IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

KeyBank National Association, et al.,	:	
Plaintiffs-Appellees,	:	Appeal No. 11AP-920
v.	:	(REGULAR CALENDAR)
Columbus Campus, L.L.C., et al.,	:	
Defendants-Appellees,	:	
(Southwest Greens of Ohio, L.L.C.,	:	
Defendant-Appellant).	:	

KeyBank National Association, et al.,	:	
Plaintiffs-Appellees,	:	Appeal No. 11AP-952
v.	:	(REGULAR CALENDAR)
Columbus Campus, L.L.C., et al.,	:	
(W.H. Canon, et al.,	:	
(Defendants-Appellants).	:	

KeyBank National Association, et al.,	:	
Plaintiffs-Appellees,	:	Appeal No. 11AP-955
v.	:	(REGULAR CALENDAR)
Columbus Campus, L.L.C., et al.,	:	
(John Eramo & Sons, Inc.,	:	
(Defendants-Appellants).	:	

KeyBank National Association, et al.,	:	
Plaintiffs-Appellees,	:	Appeal No. 11AP-958
v.	:	(REGULAR CALENDAR)
Columbus Campus, L.L.C., et al.,	:	
Defendants-Appellees,	:	
(Braun Construction Group, Inc.,	:	
Defendant-Appellant).	:	

KeyBank National Association, et al.,	:	
Plaintiffs-Appellees,	:	Appeal No. 11AP-959
v.	:	(REGULAR CALENDAR)
Columbus Campus, L.L.C., et al.,	:	
Defendants-Appellees,	:	
(Karst & Sons, Inc.,	:	
Defendant-Appellant).	:	

KeyBank National Association, et al.,	:	
Plaintiffs-Appellees,	:	Appeal No. 11AP-963
v.	:	(REGULAR CALENDAR)
Columbus Campus, L.L.C., et al.,	:	
Defendants-Appellees,	:	
(Rite Rug Company,	:	
Defendant-Appellant).	:	

KeyBank National Association, et al.,	:	
Plaintiffs-Appellees,	:	Appeal No. 11AP-964
v.	:	(REGULAR CALENDAR)
Columbus Campus, L.L.C., et al.,	:	
Defendants-Appellees,	:	
(Majestic Drywall Services, Inc.,	:	
Defendant-Appellant).	:	

BRIEF OF *AMICUS CURIAE* AMERICAN SUBCONTRACTORS ASSOCIATION & AMERICAN SUBCONTRACTORS ASSOCIATION OF OHIO IN SUPPORT OF DEFENDANT-APPELLANT SUBCONTRACTORS AND MATERIAL SUPPLIERS

On Appeal from the Franklin County, Ohio Court of Common Pleas
Case No. 09CVE-07-9921

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U.S. Census Bureau, Construction: Geographic Area Series: Detailed Statistics
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STATEMENT OF INTEREST OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

The American Subcontractors Association ("ASA") is a national non-profit corporation supported by membership dues paid by approximately 5,000 member companies throughout the country. Membership is open to all commercial construction subcontractors, material suppliers and service companies. ASA members represent the combined interest of both union and non-union companies, and range from the smallest private firms to the nation's largest specialty contractors. Hundreds of ASA's member companies are located here in Ohio. The ASA of Ohio is a statewide chapter of the national ASA, and was formed in 2008 to consolidate the former Columbus, Cincinnati, and Cleveland chapters. The issues set forth in this Appeal profoundly impact ASA's member companies, as well as the thousands of Ohioans who are gainfully employed by these companies.

The ASA is especially interested in assisting Ohio courts in interpreting the scope of flow-down clauses in Ohio construction contracts, establishing clear requirements for subordination agreements, clarifying a common sense interpretation of the distribution requirements of R.C. 1311.14(B), and bringing applicable decisions on flow-down clause construction from other jurisdictions to this Court's attention. This Court's decision will impact construction across the State of Ohio where billions of dollars of construction work is being performed. The ASA has an interest in defending Ohio's Mechanic's Lien Law—a law which would be rendered meaningless on any bank-funded construction project in Ohio if this Court affirms the lower court's decision.

This Amicus Brief is strictly concerned with the novel issue of the scope of the subcontract flow-down clause and the ability of a lender to require subcontractors to subordinate their lien interests in the manner used in the facts of this case.

STATEMENT OF FACTS

A. The Owner, the Lenders, the General Contractors, and the Notice of Commencement.

The Owner was formed to own a continuing care retirement community. (*Stip.* T.d. 932) (attached to Appellants' Brief as Appx. 5). The Owner entered into five construction agreements (collectively and individually "Prime Contract") with Braun Construction Group, Inc. and J.M. Olson Corporation (collectively "General Contractors"). (*Id.*) True and accurate copies of the Prime Contract are found in the Appendix to the Order Entering Stipulated Facts with Negative Notice, at document numbers 1 through 5. (*Id.*) The parties agree that the Prime Contract attached to the Order Entering Stipulated Facts with Negative Notice as Exhibit 1 is the specimen contract for all Prime Contract documents on the project. (*Summ. J. Dec.*, T.d. 1098) (attached to Appellants' Brief as Appx. 1). The General Contractors filed the Original Notice of Commencement for the project on March 10, 2008. (*Id.*) Accordingly, the effective priority date of all valid mechanic's liens on the project is also March 10, 2008. (*Stip.* T.d. 932.) The General Contractors entered into individual agreements ("Subcontract Agreement") with Subcontractors. (*Id.*) The parties agree that the Subcontract Agreement attached to the Order Entering Stipulated Facts with Negative Notice as Exhibit 6 is the specimen contract for purposes of priority. (*Id.*)

After the Notice of Commencement was filed, the Owner entered into a lending agreement with the Lenders. (*Summ. J. Dec.*, T.d. 1098.) The funds provided by the Lenders were not used to pay off any prior loans. (*Stip.* T.d. 932.) None of the loan funds were disbursed by Lenders directly to contractors, subcontractors, material suppliers, or laborers who performed work or provided materials to or for the Project. (*Id.*) Due to non-payment, the General Contractors and Subcontractors timely filed their mechanic's liens. (*Summ. J. Dec.*, T.d. 1098.)

B. The Subcontract Agreement Language.

The Subcontract Agreement is a paid-if-paid contract that conditions payment to the Subcontractors upon payment to the General Contractors. (*Stip. Ex. 6*, at Art. III) (attached to Appellants' Brief as Appx. 30). It states that "[t]his Subcontract and the documents incorporated herein sets[sic] forth the entire agreement between the Contractor and the Subcontract." (*Id.*, at Art. XXVIII.) The agreement identifies the documents making up the Subcontract Agreement as "this Subcontract Agreement, along with the following exhibits [list of Exhibits A-G]." (*Id.*, at Article XXIX) None of these listed exhibits are the Prime Contract; they were portions of the Prime Contract that were deemed important enough to attach and incorporate. (*Id.*) The Subcontract Agreement states that it is the "entire agreement between the parties . . . and supersedes all . . . previous written . . . representations or agreements." (*Id.*, at Art. XXVII(f).) The Subcontract Agreement language requires Subcontractors to perform work "strictly in accordance with the Subcontract Documents listed in Exhibit A attached hereto and incorporated by reference." (*Id.*, at Art. I.) No other exhibit or document is stated to be both "attached hereto and incorporated by reference," although other exhibits are said to be attached. (*Id.*)

The Subcontract Agreement contains a clause requiring the Subcontractors to assume the responsibilities of the Prime Contract "with respect to Subcontractor's Work." (*Id.*) Specifically, this clause ("Flow-Down Clause") states:

> Subcontractor shall be bound by the terms of the Prime Contract and all documents incorporated therein, including without limitation, the General and Supplementary Conditions, and assumes toward the Contractor, with respect to the Subcontractor's Work, all of the obligations and responsibilities that the Contractor, by the Prime Contract, has assumed toward the Owner.

(*Id.*)

The "General Conditions" were a separate document attached to the contract between the Owner and General Contractors containing the subordination language, which is the focus of this appeal.

The Prime Contract itself was not attached to the Subcontract Agreement, was not listed as a Subcontract Document in Article XXIX, and the Subcontract Agreement specifically referred to some sections of the Prime Contract, stating that certain specific provisions applied to the Subcontractor. (*See, e.g., id.*, at Art. III.) (specifically conditioning payment on "the conditions for payment under the Prime Contract . . . "). There was no specific reference to any portion of the Prime Contract regarding subordination of mechanic's lien priority.

C. The Prime Contract Language and Subordination Clauses.

The Prime Contract consists of the AIA 111-1997 Prime Contract agreement, the AIA-201-1997 General Conditions, Supplemental Conditions, Drawings, Specifications, Addenda, and other documents, including a project schedule. (*Stip. Ex. 1*) (attached to the Appellants' Brief as Appx. 25). The Prime Contract incorporates these separate documents "as fully a part of the Contract as if attached to this Agreement or repeated herein." (*Id.*, at §1.) Section 1.1.2 of the General Conditions to the Prime Contract expressly state that the Prime Contract must "*not* be construed to create a contractual relationship *of any kind* . . . between the *Owner* and a *Subcontractor* . . . [or] between *any persons or entities other than* the Owner and Contractor." (*Id.*, at Gen. Cond. § 1.1.2.) (emphasis added). Furthermore, the General Conditions are required to be signed by the General Contractors and Owner, and that if they are not signed, the Architect must identify them for signature. (*Id.*, at Gen. Cond. § 1.5.1.) The General Conditions themselves are not signed by the General Contractors or Owner of the project.

In regard to the Subcontractors, the Prime Contract requires the General Contractors to put "provisions" into all Subcontract Agreements "requiring the Subcontractor thereunder to perform its portion of the Work in accordance with the Contract Documents and shall require the Subcontractor to adhere to all Applicable Laws and applicable provisions contained in this

Agreement." (*Id.*, at Gen. Cond. § 5.2.6.) Furthermore, the General Conditions of the Prime Contract state that "*to the extent of the Work to be performed* by the Subcontractor," each "subcontractor will require the Subcontractor . . . to be bound to the *Contractor* by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities . . . which the Contractor, assumes toward the Owner." (*Id.*, at Gen. Cond. § 5.3.1) (emphasis added) (grammatical errors in the original).

The General Conditions to the Prime Contract contain two provisions regarding subordination (collectively "Subordination Clauses"). The first is found in section 13.1.2 of the General Conditions and states that:

> To the extent permitted by law, the Contractor and all Subcontractors (and each of their respective subcontractors and suppliers) *are hereby subordinate to* any and all statutory, constitutional and contractual liens, security interests and *right each may now or in the future may have against the Project* or any portion thereof to the liens, security interests, and rights of any lender having a lien against all or any portion of the Project, from time to time. Contractor and all subcontractors agree to execute and deliver to Owner, such documents as may be requested by Owner to *acknowledge such* subordination.

(*Id.*, at Gen. Cond. § 13.1.2.) (emphasis added) (grammatical errors in the original).

No such documents were ever requested by the Owner to acknowledge any subordination.

The second of the Subordination Clauses is found in Article 16 of the General Conditions, and states:

> The Contractor, all Subcontractors (and each of their respective Subcontractors) *are hereby subordinate to* any and all statutory, constitutional, contractual, and constitutional liens, *security interests*, and rights *it may now or in the future have* against the Project or any portion thereof to the liens, security interest and liens of any lender (herein called "Lender") having a lien against all or any part of the Project. *Contractor shall include this provision of this Article 16 in each agreement between Contractor and Subcontractor.*

(*Id.*, at Gen. Cond. § 16.1.) (emphasis added) (grammatical errors and mistakes in the original). Neither of the two Subordination Clauses contained any term identifying the amount of the subordination, the maximum amount of the loan, the interest rate of the loans, the loan period, or the limitations upon the use of loan proceeds. Additionally, the term "lender" is never defined.

D. The Contradictions Between the Prime Contract and Subcontract Agreement.

The requirements of the Prime Contract and the Subcontract Agreement are not consistent. The Subcontract Agreement required, *inter alia*, insurance coverage at a specific amount, as required in an attached exhibit. (*Stip. Ex. 6*, at Ex. C.) The Subcontract Agreement does not require a Performance Bond or Payment Bond. (*Id.*, at Coversheet.) The Subcontract Agreement purports to limit the scope of the work of the Subcontractors to their own relevant work specifically identified in the Subcontract Agreement exhibits. (*Id.*, at Art. I.)

On the other hand, the Prime Contract identifies the "work" on the construction project as "all Work associated with the Project in accordance with the Drawings and Specifications attached hereto . . . and the Qualifications/Scope of Work attached hereto." (*Stip. Ex. 1*, at Art. 2.) The General Contractors are required to supply 100% payment and performance bonds. (*Id.*, at § 5.2.5.) They must also provide a large amount of insurance coverage not otherwise required of the Subcontractors. (*Id.*, at Ex. F.)

SUMMARY OF THE ARGUMENT

This appeal is about the trial court's misinterpretation of an ambiguous agreement and its misapplication of R.C. 1311.14(B) allowing the Lenders to gain priority over the Subcontractors' mechanic's liens even though the Lenders never used the mortgage fund to pay the Subcontractors for their work, as required by statute. The Subordination Clauses, the Flow-Down Clause, and other language used in the Prime Contract and Subcontract Agreement make

the operative provisions ambiguous. The Flow-Down Clause in the Subcontract Agreement is ambiguous and must be construed by this Court as limited in scope, just as the courts of Virginia, Texas, Pennsylvania, New York, Indiana and Nevada have done. By its very language, the Flow-Down Clause only incorporated the substantive work-related obligations of the Prime Contract, not the procedural obligations, such as the Subordination Clauses.

Likewise, the Subordination Clauses in the Prime Contract are too ambiguous to create any subordination of the Subcontractors' mechanic's liens. They lack all essential terms, contain undefined terms, and otherwise are unenforceable by the Lenders. The trial court misinterpreted these ambiguities and violated the rules of contract interpretation when it found in favor of the Lenders, and against the Subcontractors.

Even if the Flow-Down Clause was unlimited, it is necessarily ambiguous, and should be interpreted in accordance with the Subcontractors' views, and the decisions of other courts in construction-thriving states. A limited interpretation is the only rational view that conforms to the rules of contract interpretation—including the requirement that the Court give effect to all terms and interpret the contract to create a rational result, not the absurd result created by fully incorporating the Prime Contract. Additionally, the Subcontractors' view is consistent with the holdings from Ohio courts and other states' courts.

The trial court also erred in finding the Lenders had an equitable right to subordination. Ohio statutes provide the Lenders with an adequate remedy to gain priority, a remedy the Lenders chose not to use, and the Lenders could have taken simple steps which they failed to do. Nothing was ever done to require the subordination of the Subcontractors to subordinate their mechanic's lien rights.

Finally, the longstanding public policy in the State of Ohio weighs against the trial court holding. These Subordination Clauses amount to a waiver of the Subcontractors' mechanic's lien rights. Because the Subcontract Agreement makes payment to the Subcontractors contingent upon payment to the General Contractors, any provision prohibiting the Subcontractors from filing mechanic's liens is void and unenforceable as against public policy. R.C. 4113.62(E). Giving effect to the Subordination Clauses is tantamount to eliminating all Subcontractors' lien rights. Affirming the trial court's decision will destroy Ohio's Mechanic's Lien Law for all subcontractors, contractors, and material suppliers working on financed projects. This makes Ohio's Mechanic's Lien Law meaningless state-wide.

Ultimately, the Subcontractors were entitled to priority over the Lenders because the Lenders failed to comply with the requirements of Ohio Revised Code § 1311.14, the purpose of which is to put all interested parties on notice that the Lenders were obtaining such rights and provide the subcontractors and suppliers with their right to be paid for the fruits of their labor. Compliance with this section is required for Lenders to gain priority over the liens of the Subcontractors, and the Lenders failed to meet their burden.

For all of these reasons, this Court should reverse the Franklin County Common Pleas Court decision granting the Lenders' Motion for Summary Judgment and denying the Subcontractors' Motion for Summary Judgment.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review of a trial court's grant or denial of summary judgment is *de novo*. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, 936 N.E.2d 481, ¶ 29. Further, decisions regarding contract interpretation are matters of law, and are also subject to a

de novo review on appeal. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St. 3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 37. No deference is due to the trial court's decision. *Id.*

II. THE TRIAL COURT ERRED IN GRANTING THE LENDERS' MORTGAGE PRIORITY EVEN THOUGH THE LENDERS HAD NOT FOLLOWED THE DISTRIBUTION REQUIREMENTS OF R.C. 1311.14(B) AND IN NOT REQUIRING THE LENDERS TO PAY THE SUBCONTRACTORS FOR THEIR WORK AS REQUIRED BY § 1311.14(B)(3).

The Lenders failed to substantially comply with the distribution requirements of R.C. 1311.14(B). A mortgagee gains priority over mechanic's liens under R.C. 1311.14 only if the funds are distributed as required by the statute. R.C. 1311.14(A). The Lenders were required to disburse the funds "in the following order:" first, the Lenders pay off a prior encumbrance or withhold an amount for that purpose; second, the Lenders retain from the remainder an amount sufficient to complete the construction; and third, the Lenders must pay the contractor and subcontractors, followed by the material suppliers and laborers. *Id.* § 1311.14(B)(1)-(3); *Rider v. Crobaugh*, 100 Ohio St. 88, 98, 125 N.E. 130, 133 (1919) ("The act requires the distribution of the balance of the fund in the order therein prescribed."). Only by doing this can the Lenders obtain priority over the mechanic's liens. R.C. 1311.14(B) ("In case the mortgagee pays out of the fund otherwise . . . then the lien of the mortgage . . . is subsequent to liens of original contractors, subcontractors, [and] material suppliers"). The language of the statute itself proves that compliance with the distribution order is required before the mortgage gains priority. *Id.* § 1311.14(A) (stating that "a mortgage . . . shall be prior to all . . . liens . . . to the extent that the proceeds [of the mortgage] are used and applied for the purposes of *and pursuant to this section.*") (emphasis added). Clearly, using the funds for the purposes espoused in R.C. 1311.14 is not enough, the funds must also be distributed "pursuant" to the requirements found in that statute. That was not done in this case.

The Lenders failed to do what was required. There is $41 Million left in the mortgage fund. (*Yesso Depo.* Ex. 112) (attached to Appellants' Brief as Appx. 127) Applying the distribution requirements of R.C. 1311.14(B), there is enough money in the mortgage fund to pay the Subcontractors, and the Lenders must do so before gaining priority. There were no prior encumbrances to pay-off from the project. (*Stip.*, T.d. 932; *Yesso Depo.* Ex. 11, at Recitals, §§2.1, 2.2, 2.3, 2.5, 2.9, 3.2 and 3.4) (attached to Appellants' Brief as Appx. 55). The cost to complete the construction is far less than the $41 Million remaining; only $13 Million was needed to complete construction. The mechanic's liens totaled nearly $9 Million. Even if the $13 Million was retained in the fund for completion, the remaining $28 Million is enough money to cover the claims of the Subcontractors, and must be distributed. R.C. 1311.14(B). The Lenders failed to make direct payments. (*Stip.,* T.d. 932.) Until the Lenders make direct payment, the Lenders do not have priority under R.C. 1311.14. Therefore, the trial court erred in awarding R.C. 1311.14 priority to the Lenders.

This is consistent with the public policy behind Ohio's Mechanic's Lien Law, that subcontractors be compensated for the value of the work they performed to improve property, and it is consistent with the purpose of R.C. 1311.14, which is to allow for the funding, and completion, of construction projects. *See* Ohio Constitution, Article II, Section 33; *see also* R.C. 1311.14(B)(2) (giving the court authority to direct the amount to be paid by the lender to the lien claimants). In order to ensure completion of an improvement, contractors, subcontractors, and material suppliers must be paid. Therefore, this Court should reverse the trial court's grant of lien priority under the statute—it is only available if the Lenders pay the Subcontractors for the value of the work they performed. *See* R.C. 1311.14(B)(3) & (5).

III. THE PRIME CONTRACT WAS NEVER FULLY INCORPORATED INTO THE SUBCONTRACT AGREEMENT—THAT IS INCONSISTENT WITH THE LANGUAGE OF THE SUBCONTRACT AGREEMENT AND THE EXPRESS LIMITATION OF THE FLOW-DOWN CLAUSE.

A. The Prime Contract Was Never Fully Incorporated into the Subcontract Agreement—Finding Otherwise is Inconsistent with the Overall Language of the Subcontract Agreement.

The Prime Contract, which contains the General Conditions and the Subordination Clauses, was never incorporated fully into the Subcontract Agreement as a subcontract document. In order for a separate document to be incorporated into a signed contract, it must be specifically referenced and incorporated by the language of the signed contract. *See Lincoln Welding Works, Inc. v. Ramirez*, 647 P.2d 381, 383 (Nev. 1982). Here, the Subcontract Agreement incorporates some documents as Subcontract Documents, but not the Prime Contract. The language of the Subcontract Agreement proves that it is made up of only the "Subcontract Agreement, along with the following exhibits." (*Stip. Ex. 6*, at Art. XXIX.) Additionally, in Article I of the Subcontract Agreement, the Subcontract Documents are defined as those "listed in Exhibit A attached hereto and incorporated by reference." (*Id.*, at Art. I.) These other exhibits include many documents, but do not include the Prime Contract, or any document containing either of the Subordination Clauses. Had the parties intended for the Prime Contract to be fully incorporated into the Subcontract Agreement as it did the other exhibits, some of which were originally part of the Prime Contract, they would have attached the Prime Contract in full, as an exhibit, and listed it specifically along with the other seven Subcontract Agreement exhibits. Again, incorporating all terms of the Prime Contract into every Subcontract Agreement would create an absurd result requiring each of the Subcontractors to fully perform all of the General Contractors' duties, even if they were outside the scope of their work.

In a case involving a similar construction agreement, the Eleventh District Court of Appeals determined that a document is not listed in an exhibit list was not incorporated into the contract. In *Cleveland Jet Center, Inc. v. Structural Sales Corporation*, a construction contract provision stated that the relevant "Contract Documents, which constitute the entire agreement between the Owner and the Contractor, are listed in Article 1 and . . . are enumerated as follows." *Cleveland Jet Ctr. v. Struct. Sales Corp.*, 11th Dist. No. 94-L-181, 1995 Ohio App. LEXIS 4113, at *7 (Sept. 22, 1995) (attached hereto as Appendix "A"). Although Article I of the *Cleveland Jet* agreement stated that it incorporated a general conditions document, the Eleventh District held that it was not incorporated because the document was not specifically enumerated as required by the later contract language. *Id.*, at *6-7. In the case at hand, the Subcontract Agreement likewise stated that the subcontract documents, which were to be incorporated into the Subcontract Agreement, were attached, and specifically listed. (*Stip. Ex. 6*, at Art. I & Art. XXIX.) Neither the Prime Contract nor the general conditions were listed as an exhibit. Therefore, just as the general conditions were not included in the Contract Documents in *Cleveland Jet*, the General Conditions, which contain the Subordination Clauses, are not included in the Subcontract Documents in this case. The General Contractors could have made their intention to include the Prime Contract clear by attaching it and listing it as an exhibit. This Court should similarly find that the subcontract documents do not include the Prime Contract, and therefore do not include the Subordination Clauses.

B. The Flow-Down Clause Did Not Fully Incorporate the Prime Contract Because It Was Limited by its Express Language.

Everyone agrees that *some of the provisions* of the Prime Contract were incorporated into the Subcontract Agreement. When a document is intended to be incorporated into a contract for a specific purpose, the document is incorporated only for that specific, limited purpose. *Lincoln*

Welding Works, Inc., 647 P.2d at 383. The intent of the parties to a contract resides in the language they chose to employ in the agreement. *See Shifrin v. Forest City Ent., Inc.*, 64 Ohio St. 3d 635, 638, 597 N.E.2d 499 (1992). In this case, portions of the Prime Contract were incorporated through a flow down clause, which stated:

> Subcontractor shall be bound by the terms of the Prime Contract and all documents incorporated therein, including without limitation, the General and Supplementary Conditions, and assumes toward the Contractor, *with respect to the Subcontractor's Work*, all of the obligations and responsibilities that the Contractor, by the Prime Contract, has assumed toward the Owner.

(*Stip. Ex. 6*, at Art. I) (emphasis added).

This Flow-Down Clause is limited by its very plain language language—it incorporates only the substantive work-related obligations under the Prime Contract with "respect to the Subcontractor's Work." (*Id.*) This clause does not require the Subcontractors to take on any obligations to the Lenders.

The trial court erroneously interpreted this Flow-Down Clause as two separate clauses by defining the term "and assumes . . ." as "in addition assumes." (*Summ. J. Dec.*, T.d. 1098.) This is inconsistent with the other language used by the parties. The Cambridge American English Dictionary defines "and" as "used to join two words, esp. two that are the same, to make their meaning stronger." CAMBRIDGE AMERICAN ENGLISH DICTIONARY, *And*, http://dictionary.cambridge.org/dictionary/american-english/and_4 (last visited Feb. 22, 2012). Had the trial court correctly used this meaning of the term "and," it would have interpreted the clause correctly, viewing it as *one clause*. The Subcontractors agreed to be bound by and assume, to the General Contractors, the General Contractors' obligations under the Prime Contract in regard to the Subcontractors' work, just as the General Contractors were bound to the Owner. There is one clause; the "and assumes . . ." portion modifies and explains the beginning.

This interpretation is the only interpretation of the word "and" which is consistent with the language used in the Subcontract Agreement, and the Prime Contract itself, and complies with the fundamental rules of contract interpretation. In interpreting a contract, the court must give effect to every provision of the contract. *Sunco, Inc. v. Toledo Edison Co.*, 129 Ohio St. 3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 54. "'[I]f one construction of a doubtful condition written' . . . would render a clause meaningless and it is possible that another construction would give that same clause meaning and purpose, then the latter construction must prevail." *Id.* (quoting *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St. 3d 353, 362, 678 N.E.2d 519 (1997)). The Subcontract Agreement continually makes reference to *specific procedural* portions of the Prime Contract which it incorporates. In Article X, the Subcontract Agreement states that the Subcontractors are bound by the decisions "of the Architect with respect to the quality and quantity of the work . . . and other matters set forth in the Prime Contract to the same extent Contractor is bound by [them]." (*Stip. Ex. 6*, at Art. X.) Likewise, the Subcontract Agreement specifically incorporated the conditions for payment under the Prime Contract by stating "based . . . on the conditions for payment under the Prime Contract, including . . . conditions relating to material delivered to and suitably stored on the Site." (*Id.*, at Art. III.) There are other countless examples of this specific and express incorporation throughout the Subcontract Agreement. Had the Flow-Down Clause actually been intended as a general Flow-Down Clause, as the trial court determined, then these requirements would have been totally redundant, and would have had no effect whatsoever. Instead, their inclusion shows that the parties intended the Flow-Down Clause to incorporate only the substantive work-related obligations of the Prime Contract.

Neither the General Contractors, nor the Owner, thought that a general reference to the Prime Contract was sufficient to bind the Subcontractors to the Subordination Clauses. The Prime Contract itself states that it does not create any contractual relationship, and does not bind anyone other than the General Contractors and the Owner. (*Stip. Ex. 1*, at Gen. Cond. § 1.1.2.) The requirement in the Prime Contract that there even be a Flow-Down Clause in the Subcontract Agreement is limited to the obligations related to the Subcontractors' work. (*Id.*, at Gen. Cond. § 5.2.6 and 5.3.1.) The Subordination Clauses require the General Contractors to include the specific subordination language into its Subcontract Agreements. (*Id.*, at Gen. Cond. § 16.1.) The Subcontractors, based on these conflicting provisions, could not have reasonably understood the limited Flow-Down Clause as incorporating the Subordination Clauses. Therefore, the trial court erred in its interpretation of the limited Flow-Down Clause. The proper interpretation is to view the provisions after the word "and" as an explanation of what obligations the Subcontractors bound themselves to, and to whom they bound themselves.

C. The Limited Flow-Down Clause Incorporates only the Substantive, Work-Related Obligations of the Prime Contract, Not the Procedural Obligations such as the Subordination Clauses.

Because the limited Flow-Down Clause is, by its very language, limited to substantive work-related obligations, it only incorporated these work-related obligations. It did not incorporate procedural non-work-related clauses, such as the Subordination Clauses. Contractual provisions governing security interests and mechanic's liens are "procedural in nature" and for that reason "do not . . . concern substantive aspects of performing the work or labor or providing any material under the contract." *Masiongale Electrical-Mechanical, Inc. v. Construction One, Inc.*, 102 Ohio St. 3d 1, 2004-Ohio-1748, 806 N.E.2d 148, ¶ 19. *See also VNB Mortgage v. Lone Star Indus.*, 209 S.E.2d 909 (Va. 1974) (holding that a flow-down provision limited to a

subcontractor's work does not flow down mechanic's lien waivers or procedural provisions found in the prime contract.) The Subordination Clauses in the Prime Contract are "procedural in nature" because they likewise concern only mechanic's lien priority issues, and not the "substantive aspects of . . . the work." *Masiongale*, 2004-Ohio-1748, ¶ 19. Therefore, the trial court erred when it determined that the limited Flow-Down Clause necessarily incorporated the procedural, non-work-related Subordination Clauses.

IV. EVEN IF THE SUBCONTRACT FLOW-DOWN CLAUSE WAS UNLIMITED, IT IS AMBIGUOUS, AND BINDS THE SUBCONTRACTORS ONLY TO WORK-RELATED OBLIGATIONS, NOT PROCEDURAL OBLIGATIONS, OF THE PRIME CONTRACT.

A. An Unlimited Flow-Down Clause is Inherently Ambiguous and Must be Interpreted In Favor of the Subcontractors.

Even if the Flow-Down Clause were not expressly limited, the clause is ambiguous and should be interpreted as flowing down only the substantive, work-related provisions. A contract is ambiguous where it is unclear whether it fully incorporates another clause in its entirety, and more explicit phrasing could have been used to prevent confusion. *Citizens Fed. Savs. & Loan Ass'n of Dayton v. Page*, 12th Dist. No. CA83-03-018, 1984 Ohio App. LEXIS 8758, *12-13 (Jan. 9, 1984) (citing *Cent. Realty Co. v. Clutter*, 62 Ohio St. 2d 411, 406 N.E.2d 515 (1980)) ("Without specific reference . . . the clause is ambiguous.") (attached hereto as Appendix "B"). In *Page*, the Twelfth District Court of Appeals found a mortgage ambiguous because it did not clearly incorporate clauses in their entirety under the Federal Home Loan Board regulations. *Id.* The mortgage in *Page* did not contain "specific language" incorporating these clauses. *Id.*, at *11. Likewise, in this case, the Subcontract Agreement Flow-Down Clause did not expressly state that the Subordination Clauses, or any procedural clauses, were fully incorporated into the Subcontract Agreement. Elsewhere, when specific procedural clauses were intended to be incorporated, they were specifically referenced. No such specific reference existed regarding the

Subordination Clauses. The Flow-Down Clause, if not limited by its very language, is therefore ambiguous.

An ambiguous Flow-Down Clause does not incorporate the Subordination Clauses. When a contract is ambiguous, it must be strictly construed against the drafter who had the opportunity to use more precise language. *Clutter*, 62 Ohio St. 2d at 413. There is no question that the General Contractors, not the Subcontractors, drafted the standard Subcontract Agreements. Interpreting the Flow-Down Clause against the General Contractors and in favor of the Subcontractors, the clause must be limited to only the work-related, substantive provisions, of the Prime Contract. That is the reasonable, and limited, interpretation of the Flow-Down Clause given by the Subcontractors. Had the General Contractors intended to incorporate the Subordination Clauses and other procedural clauses, they were fully capable of doing so, were in a position to do so, and "should have made this intent clear." *Page*, 1984 Ohio App. LEXIS 8758, *12-13. Therefore, the trial court erred when it interpreted the Flow-Down Clause broadly. Even if the Flow-Down Clause was a general, unlimited one as the trial court and the Lenders suggest, it is inherently ambiguous, and must therefore be interpreted in a limited fashion. In any event, the Subordination Clauses were not incorporated through the Flow-Down Clause.

B. The Trial Court's All Encompassing Interpretation of the Flow-Down Clause Creates an Absurd Result.

The interpretation offered by the trial court and Lenders violates another fundamental rule of contract interpretation. Where two interpretations of a contract exist, the one which involves rational actions by the parties, not irrational actions or absurd results, must be favored. *Ohio Crane Co. v. Hicks*, 110 Ohio St. 168, 171-72, 143 N.E. 388, 398 (1924). The Subcontractors' interpretation, that the Flow-Down Clause only incorporated substantive work-

related requirements, is rational. It created duties for the Subcontractors to perform their work in accordance with the overall, uniform requirements for the project as requested by the architect. It protected the General Contractors from sole contractual liability for the Subcontractors' work. On the other hand, the parties could not possibly have intended to incorporate all procedural obligations found in the Prime Contract because the result would be absurd.

First, under the trial court's interpretation, there would be a conflict between the actual scope of the work contained in the Prime Contract (the entire project) and in the Subcontract Agreement (a small portion of the project). (*Stip. Ex. 6*, at Art. I.); (*Stip. Ex. 1*, at Art. 2.) The Subcontractors would be required to perform the more stringent duty. (*Stip. Ex. 6*, at Art. XXVII(d).) Therefore, the Subcontractors, individually, would have been required to complete the entire project themselves. A carpentry subcontractor could not be reasonably or rationally expected to perform HVAC, masonry, and electrical work, and oversee the entire project. A rational general contractor could not have expected that, either.

Second, the Subcontractors would be required to supply a completely redundant performance and payment bond under the obligations of the Prime Contract, even though their individual Subcontract Agreements state otherwise. (*Id.*, at Coversheet.); (*Stip. Ex. 1*, at § 5.2.5.) Such "double-bonding" would serve no rational purposes when they cover the exact same work, would be payable to the Subcontractors themselves, and would be written for the same amount of the project as the General Contractors' bond.

Third, the Subcontractors would be required to provide the overly large amount of insurance required by the Prime Contract, despite the fact that their work is much more limited, and their Subcontract Agreements specifically and expressly require much less insurance. (*Stip. Ex. 6*, at Ex. C.); (*Stip. Ex. 1*, at Ex. F.) Again, there is no rational reason for this to occur, and

clearly the two provisions contradict each other, providing additional proof that there was no intention to incorporate all procedural requirements of the Prime Contract into the Subcontract Agreement. These are only a few examples; the documents may be construed to contain *tens if not hundreds of additional contradictions* and irrational provisions if interpreted in accordance with the trial court and Lenders' view.

C. Other Construction-Thriving States Have Interpreted Broad Flow-Down Clauses Narrowly In Similar Situations Because of these Absurdities and Ambiguities.

Because there is no case directly on point in Ohio (discussed *infra*), this Court should look to the learned decisions of other construction-thriving states which have considered similar issues. These states, including but not limited to Delaware, Indiana, New York, Pennsylvania, Texas, and Wyoming, have determined that even a broad, unlimited Flow-Down Clause is ambiguous and merely flows-down substantive work-related contract provisions relating to the scope, quality, character and manner of the work to be performed. *See, e.g., Falcon Steel Co. v. Weber Engineering Co., Inc.*, 517 A.2d 281 (Del. Ch. 1986); *MPACT Const. Group, LLC v. Superior Concrete Constr., Inc.*, 802 N.E.2d 901 (Ind. 2004); *CooperVision, Inc. v. Intek Integration Tech., Inc.*, 794 N.Y.S.2d 812 (N.Y. Sup. Ct. 2005); *Bernotas v. Super Fresh Food Markets, Inc.*, 63 A.2d 478 (Pa. 2004); *Tribble & Stephens Co. v. RGM Constr., L.P.*, 154 S.W.3d 639 (Tex. Ct. App. 2004); *Wyoming Johnson, Inc. v. Stag Indus., Inc.*, 662 P.2d 96 (Wyo. 1983). According to the U.S. Census Bureau's 2007 Economic Census, New York, Pennsylvania, and Texas are listed in the top ten states for number of construction contractors, and Wyoming is listed in the top ten states for percentage of workforce employed in the construction industry. U.S. CENSUS BUREAU, *Construction: Geographic Area Series: Detailed Statistics Establishments: 2007*, factfinder2.census.gov (search for table ID "EC0723A1"). Furthermore, as this Court recently declared, the Delaware Court of Chancery has much

experience in these matters because Delaware is the location of much of this country's corporate litigation. *See MD Acquisition, L.L.C. v. Myers*, 173 Ohio App. 3d 247, 2007-Ohio-3521, 878 N.E.2d 37, ¶ 7. Because Courts in these states hold that procedural obligations, i.e. the Subordination Clauses, do not Flow-Down through even a general, unlimited Flow-Down Clause. Courts in this state should do the same.

In *Falcon Steel Co. v. Weber Engineering Co., Inc.*, the Delaware Court of Chancery was faced with interpreting a general, unlimited flow-down clause. *Falcon Steel*, 517 A.2d at 285. In fact, the prime contract in *Falcon Steel* was expressly incorporated into the subcontract agreement. *Id.* The Delaware court had to decide whether that general clause incorporated a procedural arbitration provision found only in the prime contract. *Id.* The *Falcon Steel* court found that the general flow-down provision had to be read in context of the provision which stated described the subcontractor's work. *Id.*, at 286. After doing so, the court noted that the general flow-down clause "cannot be reasonably read to effect a wholesale incorporation of the entire prime contract" because it "would make little sense if so construed," and would have required the subcontractor to perform work that it had no business performing, and would have required the parties to have intended to conflicting, inconsistent provisions found in the two documents. *Id.* As noted by the Delaware court, this "is hardly the way that two commercially sophisticated parties . . . normally conduct their affairs." *Id.* Likewise, in this case, a wholesale incorporation of the Prime Contract would cause Subcontractors to engage in work not related to their business, and would cause explicit inconsistencies and conflicts in other provisions, discussed above. This is not the lone decision on this issue—the U.S. Court of Appeals for the Fifth Circuit has seen it fit to adopt this reasoning. *See Habets v. Waste Management, Inc.*, 363 F.3d 378 (5th Cir. 2004).

Courts from the neighboring State of Indiana lend additional persuasive authority for this proposition. In *MPACT Construction Group, LLC v. Superior Concrete Constructors, Inc.*, the Indiana high court held that a general incorporation of a prime contract does not incorporate the entire prime contract. *MPACT*, 802 N.E.2d at 903. The relevant subcontract agreement in *MPACT* incorporated the prime contract between the owner and the general contractor. *Id.*, at 907-08. The prime contract contained a procedural clause, which the subcontractor claimed was not incorporated. *Id.* The Indiana high court found that although there was no express limitation of the incorporation provision, one should be implied because of the language surrounding the flow-down provision. *Id.*, at 908. Specifically, the court found that because the specific work requirements were referenced after the flow-down provision, in subsequent sentences, this proved that the parties intended to limit the incorporation of the prime contract only to the work-related matters, such as the quality, quantity, and character of the subcontract work, and did not flow-down procedural obligations. *Id.* In this case, the Flow-Down Clause is also surrounded by work-related clauses, including one within the Flow-Down Clause itself. (*Stip. Ex. 6*, at Art. I.) Specifically, the Flow-Down Clause in this case is surrounded by the following phrases in Article I:

> Subcontractor shall furnish all labor, materials . . . and services necessary to properly . . . complete the *work* . . . . The *work* shall be performed . . . in accordance with the Subcontract Documents . . . . Subcontractor has examined the Contract Documents [which are] . . . suitable for . . . *Subcontractor's work*.

(*Id.*)

Similarly, the language of the Prime Contract Subordination Clauses required the Prime Contractor to include the specific subordination language in the Subcontract Agreement. (*Id.*, at Gen. Cond. § 16.1.) Likewise, the language of the prime contract in *MPACT* required the

contractor to include specific language in its subcontracts, which it also failed to do. *MPACT*, 802 N.E.2d at 910. As a result, the Indiana court refused to enforce the procedural provisions of the prime contract against the subcontractor. *Id.* Because these very facts are present in this case, this Court should likewise hold that the Flow-Down Clause was impliedly limited by the references to the Subcontractors' work that surround the Flow-Down Clause. This conclusion is consistent with the language used, and therefore the intention of the parties.

Finally, the State of New York also holds that in the construction contract context, a general incorporation clause is necessarily limited to the substantive aspects of the work covered in the prime contract. *See CooperVision*, 794 N.Y.S.2d at 600. The courts of New York have long held that "provisions other than scope, quality, character and manner of the work *must be specifically incorporated* to be effective against the subcontractor." *Id.* (emphasis added); *see also Bussanich v. 310 East 55th Street Tenants*, 723 N.Y.S.2d 444 (N.Y. App. Div. 2001). The court in *CooperVision* noted that where a party does specifically reference non-substantive, procedural obligations and specifically incorporate those obligations, it did not intend to incorporate all procedural obligations through a general incorporation clause. *CooperVision*, at 601. Likewise, in this case, the Subcontract Agreement specifically incorporates certain procedural obligations, which proves that the Flow-Down Clause was not intended to incorporate all procedural obligations. (*See, e.g.*, *Stip. Ex. 6*, at Art. III.)

This Court should therefore join courts from other construction-thriving states, and hold that even a general Flow-Down Clause could not incorporate the Subordination Clauses because such clauses are necessarily procedural and not related to the actual work to be performed by the Subcontractors. The Subcontract Agreement, and even the Prime Contract, are primarily and essentially construction contract agreements, not subordination agreements.

D. Ohio Cases Incorporating Arbitration Provisions from a Prime Contract Into a Subcontract Are Distinguishable on Both Their Facts and the Law.

The narrow-view of a general flow-down clause is not inconsistent with current Ohio case law. Other Ohio cases dealing with flow-down language are inapposite because they (1) deal with the incorporation of *arbitration provisions*, not subordination language; (2) deal with subcontract agreements that include specific and express incorporations of the documents containing those provisions; (3) deal with subcontracts that specifically express the very provisions sought to be incorporated; and (4) deal with unambiguous provisions, unlike the subordination language used here.

All Ohio cases related to incorporation provisions are distinguishable on the law. Ohio cases involving the scope of a flow-down clause involve arbitration. Ohio public policy favors the use of arbitration to resolve disputes, but no such public policy favors the subordination of a subcontractor's lien to a bank's mortgage interest unless the bank comply with the express statutory requirements. *See Hayes v. Oakridge Home*, 122 Ohio St. 3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 15. In fact, public policy weighs in favor of "protecting those who have provided labor or materials on a construction project." *JJO Constr., Inc. v. Penrod*, 8th Dist. No. 93230, 2010-Ohio-2601, ¶ 6 (attached hereto as Appendix "C"); *see also* Ohio Constitution, Article II, Section 33 (establishing the General Assembly's power to pass laws protecting mechanic's and their rights to lien, and expressly stating that "no other provision of the constitution shall impair or limit this power."). "[Ohio's] constitutional provision . . . call[s] for a *strict construction of any provision which limits the right of the lienholder* to be paid in full for labor bestowed on or material furnished for an improvement on real estate." *Gebhart v. United States*, 172 Ohio St. 200, 214-15, 174 N.E.2d 615, 624 (1961) (emphasis in original). Public policy weighs against attempts to limit a subcontractor's mechanic's lien rights, especially where the Subcontract

Agreement is a pay-if-paid contract. *See Reliance Universal, Inc. v. Deluth Constr. Co.*, 67 Ohio St. 2d 56, 58-62, 425 N.E.2d 404, 406-08 (1981) (noting longstanding Ohio public policy disfavors laws that limit a mechanic's lien claimant's statutory rights); *OBS Co., Inc. v. Pace Const. Corp.*, 558 So.2d 404 (Fla. 1990) (holding that risk shifting provisions must be clearly and specifically expressed in a subcontract agreement); R.C. 4113.62(E) (prohibiting, on public policy grounds, prospective waivers of lien in a pay-if-paid contract). Therefore, the actual issues addressed in the following Ohio cases are distinguishable on their face from the issue in this case.

The Sixth District Court of Appeals in Lucas County held in *Matrix Technologies, Inc. v. Kuss Corporation* that an arbitration clause was incorporated into a subcontract. *Matrix Techs., Inc. v. Kuss Corp.*, 6th Dist. No. L-07-1301, 2008-Ohio-1301 (attached hereto as Appendix "D"). The facts in *Matrix* are clearly distinguishable from the facts in this matter. In *Matrix*, the subcontractor claimed that a mandatory arbitration provision in the prime/general contract did not apply to its subcontract work under a general flow-down clause. *Id.* at ¶ 9. The subcontract in *Matrix* specifically referenced and incorporated "as if fully rewritten herein" the prime contract "Terms and Conditions." *Id.* at ¶ 12. These Terms and Conditions expressly incorporated and specifically included the non-work arbitration term. *Id.* at ¶ 13. The subcontract itself had provisions related to arbitration. *Id.* The arbitration clause was clear and unambiguous. *Id.*

Likewise, the parties in *Gibbons-Grable Company v. Gilbane Building Company* had the same dispute over an arbitration provision as the parties in *Matrix*. *Gibbons-Grable Co. v. Gilbane Bldg. Co.*, 34 Ohio App. 3d 170, 173, 517 N.E.2d 559, 562 (8th Dist. Ct. App. 1986). Like *Matrix*, the court in *Gibbons-Grable* noted that the document containing the arbitration

provision language was expressly and specifically included by reference and incorporated into the subcontract. *Id.* at 175 ("The contract documents consist of . . . the *agreement between the Owner and the Contractor*.") (emphasis added).

However, in the case at hand, there is no express or specific mention of the Subordination Clauses in the Subcontract Agreement. The Subordination Clauses were not incorporated by reference using the phrase "as if fully rewritten", and they were not included as a "subcontract document." (*Stip. Ex. 6*, Art. XXVIII & XXIX.) The specific terms and conditions incorporated by reference into the Subcontract Agreement did not include any Subordination Clauses. Moreover, the Subordination Clauses themselves are ambiguous, as discussed *infra*, unlike the arbitration provisions in *Gilbane* and *Matrix*. Given these fundamental differences, the Ohio cases are distinguishable—if the facts of this case included the specific reference to the subordination language in the actual language of the subcontract like the specific references to the arbitration language in these cases, and the subordination language was unambiguous, then it could have been incorporated. However, because the Subordination Clauses were never expressly and specifically included in the subcontract in this case, and because this case does not involve an arbitration provision, the *Matrix* and *Gilbane* decisions are inapplicable.

V. THE SUBORDINATION CLAUSES ARE UNENFORCEABLE BECAUSE THEY ARE NOT SELF-EXECUTING AND ARE OTHERWISE TOO AMBIGUOUS.

A. The Subordination Clauses are Not Self-Executing Subordination Agreements Because They Fail to Meet Their Basic, Essential Requirements Under Ohio Law.

The Subordination Clauses fail to satisfy either of the two methods of subordinating a security interest under Ohio law. A party may subordinate its security interest by either complying with the requirements of Ohio Revised Code § 5301.35, or by signing a separate agreement with another mortgagee containing certain essential terms. *DB Midwest, LLC v.*

Pataskala Sixteen, LLC, 3d Dist. No. 8-08-18, 2008-Ohio-6750, at ¶¶ 18-23 (attached hereto as Appendix "E"). In order to meet the requirements of Ohio Revised Code § 5301.35, the subordinating party had to acknowledge the subordination by writing it on the original lien document and signing that subordination. R.C. 5301.35. In this case, no such notation was ever claimed to have been made, and is absent from the record. Therefore, if the Subcontractors' lien rights were subordinated, it is only because the Subordination Clauses are valid self-executing subordination agreements which include all essential terms, which is not true.

The Subordination Clauses located in the Prime Contract are not valid self-executing subordination agreements. In order to be a valid self-executing subordination agreement, there must be an agreement between two competing lien holders, the agreement must state the maximum amount of the other loan, it must state the other loan's interest rate, the duration of that other loan, as well as any limitations upon the use of the other loan's proceeds. *DB Midwest*, 2008-Ohio-6750, at ¶ 20. In this case, neither of the two Subordination Clauses contains the amounts of the loans, the duration of those loans, for what the other loan proceeds can be used, the interest rate of the other loans, or even the identity of the "lenders." None of the essential information was provided in the document. Furthermore, the Lenders themselves were not a party to that agreement, and the Subordination Clauses, contained in the general conditions of the Prime Contract, were never separately signed by any parties, and were never subsequently clarified by the Lenders, which is required under Ohio law. *See Id.*, at ¶ 22.

Additionally, just as the court noted in *DB Midwest*, "the purpose of the subordination agreement supports a finding that this agreement was not an enforceable 'self-executing' subordination agreement." *Id.*, at ¶ 24. The landowner in *DB Midwest* purchased its property with the intent to develop it. *Id.* This, coupled with "the lack of essential terms in the

subordination clause" makes it apparent that "the clause was placed into the contract . . . to facilitate [the owner's] efforts in obtaining development financing . . . by offering . . . the potential opportunity to have first lien priority, not by granting any future lender automatic priority." *Id.* The court noted this *despite* the existence of *mandatory subordination language*. *Id.* In this case, the exact same logic and analysis apply because the Owner had not yet obtained its financing from the Lenders at the time it entered into the Prime Contract, which contained the Subordination Clauses. (*Summ. J. Dec.*, T.d. 1098) (noting that the Prime Contract and Subcontract Agreements were entered into before the Lenders agreed to provide any financing). The Lenders thus had "the potential opportunity to have first lien priority," but due to the failure of the Lenders, the Owner, or the General Contractors, that potential was never realized. How could the parties have intended to subordinate at that time an interest that did not exist until months later? Therefore, these Subordination Clauses are not self-executing subordination agreements, and the Subcontractors never agreed to subordinate their mechanic's lien rights. *See DB Midwest*, at ¶ 24. The intent of the Lenders is irrelevant to the interpretation of this agreement—the Lenders were not a party to the Prime Contract or the Subcontract Agreements.

B. Even the Plain Language of the Subordination Clauses Do Not Give Any Priority to the Lenders.

Even if this Court affirms the holding of the trial court that the Subordination Clauses were unambiguous, then a plain reading of those clauses *does not give priority* to the Lenders over any of the Subcontractors' mechanic's liens. The trial court held that the Subordination Clauses were clear and unambiguous. (*Summ. J. Dec.*, T.d. 1098.) Thus, the trial court lacked the authority to rewrite and interpret the unambiguous contract. *Saunders v. Mortensen*, 101 Ohio St. 3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶ 18. The Court need only read the first operative section of both Subordination Clauses to see that the Subcontractors never

subordinated their lien interests to the Lenders—the Subcontractors subordinated their lien interest to their own lien interests.

The first of the Subordination Clauses states that "all Subcontractors . . . *are hereby subordinate to* any and all statutory, constitution and contractual *liens* . . . *each may now or in the future may have*." (*Stip. Ex. 1*, at Gen. Cond. § 13.1.2.) Similarly, the second of the Subordination Clauses states that "all Subcontractors . . . *are hereby subordinate to* any and all statutory, constitutional, contractual, and constitutional *liens* . . . *it may now or in the future have*." (*Id.*, at Gen. Cond. § 16.1.) If the Subcontractors agreed to both clauses, they subordinated their interest to the interests of the Subcontractors, i.e. their very own interest. Therefore, if this Court adopts the view of the trial court that the Subordination Clauses are unambiguous, it must construe them as written, meaning the Subcontractors never subordinated their interest to the Lenders.

C. The Subordination Clauses are Unenforceable Because they are too Ambiguous.

No one could argue that the Subordination Clauses are unambiguous. In fact, they are so ambiguous that they are unenforceable. It is the age-old rule in Ohio that when an agreement does not contain required, essential terms and is otherwise ambiguous, the contract is unenforceable because there was no meeting of the minds and no mutual assent. *Monnett v. Monnett*, 46 Ohio St. 30, 34, 17 N.E. 659, 661 (1888). Additionally, if enforceable, an ambiguous contract must be construed against the drafter. *Clutter*, 62 Ohio St. 2d 411. In this case, it has already been established that the Subordination Clauses lack the essential terms required under Ohio law. Furthermore, there are too many omissions and errors in the clauses for the Court to find subordination in favor of the Lenders. The trial court noted "the drafter of this clause has demonstrated a significant degree of ineptitude." (*Summ. J. Dec.*, T.d. 1098.) **To**

find the Subordination Clauses are enforceable against the Subcontractors, this Court would have to delete between twelve (12) and fifty-nine (59) words from the Subordination Clauses, and add many more. Counsel is aware of no Ohio cases allowing such substantial rewriting of contract language without voiding the provision.

Furthermore, the Prime Contract never defines the term "Lenders" or "lenders." The Subcontractors and General Contractors were left guessing as to which lenders the Owner meant to identify—their own lenders, their suppliers, lenders to the Owner, lenders to the developer, etc. The Subcontractors would not have known to whom they subordinated their lien rights.

For these reasons, this Court should reverse the trial court's grant of summary judgment to the Lenders and denial of summary judgment to the Subcontractors. The Subcontractors are entitled to priority because the Subordination Clauses were not mutually assented to.

D. The Trial Court Erred in its Interpretation of the Subordination Clauses Because Its Interpretation Violated the Rules of Contract Interpretation.

The trial court's interpretation of the subordination language violated numerous rules of contract interpretation. An ambiguous contract must be construed against the drafter. *Clutter*, 62 Ohio St. 2d 411. While the trial court noted "the drafter of this clause has demonstrated a significant degree of ineptitude," it actually construed the language in that drafter's favor when it concluded that the Subordination Clause is enforceable. (*Summ. J. Dec.*, T.d. 1098.) The trial court admitted doing so, after stating that the clause was unambiguous and required no interpretation. (*Id.*) This Court should use its *de novo* review to construe the Subordination Clauses against the drafter. The only logical conclusion, based on this rule, is that the Subordination Clauses do not create a self-executing agreement to subordinate on the part of the Subcontractors.

Additionally, the trial court decision violates the rule that requires the court to interpret a contract in a way that gives effect to every provision within that contract. *Sunco, Inc. v. Toledo Edison Co.*, 129 Ohio St. 3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 54. If the Subordination Clauses were self-executing through the Flow-Down Clause, as the trial court claimed, then the final sentences of each clause would be rendered meaningless and given no effect. The first clause permitted the Owner to ask the Subcontractors to execute a document acknowledging that subordination. (*Stip. Ex. 1*, at Gen. Cond. § 13.1.2.) If the Subcontract Agreements incorporated the Subordination Clauses, and if the Subordination Clauses were self-executing, then the Owner would need no documents—it already had the Subcontract Agreements. This phrase would be rendered meaningless under the trial court's interpretation.

The second clause required the General Contractors to include the specific language of "Article 16" in the Subcontract Agreement, which the General Contractors failed to do. (*Id.*, at Gen. Cond. § 16.1.) Had the general Flow-Down Clause been sufficient to bind the Subcontractors to the Subordination Clauses, the Subordination Clauses would not have required the specific inclusion of the Article 16 language. Again, the trial court's decision rendered this provision meaningless. In order to give effect to both requirements in the Subordination Clauses, this Court must find that they were never assented to by the Subcontractors, and were not incorporated in the Flow-Down Clause found in the Subcontract Agreement. Only then would these provisions be given any effect or meaning.

Finally, the trial court's decision violated the requirement that terms in contracts be given their ordinary meaning. *Ward v. United Foundries, Inc.*, 129 Ohio St. 3d 292, 2011-Ohio-3176, 951 N.E.2d 770, ¶ 18. The Subordination Clauses never defined "lenders," and therefore that term takes on its ordinary meaning. *Id.* "Lender" is the noun form of the verb "lend," and means

one who "give[s] for temporary use on condition that the same or its equivalent be returned." Merriam-Webster Dictionary, *Lend*, http://www.merriam-webster.com/dictionary/lender. Subcontractors themselves give temporary use of employees, materials, equipment, and services on the condition that the equivalent amount in money will be returned, with profit. Therefore, Subcontractors meet the ordinary definition of lender, at least until they are paid for the service, labor, and materials lent. The Subcontract Agreement payment terms create that very relationship on the promise of future payment plus profit. (*Stip. Ex. 6*, at Art. III.) This relationship is analogous to any mortgagor-mortgagee relationship. The Lenders essentially had the same relationship to the project, lending money temporarily on the promise of future payment plus profit, i.e. interest. Therefore, because the term lenders could refer to Subcontractors and anyone working on the project, the trial court erred in interpreting the term "lenders" to mean the banks, instead of the actual lenders, the Subcontractors.

Because the trial court's interpretation violated the rules of contract interpretation in the ways outlined above, this Court should reverse the trial court decision, and interpret the Subordination Clauses as required by the rules, giving Subcontractors priority over the Lenders in this case.

VI. PUBLIC POLICY AND EQUITY WEIGH IN FAVOR OF THE SUBCONTRACTORS AND AGAINST THE LENDERS; THE TRIAL COURT'S DECISION ELIMINATES THE SUBCONTRACTORS' MOST IMPORTANT AND FUNDAMENTAL STATUTORY AND CONSTITUTIONAL RIGHT, AND AFFIRMING THE TRIAL COURT DECISION WOULD HAVE IMMEDIATE AND DRASTIC EFFECTS ON THE CONSTRUCTION INDUSTRY IN OHIO.

The trial court's decision violates longstanding public policy in Ohio regarding a Subcontractor's statutory and constitutional right to a mechanic's lien. If they apply to the Subcontractors, the Subordination Clauses effectively waive the Subcontractor's lien rights. Because the Subcontractors' liens would be secondary to the bank loans allegedly secured to

improve the property, there will be little to no money left in the property to satisfy the Subcontractors' liens after the Lenders are satisfied. This would be the result, even though the Subcontractors did everything correctly under the Ohio Revised Code to gain priority over the Lenders. Because the Subcontract Agreement is a pay-if-paid agreement, such a waiver of lien rights is unenforceable, and violates Ohio public policy. R.C. 4113.62(E) (stating that pay-if-paid contracts which also contain a provision preventing subcontractors from securing their payment via mechanic's liens are "against public policy"). Public policy clearly favors the right of the Subcontractors to get paid through a lien on the property that they improved—especially when their Subcontract Agreement limits their ability to get paid, at all.

Additionally, even if permitted, the waiver of such an important right should not be shrouded and hidden in ambiguous language scattered throughout multiple cross-references to different documents. The waiver of a constitutional right should be specific and express. *See generally, Johnson v. Zerbst*, 304 U.S. 458, 464 (1983). This Court should therefore indulge in every reasonable presumption based on the facts of this case that weigh against the waiver of a constitutional right. *Id.* The Subcontractors' mechanic's liens are such a right. *See* Ohio Constitution, Article II, Section 33 ("laws may be passed to secure to . . . sub-contractors . . . their just dues by direct lien upon the property, upon which they have bestowed labor. No other provision of the constitution shall impair or limit this power."); *see also* R.C. 1311.01, *et seq.* Furthermore, under Ohio's Mechanic's Lien Law, public policy favors the mechanic's lien rights of the Subcontractors over the mortgage rights of the Lenders. *See Reliance Universal, Inc. v. Deluth Constr. Co.*, 67 Ohio St. 2d 56, 58-62, 425 N.E.2d 404, 406-08 (1981) (noting that "long-standing" public policy favors lien claimants, and disfavors attempts to limit the rights of a mechanic's lien claimant). This Court should presume that the Subcontractors did not intend to

relinquish their mechanic's lien rights, and did not intend to accept the risk of the Owners' default, without a clear, unambiguous, express waiver. *See OBS Co., Inc. v. Pace Const. Corp.*, 558 So.2d 404 (Fla. 1990) (holding that where a general incorporation clause seeks to flow-down a risk-shifting provision, the burden of clear expression is on the shifting party.) These Subordination Clauses are anything but a clear and express waiver. The Flow-Down Clause is also not an express waiver. *Id.* Therefore, public policy dictates that this Court should conclude that the Subcontractors did not actually subordinate their mechanic's liens to the Lender's liens.

Moreover, equity weighs in favor of the Subcontractors, not the Lenders. Equity only assists those who take simple and reasonable steps to protect themselves. *Treinen v. Kollasch-Schlueter*, 179 Ohio App. 3d 527, 902 N.E.2d 998, 2008-Ohio-5986, ¶ 21 ("[E]quity would not have saved [the plaintiffs], when they had failed to attempt to help themselves.") The Subcontractors took all steps necessary to secure the priority of their lien rights, such as making sure there was a valid Notice of Commencement, and filing their mechanic's liens. On the other hand, the Lenders did not take the steps required by R.C. 1311.14, despite being in the better position to protect themselves from this very situation by doing so.

The Lenders cannot now rely on equity when there was an adequate remedy at law that they failed to utilize. *Id.* Had the Lenders wanted priority to the extent permitted under existing Ohio law, they could have complied with all of the requirements of Ohio Revised Code § 1311.14, and gained priority over the Subcontractor's liens. There was a legal remedy available to the Lenders to secure priority of their mortgage. The Lenders failed to use that remedy, therefore equity cannot save them.

Finally, it is clear to Ohioans that the current economic climate allows large companies to dictate terms to people with less bargaining power. Owners and powerful lenders are able to

mandate the terms of their contracts and require contractors and subcontractors to take additional risks without corresponding compensation. Construction, by its nature, creates a monopsony, giving extraordinary negotiating leverage to the single buyer of services, be that buyer a project owner hiring a prime contractor, or a prime contractor hiring subcontractors. The Subcontractors certainly have no ability to re-negotiate the Prime Contract, to which it is not a party, after the General Contractors sign with the Owner. If the Subcontractors want to work, they are required to accept those terms negotiated by other people who do not have the interest of the Subcontractors in mind. If this Court decides that the Subordination Clauses are enforceable against the Subcontractors, lenders all across Ohio will require their inclusion in every bank-funded construction project. Any subcontractor hoping to work in the State of Ohio would be required to accept these terms and essentially waive their lien rights, and their right to be paid for their labor, on all financed, i.e. larger, construction projects. Even during better economic times, non-payment on one large project could bankrupt a subcontractor. This would have a catastrophic effect on the construction industry in Ohio, and the hundreds of thousands of employees that work for construction companies in this state. *See* U.S. CENSUS BUREAU, *supra*. Any rational lender would always include this language, and all rational subcontractors would be forced to accept that language if they plan to continue working and employing Ohio's construction workers. The affirmation of the trial court will create this unjust result.

CONCLUSION

Given the non-incorporation of the Prime Contract as a Subcontract Agreement document, the work-related limitation on the Flow-Down Clause, the potential ambiguity of the Flow-Down Clause, the total ambiguity of the Subordination Clauses, and the public policy of the State of Ohio, this Court should reverse the decision of the Franklin County Court of

Common Pleas which granted the Lenders' motion for summary judgment and denied the Subcontractors' motion. The Subcontractors have a right to be paid out of the residue of the mortgage fund for their efforts and work, and due to the Lenders' non-compliance with R.C. 1311.14, if such payment is not made, the mechanic's liens have priority, legally and equitably, over the mortgage interest of the Lenders. This Court should join the other construction-heavy states of Delaware, New York, Wyoming, Virginia, Indiana, Pennsylvania, and Texas in applying a narrow, substantive work-related limitation on the Flow-Down Clause. This will encourage Lenders to be forthright with their requirements and expectations, and allow Subcontractors to know and evaluate their risks before they enter into a Subcontract Agreement.

In addition to reversing the trial court grant of summary judgment to the Lenders, this Court should hold that the Subcontractors are entitled to summary judgment as to the priority of their liens under the default priority rule found in Ohio's Mechanic's Lien Law.

DATED: March 1, 2012

Respectfully submitted,

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APPENDIX "A"

CLEVELAND JET CENTER, INC., Plaintiff-Appellee, -vs- STRUCTURAL SALES CORPORATION, Defendant-Appellant.

ACCELERATED CASE NO. 94-L-181

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, LAKE COUNTY

1995 Ohio App. LEXIS 4113

September 22, 1995, Filed

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court. Case No. 94 CV 001063.

DISPOSITION: JUDGMENT: Affirmed.

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JUDGES: HON., JUDITH A. CHRISTLEY, P.J., HON. JOSEPH E. MAHONEY, J., HON. EDWARD J. MAHONEY, J., Ret., Ninth Appellate District, sitting by assignment. CHRISTLEY, P.J., MAHONEY, J., Ret., Ninth Appellate District, sitting by assignment.

OPINION BY: JUDGE JOSEPH E. MAHONEY

OPINION

MAHONEY, J.

This is an accelerated appeal from the judgment of the Lake County Common Pleas Court denying defendant-appellant's, Structural Sales Corporation, motion to stay further proceedings on a complaint filed by plaintiff-appellee, Cleveland Jet Center. For the reasons that follow, we affirm.

Appellee is an Ohio corporation engaged in the business of repairing, refurbishing and modifying jet aircraft. In June 1991, appellee entered [*2] into a contract with appellant, an Ohio corporation, in which appellant agreed to design and build a jet aircraft hanger and an office area at the Lost Nation Airport located in Willoughby, Ohio. Appellant selected the "American Institute of Architects ("AIA") Document A111, Standard Form of Agreement Between Owner and Contractor, 1978 Edition" as the contract form and drafted the blank terms.

Over the course of the construction, a dispute arose regarding the quality of the work and final payment. Appellant filed a demand for arbitration with the American Arbitration Association ("AAA"). Appellee objected to the submission of the dispute to arbitration arguing that the contract

between the parties did not contain an arbitration clause.

On March 8, 1994, appellee filed a petition for a preliminary/permanent injunction in the Cuyahoga County Court of Common Pleas seeking to enjoin AAA from conducting further arbitration proceedings. According to appellee's complaint, after an evidentiary hearing was held, appellee's petition was denied by a one-line judgment entry dated April 25, 1994. Appellee filed a notice of appeal which is now pending before the Eighth District Court of Appeals. [*3] Neither a copy of the April 25, 1994 judgment entry nor a copy the notice of appeal was made a part of the record.

On August 8, 1994, appellee filed a complaint against appellant in the Lake County Court of Common Pleas seeking a judgment declaring that the June 1991 contract did not contain a written arbitration provision. The complaint also sought monetary damages for appellant's alleged breach of the contract and breach of the implied warranty of workmanlike construction. Appellee attached a copy of the June 1991 contract between the parties to its complaint.

In lieu of an answer, appellant filed a *Civ.R. 12(B)(6)* motion to dismiss appellee's complaint or, in the alternative, a motion to stay further proceedings pending arbitration before the AAA. Appellee filed a brief in opposition and submitted a sample copy of a 1978 edition of the AIA Document A111 with its accompanying instruction sheets and a 1987 edition of the AIA Document A111 with its accompanying instruction sheets.

On November 10, 1994, the trial court entered its judgment denying appellant's motions to dismiss or to stay the action. It is from this judgment that appellant filed a timely notice of appeal.

By judgment [*4] entry dated June 9, 1995, this court determined that the trial court's denial of appellant's motion to dismiss did not constitute a final appealable order and dismissed that portion of appellant's appeal. The remaining portion of appellant's appeal now presents one assignment of error for review.

In its sole assignment of error, appellant asserts that the trial court erred in denying its motion to stay the action. More specifically, appellant argues that in denying appellee's petition for preliminary/permanent injunction, the Cuyahoga Court of Common Pleas already determined that the contract in question contained an arbitration provision and, thus, the trial court was bound to stay the action pursuant to *R.C. 2711.02*.

R.C. 2711.01 provides, in pertinent part, that:

> "If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, *upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration,* shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance [*5] with the agreement ***." (Emphasis added.)

The determination of whether a specific controversy is arbitrable under a contract is a question of law for the court to decide upon examination of the contract. *Divine Constr. Co. v. Ohio-American Water Co. (1991), 75 Ohio App.3d 311, 316, 599 N.E.2d 388*; *Internatl. Bhd. Of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union 20 v. Toledo (1988), 48 Ohio App.3d 11, 13, 548 N.E.2d 257*; *Gibbons-Grable Co. v. Gilbane Building Co. (1986), 34 Ohio App.3d 170, 517 N.E.2d 559*. The law favors the amicable resolution of disputes through arbitration, however "a party cannot be compelled to arbitrate any dispute which he has not agreed to submit to

arbitration." Divine Constr. *Co. at 316*. See, also, *Teramar Corp. v. Rodier Corp. (1987), 40 Ohio App.3d 39, 531 N.E.2d 721*.

In the instant case, the trial court examined the contract between the parties and determined that the contract did not contain an arbitration provision. Based on the documents in the record before the trial court, we agree.

The 1978 edition of the AIA Document A111 does not contain an express arbitration provision. Moreover, the contract [*6] provides that:

> "1.1 The Contract Documents consist of this Agreement, the Conditions of the Contract (General, Supplementary and other Conditions), the Drawings, the Specifications, all Addenda issued prior to and all Modifications issued after execution of this Agreement. These form the Contract, and all are as fully a part of the Contract as if attached to this Agreement or repeated herein. An enumeration of the Contract Documents appears in Article 16. If anything in the Contract Documents is inconsistent with this Agreement, the Agreement shall govern."

Article 16 provides, in pertinent part:

> "16.2 The Contract Documents, which constitute the entire agreement between the Owner and the Contractor, are listed in Article 1 and, except for Modifications issued after execution of this Agreement, are enumerated as follows:
>
> "(List below the Agreement, the Conditions of the Contract, [General, Supplementary, and other Conditions], the Drawings, the Specifications, and any Addenda and accepted alternates, showing page or sheet numbers in all cases and dates where applicable.)"

The contract's corresponding instruction sheet indicates that this 1978 edition is to be used [*7] in conjunction with the 1976 AIA Document A201, General Conditions of the Contract for Construction.

However, the space provided under Article 16.2 is blank. Thus, the contract between the parties does not specifically incorporate by reference the 1976 AIA Document A201 into the contract. Furthermore, there is no evidence in the record that AIA Document A201 contains an arbitration provision since a copy of that document was not made a part of the record.

As to the 1987 edition of AIA Document A111, the trial count correctly determined that it contained an express arbitration provision, but that edition was of little consequence to the contract in question. Appellant could have elected to use the 1987 edition of the contract form but selected the 1978 edition as the contract form and drafted the blank terms.

Based on the foregoing, we must conclude that the trial court properly considered the evidence before it and determined that the dispute involved in the action was not referable to arbitration.

Accordingly, appellant's sole assignment of error is without merit, and the trial court's judgment is affirmed.

JUDGE JOSEPH E. MAHONEY

CHRISTLEY, P.J.,

MAHONEY, J., Ret., [*8] Ninth Appellate District, sitting by assignment.

APPENDIX "B"

CITIZENS FEDERAL SAVINGS AND LOAN ASSOCIATION OF DAYTON, OHIO, Plaintiff-Appellant, vs VAN W. PAGE, ET AL., Defendants-Appellees

CASE NO. CA83-03-018

COURT OF APPEALS, TWELFTH APPELLATE DISTRICT OF OHIO, WARREN COUNTY, OHIO

1984 Ohio App. LEXIS 8758

January 9, 1984

CASE SUMMARY:

PROCEDURAL POSTURE: In a foreclosure action brought by appellant mortgagee against appellees, mortgagors and purchasers, the mortgagee sought review of the judgment of the Court of Common Pleas of Warren County (Ohio) that granted summary judgment in favor of the mortgagors and the purchasers.

OVERVIEW: The mortgagee, a federally chartered savings and loan association, lent money to the mortgagors. The promissory note was secured by a mortgage on the subject real property, and the mortgage contained a due-on-sale clause. The mortgagors subsequently agreed to sell the property to the purchasers subject to the existing mortgage by means of a land contract. Upon learning of the sale, the mortgagee declared the balance of the loan due and payable. The mortgagors refused to tender the amount, and the mortgagee filed a complaint seeking foreclosure. The trial court granted summary judgment against the mortgagee, and the court affirmed. It held that the language of the mortgage did not grant the mortgagee the right to exercise the due-on-sale clause in the event that the mortgagors transferred the property pursuant to a land contract arrangement.

OUTCOME: The court affirmed the grant of summary judgment.

LexisNexis(R) Headnotes

Civil Procedure > Pretrial Judgments > Judgment on the Pleadings
Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Supporting Materials > General Overview

[HN1] *Ohio R. Civ. P. 56(B)* states that a party against whom a claim is sought may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

Civil Procedure > Pretrial Judgments > Judgment on the Pleadings
Civil Procedure > Trials > Judgment as Matter of Law > General Overview
[HN2] *Ohio R. Civ. P. 12(C)* states that after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

Banking Law > Regulatory Agencies > Federal Home Loan Bank System
Real Property Law > Financing > Mortgages & Other Security Instruments > Satisfaction & Termination > General Overview
Real Property Law > Financing > Secondary Financing > Lien Priorities
[HN3] 12 C.F.R. § 545.8-3(f) states that a federal savings and loan association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. The above applies except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower.12 C.F.R. § 545.8-3(g), entitled "Limitations on the exercise of due-on-sale clauses," states that a federal association, with respect to any loan made after July 31, 1976, secured by a home occupied or to be occupied by the borrower, (1) shall not exercise a due-on-sale clause because of (i) creation of a lien or other encumbrance subordinate to the association's security instrument.

Contracts Law > Contract Interpretation > General Overview
[HN4] The language of a contract must be construed so as to manifest the intent of the parties.

Real Property Law > Nonmortgage Liens > Equitable Liens
Real Property Law > Nonmortgage Liens > Lien Priorities
Real Property Law > Purchase & Sale > Contracts of Sale > General Overview
[HN5] In Ohio, a sale by land contract creates an equitable lien in favor of the vendee for the amount paid on the purchase price.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview
Contracts Law > Defenses > Ambiguity & Mistake > General Overview
[HN6] An ambiguity must be construed most strongly against the party that drafted the instrument.

COUNSEL: [*1] John H. Curp, 110 North Main Street, Dayton, Ohio 45402, and Beth W. Schaeffer, 2700 Winters Bank Tower, Dayton, Ohio 45423, for Plaintiff-Appellant.

Stanley J. Cohen and Michael P. Moloney, Cohen, Gregg, Slonaker & Laurito, 600 One First National Plaza, P.O. Box 458, Mid City Station, Dayton, Ohio 45402, for Defendants-Appellees, Van W. and Cynthia A. Page.

Thomas S. Shore, Jr., Rendigs, Fry, Kiely & Dennis, 900 Central Trust Tower, Cincinnati, Ohio 45202, for Defendant-Appellee, Stanley E. Kolb.

Timothy A. Oliver, 324 East Warren Street, Lebanon, Ohio 45036, for Defendants-Appellees, James D. and Eva N. Ethridge.

William H. Kaufman, P.O. Box 280, Lebanon Bank Building, Lebanon, Ohio 45036, for Defendants-Appellees, Mary K. Dinus and Ohio Homestead Realtors.

JUDGES: HENDRICKSON, P.J., KOEHLER and GORMAN, J.J. Judge Frank J. Gorman, of the Court of Common Pleas of Cuyhoga County, sitting by assignment of the Supreme Court of Ohio.

OPINION

MEMORANDUM DECISION AND JUDGMENT ENTRY

PER CURIAM

This cause came on to be heard upon the appeal, transcript of the docket, journal entries and original papers from the Court of Common Pleas of Warren County, Ohio, transcript [*2] of proceedings, briefs and oral arguments of counsel.

Now, therefore, the assignments of error having been fully considered are passed upon in conformity with *App. R. 12(A)* as follows:

On August 3, 1979, appellees, Van W. Page and Cynthia A. Page (hereinafter "the Pages") borrowed the sum of thirty-seven thousand dollars ($37,000) from appellant, Citizens Federal Savings and Loan Association (hereinafter "Citizens Federal"), a federally chartered savings and loan association located in Dayton, Ohio. The note was secured by a mortgage on real property located at 75 Fitzgerald Way, Franklin, Ohio. On February 26, 1982, the Pages agreed to sell the property subject to the mortgage to appellees, James A. Ethridge and Eva N. Ethridge (hereinafter "the Ethridges") by means of land contract.

Paragraph 17 of the mortgage between the Pages and Citizens Federal contains an acceleration or "due-on-sale" clause which reads in part as follows:

If all or any part of the Property or an interest therein is sold or transfered by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Mortgage, * * *. Lender may, at Lender's [*3] option, declare all the sums secured by this Mortgage to be immediately due and payable.

Relying on the language quoted above, Citizens Federal declared the balance of the loan due and payable upon learning of the land contract arrangement between the Pages and the Ethridges. The Pages refused to tender the amount, taking the position that the due-on-sale clause contained in paragraph 17 of the mortgage was not triggered by the land contract because the land contract was clearly subordinate to the mortgage, and thus exempted by clause (a) of paragraph 17.

Citizens Federal filed a complaint seeking foreclosure in the Warren County Court of Common Pleas on August 30, 1982. Named as defendants were the Pages, as mortgagors, the Ethridges, as recipients of certain rights in the subject real property stemming from the land contract agreement, and Warren County Treasurer Harry Cornett, who was joined in the event any real estate taxes or assessments on the property were at that time outstanding.

On December 21, 1982, the Ethridges filed a motion for summary judgment or for judgment on the pleadings, asserting that Citizens Federal failed to state a claim upon which relief could [*4] be granted. The trial court granted the motion on February 25, 1983. After finding that the Ethridges had standing to seek the requested relief, the court concluded that a land contract, being subordinate to the mortgage, fell within exemption (a) of paragraph 17 and thus did not trigger the due-on-sale clause.

Citizens Federal has timely filed this appeal from the decision below, and presents the following two assignments of error:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN CONCLUDING THAT THE MOVING DEFENDANT-APPELLEES AGAINST WHOM NO RELIEF WAS SOUGHT NOR CLAIM STATED HAD STANDING TO SEEK A SUMMARY JUDGMENT OF DISMISSAL OF THE COMPLAINT."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN DETERMINING THAT A LAND CONTRACT SALE OF REAL PROPERTY IS NOT AN EVENT WHICH TRIGGERS A DUE ON SALE CLAUSE IN A MORTGAGE IN WHICH A FEDERALLY CHARTERED SAVINGS AND LOAN ASSOCIATION IS THE MORTGAGEE AND WHICH CLAUSE CONTAINS LANGUAGE WHICH READS: 'IF ALL OR ANY PART OF THE PROPERTY OR AN INTEREST THEREIN IS SOLD OR TRANSFERRED BY BORROWER WITHOUT LENDER'S PRIOR WRITTEN CONSENT, EXCLUDING (a) [*5] THE CREATION OF A LIEN OR ENCUMBRANCE SUBORDINATE TO THE MORTGAGE... LENDER MAY, AT LENDER'S OPTION, DECLARE ALL THE SUMS SECURED BY THIS MORTGAGE TO BE IMMEDIATELY DUE AND PAYABLE."

Appellant's first assignment of error raises the issue of the Ethridges' standing to move for summary judgment. [HN1] *Civ. R. 56(B)* states that "[a] party against whom a claim * * * is sought may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." The rule does not indicate that certain parties may motion for summary judgment while other parties may not. The Ethridges' motion is styled in the alternative as a motion for judgment on the pleadings. [HN2] *Civ. R. 12(C)* states that "[a]fter the pleadings are closed but within such time as not to delay the trial, *any party* may move for judgment on the pleadings." (Emphasis added.) Again, the only requirement for proper standing is that the movant be a *party*.

Appellees, James D. Ethridge and Eva N. Ethridge, were included in the foreclosure action by appellant because they were expected to claim an interest in the subject property by reason of the land contract agreement with the [*6] Pages. Certainly they were parties to the action when their motion was made. Therefore, we must conclude that the Ethridges had standing under the Civil Rules to move for summary judgment or for judgment on the pleadings. Appellant's first assignment of error is, accordingly, not well taken.

Appellant's second assignment of error requires us to examine the interplay between regulations promulgated by the Federal Home Loan Bank Board governing federal savings and loan associations, and state contract law. Citizens Federal Savings and Loan Association is a federally chartered savings and loan association organized pursuant to the existing laws of the United States. Congress, in the Homeowner's Loan Act of 1933, (*12 U.S.C. Section 1461 et seq*) has authorized the Federal Home Loan Bank Board to "provide for the organization, incorporation, examination, operation and regulation" of federal savings and loan associations via "such rules and regulations as it may prescribe." *12 U.S.C. Section 1464(a).* These rules and regulations have the force and effect of federal statutory law. *First Federal Savings and Loan Association* v. *Myrick* (W.D. Ark. 1982), *533 F. Supp. 1041*. State [*7] law, should it conflict with Federal Home Loan Bank Building Board Rules governing federal savings and loan associations, is preempted by the federal regulations. 12 C.F.R. 545.6(a)(2). *See also Fidelity Federal Savings and Loan Association* v. *de la Cuesta* (1982), *U.S. , 102 S.Ct. 3014*.

Federal Home Loan Bank regulations dealing with due-on-sale clauses appear in 12 C.F.R. Section 545.8-3(f) and (g). [HN3] 12 C.F.R. 545.8-3(f) states that a federal savings and loan association:

"continues to have the power to include, as a matter of contract between it and th borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent."

The above applies "except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower * * *." 12 C.F.R. Section 545.8-3(f).

12 C.F.R. Section 545.8-3(g), entitled "Limitations on [*8] the exercise of due-on-sale clauses," states that a federal association, with respect to any loan made after July 31, 1976, secured by a home occupied or to be occupied by the borrower, "(1) shall not exercise a due-on-sale clause because of (i) creation of a lien or other encumbrance subordinate to the association's security instrument."

It is our view that the Federal Home Loan Bank Board, in its regulations promulgated pursuant to the Homeowner's Loan Act of 1933, did not intend to prohibit federal associations from exercising due-on-sale clauses when the borrower subsequently transfers his encumbered property by land contract. The language of 12 C.F.R. Section 545.8-3(f) grants the association general authority to exercise a due-on-sale clause if "all or any part of the real property securing the loan is sold or transferred by the borrower without the association's written consent." Section 545.8-3(g) provides exceptions to this general rule. To construe the exception styled "creation of a lien or encumbrance subordinate to the association's security instrument" to prevent the exercise of the clause in the event a federal mortgagor enters into a land contract with a third party [*9] would certainly "cause what was clearly meant as a limited exclusion from the due-on-sale clause applicable in a few cases only to expand so hugely as to swallow-up and extinguish altogether the due-on-sale clause itself." *Williams* v. *First Federal Savings and Loan Association of Arlington* (4th Cir. 1981), *651 F.2d 910, 920*.

Support for this position is found in the wording of the Federal Home Loan Bank Board regulations. 12 C.F.R. Section 545.8-3(f) and (g), the exceptions set forth in paragraph (g) are limited to loans made "after July 31, 1976, on the security of a home occupied or to be occupied by the homeowner," indicating that the subordinate lien exception was meant to encompass "second mortgage" situations in which the original borrower continues to occupy the secured residence. In the case at bar, the Pages, after the land contract was signed, surrendered possession of the property secured by the mortgage with Citizens Federal to the Ethridges.

A review of the other exceptions in paragraph (g) ((ii) creation of a purchase money security interest for household appliances, (iii) transfer by devise, descent or operation of law or the death of a joint tenant, and [*10] (iv) granting of a leasehold interest of 3 years or less) further supports restricted interpretation of the subordinate lien exception. The exemptions above all apply to specific circumstances where the borrower, or a joint tenant with the borrower, remains in possession of the mortgaged property, or surrenders possession of such property for only a short period of time. Certainly the four exceptions, viewed together, indicate that the subordinate lien exception was not intended to operate in a manner which would permit almost any transfer or sale of the property without the

consent of the federal lending institution which, because it was first in time, would always have a lien superior to any lien created by the borrower.

Therefore, the regulations promulgated by the Federal Home Loan Board do not prohibit the exercise of a due-on-sale clause by a federal lending institution under the circumstances present in the case at bar. In other words, Citizens Federal *could* have contracted to exercise the due-on-sale clause if the borrower were to transfer the secured property by land contract. In this situation, the regulations provide that use of the clause shall be "exclusively [*11] governed by the terms of the loan contract" between borrower and lender. 12 C.F.R. Section 545.8-3(f).

The mortgage instrument reads as follows:

"If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Mortgage * * * Lender may, at Lender's option, declare all sums secured by this Mortgage to be immediately due and payable."

Although the language of the above parallels the Federal Home Loan Bank Board regulations in some respects, there is no specific language authorizing the lending institution to invoke the clause upon any sale or transfer of interest similar to the language in 12 C.F.R. Section 545.8-3(f). *See also Williams, supra.* Further, the clause above does not indicate that the exception applies only to borrower-occupied homes, as do the Federal regulations.

[HN4] The language of a contract must be construed so as to manifest the intent of the parties. *See U.S. Fire Insurance Co.* v. *Phil-Mar Corp.* (1957), *166 Ohio St. 85*. The agreement between Citizens Federal and the Pages provides that the due-on-sale clause [*12] may be invoked upon a sale or transfer of interest in the secured property "excluding (a) the creation of a lien or encumbrance subordinate to this mortgage[.]" It is the law of [HN5] Ohio that a sale by land contract creates an equitable lien in favor of the vendee for the amount paid on the purchase price.*See Wayne Building and Loan Co.* v. *Yarborough* (1967), *11 Ohio St. 2d 195*, and *Butcher* v. *Kagy Lumber Co.* (1955), *164 Ohio St. 85*. Further, the lien created by the land contract is subordinate to the lien of appellant Citizens Federal. Therefore, we must conclude that the parties, by their contract, did not intend to grant appellant the right to exercise the due-on-sale clause in the event the Pages transfered the property pursuant to a land contract arrangement.

We concede that the instrument is ambiguous in that the mortgage fails to make it clear that the Federal Home Loan Board regulations regarding acceleration clauses were to be incorporated in their entirety. However, [HN6] such ambiguity must be construed most strongly against the party that drafted the instrument. *Central Realty Co.* v. *Clutter* (1980), *62 Ohio St. 2d 411*. If appellant wished to invoke [*13] the due-on-sale clause in the event of a land contract sale by the mortgagor, the language of the mortgage instrument should have made this intent clear; the subject instrument does not.

As a result, appellant's second assignment of error is not well taken, and is hereby overruled.

The assignments of error properly before this Court having been ruled upon as heretofore set forth, it is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Warren County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with *App. R. 24*.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to *App. R. 27*.

To all of which the appellant, by its counsel, excepts.

APPENDIX "C"

JJO CONSTRUCTION, INC., PLAINTIFF-APPELLEE vs. MICHAEL J. PENROD, ET AL., DEFENDANTS-APPELLANTS

No. 93230

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2010 Ohio 2601*; *2010 Ohio App. LEXIS 2146

June 10, 2010, Released

PRIOR HISTORY: [**1]
Civil Appeal from the Cuyahoga County Court of Common Pleas. Case No. CV-631016.

DISPOSITION: AFFIRMED.

COUNSEL: FOR APPELLANT: Joel I. Newman, Shaker Heights, OH.

FOR APPELLEE: David T. Waltz, Gross & Gross, L.L.C., Cleveland, OH.

JUDGES: BEFORE: Stewart, J., Rocco, P.J., and Blackmon, J. KENNETH A. ROCCO, P.J., and PATRICIA ANN BLACKMON, J., CONCUR.

OPINION BY: MELODY J. STEWART

OPINION

JOURNAL ENTRY AND OPINION

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)* and *26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(C)* unless a motion for reconsideration with supporting brief per *App.R. 26(A)*, or a motion for consideration en banc with supporting brief per *Loc.App.R. 25.1(B)(2)*, is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(C)*. See, also, *S.Ct. Prac.R. 2.2(A)(1)*.

MELODY J. STEWART, J.:

[*P1] Defendant-cross-claimant-appellant Refrigeration Sales Corporation, a supplier to a subcontractor on a construction project, appeals from a declaratory judgment finding [**2] that it failed to preserve its mechanic's lien rights against plaintiff-appellee J.J.O. Construction, Inc. ("JJO"), the general contractor on the project. Refrigeration Sales challenges a number of findings made by the trial court that fall into two groups: the adequacy of the lien application and the weight of the evidence. While we agree that the court erred by finding the lien application defective, we find no basis for reversing the court's factual finding that Refrigeration Sales did not timely record its mechanic's lien.

I

[*P2] JJO was the general contractor on a construction project to build a Rite Aid drug store. It subcontracted the installation of heating, ventilation, and air conditioning equipment for the building to Air Technologies. The contract specifically required that Air Technologies install "new" equipment. Air Technologies, in turn, contracted with Refrigeration Sales to supply the equipment. Refrigeration Sales provided the equipment to Air Technologies, but Air Technologies failed to tender payment to Refrigeration Sales, so Refrigeration Sales filed a mechanic's lien against the project. As required by its contract with Rite Aid, JJO posted bond on the lien sufficient [**3] to cover Refrigeration Sales' claim against Air Technologies.

[*P3] JJO then brought this action, asserting a breach of contract claim against Air Technologies and seeking a declaration that Refrigeration Sales did not timely file its mechanic's lien. Refrigeration Sales filed a cross-claim against Air Technologies for breach of contract and a counterclaim against JJO seeking judgment on the lien. Refrigeration Sales also asked the court to order the underwriting surety to pay the proceeds of the bond. The parties tried the issues to the court, but neither Air Technologies nor its principals attended trial. [1] In findings of fact, the court granted judgment to both JJO and Refrigeration Sales on their claims against Air Technologies. As to the declaratory judgment claims, the court found that the mechanic's lien affidavit submitted by Refrigeration Sales was defective because Refrigeration Sales misidentified the property and the owner of the property and it failed to record its lien affidavit within 75 days from the date on which it last furnished material to Air Technologies. The court therefore invalidated and discharged the mechanic's lien.

1 JJO learned that Air Technologies' corporate [**4] charter had been revoked by the secretary of state for nonpayment of the charter fee, so it named Air Technologies' controlling member, Michael J. Penrod, as a defendant. Penrod's attorney withdrew before trial, and Penrod found no replacement counsel.

II

[*P4] We first consider the assignments of error challenging the court's findings that Refrigeration Sales filed a deficient lien affidavit because the affidavit misidentified both the parcels of land and the owner of the land.

A

[*P5] A mechanic's lien is a prioritized security interest in the amount of unpaid labor or materials provided on a contract. In construction cases like this, a mechanic's lien creates rights in derogation of the common law -- JJO had no contractual relationship with Refrigeration Sales, having only contracted with Air Technologies. Yet the law allows Refrigeration Sales to file a mechanic's lien that has the effect of prioritizing its claims against those of JJO, the general contractor, thus jeopardizing the completion of the construction project. This has the practical effect of putting JJO at risk of paying twice: once with Air Technologies as required by its contract and again with Refrigeration Sales in order to discharge [**5] the lien. [2]

2 JJO's contract with the owner of the property stated that in the event a subcontractor filed a mechanic's lien, it was required to post a bond with a surety to discharge the lien.

[*P6] The law permits the use of mechanic's liens in furtherance of two public policies: protecting those who have provided labor or materials on a construction project and serving as a penalty for owners of property who could benefit from labor or materials that remain unpaid. See Koprince, The Slow Erosion of Suretyship Principles: an Uncertain Future for "Pay-when-paid" and "Pay-if-paid" Clauses in Public Construction Subcontracts (2008), 38 Public Contract. L.J. 47, 50-51. But because mechanic's liens are in derogation of the common law, they are strictly construed and "the steps prescribed by statute to perfect such lien must be followed[.]" *C.C. Constance & Sons v. Lay (1930), 122 Ohio St. 468, 469, 172 N.E. 283*; *Crock Constr. Co. v. Stanley Miller Constr. Co., 66 Ohio St.3d 588, 592, 1993 Ohio 212, 613 N.E.2d 1027*.

B

[*P7] *R.C. 1311.02* states: "every person who as a subcontractor, laborer, or material supplier, performs any labor or work or furnishes any material to an original contractor or any subcontractor, [**6] in carrying forward, performing, or completing any improvement, has a lien to secure the payment therefor upon the improvement and all interests that the owner, part owner, or lessee may have or subsequently acquire in the land or leasehold to which the improvement was made or removed."

[*P8] To perfect a mechanic's lien, the subcontractor must file the lien with the county recorder by submitting an affidavit showing the amount due, "a description of the property to be charged with the lien, the name and address of the person to or for whom the labor or work was performed or material was furnished, the name of the owner, part owner, or lessee, if known, the name and address of the lien claimant, and the first and last dates that the lien claimant performed any labor or work or furnished any material to the improvement giving rise to his lien." See *R.C. 1311.06(A)*.

[*P9] The court found that Refrigeration Sales "incorrectly identified the owner as Rite Aid Corporation of Ohio." JJO offered evidence to show that the correct corporate name is "Rite Aid of Ohio, Inc." As noted, the courts have strictly construed the mechanic's liens statutes and have held that a failure to name the correct party is [**7] fatal to the lien. In *Hoppes Builders & Dev. Co. v. Hurren Builders, Inc. (1996), 118 Ohio App.3d 210, 692 N.E.2d 622*, the court of appeals strictly construed *R.C. 1311.06(A)* to find that it could "not interpret the name 'Mike Hurren' to be an equivalent substitute for the name 'Hurren Builders, Inc.'" *Id. at 215*.

[*P10] In *Efficient Air, Inc. v. Qualstan Corp. [In re Qualstan Corp.] (Bankr.S.D.Ohio 2003), 302 B.R. 575*, a federal bankruptcy court declined to follow *Hoppes Builders*, believing that its holding and that of similar cases "were wrong." The bankruptcy court stated:

[*P11] "Although both courts were correct in * * * stat[ing] that the procedural requirements of mechanics' liens' statutes should be strictly followed, the statute itself in this instance is liberal. *Section 1311.06* in pertinent part states a lien affidavit must show '* * * the name of the owner, part owner, or lessee, *if known*.' *O.R.C. 1311.06* [emphasis added]. The language 'if known' in the statute mitigates in part the requirement to have the absolute correct name. Certainly, if the Ohio legislature intended to have an absolute standard with regard to the names of the owners, it would not have included the 'if known' [**8] language." *Id. at 586*.

[*P12] The decision of a federal bankruptcy court on a question of Ohio law is not binding on us. *State v. Burnett, 93*

Ohio St.3d 419, 423-424, 2001 Ohio 1581, 755 N.E.2d 857 ("state courts are not bound by federal district court decisions"). *Efficient Air* is, however, highly persuasive. In *C.C. Constance & Sons*, the supreme court acknowledged that the "mechanic's lien law contains the provision that the same shall be liberally construed in so far as it is remedial[.]" *C.C. Constance & Sons, 122 Ohio St. at 469*. The "if known" language used by *R.C. 1311.06(A)* suggests that the General Assembly did not consider "the name of the owner, part owner, or lessee" to be a vital part of the affidavit. In *Queen City Lumber Co. v. O.G. Ent., Inc*. (Mar. 30, 1983), 1st Dist. No. C-820440, the First District Court of Appeals held that the "the gratuitous insertion of an extra name technically not properly included in the affidavit" was a superfluity that was "neither misleading nor sufficient to invalidate the lien." Id., citing *Holmes v. J. B. Schmitt Co. (App. 1931), 11 Ohio Law Abs. 648, 650*; Demann, Ohio Mechanic's Lien Law, Second (1953), Section 9.5.

[*P13] Refrigeration Sales' alleged [**9] defect in naming the wrong corporation is of no consequence -- the difference between "Rite Aid Corporation of Ohio" as stated by Refrigeration Sales and the correct name of "Rite Aid of Ohio, Inc." is too trivial a basis for finding the affidavit defective. There was no allegation that the very slight difference in names was misleading nor could such an allegation have been sustainable, if made. This was a major construction project and JJO, as the general contractor, knew that Rite Aid was the owner of the building. It is beyond belief that the interested parties in this case would not have been able to ascertain the correct owner of the building based solely upon the company name listed in the affidavit. To hold otherwise would lead to the absurd proposition that even the most technical mistakes like a misspelling or omitted punctuation would result in a fatal defect to the mechanic's lien.

[*P14] We therefore find that the court erred as a matter of law by finding the affidavit deficient for listing an incorrect name for the owner of the building.

C

[*P15] We likewise disagree with the court's conclusion that Refrigeration Sales' affidavit failed to give "a description of the property to be charged [**10] with the lien[.]"

[*P16] *R.C. 1311.04(A)(1)* states an owner who contracts for the performance of any labor or work or for the furnishing of any materials for an improvement on real property that may give rise to a mechanic's lien must file a notice of commencement. This notice must contain, in affidavit form, the legal description of the real property on which the improvement is to be made. See *R.C. 1311.04(B)(1)*. For purposes of this division, "a description sufficient to describe the real property for the purpose of conveyance, or contained in the instrument by which the owner, part owner, or lessee took title, is a legal description." Id. In other words, the legal description of property contained in a deed is sufficient to satisfy the statute.

[*P17] As for the party claiming the lien, *R.C. 1311.06(D)* requires a description of the property that will be charged by the lien, and further states that a legal description of the property is sufficient if made consistent with *R.C. 1311.04(B)(1)*. "An incorrect description of the property that is the subject of a mechanic's lien generally vitiates that lien." *Internatl. Refractory Serv. Corp. v. Woodmen of the World Life Ins. Soc. (1990), 68 Ohio App.3d 513, 516, 589 N.E.2d 79, 5 Anderson's Ohio App. Cas. 217*.

[*P18] [**11] Refrigeration Sales submitted an affidavit that identified the subject property parcels with the same legal description used by Rite Aid in its notice of commencement, except for one detail: the description of Parcel No. 2 listed a Permanent Parcel Number of "443-47-008" while Rite Aid's notice of commencement listed the Parcel No. 2's Permanent Parcel No. as "443-17-008." It is uncontested that Rite Aid does not own Permanent Parcel No. "443-47-008."

[*P19] A "permanent parcel number" is not the same thing as a "legal description." A "legal description" of real property "means a description of the property by metes and bounds or lot numbers of a recorded plat including a description of any portion of the property subject to an easement or reservation, if any." See *R.C. 5313.01(E)*. A "permanent parcel number" is a sequential number assigned to real and public utility property parcels in the county by the county auditor. See *R.C. 319.28(A)*. Unlike a legal description of property, the designation of permanent parcel numbers is not mandatory, and even if established within a county, a permanent parcel numbering system can be rescinded by agreement of the county auditor and county treasurer. [**12] Id. Hence, Ohio statutes recognize the distinction between a legal description and a permanent parcel number. See, e.g., *R.C. 5721.18(B)(1)* ("In any county that has adopted a permanent parcel number system, the parcel may be described in the notice by parcel number only, instead of also with a complete legal description * * *.")

[*P20] Construing *R.C. 1311.06(A)* strictly, we conclude that an affidavit that contains a correct legal description of property subject to a mechanic's lien is sufficient even if it includes an incorrect permanent parcel number. The statute only requires a legal description of the owner's property, so any reference to a permanent parcel number would be a superfluity. Indeed, had the mechanic's lien affidavit set forth a correct permanent parcel number and omitted any legal description of the property, we would arguably be compelled to find that the affidavit failed to adhere to the strict terms of the statute. So any reference to a permanent parcel number, even if incorrectly stated in the affidavit, is not a fatal defect under *R.C. 1311.06(A)*.

[*P21] The evidence showed that Refrigeration Sales did include the correct legal description of the property as required by *R.C. 1311.04(B)(1)*: [**13] it gave the same legal description of the property as that given by Rite Aid in its notice of commencement. In any event, JJO has not contested the validity of the legal description used by Refrigeration Sales, so the court had no grounds for finding the affidavit defective on that basis.

III

[*P22] The factual issues raised in this appeal collectively complain that various aspects of the court's judgment relating to the timeliness of the affidavit are against the manifest weight of the evidence.

A

[*P23] Principles of appellate review require us to presume that court's factual findings are correct and further require us to affirm the court's judgment if those factual findings are supported by some "competent, credible evidence going to all the essential elements of the case." *C.E. Morris Co. v. Foley Constr. Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578*, syllabus. In doing so, we acknowledge that the court is in the best position to weigh the evidence and judge the credibility of witnesses. *Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 79-80, 10 Ohio B. 408, 461 N.E.2d 1273*.

B

[*P24] The parties agree that Refrigeration Sales had to file its mechanic's lien affidavit within 75 days from the date on which it last [**14] furnished material to Air Technologies. See *R.C. 1311.06(B)(3)*. Refrigeration Sales recorded its mechanic's lien in the amount of $ 30,731.01 on January 31, 2007. In the affidavit it filed in conjunction with its mechanic's lien, Refrigeration Sales represented that it last furnished material (two "power exhausts") to Air Technologies on January 22, 2007. JJO disputed this claim, arguing that Refrigeration Sales could only prove delivery of equipment on October 31, 2006 and offered testimony to show that all of the heating, ventilation, and air conditioning work on the project had been substantially completed by January 18, 2007. Refrigeration Sales offered testimony to show that on January 22, 2007, it sent two power exhausts to Canton Erectors, a third-party that would transport the units to the job site and lift them on the roof of the building.

[*P25] The parties agreed that the shipment date was crucial to determining the timeliness of the lien -- if Refrigeration Sales last furnished power exhausts on October 31, 2006, the 75-day time in which to file the mechanic's lien expired on January 14, 2007; if the power exhausts were furnished to Canton Erectors Company on January 22, 2007, [**15] the lien would be timely.

[*P26] In its findings of fact, the court found that "[t]he equipment listed on RSC's January 23, 2007 invoice was shipped to Canton Erectors in Canton, Ohio on January 22, 2007. RSC failed to establish any connection between Canton Erectors and Air Technologies, JJO, or the Project." The court also found that Refrigeration Sales failed to establish that the equipment sold to Air Technologies on January 22, 2007 had been incorporated into the project. It found that Refrigeration Sales altered a January 23, 2007 invoice to remove the words "damaged equipment" when JJO's contract with Air Technologies specified that all HVAC equipment must be "new." It therefore concluded that the equipment shipped to Air Technologies on October 31, 2006 was the last equipment furnished by Refrigeration Sales that could form the basis for a mechanic's lien.

[*P27] Refrigeration Sales argues that it was entitled to judgment on the mechanic's lien because the court found that power exhausts had shipped to Canton Erectors on January 22, 2007, thus establishing that it filled its mechanic's lien within 75 days from which it last furnished materials for the project.

[*P28] *R.C. 1311.12(A)(1)* states in [**16] part:

[*P29] "(A) A mechanic's lien for furnishing materials arises under *sections 1311.01 to 1311.22 of the Revised Code* only if the materials are:

[*P30] "(1) Furnished with the intent, as evidenced by the contract of sale, the delivery order, delivery to the site by the claimant or at the claimant's direction, or by other evidence, that the materials be used in the course of the improvement with which the lien arises;

[*P31] "(2) Incorporated in the improvement or consumed as normal wastage in the course of the improvement[.]"

[*P32] While the court found that the power exhausts were "shippped" to Canton Erectors, there was no evidence to show that the power exhausts were "delivered" as required by the statute. Refrigeration Sales maintains that it offered testimony by its "planning inspect estimator" to show that the power exhausts were delivered, but that assertion is a mischaracterization of her

testimony. She claimed that the order acknowledgment from the manufacturer showed that the power exhausts were supposed to be shipped directly to Canton Erectors, but conceded that the January 22, 2007 invoice showed that the power exhausts had been shipped from Refrigeration Sales to Air Technologies in Dalton, [**17] Ohio. She further conceded that she had no record that acknowledged delivery of the power exhausts to either Air Technologies or Canton Erectors. When asked if she knew where the power exhausts were shipped, she answered, "I don't know."

[*P33] The credit manager for Refrigeration Sales testified that he placed a credit hold on Air Technologies' account due to its non-payment of other equipment used in the construction project and suspended delivery of the power exhausts. He rescinded the credit hold after acceding to JJO's demands that the power exhausts be shipped so that the project could be completed. He testified that the January 22, 2007 invoice showed that the power exhausts were shipped from a Refrigeration Sales warehouse used to store damaged equipment directly to Canton Erectors, but offered no evidence to show that the power exhausts were actually delivered. He also conceded that he had no knowledge of whether Air Technologies had been billed for two power exhausts.

[*P34] For its part, JJO offered testimony contradicting the assertion that it called the Refrigeration Sales credit manager to demand shipment of the power exhausts and that it received an invoice for the power exhausts [**18] because Air Technologies had not paid Refrigeration Sales.

[*P35] The evidence needed to uphold the validity of the lien required proof of one of two points: did Refrigeration Sales actually deliver the power exhausts or were those power exhausts actually incorporated into the building? Either fact should have been simple to prove. There must have been multiple sources that could confirm delivery of the power exhausts: a shipping manifest or receipt or even the direct testimony from a representative of Canton Erectors could have proved that the power exhausts were delivered. The incorporation of the power exhausts into the project should have been simple to prove with evidence or testimony showing that the units were actually placed on the roof. So when Refrigeration Sales failed to offer any proof on what should have been easy to establish, the court could rationally have concluded that no such proof existed. And to further diminish Refrigeration Sales' case, the court heard the credit manager concede that he had altered the January 22, 2007 invoice removing a notation stating "damaged equipment." The construction contract called for the installation of "new" equipment and the credit manager [**19] said that he altered the invoice to avoid confusion -- he said the equipment was undamaged, but came from a "damaged equipment warehouse." Although the alteration of the January 22, 2007 invoice might have been for a benign purpose, the court could have viewed this testimony in conjunction with the lack of proof to conclude that no delivery had been made. With the steps prescribed in the mechanic's lien statute being strictly construed against the lien, the court's judgment finding that Refrigeration Sales failed to timely file its lien was not against the manifest weight of the evidence.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga

County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure.*

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and

PATRICIA ANN BLACKMON, J., CONCUR

APPENDIX "D"

Matrix Technologies, Inc., Appellant v. Kuss Corporation, et al., Appellees

Court of Appeals No. L-07-1301

COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, LUCAS COUNTY

2008 Ohio 1301*; *2008 Ohio App. LEXIS 1094

March 21, 2008, Decided

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *Matrix Techs., Inc. v. Kuss Corp., 2008 Ohio 3880, 2008 Ohio LEXIS 2209 (Ohio, Aug. 6, 2008)*

PRIOR HISTORY: [**1]
Trial Court No. CI0200704418.

DISPOSITION: JUDGMENT AFFIRMED.

COUNSEL: Keith Watkins and Andrew Ayers, for appellant.

Robert Colacarro and John Lewis, for appellees.

JUDGES: Arlene Singer, J., William J. Skow, J., Thomas J. Osowik, J., CONCUR.

OPINION BY: Thomas J. Osowik

OPINION

DECISION AND JUDGMENT ENTRY

OSOWIK, J.

[*P1] This is an appeal from a judgment of the Lucas County Court of Common Pleas finding appellant subject to a mandatory arbitration clause in a construction contract dispute. For the reasons set forth below, this court affirms the judgment of the trial court.

[*P2] Appellant, Matrix Inc., sets forth the following single assignment of error:

[*P3] "1. The Common Pleas Court erred to the prejudice of Appellant by issuing declaratory judgment that Appellant was required to submit to arbitration demanded by Appellee, when Appellant had no contract requiring arbitration with Appellee and has not agreed to any such arbitration."

[*P4] The following undisputed facts are relevant to the issues raised on appeal. Appellee, Kuss Corp., owned a manufacturing warehouse facility that was under construction in 2000. Rudolph-Libbe Inc. ("RLI") served as the general contractor for this construction project. RLI engaged various subcontractors, including appellant, [**2] Matrix Inc. ("Matrix")

[*P5] The role of Matrix in this project was to perform the requisite architectural and engineering design services connected to the construction project. Industrial Power Systems

Inc. ("IPS"), another subcontractor, was responsible to perform the electrical and mechanical system installations in accordance with the specifications prepared by Matrix.

[*P6] During the course of construction, it was discovered that the electrical system, installed by IPS in conformity with the Matrix specifications, was not adequate to operate Kuss's equipment. This required additional work to be performed by IPS and additional cost to be incurred by Kuss to remedy the defective electrical system.

[*P7] In 2001, IPS sued Kuss to recover the added expenses it sustained in correcting the inadequate electrical system. The matter went to arbitration and Kuss was ordered to pay IPS. Subsequently, Kuss submitted a demand for arbitration against Matrix to recover the monies it was ordered to reimburse Kuss. In turn, Matrix, filed a complaint for declaratory judgment seeking a determination that it was not required to submit to arbitration with Kuss. Given this scenario, this case is essentially an indemnification [**3] dispute arising from a collection matter.

[*P8] On August 21, 2007, the trial court issued a judgment denying Matrix's application for injunctive relief and further finding Matrix subject to mandatory arbitration with Kuss. This appeal stems from the latter portion of the judgment.

[*P9] In its single assignment of error, Matrix asserts that the trial court erred in issuing a declaratory judgment finding it subject to the mandatory arbitration clause in the general contract. In support, Matrix alleges that it was not bound by any mandatory contractual arbitration clause under any contract.

[*P10] The precise language of the contracts entered into by the parties will be determinative of this dispute. Thus, the emphasis of our review will focus upon the specific terms and provisions incorporated into the contracts governing this construction project.

[*P11] An appellate court applies the de novo standard of review when it reviews a trial court's contract interpretation. *Grabnic v. Doskocil, 11th Dist. No. 02-P-0116, 2005 Ohio 2887*. De novo review requires us to conduct an independent review of the record without deference to the trial court's decision. *Brown v. County Comm'rs (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153*.

[*P12] [**4] Article 3.1 of the subcontract executed between RIL and Matrix establishes, "A/E, agrees that all terms and conditions of the Rudolph/Libbe Master Terms and Conditions of Architectural/Engineering Services Agreements (Rev. date 2/1/99) (consisting of Articles 1 through 13; 15 pages) are incorporated herein by reference as if fully rewritten herein and are applicable to this Project. A copy of the Master Terms and Conditions have previously been provided to A/E."

[*P13] Significantly, Article 8.1 of the incorporated Master Terms and Conditions expressly stated, "unless a different form of dispute resolution is required under the Prime Contract, any dispute or claim arising out of or related to the agreement or the breach thereof shall be settled by binding arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof." The unambiguous terms and conditions of the contracts by which Matrix was bound connected to this project clearly established that Matrix is subject to the mandatory arbitration [**5] clause set forth in Article 8.1.

[*P14] In conjunction with the above, Article 1.1.2 of the Master Terms and Conditions incorporated into the subcontract

with Matrix stated, "In addition to its other obligations under the Agreement, A/E shall cooperate with Contractor and shall be bound to perform its services hereunder in the same manner and to the same extent the Contractor is bound by the Prime Contract between Owner and Contractor to perform such services for Owner."

[*P15] In an analogous Third District Court of Appeals construction contract dispute, the court determined that the subcontract language substantively analogous to the above triggered the mandatory arbitration clause contained in the original contract between the general contractor and owner. The subcontract language, read, "The Subcontractor agrees to be bound to and assume toward the Contractor all of the obligations and responsibilities that the Contractor by those documents, assumes towards the Owner." *Gibbons-Grable Co. v. Gilbane Bldg. Co. (1986), 34 Ohio App.3d 170, 517 N.E.2d 559.*

[*P16] Based upon the express incorporation of a mandatory arbitration clause into the Matrix subcontract, as evidenced by reading Articles 3.1 and 8.1 in conjunction [**6] with each other, as well as the persuasive rationale established in *Gibbon,* we find that the record of evidence clearly establishes that Matrix is bound to submit to mandatory arbitration. We find appellant's assignment of error is not well-taken.

[*P17] Appellant is ordered to pay the costs of this appeal pursuant to *App.R. 24*. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to *App.R. 27*. See, also, *6th Dist.Loc.App.R. 4*.

Arlene Singer, J.

JUDGE

William J. Skow, J.

JUDGE

Thomas J. Osowik, J.

CONCUR

APPENDIX "E"

DB MIDWEST, LLC, PLAINTIFF-APPELLANT, -and- HUNTINGTON NATIONAL BANK, PLAINTIFF-APPELLEE, v. PATASKALA SIXTEEN, LLC, ET AL., DEFENDANTS-APPELLEES.

CASE NUMBER 8-08-18

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, LOGAN COUNTY

2008 Ohio 6750*; *2008 Ohio App. LEXIS 5646

December 22, 2008, Date of Judgment Entry

PRIOR HISTORY: [**1]
CHARACTER OF PROCEEDINGS: Appeal from Common Pleas Court.

DISPOSITION: Judgment affirmed.

COUNSEL: DAVID A. SKROBOT, Attorney at Law, Brett R. Sheraw, Attorney at Law, Columbus, OH, For Plaintiff-Appellant.

CHARLEY HESS, Attorney at Law, Dublin, OH, For Defendant-Appellee, L.P.Z. Construction Co., Inc.

JUDGES: Rogers, J. PRESTON and WILLAMOWSKI, JJ., concur.

OPINION BY: Rogers

OPINION

Rogers, J.

[*P1] Plaintiff-Appellant, DB Midwest, LLC ("Midwest"), appeals from the judgment of the Logan County Court of Common Pleas, denying its motion for summary judgment and granting summary judgment to Defendant-Appellee, L.P.Z. Construction Company, Inc. ("LPZ"). On appeal, Midwest argues that the trial court erred in denying its motion for summary judgment and granting LPZ's motion for summary judgment because LPZ expressly agreed with Pataskala Sixteen, LLC ("Pataskala") to subordinate its mortgage to future first mortgage financing; because an express written agreement is not required between mortgagees to enforce a subordination agreement between the mortgagor and mortgagee; because LPZ had imputed notice of the subordination agreement and should be bound thereto; because no separate consideration is necessary between two mortgagees in order to enforce [**2] a subordination agreement between a mortgagee and a mortgagor, as consideration already exists in the underlying mortgagee-mortgagor transaction; and, because the subordination agreement was sufficiently specific to be enforceable. Finding that the subordination agreement lacked the essential terms necessary for enforceability, and that the

subordination agreement was not a self-executing subordination agreement, but an agreement to agree to a future subordination, we affirm the judgment of the trial court.

[*P2] In April 2003, LPZ entered into a real estate purchase contract with Players Glenn, LLC ("Players") for LPZ to sell, and Players to purchase, a sixty-five acre tract of land in Bellefontaine, OH ("the property"). The terms of the contract required Players to pay sixty percent of the contract price at closing, with a promissory note secured by a mortgage on the property to be given to LPZ for the remaining forty percent of the purchase price. Players purchased the property as part of a development project to build homes and condominiums. To assist Players in obtaining development financing from other lenders, the following language was included in the purchase contract.

> **Seller agrees** [**3] **to subordinate said mortgage, at Buyer's expense, to Buyer's development mortgage, and to release from said mortgage any lots sold by Buyer, at Buyer's expense, and for the consideration of $ 1,700.00 per lot**.

(Apr. 2003 Real Estate Purchase Contract). Prior to the closing, Players assigned all of its rights and delegated all of its duties under the real estate purchase contract to Pataskala

[*P3] In June 2004, pursuant to the real estate purchase contract, Pataskala signed a promissory note to LPZ as payee for forty percent of the contract price. The following language was included in the note:

> **This Note is secured by a Mortgage dated June 29, 2004 to Payee on property located at Bellefontaine, Logan County, Ohio, which said mortgage shall be subordinated to first mortgage financing obtained by Maker**.

(June 2004 Promissory Note).

[*P4] On the same day, Pataskala also executed a mortgage on the property in favor of LPZ. The mortgage also included the subordination agreement language, stating that "[t]his mortgage shall be subordinated to first mortgage financing obtained by undersigned Pataskala Sixteen, LLC or its assigns." (June 2004 Mortgage). This mortgage was subsequently recorded in the Logan [**4] County Recorder's Office on July 15, 2004.

[*P5] In July 2004, Pataskala entered into a loan agreement with Sky Bank ("Sky") for $ 752,000 in development financing. Under the terms of the agreement, the loan was to be secured by a first mortgage lien on the property.

[*P6] In August 2004, Pataskala signed a promissory note to Sky for $ 752,000, and, on the same day, Pataskala also executed an open end mortgage to Sky on the property, with the mortgage being subsequently recorded in the Logan County Recorder's Office on September 23, 2004. Shortly thereafter, Huntington National Bank ("Huntington") succeeded to the note and the mortgage as a successor in interest to Sky.

[*P7] In November 2007, Huntington filed a foreclosure action against Pataskala and all other parties claiming an interest in the property, including LPZ, to foreclose on its mortgage due to Pataskala's default on the promissory note. Subsequently, LPZ filed an answer to Huntington's claim and a cross claim against Pataskala, asserting that its mortgage on the property was superior to

the Huntington mortgage, and demanding that its promissory note be satisfied first from the foreclosure sale proceeds.

[*P8] In January 2008, the trial court [**5] issued a default judgment in foreclosure against Pataskala, finding that Huntington and LPZ had valid mortgages on the property, and ordering a foreclosure sale to satisfy the debts owed to the parties.

[*P9] In April 2008, Huntington filed a motion for summary judgment as to its lien priority, asserting that it held a first priority lien on the foreclosed property because of a self-executing subordination agreement between Pataskala and LPZ, which subordinated LPZ's mortgage to its "first mortgage financing." In addition, Huntington also filed a motion for substitution of plaintiff, requesting the trial court to substitute Midwest as plaintiff in the action because Huntington had assigned its note, mortgage, and all claims secured thereby to Midwest.

[*P10] Subsequently, the trial court granted Huntington's motion to substitute Midwest as plaintiff, and LPZ filed a motion in opposition to Midwest's summary judgment motion, asserting that the subordination agreement in the contract, note, and mortgage was unenforceable because it lacked essential terms; that Midwest was not a party to the agreement nor had Midwest provided consideration for the agreement, and therefore it has no right to enforce [**6] it; and, that summary judgment should be granted finding that LPZ occupies a first priority position on the mortgage because it filed its mortgage first in time.

[*P11] Attached to LPZ's motion for summary judgment was the affidavit of Caroline Zell, the president and sole owner of LPZ. In her affidavit, she testified that LPZ received a promissory note and mortgage from Pataskala as consideration for the sale of LPZ's property; that she signed the sale contract as an agent for LPZ; that, upon signing the contract, she was not aware of the subordination language contained therein; that it was always her understanding that she would have a first mortgage on the property; that she would never have knowingly permitted LPZ's mortgage to be subordinated to a second priority position; and, that neither Sky or Huntington ever contacted her regarding their mortgage with Pataskala or the issue of entering into an agreement with LPZ to place its mortgage into a first priority position.

[*P12] In June 2008, the trial court overruled Midwest's motion for summary judgment and granted LPZ's motion for summary judgment, finding that "the language relied upon by the Plaintiff does not constitute a 'self-executing [**7] subordination' and LPZ's mortgage is superior to Plaintiff's," as LPZ filed its mortgage first in time.

[*P13] It is from this judgment that Midwest appeals, presenting the following assignments of error for our review.

Assignment of Error No. I

THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING DEFENDANT-APPELLEE LPZ CONSTRUCTION COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFF-APPELLANT DB MIDWEST LLC'S MOTION FOR SUMMARY JUDGMENT, BECAUSE AN EXPRESS WRITTEN AGREEMENT IS NOT REQUIRED BETWEEN MORTGAGEES

IN ORDER TO ENFORCE A SUBORDINATION PROVISION OR AGREEMENT.

Assignment of Error No. II

THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE LPZ CONSTRUCTION COMPANY, INC'S MOTION FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFF-APPELLANT DB MIDWEST LLC'S MOTION FOR SUMMARY JUDGMENT, BECAUSE A CONSENSUS ON THE ISSUE OF SUBORDINATION WAS REACHED BETWEEN DEFENDANT-APPELLEE LPZ CONSTRUCTION COMPANY, INC. AND DEFENDANT PATASKALA SIXTEEN LLC THAT DEFENDANT-APPELLEE LPZ CONSTRUCTION COMPANY INC.'S MORTGAGE WOULD BE SUBORDINATED TO FIRST MORTGAGE FINANCING OBTAINED BY DEFENDANT PATASKALA SIXTEEN, LLC AND THE SUBORDINATION SHOULD BE ENFORCED AS BETWEEN THE PARTIES.

Assignment of Error No. [**8] ***III***

THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE LPZ CONSTRUCTION COMPANY, INC'S MOTION FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFF-APPELLANT DB MIDWEST LLC'S MOTION FOR SUMMARY JUDGMENT, BECAUSE DEFENDANT-APPELLEE LPZ CONSTRUCTION COMPANY, INC. HAD IMPUTED NOTICE OF THE SUBORDINATION PROVISION AND AGREEMENT AND IS, THEREFORE, BOUND BY THE SUBORDINATION PROVISION AND AGREEMENT.

Assignment of Error No. IV

THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE LPZ CONSTRUCTION COMPANY, INC'S MOTION FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFF-APPELLANT DB MIDWEST LLC'S MOTION FOR SUMMARY JUDGMENT, BECAUSE NO SEPARATE CONSIDERATION IS REQUIRED TO BE PAID BY A MORTGAGEE TO A SUBORDINATING MORTGAGEE IN ORDER FOR THE SUBORDINATION PROVISION TO BE ENFORCEABLE WHEN CONSIDERATION ALREADY EXISTS AS PART OF THE ORIGINAL TRANSACTION.

Assignment of Error No. V

THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE LPZ CONSTRUCTION COMPANY, INC'S MOTION FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFF-APPELLANT DB MIDWEST LLC'S MOTION FOR SUMMARY JUDGMENT, ON THE GROUNDS THAT THE SUBORDINATION PROVISION AT ISSUE LACKS SPECIFICITY AND IS UNENFORCEABLE BECAUSE THERE WERE NO TERMS RELEVANT TO THE SUBORDINATION [**9] **PROVISION THAT WERE LEFT OPEN TO FURTHER NEGOTIATION BETWEEN DEFENDANT-APPELLEE LPZ CONSTRUCTION COMPANY, INC. AND DEFENDANT PATASKALA SIXTEEN, LLC**.

[*P14] Due to the nature of Midwest's assignments of error, we elect to address its fifth assignment of error first.

Assignment of Error No. V

[*P15] In its fifth assignment of error, Midwest argues that the trial court erred in denying its summary judgment motion and granting summary judgment in favor of LPZ on the grounds that the subordination provision at issue lacked the required specificity to make it an enforceable agreement. Specifically, Midwest contends that even though the subordination agreement lacked specific, certain terms, the parties, through the language of the agreement, did not leave any terms open for further negotiation; therefore, the agreement is not merely an agreement to subordinate in the future, but a definite, enforceable, and current subordination agreement, even though not complete in all respects.

[*P16] An appellate court reviews a summary judgment order de novo. *Hillyer v. State Farm Mut. Auto. Ins. Co. (1999), 131 Ohio App.3d 172, 175, 722 N.E.2d 108*. Accordingly, a reviewing court will not reverse an otherwise correct judgment merely because [**10] the lower court utilized different or erroneous reasons as the basis for its determination. *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distr. Co., 148 Ohio App.3d 596, 2002 Ohio 3932, P25, 774 N.E.2d 775*, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Ed., 69 Ohio St.3d 217, 222, 1994 Ohio 92, 631 N.E.2d 150*. Summary judgment is appropriate when, looking at the evidence as a whole: (1) there is no genuine issue as to any material fact; (2) reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made; and, therefore, (3) the moving party is entitled to judgment as a matter of law. *Civ.R. 56(C)*; *Horton v. Harwick Chemical Corp., 73 Ohio St.3d 679, 686-687, 1995 Ohio 286, 653 N.E.2d 1196*. If any doubts exist, the issue must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg, 65 Ohio St.3d 356, 358-59, 1992 Ohio 95, 604 N.E.2d 138*.

[*P17] The party moving for summary judgment has the initial burden of producing some evidence which demonstrates the lack of a genuine issue of material fact. *Dresher v. Burt, 75 Ohio St.3d 280, 293, 1996 Ohio 107, 662 N.E.2d 264*. In doing so, the moving party is not required to produce any affirmative evidence, but must [**11]

identify those portions of the record which affirmatively support its argument. *Id. at 292*. The nonmoving party must then rebut with specific facts showing the existence of a genuine triable issue; he may not rest on the mere allegations or denials of his pleadings. Id.; *Civ.R. 56(E)*.

[*P18] In general, the first mortgage on a parcel of real property recorded at the county recorder's office in the county in which the property is situated has priority over all subsequent mortgages on that same property. *R.C. 5301.23*; *L.O.F. Employees Federal Credit Union v. Hahn, 6th Dist. No. L-82-258, 1982 Ohio App. LEXIS 11600, 1982 WL 6663*. However, the parties may waive priority by two distinct methods. First, pursuant to *R.C. 5301.35*, the party with the mortgage priority may waive that priority by noting the waiver on the original mortgage and signing it, by noting the waiver on the margin of the record of the mortgage and signing it, or by executing a separate acknowledged instrument waiving priority, as provided under *R.C. 5301.01*. Id. Second, the parties may also waive priority by a separate independent agreement. Id., citing *Glick v. Marscot (App. 1931), 10 Ohio Law Abs. 250*; *Curtis v. J.L. Shunk Rubber Co. (App. 1931), 9 Ohio Law Abs. 375*.

[*P19] [**12] To be given effect, all subordination agreements must comport with traditional contract law principles. *Ross v. Roberson, 2d Dist. No. CA 9983, 1987 Ohio App. LEXIS 5555, 1987 WL 5532*. "The elements necessary to form a contract include 'an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object of consideration.'" *Brotherwood v. Gonzalez, 3d Dist. No. 10-06-33, 2007 Ohio 3340, P12*, quoting *Kostelnik v. Helper, 96 Ohio St.3d 1, 3, 2002 Ohio 2985, 770 N.E.2d 58*. Furthermore, the contracting parties must have a meeting of the minds on the essential terms of the contract. *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Industrial Relations (1991), 61 Ohio St. 3d 366, 369, 575 N.E.2d 134*.

[*P20] Ohio case law does not set forth an established standard as to what essential terms are necessary to make a subordination contract enforceable;

however, important terms that have been mentioned are "maximum terms for loan amounts, interest rates, and loan periods, as well as limitations upon the use of loan proceeds." *Builders Fidelity Acceptance Corp. v. Daily, 9th Dist. No. 9877, 1981 Ohio App. LEXIS 13695, 1981 WL 3914*, citing *Troj v. Chesbroc (1972), 30 Conn. Supp. 30, 296 A.2d 685*; *Hux v. Raben (1966), 74 Ill. App.2d 214, 219 N.E.2d 770*, [**13] aff'd *(1967), 38 Ill.2d 223, 230 N.E.2d 831*; *Grooms v. Williams (1961), 227 Md. 165, 175 A.2d 575*. Moreover, a subordination agreement may be informal, but "it must at least be an agreement, a 'bargain of the parties in fact as found from their language or by implication from other circumstances.'" *Total Technical Services v. Kafoure Associates, 8th Dist. Nos. 51339, 51401, 1986 Ohio App. LEXIS 9699, 1986 WL 13687*, quoting *R.C. 1301.01(C)*.

[*P21] A similar issue to the one presented in this case was argued before the Ninth Appellate District in *Builders, supra*, and the court addressed whether a subordination clause in a mortgage executed between a mortgagor and a mortgagee could be enforced by a subsequent mortgagee to obtain a first priority position on its mortgage executed second in time. The subordination clause contained in the mortgage provided that "[m]ortgagee agrees to subordinate the first lien of this mortgage in favor of a construction loan or loans, obtained for the purposes of building a house or houses on the premises described above * * *." Furthermore, the agreement

between the mortgagor and mortgagee, prior to the execution of the mortgage, stated that "[r]elative to such mortgage, the same shall contain a provision to the effect [**14] that Seller will subordinate such mortgage in favor of a construction loan or loans for the purposes of a building a house or houses on this lot * * *." The court found that the language contained in the subordination clause lacked essential terms necessary for its enforceability; that no subsequent agreement was made by the parties to cure the indefiniteness of the subordination agreement; and, that the subsequent mortgagee never even contacted the first mortgagee in regards to the subordination agreement. Accordingly, the court found that the subordination agreement was "merely an agreement to make an agreement, and not in and of itself a legally enforceable and valid agreement."

[*P22] Turning to the facts of this case, the mortgage executed by Pataskala to LPZ was recorded prior to the mortgage executed by Pataskala to Sky. Accordingly, LPZ occupies a first lien priority position pursuant to *R.C. 5301.23*, unless a separate subordination agreement was reached by the parties or LPZ properly subordinated its priority under *R.C. 5301.35*. Here, LPZ and Pataskala placed a subordination clause in the real estate purchase contract, promissory note, and mortgage, but the clause contained only [**15] a general agreement between LPZ and Pataskala that LPZ would subordinate its first lien priority, with no specifics as to the amount of the subordination, length of time of the subordination, when the subordination would occur, or to whom it would subordinate.

[*P23] Accordingly, because the subordination clause contained in the contract, note, and mortgage lacked specific, essential terms, we find that there was no meeting of the minds to constitute a valid and enforceable agreement under contract law principles. Just as the Ninth District also found in the unenforceable subordination agreement in *Builders*, this agreement lacks essential terms, no subsequent agreement was ever made between the parties to cure the indefiniteness of the agreement, and Midwest never contacted LPZ regarding subordination, a simple step that would have likely solved any dispute regarding priority and prevented this litigation.

[*P24] Furthermore, the purpose of the subordination agreement supports a finding that this agreement was not an enforceable "self-executing" subordination agreement, but that it was merely an agreement to agree to subordinate in the future. Pataskala purchased the property from LPZ with the intention [**16] of developing the property and selling it off in separate lots. By this purpose and the lack of essential terms in the subordination clause, it appears that the clause was placed into the contract, note, and mortgage to facilitate Pataskala's efforts in obtaining development financing by providing an incentive to institutions to lend funds by offering them the potential opportunity to have first lien priority, not by granting any future lender automatic priority. Although the subordination clause in the note and mortgage state that LPZ's interest "*shall* be subordinated to first mortgage financing" and not that it may be subordinated, we find the lack of essential terms in the subordination clause and the underlying purpose of the clause support the trial court's grant of summary judgment based on the conclusion that this was an agreement to agree to future subordination and not a self-executing subordination agreement.

[*P25] Accordingly, we overrule Midwest's fifth assignment of error.

Assignments of Error Nos. I, II, III, and IV

[*P26] In its first, second, third, and fourth assignments of error, Midwest argues that the trial court erred in denying its motion for summary judgment and granting LPZ's [**17] motion for summary judgment because an express agreement between mortgagees is not required to enforce a subordination provision between a mortgagor and mortgagee; because the mortgagee and mortgagor agreed to a subordination provision and it should be enforced; because LPZ had imputed notice of the subordination provision and must be bound thereto; and, because no separate consideration is required between mortgagees to enforce a subordination agreement executed between a mortgagee and mortgagor, as consideration already exists in the underlying transaction. However, our disposition of Midwest's fifth assignment of error renders its first, second, third, and fourth assignments of error moot, and we decline to address them. *App.R. 12(A)(1)(c)*.

[*P27] Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

PRESTON and WILLAMOWSKI, JJ., concur.