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NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

**FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA**

BRAD BAKER PROPERTIES, LLC, an)
Oklahoma limited liability company,)

Plaintiff/Appellee,)

DEC 22 2021

**JOHN D. HADDEN
CLERK**

vs.

TRAC-WORK, INC., a foreign
for-profit business corporation,

Defendant/Appellant.

Rec'd (date)	12-22-21
Posted)
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	yes <input checked="" type="checkbox"/> no

Case No. 119,604

APPEAL FROM THE DISTRICT COURT OF
CANADIAN COUNTY, OKLAHOMA

HONORABLE JACK D. McCURDY II, TRIAL JUDGE

AFFIRMED

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Oklahoma City, Oklahoma

For Plaintiff/Appellee

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For Defendant/Appellant

OPINION BY JANE P. WISEMAN, PRESIDING JUDGE:

Defendant Trac-Work, Inc. appeals the trial court's order granting Plaintiff
Brad Baker Properties, LLC's motion for summary judgment. This appeal

proceeds according to Supreme Court Rule 1.36, 12 O.S. Supp. 2020, ch. 15, app.1, without appellate briefing. After review of the record on appeal and due consideration, we affirm the trial court's order.

FACTS AND PROCEDURAL BACKGROUND

From March 17, 2010, to August 25, 2017, Plaintiff owned the property at issue here located in Canadian County, Oklahoma. On August 25, 2017, Plaintiff conveyed the property to RJR Trucking, LLC, and on August 29, 2017, recorded its mortgage in Canadian County on the property for the principal amount of \$1,035,000.

On August 30, 2017, Trac-Work, Inc., and RJR Trucking, LLC, executed a contract to construct new railroad tracks and upgrade existing tracks on the property. On October 13, 2017, RJR Trucking then conveyed the property to RJR Trans Loading, LLC, by quitclaim deed. On November 7, 2017, Plaintiff consented to the transfer of the property by RJR Trucking and to the assignment of the promissory note to RJR Trans Loading.

At some point, RJR Trans Loading failed to make the mortgage payments to Plaintiff and defaulted under the promissory note. Plaintiff brought the present action against RJR Trans Loading, LLC, for breach of the promissory note with an unpaid balance of \$778,781.12 and for foreclosure of the mortgage. In addition to seeking judgment for the balance due, Plaintiff asked the trial court to declare its

mortgage a valid lien on the property and to determine “the priority of interest or claims by” other lien holders. It argued the proceeds from the sale of the property should be applied in this order: (1) “to the payment of all costs and expenses of foreclosure,” and (2) “to satisfy Plaintiff’s Mortgage and Note and all other valid liens in order of their priority.” Plaintiff also named Trac-Work, Inc., as a defendant stating that any claim to “some right, title, lien, estate, encumbrance, claim assessment, or interest in and to” the property in the form of a mechanic’s or materialman’s lien should “be deemed a nullity of no force and effect.”

Trac-Work answered the petition and asserted a counterclaim and cross-claim arguing it contracted with “RJR Trucking, LLC on August 25, 2017 to supply labor and materials to construct new railroad track and other improvements to the Property.” Trac-Work contends it performed all the work required of it under the contract, but RJR Trans Loading failed to pay the balance owed. Trac-Work then filed a mechanic’s and materialman’s lien against the property on March 22, 2018. It seeks a judgment against the property in the amount of \$692,820.54 “for repairs, improvements, materials, equipment and labor provided for the benefit of the Property and its owners,” and claims its lien is superior to any other lien including Plaintiff’s.

In its answer to Trac-Work's counterclaim and cross-claim, Plaintiff denied some allegations, admitted others, and denied the ability to answer some due to lack of sufficient knowledge.

When RJR Trans Loading failed to timely answer the petition, Plaintiff filed a motion for default judgment which the trial court granted, entering judgment for Plaintiff in the amount of \$778,781.12 plus interest.

Plaintiff then filed a motion for summary judgment against Trac-Work arguing that because no genuine issue of material fact existed, it was entitled to judgment as a matter of law on the issue of priority of liens. Plaintiff argued its mortgage was superior to Trac-Work's mechanic's and materialman's lien, it was entitled to foreclose its mortgage on the property, and it was entitled to judgment as a matter of law on Trac-Work's counterclaims against it. Trac-Work responded that disputed material facts exist and that its lien "for construction of or improvement to railroads" is superior to Plaintiff's mortgage pursuant to 42 O.S.2011 § 161 regardless of its lien's filing date. Plaintiff replied maintaining that (1) Trac-Work failed to follow the procedures outlined in § 161 rendering its lien "ineffectual," (2) Section 161 does not attach to real property, and (3) "Plaintiff's vendor's lien is superior in [t]itle to [Trac-Work's] M&M lien."

The trial court granted Plaintiff's motion for summary judgment, and Trac-Work appeals.

STANDARD OF REVIEW

As stated succinctly in *Toch, LLC v. City of Tulsa*, 2020 OK 81, ¶ 15, 474 P.3d 859, “Summary judgment settles only questions of law,” which we review *de novo*. “In a *de novo* review, we have plenary, independent and non-deferential authority to determine whether the trial court erred in its application of the law and whether there is any genuine issue of material fact.” *Payne v. Kerns*, 2020 OK 31, ¶ 10, 467 P.3d 659. “Like the trial court, we examine the pleadings and summary judgment evidentiary materials submitted by the parties to determine if there is a genuine issue of material fact.” *Id.* “We view the facts and all reasonable inferences arising therefrom in the light most favorable to the non-moving party.” *Id.*

ANALYSIS

In its supplemental petition in error,¹ Trac-Work argues the trial court erred in granting Plaintiff’s motion for summary judgment because (1) there are disputed questions of law and fact, (2) Plaintiff’s mortgage does not take priority over its lien, (3) Trac-Work’s “work was performed on a railroad for purposes of the lien

¹ After issuing a show cause order asking Trac-Work to show why the trial court’s April 27, 2021 order is final and appealable, Trac-Work supplemented its petition in error with a 12 O.S.2011 § 994(A) order from the trial court which also states that its “adjudication of the disputed lien priority between Plaintiff [] and Defendant Trac-Work, Inc. appears to be the only material contested issue in the case, and therefore generally determinative of all claims and issues.”

statutes granting priority,” and (4) Trac-Work’s work met the statutory requirements for a superior lien.

Trac-Work argues genuine issues of material fact exist precluding summary judgment in Plaintiff’s favor. Of the ten undisputed facts listed in Plaintiff’s summary judgment motion, Trac-Work disputes only No. 8 which states:

8. On **August 30, 2017**, Trac-Work, Inc. and RJR Trucking, LLC entered into an agreement (the “Construction Agreement”) to construct new railroad tracks on the Subject Property. See Construction Agreement attached as Exhibit “H”.

8. Disputed. RJR Trucking, LLC (“Trucking”) and TWI entered into a Contract Agreement (“Agreement”) dated August 25, 2017. See Contract Agreement attached as Exhibit 1.

The contract between RJR Trucking and Trac-Work shows the parties executed the contract on August 30, 2017; however, the first sentence of the contract states: “By mutual agreement entered into this [] 25th day of August, 2017, by RJR TRUCKING, LLC (Owner) and Trac-Work, Inc. (Contractor), for the purpose of:” Any dispute over the date of the contract is not material or determinative of any issue before us on appeal.

Trac-Work argues the trial court erred in determining Plaintiff’s mortgage takes priority over its railroad lien. In its counterclaim and cross-claim, Trac-Work stated it “filed a Mechanic[’]s and Materialman’s Lien . . . against the Property on March 22, 2018, . . . all in accordance with 42 O.S. § 141, *et seq.*” Sections 141

through 154 encompass the mechanic's and materialman's lien statutes. *See Jones v. Purcell Invs., LLC*, 2010 OK CIV APP 15, ¶ 6, 231 P.3d 706 (“In Oklahoma, statutory provisions for mechanics' liens are codified at 42 O.S.2001 §§ 141-154.”). Trac-Work's lien is titled “Mechanic's and Materialmen's Lien Statement” and advises it has a claim against RJR Trucking and RJR Trans Loading. The lien statement provides in part:

The claim is made for and on account of labor, materials, services and equipment consisting of installation of railroad track and related work last performed on or about January 11, 2018. All labor, materials, services and equipment were provided pursuant to a contract by and between Claimant, as contractor, and RJR Trucking, LLC, as owner, and that such labor, materials, services and equipment were provided to and performed upon the El Reno Rail Spur [] owned by RJR

Claimant, by and through the undersigned representative, hereby verifies that it has complied with the pre-lien notice requirements of 42 O.S. § 142.6, if applicable, having provided written notice of its claims by sending the same to Owner on February 28, 2018, via certified mail, return receipt requested.

(Emphasis omitted.) In its response to the motion for summary judgment, Trac-Work identifies and discusses this mechanic's and materialmen's lien but says that because the claim is “made for labor, materials, services and equipment consisting of installation of railroad track and related work on the Rail Spur,” it must be considered a railroad lien pursuant to 42 O.S.2011 § 161 and thus a lien with

priority over a recorded mortgage whether earlier in time or not. Section 161

states:

Every mechanic, builder, artisan, workman, laborer, or other person, *who shall do or perform any work or labor upon*, or furnish any materials, machinery, fixtures or other thing towards the equipment, *or to facilitate the operation of any railroad*, shall have a lien therefor upon the roadbed, buildings, equipments, income, franchises, and all other appurtenances of said railroad, superior and paramount, whether prior in time or not, to that of all persons interested in said railroad as managers, lessees, mortgagees, trustees, beneficiaries under trusts or owners.

42 O.S.2011 § 161 (emphasis added). The railroad lien statutes are codified at 42 O.S.2011 §§ 161-164.

During the hearing on the motion for summary judgment, Plaintiff's counsel argued:

Again, I set forth in our reply the lien that was recorded purported to be under section—the notice was 142.6. The lien as recorded was, on its face, appeared to be from Section 141. The M&M lien statute, again, we would have priority.

We agree. The lien Trac-Work relies on in response to Plaintiff's motion for summary judgment is on its face a mechanic's and materialman's lien. It is titled a "Mechanic's and Materialmen's Lien Statement" and advises it provided the pre-lien notice required by 42 O.S. § 142.6, which is contained in the mechanic's and materialmen's lien statutes. Section 142.6 defines "Claimant" as "a person, other

than an original contractor, that is entitled or may be entitled to a lien pursuant to Section 141 of this title.” 42 O.S.2011 § 142.6. Section 141 governs mechanic’s and materialman’s liens, not railroad liens. Based on the record before the trial court and now before us, we conclude Trac-Work’s lien is a mechanic’s and materialmen’s lien submitted and filed in accordance with § 141, not a railroad lien.

Because Trac-Work’s lien constitutes a mechanic’s and materialman’s lien pursuant to § 141, Plaintiff’s mortgage is superior as the real estate mortgage was recorded in Canadian County on August 29, 2017. Trac-Work and RJR Trucking did not execute their contract until the following day, August 30, 2017. More importantly, it is undisputed (as Trac-Work admitted in discovery) that no work on the property was performed before August 30, 2017. As stated in *Basham v. Goodholm & Sparrow Inv. Co.*, 1915 OK 700, ¶ 0, 152 P. 416 (syl. no. 4 by the Court):

Under the laws of this state a mortgage duly executed and recorded takes precedence over a materialman’s lien accruing after the recording of such mortgage, even to the extent of attaching to improvements placed upon the mortgaged premises afterwards by the materialman.

The Supreme Court has further held:

Priority of liens between mechanics’ and materialmen’s liens and mortgage liens generally fall into two broad categories, i.e., one category sustains the general principle that priority of liens is determined by

the date of performing the first labor and furnishing the first materials; and *the other category sustains the general principle that such priority is determined from the date construction is commenced.* As will be hereinafter shown, the first general principle has been generally applied where there was no general contract of construction but the owner-builder entered into separate contracts with materialmen for certain segments of the construction; and the *second general principle has been generally applied where there was a general contract of construction and construction was commenced prior to the time the mortgage lien was filed for record.*

American-First Title & Trust v. Ewing, 1965 OK 98, ¶ 21, 403 P.2d 488

(emphasis added). The second principle applies here as this construction contract was not begun until, at the earliest, August 30, 2017. Because Plaintiff's mortgage was recorded before any work or construction under the contract was begun, the adamant law on the issue dictates that Plaintiff's mortgage takes priority over Trac-Work's lien filed March 22, 2018.

Even if this can be argued to be a "railroad lien," Trac-Work must still show that 42 O.S.2011 § 161 applies in order to enjoy priority over Plaintiff's mortgage lien. Despite Trac-Work's arguments, we agree with the trial court that this statutory section does not apply in this case. The trial court stated:

The defendant based their argument mostly upon Title 42 O.S. sec. 161 which gives liens dealing with railroads preferential treatment. The Court however in this case finds that this particular statute only applies if the work is performed on railroad owned equipment or property. In the instant case the work was done on private property and the work did not "facilitate the operation of the

railroad”. The railroad was able to operate and in fact continues to operate regardless of whether or not this spur was built or in use. The Statute further states that the lien shall be on “the roadbed, buildings, equipments, income, franchises, and all other appurtenances of said railroad” which further convinces the Court that the lien only applies to railroad property and not private property. Based upon the Court’s analysis of the facts and the law in this case, the court finds that the plaintiff’s Motion for Summary Judgment should be and is hereby granted.

The case of *Kansas City Southern Railway Co. v. Rosier*, 1913 OK 368, 132 P. 908, involved an “action brought by a number of laborers *on the line of the Kansas City Southern Railway Company* . . . to recover for services rendered and to enforce a lien for the payment therefor against the roadbed, buildings, equipment, etc. of the said railroad company.” *Id.* ¶ 1 (emphasis added). The Oklahoma Supreme Court held that “the species of service performed was labor upon the roadbed, right of way, and tracks *of the railway company*, to enforce payment for which, in our judgment, this statute gives a right to a lien.” *Id.* ¶ 3 (emphasis added).²

The contract between Trac-Work and RJR Trucking/RJR Trans Loading states that it “proposes to furnish all equipment, labor, supervision, materials and insurance necessary to perform the following railroad new track construction *at*

² We note that this chapter in Title 42, chapter 4, is entitled “Railroads,” and the last section of the chapter, § 164, requires ten days’ notice of the lien to be given “to the railroad.” This reinforces our position that this lien does not qualify under the undisputed facts for treatment as a preferential lien against a railroad. 42 O.S.2011 § 164.

your company's El Reno, Oklahoma facility." (Emphasis added.) The undisputed facts show Trac-Work contracted to perform construction work on a railroad spur owned by RJR Trans Loading on RJR's property—work not performed for a railroad on a spur not owned by a railroad on property not owned by a railroad—all prerequisites to meeting the statutory requirements for asserting a "right to a lien against railroads," as the title to § 161 contemplates. Although Trac-Work contends its work entitled it to a railroad lien under 42 O.S.2011 § 161, the statutory lien established in that section does not apply to this non-railroad property and work under the undisputed facts of this case.

CONCLUSION

We conclude, as did the trial court, that summary judgment in favor of Plaintiff was proper as a matter of law, and the trial court's judgment is affirmed.

AFFIRMED.

BARNES, J., concurs, and BLACKWELL, J., concurs in result.

BLACKWELL, J., concurring in result:

I respectfully disagree with the trial court's, and thus the majority's, reading of 42 O.S.2011, § 161 and would hold that the appellant's lien fits within the statute as written. The statute makes no distinction between private and publically held railroads or whether "the work is performed on railroad owned equipment or

property,” as the majority would require. The appellant’s work was on, furnished materials for, and facilitated the operation of “any railroad.” Section 161, therefore, could have applied.

Nevertheless, the appellant clearly filed their lien pursuant to § 141, failed to give any mandatory notice pursuant to § 164, and did not file suit within the limitations period of § 162. I agree with the majority that, when the appellant’s lien is stripped of any priority status § 161 would confer, the appellee’s lien is superior. Accordingly, I concur in the affirmance of the grant of summary judgment.

December 22, 2021