Filed 12/19/12 Angeles Welding v. Chemoil Terminals CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ANGELES WELDING & MFG., INC., Plaintiff and Appellant, v. CHEMOIL TERMINALS CORPORATION, et al., Defendants and Respondents.	B233981 (Los Angeles County Super. Ct. No. TC022364)

APPEAL from a judgment of the Superior Court of Los Angeles County, William P. Barry, Judge. Affirmed.

Atkinson, Andelson, Loya, Ruud & Romo, Thomas W. Kovacich, Jennifer D. Cantrell and Suparna Jain for Plaintiff and Appellant.

Manatt, Phelps & Phillips, Mark D. Johnson and Benjamin G. Shatz for Defendants and Respondents.

Appellant Angeles Welding & Mfg. Inc. (Angeles) appeals from an order granting summary judgment in favor of respondents, Chemoil Terminals Corporation (CTC) and RLI Insurance Company (RLI, both collectively referred to as respondents). The motion for summary judgment was based on the contention that Angeles failed to provide the statutorily required proof of service of a preliminary notice for a mechanics' lien. We affirm the judgment (order granting summary judgment).

FACTUAL AND PROCEDURAL BACKGROUND

CTC, a petroleum storage and distribution company, was operating a facility in Carson, on leased property. CTC entered into a contract with Imperial Tank Services and Consulting (Imperial) in which Imperial agreed to be the general contractor for the construction of several storage tanks (hereinafter the Carson Project).[1] Imperial entered into an agreement with Angeles, in which Angeles agreed to act as a subcontractor and furnish work, labor and materials necessary for the Carson Project. There was no contractual relationship between CTC and Angeles. Imperial completed the Carson Project in March 2008 and CTC paid Imperial.

Angeles alleges it supplied materials and services for the Carson Project for Imperial, but Imperial only partially paid the amount due, leaving a balance of approximately $212,000 owed to Angeles. Angeles further alleges it served 20-day preliminary notices as required by California mechanics' lien statutes. (Civ. Code, §§ 3097, et seq.) As a result of Imperial failing to pay its debt, Angeles recorded a mechanics' lien against the Carson property on July 2, 2008.

On September 29, 2008, Angeles filed this action against Imperial, CTC, RLI, and others, for breach of contract, foreclosure of mechanics' lien and other common counts. On, November 17, 2008, CTC and its surety, RLI, recorded a mechanics' lien release bond. During the pendency of the case, Imperial filed a bankruptcy petition. The

---

[1] A written contract provided for the construction of two tanks, and an oral agreement provided for the construction of a third tank.

complaint was amended and alleged a single cause of action for the recovery on a mechanics' lien release bond.

CTC and RLI moved for summary judgment on the ground that Angeles could not establish compliance with applicable mechanics' lien law. CTC alleged that Angeles did not comply with the notice requirements sections in order to perfect a mechanics' lien because it did not have proof of proper service.

Angeles opposed the motion on the grounds that strict compliance with the notice requirement was not necessary and that it had other evidence to prove it properly served the preliminary notice. Angeles also argued it should be excused from the statutory requirement of proof (Civ. Code, § 3097.1) under the doctrine of impossibility.

The superior court granted the motion, holding that Civil Code sections 3097 and 3097.1 are part of a statutory scheme which requires strict compliance and that since Angeles could not prove that it served the mandatory notice, judgment would have to be entered in favor of CTC.

Angeles appeals, contending the trial court erred in granting summary judgment.

DISCUSSION

1. The Trial Court Did Not Err In Granting Summary Judgment In Favor Of Respondents.

A. Standard of Review

A trial court properly grants summary judgment or adjudication if there is no triable issue of material fact and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) To secure summary judgment or adjudication, a moving defendant may show that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. Once the moving defendant has met its burden, the burden shifts to the plaintiff to show that a triable issue of fact exists as to the cause of action or the defense thereto. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar*, *supra*, at p. 849.)

On appeal, we exercise our independent judgment in determining whether there are no triable issues of material fact and if the moving party is thus entitled to judgment or adjudication as a matter of law. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334–335.) We must uphold the judgment or adjudication if it is correct on any ground that the parties have had an adequate opportunity to address on appeal, regardless of the reasons the trial court gave. (*Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 71; Code Civ. Proc., § 437c, subd. (m)(2).)

The trial court in this case granted summary judgment on behalf of respondents on the grounds that Angeles did not comply with Civil Code section 3097.1 and therefore could not satisfy a prerequisite for the claim of a lien against CTC's real property.

B. Mechanics' Lien Law Requires That A Claimant Strictly Comply With Statutory Framework And Therefore The Lower Court Did Not Err In Granting Summary Judgment.

A mechanics' lien is a claim against the real property which may be filed if a claimant has provided labor or furnished materials for the property and has not been paid. (*Kim v. JF Enterprises* (1996) 42 Cal.App.4th 849, 854.)

Mechanics' lien law is derived from the California Constitution. (*Connolly Development, Inc. v. Superior Court* (1976) 17 Cal.3d 803, 826-827 (*Connolly*).) Article XIV, section 3, of the California Constitution directs the Legislature to effectuate a Mechanics' Lien remedy by statute: "Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens." (Cal. Const. art. XIV, § 3.; accord, *Industrial Asphalt, Inc. v. Garrett Corp.* (1986) 180 Cal.App.3d 1001, 1005 (*Industrial*).)

The statutory scheme for a mechanics' lien remedy enacted by the Legislature provides protections to the various parties. (*Industrial, supra,* 180 Cal.App.3d at p. 1006.) The notice provisions alert owners and lenders to possible claims against property or funds arising from contracts otherwise unknown to them. (*Romak Iron Works v.*

Prudential Ins. Co. (1980) 104 Cal.App.3d 767, 778.) They also ensure that the scheme does not deprive the property owners of due process of law. (*Ibid.*)

Due to the statutory scheme's unique constitutional command, "the courts have uniformly classified the mechanics' lien laws as remedial legislation, to be liberally construed for the protection of laborers and materialmen. [Fn. omitted]." (*Connolly, supra*, 17 Cal.3d at pp. 826-827.) Nevertheless strict compliance with the preliminary notice requirement is required. (*Harold L. James, Inc. v. Five Points Ranch, Inc.* (1984) 158 Cal.App.3d 1, 5*;* see *San Joaquin Clocklite, Inc. v. Willden* (1986) 184 Cal.App.3d 361, 367.) The Legislature "'imposed the notice requirements for the concurrently valid purpose of alerting owners and lenders to the fact that the property or funds involved might be subject to claims arising from contracts to which they were not parties and would otherwise have no knowledge.'" (*Harold L. James, Inc. v. Five Points Ranch, Inc., supra*, 158 Cal.App.3d at p. 5.)

A mechanics' lien is perfected by filing a claim of lien within certain time limitations and by meeting statutory requirements. (*Kim*, *supra*, 42 Cal.App.4th at p. 854.) One of these requirements includes service of a preliminary 20-day notice. (§ 3097.)[2] Civil Code section 3114 states, "A claimant shall be entitled to enforce a lien *only if* he has given the preliminary 20-day notice (private work) in accordance with the provisions of Section 3097, if required by that section, and has made proof of service in accordance with the provisions of Section 3097.1." (Civ. Code, § 3114, italics added.)[3]

---

[2] The applicable statutes in effect at the time the complaint was filed were recently repealed and new statutes are currently in effect. (Stats. 2010, ch. 697 (S.B.189), § 16, operative July 1, 2012.)

[3] Repealed by Statutes 2010, chapter 697 (S.B.189), section 16, operative July 1, 2012.

Civil Code section 3097.1 includes clear instructions as to how a party should prove that it served notice in accordance with Civil Code section 3097.[4] According to the statute:

> Proof that the preliminary 20-day notice required by Section 3097 was served in accordance with subdivision (f) of Section 3097 *shall* be made as follows: ¶ (a) If served by mail, by the proof of service affidavit described in subdivision (c) of this *section accompanied either by the return receipt of certified or registered mail, or by a photocopy of the record of delivery and receipt maintained by the post office*, showing the date of delivery and to whom delivered, or, in the event of nondelivery, by the returned envelope itself. (Civ. Code, § 3097.1, italics added.)

Civil Code sections 3097 and 3097.1 require a claimant to prove that it provided proper notice by mail with (1) a proof of service affidavit; and (2) a return receipt of certified or registered mail or a photocopy of the record of delivery and receipt maintained by the post office.

The dispute in this case involves the interpretation and required level of compliance with Civil Code section 3097.1. Angeles contends the lower court erred in requiring strict compliance with this statute. It argues that since there is evidence that CTC received notice, strict compliance with the Civil Code section 3097.1 requirement was not necessary.

In support of its summary judgment motion, respondents submitted the declaration of CTC's chief engineer (Ken Ezoe), Angeles' responses to a statement of undisputed facts in a prior motion for summary judgment, and a request for judicial notice of the U.S. Post Office manual.

In opposition to the summary judgment motion, Angeles conceded that it could not comply with the statutory requirement of Civil Code section 3097.1, because it did not serve the notices "return receipt requested" and could not provide a photocopy of the

---

[4] Repealed by Statutes 2010, chapter 697 (S.B.189), section 16, operative July 1, 2012.

record of delivery and a receipt maintained by the post office. But Angeles asserts that it did send the notices, and submitted declarations from a private process service company that the preliminary notices were served by certified mail. Angeles asserted that it served a notice in April 2007 (the April Notice) and a second notice in October 2007 (the October Notice). The notice sent in April names CTC as the "Reputed Owner" of the Carson property. The October Notice" names "Chemoil Corporation" as the "Reputed Owner." It was undisputed that Chemoil Corporation has no ownership or possessory interest in the Carson property.[5]

Angeles also claimed that the October notice was sent by certified mail because Ezoe admitted it was. It refers to a declaration filed by Ezoe in support of the summary judgment motion in which he stated that on October 13, 2007, Angeles "served a 20-day Preliminary Notice under Cal. Civil Code section 3097." It also points to Ezoe's testimony at a deposition that he had no reason to doubt that CTC had received the October notice which Angeles' counsel had placed in front of him.

Angeles contends that the October Notice is not defective because Civil Code section 3097 does not require that the preliminary notice must correctly name the owner. It also points to deposition testimony that many preliminary notices all found their way to CTC even though they were addressed to many different Chemoil entities.

In construing a statute, it is the duty of the court "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. . . ." (Code Civ. Proc., § 1858.) The court will begin by examining the statutory language because it generally is the most reliable indicator of legislative intent. (*Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222, 227.) The court will give the language its usual and ordinary meaning, and "'[i]f there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning

---

[5] The record reflects that approximately 50 preliminary notices were sent to various entities with names similar to CTC or Chemoil but there is no indication of whether these were related corporate entities or valid names.

of the language governs.' (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.)" (*Allen v. Sully*, *supra*, 28 Cal.4th at p. 227.)

Angeles filed a request for judicial notice of legislative materials considered before the 1979 amendment of Civil Code section 3097.1. We granted that request and reviewed the materials, which were not offered to the trial court. The law in effect before the amendment required an Acknowledgement of Receipt of Preliminary Notice mailed or delivered to the recipient or a sworn affidavit. The Senate and Assembly judiciary committee materials (Exhibits B and C) indicate that the purpose behind the legislation was to reduce costs and paperwork by eliminating the requirement of the written Acknowledgement. The Assembly committee's Bill Digest (Exhibit C) discussed the requirement of requesting a return receipt and its related cost. The committee concluded that if the sender did not want to incur the costs of requesting a return receipt, it could send the notice certified mail and rely on the post office's records. The last exhibit, Exhibit D, the Assembly committee's Bill Analysis, includes numerous letters objecting to the amendment because of the cost of sending notices return receipt requested. Nevertheless, the amendment was enacted. Thus, the legislative materials show only that the objections were raised, and do not demonstrate that the specific language caused an unintended result or that the legislature's intent was to omit the requirement of requesting a return receipt.

In *Tarrant Bell Property LLC v. Superior Court* (2011) 51 Cal.4th 538, 542, the Supreme Court held that the courts may properly consider legislative history in order to determine whether a statute's use of "shall" is dispositive. Here, nothing in the documents offered by Angeles indicates that the legislature intended to use the word "may" instead of "shall" in requiring notice to be given in the specified manner.

In *IGA Aluminum Products, Inc. v. Manufacturers Bank* (1982) 130 Cal.App.3d 699, a subcontractor sent a 20-day preliminary notice by first class mail rather than certified or registered mail, as directed by statute. (*Id*. at p. 701.) The subcontractor later sued to foreclose on the mechanics' lien and the defendant, the construction lender, successfully moved for summary judgment. (*Id.* at p. 702.) Even though the parties

agreed that the notice was delivered, and the defendant made no showing that it was prejudiced by the first-class delivery, the court of appeal upheld the summary judgment on the grounds that "[Civil Code] section 3097 expressly requires that the pre-lien notice be given in a specified manner, and that fulfilling the notice requirement is a prerequisite to a lien." (*Id.* at p. 706.)

Angeles cites *Industrial, supra*, 180 Cal.App.3d 1001, as authority for the proposition that it need not strictly comply with the preliminary notice requirements of Civil Code sections 3097.1 and 3114. This case is inapplicable, however, because the defective notice "concerned a party *not* affected by the lien, about whom the statute does not specifically manifest a legislative intent . . . ." (*Industrial, supra*, 180 Cal.App.3d at p. 1009, italics in original.) In *Industrial*, the plaintiff was a subcontractor who provided a 20-day notice to the property owner but not the general contractor. (*Id.* at p. 1004.) The general contractor declared bankruptcy before trial. (*Ibid.*) The issue then, in *Industrial*, was that failure to give notice to the general contractor, who was not a party to the cause of action, precluded the plaintiff from enforcing a mechanics' lien. (*Id.* at pp. 1005-1006.) The court in *Industrial* granted relief to the plaintiff despite an error in notice to the bankrupt general contractor, but only because the general contractor was completely unaffected by the mechanics' lien and the statute was unclear as to the legislative intent in such a situation. (*Id.* at p. 1009.) Applied to this case, the reasoning of *Industrial* would only be dispositive had Angeles' defective notice been sent to the general contractor, Imperial, and therefore this case does not grant Angeles relief.

Additionally, Angeles relies on *Truestone, Inc. v. Simi West Industrial Park II* (1984) 163 Cal.App.3d 715, to support the proposition that actual knowledge may estop a property owner from asserting the notice requirement of Civil Code section 3097. However, counter to Angeles' contention, the *Truestone* court recognizes that "[b]ecause strict compliance with [Civil Code section 3097] is required, a claim of actual notice or substantial compliance is irrelevant. (*IGA* [*, supra,*] 130 Cal.App.3d 699.)" (*Truestone, Inc. v. Simi West Industrial Park II* (1984) 163 Cal.App.3d 715, 721.) The *Truestone* court affirmed the necessity of strict compliance with Civil Code section 3097, but

remanded the case because there a triable issue of fact existed as to whether the defendant created an express contract with the plaintiff, giving rise to an exception to the Civil Code section 3097 notice requirement. (*Id.* at p. 723.) In the case at hand, it is undisputed that there is no contractual relationship between Angeles and CTC, therefore, *Truestone* does not grant relief to Angeles either.

Civil Code section 3097.1 is unambiguous as to its proof of notice requirement, and therefore there is no room for judicial construction. The statute specifically provides that proof of compliance with Civil Code section 3097 *shall* be made in accordance with the methods described therein. (Civ. Code § 3097.1.) Since service was allegedly sent by certified mail in this case, Angeles is required by statute to provide a service affidavit accompanied by either (1) a return receipt or (2) by a photocopy of the record of delivery and receipt maintained by the post office. (Civ. Code § 3097.1, subd.(a).) The meaning of the word "shall" is clear and forecloses any form of ambiguity in this statute. "The rule requiring their liberal construction may not be applied to frustrate the Legislature's manifested intent to exact strict compliance with the preliminary notice requirement." (*Romak, supra,* 104 Cal.App.3d at p. 778; *IGA Aluminum Products, Inc. v. Manufacturers Bank, supra,* 130 Cal.App.3d at p. 705.)

While the record does indicate that CTC received the preliminary notices at some point,[6] the statutory scheme requires more than mere actual notice or substantial compliance. (See, *Truestone, supra,* 163 Cal.App.3d at p. 721.) Mechanics' lien laws require strict compliance to the statutory scheme in order to ensure that neither the materialmen nor the property owners or lessees are prejudiced. (*Harold, supra*, 158 Cal.App.3d at p. 5.) Angeles was required by statute to provide proof of compliance with Civil Code section 3097 and its failure to do so precludes it from enforcing the mechanics' lien.

---

[6] Ezoe did not testify unequivocally that he received the preliminary notices timely, by certified mail. He only testified that he "believed" he received the notices by mail and had "no reason to believe" they were not sent by certified mail.

Accordingly, the trial court did not err in granting summary judgment on behalf of respondents. Angeles admits that it cannot provide a return receipt or a photocopy of the record of delivery and receipt maintained by the post office for either the October or April Preliminary Notices. Because Angeles admits that it cannot provide any of these items, it cannot comply with Civil Code section 3097.1 and therefore is precluded from enforcement of the mechanics' lien under Civil Code section 3114. The trial court properly recognized that because of this missing element, Angeles' cause of action for the enforcement of the lien cannot be established and therefore respondents were entitled to summary judgment. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar*, *supra*, 25 Cal.4th at p. 849.)

C. The Doctrine of Impossibility Cannot Excuse Angeles' Failure to Comply with Civil Code Section 3097.1

Angeles claims that its failure to comply with the notice requirements of Civil Code sections 3097, 3097.1 and 3114 should be excused because its failure to obtain proof of service pursuant to Civil Code section 3097.1 was "no fault of its own." Angeles relies on Civil Code section 3531 claiming that compliance with Civil Code section 3097.1 was impossible and therefore can be excused. Civil Code section 3531 provides that "The law never requires impossibilities."

Angeles produced responses from U.S. Post Office personnel dated July 22, 2008, and a private process service company dated May 2010 indicating that the Post Office did not have delivery records for the April or October notices. Angeles' reasoning is that since Civil Code section 3097 does not provide specifically that a claimant must serve notice return receipt requested, Angeles did not request a return receipt. Because it did not request a return receipt and it could not obtain proof of service from the post office, it must be excused from the proof of service requirement.

What Angeles does not address is that Civil Code section 3097.1, the section *immediately following* section 3097, describes how a party may prove that it served the notice. In addition, section 3114 provides that "A claimant shall be entitled to enforce a lien only if he has given the preliminary 20-day notice (private work) in accordance with

the provisions of Section 3097, if required by that section, *and has made proof of service in accordance with the provisions of Section 3097.1*." (Italics added.) Therefore, Angeles' argument that it could not be expected to request a return receipt for the mailing is completely meritless. Further, its failure to actually seek post office records for the mailing until almost two years later does not create a legal impossibility.

"'Impossibility means not only strict impossibility but also impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved. (*Oosten v. Hay Haulers etc. Union* (1955) 45 Cal.2d 784, 788.)'" (*Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 299-300.) In order to be excused from compliance "'[t]he impossibility must consist in the nature of the thing to be done, and not in the inability of the party to do it.'" (*Kennedy v. Reece* (1964) 225 Cal.App.2d 717, 725.)

With respect to the April Notice, Angeles has failed to show how its compliance with Civil Code section 3097.1 was impossible. The April notice was served on April 20, 2007, by certified mail, without a "return receipt requested." The record indicates that Angeles did not seek a delivery record of this notice until early May 2010.

According to the Post Office's Domestic Mail Manual submitted by respondents in support of their summary judgment motion, "A request for a return receipt after mailing for Express Mail must be submitted within 90 days after the date of mailing. *All other requests must be submitted within 2 years from the date of mailing*." (U.S. Postal Service, Mailing Standards of the United States Postal Service: Domestic Mail Manual, ch. 503, subtopic 6.3.3; italics added.) In this case, Angeles sought a request for a return receipt for its April notice over two years after sending notice to CTC. Angeles should have been aware of how long the Post Office keeps records of service and, accordingly, Angeles cannot claim that obtaining records within two years after sending service would have been impractical because of extreme or unreasonably difficulty or expense. (*McMahon, supra,* 219 Cal.App.3d at pp. 299-300.)

Further, Angeles claims that the Post Office's failure to maintain a record of the October notice should be excused because of impossibility. While the record does show

that Angeles sought a proof of delivery eight months later, within the two-year window, but after the 90 days within which a return receipt could be requested, its failure to request proof of delivery at an earlier time does not entitle them to claim legal impossibility.

Angeles has not shown how compliance with Civil Code section 3097.1 by sending notice via return receipt requested would have been impractical because of extreme and unreasonable difficulty. In the case at hand, Angeles has shown that at the time of summary judgment it was unable to comply with Civil Code section 3097.1. However, Angeles has not been able to show that by its nature, compliance with Civil Code section 3097.1 would have been impossible. Angeles could have opted to send the notice "return receipt requested," and because this option existed, we cannot excuse compliance because of impossibility.

DISPOSITION

Because proof of proper service of the preliminary notice is a prerequisite to perfecting a lien according to Civil Code section 3114, and because the evidence shows that Angeles failed to provide proof of proper service pursuant to Civil Code section 3097.1, the judgment is affirmed.

The parties shall bear their own costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**