OHIO COURT OF APPEALS
FIFTH APPELLATE DISTRICT
GUERNSEY COUNTY, OHIO

MID-OHIO MECHANICAL, INC.	:	
	:	Case No. 2007 CA 35
Plaintiff-Appellee,	:	
v.	:	
	:	
EISENMANN CORPORATION,	:	
	:	
Defendant-Appellant.	:	

AMICUS BRIEF OF AMERICAN SUBCONTRACTORS ASSOCIATION IN SUPPORT OF APPELLEE MID-OHIO MECHANICAL, INC.

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ASSIGNMENT OF ERRORS AND ISSUES PRESENTED FOR REVIEW

First Assignment of Error: The trial court erred in allowing Plaintiff-Appelle Mid-Ohio Mechanical, Inc. ("Mid-Ohio") to proceed to trial on a mechanic's lien claim against Defendant-Appellant Eisenmann Corporation ("Eisenmann").

> Issue Presented For Review No. 1. Whether the dismissal of the owner as a party when the mechanic's lien claim converted from a foreclosure to a cash deposit deprived the Court of jurisdiction when the two parties interested in the deposit, Eisenmann and Mid-Ohio, remained parties to the case?

Second Assignment of Error: The trial court erred in failing to provide the jury with jury instructions that accurately stated Ohio law.

> Issue Presented for Review No. 2. Whether the trial court materially mislead the jury by telling them that Mid-Ohio's T&M tickets were presumed reasonable absent bad faith or fraud?

I. PRELIMINARY STATEMENT

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 are both union and non-union companies, ranging in size from the smallest private firms to the nation's largest specialty contractors. Hundreds of ASA's member companies are located here in Ohio, with chapter offices in Cleveland, Columbus, Cincinnati and Dayton. The issues raised in the instant appeal profoundly impact ASA's member companies as well as the thousands of Ohioans who are gainfully employed by these companies. The financial survival of the ASA member companies depends upon the fair and consistent enforcement of the Ohio mechanic's lien laws.

II. FACTUAL BACKGROUND AND STATEMENT OF THE CASE

Plaintiff-Appellee Mid-Ohio Mechanical, Inc. ("Mid-Ohio"), is a contractor from Licking County, Ohio. Mid-Ohio was hired as a subcontractor to Carden Metal Fabricators, Inc. ("Carden") to perform part of the construction and installation of a paint line in the Byesville factory owned by two affiliated companies known as LDM Technologies, Inc. and Plastech Engineering Products, Inc. (hereafter the "Owner"). Carden, in turn was a subcontractor to Eisenmann Corporation ("Eisenmann"), the Defendant-Appellant herein. Eisenmann contracted directly with the Owner.

The work contracted by the Owner was for the installation of a massive manufacturing line to be installed by Eisenmann and its subcontractors. The construction of the manufacturing line was designed, supervised, and inspected just as any commercial

construction project would be. Plans and specifications were prepared by an architect and engineer. The plans were approved by the Mid-East Ohio Building Department. Subsequently, the work of Eisenmann and its subcontractors was inspected by the Mid-East Ohio Building Department.

Before the project was completed, Carden went out of business. Eisenmann then issued purchase orders to Mid-Ohio to have Mid-Ohio continue to work on the project. Shortly thereafter, Eisenmann asked Mid-Ohio to cease work. Because Carden had not paid Mid-Ohio in full, Mid-Ohio filed a mechanic's lien in the amount of $768,396.67.

On May 25, 2004, Appellee Mid-Ohio filed its Complaint in Foreclosure seeking to foreclose upon its mechanic's lien against the property of the Owner, LDM. Less than three months later, Appellant Eisenmann and the Owner jointly took steps authorized by the Ohio Revised Code to avoid the cumbersome foreclosure action. Pursuant to Ohio Revised Code Section 1311.11, they jointly funded and submitted a cash deposit (hereinafter the "Cash Deposit") to the Trial Court in the amount of $1,152,605.00. Pursuant to Section 1311.11, the Cash Deposit was to act as a substitute for the security of the mechanic's lien.

At the time the Cash Deposit was proffered, the trial court issued an order approving the Cash Deposit and declaring the discharge of the mechanic's lien filed by Mid-Ohio:

> "It is further [ordered] that upon the filing of this order the mechanic's lien shall be void and the property described in Exhibit A shall be wholly discharged from such lien. It is further ordered that the cash deposit shall be released by the Clerk of Courts for the Gurensy County Common Pleas Court and paid to Applicants Eisenmann Corp., Plastech Engineered Products, Inc., and LDM Technologies jointly upon dismissal of this lawsuit without prejudice or the satisfaction of such judgment and/or verdict as may be entered in favor of Plaintiff or any Defendant."

On August 30, 2004, the Court entered another order in response to a motion by Eisenmann to dismiss certain parties that had been named in the foreclosure action. These parties were no longer "necessary parties" because the claim of Mid-Ohio had been transferred from the real property to the Cash Deposit. In the order of that date, the Court specifically stated as follows:

> "Court finds that the real estate that is subject of this foreclosure action has been discharged from the claim of the mechanic's lien by Plaintiff and that the mechanic's lien of Plaintiff has been transferred to a cash deposit with the Clerk of Court which none of the Defendant lien holders have an interest. Motion is well taken. It is ordered that the Amended Complaint in Foreclosure shall be and is hereby dismissed as to the Gurnsey County Treasurer, Huntington National Bank, Bank of America and General Electric Capital Corp."

On December 15, 2005, counsel for Mid-Ohio filed a Notice of Dismissal of all claims against the owner, Plastech and LDM. Although these Defendants had not been a part of the earlier motion that allowed four other Defendants to be dismissed, the owner no longer claimed any interest in the funds that had been deposited with the Court. Less than three weeks later, Eisenmann immediately moved to dismiss the entire action because they asserted that by dismissing the owner, Mid-Ohio had dismissed all claims in the action. After extensive briefing by the parties, the Trial Judge denied Eisenmann's motion and stated as follows:

> Court finds that ORC 1311.11 (C) (3) provides a cash deposit ...is released...when a suit on the security is dismissed with prejudice to the Plaintiff.
>
> Court finds that by entry of 81303 the Court stated that the deposit would be released "upon dismissal of law suit. (emphasis added). Motion for Release of Cash Deposit is denied.

More than thirteen months later, the Court conducted a seven-day jury trial. The jury awarded Mid-Ohio the entire amount of its claim, subject only to a set-off of $14,550 in recognition of amounts due under Eisenmann's counterclaim. After a flurry of post-trial motions filed by Eisenmann were denied by the Court, Eisenmann filed the instant appeal.

III. LAW AND ARGUMENT

A. Mid-Ohio's Voluntary Dismissal of the Owner was Proper.

1. The public policy of Ohio supports the affirmance of the judgment below.

In 1823, Ohio passed its first Mechanic's Lien law. While the law has been substantially revised in modern times, the law continues to provide the security necessary for the construction industry to operate. Because the purpose of a mechanic's lien is to provide reasonable security for amounts earned by a contractor or subcontractor, the Ohio Revised Code has long provided a provision that allows the owner of real property to remove a mechanic's lien from its real property by posting sufficient alternate security with the Court of Common Pleas.

Although Ohio law also holds that an action on a mechanic's lien is "in rem" rather than "in personam," Eisenmann seeks to create procedural hurdles for contractors and subcontractors who cooperate with an owner seeking to provide such alternate security. The confusion and uncertainty that will result in the event that Eisenmann's position is upheld will be harmful to subcontractors and contractors throughout Ohio. Because of such uncertainty, subcontractors and contractors preparing bids for projects will not know whether they can rely upon the security of the mechanic's lien remedy. Without such security, the subcontractors and contractors will not be able to offer their best and lowest prices during the bidding process.

2. The notice of dismissal simply confirmed that the mechanic's lien claim had been dismissed once the cash deposit was submitted.

In a last desperate attempt to avoid paying for the work undertaken by Mid-Ohio, Eisenmann is utilizing smoke and mirrors to fashion an argument on appeal. Eisenmann

argues first that the claim of Mid-Ohio was lost once it decided to dismiss the Owner after the cash deposit was substituted for the security of the Mechanic's Lien. Eisenmann asserts that because the foreclosure complaint named LDM as the Owner of the subject real property, the dismissal of LDM caused Mid-Ohio's claim against the cash deposit to somehow evaporate. Perhaps intentionally, Eisenmann dances around any substantive legal analysis and fails to point to any provision of the Ohio Civil Rules or any applicable Ohio case law that would support Eisenmann's position.

Nobody will dispute Eisenmann's first assertion that the notice of dismissal of December 15, 2005 "divested the trial court of jurisdiction over Mid-Ohio's mechanic's lien claims." In fact, we would all agree that the mechanic's lien claim had already been divested pursuant to the entry of August 13, 2004 in which the Court entered an order stating that "the mechanic's lien shall be void and the Property described in Exhibit A shall be wholly discharged from such lien."

3. The owner was not a necessary party to the claim against the cash deposit.

Eisenmann's second assertion states that voluntary dismissals are "self-executing without court intervention" and that a dismissal with prejudice "constitutes a final judgment." Eisenmann then leaps to the conclusion that Mid-Ohio's notice of dismissal of the Owner stripped the trial court of its jurisdiction. Since Eisenmann does not provide a basis for this assertion, one can only guess.

Perhaps Eisenmann is asserting that the Owner was a "necessary party" who qualified as "indispensable" under Ohio Civil Rule 19. Unfortunately for Eisenmann, neither the case law nor the Ohio Civil Rules lend any support to this argument. The courts of Ohio have long held that a proceeding brought purely to enforce a mechanic's

lien is recognized as a suit "*in rem.*" *Schuholz v. Walker* (1924), 111 Ohio St. 308, 312; *Crandall v. Irwin* (1942), 139 Ohio St. 253.

In fact, the "*in rem*" character of foreclosure proceedings has been acknowledged by this Fifth Circuit Court of Appeals in a case arising in Guernsey County. In *Amtrac of Ohio, Inc. v. Reacon Structures, Inc.*, (Aug. 6, 1986), Fifth Dist. No. CA-801, (a copy of which is included in the Appendix) this Court acknowledged that a foreclosure action is "in rem" and found that where a mechanic's lien claim is asserted against a land owner who is not in privity with the claimant, no personal judgment could be entered.

To determine whether an absentee party's joinder should be compelled—whether the party is "necessary"—courts must evaluate the strength of the nonparty's interest in the pending litigation. This inquiry can be broken down into three questions: (1) In the absence of joinder, can complete relief be accorded those already parties to the action? (2) Will a judgment in the absence of the nonparty as a practical matter impair that individual's interest in the subject matter of the action? and (3) Will those already parties be subject to a substantial risk of incurring inconsistent obligations in separate suits? If the answer to any of these questions is affirmative, the nonparty must be joined "if feasible." Thus, the standard is phrased in terms of what harm may accrue if party joinder is not ordered, rather than what policies should be satisfied through joinder.

In the instant action, once the cash deposit was substituted for the mechanic's lien and once the Owner disclaimed any interest in the funds on deposit with the court, the Owner could not be viewed as a "necessary party" to the action. In fact, one could argue that the Owner would not even have been a *proper* party. In *State, ex rel. Vanschaick v. Bowen* (1936), 131 Ohio St. 310, the Ohio Supreme Court considered an in rem action

similar to the case at bar. The *Vanschaick* case involved an action in-mandamus filed against the Ohio Superintendent of Insurance for an order compelling the Superintendent to surrender certain bonds that had been deposited by a foreign surety company. The company had filed he deposit as security in order to transact business in the state of Ohio. When the New York surety company was declared insolvent by the courts of New York and subsequently dissolved and its charter cancelled, the liquidator sought to seek the return of the bonds that had been deposited as security with the State of Ohio.

The liquidator from New York State argued that because the surety company had been judicially dissolved, the company had ceased to exist. Therefore, he agreed, a suit against the company was unavailing; that no service could be had upon the company; and that no judgment could be rendered against it. The Supreme Court of Ohio made short work of this argument, stating that "the action is not one in personam but one in rem. The action is against the securities deposited and not for personal judgment against the dissolved insurance company, and may therefore be maintained."

Just as in *Vanschaick*, in the instant action the court's order of August 13, 2004 made clear that the action in the trial court was to proceed as an in rem action against the cash deposit. The owner was therefore not a "necessary party" under Ohio Civil Rule 19.

Even if the owner had not disclaimed an interest in the cash deposit, the dismissal of the owner would have been appropriate. Since the owner had notice of the pending claim, and actually deposited the bulk of the funds into the court, the owner could have easily moved to intervene in order to seek the return of all or a portion of the cash deposit being held by the court.

4. Mid-Ohio's claim against the cash deposit was properly before the trial court.

Alternatively, perhaps Eisenmann is asserting that the pleadings filed by Mid-Ohio failed to state a claim upon which relief could be granted. A brief review of the language of Ohio Civil Rule negates any such argument.

The Civil Rules do not require a detailed statement of the facts upon which a claim is based. Rather, only a short and plain statement of the claim that will give the defendant fair notice of what the Plaintiff's claim is and the grounds upon which it rests is required. Ohio Civil Rule 8 (E) (1); *Cincinnati v. Beretta, U.S. Corp, 95 Ohio State* st.3d 416, 424. Ohio Civil Rule 8 (F) specifically states that "all pleadings shall be so construed as to do substantial justice."

Under the policy of "notice pleading," it is hard to imagine that Eisenmann did not have notice that Mid-Ohio was claiming against the cash deposit. The trial court's entry of August 13, 2004 clearly noted that the cash deposit was substituted for the land and that the claim of Mid-Ohio against the land would now attach to the cash deposit. Under the policy of "Notice Pleading," it is hard to imagine that Eisenmann did not have "notice" that Mid Ohio claim against the cash deposit.

Counsel for Eisenmann must surely agree that the pleadings of Mid Ohio properly set forth a claim for foreclosure against the real property owned by LDM. Had the Complaint not set forth that claim, they certainly would not have deposited $1,152,605.00 into escrow with the court. Since the pleadings of Mid-Ohio clearly set forth the foreclosure claim, the dismissal of the land owner in return for the posting of the bond did not alter the efficacy of the pleadings of Mid-Ohio.

B. The Trial Court Correctly Instructed the Jury as to the Burden of Proof Relating to Time and Materials Invoicing.

1. The public policy of Ohio supports the upholding of the judgment below.

"Cost-plus" and "time and material" contracts have been used in the construction industry for many years. Under such agreements, a contractor or subcontractor agrees to charge for the actual time of tradesmen on the job as well as for the cost of materials utilized on the project. Ordinarily the parties agree to a "mark up" for overhead and profit. At other times, the overhead and profit is included in the labor and material charges. Standard contract forms utilizing such terms have been published by the American Institute of Architects and many other leading construction trade organizations.

Time and materials contracting in the construction industry is particularly common in situations like that at issue in the case at bar, where a subcontractor is hired to either supplement or complete the work of another subcontractor. Such situations are particularly problematic for a replacement subcontractor because it is all but impossible to determine how much of the work has been completed and whether the work has been completed correctly and in accordance with the contract documents. If the replacement subcontractor was required to offer a fixed price, the quote would by necessity include contingency costs that might never be incurred. Because of such uncertainty, industry representatives long ago realized that the most economic course of action in such situations is to retain a subcontractor to work on a time and materials basis.

While tradesmen on a construction project rarely give consideration to the burden of proof that will apply if they have to argue about their bill for services, the courts of Ohio have long ago considered such issues. In *Charles A. Burton, Inc. the Durkee* (1954), 162 Ohio St. 433, the court rejected the argument that a contractor billing on a

plus basis must not only prove that the costs were incurred but also prove that the costs incurred were reasonable. Instead, the court stated as follows:

> There is no established principle in the law that one who contracts to do certain work for another must disprove his default as a part of his affirmative case for compensation. In fact the opposite must be the general rule. Honesty and good faith are always presumed.

Burton , supra, 162 Ohio St. at 443.

In an effort to avoid the jury's verdict, Eisenmann asserts that the judge gave the jury an improper instruction as to how the amount to be awarded to Mid-Ohio should be determined. Although the court charged the jury with language taken directly from *Burton*, Eisenmann argues that the instruction was in error and that the trial court should have instead given the instruction proferred by Eisenmann.

Generally, the requested instruction must contain a correct statement of the law, be supported by the evidence of record, and be specifically applicable to the issues actually tried in the case. *Marshall v Gibson* (1985), 19 Ohio St. (3d) 10. If the requested instruction does not meet this standard, it may be rejected and need not be given by the court. *Id.* In particular, the court should not instruct the jury on an issue, even though pleaded, if not supported by the evidence. *Steadley v Montanya* (1981), 67 Ohio St.(2d) 297. The instructions should not be abstract, ambiguous, or argumentative. *Walczesky v Horvitz Co* (1971) 26 Ohio St.(2d) 146.

Also, the court should not give a requested instruction which is *not* a correct statement of the law, and it has no duty to revise or edit a requested instruction to make it correct and then give it. *Martin v Dayton Power & Light Co.* (Greene Cty. 1958), 107 App 19.

2. Any departure from the strictures of Burton will result in uncertainty for contractors and subcontractors throughout Ohio.

For over fifty years, the law of Ohio has been settled for the purposes of billing and collecting on a time and material basis. Any deviation from this long standing rule will result in substantial uncertainty in the construction industry. Contractors and subcontractors who are asked to work on a cost plus or time and materials basis will struggle with the decision as to whether or not to insist upon a lump sum contract. Project owners will also be penalized by the inability to undertake work in the most efficient fashion by utilizing a time and material contract.

IV. CONCLUSION

For the reasons stated and in accordance with the foregoing authority, Amicus Curiae American Subcontractors Association prays that this Court affirm the judgment of the Guernsey County Court of Common Pleas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has been delivered by regular U.S. Mail, postage pre-paid to the following parties, this ___ day of November, 2007:

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