Appeal No. ED 87412

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

GEORGE WEIS COMPANY, Plaintiff/Appellant, vs. STRATUM DESIGN-BUILD, INC., TITLE INSURERS AGENCY, INC., HURLBUT INVESTMENTS, LLC, and SOUTHWEST BANK OF ST. LOUIS, Defendants/Respondents.	)	Appeal No. ED 87412

Appeal from the Missouri Circuit Court
Circuit Court of St. Louis County, Missouri
The Honorable Barbara Wallace, Judge Presiding

BRIEF OF RESPONDENTS
HURLBUT INVESTMENTS, LLC and SOUTHWEST BANK OF ST. LOUIS

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JURISDICTIONAL STATEMENT

Appellant George Weis Company ("Appellant") appeals from a judgment of the Trial Court granting Respondents Hurlbut Investments and Southwest Bank's (together, "Respondents") Motion to Dismiss Plaintiff's Petition for lack of subject matter jurisdiction.

The issue on appeal is whether the Trial Court properly dismissed Appellant's Petition for lack of subject matter jurisdiction based on the court's determination that Appellant's claim is barred because Appellant failed to intervene or consolidate its claim with a prior equitable mechanics lien action. For this reason, the appeal does not fall under the exclusive appellate jurisdiction of the Missouri Supreme Court and is within the general appellate jurisdiction of the Missouri Court of Appeals. MO. CONST., Art. V, §3. In addition, jurisdiction is proper in the Missouri Court of Appeals-Eastern District as the case is on appeal from the Circuit Court of St. Louis County. Mo. Rev. Stat. § 477.050 (2005).

STATEMENT OF FACTS

On or about October 27, 2003, Dynamic Electric Corporation, among other plaintiffs, filed an equitable mechanics lien lawsuit against Hurlbut Investments LLC ("Respondent") and other defendants. This lawsuit was filed in the Circuit Court of St. Louis County, Missouri, and was styled *Dynamic Electric Corp., et al. vs. Stratum Design-Build, et al.*, case number 03CC-004361. (LF: 51) The equitable mechanics lien lawsuit was instituted to determine the rights of various subcontractors involved in the Hurlbut Auto Spa project. (LF: 51) George Weis Company ("Appellant") was aware of the equitable mechanics lien action but failed to intervene. (LF: 51)

Instead of moving to intervene in the equitable mechanics lien lawsuit, Appellant chose to file on June 17, 2004 a separate lawsuit in the Circuit Court of St. Louis County, Missouri, styled *George Weis Company, et al. vs. Stratum Design-Build, Inc., et al.*, case number 04CC-2524. (LF: 36) A few days before Appellant's case was set for trial, after its lawsuit had been pending for over one year, Appellant attempted to amend its petition to add Hurlbut Investments and Southwest Bank of St. Louis ("Respondents") as defendants. (LF: 37) The circuit court denied Appellant's motion and did not allow it to add Respondents as defendants. (LF: 37) Rather than proceed with trial, Appellant dismissed its lawsuit and on July 21, 2005 re-filed a new lawsuit against Respondents and other parties. (LF 83-98) Appellant alleged in its petition that it provided construction services for the Hurlbut Auto Spa at No. 8 Ellisville Town Center Dr., Ellisville,

Missouri, which is the same property and same construction project at issue in *Dynamic Electric Corp., et al. vs. Stratum Design-Build, et al.*, 03CC-004361. (LF: 51, 83) Appellant further alleged that Respondents breached their construction escrow agreement with the general contractor and the escrow agent. Appellant further alleged that Respondent Hurlbut Investments was the owner of the project and that Stratum Design-Build entered into a general contract with the owner. (LF: 84) Appellant further alleged that it was a subcontractor of Stratum Design-Build and performed drywall and related work on the Hurlbut Auto Spa project. (LF: 84) Appellant alleged that the purpose of the construction escrow agreement was to use the escrow fund to pay for the construction improvements on the Hurlbut Auto Spa. (LF: 86)

In response to Appellant's lawsuit, Respondents filed a joint motion to dismiss. (LF: 51) The basis of the joint motion was lack of subject matter jurisdiction or, in the alternative, failure to state a claim upon which relief can be granted. (LF: 51, 54) Respondents alleged in their pleading that Appellant was aware of the prior equitable mechanics lien action but failed to intervene and that the conclusion of the prior equitable mechanics lien suit barred all later actions related to the same construction project. (LF: 51) Appellant filed a response which did not deny it had notice of the prior equitable mechanics lien action, and instead pled only that no party asserted a claim to join George Weis Company with the mechanics lien lawsuit. (LF: 38) Appellant admitted that it never joined the prior equitable mechanics lien action. (LF: 36)

In its Order/Judgment dated November 29, 2005, the trial court found that it lacked subject matter jurisdiction to hear Appellant's petition and dismissed it with prejudice. (LF: 20-22) The trial court's order did not reach the issue of whether Appellant had standing to sue for breach of contract under an intended third party beneficiary theory. The trial court entered an Amended Judgment on November 30, 2005 which dismissed all counts against all defendants with prejudice. (LF: 19) Appellant filed its Notice of Appeal on December 19, 2005 (LF: 3, 5-13).

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN DISMISSING THE PETITION, ON THE GROUNDS IT LACKED SUBJECT MATTER JURISDICTION UNDER THE MISSOURI MECHANIC'S LIEN STATUTE, 429.300, BECAUSE THE PETITION ALLEGES A CLAIM AGAINST STRATUM DESIGN-BUILD, INC. FOR BREACH OF CONTRACT AND FOR VIOLATING THE PROMPT PAYMENT ACT, AND AGAINST THE OTHER DEFENDANTS FOR BREACH OF FIDUCIARY DUTY (TITLE INSURERS AGENCY, INC.) AND BREACH OF THE CONSTRUCTION ESCROW AGREEMENT (HURLBUT INVESTMENTS AND SOUTHWEST BANK OF ST. LOUIS) AND THEREFORE SEEKS TO ENFORCE A MECHANIC'S LIEN CLAIM OR DEMAND AGAINST THE REAL ESTATE ON WHICH THE CONSTRUCTION PROJECT WAS LOCATED.

Drywall Interior Systems Construction, Inc. v. Ladue Building & Engineering Corporation, 857 S.W.2d 523 (Mo.App. E.D. 1993)

State ex rel. Kirkwood Excavating, Inc. v. Stussie, 689 S.W.2d 131 (Mo.App. E.D. 1985)

Mo. R. Civ. P. 55.27(g)(3)

Mo. Rev. Stat. §429.300

II. THE TRIAL COURT DID NOT ERR BY DISMISSING THE PETITION, WITHOUT A HEARING ON THE MERITS, ON THE GROUNDS THAT THE MECHANIC'S LIEN STATUTE REQUIRES JOINDER OF ALL NON-MECHANIC'S LIEN CLAIMS IN ONE LAWSUIT, OR THEY ARE BARRED, AND DID NOT DENY PLAINTIFF DUE PROCESS OF LAW UNDER THE MISSOURI AND UNITED STATES CONSTITUTIONS BECAUSE PLAINTIFF WAS PROVIDED WITH NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE ITS CLAIMS WERE BARRED.

Drywall Interior Systems Construction, Inc. v. Ladue Building & Engineering Corporation, 857 S.W.2d 523 (Mo.App. E.D. 1993)

III. THE TRIAL COURT DID NOT ERR BY DISMISSING THE PETITION BECAUSE IT DOES NOT STATE A CAUSE OF ACTION (1) AGAINST STRATUM DESIGN-BUILD, INC. FOR BREACH OF CONTRACT AND FOR VIOLATION OF THE PROMPT PAYMENT ACT (2) AGAINST TITLE INSURERS AGENCY, INC. FOR BREACH OF ITS FIDUCIARY DUTY IN THE ADMINISTRATION OF THE CONSTRUCTION ESCROW AGREEMENT AND (3) AGAINST HURLBUT INVESTMENTS, LLC AND SOUTHWEST BANK FOR BREACH OF THE CONSTRUCTION ESCROW AGREEMENT, IN THAT PLAINTIFF

IS NOT A THIRD-PARTY BENEFICIARY OF THAT

AGREEMENT.

H.H. Stephens v. Great Southern Savings & Loan Association, 421 S.W.2d 332 (Mo.App.1967)

Laclede Inv. Corp. v. Kaiser, 596 S.W.2d 36, 42 (Mo.App. E.D. 1980)

State ex rel. E.A. Martin Machinery Co. v. Line One, Inc., 111 S.W.3d 924 (Mo.App. S.D. 2003)

Wilson v. General Mortgage Company, 638 S.W.2d 821 (Mo.App. E.D. 1982)

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DISMISSING THE PETITION ON THE GROUNDS IT LACKED SUBJECT MATTER JURISDICTION UNDER THE MISSOURI MECHANIC'S LIEN STATUTE, 429.300, BECAUSE THE PETITION ALLEGES A CLAIM AGAINST STRATUM DESIGN-BUILD, INC. FOR BREACH OF CONTRACT AND FOR VIOLATING THE PROMPT PAYMENT ACT, AND AGAINST THE OTHER DEFENDANTS FOR BREACH OF FIDUCIARY DUTY (TITLE INSURERS AGENCY, INC.) AND BREACH OF THE CONSTRUCTION ESCROW AGREEMENT (HURLBUT INVESTMENTS AND SOUTHWEST BANK OF ST. LOUIS) AND THEREFORE SEEKS TO ENFORCE A MECHANIC'S LIEN CLAIM OR DEMAND AGAINST THE REAL ESTATE ON WHICH THE CONSTRUCTION PROJECT WAS LOCATED.

As an initial matter, Appellant directed the court to an incorrect standard of review. *De novo* review is not appropriate in this case. This court reviews motions to dismiss for lack of subject matter jurisdiction for abuse of discretion. *James v. Poppa*, 85 S.W.3d 8, 9 (Mo. banc 2002). A court is without subject matter jurisdiction to entertain a contract action at law filed after the commencement of an equitable mechanics lien action. *State ex rel. Clayton Greens Nursing Center, Inc. v. Marsh*, 63 S.W.2d 462, 464 (Mo. banc 1982);

State ex rel. Great Lakes Steel Corp. v. Sartorius, 249 S.W.2d 853, 854 (Mo. banc 1952). A court's decision to dismiss for lack of subject matter jurisdiction is a question of fact left to the sound discretion of the trial court. *James v. Poppa, Id.*; *State ex rel. McDonnell Douglas Corp v. Ryan*, 745 S.W.2d 152, 154 (Mo. banc 1988). An abuse of discretion occurs when a trial court's ruling is clearly against the logic of the circumstances before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration. *Hancock v. Shook*, 100 S.W.3d 786, 795 (Mo. banc 2003).

A motion to dismiss for lack of subject matter jurisdiction shall be granted when it "appears by suggestion of the parties or otherwise" the circuit court lacks jurisdiction of the subject matter. Mo. R. Civ. P. 55.27(g)(3). As the term "appears" suggests, the quantum of proof is not high and can be satisfied with a preponderance of the evidence that the court is without jurisdiction. *James v. Poppa, Id*. *Parmer v. Bean,* 636 S.W.2d 691, 694 (Mo.App. E.D. 1982).

Appellant suggests that the trial court's judgment contained references to matters outside the scope of the pleadings and therefore the *de novo* standard of review applies. Appellant's argument is not correct. The trial court may consider affidavits, exhibits and evidence pursuant to Mo. R. Civ. P. 55.27 and 55.28 to determine whether it has subject matter jurisdiction and this court will review for abuse of discretion. *Quinn v. Clayton Construction Co., Inc.*, 11 S.W.3d 428, 431-32 (Mo. App. E.D. 2003).

Appellant's further argument that *de novo* review is warranted because it seeks to challenge the interpretation and/or application of a Missouri statute and issues of law is misplaced. The trial court's decision to dismiss for lack of subject matter jurisdiction is a *question of fact* left to the sound discretion of the trial court. *James v. Poppa, Id*.

The trial court did not abuse its discretion when it found that it did not have subject matter jurisdiction to hear Appellant's lawsuit. In its Order/Judgment, the court made the following factual determinations in concluding that it did not have subject matter jurisdiction: first, that the case *Dynamic Electric Corp, et al. vs. Stratum Design-Build, et al.*, 03CC-004361, filed in the Circuit Court of St. Louis County on October 27, 2003 was an equitable mechanics lien action instituted to determine the rights of various subcontractors involved in the Hurlbut Auto Spa project; (LF: 20) second, that Appellant alleged it provided construction services for the Hurlbut Auto Spa project but was not a party to the *Dynamic* case; (LF: 20) third, that the *Dynamic* case was dismissed through settlement and is no longer open for any purpose; (LF: 21) and fourth, that Appellant was aware of the *Dynamic* case but failed to intervene or move to consolidate its breach of contract action with the equitable mechanic's lien action. (LF: 21)

Because of these facts, the trial court found that it lacked subject matter jurisdiction to hear Appellant's lawsuit. None of the court's factual determinations were unreasonable or arbitrary. None of the court's determinations indicate the court lacked careful, deliberate consideration. Instead, it "appeared"

to the court that it lacked subject matter jurisdiction and the court did not abuse its discretion in finding that it lacked subject matter jurisdiction.

The first set of facts relied on by the court was that the case *Dynamic Electric Corp, et al. vs. Stratum Design-Build, et al.*, 03CC-004361 was filed in the Circuit Court of St. Louis County on October 27, 2003 and was an equitable mechanics lien action instituted to determine the rights of various subcontractors involved in the Hurlbut Auto Spa project. (LF: 20) In its motion to dismiss, Respondent asked the court to take judicial notice of this case. (LF: 51) Appellant did not object to the court taking judicial notice. Appellant never denied that the earlier *Dynamic* suit concerned the same property and the same construction project as its current suit. Appellant failed to provide any evidence whatsoever concerning the *Dynamic* case, except to state that it had information that the *Dynamic* case had been dismissed through settlement. (LF: 36) In light of the fact that there was no objection and no argument from Appellant to the contrary, the court did not abuse its discretion in taking judicial notice of its own files. The court did not abuse its discretion in finding that the *Dynamic* case was an equitable mechanics lien action instituted to determine the rights of various subcontractors involved in the Hurlbut Auto Spa project.

The second set of facts relied on by the court was that Appellant provided construction services for the Hurlbut Auto Spa project but was not a party to the mechanics lien action. (LF: 20) Appellant itself alleged in its petition that it provided construction services for the Hurlbut Auto Spa project. (LF: 84)

Appellant admitted that it was not a party to the *Dynamic* case. (LF: 36) Likewise, Respondent alleged that Appellant was not a party to the *Dynamic* case. (LF: 51) There is complete agreement between Appellant and Respondent on this set of facts. Therefore, a preponderance of the evidence indicates that Appellant provided construction services for the Hurlbut Auto Spa project but was not a party to the mechanics lien action. The court did not abuse its discretion in making the finding that Appellant provided construction services for the Hurlbut Auto Spa project but was not a party to the mechanics lien action.

The third set of facts relied on by the court was that the *Dynamic* case was dismissed through settlement and is no longer open. (LF: 21) Appellant stated that it had information that the *Dynamic* case had been dismissed through settlement. (LF: 36) Respondent asked the court to take judicial notice of the *Dynamic* case. (LF: 51) There is complete agreement between Appellant and Respondent on this set of facts. Therefore, a preponderance of the evidence indicates that the *Dynamic* case was dismissed through settlement and is no longer open for any purpose. The court did not abuse its discretion in making the finding that the *Dynamic* case was dismissed through settlement and is no longer open for any purpose.

The fourth set of facts relied on by the court was that Appellant was aware of the *Dynamic* case but failed to intervene or move to consolidate its breach of contract action with the equitable mechanic's lien action. (LF: 21) Appellant argues that the trial court's finding that Appellant was aware of the *Dynamic* case

is beyond the scope of the pleadings. Upon a motion to dismiss for lack of subject matter jurisdiction, a court is allowed to consider evidence outside the pleadings. *Quinn v. Clayton Construction Co., Inc., Id.* In any event, a reading of the pleadings clearly shows that this fact was addressed in the pleadings. Specifically, Respondent in its motion to dismiss averred that Appellant was aware of the *Dynamic v. Stratum-Design-Build, et al.* equitable mechanics lien action but failed to intervene. (LF: 51) Appellant never denied that averment, and only stated that none of the defendants in *George Weis Company v. Stratum Design-Build, et al.*, 04CC-2524 (which did not include the present Respondents Hurlbut Investments and Southwest Bank) contended that the case should be consolidated with the mechanics lien case. (LF: 36) Appellant never denied that it knew about the equitable mechanics lien lawsuit yet failed to take action to join or intervene. Therefore, a preponderance of the evidence indicates that Appellant was aware of the *Dynamic* case but failed to intervene or move to consolidate its breach of contract action with the equitable mechanic's lien action. The court did not abuse its discretion in making the finding that Appellant was aware of the *Dynamic* case but failed to intervene or move to consolidate its breach of contract action with the equitable mechanic's lien action.

The court did not abuse its discretion in dismissing Appellant's petition for lack of subject matter jurisdiction. None of the court's factual determinations were unreasonable or arbitrary. None of the court's determinations indicate the court lacked careful, deliberate consideration. Instead, it "appeared" to the court

that it lacked subject matter jurisdiction and the court did not abuse its discretion in finding that it lacked subject matter jurisdiction.

Even if the court accepts Appellant's position that the standard of review is *de novo,* Appellant's legal arguments are incorrect. Appellant argues that Mo. Rev. Stat. § 429.300 does not bar its claim because Appellant did not assert a mechanics lien or other claim against real estate. Appellant correctly states that the equitable mechanic's lien statute provides that "all other suits that may have been brought on any mechanics lien claim or demand shall be stayed and no further prosecuted." Mo. Rev. Stat. § 429.300. Appellant fails to note that the statute also similarly provides that "After the institution of such equitable action no separate suit shall be brought upon any mechanic's lien or claim against said property, or any of it, but the rights of all persons shall be adjusted, adjudicated and enforced in such equitable suit." Mo. Rev. Stat. § 429.300.

Appellant neglects to recognize the precedents of over 50 years of Missouri Supreme Court and Missouri Eastern District Court of Appeals case law which interpret the statute to bar breach of contract and all other claims which arise out of the same construction project if they have not been joined with the equitable mechanics lien suit. Appellant instead relies on the 1993 Western District case, *Mabin Construction Company, Inc. v. Historic Constructors*, 851 S.W.2d 98 (Mo. App. W.D. 1993). This one Western District case which Appellant solely cites for his position at is at odds with the Eastern District and Missouri Supreme Court case law.

Appellant points out that the Missouri Supreme Court cited *Mabin* in the case in *Dunn Industrial Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421 (Mo. banc 2003). Yet, *Dunn* supports the trial court and is cited by the trial court in its Judgment/Order. (LF: 21) In *Dunn*, the Missouri Supreme Court cited *Meiners Co. v. Clayton Greens Nursing Ctr*., 645 S.W.2d 722, 724 (Mo. App. 1982) for the principle that "once an equitable mechanic's lien action is brought, it is the exclusive method of litigating liens and other claims pertaining to particular property. *Dunn*, 112 S.W.3d at 430.

The *Meiners* case cites the holdings of *State ex rel. Clayton Greens Nursing Center, Inc. v. Marsh,* 634 S.W.2d 462, 465 (Mo. banc 1982) which itself relies on *State ex rel. Great Lakes Steel Corporation v. Sartorious,* 249 S.W.2d 853, 854 (Mo. banc 1952). This line of Missouri Supreme Court cases establishes that once an equitable mechanic's lien suit is commenced, no other actions in equity or at law, for lien, contract, or otherwise, may be commenced to enforce rights determined in the equitable lien suit; and further holds that a trial court has no jurisdiction to hear such separate actions. *Id.* The court in *Meiners* acknowledged that Mo. Rev. Stat. §§429.290 and 429.300 bar a separate suit on account. *Meiners,* 645 S.W.2d at 724. The court allowed the suit on account to proceed because of an evidentiary technicality, holding that the defendant did not meet its burden of proof of showing there was a related equitable mechanic's lien suit. *Id.* In Appellant's case currently before the court, Respondent met its burden of proof when it moved the court to take judicial notice of the prior equitable mechanics

lien case and Appellant did not object to the court taking judicial notice of the file. (LF: 51)

In *Dunn*, the Supreme Court considered the question of whether a general contractor could move to arbitrate claims against a subcontractor for failure to perform and against the subcontractor's parent company as a guarantor. *Dunn*, 112 S.W.3d at 427. The court held that the mechanics lien statute operates as the exclusive vehicle for litigating mechanics liens and other claims related to property. *Id.* at 430. The court further held that because arbitration is not a form of litigating claims but rather is an alternative to litigation, claims to arbitrate are not stayed by the equitable mechanics lien statute. *Id.* at 431. The court also decided that the general contractor's claims against the subcontractor's parent company were not covered by the arbitration agreement and therefore remanded the case so that the parent company could litigate the guarantor claim as part of the equitable mechanics lien lawsuit. *Id.* at 436-37.

This holding implicitly shows that the guarantor claim was correctly joined with the equitable mechanics lien action under Mo. Rev. Stat. §429.290. If the guarantor claim was correctly joined in the equitable mechanics lien action, then Mo. Rev. Stat. §429.300 applies, providing "[a]fter the institution of such equitable action no separate suit shall be brought upon any mechanic's lien or claim against said property, or any of it, but the rights of all persons shall be adjusted, adjudicated and enforced in such equitable suit." Mo. Rev. Stat. §429.300.

The Eastern District Court of Appeals has held that breach of contract claims are barred after the conclusion of an equitable mechanics lien suit. *Drywall Interior Systems Construction, Inc. v. Ladue Building & Engineering Corporation*, 857 S.W.2d 523, 524 (Mo.App. E.D. 1993). The underlying facts of *Ladue Building & Engineering* are almost identical to the facts in Appellant's case. In *Ladue Building & Engineering*, the plaintiff subcontractor filed a petition against the defendant general contractor for breach of contract. *Id.* at 523. The general contractor moved to dismiss the subcontractor's lawsuit, arguing that the property owners had sued the general contractor and several others for breach of contract, and that sixteen subcontractors, not including the plaintiff, had joined their mechanics lien lawsuits with that suit. *Id.* The general contractor further argued that the plaintiff had actual knowledge of that lawsuit and that the plaintiff's failure to intervene and assert its breach of contract claims in the equitable mechanics lien litigation barred its breach of contract action against defendant. *Id.* at 523-24.

The Eastern District Court of Appeals agreed with the general contractor's argument and affirmed the trial court's dismissal, holding that:

> A breach of contract suit arising out of a construction project cannot be maintained and the proceedings must be stayed if an equitable mechanic's lien action has been filed relating to the same project. This is true whether the breach of contract action was filed before or after the mechanic's lien suit was filed. *State ex rel. Kirkwood Excavating Inc. v. Stussie*, 689

S.W.2d 131, 133 (Mo.App. 1985), *citing State ex rel. Clayton Green's Nursing Center, Inc. v. Marsh*, 634 S.W.2d 462 (Mo. banc 1982).

Id. at 524. The court further explained that separate lawsuits filed by parties who were not participants in the prior equitable mechanics lien actions are barred:

> In the *Clayton Green's v. Marsh* case the supreme court has interpreted the mechanics' lien statute, Section 429.300 RSMo 1978, to mean that a contractor or supplier on a construction project cannot recover in a breach of contract suit if a mechanic's lien suit is filed by a different entity which did work on the same job, unless the breach of contract suit is joined with the mechanic's lien suit. *State ex rel. Kirkwood Excavating*, 689 S.W.2d at 133.

Id. The court held that the plaintiff's breach of contract claim was barred because plaintiff did not intervene in the prior equitable mechanics lien action, and the prior action had been dismissed through settlement and was no longer open for any purpose. *Id.*

Appellant's case currently before this court involves the same issues resolved by the court in *Ladue Building & Engineering.* Appellant, a subcontractor, filed a petition against the Respondents, the construction project property owner and the construction project financing entity, for breach of a construction escrow contract. (LF: 88-91) Respondents jointly moved to dismiss the subcontractor's lawsuit. (LF: 51) Respondents argued that an equitable mechanics lien action concerning the same construction project was filed at a prior

date. (LF: 51) Respondents further argued that Appellant had actual knowledge of that lawsuit and that its failure to intervene and assert its breach of contract claims against Respondents in the equitable mechanics lien litigation barred its breach of contract action. (LF: 51). In its response to the motion to dismiss, Appellant never denied that it had notice of the equitable mechanics lien action. (LF: 36-38) The similarities of fact between Appellant's case and the facts in *Ladue Building & Engineering* are undeniable and the court's holding in *Ladue Building & Engineering* is clearly controlling.

Other cases decided by the Eastern District Court of Appeals unequivocally support the trial court's Order/Judgment dismissing Appellant's lawsuit for lack of subject matter jurisdiction. The court has held that the equitable mechanic's lien statute bars all subsequent lawsuits when those lawsuits *arise out of the same construction project* as the prior equitable mechanics lien action. In *State ex rel. Kirkwood Excavating*, 689 S.W.2d at 133 (Mo.App. E.D. 1985), the court found that a contractor or supplier on a construction project cannot recover in a breach of contract suit if a mechanic's lien suit is filed by a different entity which did work on the same job, unless the breach of contract suit is joined with the mechanic's lien suit. *Id.* The court commented further that the Missouri Supreme Court has ruled that equitable mechanics' liens suits once filed are the exclusive remedy in all disputes, whether based on contract only or on a lien claim, when the disputes are between parties involved in the same construction project from which the mechanic's lien suit arises. *Id.*

In *State ex rel. Power Process Piping, Inc. v. Dalton,* 681 S.W.2d 514, 516 (Mo.App. E.D. 1984), the Eastern District Court of Appeals held that a breach of contract suit filed after an equitable mechanics lien could not be maintained where causes arose out of the same construction project. *Id.* The court commented further that the Missouri Supreme Court interpreted 'mechanics lien claim or demand' to include non-lien-actions at law for breach of contract and held the equitable mechanics liens suits, once filed, are the exclusive remedy of all disputes between parties involved in the same construction project from which the mechanics lien suit arises. *Id.* at 517.

This court's holding in *Ladue Building & Engineering* is controlling. Appellant's case involves almost identical facts to those present in *Ladue Building & Engineering*. Appellant has not made an attempt to differentiate the facts of its case because it cannot. Instead, Appellant has urged this court to ignore its own case law and the case law of the Missouri Supreme Court and has pointed this court to one sole Western District case. The relevant Eastern District and Missouri Supreme Court case law unequivocally supports the trial court's Order/Judgment that Appellant's lawsuit was barred and the trial court lacked subject matter jurisdiction to proceed.

II. THE TRIAL COURT DID NOT ERR BY DISMISSING THE PETITION, WITHOUT A HEARING ON THE MERITS, ON THE GROUNDS THAT THE MECHANIC'S LIEN STATUTE REQUIRES JOINDER OF ALL NON-MECHANIC'S LIEN CLAIMS IN ONE

LAWSUIT, OR THEY ARE BARRED, AND DID NOT DENY PLAINTIFF DUE PROCESS OF LAW UNDER THE MISSOURI AND UNITED STATES CONSTITUTIONS BECAUSE PLAINTIFF WAS PROVIDED WITH NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE ITS CLAIMS WERE BARRED.

Appellant again has directed the court to an incorrect standard of review. *De novo* review is not appropriate in this case. This court reviews motions to dismiss for lack of subject matter jurisdiction for abuse of discretion. *James v. Poppa*, *Id.* at 9.

Appellant argues that the trial court denied it due process of law under the Missouri and United States constitutions when the court dismissed Appellant's lawsuit for lack of subject matter jurisdiction without first affording it notice and an opportunity to be heard. Appellant further argues that in order to have been afforded due process, the Respondents, or any non-party, should have provided Appellant notice that its claims would be barred if they were not asserted in the equitable mechanic's lien action.

Appellant's argument has no merit because Appellant was afforded notice of the equitable mechanic's lien suit. In its Order/Judgment, the trial court found that:

> this is not a situation where Plaintiff had no notice of the equitable mechanic's lien action or opportunity to intervene therein. To the contrary, Plaintiff was aware of the *Dynamic* case but failed to intervene or move to

consolidate its breach of contract action with the equitable mechanic's lien action.

(LF: 9) Appellant has never argued that it had no notice of the *Dynamic* case because it cannot. Rather, Appellant argues that no one told it that its claims would be barred if it did not join the equitable mechanics lien action.

The Eastern District Court of Appeals confronted this situation in *Ladue Building & Engineering* and found that the plaintiff was not denied due process of law when its claimed were barred. *Ladue Building & Engineering*, 857 S.W.2d at 524. In *Ladue Building & Engineering*, the plaintiff argued that it was a denial of due process for the court to preclude a non-lien claimant from bringing an action for breach of contract where the breach of contract claim and the liens involve the same construction project. *Id.* The plaintiff argued that it was a denial of due process if the non-lien claimant is not joined in an equitable mechanic's lien lawsuit and is not given notice of the impact or consequences of failing to intervene in that lawsuit. *Id.*

The court rejected the plaintiff's argument and did not decide whether it was a denial of due process where a non-lien claimant is not given notice of the consequences of failing to intervene in an equitable mechanic's lien action. *Id.* The court stated that plaintiff had actual knowledge of the equitable mechanics lien action and therefore notice was not an issue. *Id.*

The court comment further that the legislature has not spoken on the notice requirements, if any, of an equitable mechanic's lien action under Mo. Rev. Stat.

§§429.290 and 429.300, and that the court would defer to the legislature to provide an answer or until a non-notice case appears. *Id.*

In Appellant's case before this court, Appellant has never denied that it had notice of the *Dynamic* equitable mechanic's lien action. Appellant merely argues that no one told it that its claims would be barred if it did not join the equitable mechanics lien action, an argument which was soundly rejected in *Ladue Building & Engineering.* The trial court found that Appellant was aware of the *Dynamic* case but failed to intervene or move to consolidate its breach of contract case with the equitable mechanics lien action. Just as the Eastern District found in *Ladue Building & Engineering*, notice is not an issue in this case and there has not been a denial of due process under the United States Constitution or Missouri Constitution.

III. THE TRIAL COURT DID NOT ERR BY DISMISSING THE PETITION BECAUSE IT DOES NOT STATE A CAUSE OF ACTION (1) AGAINST STRATUM DESIGN-BUILD, INC. FOR BREACH OF CONTRACT AND FOR VIOLATION OF THE PROMPT PAYMENT ACT (2) AGAINST TITLE INSURERS AGENCY, INC. FOR BREACH OF ITS FIDUCIARY DUTY IN THE ADMINISTRATION OF THE CONSTRUCTION ESCROW AGREEMENT AND (3) AGAINST HURLBUT INVESTMENTS, LLC AND SOUTHWEST BANK FOR BREACH OF THE CONSTRUCTION ESCROW AGREEMENT, IN THAT PLAINTIFF

IS NOT A THIRD-PARTY BENEFICIARY OF THAT AGREEMENT.

Review of a trial court's ruling on a motion to dismiss is generally limited to the sufficiency of the pleadings on their face. *ADP Dealer Services Group, et al. v. Carroll Motor Company*, 195 S.W.3d 1, 6 (Mo.App. E.D. 2005). Appellant's brief makes factual allegations against Respondents that are not contained on the face of Appellant's petition.

For example, on pages 29 and 30 of its appellate brief, Appellant presents an analysis of the terms and requirements of the construction escrow agreement that was not contained in its petition and therefore it should be disregarded by this court. Likewise, Appellant's statement on page 35 of its brief concerning the supposed reasons why the construction escrow agreement was established was not contained in its petition and should be disregarded by this court. Likewise, Appellant's statement on page 35 of his brief that Stratum Design-Build went out of business was not contained in its petition and should be disregarded by this court. All other allegations of fact and legal arguments contained in Appellant's brief which were not present in its petition should be disregarded by this court.

Appellant's petition fails to state a claim upon which relief may be granted because Appellant failed to allege facts which would show it was a third party beneficiary to the construction escrow agreement. Third party beneficiary rights depend on, and are measured by, the terms of the contract between the promisor and the promisee. *Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 737 S.W.2d

206, 213 (Mo.App. E.D. 1987). The general rule is that recovery by a third party is not permitted if the party is only incidentally, indirectly or collaterally benefited by a contract. *H.H. Stephens v. Great Southern Savings and Loan Ass'n*, 421 S.W.2d 332, 335 (Mo.App. 1967). The court may not speculate from the language in the contract that the contracting parties wanted to make the plaintiff a third party beneficiary. *Laclede Inv. Corp. v. Kaiser*, 596 S.W.2d 36, 42 (Mo.App. E.D. 1980). The court reasoned that because people usually contract and stipulate for themselves and not for third persons, a strong presumption arises that such was their intention, and the implication to overcome that presumption must be so strong as to amount to an express declaration. *Id.* For Appellant to meet this burden, "[i]t must be shown that the benefit to the third party *was the cause of the creation of the contract*." *State ex rel. E.A. Martin Machinery Co. v. Line One, Inc*., 111 S.W.3d 924, 931 (Mo.App. S.D. 2003). (Emphasis added).

Appellant never pled that any benefit it claimed under the construction escrow agreement was the cause of creation of the contract, and never pled that that Respondents *expressly declared* that the escrow agreement was entered into to benefit Appellant. Appellant failed to plead any facts in its petition that would overcome the strong presumption against finding that it was a third-party beneficiary. Instead of pointing to actual words in the contract of the Respondents' intent or express declarations of the Respondents' intent, Appellant only offered its own speculation that Respondents wanted to make Appellant a third-party beneficiary. Under the holding in *Laclede Inv. Corp. v. Kaiser*, the

court may not speculate from the language in the contract that the contracting parties wanted to make the plaintiff a third party beneficiary. *Laclede Inv. Corp.*, 596 S.W.2d at 42.

Appellant's allegation that the contracting parties "intended to benefit" it is not enough to establish third-party beneficiary status upon Appellant. Rather, Respondents must intend to assume a *direct obligation* to Appellant in order for Appellant to be considered a beneficiary of the contract:

> it is not every promise . . . made by one to another from the performance of which a benefit may ensue to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited.' And the intent necessary to establish the status of a third-party beneficiary is 'not so much a desire or purpose to confer a benefit on the third person, or to advance his interests or promote his welfare, but rather an intent that the promisor assume a direct obligation to him.

Laclede Inv. Corp., *Id.*, quoting *Great Southern, Id.* There are many reasons why Respondents may have entered into the construction escrow agreement for their own benefit. Examples may include but are not limited to title insurance requirements, access to lower construction financing interest rates, cash flow management, accounting, and tax considerations. Appellant has not overcome the strong presumption that Respondents and the other defendants entered into the

construction escrow agreement for their own benefit, and not for the benefit of Appellant.

Appellant cites to *I.A.C. v. Ward Parkway Shopping Center Co.,* 75 S.W.3d 247, 260 (Mo. banc 2002) and states that it is not necessary for the parties to a contract to have as their primary object the goal of benefiting third parties, but only that third parties be primary beneficiaries. The court held that:

> Only those third parties for whose primary benefit the parties contract may maintain an action . . . [I]t is not necessary for the parties to the contract to have as their 'primary object' the goal of benefiting the third parties, but only that third parties be primary beneficiaries. *Id., quoting Andes v. Albano,* 853 S.W.2d 936, 942 (Mo. banc 1993).

In *Ward Parkway Shopping Center,* the court found that plaintiff, a minor patron of a shopping mall who had been raped while on the shopping mall property, was a donee beneficiary of the shopping mall's contract with a security company. Under the facts of that case, the court found that the shopping mall contracted with the security company for the very purpose to protect mall customers from violent crime. *Ward Parkway Shopping Center Co.,* 75 S.W.3d at 260. The court looked at specific paragraphs of the security contract which used phrases such as "the contractor may detain an individual *when necessary to protect that individual or mall customers or employees from risk of serious injury*." *Id.* at 261.

The holding in *Ward Parkway Shopping Center* is inapposite to the facts of Appellant's case. Appellant's petition did not point to any wording in the contract

which indicated that Respondents were conveying a benefit upon Appellant. Appellant only states that the funds paid to it would be disbursed out of escrow. However, that statement only alleges a means by which Appellant would have received payment. Appellant does not indicate a specific benefit bestowed on it by virtue of the escrow agreement. Appellant does not indicate a specific benefit to it contained in the wording of the escrow agreement. For example, Appellant does not and cannot point to any wording in the escrow agreement stating that it was entered into to protect Appellant and to assure Appellant it would be paid.

Appellant further failed to establish itself as a creditor beneficiary. In order for a party to qualify as a creditor beneficiary, the "performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary." *Laclede Inv. Corp.*, 596 S.W.2d at 43. In other words, "a creditor beneficiary is one upon whom the promisee intends to confer the benefit of performance of the contract and thereby discharge an obligation or duty the promisee owes the beneficiary." *Wilson v. General Mortgage Company*, 638 S.W.2d 821, 823 (Mo.App. E.D. 1982). In Appellant's case, none of the parties agreed in the construction escrow agreement to assume a direct obligation to Appellant. Respondents did not owe an actual, supposed, or asserted duty or legal obligation to Appellant which would have been discharged through performance of the construction escrow agreement.

Respondent Hurlbut Investments did not owe an actual, supposed, or asserted duty or legal obligation to Appellant. Appellant had no contract for

construction services with Hurlbut Investments. Appellant failed to assert a mechanics lien or file suit on a mechanics' lien against the property within the time period allotted by statute. Appellant's recourse against Respondent Hurlbut Investments would have been to intervene in the equitable mechanics lien lawsuit. Appellant chose not to do so and abandoned any lien rights it may have had. Respondent Hurlbut Investments owes no duty or legal obligation to Appellant. Likewise, Appellant had no loan agreement with Respondent Southwest Bank of St. Louis, and Respondent Southwest Bank of St. Louis owes no duty or legal obligations to it.

Appellant fails to establish any facts which would indicate it is a donee beneficiary to the construction escrow agreement. Appellant cites *Kansas City N.O. Nelson Co. v. Mid-Western Construction Company of Mo., Inc.*, 782 S.W.2d 672, 677 (Mo.App. W.D. 1989) for this proposition, but offers no argument. Because Appellant would only be collaterally benefited by the construction escrow agreement, it is neither a creditor third-party beneficiary nor a donee third-party beneficiary.

Appellant failed to allege any facts that would have established it as a third-party beneficiary of the construction escrow agreement. Rather, the facts which Appellant pled at best established only that Appellant would be collaterally benefited by the money loaned and deposited into escrow by Respondents. The rule permitting recovery by a third-party beneficiary is not extended to give a third person, who would only be incidentally, indirectly or collaterally benefited by a

contract, the right to recover upon it. *H.H. Stephens v. Great Southern Savings & Loan Association,* 421 S.W.2d 332, 336 (Mo.App.1967).

In *Great Southern*, the Court of Appeals held that the plaintiff subcontractor was not a donee or creditor third party beneficiary of a construction loan escrow agreement between the defendant savings and loan institution and the general contractor. The court held that the fact that the subcontractor might have benefited from money loaned to the general contractor did not confer any right of action against the defendant financial institution. *Id.* The court cited the following example which illustrates a collateral benefit which gives the third party no right to recovery:

> Where A owes money to creditor C, or to several creditors, and B promises A to supply him with the money necessary to pay such debts, no creditor can maintain suit against B on this promise.

Id., *quoting* 4 *Corbin on Contracts*, § 779D, p.43. The court held that the plaintiff subcontractor was not a donee or creditor third-party beneficiary, but rather would only be collaterally benefited by the agreement. *Id.* The facts contained in *Great Southern Savings & Loan* are almost identical to the facts surrounding Appellants case. The fact that Appellant might have benefited from the money loaned into escrow by Respondents to Stratum did not confer third-party beneficiary status to Appellant.

Because Appellant might have only been collaterally benefited by the construction escrow agreement, it had no right to sue under a breach of contract

theory against Respondents, and Appellant failed to state a claim upon which relief may be granted.

CONCLUSION

For the foregoing reasons, Respondents Hurlbut Investments and Southwest Bank of St. Louis respectfully submit that the Order/Judgment and Amended Judgment entered by the trial court, dismissing Appellant's petition with prejudice, should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the information required by Rule 55.03.

2. This brief complies with the limitations contained in rule 84.06(b) and Special Rule 360(a) of the Special Rules of the Missouri Court of Appeals for the Eastern District.

3. The word count of this brief is 7,115 and the line count is 637.

4. The disk served with the briefs filed to the Court and the disk served with the briefs to the Appellant have been scanned for viruses and are virus-free.

5. The brief was prepared using "Times New Roman" 13 point font, using Microsoft Office Word 2003.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of Respondents' Brief and Appendix, as well as one disk containing said brief and appendix, were mailed, postage prepaid, this 14th day of August, 2006, to:

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APPENDIX

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