

2016 IL App (1st) 140797-U

SIXTH DIVISION  
May 27, 2016

No. 1-14-0797

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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WHEATON BANK and TRUST COMPANY,	)	Appeal from the Circuit Court
as Successor to the Federal Deposit Insurance	)	of Cook County
Corporation, Solely as Receiver for Wheatland	)	
Bank,	)	
	)	
Plaintiff and Counterdefendant-Appellee,	)	
	)	No. 11CH 12388
v.	)	
	)	
STAR TECH GLASS, INC.,	)	
	)	
Defendant and	)	
Counterplaintiff-Appellant,	)	Honorable
	)	Michael T. Mullen,
(David A. Sundry, Michelle M. Kranicke, Maciej	)	Judge Presiding.
Krzyzewski, Comfort Solutions, Universal	)	
Plumbing and Sewer, Inc., S and S General	)	
General Contractors, Inc., All Wired Up, Inc.,	)	
Wellington Homes and Development, LLC,	)	
Chicago Title Land Trust Company, as Trustee	)	
Under Trust Agreement Dated January 21, 2010	)	
and Known as Trust No. 800235449, Unknown	)	
Owners and Nonrecord Claimants,	)	

Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

¶ 1 *HELD:* The circuit court's order dismissing the defendant's lien claims for failing to comply with section 34 of the Illinois Mechanics Lien Act was affirmed.

¶ 2 Defendant Star Tech Glass, Inc. (Star Tech) appeals from the dismissal of its mechanic's lien claims. The sole issue on appeal is whether a lienholder's failure to comply with the filing requirement set forth in section 34 of the Illinois Mechanics Lien Act (Act) (770 ILCS 60/34 (West 2010)) mandates the dismissal of the lien claims. We hold that the language in section 34 of the Act providing that a mechanics lienholder's failure to file an answer to a mortgage foreclosure complaint within 30 days of service of process required the circuit court to dismiss Star Tech's lien claims.

## 3 BACKGROUND

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\*\*\*IF YOU FAIL TO DO SO, A JUDGMENT BY DEFAULT MAY BE ENTERED  
AGAINST YOU FOR THE RELIEF REQUESTED IN THE COMPLAINT."

¶ 5 On January 13, 2012, Star Tech, on its own behalf and as assignee of other lienholders named in the complaint, filed answers to the foreclosure complaint and counterclaims to foreclose on the mechanic's lien claims. The counterclaims also alleged breach of contract claims.<sup>1</sup>

¶ 6 On February 8, 2012, Wheaton Bank filed a motion to dismiss all of the mechanic's lien claims contained in the counterclaims on the ground that Star Tech and its assignors failed to file answers to the foreclosure complaint within 30 days as required by section 34 of the Act.<sup>2</sup> On June 15, 2012, the circuit court granted Wheaton Bank's motion to dismiss the mechanic's lien claims. On July 19, 2012, the circuit court entered a judgment of foreclosure and sale. Following the sale of the property, on January 23, 2013, the circuit court entered an order approving the sale, providing for distribution of the proceeds and for the possession and deed to the property.

¶ 7 On February 13, 2014, Star Tech voluntarily dismissed the pending breach of contract claims, terminating the litigation. Star Tech filed a timely notice of appeal.

¶ 8 ANALYSIS

¶ 9 I. Standard of Review

¶ 10 A motion to dismiss is reviewed *de novo*. *Gateway Concrete Forming Systems, Inc. v. Dynaprop XVIII: State Street LLC*, 356 Ill. App. 3d 806, 809 (2005) (reviewing the dismissal of a complaint to foreclose a mechanic's lien for failing to comply with section 34 of the

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<sup>1</sup> The other defendant lienholders are not parties to this appeal.

<sup>2</sup>The motion to dismiss did not specify the section of the Civil Practice Act under which the motion to dismiss was brought.

Act). The construction of a statute presents a question of law, which the court reviews *de novo*. *Majid v. Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago*, 2015 IL App (1st) 132182, ¶ 13.

¶ 11 II. Discussion

¶ 12 Prior to 2013, section 34 of the Act provided as follows:

"Upon written demand of the owner, lienor, or any person interested in the real estate, or their agent or attorney, served on the person claiming the lien, or his agent or attorney, requiring suit to be commenced to enforce the lien or answer to be filed in a pending suit, shall be commenced or answer filed within 30 days thereafter, or the lien shall be forfeited. Such service may be by registered or certified mail, return receipt requested, or by personal service." 770 ILCS 60/34 (West 2010).

¶ 13 In 2013, the legislature amended section 34, adding subparagraph (b) and providing as follows: "A written demand under this Section must contain the following language in at least 10 point bold face type: 'Failure to respond to this notice within 30 days after receipt, as required by Section 34 of the Mechanics Lien Act, shall result in the forfeiture of the referenced lien.' " Pub. Act 97-1165 § 5 (eff. Feb. 11, 2013) (adding 770 ILCS 60/34(b)).

¶ 14 Star Tech acknowledges that the 2010 version of section 34 applies to this case. Therefore, the mortgage foreclosure summons issued to Star Tech was not required to contain the demand language added by the 2013 amendment to section 34 of the Act.

¶ 15 Star Tech maintains that the circuit court's strict interpretation of section 34 of the Act leads to an unjust result and contradicts the purpose of the Act.

¶ 16 As this court explained in *Gateway Concrete Forming Systems, Inc.*:

"The purpose of the Act is to permit a lien upon premises where a property owner received a benefit from improvements to his property or realized an increase in property value because of a contractor's labor and materials. [Citation.] Mechanic's liens are not recognized by common law and exist only by virtue of the statutes that created them; therefore, the Act must be strictly construed with respect to those requirements upon which the right to a lien depends." *Gateway Concrete Forming Systems, Inc.*, 356 Ill. App. 3d at 809.

While a contractor has up to two years after completing a project to file a lien against the property, section 34 of the Act permits the property owner or any other interested person to force the issue of the validity of the claims within 30 days of receiving a demand notice or forfeit his rights to the lien. *Gateway Concrete Forming Systems, Inc.* 356 Ill. App. 3d at 809; *Krzyminski v. Dziadkowiec*, 296 Ill. App. 3d 710, 712 (1998) (the purpose of sections 34 and 35 of the Act is to provide a method for the property owner 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 the lien).

¶ 17

Illinois courts have consistently held that compliance with the notice requirement of section 34 of the Act is jurisdictional and not subject to waiver or estoppel. *Vernon Hills III Limited Partnership v. St. Paul Fire & Marine Insurance Co.*, 287 Ill. App. 3d 303, 308-09 (1997); *Gateway Concrete Forming Systems, Inc.*, 356 Ill. App. 3d at 809; *Pickus Construction & Equipment Co.*, 158 Ill. App. 3d 141, 144, 146 (1987) (section 34 is jurisdictional, and the failure to file suit upon written notice pursuant to section 34 of the Act operates to forfeit and remove the mechanic's lien).

¶ 18 Star Tech argues that in the interest of justice, Illinois courts have allowed the filing of pleadings more than 30 days after the service of summons and that the proper inquiry is whether the opposing party will be prejudiced by the allowance of a late pleading. The cases relied on by Star Tech hold that the court has the discretion to allow the late filing of pleadings, but they do not address the situation where the timely filing of the answer is jurisdictional as is section 34 of the Act. Star Tech's reliance on *Norman A. Koglin Associates v. Valenz Oro, Inc.*, 176 Ill. 2d 385 (1997), and *Charter Bank & Trust v. Edward Hines Lumber Co.*, 233 Ill. App. 3d 574 (1992), is misplaced.

¶ 19 In *Norman A. Koglin Associates*, the supreme court held that while the contractor failed to follow civil procedure rules, under the liberal construction of pleadings the contents of its answer sufficed as a counterclaim to assert its mechanic's lien. The court did not address the notice requirement of section 34 of the Act. *Charter Bank & Trust Co.* supports Wheaton Bank's position in this case. The appellate court held that the contractor had complied with section 34 by filing his answer within 30 days of its receipt of the summons, and that nothing else was required to preserve its lien claim. *Charter Bank & Trust Co.*, 233 Ill. App. 3d at 578. The court went on to hold that compliance with section 34 of the Act did not require the contractor to file his counterclaim and that subsequently seeking leave of court to file his counterclaim was proper and timely. *Charter Bank & Trust Co.*, 233 Ill. App. 3d at 578.

¶ 20 Star Tech maintains that the strict construction of section 34 contradicts the broad discretion the circuit court exercises over the timing of answers, counterclaims and intervention by third parties under sections 15-1107(b) (735 ILCS 5/15-1107(b) (West 2010)) and section 15-1501(e) (2) (735 ILCS 5/15-1501(e) (2) (West 2010)) of the Illinois Mortgage Foreclosure Law (Foreclosure Law). It also maintains that under section 15-1404 (735 ILCS

5/15-1404 (West 2010)), its interest in the property cannot be terminated until the judicial sale of the real estate. *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 4 (2010) (the Foreclosure Law governs the mode of procedure for mortgage foreclosures and inconsistent statutory provisions are not applicable).

¶ 21 We find no contradiction. Section 15-1107(b) provides that mechanic's liens "shall be enforced as provided in the [Act]." Unlike the procedural sections of the Foreclosure Law relied on by Star Tech, section 34 of the Act is jurisdictional, and the failure to comply deprives the lien claimant the ability to enforce the lien, not just the opportunity to participate in the foreclosure suit . Moreover, to accept Star Tech's construction of these provisions would render the circuit court powerless to enter default judgments, award summary judgments or dismiss parties where appropriate prior to the final judgment. See *Bowman v. Ottney*, 2015 IL 119000, ¶ ¶ 9, 17 (the court considers the consequences of construing the statute one way or the other and will avoid a construction that would defeat the statute's purpose or yield absurd or unjust results).

¶ 22 We conclude that Star Tech and its assignors, having failed to comply with section 34 of the Act, forfeited their lien claims. The circuit court's dismissal of the claims was proper under section 34 of the Act and is affirmed.

¶ 23 Affirmed.