

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

10302 MADISON AVE., LLC)	CASE NO. CV 12 787831
)	
Plaintiff)	JUDGE JOHN P. O'DONNELL
)	
vs.)	
)	
J.L.E.C., INC., dba J. LOMBARDO ELECTRIC, INC.)	<u>JOURNAL ENTRY</u>
)	
)	
Defendant/Third-party Plaintiff)	
)	
vs.)	
)	
CLEVELAND HEATED STORAGE, LLC, et al.)	
)	
)	
Third-party defendants)	

John P. O'Donnell, J.:

The plaintiff's complaint for slander of title and the defendant's counterclaim for unjust enrichment were tried to the court on June 24, 2013. Testimony was given by Robert Henderson, the plaintiff's chief financial officer, and John S. Lombardo, the defendant's president. Joint trial exhibits JX 1 through JX 13 and the plaintiff's exhibits 1, 5, 6, 12 and 13 were admitted. Written closing arguments of both sides were filed on June 28 and this entry follows.

SUMMARY

Plaintiff 10302 Madison Avenue, LLC is the owner of a building at 10302 Madison Avenue in Cleveland. The building's previous tenant went out of business and the plaintiff then rented it to Cleveland Heated Storage, LLC for use as a storage facility. In turn, CHS

retained defendant J.L.E.C., Inc., dba J. Lombardo Electric, Inc., to install and update electrical systems at the property. CHS did not pay for the work and Lombardo filed a mechanic's lien on January 30, 2012.

On July 25, 2012, Madison filed a complaint for a declaratory judgment that the mechanic's lien was invalid and for damages for slander of title. Lombardo responded with a counterclaim against Madison for unjust enrichment.¹

After cross-motions for summary judgment, the court, by an entry journalized May 13, 2013, found that the mechanic's lien was invalid and unenforceable, leaving the complaint for slander of title and the counterclaim for unjust enrichment to be decided at a trial.

FINDINGS OF FACT

Madison owns the property at 10302 Madison Avenue. In August, 2011, Madison leased the property to CHS, which planned to use the property as indoor storage for boats and cars. The lease covered an initial period of five years. Besides requiring CHS to pay monthly rent, the lease also obligated CHS to pay for improvements to the property's electrical systems. Considering that CHS would be spending money on the improvements, the monthly rent was less than it otherwise would have been and Madison allowed CHS to occupy the premises rent-free from August through December.

CHS contracted with Lombardo to do the electrical work. Lombardo had no contract with Madison. After Lombardo finished the majority of the work, CHS did not pay the \$49,814.00 bill. CHS did not refuse to pay on the basis that the work was faulty, and in this lawsuit Madison has stipulated that the work was done correctly.

¹ On October 9, 2012, Lombardo filed a third-party complaint alleging breach of contract against CHS and its guarantor, Phillip J. Cable. The third-party complaint against Cable only is stayed by his personal bankruptcy filing. CHS never entered an appearance and a default judgment on the third-party complaint against CHS was entered for Lombardo on December 21, 2012.

Having not received two progress payments, Lombardo stopped work and, on January 30, 2012, filed with the office of the fiscal officer of Cuyahoga County a mechanic's lien pursuant to Ohio Revised Code section 1311.01 *et seq.* After filing the mechanic's lien, Lombardo retained the debt collection company Taylor, Ferguson & Ross, to collect the unpaid bill.

On May 10, counsel for Madison corresponded to Michael Marino, TFR's director of operations. The letter acknowledged Lombardo's ability to place a lien on CHS's leasehold interest, but informed Marino that, since Madison was the owner of the property and CHS a lessee, Lombardo's lien on Madison's fee was invalid and should be removed.

In the meantime, CHS defaulted on the lease and Madison filed for eviction in the Cleveland Municipal Court's housing division.

The eviction case was resolved by a consent judgment entry dated May 21, 2012. The agreement allowed CHS to retain possession of the premises by making certain payments, including Lombardo's bill. The consent entry further provided that if CHS did not make the payments then Madison was "entitled to immediately obtain possession of the premises." CHS defaulted again, and, by July, Madison terminated the leasehold and took possession of the property.

Both before and after CHS's lease was terminated, Madison's counsel continued to urge Marino to release the mechanic's lien. Because Marino deemed CHS and its guarantor, Cable, as uncollectible he refused to release the lien. Even after the leasehold was terminated, Marino continued to threaten Madison with litigation. On July 16 he emailed Henderson that payment "to avoid foreclosure" was never received and a payment had to be made "to avoid litigation."

Unsatisfied with the response, he then emailed Madison's counsel on July 20 as follows:

Normally I would maintain a level of professionalism and not say what I am about to but you should have communicated with me as to the delinquency of Phil Cable's payments long ago and been a lot more cooperative throughout instead of playing games and trying to finagle a Release of Lien out of my client prior to payment.

Having the Attorney for JLEC file a lawsuit against your client is going to be fun and quite frankly feel good.

The email went on to claim, in essence, that Lombardo could lien Madison's fee interest in the property by virtue of an unspecified 1994 change in Ohio law. Marino went on to say that Madison "will lose this property or pay a considerable amount more than needed unless you deal direct"² and pay the lien amount within five days. He closed by warning: "This is your last chance. Govern yourself accordingly."³

This lawsuit was filed and, despite ample proof that CHS no longer had a leasehold interest in the property, Lombardo still refused to release the lien until after the May 13, 2013, entry.

LAW AND ANALYSIS

Madison's slander of title claim

Slander of title to real estate is a tort action against one who falsely and maliciously defames title to property and causes some special pecuniary damages or loss. *Prater v. Dashkovsky*, 10th Dist. No. 07AP-389, 2007-Ohio-6785, ¶11. Generally, slander of title to real estate involves the wrongful recording of an unfounded claim, such as a mechanic's lien, to the property of another. *Id.* To prevail, a claimant must prove: (1) there was a publication of a defamatory statement disparaging claimant's title; (2) the statement was false; (3) the statement

² Plaintiff's exhibit 12, Michael Marino July 20, 2012, email to David Mayo, Esq.

³ *Id.*

was made with malice or made with reckless disregard of its falsity; and (4) the statement caused actual or special damages. *Id.*

As to the first element, a statement is defamatory if it injures another's reputation. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-346 (1974). An assertion that a person in business does not pay bills that are owed is harmful to that person's reputation. The mechanic's lien filed by Lombardo is just such a statement in that Lombardo claims that Madison did not pay \$49,814 owed to Lombardo. The lien undoubtedly also disparaged Madison's title by encumbering it and limiting Madison's ability to sell the property or use it as security for a debt. Madison proved the first element of a slander of title claim.

The second element requires that the statement be false. That element is also satisfied. Lombardo never had a contract with Madison and had no reason to believe that Madison was liable under CHS's contract. And while it is true that Lombardo thought it had a meritorious claim for unjust enrichment, R.C. 1311.02 gives a lien only for work "undertaken by virtue of a contract."

The third element is malice *or* reckless disregard of the truth. *Green v. LeMarr*, 139 Ohio App. 413, 430-431 (2d Dist. 2000). The evidence is clear and convincing that Lombardo acted with both malice *and* reckless disregard of the truth. Marino's statements alone, as Lombardo's agent, show malice. He was explicit that it would be "fun" to file suit against Madison even though he could not show a legal basis for such a suit. If his claim had legal merit then his conduct might have been just offensive. But given the lack of legal or evidentiary support for his threatened lawsuit, his conduct was malicious.

Lombardo also acted with reckless disregard for the truth. CHS's leasehold was the only interest subject to a lien by Lombardo. The contractor knew as early as July that the

leasehold no longer existed and that therefore any basis for the lien was gone. Despite that, Lombardo continued to assert its lien for almost another year until the adverse May 13 ruling.

The final element is damages. The damages claimed by Madison are for the expenses incurred to have the invalid lien removed but not including the expense of this lawsuit. The prevailing party in a slander of title action may recover as special damages those attorney fees and expenses incurred to remove the cloud on title but not those incurred to prosecute the slander of title action. *Id.*, 435. Henderson testified that Madison incurred legal expense of \$27,000 to get the lien removed between its recording on January 30 and the filing of this lawsuit on July 25. Although some of that expense was in connection with the eviction action and subsequent negotiation of the consent entry, that lawsuit was necessitated by Lombardo's insistence that the lien was effective against Madison's interest and was not going to be voluntarily released. Hence, those attorney's fees are "special damages" for which Lombardo is liable for slander of title.

Lombardo's unjust enrichment claim

The elements of an unjust enrichment claim are: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *Lycan v. City of Cleveland*, 8th Dist. No. 94353, 2010-Ohio-6021, ¶7. Lombardo did confer on Madison a benefit of which it is aware: an improved electrical system. Moreover, Lombardo is almost certain to go unpaid if there is no recovery against Madison. Nevertheless, no injustice will happen if Madison is not forced to pay Lombardo.

Lombardo was well aware that it did not have a contract with the owner of the property. John Lombardo testified that he has been president of the company since 2001. This

experienced contractor understood that if CHS didn't pay then he had no contract with Madison to fall back on. Knowing that, he accepted the risk of CHS's non-payment and performed most of the contract. For that risk to be fairly shifted to Madison there must be some evidence that Madison agreed to bear it. There is no such evidence here.

Additionally, Madison has already provided value, albeit not to Lombardo, for the work in the form of free rent to CHS for five months.

Finally, unjust enrichment is an equitable remedy. As such, the person seeking the remedy must have "clean hands." *Just Like Us Family Enrichment Ctr. v. Easter*, 8th Dist. No. 94180, 2010-Ohio-4893, ¶19. Marino's conduct in continuing to assert a lien that was invalid as soon as CHS's leasehold terminated demonstrates Lombardo's unclean hands. To put it colloquially, Marino put the screws to Madison to try to extort money that Madison didn't owe. That alone should be sufficient to deny the equitable relief Lombardo seeks.

CONCLUSION

For the reasons outlined in this entry, the court finds in favor of plaintiff 10302 Madison Avenue, LLC on the complaint for slander of title and enters judgment in Madison's favor and against J.L.E.C., Inc. in the total amount of \$27,000 with interest at the statutory rate beginning on the date of this entry, and court costs. The court finds in favor of the plaintiff/counterclaim defendant 10302 Madison Avenue, LLC on the defendant/counterclaim plaintiff J.L.E.C., Inc's counterclaim for unjust enrichment, at the defendant's cost.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date: _____

SERVICE

A copy of this journal entry was sent by email, this 12th day of July 2013, to the following:

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Judge John P. O'Donnell