

No. [REDACTED]

[REDACTED]

Plaintiff,

v.

[REDACTED]
[REDACTED] dba

Defendants.

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In the District Court

Harris County, Texas

[REDACTED] Judicial District

**Plaintiff's Response to [REDACTED] s
Motion for Summary Judgment**

[REDACTED] summary judgment evidence demonstrates that it filed its lien timely; that its affidavit substantially complies with the Texas Property Code; and that its lien is enforceable against [REDACTED] s property. And [REDACTED] has provided more than a scintilla of evidence supporting its quantum meruit claim. Thus, [REDACTED] s motions for summary judgment and declaratory relief should be denied.

Respectfully submitted,

[REDACTED]

By: _____

[REDACTED]

[REDACTED]

[REDACTED]

Attorneys for [REDACTED]

Factual Background

The [REDACTED] ([REDACTED]) contracted with [REDACTED] for the construction of a left-turn lane at [REDACTED] Katy, Texas.¹ [REDACTED] in turn, subbed the job out to [REDACTED] ([REDACTED]).² [REDACTED] set out to construct the turn and finished the job in July 2007.³ Not having been paid for the job, [REDACTED] sent its notice of intention to file a lien to [REDACTED] on September 26, 2009.⁴ It filed a lien the same day in the county clerk's office and sent a copy to [REDACTED].⁵ [REDACTED] has admitted receiving [REDACTED]'s notice and a copy of the lien within the timeframe set out in the Texas Property Code.⁶

Summary Judgment Evidence

[REDACTED] relies on the following evidence in support of this response:

- Affidavit of [REDACTED] with attachments
- Deposition of [REDACTED]
- Plaintiff's Original Petition with attachments

[REDACTED]'s filing was timely.

To perfect and enforce a lien, a subcontractor need only *substantially* comply with Chapter 53 of the Texas Property Code.⁷ To perfect a lien, he must give the property

¹ [REDACTED] Contract, [REDACTED] affidavit, Exhibit A.

² [REDACTED] agreement, [REDACTED] affidavit, Exhibit D; Plaintiff's Original Petition, Exhibit A.

³ Plaintiff's Original Petition at ¶ 8; [REDACTED] affidavit at 2.

⁴ [REDACTED] notice letter, [REDACTED] affidavit, Exhibit D.

⁵ Mechanic's Lien Affidavit; [REDACTED] affidavit, Exhibit D; Plaintiff's Original Petition, Exhibit C.

⁶ [REDACTED] affidavit at 2.

⁷ Tex. Prop. Code § 53.051.

owner notice of the debt by the fifteenth day of the third month after he has finished the work.⁸ The notice just needs to warn the owner that his property may be subject to lien if the subcontractor's claim isn't paid or otherwise settled.⁹ Next, the subcontractor must file the lien by the fifteenth day of the fourth calendar month after the day that his debt is deemed to accrue.¹⁰ It's deemed to accrue on the last day of the calendar month when he finished the work.¹¹

Here, █████ finished its work in July 2007.¹² Consequently, it had until October 15th to send its notice of lien to █████ and November 15 to file its lien. Since it sent its notice on September 26 and filed the lien the same day, its filing was timely.¹³

█████'s lien substantially complies with the statute.

█████ complains that █████ failed to comply with all the technical requirements of the statute, but the courts liberally construe its provisions to protect laborers and materialmen.¹⁴ For instance, the general test for determining the sufficiency of a land description is whether the tract can be identified with reasonable certainty.¹⁵ Parole evidence is even allowed to explain descriptive lien terms and descriptive words are to be given a liberal construction.¹⁶ Consequently, courts have affirmed liens that didn't have the address in the sworn part of the affidavit; that misidentified the relevant county; and

⁸ Tex. Prop. Code § 53.056.

⁹ Tex. Prop. Code § 53.056(b).

¹⁰ Tex. Prop. Code § 53.052(a).

¹¹ Tex. Prop. Code § 53.053(c).

¹² Plaintiff's Original Petition at ¶ 8; █████ affidavit at 2.

¹³ See █████ affidavit at 2 and Exhibit D; Plaintiff's Original Petition, █████

¹⁴ *Richardson v. Mid-Cities Drywall*, 968 S.W.2d 512, 515 (Tex. App. – Texarkana 1998, no writ).

¹⁵ See *Zobel v. Slim*, 576 S.W.2d 369 (Tex. 1978).

¹⁶ *Palomita, Inc. v. Medley*, 747 S.W.2d 575, 576 (Tex. App. – Corpus Christi 1988, no writ).

that didn't include a statement identifying when notice of the claim was sent to the owner (one of [REDACTED] complaints).¹⁷ The material issues relative to substantial compliance are whether [REDACTED] received notice of the lien;¹⁸ whether [REDACTED] [REDACTED] meaningfully apprised [REDACTED] of the nature of the lien and its own address where it could be contacted;¹⁹ and whether [REDACTED] was prejudiced by the lack of any information in the affidavit.²⁰

Substantial compliance is shown to exist where an owner hasn't been misled to his own prejudice.²¹ [REDACTED] has admitted that it received timely notice of the lien²² and that [REDACTED] did apprise it of its contact information.²³ While it has complained about technicalities of completeness, [REDACTED] hasn't demonstrated any prejudice. And because it hasn't shown any prejudice, it isn't entitled to judgment for the lack of substantial compliance.

¹⁷ See *Richardson*, 968 S.W.2d at 515; *AMS Constr. Co. v. Warm Springs Rehab. Found., Inc.*, 94 S.W.3d 152, 163 (Tex. App. – Corpus Christi 2002, no writ). See also *Mustang Tractor & Equip. Co. v. Hartford Accident & Indem. Co.*, 263 S.W.3d 437 (Tex. App. – Austin 2008, pet. denied) (lien held valid even when contractor mistakenly left out notice information).

¹⁸ Compare *Raymond v. Rahme*, 78 S.W.3d 552, 561 (Tex. App. – Austin 2002, no writ) (subcontractor didn't provide timely notice to owner so lien wasn't valid).

¹⁹ *Richardson*, 968 S.W.2d at 515 (mailing address accurately provided a means of contact).

²⁰ See *id.*, citing *Hunt Developers, Inc. v. Western Steel Co.*, 409 S.W.2d 443, 449 (Tex. App. – Corpus Christi 1966, no writ) (“The Legislature did not intend that the materialman should lose his lien through technicalities of a warning, where the owner was not misled to his prejudice.”).

²¹ *Id.*

²² See [REDACTED] affidavit at 2.

²³ See [REDACTED] affidavit, Exhibit D ([REDACTED] letterhead and mechanic's lien affidavit).

█'s lien is contiguous to the improvement.

Where property abuts on or is bounded by a public street, the fee in the land extends to the center of the street.²⁴ Consequently, █ may enforce a lien on █ property for its work in constructing a turn lane in the middle of the street.

█ has provided more than a scintilla of evidence.

While couched as a Rule 166a(c) motion,²⁵ █'s motion for summary judgment on quantum meruit is really a no-evidence motion for summary judgment²⁶ because it argues that there is no evidence “for the person sought to be charged,” or that it was reasonably notified that █ sought to be paid for constructing the turn lane.²⁷ Thus, █ is only required to provide the court with a scintilla of evidence supporting its quantum meruit claim to defeat the motion.

█ constructed a left-turn lane on █'s property and the value of its services and materials were \$36,606.58.²⁸ █ claims that it paid █

█ a down payment of \$3,600 and \$26,400 when the work was completed.²⁹

█ admitted that it has received the benefit of the turn lane, but it hasn't paid any monies to █ even the \$6,606.58 above what it paid to █³⁰

²⁴ *Peeples et ux. v. Smith Bros., Inc.*, 65 S.W.2d 777, 777 (Tex. Civ. App. – Waco 1933, writ dismissed); see also *Texas Bitulithic Co. v. Warwick*, 293 S.W. 160, 162 (Tex. Comm'n Appeals 1927) (title extends to the center of the street unless express terms of the grant show a contrary intention).

²⁵ See █'s motion for summary judgment at 3-4.

²⁶ See Tex. R. Civ. P. 166a(i).

²⁷ █ motion at 15. (“there is no evidence in support of the second element . . . evidence shows Plaintiff cannot [sic] prove the fourth element of quantum meruit”).

²⁸ See Exhibit B to Plaintiff's Original Petition and █ Deposition at 21 (Rothchild still owns property).

²⁹ █ affidavit at 2.

³⁰ See █ deposition at 94.

A party is entitled to recover in quantum meruit for extra work performed that was knowingly accepted despite an express contract.³¹ Here, ██████ accepted ██████'s work and even resisted having the turn lane taken down for nonpayment.³² Since ██████ has failed to prove that an express contract covers ██████'s extra work, especially on a construction project,³³ its no-evidence motion should be denied.

██████████ *s declaratory judgment action must fail.*

██████████ filed a counterclaim for this court to enter a judicial declaration that ██████ isn't entitled to a statutory lien on the property.³⁴ It has filed for summary judgment on this counterclaim and has requested attorneys' fees. Its motion should be denied.

A counterclaim for declaratory judgment isn't proper if it's nothing more than a mere denial of the plaintiff's claims.³⁵ A counterclaim for declaratory judgment has to have greater ramifications than the original suit; it should seek some sort of affirmative relief.³⁶ To qualify as a claim for affirmative relief, the pleading must assert some cause of action, independent of the plaintiff's claim, on which he could recover benefits, relief, or some other kind of compensation.³⁷

³¹ *Black Lake Pipe Line Co. v. Union Constr. Co.*, 538 S.W.2d 80, 86 (Tex. 1976) (jury found that Black Lake had to do more excavation than was contemplated).

³² ██████ deposition at 57.

³³ See *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 685 (Tex. 2000) (to nullify unjust enrichment claim, defendant had to prove express contract covered work performed).

³⁴ R ██████ First Amended Original Answer and First Amended Original Counterclaim.

³⁵ *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 842 (Tex. 1990); *Sanchez v. AmeriCredit Financial Services, Inc.*, 308 S.W.3d 521, 524 (Tex. App. – Dallas 2010, no writ).

³⁶ *HECI Exploration Co. v. Clajon Gas Co.*, 843 S.W.2d 622, 638-39 (Tex. App. – Austin 1992, writ denied).

³⁷ *Gen. Land Office of Tex. v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 570 (Tex. 1990).

As elucidated in its amended answer, [REDACTED] s declaratory action doesn't seek any affirmative relief; it only seeks to avoid liability for [REDACTED] s mechanic's lien.³⁸ Since its action doesn't present any greater ramifications than its affirmative defenses,³⁹ its pleading for declaratory judgment is improper and summary judgment should be denied.

Conclusion

[REDACTED] filed suit against [REDACTED] seeking to foreclose on its mechanic's lien on [REDACTED] s property and for quantum meruit. [REDACTED] has failed to prove that [REDACTED] s lien doesn't substantially comply with the Texas Property Code or that the left turn lane at issue isn't contiguous to [REDACTED] s property. [REDACTED] has provided more than a scintilla of evidence supporting its quantum meruit claim. [REDACTED] has also demonstrated that [REDACTED] s declaratory judgment action doesn't seek anything more than a denial of the lien. Thus, [REDACTED] s motion for summary judgment should be denied in its entirety.

³⁸ See [REDACTED] s motion for summary judgment at 16-17.

³⁹ See [REDACTED] s amended answer at ¶¶ 2-17.

Respectfully submitted,

[Redacted]

By: _____

[Redacted]

[Redacted]

Telephone: [Redacted]

Facsimile: [Redacted]

Attorneys for [Redacted]

Certificate of Service

I certify that a true and correct copy of this document has been served upon all parties or their counsel of record in compliance to the Texas Rules of Civil Procedure this the ____ of October 2010.

[Redacted]

**Summary Judgment Evidence
Exhibit List**

1. Affidavit of [REDACTED] with exhibits
2. Deposition Excerpts of [REDACTED]
3. Plaintiff's Original Petition with attachments