

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

MORTGAGE ELECTRONIC REGISTRATION)
SYSTEMS, INC.,)

Plaintiff,)

v.)

FREDERICK W. CALCUTT III; MARISSA J.)
CALCUTT a/k/a MARISSA ANN JURADO)
a/k/a MARISSA ANN CALCUTT; UNKNOWN)
OWNERS AND NONRECORD CLAIMANTS,)

Defendants.)

No. 05 CH 14323

Honorable Thomas R. Mulroy

BEATA JELENSKI, d/b/a RBM)
DEVELOPMENT, INC.,)

Counter-Plaintiff,)

v.)

MORTGAGE ELECTRONIC REGISTRATION)
SYSTEMS, INC.; FREDERICK W. CALCUTT)
III; MARISSA J. CALCUTT a/k/a MARISSA)
ANN JURADO a/k/a MARISSA ANN)
CALCUTT; UNKNOWN OWNERS AND)
NONRECORD CLAIMANTS,)

Counter-Defendants.)

OPINION AND JUDGMENT ORDER

This case, which began as a straightforward mortgage foreclosure case, comes before the Court for ruling on the Counterclaim for Foreclosure of Mechanic’s Lien of intervenor Beata Jelenski d/b/a RBM Development, Inc. (“RBM”). Mortgage Electronic Registration Systems, Inc., (“MERS”) filed a complaint for mortgage foreclosure on August 24, 2005 against Frederick

W. Calcutt III and his wife, Marissa Calcutt, who own the property located at 1743 West Farwell in Chicago, Illinois (the "Property"). The Calcutts purchased the Property in 2000 for \$178,000. They obtained a loan of \$637,500, secured by the Property, on November 12, 2004. The November 2004 loan was the subject of MERS's mortgage foreclosure complaint, which alleged that the Calcutts were in default for failure to pay monthly installments of principal, interest, taxes and insurance beginning in May 2005. The Honorable Lewis M. Nixon entered a judgment of foreclosure and sale on March 8, 2006 in favor of MERS in the amount of \$699,553.68. (MERS Ex. 1)

On May 3, 2006, Judge Nixon granted RBM's motion to intervene in the case and granted RBM leave to file its counterclaim seeking foreclosure of its \$344,000 mechanic's lien and asserting its priority over MERS. RBM never recorded a mechanic's lien on the Property; it asserted its claim through its counterclaim. Trial was held on RBM's counterclaim on July 10, 2009, July 14, 2009, and November 6, 2009. For the reasons set forth below, the Court finds in favor of Counter-Defendants on Counter-Plaintiff RBM's Counterclaim.

FINDINGS OF FACT

1. On January 8, 2002, Frederick W. Calcutt III ("Calcutt") and RBM entered into a written "Construction Contract" for RBM to furnish labor and materials to renovate Calcutt's residence at 1743 West Farwell in Chicago, Illinois.
2. The contract price was \$110 per square foot. (MERS Ex. 3)
3. RBM began working on the Property in 2002.
4. Throughout 2002, Calcutt failed to pay RBM for its services, and RBM stopped work in the fall of 2002.

5. On January 24, 2002, Ms. Jelenski signed a notarized “Illinois Mechanics Lien Sworn Statement” in which she claimed that \$421,500 was due or to become due for the Project. (RBM Ex. 2(a-c))

6. In May 2003, Calcutt contacted RBM and asked Ms. Jelenski, RBM’s principal, to return to the Property to complete construction. RBM agreed and, in May 2003, came back to work.

7. In October 2003, RBM again stopped working on the Property because Calcutt had not paid RBM.

8. On May 1, 2004, RBM resumed work after more negotiations about payment. The parties signed another contract with the same price terms and which referred to the same renovation project as the 2002 contract. (RBM Ex. 10)

9. By October of 2004, Calcutt had still not paid RBM, so he gave Ms. Jelenski a warranty deed to the home dated October 21, 2004.

10. Mr. Calcutt prepared the deed, which provided that “Grantor warrants the title to the property subject only to the Mortgage and other security documents executed in connection with the Mortgage in favor of Grantee, Beata Jelenski, (unpaid real estate taxes), and easements, restrictions and other matters of record.” (MERS Ex. 2)

11. Mr. Calcutt admitted that he signed over his home to Ms. Jelenski so she would have assurance that he would pay his bill. He said that if he did not pay, she would have the home. He did not pay RBM or Ms. Jelenski. Ms. Jelenski did not record the deed and claims not to own the home, which is in foreclosure.

12. The Calcutts obtained a loan of \$637,500, secured by the Property, on November 12, 2004. In the loan application, Calcutt indicated that he was self-employed as an owner of RBM.

13. RBM did not record a lien on the Property. On or about October 21, 2004, Ms. Jelenski received a warranty deed conveying title to the Property from Mr. Calcutt to her. (MERS Ex. 2)

14. RBM's counterclaim asserts a mechanic's lien based upon a \$514,000 contract with Calcutt dated May 1, 2004, pursuant to the Illinois Mechanic's Lien Act (770 ILL. COMP. STAT. 60/1 *et seq.* (2009)). RBM bases its claim on the value of its work performed between May 1, 2004 and February 19, 2006, which represents 67% of the total value of the work done on the property between 2002 and 2006.

15. RBM's counterclaim alleges that the amount due for work under the May 1, 2004 contract is \$464,000 and seeks a lien for the alleged balance due of \$344,000 for work claimed to have been done within three years prior to the last day of work.

16. RBM alleges that the last day of work was February 19, 2006.

17. RBM seeks no compensation for any work performed before May 1, 2004.

18. Testimony came from: (1) Beata Jelenski, owner of RBM; (2) Slawomir Jerominski; (3) Michael Noonan; (4) John Siegmund; (5) Keith Stocker; (6) Thomas A. Reardon; and (7) Frederick Calcutt.

The Witnesses

Beata Jelenski

19. Ms. Jelenski testified that RBM and Mr. Calcutt executed a construction contract on January 8, 2002.

20. Ms. Jelenski provided an overview of her company and testified as to the work RBM and its subcontractors performed at the Property.

21. Among other things, Ms. Jelenski testified that she finished the basement and constructed a deck on the Property in 2006 and renovated the kitchen between 2004 and 2006.

22. When asked if she had any documents that would show when any of the work was actually done, Ms. Jelenski testified that she didn't have documents but knew that the work was done between 2004 and 2006.

23. Ms. Jelenski testified as to how RBM determined the amount of the lien to be included in its claim and testified that the value of the work performed after the 2004 contract was approximately \$344,000.

Slowamir Jerominski

24. Mr. Jerominski testified that his company, Chicagoland Woodworking Services ("CWS"), performed heating and air-conditioning work, installed hardwood floors and granite countertops, and built a deck on the Property.

25. RBM and CWS did not have a written contract.

26. Mr. Jerominski testified that CWS is owed \$79,000 for work done over five months in 2005. In his deposition, he testified that CWS completed its work in either 2003 or 2004.

27. Mr. Jerominski testified that he had no documents or time records available which would show when CWS performed the work. He did admit that he possessed “books and records” but that they were unavailable and in storage. He stated that he had not reviewed these records for trial.

28. Mr. Jerominski further testified that he has no documents that relate to the costs of materials and supplies CWS contributed to the Property. He stated that he had documents which would show the cost of the supplies used on the project, but it would take “a week” to retrieve them. He had not reviewed these records for trial.

Michael Noonan

29. RBM called Michael Noonan, who refused to swear, affirm, or take an oath that his testimony would be the truth, stating that he denied being a “federal citizen” but rather that he considers himself a “sovereign-type” citizen.

30. Mr. Noonan said he began working on the Property in early 2002 as the job foreman and claims he is owed around \$90,000 for work performed between 2002 and 2006. He kept no records or documents and provided no calculations to support his \$90,000 estimate.

31. He testified that he never submitted an invoice for his work, but he did sign sworn lien waivers attesting that he had been paid. He did not object to swearing upon oath on these waivers.

32. Mr. Noonan had no memory or record of the last day of work on the Property.

33. Mr. Noonan testified that Ms. Jelenski promised to pay his bill if she were successful in this litigation. RBM and Mr. Noonan work together on various projects and Mr. Noonan stated that they always did business in this informal way.

John Scott Siegmund

34. Mr. Siegmund testified that he first worked on the Property in May 2003 when his company, Red Sun, did the exterior framing of the Property, drywall, painting, and installation of carpet between May 2003 and February 2006.

35. Mr. Siegmund claimed Red Sun is owed \$65,000 for work performed between May 2004 and February 2006.

36. RBM's Exhibit 19 was created on or around February 27, 2007, and it purports to summarize the hours worked by Red Sun's employees between 2003 and 2006. (RBM Ex. 19)

37. Mr. Siegmund testified that according to RBM's Exhibit 19(A), Jozef Cubaj spent eight (8) weeks, working forty (40) hours per week, to paint the interior of the Property.

38. Mr. Siegmund also testified that according to RBM's Exhibit 19(A), Rigo Ramirez spent eight (8) weeks, working forty (40) hours per week, to install baseboards and carpeting in the Property.

39. Mr. Siegmund testified that RBM kept a calendar at the Property that detailed who worked and how many hours each person worked on the Property, but he last saw the calendar in 2005.

Frederick Calcutt

40. Mr. Calcutt testified that he entered into the contract with RBM on January 8, 2002 and that RBM began its work in 2002. (MERS Ex. 3)

41. Mr. Calcutt testified that the Project was his first attempt at the "rehab business."

42. When asked by the Court if he gave Ms. Jelenski ownership of the Property, he answered "Yes."

43. In the fall of 2004, the Calcutts applied for loan refinancing, claiming that their home was now appraised at \$715,000. Frederick Calcutt stated in the loan application that he had a financial interest in and income from RBM.

44. Mr. Calcutt testified that he made false statements to the Illinois Secretary of State where he claimed to be an officer of RBM. He admitted lying on his mortgage application where he claimed to be the owner of RBM and where he claimed his gross monthly income was \$12,388. However, he testified he was told to do so by his “banker.” (RBM Ex. 11)

45. Mr. Calcutt worked on a second project with RBM.

46. Mr. Calcutt admitted that he received and kept for his personal benefit over \$300,000 from construction loans paid to RBM related to the second project.

47. Mr. Calcutt testified that to his knowledge, Ms. Jelenski never called the police and never filed suit against him.

Keith Stocker

48. Mr. Stocker was a licensed real estate appraiser who worked for Appraisals Unlimited and performed four appraisals of the Property.

49. Mr. Stocker testified that according to Appraisals Unlimited’s January 15, 2000 appraisal, the Property had an appraised value of \$260,000.

50. Mr. Stocker testified that according to Appraisals Unlimited’s February 17, 2002 appraisal, the Property had an appraised value of \$650,000.

51. Mr. Stocker testified that some work was ongoing, but the Property had been totally remodeled by February 17, 2002.

52. According to Mr. Stocker’s testimony, when he inspected the Property in 2002, the house had already been completely reconstructed. The house had doubled in size and had

three full baths, an enclosed backyard and two fireplaces. He testified that it was a “beautifully rehabbed house.”

53. Mr. Stocker inspected the house a second time in conjunction with an appraisal dated February 25, 2003 and did not see any sign of construction work during that inspection.

54. Mr. Stocker described the 2003 appraisal as a snapshot in time of what the Property looked like in February 2003.

55. Mr. Stocker testified that the 2003 appraisal was accurate when it noted the following completed amenities: wood, solid interior doors; an uncovered deck; double-hung vinyl windows with storm screens; an asphalt roof; aluminum siding; two fireplaces; a combination of carpet, tile, and hardwood floors throughout; a combination of plaster, drywall, and panel walls; and painted wood interior trim. (RBM Ex. 20)

Thomas Reardon

56. RBM called Thomas Reardon to testify as an adverse witness. MERS produced Mr. Reardon as its corporate representative in response to the Court’s order requiring MERS to comply with RBM’s Notice to Produce.

57. Mr. Reardon testified that he was employed by Chase Home Finance, LLC, and he was not an employee of MERS. Mr. Reardon admitted that he did not know who actually owned the note and mortgage on which MERS based its lien claim.

58. Mr. Reardon testified that the beneficial owner of the Note is a “trust held by U.S. Bank.”

CONCLUSIONS OF LAW

The evidence showed that RBM and the Calcutts had a long-standing relationship which included (1) work on the Calcutts’ home, (2) Mr. Calcutt giving RBM’s principal a warranty

deed to the home to be filed in the event he did not pay RBM for its work, and, according to Mr. Calcutt's 2004 loan application, (3) his receipt of money from RBM as a kind of employee or partner. At trial, Mr. Calcutt testified that he lied when he made the income statement on the loan application. The Court found it impossible to tell whether he lied on the application or whether he was being untruthful at trial.

Counter-Plaintiff RBM failed in its burden of proof. The Court judged the credibility of the witnesses and carefully evaluated their demeanor under direct and cross examination. The witnesses RBM called were not credible and were biased in favor of RBM, and the documents RBM introduced into evidence did not prove its case. For the reasons stated below, the Court finds for Counter-Defendants on the Counterclaim.

I. RBM Failed to Carry its Burden of Proof

1. RBM asserts a \$344,000 mechanic's lien.
2. The "burden of proving that each requisite [of the Illinois Mechanic's Lien Act] has been satisfied is on the party seeking to enforce the lien." *Ronning Eng'g Co., Inc. v. Adams Pride Alfalfa Corp.*, 181 Ill. App. 3d 753, 759 (4th Dist. 1989).
3. RBM failed to prove: (1) precisely what work was done; (2) who performed the work; (3) when the work was performed; and (4) how much was charged for the work.
4. RBM failed to provide time records, invoices, bills or material delivery documents to substantiate the work that RBM claims it or its subcontractors performed at the Property.
5. During three days of testimony, RBM failed to put forth any evidence with sufficient credibility and specificity to meet its burden of proof.
6. Therefore, RBM's mechanic's lien must fail.

II. RBM's Complaint Does Not Describe the Contract

7. RBM's Counterclaim to Foreclose Mechanic's Lien alleges a contract dated May 1, 2004.

8. RBM and Calcutt signed at least two "contracts," the first on January 8, 2002, and the second on May 1, 2004.

9. Both "contracts" were for essentially the same work in the same renovation of the Property and were for the same price of \$110 per square foot. The second contract was merely a reaffirmation of the first.

10. "As mechanics' liens were not recognized by common law or in equity, but exist only by virtue of statutes creating them and providing a method for their enforcement, those statutes must be strictly construed with reference to the requirements upon which the right depends." *Ronning*, 181 Ill. App. 3d at 758-759.

11. RBM's Counterclaim fails to reference the correct contract. *See id.* (mechanic's lien claim was properly dismissed where the complaint alleged the wrong contract).

III. RBM Failed to Prove the Completion Date of the Work

12. The date of the contract is January 8, 2002 and the work commenced in 2002. The last day of work claimed by RBM was February 19, 2006, but RBM failed to carry its burden of establishing a completion date.

13. RBM produced no records regarding the last day of work, and none of RBM's witnesses credibly testified as to the last day they performed work at the Property.

14. The Illinois Mechanic's Lien Act provides that a mechanic's lien is not valid where the contract does not specify a time for completion or payment unless the work giving rise to the lien is completed within three years of its commencement. *See 770 ILL. COMP. STAT. 60/6*

(2009) (“In no event shall it be necessary to fix or stipulate in any contract a time for the completion or a time for payment in order to obtain a lien under this act, provided, that the work is done or material furnished within three years from the commencement of said work or the commencement of furnishing said material”).

15. Because RBM did not carry its burden of proving that the work under the contract was completed within three years of its commencement and the contract did not specify a completion date or time for payment, RBM’s lien is invalid.

16. Furthermore, Section 7 of the Illinois Mechanic’s Lien Act provides that in order to enforce a mechanic’s lien against “any other creditor or incumbrancer or purchaser,” a contractor must record a mechanic’s lien on the property or bring an action to enforce the lien within four months of completion of the work. 770 ILL. COMP. STAT. 60/7 (2009).

17. Thus, in order to assert priority over the MERS lien, RBM had the burden of proving that its Counterclaim was filed within four months of the last date RBM performed work at the Property. RBM failed to satisfy its burden of proof as to the completion date.

18. Thus, RBM is not entitled to priority over the MERS mortgage.

IV. Beata Jelenski d/b/a RBM and Calcutt Appear to be in a Joint Venture

19. The course of the parties’ dealings has all of the earmarks of a joint-venture relationship. The evidence suggested that Beata Jelenski d/b/a RBM Development operated as a joint venturer with Mr. Calcutt in improving the Property. As such, RBM would not be entitled to a mechanic’s lien. *See Fitzgerald v. Van Buskirk*, 16 Ill. App. 3d 348, 350 (2d Dist. 1974) (a joint venturer is not a party entitled to a mechanic’s lien).

20. The work on the Property began and stopped numerous times, as funds became available.

21. Calcutt indicated on his mortgage loan application, dated November 12, 2004, that he was employed by RBM. He indicated that his position was “owner” and that he had been in that job for three (3) years.

22. Jelenski became the owner of the Property via a signed, notarized warranty deed from Frederick and Marissa Calcutt dated October 21, 2004. The warranty deed, upon delivery, transferred ownership of the Property in fee simple to Jelenski. *Loop Mortgage Corp. v. Williams (In re Cook County Treasurer)*, 185 Ill. 2d 428, 433 (Ill. 1998). Jelenski’s failure to record the deed does not defeat her ownership interest. *See id.* (“The grantee’s failure to record the deed may affect the grantee’s rights vis-à-vis a third party who purchases the property without notice of the grantee’s unrecorded interest . . . , but the grantee’s failure to record does not resuscitate the grantor’s interest in the property”).

23. The parties’ course of conduct, Calcutt’s statements on his mortgage loan application, and Jelenski’s ownership of the Property indicate that the parties operated in a joint venture, which would defeat RBM’s right to a mechanic’s lien.

IT IS HEREBY ORDERED:

Judgment is entered in favor of Counter-Defendants and against Counter-Plaintiff Beata Jelenski d/b/a RBM Development, Inc., on the Counterclaim.

ENTERED:

Date: February 2, 2010

Judge Thomas R. Mulroy