IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,075

SHELDON E. STUNKEL, et al.,

Petitioner,

- vs. -

GAZEBO LANDSCAPE DESIGN, INC.,

Respondent.

ON PETITION FOR REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
PURSUANT TO A CERTIFIED QUESTION

RESPONDENT'S ANSWER BRIEF ON THE MERITS

Robert E. Ferencik, Jr., Esq., FBN 263478
David H. Brodie, Esq., FBN 813168
LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
Attorneys for Respondent
150 South Pine Island Road, Suite 400
Fort Lauderdale, Florida 33324
Phone: (305) 525-3553

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RESPONSE TO PETITIONER'S STATEMENT OF THE CASE AND FACTS

Respondent, Gazebo Landscape Design, Inc, (hereinafter "GAZEBO"), takes issue with the facts as set out by Petitioners Sheldon E. and Sally F. Stunkel, (hereinafter "STUNKELS"), and submit the following points to clarify the record.[1]

As the STUNKELS note, the record does reflect that GAZEBO provided accommodating services to the STUNKELS in November of 1990, in the nature of traveling with the STUNKELS on the STUNKELS own private jet to sample various trees in the vicinity of Tampa, and that such services were provided more than 45 days prior to the date GAZEBO served the STUNKELS with a Notice to Owner. However, what the STUNKELS did not state is that the record also reflects that that at the time GAZEBO provided these gratuitous accommodations, GAZEBO had not yet entered into an enforceable contract with the contractor.

Although the District Court stated in its opinion that "(the contractor) entered into an oral contract with Gazebo, a landscaping subcontractor, for Gazebo to obtain and plant trees," the District Court made findings that there was evidence before the trial judge which illustrated that, in fact, no binding enforceable contract existed between GAZEBO and the contractor prior to December 5, 1990. The District Court emphasized that:

> "The lower court heard testimony from Gazebo's representative that no deal was sold until 'the job (was) in

[1] To maintain conformity with the denotations utilized by Petitioners in their Initial Brief on the Merits, all references to the decision of the Fourth District Court of Appeal contained in the Appendix will be denoted by the letter "A"; references to the Record will be denoted by the letter "R"; references to the Transcript will be denoted by the letter "T": and references to Petitioner's Initial Brief on the Merits will be denoted by the letter "P", all with appropriate page numbers. Petitioners shall be referred to as the "STUNKELS" and Respondents as "GAZEBO."

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
BROWARD (305)525-3553 DADE (305)949-8003 FAX (305)474-7343

> the ground and I got the check.' In addition, Gazebo's representative testified that the deposit for the trees was refundable. This representative further testified that the trip to Sarasota was a 'sales thing,' and if 'the guy liked the trees we sold the deal.' However, he also stated that, 'If Mr. Stunkel walked out there and said, 'these trees are no good,' I would have left and he would have probably hired someone else."

Furthermore, Petitioners have inappropriately mischaracterized a $5,000 deposit given to the tree supplier by GAZEBO as payment for the trees when in fact the testimony of GAZEBO's representative unequivocally indicated that such sums were merely given as a "deposit" for the trees and were entirely "refundable." (P.3; T.69, 70, 116.).

Additionally, Petitioners have omitted from their Statement that the Final Judgment entered by the trial judge which is in the record and upon which appellate review is limited,[2] contained language indicating that the trial judge passed upon inappropriate considerations concerning the "demeanor, frankness, and credibility of the witnesses", when ruling on the STUNKEL'S motion for involuntary dismissal.[3] (R.62, 63.) The Final Judgment appealed from in this matter states, in pertinent part, as follows:

> This cause came on to be heard for a nonjury trial at 1:30 p.m. on September 17, 1992 and the **Court having observed the demeanor, frankness and credibility of the witnesses**, having heard the arguments of counsel, having reviewed the pleadings, and being otherwise fully advised in the premises, it is hereby... (emphasis added). (R.62.)

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[2] *See*, Rosenberg v. Rosenberg, 511 So.2d 593, 595 (Fla. 3rd DCA 1987).

[3] *See*, Vance v. Indian Hammock Hunt & Riding Club, Ltd., 403 So.2d 1367 (Fla. 4th DCA 1981); Tillman v. Baskin, 260 So.2d 509 (Fla. 1972).

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
BROWARD (305)525-3553 DADE (305)949-8003 FAX (305)474-7343

Although the STUNKELS filed a motion to amend the Final Judgment, this motion was not considered by the trial court and the Final Judgment was not amended.[4]

[4] Nevertheless, the STUNKELS argued to the District Court below that the carefully selected and extensive language in Judge Carlisle's Final Judgment regarding the trial court's considerations of the credibility of the witnesses in deciding to grant an involuntary dismissal, was, in actuality, inadvertently included by the STUNKELS in the Final Judgment due to a "scrivener's error." Such contentions by the STUNKELS effectively "second-guessing" what they believe to be the true intent of the trial judge, which are entirely in contradiction to the unambiguous language in the Final Judgment upon which the appeal is based, are inappropriate and are not properly subject to the reviewing court's consideration. Rosenberg at 595; Thornber v. City of Fort Walton Beach, 534 So.2d 754 (Fla. 1st DCA 1988). It is additionally interesting to note that while the STUNKELS claimed that the language included in the Final Judgment was due to a scrivener's error, the STUNKELS first sought to have the trial judge amend his ruling only after learning of the impermissibliity of such considerations by a trial judge in granting an involuntary dismissal and after appreciating the potential consequence of the trial court's findings through GAZEBO's Motion for Rehearing.

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
BROWARD (305)525-3553 DADE (305)949-8003 FAX (305)474-7343

ISSUE PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT PROPERLY REVERSED THE TRIAL COURT'S ENTRY OF AN INVOLUNTARY DISMISSAL AGAINST GAZEBO AT THE CONCLUSION OF GAZEBO'S CASE AND PRIOR TO THE PRESENTATION OF ANY EVIDENCE BY THE STUNKELS

SUMMARY OF ARGUMENT

The District Court properly reversed the trial court's entry of an involuntary dismissal against GAZEBO entered on the basis that GAZEBO had failed to timely serve a Notice to Owner to the STUNKELS and that GAZEBO's Claim of Lien was not sworn to. The District Court correctly determined that there were sufficient facts and testimony before the trial court for one to reasonably interpret that GAZEBO did not furnish labor or materials for purposes of commencing the period for service of a Notice to Owner until December 5, 1990, rendering service of GAZEBO's Notice on January 8, 1991, timely under the Construction Lien Law. The District Court noted that there was unrebutted evidence in the record that GAZEBO's traveling with the STUNKELS in November of 1991 to Tampa to sample and identify certain trees which Mr. Stunkel wanted was nothing more than a gratuitous "sales thing" within which GAZEBO took part in hopes of eventually landing the job. Accordingly, having not yet obtained the status of a "lienor" under Chapter 713, Fla. Stat., GAZEBO was not required to serve the STUNKELS with a Notice to Owner at such time and it was, therefore, error for the trial judge to enter an involuntary dismissal on such basis. In fact, even if GAZEBO had obtained the status of a "lienor" prior to performing such gratuitous services, there was

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
BROWARD (305)525-3553 DADE (305)949-8003 FAX (305)474-7343

sufficient evidence in the record that such services were not provided by GAZEBO as part of any contractual obligation and, accordingly, did not constitute the furnishing of services and materials for commencing the period for service of a Notice to Owner. Furthermore, the evidence was uncontroverted that GAZEBO timely recorded a Claim of Lien, which on its face was, in all respects, in proper form. While there was evidence that GAZEBO's representative did not taken an oath prior to signing the Claim of Lien, the record is completely devoid of any adverse effects suffered by the STUNKELS as a result of such omission. Accordingly, the District Court's reversal of the dismissal entered below should be affirmed and the question certified should be answered in the negative.

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
BROWARD (305)525-3553 DADE (305)949-8003 FAX (305)474-7343

ARGUMENT

THE DISTRICT COURT PROPERLY REVERSED THE TRIAL COURT'S ENTRY OF AN INVOLUNTARY DISMISSAL AGAINST GAZEBO AT THE CONCLUSION OF GAZEBO'S CASE AND PRIOR TO THE PRESENTATION OF ANY EVIDENCE BY THE STUNKELS

The District Court's finding of error in the trial court's entry of an involuntary dismissal against GAZEBO was proper and in full accord with applicable statutory and judicial authority. In support of its reversal, the District Court applied the appropriate standard and determined that:

> "In considering the Motion for Involuntary Dismissal at bar, the trial court should have taken all the facts and evidence presented and evaluated them in a light most favorable to Gazebo. If any reasonable interpretation supported Gazebo's claim, the Stunkel's motion should have been denied." (A.4.).

As GAZEBO argued below, where the evidence could have been regarded as conflicting, the trial judge was required to disregard such conflicts or resolve them in favor of GAZEBO. Glass v. Long, 341 So.2d 1066 (Fla. 2d DCA 1977). The trial judge was not entitled to weigh the evidence or credibility of the witnesses in ruling on the STUNKEL's Motion for Involuntary Dismissal, and it was incumbent upon the trial judge

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
BROWARD (305)525-3553 DADE (305)949-8003 FAX (305)474-7343

to deny the STUNKEL's motion where GAZEBO had presented a prima facia case based upon unimpeached evidence.[5] Tillman v. Baskin, 260 So.2d 509 (Fla. 1972).

In reviewing the propriety of the trial judge's ruling, the District Court appropriately construed the evidence in favor of GAZEBO and determined that the evidence viewed in such light, at the very least, presented a prima facia case before the trial court for foreclosure of GAZEBO's construction lien. The District Court correctly determined that the evidence presented before the trial court could be reasonably interpreted and was sufficient to create a rebuttable presumption that no binding contractual obligation existed between the parties prior to GAZEBO's commencing its planting services at the site. In fact, in its opinion, the District Court quoted extensive unrebutted testimony that was presented before the trial judge from GAZEBO representatives, which was sufficient to conclude that there was no binding contract between GAZEBO and the contractor until the trees were delivered to and approved at the site by Mr. Stunkel himself, and "the job (was) in the ground." (A.4.).

The District Court concluded that the facts and testimony elicited at trial could "be reasonably interpreted to support GAZEBO's claim that (they) did not furnish services or materials (commencing the time period of service of a Notice to Owner) until December 5, 1990," and that the preliminary activities engaged in by GAZEBO were purely on a gratuitous basis, in hopes of eventually landing a contract. (A.4.).

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[5] While the 4th DCA did not specifically address the issue as grounds for reversal in its opinion, Gazebo argued in its initial brief below that the Final Judgment entered by the trial judge in clear and unambiguous language, indicated that in support of its entry of dismissal, the court passed upon considerations concerning the "demeanor, frankness and credibility of the witnesses." (R.62, 63). It is well settled doctrine of this court, that such considerations are wholly inappropriate and constitute reversible error. Tillman at 509.

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
BROWARD (305)525-3553 DADE (305)949-8003 FAX (305)474-7343

Recognizing that such unrebutted evidence was indeed before the trial judge, the District Court appropriately found error in the trial judge's entry of an involuntary dismissal against GAZEBO. GAZEBO had alleged and presented facts which, if taken as true, as the trial judge was required in ruling on the STUNKEL's motion, did not constitute the furnishing of lienable services or materials for initiating commencement of the 45 day period for service of GAZEBO's Notice to Owner, as a matter of law.

Additionally, the District Court held that the sole authority argued by the STUNKELS in support of their Motion for Involuntary Dismissal and relied upon by the trial court in ruling thereon, the First District case of Arlington Lumber & Trim Co., Inc. v. Vaughn, 548 So.2d 727 (Fla. 1st DCA 1991), was inapplicable and entirely "distinguishable from the instant appeal." (A.3.).

In reaching its conclusion that the trial judge had erred, the District Court declined to hold as a matter of law that a subcontractor does not begin to furnish services until work actually begins at the site of the improvement. Instead the Court examined the "totality of the circumstances" surrounding the GAZEBO job and suggested that trial courts should do the same when determining when the furnishing of services begins for purposes of timely service of a Notice to Owner. (A.5.). The District Court suggested that factors such as the lack of economic detriment to the subcontractor, or the fact that the subcontractor was simply "engag(ing) in certain activities on a gratuitous basis, in hopes of 'landing' a job" (as in the case at bar), are vital indicators in determining when the furnishing of services begins for commencing

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
BROWARD (305)525-3553 DADE (305)949-8003 FAX (305)474-7343

the 45 day period for service of a Notice to Owner under §713.06(2)(a), Fla. Stat. (A.5.).

A. The trial court committed reversible error in entering an involuntary dismissal against GAZEBO on the basis that GAZEBO's Notice to Owner was not timely served in accordance with §713.06, Fla.Stat.

1. The record reflects that GAZEBO was not a "lienor" under Chapter 713, Florida Statutes, prior to December 5, 1990, and , accordingly, was not required to serve a Notice to Owner prior thereto.

Notwithstanding the argument of the STUNKELS, Chapter 713, Florida Statutes is in full accord with the District Court's ruling.

Section 713.06(2)(a), Fla. Stat. (1991), provides in pertinent part:

> All **lienors** under this section, except laborers, as a prerequisite to perfecting a lien under this chapter and recording a claim of lien, must serve a notice on the owner setting forth the lienors name and address, a description sufficient for identification of the real property, and the nature of the services or materials furnished or to be furnished. (emphasis added). §713.06(2)(a), Fla.Stat. (1991).

In accordance with §713.01(16), Fla.Stat. (1991), a "lienor" is defined as:

> (a) a contractor;
> (b) a subcontractor;
> (c) a sub-subcontractor;
> (d) a laborer;
> (e) a materialman who contracts with the owner, a contractor, a subcontractor, or a sub-subcontractor; or
> (f) a professional lienor under §713.03;
> and who has a lien or prospective lien upon real property under this part, and includes his successor in interest. No other person may have a lien under this part. §713.01(16), Fla.Stat. (1991).

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
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Under §713.01(26), a "subcontractor" is defined as:

> A person other than a materialman or laborer who **enters into a contract** with a contractor for the performance of any part of such contractor's contract. (emphasis added). §713.01(26), Fla.Stat. (1991).

As Petitioners concede, the mechanic's lien statutes are to be strictly and, therefore, literally construed. Aetna Casualty & Surety Co. v. Buck, 594 So.2d. 280 (Fla. 1992); Mursten Construction Company v. CES Industries, 588 So.2d 1061 (Fla. 3d DCA 1991). Where the language of the statute is clear and unambiguous and conveys a clear meaning, the statute must be given its plain and ordinary meaning. Aetna Casualty & Surety Company v. Huntington National Bank, 609 So.2d 1315 (Fla. 1992); and Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987).

Accordingly, as unambiguously provided in §713.06(2)(a), Fla.Stat., one is not required to serve a Notice to Owner, unless one is a "**lienor** under this section." (emphasis added). §713.06(2)(a), Fla.Stat. (1991). The legislature has specifically enumerated and restricted those who constitute and qualify as a "lienor" in §713.01(16), Fla.Stat. (1991), set forth hereinabove. The only category under §713.01(16), Fla.Stat. (1991), which GAZEBO could be classified as a lienor is that of "subcontractor" under §713.01(16)(b), Fla.Stat. (1991). This point is uncontroverted by Petitioners and has been correctly recognized by the District Court. (P.13; A.2.). In fact, in their Initial Brief, Petitioners appropriately distinguish GAZEBO from a "materialman" who by definition performs no labor in the installation of materials furnished and from a "laborer" who by definition does not furnish materials or labor service of others. (P.13.).

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
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It follows, therefore, that before GAZEBO could be deemed to have commenced furnishing services or materials as a "lienor" for the purpose of being required to serve a Notice to Owner, GAZEBO must first have been deemed a "subcontractor" under §713.01(16)(b), Fla. Stat. (1991).

The testimonial and documentary evidence before the trial court, in addition to the pleadings, uncontradictingly establish that GAZEBO did not enter into a binding contract with a contractor and hence did not become a "subcontractor" on the project prior to December 5, 1990, when it first began its planting services at the site.

The uncontroverted evidence before the trial court established that the contractor[6] made nothing more than an offer to purchase various types of palm trees at set prices which could only result in a binding contract upon their delivery to the owner's property, acceptance by the owner thereat, and installation by GAZEBO thereon. (T.114-116.). At trial, the testimony of GAZEBO's representatives went unrebutted that GAZEBO and the contractor had neither established any binding contractual relationship nor were under any financial obligation to one another prior to the delivery, acceptance and planting of the trees at the STUNKEL residence. (T.114-116.). In its opinion, the District Court appropriately recognized and focused in on this fact. The District Court recited that "the lower court heard testimony from Gazebo's representative that no deal was sold until 'the job (was) in the ground and I got the check.' In addition, Gazebo's representative testified that the deposit for the trees was refundable." (A.4.). In fact, GAZEBO's representative testified that at any time prior to

[6] Bill Free Customs Homes, Inc.

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
BROWARD (305)525-3553 DADE (305)949-8003 FAX (305)474-7343

the actual planting of the trees, the contractor or the STUNKELS could have gone to someone else to have the trees planted and would have had no obligation to GAZEBO whatsoever. (T.107, 114, 115.). GAZEBO's representative testified, "if Mr. Stunkel walked out there and said 'these trees are no good,' I would have left and he probably would have hired someone else to do it." (T.114). All the foregoing of which can be reasonably interpreted to conclude that no binding contract existed between GAZEBO and the contractor and hence, GAZEBO was not a "subcontractor" or "lienor" on the project prior to December 5, 1990.

Surprisingly, however, the STUNKELS continue to maintain that "the deal was sold" when Mr. STUNKEL tagged certain trees which he liked during his trip to Tampa, when, in fact, after posing this exact question to GAZEBO on cross-examination at trial, the response elicited from GAZEBO's representative by the STUNKELS' counsel was an unequivocal "No, the deal was not (sold)." (T.115.). GAZEBO's representative further emphasized that no deal was sold until "the palms were installed." (T.115.). "If we got home and he said, 'I do not want these trees,' he could have said that." (T.115). In fact this was a distinct possibility because as the evidence below indicates, while Mr. Stunkel tagged certain trees which he liked, these trees were still to undergo substantial changes in the nature of special trimming procedures to be performed by the tree collector[7] prior to their delivery to and ultimate approval and acceptance by Mr. Stunkel at his residence.[8] (T.37, 96, 97.). The testimony of GAZEBO's representative

[7] Turner Tree and Landscape.

[8] The testimony of GAZEBO's representative was uncontroverted that GAZEBO was not in any way involved in or performed any service in connection with the preparation and trimming process of the trees. (T.38.).

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
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conveyed that Mr. Stunkel was extremely particular and explicit about how he wanted the trees to eventually look. (T.37, 96, 97.) Accordingly, no binding contract was entered into with GAZEBO until the finished trees were delivered, accepted, and planted at the STUNKEL residence. (T.107, 114, 115.)

While Petitioners have represented to this Court that GAZEBO had an oral agreement "expressly" obligating GAZEBO to travel with the STUNKEL's to Tampa to select and identify particular trees, the unrebutted record evidence reveals that such allegations by the STUNKEL's are entirely unfounded and, in fact, amount to nothing more than a blatant misrepresentation of the true facts elicited at trial. (P.13, 14.). The entirety of the evidence which was presented before the trial judge consistently and without exception indicated that GAZEBO had **no** binding contract with the contractor prior to the delivery, acceptance and installation of the trees at the STUNKEL residence. Any accommodating services provided by GAZEBO prior thereto were provided purely on a gratuitous basis for which GAZEBO had neither an intention nor expectation of compensation and which were performed solely in an attempt to eventually be awarded the contract. (T.103, 112-116.). Notwithstanding the STUNKEL's unfounded allegations, these gratuitous accommodations provided by GAZEBO were never a part of any contract and GAZEBO never billed for nor sought compensation of any kind for such services from the contractor or the STUNKELS. This is clearly evidenced by the trial testimony, as well as the invoices submitted by GAZEBO to the contractor for payment of its services which were entered into evidence without objection in the trial court. (R.32-43.). This was the only testimony and

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
BROWARD (305)525-3553 DADE (305)949-8003 FAX (305)474-7343

evidence which the trial judge had before him upon which to render his decision. The District Court astutely focused in on this fact as evidenced by the recitation in its opinion of GAZEBO's testimony that the whole "trip to Sarasota was a 'sales thing'." (A.4.). There simply was no binding obligation existing between GAZEBO and either the contractor or the STUNKELS during this time. The unimpeached evidence reflected in the record establishes that the very creation of a binding contract between GAZEBO and the contractor was expressly conditioned upon the specific performance of GAZEBO in actually delivering and planting trees which were acceptable to the STUNKELS. (T.107, 112-116.). It is a fundamental axiom of contract law that "where an offer requires acceptance by performance and does not invite a return promise (as is the case here)... a contract can be created only by the offerees' performance." Restatement (Second) of Contracts, §50, Comment (b) (1981). In the instant matter, the evidence before the trial judge was consistently clear and uncontradicted that only GAZEBO's specific performance in delivering and planting trees which were acceptable to the STUNKELS when they arrived, could have, and did, in fact, create a binding contract with the contractor. It was at this time, when the contract was created, and no sooner, that GAZEBO first became a "subcontractor" on the project and, therefore, a "lienor" in accordance with Chapter 713, Florida Statutes. Prior to such time, GAZEBO had no rights as a lienor against the property of the STUNKELS and, accordingly, had no obligation under §713.06(2)(a) to furnish a Notice to Owner to the STUNKELS. In fact, it would be entirely inappropriate and arguably ineffective for GAZEBO to have served the STUNKELS with a notice misrepresenting that GAZEBO was providing

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
BROWARD (305)525-3553 DADE (305)949-8003 FAX (305)474-7343

services for which it had a right to enforce a claim for payment in the nature of a construction lien against the STUNKELS's property, prior to its entering into a binding contract, when no such right yet existed. Any lien rights eventually acquired by GAZEBO flowed from their contract rights, and as correctly determined by the District Court, there was sufficient evidence before the trial judge for one to reasonably interpret that no binding contract was in existence between GAZEBO and the contractor prior to December 5, 1990. §713.06(1), Fla. Stat. (1991).

Respondents do not take issue with Petitioners' representations to this Court that the purpose behind service of a Notice to Owner is "to require potential **lienors** to notify the owner of their lien promptly, in fact even before they commence to furnish services or materials **if they so desired**," (emphasis added). (P.14.). However, Respondents would merely emphasize to this court, the statutory requirement that one must be a "lienor", strictly within the definitions of Chapter 713, Florida Statutes, before one can be **required** to serve a Notice to Owner and, accordingly, before one can be deemed to furnish services or materials for purposes of commencing the 45 day period for service of the Notice. §713.06(2)(a), Fla. Stat. (1991). The District Court correctly concluded that there was sufficient evidence before the trial court from which one could reasonably interpret this date to be no earlier than December 5, 1990, rendering GAZEBO's service of its Notice timely in all respects.

Based upon the foregoing, a strict construction of the lien law, as Petitioners agree is required, mandates that the District Court's reversal be approved and that the question certified be answered in the negative.

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
BROWARD (305)525-3553 DADE (305)949-8003 FAX (305)474-7343

2. The First District Court's decision in Arlington Lumber & Trim Co., Inc. v. Vaughn, 548 So.2d 727 (Fla. 1st DCA 1989), notwithstanding the argument of the STUNKELS, does not apply under the facts of this case.

Additionally, the STUNKELS have alleged that a $5,000 deposit given to the tree collector by GAZEBO in November constituted the first furnishing of materials for commencing the 45 day period for service of the Notice. The STUNKELS have inaccurately represented to this Court in their Initial Brief that the $5,000 deposit given to the tree collector by GAZEBO was a "down payment" which was "not refundable if the trees were delivered." (P.16, 20.). In actuality, the unimpeached testimony before the trial judge indicated that, in fact, the tendering of $5,000 to the tree collector was nothing more than a "deposit" which was entirely refundable and was given merely "to hold the trees, in case the job was sold." (T.69, 70, 116.). GAZEBO's representative unequivocally attested to this at trial. He testified, "It was, like if (Mr. Stunkel) decided, I don't want the trees, I get the deposit back." (T.116). While Petitioners believe the trial judge correctly recharacterized as a "downpayment" what GAZEBO representatives clearly alleged was a refundable deposit, it is respectfully suggested once again, that in ruling on the STUNKEL's motion, the trial judge was not permitted to weigh or recharacterize the evidence based upon his personal beliefs or intuitions, but was required to take all the facts presented by GAZEBO as true. Tillman v. Baskin, 260 So.2d 509 (Fla. 1972); Vance v. Indian Hammock Hunt and Riding Club, Ltd., 403 So.2d 1367 (Fla. 4th DCA 1981).

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Petitioners further compound this inaccurate presumption and assert that since GAZEBO "purchased"[9] the trees in November, in accordance with the First District's decision of Arlington Lumber & Trim Co. v. Vaughn, 548 So.2d. 727 (Fla. 1st DCA 1989), it was at such time in November that GAZEBO began to first furnish materials for the purpose of triggering the 45 day period for service of GAZEBO's Notice to Owner. The Arlington decision is the only authority referred to by the STUNKEL's in the trial court and relied upon by the trial judge in granting the STUNKEL's motion.

As urged by Respondent's in the Appellate proceedings below, the District Court appropriately distinguished the Arlington decision from the instant appeal. (A.3). In its opinion, the District Court elaborated:

> In Arlington, the first district held that the time during which a materialman was required to serve a notice to owner began to run when the contractor made an over the counter purchase of materials for a job, as this was when the materialman began to furnish his materials. Id. at 729. Conversely, at bar, even though Gazebo might have given Turner Tree and Landscape a deposit for the trees, there were no affirmative acts taken by Gazebo which establish that Gazebo actually began to furnish materials, the trees, to the Stunkels. (A.3.).

It is respectfully submitted that, once again, the STUNKELS have grossly misapplied the First District Court's opinion in Arlington to the facts of the instant case. As conceded by the STUNKELS in their Initial Brief, GAZEBO was not a materialman on the project, but rather a subcontractor. (P.13.). The materialman was the tree collector, Turner Tree and Landscape. GAZEBO's tendering of a $5,000 refundable

[9] Recharacterizing, once again, what GAZEBO had unequivocally testified was a refundable deposit.

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deposit to the materialman to reserve trees for a potential subsequent sale, can by no stretch of the imagination equate to a completed over-the-counter sale of materials, which was the very basis for the First District's ruling in Arlington. Furthermore, even if an over-the-counter sale of materials could be deemed to have been completed in November of 1990, under Arlington, such a sale would merely constitute the beginning of the 45 day period for service of a Notice to Owner by the materialman and seller of the trees, Turner Tree and Landscape, which the subcontractor, GAZEBO, installed on the STUNKELS' residence no sooner than December 5, 1990. (T.36, 43, 44, 72, 98, 123.).

To hold, as the STUNKELS urge of this Court, that the time period for serving a Notice to Owner begins to run for a subcontractor at the time he places a deposit, or even purchases for that matter, goods from a materialman, prior to performing labor under its contract or delivering materials to the job, is entirely unprecedented and would be an unwarranted extension of the First District Court's limited ruling in Arlington. Such a holding would certainly foster inequitable and anomalous results in the lien law.

3. §713.06, Fla. Stat., does not require a subcontractor to serve a Notice to Owner prior to his commencing the furnishing of services which are provided in accordance with a binding contract.

Additionally, in contrast to the facts of the instant case, even where one has already obtained the status of a "subcontractor," hence, a "lienor" by virtue of a binding contract with the contractor at the time he or she begins to select materials in preparation for future installation on a contracted for job, absent a binding contractual

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obligation to provide such preliminary services, as posed in the question certified, such services do not constitute the first furnishing of services for the purposes of commencing the 45 day period for service of a Notice to Owner.

§713.06(1), Fla. Stat. (1991), provides in pertinent part:

> ... a subcontractor... has a lien on the real property improved for any money that is owed to him for labor, services or materials furnished **in accordance with his contract**... (emphasis added). §713.06(1), Fla.Stat. (1991).

A literal interpretation and application of the language of §713.06(1) allows a subcontractor to have a statutory lien for only such services or materials furnished which were provided as a part of his agreement with the contractor. The performance of any services which are not performed in accordance with ones contract, including the selection of materials, are not properly lienable under Chapter 713, Florida Statutes. Certainly, it would serve no purpose other than to create uncertainty and confusion in the construction industry to **mandate** that a subcontractor serve a notice of its intention to claim a lien prior to its commencing the furnishing of any lienable services. In fact, a cursory analysis of §713.06, Fla.Stat. (1991), suggests that it was not the intention of the legislature to create such an unreasonable requirement.

Section 713.06(2)(a) requires that the Notice be served "not later than 45 days after commencing to furnish his services and materials." §713.06(2)(a), Fla.Stat. (1991). As correctly suggested by Petitioners, in order to determine the legislative intent behind a particular statute, each of the statutory provisions must be read in *pari materia*. Forsythe v. Longboat Key Beach Erosion Control District, 604 So.2d 652 (Fla.

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1992). When §713.06(1) and §713.06(2) are read in conjunction with one another, it becomes transparently evident that the language under subsection (2)(a) of §713.06, "commencing to furnishes **his services or materials**" is referring and relating to the lienable "labor, services or materials furnished **in accordance with his contract**" as set forth under the immediately preceding subsection 713.06(1), Fla.Stat. (1991). (emphasis added). In other words, §713.06 requires a subcontractor to furnish a Notice to Owner within 45 days of his first furnishing services or materials which were provided in accordance with his contract, not when he merely provides preliminary non-lienable services not contemplated by and outside the scope of his contract. Such interpretation is readily apparent from the plain and ordinary meaning of the language employed and results in the most logical and practical application of the statute. Any other interpretation would create a virtual universe of uncertainty among subcontractors as to when to serve their Notice, many of whom enter into contracts months or possibly even years prior to the time when they are required to commence performance of their actual contractual duties.

Accordingly, the furnishing of services or materials which are not in accordance with one's underlying contractual obligation should not constitute the furnishing of services and materials by a subcontractor for purposes of commencing the 45 day period within which to serve a Notice to Owner. This holds true whether one is deemed a "subcontractor" prior to his commencement of services which are not a part of a contractual obligation, or whether one has not yet obtained the status of "subcontractor," hence, a "lienor," as in the case at bar.

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While GAZEBO maintains that there was sufficient evidence before the trial court to establish that GAZEBO had not yet become a "subcontractor" prior to December 5, 1990, even if somehow GAZEBO could have been deemed a subcontractor prior thereto, their is simply no evidence in the record that the accommodations provided by GAZEBO prior to said date constituted lienable services. GAZEBO'S activities prior to that time were merely in preparation for performing its work at the site. In fact, the evidence is consistent and uncontroverted that the gratuitous services which GAZEBO provided were just that, "gratuitous," for which GAZEBO neither expected compensation, nor billed for it. (T.103, 112, 113, R.32-43.).

It is, therefore, incumbent upon this Court to answer the question certified:

> DOES A SUBCONTRACTOR BEGIN TO FURNISH SERVICES, FOR THE PURPOSE OF TIMELY PROVIDING A NOTICE TO OWNER IN ACCORDANCE WITH SECTION 713.06(2)(a), FLORIDA STATUTES (1991), WHEN, **WITHOUT ANY BINDING CONTRACTUAL OBLIGATION TO DO SO**, HE OR SHE BEGINS TO SELECT MATERIALS AT SOME LOCATION OFF THE JOB SITE, FOR FUTURE INSTALLATION ON THE JOB SITE? (emphasis added). (A.5.).

in the negative and affirm the decision of the District Court below.

While it is evident that the District Court correctly determined that, under the facts of the instant matter, GAZEBO had not commenced the furnishing of services or materials for purposes of commencing the 45 day period for service of a Notice to Owner prior to December 5, 1990, when it first performed services under a contract at the site, the District court declined to hold as a matter of law that a subcontractor "does not begin to furnish services until work is actually performed at the job site." (A.4.).

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Instead, the District Court recommended a "totality of the circumstances" test and suggested that "in determining when the furnishing of services begins, we suggest that the trial court look at all of the circumstances surrounding the particular job or transaction." (A.5.). Respondent respectfully suggests that such a "case-by-case" evaluation, as recommended by the District Court, is neither warranted nor practical and would only serve to frustrate the interests of the construction industry by increasing litigation due to the continued lack of certainty as to when the exact time period for service of a Notice to Owner begins to commence. It should not require lawyers and judges to determine how the 45 day period for service of notices to owner should be calculated in a particular case. Accordingly, Respondent urges this Court to determine once and for all, as a matter of law, the time period for service of a Notice to Owner begins to run for a lienor from the first day he or she delivers material at or labors on the project.

Notwithstanding two limited exceptions, as in the case of specially fabricated materials and as the First District has carved out in Arlington above, the time period for service of a Notice to Owner by a materialman has already been correctly understood by the courts to commence upon the delivery of the materials to the job site. *See,* Oolite Industries, Inc. v. Millman Construction Company, Inc. 501 So.2d 655 (Fla. 3rd DCA 1987), where the court held that in the case of specially fabricated materials, the time for serving a Notice to Owner starts from the date on which fabrication is begun and not upon actual delivery of the materials. In distinguishing the argument of the appellant that the actual date of delivery of the specially fabricated materials should be

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
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used, the court appropriately noted that the date of **actual delivery is used in "the situation in the case of ordinary materials**." (emphasis added). Oolite at 656. In his dissenting opinion, Judge Schwartz argued that, in fact, there is no valid basis for even requiring an earlier notice for specially fabricated materials. He emphatically stressed that there would be no reason to give one the benefit of an earlier notice "which they plainly would not be entitled if 'ordinary' materials were involved. Id.

The courts have also appropriately applied the same **"delivery at the job site,"** rule in the case of rental equipment. *See*, Essex Crane Rental Corporation of Alabama v. Millman Construction Company, Inc., 516 So.2d 1130 (Fla. 3rd DCA 1987), where the Third District held that the time for serving a Notice to Owner also runs from the date of **actual delivery** of rental equipment to a job.

Furthermore, although the District Court below stated in its opinion that "there is no legal authority in Florida specifically concluding that a contractor does not begin to furnish services until its employees actually begin work at the job site," the existing cases have consistently used the first date that a subcontractor labors at or delivers material to the project as the initial date for calculating the period in which to serve the statutory Notice. (A.4.). In Rite-way Painting & Plastering, Inc. v. Tetor, 582 So.2d 15 (Fla. 2d DCA 1991), where the court extended the 45 day period for serve of a Notice to Owner to 48 days since the 45th day fell on a Saturday, the court held that the computation for the statutory period for service of the Notice began to run from the date that the subcontractor "**commenced providing labor and/or material to the project**." (emphasis added). Rite-way Painting & Plastering, Inc. at 17. *See also,* Daly

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Aluminum Products, Inc. v. Stockslager, 244 So.2d 528 (Fla. 2d DCA 1970), where the Court held that service of the Notice by a subcontractor was timely when **served "within forty-five days from commencement of the improvements"** on the project. (emphasis added). Daly at 529. *See also*, In re Guardian Equipment Corporation, 23 B.R. 126 (S.D. Fla. 1982), where the court found that the testimony of a subcontractor corporation's president as to the date when the subcontractor's employees **"first appeared on the premises and began work"** was sufficient to establish that a Notice to Owner served within 45 days thereof was timely. (emphasis added). In re Guardian at 128.

In fact, as suggested by Rakusin in the Florida Construction Lien Manual, this appears to be the rule-of-thumb. "Except where specifically fabricated materials are involved, the general rule is that the time period (for service of a Notice to Owner) is computed from the first day on which the **claimant delivers material or labors on the job**." (emphasis added). 1 S. Rakusin, Florida Construction Lien Manual, Chapter 8 at 100 (1993).

The simple fact is that no useful purpose would be furthered by requiring a subcontractor to service his Notice at any time earlier than his first furnishing materials to or laboring at the job site. Subcontractors and others claiming lien rights under §713.06 must "...perform labor or services or furnish materials constituting a part of an improvement." §713.02(4), Fla. Stat. (1991). An improvement is defined as "...any building, structure, construction, demolition, excavation, landscaping, or any part thereof existing, built, erected, placed, made or done on land or other real property for

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its permanent benefit." §713.01(13), Fla. Stat. (1991). Since a subcontractor may only claim a lien for materials and services which constitute a part of an improvement, it follows that no lien may be claimed for preparatory activities undertaken off the construction site. The lien law further provides that "'Site of the improvement' means the real property which is being improved **and on which labor or services are performed or materials furnished in furtherance of the operations of improving such real property.**" (emphasis added). §713.01(25), Fla. Stat. (1991). This underscores further that a subcontractor's lienable services include only those occurring at the construction site. It therefore seems clear that it is the date when those services are first performed at the construction site that is to be counted as the first of the 45 day period within which a Notice to Owner must be served. Although no court has held otherwise, it would be of great assistance to the construction industry and would most certainly mitigate future litigation over the issue for this Court to clarify to the construction industry that indeed, as a matter of law, a subcontractor first commences the furnishing of his labor, services or materials for purposes of service of a Notice to Owner, when he first delivers materials to or begins laboring at the job site.

B. The trial court committed reversible error in entering an involuntary dismissal against GAZEBO on the basis that GAZEBO's Claim of Lien was not sworn to.

As a basis for its entry of an involuntary dismissal against GAZEBO, the trial judge found that the GAZEBO representative's failure to have taken an oath at the time of signing its Claim of Lien was proper justification for denying GAZEBO enforcement of

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its lien claim, notwithstanding the complete absence of a showing of prejudice by the STUNKELS. Although this issue was thoroughly briefed by both parties on appeal, the District Court did not find the need to address this issue either at oral argument or in its opinion reversing the trial judge's decision. The District Court simply reversed and remanded the entire case, effectively finding no merit in either ground cited by the trial judge in support of his granting an involuntary dismissal against GAZEBO. While the question certified deals solely with the issue of timely service of a Notice to Owner, Petitioners have been inclined to readdress their previously meritless argument of lack of compliance with §713.08, Fla. Stat. (1991), to which Respondent herein responds.

Florida Statutes, §713.08, sets forth the requisite elements to be included in a valid lien claim. §713.08(1)(h)(2) provides that "[t]he claim of lien shall be signed **and verified** by the lienor or his agent acquainted with the facts stated therein." (emphasis added). §713.08(1)(h)(2), Fla. Stat. (1991). GAZEBO's Claim of Lien was admitted into evidence at trial and is a part of the record at page 44. (R.44.). The evidence in the record demonstrates without dispute that the Claim of Lien was signed by Mr. Greenberg, GAZEBO's president, and that Mr. Greenberg was acquainted with the facts stated. (R.44; T.77, 78.). The evidence also indicates without dispute that the signature of Mr. Greenberg was notarized. (R.44; T.77.). However, when questioned on cross-examination whether or not he had been put under oath prior to signing, Mr. Greenberg replied, "No." (T.78.). Even assuming that this testimony **required** the conclusion that the Claim of Lien had not been properly **verified**, that conclusion,

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
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without more, would not be proper justification for entry of an involuntary dismissal on Plaintiff's claim.

Section 713.08(4)(a), Fla. Stat. (1991), provides that "the omission of any of the foregoing details or errors in such a claim of lien [including the verification requirement] shall not, within the discretion of the trial court, prevent the enforcement of such lien against one who has not been adversely effected by such omission or error." §713.08(4)(a), Fla. Stat. (1991). Whatever errors the trial court may have found existed in GAZEBO's Claim of Lien were not shown by the evidence to have by any means adversely effected the STUNKELS. In fact, there was no testimony whatsoever that the STUNKELS suffered any prejudice. To the contrary, the only evidence in the record indicates that the STUNKELS have never paid anyone for the trees and are simply enjoying their benefit at GAZEBO's expense.

Nevertheless, the STUNKELS attempt to persuade this Court that GAZEBO's lien was properly dismissed on the rationale that "no court has enforced a lien where the lienor has admittedly failed to swear to the truth contained in the claim of lien." (P.23.). However, what the STUNKELS have failed to advise this Court, is that no court has properly **refused** to enforce a claim of lien where errors or omissions are present, absent a showing of prejudice by the owner. Admittedly, while no court has specifically based a ruling on the precise facts of the case at bar, the broader issue has been unanimously determined time and time again. As the authorities discussed below conclude, evidence of a defect or omission in a claim of lien, without evidence of corresponding prejudice, should not prevent enforcement of a lien. The cases

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interpreting Florida Statutes, §713.08, are explicitly clear and in full accord on that position. See Johnson and Bailey Architects v. Southeast Brake Corp., 517 So.2d 776 (Fla. 2d DCA 1988) [error to deny enforcement of a claim of lien where a lien did not contain a legal description of the property]; Mid-State Contractors, Inc. v. Halo Development Corp., 342 So.2d 1078 (Fla. 2d DCA 1977) [error to deny lien claim for failure to comply with requirement of including amount unpaid absent showing of prejudice]; Adobe Brick & Supply Co., v. Centex Winston Corp., 270 So.2d 755 (Fla. 3d DCA 1972) [absent a showing that the owner was adversely effect by incorrect legal description in claim of lien, error to grant judgment at the close of Plaintiff's case]: Rapidick Industries, Inc. v. Summit Insurance Company of New York, 318 So.2d 425, 426 (Fla. 4th DCA 1975) ["in view of subsection (4)(a) of Section 713.08 of the mechanic's lien law, when an omission or error occurs in recorded claim of lien, a balancing of the interest of the party's favors exercise of that subsection of the statute to permit enforcement of the lien, unless it should appear that by reason of such omission or error in the claim of lien the owner or obligated party thereby has been adversely effected."].

The enforcement of a lien with defects or omissions is a discretionary matter. However, while the trial court is accorded discretion in reviewing an error or omission in the claim of lien, "the discretion should not be exercised to deny enforcement of a lien against one who has not been adversely effected by such omission or error. The discretion there granted to the court is to enforce the lien in such circumstances." Mid-State Contractors at 1080; Adobe Brick & Supply Co. at 759.

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In other words, the statute allows the trial court the discretion to enforce a lien containing errors where no prejudice is shown, not the discretion to deny enforcement in the absence of evidence of prejudice merely because of the existence of the error. In the trial below there were no facts before the trial court upon which any decision against enforcement could have been justified since evidence of prejudice was entirely absent. This is a matter for which the burden of proof was squarely on the shoulders of the STUNKELS, yet they presented no evidence. GAZEBO was clearly entitled to rely on this absence of proof which was sufficient, in and of itself, to permit a finding in GAZEBO's favor.

Notwithstanding the STUNKELS' suggestion to this Court that GAZEBO's Claim of Lien was not in substantial compliance with the requirements of §713.08, Fla. Stat. (1991), an examination of GAZEBO's Claim of Lien in the record at page 44, reveals that all of the information required by §713.08(1) to be incorporated in the Claim of Lien, was in fact included in GAZEBO's Claim of Lien, was in fact entirely accurate, and was, at the very least, in substantial compliance of §713.08, Fla. Stat. (1991). Where a contractor (or subcontractor as the case may be), has substantially complied with the statutory prerequisites of claiming a mechanic' lien, the contractor has stated a cause of action which is not subject to dismissal absent the showing of adverse effect on behalf of the owner. Blinn v. Dumas, 408 So.2d 683 (Fla. 1st DCA 1982). The STUNKELS have made no such showing.

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150 S. PINE ISLAND ROAD, SUITE 400, FORT LAUDERDALE, FLORIDA 33324
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Accordingly, the trial court committed reversible error in entering an involuntary dismissal on GAZEBO's Claim of Lien on the basis that its contents were unsworn, in the complete absence of a showing of prejudice by the STUNKELS.

CONCLUSION

Accordingly, for the reasons set forth herein, GAZEBO respectfully requests that if this Honorable Court should accept jurisdiction of this matter, that it affirm the decision of the Fourth District, and answer the certified question in the negative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 20th day of September, 1994, to STEVEN E. STARK, ESQ., Fowler, White Burnett, Hurley, Banick & Strickroot, P.A., Attorneys for Petitioners, 100 S.E. 2nd Street, 17th Floor International Place, Miami, FL 33130-1101.

LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
Attorneys for Respondent

BY: _____
ROBERT E. FERENCIK, JR., FBN 263478
DAVID H. BRODIE, FBN 813168

REF:DHB:mb
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LEIBY FERENCIK LIBANOFF AND BRANDT, P.A.
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APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1994

GAZEBO LANDSCAPE DESIGN, INC.,

Appellant,

v.

BILL FREE CUSTOM HOMES, INC., a Florida corporation, SHELDON E. STUNKEL and SALLY STUNKEL,

Appellees.

CASE NO. 92-3274.

L.T. CASE NO. 92-1647 AJ.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed April 27, 1994

Appeal from the Circuit Court for Palm Beach County; James T. Carlisle and Tom Johnson, Judges.

Robert E. Ferencik, Jr., of Leiby Ferencik Libanoff and Brandt, P.A., Miami, for appellant.

Christopher L. Kurzner and Steven E. Stark of Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., Miami, for appellees.

POLEN, J.

Appellant, Gazebo Landscape Design, Inc., sought to enforce a mechanic's lien against the appellee homeowners, Bill and Sally Stunkel (the Stunkels), for landscape work done, including the planting of hand selected trees. The trial court refused to enforce the mechanic's lien, and entered judgment in favor of the Stunkels on the grounds that Gazebo did not serve them with a notice to owner within forty-five days after

commencing to furnish service or materials, as required by section 713.06 (2)(a), Florida Statutes (1991).[1] We reverse.

The Stunkels entered into a contract for the construction of a residence on their property with Bill Free Custom Homes, a general contractor. Bill Free then entered into an oral contract with Gazebo, a landscaping subcontractor, for Gazebo to obtain and plant trees, which were to be hand selected by the Stunkels. On November 7, 1990, one of Gazebo's representatives flew to Sarasota with the Stunkels, on the Stunkels' private jet, where they met with a tree collector, Turner Tree and Landscape. The Stunkels selected several trees, and physically tagged them to ensure that these would be the exact trees delivered to their premises and planted by Gazebo. On December 5, 1990, several of Gazebo's employees went to the Stunkel residence to dig holes in preparation for the arrival of the trees. On December 7, 1990, the trees arrived from Turner Tree and Landscape and were planted by Gazebo. On January 15, 1991, Gazebo sent a notice to the Stunkels at their residence, via certified mail, which was returned unclaimed. On January 18, 1991, Gazebo had a notice to owner hand posted on the gate of the Stunkel's residence.

---

[1]

> All lienors under this section, except laborers, as a prerequisite to perfecting a lien under this chapter, and recording a claim of lien, must serve a notice on the owner. . . . The notice must be served before commencing, or not later than 45 days after commencing to furnish his services or materials. . . . §713.06(2)(a), Fla. Stat. (1991).

On February 11, 1992, Gazebo filed a complaint for breach of contract and to foreclose its claim of lien, naming both Bill Free and the Stunkels. The action against Bill Free was stayed in bankruptcy. On September 17, 1992, the Stunkels and Gazebo proceeded to trial. At the close of Gazebo's case, the trial court entered an involuntary dismissal against Gazebo's claim of lien.

We hold that the trial court erred in granting the motion for involuntary dismissal and entering a final judgment in the Stunkels' favor. We base this holding on the lack of legal authority in Florida to support the trial court's conclusion that Gazebo began furnishing services to the Stunkels in November 1990, when a representative of Gazebo went with the Stunkels to select the trees. The only authority referred to by the Stunkels, and relied upon by the lower court, was Arlington Lumber & Trim Co., Inc., 548 So. 2d 727 (Fla. 1st DCA 1989), which is distinguishable from the instant appeal. In Arlington, the first district held that the time during which a materialman was required to serve a notice to owner began to run when the contractor made an over the counter purchase of materials for a job, as this was when the materialman began to furnish his materials. Id. at 729. Conversely, at bar, even though Gazebo might have given Turner Tree and Landscape a deposit for the trees, there were no affirmative acts taken by Gazebo which establish that Gazebo actually began to furnish materials, the trees, to the Stunkels. It should be further noted that Arlington refers only to the furnishing of materials, and gives

no guidance as to when a materialman, contractor, subcontractor, or any other might begin to furnish services.

We also acknowledge that there is no legal authority in Florida specifically concluding that a contractor does not begin to furnish services until its employees actually begin work at the job site. However, in considering the motion for involuntary dismissal at bar, the trial court should have taken all the facts and evidence presented and evaluated them in the light most favorable to Gazebo. Charlotte Asphalt, Inc. v. Cape Cove Corporation, 406 So. 2d 1234 (Fla. 2nd DCA 1981). If any reasonable interpretation supported Gazebo's claim, the Stunkels' motion should have been denied. The lower court heard testimony from Gazebo's representative that no deal was sold until "the job (was) in the ground and I got the check." In addition, Gazebo's representative testified that the deposit for the trees was refundable. This representative further testified that the trip to Sarasota was a "sales thing," and if "the guy liked the trees we sold the deal." However, he also stated that, "If Mr. Stunkel walked out there and said, 'these trees are no good,' I would have left and he would have probably hired someone else." Since these facts and this testimony can be reasonably interpreted to support Gazebo's claim that it did not furnish services or materials until December 5, 1990, when they began to dig holes at the Stunkel residence, we hold that the trial court erred in granting the Stunkels' motion for involuntary dismissal.

However, we do not hold as a matter of law that a contractor does not begin to furnish services until work is

actually performed at the job site. Rather, in determining when the furnishing of services begins, we suggest that the trial court look at all of the circumstances surrounding the particular job or transaction. It might be particularly useful to determine whether the contractor had actually suffered any economic detriment, or whether he simply engaged in certain activities on a gratuitous basis, in hopes of "landing" a job. This practical analysis, based on the totality of the circumstances, might eliminate any possible confusion and uncertainty in the construction industry as to when services are actually furnished, and when notice should be given in accordance with section 713.06 (2)(a), Florida Statutes (1991), so a mechanic's lien can be legally enforced.

Thus, we reverse and remand for proceedings consistent with this opinion. Nonetheless, we certify to the supreme court the following question as one of great public importance:

> DOES A SUBCONTRACTOR BEGIN TO FURNISH SERVICES, FOR THE PURPOSE OF TIMELY PROVIDING A NOTICE TO OWNER IN ACCORDANCE WITH SECTION 713.06(2)(a), FLORIDA STATUTES (1991), WHEN, WITHOUT ANY BINDING CONTRACTUAL OBLIGATION TO DO SO, HE OR SHE BEGINS TO SELECT MATERIALS AT SOME LOCATION OFF THE JOB SITE, FOR FUTURE INSTALLATION ON THE JOB SITE?

ANSTEAD and STONE, JJ., concur.