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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

GRIFFITH COMPANY,

Plaintiff and Respondent,

v.

SPONDULIX COMPANY, INC., et al.,

Defendants and Appellants.

F062045

(Super. Ct. No. S1500CV266038)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

McCarthy & Holthus, James M. Hester, Melissa Robbins Coutts, and Jessica L. Klickna for Defendants and Appellants.

RB Pierce and Ronald B. Pierce; Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, Catherine E. Bennett and Timothy G. Scanlon for Plaintiff and Respondent.

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This is an appeal from a judgment entered after a trial to the court sitting without a jury. Defendants and appellants Spondulix Company, Inc., and The Doctors Company contend the court erred in permitting plaintiff and respondent Griffith Company to recover on its bonded stop notice. (See Civ. Code, § 3083; all further section references are to the Civil Code unless otherwise stated.) Finding no error, we affirm the judgment.

### **FACTS AND PROCEDURAL HISTORY**

Plaintiff performed paving and other infrastructure work pursuant to a subcontract with Michael Mugford Builder, Inc., which was the general contractor for a development called Tiffini Place. Tiffini Place was owned by Tiffini R. Hughes Investments, LLC (Hughes), which obtained construction financing from defendants. Defendants' loan was secured by a deed of trust recorded prior to the beginning of work on the property by plaintiff. When plaintiff began work at the property, it served on defendants a preliminary 20-day notice that it was providing labor and materials for the project. (See § 3097.)

Plaintiff completed its work under the contract. At some point after the completion of plaintiff's work, the project shut down and defendants declared the loan in default. On October 10, 2008, plaintiff filed a mechanics' lien to secure payment for labor and materials provided on the project. On December 31, 2008, plaintiff served a bonded stop notice on defendants, demanding that they withhold from undistributed construction loan proceeds the money owed to plaintiff on its subcontract.

On January 6, 2009, plaintiff sued defendants and others to recover \$211,800 it claimed it was owed for labor and materials provided for the project. As relevant to this appeal, plaintiff asserted a cause of action for foreclosure of its mechanics' lien (Second Cause of Action) and for enforcement of its stop notice (Third Cause of Action). Defendants foreclosed on their deed of trust on May 5, 2009, and purchased Tiffini Place at the foreclosure sale on September 10, 2009.

All defendants named in the complaint defaulted, except for Spondulix Company, Inc., and The Doctors Company. The matter was tried on the mechanics' lien and the stop notice theories of recovery. (Although the mechanics' lien cause of action was, by its terms, directed only toward ownership interests in the property and although defendants' deed of trust was recorded prior to service of plaintiff's 20-day notice, plaintiff asserted at trial that its mechanics' lien had priority over the deed of trust and had not been extinguished by the intervening foreclosure sale.) The court found for plaintiff on the stop notice cause of action; it awarded judgment for plaintiff in the amount of the stop notice (\$211,800), together with statutory interest, costs, and attorney fees. The court found that plaintiff's mechanics' lien was extinguished by foreclosure of defendants' deed of trust; it dismissed the mechanics' lien cause of action.

### **DISCUSSION**

A stop notice "is a statutory remedy designed to reach unexpended construction funds in the owner's or lender's hands ...." (Cal. Mechanics' Liens and Related Construction Remedies (Cont.Ed.Bar 3d ed. 2011) § 2.82, p. 90.) Such notices are authorized by section 3103 for claims by those who have furnished "labor, services, equipment, or materials" for a construction project. When, as in the present case, the stop notice is supported by a bond equal to 125 percent of the claim (see § 3083), the construction lender is required, with certain exceptions, to "withhold from the borrower or other person to whom it or the owner may be obligated to make payments or advancement out of the construction fund, sufficient money to answer the claim ...." (§ 3162, subd. (a).) The claimant on a stop notice may file an action against the owner and construction lender to enforce the claim stated in the stop notice. (§ 3172.) Defendants contend in this appeal that plaintiff's bonded stop notice was not served in a timely manner, that the action was not filed in accordance with statutory directives, and that there were no unexpended sums in the "construction fund" to which the stop notice could attach. The trial court concluded the notice was timely and defendants possessed

unexpended construction funds when the notice was served. It concluded that the minor deviations from the time for filing and service of the action were immaterial and did not prejudice defendants. We conclude the trial court correctly resolved each of these issues.

*A. Timeliness of the Stop Notice*

Defendants contend plaintiff failed to establish that its stop notice was served within the time permitted by the stop notice law. They contend plaintiff's work on the project was completed on July 29, 2008, and that, pursuant to sections 3086, subdivision (c) and 3116, plaintiff had 150 days to serve its stop notice. Defendants contend the notice was not timely after December 26, 2008, and the notice was not served until December 31, 2008. Defendants' argument wholly ignores the language of the relevant statutes, however. Section 3086, subdivision (c) provides, in the circumstances of this case, that completion of a "work of improvement," once the work has commenced, occurs upon the "cessation of labor thereon for a continuous period of 60 days." This does not mean, as defendants imply, cessation of work by the particular stop notice claimant. Instead, section 3106 specifically provides, in relevant part: "Except as otherwise provided in this title, 'work of improvement' means the entire structure or scheme of improvement as a whole." Thus, the issue is whether work on the project as a whole has stopped, not whether any particular subcontractor has, for example, completed delivery of its materials to the project or completed its individual portion of the work.<sup>1</sup> The trial court properly found, on substantial evidence, that work on the project continued into September 2008.<sup>2</sup> The stop notice was timely. We need not consider

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<sup>1</sup> At oral argument, defendants' counsel repeatedly contended the "scheme of improvement as a whole" standard of section 3106 was inapplicable in this case because the improvements provided by plaintiff were streets, not buildings. No such distinction exists in the law when the streets are built on-site, as was the case here. (10 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 28:55, p. 184.)

<sup>2</sup> Defendants summarily argue that "no concrete evidence was admitted at trial" that would support the trial court's conclusion. When an appellant contends that "some

plaintiff's alternative basis for contending the stop notice was timely, namely, that there was no "completion" of its work because of the absence of final governmental acceptance of the work (see § 3086, final par.<sup>3</sup>), since we conclude the notice was timely without regard to the necessity for such acceptance.

*B. Timeliness of Filing and Notice of Commencement of Action*

Section 3172 provides, in relevant part: "An action against the owner or construction lender to enforce payment of the claim stated in the stop notice or bonded stop notice may be commenced at any time after 10 days from the date of the service of the stop notice upon either the owner or construction lender and shall be commenced not later than 90 days following the expiration of the period within which claims of lien must be recorded .... Notice of commencement of any such action shall be given within five days after commencement thereof ...." In the present case, plaintiff filed its action six days after serving the stop notice and failed to provide notice of commencement of the

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particular issue of fact is not sustained [by the evidence], they are required to set forth in their brief all the material evidence on the point and not merely their own evidence. Unless this is done the error assigned is deemed to be waived." (*Kruckow v. Lesser* (1952) 111 Cal.App.2d 198, 200.) Here, defendants not only fail to summarize the evidence but they also wholly ignore the unimpeached testimony of plaintiff's witness who testified he was at the property and saw ongoing work during the relevant time period, that is, into the middle of August 2008. In addition, the witness testified he saw that other work had been done after this time. Because defendants have forfeited any substantial evidence claim (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881), we merely note that we have reviewed the trial testimony and conclude evidence of continuing work was substantial.

<sup>3</sup> The final paragraph of section 3086 states: "If the work of improvement is subject to acceptance by any public entity, the completion of such work of improvement shall be deemed to be the date of such acceptance; provided, however, that, except as to contracts awarded under the State Contract Act ..., a cessation of labor on any public work for a continuous period of 30 days shall be a completion thereof." To the extent defendants contend the stop notice period commenced 30 days after cessation of labor, they ignore the statutory definition of a "[p]ublic work" as "any work of improvement contracted for by a public entity." (§ 3100.) No such contract was involved in the present case.

action until eight days after the action was filed. Defendants contend plaintiff “failed to comply with the requirements of the Civil Code, rendering its enforcement action deficient.”

The time requirements of section 3172 are not jurisdictional. Those time requirements “are for the purpose of providing protective measures and a necessary warning to those to whom notice is to be given or upon whom service is to be made. If the time provisions are not complied with and as a consequence injury results to the entity or a legal claimant under the entity upon which service is required then it would stand to reason that a strict compliance with the requirement could properly be insisted upon by the servicee. But if no right of the servicee or any person or entity who could legally claim under the servicee is adversely affected by failure to comply with the time for service requirement, then the requirement unless made so by specific mandate, is not a jurisdictional factor requiring the collapse of any remedy of which such notice or service forms a part.” (*Sunlight Elec. Supply Co. v. McKee* (1964) 226 Cal.App.2d 47, 50.) Because the provisions relating to time of commencement and service of the action are not jurisdictional, such defenses are waived if not properly pleaded by demurrer or answer. (*Miller v. Mountain View Sav. & L. Assn.* (1965) 238 Cal.App.2d 644, 654.) In this case, defendants failed to assert the section 3172 deficiencies in their answer (nor did they file a demurrer) and have asserted no prejudice arising from plaintiff’s deviations from the requirements of that section.<sup>4</sup> We conclude that plaintiff’s substantial compliance with the time requirements of section 3172, in the absence of prejudice to defendants, did not preclude judgment for plaintiff on its stop notice cause of action.

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<sup>4</sup> Defendants’ answer asserted the defenses of laches and statute of limitations. Neither of these general defenses, however, served to raise the claim that the action was filed prematurely or that service was not effected within the time required by section 3172.

### C. Availability of Funds

As noted above, the duty of a construction lender, upon service of a bonded stop notice, is to “withhold from the borrower or other person to whom it or the owner may be obligated to make payments or advancement out of the construction fund, sufficient money to answer the claim ....” (§ 3162, subd. (a).) “No assignment by the owner or contractor of construction loan funds, whether made before or after a stop notice or bonded stop notice is given to a construction lender, shall be held to take priority over the stop notice or bonded stop notice, and such assignment shall have no effect insofar as the rights of claimants who give the stop notice or bonded stop notice are concerned.” (§ 3166.) Defendants contend that there was no “assignment” of funds in this case and that, by the time the bonded stop notice was given by plaintiff, there was nothing left of the construction funds. Accordingly, defendants contend, there was nothing for them to “withhold” to pay plaintiff’s claim.

Defendants do not dispute that upon the initial funding of the construction loan on February 19, 2008, \$525,000 of the loan proceeds was allocated to defendants as “[l]oan [f]ees” and \$640,000 was allocated to defendants as an “[i]nterest reserve” account. The trial court concluded that, pursuant to *Familian Corp. v. Imperial Bank* (1989) 213 Cal.App.3d 681 (*Familian*), such funds had been assigned to defendants within the meaning of section 3166 and were, as a result, available to plaintiff through the bonded stop notice procedure.<sup>5</sup>

Defendants acknowledge that plaintiff’s bonded stop notice claim had priority over their own claim to the loan fee and interest reserve under the holding of *Familian*,

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<sup>5</sup> The court also concluded that a \$70,000 finder’s fee and a \$120,000 project management fee, which had been paid to third parties for expenses incurred by defendants, were also assignments subject to recapture under section 3166. We need not, and do not, separately consider these third-party fees, since the amount withheld by defendants for their own charges was sufficient to satisfy plaintiff’s stop notice claim.

*supra*, 213 Cal.App.3d 681. They contend, however, that *Familian* was wrongly decided and we should reject its holding. In support of this proposition, and in total disregard of California Rules of Court, rule 8.1115(a), defendants rely upon an appellate opinion that was depublished upon grant of review by the Supreme Court. “We remind counsel that use of a depublished case for this purpose is absolutely prohibited by the California Rules of Court. [Citation.] The rules authorize reference to unpublished opinions only in a narrow set of circumstances, none of which appl[y] here. [Citation.] We realize that depublished and unpublished decisions are now as readily available as published cases ... [but t]hat does not give counsel an excuse to ignore the rules of court.” (*People v. Williams* (2009) 176 Cal.App.4th 1521, 1529.) While we do not impose sanctions for the present violation, we will not consider defendants’ lengthy exposition on the depublished case they extensively quote and rely upon.

In *Familian, supra*, 213 Cal.App.3d at page 683, the lender had “paid approximately \$528,000 to itself for preallocated loan expenses including interest, loan fees, document preparation fees, and general and administrative expenses.” Concluding that “[s]imilar claims asserted by construction lenders have been consistently rejected by the courts” (*id.* at p. 684), the court held that these preallocated expenses were invalid assignments of construction funds under section 3166. (*Familian, supra*, 213 Cal.App.3d at p. 687.) “The lender is at liberty to establish whatever reserves or other devices are necessary to protect its interests. Section 3166 does not prohibit [the lender’s] practices; it simply assures priority to those who contribute the labor and materials to improve the property and increase the value of the lender’s security.” (*Ibid.*) In the present case, for example, the interest of the lenders was protected and preserved by the priority position of their deed of trust, upon which they foreclosed. By their purchase of the property at the foreclosure sale, defendants obtained the benefit of the increase in value provided by plaintiff’s labor and materials. Any protection plaintiff might have had based on its mechanics’ lien, by contrast, was extinguished by defendants’ foreclosure sale. “An

entire body of constitutional, statutory, and case law is designed to protect the claims of laborers and materialmen.” (*Id.* at p. 684.) The rule in *Familian, supra*, 213 Cal.App.3d 681, has been a clear and established part of this body of law for over two decades, during which the Legislature has not seen fit to amend section 3166 to change the rule set forth in that case. Defendants have not presented any convincing reasons for this court to depart from established precedent in the present case.

#### D. Attorney Fees

Finally, defendants contend the trial court abused its discretion in determining that plaintiff was the prevailing party for purposes of an award of attorney fees pursuant to section 3176, which provides in part that the prevailing party “shall be entitled to collect from the party held liable by the court for payment of the claim, reasonable attorney’s fees in addition to other costs and in addition to any liability for damages.” Plaintiff clearly was the prevailing party. As the trial court concluded, plaintiff recovered the entire amount it sought in the action. Plaintiff was entitled to only one recovery, and the fact that it fully recovered on one theory and not on an alternative theory does not diminish the net judgment in its favor.<sup>6</sup> The court did not abuse its discretion in rejecting defendants’ claims of litigation hardship as a basis for determining that plaintiff was the prevailing party: All parties to litigation suffer hardships over the protracted course of the proceedings; defendants did not establish that their inability to sell the property after foreclosure due to the pending litigation was significantly more severe than plaintiff’s hardship in being denied payment for its labor and materials over that same period of time. Further, the court had before it substantial evidence upon which to base the award

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<sup>6</sup> Defendants contend that remedy on the stop notice cause of action was “invariably inferior” to the remedy under the mechanics’ lien cause of action because any remedy on the mechanics’ lien would, in effect, be secured by the real property. The fact remains, however, that the two causes of action sought, and the net result of each was, recovery of only one sum—the amount due for labor and materials.

of attorney fees. Plaintiff's counsel submitted his declaration and supporting exhibits attesting that the claimed fees related solely to the stop notice cause of action, and not to the mechanics' lien cause of action. The trial court, as finder of fact, was entitled to accept that evidence and award fees based upon it. Defendants have not established that the award of attorney fees in this case was a "manifest abuse of discretion." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.)

**DISPOSITION**

The judgment is affirmed. Plaintiff/respondent is awarded costs on appeal.

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DETJEN, J.

WE CONCUR:

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LEVY, Acting P.J.

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GOMES, J.