

No. 1-12-2146

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 JUDICIAL DISTRICT

MACIEJ LESNIAK and MICHAEL VIGLIONE,)	Appeal from the Circuit
)	Court of Cook County.
Plaintiffs-Appellees,)	
)	No. 11-CH-10934
v.)	
)	
WESLEY'S FLOORING, INC.,)	The Honorable
)	Lewis Michael Nixon,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court, which granted summary judgment in favor of the plaintiffs, was affirmed.

¶ 2 The defendant, Wesley's Flooring, Inc., appeals the circuit court order which denied its motion for summary judgment and granted the cross-motion for summary judgment filed by the plaintiffs, Maciej Lesniak and Michael Viglione, quashing the mechanic's lien the defendant recorded on the plaintiffs' property. We affirm.

¶ 3 In 2008, the plaintiffs entered into a contract with Hudson Home, Inc. (Hudson), a general contractor, for a nearly \$1 million renovation project at their home on Elm Street in Chicago. In

No. 1-12-2146

January 2010, Hudson hired the defendant as a subcontractor to install hardwood floors in the home. The defendant claimed that, on or about May 18, 2010, it completed the installation of the hardwood floors and that the cost of its labor and materials for the project was \$22,720. It further claimed that it had been paid \$11,220 by Hudson, but that neither Hudson nor the plaintiffs had paid the remaining \$11,500. On June 14, the defendant sent the plaintiffs a subcontractor's notice as required by section 24(a) of the Mechanics Lien Act (Act) (770 ILCS 60/24(a) (West 2010)), notifying them that it performed the work and that a lien waiver would be provided to Hudson after it received payment. On June 18, the defendant sent the plaintiffs a subcontractor's notice of its intention to file a mechanic's lien.

¶ 4 On June 28, 2010, Hudson filed for bankruptcy in the Northern District of Illinois (*In re Hudson Homes*, No. 10-2872). On October 20, 2010, the defendant recorded the lien against the plaintiffs and Hudson. On December 3, 2010, the plaintiffs, pursuant to section 34 of the Act (770 ILCS 60/34 (West 2010)), demanded that the defendant file suit to enforce its lien within 30 days. The defendant never filed suit.

¶ 5 On March 22, 2011, the plaintiffs filed a two-count complaint against the defendant, seeking to have the lien removed from their property's title. In count I, they alleged that the defendant's lien was invalid, claiming that they paid Hudson in full and that the lien was forfeited because the defendant failed to file its suit within 30 days of their section 34 demand. In count II, pursuant to section 35 of the Act (770 ILCS 60/35 (West 2010)), the plaintiffs sought \$2,500 plus attorney fees and costs for the defendant's violation of sections 34 and 35.

¶ 6 On May 17, 2011, the defendant moved for summary judgment pursuant to section 2-1005

No. 1-12-2146

of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2010)), arguing that, because Hudson had filed for bankruptcy, the Bankruptcy Code's automatic stay provision (11 U.S.C.A. § 362(a)(1) (2010)) barred it from filing suit on its lien as the plaintiffs had demanded. The defendant argued that the Act required it to file suit against both the owner and the general contractor; therefore, the time to file suit was tolled until the automatic stay was lifted in Hudson's bankruptcy action.

¶ 7 On July 18, 2011, the plaintiffs filed a cross-motion for summary judgment, arguing that the Act did not bar a property owner from proceeding to remove the lien. They argued that they paid Hudson only after receiving lien waivers from it and before they received the defendant's notice. The plaintiffs attached several lien waivers from Hudson, including one which was notarized and dated January 26, 2010, and which stated that it had received payment of \$889,686.55 and that the plaintiffs had no outstanding balance. They also included an invoice from Hudson, dated May 24, 2010, which included a line showing that "hardwood flooring" for \$21,950.25 had been paid.

¶ 8 Additionally, the plaintiffs attached an affidavit from Lesniak in which he states that Hudson provided lien waivers before he made any payments. After he paid Hudson in full, Lesniak received the defendant's notice of its intent to file the lien. According to Lesniak, in June 2010, he contacted the defendant's attorney, who accused him of scheming to cheat the defendant out of money. Lesniak averred that he provided the invoices to the defendant's attorney, but that the attorney continued to demand payment, informed him that Hudson had filed for bankruptcy, and told him that a lien would be filed if he did not pay. Because of the lien, Lesniak had been unable to secure financing to buy out Viglione's interest in the property.

No. 1-12-2146

¶ 9 On September 28, 2011, the circuit court continued the case due to Hudson's bankruptcy. On February 24, 2012, the plaintiffs filed a motion in the circuit court to resume the case, attaching the bankruptcy court's February 8 order, which they represented had lifted the automatic stay to allow this litigation to proceed. The bankruptcy court's order states that:

¶ 10 "[u]pon consideration of the motion filed by Matt Lesniak for entry of an order modifying the automatic stay to allow state court litigation to proceed with respect to State Court Case Number 11 Ch 10934 ***; it is ordered *** [t]he automatic stay is hereby modified to allow the movants to proceed with the pre-petition mechanics lien suit against non-debtors."

¶ 11 On June 26, 2012, the circuit court denied the defendant's motion for summary judgment and granted the plaintiffs' cross-motion for summary judgment. The circuit court stated that it understood the bankruptcy court order to have allowed the plaintiffs to proceed with their suit against the defendant, the nondebtor. The court granted the plaintiffs' motion because the defendant did not file suit to enforce its lien within 30 days of the entry of the bankruptcy court order. The court explained that, under section 34 of the Act, the defendant's lien was forfeited when it failed to file suit to enforce its lien within 30 days of the plaintiffs' demand. The next day, the court entered an order quashing the defendant's mechanic's lien. The defendant timely appealed.

¶ 12 Summary judgment is appropriately granted where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Cordeck Sales v. Construction Systems*, 382 Ill. App. 3d 334, 343, 887 N.E.2d 474 (2008).

No. 1-12-2146

While summary judgment is a drastic means of disposing litigation, it is an appropriate and efficient method to dispose of a lawsuit when the moving party's right is clear and free from doubt. *Id.* Where the parties have filed cross-motions for summary judgment, they agree that no genuine issue as to any material fact exists and that only a question of law is involved. *Id.* However, the mere filing of cross-motions for summary judgment does not require that the court grant the requested relief to one of the parties where genuine issues of fact exist. *Id.* We review the circuit court's grant of summary judgment *de novo* (*Id.* at 344), and we may affirm the circuit court's ruling on any basis that is supported by the record (*Zuccolo v. Hannah Marine Corp.*, 387 Ill. App. 3d 561, 564, 900 N.E.2d 353 (2008)).

¶ 13 "The Act is a comprehensive statutory enactment that outlines the rights, responsibilities, and remedies of parties to construction contracts, including owners, contractors, subcontractors, and third parties." *Cordeck Sales v. Construction Systems*, 382 Ill. App. 3d 334, 353, 917 N.E.2d 536 (2008). The Act's overall purpose is to require a person with an interest in real property to pay for improvements which have been induced or encouraged by his own conduct. *Id.* Because the right to a mechanic's lien is statutory, a contractor must strictly comply with the Act to be eligible for relief. *Id.* at 357. In this case, various sections of the Act interact, triggering duties for the different parties involved.

¶ 14 Section 5 of the Act pertains to the duties of the owner and the contractor. 770 ILCS 60/5 (West 2010). To protect himself from paying twice for the same work, the owner must demand from his contractor, prior to payment, a sworn statement listing all subcontractors providing labor and materials to the contractor. 770 ILCS 60/5 (West 2010); *Lazar Brothers Trucking v. A&B*

No. 1-12-2146

Excavating, 365 Ill. App. 3d 559, 563, 850 N.E.2d 215 (2006). Section 5 also states that it is the contractor's duty to provide this information to the owner. 770 ILCS 60/5 (West 2010). However, the contractor's affidavit does not protect the owner if he has notice that the affidavit contains false information. *Lazar*, 365 Ill. App. 3d at 563.

¶ 15 Once a lien has been recorded, an owner may seek to clear his title through section 34 of the Act. Section 34 of the Act provides that, when an owner serves the lien claimant with a written demand "requiring suit to be commenced to enforce the lien," the suit shall be commenced within 30 days thereafter, or the lien shall be forfeited. 770 ILCS 60/34 (West 2010). The purpose of this section is to "provide a method for property owners to force the issue on the validity of claims already filed and to clear a cloud on the owner's property created by the filing of a lien." *Krzyminski v. Dziadkowiec*, 296 Ill. App. 3d 710, 712, 695 N.E.2d 1275 (1998).

¶ 16 A subcontractor's duties are governed by sections 21 and 24 of the Act. Section 21 requires that the subcontractor notify the owner that it is supplying materials or labor within 60 days from its first furnishing the materials or labor. 770 ILCS 60/21 (West 2010). Section 21, however, states that any notice given *after* 60 days "shall preserve [the subcontractor's] lien, but only to the extent that the owner has not been prejudiced by payments made prior to receipt of the notice." *Id.* The notice shall warn the owner that he should receive a waiver of lien "executed by each subcontractor who has furnished materials or labor" before making any payment to the contractor. *Id.* Section 24 of the Act further provides that, to protect its right to receive payments, within 90 days of the *completion* of the work, each subcontractor must provide written notice to the owner of the amount owed to the subcontractor for work on the project. 770 ILCS 60/24 (West 2010); *Lazar*, 365 Ill.

No. 1-12-2146

App. 3d at 563. However, "[e]ven timely notice may not protect the subcontractor, if the owner made proper payments to the contractor prior to receiving notice of the subcontractor's claim." *Lazar*, 365 Ill. App. 3d at 563.

¶ 17 A subcontractor's lien is governed by Section 28 of the Act, which provides that, if the money owed to the subcontractor is not paid within 10 days after notice is served as provided in section 24 of the Act, then the subcontractor may "either file a claim for lien or file a complaint and enforce such lien within the same limits as to time and in such other manner" as provided for the contractor in section 7 of the Act, "or he may sue the owner and contractor jointly for the amount due in the circuit court, and a personal judgment may be rendered therein, as in other cases." 770 ILCS 60/28 (West 2010). Section 28 of the Act further states:

"All suits and actions by sub-contractors shall be against both contractor and owner jointly, and no judgment shall be rendered therein until both are duly brought before the court by process or publication ***. All such judgments, where the lien is established shall be against both jointly, but shall be enforced against the owner only to the extent that he is liable under his contract as by this Act provided *** but this shall not preclude a judgment against the contractor, personally, where the lien is defeated." 770 ILCS 60/28 (West 2010).

¶ 18 Section 7 of the Act provides that, when a lien claimant seeks to enforce a mechanic's lien against an owner, the claimant has two years following the completion of its work to record its lien. 770 ILCS 60/7 (West 2010). As to third parties, such as creditors and purchasers, section 7 provides that the contractor must file to enforce the lien within four months after the completion of the work. *Id.*

No. 1-12-2146

¶ 19 The defendant first argues that the circuit court erred in granting the plaintiffs summary judgment on the basis that it failed to file suit to enforce the lien within 30 days of the plaintiffs' section 34 demand. Relying on *Chicago Whirly, Inc. v. Amp Rite Electric Co., Inc.*, 304 Ill. App. 3d 641, 710 N.E.2d 45 (1999), the defendant argues that it could not file suit to enforce its lien until Hudson's bankruptcy was final or the stay was lifted so that it could name Hudson in the suit. We agree.

¶ 20 In *Chicago Whirly*, the plaintiff-owner filed a motion to remove the mechanic's lien which the defendant-subcontractor filed after it claimed it had not been paid for work that it performed for the plaintiff's general contractor. *Chicago Whirly*, 304 Ill. App. 3d at 642. The general contractor filed for bankruptcy; a few days later, the defendant-subcontractor filed a mechanic's lien encumbering the plaintiff's property. *Id.* Shortly thereafter, the plaintiff-owner served the defendant-subcontractor with its demand, pursuant to section 34 of the Act, that it file suit to enforce its lien. *Id.* The defendant-subcontractor notified the plaintiff-owner that it could not file suit because the general contractor was a necessary party to such an action and the automatic stay in its bankruptcy case prevented it from naming the general contractor as a party. *Id.*

¶ 21 The appellate court determined that the general contractor was a necessary party to the defendant-subcontractor's suit and that the automatic stay in the general contractor's bankruptcy case prevented the defendant-subcontractor from filing suit within the 30-day limit. *Id.* at 643-44. The appellate court further stated that it did not "believe that [the] defendant had an obligation to seek" relief from the automatic stay in the bankruptcy court in order to comply with the requirements of section 34. *Id.* at 645. The appellate court therefore concluded that the defendant-subcontractor was

No. 1-12-2146

not required to and was not able to file suit on its mechanic's lien until after the automatic stay in the contractor's bankruptcy case had terminated. *Id.* at 646. Stated otherwise, the automatic stay in general contractor's bankruptcy tolled the time the subcontractor had to file suit to enforce its lien. *Id.*; see also *Garbe Iron Works, Inc. v. Priester*, 99 Ill. 2d 84, 87, 457 N.E.2d 422 (1983) (holding that the automatic stay in the bankruptcy of a necessary party in an action to enforce a mechanic's lien extends the amount of time the subcontractor has to file suit); *Concrete Products, Inc. v. Centex Homes*, 308 Ill. App. 3d 957, 960, 721 N.E.2d 802 (1999) (finding that subcontractor's pending suit to enforce its mechanic's lien could not proceed during the time the contractor was unable to participate after the contractor subsequently filed for bankruptcy, triggering the automatic stay).

¶ 22 In this case, like in *Chicago Whirly*, the plaintiffs sought to have the lien removed after the defendant failed to file suit to enforce its lien within 30 days of its section 34 demand. However, the defendant could not file its suit because of Hudson's pending bankruptcy. While the plaintiffs sought relief from the automatic stay in the bankruptcy court, the bankruptcy court order granted the plaintiffs relief only as to proceeding against "nondebtors." The bankruptcy court's order did not allow the defendant to file suit against the debtor (Hudson), who is a necessary party to the action. Like the defendant in *Chicago Whirly*, the defendant here is not required to and is unable to file its suit to enforce its mechanic's lien until the automatic stay in Hudson's bankruptcy case has terminated or been lifted. We also agree with *Chicago Whirly* that the defendant is not obligated to seek relief from the automatic stay in the bankruptcy court. Therefore, the circuit court erred in granting summary judgment in favor of the plaintiffs on the basis that the defendant forfeited its lien by failing to file its suit within 30 days of the plaintiffs' section 34 demand.

¶ 23 However, as the plaintiffs point out, we may affirm the circuit court's order on any basis that is supported by the record. *Zuccolo*, 387 Ill. App. 3d at 564. The plaintiffs argue that the lien waivers that they received from Hudson before issuing any payments bar the defendant's claim for a mechanic's lien. On this point, we agree with the plaintiffs and affirm the circuit court's grant of summary judgment in their favor on this basis.

¶ 24 Section 5 of the Act requires contractors to provide information to the owner that is within their knowledge but that may not be known to the owner. *Bricks, Inc. v. C & F Developers, Inc.*, 361 Ill. App. 3d 157, 164, 836 N.E.2d 743 (2005). The purpose of requiring these sworn statements from contractors is to protect owners from the potential claims of unknown subcontractors. *Id.* "Moreover, an owner is entitled to rely upon a contractor's affidavit in making payments and is protected as against unidentified subcontractors so long as he has no knowledge or notice that the affidavit contains false or incomplete information." *Id.*; see also 770 ILCS 60/27 (West 2010).

¶ 25 In *Bricks*, the subcontractor filed suit to enforce its lien against the general contractor and the property owner for materials that it supplied, valued at \$64,510. *Bricks*, 361 Ill. App. 3d at 159. The owner made payments after receiving the general contractor's affidavit, which failed to include the subcontractor's information. *Id.* The owner paid all but \$10,000 of its total bill due to the general contractor before receiving the subcontractor's notice and claim for a mechanic's lien. *Id.* The trial court determined that the subcontractor's lien was limited to the \$10,000, because the owner's earlier payments were made in reliance on the contractor's affidavit and before it received notice from the subcontractor. *Id.* The appellate court agreed and affirmed, stating that, even though the subcontractor complied with section 24's notice requirement, the owner can rely on sworn statements

No. 1-12-2146

from its contractor. *Id.* at 165.

¶ 26 Likewise, in this case, the uncontroverted evidence establishes that Hudson supplied the plaintiffs with an affidavit and lien waiver on January 26, 2010, which stated that it had received \$889,686.55 of the total contract amount of \$974,055.02 and that there were no other outstanding contracts for work or materials due. Hudson's lien waiver did not list any subcontractor, and Lesniak's affidavit states that he relied upon Hudson's sworn affidavit and lien waiver before making full payment and that he received notice of the defendant's notice only after he had paid Hudson in full. While the defendant argues that the plaintiffs owed money to Hudson even after it sent its notice, the only evidence on the record regarding the plaintiffs' payments are Lesniak's affidavit, stating he paid Hudson in full before receiving the defendant's notice, and the January 26, 2010, lien waiver, stating the plaintiffs had no balance remaining. With no evidence to the contrary, there is no disputed fact as to this issue. Because the plaintiffs did not have an outstanding balance at the time they received the defendant's section 24 notice, the defendant had no valid lien claim against the plaintiffs. Therefore, we affirm the judgment of the circuit court on the basis that the defendant's lien against the plaintiff was barred by their previous payments to their general contractor.

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 28 Affirmed.