

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Fullerton Lumber Company,

Plaintiff,

ORDER

v.

27 CV 08-22605

James W. Clark, Inc., d/b/a Clark Kent
Homes; Stuart A. Harris; Alexandrine
S. Harris; M&T Mortgage Corporation;
Mortgage Electronic Registration
Systems, Inc.; Lakes Gas Co.; Metro
Home Insulation, LLC; John Doe;
Mary Roe; ABC Corporation and XYZ
Partnership,

Defendants.

The above-entitled matter came before Judge Charles A. Porter, Jr. on March 31, 2009 for a hearing on Defendant MERS' Motion for Partial Summary Judgment and Plaintiff's Motion for Partial Summary Judgment. Michael Coaty, Esq. appeared for the Plaintiff. Bradley Beisel, Esq. and David Krco, Esq. appeared for Defendant MERS.

Based upon the evidence adduced, the argument of counsel, and all of the files, records, and proceedings herein,

THE COURT FINDS:

1. The above-entitled matter is a mechanic's lien case for the subject property legally described as follows:

Tract C, Registered Land Survey No. 288, Hennepin County, Minnesota.
Together with an easement for road purposes over and across Tract "F" as
shown in deed Doc No 425443;

Together with an easement for ingress and egress over that part of Tract D
of Registered Land Survey No. 288 described as follows: Beginning at
the most Northerly corner of said Tract D thence Southwesterly along the
dividing line between Tracts C and D of said Registered Land Survey No.
288 distance of 18 feet; thence at right angles in an Easterly direction to
the Southwesterly line of Tract F, thence Northwesterly along the dividing
line between Tracts D and F and Tracts D and B to the place of beginning,

according to the United States Government Survey thereof as shown in deed Doc. No. 425443.

2. The homeowners, Defendants Stuart and Alexandrine Harris (together, "Harris") purchased the property on January 19, 2006, and were issued Certificate of Title No. 1174640 by the Hennepin County Registrar of Titles. Harris worked with builder Clark Kent Homes to build a house on the property; they applied for a building permit from the City of Minnetonka on June 9, 2006. Harris gave Defendant MERS a \$649,500 mortgage on the property; MERS filed the mortgage on September 5, 2006 as document number 4301552.
3. On September 1, 2006, Harris and James W. Clark signed an "Acknowledgement of Construction Status" for MERS, saying "Construction Has NOT Commenced," meaning "no labor has been performed on, nor materials delivered to, and no labor will be performed on nor materials delivered to, the above referenced property until M&T Mortgage Corporation perfects its lien on such property and gives its express consent to begin construction." Beisel Aff. Ex. D.
4. The Plaintiff provided lumber and other building materials to Defendant Clark Kent Homes from October 6, 2006 through September 11, 2007, and allegedly did not receive \$17,311.07 in payment. The Plaintiff filed a mechanic's lien on the property on January 7, 2008. The Plaintiff filed a satisfaction of mechanic's lien on October 17, 2008, but later learned the property description was erroneous and the satisfaction was meant to be filed on a different property.
5. There is an invoice from Zaback Excavating, LLC, which did the excavation work on the property, crediting Clark Kent Homes \$12,000 for payment on work described as "Import fill dirt, place & compact behind house for landscape berm" and dated "8/01 thru 10/26." Hennessey Aff. Ex. B at 1 of 1; Krco Supp. Aff. Ex. A at 3 of 3. The specific itemization of the dates and types of work performed, with hours worked and hourly rates, shows the first date of work as September 13, 2006, when Zaback tore down a shed and hauled out debris. According to this invoice, the excavation work was done on September 18 and 19, 2006, and footings were poured on September 27, 2006. Krco Supp. Aff. Ex. A at 2 of 3.
6. Defendant MERS now moves for partial summary judgment declaring its mortgage is prior and superior to the Plaintiff's mechanic's lien. The Plaintiff now moves for partial summary judgment vacating or removing the October 17, 2008 satisfaction of mechanic's lien.
7. Summary judgment is appropriate where the material facts are undisputed and one party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03.
8. Here, there is no dispute that MERS filed its mortgage on September 5, 2006. The Plaintiff tries to dispute the priority of MERS' mortgage with the third page of a December 8, 2006 invoice from Zaback Excavation that lists the general

period of August 1 through October 26 as the billing time for the \$12,000 payment made. However, taking the entire three-page invoice as a whole and in light of the September 1, 2006 "Acknowledgement" that construction had not begun, no reasonable jury could conclude that "August 1" on the invoice was the actual start date for construction. It may be reasonable to conclude that "August 1" was the date of a proposal or an on-site viewing, but it is not appropriate to assume, with no other evidence, that August 1 was the first date of visible improvements. The invoice clearly itemizes the work done and indicates the first project, tearing down a shed and hauling out debris, was done on September 13, 2006. The invoice clearly states that excavation was done on September 18 and 19, 2006.

9. The Minnesota Statutes provide the following with respect to priority: "As against a bona fide purchaser, mortgagee, or encumbrancer without actual or record notice, no lien shall attach prior to the actual and visible beginning of the improvement on the ground." Minn.Stat. §514.05, subd. 1. "Visible staking, engineering, land surveying, and soil testing services do not constitute the actual and visible beginning of the improvement on the ground referred to in this section." *Id.* at subd. 2.
10. Here, because Harris signed an "Acknowledgement" as of September 1, 2006 that labor and materials had not yet begun for the construction project, and the MERS mortgage was recorded on September 5, 2006, Zaback's work on the property began on September 13, 2006, and the excavation began September 18m 2006, the MERS mortgage was recorded before the visible improvements began.
11. MERS' mortgage is prior to the Plaintiff's mechanic's lien.
12. The Plaintiff filed a satisfaction of mechanic's lien on the Harris property as a result of an administrative error. There is no formal opposition to Plaintiff's motion to vacate the mistaken satisfaction. The satisfaction should be vacated.

IT IS ORDERED:

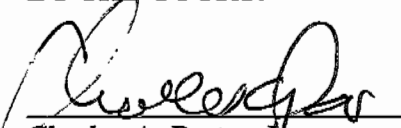
1. Defendant MERS' Motion for Partial Summary Judgment is hereby **GRANTED**.
 - a. The MERS mortgage, filed September 5, 2006 with the Hennepin County Registrar of Titles as document number 4301552, is prior and superior to any mechanic's lien that might be awarded to Plaintiff Fullerton Lumber Company on the property that is the subject of the above-entitled matter, which is legally described in paragraph 1 of the Findings above.
2. The Plaintiff's Motion for Partial Summary Judgment is **GRANTED**.
 - a. The Hennepin County Registrar of Titles is hereby ordered to vacate, strike or otherwise remove the satisfaction of mechanic's lien dated

October 17, 2008 and recorded on November 3, 2008 as document number 4542087 from its property records.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: 6-22-09



Charles A. Porter, Jr.
Judge of District Court