

IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA

**FULLERTON LUMBER COMPANY, a
Minnesota corporation,**

Plaintiff,

vs.

**DENNIS E. COLSDEN and
STEPHANIE COLSDEN, husband and
wife, C. E. HEANEY, JR., and LONG
BEACH MORTGAGE COMPANY,**

Defendants.

Case No. CI02-6

DECREE OF FORECLOSURE

DATE OF HEARING: August 23, 2002.

DATE OF RENDITION: September 2, 2002.

DATE OF ENTRY: Court clerk's file-stamp date per § 25-1301(3).

APPEARANCES:

For plaintiff: James T. Boler, of James T. Boler Attorney at Law,
P.C., L.L.O.

For defendants:

Colsden: No appearance.

Heaney & LBMC: Michael V. Smith, of Smith, King & Freudenberg, P.C.,
without defendant Heaney.

SUBJECT OF ORDER: Motions for summary judgment of: (1) defendants
Heaney and Long Beach Mortgage Company, and,
(2) plaintiff.

PROCEEDINGS: See journal entry rendered contemporaneously with
hearing.

FINDINGS: The court finds and concludes that:

1. The plaintiff petitioned to foreclose a construction lien. The defendants Heaney and Long Beach Mortgage Company constitute trustee and beneficiary, respectively, on a deed of trust. Those defendants (the moving defendants) moved for summary judgment. In turn, the plaintiff moved for summary judgment. The defendants Colsden (the Colsdens), the record owners, filed a notice stating that they do not resist either motion for summary judgment, but take no position as to the priority between plaintiff and the moving defendants.

2. As the Supreme Court restated in *Richmond v. Case*, 264 Neb. 319, ___ N.W.2d ___ (2002), summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. In considering the motion, this court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.* The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists. *Id.* That party must therefore produce enough evidence to demonstrate his or her entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. *Id.*

3. The evidence shows that there is no dispute of fact. As the parties' briefs show, the sequence and occurrence of events is undisputed.

a. The Colsdens commenced their construction project in August or September of 2000. By September 29, 2000, "visible commencement" had occurred. NEB. REV. STAT. § 52-137(4) (Reissue 1998).

b. The Colsdens signed a trust deed (construction security agreement) on October 27, 2000, securing an obligation they incurred to construct a house upon the subject real estate. The Colsdens also signed a notice of commencement on October 27, 2000.

The trust deed was recorded with the Cherry County Clerk ex officio Register of Deeds on October 27, 2000, at 4:00 o'clock p.m. The notice of commencement was recorded with the Cherry County Clerk on the same date at the same time immediately after the trust deed. The attorney closing the loan expressly instructed the clerk that the documents were to be filed and recorded in that order. A \$90,000.00 loan was disbursed to the Colsdens on October 27, 2000, by Mid-America Mortgage, Inc. (Mid-America), the trustee and beneficiary of the trust deed.

c. Fullerton Lumber Company sold one or both of the Colsdens materials used in the construction of a residence on the subject real estate.

d. The notice of commencement lapsed upon its stated expiration date of December 26, 2000.

e. On June 8, 2001, the defendant Long Beach Mortgage Company refinanced the construction loan made to Colsdens by Mid-America. The proceeds from the Long Beach Mortgage Company loan paid the balance due Mid-America. Long Beach Mortgage Company recorded its trust deed on the subject real estate on June 8, 2001.

f. On July 20, 2001, the plaintiff, Fullerton Lumber Company, recorded a construction lien against the subject real estate in the records of the Cherry County Clerk.

g. One or both of the Colsdens owe the plaintiff \$10,921.09, together with interest at the contract rate of 18% per annum of \$2,845.13 as of June 30, 2002, and interest on \$10,921.09 at the rate of 18% per annum (\$5.39 per diem) from June 30, 2002 until paid, which amount is supported by the plaintiff's construction lien.

4. The moving parties have thoroughly briefed the applicable law regarding priorities under these facts. While numerous statutes apply to some degree, the key sections are §§ 52-137 and 52-139.

5. The plaintiff correctly observes that the Nebraska Construction Lien Act was based upon the Uniform Simplification of Land Transfers Act (USLTA). The plaintiff relies on a quotation from the comment to USLTA § 5-209 (NEB. REV. STAT. § 52-139) stating

that, “if a claimant records after visible commencement and while no notice of commencement is effective, he has priority over any interest which would have lost to a purchaser for value without knowledge who recorded when visible commencement occurred.” USLTA § 5-209, comment 1, 14 U.L.A. 338-39 (1990). However, where read in context with the remainder of that comment and the comment to § 5-207, the comment does not control the current situation as a literal reading in isolation might suggest.

6. Section 52-139 (based on USLTA § 5-209) states: “(1) Except as provided in this section, a construction lien has priority over adverse claims against the real estate as if the construction-lien claimant were a purchaser for value without knowledge who had recorded at the time his or her lien *attached*.” NEB. REV. STAT. § 52-139(1) (Reissue 1998) (emphasis supplied). Thus, putting aside the exceptions momentarily, the critical time for comparison is the time of *attachment* of the construction lien.

7. Section 52-137 (based on USLTA § 5-207) determines the time of attachment. Subsection (1) precludes attachment where no construction lien has been recorded. The plaintiff recorded its lien, so this court must consider the balance of the section in determining the *time* of attachment. Subsection (2) expressly determines the time of attachment for a lien recorded while a notice of commencement is effective. Here, both sides agree the notice of commencement had lapsed at the time of recording of plaintiff’s construction lien. Subsection (3) determines the time of attachment for a lien record while there is no effective notice of commencement:

(3) If a lien is recorded while there is no recorded notice of commencement covering the improvement in connection with which the lien arises, the lien attaches at the earlier of visible commencement of the improvement or the recording of the lien, but *if visible commencement has occurred before or within thirty days after the lapse of the last notice of commencement* covering the improvement:

(a) The lien attaches at the time the lien is recorded if the lien is recorded within thirty days after the lapse of the last effective notice of commencement; or

(b) The lien relates back to and attaches thirty-one days after the termination date if the lien is recorded more than thirty days after the lapse of the last effective notice of commencement.

NEB. REV. STAT. § 52-137(3) (Reissue 1998) (emphasis supplied).

8. The plaintiff urges that the word “before” means only during the effective period of the notice of commencement. However, that interpretation requires the court to read into the statute additional words of limitation that do not appear therein. It is not for the courts to supply missing words or sentences to a statute to make clear that which is indefinite, or to supply that which is not there. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001). That rule necessarily follows from the rule that in construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of the court to read anything plain, direct, and unambiguous out of the statute. *Id.* Just as a court cannot read a word or phrase out of a statute, the court cannot read words into the statute where it can be avoided. Here, an alternative construction exists avoiding such injection of missing words. The words “before . . . the lapse” can be read to mean before the existence of the notice of commencement.

9. Subsection (3) cannot be read to apply only where there has never been a notice of commencement recorded. Such reading directly contradicts the plain language of the subsection, which obviously contemplates application of the subsection where there has previously been a recorded notice of commencement.

10. In addition, the plaintiff’s interpretation of § 52-137(3) conflicts with the basic purpose of the USLTA. As the drafters explained:

[A] claimant who contracts to work on a project as to which a notice of commencement has not been recorded runs the risk that the attachment date of his lien will be delayed by a subsequent recording of a notice of commencement. The claimant, however, may protect himself against that risk by determining whether or not a notice of commencement has been recorded or by recording his lien. If he knows that a notice of commencement has not been recorded, he may record a notice of commencement himself. [citation omitted]

The rule allowing the priority of unrecorded liens to be controlled by the date a notice of commencement is recorded, even though the notice is

recorded after visible commencement of the project, is necessary to give effect to the basic rule which permits determination of priority between lien claimants and others by reference to a record event. If a claimant's priority dated from the time a prior notice of commencement was recorded, only if the notice had been recorded prior to visible commencement, third parties would always have to make off-the-record inquiry to determine when visible commencement occurred. A major purpose of [the USLTA] is to avoid the necessity of that inquiry.

USLTA § 5-207, comment 5, 14 U.L.A. 335 (1990).

11. Comment 6 provides direct, compelling support for this court's interpretation and its application to the present case:

If there was a previously effective notice of commencement which had lapsed, a lien cannot attach earlier than the day the lien is recorded or 30 days after the lapse of the last effective notice of commencement, whichever is earlier. This limitation on relation back to visible commencement provides persons who deal with the land a mechanism for assuring themselves that no construction claimant can later come in and take priority over their interest. . . . If the visible commencement priority rule applied in all cases where there is no effective notice of commencement, [the persons dealing with the land] would run the risk that some claimant would later record a lien which would then take priority over his (or their) interest.

USLTA § 5-207, comment 6, 14 U.L.A. 335-36 (1990).

12. These comments to § 5-207 directly contemplate the situation where visible commencement occurs prior to the recording of the notice of commencement and the construction lien is recorded after the lapse of the notice of commencement. The comments support the moving defendants' contention that § 52-137(3)(b) determines the time of attachment under these facts to 31 days after the termination date.

13. Here, the plaintiff's lien attached on January 26, 2001, i.e., 31 days after the notice of commencement lapsed on December 26, 2000. Of course, Mid-America's trust deed was recorded on October 27, 2000. Consequently, at the time of *attachment*, the record notice of Mid-America's previously-recorded trust deed gave it priority over the plaintiff's construction lien.

14. However, the moving defendants' trust deed was recorded on June 8, 2001. Unless one of the exceptions in § 52-139 applies, the plaintiff's lien would have priority over the moving defendants' refinancing trust deed. Subsection (4) supplies the controlling exception: "To the extent that a subsequent security interest is given to secure funds used to pay a debt secured by a security interest having priority over a construction lien under this section, the subsequent security interest is also prior to the construction lien." NEB. REV. STAT. § 52-139(4) (Reissue 1998). To paraphrase the statute, to the extent that the Long Beach Mortgage Company trust deed was given to secure funds used to pay the debt secured by the prior Mid-America trust deed, the Long Beach Mortgage Company trust deed is also prior to the plaintiff's construction lien. *Lincoln Lumber Co. v. Lancaster*, 260 Neb. 585, 618 N.W.2d 676 (2000).

15. The evidence shows without dispute that the entire proceeds of the Long Beach Mortgage Company loan were paid to retire the Mid-America construction loan. Consequently, the plaintiff's construction lien is junior and inferior to the moving defendants' trust deed.

16. The moving defendants did not cross-petition and counterclaim for foreclosure of their trust deed. Even if the prayer for relief in the moving defendants' answer might be construed as a cross-petition and counterclaim, the allegations of the answer do not state a cause of action for judicial foreclosure of the moving defendants' trust deed. Therefore, the proper relief is to dismiss the plaintiff's petition with prejudice as against the moving defendants, and to order foreclosure of the plaintiff's construction lien only as against the defendants Colsden. The decree should authorize an order of sale of the real estate subject to unpaid real estate taxes and further subject to the indebtedness secured by the moving defendants' first trust deed.

17. Although the plaintiff's consumer credit agreement (Exhibit 3, page 23) is signed only by defendant Dennis E. Colsden, that does not raise any issue of fact as to defendant Stephanie Colsden in this case as to the specific relief granted by this decree.

This is an action in equity for foreclosure of a construction lien. To the extent that the plaintiff's amended petition purports to seek a judgment at law, it should be denied without prejudice to future action if the plaintiff's claim is not satisfied by the foreclosure of the plaintiff's construction lien. If the plaintiff were permitted to pursue both an action at law for judgment against the Colsdens and simultaneously pursue an equitable action for foreclosure of its lien, such course would violate the principle that equity applies only where there is no adequate remedy at law. In this instance, such course would also raise an issue of fact as to the plaintiff's contract claim at law against Stephanie Colsden. The absence of her signature on the credit agreement raises at least an inference that she was not personally a party to the oral contract alleged by the plaintiff. Of course, as to the foreclosure of the plaintiff's construction lien, it is immaterial whether she was also a party to the oral contract.

18. There is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving parties are entitled to judgment as a matter of law to the extent of the relief granted to the moving parties and denied to the nonmoving parties.

19. To the extent of the relief granted in favor of the plaintiff or denied to the moving defendants, the plaintiff's motion for summary judgment should be granted. In all other respects the motion should be denied.

20. To the extent of the relief granted in favor of the moving defendants or denied to the plaintiff, the moving defendants' motion for summary judgment should be granted. In all other respects the motion should be denied.

21. The plaintiff is entitled to recover its costs, which should be taxed in the amount of \$69.82 as shown by the clerk's records, in foreclosing its junior lien as against the defendants Colsden.

22. The moving defendants would be entitled to recover their taxable costs; however, the clerk's records show no taxable costs incurred by the moving defendants.

DECREE:

IT IS THEREFORE ORDERED, ADJUDGED, AND
DECREED that:

1. The plaintiff's motion for summary judgment is granted to the extent of the relief granted in favor of the plaintiff or denied to the moving defendants, and is otherwise denied.

2. The moving defendants' motion for summary judgment is granted to the extent of the relief granted in favor of the moving defendants or denied to the plaintiff, and is otherwise denied.

3. The plaintiff's petition is dismissed with prejudice as against the defendants Heaney and Long Beach Mortgage Company.

4. The plaintiff's petition is granted as against the defendants Colsden to the extent of the relief granted herein.

5. There is due and owing to the plaintiff from one or both of the defendants Colsden the sum of \$10,921.09, together with interest at the contract rate of 18% per annum of \$2,845.13 as of June 30, 2002, and interest on \$10,921.09 at the rate of 18% per annum (\$5.39 per diem) from June 30, 2002, until paid, together with the taxable costs of \$69.82.

6. The plaintiff has a construction lien against the subject real estate, being Lot 1, Block 3, City Third Addition to the City of Valentine, Cherry County, Nebraska.

7. The plaintiff's lien is junior and inferior to the lien of the defendants Heaney and Long Beach Mortgage Company in the deed of trust given to defendants Heaney and Long Beach Mortgage Company, which deed of trust is recorded in Book 119 of Mortgages of Cherry County, Nebraska, at Page 759.

8. The plaintiff's lien is superior to the right, title, interest, lien, claim, or demand of the defendants Colsden in and to the subject real estate and appurtenances thereto.

9. The plaintiff's lien, being the lien recorded in Book D of Mech. Liens of Cherry County, Nebraska, at Page 336, is hereby foreclosed.

10. The defendants Colsden, or one of them, shall pay to the plaintiff within twenty days from the date of entry of this decree, the amount above determined, with interests and costs as stated above.

11. Upon the failure of the defendants Colsden, or one of them, to pay such amounts with interest and costs, the Sheriff of Cherry County, Nebraska, shall sell as upon execution, according to law, the real estate and appurtenances above described, which shall be sold subject to any unpaid real estate taxes and subject to the prior and superior lien of the defendants Heaney and Long Beach Mortgage Company, and shall apply the proceeds, first, to the payment of the costs herein, including the costs above determined and the costs of sale, second, to the payment of the lien of the plaintiff as set forth above, with interest thereon, bringing the surplus, if any, into Court to abide the further order of the court. Pursuant to Uniform District Court Rule 15, the purchaser shall deposit at least 15% of the bid upon acceptance with the sheriff, to be held for disposition upon the further order of the Court, and shall pay the balance of the purchase price upon confirmation of sale.

12. Upon the coming in of the report of sale and confirmation thereof, the defendants Colsden are foreclosed and forever barred of all right, title, interest, lien, claim, demand, or equity of redemption whatever in or to the real estate and appurtenances or any part thereof, and the sheriff shall make, execute, and deliver to the purchaser at the sale a good a sufficient conveyance to the real estate and appurtenances, and put the purchaser into peaceable possession thereof.

13. To the extent that the plaintiff's amended petition may be read to assert an action at law for judgment against the defendants Colsden, that claim is dismissed without prejudice to a later action at law against the proper defendant or defendants if the foreclosure of the construction lien fails to satisfy the indebtedness owed to the plaintiff.

14. All claims of all parties not expressly granted herein are denied.

15. All requests for attorneys' fees, express or implied, are denied.

16. This is a final judgment. The pretrial conference previously scheduled for September 20, 2002, is canceled as moot.

Signed in chambers at **Ainsworth**, Nebraska, on **September 2, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.

BY THE COURT:

If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.
- Note the decision on the trial docket as: [date of filing] **Signed "Decree of Foreclosure" entered.**
Done on _____, 20____ by _____.
- Mail postcard/notice required by § 25-1301.01 within 3 days (stating "Decree of Foreclosure entered").
Done on _____, 20____ by _____.
- Enter judgment on the judgment record.
Done on _____, 20____ by _____.

William B. Cassel
District Judge

Mailed to: