2016 IL App (3d) 140821-U

Order filed February 25, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2016

OTTO BAUM COMPANY, INC., an Illinois Corporation, Plaintiff-Appellee, v. SUD FAMILY LIMITED PARTNERSHIP, a Wisconsin Limited Partnership, GIAN C. SUD, individually, doing business as SUD Family Limited Partnership, and NANCY A. SUD, individually, doing business as SUD Family Limited Partnership, Defendants-Appellants, and METHODIST SERVICES, INC., an Illinois not for profit corporation, UNKNOWN OWNERS and UNKNOWN NECESSARY PARTIES, Defendants.	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois, Appeal No. 3-14-0821 Circuit Nos. 09-CH-310 & 09-CH-311
OTTO BAUM COMPANY, INC., an Illinois Corporation, Plaintiff-Appellee,	)	Honorable Michael P. McCuskey, Judge, Presiding.

v.

SUD FAMILY LIMITED PARTNERSHIP, a Wisconsin Limited Partnership, SUD'S OF PEORIA, INC., an Illinois corporation,

Defendants-Appellants,

and

COMMERCE BANK NATIONAL ASSOCIATION, a national banking association,

Defendant-Appellee,

and

METHODIST SERVICES, INC., an Illinois not for profit corporation, REGIONS BANK, an Alabama banking corporation, BUSEY BANK, an Illinois banking corporation, PEORIA MOB OWNERS, LLC, a Delaware limited liability company, THE DASCO COMPANIES, LLC, a Florida corporation, THE METHODIST MEDICAL CENTER OF ILLINOIS, an Illinois not for profit corporation, METHODIST HEALTH SERVICES CORPORATION, an Illinois not for profit corporation, FARNSWORTH GROUP, INC., an Illinois corporation, P.J. HOERR, INC, an Illinois corporation, CITY OF PEORIA, UNKNOWN OWNERS and UNKNOWN NECESSARY PARTIES,

Defendants.

PRESIDING JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: A judgment in favor of a contractor in a breach of contract action, and foreclosing on mechanics liens, was upheld on appeal because the facts supported the trial court's conclusion that the contractor acted pursuant to oral contracts that were authorized by the owner through its agent. The facts alleged in the pleadings sufficiently stated the agency relationship and the oral contracts, the terms of which were reflected in unsigned written contracts. A bank that purchased one of the owner's lots was entitled to damages in the amount necessary to defend against the contractor's claims and to satisfy the lien, but was not entitled to keep the property and be reimbursed for the purchase price.

¶ 2 The defendants, the Sud Family Limited Partnership (SFLP), Sud's of Peoria, Inc., Gian Sud, and Nancy Sud (collectively, the Sud defendants), appealed from judgments entered in favor of the plaintiff, Otto Baum Company, Inc. (Otto), foreclosing two mechanics liens and finding breaches of oral contracts, denying SFLP's counterclaims, and entering judgment in favor of the defendant, Commerce Bank.

¶ 3 FACTS

¶ 4 SFLP was a limited partnership that owned and leased commercial real estate. In 2004, SFLP purchased 40 acres of land in Peoria to build an automobile dealership, which was to be built primarily on one (Lot 3) of the five lots, on approximately eight acres. A general contractor, Core Construction of Illinois (Core), was to construct the automobile dealership. The written contract between Core and SFLP was a $7,833,900 design-build contract, which was fully paid by SFLP. However, after Core was fully paid, SFLP continued to receive invoices for

work done by Otto, who had done the excavating work on the property. SFLP contends that this work was paid for under the Core contract.

¶ 5 Otto filed two lawsuits against SFLP, and other defendants, which were consolidated for trial. The first lawsuit (09-CH-310) involves construction work performed by Otto on Lot 5 of the property, which the parties refer to as the Sud Plaza subdivision. The First Amended Complaint alleged claims to foreclose the mechanics lien, breach of contract, unjust enrichment, and *quantum meruit* (Lot 5 complaint). Otto sought $254,589.00, plus interest and attorney's fees, for the preparation of Lot 5. The second lawsuit (09-CH-311) involved the construction of the roadway and contained the same claims (roadway complaint). Otto alleged that it had constructed 1,000 feet of roadway, and sought $225,896.78, plus interest and attorney's fees. Commerce Bank was also named as a defendant. SFLP filed counterclaims against Otto for slander of title and to quiet title.

¶ 6 The evidence at trial established that SFLP purchased 40 acres of property at the intersection of Illinois Route 6 and Allen Road in Peoria pursuant to a warranty deed dated June 25, 2004. Gian Sud testified that he had a doctorate in biomedical sciences and was a professor before he purchased his first car dealership. Dr. Sud and his wife, Nancy Sud, were the general partners of SFLP, which was a limited partnership. Dr. Sud was also the president of Sud's of Peoria, Inc., which was an Illinois corporation. Dr. Sud testified that he began working with Clark Engineering, which later became STS, in late 2004 to work on ingress and egress to the property. Dr. Sud testified that he wanted to build his car dealership on the 40 acres and sell the rest of the property. Dr. Sud could not recall when he was introduced to Core, but he testified that he met with Core in April or May of 2006, and Core made a verbal presentation regarding the dealership project. Dr. Sud testified that he told Core that he needed a turnkey operation,

which Dr. Sud testified that he believed would include the dealership and the road. Dr. Sud testified that he hired Lee Austin of STS through Core, and Otto was hired through Core.

¶ 7 In an agreement dated April 25, 2006, the owner of the property, which was listed as Suds of Peoria Inc., and the contractor, Otto, agreed to what the parties refer to as the rough grading contract for a total of $366, 230.00. This contract covered the dirt work that was necessary to prepare lots 1, 2, and 3 for the car dealership. The agreement was signed by Dr. Sud and Tom Reuter, a project manager at Otto, although Austin testified that Dr. Sud did not actually sign the contract until November 2006, when the work was mostly complete. STS was identified as the architect and owner's representative. According to Reuter, STS directed Otto to have all communications addressed to STS as the owner's representative. Reuter testified that the architect engineer was the owner's representative on most of his jobs. There was one change order associated with the rough grading project, for $4,264, which was signed by Reuter for Otto, Don Hemphill for STS, and Gian Sud for SFLP. Hemphill was an engineer for STS, and he testified that he was the project manager for the Sud development while Austin, also an engineer at STS, was the project director. By email dated August 30, 2006, Hemphill directed Otto to submit pay requests to STS rather than directly to the owner. Otto fully performed this contract and was fully paid as of February 6, 2007. According to Reuter, he told STS that Otto needed to be fully paid on the rough grading contract before it would start on the roadway.

¶ 8 In June 2006, Austin wrote a letter to Dr. Sud detailing the costs of construction to develop the property. The attached document detailed a summary of costs, totaling $2,226,000.00, but did not reference the construction of the dealership. Austin testified that he discussed it with Dr. Sud.

¶ 9 On September 19, 2006, SFLP entered into a contract with Core to build the car dealership for the total contract price of $7,833,900. The owner was typewritten on the agreement as Sud's of Peoria, Inc., but a correction initialed by Dr. Sud listed SFLP as the owner. The agreement referenced documents that were used to prepare the proposal, including civil engineering drawings prepared by STS dated April 17, 2006. The agreement specified all the things that it included, but specifically did not include subdivision work and site access. Also, the agreement provided that the site preparation was to be completed under a separate contract.

¶ 10 Around the same time that SFLP entered into contract with Core, STS prepared roadway project plans for SFLP that were sent out to solicit bids from contractors. There were a number of emails dated between the dates of October 5-18, 2006, among STS and the various contractors regarding the bidding process. Three contractors, including Otto, submitted bids. Austin testified that the bids were submitted to Dr. Sud, Austin recommended the lowest bid, and Dr. Sud agreed to the recommendation. On November 3, 2006, Reuter was informed by Hemphill at STS that Otto was awarded the roadway contract and Reuter was directed to prepare the contract. Reuter testified that he prepared the contract as directed, copying and pasting from the prior rough grading contract, dated November 9, 2006, for the amount of $374,619.37, and signed it and sent it to STS. Austin, by transmittal letter dated November 28, 2006, sent two copies of the contract to Gian Sud. Dr. Sud testified that he never received the proposed contract, and there is no copy of the contract signed by anyone at SFLP. Austin testified that he could not specifically remember a follow-up conversation with Dr. Sud regarding the November 9, 2006, contract, but stated that he likely did. However, Austin testified that although he did not have the authority to order work, he had verbal authority from Dr. Sud or someone at SFLP to authorize or approve

the work by Otto under this contract. Dr. Sud testified that he was aware that Otto was going to construct the road, but testified that he believed that it was being done under the Core contract.

¶ 11 Austin testified that, after the roadway contract was signed by Reuter and sent to SFLP, Austin conducted a preconstruction meeting. Austin testified that Reuter and Dr. Sud were present, along with some others. Reuter testified that he was at the meeting in Dr. Sud's office, along with Austin, Dr. Sud, and possibly Suniti Sud. According to Austin, coordination and scheduling of the roadway and Lot 5 dirt work were discussed at the meeting, without objection from Dr. Sud. During the meeting, Dr. Sud requested a sign soliciting clean dirt for fill for lot 5, which is referenced in the November 28, 2006, letter from Reuter to STS.

¶ 12 Lot 5 was expected to be sold to Methodist Services, Inc. (Methodist). On November 22, 2006, a proposal to develop the lots adjacent to the roadway, including Lot 5, was forwarded by Otto to STS. The original estimate was $1,525,825. On February 5, 2007, Reuter sent a revised estimate to STS for a total of $519,500. In April 2007, an email was sent out to other contractors at Dr. Sud's request to check the fairness of Otto's bid. In an email dated May 9, 2007, Austin informed Reuter that it had the prices from the other contractors and was ready to talk a firm price with Otto. Otto began processing the dirt dumped by others on Lot 5 in late May 2007, around the same time the roadway construction began. Reuter testified that proceeding with the work before the contract was finalized was not unusual with STS. Reuter testified that he believed that SLFP had authorized the work, as relayed to Otto by STS as the owner's representative. Austin testified that he had verbal authority from Dr. Sud to complete the dirt work on Lot 5 because Dr. Sud wanted to get the lot sold.

¶ 13 The contract to sell Lots 2 and 5 to Methodist was signed on May 5, 2007, for a total purchase price of $2,737,984. At that time, "fill on the property" language was stricken from the

contract and the contract only required that the seller complete structural fill and compaction of roadway to 95%. The sale contract was subject to board approval and contained a 60-day inspection period. On June 11, 2007, Austin met with Michael Bryant, then president of Methodist, on site at Lot 5, at Dr. Sud's request. At the meeting, Bryant directed Austin as to which trees needed to be cleared and what earthwork elevations had to be raised so he could present it to his board regarding the purchase of the property. Austin verbally directed Reuter via telephone, and an employee on-site, as to what work was to be done. Dr. Sud testified that he had no recollection of these events. On September 10, 2007, Otto sent a recalculated bid to STS based on the work done until Otto stopped work on Lot 5. No one from SFLP ever signed the Lot 5 dirt work contract, and the $254,589 balance was never paid.

¶ 14 During the same timeframe as the work on the roadway and Lot 5, STS and SFLP entered into a written contract for engineering services for Sud Plaza development. The contract was created on May 21, 2007, and signed by Dr. Sud for SFLP on July 2, 2007. The contract noted that STS had already been performing services for SFLP, and had been paid for fees totaling $177,400 through December 2006. The contract estimated that the remaining fees under the contract would total $125,000. The contract provided that STS would provide civil engineering design, "[a]ssistance with bidding and preparation of contracts for the work to construct the various subdivision improvements and construction observation," and "[p]rofessional services and or assistance with other work necessary to develop the subdivision…"

¶ 15 During the spring of 2007, the Greater Peoria Sanitary District required changes to the original sanitary sewer plans. Otto prepared and tendered an estimate of the changes to the roadway contract dated March 26, 2007, to STS. STS prepared "Change Order No. 001" reflecting the increase of $41,115.80. The change order was signed by Austin on March 30,

2007, and transmitted to Reuter on the same day. Reuter signed the change order on April 3, 2007, and returned it to STS. The change order was included in the documents transmitted to Dr. Sud on July 5, 2007, along with Pay requests 1, 2, and 3, and Otto discount letter, and the STS check sheet.

¶ 16 On July 19, 2007, work on the roadway stopped due to soft soil conditions. By letter dated July 27, 2007, to STS, Otto identified a lime stabilization solution costing $31,401.00. STS informed Otto that it was still waiting for approval from SFLP in an email dated July 30, 2007. According to Reuter, the issue was resolved at the site during a meeting between himself, Austin, and Dr. Sud. Austin and Dr. Sud had a meeting that Reuter could not hear, then Austin came over to where Reuter was standing and they discussed the fact that the lime stabilization was a change to the roadway project. Austin went back over and had another discussion with Dr. Sud. Austin then walked back over to Reuter. Reuter clarified that it was a change and Otto would need to be paid in order to do the work. This change was later referenced as "change 6" in the attachment to Austin's August 27, 2007, email that was sent to Karen Alexander, Dr. Sud's administrative assistant. The attachment indicated that the bid was $30,000, but as verbally agreed with Dr. Sud, SFLP would only bear the cost of $10,000. Alexander's response on the same date said "Doc said this is okay!" Austin testified that this email gave authorization for all seven changes referenced in the attachment. Austin forwarded this response to Reuter, informing Reuter that Dr. Sud had authorized the changes to the roadway project. The seven changes referenced in the attachment are reflected in Change order No. 2, which was prepared and signed by STS on the date of the email, and forwarded to Otto, and signed by Reuter on September 18, 2007.

¶ 17 The roadway was substantially completed by the end of September 2007, and the dealership opened in early October 2007. According to Austin, Otto completed all of the work required of it in the unsigned contract and the two change orders. On September 26, 2007, STS sent SFLP a transmittal letter including Otto's pay requests 4, 5, and 6; a retainer reduction request; change order 2 signed by STS and Otto, and the additional work attachment. STS found the pay requests to be in order. SFLP paid Otto's pay request 4 in the amount of $22,419.72. Pay requests 5 and 6 were never paid.

¶ 18 Otto recorded its roadway mechanics lien on February 8, 2008. The lien identified Otto as a general contractor who had done work for the owner, SFLP, pursuant to the November 9, 2006, standard form subcontract agreement. The lien states that Otto last worked on the roadway project on October 17, 2007. The unsigned agreement dated November 9, 2006, along with the two change orders, were attached to the lien. Otto filed suit on July 2, 2009, alleging it was due the unpaid contract amount of $180,717.42 ($225,896.78 less a partial assignment) plus interest. The total due as of July 2, 2014, principal and interest, was $306,344.44.

¶ 19 Otto also recorded its Lot 5 dirt work mechanics lien on February 8, 2008. The lien identified Otto as the general contractor and sought a lien on work done by Otto for the owner, SFLP, pursuant to a written agreement dated September 10, 2007. The written, but unsigned, estimate and agreement was attached. The lien stated that Otto's last day worked on the Lot 5 project was October 31, 2007. The Lot 5 lawsuit was also filed on July 2, 2009. The principal amount due on the Lot 5 contract was $254,589, plus interest. The total, principal and interest, due under the mechanics lien as of July 2, 2014, was $424,576.98.

¶ 20 With respect to Commerce Bank, it entered into a purchase agreement with SFLP on June 6, 2008, for the purchase of Lot 1 for the purchase price of $469,000. The purchase agreement

required that Lot 1 be free and clear of all liens. Between the time the purchase agreement was signed and the closing date of September 30, 2008, Commerce Bank learned of Otto's lien claim against Lot 1. At the closing, Commerce Bank's counsel indicated that it would not close without a release of that lien. At the closing, Suniti Sud, a limited partner of SFLP, provided a signed release of Otto's lien claim, stating that it had been resolved and the release just needed to be recorded. Suniti Sud also provided an affidavit signed by Dr. Sud, representing that there were no debts or outstanding liabilities that would give rise to a mechanics lien. Based upon Suniti Sud's representation, Commerce Bank went forward with the transaction. However, although Otto had signed the release as part of a proposed settlement, the settlement was never completed, Otto was never paid, and the release was never recorded. Chicago Title issued an owner's policy of title insurance to Commerce Bank. After Commerce Bank was named as a defendant in the roadway case, it filed a nine count First Amended Counterclaim for damages against SFLP, Gian Sud, and defendant Nancy Sud, alleging breach of contract, breach of warranty, contractual indemnity, fraudulent misrepresentation, fraudulent concealment, and unjust enrichment. The trial court granted in part and denied the Sud defendants' motion to dismiss the fraud and unjust enrichment counts, denying the motion with respect to the claims of fraudulent misrepresentation but dismissing the counts alleging fraudulent concealment and unjust enrichment. In its contract and warranty counts, Commerce Bank alleged that it was damaged in the amount of its costs to defend against Otto's lien and lawsuit and the amount to release the lien. In the fraudulent misrepresentation counts, Commerce Bank sought the same damages, but also sought to recover for the diminished value of the property. It did not allege punitive damages. Commerce Bank's defense was provided by Chicago Title, under a claim made under the title policy. Shortly after the trial began, Chicago Title, on behalf of Commerce

Bank, agreed to pay Otto to settle the lien as to Lot 1. That settlement agreement, for a total of $46,500, was reached on April 23, 2014.

¶ 21 Otto's counsel hired Randall Neff, a real estate appraiser, to give his opinion as the value of Lots 1-5 on three specific dates. Neff testified that there were some assumptions given to him regarding the condition of the property. He was to do a land-only valuation on the lots, not taking into account any buildings or structures. Neff testified that the entire 40-acre tract had not been subdivided or developed as of the first date, January 1, 2006. On that date, Neff's opinion was that the value of the property was $2,500,000. For the second date, January 1, 2008, Neff assumed that the property had been developed into five commercial lots with the infrastructure completed. As of that date, Neff's opinion was that Lot 1 was worth $470,000, Lot 2 was worth $2,000,000, Lot 3 was worth $2,500,000, Lot 4 was worth $1,800,000, and Lot 5 was worth $820,000. Neff considered market conditions, but opined that the values were the same on the third date, May 29, 2013, the date of the appraisal.

¶ 22 The trial court found that the written design-build contract between Core and SFLP was for the construction of the dealership building on Lot 3; it did not encompass construction of the roadway or the dirt work on the lots other than Lot 3. The trial court found that there were valid oral contract via agency claims with respect to the work done on the roadway and Lot 5. Specifically, the trial court found that although there was no executed contract for the roadway project, SFLP was obligated under an oral agreement, sufficiently defined as to the scope, time, and price. The trial court noted the constant communication between STS, Otto, Suniti Sud and Dr. Sud throughout the planning and duration of the roadway project. The trial court found that Dr. Sud and/or SFLP was fully informed as to the detail of the work, the nature of the progress, and the necessity for changes. With respect to Lot 5, the trial court ruled that there was a valid

oral contract between Otto and SFLP to accomplish the required earthmoving activity for Lot 5, with Dr. Sud's knowledge, permission, and encouragement.

¶ 23 The trial court entered judgments in favor of Otto on both its mechanics liens and on the breach of contract claims, and entered judgments in favor of Otto on SFLP's counterclaims. The judgments were entered against SFLP, Gian Sud individually, and defendant Nancy Sud individually, jointly and severally. In the roadway case, the money judgment in favor of Otto was for $180,717.42, plus costs of $4,085.62, attorney's fees of $150,033.18, and interest of $62,811.16. A judgment of foreclosure and sale as to Lots 2-5 was entered on the roadway mechanics lien claim. As to the Lot 5 case, the trial court entered a money judgment in favor of Otto in the amount of $254,589, plus costs of $779.81, attorney's fees of $67,393.27, and interest of $85,003.12. A judgment of foreclosure and sale as to Lot 5 was also entered.

¶ 24 The trial court also entered judgment in favor of Commerce Bank. When giving its judgment from the bench, the trial court noted that the counterclaim involved a claim of fraudulent misrepresentation by the Sud defendants. The trial court noted that there was no waiver on behalf of Commerce Bank. It also noted that a false representation was made at closing: that Otto's lien claim had been resolved and the release would be immediately recorded. The court stated that it was a reasonable inference that Suniti Sud, as a limited partner providing legal services to SFLP, was aware that the claim had not been paid, but, knowing that, she represented that the release would be filed immediately. That representation induced the closing. The trial court further found that the testimony at trial established that SFLP breached the purchase agreement and the warranty terms of the warranty deed. SFLP and the individual members of the limited partnership were responsible and liable for that conduct and action. The trial court entered judgment in Commerce Bank's favor "on its First Amended Counterclaim"

against SFLP, Gian Sud, and Nancy Sud, jointly and severally, in the amount of $696,981.49. That amount reflected damages in the amount of the purchase price of $469,000, the $46,500 paid to Otto to release the lien, and attorney's fees and costs of $181,481.49. All of the orders contained Rule 304(a) language.

¶ 25 The Sud defendants filed a posttrial motion on July 29, 2014, which was denied on September 26, 2014. The Sud defendants then filed their notice of appeal on October 14, 2014.

¶ 26 ANALYSIS

¶ 27 I. Otto's pleadings

¶ 28 SFLP argues that the trial court's conclusion, that SFLP was obligated on oral contracts that existed between Otto and SFLP due to an agency relationship between STS and SFLP, was not pled in the complaints. SFLP argues that Otto pled that there were written contracts and did not plead an oral contract or an agency relationship between STS and SFLP. Otto contends that it pled the necessary facts to recover. Otto alleged that SFLP, through its authorized agent, entered into contracts for the roadway and Lot 5. Otto did not allege that those contracts were fully executed. Otto attached the unsigned contracts and the change orders, what Otto alleges made up the partly written and partly oral contracts, as exhibits to the complaints and to the mechanics liens.

¶ 29 Pleadings are to be liberally construed. 735 ILCS 5/2-603(c) (West 2012). However, it is a fundamental rule that a party is limited to recovering on the issues and theories it has alleged in its pleadings. *Catom Trucking, Inc. v. City of Chicago*, 2011 IL App (1st) 101146, ¶ 25 (citing *Kincaid v. Ames Department Stores, Inc.*, 283 Ill.App.3d 555, 568 (1996)). The sufficiency of pleadings is a question of law, which we review *de novo*. *In re Andrea D.*, 342 Ill. App. 3d 233, 242 (2003).

¶ 30 The Lot 5 mechanics lien stated that Otto performed general contractor work pursuant to a written agreement, which was attached as an "Estimate & Agreement" that was not signed by SFLP. The roadway mechanics lien stated that Otto performed work for SFLP pursuant to a standard form subcontract agreement, which was also attached and unsigned by SFLP. Both amended complaints alleged writings, identified as "contracts," that defined the scope of the work but did not allege that the contracts were signed. Both complaints have the referenced, unsigned, documents attached.

¶ 31 It is clear that a party named in a contract may, by his acts and conduct, indicate his assent to its terms and become bound by its provisions even though he has not signed it. *Landmark Properties, Inc. v. Architects Int'l-Chicago*, 172 Ill. App. 3d 379, 383 (1988). The complaints sufficiently alleged contracts based on the terms of the writings, whether the writings were signed by SFLP. The terms of the alleged contract in the Lot 5 case were described in the "Estimate & Agreement" attached to the complaint. In the roadway case, the terms of the alleged contract were contained in the AIA standard form agreement and the two change orders. Whether or not SFLP agreed to the terms of those contracts was a matter of proof for the trial court.

¶ 32 The complaints also alleged facts sufficient to find an agency relationship between SFLP and STS. For example, the Lot 5 complaint states:

> "6. By bid dated July 23, 2007 OTTO BAUM proposed to perform the Grading Work for a lump sum of money based on structural fill grades designated at said time by [SFLP]'s authorized engineering firm, STS Consultants, which bid was accepted by [SFLP].
>
> ***

8. The structural fill grades for Lot 5 were revised after the July 23, 2007 bid, and a final grading plan was developed by STS Consultants for [SFLP] in conjunction with the contemplated sale of Lot 5 by [SFLP] to Methodist ("Final Grading Plan").

* * *

20. On September 19, 2007, Plaintiff invoiced [SFLP], through STS Consultants, the Project architect***" (Lot 5 Complaint).

¶ 33 The roadway complaint states:

"6. On November, 9, 2006, [SFLP], by its authorized agent, entered into a "Standard Form Subcontract Agreement between Owner and Contractor" with [Otto] ***

* * *

18. On April 27, 2007, as required by Article 4.1 of the Contract [Otto] invoiced [SFLP], through STS Consultants as the Project architect***" (Roadway complaint).

¶ 34 We find that, although the complaints did not allege nor attach signed contracts, the factual allegations in the complaints, along with the attached exhibits, sufficiently alleged the contracts at issue. See *Burton v. Airborne Express, Inc.*, 367 Ill. App. 3d 1026, 1034 (2006) (exhibits are a part of the complaint to which they are attached). Also, the factual allegations in the complaints sufficiently alleged an agency relationship between STS and SFLP.

¶ 35 II. Were judgments entered in favor of Otto against the manifest weight of the evidence?

¶ 36 SFLP argues that the trial court's finding of oral contracts between SFLP and Otto, with STS acting as an agent of SFLP, was clearly erroneous. Otto argues that the evidence supported the trial court's finding that there were oral contracts between SFLP and Otto for both the roadway and Lot 5. There seems to be no dispute that the work was done by Otto on both

projects and that Otto was only paid for a portion of the roadway project. The dispute is whether both projects fell under the larger design-build contract with Core.

¶ 37 A trial court's construction of an oral agreement between parties will be accepted on appeal unless it is against the manifest weight of the evidence and an opposite conclusion is clearly warranted. *Edward M. Cohon & Associates, Ltd. v. First National Bank of Highland Park*, 249 Ill. App. 3d 929, 941 (1993). A judgment is against the manifest weight of the evidence only if the opposite conclusion is clear or where the trial court's findings appear to be unreasonable, arbitrary, or not based on evidence. *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 13.

¶ 38 Based on the evidence produced at trial, the trial court concluded that the design-build contract with Core did not include the roadway project or Lot 5, primarily because those projects were not included in the description of the car dealership project. The opposite conclusion is not clear from the evidence. The trial court found that STS's involvement was that of a firm offering engineering services to accomplish the Sud development on the 40-acre tract. The relationship between STS and SFLP was memorialized in a contract generated on May 21, 2007, that Dr. Sud signed on July 2, 2007, which as the trial court correctly noted was around the time period when a substantial amount of work was done on the roadway and Lot 5. Although SFLP did not sign the contracts, the trial court found that the evidence established that SFLP had contractually obligated itself to Otto under oral agreements that were sufficiently defined as to scope, time, and price. This conclusion was not against the manifest weight of the evidence.

¶ 39 III. Validity of mechanics liens

¶ 40 SFLP argues that the lien claims do not meet the strict requirements of the Mechanics Lien Act because both claim that there was a written contract, the roadway contract names the

wrong party, all necessary parties were not named, the roadway liens were not valid on the adjacent lots, and the award of attorney's fees was improper without a finding that SFLP did not pay without just cause or right.

¶ 41 Since the rights created under the Mechanics Lien Act (Act) are statutory and in derogation of the common law, the technical and procedural requirements necessary for a party to invoke the benefits of the Act must be strictly construed. *Cityline Construction Fire & Water Restoration, Inc. v. Roberts*, 2014 IL App (1st) 130730, ¶ 10. Whether substantial compliance with a statutory provision has taken place presents a question of law that we review *de novo*. *In re Laura H.*, 404 Ill. App. 3d 286, 290 (2010).

¶ 42 Section 7 of the Act instructs a lien claimant to: (1) file the claim within four months after the completion of the work; (2) verify the lien by affidavit of the claimant or an agent or employee; (3) include a brief statement of the contract; (4) set forth the balance due; and (5) provide a sufficiently correct description of the lot, lots, or tracts of land to identify the same. *National City Mortgage v. Bergman*, 405 Ill. App. 3d 102, 108-09 (2010) (citing *Tefco Construction Co. v. Continental Community Bank & Trust Co.*, 357 Ill. App. 3d 714, 719 (2005); 770 ILCS 60/7 (West 2012). SFLP cites to the case of *Ronning Engineering Co. v. Adams Pride Alfalfa Corp.*, 181 Ill. App. 3d 753 (1989), in support of its argument that the mechanics lien failed to comply with section 7's requirement that the lien contain a brief statement of the contract. In *Ronning Engineering Co.*, the court found that the mechanics lien was properly dismissed because the lien described a written contract that was different than the contract alleged in the complaint. *Ronning Engineering Co.*, 181 Ill. App. 3d at 759. Specifically, the lien, and the attached contract, described a written contract entered into on September 20, 1985, between the plaintiff and a joint venture. However, the complaint sought to foreclose based

upon a verbal contract entered into on July 1, 1986, between the plaintiff and the owner of the joint venture.

¶ 43 A more recent case has clarified that the lien only needs to contain a sufficiently correct description of a contract to be enforceable; it does not need to be "absolutely correct and perfect." *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784, ¶ 141, *appeal denied*, 23 N.E.3d 1202 (Ill. 2015). In that case, a lien that described a written contract that was actually based on numerous correspondences, emails, and change orders, was a sufficient description of the contract. *Id.* ¶ 142. A separate lien that did not describe the exact capacities of the parties, whether the contract was with the LLC or the sole member-manager of the LLCS, substantially identified the parties and was sufficient under section 7. *Id.*

¶ 44 Otto's lien for the roadway states that it performed work pursuant to the Standard Form Subcontract Agreement Between Owner and Contractor dated November 9, 2006. That agreement was never signed by SFLP, but it sufficiently describes the same contract as alleged in the complaint. Also, the mechanics lien and the Standard Form agreement state the contract was between Otto and Suds of Peoria, Inc., rather than SFLP. The complaint alleges that the contract was entered into with SFLP. Otto contends that the trial court found that Suds of Peoria was an agent for SFLP, but that it not supported by the record. The trial court did find that Dr. Sud was the principal in a number of entities, including both of those just referenced. The claim for the contractor's lien alleged that the work was done pursuant to the subcontract agreement with Suds of Peoria, but was directed to SFLP and alleged that SFLP owned the property where the work was done. Thus, under *North Shore Community Bank & Trust Co.*, it appears that the contract is described sufficiently.

¶ 45 The lien for Lot 5 alleges a written agreement entered into between SFLP and Otto on September 10, 2007. The contract was an estimate and agreement that was never signed by SFLP. Similar to the contract in *North Shore*, the terms of the alleged written contract were actually based on a number of writings and correspondence, but was sufficiently described for purposes of the Act.

¶ 46 SFLP also alleges that not all necessary parties were named, arguing that STS was a necessary party because it was in the chain of contract between the claimant and the owner. Otto alleges that there was no chain of contracts; STS was SFLP's representative, but it was not a party to the contracts. Section 11 of the Act, which was amended in 2006, requires that claimants name all necessary parties when asserting a claim. 770 ILCS 60/11(b)(West 2012). Section 11(b) provides:

> "Each claimant shall make as parties to its pleading (hereinafter called "necessary parties") the owner of the premises, the contractor, all persons in the chain of contracts between the claimant and the owner, all persons who have asserted or may assert liens against the premises under this Act, and any other person against whose interest in the premises the claimant asserts a claim." 770 ILCS 60/11(b) (West 2012).

¶ 47 Neither party cites to any caselaw interpreting this provision as amended. We find that STS, as an agent of SFLP, was not in the chain of contracts. That provision would more appropriately apply to subcontractors or material providers that can potentially claim a lien themselves. See *Joseph T. Ryerson & Son, Inc. v. Manulife Real Estate Co.*, 207 Ill. App. 3d 622, 625 (1990) (subcontractor was a necessary party in an action by a material supplier to foreclose a mechanics lien against the owner).

¶ 48 SFLP also argues that the roadway lien, which the trial court held could be equally divided and foreclosed on all five lots, was not allowed because Illinois law does not permit liens on adjacent lots. SFLP argues that there was no improvement to the individual lots in connection with the Roadway. The trial court found that the liens were proper because the roadway was begun on the 40-acre tract before it was subdivided, and the roadway adjoined all five lots. The trial court distinguished the cases cited by SFLP on the basis that those bordering properties were not all owned by a common owner, or the road was an improvement, not a new construction. See *Smith v. Kennedy*, 89 Ill. 485 (1878); *Cronin v. Tatge*, 281 Ill. 336 (1917). That conclusion is supported by the record.

¶ 49 IV. Attorney fees under the Mechanics Lien Act

¶ 50 SFLP argues that attorney's fees were not recoverable under the Act because it did not pay "without just cause or right." Otto argues that SFLP's defenses were not well grounded in fact or warranted by law, so it did not have just cause or right to refuse to pay. The trial court found that SFLP had contracted to make the roadway and Lot 5 improvements with Otto and had failed and refused to pay without just cause or right. The general rule is that an unsuccessful party is not responsible for the payment of the other party's attorney fees. *Mirar Development, Inc. v. Kroner*, 308 Ill. App. 3d 483, 488 (1999). However, attorney's fees are recoverable when specifically authorized by statute or contract. *Id.* at 486. Section 17 of the Act provides:

> "If the court specifically finds that the owner who contracted to have the improvements made failed to pay any lien claimant the full contract price, including extras, without just cause or right, the court may tax that owner, but not any other party, the reasonable attorney's fees of the lien claimant who had perfected and proven his or her claim." 770 ILCS 60/17(b) (West 2012).

¶ 51 A claim is asserted "without just cause or right," when it is not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. 770 ILCS 60/17(d)(West 2012). The trial court found that SFLP's defenses were asserted without just cause or right and ordered reasonable attorney's fees. A trial court's decision whether to award attorney fees is a matter within its discretion and will not be disturbed absent an abuse of that discretion. *Central Illinois Electrical Services, L.L.C. v. Slepian*, 358 Ill. App. 3d 545, 550 (2005). The trial court concluded that SFLP contracted with Otto for the improvements, and then failed to pay Otto the full contract price. Since SFLP's failure to pay Otto was not well grounded in fact, the trial court's award of attorney's fees was not an abuse of discretion.

¶ 52 V. Slander of title and quiet title claims

¶ 53 SFLP filed two counterclaims, alleging the Otto had slandered SFLP's title to the property by filing false lien claims and requested quiet title to the property. SFLP argues that, due to the improper mechanics liens and the lack of any contracts, Otto slandered SFLP's title. The trial court entered judgment in favor of Otto on the counterclaims because there was no evidence in the record that Otto acted with malice in seeking to prefect and enforce a mechanics lien for the roadway project. The trial court found no valid basis to quiet title. In light of our holdings regarding the validity of the mechanic's liens, there is no basis for either of these claims.

¶ 54 VI. Interest on the roadway contract

¶ 55 SFLP argues that the trial court improperly accepted Otto's calculation of interest in the roadway case, which SFLP argues was more than $14,000 too much. SFLP argues that interest should have been calculated from the date when the road was completed, not the date of the

contract. Otto argues that the interest was calculated based upon the due dates of the pay requests and the judgment of $62,811.16 should be affirmed. Neither party cites to any caselaw, but neither party disputes the rate of 5% per annum. Based on the language on the judgment, the trial court based its award of interest upon the dates that the payments became due and were not paid. Thus, the interest was properly calculated.

¶ 56 VII. Commerce Bank judgment

¶ 57 Commerce Bank contends that we lack jurisdiction over the judgment in favor of Commerce Bank because SFLP failed to file a timely notice of appeal directed toward Commerce Bank's judgment and failed to file a posttrial motion directed to that judgment. Commerce Bank filed a motion to dismiss the appeal, which was taken with the case. Commerce Bank argues that since the posttrial motion was not directed at the Commerce Bank judgment, the notice of appeal should have been filed within 30 days, by August 1, 2014. SFLP argues that Commerce Bank's claims were derivative of Otto's mechanics liens claims, so the posttrial motion addressing the validity of the mechanics liens required a final ruling before the Commerce Bank judgment could be appealed. In ruling on motions to stay, the trial court found that the judgments were wrapped up together and it had jurisdiction over Commerce Bank due to the posttrial motion.

¶ 58 Jurisdiction in conferred upon an appellate court through the filing of a timely appeal. *Berg v. Allied Security, Inc.*, 193 Ill. 2d 186, 189 (2000). A notice of appeal must be filed within 30 days after the entry of the final judgment appealed from, or within 30 days after the order disposing of a timely postrial motion directed against the judgment. Ill. S. Ct. R. 303(a) (eff. June 4, 2008). For a motion to qualify as a posttrial motion for the purposes of Rule 303, it must be one which specifically requests one or more of the types of relief authorized in section 2-1203

of the Code of Civil Procedure (735 ILCS 5/2-1203 (West 2012), consisting of rehearing, retrial, modification or vacation of judgment. *Petition of Village of Kildeer to Annex Certain Prop.*, 162 Ill. App. 3d 262, 280 (1987) *aff'd sub nom. Petition of Village of Kildeer to Annex Certain Territory*, 124 Ill. 2d 533 (1988). Whether a posttrial motion is one directed against the judgment is determined by looking at the motion and determining if it attacks the original judgment or involves some independent determination. See *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 461 (1990) (a motion for attorney's fees is not a posttrial motion directed against the judgment); *Mo v. Hergan*, 2012 IL App (1st) 113179, ¶ 32 (a motion for an extension of time to file a postjudgment motion is not a motion directed against the judgment). Whether this court has jurisdiction is an issue of law we decide *de novo*. *Heartland Bank & Trust v. The Leiter Group*, 2014 IL App (3d) 130498, ¶ 13.

¶ 59 In this case, SFLP's posttrial motion asked the trial court to reverse the judgments entered in favor of Otto on the two mechanics lien counts. All of Commerce Bank's claims against SFLP were counterclaims and depended on Otto's valid mechanics lien against Lot 1. Consequently, if the trial court granted the posttrial motion, the original judgments would necessarily have been modified. See *McCarthy v. Denkovski*, 301 Ill. App. 3d 69, 73 (1998) (the granting of the defendants' posttrial motion for a judgment notwithstanding the verdict or a new trial on their counterclaim would have resulted in a modification of the original judgment and was thus directed against the judgment). Since a reversal of the mechanics lien would have resulted in a modification of Commerce Bank's claim against SFLP, the posttrial motion was directed against the judgment and we have jurisdiction. Thus, the motion to dismiss the appeal is denied.

¶ 60 VIII. Whether Commerce Bank concealed the real party in interest?

¶ 61 SFLP contends that Commerce Bank concealed that Chicago Title was the real party in interest. During the trial, SFLP learned that Chicago Title, pursuant to a title policy, had paid $46,500 to Otto to settle and obtain a release of the mechanics lien on Lot 1. Chicago Title was then entitled to recoup the $46,500 from any settlement of judgment against SFLP. SFLP argues that this violated the Code of Civil Procedure because Commerce Bank's counterclaims were actually subrogation claims, and Commerce Bank sustained no actual damage. Commerce Bank contends that it was the properly named party.

¶ 62 Chicago Title was obligated to pay the costs, attorneys' fees, and expenses incurred in the defense of any matter insured by the policy issued to Commerce Bank. However, Commerce Bank argues that, while Chicago Title recovered its $46,500 and the fees and costs, it recovered its damages of $469,000. SFLP's response is that the trial court order awarding the $469,000 was in error.

¶ 63 The doctrine of subrogation is a method whereby one who has involuntarily paid a debt or claim of another succeeds to the rights of the other with respect to the claim or debt. *Walker v. Ridgeview Construction Co., Inc.*, 316 Ill. App. 3d 592, 597 (2000). However, if an insured plaintiff has even a *de minimis* pecuniary interest in the lawsuit, that interest is sufficient to allow a subrogation action to be maintained in plaintiff's name. *Radtke v. International Heater Co., Inc.*, 140 Ill.App.3d 542, 544 (1986). In this case, Commerce Bank did sustain damages in excess of the $46,500 amount necessary to release Otto's lien, since the existence drew them into several years of litigation during which time the property remained vacant. Thus, Commerce Bank had at least a *de minimis* pecuniary interest based on the value of the property and/or its interest in keeping the property, and the counterclaim could be maintained in the name of Commerce Bank.

¶ 64 IX. Whether the judgment granted to Commerce Bank on its cross-claims were in error

¶ 65 Commerce Bank asserted a number of claims against SFLP, including fraudulent misrepresentation, breach of contract, and breach of warranty, all arising from SFLP's sale of Lot 1 to Commerce Bank. The trial court concluded that SFLP breached the purchase agreement and the terms of the warranty deed by selling Lot 1 subject to the mechanic's lien, and it awarded Commerce Bank the purchase price, the amount to release the lien, costs and fees, and allowed Commerce Bank to keep the lot. SFLP argues that this was in error, again contending that the mechanics liens were invalid (a premise that we have already rejected), but also arguing that there was no fraudulent misrepresentation and return of the purchase price was a windfall.

¶ 66 The evidence at trial supports the trial court's conclusion that SFLP breached the purchase agreement and the warranty terms in the warranty deed**.** The purchase agreement clearly required the property to be free of all liens, the Otto lien was a valid lien against Lot 1, and the Sud defendants breached the covenants in the warranty deed. The issue is, then, one of damages. In terms of breach of contract, the purpose of damages is to put the nonbreaching party into the position it would have been in had the contract been performed, but not in a better position; compensation awarded in a breach of contract action should not provide plaintiff with a windfall. *Walker*, 316 Ill. App. 3d at 596. Where an award of damages is made after a bench trial, the standard of review is whether the trial court's judgment is against the manifest weight of the evidence. *1472 N. Milwaukee, Ltd.*, 2013 IL App (1st) 121191, ¶ 13.

¶ 67 However, although the trial court did not specifically state that fraudulent misrepresentation was proven, it is clear that was the court's finding. In order to prove fraudulent misrepresentation, a plaintiff must prove: (1) a false statement of material fact; (2) knowledge or belief of the falsity by the party making it; (3) intention to induce the other party to

act; (4) action by the other party in reliance on the statement; and (5) damage to the other party resulting from such reliance. *Kopley Group V., L.P. v. Sheridan Edgewater Properties, Ltd.*, 376 Ill. App. 3d 1006, 1017 (2007). In rendering its decision, the trial court sequentially made findings on each element of such a claim. The trial court found that, first, "[t]he representation was made at closing that the [Otto] Baum lien claim had been resolved and the release would be immediately recorded. That was false." The trial court then found it could make the reasonable inference that Suniti Sud was aware that the claim had not been paid and "knowing that, she represented that the release would be filed immediately when the original came available to her." Third, the trial court found that the "representation then induced the closing." Lastly, Commerce Bank was then damaged by SLFP's breach of the purchase agreement and warranty terms.

¶ 68 Damages for fraudulent misrepresentation are generally computed by assessing the difference between the actual value of the property sold and the value the property would have had if the representations had been true. *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 196 (1989). Commerce Bank continues to own Lot 1, but the trial court also ordered a refund of the purchase price. The Sud defendants argue that the pro-rated value of the mechanics lien, $46,500, was the correct measure of damages. Commerce Bank argues that it was not against the manifest weight of the evidence to determine that the value of Lot 1 was $0. However, neither party pointed to any trial evidence that the value of Lot 1 was $0 because of the $46,500 lien, especially in light of the fact that Commerce Bank paid $469,000 for the property in 2008 and Methodist paid $2.7 million for two adjacent lots in 2007. In addition, there was an appraisal of the property in 2013 that found that an unencumbered Lot 1 was still worth $470,000. Thus, under the claims pled and proved by Commerce Bank, it was properly

awarded damages in the amount of Otto's lien, court costs, and attorney's fees. The purchase price of the property was a windfall and we reverse on that ground alone.

¶ 69 CONCLUSION

¶ 70 The judgment of the circuit court of Peoria County is affirmed in part and reversed in part. Commerce Bank's motion to dismiss the appeal is denied. That portion of the trial court's order awarding Commerce Bank damages on its counterclaim in the amount of $469,000 is reversed. The remainder of the trial court's judgment is affirmed.

¶ 71 Affirmed in part, reversed in part.