

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000297-MR

KINDRED HOMES, INC.

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 04-CI-00561

ROBERT COLVIN;
VICKIE BLACKBURN;
PNC BANK, N.A. ;
AND WASHINGTON MUTUAL BANK, F.A.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

BARBER, JUDGE: Appellant, Kindred Homes, Inc. (Kindred),
appeals the Jessamine Circuit Court's order dissolving a
Mechanics and Materialman's lien. We affirm the trial court's
ruling.

Kindred Homes entered into a contract to construct a
home for Appellees Robert Colvin and Vickie Blackburn for the
sum of \$423,080.00. The contract required all changes to the
plans to be made in writing. Colvin and Blackburn contend that

Kindred made several changes to the plans which were not made in writing or approved. These changes resulted in an increase of the building cost. Colvin and Blackburn contend that Kindred's work was deficient in several regards, including negligent installation of several items. Colvin and Blackburn assert that all the necessary repairs resulted in extra costs to them. Kindred last furnished work and supplies on that property on April 20, 2004. The parties ended up in a dispute over whether Kindred owed Colvin and Blackburn money for the repairs, or whether Colvin and Blackburn owed Kindred for the change in construction.

Kindred asserts that as of May 26, 2004, the amount in dispute was \$60,258.09, not accounting for interest and fees. On June 3, 2004, Kindred recorded a Statement of Mechanic's and/or Materialman's Lien against property owned by Colvin and Blackburn pursuant to KRS 376.010. A letter and a copy of the unrecorded lien was sent to Colvin and Blackburn via registered mail before the lien was filed, and confirmation of receipt was provided to Kindred. This confirmation shows service on Robert Colvin and Vickie Blackburn was signed by Vickie Blackburn. Colvin and Blackburn contend that the letter they received stated that a mechanics lien would be filed against the subject property if the debt was not paid, but did not give them notice that a lien had actually been filed. The attached lien was not

a copy of a filed and recorded lien, but was a copy of the lien actually filed six days later on June 3, 2004. On June 21, 2004, Colvin and Blackburn responded to the letter by counsel, stating that they disputed the sums claimed to be due. Kindred made no further communication with Colvin or Blackburn.

In July, 2004, Kindred filed suit against Colvin, Blackburn, and two banks, PNC and Washington Mutual Bank, FA, who were also lienholders in the property. Kindred demanded funds due for the construction. Colvin and Blackburn allege that until they received notice of the suit they had no idea that a lien had been filed against the property. They argued that the lien was not effective as proper notice had not been given.

Colvin and Blackburn moved the court to dissolve the lien. They claimed that notice had not been provided in accordance with law, and that such notice was required to perfect the lien. Kindred asserts that no prior notice of the lien was required by law. KRS 376.010(3) states, in pertinent part:

No person who has not contracted directly with the owner or his agent shall acquire a lien under this section unless he notifies in writing the owner of the property to be held liable or his authorized agent . . . of his intention to hold the property liable and the amount for which he will claim a lien. . . .

Kindred argues that this statute expressly exempts situations where the builder has made a direct contract with the property owner from the prior notice requirement. Colvin and Blackburn agree that no pre-filing notice of the lien was required, but assert that the law requires that the property owner must have notice after the lien is filed for notice to be considered statutorily effective. Middletown Engineering Co. v. Main Street Realty, Inc., 839 S.W.2d 274, 275 (Ky. 1992).

Kindred relies upon KRS 376.080(1), which requires a lien claimant to mail notice of the lien to the property owner within seven days of filing as supporting its claim that appropriate notice was given. Kindred asserts that it complied with this statutory requirement by sending notice before the filing took place, but within seven days of the filing. Kindred contends that it mailed a letter and copy of the lien within the applicable time period. The copy of the lien mailed was not stamped as a filed copy.

Because the lien sent to them was not stamped as filed by the clerk and was not sent within seven days after the lien was filed, Colvin and Blackburn contend it did not satisfy the notice requirement found in KRS 376.080(1). The only notice provided the homeowners was sent on May 28, 2004, six days before the lien was filed. Colvin and Blackburn assert that the letter and copy of the lien they received was merely a notice of

intent to file, and not a notice that a lien had been filed. The letter sent to Colvin and Blackburn states, in relevant part:

Please take notice of my client's intention to hold [the property] liable for the amount of the debt and the enclosed mechanic's lien will be filed against the subject property . . . Payment must be made as indicated herein within thirty (30) days from the date of this letter; or you must notify our office in writing within thirty (30) days of your receipt of this letter that the debt, or any portion thereof, is disputed, or we will assume the debt to be valid. . . . This is the first and last notice by our firm of your breach of the payment obligation, and if payment is not made by the time frame stated herein, appropriate legal action will be taken.

A copy of the signed, dated and notarized lien was attached to the letter. Colvin and Blackburn replied to the letter, by counsel, within the thirty day time period given, to dispute the sum of the debt claimed.

The Jessamine Circuit Court dissolved the lien on December 9, 2004. Kindred then filed a motion to amend the trial court's order as being a ruling on an improperly noticed motion for summary judgment. The court set aside the order dissolving the mechanics lien, because Kindred did not receive proper notice of the hearing. The court then ruled that as of the date of the new hearing, January 12, 2005, the lien was dissolved.

This Court does recognize that the laws regarding mechanics and materialmans liens are to be interpreted and applied liberally in order to protect the rights of the builders and suppliers. Bee Spring Lumber Co. v. Pucossi, 943 S.W.2d 622, 624 (Ky. 1997). KRS 376.010 states that a mechanics lien is created at the time the supplies are provided. Our Court has stated that the statute:

Provides that a person who performs labor or furnishes materials "shall have" a lien on the land and improvements. The language does not state that the person has a right to obtain or create such a lien, but that the person shall have a lien. Moreover, subsection (2) indicates that the lien "shall not take precedence over" a mortgage, other contract lien or conveyance for value without notice when a statement regarding the lien is filed with the county clerk's office prior to the subsequent mortgage, lien or conveyance. KRS 376.010(2). In other words, the lien exists but in order to perfect the lien and provide notice, a statement must be filed.

Metal Sales Mfg. Corp. v. Newton, 12 S.W.3d 691, 694 (Ky.App. 1999). The Court agrees that Kindred was permitted by law to file the lien, and that a lien was filed on June 3, 2004. Kindred did not provide notice of the filing of the lien to Colvin and Blackburn after the lien was filed, but rather 6 days prior to the lien being filed.

We believe that the language of the letter sent with the lien was too equivocal to be considered notice that a lien

was filed. The letter appears to give the debtor thirty days to dispute the debt. This was the only correspondence between Kindred and the property owners. The letter and copy of an unfiled lien was insufficient notice that a lien had been filed.

Justice Reynolds specifically addressed this notice question in Middletown Engineering Co. v. Main Street Realty, Inc., 839 S.W.2d 274, 276 (Ky. 1992). " . . . and one to be sent after the lien is filed." (Emphasis ours.)

Therefore, the judgment of the Jessamine Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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