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Karen A. Yarbrough
Cook County Clerk
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION
MORTGAGE FORECLOSURE / MECHANICS LIEN SECTION

M&S PROPERTY MANAGEMENT

Plaintiff,

YORKE PROPERTIES ILLINOIS, LLC
An Illinois Limited Liability Company
UNKNOWN OWNERS, UNKNOWN
CLAIMANTS

Defendants.

No. 2021 CH 01952

MEMORANDUM OPINION AND ORDER

THIS CAUSE coming to be heard with due notice having been given and the Court being fully advised in the premises, it is hereby ordered that Defendant Yorke Properties Illinois, LLC's ("Defendant's") Motion to Dismiss Pursuant to 735 ILCS 5/2-615, 2-619, and 2-619.1 is **GRANTED IN PART** and **DENIED IN PART**.

STATEMENT OF THE FACTS

Defendant owned properties and contracted with Plaintiff M&S Property Management ("Plaintiff") to "provide property management services" on June 1, 2018.[1] In controversy are seventeen properties separated into three sets.

Set I

- 6425–27 S. Eberhart; and
- 9511 S. Commercial.

Set II

- 10844 S. King Dr. (deeded Mar. 17, 2021) (recorded Apr. 5, 2021);
- 1235–37 W. 79th St. (deeded Mar. 11, 2021) (recorded Apr. 9, 2021);
- 946 Central Park Ave. (deeded Feb. 26, 2021) (recorded Mar. 31, 2021);
- 2254 W. Adams (deeded Feb. 19, 2021) (recorded Apr. 1, 2021);

[1] Verified Compl. to Foreclose Mechanic's Lien and Other Relief ("Compl."), ¶¶ 1, 3.

- 8021 S. Carpenter (deeded Dec. 30, 2020) (recorded Feb. 17, 2021) (subsequent mortgage recorded Feb. 17, 2021);
- 716–18 E. 90th St. (deeded Jan. 4, 2021) (recorded Mar. 5, 2021) (subsequent mortgage recorded Mar. 5, 2021);
- 6235 S. Eberhart (deeded Dec. 8, 2020) (recorded Feb. 9, 2021); and
- 6210–12 S. Eberhart (deeded Dec. 15, 2020) (recorded Mar. 16, 2021).

Set III

- 537 Quail Run Rd. (mortgage recorded Jan. 11, 2007) (modification recorded Mar. 25, 2011) (assignment recorded Apr. 30, 2019);
- 6949–51 S. Sangamon (mortgage and assignment recorded Mar. 6, 2019);
- 802–06 E. 89th Place (mortgage and assignment recorded June 28, 2019);
- 5402 S. Wells (mortgage and assignment recorded Mar. 6, 2019);
- 820 E. 92nd/9158 S. Dauphin Ave. (mortgage and assignment recorded Apr. 30, 2019);
- 409 Paxton (mortgage and assignment recorded Apr. 30, 2019); and
- 1609 S. Spaulding (assignment recorded Feb. 18, 2021).

Plaintiff furnished "labor, services and materials provided under the Agreement."[2] Defendant says Plaintiff had other obligations too, such as to deposit rents and charges into a trust account. Plaintiff says the contract expired; however, "Plaintiff continued to operate under the prior terms due to the parties['s] subsequent actions."[3] Plaintiff notified Defendant of its intent to file liens and filed them. Defendant responded by issuing section 34 notices demanding Plaintiff file suit within thirty days on March 15 and April 29, 2021. Plaintiff filed its complaint to foreclose its mechanic's liens in the amount of $483,470.00 on April 22, 2021, to recover against Defendant under breach of contract or, in the alternative, *quantum meruit*. Defendant now moves to dismiss Plaintiff's complaint against it with prejudice pursuant to sections 2-619(a)(5) and 2-615.

SUMMARY OF THE ARGUMENTS

Defendant moves to dismiss Plaintiff's action to foreclose on its mechanic's liens under section 2-619(a)(5), and the parties made various arguments regarding the three sets of properties.

Regarding the first set of two properties, Defendant says it never owned these properties. Illinois Service Federal Savings & Loan Association ("Illinois Service"), now GN Bank, held mortgages on them. Plaintiff says that no record was cited of Illinois Service assigning those mortgages to GN Bank and that Plaintiff had a

[2] Compl., ¶ 5.
[3] Pl.'s Resp. Def.'s Mot. to Dismiss Pursuant 735 ILCS 5/2-615, 2-619 and 2-619.1 ("Pl.'s Resp.") 5.

business relationship with GN Bank, which had assigned mortgages relating to "some of the properties at issue."[4]

Regarding the second set of eight properties, Defendant says it owned them on the date of the contract but sold them and recorded those deeds prior to when Plaintiff filed suit (April 22, 2021). Plaintiff says it should be excused on two grounds for not joining these property owners. First, all sales occurred after Plaintiff notified Defendant of its intent to place a lien on these properties, and Defendant "apparently" did not tell these purchasers about that.[5] Second, delays in the Cook County Recorder of Deeds office between February and April 2021 due to the pandemic caused those deeds not to be recorded at the time Plaintiff searched for them. Defendant disputes such delays occurred.

Regarding the third set of seven properties, Defendant alludes to third-party liens on these properties.[6] Plaintiff says it should be excused on three grounds for not joining these third parties. First, Defendant had assigned a mortgage and its interests in leases and rents for five properties to Chicago-Washington DC Property Loans ("Chicago-Washington"), and the relationship between Defendant and Chicago-Washington is a relevant fact that should be determined outside a motion to dismiss. Second, the assignment to Chicago-Washington for 1609 S. Spaulding was not made until around February 2021, and that record was not available when Plaintiff sued. Third, these third parties could be Defendant's alter egos.

Defendant also moves to dismiss Plaintiff's action for breach of contract under section 2-615 and its action in the alternative for *quantum meruit* under section 2-615. Defendant argues that the breach-of-contract claim is deficient because Plaintiff had other obligations with which it needed to affirm compliance to demonstrate that it itself performed under the contract. Defendant also argues that the *quantum meruit* claim is deficient because an express agreement exists, and Plaintiff admits to its existence by saying that the parties conformed to the terms of the contract after it had expired.

STANDARD OF REVIEW

A section 2-619.1 motion may combine a section 2-615 motion and a section 2-619 motion. 735 ILCS 5/2-619.1. A section 2-615 motion to dismiss challenges the legal sufficiency of pleadings based upon their deficiencies. *Rehfield v. Diocese of Joliet*, 2021 IL 125656, ¶ 20. In analyzing that motion, a court should view allegations in the light most favorable to the nonmovant and all well-pleaded facts as true to

[4] Pl.'s Resp. 2.

[5] Pl.'s Resp. 3.

[6] *See* Def.'s Mem. Supp. Its Mot. to Dismiss Pursuant 735 ILCS 5/2-615, 2-619 and 2-619.1 ("Def.'s Mot.") 5, 6 ("For the seven remaining properties, property records show that in addition to [Defendant,] there are various third parties who also have recorded interests in the properties.").

determine whether any set of facts exists to entitle the nonmovant to recovery. *Id.* A section 2-619(a)(5) motion to dismiss challenges an action because it "was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5). In analyzing that motion, a court should again view allegations in the light most favorable to the nonmovant and all well-pleaded facts as true. *Valerio v. Moore Landscapes, LLC*, 2021 IL 126139, ¶ 20.

ANALYSIS

I. Section 34

Before analyzing the parties' arguments, the Court must examine a section 34 issue *sua sponte*. "Upon written demand of the owner, . . . requiring suit to be commenced to enforce the lien or answer to be filed in a pending suit, suit shall be commenced or answer filed within 30 days thereafter, or the lien shall be forfeited." 770 ILCS 60/34. Defendant demanded Plaintiff file suit within thirty days on March 15 and April 29, 2021. Plaintiff filed suit on April 22, 2021. The March 15 demand affected six properties: 10844 S. King Dr.; 1235–37 W. 79th St.; 6949–51 S. Sangamon; 802–08 E. 89th Place; 5402 S. Wells; and 820 E. 92nd/9158 S. Dauphin Ave. These properties must be dismissed from the foreclosure on mechanic's liens.

II. Action to Foreclose on Its Mechanic's Liens and Section 2-619(a)(5)

Defendant argues Plaintiff's action to foreclose on its mechanic's lien should be dismissed because the time in which to join necessary parties (i.e., thirty days) has run and relies on *CB Constr. & Design, LLC v. Atlas Brookview, LLC*, 2021 IL App (1st) 200924. "Lien claimants" who do not file suits within thirty days after being served with a section 34 demand forfeit their liens. 770 ILCS 60/34. Necessary parties include "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).

In *CB Constr. & Design, LLC*, the court construed sections 34 and 11(b) together to hold that necessary parties must be joined within thirty days of demands for suit being filed, or the mechanic's liens are forfeited under section 2-619(a)(5). 2021 IL App (1st) 200924, ¶¶ 26–30. However, contrary to Defendant's assertions, the court concluded that third-party lienholders were necessary parties because the plaintiff asserted its lien was "senior and superior" to theirs and requested sale, not because they had recorded their liens prior to suit being filed.[7] That reasoning makes

[7] *See* Def.'s Mot. 10 ("The court found that the mortgage lender and assignee were necessary parties because they both had recorded interests in the property that predated the filing of the plaintiff's complaint and the plaintiff's request that the property be sold and its lien be declared senior and superior to any other interests made them 'person[s] against whose interest in the premises the

relevant the question of whether Plaintiff here did in fact assert that its liens were senior and superior to any others.

Plaintiff did not. Defendant says that Plaintiff "seeks relief that would undisputedly affect [other lienholders'] property interests, including collection of rents, sale of the properties and a finding that [Defendant] and 'all persons claiming by, through or under' it be 'forever barred and foreclosed from all rights or equity of redemption.'" Def.'s Mot. 11 (alteration in original) (quoting Compl. ¶¶ 13–14). As relevant here, Plaintiff asks this Court to determine that:

1. "Defendants, *or some of them*, be ordered to pay [Plaintiff] whatever sums shall be found due it on taking of account, together with interest and costs," Compl. ¶ 13(b) (emphasis added);
2. "In the case of a sale and failure to redeem from the sale, Defendants, and all persons claiming by, through or under them *may be* forever barred and foreclosed from all rights or equity of redemption," Compl., ¶ 13(e) (emphasis added);
3. "[A] deficiency decree *may be* entered against *such of the Defendants as may be found personally liable* to pay the same[, and] execution *may* issue thereon." Compl., ¶ 13(f) (emphasis added); and
4. [T]his court tax all named Defendants and all other owners and tenants an amount sufficient to reimburse [Plaintiff] for its reasonable attorneys' fees [and costs] for Defendants' . . . failure to pay [the amount] due and owing to [Plaintiff] *without just cause or right*." Compl., ¶ 14(a) (emphasis added).

Plaintiff asks the Court to determine the rights amongst the parties and the lienholders in each request. Unlike the plaintiff in *CB Constr. & Design, LLC*, Plaintiff does not itself assert that its lien is "senior and superior" to any other. *See also* Compl., ¶ 10 (discussing how other creditors may have liens on the property but not saying that Plaintiff's own interest is senior and superior). For example, in Compl., ¶ 13(e), Plaintiff does not say that Defendants should be foreclosed from all rights or equity of redemption from a sale and failure to redeem. It says that they may. And some may indeed. But which Defendants should be foreclosed requires the Court to examine the rights of the parties and the lienholders, and Plaintiff makes no assertions regarding those rights independent of the Court's examination.

Determining whether the subsequent purchasers and third-party lienholders are necessary parties here therefore requires examining their rights in comparison with the parties'. Under general principles of law, senior and superior lienholders are

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claimant asserts a claim.'" (citation omitted)). Only the reason that the plaintiff had requested the property be sold and its lien be declared senior and superior to any other was necessary to reach the court's conclusion. After all, whether lien claimants assert their liens are senior and superior to others' does not depend on whether those lien claimants are right. It does not depend on the lien claimants' rightly applying the law. Lien claimants who assert that their liens are senior and superior to others but are totally wrong as a matter of law would nevertheless have made those other lienholders necessary parties under the court's reasoning. *See also* notes 8–11 *infra*.

not necessary parties,[8] but junior lienholders may be[9]. Under the law of mechanic's liens, a mechanic's lien "attaches as of the date of the contract," 770 ILCS 60/1(a), the date of attachment is the date of priority,[10] and both senior and superior lienholders and junior lienholders should be necessary parties[11]. All third-party lienholders, senior and junior, should therefore be joined as necessary parties here. Merely joining "Unknown Owners" and "Unknown Claimants" as parties would be insufficient. *See CB Constr. & Design, LLC*, 2021 IL App (1st) 200924, ¶ 33; 770 ILCS 60/11(c). What is left is to address the various arguments regarding the three sets of properties. The reason put forth that the pandemic delayed recordings will be addressed after all the rest. In general, senior and junior lienholders of record existed who should have been joined as necessary parties but were not, and no valid reason for not joining them were proffered.

Defendant simply had no interest in the first set of two properties. Regardless of whether Illinois Federal recorded an assignment of its interest to GN Bank, there is nothing in the record suggesting that Defendant had an interest in these properties. Even taken in the best possible light, an allusion to business relationships between Defendant and GN Bank and assignments of mortgages between them is insufficient to survive a motion to dismiss.

The purchasers of the second set of six remaining properties should have been joined as junior lienholders. The law of mechanic's lien contemplates that there may be junior lienholders, including subsequent purchasers. *See* 770 ILCS 60/16 (discussing encumbrances made "before or after the making of the contract for improvement"). The fact there were subsequent purchasers after notices to file mechanic's liens were delivered does not affect their status as necessary parties.

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[8] *See, e.g., Gregory v. Suburban Realty Co.*, 292 Ill. 568, 575, 576 (1920); *Crawford v. Munford*, 29 Ill. App. 445, 447 (4th Dist. 1888).

[9] Older cases from our Supreme Court held that they are. *Hart v. Winger*, 83 Ill. 282, 286 (1876) (quoting *Montgomery v. Brown*, 7 Ill. 581, 585x586 (1845)). Newer cases from the appellate court hold that they are not, but without citing to *Hart* or *Montgomery*. *E.g., Marino v. United Bank of Ill., N.A.*, 137 Ill. App. 3d 523, 528 (2d Dist. 1985); *React Fin. v. Long*, 366 Ill. App. 3d 231, 236 (3d Dist. 2006); *see also Citizens Bank, N.A. v. Huynh*, 2018 IL App (1st) 172227-U, ¶ 59 n.2.

[10] *Pittsburgh Plate Glass Co. v. Kransz*, 291 Ill. 84, 85–90 (1919).

[11] The Mechanic's Lien Act is "in derogation of the common law and must be strictly construed." *Koester v. Huron Dev. Co.*, 25 Ill. 2d 337, 340 (1962). It has a special feature setting it apart from other areas of law dealing with lienholders and necessary parties. Normally, secured creditors enjoy any increase in the value of the collateral. *See, e.g., In re Immel*, 436 B.R. 538, 541–44 (Bankr. N.D. Ill. 2010) (citing *Dewsnup v. Timm*, 502 U.S. 410 (1992)) (holding that a wholly underwater lien cannot be stripped off: an undersecured lien cannot be bifurcated and stripped down under *Dewsnup*, with the result that wholly underwater liens survive bankruptcy and can enjoy any increase in the value of the collateral post-discharge). Not so in the law of mechanic's liens, where section 16 gives mechanic's lienholders priority as to the value of any enhancements. 770 ILCS 60/16; *cf. CB Constr. & Design, LLC*, 2021 IL App (1st) 200924, ¶ 25 (reaching the same result implied in cases where plaintiffs do not assert their liens are senior and superior to others). *But see* Howard M. Turner, *The 2005 Amendments to The Illinois Mechanics Lien Act*, 93 Ill. B.J. 630 (2005).

The third-party lienholders of the third set of three remaining properties should have been joined, as one was a senior lienholder, and the others were junior lienholders. First, as before, even taken in the best possible light, the allusion to business relationships between Defendant and Chicago-Washington, especially without explaining the relevancy, is insufficient to survive a motion to dismiss. Second, Plaintiff sued on April 22, 2021, so it is not clear why it would not have constructive notice of an assignment made about February 2021, unless this argument relates to the pandemic delaying recordings. Third, although alter ego theory and piercing the corporate veil would significantly affect the analysis, Plaintiff has alleged no facts that make this theory plausible.

Finally, the argument that the pandemic delayed recordings deserves special attention. Judicial notice includes generally known facts or facts "readily verifiable from sources of indisputable accuracy." *People v. Davis*, 65 Ill. 2d 157, 161–65 (1976). Recordings in the Cook County Recorder of Deeds office serve the purpose of providing the public with constructive notice of liens on property. Although a delay in recording in that office may be relevant to constructive notice, the Court need not consider that argument here, because there is no judicial notice of such a delay. First, although the pandemic has certainly had a significant impact on the judicial system, the Court simply cannot say it is generally known that the pandemic delayed the office from recording specifically between February and April 2021. There is not much more to the analysis of this prong than that. Although Defendant has an interest in opposing Plaintiff's arguments, Defendant at least disputes that this delay occurred and requests evidence of it. Second, Plaintiff indeed does not point the Court to any evidence or any source to investigate this delay, so there is no source of "indisputable accuracy" of which to speak. *Id.* at 165.

After examining all these issues, the Court determines that there were senior and junior lienholders who should have been joined within thirty days but were not, and there were no valid excuses. Plaintiff's action to foreclose on mechanic's liens should therefore be dismissed under section 2-619(a)(5) with prejudice. *CB Constr. & Design, LLC*, 2021 IL App (1st) 200924, ¶ 38.

III. Action for Breach of Contract and Section 2-615

Plaintiff's breach-of-contract claim is deficient under section 2-615. Plaintiff acknowledges that Illinois is a fact-pleading jurisdiction. Pl.'s Resp. 5. Defendant cites to four elements of a breach-of-contract claim, and one of those elements is "performance by the plaintiff of the contract." Def.'s Mot. 12 (citing *Ontap Premium Quality Waters, Inc. v. Bank of N. Ill., N.A.*, 262 Ill. App. 3d 254, 258–59 (2d Dist. 1994). Plaintiff does not dispute that this is the law in Illinois but seems to imply that its allegation that Plaintiff "performed by providing labor, materials, and services as alleged on each property" is sufficient to satisfy that element under a section 2-615 standard. However, Defendant specifies plenty of other obligations Plaintiff had to

satisfy under the contract. Def.'s Mot. 12–14. Defendant neither disputes that those obligations existed in fact nor argues how those facts need not be alleged as applied to the law. So, Defendant should replead its breach-of-contract claim to cure these deficiencies.

IV. Action for *Quantum Meruit* and Section 2-615

Defendant argues the *quantum meruit* claim should be dismissed because Plaintiff says there was a contract or the parties continued to operate under the terms of the contract after it had expired. However, there is no basis for dismissal. The existence of an express contract may defeat a *quantum meruit* claim, but a court sitting in review of a motion to dismiss would not make factual determinations like whether an express contract existed. *See Weydert Homes, Inc. v. Kammes*, 395 Ill. App. 3d 512, 522 (2d Dist. 2009). That is more the province of a motion for summary judgment or a trial itself. *Id.* In fact, Defendant's reliance on *Archon Constr. Co. v. U.S. Shelter, L.L.C.*, 2017 IL App (1st) 153409, is misplaced exactly because the trial court found that an express contract existed to defeat the *quantum meruit* claim at a bench trial. *See* ¶ 4. At the motion to dismiss stage, a plaintiff should be able to allege a breach-of-contract claim and a *quantum meruit* claim in the alternative. The *quantum meruit* claim here should not be dismissed.

CONCLUSION

THIS COURT having heard the cause hereby orders that:

1. Count I: Foreclosure on Mechanic's Lien be **DISMISSED WITH PREJUDICE**; and
2. Count II: Breach of Contract be **DISMISSED WITHOUT PREJUDICE**.

ENTERED: .

Lewis Nixon **1840**

Judge **Judge's No**

ENTERED
Judge Lewis Nixon-1840
MAR 17 2022
IRIS Y. MARTINEZ
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

I hereby certify that the document to which this certification is affixed is a true copy.

Date IRIS Y. MARTINEZ MAY 17 2022

IRIS Y. MARTINEZ
Clerk of the Circuit Court
of Cook County, IL