2014 IL App (3d) 130235-U

Order filed September 18, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

GLENWOOD RESORT OWNERS' ASSOCIATION, an Illinois not-for-profit corporation,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois.
Plaintiff-Appellant/Cross-Appellee,	)	Appeal No. 3-13-0235 Circuit No. 08-L-48
v.	)	
GLENWOOD PROPERTIES, INC.,	)	The Honorable R. James Lannon, Jr. & Troy D. Holland,
Defendant-Appellee/Cross-Appellant.	)	Judges, presiding.

PRESIDING JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied plaintiff's request for class action certification. The trial court did not err in finding that defendant was properly served with notice to commence suit to enforce a lien pursuant to the Mechanics Lien Act and that notice was not ambiguous in naming plaintiff.

¶ 2 Defendant, Glenwood Properties, Inc., filed a mechanics lien against plaintiff, Glenwood Resort Owners' Association, and the owners of the lots in Glenwood Resorts who were members

of the association. Plaintiff served defendant with notice to commence suit to release the lien and filed a complaint for statutory penalties for failure to release the lien under the Mechanics Lien Act (Act) (770 ILCS 60/0.01 *et seq*. (West 2008)). In conjunction with the complaint, plaintiff moved to certify the claim as a class. The trial court denied plaintiff's request for class action certification. It then found defendant liable for failing to enforce the lien and awarded plaintiff a $2,500 statutory penalty. Plaintiff appeals the denial of its request to certify the claim as a class action. Defendant cross-appeals, arguing that the statutory penalty should not have been awarded because plaintiff failed to properly serve notice. We affirm.

¶ 3 Glenwood Resort Owners' Association is a corporation that owns real property in Glenwood Resorts, an RV resort park in Marseilles, Illinois. It is also an association consisting of approximately 400 members who own lots in the resort. The members of the association each own lots, individually, held in fee simple estates.

¶ 4 Defendant, Glenwood Properties, owns Glenwood Resorts and maintains a common roadway, known as Valley Road, within the resort that is used by the members of the association as residents and owners. Defendant sought payment for the cost of maintaining the road, and the resort owners' association refused to pay.

¶ 5 On October 6, 2006, defendant filed a mechanics lien with the county recorder's office in the amount of $89,908.43 against the properties owned by plaintiff and the individual lots in Glenwood Resorts. On September 28, 2007, plaintiff filed, with the county recorder, a notice to commence suit to enforce the lien. The notice stated:

> "Pursuant to 770 ILCS Section 60/34, written demand of Glenwood Resort Owners' Association by and through their attorney, Alan Howarter, to commence suit to enforce the lien on the described property on attached Exhibit A."

An affidavit attached to the notice stated that James Bertagnoli delivered the notice to commence suit to Lee Gold on September 25, 2007, in person. Bertagnoli was a resident of the resort and a member of the board of the resort owners' association. The parties indicate that Bertagnoli was deceased at the time of trial.

¶ 6 On February 26, 2008, Howarter delivered a letter to the president of Glenwood Properties, David Goldman, informing him that notice to commence suit had been filed in the recorder of deeds office on September 28, 2007, and served on his agent, Gold, on September 25, 2007. A copy of the notice was enclosed. The letter also notified Goldman that he had 30 days to commence suit or forfeit the lien from the date of service and that since suit was not filed within the proper time, the lien was forfeited. Pursuant to statute, Howarter demanded that Goldman sign the enclosed release within 10 days and stated that his failure to do so would result in the filing of a complaint for statutory penalties.

¶ 7 On March 31, 2008, plaintiff filed a complaint for statutory penalties. Count I requested statutory damages in the sum of $2,500, plus costs and attorney fees, under section 35 of the Act. Count II sought class certification. The trial court denied plaintiff's request to certify the cause as a class on the basis that the 400 lot members were not named in the notice demanding suit.

¶ 8 Defendant subsequently filed an motion to dismiss count I, claiming that service by plaintiff was defective because, among other things, Gold was not an officer or agent of Glenwood Properties. In response, plaintiff filed a brief and attached to it three transcripts of proceedings in which Goldman and Gold testified that Gold was employed by Glenwood Properties as the park manager, that he had general operation and maintenance responsibilities at the resort, and that he was given the title of "property manager."

¶ 9 At the hearing, Ed Payne testified that on September 25th, 2007, he was riding in a golf cart with James Bertagnoli looking for Gold so Bertagnoli could serve him papers. They met Gold on Valley Road on the bridge, and Bertagnoli handed him the papers. Bertagnoli told Payne that the documents were "court papers." On cross-examination, Payne admitted that he did not know the contents of the papers.

¶ 10 Gold testified that he knew Bertagnoli and Payne, but denied that he had received the notice to commence from Bertagnoli. Counsel for defendant asked Gold if he had ever seen the notice to commence suit document before the hearing. He stated, "Not that I'm aware of." On cross-examination, Gold testified that he was the park manager for the resort in 2007.

¶ 11 Goldman also testified. He claimed that he first received the notice to commence suit when he received a copy of the document attached to the demand to release lien served on him in open court on February 26, 2008.

¶ 12 The trial court found that the notice to commence was served on Gold as an agent of defendant. It further determined that since defendant did not release the mechanics lien within 10 days after written demand, it was in violation of section 35 of the Act. The court concluded that defendant was liable for failure to commence suit and adjudicated a single statutory penalty in the amount of $2,500, plus attorney fees and costs.

¶ 13 I. APPEAL

¶ 14 On appeal, plaintiff argues that the trial court erred in denying its motion to certify the statutory penalties suit as a class action.

¶ 15 To succeed on a statutory penalties claim, the Mechanics Lien Act requires two demands be served on the person claiming the lien. First, section 34 states:

"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, 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, *** or by personal service." 770 ILCS 60/34 (West 2008).

Second, section 35 of the Act states:

"Whenever a claim for lien has been filed with the recorder of deeds, either by the contractor or sub-contractor, and is paid with cost of filing same, or where there is a failure to institute suit to enforce the same after demand as provided in the preceding section within the time by this Act limited the person filing the same or some one by him duly authorized in writing to do so, shall acknowledge satisfaction or release thereof, *** and on neglect to do so for 10 days after such written demand he or she shall be liable to the owner for the sum of $2,500, which may be recovered in a civil action together with the costs and reasonable attorney's fees of the owner, lienor, or other person interested in the real estate, or his or her agent or attorney incurred in bringing such action." 770 ILCS 60/35 (West 2008).

¶ 16 Under section 2-801 of the Code of Civil Procedure, a class may be certified if the proponent establishes the following prerequisites: (1) the class is so numerous that a joinder of all members is impracticable; (2) there are questions of fact or law common to the class that predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interest of the class; and (4) the class action is an

appropriate method for the fair and efficient adjudication of the controversy. 735 ILCS 5/2–801 (West 2008).

¶ 17 In deciding whether to certify a class, a court may consider any matters of fact or law properly presented in the record, including any pleadings, depositions, affidavits and testimony that may have been adduced at hearings. *Brown v. Murphy*, 278 Ill. App. 3d 981, 989 (1996). A trial court's assessment of whether a proposed class meets the requirements of section 2-801 is reviewed deferentially. *Smith v. Illinois Central R.R. Co.*, 223 Ill. 2d 441, 447 (2006). Certification of a class lies within the sound discretion of the trial court and will be reversed on appeal only if there is an abuse of discretion or if impermissible legal criteria are applied. *Purcell & Wardrope Chartered v. Hertz Corp.*, 175 Ill. App. 3d 1069, 1074 (1988).

¶ 18 For a statutory penalties claim to be valid, the party asserting the claim must comply with the requirements of both sections 34 and 35 of the Act. In this case, plaintiff is a corporation that owns real estate listed in defendant's mechanics lien. Plaintiff filed notice to commence suit under section 34 as "Glenwood Resort Owners' Association." The notice did not name the additional 400 members of the association or claim to be representing the class. No other section 34 notice was given. Because none of the members of the association provided notice to commence suit or were noted as members of the class, they cannot seek the statutory relief provided under section 35 of the Act. Thus, plaintiff failed to meet the necessary requirements under the Mechanics Lien Act for other parties to be members of the class it now seeks to establish. The trial court considered plaintiff's notice to commence suit, the affidavit attached to the notice and the pleadings filed in response to the class action motion, and denied class certification of plaintiff's statutory penalties claim. The court's decision was not an abuse of discretion.

¶ 19 II. CROSS-APPEAL

¶ 20 A. Proper Service of Notice

¶ 21 On cross-appeal, defendant argues that the trial court erred in finding that plaintiff properly served defendant with notice on September 25, 2007.

¶ 22 The law is well established in Illinois that a decision based on conflicting evidence should not be disturbed on appeal unless it is contrary to the manifest weight of the evidence. Unless the opposite conclusion is clearly evident from the record, the reviewing court will not substitute its judgment for that of the trier of fact on matters of credibility of a witness, weight of evidence and the inferences drawn from the evidence. *Best v. Best*, 223 Ill. 2d 342, 350 (2006).

¶ 23 At the hearing on the issue of notice, plaintiff argued that on September 25, 2007, Bertagnoli served Gold, as agent of defendant, with section 34 notice. Attached to its original complaint was an affidavit, signed by Bertagnoli, stating that he served Gold with notice in person on September 25, 2007. In addition, Payne, an acquaintance of both Bertagnoli and Gold, testified that he witnessed Bertagnoli serve Gold with court papers on that date. Although, Gold and Goldman denied that that they were served with any documents on September 25, or that they received notice from Bertagnoli, the trial court found that notice to commence suit was properly served. We find an opposite conclusion is not clearly evident from the record.

¶ 24 B. Ambiguous Notice under Section 34 of the Act

¶ 25 Next, defendant maintains that it was unclear from the language of the notice to commence suit and the demand letter whether defendant was to take action for the lien against plaintiff or its members. It argues that since notice was ambiguous, no statutory penalty should have been awarded to plaintiff.

¶ 26 Notice under section 34 of the Act is jurisdictional. *M.L. Ensminger Co. v. Chicago Title & Trust Co.*, 74 Ill. App. 3d 677, 678 (1979). The purpose of notice is to apprise the party being notified of the demands made in order to give that party an opportunity to support or oppose the matter at issue. *Village of Southern View v. County of Sangamon*, 228 Ill. App. 3d 468, 472 (1992).

¶ 27 Here, the notice to commence suit filed by plaintiff states that written demand to commence suit to enforce the lien is made by "Glenwood Resort Owners' Association," and the pleading is signed, "Alan Howarter, as attorney for Glenwood Resort Owners' Association." Further, the demand letter states that notice to commence suit has been filed with the recorder of deeds office and that the lien has been forfeited. It demands release of the lien within ten days and notes that defendant's failure to do so will result in the commencement of a statutory penalties suit. It is also signed by Alan Howarter, as the "attorney for Glenwood Resort Owners' Association."

¶ 28 We find notice was unambiguous. The notice to commence suit and the letter apprise defendant that the party filing the action is Glenwood Resort Owners' Association. Neither document indicates that the individual members of the association will be named as additional plaintiffs. In this case, defendant had notice that the statutory penalties complaint would be filed by Glenwood Resort Owners' Association. The trial court held a hearing and assessed a penalty of $2,500, plus costs in favor of plaintiff, Glenwood Resort Owners' Association. We find no error in the court's application of sections 34 and 35 of the Act.

¶ 29 III. CONCLUSION

¶ 30 The judgment of the circuit court of La Salle County is affirmed.

¶ 31 Affirmed.