

STATE OF INDIANA )  
 ) SS:  
COUNTY OF JOHNSON )

IN THE JOHNSON SUPERIOR COURT NO. 1  
CAUSE NO. 41D01-9808-CP-00376

JD PUGH'S CABINET COMPANY, INC., )  
successor in interest to SUGAR CREEK )  
CABINETS, )  
Plaintiff, )

- VS - )

MARY KAY HUNT and DENNIS HUNT, )  
personally and d/b/a LEADING EDGE )  
CUSTOM HOMES, )  
Defendants. )

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JD PUGH'S CABINET COMPANY, INC., )  
successor in interest to SUGAR CREEK )  
CABINETS, )  
Plaintiff, )

- VS - )

NORWEST MORTGAGE, INC., )  
Defendant. )

**FILED**

APR 03 2002

*Thomas Vander Luitgaren*  
CLERK, JOHNSON SUPERIOR CT #1

### ORDER ON MOTION FOR SUMMARY JUDGMENT

The above matter came before the Court on the 2<sup>nd</sup> day of April, 2002 on the Defendant's Motion for Partial Summary Judgment on Plaintiff's Claim to Foreclose Mechanic's Lien filed on January 4, 2002 and on the Plaintiff's Motion to Strike Defendants' Motion for Partial Summary Judgment filed on January 14, 2002. The Plaintiff appeared by counsel, Catherine Morrison, Esq., and J. Greg Wolf, Esq. The Defendants appeared by Thomas Vander Luitgaren, Esq. Plaintiff moves to dismiss Plaintiff's Motion to Strike Defendant's Motion for Partial Summary Judgment as now being moot due to the continuance of the trial setting. Motion granted.

And the Court, having heard argument and being duly advised in the premises, finds as

follows:

1. That Summary Judgment is only appropriate when the designated evidentiary material shows that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. T.R. 56(C).

2. That relying on specifically designated evidence, the Plaintiff, as the moving party, bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Metal Working Lubricants Co. v. Indianapolis Water Co., 746 N.E.2d 352, 354-55 (Ind.Ct.App. 2001); *see also* I/N Tek v. Hitachi Ltd., 734 N.E.2d 584, 586 (Ind.Ct.App.2000), *trans. denied*.

3. That by the Plaintiff's Amended Complaint for Damages and Foreclosure of Mechanic's Lien of October 15, 1998, the Plaintiff have asserted as one cause of action an action founded upon foreclosure of mechanic's lien.

4. That the Defendants have filed for summary judgment on the basis of defects in the mechanic's lien filed by the Plaintiff, which is the basis of the Plaintiff's action for foreclosure of mechanic's lien under Indiana Code 32-8-3-3.

5. That the Plaintiff asserts that the mechanic's lien recorded by the Defendant on February 13, 1998 is deficient in the following respects:

- A. The Mechanic's Lien incorrectly lists the owner of the property.
- B. The Mechanic's Lien incorrectly lists the address of the property owners.
- C. The Mechanic's Lien incorrectly lists the name of the claimant.

6. That the Court determines that there is no genuine issue of material fact in the following matters:

A. A Notice of Intention to File Lien was recorded on February 13, 1998 in the Office of the Recorder of Johnson County, Indiana as Instrument No. 98003763 by Sugar Creek Cabinets against

certain real estate known as "Lot 3, Claybridge Manor Minor Plat as Recorded in Plat Cabinet C, #756 A&B in the Office of the County Recorder, County of Johnson, State of Indiana. The property is commonly known as 434 Peterman Road, Greenwood, IN."

B. The Notice of Intention to File Lien listed the property owner as "Dennis and Linda Hunt d/b/a Leading Edge Custom Homes" when the property described was owned by Dennis L. Hunt and Mary Kay Hunt, Husband and Wife.

C. The records of the Johnson County Treasurer and the Johnson County Auditor establish that as of the date of recording the notice of intention to file lien by the claimant the property in question was owned by Dennis L. Hunt and Mary Kay Hunt with an address for purpose of issuance of tax notice of 496 North Peterman Road, Greenwood, Indiana 46142. The recorded Notice of Intention to File Lien failed to include such address in the Notice of Intention to File Lien.

D. The notice of filing of the notice of intention to file lien was issued to "Dennis and Linda Hunt d/b/a Leading Edge Custom Homes" at an address of P.O. Box 593, Greenwood, Indiana 46142 by the Johnson County Recorder. Such mailing address is a proper mailing address for the Defendants. In addition, a property address of 434 Peterman Rd., Greenwood, IN was also listed in the notice.

D. The Notice of Intention to File Lien was asserted by Sugar Creek Cabinets with the omission of the identification of "Inc."

E. Sugar Creek Cabinets, Inc. was a corporation organized and existing under the laws of the State of Indiana at the time of recording of the notice of intention to file lien, although the entity has been dissolved by action of the Secretary of State of the State of Indiana on December 20, 2001.

7. That Indiana Code 32-8-3-3(c) requires in parts relevant hereto, that the "statement under subsection (a) or (b) must specifically set forth: (1) the amount claimed; (2) the name and address of the claimant and the name of the owner; (3) the latest address of the owner as shown on the property tax records of the county; and (4) the legal description, street and number, if any, of the lot or land on which the house, mill, manufactory or other buildings, bridge, reservoir, system of waterworks or other structure may stand or be connected with or to which it may be removed. The name of the owner and legal description of the lot or land will be sufficient if they are substantially as set forth in the latest entry in the transfer books described in IC 6-1.1-5-4 of the county auditor

or, if IC 6-1.1-5-9 applies, the transfer books of the township assessor at the time of filing of the notice of intention to hold a lien. The recorder shall mail first class one (1) of the duplicates to the owner named in the notice within three (3) business days after recordation and post records as to the date of this action. The notice shall be addressed to the latest address of the owner as specifically set out in the sworn statement of the person intending to hold a lien upon the property."

8. That the Defendant asserts that the Plaintiff's Notice of Intention to File Lien is defective by failure to specifically describe the claimant as a corporation through omission of the corporate designation "Inc.". Such failure is not a defect in the Notice of Intention to File Lien. *Kendall Lumber & Coal Co., Inc. v. Roman*, 91 N.E.2d 187, 120 Ind. App. 368 (Ind. Ct. App. 1950); *Waverly Co. v. Moran Electric Service, Inc.*, 26 N.E.2d 55, 108 Ind. App. 75 (Ind. Ct. App. 1940).

9. That the Defendant asserts that the Plaintiff's Notice of Intention to File Lien is defective by reason of the use of an address of P.O. Box 593, Greenwood, Indiana 46142 instead of the address shown by county tax records of 496 North Peterman Road, Greenwood, Indiana 46142.

Although P.O. Box 593, Greenwood, Indiana 46142 is a proper address for the Defendants and Indiana Code 32-8-3-3 does not specifically require that notice be issued to the address to which tax records are sent, Indiana Code 32-8-3-3(c)(3) does specifically require that the statement "must" include the "latest address of the owner as shown on the property tax records of the county". Such address was omitted from the Notice of Intention to File Lien, and thus the Notice of Intention to File Lien is defective under the provisions of Indiana Code 32-8-3-3(c).

10. That the Defendant asserts that the Plaintiff's Notice of Intention to File Lien is defective by reason of the failure to properly identify the owners of the property. As noted, there is no question that the property in question was owned by Dennis L. Hunt and Mary Kay Hunt at the time of the recording of the Notice of Intention to File Lien. The identification by the Plaintiff of Linda Hunt as a spouse of Dennis Hunt was based upon the Plaintiff's erroneous information and belief.

11. That Plaintiff cites the Court to the case of *Beneficial Finance Company v. Wegmiller Bender Lumber Company, Inc.*, 402 N.E.2d 41 (Ind. Ct. App. 1980), petition for rehearing denied, 403 N.E.2d 1150 (Ind. Ct. App. 1980). The Defendant cites the Court to the case of *Logansport*

Equipment Rental, Inc. v. Transco, Inc., 755 N.E.2d 1135 (Ind. Ct. App. 2001).

In *Beneficial Finance*, the Indiana Court of Appeals upheld a Notice of Intention to File Mechanic's Lien against an assertion that the Notice was defective based upon a failure to include an owner wife in addition to the named owner husband. In *Logansport Equipment Rental, Inc.*, the Indiana Court of Appeals found a Notice of Intention to File Mechanic's Lien invalid based upon the failure of the claimant to properly identify the property owner, wherein the claimant had listed a property owner as Transco, Inc. when in fact the property was owned by Transco Railcar, Inc. As noted by the Indiana Court of Appeals in *Logansport Equipment Rental, Inc. v. Transco, Inc.*, 755 N.E.2d 1135 (Ind. Ct. App. 2001),

"Whether there has been substantial compliance by the lien claimant depends upon the degree of non-compliance with the letter of the statute, the policy which underlies the particular statutory provision in question, and the prejudice which may have resulted to either the owner of the property or other third parties who have an interest in the real estate." *Beneficial Fin. Co. v. Wegmiller Bender Lumber Co.*, 402 N.E.2d 41, 45 (Ind.Ct.App.1980), reh'g denied. The filing requirements for a mechanic's lien serve two policy objectives: (1) to provide the record titleholder of the property with notice that a mechanic's lien has been placed upon the real estate; and (2) to put third party purchasers and money lenders on notice of the same fact. *Suburban Elec. Co. v. Lake County Trust Co.*, 412 N.E.2d 295, 297 (Ind.Ct.App.1980). Hypertechnicalities should not be used to frustrate the remedial purpose of mechanic's liens; however, we find that listing the wrong owner on the notice is not a hypertechnicality. Rather, when Logansport listed the wrong owner on the notice, it did not substantially comply with the notice requirements of the mechanic's lien statute." Id. at 1137.

12. That it is noted by the Indiana Court of Appeals in *Cline v. Indianapolis Mortar & Fuel Co., Inc.*, 117 N.E. 509, 65 Ind. App. 383 (Ind. Ct. App. 1917), that "mechanic's lien statutes must be strictly construed, in determining the persons entitled to acquire and enforce such liens, but, being remedial in character, they should be liberally construed, in order to carry their object into effect in giving a lien to those entitled to their benefits. *Rader v. A. J. Barrett Co.* (1914) 59 Ind. App. 27, 108 N. E. 883; *Deal v. Plass* (1915) 59 Ind. App. 185, 109 N. E. 51; *McNamee v. Rauck* (1890) 128 Ind. 59, 27 N. E. 423; *Indianapolis, etc., Co. v. Brennan* (1909) 174 Ind. 1, 87 N. E. 215, 90 N. E. 65, 68, 91 N. E. 503, 30 L. R. A. (N. S.) 85." Id. at 510.

As noted in *Mullis v. Brennan*, 716 N.E.2d 58 (Ind. Ct. App. 1999), the Indiana Court of Appeals has determined that matters on the creation of a mechanic's lien are to be strictly construed. The Court of Appeals noted, "Because the mechanic's lien statute is in derogation of the common

law, the provision of the statute "relating to the creation, existence or persons entitled to the lien have historically been strictly construed." *Garage Doors of Indianapolis v. Morton*, 682 N.E.2d 1296, 1302 (Ind.Ct.App.1997), trans. denied." Id. at 63.

13. That the purpose of the mechanic's lien statute was succinctly identified in *Rose & Walker, Inc. v. Swaffar*, 721 N.E.2d 899 (Ind. Ct. App. 2000). The Court noted that "(t)wo purposes of this statute are: (1) to put landowners on notice that there is a lien on the property; and (2) to put any third party buyers on notice of the encumbrance on the property." Id. at 902. In so holding, the Court upheld the mandatory requirement of Indiana Code 32-8-3-1 that mechanic's liens be recorded, even though the notice of intention had been completed and sent by the claimant directly to the property owner.

14. That from the strict language of *Logansport Equipment Rental, Inc. v. Transco, Inc.*, 755 N.E.2d 1135 (Ind. Ct. App. 2001), this Court must conclude that Indiana has adopted a very strict construction as to the necessity of identifying the proper owner of the property. The case specifically states that "(w)e believe that any party who would impinge on an owner's title to real estate by filing a mechanic's lien must assume the responsibility of determining who the true owner is under Indiana Code Sec. 32-8-3-3(c). Here, had Logansport searched the last entry for the property in the applicable transfer book, it would have learned that Transco Railcar was the true owner." Id. at 1137.

15. That in recognition of the creation of tenancy by the entirety property through ownership of the property by Dennis L. Hunt and Mary K. Hunt, Husband and Wife, it is unclear to the Court that a third party researcher would necessarily be placed upon notice of further investigation if he or she came across a mechanic's lien on property owned by Dennis Hunt and Linda Hunt.

16. That the Court thus determines that Indiana law places the burden upon the claimant to accurately identify the owner of the property against which the notice of intention to hold mechanic's lien is asserted. The claimant in this case failed to accurately identify the true owners of the property. The notice of intention to hold lien is defective.

17. That the Court thus determines (1) that the Plaintiff failed to list the true owners of the real estate against which the notice of intention to hold mechanic's lien was asserted, and (2) that the Plaintiff failed to list "the latest address of the owner as shown on the property tax records of the county" as required by Indiana Code 32-8-3-3(c). The requirements of Indiana Code 32-8-3-3(c) are mandatory. Strict construction of the mechanic's lien statute as to creation of the mechanic's lien prohibits the Court from disregarding the mandatory terminology of Indiana Code 32-8-3-3(c). See, *Rose & Walker, v. Swaffar*, 721 N.E.2d 899 (Ind. Ct. App. 2000).

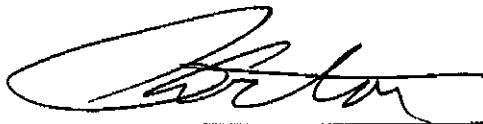
18. That the Court determines that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law in accordance with Trial Rule 56. The Notice of Intention to Hold Lien upon which Plaintiff bases its cause of action for foreclosure of mechanic's lien is determined to be defective and not in compliance with the requirements of Indiana Code 32-8-3-3(c), and accordingly, partial summary judgment is entered in favor of the Defendants, Mary Kay Hunt and Dennis Hunt, and against the Plaintiff, JD Pugh's Cabinet Company, Inc., successor in interest to Sugar Creek Cabinets, as to the cause of action based upon foreclosure of mechanic's lien.

IT IS THEREFORE ORDERED BY THE COURT, partial summary judgment is entered in favor of the Defendants, Mary Kay Hunt and Dennis Hunt, and against the Plaintiff, JD Pugh's Cabinet Company, Inc., successor in interest to Sugar Creek Cabinets, as to the cause of action based upon foreclosure of mechanic's lien.

IT IS FURTHER ORDERED BY THE COURT, That the above cause of action proceed to trial by court on all remaining issues on date of May 22nd, 2002 at 8:30 A.M.

IT IS FURTHER ORDERED BY THE COURT, That the Clerk of the Court place the original of the foregoing Order in the Record of Judgments and Orders (RJO).

Dated: April 3, 2002.

A handwritten signature in black ink, appearing to read 'Kevin M. Barton', written over a horizontal line.

KEVIN M. BARTON, JUDGE  
JOHNSON SUPERIOR COURT NO. 1

**Distribution:**

Thomas W. Vander Luitgaren, Esq.

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Catherine Morrison, Esq.

Craig Doyle, Esq.