

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

TWEHOUS EXCAVATING COMPANY, INC.,

APPELLANT,

v.

L. L. LEWIS INVESTMENTS, L.L.C, ET AL.,

RESPONDENTS.

DOCKET NUMBER WD69820
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DATE: August 4, 2009

Appeal From:
COLE COUNTY CIRCUIT COURT
THE HONORABLE PATRICIA S. JOYCE, JUDGE

Appellate Judges:
DIVISION THREE: HAROLD L. LOWENSTEIN, Presiding Judge, JOSEPH M.
ELLIS and LISA WHITE HARDWICK, Judges

Attorneys:
Paul T. Graham, Esq., Jefferson City, MO, for appellant.

Michael G. Berry, Esq., Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

TWEHOUS EXCAVATING COMPANY, INC.,

APPELLANT,

v.

L. L. LEWIS INVESTMENTS, L.L.C, ET AL.,

RESPONDENTS

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Cole County

Before Division Three Judges: HAROLD L. LOWENSTEIN, Presiding Judge,
JOSEPH M. ELLIS and LISA WHITE HARDWICK, Judges

Holder of mechanics lien, Twehous Excavating Company, Inc., was assigned construction notes on defaulting landowner to lender. After settlement of mechanics liens balances, lender assigned landowner's notes to it to lien holder Twehous. After foreclosure on the property was secured, lien holder Twehous brought suit for the deficiency on the notes assigned to it by lender. The trial court sustained the landowner's motion for judgment on the pleadings on Twehous's suit to recover the deficiency. The trial court found that the deficiency action was barred either by the doctrine of *res judicata* or by the settlement agreement reached in the mechanic's lien suit. Twehous appeals.

Reversed and remanded.

Division Three holds:

The issue in this case is the effect, if any, of a previous mechanic's lien action, which was settled, on a subsequent suit seeking a deficiency following the foreclosure sale of the subject property.

Twehous argues that the trial court erred in finding its deficiency suit was barred. *Res judicata*, or claim preclusion, precludes a litigant from bringing in a subsequent lawsuit, claims that *should* have been brought in the first suit. Lender could not have brought a deficiency claim at the time of

the mechanic's lien suit because lender had yet to foreclose on the property. Thus, the deficiency action was not barred by the doctrine of *res judicata*.

The real issue in this suit is whether the scope of the settlement agreement barred Twehous from bringing this separate lawsuit seeking a deficiency judgment. The intent of the parties to the settlement agreement was clearly to resolve the dispute as to the amount of the mechanics liens and to determine the relative priority of the interests of the two lien holders, the lender and Twehous. Thus, consistent with that intent, the provisions of the agreement pertaining to Twehous's rights of recovery only implicate its interest in the property at that time, the mechanic's liens. Twehous did not have any legal interest in the lender's notes when the agreement was reached. Upon assignment of the notes, Twehous stood in the lender's shoes with regard to its interest in the real estate. The lender had not waived any right to seek a deficiency judgment in the settlement agreement. Accordingly, Twehous, the assignee, succeeded to the rights of the lender, the assignor. These rights included foreclosure on the notes, the selling of the real property, and the action seeking a deficiency judgment. Nothing in the settlement agreement barred the deficiency suit.

Thus, because Twehous, as the assignee of the notes secured by the real property, was not barred from seeking a deficiency judgment by the doctrine of *res judicata* or the settlement agreement, the judgment of the circuit court is reversed and remanded.

Opinion by: Harold L. Lowenstein, Judge

August 4, 2009

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