

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
MECHANICS LIEN SECTION**

THE HEARTLAND CONSTRUCTION)	
GROUP, INC.,)	
)	
Plaintiff,)	
v.)	No. 06 CH 5680
)	
BURCHELL LOVE, FIFTH THIRD BANK,)	Judge Thomas R. Mulroy
UNKNOWN OWNERS and)	
NONRECORD CLAIMANTS,)	
)	
Defendants.)	

OPINION AND JUDGMENT ORDER

This matter involves a dispute over remodeling work and improvements The Heartland Construction Group, Inc. (“Plaintiff”), performed on the property at 234-236 East 61st Street in Chicago (the “Property”). On March 22, 2006, Plaintiff filed its complaint against defendants Burchell Love, the property owner (“Defendant”), and Fifth Third Bank, the mortgagee (“Bank”). Count I seeks foreclosure of a mechanic’s lien which was originally filed on October 27, 2005 (Plaintiff’s Exhibit 34) and was amended on March 21, 2006 (Plaintiff’s Exhibit 13). Count II seeks compensation, including nine percent interest, under the parties’ contract. The amount claimed is \$28,662, involving various change orders. Defendant does not dispute that the change orders at issue total the amount claimed.

Defendant counterclaimed to recover damages she alleges she incurred in the form of lost profits and as a result of Plaintiff’s failure to complete the work contemplated in the parties’ contract in a good and workmanlike manner. The counterclaim alleges that because of Plaintiff’s actions and poor workmanship, Defendant incurred damages in excess of \$55,000 in the form of

repair expenses and inability to use the building for two months. Defendant provided the following non-exhaustive list of construction defects:

- a. Masonry work was incomplete;
- b. Floors are cracking;
- c. Did not use steel [sic] beams to hoist floor;
- d. Gutters were not installed properly;
- e. Water is penetrating walls and windows;
- f. Ceramic tile in kitchen is loose;
- g. Vinyl is cracking;
- h. Outside drains were improperly done; and
- i. Parking lot was not properly paved.

Counterclaim at 2-3.

Further, the Bank asserted as an affirmative defense that its mortgage lien is superior in time and right to any right which Plaintiff may have in the Property.

This matter came before the Court for trial on September 25, 2009. Burchell Love, Richard Easty, Plaintiff's president, and Erick Soderberg, a former Fifth Third Bank loan officer, testified at trial. For the reasons outlined below, the Court finds in favor of Plaintiff on its complaint and Defendant's counterclaim.

FINDINGS OF FACT

1. The Heartland Construction Group, Inc., is a construction company operating in Cook County, Illinois. Richard L. Easty is Heartland's president and sole shareholder.
2. Burchell Love owns and operates Love Learning Center, a day care facility at 228-236 East 61st Street in Chicago.
3. Defendant owns a building at 228 E. 61st Street ("228 Building") and two buildings next door, with common walls, at 234-236 E. 61st Street ("234-236 Building"). The 228 Building is connected to the 234-236 Building by an inside walkway. Plaintiff's construction for Defendant on the 234-236 Building is at issue in this case.

4. In 2004, Defendant borrowed money from Fifth Third Bank (“Bank”) in order to remodel the 228 Building. Erick Soderberg, a loan officer at the Bank, was Defendant’s banker and assisted her in obtaining the loan which was used for the construction on the 228 Building. Plaintiff did not do this construction, and by all accounts, the work was done poorly.

5. In 2004, Defendant wanted to complete the remodeling for her day care center and hired The Architect’s Group to prepare plans for the remodeling of the 234-236 Building. Defendant went to Soderberg and the Bank for an additional loan to complete her remodeling project.

6. On March 21, 2005, The Love Learning Center/Day Care executed a Revolving Note in the original principal amount of \$560,000, which was secured, in part, by a mortgage against the Property. On October 3, 2005, a Revolving Note in the principal amount of \$595,000 was executed and secured, in part, by a mortgage against the Property. The October note was a renewal of the March note.

7. Because the earlier construction work at the 228 Building was of bad quality and because the Bank wanted to insure that the Building would have adequate collateral value for the Bank loan, Soderberg was closely involved with oversight of the new construction on the 234-236 Building.

8. Soderberg recommended Plaintiff and two other contractors to Defendant as potential contractors for the new work on the 234-236 Building. Defendant ultimately hired Plaintiff to do the work and obtained financing from the Bank through Soderberg.

9. On February 18, 2005, Plaintiff entered into a contract with Defendant for construction work on the 234-236 building for \$329,472. The scope of the work was defined by Plaintiff’s construction quotation, clarifications attached to the AIA form, the Architectural Plans for the 234-236 Building, and the narrative of work to be performed at the 234-236 Building.

10. On March 7, 2005, Plaintiff began work on the Property. At that time, Defendant's day care center was operating next door in the 228 Building. During construction, Soderberg visited the Property several times a week to assess the progress of the work. He was pleased with the quality of the work and Defendant also expressed her satisfaction with Plaintiff's work.

11. On March 8, 2005, Defendant informed the City of Chicago Department of Construction and Planning that she had "contracted with Heartland Construction Group, Inc." to complete the renovation work for the 234-236 Building.

12. The procedure the Bank used for disbursement of the loan proceeds to pay Plaintiff was that Plaintiff would submit a sworn statement to the Bank and to Defendant, the Bank would obtain Defendant's approval to pay Plaintiff and then would make the payment. The parties stipulated that the Bank made the following payments to Plaintiff on behalf of Defendant for Plaintiff's work under the Contract: \$109,824.00 on March 22, 2005, \$109,824.00 on May 27, 2005, and \$109,824.00 on June 24, 2005, for a total of \$329,472.

13. After the work started, Plaintiff encountered unforeseen, serious conditions at the Property that required work outside the scope of the Contract. Defendant authorized this extra work.

14. In early June of 2005, Soderberg met with Defendant and Easty at the Property to discuss the extras. Easty showed Soderberg and Defendant the unanticipated serious problems in the roof, the floor and certain masonry. They also discussed other extras and the costs to do the extra work. Defendant directed Easty to proceed with the work and asked Soderberg if her line of credit with the Bank could be increased to cover the additional costs. Soderberg replied that he would check with the Bank. Ultimately, the Bank approved the increased loan amount. Defendant also approved the extra work in other conversations with Soderberg and Easty.

15. As a result, Plaintiff issued various change orders and submitted the change orders to the bank.
16. Defendant did not sign the Change Orders but orally approve the extras which are represented by them.
17. Soderberg prepared documentation for Bank approval of an increase in Defendant's loan which noted that \$226,000 was to pay off an existing mortgage and \$369,000 was for "Capital Improvements."
18. Plaintiff was not paid for the extras.
19. All of the extras claimed are for work performed by Plaintiff which was outside the scope of the Contract.

CONCLUSIONS OF LAW

This case, as many do, turned on the credibility of the witnesses, supporting documentation, and the corroboration of the parties' version of events. Defendant, who operates a day care center, wanted her facility improved and modernized so she could increase her business and provide better day care. Soderberg met Defendant fortuitously when she made a night deposit at the Bank. He worked hard for his new customer and was able to help her obtain over \$500,000 in loans for her day care center. He befriended Defendant and watched over her remodeling project to ensure its quality. He worked with Plaintiff and was a go-between for the parties. Soderberg testified that Defendant was a very important client and one whom he wanted to succeed. He spent a great deal of time supervising the construction project, and his testimony was important to the case. When he told Defendant he was leaving the Bank for new employment, Defendant expressed her gratitude by giving him a gift. Defendant clearly appreciated her banker's hard work on her behalf. Soderberg was at the critical meeting with Easty and Defendant

when they discussed the extra work and when Defendant agreed upon the extras at issue here. He approved payment to Plaintiff and had many conversations with Defendant on many issues involving the construction and the loans from the Bank. He made it clear in his testimony that the extras had been approved and pointed to the Bank documents which corroborated his recollection.

Richard Easty, Plaintiff's president, was a credible witness who clearly remembered the details of this project and the reasons for the extra work. He was unequivocal that he discussed the extra work with Defendant and that she approved it. He was clear on what he was required to do under the contract and was certain about the fact that the extra work Defendant claimed she had to do to finish the project was not within the scope of his contract. He is an experienced general contractor who worked hard to do the right thing for Defendant under difficult circumstances.

Plaintiff sued Defendant for the extra work it did and she approved and filed a mechanic's lien to collect what it alleged was due. In order to prevail on its claim for extras, Plaintiff must prove the following elements:

- (1) the work was outside the scope of his contract promises;
- (2) the extra work items were ordered by the owner;
- (3) the owner agreed to pay extra, either by his words or conduct;
- (4) the contractor did not furnish the extras as his voluntary act;
- and (5) the extra items were not rendered necessary by any fault of the contractor.

Wilmette Partners v. Hamel, 230 Ill. App. 3d 248, 264 (1st Dist. 1992). Furthermore, extras must be proved by clear and convincing evidence. *Id.* Plaintiff met its burden of proof in this regard, and Easty's version of events was credible and was corroborated by Soderberg.

Counterclaim

Defendant brought a counterclaim against Plaintiff alleging she suffered damages because she had to finish Plaintiff's work. As Defendant noted in her closing argument, it is her burden of proof to establish that (1) Plaintiff did not perform in a workmanlike manner and (2) the amount of her damages. Builders are held to a duty of substantial performance in a workmanlike manner. *Meyers v. Woods*, 374 Ill. App. 3d 440, 453 (3d. Dist 2007). A "failure to perform in a workmanlike manner constitutes a breach of contract entitling the plaintiff to damages." *Id.* The measure of damages in these cases is summarized as follows:

It is well settled in Illinois that the measure of damages for a breach of contract when a builder has provided less than full performance or has provided defective performance is generally the cost of correcting the defective condition. However, two exceptions exist. First, if the defects can only be corrected at a cost unreasonably disproportionate to the benefit to the purchaser, or second, if correcting the defects would entail an unreasonable destruction of the builder's work, then the measure of damages is the amount by which the defects have reduced the value of the property as a whole.

Arch of Illinois v. S.K. George Painting Contrs., 288 Ill. App. 3d 1080, 1082 (5th Dist. 1997) (citations omitted).

Defendant was unable to carry her burden of proof that Plaintiff did not perform in a workmanlike manner and was unable to substantiate her damages or to relate them to the contract work Plaintiff was obliged to perform. For instance, Defendant admitted a bill from "Ted's Builders" for roof repair allegedly done in March 2009, nearly four years after Plaintiff's work, and which does not list an address for where the work was done. Roofing work was not within the scope of plaintiff's contract. In 2005, when Easty told Defendant that she need certain roof repair work, Defendant ordered Plaintiff to do only the minimum amount of roofing work necessary to avert the immediate crisis.

Defendant's counterclaim also alleged that she suffered damages relating to lost profits, paving a parking lot and certain other work which she claimed was Plaintiff's responsibility or was caused by Plaintiff. However, she failed to adequately prove her damages and failed to prove that the work she claimed she needed to do was within Plaintiff's original contract scope.

Based on the credibility of the witnesses, the Court finds for Plaintiff on its mechanic's lien and breach of contract claim. The Court's finding entitles Plaintiff to statutory interest under the Mechanic's Lien Act. The Court declines to award interest for breach of contract because Plaintiff will recover interest on its damage amount under the mechanic's lien claim. The Court finds for Plaintiff on Defendant's counterclaim.

Lien Priority

Fifth Third Bank was named as a defendant in this case because it holds a mortgage on the Property. The Bank asserts that its mortgage has priority over Plaintiff's mechanic's lien. The Court agrees.

Section 7 of the Illinois Mechanic's Lien Act provides that to be effective against any other creditor, incumbrancer, or purchaser, a claim for lien must be recorded within four months of the completion of the work, a requirement "intended to give third parties dealing with the property, other than those with an ownership interest, notice of the lien." *Norman A. Koglin Assocs. v. Valenz Oro, Inc.*, 176 Ill. 2d 385, 391 (1997). Among other things, the claim for lien must contain a "sufficiently correct description of the lot, lots or tracts of land to identify the same." 770 ILL. COMP. STAT. 60/7 (2009). In this case, work on the project was substantially complete on or about August 15, 2005. Plaintiff's mechanic's lien was originally recorded on October 27, 2005 without a legal description of the Property and with the wrong common address and P.I.N. number. It was

amended on March 21, 2006 to add the legal description and correct the common address and P.I.N. number for the Property.

The original lien was ineffective against Fifth Third Bank. It did not satisfy the requirement that the lien include a “sufficiently correct description” of the Property because the legal description was missing and the lien identified the wrong common address and P.I.N. “The purpose of the description requirement is to protect third parties from purchasing or financing real property without being aware that it is encumbered.” *Steinberg v. Chicago Title & Trust Co.*, 142 Ill. App. 3d 601, 606 (1st Dist. 1986). Because a legal description of this property exists, Plaintiff was required to include it in the claim for lien. *Id.* The theory behind this requirement is that “the use of the legal description of property as recorded by plat will ensure the enforcement of a lien against third parties by providing them with a readily available, sufficient and correct notice of the lien.” *Id.* at 607. Thus, the original claim for lien was ineffective as against the Bank.

Furthermore, the amended claim for lien, which was filed outside of the four-month timeframe, could only correct the previous errors as to Defendant, the property owner. Plaintiff’s rights as against third parties, such as the Bank, could not be affected by an amended claim for lien filed after the four-month period expired. *See Federal Sav. & Loan Ins. Corp. v. American Nat’l Bank & Trust Co.*, 115 Ill. App. 3d 426, 428 (1st Dist. 1983) (noting that section 7 of the Mechanic’s Lien Act, by expressly allowing amendments as to the owner any time before final judgment, implicitly precludes amendments as to all non-owner parties). The theory behind this rule is that “allowing the untimely amended claim to relate back to the date of filing the original claim to cure the defective claim would serve only to undermine the purpose of the filing requirement, that of giving notice of the nature and extent of the lien to third parties.” *Id.* at 429. The deficiencies in the original lien claim could not be corrected by the amended lien claim, which

was filed seven months after the work was substantially complete. Because the Bank's mortgage was recorded before the mechanic's lien and Plaintiff failed to record a claim for lien effective as against the Bank within the prescribed time limits, the Bank's mortgage lien has priority over Plaintiff's mechanic's lien.

IT IS HEREBY ORDERED:

A. Judgment is entered in favor of Plaintiff Heartland Construction and against Defendant Burchell Love on Count I of Plaintiff's Complaint, with statutory interest plus costs. Plaintiff may submit a bill of costs within twenty eight (28) days. It is further ordered that the lien recorded under document number 0608034054 is found to be valid for \$28,662. Judgement is entered in favor of Plaintiff on Count II of its complaint without interest. The lien is to be satisfied within twenty-eight (28) days.

B. Judgment for mechanic's lien is entered in favor of Plaintiff and against Defendant and against the property located at 234-236 East 61st Street, Chicago, Illinois, legally described as:

THAT PART OF THE FOLLOWING DESCRIBED TRACT OF LAND LYING EAST OF THE WEST 42.25 FEET, SAID TRACT BEING DESCRIBED AS THE SOUTH 20 FEET OF LOT 7 AND ALL OF LOT 8, 9, AND 10 IN BLOCK 3 IN PARKER'S SUBDIVISION OF BLOCK 4 IN WILSON HEALD AND STEBBINGS SUBDIVISION OF THE EAST ½ OF THE SOUTHWEST ¼ OF SECTION 15, TOWNSHIP 38 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO MAP OF SAID PARKER'S SUBDIVISION RECORD MARCH 13, 1874 IN BOOK 7, OF PLATS PAGE 37, ALL IN COOK COUNTY, ILLINOIS.

C. In case of default of said payment being made by Defendant, then the premises hereinabove described or so much thereof as may be sufficient to satisfy the amount due to the lienholders shall be sold for principal and interest, the cost of this suit and other fees as aforesaid, and disbursements and commission, at public auction for cash to the highest bidder in Room 704, Richard J. Daley Center, 50 W. Washington St., Chicago, Cook County, Illinois, by the sheriff of

Cook County, at such time as he shall prescribe after the expiration of the redemption period in this judgment.

D. Plaintiff or such other party designated by the Court shall give public notice of the sale as follows:

1. The notice of sale shall include the following information, provided, however, an immaterial error in the information shall not invalidate the legal effect of notice:

- (a) The name, address and telephone number of the person to contact for information regarding the real estate;
- (b) The common address and other common description (other than legal description) of any of the real estate;
- (c) A legal description of the real estate sufficient to identify it with reasonable certainty;
- (d) A description of the improvements on the real estate;
- (e) Whether the real estate may be inspected prior to the sale upon making reasonable arrangements with the person identified in paragraph (a);
- (f) The time and place of the sale;
- (g) The terms of the sale; and
- (h) The case title, case number and the court in which the foreclosure was filed.

2. The notice of sale shall be published at least three consecutive calendar weeks (Sunday through Saturday), once in each week, the first such notice to be published

not more than thirty-five (35) days prior to the sale, the last such notice to be published not less than seven (7) days prior to the sale by:

- (a) An advertisement in a newspaper where legal notices are commonly placed; and
- (b) A separate advertisement in the section of such newspaper, which may be the same newspaper, in which real estate other than real estate being sold as part of legal proceedings is commonly advertised to the general public; provided, that where both advertisements could be published in the same newspaper and that newspaper does not have separate legal notices and real estate advertisements section, a single advertisement shall be sufficient.

3. The party who gives notice of the published sale shall also give notice to all parties in the action who have appeared and who have not previously been found by the Court to be in default for failure to plead. Such notice shall be given in a manner provided in the applicable rules of court for service of paper other than process and complaint, no more than twenty-eight (28) days or less than seven (7) days to the day of sale. After notice is given as required in this section, a copy thereof shall be filed in the Office of the Clerk of this Court together with a certificate of counsel of their proof notice has been served in compliance with this section.

4. The party who gives notice of the public sale shall again give notice of any adjourned sales, provided, however, that if the adjourned sale is continued for less than thirty days (30) after the last scheduled sale, notice of any adjourned sale needs to be given only once not less than five (5) days prior to the date of the adjourned sale.

5. Notice of the sale may be given prior to the expiration of the redemption period.
6. No other notice by publication or posting shall be necessary.
7. The person named in the notice of sale to be contacted for information about the real estate shall not be required to provide additional information other than that set forth in the notice of sale.
8. The Sheriff shall give to any purchaser a Certificate of Sale as required by law.
9. The Sheriff shall file his report of sale and distribution and obtain confirmation thereof by order of court.
10. If the premises so sold shall not have been redeemed by the laws of this State as hereinafter set forth, said Sheriff or his successor in office, upon production of any Certificate of Sale aforesaid by the purchaser or purchasers, his or their heirs, successors or assigns, shall execute to the legal holder or holders thereof a deed of conveyance of the premises in such certificate described. The period of redemption expires according to the timeframe provided in the statute.

ENTERED:

Date: October 23, 2009

Judge Thomas R. Mulroy