

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA-20-0482

A.C.I. Construction, LLC,

Plaintiff/Appellant/Cross-Appellee,

v.

ELEVATED PROPERTY INVESTMENTS, LLC, LEASE OPTION
SOLUTIONS, LLC, WESTERN BUILDING CENTER, JUSTIN NORBERG,
NORBERG ELECTRIC, LLC, MONTANA DIRT WORKS,

Defendants/Appellees/Cross Appellant.

ON APPEAL FROM THE MONTANA ELEVENTH JUDICIAL DISTRICT
COURT, FLATHEAD COUNTY,
THE HONORABLE ROBERT B. ALLISON

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE ISSUE

Montana's construction lien statutes are remedial. In this case, the district court narrowly interpreted the lien priority statute, which consequently furnished the lender a windfall and left the contractor exploited. Should Lease Option Solutions, LLC (LOS) be entitled to a windfall of \$71,435.98?

STATEMENT OF THE CASE

A.C.I. Construction, LLC (ACI) provided labor and materials to a Kalispell homeowner, Elevated Property Investments, LLC (EPI) to assist in “flipping” a house. EPI had obtained financing for the purchase and remodel costs from LOS. LOS paid the construction funds directly to EPI, not to ACI, the general contractor. EPI did not pay ACI for all the labor and material, so ACI properly recorded two construction liens against the property and subsequently filed suit to foreclose those liens.

EPI appeared and defaulted. Over ACI’s objection, on summary judgment, LOS successfully argued that it, as trust indenture beneficiary, held lien priority over EPI’s materialman liens and was permitted to purchase the property at a trustee’s sale with a credit bid. The case proceeded to a two-day bench trial after which the district court determined ACI was entitled to recover the full value of its’ labor and material, together with attorney’s fees and pre-judgment interest. After trial, however, the district court upheld its’ pre-trial determination that LOS held lien priority over ACI. ACI was awarded part, but not all, of its’ labor and material from LOS at trial and was not awarded any attorney’s fees or pre-judgment interest.

ACI contends LOS was not entitled to summary judgment as a matter of law because the district court misinterpreted Mont. Code Ann. §71-3-542. ACI further contends genuine issues of material fact - which were resolved in its' favor at trial - existed at the time the district court granted lien priority to LOS, which means the trustee's sale should never have occurred. From the district court's *Findings of Fact and Conclusions of Law*, ACI timely appealed, including appeal of the district court's March 13, 2020 *Order and Rationale on Motions for Summary Judgment*. LOS also has timely filed a cross-appeal.

STATEMENT OF FACTS

Appellant largely does not dispute the *Findings of Fact* determined by the district court. EPI was a company which owned a house in Flathead County, Montana for the purpose of “flipping” it. Appendix 1, Findings of Fact (FOF), ¶ 2. EPI purchased the property with financing from LOS, who secured the loan with a trust indenture recorded on September 18, 2017. *Id.* at FOF, ¶¶ 4, 10. LOS provided EPI with \$252,000.00, which included \$88,860.00 allocated to a construction loan. *Id.* at FOF, ¶ 11. The loan was based upon a budget submitted by EPI and approved by LOS. *Id.* EPI originally engaged another contractor, Dynamic Builders, to perform remodel work. *Id.* at FOF, ¶ 13. Subsequently, EPI engaged ACI pursuant to a real estate improvement contract to complete the remodel. *Id.* at FOF, ¶ 12.

ACI provided labor and materials to remodel the home. *Id.* at FOF, ¶ 15. The labor and materials provided by ACI included demolition, electrical wiring, flooring, windows and doors, two “Med/high end” full bathrooms, cabinets, drywall, plumbing, siding, painting, heating, ventilation and air conditioning (HVAC), framing, insulation, and structural integrity. *Id.* at FOF, ¶¶ 42-55. The labor and materials provided by ACI totaled

\$141,000.00, but ACI was only paid \$47,350.00. *Id.* at FOF, ¶ 56.

Consequently, ACI recorded two construction liens against the property on July 26, 2018 and October 5, 2018. *Id.* at FOF, ¶¶ 17-18. LOS filed a motion for summary judgment seeking a determination that its' trust indenture had priority over the construction liens. Appendix 2. ACI opposed the motion, asserting genuine issues of material fact remained whether particular electric, HVAC, and plumbing work was included in the scope of the construction loan. Appendix 3. Ultimately, the district court granted LOS' motion for summary judgment, which allowed LOS to conduct a trustee's sale. Appendix 4. The gravamen of the district court's rationale in allowing the trustee's sale was the "work for which ACI has filed its lien was not specified in the construction loan agreement." *Id.* at 2:23-24.

At trial, the district court found otherwise. Specifically, the district court found that the construction budget submitted by EPI and approved by LOS included costs for demolition, Appendix 1, FOF, at ¶ 42, electrical wiring, *Id.* at FOF, ¶ 43, flooring, *Id.* at FOF, ¶ 44, windows and doors, *Id.* at FOF, ¶ 45, two "Med/high end" full bathrooms, *Id.* at FOF, ¶ 46, cabinets, *Id.* at FOF, ¶ 47, drywall, *Id.* at FOF, ¶ 48, plumbing, *Id.* at FOF, ¶

49, siding, *Id.* at FOF, ¶ 50, painting, *Id.* at FOF, ¶ 51, HVAC, *Id.* at FOF, ¶ 52, framing, *Id.* at FOF, ¶ 53, insulation, *Id.* at FOF, ¶ 54, and structural integrity, *Id.* at FOF, ¶ 55.

At the time of trial, LOS had received an offer to purchase the property for \$475,000.00. *Id.* at FOF, ¶ 58. LOS was “made whole” on the sale of the property, including all costs included in the foreclosure process and post-foreclosure process, totaling \$309,914.02. *Id.* at FOF, ¶ 59. From the sales price, LOS was ordered to pay \$93,650.00 to ACI, meaning LOS has been granted a windfall of \$71,435.98 ($((\$475,000 - \$309,914.02) - \$93,650.00) = \$71,435.98$) over and above what made them whole. *Id.* at Order (Or.), ¶ 2. Conversely, ACI is still owed \$43,869.10 ($(\$137,519.10 - \$93,650.00) = \$43,869.10$) from EPI together with its’ attorney’s fees and pre-judgment interest. *Id.* Or., at ¶ 1. LOS has been awarded a windfall; ACI is bankrupt¹. See Appendix 5, 170:11-15.

¹ ACI has not filed for legal bankruptcy.

STANDARD OF REVIEW

The Montana Supreme Court reviews a district court's grant or denial of a motion for summary judgment *de novo*, applying the same criteria of Mont. R. Civ. P. 56 as a district court. *Pilgeram v. GreenPoint Mort. Funding, Inc.*, 2013 MT 354, ¶ 9, 313 P.3d 839 (citations omitted). The Supreme Court reviews a district court's conclusions of law to determine whether they are correct and its findings of fact to determine whether they are clearly erroneous. *Id.* (Citations omitted).

SUMMARY OF THE ARGUMENT

Contrary to Montana case law, the district court narrowly interpreted the remedial nature of Montana's construction lien statutes, which requires strict procedural adherence in exchange for a liberal application. The narrow interpretation allowed LOS to hold a trustee's sale, preventing ACI from recovering the fair value of its' labor and materials, attorney's fees, and pre-judgment interest. The district court's narrow interpretation resulted in a windfall to LOS and a shortfall to ACI.

Alternatively, ACI met its' burden by establishing at trial it provided the labor and materials for the "specific items listed in the loan agreement," including all labor and materials identified in paragraphs 42-55 of the dispositional *Order*.

The remedial nature of Montana's construction lien statutes are premised upon simple logic: a mortgagee is typically more capable of protecting its' interest in a property. Such was the case here. LOS, unlike other lenders who regularly operate in Montana, dealt directly with the homeowner, EPI, instead of the general contractor, ACI. LOS' decision to circumvent the general contractor meant it could not verify the project was on-time or on-budget. LOS should not benefit from its' failure, particularly

when it results in the bankruptcy of a small contractor who strictly adhered to the procedural steps necessary to protect its' interest in a remodeled house.

ARGUMENT

I. The district court misapprehended the word “particular” as stated in Mont. Code Ann. § 71-3-542(4) by construing it too narrowly.

Montana statute allows a first in time, first in right for lien priority.

Mont. Code Ann. § 71-3-542(2). An exception to this rule occurs when

- (4) A construction lien has priority over any interest, lien, mortgage, or encumbrance that is filed before the construction lien attaches if that interest, lien, mortgage, or encumbrance was taken to secure advances made for the purpose of pay for the particular real estate improvement to which the lien was attached. Mont. Code Ann. § 71-3-542(4) (emphasis added).

The district court, without citing precedent, interpreted the word “particular” to mean “specific items listed in the loan agreement.” Appendix 4, 2:22-23.

The district court ignored controlling Montana law, which requires construction “lien statutes as to procedure will be strictly enforced. Once the procedure has been fulfilled, the statutes will be liberally construed so as to give effect to their remedial character.” *Tri-County Plumbing and Heating v. Levee Restorations, Inc.* (1986), 221 Mont. 403, 415, 720 P.2d 247, 255.

Under Montana law, a contractor is entitled to priority for recovery of the value of their labor and material because a “mortgagee is in a better position to protect himself than a mechanic.” *Beck v. Hanson* (1979), 180

Mont 82, 87, 589 P.2d 141, 143 (citations omitted). This Court has rejected an “argument that a mechanic’s lien is solely dependent upon a contract.” *Id.*, 589 P.2d at 144.

Here, LOS did not contest ACI strictly adhered to the procedural requirements of recording a construction lien, and the district court determined the liens were properly recorded. Appendix 1, FOF, ¶¶ 17-18. *Tri-County*, therefore, requires the district court to construe Mont. Code Ann. § 71-3-542(4) “liberally...so as to give effect to their remedial character.” *Tri-County*, at 415, 720 P.2d at 255. The district court instead construed the word “particular” narrowly to mean only the labor and material that was included in the budget document submitted by EPI, contrary to Montana law, which has rejected the argument that a construction lien is solely dependent on a contract. *Beck*, at 87, 589 P.2d at 144.

The policy underpinning the priority of a construction lien over a prior-recorded trust indenture is logical and ratified by the Montana Supreme Court: a lender is in a better position to protect its’ interest. *Beck*, at 87, 589 P.2d at 143; see *Home Interiors v. Hendrickson* (1984), 214 Mont. 194, 199, 692 P.2d 1229, 1232 (“the party having the greatest ability to

protect its interests has the burden of exercising due care to prevent overreaching by an interested party”); see also *Tri-County*, at 418, 720 P.2d at 256 (“the holder of a trust indenture was the party with the greatest ability to protect its interest by either withholding funds to the extent of the contemplated improvement or by requiring the landowner to obtain lien waivers”).

LOS failed to protect its’ interest. As the district court observed, LOS did not pay any contractor, sub-contractor, or material supplier directly. Appendix 1, FOF, ¶ 30. LOS distributed all funds under its’ loan directly to EPI and relied on EPI to make appropriate payments to contractors and sub-contractors. *Id.* The loan to EPI had been the only loan issued in Montana thru the date of trial. *Id.* at FOF, ¶ 5. Unrebutted testimony provided that payment directly to the homeowner (as opposed to the contractor directly) is contrary to common practice in Montana. Appendix 5, 132:15-25. LOS relied upon the homeowner’s intervention in dealing with the contractors, opposite Montana custom, and consequently failed to protect its’ interest.

The district court erred as a matter of law when it interpreted the word “particular” narrowly. Montana case law strictly enforces construction

lien filing procedures, but liberally construes the liens remedial effect. This affords the party who can least protect its' interest some security. In this case, LOS mistakenly dealt solely with the homeowner, which resulted in ACI providing additional, necessary labor and materials towards the remodel of the home. The remedial protection was triggered. The district court's grant of summary judgment on lien priority should be reversed as a matter of law, the district court's Conclusion of Law (COL), ¶ 11 should be determined to be incorrect, and foreclosure of the construction lien should be ordered, including ACI's recovery of attorney's fees and pre-judgment interest.

II. The district court contradicted itself when it resolved disputed material facts, at trial, in favor of ACI that the district court previously had determined were not disputed for purposes of summary judgment.

The district court, in construing the application of "particular" narrowly, erroneously concluded

[t]he trust indenture provided that it was not to fund all advances for the property, rather, it was to the specific items listed in the loan agreement. *For this work, parties were paid, and lien releases were obtained.* Appendix 4, 2:21-23 (emphasis added).

After trial, the district court concluded LOS' construction budget included costs for demolition, Appendix 1, FOF, ¶ 42, electrical wiring, *Id.* at FOF,

¶ 43, flooring, *Id.* at FOF, ¶ 44, windows and doors, *Id.* at FOF, ¶ 45, two “Med/high end” full bathrooms, *Id.* at FOF, ¶ 46, cabinets, *Id.* at FOF, ¶ 47, drywall, *Id.* at FOF, ¶ 48, plumbing, *Id.* at FOF, ¶ 49, siding, *Id.* at FOF, ¶ 50, painting, *Id.* at FOF, ¶ 51, HVAC, *Id.* at FOF, ¶ 52, framing, *Id.* at FOF, ¶ 53, insulation, *Id.* at FOF, ¶ 54, and structural integrity, *Id.* at FOF, ¶ 55. ACI completed all or most of the labor and material associated with these costs. *Id.* The district court, after trial, concluded ACI was not paid for this labor and material and LOS did not obtain lien releases for this work. *Id.* at FOF, ¶¶ 31, 56.

The district court contradicted itself. It first determined no genuine issue of material fact existed that the specific labor and material provided to improve the house was paid and released. Then it determined the specific labor and material provided to improve the house was not paid and released. In its’ *Order and Rationale on Motions for Summary Judgment* , Appendix 4, the district court ignored the contested material facts presented by ACI vis-e-vie *Affidavits* from subcontractor Gene Riffle, subcontractor Henry Ratzlaff, subcontractor Lon Hayek, subcontractor Vern Schrader, subcontractor Bradshaw, and, most importantly, general contractor Robert Wickland. Appendix 3, Exhibits 3, 4, 5, 6, 7 and 2,

respectively. Each *Affidavit* established contested material facts. Each of the individuals who presented affidavit testimony, except Gene Riffle, presented testimony at trial similar to their Affidavits. Appendix 5, pp. 22-158. Once presented with live testimony the district court resolved the contested material facts in favor of ACI.

In summary judgment, the district court erroneously resolved disputed material facts in favor of LOS when it determined LOS had paid for and received lien releases for the specific labor and material itemized in its' budget. At trial, the district court resolved those same disputed material fact in exactly the opposite way - in favor of ACI. The district court's u-turn is clearly erroneous and warrants a *de novo* reversal of the summary judgment order. Foreclosure of the construction lien should be ordered, together with reasonable attorney fees and pre-judgment interest.

III. The district court made a mistake of law when it allowed LOS to proceed with a trustee's sale.

As argued, *supra*, the district court erred in its' March 13, 2020 decision, which allowed LOS to proceed with the trustee's sale. Although the district court did not separately rule on ACI's *Motion to Cancel Defendant's Trust Sale*, Appendix 6, the March 13, 2020 *Order* had the effect of denying ACI's *Motion*. The ramifications of the district court's

denial were not fully understood until after trial.

After trial, the district court found that EPI had no other assets other than the real property which was the subject of this action. Appendix 1, FOF, ¶ 37. The district court went on to conclude EPI is responsible for attorney fees and costs incurred by ACI pursuant to Mont. Code Ann. § 71-3-124, and that EPI is responsible for pre-judgment interest and the right to recover vested against EPI on the date of the first filing of ACI's construction lien. *Id.* at COL, ¶¶ 7, 8. Nevertheless, the district court concluded the trustee's sale foreclosed all liens or interests held against the property. *Id.* at COL, ¶ 11. The district court's conclusion to affirm the trustee's sale after trial is manifestly unjust.

LOS held title to the property after the trustee's sale because they were allowed to enter a credit bid². Mont. Code Ann. § 71-1-318. Thereafter, LOS sold the property for \$475,000.00. Appendix 1, FOF, ¶ 58. If the trustee's sale had not been allowed to occur, the sales price in excess of LOS' mortgage, costs, and post-foreclosure maintenance would have inured to the homeowner, EPI, subject to liens or other claims on the

² A credit bid is the same as cash, but the district court did not require LOS to deposit cash in the clerk of court's account. *Rocky Mt. Bank v. Stuart* (1996), 280 Mont. 74, 81, 928 P.2d 243, 247.

property. Mont. Code Ann. § 71-1-316. Under such a scenario, LOS would have been made whole and ACI would have been more fully recompensed. Instead, ACI has encumbered significant attorney's fees, eaten \$43,869.10 in labor and material expenses owed by EPI (see Appendix 1, Or., ¶ 1), and been denied pre and post-judgment interest. Meanwhile, LOS - who has been fully compensated vis-a-vis the trustee's sale - secured a windfall of \$71,435.98.

Under Montana law, the right of a construction lien on property upon which a contractor has supplied labor or materials is not dependent on whether a contract with the property owner was written or oral, express or implied. *Williams Bros. Constr. V. Vaughn* (1981), 193 Mont 224, 226-227, 631 P.2d 688, 690. Construction liens are remedial. *Id.*, at 227, 631 P.2d at 690. They are for the express purpose of providing payment to contractors out of the property to which their work and material have contributed an increase value. *Id.* Lien statutes should be given full effect in that they should receive a liberal construction so that the objects and purposes of such statutes may be carried out. *Id.*

The district court's decision to allow the trustee's sale to occur (because it erroneously determined LOS had lien priority) caused a small,

Kalispell construction company to close. See Appendix 5, 170:11-15 (“[t]his job basically bankrupted us, both professionally and personally”). In the meantime, a company who has placed a singular loan in Montana is granted a \$71,435.98 windfall. Montana’s construction lien statutes are not dependent upon contract, and the construction lien in this case was not dependent upon the construction budget LOS agreed to without input from ACI. *Williams Bros.*, at 226-227, 631 P.2d at 690; see also *Beck*, at 87, 589 P.2d at 144. They are dependent upon a remedy for the contractor’s labor and materials, which contributed an increase to the value of the house. *Williams Bros.*, at 227, 631 P.2d at 690. Here, LOS was able to walk away with the surplus, yet it did not contribute anything to the increased value of the house. The trustee’s sale should not have been allowed to occur.

CONCLUSION

Montana's construction lien statutes are remedial in nature and intended to protect Montana contractors, who are less likely than a lender to be able to protect their interest in real property. Here, the district court violated the remedial nature of the construction lien laws first by narrowly interpreting what the legislature meant by "particular," then by determining genuine issues of material fact initially in favor of the lender and, at trial, in favor of the contractor. ACI provided the labor and material which made it possible for LOS to sell the house for \$475,000.00. LOS should not reap ACI's reward. A trustee's sale should never have happened, and this Court should reverse the district court's March 13, 2020 *Order de novo* and COL, at ¶ 11 as incorrect. Excess proceeds from the house sale should be distributed to the clerk of court in accordance with Mont. Code Ann. § 71-1-316 and distributed accordingly.

Dated this 26th day of January, 2021.

ST. PETER LAW OFFICES, P.C.

By: /s/ Michael O'Brien
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Arial text, typeface of 14 points, is double spaced, and the word count does not exceed 10,000 words, excluding Certificate of Service and the Certificate of Compliance.

Dated this 26th day of January, 2021.

ST. PETER LAW OFFICES, P.C.

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