

2012 IL App (1st) 113049-U

SIXTH DIVISION  
November 30, 2012

No. 1-11-3049

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

---

PRIVATEBANK AND TRUST COMPANY,	)	Appeal from the
as successor in interest to Founders Bank, an Illinois	)	Circuit Court of
banking corporation,	)	Cook County.
	)	
Plaintiff-Appellee,	)	
	)	No. 08 CH 14558
v.	)	
	)	
3232 PETERSON LLC, KRW CONSULTING GROUP,	)	
LLC, BUILT FORM ARCHITECTURE, PICKET FENCE	)	
DEVELOPMENT, LTD., PETER M. KOULOGEORGE,	)	
UNKNOWN OWNERS and NONRECORD	)	
CLAIMANTS,	)	
	)	Honorable
Defendants	)	Margaret A. Brennan,
	)	Judge Presiding.
(Vari Architects, Ltd.,	)	
	)	
Defendant-Appellant).	)	

---

JUSTICE HALL delivered the judgment of the court.

Presiding Justice LAMPKIN and Justice GARCIA concurred in the judgment.

## O R D E R

¶ 1 *Held:* Summary judgment for the plaintiff was proper where the defendant failed to enforce its mechanic's lien within the two-year statute of limitations. The denial of the defendant's motion for reconsideration was not error. The circuit court's denial of the defendant's motion for leave to file a counterclaim was not an abuse of discretion.

¶ 2 The defendant, Vari Architects, Ltd. (Vari), appeals from orders of the circuit court of Cook County granting summary judgment to the plaintiff, Privatebank and Trust Company,<sup>1</sup> and denying Vari's postjudgment motions. On appeal, Vari contends the court erred in granting summary judgment to the plaintiff based on Vari's failure to file a suit or a counterclaim to foreclose its mechanics lien claim within the two-year statute of limitations set forth in section 9 of the Mechanics Lien Act (770 ILCS 60/9 (West 2008) (the Act)). It further contends that the denials of its postjudgment motions for reconsideration and for leave to file a counterclaim were error.

¶ 3 BACKGROUND

¶ 4 The plaintiff filed a mortgage foreclosure suit against defendants 3232 Peterson LLC, KRW Consulting Group, LLC, Built Form Architecture, Picket Fence Development, Ltd., Peter M. Koulogeorge, Unknown Owners and Nonrecord Claimants.<sup>2</sup> In its amended complaint, the plaintiff added Vari as a party-defendant based on its recording of a mechanics' lien. Vari

---

<sup>1</sup> Privatebank and Trust Company is the successor to Founders Bank, the original plaintiff.

<sup>2</sup>These defendants are not parties to this appeal.

No. 1-11-3049

answered the amended complaint but did not seek any affirmative relief and did not file a counterclaim to foreclose its lien.

¶ 5 During 2008 and 2009, the parties engaged in discovery. The plaintiff propounded an extensive number of interrogatories, requests to admit and document production requests to Vari relating to its mechanics lien claim.

¶ 6 On May 4, 2009, the circuit court entered a judgment of foreclosure and sale as to all the defendants except Vari. The order acknowledged that Vari was a party because of its mechanics lien and that resolution of its lien was not required at this stage of the proceedings and would be addressed after the sale. See 735 ILCS 5/15-1506(h) (West 2008). The order also stated that the plaintiff's mortgage was prior and superior except as to certain claims, specifically that of defendant Vari.

¶ 7 On June 23, 2009, the plaintiff filed a motion for summary judgment alleging that Vari's mechanics lien claim was invalid and that the plaintiff's mortgage lien had priority over Vari's lien. The circuit court denied the plaintiff's motion. On December 11, 2009, the court entered an order confirming the sale and distribution of the property. The order further provided that Vari's lien was not terminated and remained "undetermined as to effect and priority until such time as the Court addresses such issues."

¶ 8 On April 21, 2011, the plaintiff filed a second motion for summary judgment. In the motion, the plaintiff asserted that Vari's mechanics lien claim was barred because Vari failed to file a suit or counterclaim to enforce its lien claim within the two-year statute of limitations, which had expired on April 10, 2010. In its response to the motion, Vari asserted that because it

No. 1-11-3049

had filed its answer within the two-year limitations period, an amendment to assert a counterclaim for enforcement of its lien would relate back to the filing of its answer. Vari also asserted that, following the entry of the December 11, 2009 order, it had agreed to wait until the completion of the sale of the property to settle its lien claim. Finally, Vari asserted that depending on the outcome of the motion, it intended to amend its answer to assert a counterclaim to enforce its lien.

¶ 9 On June 29, 2011, the circuit court granted the plaintiff's motion for summary judgment. The court ruled that Vari's answer could not be construed as a counterclaim and that allowing Vari to file a counterclaim would change the character of the action between the parties. The court entered judgment in favor of the plaintiff and held that Vari had no claim to the proceeds from the judicial sale of the property.

¶ 10 On July 13, 2011, Vari filed a motion for leave to file a counterclaim. The proposed counterclaim sought enforcement of Vari's mechanics lien claim. On July 29, 2011, Vari filed a motion for reconsideration of the order granting summary judgment to the plaintiff. On October 13, 2011, the circuit court denied both motions. This timely appeal followed.

¶ 11 ANALYSIS

¶ 12 I. Summary Judgment

¶ 13 A. *Standard of Review*

¶ 14 The court's review of an order granting summary judgment is *de novo*. *Inter-Rail Systems, Inc. v. Ravi Corp.*, 387 Ill. App. 3d 510, 515 (2008). "Summary judgment is proper if, and only if, the pleadings, depositions, admissions, affidavits and other relevant materials on file

No. 1-11-3049

show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.' " *Inter-Rail Systems, Inc*, 387 Ill. App. 3d at 515-16 (quoting *Prowell v. Loretto Hospital*, 339 Ill. App. 3d 817, 822 (2003)). To determine whether a genuine issue of material fact exists, the pleadings, admissions and affidavits are construed strictly against the movant and liberally in favor of the nonmovant. *Inter-Rail Systems, Inc*, 387 Ill. App. 3d at 516.

¶ 15

B. Discussion

¶ 16 Vari contends that the circuit court erred when it granted summary judgment to the plaintiff. Vari points out that it filed its answer to the complaint within the two-year time period specified in section 9 of the Act. 770 ILCS 60/9 (West 2008). Vari further points out that through the extensive amount of discovery engaged in by the parties, the plaintiff was well aware of Vari's lien claim. Therefore, the trial court erred by not treating Vari's timely-filed answer as the equivalent of a counterclaim to foreclose the lien. In support of its argument, Vari relies on *Norman A. Koglin Associates v. Valenz Oro, Inc.*, 176 Ill. 2d 385 (1997).

¶ 17 In *Norman A. Koglin Associates*, the plaintiff filed suit to enforce its mechanics lien claim. Bernard Company also had a mechanics lien on the property and was named as a defendant in the suit. Bernard filed an answer admitting the factual allegations of the complaint but denying that the plaintiff's lien was superior to its lien. Bernard set forth the specifics of its lien claim, including the amount owed, when it performed the services under its contract and its perfection of the lien by recording it. Attached to the answer was a copy of the recorded lien. In the prayer for relief, Bernard requested that the court determine the amount of the lien and, that it had priority over the other liens . It further requested that the court order the foreclosure of the

No. 1-11-3049

lien, order the premises sold to satisfy any judgment, and finally, for any relief the court deemed proper. *Norman A. Koglin Associates*, 176 Ill. 2d at 387-88.

¶ 18 After settling with the other defendants but without notice to Bernard, the plaintiff moved to voluntarily dismiss the complaint. The circuit court granted the motion. Bernard filed a motion to modify the order of dismissal to allow it to file an amended complaint. The court denied the motion on the basis that Bernard failed to enforce its mechanics lien within the two-year limitations period in section 9 of the Act. On appeal, the appellate court reversed the dismissal order and remanded the cause to allow Bernard to enforce its mechanics lien. *Norman A. Koglin Associates*, 176 Ill. 2d at 389.

¶ 19 The supreme court affirmed the appellate court's decision. Initially, the court pointed out that Bernard should have formally asserted its lien in a counterclaim as part of its answer. *Norman A. Koglin Associates*, 176 Ill. 2d at 393; see 735 ILCS 5/2-608(b) (West 2008). Since under section 1-106, the provisions of the Code of Civil Procedure (735 ILCS 5/1-106 (West 2008) (the Code)) were to be liberally construed, the court held that the circuit court should have construed the affirmative relief requested in Bernard's answer to constitute a counterclaim. *Norman A. Koglin Associates*, 176 Ill. 2d at 395 (section 12 of the Act (770 ILCS 60/12 (West 2008)) adopted the same procedural rules that apply in other civil cases). The court found that Bernard's answer alleged all the elements necessary to state a claim under the Act and agreed with the appellate court that "[t]he only thing missing from the document was the word "counterclaim." [Citation.] ' " *Norman A. Koglin Associates*, 176 Ill. 2d at 396.

¶ 20 Unlike Bernard in *Norman A. Koglin Associates*, Vari's answer failed to set forth any

No. 1-11-3049

facts relating to its mechanics lien claim and did not request that the court adjudicate its lien claim. Even liberally construed, Vari's answer set forth none of the elements of a suit under the Act and failed to ask for any affirmative relief in connection with the enforcement of its lien claim. Therefore, unlike Bernard's answer in *Norman A. Koglin Associates*, Vari's answer to the plaintiff's amended foreclosure complaint did not preserve its mechanics lien claim.

¶ 21 Since Vari failed to file a suit or counterclaim to enforce its mechanics lien claim within the two-year limitation period of section 9 of the Act, its mechanics lien claim was barred. Therefore, the circuit court's grant of summary judgment to the plaintiff was proper.

¶ 22 II. Reconsideration

¶ 23 Vari contends that the denial of its motion for reconsideration was error. It asserts that the circuit court erred in applying existing law when it granted summary judgment to the plaintiff.

¶ 24 A. *Standard of Review*

¶ 25 The *de novo* standard of review applies where the motion for reconsideration is based on the circuit court's application of existing law. See *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 330 (2008).

¶ 26 B. *Discussion*

¶ 27 Vari argues that the circuit court erred when it failed to treat its timely-filed answer as a counterclaim pursuant to the supreme court's decision in *Norman A. Koglin Associates*. In light of our determination that *Norman A. Koglin Associates* is distinguishable and that summary judgment for the plaintiff was proper, we conclude that the circuit court did not err in denying

No. 1-11-3049

Vari's motion for reconsideration.

¶ 28 III. Leave To Amend

¶ 29 Vari contends that the circuit court erred in denying its motion for leave to file a counterclaim. It argues that the court failed to apply existing law when it denied the motion on the grounds that filing a counterclaim would change the nature of the lawsuit.

¶ 30 A. *Standard of Review*

¶ 31 The abuse of discretion standard applies to the circuit court's ruling on a motion to amend pleadings. *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 351 (2002); *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 219 (2010). The parties maintain that the *de novo* standard applies to our review of the court's denial of leave to file the counterclaim because the court based its decision on the documentary evidence, and there was no evidentiary hearing. See *Stojkovich v. Monadnock Building*, 281 Ill. App. 3d 733, 742-43 (1996) (*de novo* review applied to the denial of motion to amend the complaint to add a request for punitive damages; the ruling was based on documentary evidence, and the credibility of the witnesses was not at issue). However, in *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263 (1992), the supreme court applied the abuse of discretion standard even though there was no indication that an evidentiary hearing had been held on the motion for leave to amend).

¶ 32 B. *Discussion*

¶ 33 1. Section 2-616 of the Code

¶ 34 Vari maintains that, in denying its motion to file a counterclaim, the circuit court ignored section 2-616(b) of the Code (735 ILCS 5/2-616(b) (West 2008)) which allows amendments to

No. 1-11-3049

pleadings after the running of the statute of limitations period. It argues that under section 2-616(b), the proposed counterclaim would relate back to the filing of its answer and would therefore be timely under the two-year limitations period in section 9 of the Act.

¶ 35 Section 2-616(b) provides in pertinent part as follows:

"The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross claim interposed in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving the cause of action, cross claim or defense set up in the amended pleading, and for that purpose only, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended." 735 ILCS 5/2-616(b) (West 2008).

However, the right to amend under section 2-616 is neither absolute nor unlimited. *I.C.S. Illinois, Inc.*, 403 Ill. App. 3d at 219.

¶ 36 In *Norman A. Koglin Associates*, the supreme court determined that section 2-616(b) provided an alternative basis upon which to preserve Bernard's mechanics lien claim. Quoting

No. 1-11-3049

from its decision in *Boatmen's National Bank v. Direct Lines, Inc.*, the court explained as follows:

"The purpose of the relation back provision has been construed as the preservation of causes of action \*\*\* against loss by reason of technical rules of pleading. [Citation.] To further this purpose, courts should liberally construe the requirements of section 2-616(b) in order to allow the resolution of litigation on the merits and to avoid elevating questions of form over substance. [Citation.] The rationale behind the same transaction or occurrence rule is that a defendant will not be prejudiced by an amendment so long as "his attention was directed, within the time prescribed or limited, to the facts that form the basis of the claim asserted against him." ' [Citation.] " *Norman A. Koglin Associates*, 176 Ill. 2d at 398 (quoting *Boatmen's National Bank*, 167 Ill. 2d 88, 102 (1995)).

¶ 37 In determining the meaning of a statute, the court does not read parts of the statute in isolation but reads it as a whole, considering all relevant parts. *Gardner v. Mullins*, 234 Ill. 2d 503, 511 (2009). Section 2-616(a) provides that "[a]t any time *before final judgment*, amendments may be allowed on just and reasonable terms." (Emphasis ours.) 735 ILCS 5/2-616(a) (West 2008). Section 2-616(c) provides that "[a] pleading may be amended at any time, before or after judgment to conform the pleadings to the proofs." 735 ILCS 5/2-616(c) (West 2008).

¶ 38 Where a final judgment has been entered in a case, a party has no statutory right to amend. *Compton*, 382 Ill. App. 3d at 332. In this case, the June 29, 2011 order granted summary judgment to the plaintiff and entered a final judgment barring Vari's mechanics lien claim. The

No. 1-11-3049

fact that Vari filed a motion for reconsideration did not render the June 29, 2011 order nonfinal. See *Gardner*, 234 Ill. 2d at 510 (filing of a motion to reconsider has no effect on the finality of an otherwise final order).

¶ 39 Both *Norman A. Koglin Associates* and *Boatmen's National Bank* are distinguishable. In *Norman A. Koglin Associates*, the supreme court did not address whether an amendment may be allowed after final judgment for any reason other than to conform the pleadings to the proof. In *Boatmen's National Bank*, the order granting the plaintiff's motion for leave to file a ninth amended complaint after the statute of limitations had expired was entered prior to the entry of the final judgment in that case. *Boatmen's National Bank*, 167 Ill. 2d at 96.

¶ 40 A liberal construction cannot overcome the plain language in subsection (c) restricting amendments after final judgment to conforming the pleadings to the proof. 735 ILCS 5/2-616(a)(c) (West 2008). Moreover, Vari does not assert that filing its counterclaim would be proper under section 2-616(c). Vari had no right under section 2-616 to file its counterclaim.

## 2. Section 2-1005(g) of the Code

¶ 41 Vari argues that it had a right to file its counterclaim pursuant to section 2-1005(g) of the Code. Section 2-1005(g) provides that "[b]efore or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms." 735 ILCS 5/2-1005(g) (West 2008).

¶ 42 In *Wells v. Great Atlantic & Pacific Tea Co.*, 171 Ill. App. 3d 1012 (1988), this court examined the relationship between sections 2-616(c) and 2-1005(g) of the Code. The court noted that sections of the Code were not to be read in isolation but construed to give effect to the

No. 1-11-3049

legislative purpose as expressed in the Code: liberal construction "so that controversies may be speedily and finally determined according to the substantive rights of the parties." *Wells*, 171 Ill. App. 3d at 1019-20. Acknowledging that other courts had interpreted section 2-1005(g) differently, we concluded as follows:

"Applying these principles we believe that section 2-1005(g) to mean that before or after the grant of summary judgment, but before the summary judgment becomes final, the court shall permit pleadings to be amended upon just and reasonable terms. After final judgment, the only amendments which may be allowed are ones to conform the pleadings to the proofs pursuant to section 2-616(c). To hold otherwise would strip summary judgment of finality and would frustrate the purpose of the summary judgment procedure, which is to avoid the congestion of trial calendars and the expense and delay of unnecessary trials by summarily disposing of cases where no genuine issue of material fact is presented. [Citation.]" *Wells*, 171 Ill. App. 3d at 1020.

See *Hartzog v. Martinez*, 372 Ill. App. 3d 515, 521-22 (2007) (recognizing that there was "a strong argument to be made for the proposition that the right to amend following a final summary judgment should be more restricted than the right to amend prior to summary judgment or where the summary judgment is interlocutory," citing *Wells*, 171 Ill. App. 3d at 1020).

¶ 43 Notwithstanding the decision in *Wells*, the court in *Hartzog* observed that the "question still remains open" as to whether to differentiate between a final summary judgment or a nonfinal one. *Hartzog*, 372 Ill. App. 3d at 523; cf. *Giacalone v. Chicago Park District*, 231 Ill. App. 3d 639 (1992) (treating the motion to amend after final summary judgment the same as a motion

No. 1-11-3049

brought before the order was final). Nonetheless, the circuit court is not mandated to grant a motion for leave to file an amended pleading in all cases following the grant of summary judgment. As the supreme court in *Loyola Academy* noted, the "just and reasonable terms" language in section 2-1005(g) mirrored the language in section 2-616(a), allowing amendments on "just and reasonable terms," and required that the circuit court permit the amendment if " 'it would further the ends of justice.' " *Loyola Academy*, 146 Ill. 2d at 272-73 (quoting *Seibert v. Continental Oil Co.*, 161 Ill. App. 3d 891, 895 (1987)).

¶ 44 In reviewing a ruling on a motion for leave to file an amended pleading, the court considers the following factors: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment was timely; and (4) whether previous opportunities to amend the pleadings could be identified. *Loyola Academy*, 146 Ill. 2d at 273-74. A party must meet all four of the *Loyola factors*. *I.C.S. Illinois, Inc.*, 403 Ill. App. 3d at 220.

¶ 45 In this case, the proposed amendment was not timely, and Vari failed to avail itself of its many opportunities to add a counterclaim to enforce its lien. The stage of litigation at which a proposed amendment is brought is a relevant consideration. *Hartzog*, 372 Ill. App. 3d at 525-26. On December 11, 2009, the circuit court entered an order confirming the sale and distribution of the property. The only identified claim remaining was Vari's mechanics lien. At that time, the two-year statute of limitations had not yet run. Vari could have sought leave to file a counterclaim to enforce its mechanics lien claim up until April 10, 2010, when the limitations period expired but failed to do so. Even after the plaintiff moved for summary judgment on the

No. 1-11-3049

basis that the statute of limitations had expired, Vari did not seek leave to file a counterclaim but chose to wait for the outcome of the summary judgment motion. See *Hartzog*, 372 Ill. App. 3d at 526 (while aware of the need to amend for five months, the plaintiffs did not seek leave to amend their complaint until after the defendant was granted final summary judgment).

¶ 46 Vari's explanation of its failure to file a counterclaim earlier was that after the December 11, 2009, order was entered, it agreed to wait until after the plaintiff sold the property to deal with its mechanics lien. Vari admits that there is little evidence supporting the existence of that agreement. No affidavit attesting to the agreement was filed in support of its response to the motion for summary judgment. Vari points out that it was not required to file its counterclaim at the time it filed its answer to the complaint. See *Peregrine Financial Group, Inc. v. Martinez*, 305 Ill. App. 3d 571, 580 (1999) (counterclaims are permissive in Illinois). Still, Vari fails to offer a reason as to why it did not file its counterclaim with its answer to the plaintiff's complaint. Significantly, it does not address why, after the plaintiff raised the statute of limitations issue in its second motion for summary judgment, Vari still did not seek leave to file a counterclaim. For these reasons, Vari cannot meet the *Loyola* factors of timeliness and opportunities for leave to amend.

¶ 47 Vari points out that our courts consider the prejudice to the party opposing an amendment to be the most important of all the *Loyola* factors, and where there is no prejudice or surprise to the nonmovant, the circuit court has substantial latitude to grant an amendment. *Hartzog*, 372 Ill. App. 3d at 525. Vari argues that the counterclaim could not have taken the plaintiff by surprise, since Vari was a party to the suit only because of its mechanics lien on the property and because

No. 1-11-3049

the parties conducted extensive discovery regarding Vari's lien claim. In addition, in its orders of May 4, 2009, and December 11, 2009, the circuit court recognized Vari's lien claim, and provided that its effect and priority would be determined at a later date. But at the time those orders were entered, the statute of limitations had not yet expired, and the orders made no mention that the limitations period was tolled or was otherwise waived.

¶ 48 The existence of Vari's mechanics lien claim could not have surprised the plaintiff. However, the plaintiff could certainly have been surprised by Vari seeking to file a counterclaim to enforce its lien more than two years after Vari filed its answer and only after the plaintiff was granted final summary judgment based on Vari's failure to seek timely enforcement of its claim. See *Hartzog*, 372 Ill. App. 3d at 525 (the plaintiffs' motion for leave to amend their complaint could certainly have taken the defendant by surprise where the plaintiffs failed to seek to amend their complaint in response to the motion for summary judgment and sought to amend only after summary judgment was granted).

¶ 49 Our civil practice rules are to be liberally construed, "to the end that controversies may be speedily and finally determined according to the substantive rights of the parties." 735 ILCS 5/1-106 (West 2008). The plaintiff would be prejudiced if Vari were allowed to file a counterclaim at this late date and after the entry of the final judgment in this case.

¶ 50 Finally, this court has held that in ruling on an amendment, the court may consider whether the claim asserted in the amended pleading would ultimately be successful. *Hartzog*, 372 Ill. App. 3d at 526. Under the circumstances of this case, we decline to do so.

¶ 51 Vari failed to satisfy all of the *Loyola* factors. Therefore, the circuit court did not abuse

No. 1-11-3049

its discretion when it denied the motion for leave to file a counterclaim.

¶ 52

CONCLUSION

¶ 53 The judgment of the circuit court is affirmed.

¶ 54 Affirmed.