

IN THE
SUPREME COURT OF MISSOURI

No. SC94038

BRENTWOOD GLASS COMPANY, INC.,

Plaintiff-Appellant,

vs.

CLAYCO, INC., CORNERSTONE VI, LLC, UMB BANK,
VICTOR ZARILLI, NATIONAL CITY BANK,
PAUL M. MACON, ST. LOUIS COUNTY, MISSOURI,

Defendants-Respondents,

Appeal from the Circuit Court of the County of St. Louis, Missouri

Division 18

The Honorable Richard C. Bresnahan

SUBSTITUTE REPLY BRIEF

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STATEMENT OF FACTS

In violation of Rule 84.04 (c), Defendants-Respondents’ (“Defendants”) Supplemental Statement of Facts is corrupted by argumentative legal conclusions, statements contrary to or unsupported by the record, and the inclusion of irrelevant facts. For these reasons, it is not a reliable guide to the record.

These are some of its deficiencies.

Defendants argumentatively and mistakenly speak of Brentwood’s lack of “substantial evidence,” (Resp’t Substitute Br. at 8), rather than what is required to survive a motion for summary judgment: “any evidence.” *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 382 (Mo. banc 1993).

Ignoring emails and shipping tickets that show that parts were sent to Plaintiff-Appellant Brentwood Glass Company, Inc. (“Brentwood”) on February 7th and 9th of 2007 (A.L.F. VI/654-64), parts that Bettie Albers (“Bettie”), Brentwood’s vice-president, installed on February 13, 2007 (L.F.¹ V/619 ¶¶ 73, 74; A.L.F. VI/627 ¶ 8; A.L.F. IV/476 at 137, l. 22 – 138, l. 6; L.F. I/169), Defendants are mistaken in saying that there are no records or other documentation evidencing this work. (Resp’t Supp. Br. at 5, 8, 9.)

Rather than fairly describing the entire waiver form, Defendants call it a “lien waiver” and argue that its legal effect was that, when signed, Brentwood “waived any and all lien rights with respect to the Project through that date.” (Resp’t Supp. Br. at 5-6.) They

¹Legal File. The Roman numeral refers to the volume and the Arabic number refers to the page within said volume.

repeatedly ignore the title of the form: “**PARTIAL WAIVER OF LIEN.**” (A.L.F. IV/516-26 (S.A. 24). They also omit that the only evidence of the parties’ intentions is this: Brentwood intended to waive its lien only to the extent of the amount of the partial payment stated in the waiver. (A.L.F. VI/630 ¶ 14.)

Defendants argue that “Koman never received notice of the filing of any lien . . . on behalf of the County.” (Resp’t Substitute Br. at 8.) That Koman received such notice is undisputed. (*E.g.*, L.F. II/354 ¶ 39; L.F. V/528-32, 548-53, 604 ¶ 39; L.F. VIII/1074-80.) Defendants’ conclusion that Koman was not then the County’s agent has no place in the statement of facts.

With nary a citation to the record, Defendants claim that Pal’s Glass was out of business when it consented to the judgment against it. (Resp’t Substitute Br. at 11.) Nothing in the record supports this claim.

ARGUMENT

Standard of Review

It was the Court of Appeals’ Memorandum (Memorandum at 5), blessing the “no-explanation-needed rule,” that prompts Brentwood’s request for this Court to re-examine this rule, a rule that provokes citizens, upon whose acceptance and support our courts depend, to view such a ruling with bewilderment, if not outright cynicism and disrespect.

I

BOND CLAIM

A. County Contract

The County is mistaken in suggesting that there is no evidence that it had a contract

with anyone to provide construction services. (Resp’t Substitute Br. at 60-63.) The lease itself provides that “[*o*]n behalf of the County, [Cornerstone] will purchase and construct the Project . . . in accordance with the Plans and Specifications.” (A.L.F. VI/738 § 4.2 (A16) (emphasis added).) What more evidence is needed, in opposing a motion for summary judgment, to establish that the County had a contract with Cornerstone to build the Project?

B. “Public Works”

The County argues that Section 107.170² (“Little Miller Act”) (Substitute Appendix (“SA”) at 8-9) does not apply to the Project, because the office building built on its property was not a “public facility.” (*Compare* Resp’t Substitute Br. at 63-65 with L.F. II/345 ¶ 3.b. and Resp’t Br. (Ct. App.) at 44-55.) As Defendants make this argument for the first time in this Court, it should be disregarded. Rule 83.08(b); *Brown v. Brown*, 423 S.W.3d 784, 788 (Mo. banc 2014). Assuming that we must consider it, Defendant’s conclusion is mistaken for several reasons.

The County overlooks other portions of the statute’s definition of jobs for which a payment bond is required: “**Public works**”, the erection, construction . . . of any building . . . or other public facility owned by the public entity. Section 107.170.1(3). The Project was a ten-story office building. (L.F. I/20-II/343; L.F. VIII/1134-A.L.F. IX/1191.) The County does not deny that it owned the building. But, it implies that, even so, the building was not “public,” because, rather than planning to use or occupy the building itself, the County intended to lease and, then, to sell it to a private company. (Resp’t Substitute Br. at 63-65.)

Such a narrow interpretation of this statute is not warranted. The statute does not

²All references are to R.S. Mo. (2000) unless otherwise indicated.

require that the building be occupied by the public entity itself. It is at odds with the requirement that the Little Miller Act be “read broadly to carry out its purpose to protect those who improve and enhance the public properties.” *Missouri Dep’t of Transportation ex rel. On Point Contractors, LLC v. Aura Contracting, LLC*, 391 S.W3d 11, 15 (Mo. App. E.D. 2012) (citations omitted). And, it would defeat “[t]he public policy of Missouri . . . that subcontractors . . . are entitled to the protection of *either* mechanic’s liens *or* payment bonds *depending on the nature of the property they improve.*” *Id.* at 16 (citations omitted).

As a building owned by the County, if it was “held for the ‘benefit of the public’ and ‘reasonably necessary for public use,’” *Collins & Hermann, Inc. v. TM2 Construction Co.*, 263 S.W.3d 793, 797 (Mo. App. E.D. 2008) (*quoting River’s Bend Red-E-Mix, Inc. v. Parade Park Homes, Inc.*, 919 S.W.2d 1, 3 (Mo. App. W.D. 1996)), it was immune from the imposition of a mechanic’s lien, at least as to anything but the leasehold interest. Section 429.070; *Miners Lumber Co. v. Miller*, 117 S.W.2d 711, 714 (Mo. App. St. L. 1938).

The ordinance authorizing the Project states that the Project is “desirable for the improvement of the economic welfare and development of the County and within the **public purposes** of [Missouri constitutional, statutory, and local law].” (L.F. VII/954 (emphasis added).) Surely this language alone is sufficient to create a question of fact as to whether this building was a “public work.”

In making the argument that the Little Miller Act does not apply to this Project, the County has cast aside any pretense of logical consistency. In an earlier trial court motion, the County argued that this was public property and, so, not subject to a mechanic’s lien. (Appellants’ Supplemental L.F. 24-25.) Its lease warns: “Notice is hereby given that . . . no

mechanics' or other similar lien . . . shall attach to or affect the reversionary or other estate of the County in and to the Project" (A.L.F. VI/745 § 8.5 (a).) It now claims that Brentwood cannot assert a bond claim either. (Resp't Substitute Br. at 63-65.) Both defenses cannot be right, as they would frustrate the comprehensive scheme of the complementary bond and mechanic's lien statutes.

The only case which the County cites, *On Point Contractors*, 391 S.W3d at 15-16, is not remotely similar. There, a private owner engaged a private contractor to build a commercial project that entailed some "incidental work upon and within a public right of way" *Id.* at 13. The project was "paid for [by] and [was] for the benefit of . . . a private company." *Id.* at 16. That is not so here. The Project was paid for, at least in part, by the proceeds of the County's issuance of \$21 Million in industrial revenue bonds. (A.L.F. VI/672 - VIII/1059.) The ordinance is evidence that it was for the benefit of the public. (L.F. VII/954.)

Though the County acknowledges that it owned the Property for almost five years, (Resp't Substitute Br. at 63), it calls this "temporary ownership" (Resp't Substitute Br. at 64). It urges this Court to follow *American Seating Co. v. City of Philadelphia*, 256 A.2d 599, 605 (Pa. 1969), in concluding that the Property, while owned by the County, and not susceptible to a sheriff's sale to obtain payment for a mechanic's lien, was subject to an inchoate mechanic's lien. (Resp't Substitute Br. at 64-65.)

American Seating's facts and law are quite different. There the city leased land, for a 50-year term, to a developer who agreed to build an arena with his own money. *American Seating.*, 256 A.2d at 600. Unlike Missouri, under Pennsylvania law, public property used

for proprietary and quasi-private purposes, rather than for governmental functions, can be subjected to a mechanic's lien. *Id.*, 256 A.2d at 601. And, *American Seating* never mentions whether Pennsylvania has a Little Miller Act and a comprehensive public policy, like that of Missouri, to assure some method of payment to those who work on public projects as well as those who labor on private ones. *Id.*

The County suggests that a subcontractor would get a lien that it could not foreclose upon for what might be many years. How would this remedy provide any practical relief to a subcontractor who might have invested large sums in the wages of its workers and in its materials? Would this not conflict with the "strong legislative purpose to protect those who furnish labor and materials for public construction and to assure that they will be paid"? *School Dist. of Springfield R-12 ex. rel. Midland Paving Co. v. Transamerica Ins. Co.*, 633 S.W.2d 238, 248 (Mo. App. S.D. 1982).

C. Agent

The County argues that the bond statute does not apply if its agent hired a contractor. (Resp't Substitute Br. at 65-66.) But, this cannot be right, as it would require us to ignore one of the most elemental principles of law: a principal is responsible for the act of its agent, so long as the agent acts within the scope of its actual authority. *E.g., Bach v. Winfield-Foley Fire Protection District*, 257 S.W.3d 605, 608 (Mo. banc 2008).

D. Pleadings

The County argues that it is entitled to summary judgment on the bond claim, because Brentwood's petition is "insufficient with respect to the entire agency relationship." (Resp't Substitute Br. at 67.) It complains that the petition does not set forth "specific and detailed

allegations required in order to establish an agency relationship under Missouri law” and does not explain the connections between the parties. (Resp’t Substitute Br. at 69, 67-69.)

But, a petition need only allege ultimate facts, not evidentiary or operative facts. *E.g.*, *Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004). Though the Fourth Amended Petition misidentified the agent, it did allege that the County acted through an agent in hiring Clayco. (L.F. I/79 ¶ 179.) The Fifth Amended Petition³ alleged that Cornerstone was the County’s agent and that Koman was Cornerstone’s agent or alter ego in hiring Clayco. (L.F. VIII/1136-37 ¶¶ 12, 13, 14, 15.)

E. Evidence of Agency

Complaining that there is no “substantial evidence” of any agency relationship, (Resp’t Substitute Br. at 69-73), the County distorts the standard for summary judgment. The question is not whether there is “*substantial* evidence,” but, rather, whether there is “*any* evidence.” *ITT Commercial Finance Corp.*, 854 S.W.2d at 82 (emphasis added).

What more is needed to survive a motion for summary judgment than an admission by a party opponent, *i.e.*, the County, that it had an agent? The language of the lease is evidence of an agency relationship.

As to the “nature and scope” of the agency, the lease says this: “On behalf of the County, [Cornerstone] will purchase and construct the Project . . . in accordance with the Plans and Specifications.” (A.L.F. VI/738 § 4.2 (SA16).)

As to the “level or degree of control that the County had over Cornerstone’s actions,”

³The trial court considered both versions of the petition. (L.F. VIII/1132; A.L.F. IX/1214.)

the lease provides: “[Cornerstone] may revise the Plans and Specifications . . . but revisions that would materially alter the intended purpose of the Project may be made only with the prior written approval of the County.” Without citation to any authority, the County claims that its right to veto changes in the plans and specifications that would materially alter the Project is not enough to constitute the type of control that a principal must have over an agent. (*Id.* at 72.)

F. Koman’s Role

The County disputes that Brentwood is entitled to an inference that Koman was acting for Cornerstone in hiring Clayco. (Resp’t Substitute Br. at 73.) It points to evidence that “Koman was acting as the developer with respect to the Project.” (L.F. VIII/1100 ¶ 9.) But, this self-serving statement begs many questions:

1. what does “developer” mean in this context?
2. how could Koman “develop” property it did not own or lease unless it was acting for the owner or tenant?
3. what gave Koman the right to allow Clayco to build the Project on the County’s (or Cornerstone’s) Property?
4. did Cornerstone sublet the Property to Koman (A.L.F. VI/729)?
5. was Koman acting for Cornerstone in building the Project for the County (*e.g.*, A.L.F. VI/738 § 4.2,

L.F. VII/821)?

and,

6. did Cornerstone give Koman the right to draw on the \$21 Million bond fund, (*e.g.*, A.L.F. VI/739 § 4.4, VI/677, VI/767, VI/776)?

The usual meaning of “developer” is one “who invests in and develops the urban or suburban potentialities of real estate. . . .” *Random House’s Webster’s Unabridged Dictionary* 543 (2d ed. 2001). But, there is no evidence that Koman had invested in this property or that Koman had any other interest in the land and building. The only logical inference is that Koman must have been working for those who did have interests in the Property: Cornerstone and the County.

Because the evidence (*See* Appellant’s Substitute Brief at 22-24) reasonably supports the inference that Koman acted for Cornerstone in hiring Clayco, the judgment must be reversed. *ITT Commercial Finance Corp.*, 854 S.W.2d at 382.

G. Mistake or Misnomer

Though Brentwood did not use the words “misnomer” and “mistake” in its trial court memoranda, it did point out facts from which one could reasonably infer that the prime contract was really between Cornerstone and Clayco. Operating Cornerstone and Koman out of the same office, William J. Koman, Jr. signed all documents on behalf of both entities. (Resp’t S.L.F. at 22, 42-47.) Cornerstone owned the Property at the time when Koman, misidentified as the owner of the Property, hired Clayco to construct the Project on the Property, agreeing to pay as much as \$25 Million to build the Project. (*Id.*) Cornerstone then

deeded the Property to the County, leased it back, promised to build the Project as the County's agent, and borrowed \$21,000,000.00 from the County to do so. (*Id.*) And, Koman had no interest in the Property. (*Id.*)

H. Policy

The County is mistaken in suggesting that applying the Little Miller Act to this Project is tantamount to "changing established law after the fact." (Resp't Substitute Br. at 74.) The County's claim to the contrary notwithstanding (Resp't Substitute Br. at 75-77), what is true is that Brentwood's bond claim presents an issue of first impression: does the Little Miller Act apply to this type of building project - one in which the ultimate user and eventual owner is a private party but which is owned, during development, by a public entity and financed by that public entity's bonds?

The County was aware of the possibility that the Little Miller Act might govern this job. Its lease provides: "[Cornerstone] will comply with the provisions of Section 107.170 . . . to the extent applicable to the construction of the Project." (A.L.F. VI/738 § 4.2 (d).) And, the lease required Cornerstone to indemnify it against Cornerstone's default in failing to comply with Section 107.170. (A.L.F. VI/752 § 10.5.)

I. Conclusion

Because the record contains evidence that the County did have a contract with or through Cornerstone to build the Project, that the Project was a "building" owned by it, and that the Property itself was not subject to a mechanic's lien, summary judgment in favor of the County on the bond claim is not warranted.

II

MECHANIC'S LIEN CLAIM

A. Lien Was Timely

Again ignoring that this Court is reviewing the grant of summary judgment, Defendants claim that the judgment must be affirmed, because there is “no substantial evidence” to corroborate Bettie’s testimony of Brentwood’s work in early February 2007. (Resp’t Substitute Br. at 43-47.) No such corroboration is required under *ITT Commercial Finance Corp.*, 854 S.W.2d at 382.

It also matters not that the documentation supporting this work consists only of emails and shipping tickets, (A.L.F. VI/654-64), or that Brentwood did not send an invoice for Bettie’s work. These facts merely go to the *weight* of the evidence. Bettie’s testimony is “*any evidence*” which precludes summary judgment. *ITT Commercial Finance Corp.*, 854 S.W.2d at 82 (emphasis added).

Defendants cite *Westerhold v. Mullenix Corp.*, 777 S.W.2d 257, 265 (Mo. App. E.D. 1989) in suggesting that Bettie’s work does not count. (Resp’t Substitute Br. at 45-46.) Their reliance is misplaced, because in *Westerhold* the contractor’s evidence “merely show[ed] two of its employees were at the job site on March 3, each for four hours.” *Id.* at 265. There was “no evidence at trial showing the nature of the work done on March 3.” *Id.* That is not true of Brentwood’s evidence: Bettie installed bathroom mirrors, did caulking, and installed vertical covers and exterior mullions on the storefront windows. (L.F. V/619 ¶¶ 73, 74; A.L.F. VI/626-27 ¶¶ 2-4, 7, 8; A.L.F. IV/476 at 137, 1.22 – 138, 1.6 and at 139, 1. 5 - 140, 1. 6; L.F. I/169 ; A.L.F. VI/654-64.)

B. Notice of Lien

Defendants concede this: for the purpose of the notice to owner required of an original (general) contractor under Section 429.012, the owner entitled to notice is the record owner at the time the general contract was signed. (Resp't Substitute Br. at p. 54, *citing Home Building Corp. v. Ventura Corp.*, 568 S.W.2d 769, 771 (Mo. banc 1978)). However, for the purpose of the notice to owner required of a subcontractor or supplier under Section 429.100, Defendants argue that the identity of the owner entitled to notice should be determined at a different time: at the time the work on the project commences. (Resp't Substitute Br. at 49.) But, they fail to articulate a good policy reason to use different tests under these two statutes. Careful consideration reveals that there are good policy reasons to use the same test for both.

The purpose of the ten-day notice, required of a subcontractor or supplier before filing a lien, is to allow the owner to withhold payment from his contractor and thus avoid double payment. *River City Drywall, Inc. v. Raleigh Properties, Inc.*, 341 S.W.3d 716, 723 (Mo. App. E.D. 2011). Logically, the owner who has the right to withhold payment from his contractor would be the same owner who hired the original contractor to perform the work!

Further support for the proposition that "owner" should be determined at the time of contracting is found in Section 429.010. Only persons who perform construction upon land "under or by virtue of any contract with the owner or proprietor thereof . . ." may have a lien. See also Section 429.190 which provides that the "parties to the contract" are necessary parties in a lien enforcement suit. Mechanic's liens are based upon contractual rights. The term "owner" should be interpreted to be the owner at the time of the contract with the original contractor.

Defendants cite four cases for the proposition that, for the purpose of the ten-day notice, the owner is whoever held title when the work commences. (Resp't. Substitute Br. at 49.) **But, defendants fail to point out that, in each of these cases, the owner at the time of contracting was the same as the owner at the time the work commenced.** *BCI Corp. v. Charlebois Constr. Co.*, 673 S.W.2d 774, 776-77 (Mo. banc 1984); *Vasquez v. Village Center, Inc.*, 362 S.W.2d 588, 595-96 (Mo. 1962); *Dave Kolb Grading, Inc. v. Lieberman Corp.*, 837 S.W.2d 924, 935-36 (Mo. App. E.D. 1992); and, *Bullmaster v. Krueger*, 151 S.W.3d 380, 385 (Mo. App. W.D. 2004). So, the statements by these courts are *dicta*.

Defendants misread *River City*, 341 S.W.3d at 723. (Resp't Substitute Br. at 55.) Because the owner at the time of contracting was the same as at the time the work was done, it, too, is *dictum*. *River City*, 341 S.W.3d at 718-20. And, *River City* makes no mention that the purpose of the notice is to alert "the *current* owner." (Resp't Substitute Br. at 55 (emphasis added).) Instead, it simply states that the purpose of the ten-day notice is "to afford a property owner notice of outstanding claims of sub-contractors so that he may withhold payment from his direct contractor and thus avoid double payment." *River City*, 341 S.W.3d at 723 (emphasis added) (*quoting BCI Corp. v. Charlebois Constr. Co.*, 673 S.W.2d at 781).

No court, in these cases or any other, has squarely faced a situation in which the property was transferred between the time of contracting and the time that work commenced. Here, Cornerstone was the owner at the time that Clayco was hired. (L.F. III/376-89 (SA12-14); L.F. VIII/1061-64; L.F. II/359-64.) However, Cornerstone deeded the Property to the County after the time of contracting and before work commenced. (*Id.*; A.L.F. IV/420 (SA 22-23).)

The purpose of the ten-day notice and consistency between the different provisions of the lien statute would be better served by determining that the “owner” for purposes of notice under Section 429.100 is the owner at the time of contracting with the original contractor for the work. In this case, Cornerstone was the owner at that time.

C. **Notice To Owner’s Agent**

Alternatively, Brentwood complied with Section 429.100, because it provided notice to the County’s agent for the project: Cornerstone. (L.F. VIII/1074-80; A.L.F. VI/729, 738 § 4.2.). The lease states that Cornerstone is the County’s agent for the Project, (A.L.F. VI/729, 738 § 4.2), especially for the limited purpose of transmitting a notice of lien to the County: “[Cornerstone] shall promptly notify the County of the imposition of such [a mechanic’s] lien of which [Cornerstone] is aware and shall promptly, at its own expense, take such action as may be necessary to fully discharge or release any such lien.” (A.L.F. VI/745 § 8.5 (a).)

In the context of determining whether a contractor was an original contractor, because it had contracted with the owner through an agent, or a subcontractor, the *River City* court said this:

The term ‘agent’ as used in our mechanic’s lien statutes, is interpreted broadly. The level of authority required to create an agency relationship for purposes of the mechanic’s lien statute is less than required in other contexts.

River City, 341 S.W.3d at 721 (citations and internal quotation marks omitted).

D. Notice To Owner of Leasehold Or To Equitable Owner

1. Claim

The petition alleges that “by virtue of its leasehold interest and option to repurchase . . . Cornerstone was and is the equitable owner and/or the record owner of [the Property].” ((L.F. I/64 ¶ 143.)

2. Owner of Leasehold

Section 429.070.1 allows the imposition of a mechanic’s lien against improvements for which a tenant has contracted as well as against the leasehold interest itself. Cornerstone is “*the owner[] of the leasehold property* upon which the lien was sought to be attached.” *Miners Lumber*, 117 S.W.2d at 714.

Defendants argue that, even if the lien is only against Cornerstone’s leasehold interest, Brentwood was obliged to give notice not only to Cornerstone but also to the County. This contention is supported by neither precedent nor logic. They cite no case that has so held. (Resp’t Substitute Br. at 57.) Keeping in mind the purpose of the ten-day notice is to give the person who hired the contractor the opportunity to avoid paying twice for the same work, *River City*, 341 S.W.3d at 723, there is no logical reason for requiring a subcontractor who seeks a lien against the leasehold to give notice to the landlord, one who did not hire the general contractor, who has no duty to pay for the construction, and who has no property interest subject to the lien.

Defendants insinuate that the lien must fail, because Brentwood “failed to introduce evidence regarding the economic feasibility and possibility of damage the subject premises might suffer upon removing the improvements in question” (Resp’t Substitute Br. at 57-

58, fn. 5.) Defendants did not raise this issue in the trial court, (L.F. II/345 ¶ 3.a.), or in the Court of Appeals (Resp't Br. at 14-43). So, it should not be considered. *Brown v. Brown*, 423 S.W.3d a 788; Rule 83.08(b).

Defendants also ignore that the leasehold interest itself is subject to such a lien. Section 429.070. There is no reason to believe that Cornerstone's lease itself would not have sufficient value to satisfy Brentwood's lien. (A.L.F. VI/755-56 § 11.1.) Now that Cornerstone has purchased the property, (L.F. VIII/1099 ¶ 4), its leasehold interest has ripened into a fee interest, an interest to which the lien attaches and which a Sheriff's sale purchaser would acquire.

3. Equitable Owner

Throughout the construction, Cornerstone held the contractual right, as well and the obligation, to purchase the Property. (L.F. I/64 ¶ 143; A.L.F. VI/755-57, 783-94.) Years after the Project was built, Cornerstone re-purchased the Property. (L.F. VIII/1099 ¶ 4.)

Though Defendants do not dispute that the interest of an equitable owner can be subjected to a mechanic's lien, they insist that, even if Cornerstone was the equitable owner of the Property at the time it received the Section 429.100 notice, Brentwood also should have given a ten-day notice to the County. (Resp't Substitute Br. at 58-59.) But, once again, neither case law nor logic supports Defendants' contention.

Defendants rely on *Towner v. Remick*, 19 Mo. App. 205, 209-10 (K.C. 1885). But they fail to observe that, in that case, plaintiffs sought a lien against the fee interest held by two tenants in common, but they gave notice to only one of them. *Id.* On the contrary, to the extent that the lien Brentwood seeks reaches only the equitable ownership of Cornerstone,

there are no other equitable owners entitled to notice. A lien against Cornerstone's equitable interest has no effect on the County's title. And, so, there is no logical reason to require notice to the County as well.

E. Just and True Account

1. Waiver Form is Ambiguous

Defendants repeatedly claim that the Clayco lien waiver form is "unambiguous." (Resp't Substitute Br. at 24, 32-35.) But saying it does not make it so. While they quote much of the form, they omit its title, the very part that creates the ambiguity. (Resp't Substitute Br. at 27-28.) The title "**Partial Waiver of Liens**" is in all capital letters, bold-face type, in larger fonts, and prominently placed at the top of the page. (*Compare* Resp't Substitute Br. at 27 *with* S.L.F. 13 (SA 24).) It is the conflict between this title and the words in the body of the form - words that Brentwood is waiving "any and all liens" - that creates this ambiguity.

Citing *J.C. Penney Life Insurance Co. v. Transit Casualty Co.*, 299 S.W.3d 668, 673 (Mo. App. W.D. 2009), Defendants argue that the meaning of the partial lien waiver must be discerned from the four corners of the document itself and not from parol evidence and that it must not be read as it would be understood by a reasonable person. (Resp't Substitute Br. at 32-33.) The four corners of the waiver form include the title: "**Partial Waiver of Lien.**" (SA 24.)

And, *J.C. Penney* never mentions, and certainly never rejects, the *Klonski v. Cardiovascular Consultants of Cape Girardeau, Inc.*, 171 S.W.3d 70, 72-73 (Mo. App. E.D. 2005), approach to determining whether an agreement is ambiguous: can it be read by a

reasonable, average person in more than one way? *J.C. Penney*, 299 S.W.3d at 673.

Defendants include an interesting discussion of a few examples of lien waivers which, without reference to any evidence in the record, they say are used in the construction industry. (Resp't Substitute Br. at 33.) But, Defendants' general comments are academic for the reason that "a reasonable, average person," *Klonski*, 171 S.W.3d at 72-73, reading just the words of this document, would not know what this form means. Did Brentwood waive any and all liens for any work it had done and would do on this Project? If so, how is this a "partial" waiver? Did it waive its lien for work up to the date of its pay application, up to the date of the document, or to the extent of the payment? If so, how is this a waiver of "any and all liens"?

If we also consider the circumstances in which the waivers were given, it becomes apparent that there are several possible interpretations.

For example, Bettie signed a waiver on July 20, 2006, exchanging it for a check she got the next day. (A.L.F. VI/632) The check was in payment of the work Brentwood had performed through May 31, 2006, less 10% that Pal's Glass held back, until the completion of all work, as retainage. (*Id.*) So, did she waive a lien:

1. for all of the work performed through May 31st except for retainage?
2. for all work through May 31st including the retainage (then almost \$60,000.00)?
3. for all work Brentwood had performed through July 20th (including more than \$100,000.00 in

work in June and July and still due, plus retainage)?

4. for all work Brentwood had done up to July 20th as well as the hundreds of thousands of dollars of work that it would do in the future?
5. only to the extent of the amount it was then paid?

(*Id.*)

As discussed in Appellant’s principal substitute brief at 36-38, this ambiguous form must be construed against Clayco, the drafter, and must be supplemented by parol evidence of the parties’ intention. And, the only evidence of anyone’s intent is that it was Brentwood’s understanding and intent that it was waiving its lien only to the extent of the amount of the recited payment. (A.L.F. VI/630 ¶ 14.)

Defendants misinterpret the import of *Tharp v. Keeter/Schaeffer Investments, L.P.*, 943 S.W.2d 811, 817-20 (Mo. App. S.D. 1997). (Resp’t Substitute Br. at 34-35.) All but the last of the *Tharp* lien waivers stated that the contractor waived all lien rights up to a stated date. *Id.* at 817-18. They were not titled “**Partial Waiver of Lien.**” *Id.* And unlike the last lien waiver, none of the earlier forms said that the waiver was limited to the amount of the payment. *Id.*

Because the next to last lien waiver said that the contractor released all rights to claim a lien for all work done up to a stated date, a date weeks after the contractor had finished the job, the owner argued that the contractor had waived his right to assert a lien for the 10% retainage that had been withheld from all prior payments. *Id.*

The owner argued that, because the contractor had added language to the last lien waiver – words that limited the waiver to the “extent of the \$25,000 payment received,” that changed the title by adding the word “Partial,” and that said it was for “Partial Retainage,” – the contractor must have known that the earlier lien waivers were “total waivers” of all rights to claim a lien for work up to the dates stated in those forms. *Id.*

So, the question in *Tharp* was not the meaning of the last waiver, the form Defendants quote. *Id.* at 819. It was whether the owner could escape a lien for the ten percent retainage. *Id.* The focus was on the earlier lien waivers, signed by the contractor and exchanged for ninety percent of the amount earned, “where both parties understood the ten percent withheld on each invoice would be payable when the job was finished.” *Id.*

Because the court found that the owner had not changed its position to its detriment based on the lien waivers, it held that the “lien waivers executed by Plaintiff waived his right to a mechanic’s lien only for the amounts shown of the waivers, not for the retainage shown on each invoice.” *Id.* at 820.

In this case, there is no evidence that Cornerstone or the County changed their positions to their detriment – or even saw – the Brentwood lien waivers.

Disregarding most of the parol evidence of the parties’ intentions, summarized at pages 38-40 of Appellants’ Substitute Brief, Defendants contend that the language of Glass Installation Subcontract⁴ - words which indicate that the waivers were meant to waive a lien only to the extent of the amount of the recited payment - must not be considered, because Clayco was not a party to this contract. (Resp’t Substitute Br. at 35.) What is missing from

⁴Subcontract between Pal’s Glass and Brentwood.

this topsy-turvy argument is any recognition that it was not to Clayco, but rather to Pal's Glass, that Brentwood gave these forms in exchange for Pal's Glass' progress payments. (E.g., A.L.F. IV/494 at 194, l. 19 - 196, l. 19.) As these documents were executed and delivered as part of Brentwood's performance of its contractual duties under the Glass Installation Subcontract, the provisions of that contract are most relevant to Brentwood's and Pal's Glass' intentions.

2. Extra Work

Defendants argue that Brentwood's lien is not a just and true account, because, they allege, it includes charges for "extra work" that are not documented by executed change orders. (Resp't Substitute Br. at 30-32.) Defendants correctly observe that the Glass Installation Subcontract requires that changes in the scope of work which affect the price to be paid must be documented by an agreed change order. (L.F. I/122-23, §§ 7.1 - 7.9.) However, like any contractual requirement, "parties can waive a change order requirement by orally agreeing to the work." *KC Excavating and Grading, Inc. v. Crane Construction Co.*, 141 S.W.3d 401, 407 (Mo. App. W.D. 2004).

Without any references to the record, Defendants say that the charges for extra work were unauthorized. (Resp't Substitute Br. at 31.) But, they ignore evidence in the record that demonstrate that the charges were authorized and that Pal's Glass waived the change order requirement. (E.g., A.L.F. VI/630 ¶¶ 14-16; A.L.F. VI/631 ¶ 21; A.L.F. IV/473 Dep. p.91.)

3. Hourly Rate

Brentwood is entitled to a lien for the reasonable value of the labor and material that it furnished. *Dave Kolb Grading*, 837 S.W.2d at 931. The reasonable value of services

is a question of fact. *E.g., Leggett v. Mutual Commerce Casualty Co.*, 250 S.W.2d 995, 999 (Mo. 1952).

The labor rate stated in the Subcontract is evidence of the reasonable value of the work; but it is not conclusive. The cases cited by Defendants concerning limiting recovery in quantum meruit to the *total* agreed contract price for the work, (Resp't Substitute Br. at 37-40), have no application to this issue because: (a) the labor rates are not the *total* contract price; and, (b) most of Brentwood's claim is for extra work – *i.e.*, work done for Pal's Glass and/or Clayco over and above the scope of work under the Subcontract, (*e.g.*, L.F. I/135-44).

Defendants again distort the standard of review by claiming that there is “no *substantial* evidence that the overcharge was due to an honest mistake. . . .” (Resp't Substitute Br. at 38 (emphasis added).) Even if, *arguendo*, Brentwood was mistaken in using a higher labor rate, there is evidence that this was simply an honest mistake. (A.L.F. VI/631 ¶ 18.)

It is a simple matter to modify the labor rate and thereby proportionally reduce the amount of the lien. As such, this is no basis for finding that the lien fails to provide a “just and true” account. *Missouri Land Development Specialties, LLC v. Concord Excavating Co.*, 269 S.W.3d 489, 499 (Mo. App. E.D. 2008).

Defendants' argument that the total balance shown in the lien, by comparison to the original contract amount less progress payments, by itself, demonstrates that the lien is not a “just and true” account, (Resp't Br. at 30), must be disregarded, as they make this contention for the first time in this Court, (L.F. II/345 ¶ 3.a.; Resp't Br. (Court of Appeals) at 27-30). Rule 83.08 (b); *Brown v. Brown*, 423 S.W.3d at 788.

4. Payments to Suppliers

At the time that it filed its lien, Brentwood was not aware of the \$47,343.92 in payments made by Clayco to Brentwood's suppliers. (A.L.F. IV/467 Dep. p. 57, l. 22 - p. 58, l. 21; A.L.F. VI/626 ¶ 3; A.L.F. VI/631 ¶ 19.) Defendants ignore this testimony of Brentwood's corporate designee:

Q. Were those payments deducted from your claim regarding materials in your mechanic's lien?

A. No.

Q. Why not?

A. I was not aware of them.

(A.L.F. IV/467, Dep. p. 58, ll. 16-21.) As this is evidence that the omission of these credits was innocent, the failure to give these credits does not destroy the lien. *E.g.*, *Glasco Electric Co. v. Best Electric Co.*, 751 S.W.2d 104, 109-10 (Mo. App. E.D. 1988); *A.E. Birk & Son Plumbing and Heating, Inc. v. Malan Construction Co.*, 548 S.W.2d 611, 617 (Mo. App. St. L. 1977).

Defendants' repeatedly refer to what they characterize as Brentwood's misrepresentation in the January 12th partial lien waiver. (Resp't Substitute Br. at 40, 41.) Like each of the previous partial lien waivers, the form stated that Brentwood had paid its suppliers and subcontractors. (A.L.F. IV/516-26 (S.A. 24)). But, they point to no evidence of whether the bills, which Clayco paid three and a half months later, (L.F. I/69-70), were for materials or labor that had been furnished by January 12th, weeks before Brentwood finished working (*e.g.*, A.L.F. VI/629 ¶ 13). So, there is no evidence that Brentwood misrepresented

anything.

But, even if it did, this argument is misleading, because any such misrepresentation would have absolutely no bearing on the question of whether Brentwood was aware that Clayco had made these payments.

F. Conclusion

There is evidence in the record that Brentwood filed its lien within six months of its last day of work. Also, there is evidence that, by giving notice to Cornerstone and Koman, it gave the required ten-day notice of its intention to file its mechanic's lien, because Cornerstone was the owner of the Property when the original contract was signed, Cornerstone was the agent for the County who owned the Property during construction, Cornerstone itself was the equitable owner as well as the owner of a leasehold interest in the Property, and Koman signed the contract with Clayco. There is evidence that Brentwood's lien is a just and true account despite Defendants' claims to the contrary, because it did not contain charges for work for which it had waived its right to assert a lien, its inclusion of charges for extra work and its labor rate were proper, and its failure to credit Clayco's payments to Brentwood's suppliers was completely innocent.

CONCLUSION

For the foregoing reasons, the trial court erred in granting Defendants' motion for summary judgment as to the bond claim and as to the mechanic's lien claim. The court's judgment should be reversed and the case remanded for trial on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
RULE 84.06(c)

The undersigned counsel of record hereby certifies that the foregoing brief includes the information required by Rule 55.03, was prepared in proportional typeface of 13 points, that the word processing system used to prepare the brief is WordPerfect X6 in Times New Roman, and that the brief contains 7,100 words as determined by the WordPerfect X6 word counting system.

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CERTIFICATE OF SERVICE

I certify that a copy of Substitute Reply Brief of Appellant were served by ECF Notice of Electronic Filing this 26th day of June, 2014, to:

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