontractors maintain that, even if the trial court properly found that they contractually subordinated their

mechanic's liens to the Lenders' construction mortgage, equity requires that the Subcontractors be paid for the labor and materials they provided on the project after February 28, 2009.

{¶ 63} The Lenders counter that: (1) the Subcontractors waived their equitable argument because they first asserted it in their reply to the Lenders' brief in opposition to the Subcontractors' motion for summary judgment, and (2) even if the Subcontractors had properly preserved the argument, the trial court could not order such payment because there has been no judicial adjudication of the validity of the Subcontractors' mechanic's liens. In response, the Subcontractors argue that the waiver doctrine does not apply because the legal issue of lien priority, raised by both Subcontractors and the Lenders in their respective motions for summary judgment, implicitly encompassed the equitable issue of payment for labor and materials provided on the project after February 28, 2009.

{¶ 64} Assuming, without deciding, that the Subcontractors properly raised the equitable issue of payment, we note that the trial court found inapposite *France v. Coleman,* 29 App.D.C. 286 (1907), the single case upon which the Subcontractors rely for their proposition. In *France,* the court placed a constructive trust, through the application of the doctrine of equitable estoppel, in favor of the mechanic's lienors on the undistributed portion of the construction loan. However, the court's imposition of the constructive trust was based upon a finding that the construction project had been completed in compliance with the terms of the construction loan agreement. Other courts have limited the usefulness of the constructive trust theory, or its closely aligned counterpart, the equitable lien theory, by restricting it to situations where the project is completed. For example, in *J.G. Plumbing Serv., Inc. v. Coastal Mtge. Co.,* 329 So.2d 393 (Fla.App.1976), an unpaid subcontractor sought to impose an equitable lien on undisbursed construction loan proceeds under circumstances where the lender foreclosed on an uncompleted project. The court reasoned that where a lender forecloses on a completed project, but does not disburse all funds, it has more security than it bargained for and should be accountable for the balance. In contrast, where the project is not completed, the partially constructed building may be worth substantially less than the total cost of the labor and materials which have already been incorporated into the

project. The court found that, under such circumstances, it cannot be said that the lender has been unjustly enriched and, therefore, no equitable lien arises. Thus, the holding in *France* is inapposite to the instant case, in which the project has not been completed. Accordingly, the trial court did not err in declining to apply the constructive trust theory espoused in *France.* The first assignment of error is overruled.

{¶ 65} In their second assignment of error, the Subcontractors contend the trial court erred in granting summary judgment in favor of the Lenders on grounds that the Lenders' construction mortgage had lien priority over the Subcontractors' mechanic's liens pursuant to R.C. 1311.14. Having determined that the Subcontractors' contractually agreed to subordinate their mechanic's lien rights to the Lenders, this assignment of error is moot.

{¶ 66} By their fourth assignment of error, the Subcontractors argue the trial court erred in excluding relevant evidence pertaining to the lien priority issue. While the summary judgment briefing was pending before the trial court, the Lenders filed a separate complaint against their title insurer, Chicago Title, alleging bad faith in failing to pay the Subcontractors' mechanic's liens. Thereafter, the Subcontractors filed in the instant action a notice of supplemental authority urging the trial court to consider certain allegations set forth in the Lenders' complaint in the Chicago Title litigation, as well as documentation allegedly supporting those allegations. In particular, the Subcontractors noted that the Lenders asserted in their complaint that "Chicago Title acknowledged in 'its search and examination preparatory to fulfilling said request has determined that title to said real property appears to be subject to the following items: "**mechanics and materialsmen's liens arising from work performed or materials furnished prior to recordation of the mortgage of even date securing KeyBank's construction loan made to Columbus LLC**." ' " (Emphasis sic.) The Subcontractors maintained that this allegation, and the documentation supporting it, "proves that both Chicago Title and KeyBank were aware of the priority of the mechanics liens at the time KeyBank made its loan." The Subcontractors urged consideration of the complaint and supporting documentation in the Chicago Title litigation "when determining whether the mechanics liens here have priority by virtue of the Notice of Commencement over the later-in-time-filed KeyBank Mortgage." The Lenders filed a motion to strike the

supplemental authority, which was unopposed by the Subcontractors. The trial court granted the Lenders' motion and struck the Subcontractors' supplemental authority. The Subcontractors contend the trial court abused its discretion in doing so.

{¶ 67} Before considering the merits of this argument, we must first address the Lenders' contention that the Subcontractors have waived it. The Lenders aver that the Subcontractors' failure to file a responsive memorandum to the Lenders' motion to strike the supplemental authority waived any right to appeal the court's order granting the motion to strike. In support of its waiver argument, the Lenders rely on *Douglass v. Salem Community Hosp.,* 153 Ohio App.3d 350, 2003-Ohio-4006, ¶ 20 (7th Dist.). In *Douglass,* the appellants argued that the trial court abused its discretion when it granted the appellees' motion to strike the affidavit of the appellants' expert. The appellees responded that the appellants' failure to file a response to its motion to strike the affidavit waived the argument on appeal. Relying on *Sharma v. Hummer*, 6th Dist. No. WD-00-047 (Apr. 27, 2001), the *Douglass* court found no merit to the appellees' claim. The court noted that in *Sharma,* the defendants moved for summary judgment. In response to that motion, the plaintiffs filed four affidavits; the defendants subsequently moved to strike all four. Although the *Sharma* court noted the plaintiffs' failure to respond to the defendants' motion to strike, it did not address whether such failure waived any arguments on appeal and affirmatively addressed whether the affidavits were properly stricken. The *Douglass* court agreed with the result in *Sharma,* finding that "a party's attempt to introduce an affidavit into evidence is sufficient to preserve any arguments that party may on appeal have about that affidavit's admissibility." *Id.* at ¶ 19. Contrary to the Lenders' contention, *Douglass* actually contradicts the Lenders' argument. Applying *Douglass* to the instant case, the Subcontractors' attempt to introduce supplemental authority is sufficient to preserve any arguments the Subcontractors may have had as to its admissibility and relevance.

{¶ 68} Turning to the substance of the assignment of error, we first note that a trial court's decision to grant or deny a motion to strike is within its sound discretion and will not be overturned on appeal absent an abuse of discretion. *Douglass*, citing *Early v. The Toledo Blade,* 130 Ohio App.3d 302, 318 (6th Dist.1998). Similarly, the decision to admit or exclude evidence is also subject to review under an abuse of discretion standard, and

absent a clear showing that the trial court abused its discretion in the manner that materially prejudices a party, we will not disturb the trial court's ruling. *Cashlink, L.L.C. v. Mosin, Inc.*, 10th Dist. No. 12AP-395, 2012-Ohio-5906, ¶ 9, citing *Boggs v. The Scotts Co.,* 10th Dist. No. 04AP-425, 2005-Ohio-1264, ¶ 35. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court acted unreasonably, arbitrarily or unconscionably. *Cashlink,* citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 69} We find no abuse of discretion in the trial court's decision to grant the Lenders' motion to strike the Subcontractors' supplemental authority. Evid.R. 411 states:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership or control, if controverted, or bias or prejudice of a witness.

{¶ 70} In *Prymas v. Kassai,* 168 Ohio App.3d 123, ¶ 35 (8th Dist.2006), the court explained the justification for the exclusion of evidence of liability insurance:

> The rule against admitting evidence of liability insurance merely codifies long-standing law designed to deter two evils. First, evidence of liability insurance is not particularly relevant, because having liability insurance does not make it more likely that a person will engage in negligent or other wrongful conduct. * * * Second, the rule guards against the possibility that a jury might return an inflated or exaggerated damage award to be paid by "a supposedly well-pursed and heartless insurance company that has already been paid for taking the risk."

{¶ 71} The scope of Evid.R. 411 has been expanded beyond liability insurance policies to include indemnity agreements such as the policy issued by Chicago Title. Indeed, the *Prymas* court at ¶ 36 found that the trial court "abused its discretion by permitting [the appellee] to introduce evidence relating to the indemnity agreement." As in *Prymas,* whether the Lenders had or lacked insurance coverage for its potential losses related to the loan to Campus is irrelevant to the issues raised in the parties' cross-motions for summary judgment: whether the Lenders substantially complied with R.C.

1311.14 to obtain priority over the Subcontractors' mechanic's liens and whether the Subcontractors contractually subordinated their mechanic's liens to the Lenders' mortgage liens.

{¶ 72} Finally, even assuming that the Lenders were aware of the Subcontractors' mechanic's liens and that evidence relating to the Lenders' title insurance regarding those mechanic's liens was admissible, the fact remains that the Subcontractors subordinated their mechanic's lien rights to the Lenders' construction mortgage via the subordination provisions in the General Conditions of the Prime Contracts, which were fully incorporated into the Subcontracts via the flow down clause in the Subcontracts. The fourth assignment of error is overruled.

{¶ 73} Having overruled the first, third, and fourth assignments of error, and having found moot the second assignment of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and SADLER, JJ., concur.