



In the instant action to quiet title and for declaratory judgment, Plaintiff seeks an order declaring the May 31, 2012 deed to be valid and directing the Register and Recorder to record a copy of that deed, as well as a declaration that all six parcels are encumbered by its mortgage and that Dibble and Black Bear are barred from asserting any interest inconsistent with that position. With respect to those defendants other than Dibble and Black Bear, all of whom have either mortgages or judgments against the same parcels, Plaintiff seeks a declaration that the lien of its mortgage takes priority over all others.<sup>2</sup> Two of those defendants, Charlie McCague and Linde Corporation, have filed Answers and Counterclaims, asserting that their liens have priority over Plaintiff's mortgage.

In the instant motion for summary judgment, Plaintiff asks the court to provide the relief sought in its complaint.<sup>3</sup> It appears that except with respect to Linde Corporation, Plaintiff is indeed entitled to that relief at this time.

### **Validity of May 31, 2012 deed**

For the reasons stated in the Opinion issued in support of this court's Order of January 12, 2015 entered to No. 13-01,130, this court found that title to the parcels at issue was transferred from Dibble to Black Bear on May 31, 2012 even though the deed was not recorded. Thus, the court found the deed to be valid.

Defendant Charlie McCague argues that the deed was ineffective to transfer title for lack of recording, and that Black Bear had never completed

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<sup>2</sup> Plaintiff also seeks to add Dibble in his individual capacity as a signatory and mortgagor on the January 9, 2013 mortgage in order to encumber his interest, if any, as of the effective date of the original instrument. The court finds this unnecessary in light of its prior holding that Black Bear Holdings, LLC was the legal owner of the properties at the time of the January 9, 2013 mortgage.

<sup>3</sup> Plaintiff is *not* asking for relief against MaryAnn Hill, Rosdev Capital Funding, LP or Barry Isett and Associates, Inc. as Hill and Rosdev have since recorded releases of their mortgages and Isett has recorded a subordination agreement of his judgment lien.

payments to Dibble so the entire transaction was never finalized. Both of these arguments challenge this court's prior holding but Defendant McCague has no standing to do so. As the Superior Court noted in Kessler v. Mandel, "[i]t has been frequently ruled that a mechanic's lien, before it is reduced to judgment, is open to impeachment by all having an interest in its validity, but after judgment "though irregular on its face, and even illegally recovered" it cannot be attacked collaterally by third persons, including the lien creditors, except for fraud or collusion". 40 A.2d 926, 927 (Pa. Super. 1945), citing and quoting Sicardi v. Keystone Oil Company, 24 A. 161, 162 (Pa. 1892), and Nolt v. Crow, 22 Pa. Super. 113, 116 (1903). Judgment on the mechanic's lien having been entered in 2015, and no fraud or collusion having been alleged, it is not now subject to attack by Mr. McCague.

### **Judgments of Joshua Phillips and Robert L. Voneida**

A confessed judgment in favor of Joshua Phillips and against Black Bear was entered December 4, 2013, and judgments in favor of Voneida and against Dibble and Black Bear were entered January 27, 2014 and September 9, 2015, respectively.

Pursuant to 42 Pa.C.S. Section 8141, Plaintiff's mortgage takes priority over all three of these judgments as all three were recorded later in time, after Plaintiff's mortgage was recorded.

### **Mortgages of Charlie McCague**

To secure loans made by McCague to Black Bear at some time prior thereto, McCague obtained a mortgage on all six parcels from Black Bear and a

mortgage on the two parcels at issue from Dibble, and recorded those mortgages on June 25, 2015 and October 12, 2015 respectively. Because the title search revealed the lien of Plaintiff's open-end mortgage, both of McCague's mortgages contain subordination language subordinating them to "said mortgage given to Susquehanna Bank, and its successors and assigns, by Mortgagor and recorded prior to this mortgage." McCague now attempts to assert priority over Plaintiff's mortgage on the two parcels at issue by arguing that Black Bear had no ability to encumber the properties as they were not titled in its name, but that argument relies on a successful challenge to this court's prior holding and, as noted above, McCague has no standing to make such a challenge. Therefore, again based on 42 Pa.C.S. Section 8141, Plaintiff's mortgage takes priority over both of these mortgages as both of them were recorded later in time, after Plaintiff's mortgage was recorded.

### **Mechanic's Lien of Linde Corporation**

As noted above, Linde obtained judgment on a mechanic's lien claim filed against the two parcels at issue (as well as one other parcel not at issue), on January 12, 2015. The claim itself had been filed May 16, 2013 and the lien appears to have been perfected June 13, 2013.<sup>4</sup> Unlike mortgages, however, with one exception (which will be discussed shortly) the priority of mechanic's liens depends not on their filing date but on the date "of the visible commencement upon the ground of the work of erecting or constructing the improvement." 49 P.S. Section 1508(a). In this case, that date was previously (in No. 13-01,130)

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<sup>4</sup> To perfect a lien, a claimant must file a claim with the Prothonotary within six months of the completion of the work, serve written notice of the filing on the owner within one month of the filing, and file an affidavit of service within twenty days after service of the notice. 49 P.S. Section 1502.

found to be April 21, 2012, giving the mechanic's lien priority over Plaintiff's mortgage, recorded on January 9, 2013, if the lien is upheld.

Plaintiff alleges that the mechanic's lien was *not* perfected in a timely manner, specifically asserting that the claim was not filed within six months of the completion of the work, and therefore is not entitled to priority over its mortgage.

Unlike collateral attacks on mechanic's lien *judgments* by those who hold liens filed subsequent to the *judgment*, which are *not* allowed, the law *does* allow attack on the lien itself by a creditor whose mortgage is being subordinated by a mechanic's lien claim filed later in time but which is given priority under the Mechanic's Lien Law. Equibank v. Adle, Inc., 595 A.2d 1284 (Pa. Super. 1991). “[W]here the mechanics' lien holder avers its judgment takes priority over an incumbrance earlier in date, he can be required to prove the matters he alleges give his judgment priority.” *Id.* at 1286. The Equibank Court found this to be so because, as noted in Nolt v. Crow:

A judgment on a mechanic's lien ranks, as a judgment, from the date of its entry. As against incumbrances of later date it is, on the face of the record, a prior lien on the property bound by it. Against incumbrances earlier in date, however, *the matters that give it priority, under the mechanic's lien law, must be affirmatively shown* since the judgment implies nothing beyond the indebtedness on which it is based.

Equibank, *supra* at 1286, quoting Nolt v. Crow 22 Pa. Super. 113, 114 (1903)(emphasis added).

In Equibank, the Court allowed a mortgagee to question the validity of a mechanic's lien and found such lien defective for failure to comply with the statutory requirements related to work upon several different improvements. The lien was thus subordinated to the mortgage held by the challenger.

In the instant case, although Plaintiff may challenge the lien's validity, that challenge presents an issue of fact: when was the work completed? Although Plaintiff asserts the work was completed no later than July 20, 2012, Linde asserts the work was not completed until November 19, 2012.<sup>5</sup> This issue of fact prevents entry of summary judgment against Linde.<sup>6</sup>

Plaintiff also argues<sup>7</sup> that even if Linde's lien is determined to be valid, its open-end mortgage should nevertheless be given priority under the exception to the rule, contained in subsection (c) of Section 1508, which *at the time Plaintiff filed its lien in 2013* read in pertinent part as follows:

(c) Any lien obtained under this act by a contractor or subcontractor shall be subordinate to the following:

...

(2) An open-end mortgage as defined in 42 Pa.C.S. § 8143(f) (relating to open-end mortgages), the proceeds of which are used to pay all or part of the cost of completing erection, construction, alteration or repair of the mortgaged premises secured by the open-end mortgage.

49 P.S. Section 1508(c)(2). This statute was amended on July 9, 2014, effective September 7, 2014, such that subsection (c)(2) was replaced by the following:

(2) An open-end mortgage as defined in 42 Pa.C.S. § 8143(f) (relating to open-end mortgages), where at least sixty percent (60%) of the proceeds are intended to pay or are used to pay all or part of the costs of construction.

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<sup>5</sup> See Paragraph 28 of Linde's Response in Opposition to Motion for Summary Judgment, filed March 31, 2017.

<sup>6</sup> It is noted that Linde has filed its own motion for summary judgment and it is anticipated that the issue of fact will be resolved through either that motion, or if no stipulations can be reached, through a hearing limited to that single issue.

<sup>7</sup> The court is addressing this final issue in the interest of judicial economy even though it may be mooted by a future determination that the mechanic's lien was not timely perfected.

Id. The amendment changed the requirement that 100% of the proceeds of the open-end mortgage be used to pay costs of construction, to a requirement that only 60% of the proceeds be used to pay costs of construction.

Plaintiff admitted at argument that it cannot meet the 100% test, but believes it can meet the 60% test and thus argues for its application in spite of the fact that the statute was not amended until after Linde's lien was filed and perfected. This argument is based on the following language in Section 5 of the Act which implemented the amendment, Act of July 9, 2014, P.L. 1019: "The ... amendment of section 508(c) of the act shall apply to liens perfected on or after the effective date of this section". Plaintiff apparently seeks to have the court interpret the word "perfected" as referring to a state of being, rather than an act, that is, to hold the view that once a lien is "perfected", it remains in a state of "perfection" and thus at the time the statute was amended, any prior liens remain "perfected on or after the effective date." The court rejects this interpretation. If all prior liens were to be affected by the change, there would be no reason to refer to "liens perfected on or after the effective date of this section". Instead, the legislature would have said the amendment applies to all liens whether perfected before or after the effective date. Further, Plaintiff's interpretation ignores the rest of the section, as italicized: "The ... amendment of section 508(c) of the act shall apply to liens perfected on or after the effective date of this section, *including liens relating to the construction of an improvement for which the visible commencement of work occurred prior to the effective date of this section, but were not perfected until on or after the effective date of this section.*" This language makes it clear that "perfected" refers to an act, not a state of being. Finally, retroactive application of the amendment would significantly affect

otherwise settled property rights, and the court does not believe the legislature had any such intent.

Therefore, since the 100% test cannot be met by Plaintiff's open-end mortgage, the exception does not apply and if the mechanic's lien is found to have been timely perfected, it will be given priority over the mortgage.

### **Conclusion**

As all issues respecting all defendants except Linde Corporation have been resolved as a matter of law, summary judgment in favor of Plaintiff and against all parties except Linde Corporation is appropriate, and the court enters the following:

### **ORDER**

AND NOW, this            day of May 2017, for the foregoing reasons, Plaintiff's motion for summary judgment is granted in part and denied in part, and it is hereby ordered and directed as follows:

1. Plaintiff has a valid mortgage lien on all six contiguous parcels of real property located in Lewis Township, Lycoming County, Pennsylvania, described in the mortgage recorded on January 9, 2013 at Book 7864, page 6, including but not limited to parcels with ID#s 24-268.0-149 and 24.268.0-152.

2. This mortgage lien has priority over the following:

(a) The confessed judgment in favor of Joshua Phillips and against Black Bear Holdings, LLC entered December 4, 2013;

(b) The judgment in favor of Robert L. Voneida t/a Voneida Electric and against Stewart Dibble entered January 27, 2014;

(c) The judgment in favor of Robert L. Voneida t/a Voneida Electric and against Black Bear Holdings, LLC entered September 9, 2015;

(d) The mortgage recorded by Charlie McCague on June 25, 2015;  
and

(e) The mortgage recorded by Charlie McCague on October 12, 2015.

3. All defendants (except Linde Corporation), their heirs, successors, assigns and representatives are forever barred from asserting any right, lien, title or interest in the six contiguous parcels of real property located in Lewis Township, Lycoming County, Pennsylvania, described in the mortgage recorded on January 9, 2013 at Book 7864, page 6, including but not limited to parcels with ID#s 24-268.0-149 and 24.268.0-152, that is inconsistent with Plaintiff's higher priority mortgage lien on said parcels.

4. The Lycoming County Register & Recorder shall record a copy of the May 31, 2012 deed from Stewart Dibble to Black Bear Holdings, LLC (to be provided to that office by Plaintiff) together with a certified copy of this Court's Opinion and Order herein and index them to the six contiguous parcels of real property located in Lewis Township, Lycoming County, Pennsylvania, described in the mortgage recorded on January 9, 2013 at

Book 7864, page 6, including but not limited to parcels with ID#s 24-268.0-149 and 24.268.0-152.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Lycoming County Register & Recorder  
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